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Florida Constitutional Law

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FLORIDA CONSTITUTIONAL LAW*

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I. INTRODUCTION

The November 5, 1974, general election resulted in adoption of a number of constitutional amendments.

Article I, section 2, the guarantee of equal protection, now concludes with the statement: "No person shall be deprived of any right because of race, religion *or physical handicap.*" (The italicized words were added by the 1974 amendment.)

Article IV, section 9 provides that the five members of the Game and Fresh Water Fish Commission shall be "appointed by the govenor *subject to confirmation by the senate . . . .*" The section further provides:

> The commission shall exercise the *regulatory and executive* [rather than non-judicial] powers of the state with respect to wild animal life and fresh water aquatic life . . . . *The legislature may enact laws in aid of the commission, not inconsistent with*

> *this section. The commission's exercise of executive powers in the area of planning, budgeting, personnel management, and purchasing shall be provided by law. Revenue derived from such license fees* [for taking wild animal life and fresh water aquatic life] *shall be appropriated to the commission by the legislature for the purpose of management, protection and conservation of wild animal life and fresh water aquatic life.*

Article V, section 12(a) clarifies and increases the powers of the Judicial Qualifications Commission, which is now

> *vested with jurisdiction to investigate and recommend to the Supreme Court of Florida the removal from office of any justice or judge whose conduct, during term of office or otherwise occurring on or after November 1, 1966, (without regard to the effective date of this section) demonstrates a present unfitness to hold office, and to investigate and recommend the reprimand of a justice or judge whose conduct, during term of office or otherwise occurring on or after November 1, 1966 (without regard to the effective date of this section), warrants such a reprimand.*

Section 12(c) of article V now specifies that members of the commission, other than those subject to impeachment because of other offices they hold concurrently, "*shall be subject to removal from the commission pursuant to the provisions of Article IV, Section 7,*" which provides generally for the removal of officers other than those subject to impeachment.

Pursuant to article V, section 12(d), "*[t]he commission* [rather than the Supreme Court] shall adopt rules regulating *its* proceedings . . ." subject to repeal "*by general law enacted by a majority vote of the membership of each house of the legislature, or by the supreme court, five justices concurring.*" In addition to its power to recommend removal or reprimand of a justice or judge,

> *[t]he commission may with seven members concurring recommend to the supreme court the temporary suspension of any justice or judge against whom formal charges are pending and in the event the supreme court suspends such justice or judge all proceedings before the commission and all hearings shall be public. Otherwise, all proceedings before the commission shall be confidential until a recommendation is filed with the clerk of the supreme court recommending removal or public reprimand at which time such proceedings shall become public record.*

Furthermore, under section 12(e) of article V,

> *[t]he commission shall have access to all information from all executive, legislative and judicial agencies, subject to the rules of the commission. On request of the speaker of the house of representatives or the governor, the commission shall make available information for use in consideration of impeachment or suspension, respectively.*

Article VII, section 10, dealing with pledges of credit, now has a new subsection (d), permitting laws authorizing

> *a municipality, county, special district, or agency of any of them, being a joint owner of, giving, or lending or using its taxing power or credit for the joint ownership, construction and operation of electrical energy generating or transmission facilities with any corporation, association, partnership or person.*

Article VIII, section 1(d), which pertains to elected county officials, gives the title "*property appraiser*" to the elected county official who was previously described as tax assessor.

The previous survey in this Review[1] ended with cases contained in volume 294, Southern Reporter Second Series, decided in the spring of 1974. The present survey starts at that point, and ends with cases in volume 308, decided in the spring of 1975. This survey continues to make no attempt to cover criminal law and procedure, since these topics are dealt with in another survey article.[2]

II. ORGANS OF STATE GOVERNMENT

A. *Separation of Powers*

1. PROHIBITION AGAINST ENCROACHMENT

In an advisory opinion,[3] the supreme court reaffirmed its view that the power of pardon and restoration of civil rights is vested exclusively in the executive. The Governor had requested advice concerning the Florida Correctional Reform Act of 1974.[4] Section 28 of the Act[5] provided that upon conviction of a felony, a person would suffer suspension of only certain civil rights, specifically the rights to vote, to hold public office and to serve on a jury. The section also

1. Levinson, *Florida Constitutional Law*, 28 U. MIAMI L. REV. 551 (1974) [hereinafter cited as 1974 Survey].
2. Marx & Tatum, *Florida Criminal Law*, 30 U. MIAMI L. REV. ___ (1976).
3. Advisory Opinion to the Governor, 306 So. 2d 520 (Fla. 1975).
4. Fla. Laws 1974, ch. 74-112.
5. Codified as FLA. STAT. § 944.292 (Supp. 1974).

provided for the automatic reinstatement of these rights upon discharge from parole or release from the custody of the department of health and rehabilitative services without parole. The court found section 28 to be "a clear infringement upon the constitutional power of the Governor to restore civil rights."[6]

In interpreting two statutes dealing with bail, the District Court of Appeal, Second District, was guided by the principle that the power to admit to bail, being a judicial power, must be free from encroachment by the legislative branch. Florida Statutes section 903.132 (1973) directed that "[n]o person may be admitted to bail upon appeal from a conviction of a felony if such person has previously been convicted of a felony . . . ." Florida Statutes section 924.071(2) (1973) directed that a defendant whose case was stayed pending the determination of an appeal made by the state from a pretrial order "shall be released on his own recognizance . . . if he is charged with a bailable offense." In *Bamber v. State*[7] and *State ex rel. Harrington v. Genung*,[8] the court held that these sections could not be given mandatory effect, since to do so would permit a legislative encroachment upon a judicial power.

The District Court of Appeal, Third District, found an unwarranted intrusion into the legislative field when the Circuit Court of Dade County created a committee to assist the court in studying that county's rush hour traffic program. Having determined that the program was a proper exercise of the county's police power, the district court in *Dade County v. Palladeno*[9] held that the circuit court was foreclosed from undertaking any further scrutiny of the program.

2. PROHIBITION AGAINST DELEGATION

In *State v. Holden*,[10] the discretion given to police officers to make arrests under Florida's disorderly intoxication statute[11] was upheld as constitutional by the supreme court. Because the statute limited the discretion to situations where an intoxicated person "endanger[ed] the safety of another person or property" or

6. 306 So. 2d at 521.
7. 300 So. 2d 269 (Fla. 2d Dist. 1974).
8. 300 So. 2d 271 (Fla. 2d Dist. 1974).
9. 303 So. 2d 692 (Fla. 3d Dist. 1974).
10. 299 So. 2d 8 (Fla. 1974).
11. FLA. STAT. § 856.011 (1973).

"caus[ed] a public disturbance," it was held to be a valid attempt to protect the health, safety, and welfare of the public and, therefore, a constitutional delegation of legislative power.

Despite a city ordinance's valid goal of insuring public safety, the District Court of Appeal, First District, in *Early Mobile Homes, Inc. v. City of Port Orange*,[12] held that the ordinance empowering building inspectors to determine whether mobile homes were properly set up was an invalid delegation of legislative power since it lacked any definitive standards upon which the inspector's determination was to be made.

An Attorney General opinion[13] during the survey period dealt with statutes conferring power upon the Board of Regents to adopt traffic regulations for institutions under its management,[14] to charge off uncollectible accounts[15] and to authorize certain new construction.[16] The opinion deemed these powers to partake so much of the exercise of sovereign power that they could not be delegated to one not commissioned as an "officer," as required by article II, section 5. Thus, according to the Attorney General, even though the Board of Regents has the general power to delegate its duties to its chancellor or to the presidents of the state universities, the particular duties in question should not be delegated until legislative or judicial clarification of the situation is received.

Sarasota County v. Barg[17] involved a special act[18] creating the Manasota Key Conservation District within Sarasota County, and prohibiting "undue or unreasonable dredging, filling or disturbance of submerged bottoms," and "unreasonable destruction of natural vegetation." Disputes arising under the act were to be settled by a board of appeals, appointed by the County Commission. Decisions of the board of appeals were to be enjoined or enforced by civil litigation. The supreme court sustained most of the statute, but severed and invalidated the portions quoted above. The court stated:

> The Act does not contain any standards or guidelines to aid any court or administrative body in interpreting these terms. The

12. 299 So. 2d 56 (Fla. 1st Dist. 1974).
13. Fla. Att'y Gen. Op. 074-208 (July 19, 1974).
14. FLA. STAT. § 239.54 (1973).
15. FLA. STAT. § 240.103(2) (1973).
16. FLA. STAT. § 240.141 (1973).
17. 302 So. 2d 737 (Fla. 1974).
18. Fla. Laws 1971, ch. 71-904.

determination of what conduct falls within the proscription of these ambiguous provisions is left to the unbridled discretion of those responsible for applying and enforcing the Act. This amounts to an unrestricted delegation of legislative authority, in violation of the Florida Constitution, Article II, Section 3.[19]

B. *Courts*

1. JURISDICTION OF THE SUPREME COURT

a. Conflict Certiorari

In *Adams v. Seaboard Coast Line Railroad Co.*,[20] certiorari jurisdiction was based on a conflict between the decision of the District Court of Appeal, First District, in that case and a prior decision of the same court in another case. The supreme court found conflict since the district court, applying the same rule of law, had reached different results in the two cases although the controlling facts were substantially the same.

In *Town of Lantana v. Pelczynski*,[21] certiorari was sought on the basis of conflict between a district court decision and an earlier supreme court decision. The District Court of Appeal, Fourth District, had followed a supervening decision[22] of the United States Supreme Court and had expressly rejected the Supreme Court of Florida precedent. Having granted certiorari, the Supreme Court of Florida receded from its own precedent and affirmed the district court of appeal, yielding to the authority of the United States Supreme Court decision. However, in *Wackenhut Corp. v. Judges of the District Court of Appeal, Third District of Florida*,[23] the court stated that a petition for certiorari will not be granted on the ground of conflict between decisions in two districts, where the decision of one of the district courts of appeal has been reversed by the Supreme Court of Florida.

b. Commissions Established by Law

The supreme court emphasized the discretionary nature of its power to issue writs of certiorari to "commissions established by

19. 302 So. 2d at 742.
20. 296 So. 2d 1 (Fla. 1974).
21. 303 So. 2d 326 (Fla. 1974).
22. Mills v. Alabama, 384 U.S. 214 (1966).
23. 297 So. 2d 300 (Fla. 1974).

general law having statewide jurisdiction"[24] in *Scholastic Systems, Inc. v. LeLoup*.[25] In a reconsideration of how best to use its judicial resources to give proper consideration to all cases which equally demand its careful review, the court concluded that "there is no constitutional requirement for the extensive, appellate-type review previously afforded here in workmen's compensation cases."[26] Henceforth the court's consideration of decisions of the Industrial Relations Commission will be governed by the traditional standard of "departure from the essential requirements of law."[27]

c. Habeas Corpus[28]

In *Walker v. Wainwright*,[29] a prisoner who was serving a number of concurrent and consecutive sentences petitioned the supreme court for habeas corpus, alleging that one of the sentences resulted from a coerced plea of guilty and from the trial judge's consideration of improper factors in determining the sentence. The petitioner had attempted to appeal, but had negligently failed to file notice of appeal within the 30-day jurisdictional time period and the district court of appeal had dismissed his appeal as untimely filed. The supreme court noted that a writ of habeas corpus may issue even though the petitioner is not entitled to immediate relief from confinement. Howevern the court dismissed the habeas petition, since petitioner had failed to exhaust relief available under the Florida Rules of Criminal Procedure, and had not demonstrated that the state was responsible for his failure to do so.

d. Rules for Practice and Procedure and Administration of the Judicial System

In *Clement v. Aztec Sales, Inc.*,[30] the supreme court found that an order granting a new trial is a substantive right within the do-

24. FLA. CONST. art. V, § 3(b)(3).

25. 307 So. 2d 166 (Fla. 1974), *noted in* 29 U. MIAMI L. REV. 798 (1975). A more critical view is expressed in Levinson, *The Florida Administrative Procedure Act: 1974 Revision and 1975 Amendments*, 29 U. MIAMI L. REV. 617, 679 (1975).

26. 307 So. 2d at 168.

27. *Id.* This is also the standard applied in certiorari review of Public Service Commission orders, in interlocutory petitions and in common law certiorari.

28. Cases in which a writ of habeas corpus was used to obtain judicial review of parole orders are discussed in section V, G *infra*.

29. 303 So. 2d 321 (Fla. 1974).

30. 297 So. 2d 1 (Fla. 1974).

main of the legislature and not a matter of practice and procedure within the rulemaking power of the supreme court.[31] Therefore, the court sustained the validity of a statute[32] which provided an appeal of an order granting a new trial. The court did not regard this as an interlocutory appeal, and found no conflict between the statute granting this appeal, and the Florida appellate rule[33] which authorizes interlocutory appeals only in certain situations, without mention of orders granting new trials.

The court considered an alleged conflict between a statute[34] and a Rule of Juvenile Procedure,[35] both dealing with the trial of juveniles as adults, in *Davis v. State*.[36] After conducting a hearing, the juvenile court had specifically found that there was probable cause to believe that a 16-year-old child had committed certain felonies; both the statute and the rule required such a finding as one of the requisites for trial as an adult. The court had also found in accordance with the second requirement of the rule that it was in the best interest of the public that the juvenile court's jurisdiction over the child be waived. The appellant contended that the juvenile court had failed to meet the other requirements of the statute: that the court must make a finding, based upon a consideration of certain specified factors, that there is no reasonable prospect of rehabilitating the child prior to its majority; and that it set forth in writing the reasons for its finding. The supreme court held that the factors specified by the statute were intended to be guidelines for the determination of the public interest to the same extent that the eight factors enumerated by the United States Supreme Court in *Kent v. United States*[37] were intended to be. The statutory provisions and the *Kent* criteria were found not to apply in every case and to be directory rather than mandatory.

Closely related to the rulemaking power of the supreme court as a whole is the authority of the Chief Justice as chief administrative officer of the judicial system. Under this authority, the Chief

31. FLA. CONST. art. V, § 2(a). While laws adopted by a two-thirds vote of both houses may repeal the court's rules of practice and procedure, laws adopted by a lesser majority which conflict with these rules are invalid.

32. *See* FLA. STAT. § 59.04 (1973).

33. FLA. APP. R. 4.2(a).

34. FLA. STAT. § 39.09(2) (1973).

35. FLA. R. JUVENILE P. 8.110(b)(6)(c).

36. 297 So. 2d 289 (Fla. 1974).

37. 383 U.S. 541 (1966).

Justice had ordered the visiting state attorney who was assigned to the Leon County Grand Jury (in the Second Judicial Circuit) to desist from proceeding with any further investigation of candidates who had qualified for election until the day following the election. The Governor had assigned the state attorney of the Fourth Judicial Circuit to the Second Judicial Circuit for the maximum period allowed by statute—60 days. The assignment had already been extended for 90 days upon the request of the Governor and the concurrence of the supreme court. Upon the Governor's petitioning the court for an additional extension, the Chief Justice entered the order in controversy, whereupon the Attorney General, on behalf of the Governor, asked the entire court to review the order. In *In re Executive Assignment of State Attorney*,[38] the court, by a four-to-three margin, found the administrative order of the Chief Justice to have been within the scope of his constitutional authority.

The Chief Justice in his order had noted that in some areas of the state, and particularly in Leon County, grand juries were conducting investigations of the conduct of certain incumbents and other candidates for election. He further noted that although many of these investigations could have been completed prior to the qualifying dates, they were instead being held so as to coincide with the campaign season. These investigations and the resulting publicity tended, according to the Chief Justice, to "confuse the electorate in the careful weighing of the qualifications of the candidates in a calm and objective manner."[39] Thus, the grand jury, a part of the state judicial system, was interfering with the right of the other two branches of government to manage the election process.

Justice Overton in his dissenting opinion maintained that the constitutional administrative authority over the judicial system does not extend to consideration of how particular court proceedings might affect candidates for election and does not include authority to terminate grand jury investigations without a showing of illegality or improper conduct in a particular case. In upholding the order as a proper exercise of the administrative authority of the Chief Justice, the majority pointed out that prior to entering the order, the Chief Justice had been assured by the state attorney that the delay would not endanger the ultimate result of any matter under

38. 298 So. 2d 382 (Fla. 1974).
39. *Id.* at 385.

investigation. The majority also noted that the order had been revised and clarified to the extent that the public interest and general welfare of Florida and law enforcement generally would suffer no injury. In particular, the stay order allowed any grand jury investigation of a candidate to proceed upon showing of good cause. Under this provision, presentment of the Leon County Grand Jury was submitted to the Chief Justice, who found good cause therein to rescind the prior orders. Thus, he allowed the investigations to proceed and he approved the request for the extension of the assignment of the special prosecutor to the Leon County Grand Jury.

2. JURISDICTION OF DISTRICT COURTS OF APPEAL

The Supreme Court of Florida in *Monroe Education Association v. Clerk, District Court of Appeal, Third District*,[40] found that under article V, section 4(b)(3), the district court is required to accept and duly consider an application for a constitutional writ even though it is not ancillary to any appellate matter pending in that court. The questions of whether the writ should issue and whether it would be more appropriate to transfer the application to the circuit court, however, are left to the sound discretion of the district court.

The District Court of Appeal, Second District, ruled in *Galloway v. State*[41] that the circuit court, sitting in its appellate capacity, should have treated an appeal from a decision of the county court as a petition for writ of certiorari, the form of action specified by statute in the circumstances, rather than deny review. In support of its decision, the court cited article V, section 2(a) of the Florida Constitution, under which the rules adopted by the supreme court for all courts must include "a requirement that no cause shall be dismissed because an improper remedy had been sought." Similarly, the District Court of Appeal, Fourth District, in *Ison v. Florida Sanitarium & Benevolent Association*[42] treated an appeal as a petition for writ of certiorari since the district courts of appeal have no jurisdiction on appeal to review an appellate decision of a circuit court.

In *State ex rel. Volusia Jai-Alai, Inc. v. Board of Business*

40. 299 So. 2d 1 (Fla. 1974).
41. 305 So. 2d 278 (Fla. 2d Dist. 1975).
42. 302 So. 2d 200 (Fla. 4th Dist. 1974).

Regulation,[43] mandamus was found to be an appropriate action for review of the Board's suspension of the petitioners' permits to operate jai-alai frontons and to conduct parimutuel wagering at the frontons. The Board argued that review should be by certiorari under the Administrative Procedure Act of 1961.[44] However, the District Court of Appeal, First District, held that certiorari would lie only to review exercises of the "quasi-judicial" power of agencies, while other remedies should be pursued to review "quasi-executive" actions. The court characterized the agency's order in the present case as being a mixture of quasi-judicial and quasi-executive, and concluded that certiorari and mandamus were available as appropriate alternative remedies in the occasional instance where such characterization applies.[45] The court observed that review of previous cases "leaves one hopelessly mired in procedural uncertainty as to the proper remedy to be invoked."[46] Hopefully, the 1974 revision of the Florida Administrative Procedure Act has dispelled much, if not quite all, of the uncertainty.

