University of Miami Law Review

Volume 25 | Number 4 Article 2

7-1-1971

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Recommended Citation
Charles C. Kline, *Collection Pursuant to Florida's Supplementary Proceedings in Aid of Execution*, 25 U. Miami L. Rev. 596 (1971)
Available at: https://repository.law.miami.edu/umlr/vol25/iss4/2

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COLLECTION PURSUANT TO FLORIDA'S SUPPLEMENTARY PROCEEDINGS IN AID OF EXECUTION

CHARLES C. KLINE*

I. INTRODUCTION

Partially as a result of today's exceedingly liberal credit practices, the judgment creditor is more and more often finding himself with a judgment and no apparent means by which it may be satisfied. He may perhaps be reminded of the old cliche that "one cannot squeeze blood out of a turnip." If this is the case, and the judgment debtor really has no financial resources, the judgment creditor may indeed have to bide his time until his debtor again comes into means. However, with disturbingly increasing frequency, it often seems that the debtor had property prior to the judgment but has somehow or other caused it to disappear. When this happens, the

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property of the judgment debtor is normally either out of reach of the creditor's writ of execution, or its existence and location may be unknown to the creditor. At this point, the judgment creditor may have to return to court for additional help in satisfying his judgment.

One remedy which is available to those faced with the above dilemma is to institute a proceeding supplementary to and in aid of execution. It will be the purpose of this article to outline the nature, scope and use of such supplementary proceedings in aid of execution. An attempt will be made to demonstrate how the proceedings are used both in general and in particular situations. After an in depth analysis of these proceedings, comments and recommended changes will be made by way of conclusion.

The approach to be used in fulfilling the above purpose involves a two step process. First, the reader will be presented with a brief synopsis of the process of collection pursuant to a writ of execution. This will be done for the purpose of illustrating the limitations upon collection by way of the ordinary writ of execution and without the aid of supplementary proceedings. Once the background information on the execution process has been presented, the second and major phase of this article will begin. Proceedings supplementary to execution will be examined with a view towards defining their nature and scope as well as diagraming the step-by-step procedure used in implementing this remedy. The effectiveness of the proceedings in particular cases will be analyzed and conclusions ultimately will be reached with respect to suggestions for improvement.

At this point, the reader's attention should be directed to the fact that there are several fine articles on supplementary proceedings in Florida.[1] Despite the existence of this material, it is submitted that this further treatment of the subject is warranted. Since the date of the most recent article on supplementary proceedings, the statutes with respect thereto have been amended and consolidated into one section.[2] Furthermore, there appears to be some conflict in the case law.

Since the scope of this article has been narrowed to an in depth study of supplementary proceedings, other writs and remedies, which concern themselves with such problems as execution against non-monetary decrees, certain equitable interests not reachable by supplementary proceedings, and protection prior to judgment will not be discussed in this article. In the event that the reader needs information concerning collection procedures other than supplementary proceedings, he should consult the various other collection writs which are: assistance,[3] sequestration,[4]

1. FLORIDA BAR CONTINUING LEGAL EDUCATION DIV., FLORIDA CIVIL PRACTICE AFTER TRIAL §§ 3.24-3.43 (1966); 13 FLA. JUR. *Executions* §§ 133-46 (1957); Note, *Florida Procedure in Satisfying or Avoiding a Money Judgment*, 17 U. FLA. L. REV. 269 (1964).

2. Fla. Laws 1967, ch. 67-254, § 11, at 594, *amending*, FLA. STAT. §§ 55.52-55.611 (1965).

3. These writs are used by courts of equity to enforce decrees which order the conveyance of real property.

4. This writ may be used in certain cases to enforce equitable decrees and also to place property into the custody of the court during the course of equitable litigation.

attachment,[5] garnishment,[6] creditor's bills,[7] *ne exeat*,[8] possession,[9] and notice of *lis pendens*.[10]

II. Collection by Writ of Execution

A. *General Aspects of the Execution Process*

Broadly speaking, execution is the process, ancillary to an action, whereby the final judgment or decree of the court is carried into effect.[11] The actual process is symbolized by a writ which is issued to an officer, authorizing and directing him to enforce the judgment of the court.[12] Today, both legal judgments and equitable decrees are enforceable by a "writ of execution," provided that the equitable decree has been reduced to a money payment.[13]

The threshold problem encountered while studying the law of collection is the loose and somewhat confusing usage of the word "execution." The term execution is often used by the courts to define any process which carries into effect the judgment or decree of the court.[14] However, when used specifically, *i.e.*, "writ of execution," the term is used to designate the writ of *fieri facias* which is the ordinary writ issued for the enforcement of a money judgment.[15] Another writ often used in conjunction with *fieri facias* is the writ of *scire facias* which currently has as its principal function the revival of a dormant judgment so that a "writ of execution" (*fieri facias*) may be issued thereon.[16] Today there is little need for *scire facias* since the Florida Rules of Civil Procedure provide that any relief obtainable by *scire facias* may also be granted on motion after notice.[17]

5. Attachment is primarily concerned with the taking into custody of real and personal property in the debtor's possession prior to the rendition of judgment. Attachment results in the acquisition of a lien.

6. Garnishment proceedings are generally used to conditionally subrogate the garnishor to the rights of his debtor in personal property, or indebtedness, in the possession of or owed by a third party, pending the entry of judgment.

7. A creditor's bill is a suit brought in equity to satisfy a judgment for an indebtedness where there is no adequate remedy at law. The creditor's suit may be commenced prior to judgment, but after filing. All property not otherwise exempt is subject to this bill.

8. This writ authorizes the arrest and imprisonment of a debtor who is about to flee the jurisdiction of the court. It is commonly used to secure bond to insure the payment of alimony and bastardy support decrees.

9. A writ issued by a court of law used to transfer the possession of land.

10. Notice of *lis pendens* operates with respect to property involved in a suit and serves to notify prospective purchasers and encumbrancers that any interest they may acquire in that property will be subject to the final judgment in the case.

11. 21 Am. Jur. *Executions* § 2 (1939).

12. Raulerson v. Peeples, 81 Fla. 206, 87 So. 629 (1921).

13. Fla. R. Civ. P. 1.570.

14. Raulerson v. Peeples, 81 Fla. 206, 87 So. 629 (1921).

15. Evins v. Gainesville Nat. Bank, 80 Fla. 84, 85 So. 659 (1920); Pasco v. Harley, 73 Fla. 819, 75 So. 30 (1917).

16. McCallum v. Gornto, 127 Fla. 792, 174 So. 24 (1937). This writ will be discussed in detail in § II-C, p. 599 *infra*.

17. Fla. R. Civ. P. 1.100(d).

B. *Requirements for the Issuance of a Writ of Execution*[18]

No execution can issue unless there is a judgment in terms of money or a decree in equity for money payments.[19] For this reason, a default judgment, which quite often does not specify the amount of damages,[20] will not support the issuance of a writ of execution.

Another limitation placed upon the writ of execution is that it may only issue upon a final judgment.[21] For the purposes of execution, a final judgment is one which disposes of the entire merits of the cause and determines whether the claimant is entitled to any recovery.[22] Furthermore, since the rendition of a judgment or decree is a judicial act,[23] requiring reduction to writing and signature by the judge,[24] a mere confession of judgment will not support the issuance of a "writ of execution."[25]

One of the formalities which must be observed prior to the issuance of a "writ of execution" is the entry of a final judgment. The issuance of the writ requires an entry into the court record of the judgment upon which the writ has been issued. A failure to enter the judgment makes the writ voidable but not void.[26] Any "writ of execution" issued upon a judgment which has not been entered may be validated by properly entering the judgment in the record book.[27] In this regard, it should be noted that any judgment subject to collateral attack is void and any writ of execution issued thereon is also void.[28] But the mere failure to enter a final judgment into the record book does not make the judgment subject to collateral attack so long as rendition is shown by the progress docket in the cause.[29]

C. *Time Limitations*

Since a "writ of execution" needs the support of a valid judgment, it follows that the writ may not be issued beyond the life of the judgment.[30]

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18. The common law term of *fieri facias*, which is often used interchangeably with "writ of execution" will be dropped at this point since the right to execution on a judgment is, in this state, a statutory one; *cf.* FLA. STAT. § 56.021 (1969).

19. Pan American Surety Co. v. St. Ana, 105 So.2d 500 (Fla. 3d Dist. 1958).

20. For instance, the defendant has the right to contest the issue of unliquidated damages, therefore a default judgment involving such an issue will not be a money judgment. *E.g.*, White v. Crandall, 105 Fla. 70, 137 So. 272 (1931).

21. *E.g.*, Davidson v. Seegar, 15 Fla. 671 (1876).

22. Irving Trust Co. v. Kaplan, 155 Fla. 120, 20 So.2d 351 (1944).

23. Ellis v. State, 100 Fla. 27, 129 So. 106 (1930) (criminal case).

24. FLA. R. APP. P. 1.3.

25. Therefore, in order to have execution, the party must bring an action on the confession of judgment. First Nat'l. Bank v. Brown, 119 Fla. 761, 162 So. 142 (1935). Today such an action on a domestic judgment may be barred by statute. *See* FLA. STAT. § 55.05 (1969).

26. Adams v. Higgins, 23 Fla. 13, 1 So. 321 (1887).

27. *Id.*

28. Brauer v. Paddock, 103 Fla. 1175, 139 So. 146 (1932).

29. FLA. STAT. § 55.07 (1969).

30. *Cf.* Spurway v. Dyer, 48 F. Supp. 255 (S.D. Fla. 1942). See also FLA. R. CIV. P. 1.550(a).

Therefore, the absolute limitation placed upon the execution of any given judgment will be provided for by the statute of limitations applicable to judgments of the rendering court. Judgments of any Florida state court of record have a life of 20 years.[31] When the judgment is one rendered by a justice of the peace its life is 11 years.[32] If the judgment is one of a foreign court, an action thereon will be barred after 7 years provided, however, that the judgment debtor has been within the jurisdiction of the State of Florida during the 7 years subsequent to judgment.[33] It appears that the above-mentioned periods commence running at the rendition, rather than the entry of the judgment.[34] In any event, it should be recalled that an action on the judgment creates another judgment which will begin anew the running of the statute of limitations.

As previously indicated, the absolute time limitation placed upon the issuance of a "writ of execution" is the period of the statute of limitations with respect to the underlying judgment. This, however, is not the only time limitation. A judgment may become dormant during this period for one of several reasons. If a judgment becomes dormant, it will not support the issuance of a "writ of execution" until it has been properly revived. At common law, a judgment became dormant one year and a day after rendition and thereafter would not support the issuance of a "writ of execution."[35] Until 1967, Florida Statute section 55.15 (1965) had extended this period to three years[36] after which time the judgment became dormant and had to be revived by a writ of *scire facias*.[37]

With the repeal of Florida Statute section 55.15 (1965),[38] there now seems to be some doubt as to what the law is with respect to the dormancy of judgments. Does the lack of a specified statutory dormancy period mean that the common law period of one year and a day is once again applicable?[39] Or, does the absence of such a period indicate that, in Florida, judgments no longer become dormant?[40] It is submitted that there is no clear answer to these questions as there are logical arguments in support of either view. One could take the position that since the rules of procedure were modified in 1962 to allow any relief available by *scire facias* to be

31. FLA. STAT. § 95.11(1) (1969).

32. Viggio v. Wood, 101 So.2d 922 (Fla. 3d Dist. 1958).

33. Van Deren v. Lory, 87 Fla. 422, 100 So. 794 (1924), interpreting REV. GEN. STAT. § 2939(2) (1920) now FLA. STAT. § 95.11(2) (1967).

