Real Property Law

Ralph E. Boyer

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Judicial rather than legislative activity accounted for the principal developments in the field of real property during the period of this survey. Litigation involved all major areas of property law in the usual plentiful amount. Noteworthy decisions included: application of the estoppel by deed principle to a mortgage executed by only one of the entireties tenants; establishment of the superiority of a perfected federal tax lien over the widow's dower in personalty; validation of the statute affording preferential tax assessment to agricultural lands; and erosion of the indemnity principle in fire insurance cases.

Legislative activity included clarifying amendments to the Condominium Act, the most significant of which was the provision exempting pre-emptive and similar occupancy control agreements from the rule against perpetuities.

Because of the large number of decisions and the breadth of the subject matter, this material represents the writers' selection of the most noteworthy and significant developments. A reaffirmation of principles well established in Florida, particularly as they apply to commonly recurring fact situations, is generally excluded.

The style of the article is similar to that of previous surveys except that the principal headings have been rearranged. The material is discussed in order under the following headings:

**REAL PROPERTY LAW**

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* Acknowledgment is gratefully accorded the Lawyers' Title Guaranty Fund, Orlando, Florida, for its annual grant to the University of Miami School of Law. This contribution is used at the University of Miami to encourage student research in property law and to aid professors in the research and preparation of articles. The preparation of this paper was aided by the Fund's contribution.

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1. The period covered is the 1963-65 biennium, or more specifically, from volume 155, p. 128 through volume 176 of the Southern Reporter, second series, and applicable Federal Reports.
2. Hillman v. McCutchen, 166 So.2d 611 (Fla. 3d Dist. 1964), discussed infra text following note 23.
3. In re Griffin's Estate, 164 So.2d 883 (Fla. 2d Dist. 1964), discussed infra text following note 85.
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**UNIVERSITY OF MIAMI LAW REVIEW** [Vol. XX
I. MORTGAGES

A. Deficiency Decrees and Value Determination

The foreclosure sale price has been held inconclusive for purposes of determining a deficiency when the mortgagee is the purchaser at a clerk's foreclosure sale.\(^8\) This result has been reached in the face of the statute providing that "The value of the property sold by the clerk shall be conclusively presumed to be the amount bid therefor and for which the property was sold at the sale. . . ."\(^9\) Before the statute several cases involving foreclosure by a master in chancery had taken a position similar to the statutory pronouncement, namely that the value of the property between the parties is conclusive as to its value in considering the question of a deficiency.\(^10\) The rule denying the conclusiveness of the value is applicable whether the deficiency is sought in the foreclosure proceedings themselves or in a separate suit at law on the note.\(^11\)

The fairness of the rule permitting the court to look behind the foreclosure price is strikingly illustrated by *Maudo, Inc. v. Stein.*\(^12\) In *Maudo* the mortgagee held a purchase money note and mortgage in the amount of $73,000 dollars. Upon default and foreclosure the mortgagee bid $500 dollars and purchased the property. Thereafter he instituted an action at law to recover on the note. The trial court awarded the mortgagee the face amount of the note plus attorney's fees and interest, less the $500 dollars which was bid at the foreclosure sale. This was done notwithstanding admitted evidence that the property in question was valued from at least $82,000 to as much as $120,000 dollars. In reversing,

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8. The courts of appeal in all three districts concur. *Maudo, Inc. v. Stein,* 171 So.2d 403 (Fla. 3d Dist. 1965); *Jonas v. Bar-Jam Corp.,* 170 So.2d 479 (Fla. 3d Dist. 1965); *Builders Fin. Co. v. Ridgewood Homesites, Inc.,* 157 So.2d 551 (Fla. 2d Dist. 1963); *Kurkjian v. Fish Carburetor Corp.,* 145 So.2d 523 (Fla. 1st Dist. 1962).


10. *Etter v. State Bank,* 76 Fla. 203, 79 So. 724 (1918); *Jacksonville Loan & Ins. Co. v. Nat'l Mercantile Realty & Improvement Co.,* 77 Fla. 825, 82 So. 292 (1919). See also: *Tendler v. Gottlieb,* 126 So.2d 308 (Fla. 3d Dist. 1961), holding that the fact that the land was sold at a substantial profit eight months later does not of itself show inadequacy of price; *Connelly v. Central States Southeast & Southwest Areas Pension Fund,* 315 F.2d 683 (5th Cir. 1963), for the federal position in applying Florida law.

11. In *Maudo, Inc. v. Stein,* *supra* note 8, the question of a deficiency and the value of the foreclosed realty was raised in a subsequent law action; in *Jonas v. Bar-Jam Corp.,* and in *Builders Fin. Co. v. Ridgewood Homesites, Inc.,* both *supra* note 8, the issue was raised in the foreclosure proceedings.

12. 171 So.2d 403 (Fla. 3d Dist. 1965).
the appellate court clearly indicated that the trial court was in error in not considering the value of the property in arriving at the measure of damages which should be awarded.

A rationale behind the apparent circumvention of the statute is contained in *Jonas v. Bar-Jam Corp.* Therein, the Third District Appellate Court stated: "[W]hile the provision of § 702.02(5) . . . making the bid price conclusive as to value on a mortgage foreclosure sale is useful for certain purposes such as determining the validity of the sale, it is not binding on the chancellor on the matter of value when considering an application for deficiency decree." Thus, there seems little doubt but that the provision of section 702.02(5) which establishes the bid price as the value has been laid to rest.

This result is desirable, but the limits of the rule are not yet established. The cases cited involved situations where the mortgagee was the purchaser at the foreclosure. It is obviously fair to offset the value of the property acquired from the debt remaining in those situations. The same considerations, however, may not apply if a third party or outsider purchases the property at the foreclosure sale. In that situation it may very well be that the best evidence of value is the price bid. Further, the effect of the rule, if any, on foreclosures by masters' sales is not clear. The rule has been that although the rendition of such a decree is within the sound judicial discretion of the court, the sum bid is conclusive as to value unless the sale is vacated or an appeal prosecuted. In any event, the assertion or retention of general equitable principles will permit the courts to reach fair and just results.