State ex rel. Rash v. Williams[47] restated the principle that prohibition is a prerogative writ by which a court having appellate jurisdiction over an inferior court may prevent the latter from exercising jurisdiction which has not been vested in it by law. Where the question of the constitutionality of a statute does not go to the fundamental jurisdiction of a court, a writ of prohibition to prevent a judge from issuing an order under the statute is inappropriate. In *State ex rel. Christian v. Rudd*,[48] relator sought review of the circuit court's denial of his motion to dismiss the indictment against him on grounds that it had been improperly brought by the grand jury. He petitioned for a writ of prohibition, or alternatively certiorari. The court held common law certiorari to be the appropriate writ to correct the procedure of a court which has not observed the requirements of law deemed essential to the administration of justice.

In the companion case, *State ex rel. Christian v. Austin*,[49] the

43. 304 So. 2d 473 (Fla. 1st Dist. 1974).

44. FLA. STAT. ch. 120 (1973).

45. The district court cited as authority for this conclusion West Flagler Associates, Ltd. v. Board of Business Regulation, 241 So. 2d 369 (Fla. 1970).

46. 304 So. 2d at 475.

47. 302 So. 2d 474 (Fla. 3d Dist. 1974).

48. 302 So. 2d 821 (Fla. 1st Dist. 1974), *modified on other grounds*, 310 So. 2d 295 (Fla. 1975).

49. 302 So. 2d 811 (Fla. 1st Dist. 1974), *modified on other grounds*, 310 So. 2d 289 (Fla. 1975).

District Court of Appeal, First District, held relator Christian to be a proper party to bring a direct proceeding in quo warranto. Respondent, the elected state attorney of the Fourth Judicial Circuit, had been assigned by the Governor to serve in the Second Judicial Circuit in order to investigate certain allegations concerning the relator. The investigation led to five indictments against the relator. Relator was challenging the propriety under the circumstances of the respondent's discharging the duties of an elected official of the Second Judicial Circuit. A writ of quo warranto is usually brought by the Attorney General or by a state attorney but if these officials will not institute the action, a private citizen may do so in certain instances, and if the action is to enforce a public right by correcting the usurpation, misuse or non-use of a public office, a relator need not show a specific personal interest in the matter. It is enough that the relator is a citizen and has an interest in having the law upheld; no other real or personal interest need be shown.

3. DISCIPLINE OF JUDGES

In *State ex rel. Turner v. Earle*,[50] an incumbent circuit judge sought a writ of prohibition from the supreme court in order to prevent the Judicial Qualifications Commission from investigating or proceeding against him with regard to misconduct alleged to have been committed prior to the time he became a circuit judge and while he held an office not within the jurisdiction of the Commission (he was a judge of a criminal court of record). The court held that prohibition was an inappropriate remedy since prohibition can issue only to a judicial or quasi-judicial tribunal with decision-making power, while the Commission can only make recommendations to the supreme court. However, the court exercised jurisdiction under its "all writs" authority, coupled with its authority to adopt rules regulating the Commission's proceedings.

On the merits, the court held that a public officer may not be removed from office for misconduct which he committed in another public office or in a prior term of office unless express constitutional language provides otherwise. Article V, section 12(a) was amended in 1974 to authorize discipline of judges if past conduct demonstrates present unfitness. However, since the instant case was decided before the 1974 amendment and since the pre-1974 Florida

50. 295 So. 2d 609 (Fla. 1974).

Constitution contained no provision contrary to the general rule, the relator was entitled to the relief requested. The court stated that the Commission might investigate within a reasonable time (but not exceeding 2 years[51]) before a present term of office only when such investigation was in relation to a charge of misconduct occurring in a present term of office; prior conduct could not, standing alone, serve as a basis for discipline. The Commission might also investigate matters occurring within a reasonable time (not exceeding 2 years) before its own origin, where germane to alleged misconduct occurring after January 1, 1973.

The extent of the Commission's jurisdiction was further delineated in *In re Dekle*,[52] in which the court granted a motion to dismiss an original proceeding brought by the Commission against a supreme court justice. Although acknowledging that estoppel or res judicata did not apply with respect to Commission proceedings, the court nevertheless held that where the Commission, according to its own rules and regulations, had taken a formal vote which was not a sufficient basis on which to make an affirmative recommendation, the Commission was without further jurisdiction and could not bring an action before the supreme court absent a taking of further evidence or a showing of why the matter should be deferred.

Once the Commission has so recommended by the vote of two-thirds of its members, the supreme court is authorized to order that a justice or judge be reprimanded or removed from office "for willful or persistent failure to perform his duties or for other conduct unbecoming a member of the judiciary."[53] *In re Dekle*[54] and *In re Boyd*[55] clarified the extent of this authority and of the standards for the discipline of judges. Both cases dealt with an ex parte memorandum given to the two justices by an attorney representing parties in a case before the court. Both justices were publicly reprimanded by the court—Justice Dekle for utilizing a memorandum which he knew or should have known was ex parte, and Justice Boyd for delay in bringing the memorandum to the attention of the members of the court and other interested authorities, and for destroying it. However, in neither case did the court follow the recommendation of the

51. The two-year limit was derived by analogy from the statute of limitations for noncapital crimes. *Id.* at 618 n.9.

52. 308 So. 2d 4 (Fla. 1975).

53. FLA. CONST. art. V, § 12(d).

54. 308 So. 2d 5 (Fla. 1975).

55. 308 So. 2d 13 (Fla. 1975).

Judicial Qualifications Commission that both justices be removed from office for conduct unbecoming a judge.

In Justice Dekle's case, the court found that the memorandum had no effect on his vote. Although he had used the memorandum in preparation of what was originally to be a dissenting opinion, the revised opinion which became that of the majority was based only on the briefs and record filed. The court also found that Justice Boyd was not influenced improperly in the decision since he took a position which was contrary to that expressed in the memorandum. Moreover, there was contradictory evidence as to whether the attorney gave Justice Boyd the memorandum with the latter's knowledge.

The court noted that objective, and not merely subjective, misconduct warrants judicial discipline and that a judge may be guilty of misconduct even if there is no implication of harm to any litigant. However, the court found that the constitution places within the court's sound discretion the determination of the measure and extent of discipline in each individual case of judicial misconduct.

By analogy to attorney disbarment cases, the court ruled that judges, while held to even stricter ethical standards than attorneys,

> should not be subjected to the extreme discipline of removal except in instances where it is free from doubt that they intentionally committed serious and grievous wrongs of a clearly unredeeming nature.[56]

Thus, in the absence of a clear showing of corrupt motive or deliberate or intentional wrong, the court found that Justice Dekle's impropriety and laxness and Justice Boyd's impropriety did not constitute dishonesty or moral turpitude warranting removal from office.

Following the *Dekle* and *Boyd* decisions, the legislature passed a proposed constitutional amendment[57] making it clear that a judge could be unseated for unethical conduct even if no bad faith or corrupt motive is proved. The amendment would also disqualify supreme court justices from considering Judicial Qualifications Commission recommendations affecting a member of their own court; a panel of seven chief circuit judges, selected on the basis of seniority, would act on such recommendations. On finding probable cause to believe a judge guilty of misconduct, the Commission

56. *Id.* at 21.

57. H.J. Res. 1709, [1975] Fla. Laws 1123.

would be required under the amendment to hold public rather than secret trials. In addition, the amendment would give the Commission access to information held by grand juries. The proposed amendment is subject to voter approval in the November 1976 general election.

4. RAISING CONSTITUTIONAL ISSUES IN LITIGATION

Stembridge v. Harwitz[58] restated the well-established rule that where a trial court unnecessarily reaches a question of the constitutionality of a law, the part of the opinion dealing with the constitutional issue is to be treated as advisory rather than an issue in the case, and the final judgment should be amended to eliminate a holding of unconstitutionality.

Duran v. Wells[59] involved an allegation that the Florida criminal legal process was being used to collect back rent from migrant workers. The plaintiff had recently been convicted[60] of the crime of obtaining lodging with intent to defraud the owner. In a separate proceeding she brought an individual action against the landlord for damages, a class action for declaratory judgment that the statute was unconstitutional, and sought injunctive relief against its enforcement and expungement of arrest and conviction records of all persons arrested and/or convicted under the statute. She alleged that the statute violated the Florida Constitution's proscription against imprisonment for debt[61] and the due process clause of the fourteenth amendment. The court found that the constitutional questions were not properly presented since, as a general rule, the question of the validity of a criminal statute should be raised only as a defense to a prosecution, or in an action alleging imminent threat of prosecution. Finding no justiciable controversy on the constitutional question, the District Court of Appeal, Second District, affirmed the lower court's grant of the defendant's motion to dismiss.

5. COURTS GENERALLY

A circuit court judge is empowered under Florida Statutes section 27.16 (1973) to appoint an acting state attorney to serve as

58. 303 So. 2d 85 (Fla. 3d Dist. 1974).
59. 307 So. 2d 259 (Fla. 2d Dist. 1975).
60. Pursuant to FLA. STAT. § 509.151 (1973).
61. FLA. CONST. art. I, § 11.

temporary prosecutor when a vacancy exists due to nonappointment by the Governor and when the regular state attorney is absent at a term of the court or is present but unable to or disqualified from performing the duties of that office. The supreme court in *State ex rel. Harris v. McCauley*[62] made clear that the statute is only a recognition of an inherent power of the circuit court. A circuit court judge is not circumscribed in selecting an acting state attorney by any statutory or constitutional qualifications for a regular state attorney or assistant state attorney. Thus, a duly appointed acting state attorney may validly sign felony informations, although a member of the bar less than 5 years and consequently not qualified under article V, section 17 of the Florida Constitution to hold office as a state attorney.

C. *Legislature*

1. INVESTIGATIONS

In *Forbes v. Earle*,[63] the supreme court denied a petition for writ of mandamus sought by the chairman of the House Subcommittee on the Judiciary. The Subcommittee sought to compel the chairman of the Judicial Qualifications Commission to present to the Subcommittee all the Commission's files containing information on asserted judicial misconduct which could lead to impeachment, and to testify concerning these matters. Article V, section 12(c) of the Florida Constitution provides that the record of the proceedings before the Commission shall be made public after a recommendation of removal of any justice or judge, thus implying to the supreme court a requirement of confidentiality before the recommendation. While finding valid reasons supporting this requirement, the court recognized that it must be read in pari materia with article III, section 5 (granting the legislature subpoena power during investigations) and article III, section 17 (authorizing the speaker of the house to appoint a committee to investigate charges against any officer subject to impeachment). The court expressed the opinion that the speaker of the house or his designated representative could examine, in camera and in the presence of the Chief Justice or his representative, matters and investigative files of the Judicial Qualifications Commission that concern a named officer who, in the

62. 297 So. 2d 825 (Fla. 1974).
63. 298 So. 2d 1 (Fla. 1974).

Speaker's opinion, may be subject to an impeachment investigation. The court pointed out that the "raw files" of the commission would not qualify as evidence in impeachment proceedings, but that these files should be available under the procedure mentioned above as a means of developing presentable evidence in any appropriate impeachment proceeding. In *Forbes*, however, no specific charges had been made against any officer and no impeachment committee had been appointed. The court did not believe that article III, section 17 authorized such a sweeping investigation of the class of officers subject to impeachment, and it therefore denied the petition for writ of mandamus.

2. SPECIAL LAWS

In *Dickinson v. Bradley*,[64] the supreme court held that a claim bill, although restricted to a designated person, is nevertheless validly enacted as a general law and does not have to meet the notice or referendum requirement applicable to special laws. The purpose of notice with respect to a special law is to inform people in the locality affected and to allow those opposed to attempt to prevent its enactment. The claim bill in question[65] provided for the State of Florida to pay the plaintiff out of "general county funds." Finding no funds designated as such and finding an unmistakable legislative intent to compensate the plaintiff, the court construed the source of funds to be the general revenue fund of the state. Thus, since the act as interpreted by the court did not appropriate the funds of any locality, the court found the requirement of notice to be unnecessary in the instant case.

Brandon Planning and Zoning Authority v. Burns[66] held unconstitutional a special act[67] which purported to transfer zoning jurisdiction over an area of the county from the Board of County Commissioners to the appellant Authority and to empower the Authority to enact county zoning ordinances which the commissioners and other county officials would have to obey and enforce.

The supreme court found that the act pertained to "election, jurisdiction or duties of officers, except officers of municipalities, chartered counties, special districts or local governmental agen-

64. 298 So. 2d 352 (Fla. 1974).
65. Fla. Laws 1971, ch. 71-468.
66. 304 So. 2d 121 (Fla. 1974).
67. Fla. Laws 1972, ch. 72-564.

cies," one of the topics which, under article III, section 11, may not be the subject of a special law or general law of local application.

The court adopted the rationale of the trial court which pointed out that a special act is not invalid where its main purpose is valid and constitutional, and where the effect upon the jurisdiction or duties of the county officers is merely incidental to the main purposes or where the special act only adds to the officers' duties. However, a special act must be held unconstitutional where the purpose is to usurp rights, powers and privileges conferred by general law on county officers.

D. *Executive*

1. GOVERNOR—GENERAL POWERS AND FUNCTIONS

In *Austin v. State ex rel. Christian*,[68] the Supreme Court of Florida considered the extent of the Governor's power to assign a state attorney to discharge the duties of another state attorney. Article V, section 17 of the Florida Constitution provides that a state attorney "shall perform other duties prescribed by general law." Pursuant to this provision the legislature had enacted statutes permitting the Governor to require one state attorney to assist another state attorney in the discharge of the latter's duties[69] and to assign one state attorney to another circuit to discharge the duties of the circuit's regular state attorney if the latter was disqualified or to order the exchange of state attorneys if the Governor felt that the ends of justice would be best served by such exchange.[70] Acting under these statutes, the Governor, by executive order, had assigned the state attorney of the Fourth Judicial Circuit to discharge such duties of the state attorney of the Second Judicial Circuit as related to allegations or reports concerning the Commissioner of Education. The order further authorized the assigned state attorney to designate one or more of his duly qualified assistant state attorneys to work with him. No contention was made that the state attorney of the Second Judicial Circuit was disqualified or otherwise unable to act, but only that great demands were placed on his resources by his agreement to assist the state attorney in the Thirteenth Judicial Circuit. The district court of appeal,[71] while holding the statutes

68. 310 So. 2d 289 (Fla. 1975).
69. FLA. STAT. § 27.15 (1973).
70. FLA. STAT. § 27.14 (1973).
71. State *ex rel.* Christian v. Austin, 302 So. 2d 811 (Fla. 1st Dist. 1975).

constitutional, had strictly construed the statutes and had held the assignment of the state attorney and his assistants to be invalid since there had not been an exchange of state attorneys and since the assigned state attorney had conducted the investigation of the Commissioner of Education without supervision by the regular state attorney. The supreme court refused to strictly construe the statutes and reversed the district court's holding that the assignment of the state attorney was not within the scope of the statutes. The supreme court, however, did hold the assignment of assistant state attorneys to be invalid since such assignment was not expressly authorized by the statutes.[72] Consequently, in a companion case,[73] the supreme court found invalid indictments which had been handed down by the grand jury before which the illegally assigned assistant state attorneys had appeared.

In an advisory opinion,[74] the supreme court clarified the circumstances in which the Governor, at the beginning of his second term, must reappoint officers who had been appointed during the preceding term under statutes which provide for service at the pleasure of the Governor. Article III, section 13 of the Florida Constitution prohibits the creation of any office with a term exceeding 4 years. However, the court had earlier held that article IV, section 6 creates an express exception to the 4-year limitation. The court advised the Governor that where the initial appointment required confirmation of the Senate and the statute requires reappointment or replacement at the discretion of the Governor, a new appointment is required; where the initial appointment required approval of three members of the Cabinet and confirmation of the Senate and the official, by statute, serves at the pleasure of the Governor and Cabinet, no reappointment would be required; where the official serves at the pleasure of the Governor, but no requirement of Senate confirmation of the appointment exists and no express requirement of reappointment or replacement at the discretion of the Governor is made by statute, the official need not be reappointed and would continue to serve at the pleasure of the Governor.

72. The statute was subsequently amended to expressly provide for the assignment of assistant state attorneys. *See* FLA. STAT. § 27.14 (Supp. 1974).

73. Rudd v. State *ex rel.* Christian, 310 So. 2d 295 (Fla. 1975).

74. Advisory Opinion to the Governor, 306 So. 2d 509 (Fla. 1975).

2. SUSPENSIONS

By vote of four to three, the justices of the supreme court advised the Governor that a superintendent of schools who has been employed by the district school board pursuant to the local option under article IX, section 5 is not subject to the Governor's power of suspension.[75] The new option provided by the 1968 constitution was said to be more than merely a change in the means of selection of the superintendent. It provided an option to make the superintendent a local employee subject to local control by the school board rather than an elected, constitutional officer subject to state control by the executive. When the electors have chosen to have an employed superintendent, only the district school board has power to remove him.

E. *Vacancies in Office*

Under article V, section 11(a), the Governor is authorized to fill vacancies in judicial office by appointing one of not fewer than three persons nominated by the appropriate judicial nominating commission. The Governor's power to fill vacancies extends only to appointment to a term ending on the first Tuesday after the first Monday in January of the year following the next primary and general election rather than to the total unexpired term of the judge vacating.

The Governor requested the advice of the supreme court in regard to this power of appointment when a circuit court judge and a district court judge submitted resignations prior to the primary and general elections in the fall of 1974. Although the words "primary and general election" seem to have a clear meaning on their face, the supreme court construed them to mean the non-partisan judicial election process established by the legislature in Florida Statutes section 105.021 (1973). The court advised[76] the Governor to fill the vacancies by appointment of new judges to a term expiring after the judicial elections in 1976 instead of after the elections in 1974.

The advisory opinion also stated that a vacancy in office does not occur until the office actually becomes vacant, except in cases of artificial vacancies created by the "resign-to-run" law[77] and the

75. Advisory Opinion to the Governor, 298 So. 2d 366 (Fla. 1974).

76. Advisory Opinion to the Governor, 301 So. 2d 4 (Fla. 1974).

77. FLA. STAT. § 99.012 (Supp. 1974). For a discussion of the statute, see 1974 Survey, *supra* note 1, at 593-94.

vacancy created under the circumstances present in *Spector v. Glisson*.[78]

In *Spector*, Justice Ervin, who was to reach the mandatory retirement age on January 26, 1975, had stated by letter in February 1974 that he would resign unconditionally effective January 6, 1975. The court held that there was an immediate vacancy for the office which was subject to an election and granted a writ of mandamus to compel the Secretary of State to accept qualifying papers and fees of the petitioner and intervenor as candididates for justice of the Supreme Court of Florida in the election of September 10, 1974. The court stated that the authority to fill vacancies by appointment arises only in those instances where the elective process is not available and there is a need for someone to fill an interim judgeship so that the business of the courts can continue. According to the court in *Spector*, an intervening election should be utilized to choose the successor in situations where a known vacancy must mandatorily occur in conjunction with and reasonably before a judicial election.

Thus, in *Spector* the court determined that the resignation of Justice Ervin created an immediate vacancy. However, in its advisory opinion the court determined that in the case of the resignations of the district court and circuit judges, the vacancy would not occur until the effective date of the resignation. The advisory opinion distinguished *Spector* by stating that in that case there was ample time to fill the vacancy in an appropriate election and that the effective date of the vacancy coincided with the commencement of the terms of other judicial officers elected during the same election process.