34. *Cf.* Massey v. Pineapple Orange Co., 87 Fla. 374, 100 So. 170 (1924). This appears to be the most logical approach since the alternative, of waiting until "entry" to commence the running of the time period, could allow the judgment creditor to prolong the period by causing the judgment not to be recorded.

35. Spurway v. Dyer, 48 F. Supp. 255 (S.D. Fla. 1942).

36. FLA. STAT. § 55.15 (1965). This statute has since been repealed and the period during which a judgment, without *scire facias*, will support an execution, does not now appear to be specifically covered by statute.

37. *Id.*

38. Fla. Laws 1967, ch. 67-254, § 49.

39. *Cf.* Spurway v. Dyer, 48 F. Supp. 255 (S.D. Fla. 1942).

40. *Cf.* FLA. STAT. § 56.021 (1969).

granted upon motion after notice without the issuance of a writ of *scire facias*,[41] the legislature could have intended that their repeal of the three-year dormancy statute operate to revive the one-year common law period because the revival by motion practice would be simple and no hardship would accrue. On the other hand, there appears to be a more persuasive argument to the effect that the legislature intended to do away with dormancy entirely when it repealed Florida Statute section 55.15 (1965). This theory can be based upon a comparison of the language of the earlier statutes and that of the section which has taken its place. The original section provided as follows:

> The plaintiff shall be entitled to his execution at any time within three years after the rendition of any judgment or decree, and upon the issuance of his execution, shall be entitled to renew the same upon the return to the clerk's office of the original execution, from time to time for twenty years, unless the same be sooner satisfied.[42]

In the act that repealed the above section, the reviser's notes provided that section 55.15 was repealed and the subject matter contained therein would now be covered by section 56.021 which provides as follows:

> When issued, an execution is valid and effective during the life of the judgment or decree on which it is issued. When fully paid, the officer executing it shall make his return and file it in the court which issued the execution. If the execution is lost or destroyed, the party entitled thereto may have an alias, pluries or other copies on making proof of such loss or destruction by affidavit and filing it in the court issuing the execution.[43]

Since the only time limitation apparently provided by this section is that an execution will only be valid and effective during the life of the judgment or decree on which it is issued, it can be argued that a judgment no longer becomes dormant and will support the issuance of a "writ of execution" during its entire lifetime without any need for revival. This position becomes especially persuasive when viewed in the light of the facts that the reviser's notes were specifically made a part of the act which repealed the earlier dormancy statute.[44] Consequently, it appears to this author that it is quite probable that a judgment no longer becomes dormant in Florida for the purposes of the issuance of a writ of execution.

The passage of time has not always been the only incident which has caused a judgment to become dormant. For instance, in many states the death of the judgment debtor prior to the issuance of an execution necessitated a revival of the judgment, by *scire facias*, against either the per-

41. FLA. R. CIV. P. 1.100(d).
42. FLA. STAT. § 55.15 (1965); *repealed*, Fla. Laws 1967, ch. 67-254 § 49.
43. FLA. STAT. § 56.021 (1969).
44. Fla. Laws 1967, ch. 67-254, § 52.

sonal representative, in the case of personal property, or the heirs, in the case of realty.[45] In Florida, however, the rule is that the judgment creditor may not have execution issue after the death of the debtor. Such a judgment must be filed in the same manner as other claims against the decedent's estate.[46]

D. *Formalities*

The writ of execution is issued by the clerk of the court upon the motion of the judgment creditor.[47] This motion may be by oral request[48] and the writ, when issued, is enforceable anywhere in the state.[49] Generally speaking, the writ should contain an order to the sheriff requiring him to enforce the judgment by levy and sale.[50] It must also bear the date of issuance[51] and be designated as returnable upon satisfaction.[52] Any defect in the writ which may be cured by an amendment thereto will not invalidate the proceedings thereunder.[53]

E. *Property Subject to a Writ of Execution*

One of the most stringent limitations placed upon the writ of execution is the property which it may lawfully reach. Florida Statute section 56.061 (1969) provides that the lands, tenements, goods, chattels, and equities of redemption in real[54] and personal[55] property belonging to the judgment debtor are subject to a writ of execution. Although this list of property seems extensive, it should be recalled that the property must be in the possession of the judgment debtor. There is an exception to this rule to the effect that property belonging to the judgment debtor which was fraudulently transferred and is in the possession of a third party may be made subject to a levy pursuant to the writ of execution. However, as the Florida Supreme Court has pointed out,[56] this practice is extremely dangerous for it may cause the judgment creditor to become liable for wrongful execution if it develops that the transfer cannot be shown to

45. *See, e.g.*, Dougherty v. White, 112 Neb. 675, 200 N.W. 884 (1924).

46. O'Flarity v. Gurley, 22 Fla. Supp. 196 (Duval Co. Cir. Ct. 1964).

47. FLA. R. CIV. P. 1.160. Presumably this means the court in which the judgment was rendered; *cf.*, 21 AM. JUR. *Executions* § 28 (1939).

48. FLA. R. CIV. P. 1.550(a).

49. FLA. STAT. § 56.031 (1969). The writ itself is directed to any and all sheriffs of the state. *Id.*

50. *Id.*

51. *Id.*

52. FLA. STAT. § 56.041 (1969).

53. Adams v. Higgins, 23 Fla. 13, 1 So. 321 (1887).

54. On motion by the judgment creditor, the court will order a hearing to determine the interest of the judgment debtor in the equity of redemption. FLA. STAT. § 56.071 (1967).

55. A bond must be posted by the purchaser at the execution sale equal to twice the sheriff's evaluation of the property so sold. FLA. STAT. § 56.08 (1967). Bond is for the protection of the mortgage.

56. Richard v. McNair, 121 Fla. 733, 164 So. 836 (1935).

have been fraudulent.[57] It is because the writ of execution is practically exercisable only against property in the possession of the debtor, and only with respect to certain kinds of property, that the additional remedies such as garnishment, creditor's bills and supplementary proceedings are necessary.

F. *Levy Under a Writ of Execution*

Another problem incident to the execution process, which is not entirely solved by the other remedies such as supplementary proceedings, is the practical difficulty of bringing about a levy under the writ. "A levy of execution has been defined as an absolute appropriation in law of the property levied on to the payment of the judgment debt."[58] The property so appropriated is later sold and the proceeds used to satisfy the judgment. By statute, execution may be levied by sheriffs,[59] their deputies, and, if the writ issued from a justice of the peace court, the constable of the county.[60] Levy requires an interference, by the execution officer, with the possession of the property in such a manner that he would be amenable to an action for trespass were it not for the protection afforded him by the writ.[61] Once property has been levied upon, it is in *custodia legis*[62] and may not be taken by another execution in the hands of some other officer.[63] Naturally, special problems arise where the interest levied upon is not in the form of tangible property. These situations are in part covered by statutes and sometimes require special orders from the court issuing the execution. It occasionally happens that the sheriff will receive several writs running in favor of different judgment creditors, each of which is to be executed against the same judgment debtor. When two or more writs are delivered to the sheriff or his deputies, he should make his levy pursuant to the first writ received.[64] In the event that a subsequently delivered writ is levied upon first, the property is bound by that sale in favor of that writ,[65] and the party whose writ was first delivered must seek relief from the sheriff to the extent that he is damaged.[66]

G. *Execution Sales*

Following the levy of execution, there must be a sale of the property levied upon. Of primary importance regarding sales is the requirement of

57. *Id.* at 741-42, 164 So. at 840.
58. 21 AM. JUR., *Executions* § 94 (1939).
59. FLA. STAT. § 56.031 (1969).
60. FLA. STAT. § 37.18 (1969).
61. 21 AM. JUR. *Executions* § 107 (1939).
62. Hooker v. Wiggins, 104 Fla. 355, 139 So. 803 (1932).
63. Adams v. Burns, 126 Fla. 685, 172 So. 75 (1936).
64. Love v. Williams, 4 Fla. 126 (1851).
65. *Id.*
66. Albrecht v. Long, 25 Minn. 163 (1878).

public notice.[67] All such sales must take place between 11 a.m. and 2 p.m. on a weekday[68] and should be conducted in the courthouse in the county wherein the property was levied upon, or, if inconvenient, at the place of levy.[69] The general rule seems to be that, in order to protect the judgment debtor, the sheriff may only sell pursuant to the writ under which he advertised[70] and, where the property is divisible, no more should be sold than necessary to satisfy the judgment.[71]

H. *Execution Against Personal Property*

In Florida, the writ of execution creates a lien on all property of the judgment debtor which can be subject to levy and sale thereunder.[72] This lien commences or becomes effective at the time the writ of execution is delivered to the sheriff[73] and should be carefully distinguished from the "judgment lien" which applies only to certain real property.[74] With respect to the execution lien, the writ first delivered to the sheriff has priority over subsequently acquired execution liens, even when the first has not been levied upon while the others have.[75] Generally speaking, this lien also prevails over subsequent dispositions of the property,[76] but, as to prior liens and other forms of security interests, it is dangerous to generalize.

In some cases, because of the nature of the property involved, it becomes exceedingly difficult to determine what action by the sheriff constitutes a proper levy of execution. Because the time of levy indicates when the lien arises, this problem is of paramount significance. Also, because some property in certain situations was beyond the reach of execution at common law, special rules have arisen which govern the right to, or the manner of, levying upon certain forms of personal property. To levy

67. FLA. STAT. § 56.21 (1969).

68. FLA. STAT. § 56.22 (1969).

69. FLA. STAT. § 56.23 (1969).

70. Griggs v. Miller, 374 S.W.2d 119 (Mo. 1963). This rule puts the debtor on notice as to how much of his property must be sold and prevents surprises.

71. *Id.* In addition, the defendant in execution may obtain the release of any property held by the sheriff by substituting property of an equal or greater value. FLA. STAT. § 56.11 (1969).

72. United States v. Gurley, 415 F.2d 144 (5th Cir. 1969). This includes all realty, goods, chattels, corporate stock, etc., described therein, but not contractual rights or choses in action such as bank accounts or bad debts. Willar v. Petruska, 402 F.2d 756 (5th Cir. 1968).

73. *E.g.*, Black v. Miller, 219 So.2d 106 (Fla. 3d Dist. 1969).

74. FLA. STAT. § 55.10 (1969) provides that:

> Judgments and decrees become a lien on real estate in the county where rendered when the judgment or decree is recorded in the proper record of such county and in other counties when a certified copy thereof is recorded in the proper record of other counties.

75. This is the case even where the subsequently delivered writs describe specifically the property mentioned in the prior unexecuted writ. [1959-1960] FLA. ATT'Y GEN. BIENNIAL REP. 660.