It must be recognized that although the bid price will not be treated as conclusive, the courts have been quick to reverse the denial of a deficiency where the record does not indicate sufficient equitable considerations to support such denial. In *Nathanson v. Weston*, a purchase money second mortgagee foreclosed and purchased at the sale

13. 170 So.2d 479 (Fla. 3d Dist. 1965).
14. *Id.* at 480. Denial of a deficiency decree was affirmed.
15. Although the Supreme Court of Florida does not appear to have resolved the precise point, the conclusion seems supportable on the basis of the decisions reached in all three intermediate appellate courts. See cases cited *supra* note 8.
16. Letchworth v. Koon, 99 Fla. 451, 127 So. 321 (1930); 2 BOYER, FLA. REAL ESTATE TRANSACTIONS § 32.21, at 1065 (1964). The principle is also inherent in the cases discussed in this section.
17. See the first two cases cited *supra* note 10.
18. See Frank v. Levine, 159 So.2d 665 (Fla. 3d Dist. 1964), holding to the effect that all equitable defenses that may be raised in equity upon application for a deficiency incident to the foreclosure, may be raised at law in defending an action on the note.
19. In Weinstein v. Park Manor Constr. Co., 166 So.2d 842 (Fla. 2d Dist. 1964), the court reversed the denial of a deficiency decree where the record did not reveal that the defendant offered any real evidence to refute the value of the property from the price bid at the sale.
20. 163 So.2d 41 (Fla. 3d Dist. 1964).
for 100 dollars. There remained a deficiency in excess of 15,000 dollars. The chancellor refused to grant the decree, apparently relying on the mortgagor's position that at the time of the original purchase 3,200 dollars was paid in cash and prior to default some 3,500 dollars was paid toward reducing the first and second mortgage. In reversing the court stated "No equitable considerations appear in this record sufficient to warrant the denial of the deficiency." It would appear that a required equitable consideration is a showing that the foreclosed property purchased by the mortgagee is at the time of foreclosure worth considerably more than that amount for which it was purchased.

B. Estoppel, or Twinkle, Twinkle Little Eye

In an apparent case of first impression, the principle of estoppel by deed has been applied to validate in part a mortgage executed by only one of the entireties tenants. The case is Hillman v. McCutchen, wherein the husband alone executed a note and mortgage encumbering entireties property. The parties were subsequently divorced and the wife was awarded the property as lump sum alimony. Default in the mortgage caused the plaintiff to seek foreclosure. The wife defended on the ground that she was never a party to the note and mortgage and counterclaimed for cancellation. The trial court cancelled the note and mortgage and the mortgagee appealed. The appellate court held that, although the mortgage was ineffective to encumber the property while it was held as an estate by the entireties, the property became a tenancy in common upon the divorce, and the doctrine of estoppel by deed caused the lien of the mortgage to attach to the after-acquired one-half interest of the husband at the instant of the divorce. Accordingly, the husband's interest, as awarded to the wife, was subject to the lien of the mortgage. Although the property was conveyed to the wife in the same decree which granted the divorce, the court held that, "It has long been recognized that one's legal condition may change in the 'twinkling of an eye'. . . We therefore conclude that that title may pass into and out of a person by operation of law in the 'twinkling of a legal eye.'" It was accordingly

21. Id. at 42.
23. 166 So.2d 611 (Fla. 3d Dist. 1964).
24. The doctrine of estoppel by deed vests in a grantee the after-acquired title of a grantor who had no title at the time of the conveyance. See generally 1 BOYER, FLA. REAL ESTATE TRANSACTIONS § 15.11(3), at 332 (1964) as to mortgages. The mortgage in issue contained a warranty of title covenant.
25. Hillman v. McCutchen, 166 So.2d 611 (Fla. 3d Dist. 1964).
26. Id. at 613.

The short period involved in this case is reminiscent of the short period of time involved in the operation of the Statute of Uses. In explaining that statute, CASNER & LEACH, CASES AND TEXT ON PROPERTY 373 (1951) state:

How long was Throckmorton seized of the land? A scintilla juris—not absolute zero (one minus one) but relative zero (one over infinity)—a period of time shorter than any period you can mention, but still a period of time, witness Pimbe's Case.
held that although the same instrument that created the tenancy in common created the wife's interest in the husband's half, the lien attached before the wife took.

It is a delight to bear witness to the compelling logic of the court. However, there are some implications which may cause difficulty. Although the court did not state that the property in question was other than homestead, caution suggests that the doctrine be limited at best to non-homestead property. Where the property is homestead, there would appear to be no way to avoid the conclusion that the mortgage trans-

Then in a footnote, the authors add:

Our mathematical friends tell us that "relative zero" and one-over-infinity are old hat, pre-atomic and perhaps anti-democratic. Now they just call it zero. When we object that it is hard to see how the Queen got anything in Pimbe's Case if Throckmorton got zero, they answer that we would do better to go at it geometrically instead of arithmetically—it's like the point at which two lines intersect, which has a length of zero—or, better still, the point at which a tangent touches an arc, which also has a length of zero. "Gosh," they say, "is this what you lawyers spend your time on?" And we say, "Sure, especially at Harvard. All our time."

Somewhat along the same lines is the metamorphosis of googolplex from a very large number into a very small number under former City of Miami tax procedures. This is detailed in 2 Boyer, supra note 24 § 31.20, at 921.

Competition among bidders eventually resulted in the discovery of the "Googolplex," a quantity supposedly as near to nothing as possible—one over one with countless zeros. This, however, was not the limit of minuteness. The "Googolplex of a Googolplex," or "Gee Gee" for short, became the common bid in the sale of City of Miami tax certificates.

A footnote further explains:

Miami Herald, 10-G, Sunday, Je. 24, 1956. The ingenious bidder who first cried "googolplex" may have had a hazy memory from his higher Mathematics course, or else, resolving to be master of the words and not their slave, used his own definition.

Consider the following excerpt from Kasner & Newman, "Mathematics And The Imagination" (1940), p. 23:

The name "googol" was invented by a child (Dr. Kasner's nine-year-old nephew) who was asked to think up a name for a very big number, namely 1 with a hundred zeros after it. He was very certain that this number was not infinite and therefore equally certain that it had to have a name. At the same time he suggested "googol," he gave a name for a still larger number: "Googolplex." A googolplex is much larger than a googol, but is still finite, as the inventor of the name was quick to point out. . . . The googolplex then, is a specific finite number, with so many zeros after the 1 that the number of zeros is a googol. A googolplex is much bigger than a googol, much bigger even than a googol times a googol. A googol times a googol would be 1 with 200 zeros, whereas a googolplex is a 1 with a googol of zeros.

For further discussion of the googol and googolplex, consult Kasner and Newman, supra. It is again emphasized that the Miami tax bidders regard the googolplex as a very small number (the googol representing a very large number, and the googolplex, 1 over a googol, or a very small number), and not a very large number as conceived by Messrs. Kasner and Newman.

27. The possibility of estoppel by deed applied to conveyances by one of entireties tenants is discussed in 1 Boyer, Fla. Real Estate Transactions § 20.02, at 445 (1964) and in Boyer, Memorandum on Proposed Title Standard Relative to Estate by the Entirety, 32 Fla. B.J. 136 (1958). The logic of such a position was apparently not impressive to the committee which promulgated the title standards as Title Standard 6.3, reprinted in 1 Boyer, supra this note, at 280, takes the position that a conveyance or mortgage by only one of the entireties tenants is a nullity and remains a nullity thereafter regardless of what later happens. The court was either unimpressed or unaware of both of these enlightening scholastic endeavors as it cited neither the title standard nor the opposing observations.
action was void for failure of the wife's joinder. There is authority for
the proposition that a void deed does not give rise to an estoppel. A
similar argument as to the instrument being void can be applied to a
purported conveyance by one of the entireties tenants. This is particu-
larly true if the one conveying tenant is the wife. On the other hand,
there seems to be no sensible reason for not applying estoppel by deed
principles to ineffective conveyances of either husband or wife to enti-
reities realty.