A special act, increasing by two the membership of Broward County's school board, became effective after approval at a referendum held on September 10, 1974, the same day as the first primary election. Florida Statutes section 100.111(6)(b) (1973) provides in substance that where a "vacancy in nomination" exists after September 15th, no special election shall be held, but the county chairmen of the political parties shall be notified in order that the parties may decide either to provide a nominee for their party or resolve not to offer a candidate for the office in the general election. Since in the instant case there was no chance for selecting nominees in a special primary election before September 15, 1974, the supreme

78. 305 So. 2d 777 (Fla. 1975).

court advised[79] the Governor that the provisions of section 100.111(6)(b) governed. Should both parties, however, decline to offer a candidate, it would become the duty of the Governor to fill the offices by appointment.

No note was taken of the apparent conflict between the statute as interpreted by the court and the Florida Constitution. Article X, section 3 provides that a vacancy in office occurs upon the creation of an office. It could be argued, therefore, that a vacancy in office occurred when the act creating the two new school board positions became effective on the date of the favorable referendum. Article IV, section 1(f) would then empower the Governor to fill the vacancy by appointment without requiring the Governor to defer to the political parties should they decide to provide a nominee for the office in the general election.

According to the Attorney General of Florida in an opinion to the Governor,[80] section 100.111(6)(b) is also applicable to the election of successors to fill vacancies in judgeships which occur under circumstances when it is too late for a successor to qualify during the statutory qualifying period.

III. ORGANS OF LOCAL GOVERNMENT

A. *Counties*

The Attorney General has taken the position that until legislative or judicial clarification to the contrary, it is the safer course to assume that the board of commissioners of noncharter counties are not authorized to adopt rent control ordinances.[81]

B. *Municipalities*

The constitutional grant of power to municipalities provides that they

> shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.[82]

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79. Advisory Opinion to the Governor, 302 So. 2d 748 (Fla. 1974).

80. Fla. Att'y Gen. Op. 074-228 (Aug. 6, 1974).

81. Fla. Att'y Gen. Op. 075-91 (Apr. 3, 1975). Under FLA. CONST. art VIII, § 1(f), noncharter counties have only those powers of self-government specifically granted by law.

82. FLA. CONST. art. VIII, § 2(b).

In *City of Miami Beach v. Fleetwood Hotel, Inc.*[83] the supreme court had held that this provision did not empower a city to enact an ordinance on rent control. However, since the *Fleetwood Hotel* decision, the Municipal Home Rule Powers Act[84] has expanded municipal power to include any power not expressly prohibited by law.[85] *City of Miami Beach v. Forte Towers, Inc.*[86] unanimously held that the Act validly empowered a municipality to enact rent control ordinances in appropriate circumstances as a proper municipal purpose. A majority of five agreed with the trial court that the evidence presented at trial did not overcome the city council's finding that an emergency existed sufficient to support enactment of the ordinance. However, by a vote of four to three, the court found that the ordinance was constitutionally defective for lack of sufficient objective guidelines accompanying the delegation of legislative power to the rent control administrator. Justice Dekle in his concurring opinion found the guidelines to be arbitrary, unreasonable, confiscatory and a denial of due process.

In *United Sanitation Services, Inc. v. City of Tampa*,[87] the District Court of Appeal, Second District, held that a city may operate a garbage collection service within its territory as a city-owned monopoly since garbage collection is an essential public service. This function, according to the court, should not be regarded as an exercise of the police power, and therefore the city need not demonstrate a relationship between the function and the public health, safety or welfare.

Provision of police services is also within the municipal powers. Nevertheless, the state legislature may restrict the exercise of this power. A special statute[88] providing that police officers in the City of Miami should not be required to work more than 40 hours a week was upheld in *Reese v. Thorne*.[89] Although the City of Miami Charter[90] gave the police chief a broad range of powers over the police force, subject to the supervision of the Director of Public Safety, the supreme court observed that the charter did not and

83. 261 So. 2d 801 (Fla. 1972).
84. Fla. Laws 1973, ch. 73-129, *creating* FLA. STAT. ch. 166 (1973).
85. *See* FLA. STAT. § 166.021(1) (1973).
86. 305 So. 2d 764 (Fla. 1974).
87. 302 So. 2d 435 (Fla. 2d Dist. 1974).
88. Fla. Laws 1955, ch. 30989.
89. 297 So. 2d 9 (Fla. 1974).
90. Fla. Laws 1925, ch. 10847.

could not validly confer absolute powers upon the police chief. The statute was characterized as "merely one restriction, easily administered on the police chief's large array of powers,"[91] and therefore compatible with the charter as construed. In two opinions,[92] the Attorney General pointed out that in the absence of a general law allowing it to do so, a municipality may not extend fire or police protection beyond its territorial limits when not authorized by municipal charter or other special law. The Attorney General found it doubtful that under Florida Statutes section 163.01 (1973), two cities could validly enter into an agreement providing for a consolidated police department under the supervision and control of an administrative entity independent of either city. However, under article VIII, section 4 of the Florida Constitution, the cities could, with the approval of the electorate of each city, contract for the performance of law enforcement duties by the police force of one city in the other under the joint supervision and control of the cities' police chiefs.[93]

In *Bubier v. State ex rel. Crane*,[94] the district court held that a city commission may not effectively abolish a department established in its charter by the simple expedient of not appropriating city funds for the operation of the department. The case arose prior to October 1, 1973, the effective date of Florida Statutes section 166.031(5) (1973), which gives a municipal governing body authority to amend its charter. The narrow holding would still seem to be valid law, however, in that under section 166.031(5) the charter may be amended and municipal departments abolished only by unanimous vote of the governing body.

C. *Consolidation*

Albury v. City of Jacksonville Beach[95] held that certain former municipalities which had been expressly excluded from the consolidation of the City of Jacksonville continued to exist as quasi-municipal corporations, empowered to exercise all municipal functions which they were permitted to perform under their original

91. 297 So. 2d at 10.

92. Fla. Att'y Gen. Op. 074-222 (Aug. 1, 1974); Fla. Att'y Gen. Op. 074-211 (July 22, 1974).

93. Fla. Att'y Gen. Op. 074-220 (Aug. 1, 1974).

94. 299 So. 2d 98 (Fla. 4th Dist. 1974).

95. 295 So. 2d 297 (Fla. 1974).

charters and the general laws of the state immediately prior to consolidation. They have the same rights as duly constituted municipal corporations to share in, receive and expend revenues allocated by the federal and state governments. However, when a quasi-municipality imposes an occupational license tax, the consolidated government can collect only that tax which would have been payable to the old Duval County had consolidation never occurred.

IV. ELECTIONS

A. *Qualification of Electors*

The constitution and statutes prohibit convicted felons from voting,[96] but do not require applicants for registration to swear that they are qualified to vote, only that they are qualified to register.[97] The Supervisor of Elections of Brevard County had modified the registration oath to provide that the applicant was qualified to vote. In *State v. Parsons*,[98] the District Court of Appeal, Fourth District, held that the right to register to vote could not be encumbered with oaths broader than required by the constitution, and that the defendant, a convicted felon who had taken the registration oath, could not be convicted of false swearing for taking an untrue oath which was neither required nor authorized by law.

B. *Minority Political Parties and Independent Candidates*

Danciu v. Glisson[99] involved the constitutionality of the statutory requirement[100] that an independent candidate for statewide office submit and have certified on petitions the signatures of 5 percent of the total registered electors of Florida. The court found that the provisions in question were not an unreasonable means to control the length of the ballot, thereby assuring orderly and effective elections. However, the difference between the requirement of signatures of 5 percent of the electorate for "independent" candidates and 3 percent for "minority party" candidates[101] was held to be arbitrary. The lower requirement was held to apply to both.

96. FLA. CONST. art. VI, § 4; FLA. STAT. § 97.041 (Supp. 1974).
97. FLA. CONST. art. VI, § 3; FLA. STAT. § 97.051 (1973).
98. 302 So. 2d 766 (Fla. 4th Dist. 1974).
99. 302 So. 2d 131 (Fla. 1974).
100. FLA. STAT. § 99.152 (Supp. 1974).
101. FLA. STAT. § 101.261(1) (1973).

C. *Municipal Recall Elections*

In *Hurt v. Naples*[102] the supreme court faced the question of whether a city councilman whose incumbency was being challenged in a recall election could run in a simultaneous election as a candidate to succeed himself if recalled. The court stated as a general proposition that no one should be denied eligibility to be a candidate for public office absent a valid constitutional or statutory declaration of ineligibility. Because the city charter[103] and constitution were silent on the point, the court held that the recall of the petitioner by a majority vote and his simultaneous election by plurality as successor councilman must stand.

D. *Format of the Ballot*

The district court in *Nelson v. Robinson*[104] held that a candidate has a right to appear on the ballot, but has no right to a particular place on the ballot, so long as the position given does not interfere with the voters' right to a full, free and open choice. The court noted that an election should not be set aside except upon a showing of a reasonable probability that the results would have been changed, but for the irregularities complained of. The court also observed that it was dealing with a claim made after the election and, in dicta, pointed out that one who does not avail himself of the opportunity to object to irregularities in the ballot prior to the election may not do so thereafter.

V. Constitutional Rights and Limitations

A. *Declaration of Rights*

1. RELIGIOUS FREEDOM

A county zoning ordinance forbidding the issuance of alcoholic beverage licenses to any new business located within 1500 feet of an established church was upheld in *Horne v. Hernando County*.[105] The challenge to its constitutionality was based on an alleged conflict with federal and state constitutional provisions[106] prohibiting estab-

102. 299 So. 2d 17 (Fla. 1974).
103. City of Miami Springs Charter § 30, Fla. Laws 1949, ch. 26037, § 30.
104. 301 So. 2d 508 (Fla. 2d Dist.), *cert. denied*, 303 So. 2d 21 (Fla. 1974).
105. 297 So. 2d 606 (Fla. 2d Dist. 1974).
106. U.S. Const. amend. I; Fla. Const. art. I, § 3.

lishment of religion. Although the precise question was one of first impression in Florida, the district court cited Supreme Court of Florida decisions[107] on similar questions to the effect that since the purpose of the ordinance was to promote the general welfare of the community, and not to promote religion, the ordinance did not violate the constitution. The incidental benefit to religion did not bring the ordinance within the constitutional proscription.

2. FREEDOM OF SPEECH, PRESS, ASSEMBLY

With its decision in *Town of Lantana v. Pelczynski*,[108] the Supreme Court of Florida receded from its 1934 decision in *Ex parte Hawthorne*[109] on the basis of a subsequent United States Supreme Court decision[110] which reached the opposite result. A municipal ordinance made it unlawful to publish or circulate, or cause to be published or circulated, any charge or attack against any candidate during the 7 days preceding an election unless the charge or attack had been personally served upon the candidate at least 7 days prior to the election. The ordinance was held unconstitutional as a clear violation of the first amendment of the United States Constitution and article I, sections 4 and 9 of the Florida Constitution.

In *State v Aiuppa*,[111] the supreme court upheld the constitutionality of the Florida statute[112] providing penalties for the distribution of obscene material. In answering certified questions which arose during the trial of an exhibitor of the movie "Deep Throat," the Florida court found that the statutory definition of obscenity[113] met the requirement of specificity set out by the United States Supreme Court in *Miller v. California*.[114] To satisfy this requirement

107. Nohrr v. Brevard County Educ. Facilities Authority, 247 So. 2d 304 (Fla. 1971); Johnson v. Presbyterian Homes of the Synod of Fla., Inc., 239 So. 2d 256 (Fla. 1970).

108. 303 So. 2d 326 (Fla. 1974).

109. 116 Fla. 608, 156 So. 619 (1934).

110. Mills v. Alabama, 384 U.S. 214 (1966).

111. 298 So. 2d 391 (Fla. 1974).

112. FLA. STAT. § 847.07 (1973).

113. FLA. STAT. § 847.07(2) (1973) provides:

> Considered as a whole and applying community standards, material is obscene if:
>
> (a) Its predominant appeal is to prurient interest; that is, a shameful or morbid interest in nudity, sex, or excretion;
>
> (b) It is utterly without redeeming social value; and
>
> (c) In addition, it goes substantially beyond customary limits of candor in describing or representing such matters.

114. 413 U.S. 15 (1973).

of specificity the Florida court looked first to the Georgia obscenity statute[115] upon which the Florida statute was patterned, and then to the judicial interpretations of that statute by the Supreme Court of Georgia. The Florida court pointed out that statutes adopted from one state may be deemed to have been adopted with, and are governed by, the construction placed on them at the time of their enactment in Florida by the highest court of the state from which they were adopted. The supreme court concluded that since the Georgia court in *Slaton v. Paris Adult Theatre I*[116] had held that its previous interpretations of the Georgia obscenity statute supplied the specificity required by *Miller* for statutory definitions of obscenity, a similar construction should follow for the Florida statute. Accordingly, it was found that the Florida statute, properly construed, met the *Miller* standards.

The court also found that the statutory language was not unconstitutionally vague and did not violate due process; standing alone, the language was sufficient to give notice to an offender of the conduct prohibited.

The questioning in *Aiuppa* of the Florida statute's definition of obscenity focused on the fact that the definition was in terms of an appeal to prurient interests rather than a specific depiction or description of sexual conduct as mandated by *Miller*. However, the majority of the court found that "[t]he intent of the legislature to regulate the depiction or description of sexual conduct is manifest from the undeniable fact that sexual conduct is the keystone of obscenity."[117] The majority stated: "We refuse to permit grammatical niceties to frustrate our duty to effectuate legislative intent."[118] As Justice Ervin's dissenting opinion pointed out, the majority's reasoning seemed to be that since any attempt to regulate other material would conflict with the first amendment, the legislature must only have intended to regulate materials depicting sexual conduct.

The statute also requires that to be obscene, material must be shown to be "utterly without redeeming social value." The court held that the state must continue to make such a showing until the legislature sees fit to adopt the less stringent *Miller* test which re-

115. *See* GA. CODE ANN. § 26-2101 (1972).
116. 231 Ga. 312, 201 S.E.2d 456 (1973).
117. 298 So. 2d at 396.
118. *Id.*

quires only that the material be shown to be without "serious literary, artistic, political or scientific value."[119]

The defendant in *State v. Papp*[120] had been convicted under Florida Statutes section 847.011(1)(a) (1969), which forbade

> possession, custody or control with intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise in any manner, [of] any obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic . . . magazine . . . .

The supreme court had earlier held in *State v. Reese*[121] that the same standard regarding the possession of obscene material contained in Florida Statutes section 847.011(2) (1967) was not unconstitutionally vague once the word "immoral," which was severable, was removed. Although *Miller* had been decided subsequent to *Reese*, the court pointed out that it had clearly affirmed the *Reese* ruling in *Rhodes v. State*[122] and that nothing in *Miller* abrogated the ruling in *Reese*.

Relying on its earlier decision, the supreme court thus held that once the word "immoral" was eliminated from section 847.011(1)(a), that section did not fail to give adequate notice of the conduct sought to be proscribed and was not susceptible to attack on the ground of constitutional vagueness.

In *State ex rel. Gerstein v. Walvick Theatre Corp.*,[123] a four-to-three majority of the Supreme Court of Florida relied on the United States Supreme Court case of *Kingsley Books, Inc. v. Brown*[124] in holding that the statutory provision[125] allowing both criminal and injunctive relief from proscribed dissemination of obscene material does not violate standards of due process. The court found that even acquittal on the criminal charge does not bar injunctive or forfeiture proceedings to remedy the public wrong of dissemination of obnoxious and prohibited materials. Being remedial and not punitive, civil action for an injunction or forfeiture after termination of the criminal proceedings is not barred by principles of double jeopardy. In his dissenting opinion, Justice Ervin maintained that, because of

119. 413 U.S. at 24.
120. 298 So. 2d 374 (Fla. 1974), *rehearing denied*, 316 So. 2d 546 (Fla. 1975).
121. 222 So. 2d 732 (Fla. 1969).
122. 283 So. 2d 351 (Fla. 1973).
123. 298 So. 2d 406 (Fla. 1974).
124. 354 U.S. 436 (1957).
125. FLA. STAT. § 847.011 (1973).

the later guidelines of *Miller*, once a criminal trial jury determined that the same material sought to be suppressed criminally and civilly passes muster locally and is not obscene, the question of obscenity is also settled in any pending action for injunction or forfeiture.

The district court decided in *State v. Samscot Enterprises, Inc.*[126] that the "irreparable harm" necessary for issuance of permanent injunctive relief was established by a determination of obscenity as a matter of law, notwithstanding the absence of additional proof that the defendant intended to show or exhibit the films for an additional period. In arriving at the conclusion that injunctive relief and ultimate destruction of the material may follow a declaration of obscenity and be concomitant therewith, the court stated: "[T]he very premise upon which 'obscenity' is based is the offensive nature of the material and the harm or injury to the public that such material is likely to cause."[127]

In *Jones v. State*,[128] the Florida statute[129] prohibiting profanity was upheld as constitutional. The statute provides that "[a]ny person who shall publicly use or utter any indecent or obscene language shall be guilty of a misdemeanor of the second degree . . . ." This language was found sufficient to convey its prohibition to a person of common understanding.

3. RIGHT TO WORK

Article I, section 6 of the Florida Constitution permits public employees to bargain collectively, but prohibits them from striking. In order to provide statutory implementation of this provision and to promote harmonious and cooperative relationships between government and its employees, the legislature enacted a law[130] which grants public employees the right of organization and representation and which creates a Public Employees Relations Commission to assist in resolving disputes between government and its employees. The Commission has power to

> resolve questions and controversies concerning claims for recognition as the bargaining agent for a bargaining unit, determine or approve units appropriate for purposes of collective bargaining,

126. 297 So. 2d 69 (Fla. 4th Dist. 1974).
127. *Id.* at 71.
128. 293 So. 2d 33 (Fla.), *appeal dismissed*, 419 U.S. 1081 (1974).
129. FLA. STAT. § 847.05 (1973).
130. Fla. Law 1974, ch. 74-100, *creating* FLA. STAT. §§ 447.201 *et seq.* (Supp. 1974).

and investigate charges of engagement in prohibited practices and charges of striking by public employees.[131] 314

In *Auchter Co. v. Florida Department of Commerce, Industrial Relations Commission*,[132] the District Court of Appeal, First District, reversed an order of the Industrial Relations Commission and held that union carpenters who refused nonunion work were ineligible to receive unemployment compensation. The carpenters claimed that it was against union rules to work at a nonunion job that paid less than union scale and that their acceptance of such work would result in their being subjected to union discipline and being deprived of union retirement and medical benefits. The Commission argued that article I, section 6 would not allow the claimants to be forced to jeopardize their right to union benefits as a condition of qualification for unemployment benefits. In answer to this, the district court pointed out that any sanctions imposed on the claimant would be by action of the union and not by the employer or the State of Florida; it was the union and not the prospective employer or State of Florida which would foreclose the claimants' rights to unemployment compensation if they chose not to accept the union sanctions.

4. IMPAIRMENT OF OBLIGATION OF CONTRACTS

A later section of this survey[133] includes discussion of the substantive due process aspects of *Palm Beach Mobile Homes, Inc. v. Strong*[134] and *Stewart v. Green*.[135] In these cases the supreme court sustained the validity of a Florida statute[136] which imposes limits on the circumstances in which the owner or operator of a mobile home park may evict a mobile home owner. One of the litigated issues was whether contractual rights would be impaired if the statute was applied to tenancies which had been created before enactment of the statutes.