76. *See* Love v. Williams, 4 Fla. 126 (1851); Black v. Miller, 219 So.2d 106 (Fla. 3d Dist. 1969); Nason v. Polo Water Co., 166 So.2d 691 (Fla. 2d Dist. 1964).

on corporate stock, the sheriff must exhibit to the transfer agent a copy of the writ of execution and inform him that a levy is thereby made upon the judgment debtor's shares.[77] Equities of redemption, which by statute are subject to execution, require the use of a special procedure subsequent to levy and prior to sale. The procedure is designed to aid in determining the mortgagor's interest in the property, or more precisely, to protect the mortgagee and purchasers at the execution sale.[78] This procedure amounts to a hearing which is commenced upon the motion of the levying party.[79] The interest of a copartner in partnership properties is also subject to a writ of execution pursuant to a judgment against the partner individually.[80] When the partnership itself is the judgment debtor, a writ of execution may be levied against the entity, or its individual partners, or any one of them.[81] Even a corporate franchise, which ordinarily is considered an intangible, has been subject to a writ of execution in at least two early cases.[82] Of course, the foregoing cannot attempt to be an all inclusive list of the various types of personal property which present difficulty to the levying sheriff. They are mentioned at this point only by way of illustration of the various stumbling blocks in the execution process.

I. *Execution Against Real Property*

Under Florida law, judgments and decrees, when properly recorded, create a lien against all real property of the judgment debtor.[83] However, no judgment will become a lien on real property of the judgment debtor until it has been rendered and entered into the record book of the county in which the land is situated.[84] The recording of the original judgment or decree does not satisfy the statute; rather, a certified transcript thereof must be filed in the judgment lien recordbook.[85] This judgment lien is then

77. It should be noted that the statute which specifically authorized this procedure was repealed effective June 26, 1967. Fla. Laws 1965, ch. 65-254, § 1. The same legislature, however, specifically provided that corporate stock shall be subject to levy and sale under execution. FLA. STAT. § 56.061 (1967). According to this section levy shall be made "on such personal property."

78. *Cf.* Mitchell v. Maxwell, 2 Fla. 594 (1849).

79. FLA. STAT. § 56.071 (1969).

80. B.A. Lott, Inc. v. Padgett, 153 Fla. 308, 14 So.2d 669 (1943). Levy and sale under this execution has the effect of dissolving the partnership and the proceeds, less partnership liabilities, go to the judgment creditor to the extent of his debtor's interest therein.

81. State *ex. rel* Clower v. Sweat, 120 Fla. 312, 162 So. 689 (1935).

82. Leonard v. Baylen Street Wharf Co., 59 Fla. 547, 52 So. 718 (1910); *cf.* Holland v. State, 15 Fla. 455 (1876).

83. FLA. STAT. § 55.10 (1969). But apparently only judgments and decrees which are for the payment of money will create such a lien. [1949-1950] FLA. ATT'Y GEN. BIENNIAL. REP. 35. *But cf.*, Nassau Realty Co. v. City of Jacksonville, 147 Fla. 754, 198 So. 581 (1940), holding that suits to enforce or foreclose on earlier liens merge the earlier lien into a judgment lien.

84. FLA. STAT. § 55.10 (1969); Bond-Howell Lumber Co. v. First Nat'l Bank, 200 So.2d 555 (Fla. 4th Dist. 1967).

85. [1967-1968] FLA. ATT'Y GEN. BIENNIAL REP. 142.

effective for the life of the judgment.[86] During the period of the lien, all after acquired real property also becomes subject thereto.[87]

As in the case of personal property, not all interests of the judgment debtor in real property can be made subject to the judgment lien. To begin, the judgment debtor must have legal title to the real property.[88] However, the lien only attaches to the extent of the judgment debtor's beneficial interest in the property to which he has a legal title.[89] Therefore, a mere trustee has no interest to which a judgment lien may attach.[90] In the case of a partnership or co-tenancy, a judgment against either partner or co-tenant establishes a lien against his respective interest in the lands of the co-tenancy or partnership.[91]

The priority of the judgment lien, as in the case of the execution lien, is beyond the scope of this article. Execution is discussed at this point only for the purposes of providing a background to proceedings supplementary to execution. Only a few generalizations are required with respect to priorities. As between successive judgments against the same debtor, the prior in time creates a superior lien against the real property of the judgment debtor.[92] This is true even where the later judgment is first executed.[93] On the other hand, the priority question with respect to the judgment lien versus other forms of interest in the debtor's property does not admit of such well defined rules. The statutes concerning security interests in fixtures, the priority of tax liens, and other applicable statutes should be consulted in every case.

J. *Summary of Execution*

Up to this point some aspects of the process of executing a money judgment have been outlined. No attempt has been made to deal with all the details surrounding the process of collection by writ of execution, as the purpose of this article is to analyze supplementary proceedings. The foregoing brief discussion of collection by writ of execution should be sufficient to appraise the reader of the many difficulties inherent in collection by this means. Since the writ is not available against choses in action, contractual rights or other mere equitable interests,[94] and is further limited by the need for possession and the problems inherent in levying the writ, it should by now be obvious that the judgment creditor may

86. FLA. STAT. § 55.081 (1969); Giddins v. McFarlan, 152 Fla. 281, 10 So.2d 807 (1943).

87. B.A. Lott, Inc. v. Padgett, 153 Fla. 304, 14 So.2d 667 (1943).

88. United States v. Cohen, 271 F. Supp. 709 (S.D. Fla. 1967); Cheves v. First Nat'l Bank, 79 Fla. 34, 83 So. 870 (1920). This would seem to preclude the judgment creditor from acquiring a judgment lien on a mere leasehold since in most states it is considered an equitable interest. *Cf.* Summerville v. Stockton Milling Co., 142 Cal. 529, 76 P. 243 (1904).

89. Arundel Debenture Corp. v. Le Blond, 139 Fla. 668, 190 So. 765 (1939).

90. First Nat'l Bank v. Savarese, 101 Fla. 480, 134 So. 501 (1931).

91. Eldridge v. Post, 20 Fla. 579 (1884).

92. Dunham & Co. v. Post, 20 Fla. 579 (1884); Love v. Williams, 4 Fla. 126 (1851).

93. Massey v. Pineapple Orange Co., 87 Fla. 374, 100 So. 170 (1924).

94. *E.g.*, Peninsula State Bank v. United States, 211 So.2d 3 (Fla. 1968).

quite often find himself in need of an additional collection device. The remainder of this article will examine in detail one of these devices, supplementary proceedings in aid of execution.

III. Supplementary Proceedings in Aid of Execution

A. *The Nature and Purpose of Supplementary Proceedings*

1. IN GENERAL

Supplementary proceedings were unknown to the common law and were first provided by the legislature in 1919.[95] Later, in 1927, these sections were renumbered and became a part of the Compiled General Laws of Florida.[96] Eventually the sections providing for supplementary proceedings became a part of the Florida Statutes and remained substantially unchanged from their original form up and through 1961.[97] In 1963, the Statutes with respect to these proceedings were amended by adding an additional section which provided for the taxing of costs.[98] The only material change in the entire history of these sections came in 1967 when the legislature combined them all into one section and substantially altered the language of some of their provisions.[99]

Before examining the operation and effect of supplementary proceedings, it seems appropriate to determine the purpose which the legislature sought to accomplish by enacting these sections. In this regard, it is clear

> that the fundamental purpose behind the act [was] to assist judgment creditors to discover any assets the defendant may have that can be appropriated to the payment of the execution, and that it is a new and additional means to make effective the process of the law, when a judgment has been secured and a fruitless effort has been made to satisfy it.[100]

The Florida Supreme Court has stated that:

> These statutes were designed to assist judgment creditors to discover any assets of the defendant that could be appropriated to satisfy the judgment, thereby furnishing additional means of satisfying executions after they have been returned unsatisfied.[101]

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95. Fla. Laws 1919, ch. 7842.

96. Comp. Gen. Laws of Fla., §§ 4540-49 (1927).

97. Fla. Stat. §§ 55.52-.61 (1961).

98. Fla. Stat. § 55.611 (1969); *added by*, Fla. Laws 1963, ch. 63-144, § 1.

99. The change was implemented by Fla. Laws 1967, ch. 67-254, § 11. Today, all of the provisions providing for supplementary proceedings in aid of execution are contained in Fla. Stat. § 56.29 (1969).

100. South Florida Trust Co. v. Miami Coliseum Corp., 101 Fla. 1351, 1355, 133 So. 334, 336 (1931); *accord*, Richard v. McNair, 121 Fla. 733, 164 So. 836 (1935).

101. Ryan's Furniture Exch. Inc. v. McNair, 120 Fla. 109, 117, 162 So. 483, 486 (1935).

In a later opinion, the same court opined that:

> [T]he purpose of the statutes, titled "proceedings supplementary," is to aid the holder of a "valid and outstanding" execution to ferret out what assets the judgment debtor may have or what property of his others may be holding for him, or may have received from him to defeat the collection of the lien or claim, that might be subject to the execution. Such proceedings are not necessary to bring new life to the judgment itself or the lien of the judgment, and seem to bear no direct relation to it. They are in the nature of proceedings in discovery of property which should be made available to the execution. As we see it, they relate directly to the execution and are designed to aid in determining through judicial process what property the defendant may have or others may have for him that could be subjected to the execution; . . .[102]

As the foregoing language indicates, supplementary proceedings are a collection device which operate to enhance the effectiveness of the writ of execution. The proceedings have been regarded as a substitute for a creditor's bill in chancery,[103] but the Florida courts have not as yet held that the jurisdiction of the circuit court in such cases has become co-extensive with the jurisdiction of the circuit court in the chancery cases.[104] In sum, the legislature, in creating proceedings supplementary to execution, intended to create an expeditious remedy for the enforcement of money judgments which would be separate and distinct from the creditor's bill in equity.

2. MORE THAN JUST A DISCOVERY DEVICE

These proceedings do more than simply seek out property which may be applied to the satisfaction of the execution. When carried to their proper conclusion, they can result in a judgment against third persons who hold property belong to the debtor. This judgment, in turn, is made subject to the writ of execution and the judgment debtor thereby receives satisfaction of the original judgment. Proceedings supplementary to execution should not be confused with discovery in aid of execution which is a process permitted by the Florida Rules of Civil Procedure.[105] The discovery process may be commenced any time after the entry of judgment and does not require the return of an unsatisfied execution in order to implement the proceedings. However, the discovery process does not have

102. Young v. McKenzie, 46 So.2d 184, 185 (Fla. 1950).

103. Reese v. Baker, 98 Fla. 52, 123 So. 3 (1929).

104. Virginia-Carolina Chem. Corp. v. Smith, 121 Fla. 720, 164 So. 717 (1935) (opinion amended as to other matters on rehearing).

105. In aid of a judgment, decree or execution the judgment creditor or his successor in interest, when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions. FLA. R. CIV. P. 1.560.

the teeth of supplementary proceedings for it operates only as a discovery device and no orders are made by the court requiring persons to produce property or show cause why the property should not be produced. On the other hand, in supplementary proceedings, the judge may order third parties to pay the judgment creditor's judgment and this order may be enforced through the court's power of contempt. The discovery procedure provided by the Florida Rules is a flexible and inexpensive supplement to supplementary proceedings but it does not operate to supplant these proceedings.[106] In this connection, the judgment creditor might find it convenient to resort first to the discovery procedure for the purposes of determining whether any third persons hold property belonging to the debtor. Once this information is obtained, and it is determined that the third parties refuse to allow the property to be applied to the judgment creditor's judgment, he may then commence supplementary proceedings in aid of execution.