It also may be noted that the result of the decision may be the
ousting of the divorced wife from the possession and enjoyment of the
property which was awarded to her in the divorce proceeding. If in fact
the wife cannot purchase the interest at the mortgage foreclosure sale,
the purpose of the lump sum alimony award may be thwarted. The
purchaser at the foreclosure sale will become a tenant in common, and
if co-possession or physical division is not feasible, as it likely will not be,
he may bring a partition action and cause the whole estate to be sold with
the cotenants sharing in the proceeds. Another intriguing problem is

28. Fla. Const. art. X, § 1. For an exhaustive treatment of the limitations on the con-
veyance and encumbrance of Florida homestead law, see articles by Shapo and Buchwald, infra, note 67.

29. Phillips v. Lowenstein, 91 Fla. 89, 107 So. 350 (1926), indicating that a deed by a
married woman, void because of the non-joinder of her husband, may be no predicate for
an estoppel. The rule would apply with even more cogency to a void conveyance of the
homestead where the constitution requires the joinder of both parties.

30. That the joinder of both parties is necessary for a conveyance or encumbrance of
entireties property has been held or asserted many times: Cooper v. Maynard, 156 Fla. 534,
23 So.2d 734 (1945); Strauss v. Strauss, 148 Fla. 23, 3 So.2d 727 (1941); Newman v.
Equitable Life Assur. Soc. of U.S., 119 Fla. 641, 160 So. 745 (1935); Anderson v. Trueman,
100 Fla. 727, 130 So. 12 (1930); English v. English, 66 Fla. 427, 63 So. 822 (1913); Bailey v.
Smith, 89 Fla. 303, 103 So. 833 (1925); Anderson v. Carter, 100 So.2d 831 (Fla. 2d Dist.
1958); Penzi v. David, 122 So.2d 635 (Fla. 2d Dist. 1960); Yanfianaro v. Ninos, 123 So.2d
286 (Fla. 2d Dist. 1960).

The exceptions to the above rule that a husband can convey entireties property to the
wife without her joinder, Hunt v. Covington, 145 Fla. 706, 200 So. 76 (1941), and the
statutory agency permitting non-separated spouses to contract for the imposition of
mechanics' liens to jointly held property, LeRoy v. Reynolds, 141 Fla. 586, 193 So. 843
(1940), are not relevant to this discussion.

In the instant case the court treated the mortgage at its inception as ineffective to
operate as an encumbrance rather than being void and a nullity, unless the instrument might
be void without being void forever.

31. Fla. Stat. §§ 693.01 and 708.08 (1963), provide that a deed or mortgage by a
married woman is not valid without the joinder of her husband. A married woman's deed
without the husband's joinder is generally said to be void, Wilkins v. Lewis, 78 Fla. 78, 82
So. 762 (1919); Phillips v. Lowenstein, 91 Fla. 89, 107 So. 350 (1926). But see Hill v.
Lummuus, 123 So.2d 365 (Fla. 3d Dist. 1960), where estoppel was applied apparently to
punish a prior conveyancer to the married woman when the object was to defeat creditors.
The case is discussed in Boyer, Survey of Real Property Law, 16 U. Miami L. Rev. at 151-152
(1961), wherein it is pointed out that the prophylactic effect of the decision will be largely
lost on the fraudulent grantor who has in the interim departed this earthly life.

32. Mystical common law concepts of the unity of husband and wife deserve little
more than a tolerant smile in our sophisticated society of equal rights, frequent divorce,
mARRIED women's property laws, and frequent predominant attainment of the female of the
species. The dogma that entireties tenants are seized per tout et non per my need not shock
us into silent obsequiousness.
C. Homestead, or a Void Mortgage is a Void Mortgage Sometimes

The problem of a mortgage executed by only one of the marital community was compounded in *Tri-County Produce Distribs., Inc. v. Northeast Prod. Credit Ass'n.* Therein the affected property was homestead held as an estate by the entireties. The wife had not signed the mortgage instrument in the space provided, but she had signed a rider which was attached thereto.

The dispute evolved into one between two mortgagees—the plaintiff, which also held two prior properly executed mortgages, and the defendant, which held a properly executed subsequent mortgage. The plaintiff filed suit for reformation on the basis of mutual mistake and asked that the instrument be reformed by the addition of the wife’s signature. The defendant contended that the mortgage was void for failure of the wife to join in the execution of the mortgage.

The trial court reformed the instrument in accordance with the plaintiff’s request, but the intriguing question as to the possibility of reformation by the addition of signatures was circumvented when the appellate court affirmed the decision on other grounds. There were three written opinions, two of them asserting an estoppel against the mortgagors on the basis of their failure to perfect an appeal, and an estoppel against the defendant on the basis of the recording act. The

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33. The question of the effect of the recording act on the principle of estoppel is discussed in 1 Boyer, supra note 27 § 15.11(2), at 329.
34. The recording act, Fla. STAT. § 695.01 (1963), protects from unrecorded instruments subsequent bona fide purchasers for value without notice of the unrecorded instrument. In the instant case the wife did not have actual notice when the mortgage was executed; it was not stated when it was recorded if at all; and the wife was a subsequent grantee as to the husband’s one-half interest, but whether she was a purchaser for value is more difficult. Also, the question as to whether a recorded ineffective mortgage such as this one would constitute constructive notice is not without some difficulty. A deed or instrument not entitled to record does not constitute constructive notice although it is in fact recorded. This rule, however, generally pertains to instruments not properly executed because of a defect in some formalities, such as acknowledgment or witnesses. See Lassiter v. Curtiss-Bright Co., 129 Fla. 728, 177 So. 201 (1937); McKeown v. Collins, 38 Fla. 276, 21 So. 103 (1896).
35. 160 So.2d 46 (Fla. 1st Dist. 1963).
36. See supra subsection B and note 27 as to the necessity of both husband and wife to join in a conveyance or encumbrance of entireties property; supra note 28 as to a similar requirement for homestead property.
37. The only support cited for the proposition was Sumner v. Rhodes, 14 Conn. 134 (1840), and this would be of doubtful applicability to the homestead “protected” by the Florida constitution.
38. 160 So.2d 46, 46 and 51 (Fla. 1st Dist. 1963), for the opinions of Justices Wigginton and Sturgis.
third opinion, by Justice Rawls, was predicated on the proposition that the wife did sign the mortgage since there is no requirement that it be signed in any particular place.

It is submitted that the decision has limited applicability. Because of the default on the prior properly executed mortgages, the mortgagors were assured of losing their land anyway, the only point in issue being the priorities of the third and fourth mortgage. However, the case raises interesting questions which may produce litigation in the future.

D. Usury

1. ACCELERATION INTO NOTHINGNESS

A large caveat to lenders in drafting mortgages and notes with acceleration clauses is the lesson of First Mortgage Corp. v. Stellmon. In this case the face amount of the note included principal and interest for ten years, and both the note and mortgage contained acceleration clauses which provided that upon default the entire sum mentioned in the note would become due and payable at the option of the holder. Upon default the mortgagee did not seek to accelerate but rather sought to foreclose only for the past due installments. It was held that the existence of an acceleration clause which did not preclude the mortgagee from recovering unearned interest upon default rendered the note usurious. Inasmuch as the mortgagee could have foreclosed on the face amount of the note, the note was usurious and subject to the penalties provided in the usury statutes.