The court characterized the statute as being a reasonable regulation of the remedy, rather than as an impairment of the right, created by a tenancy. On this basis, the court found that the statute

131. FLA. STAT. § 447.207(6) (Supp. 1974).
132. 304 So. 2d 487 (Fla. 1st Dist. 1974).
133. *See* section VI, B *infra*.
134. 300 So. 2d 881 (Fla. 1974).
135. 300 So. 2d 889 (Fla. 1974).
136. FLA. STAT. § 83.69 (1973), *formerly* FLA. STAT. § 83.271 (Supp. 1972).

could be applied to pre-existing tenancies.

The distinction between rights and remedies arose also in *Ratner v. Hensley*.[137] In a suit brought in a Florida court for enforcement of a South Carolina judgment, one of the issues was whether the South Carolina court had acquired jurisdiction over the defendant. He had been served pursuant to a constructive service statute, which had been enacted after the cause of action had accrued. The District Court of Appeal, Third District, held that the statute could properly be applied to a pre-existing cause of action, since the statute dealt with the remedy rather than with the right. The court observed that, "[w]hile it is true that substantive rights are fixed as of the time the cause arose, the rights relative to procedural matters are determined by the law in force at the time the action is brought."[138]

5. ACCESS TO COURTS

Whether the tort exemption and limitation on the right to sue for personal injury damages under Florida's no-fault insurance act[139] violate the right of access to the courts was among the questions considered by the supreme court in *Lasky v. State Farm Insurance Co.*[140] The personal injury provisions[141] of the act limit neither an injured person's recovery of medical expenses nor any compensation he may receive for loss of income and loss of earning capacity. They do, however, prohibit an injured person from recovering for pain and suffering, mental anguish and inconvenience—intangible personal injuries—unless his medical expenses exceed $1,000.

After considering the advantages and disadvantages to an injured person under both the traditional tort system and the no-fault system, the court indicated that the personal injury provisions of the no-fault act were a reasonable alternative to the traditional tort remedy. Thus, since a reasonable alternative to the traditional rem-

137. 303 So. 2d 41 (Fla. 3d Dist. 1974).

138. *Id.* at 45. However, in Barton v. Keyes Co., 305 So. 2d 269, 271 (Fla. 3d Dist. 1974), the court stated:

> We note that our recent decision in Ratner v. Hensley . . . may seem to indicate a holding that all constructive service statutes may be given a retroactive application. To the extent that our opinion in Ratner may be given such an interpretation, we recede therefrom.

139. FLA. STAT. §§ 627.730-.741 (1973).

140. 296 So. 2d 9 (Fla. 1974).

141. FLA. STAT. §§ 627.737(1), (2) (1973).

edy existed, the access to courts provision of the constitution had not been violated.

In making this determination, the supreme court was faced with the task of distinguishing *Kluger v. White*.[142] In that case the supreme court had held invalid as a denial of access to the courts, the section[143] of the no-fault act which eliminated tort actions for property damage less than $550. The court's distinction of the threshold for property damage recovery from the threshold for intangible personal injuries recovery seems to center around the idea that the property damage provision denied all recovery if the threshold was not met, while the personal injury provisions deny recovery of only certain kinds of damages if the threshold is not met. That this distinction may not be totally convincing does not detract from the supreme court's conclusion that the personal injury provisions, taken as a whole, provide a reasonable remedy to persons injured in automobile accidents.

Following what it termed persuasive dicta in *Lasky*, the Fourth District held the no-fault act to be applicable to nonresidents as well as to residents receiving injuries while passengers in motor vehicles in Florida.[144] The court concluded that both have equal access to the courts, and are thus subject to the same restrictions, limitations and conditions.

6. IMPRISONMENT FOR DEBT

The Florida Constitution prohibits a person from being imprisoned for failure to pay his debts, except in cases of fraud.[145] A former husband's obligations under a divorce decree to make mortgage payments to his ex-wife or her estate until the mortgage was satisfied was held by the District Court of Appeal, First District, to be a payment of a debt for settlement of a property right in *Corbin v. Etheridge*.[146] The husband could not, therefore, be imprisoned for contempt of court for failing to make the monthly payments.

7. REIMBURSEMENT OF COSTS TO SUCCESSFUL DEFENDANT

The constitutional authority[147] for the reimbursement of costs

142. 281 So. 2d 1 (Fla. 1973).
143. FLA. STAT. § 627.738 (1973).
144. Johnson v. Liberty Mut. Ins. Co., 297 So. 2d 858 (Fla. 4th Dist. 1974).
145. FLA. CONST. art. I, § 11.
146. 296 So. 2d 59 (Fla. 1st Dist. 1974).
147. FLA. CONST. art. I, § 19.

to defendants who have been acquitted or discharged in a criminal proceeding has been implemented by statute.[148] The statute provides that if the defendant has paid any taxable costs in the case, the clerk or judge shall give the successful defendant a certificate of payment of such costs, which, when audited and approved, shall be refunded by the county. *State v. Nell*[149] held that the trial court's authority does not extend to ordering a board of county commissioners to pay costs without certifying them to the board as provided by statute. The statute leaves to the courts the determination of which costs must be reimbursed to an acquitted or discharged defendant. Thus, in *Doran v. State*,[150] the District Court of Appeal, Second District, refused reimbursement for pretrial bail bond premium and for the fee charged for towing the petitioner's automobile off the street following his arrest on charges of driving under the influence of alcoholic beverages.

B. *Substantive Due Process and the Police Power*

A statute,[151] enacted in 1972 and amended in 1973, provides that the owner or operator of a mobile home park can evict a mobile home owner only on one of the grounds listed in the statute. In summary, the permissible grounds are: (1) nonpayment of rent; (2) conviction of a violation of law deemed detrimental to other dwellers in the park; (3) violation of any reasonable rule or regulation which has been established and duly publicized by the park owner or operator; or (4) change in the use of the land for a purpose other than a mobile home park. The supreme court sustained this statute, as a reasonable exercise of the police power, in the companion cases of *Palm Beach Mobile Homes, Inc. v. Strong*[152] and *Stewart v. Green*.[153] The court observed that the mobile home industry, which provides accomodation for some 700,000 Floridians, "peculiarly affects the public interest and bears a substantial relation to the public health, safety, morals, and general welfare."[154] This characterization evidently brings the industry into the category of a "busi-

148. FLA. STAT. § 939.06 (1973).

149. 297 So. 2d 90 (Fla. 2d Dist. 1974).

150. 296 So. 2d 86 (Fla. 2d Dist. 1974); *accord*, Wood v. City of Jacksonville, 248 So. 2d 176 (Fla. 1st Dist. 1971).

151. FLA. STAT. § 83.69 (1973), *formerly* FLA. STAT. § 83.271 (Supp. 1972).

152. 300 So. 2d 881 (Fla. 1974).

153. 300 So. 2d 889 (Fla. 1974).

154. 300 So. 2d at 884; 300 So. 2d at 891.

ness affected with a public interest," regulation of which is strongly presumed to be a reasonable exercise of the police power.[155] The challengers in these cases were unable to overcome the presumption in favor of validity. The court noted that mobile home spaces were in short supply in many areas of the state; consequently, an evicted mobile home owner might experience serious difficulty and exorbitant expense in obtaining a new location. In this economic situation, the court sustained the reasonableness of the legislative decision to extend special protection to mobile home owners, as a class threatened with oppressive treatment.

In addition, dictum suggests that if eviction is attempted on the basis of a tenant's violation of the park's rules and regulations, the courts will carefully scrutinize the rules, not only as written but also as applied, so as to provide the tenant with judicial protection against arbitrary or discriminatory treatment.

In *Thomas v. City of West Palm Beach*,[156] on conflict certiorari, the supreme court reviewed a district court of appeal decision on the validity of a municipal ordinance.[157] The ordinance[158] authorized a city building official to order the demolition, removal, or vacating of any dwelling found unfit or unsafe for human habitation, or the repair of any such dwelling if the cost of repair would not exceed 50 percent of the value of the structure after repair. The ordinance defined "unfit or unsafe" dwellings as those which were

> structurally unsafe, unstable, unsanitary, inadequately provided with exit facilities, constituting a fire hazard, unsuitable or improper for the use or occupancy to which they are put, constituting a hazard to health or safety because of inadequate maintenance, dilapidation, obsolescence or abandonment, dangerous to life or property or otherwise in violation of the Housing Code, as well as the Building Code (chapter 10), the Electrical Code (chapter 19) and the Plumbing Code (chapter 36).

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155. *See* 1974 Survey, *supra* note 1, at 608-09.

156. 299 So. 2d 11 (Fla. 1974).

157. The constitution provides for appeals to the supreme court from decisons which pass upon the validity of a state or federal statute. FLA. CONST. art. V, § 3(b)(1). However, decisions which pass upon the validity of a municipal ordinance are not appealable to the supreme court, but instead are disposed of by the district court of appeal. Callendar v. State, 181 So. 2d 529 (Fla. 1966); Dresner v. City of Tallahassee, 164 So. 2d 208 (Fla. 1964). The district court decision in such a case may be reviewed in the supreme court only if some other jurisdictional basis for supreme court review can be found. In the case under discussion, the supreme court's conflict certiorari jurisdiction was invoked.

158. WEST PALM BEACH, FLA., CODE art. II, § 27-19 (1967), *quoted in* 299 So. 2d at 12-13.

The official had to give written notice and time for compliance, and any aggrieved party could obtain an administrative hearing, followed by judicial review.

First, the court found sufficient standards and procedures to sustain the ordinance against attack as an improper delegation. The court particularly noted the incorporation by reference of the Housing, Building, Electrical and Plumbing Codes.

Next, the court sustained the ordinance as a reasonable exercise of the municipal police power, for the protection of the public health, safety, morals and general welfare. Recognizing that all enactments are presumed valid, the court observed that "viewed in the most favorable light to Petitioner we find the ordinances fairly debatable, which requires our approval thereof."[159]

As precedents for using the "fairly debatable" test, the *Thomas* opinion cited *Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority*[160] and *Lester v. City of St. Petersburg*.[161] In *Harrell's Candy Kitchen* the supreme court applied the "fairly debatable" test to a zoning ordinance, observing that the test had become well established for use in such cases.[162] In *Lester*, the district court of appeal used the "fairly debatable" test to examine the validity of a municipal housing code, citing *Harrell's Candy Kitchen* and commenting that the test was applicable not only in zoning cases, but also to cases involving "any regulation enacted for the public welfare."[163] The *Thomas* opinion evidently adopts the *Lester* view, since *Thomas* applies the "fairly debatable" test to a housing code.

Of course the words "fairly debatable" contain no magic, but they have provided a convenient means of separating zoning litigation from other matters, with the implication that the standards for judicial review may be different in zoning cases than in other situations. If the court decided that *Thomas* provided an appropriate opportunity to abandon the distinction between the standards for judicial review in zoning and in other litigation involving regulations for the public welfare, a clear statement to this effect, together with supporting rationale, would have made the *Thomas* opinion more helpful.

159. 299 So. 2d at 15.
160. 111 So. 2d 439 (Fla. 1959).
161. 183 So. 2d 589 (Fla. 2d Dist. 1966).
162. 111 So. 2d at 443-44.
163. 183 So. 2d at 591.

In *Zarsky v. State*,[164] a motorist had received 15 convictions for moving traffic violations within a 5-year period. Following an administrative hearing, the state suspended his driver's license for 5 years, as required in such situations by the habitual traffic offender statute.[165] The supreme court sustained the statute against challenges on several grounds.

First, the court held the statute to be a reasonable exercise of the police power. The court reaffirmed the traditional view that "reasonable regulation of an individual's *right* to drive is in the interest of public good,"[166] and later took the inconsistent position that a driver's license is a "*privilege* as opposed to a right."[167] By reaching the same result whether a driver's license is called a privilege or a right, the court demonstrated, albeit unintentionally, that these terms do not help with the decision of police power cases. Evidently, the government must follow fair procedures, even-handed treatment and rational decisionmaking whether dealing with rights or privileges. The distinction between rights and privileges, at least in the context of police power cases, seems to be little more than an exercise in rhetoric.

Second, the court found that the suspension or revocation of a driver's license is not cruel and unusual punishment, and indeed not punishment at all, but merely a measure for the protection of the public. The court made no attempt to distinguish *Pauline v. Borer*,[168] in which the same court had held, just one year previously, that the suspension of a real estate broker's license in the circumstances of the case was too "harsh and unusual," and that public reprimand would be the appropriate penalty. A possible distinction is that the statute in *Pauline* conferred significant discretion upon an administrative agency to determine the sanction, while the habitual traffic offender statute in *Zarsky* specified the sanction precisely if the agency found certain facts.

Third, in response to an argument on equal protection grounds, the court found that the statute created a reasonable classification, and provided equal treatment for all persons falling within the class. Finally, the court noted that the ex post facto rule did not preclude the statute from imposing an enhanced sanction on habitual offend-

164. 300 So. 2d 261 (Fla. 1974).
165. FLA. STAT. § 322.27(5) (1973).
166. 300 So. 2d at 263 (emphasis added).
167. *Id.* (emphasis added).
168. 274 So. 2d 1 (Fla. 1973).

ers, even though part of the conduct giving rise to the sanction had occurred prior to enactment of the statute. Prior case law had sustained the validity of enhanced criminal sanctions under habitual offender statutes; the principle applies a fortiori where the sanction is characterized as remedial rather than punitive.

C. *Equal Protection*

In *Brown v. Bray*,[169] a section of the Florida bastardy law was challenged, on the ground that it violated equal protection by discriminating against the father of an illegitimate child, as compared to the father of a legitimate child. The alleged discrimination was the contrast between the dissolution of marriage statute, where both parents are eligible for consideration as custodians of the child, and the bastardy statute, which appeared to eliminate the father as a candidate for custodian. The bastardy statute[170] provides, in part, that if the circuit court determines that the defendant is father of the child, the court shall order the defendant

> to pay the complainant, her guardian or such other person assuming responsibility for the child as the judge may direct, such sum or sums as shall be sufficient to pay reasonable attorney's fee, hospital or medical expenses, cost of confinement and any other expenses incident to the birth of such child. In addition the court shall order the defendant to pay periodically for the support of such child such sums as shall be fixed by the court in accordance with the provisions of this act . . . .

The supreme court acknowledged that the statute would violate the fourteenth amendment, under such decisions as *Levy v. Louisiana*[171] and *Stanley v. Illinois*,[172] if it were interpreted as preventing the father from being considered as custodian. However, the court considered the statutory language broad enough to authorize the circuit court, in its discretion, to award custody to the father, and to order him to pay for the child's support commensurate with such custody. So construed, the court found the statute constitutional.

The regulations of the Board of Regents impose a certain registration fee upon students who have been citizens of Florida for at

169. 300 So. 2d 668 (Fla. 1974).
170. FLA. STAT. § 742.031 (1973).
171. 391 U.S. 68 (1968).
172. 405 U.S. 645 (1972).

least one year immediately preceding the first day of classes of the current term, and a higher fee upon students who do not satisfy that requirement. *Weitzel v. State*[173] sustained the validity of the distinction. Relying heavily on dictum in *Vlandis v. Kline*,[174] the District Court of Appeal, First District, held that the tuition differential based upon a durational citizenship requirement was a reasonable classification that did not violate the fourteenth amendment. The court added, without discussion, that no provision of the Florida Constitution was violated either.

In *Perkins v. Florida State University*,[175] petitioner was a computer operator who had been dismissed by the university. Following an unfavorable decision by the Career Service Commission on his petition for review, he asked the university for a free transcript of those proceedings so that he could seek judicial review. The university refused his request, although the university as a matter of policy furnished free transcripts to other classes of personnel, including faculty members, in similar circumstances. The District Court of Appeal, First District, found no legal requirement that free transcripts be furnished to any dismissed employee. "However," said the court, "having elected to do so for some, respondents must do so for all."[176] The court emphasized that its opinion was based, not upon the indigency of the petitioner, but upon the requirement of equal treatment in disciplinary matters and proceedings of all employees of a single state agency or entity. Further, the court ordered the university to furnish only such portions of the transcript as might be necessary for judicial review, under the guidelines of *Draper v. Washington*[177] and *Cueni v. State*.[178] The court supported its decision by referring to the fourteenth amendment and to the equal protection clause of the Florida Constitution.

Sattler v. Askew[179] involved a challenge, on equal protection grounds, against the method of allocating state road funds. The case will be discussed in a later section.[180]

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173. 306 So. 2d 188 (Fla. 1st Dist. 1974).

174. 412 U.S. 441 (1973).

175. 303 So. 2d 415 (Fla. 1st Dist. 1974), *cert. denied*, 314 So. 2d 583 (Fla. 1975).

176. *Id.* at 416.

177. 372 U.S. 487 (1963).

178. 303 So. 2d 411 (Fla. 1st Dist. 1974), *cert. denied*, 310 So. 2d 738 (Fla.), *cert. denied*, 96 S. Ct. 64 (1975).

179. 295 So. 2d 289 (Fla. 1974).

180. See text accompanying notes 337-39 *infra*.

An opinion of the Attorney General[181] ruled that publicly owned and operated utilities may not charge lower rates to the class of consumers over 65 years old than to others. The equal protection principle precludes any classification for rate purposes, except on a basis reasonably related to the service provided.

D. *Zoning*

A city ordinance[182] provided, in part:

> No House Car, Camp Car, Camper or House Trailer, nor any vehicle, or part of vehicle, designed or adaptable for human habitation, by whatever name known, . . . shall be kept or parked on public or private property within the City, except if enclosed within the confines of a garage, and unoccupied . . . .

City of Coral Gables v. Wood[183] upheld the ordinance, at least as applied in the circumstances of the case. First, the District Court of Appeal, Third District, disposed of a challenge addressed to the vagueness of the ordinance. The court recognized that some doubt could arise as to whether or not certain types of vehicles were covered, but found without question that the Apache vehicle at issue in the case was a "camper" as contemplated by the ordinance.

Next, the court resolved the substantive due process question, stating the principle that a zoning ordinance should be sustained "unless it is clearly shown that it has no foundation in reason and is a mere arbitrary exercise of power without reference to public health, morals, safety or welfare."[184] The court did not use or even mention the "fairly debatable" test, which has been traditionally applied in zoning cases.[185] Since this case dealt with the validity of a zoning ordinance without using the "fairly debatable" test, while that test was applied in the non-zoning context of *Thomas v. City of West Palm Beach*, noted under a previous section,[186] it appears that the "fairly debatable" test can no longer be closely identified with litigation on the validity of zoning ordinances. The comment made earlier in connection with *Thomas* is reiterated: if the courts decide to abandon the traditional "fairly debatable" test for zoning

181. Fla. Att'y Gen. Op. 074-212 (July 22, 1974).

182. CORAL GABLES, FLA., ZONING CODE § 4.09(a) (1972), *quoted in* 305 So. 2d at 262-63.

183. 305 So. 2d 261 (Fla. 3d Dist. 1974).

184. *Id.* at 263.

185. See text accompanying notes 162-63 *supra*.

186. See text accompanying notes 156-59 *supra*.

ordinances, the courts should explain the reasons for doing so, and consider the implications of this departure on future litigation.

The *Wood* opinion sustained the ordinance as a valid exercise of the police power for aesthetic purposes, namely, for "preventing unsightly appearances and diminution of property values which obtain when camper-type vehicles are parked or stored out of doors in a residential area of the community."[187] The court found that the ordinance carried out this purpose in a reasonable manner, since it did not limit the right to own such vehicles, but merely regulated the parking or storage of them.