3. NATURE OF THE REMEDY

In discussing the nature of the relief provided by supplementary proceedings, one of the threshold inquiries is whether the remedy is legal or equitable. An answer to this question has more effect than the mere satisfaction of academic curiosity. If supplementary proceedings were to be considered equitable in nature, this could give rise to the requirement that judgment creditors, before they may resort to this remedy, must exhaust their means of relief at law. Furthermore, the right to a jury trial in such proceedings might then be non-existent.

It seems clear to this writer that the relief provided by Florida Statute section 56.29 (1969) is legal and not equitable. Research has disclosed only one decision which casts any doubt upon this conclusion. In *Gantz v. First National Bank of Miami,*[107] the following dicta appears:

> The only time that resort to a court of *equity* to enforce a common law judgment is permitted is when the remedies provided for the satisfaction of such judgment have been exhausted, are inadequate, or are of no avail. The judgment creditor then has recourse to supplementary proceedings provided by statute or a creditor's bill to reach equitable interests not subject to levy of execution.[108]

Despite the existence of the above language, it is submitted that supplementary proceedings are legal in nature. Authority for this position can be found in the case of *South Florida Trust Co. v. Miami Coliseum Corp.*,[109]

106. Wilde v. Wilde, 237 So.2d 203 (Fla. 4th Dist. 1970).
107. 138 So.2d 367 (Fla. 3d Dist. 1962).
108. *Id.* at 368 (emphasis added).
109. 101 Fla. 1351, 133 So. 334 (1931).

which dealt indirectly with the character of the remedy provided by the supplementary proceedings statutes. In the *South Florida* case, the defendant in supplementary proceedings alleged that the remedy provided thereby was violative of the Florida Constitution in that the supplementary proceedings statutes gave the power to discover assets to the law courts. This power, the defendant asserted, was equitable in nature and, therefore, the statutes were violative of that section of the Constitution which provides that the circuit courts shall have exclusive original jurisdiction in equity. In response to this argument, the Florida Supreme Court stated that "it may be truly said, an examination of a judgment debtor is merely a matter of procedure not necessarily involving any equitable rights as such."[110]

Another case containing language which indicates that supplementary proceedings are a legal remedy is *Orange Belt Packing Co. v. International Agricultural Corp.*,[111] which involved an appeal from both the final judgment in the main action and the final judgment in the supplementary proceedings. The Florida Supreme Court referred to both of these judgments as "two separate and distinct final judgments at law, . . ."[112] To the same effect is the case of *George E. Sebring Co. v. O'Rourke*, which referred to the statutory proceedings as providing "a specific remedy at law. . . ."[113] In view of the statements found in the above mentioned decisions, as well as other authorities,[114] it appears safe to conclude that Florida Statute section 56.29 (1969) provides the judgment creditor with a legal remedy.

Another aspect of supplementary proceedings which deserves coverage at this time is the fact that the proceedings are entirely statutory.[115] Furthermore, although supplementary proceedings are a legal cause separate from the main suit,[116] they are also collateral thereto,[117] and do not constitute an independent suit.[118]

Having outlined the general nature of supplementary proceedings, attention may now be turned to an examination of the conditions precedent to the use of the remedy.

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110. *Id.* at 1358, 133 So. at 337.

111. 112 Fla. 99, 150 So. 264 (1933).

112. *Id.* at 103, 150 So. at 265.

113. 101 Fla. 885, 898, 134 So. 556, 561 (1931).

114. *E.g.*, Bennett v. Bogue, 88 Fla. 109, 101 So. 206 (1924); Note, *Civil Procedure: Running of Limitation Period Not Tolled by Supplementary Proceedings*, 4 U. FLA. L. REV. 96 (1951).

115. Street v. Sugarman, 177 So.2d 526 (Fla. 3d Dist. 1965).

116. Orange Belt Packing Co. v. International Agricultural Corp., 112 Fla. 99, 150 So. 264 (1933).

117. Codomo v. Emanuel, 91 So.2d 653 (Fla. 1956).

118. Virginia-Carolina Chem. Corp. v. Smith, 121 Fla. 720, 164 So. 717 (1935).

B. *Conditions Precedent*

1. UNSATISFIED WRIT OF EXECUTION

It is clear that one prerequisite to the relief provided by these proceedings is that the sheriff must hold a valid, outstanding and partially or totally unsatisfied writ of execution.[119] To this requirement, there appear to be no exceptions. However, although this condition seems simple enough when taken at face value, there are several problems which lurk beneath the surface.

For instance, since the execution writ must be valid and outstanding, the question of a dormant judgment, discussed in section *2 supra*, may arise at this point. Of course, even if there is still such a thing as a dormant judgment in Florida, this problem may be cured quite easily on motion pursuant to Florida Rule of Civil Procedure 1.100 (b). Nevertheless, the judgment creditor should be apprised of this possibility when preparing to commence supplementary proceedings.

Another difficulty which may exist in this area arises from the recent amendment of the statutes involved. The earlier versions provided that once the execution had been returned unsatisfied, the proceedings could be commenced "in the court from which such execution issued, . . ."[120] Today the corresponding provision provides merely that "[w]hen any sheriff holds an unsatisfied execution, the plaintiff in execution may file an affidavit so stating and that the execution is valid and outstanding and thereupon is entitled to these proceedings supplementary to execution."[121] Nowhere in the current statute is there any indication that the judgment creditor must commence the supplementary proceedings in the same court from which the execution issued. Under this new statute, may the judgment creditor commence his supplementary proceedings in a court other than that which rendered the final judgment in the main cause? Although research has disclosed no case directly dealing with this question, it is submitted that the answer lies in the fact that the supplementary proceedings are not a separate action upon a judgment, but, rather, a collateral proceeding ancillary to the main cause.[122] Since this statute section was "intended to empower the court to follow through with the enforcement of its judgment,"[123] it would appear that despite the statutory silence on this point, the judgment creditor must still commence his proceeding in the same court from which the writ of execution was issued.

119. FLA. STAT. § 56.29(1) (1969). The requirement that there be an unsatisfied return of the execution of course implies that there must have been some form of a *money* judgment. See, p. 599 *supra*.

120. FLA. STAT. § 55.52 (1963).

121. FLA. STAT. § 56.29(1) (1969).

122. *Cf.* Virginia-Carolina Chem. Corp. v. Smith, 121 Fla. 720, 164 So. 717 (1935).

123. *Id.* at 725, 164 So. at 719.

Another uncertainty which has arisen as a result of the requirement that an unsatisfied writ of execution be returned prior to the commencement of supplementary proceedings is exemplified by the case of *State ex rel. All Florida Land Co. v. Thomas Manors, Inc.*[124] In this case, the judgment debtor resided in a county different from the one in which the court rendering the final judgment was located. Following the dictates of the statute then in effect,[125] the trial judge ordered that the supplementary proceedings be conducted by a commissioner located in the county of the judgment debtor's residence. Subsequent to the appointment of the commissioner, the judgment debtor sought to arrest the proceedings through the use of a writ of prohibition. He contended "that the appointment of a commissioner to proceed under the terms of the act in [the county of his residence] was ineffective prior to placing the execution in the hands of the Sheriff of that County and having it returned unsatisfied."[126] The Florida Supreme Court refused to accept this contention, holding that an unsatisfied return in the county wherein the judgment was originally rendered was sufficient to comport with the terms of the statute.

2. FILING THE AFFIDAVIT

Aside from the return of an unsatisfied execution, the only other condition precedent to the institution of supplementary proceedings is the filing of an affidavit. This affidavit must state that the sheriff holds an unsatisfied, valid, and outstanding execution. Probably the only difficulty surrounding this requirement is the question of who may execute the affidavit. Under the earlier statutes it was specifically provided that "the plaintiff in execution, his agent or attorney, may *make and file*" the affidavit.[127] Today the corresponding section provides only that the plaintiff in execution may file the affidavit. There is no indication as to whether the plaintiff's attorney or his agent may still *make* the affidavit.

3. NO NEED TO EXHAUST LEGAL REMEDIES

Since supplementary proceedings are characterized as a remedy at law, it is unnecessary for the judgment creditor to exhaust his legal remedies prior to resorting to supplementary proceedings. This is quite the opposite of the rule with regard to creditor's bills in equity for in order to be entitled to that remedy, the judgment creditor must first exhaust his legal remedies including supplementary proceedings in aid of execution. In contrast, it is evident from the case law that such a prerequisite does not exist when one resorts to supplementary proceedings. For example,

124. 136 Fla. 207, 186 So. 421 (1939).

125. COMP. GEN. LAWS § 4540 (1927).

126. State *ex rel.* All Florida Land Co. v. Thomas Manors, Inc., 136 Fla. 207, 210, 186 So. 421, 422 (1939).

127. FLA. STAT. § 55.52 (1963).

in *General Guaranty Insurance Co. v. DaCosta*,[128] the plaintiff in execution learned that his debtor carried liability insurance. He then commenced supplementary proceedings and impleaded the liability insurer. Although the court found that the proceeds from the liability insurance policy would clearly be subject to execution pursuant to a garnishment judgment (a legal remedy), the court nevertheless allowed the judgment creditor to implead the insurer over the insurer's objection that the procedure was improper. It seems clear that the exhaustion of legal remedies is not a condition precedent to the institution of supplementary proceedings in aid of execution.[129]

C. *Procedure*

1. IN GENERAL

Upon the return of the unsatisfied writ of execution, the plaintiff in execution may commence his supplementary proceeding.

> To launch such procedure the "plaintiff in execution" files in the court "from which such execution issued" an affidavit merely stating that the writ is valid and outstanding, giving the residence of the defendant. That sets the machinery in motion which secures to him an examination of the defendant and, if the circumstances warrant it, of others who have been involved in gifts, transfers, or assignments of the defendant's property. Upon the information so obtained, the judge may order such property in the hands of the judgment debtor himself or others as the evidence justifies to be applied toward the satisfaction of the debt.[130]

After filing the affidavit, the plaintiff moves the court to order the defendant in execution to appear before it, a commissioner, or master at a time and place specified by the order.[131] After this, the order is served upon the defendant and such other persons as are named in the affidavit. The examination is then conducted with a view towards disclosing whether the defendant in execution has any property which may be used to satisfy the judgment. Once all the testimony is taken and it appears that there is property subject to the judgment, either in the hands of the debtor or some third person, the judge may order the property applied toward the satisfaction of the judgment debt. If the property so discovered is in the hands of the judgment debtor, no problem exists; he is already a party

128. 190 So.2d 211 (Fla. 3d Dist. 1966).

129. *But cf.* Gantz v. Nat'l Bank, 138 So.2d 367 (Fla. 3d Dist. 1962).