It is difficult to tell whether the penalty imposed was in accordance with civil or criminal usury. The trial court labeled it civil usury but in applying the civil penalty the result was extinguishment of the entire debt. The appellate court indicated that if the face amount were recovered and prorated over the date of the initial loan to the date of the final decree it would amount to criminal usury. However, the result of extinguishing the debt would have been the same had the criminal penalty been imposed.

The significance of the decision is clear: acceleration clauses must be so worded that the possibility of recovering unearned interest is precluded. Although the instant case might be distinguished on the ground that this was an add-on note, the principle would seem equally appli-

39. Id. at 52.
40. Of course, if the third mortgage were entirely void, it is conceivable that the foreclosure sale would bring more than enough to pay the other three mortgages and that any surplus would go to the mortgagors and not to the third mortgagee. Because the mortgagors failed to perfect an appeal, however, the trial court's decision is binding on them and they cannot defeat the interest of the third mortgagee.
41. 170 So.2d 302 (Fla. 2d Dist. 1964).
42. The add-on note contained a face amount in excess of 20,000 dollars. The principal advanced was less than 13,000 dollars. This in effect provided for the face amount of the note including interest over the ten year period.
cable to notes merely representing the principal with a stipulated rate of interest as long as the terms of the provision permit acceleration of both principal and interest to the indicated maturity date. In any event, attorneys would be wise to recheck all form notes and mortgages for a possible defect in the acceleration clause. It is believed that the following suggested form of acceleration clause will avoid the problem of the Stellmon case:

If any sum of money herein referred to be not promptly paid within —— days next after same becomes due, then the entire sum mentioned herein, less any unearned interest, or the entire balance unpaid thereon, less any unearned interest, shall forthwith or thereafter, at the option of the holder become due and payable.

2. SECURITY, SALE AND SUBTERFUGE

The desire to circumvent usury statutes or to avoid other rules of mortgage law may influence the parties to clothe a lending of money in the garments of some other transaction such as a sale with provision for repurchase. Cases involving this problem during the period of the survey have decided the genuineness of the transaction in each instance but have given few guidelines for future determinations. Thus in Dante v. Givens, the plaintiff assigned a 6,800 dollar note and mortgage to the defendant for 3,000 dollars and a promise by the defendant to reassign in six weeks if the plaintiff paid 3,600 dollars. The plaintiff sought cancellation on the basis that the transaction was a usurious loan. The trial court agreed with the plaintiff and the appellate court affirmed the finding that the transaction was a loan rather than the sale of a mortgage. The court required the defendant to reassign the note and mortgage, return 850 dollars which was collected by the defendant from the mortgagor, and cancelled the 3,000 dollar indebtedness and 600 dollar interest—a rather harsh but consistent and fair result, assuming the good faith of the assignor. However, in rightfully protecting the necessitous debtor, the law may provide a mechanism for the unscrupulous and sophisticated borrower to take advantage of or defraud an unsophisticated investor. In contrast to this case, the two cases in the following paragraphs found the transaction to be what it purported.

The Second District Court of Appeal in Mid-State Homes reaffirmed the Florida position that a sale of property on credit at a price

43. 156 So.2d 13 (Fla. 3d Dist. 1963).
44. The defendant argued that the transaction was a sale of a mortgage rather than a loan of money. The former would not be subject to the limitations of the usury laws. Support for this position can be found in Indian Lake Estates, Inc. v. Special Invs., Inc., 154 So.2d 883 (Fla. 2d Dist. 1963), holding that a sale of installment land contracts at a discount is not subject to the usury laws notwithstanding the fact that the sale was made on a recourse basis.
45. Mid-State Homes, Inc. v. Staines, 161 So.2d 569 (Fla. 2d Dist. 1964).
which is higher than the asking price for cash does not bring the usury laws into play. It is interesting to note that had the transaction been effected through the use of a purchase money mortgage rather than an agreement for deed, there would have been a usury problem. In essence, one can avoid the usury laws in the sale of property by selling on credit at a higher price instead of “lending to the buyer” via a note and mortgage so that he can meet the purchase price. An attempt to have a deed absolute with an option back treated as a usurious mortgage transaction was unsuccessful in Zmistowski v. Oxley. The court therein held that “where the relationship of seller and purchaser is established between parties the percentage of profit or loss obviously has no relation to the usury law.” The plaintiff had failed to carry the burden of proof that the transaction was other than what it purported to be and the decree of the chancellor was upheld.

3. LENDING AGENT’S COMMISSION

In Applebaum v. Laham, an agent of the lender exacted a commission from the borrower. The amount exacted when added to the computation of interest rendered the transaction usurious. The trial court took the position that although it was usurious, the fact that the lender was not a frequent money lender and the lender’s statement disclaiming any knowledge of the exaction by the agent, did not call for the activation of the criminal or civil usury penalties. The court then applied the amount exacted toward reduction of the principal amount of the loan. On appeal the third district reversed, holding that the bare statement of the lender is not enough to rebut the presumption of usury when an agent of the lender exacts a commission. The appellate court held that it was incumbent upon the lender to rebut the presumption by evidence that would show that the agent was acting without the scope of his authority.

It is difficult to reconcile the appellate court’s decision with its statement at the outset of the opinion that “The chancellor having determined his findings of fact upon conflicting evidence and there being evidence in the record to support his findings, same will not be interfered with upon this appeal.” A cynic might conclude that what the appellate court meant was that it would not interfere with those findings that supported its position. The chancellor found that there was no willful exaction of the commission or bonus by the lender or with his knowledge.  

46. 161 So.2d 706 (Fla. 2d Dist. 1964).
47. Id. at 707.
48. 161 So.2d 690 (Fla. 3d Dist. 1964).
49. FLA. STAT. §§ 687.04 and 687.07 (1963).
50. 161 So.2d 690 at 692.
51. The findings of the lower court were set out and the following portion was included: “It follows that, (sic) that Defendant is not guilty of knowingly and willfully charging or accepting more than the legal rate of interest.”
Although the statutes require willfulness or knowledge for the imposition of the usury penalties, perhaps the requirement of positive evidence to show that the lender's agent was acting without the scope of his authority in exacting a commission is necessary in order to prevent the easy circumvention of the policy prohibiting usury.

E. Extension of Debt Held Not to Relieve Third Party Mortgagor

*Exchange Nat'l Bank v. Cole* is a troublesome case. The facts are as follows: a third party mortgagor gave a mortgage to secure the debt of another. At the time for payment, the mortgagee accepted a new note from the debtor, and then upon default of the new note, the mortgagee brought foreclosure proceedings. The trial court dismissed the complaint, apparently on the theory that the mortgage was a guarantee of the payment of a note of a third party, and that the guarantors were discharged from their undertaking when the mortgagee accepted a new note which extended the time for payment.