The "fairly debatable" test was at issue in *Allstate Mortgage Corp. of Florida v. City of Miami Beach.*[188] An ordinance[189] authorized the board of adjustment to grant variances "[w]here there are practical difficulties or unnecessary hardships in carrying out the strict letter" of a zoning ordinance. The circuit court, applying the "fairly debatable" test, sustained a decision of the board of adjustment granting a variance on grounds of hardship. The District Court of Appeal, Third District, reversed and remanded, holding that the circuit court had erred in applying the "fairly debatable" test. The correct test should have been whether the applicant for a variance had demonstrated "unique or unnecessary hardship," a standard derived partly from the above-quoted ordinance, and partly from the 1957 supreme court decision in *Josephson v. Autrey.*[190] Evidently, this standard imposes a heavier burden on the applicant than would be required under the "fairly debatable" test. The *Allstate Mortgage* decision is consistent with prior authorities;[191] the "fairly debatable" test developed as a standard for the judicial review of zoning *legislation*, not for review of *adjudications* by boards of adjustment.

A result similar to *Allstate Mortgage* was reached by the District Court of Appeal, Fourth District, in *Monterey Development Co. v. Stuart Marine Center, Inc.*[192] A special statute[193] authorized the board of zoning adjustment to grant variances where, "owing to special conditions, a literal enforcement of the provisions of the

187. 305 So. 2d at 263.
188. 308 So. 2d 629 (Fla. 3d Dist.), *cert. denied*, 317 So. 2d 763 (Fla. 1975).
189. MIAMI BEACH, FLA., RELATED LAWS § 34, *quoted in* 305 So. 2d at 631.
190. 96 So. 2d 784 (Fla. 1957).
191. See text accompanying notes 162-63 *supra*.
192. 305 So. 2d 245 (Fla. 4th Dist. 1974).
193. Fla. Laws 1961, ch. 61-2466, § 5.

[zoning ordinance] will result in unnecessary and undue hardship." Relying on this language and prior case law, the court found the applicant entitled to a variance, having demonstrated a "unique hardship."[194]

However, the "fairly debatable" test was applied to a petition for rezoning a specific parcel of property, in a situation more analogous to a variance than to general zoning legislation, in *Duval Productions, Inc. v. City of Tampa*.[195] The owner of a sub-standard sized lot in a residential zone petitioned for rezoning to a classification which would permit construction of a billboard. The lot was the remnant of a larger tract, after a partial taking through the exercise of eminent domain, in which the owner's predecessor had been entitled to severance damages. The District Court of Appeal, Second District, indulged in the presumption that the predecessor had received proper compensation, including severance damages. Accordingly, the new owner had no absolute right to rezoning on the basis of the prior partial taking. The question before the zoning board was therefore whether the billboard classification would be appropriate to the parcel in question. The board's determination was negative, and the court found this "fairly debatable,"[196] and therefore sustainable.

In the companion cases of *City of St. Petersburg v. Schweitzer*[197] and *City of St. Petersburg v. Austin*,[198] the trial courts issued peremptory writs of mandamus to compel the city to grant special exceptions and to issue building permits. The trial courts accepted petitioners' contentions that the zoning ordinances, which provided that the planning commission "may" permit special exceptions of the type requested, contained insufficient standards to guide the commission in the exercise of its discretion; that this portion of the ordinances was invalid; that the planning commission had no basis to exercise discretion; and that the special exceptions had to be granted. The District Court of Appeal, Second District,

194. It would be a unique hardship for Stuart Marine, having purchased property in a primarily marine area, having built a marina, and having planned to build a boat storage later, to be told now that it cannot receive a variance for a higher use, to build marine facilities in a marine area.
305 So. 2d at 246-47.

195. 307 So. 2d 493 (Fla. 2d Dist.), *cert. denied*, 317 So. 2d 78 (Fla. 1975).

196. *Id.* at 494.

197. 297 So. 2d 74 (Fla. 2d Dist. 1974), *cert. denied*, 308 So. 2d 114 (Fla. 1975).

198. 297 So. 2d 78 (Fla. 2d Dist.), *cert. denied*, 304 So. 2d 127 (Fla. 1974).

agreed that the zoning ordinances contained insufficient standards, but the court quashed the writs of mandamus. "When the vehicle whereby the exception could be granted became invalid," said the court, "the opportunity to obtain the exception was lost. In effect, the appellees have successfully attacked the validity of the very power, the exercise of which they sought to have the court compel."[199] In *Bal Harbour Village v. State ex rel. Giblin*,[200] the District Court of Appeal, Third District, agreed with petitioner-appellee that the zoning ordinances of the village were invalid because they had been enacted without the prior notice and public hearing required by statute. The court then affirmed the issuance of a peremptory writ of mandamus to compel the village to issue a building permit. Unfortunately, the court did not explain whether petitioner's legal right to obtain a building permit flowed from the zoning ordinances which had just been declared invalid, or from some other source. Nor did the court explain the standards it had applied in determining petitioner's legal right to the permit.

The case is further complicated by the court's refusal to give effect to a new comprehensive zoning ordinance, enacted in full compliance with the publication requirements while the appeal was pending. The village alleged in a supplemental memorandum, apparently without dispute, that petitioner's plans and specifications did not comply with the new ordinance. Noting these circumstances, the court held that "the passage of a new ordinance does not destroy the rights which may have accrued to appellee under his application for a building permit."[201] This holding suffers from the defect noted above, namely, the court's failure to explain the source and nature of petitioner's "rights" to obtain a building permit when the zoning ordinances have been declared invalid.

The same court appeared more cogent in *Metropolitan Dade County v. Rosell Construction Corp.*,[202] holding that an applicant has no vested right to the issuance of a building permit where the county has demonstrated a substantial question as to the effect of the construction upon the public health, arising from sewage disposal problems.

State ex rel. Zuckerman-Vernon Corp. v. City of Miramar[203]

199. 297 So. 2d at 77.
200. 299 So. 2d 611 (Fla. 3d Dist. 1974), *cert. denied*, 311 So. 2d 670 (Fla. 1975).
201. *Id.* at 618.
202. 297 So. 2d 46 (Fla. 3d Dist. 1974).
203. 306 So. 2d 173 (Fla. 4th Dist. 1974), *cert. denied*, 320 So. 2d 389 (Fla. 1975).

takes a much more limited view of the role of mandamus than is reflected in *Giblin*. Petitioner in *Zuckerman-Vernon* applied to the city for approval of a proposed plat and for issuance of building permits. About 3 weeks later a meeting was held to air objections. One week later the city council voted to table the matter pending conferences with attorneys and zoning experts. Six more weeks passed and the council still had not reached any decision. Petitioner then sought a writ of mandamus to compel favorable action on his application. The trial court conducted a trial on the merits and denied relief, partly on the grounds that portions of the city's zoning plan were invalid.

The District Court of Appeal, Fourth District, affirmed, but on a different basis than was given by the trial court. The appellate court held that mandamus was an inappropriate vehicle, since the city's function in approving or disapproving such applications is discretionary, not ministerial. The court added, by way of comment, that mandamus may lie in a proper case to compel the city to consider an application and render a decision. However, a petitioner would first have to exhaust administrative remedies by allowing the city a reasonable time to act on the application. The court noted that in the circumstances of the present case, at the time suit was filed, the city had not unreasonably delayed its decision.

Drage-Grothe, Ltd. v. Lake Jessamine Property Owners Association[204] involved the relationship between the board of county commissioners and the planning and zoning commission. A special act provided that any person aggrieved by a recommendation of the planning and zoning commission could file a timely appeal with the board of county commissioners, upon which the board would conduct a hearing de novo. When the board "denied" a recommendation of the planning and zoning commission which was favorable to the appellant without any appeal pending as provided under the act, without any evidence before it, and without prior notice to the appellant, the District Court of Appeal, Fourth District, held that the board had exceeded its authority.

In *Marca, S.A. v. Dade County*[205] the District Court of Appeal, Third District, held that the circuit court should have granted a motion to supplement the record in proceedings for review of an

204. 304 So. 2d 504 (Fla. 4th Dist. 1974), *cert. denied*, 317 So. 2d 75 (Fla. 1975).
205. 304 So. 2d 461 (Fla. 3d Dist. 1974).

order denying rezoning, so that the movant could have the record reflect the rezoning of comparable property a few weeks later.

State ex rel. Gardner v. Sailboat Key, Inc.[206] illustrates the interface between zoning and the law of public nuisance. After zoning had been changed, citizens invoked the law of public nusiance to prevent the use of the property in the manner contemplated by the rezoning. First, the District Court of Appeal, Third District, held that an activity may constitute a judically abatable nuisance, notwithstanding its compliance with the zoning ordinance. In effect, this permits a zoning classification to be collaterally attacked in public nuisance proceedings. Second, the court noted that an action to abate a nuisance may be brought by any citizen of the county, in the name of the state, without the necessity of a prior application to the state attorney, and without the necessity for the citizen relator to show special damages different in kind from the injury to the public at large. Third, an action to abate a public nuisance may also be brought by an individual, but without proceeding in the name of the state. In this event the individual can qualify for standing to sue only by showing special or peculiar damages, different in kind from those of the public at large.

In *Miller v. MacGill*,[207] the District Court of Appeal, First District, held that objections by an overwhelming number of neighbors did not constitue legally sufficent reason for the issuance of an injunction against the construction of a convenience store. Presumably, in light of the *Sailboat Key* decision, an injunction would have been proper if the objectors had been able to convince the court that the proposed construction would constitute a public nuisance.

Intergovernmental problems arose in some zoning cases during the survey period. In *Orange County v. City of Apopka*,[208] the District Court of Appeal, Fourth District, held that the municipally-owned airport located outside the city limits is subject to the zoning laws of the county. However, if the city wishes to apply to the county for a special exception or a zoning change, it may do so. If the county declines, the reviewing court should balance the competing public and private interests to reach an equitable resolution, and should

206. 295 So. 2d 658 (Fla. 3d Dist.), *cert. denied*, 304 So. 2d 453 (Fla.), *cert. denied*, 308 So. 2d 111 (Fla. 1974). Another similarly styled case, involving another phase of the same litigation, is reported at 306 So. 2d 616 (Fla. 3d Dist. 1974).

207. 297 So. 2d 573 (Fla. 1st Dist. 1974), *cert. denied*, 307 So. 2d 183 (Fla. 1975).

208. 299 So. 2d 652 (Fla. 4th Dist. 1974). *See also* City of Apopka v. Orange County, 299 So. 2d 657 (Fla. 4th Dist. 1974) (companion case).

declare the zoning ordinance inapplicable if it appears that the county has acted "unreasonably." The result seems to impose a lighter burden on a city than on another applicant for relief from the county's zoning.

Willumsen v. Horton[209] involved attempts by two zoning authorities to exercise jurisdiction over the same territory. A special law enacted in 1949[210] vested exclusive jurisdiction in the Whitfield Zoning District, for the zoning of certain lands in Manatee County. A special law enacted in 1963[211] conferred zoning jurisdiction upon Manatee County, expressly reserving to the Whitfield Zoning District the authority conferred in 1949. Despite this reservation, Manatee County zoned certain land in the Whitfield area as R-3. In reliance on this classificiation, owners of some of the land entered into option contracts with private parties, with warranties as to the existence of R-3 zoning. Whitfield Zoning District then asserted its authority to rezone the land. In an action for a declaratory judgment, the District Court of Appeal, Second District, sustained the authority of the District.

The landowners asserted that the District should be estopped to rezone the property, since the District, as a "special municipal corporation," had actual or constructive knowledge of the attempted exercise of zoning power by another governmental authority. Although recognizing that municipal corporations may be subjected to the doctrine of estoppel, the court stated that

> the doctrine does not generally operate to embarrass [the municipal corporation] in its capacity to govern by preventing it from exercising its police powers. . . . A review of the decisional law of Florida reveals that in instances where the doctrine of estoppel has been invoked against a municipality in respect to exercise of its zoning powers, the cases generally involve issuance of a permit or performance of some other acts within municipal authority which were later countermanded after being relied upon in good faith and to the substantial detriment of the party seeking to invoke the estoppel.[212]

The landowners in this case failed to allege a situation which could qualify as an estoppel, "there being no allegation that appellees ever

209. 307 So. 2d 833 (Fla. 2d Dist.), *cert. denied*, 315 So. 2d 473 (Fla. 1975).
210. Fla. Laws. 1949, ch. 25996.
211. Fla. Laws 1963, ch. 63-1599.
212. 307 So. 2d at 834-35.

sought to invoke the jurisdiction of the District, that the District was unwilling to respond or that it is seeking to change its position to the detriment of appellees."[213]

In *Parkway Towers Condominium Association v. Metropolitan Dade County*,[214] the supreme court permitted the county to proceed with construction of a public building which failed to conform to the county's own zoning ordinances, upon noting that the county commission had resolved to make a retroactive change in the zoning so as to validate the proposed project. The court expressed the view, prospectively, that county or municipal projects should not be constructed or operated in violation of zoning ordinances, and that any necessary amendments to the ordinances should be enacted before construction or operation is started.

E. *Administrative Due Process*

In *Buchman v. State Board of Accountancy*,[215] the Board had revoked the license of a certified public accountant, upon finding that he had committed the following acts: (1) certifying false and fraudulent financial statements; (2) willfully permitting false amounts to be included in the statements; and (3) certifying the statements although he knew or should have known that his audit had not been performed in accordance with generally accepted auditing standards. The supreme court[216] ruled that the record contained sufficient evidence of the falsity of the financial statements to sustain the first finding, but insufficient evidence of specific intent to sustain the other two. The court concluded that license revocation was inappropriate, and that "a *public censure* would best safeguard the interest of the public and the profession."[217]

In discussing the Board's findings, the court stated:

> We are not substituting our judgment for that of the Board, but rather we are viewing the evidence, noting that the statute is

213. *Id.* at 835.

214. 295 So. 2d 295 (Fla. 1974), *discharging the writ of certiorari which had been issued to review* 281 So. 2d 68 (Fla. 3d Dist. 1973).

215. 300 So. 2d 671 (Fla. 1974).

216. The supreme court entertained jurisdiction on appeal from the district court of appeal, which had rendered a per curiam decision sustaining the validity of the accountancy statute against challenges on constitutional grounds. The supreme court affirmed this aspect of the district court decision in a single sentence, and then proceeded to discuss other aspects of the case, as indicated in the accompanying text.

217. 300 So. 2d at 674 (emphasis in original).

> penal in nature, and considering only that evidence tendered meeting the fundamental requirements of due process of law. This is not to say that the Board is required to follow all of the technical rules of evidence but the Board is required to provide substantive due process within the evidentiary hearing.[218]

Further, in explaining why two of the Board's findings had to be reversed, the court stated that, with regard to those findings: "[T]he record does not disclose substantial competent evidence introduced in conformity with the requirements of due process of law."[219]

The court makes no mention of the 1961 Florida Administrative Procedure Act (APA),[220] although this statute was applicable to the agency proceedings and to the court's review in this case. The court's silence on the APA is understandable, since the 1961 version of the Act did not deal with the question of substantial evidence.[221] Prior cases, noting that the APA provided no guidance on this point, developed the substantial evidence rule as one of the standards implicit in the certiorari form of review.[222] By basing the substantial evidence rule on the requirements of due process, the *Buchman* opinion suggests that the rule must be followed, even in situations where the certiorari form of review is not used. We note that the 1974 revision of the APA,[223] which became effective after *Buchman*, sets forth significantly more detail than did its predecessor on many matters, including substantial evidence and the scope of judicial review.[224] Future cases arising under the 1974 APA can therefore be decided on the basis of the sustantial evidence rule contained in that statute. Insofar as administrative law cases arise in situations

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218. *Id.* at 673.

219. *Id.* at 674.

220. FLA. STAT. ch. 120 (1973).

221. FLA. STAT. § 120.27 (1973) dealt with the admissibility of evidence in administrative proceedings, and § 120.31(2) dealt with the scope of judicial review, but neither provision dealt with the substantial evidence rule. *See* sources cited in note 222 *infra*.

222. Peden v. State Bd. of Funeral Directors & Embalmers, 189 So. 2d 526 (Fla. 3d Dist. 1966), stated that since the 1961 APA did not deal with sufficiency of evidence, the court would follow the substantial evidence rule announced in the leading pre-1961 case of De Groot v. Sheffield, 95 So. 2d 912 (Fla. 1957). *See also* Schreiber Express, Inc. v. Yarborough, 257 So. 2d 245 (Fla. 1971); Authors' Comment on Florida Appellate Rule 4.1, 32 FLA. STAT. ANN. at 237-39 (1967).

223. FLA. STAT. ch. 120 (Supp. 1974).

224. FLA. STAT. § 120.58(1) (Supp. 1974) deals with admissibility of evidence in administrative proceedings, and § 120.68(10) deals specifically with the substantial evidence rule within the context of judicial review of agency action.

not covered by the APA,[225] *Buchman* provides a due process basis in addition to the certiorari basis for applying the substantial evidence rule.

The *Buchman* opinion does not set forth the specific provisions of the accountancy statutes and rules relied upon by the Board. As read by the present authors, the statute[226] and rules[227] authorize the Board to revoke a CPA's license on various grounds, including *any one* of the three grounds reflected in the Board's findings in this case. Following this interpretation, it is submitted that the court, by sustaining at least one of the Board's findings, necessarily sustained the Board's legal authority to revoke the license. The lack of evidence to sustain the other two findings could be regarded as harmless error. The court does not explain why it reduced the sanction from revocation to public censure. Even though the statutes do not appear to require this result, the court could conceivably justify the reduction of the sanction by reliance upon article I, section 17 of the constitution, which prohibits "[e]xcessive fines, cruel or unusual punishment . . . ." At any rate, an explanation of the court's rationale would be highly desirable.

By failing to explain its rationale, the court leaves the impression that it may have followed a tendency noted in the previous survey,[228] of empathizing with the member of a regulated profession accused of misconduct or incompetency, rather than with the regulatory agency attempting to enforce professional standards.

The supreme court had another occasion to discuss administrative due process in *Hollywood Jaycees v. State Department of Revenue*.[229] A statute[230] authorized the Florida Department of Revenue ("DOR") to invalidate tax exemptions which had been granted by county boards of tax adjustment. The statute did not provide for a hearing by the Department, but another statute[231] did provide an opportunity for trial de novo in the circuit court at the instance of

225. The 1974 APA applies generally to all state agencies, with narrowly drawn exceptions, but only to limited categories of local government agencies. *See generally* Levinson, *supra* note 25, at 624-26.

226. FLA. STAT. § 473.251 (1973), *formerly* FLA. STAT. § 473.20 (1967).

227. FLA. ADMIN. CODE ch. 21A-13 (1975).

228. *See* 1974 Survey, *supra* note 1, at 615-16, *commenting on* Gentry v. Dep't of Professional & Occupational Regulations, 293 So. 2d 95 (Fla. 1st Dist. 1974).

229. 306 So. 2d 109 (Fla. 1974).