130. Young v. McKenzie, 46 So.2d 184, 185 (Fla. 1950), *noted in* 4 U. FLA. L. REV. 96 (1951).

131. As a practical matter, this is usually done in the affidavit. For excellent examples of these affidavits, the reader should consult the following sources: FLORIDA BAR CONTINUING LEGAL EDUCATION DIV., FLORIDA CIVIL PRACTICE AFTER TRIAL § 3.29 (1966); A. SAPP, FLORIDA PLEADING, PRACTICE AND LEGAL FORMS § 56.29 (1971).

to the proceedings. Therefore, if he does not comply with the order, he may be punished for contempt. On the other hand, if the property is in the hands of a third person, that person must be impleaded and made a party to the supplementary proceedings so that the court's order will be binding upon him. This is usually done by serving upon the third person a rule to show cause why the property should not be taken and applied to the satisfaction of the judgment. Once the third persons have been made parties to the proceedings their rights may be finally adjudicated and the sheriff may then levy execution upon the property if the court orders. The only exception to this is provided in subsection 6(b) of Florida Statute section 56.29 (1969). According to that subsection, if the judgment creditor can make a prima facie showing that the debtor transferred property with the intent to defraud the creditor, the court may order the sheriff to levy upon the property and require the third person to then proceed pursuant to Florida Statute sections 56.16-56.20 (1969).[132] This provision for levy in advance of a final determination of the third person's rights has given rise to considerable confusion and misunderstanding.

> In the exercise of the ample discretion granted by the statute, no order directing the sheriff to take any property alleged to have been fraudulently transferred should be made on the *prima facie* showing contemplated by Section . . . [56.29 (6)(b)] unless every person whose rights may be affected thereby, and who is not already a party to the proceedings, be by said order impleaded and made a party thereto and afforded by the terms of said order full right to be heard and cited and directed to file an answer setting up his claim to the property within a reasonable time to be fixed by the order, a copy of which should be served upon him. And in the exercise of that discretion no such preliminary order should be made unless the judge be satisfied, either by affidavit, or by other evidence before him, that the application of the plaintiff therefor is well founded and made in good faith, and in every proper case security should be required for the protection of any third person who claims the title or possession of any property ordered seized.[133]

From the language quoted above, an omission in the statute suddenly becomes apparent; *i.e.*, the procedure for levy in advance of final determination provided by subsection 6(b) cannot be implemented until the third person, in whose possession the property is to be found, has been impleaded and made a party to the supplementary proceedings. Once this has been done, and only after a convincing preliminary showing that the debtor intended a fraudulent transfer, may the court order a levy in advance of the final determination as to whether the property should be ap-

132. The procedure set out in these sections is that which is normally applied when third persons have claims to property which is levied upon pursuant to the ordinary writ of execution.

133. Richard v. McNair, 121 Fla. 733, 745, 164 So. 836, 841 (1935).

plied to the satisfaction of the debt. If all of the above conditions are met, the court will order such a levy to be made and the property will then be within the jurisdiction of the court.

> The property being thus brought into the power of the court and protected from dissipation, concealment, or further transfer, the court should forthwith proceed to determine the issue.
>
> If the claimant fails to answer within the time required and the judge be satisfied from the evidence before him that the alleged transfer is void and that the seized property is subject to the execution, he should enter a default against the claimant and order the sheriff to sell the property to satisfy the execution.
>
> But, if the claimant answers and asserts an adverse claim to the property seized, the issue thus presented should be, on demand of either party, submitted for the determination of a jury on whose verdict an appropriate judgment may be entered and execution issued, which judgment may be reviewed by writ of error.[134]

Recapping briefly, the general procedure used in supplementary proceedings is as follows: The proceedings are commenced with the affidavit, the defendant and other persons are examined as witnesses, and findings of fact and conclusions of law are then made by the judge or a commissioner appointed by him. Up to this point the procedure is fairly simple. However, once property which would be subject to the judgment has been located, the matter becomes more complicated. When property has been located, one or several of the following things may occur: (1) If the property is completely in the debtor's possession, the court may order that it be executed upon; (2) If the property is in the hands of third persons, and was not transferred by the debtor *with the intent* to hinder or defraud his creditors, the third person must be impleaded, given an opportunity to be heard, and then a final determination must be made by the court as to whether the property should be made subject to the judgment creditor's writ of execution; or (3) If the property is in the hands of a third person who has been impleaded and allowed to be heard, and there has been a prima facie showing by the judgment creditor that the property was transferred by his debtor to hinder or defraud creditors, the court may order the sheriff to levy upon the property prior to the final determination as to whether it should be subject to the writ.

The foregoing general outline of the procedure used in supplementary proceedings is, of course, subject to some exceptions. For instance, the statute appears to be oriented more towards dealing with personal property than with real property.

There is no provision in these sections for a procedure in refer-

134. *Id.* The procedure to be followed if the claimant answers is set out in detail in FLA. STAT. §§ 56.16-56.20 (1969).

> ence to determining rights in real estate. The procedure in such respect is different from that in reference to personal property, as the statutes recognize. Instead of prescribing procedure in reference to real estate, the broad power is given the judge [in subsection 9] to prescribe what in his discretion may be the proper procedure in reference to real estate. . . . All claimants to the real estate must have a day in court. This is self-evident, and it is incumbent upon the court, under the power here conferred, to provide such procedure as will give all claimants in interest in reference to real estate a hearing.[135]

Another important factor pertaining to this general procedure is the judgment creditor's right to a day in court. In *Ferguson v. Goodley*,[136] the plaintiff in execution caused a *rule nisi* to be entered against the judgment debtor's insurer ordering the insurer to show cause why a judgment should not be entered against it. The insurer filed an affidavit asserting that it had not insured the judgment debtor. Upon this ground and several others, the insurer moved to quash the *rule nisi*. Although the record was unclear, the trial court apparently dismissed the *rule nisi* based upon an examination of the pleadings and affidavits. On appeal, the judgment was reversed on the ground that the judgment creditor was "not afforded adequate opportunity to present such evidence and testimony as may be relevant to [his] claim. . . ."[137] From the foregoing decision, it appears that all parties to supplementary proceedings must be given the opportunity to be heard with respect to their claims to the property sought to be applied to the judgment.

2. JURISDICTION

It seems clear that the procedural steps called for by the supplementary proceedings statutes are jurisdictional and must be complied with in order to give the court the power to grant the relief requested.[138] Despite this fact, there is considerable uncertainty as to what constitutes fulfillment of several of these steps. For instance, the order requiring the defendant in execution to appear and be examined concerning his property is required by subsection 3 of the current statute to "be served in a reasonable time before the date of the examination in the manner provided for service of summons or may be served on such defendant or his attorney as provided for service of papers in the rules of civil proce-

135. Florida Guar. Sec. v. McAllister, 47 F.2d 762, 765 (S.D. Fla. 1931). The section referred to now provides "[t]hat the court may enter any orders required to carry out the purpose of this section to subject property or property rights of any defendant to execution." FLA. STAT. § 56.29(9) (1969).

136. 213 So.2d 495 (Fla. 4th Dist. 1968).

137. *Id.* at 497.

138. *Cf.* Tomayko v. Thomas, 143 So.2d 227 (Fla. 3d Dist. 1962). In *Tomayko*, the plaintiff in execution failed to file an affidavit and attempted to commence the proceedings by a petition for a *rule nisi*. This procedure was held to be insufficient to confer jurisdiction over the proceedings.

dure."[139] This provision is substantially similar to the requirement set out in the earlier statutes which required that the order "be served upon the defendant at least fifteen days before the time set for such examination, and shall be served by the Sheriff in the same manner provided for service of subpoena."[140] The reader should note that the current statute, as well as its predecessors, calls for service of the order upon the defendant in execution, and this requirement is mandatory. Strict adherence to this requirement is necessary even though the proceedings are supplemental to the main cause. It is true that in a proceeding to modify the alimony provisions of a divorce decree, which is by nature a proceeding supplemental to the original decree, the parties to the main action are not again entitled to actual service of process but only to an adequate and reasonable notice of the new proceedings.[141] Be this as it may, the rule in supplementary proceedings is not the same. Although proceedings supplemental to a divorce decree and proceedings supplementary to execution are both collateral to the main cause and do not constitute a separate action, they nevertheless differ in the respect that supplementary proceedings in aid of execution are controlled by their own separate statute. The requirement of service upon the defendant in execution, even though he was a party to the previous action, is a statutory requirement and must be adhered to in every case.

Another jurisdictional aspect of supplementary proceedings which deserves mention at this point concerns itself with the various courts in which the proceedings may be brought. Are supplementary proceedings available in all the courts of this state, and, if so, is identical relief available in each court? At one time there was some authority to the effect that supplementary proceedings were available only in the circuit courts of this state. Today, however, there is no merit to this position. The civil court of record, with respect to its own judgments, has full power to conduct supplementary proceedings and implead third parties as may the circuit court with respect to its own judgments.[142] Furthermore, the civil court also has the power to appoint a commissioner as provided by the statute.[143] But although supplementary proceedings are available in the civil court of record, the relief obtainable is not quite the same as that which can be given by the circuit courts.

> The Civil Court of Record . . . is a statutory court. A limitation upon the jurisdiction of the Civil Court of Record . . . is provided by Article V, Section 6 of the Constitution of the State of Florida, . . . which expressly states that the Circuit Courts shall

139. FLA. STAT. § 56.29(3) (1969).
140. FLA. STAT. § 55.53 (1963).
141. Carter v. Carter, 164 So.2d 219 (Fla. 1st Dist. 1964).
142. Brownstone, Inc. v. Miami Nat'l Bank, 165 So.2d 262 (Fla. 3d Dist. 1964).
143. *Id.* This power is statutory and has nothing to do with the constitutional power to appoint commissioners which is limited to the circuit courts. *Id.*

> have exclusive original jurisdiction in all cases in equity and 'all actions involving the titles or boundaries of real estate, . . .'[144]

In other words, the civil court of record has jurisdiction to entertain supplementary proceedings but may neither enter any order involving the title to real property[145] nor grant any equitable relief.

Until recently, it was thought that the small claims court, created by chapter 42 of the Florida Statutes, had no power to entertain supplementary proceedings.[146] Presently, however, the Attorney General has taken the following position:

> [I]t appears that the Judges of the Small Claims Courts, created and operating under the provisions of Ch. 42, F. S., are empowered to entertain proceedings supplementary to its execution, as provided for in Sections 55.52-55.611 F. S. however, all actions that may be taken pursuant to the provisions of Sections 55.52-55.611, F. S., involving equitable matters, titles and boundaries of real estate are exclusively matters within the Circuit Courts jurisdiction.[147]

The federal district courts of this state also have jurisdiction to entertain supplementary proceedings. At one point, this jurisdiction was conferred by a federal statute which provided that the "party recovering a judgment in any common-law cause in any district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are provided in like causes by the laws of the state in which such court is held, ..."[148] The federal district courts are now authorized to institute the forum state's supplementary proceedings by virtue of Federal Rule of Civil Procedure 69.

3. APPOINTMENT OF A COMMISSIONER

According to the current supplementary proceedings statute, "the Court may refer the proceeding to a commissioner or master who may be directed to report findings of law or fact, or both."[149] Although this statute indicates that the court may make such an appointment at any time, there appears to be some question as to when, if at all, such an ap-

144. Blackwelder v. D'Ercole Enterprises, Inc., 126 So.2d 598, 600 (Fla. 3d Dist. 1961) (interpreting the 1865 Constitution). The provisions of the 1968 Constitution are essentially the same in this regard. *See* FLA. CONST. art. V, § 6 (1968).

145. An action involving real property is one "where the necessary result of the decree or judgment is that one party gains or the other loses an interest in the real estate, . . ." Barrs v. State *ex rel.* Britt, 95 Fla. 75, 80, 116 So. 28, 29 (1928).