In reversing, the appellate court appears to have departed from well settled principles of mortgage and suretyship law, but the decision is probably predicated on an entirely different principle. The court specifically stated: "We reverse upon a holding that the mortgagors undertook a primary obligation to pay the debt which was not extinguished by the taking of the second note in a lesser amount for an extended payment date." The difficulty with this position, however, is that no facts are given substantiating this conclusion. There is nothing to indicate that the mortgagors ever signed the note, and in fact the indications from the case are to the contrary. If the mortgagors did not sign the note but simply executed the mortgage, it would seem that only the property and not the mortgagors became responsible for securing the maker's obligation, and the property would seem to be only secondarily liable with primary responsibility resting on the maker.

A speculative basis for the court's statement that the debt was the primary obligation of the mortgagors is that the maker of the note was the alter ego of the mortgagors. The facts recite that a corporation was the maker of the note, and the mortgagors were the corporation's president and his wife. However, the court itself makes no mention of

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52. Fla. Stat. § 687.04 uses the word "willfully" in imposing penalties for civil usury; statute § 687.07 uses the words "willfully" and "knowingly" in imposing the penalties for criminal usury.
53. This was the rationale of the court, 161 So.2d 690 at 693.
54. 161 So.2d 715 (Fla. 3d Dist. 1964).
55. The authorities seem to be in accord that an extension to the primary obligor without the consent of the surety or guarantor will relieve the surety or guarantor. See 3 Powell, Real Property § 458 (1952).
56. 161 So.2d 715 (Fla. 3d Dist. 1964). (Emphasis added.)
57. Id. at 716.
this alter ego theory, seemingly places no special significance on the relationship of the parties, and fails to state why or in what manner the mortgagors assumed a primary obligation. It is submitted, however, that the rest of the opinion is consistent with this theory of the case. If it is assumed that the mortgagors were primarily liable, then it would seem to follow that extension of the time for payment does not extinguish the debt, and principles concerning the release of sureties have no application.

Suretyship principles are raised by the fact that the mortgagors did execute the mortgage to guarantee the debt of the third party corporation. The court begins its discussion with an earlier Florida case where the facts were similar except that the mortgage itself expressly provided that the renewal or extension of the notes without notice would be authorized. The present case there was no provision for such renewal or extension, and the court recognized this when it stated that "This is certainly a reasonable reading of what the Court said in the holding above quoted." However, the court went on to support the decision in the present case by citing authority to the effect that a renewal note does not change the character of the debt or constitute payment.

A situation analogous to the present case is commonly found where a mortgagor conveys to a third party. Then the mortgagee enters into an extension agreement with a third party grantee. In these cases the authorities are in accord to the effect that the original mortgagor is released from the primary obligation. The principle on which the release is granted is that upon conveying the grantor's status is changed from primary obligor to that of surety and that an extension without his consent will injure his right of subrogation. It is difficult to see a distinction in the two situations. In the present case the mortgagor secured the maker's obligation which was to become due on a fixed date. If in fact there is an extension of the debt without the consent of the mortgagor, then he is being forced to subject his property to a lien in excess of the period of time which was originally contemplated. In addition, his right of subrogation against the maker is destroyed or delayed during the time that the debt is extended.

F. Miscellaneous

Barone v. Walters, involved correlation of the terms of the mortgage and note. Therein the second mortgage provided that default in the first mortgage would amount to default of the second. The promissory

58. Anderson v. Trueman, 100 Fla. 727, 130 So. 12 (1930).
59. Supra note 56 at 716. The court was referring to the appellee's contention that the Anderson case was an exception to the general rule because the mortgage in the Anderson case expressly authorized the extension without notice to the mortgagor.
60. Supra note 55. See also 2 Boyer, FLA. REAL ESTATE TRANSACTIONS § 32.16 (1964).
note of the second mortgage did not contain an acceleration provision as set forth in the mortgage. Notwithstanding the omission in the note, it was held that a reference in the note to default in the mortgage is sufficient to support the acceleration.

Vance v. Fields, 62 reaffirmed the general principle that an assignment of a mortgage without an assignment of the debt creates no right in the assignee as the mortgage is a mere incident of the debt.

G. Legislation—Devise of Mortgaged Realty

Florida Laws, chapter 65-543, creates Florida Statutes section 734.051, to provide that a specific devisee of mortgaged real property shall not be entitled to have the mortgage paid at the expense of the residue of the estate unless the will expressly or impliedly shows that the testator so intended. This statute reverses the decision of Ashkenazy v. Ashkenazy's Estate. 63

II. Estates

A. Entireties—Implications and Presumptions

Cantor v. Palmer, 64 presented a somewhat strained argument by the wife of a deceased husband that he had created an estate by the entirety in unaccrued rents under a lease. The husband had owned the property individually and had executed a lease with his wife reciting that the lessors were both himself and his wife. The rent was payable to the husband alone, however. The wife contended that inasmuch as she was named as lessor with her husband there arose by implication a tenancy by the entirety in the unaccrued rents. In holding that such an implication would be unwarranted, the court reaffirmed the principle that unaccrued rent is an incident of the fee, and since there was no clear intention to create the estate none would be implied. It was also pointed out that it was necessary for the wife to join as lessor in order to release her inchoate dower. Hence, the designation of both as lessors was readily explainable without the implication of an intention to create an estate by the entirety.

In a devise to multiple persons among whom were a marital community, the interesting problem of the type and quantity of the estate of the husband and wife was presented. The case was Dixon v. Davis, 65 where the persons eligible to take were a husband and wife and three others. The will provided that all should “share and share alike.” Some of the devisees took the position that the husband and wife should take

62. 172 So.2d 613 (Fla. 1st Dist. 1965). See 2 Boyer, supra note 60, § 32.10 (1964).
63. 140 So.2d 331 (Fla. 3d Dist. 1962).
64. 163 So.2d 508 (Fla. 3d Dist. 1964).
65. 155 So.2d 189 (Fla. 2d Dist. 1963).
only a one-fourth share as tenants by the entirety. In support of this position they argued that Florida adheres to the common law view that husband and wife are one, and that when property is conveyed to a husband and wife a presumption of an estate by the entirety is raised. The court recognized the presumption but indicated that the words "share and share alike" are words which create a tenancy in common and as such manifest an intention contrary to the entireties' presumption. Accordingly, the husband and wife each took a one-fifth interest as tenants in common with the other devisees.

The application of the principle of estoppel by deed to validate a mortgage executed by only one of the entireties' tenants when an ownership interest became vested in him alone has already been discussed. 66

B. Homestead

Although the homestead area is usually a source of considerable litigation, there has been a dearth of cases during the period of this survey. However, the few that have been considered adhere to established, if non-sensical, principles 67 and occasionally resort to questionable logic to reach a desired result. 68

The proposition that an estate by the entirety cannot be created by use of a conduit without consideration where homestead status has attached to the property, was reaffirmed by the third district in Porter v. Childers. 69 The fact that the only lineal descendant had received 12,000 dollars with which to purchase her own home was immaterial, 70 and on death of the husband-father, the widow received only a life estate with the daughter getting the remainder.