230. FLA. STAT. § 193.122(1) (1973).

231. FLA. STAT. § 194.171 (1973).

a taxpayer dissatisfied by the Department's decision. The 1961 APA expressly excluded the Department of Revenue from its provisions regarding adjudicatory proceedings.[232]

The supreme court held, as a matter of due process, that a taxpayer must be given an opportunity for a hearing before the Department, even though the statutes include no provision to this effect. The court observed that the judicial trial de novo provided by statute

> does not supply the initial lack of due process by the DOR. The taxpayer is constitutionally entitled originally to administrative due process by the DOR and should not be relegated to his own initiative to bring a collateral judicial proceeding. Moreover, even though Appellants are afforded a de novo judicial hearing, they have "one strike against them" by the DOR and whether legally recognized or not must proceed in the judicial forum burdened with the tacit presumption that the decision of the DOR is correct.[233]

The court also pointed out that if the DOR makes an adverse decision, after notice and opportunity to be heard, it should serve the taxpayer with findings. Finally, the court noted that its decision was limited to situations where the DOR invalidates a tax exemption granted by a board of tax adjustment. However, the opinion contains implications for administrative agencies in general, to the effect that due process requires an opportunity for an administrative hearing before the agency reaches an adverse decision, and that a subsequent judicial trial de novo is not an acceptable substitute for the administrative hearing.

We note that the 1974 revision of the APA terminates the previous exemption of the Department of Revenue, so that the Department is now fully subject to the Act.[234] Further, the Act itself guarantees the opportunity for a "proceeding" to a party whose substantial interests are affected by agency action.[235] If a disputed issue of material fact is involved, the proceeding must be a formal hearing, including oral testimony and argument. Otherwise, the proceeding may be informal. The Act does not expressly require oral testimony or argument in the informal proceeding, but one of the present

232. FLA. STAT. § 120.21(1) (1973).
233. 306 So. 2d at 112.
234. *See* FLA. STAT. § 120.52(1)(b) (Supp. 1974).
235. FLA. STAT. § 120.57 (Supp. 1974).

authors has suggested elsewhere[236] that due process may necessitate oral proceedings in at least some situations which fall within the informal provisions of the Act. *Hollywood Jaycees* lends some support to this view.

The District Court of Appeal, Third District, took a restrained view of the judicial role in reviewing administrative sanctions, in *Florida Department of Health & Rehabilitative Services v. Career Services Commission, Department of Administration.*[237] The court held that it should not consider the severity of the Commission's punishment order unless the penalty was patently unfair or a departure from the statute or rules. The court held also that the privilege against self-incrimination protects an employee from being called as a witness against himself at a hearing before the Commission.

In *Lake Shore Mortuary, Ltd. v. State Board of Funeral Directors & Embalmers,*[238] the same court sustained the Board's order suspending a license for 90 days. However, the court set aside the portion of the Board's order which retained jurisdiction, where the record of discussion by board members at the meeting indicated that their intent was to impose automatic revocation for any subsequent violation during the 90-day suspension period. The court observed that the threat of automatic revocation violated the guarantee of due process to licensees, as expressed in the 1961 APA.[239]

The same court considered an action by a police lieutenant seeking promotion to captain, in *Bowlin v. County of Dade.*[240] Under the county's personnel rules, the so-called "Rule of Four" permitted the department head to promote any of the four candidates ranked highest by competitive examination. The court sustained the validity of this rule against challenges on various grounds. The court held that a police officer,

> as an employee, has no constitutional right to promotion by his superiors. . . . [A] Director of Public Safety charged with the enforcement of the criminal laws must be given some right of selection as to the persons upon whom he is to impose highly responsible positions.[241]

236. *See* Levinson, *supra* note 25, at 664.
237. 299 So. 2d 158 (Fla. 3d Dist. 1974).
238. 305 So. 2d 22 (Fla. 3d Dist. 1974), *cert. denied*, 321 So. 2d 77 (Fla. 1975).
239. FLA. STAT. §§ 120.21(5), (6) (1973).
240. 296 So. 2d 602 (Fla. 3d Dist.), *cert. denied*, 303 So. 2d 645 (Fla. 1974).
241. *Id.* at 604.

In *Trader Tom's Florida Fried Chicken, Inc. v. Wynne*,[242] the state beverage director denied a liquor license to an establishment, for the sole reason that topless dancing was permitted there. Admittedly the director took no steps to revoke the licenses of other topless dancing establishments. The District Court of Appeal, First District, disclaimed any opinion as to whether the director could, by rule, prohibit topless dancing in licensed establishments. However, the court held that unless and until such a rule was adopted and uniformly applied, the director could not discriminate against one topless dancing establishment while permitting others to operate.

In *State ex rel. Greenberg v. Florida State Board of Dentistry*,[243] the Board issued a subpoena to a journalist, commanding her to appear before the Board under penalty of being held in contempt of court. The document did not recite any proceeding pending before the Board, nor the nature of the matters to be discussed. Upon being called by the journalist's attorney, the Board's attorney advised that no proceeding was pending, and that the subpoena had been issued in order to compel the journalist to "give an account to the respondent of a certain newspaper article which had been written by the relator and published in the Fort Lauderdale News, which article the respondent felt to be libelous of it."[244]

The District Court of Appeal, First District, awarded a permanent writ of prohibition against the Board. The essential holding is that the court has jurisdiction to grant such relief, and that the relief is appropriate in this situation since the Board is attempting to exercise its statutory subpoena power for purposes other than those expressed or implied by the statutes. This sound conclusion is accompanied by dictum about the subpoena power of administrative agencies, a question which the court did not need to reach in view of its ruling that the Board had exceeded its statutory authority. The court observes emphatically that, regardless of the language of the statute,

> a citizen may not be held in contempt, and thereupon punished, upon failing or refusing to obey any subpoena, process or order of respondent or any other administrative agency until after he or she shall have first been afforded an opportunity for a hearing before a court of competent jurisdiction *and* until after that court

242. 302 So. 2d 153 (Fla. 1st Dist. 1974).
243. 297 So. 2d 628 (Fla. 1st Dist.), *cert. dismissed*, 300 So. 2d 900 (Fla. 1974).
244. *Id.* at 629-30.

> shall have ordered obedience to such subpoena, process or order of such administrative agency, *and* such court order shall have been disobeyed.[245]

The court does not cite any authority for this proposition. Some guidance is found in article I, section 18 of the constitution, which states: "No administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law." This provision implies, contrary to the court's dictum, that a statute could constitutionally authorize an administrative agency to impose a penalty other than imprisonment, and that a statute could also properly authorize a court to impose imprisonment as a sanction against a person who violated a valid order of an administrative agency. We note that the 1974 revision of the APA provides that a person who commits contempt of an agency which has issued a subpoena shall be subject to a $500 fine, or to any other penalty authorized by law.[246]

F. *Clarity and Other Due Process Requirements*

The requirement of statutory clarity, as an ingredient of due process, has been developed primarily in criminal law cases. Some examples will be briefly noted, since the requirement has been applied, by analogy, in noncriminal situations.[247]

State v. Dinsmore[248] invalidated a statutory provision[249] which required public officials to file financial disclosure statements regarding their interests in any business "which is subject to the regulation of, or which has substantial business commitments from any state agency, county, city, or other political subdivision of the state . . . ." The court found this language void for vagueness. In *Washington v. State*,[250] the court sustained the validity of a statute[251] prohibiting "carnal knowledge" of a "person," as applied

245. *Id.* at 632 (emphasis in original).

246. FLA. STAT. § 120.58(3) (Supp. 1974). In addition, any person who violates the provisions of the Act regarding ex parte communications is subject to being "assessed a civil penalty not to exceed $500 or by such other disciplinary action as his superiors may determine." FLA. STAT. § 120.66(3) (Supp. 1974).

247. *See* 1974 Survey, *supra* note 1, at 618-19.

248. 308 So. 2d 32 (Fla. 1975).

249. FLA. STAT. § 112.313(2) (1973).

250. 302 So. 2d 401 (Fla. 1974), *cert. denied*, 421 U.S. 918 (1975).

251. FLA. STAT. § 794.01(2) (1973).

to a man accused of homosexual rape. In *State v. Egan*,[252] the supreme court upheld a prosecution for the common law offense of "nonfeasance," upon finding that the clarity requirement was satisfied by the statute[253] which adopts the common law crimes of England as they were in effect on July 4, 1776. However, in *Holland v. State*,[254] the district court of appeal declined to enforce the common law crime of misprison of felony. The court conceded that this was a common law crime, but held that the statute adopting common law crimes should be read so as to

> grant our courts the discretion necessary to prevent blind adherence to those portions of the common law which are not suited to our present conditions, our public policy, our traditions or our sense of right and justice.[255]

The district court followed the example of other jurisdictions which had declined to enforce the common law crime of misprison of felony. However, the court did not cite *Egan*, nor did it discuss the vagueness injected into the criminal justice system by a judicial attitude of selective incorporation of the English common law of crimes.

During the survey period, courts relied upon the due process clause in various situations besides those discussed above. In *Strauser v. Strauser*,[256] the circuit court ordered a husband to make future periodic payments for child support and alimony, and ordered the sheriff to commit the husband to jail for 15 days if any payment was not made when due. The district court of appeal reversed, holding that contempt can be imposed only by a court, for willful failure to comply with a court order, and that due process requires the opportunity for a judicial hearing after the allegedly contemptuous conduct had taken place. In *Bussey v. Legislative Auditing Committee of the Legislature*,[257] the court held as a matter of due process that service of process upon the defendant's attorney is not sufficient to acquire jurisdiction over the defendant's person. *Metropolitan Dade County v. Stein*[258] arose out of the dismissal of

252. 287 So. 2d 1 (Fla. 1973).
253. FLA. STAT. § 775.01 (1973).
254. 302 So. 2d 806 (Fla. 2d Dist. 1974), *noted in* 30 U. MIAMI L. REV. 222 (1975).
255. *Id.* at 808.
256. 303 So. 2d 663 (Fla. 4th Dist. 1974).
257. 298 So. 2d 219 (Fla. 1st Dist. 1974), *appeal dismissed*, 312 So. 2d 737 (Fla. 1975).
258. 296 So. 2d 643 (Fla. 3d Dist. 1974), *cert. denied*, 307 So. 2d 185 (Fla. 1975). In this

a county employee. Upon being notified of his dismissal, the employee requested and was given a hearing before a hearing examiner. The examiner recommended that the employee's dismissal be sustained. However, the examiner failed to make written findings of fact. Relying on this procedural defect in the administrative proceedings, the employee petitioned the circuit court for review by certiorari. At the request of the county itself, the court remanded the cause to the county manager, on the ground that the hearing examiner had not forwarded his findings to the county manager as required by the personnel rules. The findings were never made, and the hearing examiner died, some 18 months after the employee had been dismissed. After a hearing, the circuit court ordered reinstatement of the employee, holding that it had become impossible to provide the due process to which the employee was entitled. The district court of appeal affirmed, noting that the circuit court had discretion, either to remand for a hearing de novo before a new hearing officer, or to order reinstatement, upon finding that the employee had been deprived of due process in the original administrative proceedings. Judge Carroll dissented, on the grounds that the employee was not entitled to reinstatement at this stage, but only to a de novo administrative hearing before a new hearing examiner.

G. *Parole and Probation—Procedural Requirements*

In *Dees v. State*,[259] the supreme court read certain "implicit" standards into the statutory procedures for parole revocation,[260] and ruled that the statute, as so interpreted, satisfied the procedural requirements laid down by the United States Supreme Court in *Morrissey v. Brewer*.[261] The Florida court discussed three implicit elements of the statute. First, the statutory requirement of a parole revocation hearing, at which both the parolee and the state could introduce evidence, contained the implicit guarantee that the parolee could confront and cross-examine the state's witnesses, as required by *Morrissey*. Second, the statutory requirement of "findings" by the commission was interpreted to mean the "written

2-1 decision, the majority relied heavily upon Metropolitan Dade County v. Klein, 229 So. 2d 589 (Fla. 3d Dist. 1969).

259. 295 So. 2d 296 (Fla. 1974).

260. FLA. STAT. § 947.23 (1973).

261. 408 U.S. 471 (1972).

statement by the factfinders" required by *Morrissey*. Third, the requirement of "due notice," implicit in the statute under pre-*Morrissey* interpretations by the Florida courts, was "amplified and enlarged" in view of *Morrissey*, so as to include written notice to the parolee of the alleged violations, including disclosure of the evidence against him.

Another aspect of *Morrissey* was discussed in *Oaks v. Wainwright*,[262] an original habeas corpus proceeding in the Supreme Court of Florida. A parolee was returned to prison, on the warrant of the Parole and Probation Commission, and did not receive a hearing until 5 weeks later. As a result of that hearing, his parole was revoked, and he remained in jail. He filed a petition in the supreme court for habeas corpus, and after the court issued the writ, the respondent did not file a return for 101 days. The supreme court noted that *Morrissey* requires a preliminary hearing as promptly as convenient, in order to determine probable cause for parole revocation, followed by a full hearing on the revocation itself. Petitioner had been denied the preliminary hearing, and the court found this procedural error could not be remedied at such a late stage of the proceedings. Denial of the preliminary hearing, together with the "unconscionable delay" in filing a return to the writ, necessitated petitioner's release from custody and reinstatement of parole. In addition, petitioner claimed $300 damages from respondent, pursuant to the statute which provides this civil remedy for failure to file a return to a writ of habeas corpus for 3 days after service.[263] The court made the award, but upon rehearing held it in abeyance, with leave to respondent to show, within a reasonable time, that the failure to file a timely return was not the fault of respondent and was not an act of willfulness on its part.

In *King v. Florida Parole & Probation Commission*,[264] petitioner filed an original habeas corpus proceeding in the Supreme Court of Florida. He raised serious factual issues regarding the circumstances under which he had waived a preliminary hearing, and regarding his alleged change of residence without permission of his parole supervisor. The commission's revocation order contained no findings of fact on these points. The court held the lack of findings was a violation of the standards of *Morrissey*. Treating the petition for

262. 305 So. 2d 1 (Fla. 1973).
263. FLA. STAT. § 79.05(1) (1973).
264. 306 So. 2d 506 (Fla. 1975).

habeas corpus as a motion to vacate under rule 3.850, Florida Rules of Criminal Procedure, the supreme court ordered the cause remanded to the circuit court to make findings of fact and conclusions of law.

Means v. Wainwright[265] was yet another original habeas corpus proceeding in the Supreme Court of Florida. Petitioner's parole had been rescinded because of a disciplinary report, before the parole agreement had been signed by the petitioner. Respondent argued that the rescission of an unexecuted grant of parole did not have to be accompanied by the same procedural protections required for the revocation of an executed grant of parole. The court held that rescission of an unexecuted grant of parole inflicted a "grievous loss" which entitled petitioner to the procedural protections of *Morrissey*, except that he would not be entitled to the preliminary hearing which would be required if parole were revoked. The court ordered petitioner released on parole, unless he was afforded a parole rescission hearing conforming to the requirement of *Morrissey* within 30 days.

In *State ex rel. Murphy v. Partin*,[266] the supreme court rendered a brief per curiam opinion, sustaining the validity of the statute[267] which provides for immediate temporary revocation of parole if the parolee is arrested on a felony charge. The effect of the statute is to deprive the parolee of the opportunity for release on bail with regard to his new felony arrest, because he is confined under the parole revocation pending the 10-day statutory period for the revocation hearing.

The district court of appeal in *White v. State*[268] held that hearsay testimony is not properly admissible in a probation revocation hearing, and that a revocation order must be reversed if based solely upon hearsay.

H. *Eminent Domain*

1. PUBLIC PURPOSE

Central & Southern Florida Flood Control District v. Wye River Farms, Inc.[269] held that a jury should not be impanelled in an emi-

265. 299 So. 2d 577 (Fla. 1974), *cert. denied*, 419 U.S. 1116 (1975).
266. 301 So. 2d 1 (Fla. 1974).
267. FLA. STAT. § 949.10 (1973).
268. 301 So. 2d 464 (Fla. 1st Dist. 1974).
269. 297 So. 2d 323 (Fla. 4th Dist. 1974).

nent domain case until the court has first resolved that the taking satisfies the public purpose requirement, since the jury's sole function is to determine the amount of compensation. The court also held that the condemning authority does not have to submit complete plans and specifications of the project in order to support the public purpose for the taking, but that if such plans and specifications are offered, they should be admitted in evidence, and they can be considered not only with regard to the public purpose, but also as an indication of the amount of compensation to which the condemnee is entitled.

Griffin v. City of Jacksonville,[270] following *Ball v. City of Tallahassee*,[271] held that the comdemning authority has the burden of presenting sufficient evidence of the necessity of taking, before any burden shifts to the condemnee. If the condemnor offers no evidence, the petition for condemnation must fail. The resolutions of the condemning authority reciting its findings for need of the land do not constitute proof of necessity.

In *Cusmano v. Tampa-Hillsborough County Expressway Authority*,[272] the court sustained the validity of the "quick taking" statutory provisions.[273] Reaffirming the tests laid down in *State Road Department v. Forehand*,[274] the *Cusmano* court found due process satisfied by a showing of:

> "Notice to the parties, the appointment of appraisers, the submission of testimony, the right to be represented by counsel and a determination by the court of whether or not these things have been done . . . before possession of the land is turned over to the petitioner."[275]

When the "quick taking" provisions are invoked, which party has the right to open and close the evidence and argument in the circuit court? *Jones v. City of Tallahassee*[276] considered two conflicting precedents of different district courts of appeal, each supported by respectable authority from other jurisdictions. *Parker v.*

270. 299 So. 2d 90 (Fla. 1st Dist.), *cert. denied*, 304 So. 2d 125 (Fla. 1974), *reviewed after remand*, 314 So. 2d 605 (Fla. 1st Dist. 1975).

271. 281 So. 2d 333 (Fla. 1973).

272. 301 So. 2d 117 (Fla. 2d Dist. 1974).

273. FLA. STAT. ch. 74 (1973).

274. 56 So. 2d 901 (Fla. 1952).

275. 301 So. 2d at 118, *quoting* State Road Dep't v. Forehand, 56 So. 2d 901, 903 (Fla. 1952).

276. 304 So. 2d 528 (Fla. 1st Dist. 1974).

Armstrong[277] had held that the condemning authority had the right to open and close, since that party would be the loser if no evidence were presented, in that the suit would be dismissed and the property returned to the condemnees if no evidence were presented, even though a "quick" order of taking had been issued. *Rice v. City of Fort Lauderdale*[278] reached the opposite conclusion, reasoning that since the condemning authority secures title and right of possession under the "quick" taking procedure by depositing the estimated compensation into the court, the burden shifts to the condemnee to show that the estimate does not represent full compensation; because of the shifting of the burden of proof, the condemnee should have the right to open and close. The *Jones* court felt that the better reasoned view was to permit the condemning authority to open and close. The court decided to this effect, and simultaneously certified the case to the supreme court as one of great public interest.

Subsequent to the *Jones* decision, however, an appeal in the *Rice* case was decided by the supreme court, styled *City of Fort Lauderdale v. Casino Realty, Inc.*[279] The supreme court agreed with the result which the district court reached on question of who should open and close the trial, but not with the reasoning of the district court. The supreme court held, instead, that the predominant nature of the compensation to be decided at trial was determinative of who should open and close the trial. In doing so, the court broke down the compensation which a landowner could receive into five possible items of damage.[280] The court also indicated which party had the burden of proving each item of damage.[281] Having done so, the court ruled that the right to open and close the trial lies with the party who has the burden of proving the items of damage which represent the "substantial issue for determination"[282] at the trial, with any doubt in cases where there are multiple substantial damage issues to be resolved in favor of the landowner. Thus, although the supreme court has resolved the conflict which existed among the

277. 125 So. 2d 138 (Fla. 2d Dist. 1960).