146. [1955-1956] FLA. ATT'Y GEN. BIENNIAL REP. 736.

147. [1965-1966] FLA. ATT'Y GEN. BIENNIAL REP. 389, 390 (specifically overruling all previous opinions in conflict therewith).

148. 28 U.S.C. § 727 (1926) in Florida Guar. Sec. Inc. v. McAllister, 47 F.2d 762, 764 (S.D. Fla. 1931). Section 727 has since been replaced by FED. R. CIV. P. 69.

149. FLA. STAT. § 56.29(7) (1969).

pointment would become mandatory. It was fairly well settled that under the former version of this statute, "[i]f the residence of the defendant is in another county, the order of the judge shall name a commissioner 'in that other county' . . . ."[150] The language of the earlier statutes provided quite plainly that if the defendant in execution resided in the county in which the court was located, the court could, in its discretion, hear the matter or appoint a commissioner for that purpose. On the other hand, if the defendant in execution resided in another county, the court was required to appoint a commissioner.[151] It is suggested that under the present version of this statute, the result will be exactly the same. The relevant subsection provides that "the court shall require the defendant in execution to appear before it or a commissioner or master at a time and place specified by the order in the county of the defendant's residence to be examined concerning his property."[152] The mandatory portion of the language is that the defendant shall only be made to appear in the county of his residence. Thus, if the court is located in another county, it must appoint a commissioner. Furthermore, there is nothing in the language of the current statute which would operate to prevent the court from appointing a commissioner even when the defendant resides in the county wherein the court is located.

Each case, of course, will give rise to its own advantages and disadvantages with respect to the appointment of a commissioner. However, this author recommends that the hearing be held before a judge whenever possible.

> The practice of appointing commissioners varies from place to place. If possible, in the interests of economy and quicker results, it is preferable to have the judge hear the matter.
>
> As a practical matter, if a commissioner must be designated or is in fact designated, it is well to have a date set before the actual signing of the order, allowing sufficient time for service. It is preferable for psychological effect to have the commissioner use a courtroom so that the defendant in execution will be impressed with the serious nature of the proceeding and the obligation to tell the truth.[153]

In the event that a commissioner is used and the creditor is dissatisfied

150. State *ex rel.* All Florida Land Co. v. Thomas Manors, Inc., 136 Fla. 207, 210, 186 So. 421, 422 (1939).

151. [T]he plaintiff shall thereupon be entitled to have from the judge of said court an order requiring the defendant or defendants in said execution to be and appear in case the residence of defendant is in the county in which the court is located, before the judge of said court or some commissioner designated in said order, and in case the residence of defendant is in another county, then before some commissioner designated in said order in that other county, at a time and place specified in said order and then and there to be examined concerning his property.

FLA. STAT. § 55.52 (1963).

152. FLA. STAT. § 56.29(2) (1969).

153. FLORIDA BAR CONTINUING LEGAL EDUCATION DIV., FLORIDA CIVIL PRACTICE AFTER TRIAL § 3.27 (1969).

with the results of the commissioner's report, the creditor may move the court to set the report aside.[154] Apparently, this is the proper procedure for preserving error and the creditor may assign as error the denial of the motion to set aside the commissioner's report.

4. POWERS OF THE COURT

Generally speaking, the power of the court entertaining supplementary proceedings is wide-ranging and amenable to a flexible application. "The Court may enter any orders required to carry out the purpose of this section to subject property or property rights of any defendant to execution."[155] Of course, the court is limited, as always, by the Constitution and the concept of due process.

One important power is the ability to implead third persons and make them a party to the supplementary proceedings whenever it appears that relief against them may be warranted. Unlike the statutes of some other states, Florida's statute provides that "the judges have the power, and it is their duty, to bring in and implead third parties whenever it appears relief against them may be warranted."[156] The details surrounding the procedure for impleading third parties will be discussed in a later section.

Contempt power is another important adjunct of supplementary proceedings. In proceedings supplementary to execution, the court may order the defendant, or any other person, to disclose the location of any property which may legally be applied to the satisfaction of the judgment. If the person so ordered refuses to comply, the court may have him imprisoned until he purges himself of the contempt by complying with the order.[157]

In supplementary proceedings the court may not only seek out other property, but may also "direct an inquiry into the corporate entity and to make an order thereon in accordance with evidence submitted" as to whether the corporate veil should be pierced and the individual stockholders made liable for the debts of the corporation.[158] This ability to pierce the corporate veil is not specifically mentioned by the statute but is part of the broad discretionary power conveyed thereby.

Under this generous umbrella of authority, it has been held that the courts have the power in supplementary proceedings to adjudicate the judgment debtor's rights under a liability insurance policy. An example is *General Guarantee Insurance Co. v. DaCosta*,[159] where the judgment

154. First Nat'l Bank v. Bebinger, 99 Fla. 1290, 128 So. 862 (1930).

155. FLA. STAT. § 56.29(9) (1969).

156. Richard v. McNair, 121 Fla. 733, 743, 164 So. 836, 840 (1935).

157. Reese v. Baker, 98 Fla. 52, 123 So. 3 (1929). This power is expressly provided by statute. FLA. STAT. § 56.29(10) (1969).

158. Riley v. Fatt, 47 So.2d 769, 773 (Fla. 1950).

159. 190 So.2d 211 (Fla. 3d Dist. 1966).

debtor's liability insurer was impleaded in the supplementary proceedings. The insurer objected to being impleaded on the ground that the judgment debtor's rights under the insurance policy were not property rights but were choses in action not reachable through the procedure being employed. This position was completely rejected by the third district which held that the phrase "property rights," as used in the supplementary proceedings statute, was broad enough to encompass the debtor's rights under a liability insurance policy. Further, the court found that even if these rights were to be characterized as choses in action, supplementary proceedings are ordinarily the proper remedy for reaching choses in action. This being the case, the district court of appeal reasoned that the court had the power in such proceedings to adjudicate the extent of the debtor's rights under the liability policy.

Because the language of the statute appears to convey such broad discretionary power, one would be of the opinion that at least the circuit courts, when entertaining supplementary proceedings, would be able to grant equitable relief where it was necessary to protect the judgment creditor's right to enforce his judgment. However, the only case dealing with this subject which research has disclosed seems to hold to the contrary. In *Street v. Sugerman*,[160] the trial court entered an order in a supplementary proceeding enjoining the judgment debtors from secreting, transferring, or hypothecating any assets belonging to a corporation in which they owned stock. The corporation had never been a party to the suit, but the stockholders were the judgment debtors in the main cause and their stock in the corporation had already been made subject to a levy of execution. In the supplementary proceedings, the judgment creditors sought to protect the value of the stock levied upon by enjoining the debtors from transferring any of the property of the corporation to third persons. On appeal to the third district, the court sua sponte decided that the trial court was without jurisdiction to issue an injunction in a common law action, interfering with the assets of a corporation and the rights of third party stockholders who were not parties to the action.

> Even though proceedings supplemental to execution may have been commenced, it does not appear that there is any statutory authority for a trial judge in a common law action to issue an injunction of the nature involved herein. We have examined the provisions of Ch. 55, Fla. Stat., and particularly § 55.60 Fla. Stat., F.S.A., relative to supplemental proceedings and it appears that, although the trial judge would have the authority to 'subject any property or property rights of any defendant to the satisfaction of any execution against him.', this was not the purported purpose of the order in the instant case.[161]

160. 177 So.2d 526 (Fla. 3d Dist. 1965).
161. *Id.* at 527.

A careful analysis of this decision leaves the reader with several questions. Was the holding really based upon the fact that the statute did not confer to the court entertaining supplementary proceedings the power to issue an injunction? Or was the holding based upon the fact that some of the stockholders of the corporation who were affected by the injunction were not parties to the original suit or the supplemental proceedings? It is suggested that the latter reason would provide a sounder basis for denying the relief requested in the *Street* case. No reading of the current statute will support the position that there is an implied prohibition against the use of equitable power in supplementary proceedings. In fact, if an implication exists, it is the contrary. As to the apparent emphasis placed by the court upon the fact that the underlying cause was a legal action, this writer fails to see any significance in that point in the light of the merger of law and equity. In any event, the *Street* case seems to represent the only significant restriction upon the powers exercisable in proceedings supplementary to execution.

5. IMPLEADING THIRD PARTIES

When seeking the satisfaction of a judgment through the process of supplementary proceedings it is important to note that the court in such proceedings cannot adjudicate the rights of third persons until they have been fully impleaded and properly made a party to the supplementary proceedings. The cases are legion wherein the judgment creditor has proceeded to a final adjudication with respect to certain property only to have his judgment reversed on appeal because a person or persons claiming an interest in that property were not joined as party defendants in the action.[162]

> If during the course of proceedings supplementary to execution the rights of third parties claiming adversely both to plaintiff in execution as well as to defendant in execution appear to be involved, no rights of such third parties should be adjudged to be affected, impaired, or finally cut off by any order of court made in such proceedings supplementary to execution, unless such third parties have been first fully impleaded and brought into the case as actual parties to the proceeding, and, as such, given an opportunity to fully and fairly present their claims *as parties* entitled to a full and fair hearing after the making up of definite issues to be tried, and not as mere spectators or bystanders in the cause.[163]

"[T]he statutes are silent on the procedure for bringing in third parties

162. *See, e.g.*, Ryan's Furniture Exch. Inc. v. McNair, 120 Fla. 109, 162 So. 483 (1935); Shanjim Publications, Inc. v. Haft, 179 So.2d 219 (Fla. 2d Dist. 1965); Crawford v. United States Fidelity and Guar. Co., 139 So.2d 500 (Fla. 1st Dist. 1962).

163. Ryan's Furniture Exch. Inc. v. McNair, 120 Fla. 109, 120, 162 So. 483, 487 (1935).

in order to protect their interest."[164] However, the decisions seem to indicate that there are several different methods available for impleading third persons. One method is

> by the service of an appropriate *rule nisi* upon them requiring them to appear and show cause why their asserted claims to disputed assets in their hands, possession or control should not be inquired into and held to be voidable as to the plaintiff in execution who is seeking to reach such disputed assets in order to satisfy his judgment against his judgment debtor whose assets he claims they in reality are.[165]

Other possible methods would be the third parties' voluntary intervention to protect their interests or service upon them of the original affidavit. Of course, the bulk of the problems and confusion have centered around the *rule nisi* or a rule to show cause as it is sometimes called.

The *rule nisi* is not an order requiring third parties to pay the judgment or suffer being held in contempt. On the contrary,

> [t]he construction to be placed on the order is that it presents *prima facie* findings against the respondents which they are required to answer and upon the allegations of which issues may be made up for the jury trial, if jury be demanded by either party, or that in default of issues being made by the pleadings default judgment may be entered and execution issued, which judgment may be reviewed on writ of error.[166]

In other words, the *rule nisi* orders the defendant to submit himself to the jurisdiction of the court and to show cause why certain of his property should not be applied to the judgment creditor's judgment. Upon his appearance in the cause, he becomes a party thereto and the court can then, on the basis of his answer, frame the issues of law and fact to be decided in the case.