The temporary status of Cuban refugees was the basis of the holding in Juarrero v. McNayr, 71 wherein the Supreme Court of Florida denied the right of homestead tax exemption to Cuban refugees. To be

68. See the discussion of Brown v. Hutch, infra text following note 73.
69. 162 So.2d 301 (Fla. 3d Dist. 1964).
70. The result may seem unfair but it is consistent. In this case the husband had remarried and attempted to create the estate by the entirety through a conduit. The facts indicated that the daughter had moved out of the house, was not a minor, and in fact had received 12,000 dollars from her father which was for the purpose of purchasing her own home. Of course, homestead status attached when the second wife moved in with her husband. The consideration required to support a conveyance of homestead must move from the grantee or from the second wife. Would marriage be a sufficient consideration if the conveyance were executed pursuant to such a pre-marital agreement? See Scoville v. Scoville, 40 So.2d 840 (Fla. 1949).
71. 157 So.2d 79 (Fla. 1963).
eligible for the tax exemption, the taxpayer must reside there in good faith and make the property in question his permanent home.\textsuperscript{72}

The most strained bit of legal reasoning in this area during the biennium was employed to sustain a conveyance to one child under attack by another. In \textit{Brown v. Hutch},\textsuperscript{73} a father sought to convey property on which he resided to a daughter who cared for him in his later years. He conveyed to her by delivery of a deed to a third party with instructions that it be given to her on his death. After giving the deed to the third party, the daughter married and her husband moved in with the family. Sometime thereafter the father had a new deed prepared and substituted it for the original one in order to reflect the change in the name of the daughter-grantee. After the father's death one of the children sought a cancellation of the deed. The appellate court took the position that "That which controls in a case of this type is, not whether a homestead status had once been in effect, but \textit{whether it existed at the time of the death} of the one claimed to be the head of the family."\textsuperscript{74} Conflicting testimony as to whether the grantor continued to be the head of the household was resolved in favor of the husband so that the homestead status ceased after the second marriage of the grantee-daughter. The court found no homestead status to have existed at the time of the grantor's death and allowed the conveyance to stand.

There is little doubt that the result reached comports with equity and good conscience. However, there is a serious question as to whether the rationale of the decision comports with the law dealing with conveyancing and homestead. It is elementary that the validity of a deed is determined as of the time it is delivered. This principle is equally applicable to a delivery made to a third party depositary.\textsuperscript{75} Further, the court in the instant case clearly recognized this in its discussion and citation of authority to sustain the validity of the deed.\textsuperscript{76} It is apparent that the court was sustaining the validity of the first deed by its showing that the grantor gave up all control and intended to vest the title (actually a remainder interest) in the grantee. Of course, if the first deed was effective, the second was a nullity because the grantee already had the estate, and the second could only be a reaffirmation at best.

Thus the apparent "holding" that the conveyance was valid because the land was not homestead at the time of the grantor's death is seemingly a non sequitur and nonsensical obfuscation. The character of the land as homestead or not at the time of death is important to determine whether

\textsuperscript{72} \textit{Fla. Const.} art. X, § 7.  
\textsuperscript{73} 156 So.2d 683 (Fla. 2d Dist. 1963).  
\textsuperscript{74} \textit{Id.} at 686 (Emphasis added.).  
\textsuperscript{75} \textit{Boyer, Fl. Real Estate Transactions} 135 (1964).  
\textsuperscript{76} 156 So.2d 683, at 686-688.
it can be devised and how it will descend, but it is not relevant to
determine whether a previously executed deed is valid or not. Circum-
stances existing at the time of the delivery and acceptance of the deed
control its validity; not what happens afterwards.

It follows then that if the land were homestead at the time of the
delivery of the first deed, and if the deed were gratuitous or otherwise
violative of constitutional prohibitions concerning the conveyancing of
homestead, that deed would be void and would remain void. The recent
case of Reed v. Fain, would seem to establish that fact rather conclu-
sively. The court, it is submitted, had better alternatives available on
which to uphold the conveyance to the daughter. The facts indicate that
in all probability the land would be considered homestead at the time
of the first conveyance or delivery of the deed to the depositary. There-
fore, if we conclude that that deed was not supported by consideration,
it would be void and title would remain with the grantor. After the
daughter’s husband moved in and became the head of the family, and the
homestead status ceased, the grantor delivered another deed to the
depository. Since the grantor still retained title, there was no prohibition
against his now conveying, gratuitously or otherwise, and the second deed
could be given effect on delivery to the depositary. An alternative basis
would be to find consideration for the first deed. At the time of the
conveyance, the grantee was caring for the grantor. A deed in consider-
ation of her continuing to extend this care, which she did, would seem
to be supported by adequate consideration.

C. Cotenancies

Hurwitz v. C.G.J. Corp., sustained a breach of contract judgment
for damages to the entire leasehold interest although only 37 per cent of
the leasehold interest was party to the action. The case grew out of a
cooperative venture whereby the scheme of organization provided for
the assignment to purchasers of individual apartments an undivided
interest as tenants in common in a long term lease. In upholding the
judgment, the appellate court pointed out that once the award is made,
the defendant would not be subject to double liability, and that the
question of apportionment between the tenants in common of the lease-
hold interest could be raised in appropriate proceedings.

77. Fla. Stat. § 731.05 (1963), precludes the devise of a homestead if the head of a
family dies leaving either a widow or lineal descendants or both; § 731.27 provides that the
homestead shall descand as other property except in the case when the decedent is survived
by a widow and lineal descendants, in which case the widow is given a life estate and a
vested remainder is given to the lineal descendants in being at the death of the decedent.
78. 145 So.2d 858 (Fla. 1962). The void deed was also held not cured by the twenty year
80. 168 So.2d 84 (Fla. 3d Dist. 1964).
81. The court did not specify the nature of the appropriate proceedings. However, an
The fiduciary principle of cotenancies, that one cannot oust the other by taking a tax deed from the state, was reaffirmed in *Albury v. Gordon*. In this case two tenants in common held title when the property was forfeited under the Murphy Act for nonpayment of taxes. Thereafter the state conveyed the property to one of the former cotenants, and he in turn later conveyed to his son. The son brought an action to quiet title to the property more than twenty years from the date of the deed to his father from the state. The court found that a constructive trust was created in favor of the purchasing cotenant, and the fact that the twenty year curative statute had run did not preclude the application of the trust, as statutes of limitations do not apply to destroy equitable interests.

D. Dower

1. Federal Tax Lien's Priority

Questions galore with regard to the effect of a "choate" federal tax lien on dower were raised in *In re Griffin's Estate*. In an apparent case of first impression, the second district was confronted with the problem of whether a widow who elected dower would take free of a federal income tax lien which was perfected during the life of her deceased husband. The lower court granted the wife her dower interest free and clear of the lien both as to realty and personality. The United States successfully appealed, challenging only the award of personality. This gives rise to interesting speculation. The court stated at the outset that "The appellant concedes that the lower court was correct in assigning the widow a dower interest in the real property, free from the debts of the decedent." There is no question but that the appellate court was correct in awarding the wife a dower interest in the personality subject to the accounting in equity might lie, or the common law action of account, or an action based on one of the common counts such as money received for the benefit of another, would appear to afford a satisfactory remedy. The rule that an occupying cotenant in exclusive possession is not liable to account to the other cotenants would appear inapplicable to recovery of damages by some of the cotenants for the benefit of all.