278. 281 So. 2d 36 (Fla. 4th Dist. 1973), *modified sub nom.* City of Fort Lauderdale v. Casino Realty, Inc., 313 So. 2d 649 (Fla. 1975).

279. 313 So. 2d 649 (Fla. 1975).

280. The items of damage are: (1) value of the land taken; (2) damage to the land remaining or severance damages; (3) special enhancement to remaining land by improvement; (4) moving expenses; and (5) business loss.

281. The landowner has the burden of proving items (2), (4) and (5), while the condemning authority has the burden as to items (1) and (3).

282. 313 So. 2d at 653.

district courts of appeal, it remains to be seen whether the new rule will provide adequate guidance for the lower courts.

2. AMOUNT OF COMPENSATION

Fleissner v. Division of Administration, State, Department of Transportation[283] held that the jury award was improper, where the award for taking was below the range of expert testimony, even though the award for severance was within the range, and the combined amount for taking and severance was within the combined range of expert testimony. Further, the court held that the trial judge had erred in excluding the testimony of an experienced motel operator, who was tendered by the condemnee as a witness on the question of whether the motel could successfully operate after the taking of a strip of land from the front of the property for road-widening purposes. This question was distinct from the question of value, and therefore the witness should have been allowed to testify, even though he was not an expert appraiser.

In *Musleh v. Division of Administration, Department of Transportation*[284] the court held that the trial judge should have admitted a survey which had been prepared by an experienced surveyor, who had been subject to rigorous cross-examination by the condemnor, even though the survey described the property slightly differently than it was described in the complaint.

In *Ocala Manufacturing, Ice & Packing Co. v. Canal Authority*,[285] the court found that the Canal Authority had abandoned state condemnation proceedings and had prevailed upon federal authorities to acquire the property in federal condemnation proceedings, in which the owner would not be able to recover costs or attorney's fees. The court awarded damages against the authority, in an amount equal to "the amount the appellant [condemnee] lost by reason of the appellee's action in prevailing on another agency, through Federal Court action, to do that which would result in a damage or loss to the landowner . . . ."[286] The amount in this case was $433,561, representing $400,000 in attorney's fees and $33,561 in costs.

283. 298 So. 2d 547 (Fla. 2d Dist. 1974). *See also* State, Dep't of Transp. v. Shaw, 303 So. 2d 75 (Fla. 1st Dist. 1974).

284. 299 So. 2d 101 (Fla. 1st Dist. 1974).

285. 301 So. 2d 495 (Fla. 1st Dist. 1974).

286. *Id.* at 498.

I. *Taxation*

1. TAXATION DISTINGUISHED FROM ASSESSMENT

A sanitary sewer assessment was found invalid by the district court in *7800 Building, Inc. v. City of South Miami.*[287] A validly enacted ordinance provided that assessments were to be made on the basis of front footage. A resolution, purporting to supersede the ordinance, required assessment by means of a formula based on applicable zoning and optimal land use. Since the city's charter permitted assessment procedures to be enacted only by means of an ordinance, the resolution was held invalid.

The court went on, however, to indicate that such an assessment formula would be invalid even if contained in an ordinance. Since some of the zoning classifications allowed several types of use which required different water and sewer need, the result of using such a formula would be inequitable assessments. Since no constitutional provision deals expressly with assessments, as distinguished from taxes, special assessments may be authorized by the legislature on the basis of its inherent power, unrestricted by limitations imposed on its taxing power. Nonetheless, the court found the assessment formula to be arbitrary, disproportionate and unconstitutional, stating that land owners would be protected by the court whenever an assessment "so transcends the limits of equality and reason that its exaction would cease to be a tax or contribution and becomes extortion and confiscation . . . ."[288]

2. INCOME AND INHERITANCE TAXES

Taking into account the history and purpose of the new corporate income tax, the Public Service Commission had determined that its rules should insure that a regulated industry and its investors would not completely escape the tax at the expense of its customers. The rule which was formulated provided that in rate proceedings the Commission would treat "as an operating expense so much of the [income tax], as is necessary to prevent the allowable earnings of a regulated company from falling below the minimum fair, just and reasonable rate of return allowed by the Commission from time to time."[289] The supreme court in *Gulf Power Co. v.*

287. 305 So. 2d 860 (Fla. 3d Dist. 1974).
288. *Id.* at 861.
289. FLA. ADMIN. CODE § 25-14.02(b) (1973).

Bevis[290] sustained the rule, subject to the elimination of the word "minimum," and with the admonition that the rule must not be applied in ways that would cripple a utility's capabilities to provide adequate services or curtail its ability to attract investors. However, the precedential value of this decision may be weakened by the controversial circumstances surrounding it, and the resulting disciplining of Justices Dekle and Boyd, as well as the attorney for Gulf Power Company.[291]

3. IMMUNITIES AND EXEMPTIONS

a. Leasehold Interests in County-Owned Land

The constitution provides that when capital projects for airport or port facilities or for industrial or manufacturing plants are publicly financed by revenue bonds, a private leasehold interest in the project is subject to taxation to the same extent as other privately owned property.[292] The district court in *Hertz Corp. v. Walden*[293] found that this provision is not a self-executing imposition of taxation. Rather, it merely puts these properties on a parity with other facilities which may be owned by a government body and leased to private parties, but which were built without revenue bond financing.

Having decided that issue, the court then considered whether two leasehold interests which Hertz had in county-owned land were immune from taxation. The Florida Constitution does not mention immunity from taxation. However, property owned by the state or a county has been held by case law to be immune from taxation, regardless of the use to which it is put.[294] Case law has also developed the rule that the legislature may confer tax exemption upon leasehold interests of parties who lease land from the state or a county if such interests are found to serve a public purpose.[295] A statute[296] has been enacted to provide such an exemption from ad valorem taxes. Statutory law[297] also provides that all leasehold inter-

290. 296 So. 2d 482 (Fla. 1974).

291. For a discussion of the disciplinary proceedings, see section II,B,3 *supra*.

292. FLA. CONST. art. VII, § 10(c).

293. 299 So. 2d 121 (Fla. 2d Dist. 1974), *aff'd*, 320 So. 2d 385 (Fla. 1975).

294. *See, e.g.*, Orlando Util. Comm. v. Milligan, 229 So. 2d 262 (Fla. 4th Dist.), *cert. denied*, 237 So. 2d 539 (Fla. 1970).

295. *See* 1974 Survey, *supra* note 1, at 634-38.

296. FLA. STAT. § 196.199 (1973).

297. FLA. STAT. § 196.001(2) (1973).

ests in property of any political subdivision or authority of the state are taxable unless expressly exempt. Thus, the question for determination in *Hertz* was whether a public purpose was served by the two facilities at Tampa International Airport leased by the Hillsborough County Aviation Authority to Hertz for use in its car rental business.

The facilities involved in *Hertz* were an Authority-owned building leased by Hertz, which was adjacent to the airport terminal and which had been financed with bond revenues, and a storage building, which was approximately one mile from the terminal and which had been built by Hertz on airport land leased from the Authority. In an earlier case, *Hillsborough County Aviation Authority v. Walden*,[298] the supreme court had denied an exemption to a car rental company facility at the old Tampa Airport, characterizing its purpose as predominantly private. Nevertheless, the district court held Hertz' terminal facility to be exempt from taxation. The facts of *Hertz* were distinguished from those of *Walden* on two points: the car rental facilities under consideration at the new airport were entirely different from those at the old airport and the testimony, present in *Hertz*, but not in *Walden*, established the indispensability of readily available car rental facilities at a modern airport. In contrast, the remote storage facilities were held taxable. These facilities did not just furnish support to the terminal facilities, but also included interests totally unrelated to the airport car rental. Nothing was found to indicate that the terminal support function could not have been furnished on property beyond the airport boundaries. The court concluded that the use of the remote facility was predominantly private in nature.

In *Dade County v. Transportes Aereos Nacionales*,[299] the district court held that during the life of the lease, the lessee holds an estate which is, for all practical purposes, equivalent to absolute ownership. The burden is on the lessee to prove that a leasehold interest in government property qualifies for exemption under the statutes. This must be accomplished by filing the requisite application with the county tax assessor; failure to file constitutes a waiver of the exemption privilege for that year.

Where property had been obtained by a county from the state subject to the restriction that it be used for a public purpose, and

298. 210 So. 2d 193 (Fla. 1968).

299. 298 So. 2d 570 (Fla. 3d Dist.), *cert. denied*, 305 So. 2d 206 (Fla. 1974).

where the property had been exempted by the board of equalization or the circuit court in the prior three years, the district court of appeal, in *Dade County v. Marine Exhibition Corp.*,[300] held that an affidavit of the acting Dade County tax assessor, asserting that the predominant use of a leasehold interest in the land was for a private, profit-making venture, was insufficient to raise a genuine issue of material fact as to whether or not the property was used for a public purpose.

b. Property Used for Exempt Purposes

Article VII, section 3(a) allows portions of property used predominantly for educational, literary, scientific, religious or charitable purposes to be exempted by general law from taxation. In *Walden v. University of Tampa, Inc.*,[301] interpreting the statute[302] implementing this article, the home of the president of a private university was held to be exempt from ad valorem taxation.

A portion of the statute[303] dealing with homes for the aged was excised by the supreme court in *Presbyterian Homes of the Synod of Florida v. Wood*[304] for being too narrow in scope to conform to the true intent of the constitutional limitation. The portion found unconstitutional provided an exemption for homes for the aged only if their residency was limited to persons under a certain income level. The court pointed out that *Jasper v. Mease Manor, Inc.*,[305] decided that the 1885 constitution, had approved criteria for exemption of homes for the aged which did not include an income test. Under the less restrictive exemption provision of the 1968 constitution,[306] the court found the narrower income test to be improper. The court noted that age itself is a status on which classification for special tax exemption treatment may be based, and that homes for the aged are the modern charitable and religious response to the problems of the aged, of which indigency is only one.

300. 296 So. 2d 652 (Fla. 3d Dist.), *cert. denied*, 419 U.S. 1027 (1974).

301. 304 So. 2d 134 (Fla. 2d Dist. 1974), *cert. denied*, 315 So. 2d 476 (Fla. 1975).

302. FLA. STAT. § 196.191(3) (1969).

303. FLA. STAT. § 196.197 (1973).

304. 297 So. 2d 556 (Fla. 1974).

305. 208 So. 2d 821 (Fla. 1968).

306. While the 1885 constitution prohibited exemption from taxation unless property was held and used exclusively for religious or charitable purposes, the 1968 constitution (article VII, section 3) only requires that the property be used predominantly for those purposes to be eligible for an exemption.

The reliance of the *Presbyterian Homes* court on the *Jasper* case is questionable. In *Jasper* the court had indicated that there existed great legislative discretion in defining "charitable use" stemming from the non-self-executing nature of the exemption provision of the constitution. The *Jasper* opinion also acknowledged that absent an explicit statute, the judiciary itself had defined "charitable use" in the more limited sense of "relief for the indigent or helpless."[307] Despite this, the court relied in large part on *Jasper* to deprive the legislature of its discretion to enact a narrower definition than that prescribed by the statute approved in *Jasper*.

Subsequent to *Presbyterian Homes*, the legislature reenacted[308] the essential provisions of the income test found unconstitutional in that decision. The Attorney General has issued an opinion[309] that the unconstitutionality of the income test has not been cured by the new statute; while homes for the aged must meet the remaining requirements of chapter 196 to qualify for exemption from ad valorem taxation, the income test need not be met.

4. ASSESSMENTS AND RATES

a. Assessment

The constitution directs with limited exceptions, that regulations shall be established by general law to secure a just valuation of all property for taxation.[310] The District Court of Appeal, Second District, in *Cassady v. McKenney*[311] was of the opinion that the criteria established by law are intended to limit the otherwise considerable discretion of the tax assessor in determining the fair market value, which has been equated with the just value of realty. The court concluded, therefore, that an assessor is obligated to consider all of the statutory criteria, and that failure to consider two of the seven criteria in Florida's Green Belt law[312] mandated reassessment.

In order to create a case for equitable relief from an assessment,

307. 208 So. 2d at 825.

308. Fla. Laws 1974, ch. 74-264, *creating* FLA. STAT. § 196.197 (Supp. 1974).

309. Fla. Att'y Gen. Op. 074-275 (Sept. 6, 1974).

310. FLA. CONST. art. VII, § 4.

311. 296 So. 2d 94 (Fla. 2d Dist. 1974).

312. FLA. STAT. § 193.461(6) (1971). One of the criteria ignored was the present depreciated value of the improvements on the land. The court found that orange trees were "improvements" and that "present depreciated value" meant the actual current value, not the original or replacement cost.

the supreme court in *Dean v. Palm Beach Mall, Inc.*[313] held that the allegations in the complaint and the proof adduced at trial must negate every reasonable hypothesis in support of a legal assessment. This is so because of the presumption of correctness which favors the taxing authority.

The district court in *Firstamerica Development Corp. v. County of Volusia*[314] acknowledged that an agricultural use does not necessarily have to be efficient or economical to qualify the land for an agricultural classification, but held that where the agricultural use was not the primary use, but rather was clearly incidental, the land did not qualify. Since the land in question had been acquired for the primary purpose of subdividing and marketing it as lots in a land installment sales promotion, it was found not to be in the agricultural category despite its use for agriculture during the year of the assessment.

In *Interlachen Lakes Estates, Inc. v. Synder*,[315] another case dealing with subdivision of land, the supreme court again considered the constitutional requirement of just valuation. It found that this requirement was violated by a statutory provision[316] for valuation of unsold, platted land on the same basis as unplatted acreage of similar character until 60 percent of the platted land had been sold as individual lots. The addition in the 1968 constitution of four classes of exceptions to the just valuation requirement[317] was found by the four-member majority to clearly imply removal of the authority to legislate others. Although the two dissenting justices pointed out that uniformity is required only of the rate of taxation,[318] not of the regulations for just valuation, the majority held that no separate standards for valuation could be established for any classes of property other than those specified in the constitution. Even if the statute had applied to all property, the court stated that it could not have survived. The classification based on ownership was said to be unreasonable, arbitrary and not related to a valid legislative purpose.

313. 297 So. 2d 298 (Fla. 1974).

314. 298 So. 2d 191 (Fla. 1st Dist. 1974), *cert. denied*, 312 So. 2d 755 (Fla. 1975).

315. 304 So. 2d 433 (Fla. 1974).

316. FLA. STAT. § 195.062 (1973).

317. Exception is made in the case of agricultural land, land used for noncommercial recreational purposes, tangible personal property held for sale as stock in trade, and livestock. FLA. CONST. art. VII, §§ 4(a), (b).

318. FLA. CONST. art. VII, § 2.

b. Distinction between Void and Voidable Assessments

If an assessment is void, a plaintiff seeking relief from it is excused from having to exhaust administrative remedies by appearing before the Board of Tax Adjustment and from having to file suit within 60 days as required by Florida Statutes Section 194.171(2) (Supp. 1974). However, a plaintiff complaining of a voidable assessment must do both. A void tax assessment is one not authorized by law, where the property is not subject to the tax assessed or where the tax roll is illegal due to some affirmative wrongdoing by the taxing official. A voidable assessment is one which, though made in good faith and not illegal per se, is irregular or unfair.[319] An assessment on property exempted from taxation by the educational property exemption statute[320] was held to be void by the District Court of Appeal, Second District.[321] However, the District Court of Appeal, Third District, has held that an assessment for taxation of a leasehold interest in government property is merely voidable because of the statutory authority to tax such interests absent a showing by the lessee that its use qualified the interests for exemption.[322]

J. *Borrowing*

The Jacksonville Port Authority proposed to issue revenue bonds to finance the construction of two projects, to be occupied by private businesses. One was a food distribution center for the Publix chain of super markets; the other was a laundry which would service industrial working garments for industrial customers, not for the general public. The Authority relied upon article VII, section 10(c), one of the new provisions appearing in the 1968 revision of the constitution, which permits statutes to authorize "revenue bonds to finance or refinance the cost of capital projects for industrial or manufacturing plants . . . ." This provision was implemented by a statute enacted in 1969,[323] which repeated the terms "industrial or manufacturing plants" with little further clarification.

319. Lake Worth Towers, Inc. v. Gerstung, 262 So. 2d 1, 4 (Fla. 1972).

320. FLA. STAT. § 196.198 (1973).

321. Walden v. University of Tampa, Inc., 304 So. 2d 134 (Fla. 2d Dist. 1974), *cert. denied*, 315 So. 2d 476 (Fla. 1975).

322. Dade County v. Transportes Aereos Nacionales, S.A., 298 So. 2d 570 (Fla. 3d Dist.), *cert. denied*, 305 So. 2d 206 (Fla. 1974).

323. FLA. STAT. §§ 159.25-.43 (1973).

In *State v. Jacksonville Port Authority*[324] the supreme court sustained both projects. The court found no difficulty in approving the food distribution center, in view of earlier decisions which had approved a beverage bottling plant[325] and a meat processing facility[326] under the same constitutional and statutory provisions. The court granted approval to the laundry facility "somewhat less readily, for it will be involved primarily in the rendering of services as opposed to the processing or distribution of products."[327] Noting that the laundry would not serve the general public, but instead would serve industries, the court declared:

> While the clientele and the nature of the cleaning services are not alone determinative of whether the proposed project qualifies as an "industrial plant," these are certainly proper factors for consideration along with the size of the plant, the number of employees, etc.[328]

The Attorney General was asked whether a district hospital board may accept interest-bearing promissory notes from patients in payment for hospital charges, and then endorse such notes to local financial institutions with recourse as to principal. In his opinion,[329] the Attorney General noted that the practice did not seem to be merely incidental to the paramount public purpose of the hospital district. The importance of the benefit to private parties led to the opinion that the practice would probably violate article VII, section 10, which prohibits the state or its subdivisions from using their taxing power or credit for the benefit of private parties.

As indicated in the introduction to this survey,[330] article VII, section 10 was amended in 1974, to permit local governments to participate with private parties in the financing of electrical generating or transmission facilities.

K. *Spending and Using Public Resources*

In *Dickinson v. Bradley*,[331] the state comptroller resisted pay-

324. 305 So. 2d 166 (Fla. 1974).
325. State v. Jacksonville Port Authority, 266 So. 2d 1 (Fla. 1972).
326. State v. County of Dade, 250 So. 2d 875 (Fla. 1971).
327. 305 So. 2d at 169.
328. *Id.*
329. Fla. Att'y Gen. Op. 074-250 (Aug. 9, 1974).
330. *See* section I *supra*.
331. 298 So. 2d 352 (Fla. 1974).

ment of a claim bill to a Dade County constable on several grounds.[332] One of the grounds was that the legislature, by requiring payment of the bill to be made by the state "out of general county funds," had directed that payment be made from the funds which are derived from parimutuel wagering and which are distributed to the counties under constitutional and statutory requirements. Although the court noted the "inartful draftsmanship or language"[333] used by the legislature in its requirement of payment "from general county funds," the court declined to imply that this meant payment from parimutuel funds, since such funds are already "very minutely committed for distribution to the several individual counties,"[334] and the court would not alter this sytem of distribution without a clear expression of legislative intent. The court held, instead, that the general tax revenues of the state can be appropriated by the legislature for any proper purpose, and "[t]o that extent the general revenue funds of the state are available as general county funds subject to appropriation."[335]

In *Markham v. State Department of Revenue*,[336] the unsuccessful candidate in the election for Tax Assessor for Broward County challenged the canvass and count of the votes. The successful candidate defended against this challenge, and incurred attorney's fees. He used personal funds to pay the attorney's fees which were incurred before he took office, but sought a judicial declaration that he could use the funds budgeted for his office to pay the attorney's fees incurred after he took office. The district court of appeal held that the public interest was not sufficiently involved to justify the expenditure of public funds for such purpose, since the dispute was between the two candidates as individuals, and did not involve the official duties of the Tax Assessor.