It is important to note that the issuance of the order impleading third parties is not merely procedural. By this it is meant that the order should not issue unless the judgment creditor has made a prima facie showing that the third person has property which should be applied to the satisfaction of the judgment creditor's writ of execution.[167] If this requirement were not made, every judgment which remained unsatisfied could result in a fishing expedition by the creditor who is casting wildly about in the hopes of finding some assets belonging to his debtor. More than a mere hunch is required for the issuance of the rule to show cause.

The need for impleading is, of course, a result of the requirement of

164. FLORIDA BAR CONTINUING LEGAL EDUCATION DIV., FLORIDA CIVIL PRACTICE AFTER TRIAL § 3.30 (1966).

165. Ryan's Furniture Exch. Inc. v. McNair, 120 Fla. 109, 120, 162 So. 483, 488 (1935).

166. State *ex rel.* Phoenix Tax Title Corp. v. Viney, 120 Fla. 657, 665-66, 163 So. 57, 61 (1935).

167. Advertects, Inc. v. Sawyer Indus. Inc., 84 So.2d 21 (Fla. 1955).

due process. No person should have his property rights affected without a chance to be heard. In this connection, it might be added that the form of the rule to show cause must be sufficient to put the third person on notice as to the nature of the proposed proceedings. It is not sufficient that the third party merely be impleaded by the order to show cause, for the order must identify the scope of the examination and the exact nature of what is being sought. In the case of *Meyer v. Faust*,[168] the order involved gave notice only of a proposed examination concerning the property of the defendant. The court held this language was not broad enough to "contemplate an inquiry of the scope necessary to an adjudication of adverse interests . . . ."[169] In other words, the order did not put the third person on notice that the judgment creditor was seeking to have transfers to the third person declared fraudulent. The lesson to be learned is that the party seeking to implead a third person should see to it that the order to show cause specifically identifies the exact nature of the inquiry.[170]

Another method of compelling a third person to become a party to the action, which has been hinted at in the cases, is through service of the affidavit. Presumably, if the affidavit names the third person as a party defendant and is served on him, that person will then become a party to the supplementary proceedings.[171]

With reference to the question of who may be impleaded, the only limitation appears to be the above-mentioned prima facie showing that the third person may have property which should lawfully be subjected to the creditor's judgment. It is now well settled in this state that even the judgment creditor's liability insurer may be impleaded into the supplementary proceedings.[172] Probably the only significant problem in this area is who is to be impleaded when the third person is a dissolved corporation. In *Scott v. Harrison*,[173] the court held that in such a situation it may order any person to appear.

6. EXAMINATION AND EVIDENCE

Rules governing the procedure for examination are another aspect of these proceedings which deserve special mention. As the previous section indicated, only parties to the proceedings can be bound by the judgment. However, nothing prevents either party from causing any

168. 83 So.2d 847 (Fla. 1955).

169. *Id.* at 848.

170. An excellent form for the Rule to Show Cause appears in FLORIDA BAR CONTINUING EDUCATION DIV., FLORIDA CIVIL PRACTICE AFTER TRIAL § 3.34 (1966).

171. *Cf.* Kornberg v. Krupka, 118 So.2d 790 (Fla. 3d Dist. 1960).

172. General Guar. Ins. Co. v. DaCosta, 190 So.2d 211 (Fla. 3d Dist. 1966).

173. 134 Fla. 696, 184 So. 233 (1938). According to the court, although the statute requires a corporation to appear and answer by an officer, if no such officer exists, the court can compel a trustee, receiver, or any other person to attend on behalf of the dissolved corporation.

person to be subpoenaed and subject to the examination. Even where the proceedings are conducted before a commissioner or master, he has the power to issue a subpoena compelling any person to testify.[174]

A matter giving rise to some question in this area has been the scope of the examination itself. The statute prescribes a liberal rule and provides for a comprehensive examination.

> So long as the examination is directed to matters affecting the business or financial interests of the defendant, what property he has, his rights thereon, and the location thereof, whether within or without the State, the examination is pertinent and competent. The purpose of the statute is to aid judgment creditors in securing information that would lead to the satisfaction, in whole or in part, of any execution held by them. Any information which tends directly or indirectly to do this must be given.[175]

Of course, there must be a limit to the examination. It has been held that the proceedings

> cannot be employed as a predicate to pry into a judgment debtor's private affairs in the absence of reasonable or well founded belief of concealment or fraudulent transfer of property, nor can it be used to uncover the personal affairs or relations of unfortunate debtors in search of some clue leading to the information desired.[176]

But beyond this limitation, the examination may take any reasonable course.

The foregoing language provides a general guide for what constitutes admissible evidence in these proceedings. If the evidence sought to be admitted takes the form of a document or similar object, the test is whether "the plaintiff has made a reasonable showing that the document is likely to" show what property the defendant has.[177]

One other point with respect to evidence which is worthy of special note relates to depositions taken in aid of execution. It will be recalled that Florida Rule of Civil Procedure 1.560 provides that a judgment creditor may conduct depositions in aid of execution. This procedure supplements, but does not supplant, the remedy provided by supplementary proceedings and may be used in conjunction therewith. It has been held that testimony taken at such a deposition is admissible in supplementary proceedings even when the person against whom it is being admitted was not a party to the supplemental proceedings at the time the deposition was taken.[178]

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174. FLA. STAT. § 56.29(7) (1969).

175. Reese v. Baker, 98 Fla. 52, 55, 123 So. 3, 4 (1929).

176. *Id.*

177. Keystone Trust Co. v. Rockefeller, 118 So.2d 604, 607 (Fla. 1st Dist. 1960). Here the document held to be admissible was a partnership agreement.

178. Hanisch v. Wilder, 210 So.2d 491 (Fla. 3d Dist. 1968), holding that the admission

7. LEVY UPON THE PROPERTY

Once these proceedings have been pursued to a final judgment against either the judgment debtor himself or some third person, the creditor may then levy execution pursuant to that judgment. But the statute is silent as to whether there is a need for the issuance of a new writ of execution or whether the old writ may again be issued to the sheriff for the purposes of levy and sale. Probably the better practice is to have a new writ of execution issued upon the judgment rendered in the supplementary proceedings. However, there is authority to the effect that "a premature return by way of endorsement '*nulla bona*' on the execution is not necessarily such a *final* return of the execution as works its dissolution."[179] In *Ryan's Furniture Exchange Inc. v. McNair,*[180] the final order in the supplementary proceedings required the clerk of the circuit court to deliver to the sheriff the execution which had originally been returned to the court unsatisfied and had formed the foundation for the supplementary proceedings. On appeal, it was argued that this order was not provided for by the statutes and was therefore erroneous. The Florida Supreme Court held that the writ had not been finally returned; therefore new execution was unnecessary. Thus, it appears that upon the rendition of final judgment in the supplementary proceedings, the creditor may sue out a writ of execution upon the new judgment or, if the order so provides, have the sheriff levy pursuant to the original writ.

Another uncertain area surrounding the concept of levy pursuant to supplementary proceedings relates to the time at which such a levy may be made. In the previous paragraph, the discussion was with reference to levy after the final judgment in the supplemental proceedings. Such a levy is probably the most typical in relation to these proceedings. But it is possible, in certain cases, to have the sheriff levy upon the property prior to the final judgment in the supplementary proceedings. The provision for such a procedure is found in Florida Statute section 56.29(6)(b)(1969) which provides that:

> When any gift, transfer, assignment or other conveyance of personal property has been made or contrived by defendant to delay, hinder or defraud creditors, the court shall order the gift, transfer, assignment or other conveyance to be void and direct the sheriff to take the property to satisfy the execution.

It will be recalled from an earlier section[181] that this procedure may be employed only when the person receiving the transfer has already been made a party, has been allowed to present his evidence, and a prima

of such a deposition in no way violates the rule in Brown v. Tanner, 164 So.2d 848 (Fla. 1st Dist. 1964).

179. Ryan's Furniture Exch. Inc. v. McNair, 120 Fla. 109, 119, 162 So. 483, 487 (1935).

180. *Id.*

181. See p. 622 *supra*.

facie showing has been made by the judgment creditor that the transfer was for the purpose of defrauding creditors. Apparently the statute does not apply to all fraudulent transfers and is only applicable to those wherein the transferor actually intended to defraud his creditors. In this particular situation, and only after the transferee has been properly impleaded and there has been a prima facie showing that the transfer was fraudulent, the court may order the sheriff to immediately levy upon the property in the hands of the third person.

> [T]hereafter 'any person who may be aggrieved thereby may file claim and bond as provided in other cases where third persons claim property taken under levy.... This procedure in reference to personal property is certainly proper because such property may be wasted, lost, or concealed, and therefore the trial of title concerning the same is fixed after possession is taken by the sheriff. All parties in interest have their day in court therefore, fixed by the statute, and the court proceeds to try title under these proceedings supplemental to execution to this personal property and to decree whether the same is the property of the judgment debtor and subject to levy under execution to satisfy the judgment.[182]

The claim and bond procedure mentioned in the above quotation is now provided for by Florida Statute sections 56.16-56.20 (1969). When this procedure is invoked by the person whose property is levied upon by the sheriff, he may file an affidavit with the sheriff and post a bond equal to double the value of the property and thereby regain possession of the property immediately. In all such cases, a jury trial is had on the question of the right to possession of the property unless it is waived.

In summary, levy is normally carried out only at the conclusion of the supplementary proceedings but, in the special case of a prima facie showing of an intentionally fraudulent transfer, levy may be had prior to the final judgment in the proceedings.

8. FEES AND COSTS

In 1963, the statutes pertaining to supplementary proceedings were amended to provide for the taxing of costs. The rule is simply that all costs pertaining to the proceedings as well as other reasonable incidental costs (not limited to docketing the execution, the sheriff's returns and service fees, and the court reporter's fees) will be taxed to the defendant in execution.[183] But it has been held that attorneys' fees are not "costs" within the meaning of the statute.[184] Therefore, the general rule

182. Florida Guar. Sec. Inc. v. McAllister, 47 F.2d 762, 764 (S.D. Fla. 1931).

183. FLA. STAT. § 56.29(11) (1969).

184. Codomo v. Emanuel, 91 So.2d 653 (Fla. 1956). In this case, the promissory note sued upon in the main cause provided for attorney's fees but the court stated that the provision could have no effect upon impleaded parties who were not privy to the note itself.

is that in supplementary proceedings it would be improper for the court to award attorneys' fees to the creditor as against either the debtor or impleaded third parties.[185]

D. *Rights of Third Parties*

Probably the most important right afforded to third persons in these proceedings is the opportunity to present their claims, as parties, on the issues involved including questions as to whether conveyances of property of the judgment debtor are avoidable as to them. This has been fully discussed in earlier sections and needs no further mention at this point. It is sufficient to say that in all cases third persons are entitled to all the guarantees of procedural due process.