82. 164 So.2d 549 (Fla. 3d Dist. 1964). The court used the words "coparceners" and "cotenants" interchangeably, and this is all right since the rules as to their duties and obligations are the same. However, coparcenary related specifically to co-heirs or the descent of property to several persons equally. The original parties in the case were technically tenants in common and not coparceners, but since today coparceners take as tenants in common, and there is no difference between the two estates, no harm is done by the equation of the two. See generally, 1 Boyer, Fla. Real Estate Transactions, §§ 20.03(2) (1964).

83. Fla. Laws 1937, ch. 18296. Murphy titles are probably the most secure type of tax titles in Florida. See generally, 2 Boyer, supra note 82, §§ 31.04-31.06.

84. Fla. Stat. § 95.23 (1963) provides in pertinent part that:

After the lapse of twenty years from the record of any deed . . . purporting to convey lands no person shall assert any claim to said lands as against the claimants under such deed . . .

After the lapse of twenty years all such deeds . . . shall be deemed valid and effective for conveying the lands therein described, as against all persons who have not asserted by competent record title an adverse claim.

85. 164 So.2d 883 (Fla. 2d Dist. 1964).

86. Id. at 884.
tax lien. However, the reason for conceding the point as to realty is not at all clear to these authors. Perhaps the personality was enough to satisfy the lien, but in any event, there is reason to believe that the government could have reached the realty both before and after the decedent's death.

The doctrine set forth in *In re Hester's Estate*, 87 would seem to apply to a government tax lien. In that case a judgment creditor executed on the realty of the husband during his lifetime and purchased at the execution sale. The Supreme Court of Florida held that the purchaser took free from the wife's dower interest. Thus, if the United States had enforced the tax lien before the decedent's death, it is difficult to see why it would not have prevailed over the wife's dower interest. 88 In the present case, however, the government did not seek to enforce its lien until *after* the husband's death.

If the government had attempted to reach the realty and assert priority over the wife's dower interest, the contention that federally created liens cannot be limited by state law because of the supremacy clause of the United States Constitution would be difficult to overcome. 89 Dower interest during the life of the husband, although it must be released in a conveyance of the real estate in order to pass an unencumbered title, is hardly "choate." 90 In fact it has been traditionally called "inchoate" dower, and this description aptly characterizes the nature of the interest. Inchoate dower can be lost or barred in many ways in addition to the wife's voluntary release to her husband's grantee. If, for example, the wife fails to survive the husband, the parties are divorced, the land is sold at an execution sale, the land is taken by eminent domain or lost because of nonpayment of taxes, or title is acquired by adverse possession against the husband, the dower interest is lost. Compared to its counterpart in personality, the dower interest in realty is

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87. 28 So.2d 164 (Fla. 1946). For an analysis of the case and attendant problems, see Boyer & Miller, *Furthering Title Marketability by Substantive Reforms with Regard to Marital Rights*, 18 U. MIAMI L. REV. 561, 583 (1964).

88. As to realty, dower only applies to realty owned by the husband at the time of his death and to land he had conveyed during marriage without the release of the wife's dower. FLA. STAT. § 731.34 (1963). When land is sold under execution, the husband does not own it at the time of his death, nor did he convey it during marriage without his wife's joinder. Thus, dower does not apply. See *In re Hester's Estate*, supra note 87.

89. See Ross, *Federal Tax Liens—Their Impact on the Law of Real Property*, 18 U. MIAMI L. REV. 183, 193 (1963). It is interesting to note that Mr. Ross predicted that in the future the wife's dower interest could not survive the federal tax lien, but that under existing law foreclosure of the tax lien during the decedent's lifetime would not be effective to cut off the wife's dower interest. This conclusion flies in the face of the *In re Hester* doctrine, as outlined in text accompanying note 87 supra. Cf. Cobb v. Shore, 183 F.2d 980 (D.C. Cir. 1950); United States v. Ettelson, 67 F. Supp. 257 (E.D. Wis. 1946).

90. The principal case, *In re Griffin's Estate*, 164 So.2d 883 (Fla. 2d Dist. 1964), reasserts the principle that liens competing with the federal tax liens must not be inchoate if they are to obtain priority, and then reviews leading cases dealing with the problem. See also Ross, supra note 89; 2 Boyer, supra note 82, § 34.15.
more secure and is in fact an encumbrance during the life of the husband, and on this basis it can be distinguished from the dower interest in personalty. However, it is still defeasible, to say the least, and can be made nonexistent by the happening of any of the events previously mentioned.

The inferiority of the Florida homestead to federal tax liens bolsters the conclusion that the federal lien would prevail over inchoate dower in realty. *Weitzner v. United States,* specifically dealing with Florida homestead law, held that a federal tax lien perfected during the husband’s life was superior to the homestead law and that the land could be sold to satisfy the tax lien. The Fifth Circuit Court of Appeals held:

*As in the case of inchoate dower,* that which the wife has during her husband’s life time with respect to homestead ownership is remote, uncertain and a mere expectancy or possibility and not a vested property right, interest or title. It follows that the tax liens of the United States were and are valid and enforceable against the property claimed as homestead.

In conclusion, then, the court was eminently correct in holding that the federal tax lien was superior to the widow’s dower interest in personalty, but it is not perceived why the federal government so readily conceded the superiority of inchoate dower as to realty.

2. **PROBATE JURISDICTION**

*In re Coffey’s Estate,* although more appropriately included in a survey of probate law, dealt with the problem of the jurisdiction of the County Judge’s Court to award dower when a stranger to the probate proceeding challenges title. The court held that the County Judge is without jurisdiction to award dower when the testator’s title is being challenged by parties who are not taking under the will.

3. **LEGISLATION—ELECTION TIME EXTENDED**

Florida Laws, chapter 65-542, amends statute section 731.35, to extend the period from sixty to seventy days in which a widow may elect to

91. *Griffin’s case,* as a basis for holding the tax lien superior to the dower in personalty, stated:

Until the death of her husband, the wife’s dower interest is unknown, undefined and could be made nonexistent by her husband selling the personal property or, in fact, giving the personal property away. It remains inchoate until his death. Since the wife’s dower interest is inchoate, uncertain and remote, it does not constitute an estate or interest. 164 So.2d at 886.

The realty dower interest may be known and defined, but it is renderable non-existent, and it would seem also to be inchoate, uncertain and remote.