In *Sattler v. Askew*[337] the supreme court was presented with a class action by residents of Broward County, alleging that provisions of several statutes[338] constituted an unconstitutional system for the statewide distribution of primary road funds, and that the system was being applied in an unconstitutional manner, resulting

332. Other aspects of the case are discussed in the text accompanying notes 64-65 *supra*.
333. 298 So. 2d at 354.
334. *Id.*
335. *Id.*
336. 298 So. 2d 210 (Fla. 1st Dist. 1974), *cert. denied*, 309 So. 2d 547 (Fla. 1975).
337. 295 So. 2d 289 (Fla. 1974).
338. FLA. STAT. §§ 206.41(4)(a), 335.04, 339.08 (1973).

in discrimination against residents of Broward County. Specifically, the complaint alleged that, although Broward County was the 2nd largest in the state on the basis of population and gasoline consumption, it ranked 66th out of 67 counties in miles of state highway per registered vehicle, 61st in miles of state road per square mile of area, 66th in miles of state road per person, and 57th in per capita construction expenditure. The trial court granted a motion to dismiss, holding that the alleged facts, even if proven correct, did not state a cause of action, since no person has a constitutional or statutory right to a proportional expenditure of the state's highway funds. The supreme court affirmed, with the additional observation that "[a] greater per capita expenditure of road funds in Florida's northern counties, for example, directly benefits the residents of the southern counties, not only because these roads are equally available to the southern county residents for their use, but also because they are necessary to encourage the tourist industry so vital to South Florida."[339] The court clarified that this was merely an example of the manner in which the expenditure of state highway funds equally benefits all state residents, and that no county or its residents has any right to have any particular proportion of the funds expended within the borders of the county.

The Attorney General rendered a number of opinions on the expenditure and use of public resources. One opinion[340] indicates that municipal funds may be used to support or oppose the question of annexation of territory to a municipality, since this is a matter that affects and involves the interests of the municipality and its citizens. The funds may be disbursed through a non-profit citizens' committee, subject to appropriate audit and review by the city clerk.

Another opinion[341] states that a municipality may not expend public funds to purchase land for the purpose of leasing or selling the land to a private industry. Nor may a municipality purchase land so as to lease or sell even a portion of it to a private industry, unless such lease or sale is incidental to a valid public purpose for which the purchase was primarily made.

Finally, the Attorney General opined[342] that voting machines

339. 295 So. 2d at 291.
340. Fla. Att'y Gen. Op. 074-227 (Aug. 5, 1974).
341. Fla. Att'y Gen. Op. 074-249 (Aug. 9, 1974).
342. Fla. Att'y Gen. Op. 075-71 (Mar. 12, 1975).

owned by a county may not be loaned to a private nonprofit corporation or to a school in connection with classroom projects, unless some public purpose will be served by such use. The opinion implies that the loan was unauthorized by statute, and that no compensation was offered to the county for the use of the machines. These circumstances distinguish the opinion from *City of West Palm Beach v. Williams*,[343] in which the supreme court held that "where bonds are not issued, public funds are not spent, and the power of eminent domain is not exercised in furtherance thereof, a municipality can lease public land for private uses in accordance with legislative authority."[344] The question left open in *Williams* remains open—whether the public purpose test would be violated by a rental at less than fair market value.[345]

L. *Claims Against State and Local Governments and Officers*

Holmes v. School Board of Orange County[346] applied the traditional rule that a county school board enjoys sovereign immunity, unless immunity has been waived by general law. In this case, immunity had been partially waived by the statute[347] which permits suits and recoveries arising out of vehicular accidents only up to the limit of liability insurance coverage. The court held that no greater amount could be recovered from the school board. The court noted also that the driver of the school bus did not enjoy immunity from personal suit by the plaintiff.

In *Baugher v. Alachua County*,[348] after an inmate of Alachua County Jail had been murdered by a fellow prisoner, the parents of the decedent brought suit against the county and against the sheriff, alleging negligence and wrongful death. The court was called upon to decide which of the defendants was responsible for the operation of the jail. Finding no Florida statute or case law on point, the court relied upon American Jurisprudence for the "controlling principle" that the sheriff is deemed to have the powers "usually regarded as belonging to the office, including that of the custody of the common jail and of the prisoners therein . . . ."[349] The court observed that

343. 291 So. 2d 572 (Fla. 1974).
344. *Id.* at 578.
345. *See* 1974 Survey, *supra* note 1, at 652-53.
346. 301 So. 2d 145 (Fla. 4th Dist. 1974), *cert. denied*, 312 So. 2d 755 (Fla. 1975).
347. FLA. STAT. § 234.03(4) (1973).
348. 305 So. 2d 838 (Fla. 1st Dist. 1975).
349. 60 AM. JUR. 2d *Penal and Correctional Institutions* § 9 (1972).

while the county owns the jail and provides funds for its operation, the sheriff is responsible for daily operations, including the allocation of specific prisoners to specific cells. Accordingly, suit against the county was dismissed. The court noted that this result was reached, even though the county had purchased liability insurance and had thereby waived immunity to the extent of the insurance coverage. "The waiver of immunity," said the court, "does not establish liability in absence of a showing that the governmental agency has committed a tort."[350] Since the county was not responsible for daily operation of the jail, it had not committed a tort.

Hernandez v. City of Miami[351] arose from the death of a motorcyclist in a collision at an intersection where telephone company repairmen were working. The administratrix of the decedent's estate brought suit against the city, alleging that the city was negligent in failing to station a police officer to direct traffic at the intersection, where telephone company vehicles were parked in such a manner as to obstruct the view and create hazards to traffic. The court held that the claim against the city must be dismissed, since the deployment of police officers is a matter within the discretion of the city, involving a duty owed to the public at large and not to the decedent or any other individual. The court followed *Wong v. City of Miami*[352] and *City of Tampa v. Davis*,[353] both of which held that a municipality is immune from liability for breach of a duty owed to the public at large.

In *Boca Raton v. Coughlin*,[354] plaintiff sued the city for false arrest and false imprisonment. She alleged that at 3:00 A.M., city police officers woke her by knocking on the door of the private home where she was employed as a sleep-in babysitter. Upon answering she was met by the officers who announced they were there to execute a search warrant. They found some pornographic material in a bedroom closet. Plaintiff was then arrested without a warrant, and charged with possession of obscene material, in violation of a municipal ordinance. She was taken to the police station, and later released on bond. The evidence was eventually suppressed, the charges dismissed, and plaintiff brought this suit. The jury awarded

350. 305 So. 2d at 839.
351. 305 So. 2d 277 (Fla. 3d Dist. 1974).
352. 237 So. 2d 132 (Fla. 1970).
353. 226 So. 2d 450 (Fla. 2d Dist. 1969).
354. 299 So. 2d 105 (Fla. 4th Dist. 1974).

her $50,000.00. On appeal, the city argued that improper charges had been given to the jury.

The district court of appeal held that the ultimate issue for the jury was whether or not the police officers reasonably believed in good faith that their arrest of plaintiff was constitutional. The trial court should have given the charge requested by the city, that at the time of the arrest, an ordinance of the city made it an offense for any person to possess obscene material, and that its constitutionality had not yet been specifically determined. However, the court should also have charged that 2 years before the arrest, the United States Supreme Court had invalidated similar provisions in other jurisdictions, and had held that the first and fourteenth amendments prohibit making mere private possession of obscene material a crime.[355] Using these charges, the jury would be in a position to properly determine the reasonableness and good faith of the officers in making the arrest.

M. *Education*

In *Cornwell v. University of Florida*[356] the university notified a nontenured professor that he would not be recommended for tenure, and that his employment would be terminated at the end of a notice period. The district court of appeal, upon the professor's petition for certiorari, denied relief.

The termination of employment was decided by an administrative officer of the university, without giving Professor Cornwell an opportunity for a prior hearing. The officer's decision was supported by a vote against tenure at a meeting of the tenured faculty members of a certain department, but Cornwell contended this was not the proper department to vote on the question, and instead he requested a vote by an "area committee" consisting of faculty members from the various subject-matter areas which his professional activities overlapped. His request for a vote by an area committee was denied. Later, he received a hearing before the university's Academic Freedom and Tenure Committee. At this hearing, the officer who had terminated Cornwell's employment stated his reasons for doing so, and these reasons included statements tending to reflect upon Cornwell's reputation. The committee reached certain

355. Stanley v. Georgia, 394 U.S. 557 (1969).

356. 307 So. 2d 203 (Fla. 1st Dist. 1975).

conclusions and made certain recommendations, which the court did not describe, but the court did state that the president of the university correctly determined that he was not bound by these conclusions or recommendations.[357]

Cornwell claimed, as a matter of due process, the right to a hearing before denial of tenure, since at that time he asserted he had an expectancy that tenure would be granted, unless proper cause were shown for denial. In this context, his "expectancy" of tenure obviously means his belief that he was legally entitled to it.[358] However, the court used the word "expectancy" in quite another sense, referring to his anticipation about the likelihood that in fact tenure would be granted. Over a page of the opinion is devoted to discussion of evidence tending to prove that Cornwell had ample reason to fear that in fact tenure would not be granted.[359] The court concluded that he had no "expectancy," because he had reason to fear denial. The court did not evaluate his claim to an "expectancy" based on legal entitlement to tenure.

Having been denied a pre-termination hearing, Cornwell pursued the post-termination hearing before the Academic Freedom and Tenure Committee, at which the adverse statements about his reputation were made. These statements, if unjustified, could have indicated that the decision to deny tenure had itself been unjustified. Cornwell, therefore, had a significant interest in arguing, to the court, that the statements were unjustified. In response to Cornwell's assertions, first, that he had been improperly denied a pre-termination hearing, and second, that unjustified criticisms of his reputation had been made at the post-termination hearing before the committee, the court stated: "Petitioner first complains of no hearing and then of too much hearing. The latter was at his request. He may not have his cake and eat it too."[360]

Another important issue in the case is whether the university's criteria for tenure are unconstitutionally vague. The court stated,

357. *Id.* at 211.

358. In Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), the United States Supreme Court declared: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. The *Cornwell* opinion cites *Roth*, but proceeds to apply a test based on the "unilateral expectation" rather than on the "legitimate claim of entitlement."

359. 307 So. 2d at 206-07.

360. *Id.* at 210.

on this point: "No useful purpose will be served by quoting the provisions of [the university's tenure] manual here. Suffice it to say that our reading of the criteria reveals them to be neither vague nor overbroad. . . . We find the questioned criteria to be in keeping with constitutional requirements as to vagueness and overbreadth."[361]

This survey would be unduly prolonged by detailed analysis of the numerous other points discussed by the court. In summary, the opinion fails to provide satisfactory judicial reasoning of the crucial issues involved, and fails to demonstrate that justice was done in this case.

N. *Homestead Exemption from Alienation*

1. FAMILY RELATIONSHIP

Did Jerry qualify as the "head of a family" for homestead purposes at the time of his death? *Jablonski v. Caputo*[362] relates that Jerry married Martha in 1925, but they separated after a few months. In 1934 Jerry began living with Pauline. In 1947 Jerry and Pauline acquired real property in the name of "Jerry and Pauline, jointly." They constructed a tavern on the property, together with living quarters which they occupied. In 1951 Jerry and Pauline were ceremonially married. Jerry died in 1954, leaving no children. He was survived by both Martha and Pauline. The evidence was in conflict as to whether Jerry and Martha had ever been divorced from each other.[363]

Without dispute, Pauline was entitled to the one-half interest in the property attributable to her joint ownership dating from the time of acquisition. The dispute was between Pauline and Jerry's sister, as administratrix of his estate, regarding the other half interest, which had been Jerry's until his death.

If Jerry and Martha had been divorced before Jerry's marriage to Pauline, the latter marriage would be valid. As a result, at the time of his death Jerry would be the head of a family, consisting of Pauline and himself, and this family would have lived together on the property. Since all other requirements for homestead would be

361. *Id.* at 210-11.

362. 297 So. 2d 310 (Fla. 2d Dist. 1974).

363. The case was remanded to the trial court to hear further evidence on the issue of the validity of the divorce.

satisfied, Jerry's half interest in the property would be homesteaded and Pauline would take it, as surviving spouse.

On the other hand, if Jerry and Martha had not been divorced before Jerry's marriage to Pauline, the latter marriage would be invalid. In that event, Jerry's family would consist of Martha and himself. However, that family would not have lived together on the property. Thus, the property would not be able to qualify as homestead, and Jerry's half interest would descend under the laws of intestate succession which, as it happened, would result in the property passing to Martha. A complete analysis of the law requires mention of still another possibility. If Jerry continued to be under a legal obligation to support Martha, he could still have been regarded as head of a family for homestead purposes, even though Martha did not live with him on the property. The court did not explore this possiblity, apparently because the separation between Jerry and Martha terminated his obligation of support.

Estate of Deem v. Shinn[364] illustrates the very point omitted from the above opinion. The marriage between Mr. and Mrs. Deem produced two daughters. The Deems separated and became divorced. Mrs. Deem and the daughters lived in Massachusetts and Mr. Deem in Florida. After the divorce, Mr. Deem purchased property in Florida and lived there. Neither Mrs. Deem nor the daughters ever lived in the Florida property. The court found that Mr. Deem never supported the daughters, and that he "affirmatively refused and evaded his support obligation to his family."[365] His will expressly disinherited his daughters. At the time of his death, one of the daughters was a minor.

The court recited the rule that, for homestead purposes, the "head of a family" must either live on the property with other family members under circumstances indicating that he is in charge, or be under a legal duty to support other family members.[366] The court found that Mr. Deem was under a legal duty to support his minor daughter, and that the Florida property where he resided thus became homestead, even though no other family member lived there with him. Since the property was homestead and since the decedent was survived by a minor child, it was not subject to devise, but instead passed to his lineal descendants.

364. 297 So. 2d 611 (Fla. 4th Dist. 1974).

365. *Id.* at 612.

366. The court cited Brown v. Hutch, 156 So. 2d 683 (Fla. 2d Dist. 1963), and *In re* Estate of Wilder, 240 So. 2d 514 (Fla. 1st Dist. 1970).

2. DEVISE

The 1972 amendment to article X, section 4(c) provides that "the homestead may be devised to the owner's spouse if there be no minor child." *In re Estate of McCartney*[367] construed this provision and held that a testator without a minor child can devise the homestead to his surviving spouse, absolutely and in fee simple, and is not restricted to devising a life estate to his spouse with a vested remainder in his adult children. The supreme court derived this result, not only from the 1972 amendment, which was adopted while this litigation was pending and thereby became part of the law of the case, but also from the earlier decision in *In re Estate of McGinty*.[368]

3. CONVEYANCE TO SPOUSE

In *Foerster v. Foerster*,[369] the husband executed a deed purporting to convey homestead property to his wife. This was expressly authorized, without the wife's joinder in the deed, by a statute[370] enacted in 1971. However, the court found the conveyance, as well as the underlying statute, invalid by reason of article X, section 4(c) which provides, in part: "The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse." The court observed: "Why the legislature enacted a law which is so patently unconstitutional is difficult to understand."[371] However, the court did not discuss the possibility that a conveyance from husband to wife may not be "alienation" as contemplated by the above constitutional language, nor the policy reasons for insisting that the wife join in a conveyance to herself.

4. OTHER ASPECTS OF HOMESTEAD[372]

Ryskind v. Robinson[373] reaffirms prior case law that the home-

367. 299 So. 2d 5 (Fla. 1974).

368. 258 So. 2d 450 (Fla. 1971).

369. 300 So. 2d 33 (Fla. 1st Dist. 1974).

370. FLA. STAT. § 689.11(1) (1973).

371. 300 So. 2d at 35.

372. *See also* Reid v. Bradshaw, 302 So. 2d 180 (Fla. 1st Dist. 1974), and Shedd v. Luke, 299 So. 2d 58 (Fla. 1st Dist. 1974), *cert. denied*, 314 So. 2d 780 (Fla. 1975), each dealing with a combination of homestead and real property law.

373. 302 So. 2d 427 (Fla. 4th Dist. 1974).

stead exemption cannot be used as a shield against a fraudulent transaction, and that under such circumstances an equitable lien might arise which may be enforced against homestead property.

O. *Coverture and Property*

Until a statutory amendment in 1973,[374] widowers could not elect to take dower, although widows could. Decedent died in 1972, and the supreme court held that it must apply the dower statute as it existed at the date of decedent's death, without regard to subsequent amendments. Decedent's second wife was the surviving widow, and his first wife was a judgment creditor. The second wife elected to take dower. The first wife filed objections to this election, and asserted that the dower statute was unconstitutional in that it discriminated against males by allowing women, but not men, to elect dower. By a vote of four to three, the supreme court held, in *In re Estate of Humphreys*,[375] that the first wife lacked standing to assert this argument, since she was obviously not a member of the class victimized by the alleged discrimination. The court expressly declined to rule upon the constitutional question.

The present authors note that the statute as it then existed seems clearly authorized by article X, section 5 of the Florida Constitution, which provides that "dower or curtesy may be established and regulated by law," a phrase introduced as an "exception" to the general requirement of equal treatment of married men and married women with regard to the holding, disposition, etc., of property. Thus, the constitutional issue raised by a statute providing dower for women but not for men seems to be exclusively a federal constitutional issue. The United States Supreme Court decision in *Kahn v. Shevin*[376] lends some support to such a system, as a type of compensatory discrimination.

When a wife's separate funds are used to acquire property in which title is taken as tenants by the entirety, is the husband presumed to hold her equity in trust for her, or is he instead presumed to have received a gift? Before adoption of the 1968 revision of the constitution, cases recognized the presumption of a trust in favor of the wife, although in the converse situation, a payment from the

374. FLA. STAT. §§ 731.34-.36, 733.09-.14 (1973). Dower and curtesy have since been abolished. *See* FLA. STAT. § 732.111 (Supp. 1974).

375. 299 So. 2d 595 (Fla. 1974), *appeal dismissed*, 420 U.S. 968 (1975).

376. 416 U.S. 351 (1974).

husband's funds for the acquisition of property taken as tenants by the entireties was presumed to be a gift to the wife.

The judicial attitude has changed, in view of the new provision[377] in the 1968 constitution requiring equal treatment of married women and married men. *Ball v. Ball*[378] holds, on this basis, that whether the funds are provided by the husband or the wife, a gift to the other spouse is presumed.

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377. FLA. CONST. art. X, § 5.

378. 303 So. 2d 32 (Fla. 2d Dist. 1974), *following* Steinhauer v. Steinhauer, 252 So. 2d 825 (Fla. 4th Dist. 1971).