Does an impleaded third party have a right to trial by jury in supplemental proceedings? According to one authority, the answer to this question is yes. The position taken is that "[t]here is no statutory right to a jury; the right results from the due process provisions established by *Richard v. McNair*, 121 Fla. 733, 164 So. 836 (1936) and *Ryan's Furniture Exchange v. McNair*, 120 Fla. 109, 162 So. 483 (1935)."[186] Perhaps this conclusion is entirely correct, but the case law cited in support thereof does not necessarily reach such a holding. The principle case, *Ryan's Furniture Exchange v. McNair,* involved a situation wherein the judgment creditor, at the hearings before the commissioner, had made out a prima facie showing that the property had been transferred by the debtor with the intent to defraud his creditors. The commissioner made findings of fact and law to this effect, and the findings were approved by the circuit court. The circuit court eventually issued an order to the sheriff to levy upon the property held by the third person transferee. On certiorari to the Florida Supreme Court, the action of the trial court was reversed because this order had been entered without first impleading the third person and giving him an opportunity to state his case. The Supreme Court went on to state

> that the ordinary right to a jury trial of issues of fact developed in such a case should not be denied, where a third party sets up *bona fide* such claim to disputed assets in his hands, possession or control, that his rights thereto could only be properly asserted and adjudicated against him in a *statutory claim proceeding*.[187]

The statutory claim proceeding referred to in the *Ryan* case provides for a statutory right to a jury trial. According to the facts of the case, there was a prima facie showing that the defendant had intentionally transferred his property for the purpose of defrauding his creditors.

185. Schwartz v. Sherman, 210 So.2d 469 (Fla. 3d Dist. 1968).

186. FLORIDA BAR CONTINUING LEGAL EDUCATION DIV., FLORIDA CIVIL PRACTICE AFTER TRIAL § 3.31 (1966).

187. Ryan's Furniture Exch. Inc. v. McNair, 120 Fla. 109, 121, 162 So. 483, 488 (1935) (emphasis added).

This placed the *Ryan* case squarely within the ambit of what is now subsection 6(b) of the supplementary proceedings statute which provides that any person aggrieved by a levy made pursuant to that subsection may file for a claim and bond proceedings which affords to him a statutory right to a jury trial. This writer does not conclude that the constitutional right to a jury trial is absent in supplementary proceedings, regardless of the claim of the judgment creditor; rather, it is suggested that the decisions leave the question moot.

A fairly recent decision tends to imply that the right to trial by jury in supplementary proceedings is a statutory right, and therefore, limited. In *Dezen v. Slatcoff*,[188] the plaintiff in execution impleaded the third party defendant and proceeded to make out a prima facie showing that the third party had received property transferred with the intent to defraud creditors. On this basis, the trial court ordered the sheriff to levy upon the property. On appeal, the third party argued that this procedure violated her constitutional right to trial by jury. This argument was rebuffed by the court for several reasons.

> There is no merit to the contention of the appellant that her constitutional rights were invaded because she did not have a jury trial. . . . In the first place, this was a summary proceeding especially authorized by law and limited as above set forth, and no trial by jury was required.[189]

As another basis for the ruling, the court pointed out that if the third party was aggrieved by the action and wished to contest the findings and order of the circuit judge, she could do so by filling a claim and bond and proceed as in those cases where a third person claims property taken under levy. This would give the third party a right to trial by jury, a statutory right.

Another substantial right of third persons with respect to these proceedings is to interplead into the supplementary proceeding when they are a stakeholder of a fund owed to the principal debtor. A third party holding a fund which is owed to the principal debtor in supplementary proceedings may make an application to intervene pursuant to Rule 1.240 of the Florida Rules of Civil Procedure, and deposit the fund into the court registry.[190]

E. *Property Subject to Supplementary Proceedings*

Both real and personal property may be made subject to proceedings supplementary to execution.[191] It is immaterial whether the prop-

188. 66 So.2d 483 (Fla. 1953).

189. *Id.* at 485. *See also* Brownstone, Inc. v. Miami Nat'l Bank, 165 So.2d 262 (Fla. 3d Dist. 1964).

190. Carter v. Carter, 164 So.2d 219 (Fla. 1st Dist. 1964).

191. Florida Guar. Sec. Inc. v. McAllister, 47 F.2d 762 (S.D. Fla. 1931).

erty is located within or without the state, because the proceedings operate in personam and the court may always enforce its judgment against the person of the defendant by way of its contempt power.[192]

Property which has been the subject of a fraudulent transfer is, of course, reachable through supplementary proceedings because the court has the power to void the transfer.[193] Furthermore, so long as the transfer is by some rule fraudulent, it may be voided in supplemental proceedings even if it was not made specifically with the intent to defraud creditors within the meaning of subsection 6(b). An example of such a transfer might be a bulk sale[194] or a sale and a temporary retention of possession.[195] With respect to fraudulent transfers, it is important to note that subsection 6(a) does not operate to exempt fraudulent transfers made more than one year prior to the rendition of judgment in the main cause. It only operates to shift the burden of proof from the plaintiff to the defendant in execution if the transfer was actually made within one year of the judgment.[196]

In conclusion, the property subject to supplementary proceedings includes virtually all property rights of the defendant in execution including such interests as choses in action and rights under a liability insurance policy.[197]

F. *Statute of Limitations*

The time limitations placed upon the commencement of supplementary proceedings are relatively simple once it is understood that the maximum limitation is not placed upon the commencement but upon the *completion* of the proceedings. In *Young v. McKenzie*,[198] the plaintiff in execution revived his dormant judgment with a writ of *scire facias* prior to the time the 20-year statute of limitations on judgments had run. The execution was issued, returned *nulla bona*, and the plaintiff commenced supplementary proceedings. After the issuance of the *rule nisi* and the impleading of a third party defendant, the 20-year period from the rendition of the final judgment in the main cause finally expired. According to the Florida Supreme Court, the defendant in execution had the right to have the *rule nisi* quashed after the running of the 20-year period. Supplementary proceedings cannot be used to search out property after the twentieth year because to do so is futile. Florida Statute section 95.11(1)(1969) provides that an action upon a judgment must be made within twenty years and Florida Statute section 56.021 (1969) says that execution is only

192. Reese v. Baker, 98 Fla. 52, 123 So. 3 (1929).
193. Licata v. Acolite Sign Co., 183 So.2d 865 (Fla. 3d Dist. 1966).
194. *See* FLA. STAT. ch. 676 (1969).
195. *See* McKibbin v. Martin, 64 Pa. 352 (1870).
196. Swartz v. Lipsky, 241 So.2d 448 (Fla. 3d Dist. 1970).
197. General Guar. Ins. Co. v. DaCosta, 190 So.2d 211 (Fla. 3d Dist. 1966).
198. 46 So.2d 184 (Fla. 1950), *noted in* 4 U. OF FLA. L. REV. 96 (1951). *See also* 19 FLA. JUR. *Judgments* §§ 513-514 (1958) relating to time limitations and revival.

good during the lifetime of the judgment. Therefore, if the supplementary proceedings are not completed during the life of the judgment, there is no point in finishing them because a valid execution could not be issued upon the underlying judgment which had since expired. The upshot of the *Young* case is that the institution of supplementary proceedings does not toll the running of the statute of limitations on the main cause. If the statute runs while the proceedings are still in process, there is no longer a valid and outstanding execution upon which the supplementary proceedings may be based for the execution lives only for the life of the judgment.

Another point to be discussed with respect to time periods is the question of dormancy which was mentioned earlier in this article.[199] The reader should remember that there is still a possibility that judgments become dormant in Florida and need to be revived.

G. *Right to Review*

As early as 1930, the Florida Supreme Court dealt with the question of whether the final order in proceedings supplementary to execution was one which could be appealed.

> While the question is new with us, and the authorities are in some conflict, we are of the opinion that the judge's final order or judgment, rendered at the conclusion of such special proceedings, adjudicating the question as to whether certain property is or is not subject to be applied to the satisfaction of the plaintiff's judgment and execution, is so far final and conclusive in its nature as to constitute a final judgment to which writ of error will lie, . . . and that it may be deemed to have been rendered in a 'case' within the meaning of Section 5 of Article V of the Constitution.[200]

The general rule appears to be that any person actually made a party to the supplementary proceedings may appeal the final judgment thereof.[201] Of course, the party appealing must show that the order entered in the supplementary proceedings was adverse to him.[202]

As to the weight given to findings of fact and conclusions of law made by the trial court in supplementary proceedings, the appellate court is required to follow the rules applied in the appeal of an ordinary case. Once the court approves the commissioner's findings of fact and law these findings are also accorded their usual weight upon appeal.[203]

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199. See p. 600 *supra*.

200. First Nat'l Bank v. Bebinger, 99 Fla. 1290, 1293, 128 So. 862, 863 (1930); *accord*, Orange Belt Packing Co. v. International Agricultural Corp., 112 Fla. 99, 150 So. 264 (1933).

201. Ryan's Furniture Exch., Inc. v. McNair, 120 Fla. 109, 162 So. 483 (1935); State *ex rel.* Phoenix Tax Title Corp. v. Viney, 120 Fla. 657, 163 So. 57 (1935).

202. Shanjim Publications, Inc. v. Haft, 179 So.2d 219 (Fla. 2d Dist. 1965).

203. Stengel v. Biggar, 129 Fla. 627, 176 So. 786 (1937).

Aside from the right of review pursuant to a writ of error (appeal), the use of other writs of review in supplementary proceedings is highly limited. In *Saffran v. Adler*,[204] the supreme court held that since the final order issued in a supplementary proceeding is treated as a final judgment and is appealable by a writ of error, there can be no review of the judgment by common law certiorari. On the other hand, a writ of prohibition to the district court is the proper remedy to restrain the execution of a circuit judge's order adjudicating the rights of a third party who is not properly impleaded into the supplementary proceedings.[205] To be entitled to this remedy, however, the facts which show that the court below lacked jurisdiction over the third party must be undisputed.

IV. Conclusion

One of the purposes sought to be accomplished by this article is a critical evaluation of the current supplementay proceedings statute. In the preceding sections, the operation of the remedy was analyzed and conclusions were reached with respect to the procedure to be used and the relief available. From the outset, it became apparent that supplementary proceedings should provide the judgment creditor with a highly efficient collection device for reaching virtually all of the debtor's assets subject to execution. However, it also became clear, as the various aspects of the remedy were examined, that there are several ambiguities and uncertainties concerning both the procedure to be followed and the rights of the parties. It remains now to sum up the more serious trouble spots and recommend to the legislature those changes which might be needed.

At the threshold is the problem concerning the dormancy of judgments. Our statutes should specifically indicate whether the common-law rule of dormancy has been eliminated.

Turning to the supplementary proceedings statute, several changes are necessary. The statute should clearly state that a remedy at law was intended. In this connection, reference should be made to the fact that there is no need for the judgment creditor to exhaust his other legal remedies. The right to a jury trial should be clearly spelled out as to each phase of the proceedings. There needs to be a statement in the statute which informs the judgment creditor that he must commence the proceedings in the court rendering the judgment in the main cause, assuming this to be the legislative intent. A statement should be inserted indicating who may make the affidavit; the attorney, the plaintiff's agent, or only the plaintiff. Much clarification is needed concerning the time at which levy is permitted. The section providing for levy in advance of a final determination is thoroughly confusing. Finally, it is suggested that the

204. 152 Fla. 405, 12 So.2d 124 (1943).
205. State *ex rel.* O'Dare v. Kehoe, 189 So.2d 268 (Fla. 3d Dist. 1966).

need for, and methods of, impleading third parties be clearly explained in the statute.

Perhaps those who are inclined to resist any of the above amendments base their position upon the fact that the answers to the questions sought to be resolved are to be found in the case law. But even if this position were sound, and it is doubtful that it is, how can the statute purport to provide a "salutory and expeditious" remedy when the judgment creditor must wade through volumes of reporters to determine such simple matters as where and when to file what?