93. 309 F.2d 45, 48 (5th Cir. 1962) (Emphasis added.).
94. 171 So.2d 568 (Fla. 3d Dist. 1965). For an exhaustive analysis of this case and probate jurisdiction generally, see Comment, Bierman, *Probate Jurisdiction—Limitations in Questions of Title—A Call for Reform,* 19 U. MIAMI L. REV. 637 (1965).
take dower if there has been an extension of time for filing objections to claims, or if litigation occurs which puts the assets of the estate in doubt. The time is measured from the date to which the time for filing objections is extended, or from the date of the final judgment determining any such litigation or contested claims.

III. LANDLORD AND TENANT

During the last two years the landlord and tenant relationship has been highly litigious, but the bulk of the decisions has dealt with the reaffirmation of general principles. Space limitations require that comments be limited to only the most interesting cases and those that seem to depart from or extend well settled principles.

A. Lessee's Default—Automatic Termination?

The general principle that lease forfeiture clauses are construed as making the lease voidable at the option of the lessor and not as causing an automatic termination in spite of their wording was reaffirmed in Altiere v. Atlantic Nat'l Bank. In this case the lessee died during the term and the lessor waited for almost a year before bringing an action against the lessee's estate for the accrued rent. The executor defended on the ground that the lease provision providing for forfeiture upon default operated as an "automatic termination" of the lease and that the lessee's estate was liable for only one month's rent. The court noted that provisions for forfeiture are generally included for the benefit of the lessor, and that the lessee cannot use them as a shield for his own default. The express provision that upon default the lessee "shall become a tenant at sufferance" was held not to warrant a decision of automatic termination benefiting the defaulting tenant. The decision and principle are justified generally, but draftsmen could avoid litigation of this nature by simply adding to the forfeiture provision "at the option or election of the lessor."

B. Frustration

A "frustrated" tenant unsuccessfully urged frustration of purpose as a defense to a distress action for rent in Jones Shutter Prods., Inc. v. Edmanuel, Inc. The exact principle involved was that the covenants of a lease become unenforceable when a lease is limited to a specific purpose and governmental action renders the premises unsuitable for such use. The lease in question provided that the premises were "[T]o be used and occupied by the lessee as Re-inforced Plastics and for no other purpose or use whatsoever." The tenant was using the building as a manufacturing plant for plastics with attendant use of flammables, and the City of Miami closed the operation for violations of the building code.

95. 168 So.2d 693 (Fla. 2d Dist. 1964).
96. 168 So.2d 682 (Fla. 3d Dist. 1964).
While recognizing the general principle, the court held that the limiting clause "Re-inforced Plastics" was not definite or specific enough to release the tenant in the instant case. Use was not limited to manufacturing plastics. Hence, although the manufacturing operation could not be conducted, there was no showing that the premises could not be used in their present condition for purposes not constituting a fire hazard such as the sale or display of re-inforced plastics. The case is another illustration of the importance of careful draftsmanship. In this case a more restricted designation of use would have inured to the benefit of the tenant, but in other situations a too confined limitation of use may "frustrate" him in other ways, as, for example, by precluding a change in operations which he may find advantageous.

C. Security Deposit

_Wagman v. Lefcoe_, 9 involved an action by the tenants to recover a security deposit after they had defaulted and were evicted from the premises. It was expressly agreed that the security deposit in question was not an advance payment of rent or a measure of the lessors' damages as the lease provided that the lessors could apply the deposit toward either one. The lease also provided that upon return of possession and "expiration of the term of the lease," the lessors "shall then return to the lessees" the balance of the security funds. The action was brought prior to the expiration of the term as provided in the lease but after eviction.

The court held for the lessors, the apparent basis of the decision being that inasmuch as the lease specifically provided for the return of the deposit upon the expiration of the lease, the lessees could not recover before that time. This would seem to be a fair result since at the expiration of the lease, and not before, the extent of the lessors' damages will be known. Thus, at that time they will know how much of the deposit they will be obligated to return. This result is also consistent with the lease terms: return to be made at the expiration of the lease; lessors to have the option to apply the deposit toward rent or damages; and the lessors to return the balance of the funds. The only difficulty is that the complaint was dismissed with prejudice. If such dismissal precludes a subsequent action at the expiration of the lease, and if the foregoing rationale is correct, then the result would be a forfeiture by the lessees simply because they brought an action too quickly.

Another possible interpretation of the case is that the court implied or construed a forfeiture on the basis that the deposit was to be returned only after performance by the tenants, and the tenants have now pre-

97. 167 So.2d 765 (Fla. 3d Dist. 1964).
98. This solution may be compared to Kanter v. Safran, 68 So.2d 553 (Fla. 1953), subsequent proceedings 82 So.2d 508 (Fla. 1955), 99 So.2d 706 (Fla. 1958).
cluded performance on their part. This conclusion is supported by the following excerpts:

Since the lease provided that the security deposit would not be returned to the lessees until the expiration of the term of the lease, and since the return was conditioned upon the appellants' prior performance, then obviously this action could not be maintained.

Since the conditions precedent required by the terms of the lease agreement did not exist or had not been performed at the time of the institution of this action, the able trial judge was eminently correct in dismissing the action.\(^9\)

Since penalties and forfeitures are generally not favored, the prior interpretation is probably the correct one.

D. Landlord's Re-entry or "Don't Change the Lock on Your Tenant's Door"

Default in the payment of rent does not authorize a landlord to re-enter forcibly and prevent the tenant from occupancy, notwithstanding an express provision for re-entry in the lease. This is the holding of *Ardell v. Milner*,\(^100\) where the landlord changed the lock on a dentist's office. The court held that the landlord's remedy of statutory eviction proceedings\(^101\) is exclusive of the right to make a forcible entry. This rule precluding forcible self help applies although a statute\(^102\) gives the landlord a right of re-entry and the lease contains a similar provision. The court also indicated that the loss of profits or income suffered by the dentist would be recoverable in an action for the wrongful eviction.

In a somewhat analogous case,\(^103\) it was held that a landlord may not take the tenant's property without resort to statutory distress proceedings: at least he may not do so when the tenant's abandonment of the premises is not clearly evident. The court indicated that Florida Statutes section 83.08 (1963), does not give the landlord a self executing possessory lien as the common law remedy of distress has been superseded by statute.

E. Percentage Leases—Single Tenant with Multiple Landlords

A somewhat novel question confronted the second district in *Alstores Realty Corp. v. Twain*.\(^104\) The lessee had built a department

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99. 167 So.2d 765, 766 (Fla. 3d Dist. 1964).
100. 166 So.2d 714 (Fla. Dist. 1964). The tenant had withheld certain rentals because of the failure of the landlord to furnish adequate air conditioning, and the amount of the rent due was in dispute.
102. FLA. STAT. § 83.05 (1963). The court also stated that the legislature intended this statute to be read into every contract calling for the payment of rent.
104. 167 So.2d 601 (Fla. 2d Dist. 1964).
store on premises leased with provisions for additional rent to be computed on a percentage of the gross receipts. In a few years the lessee expanded the store by leasing an adjacent piece of property from a different lessor. Following the landlord's refusal to reduce the percentage applicable to the additional rent on the basis of receipts from the entire store, the lessee brought an action for declaratory relief seeking to have the lease construed so as to limit computations of gross receipts for additional rental purposes to that portion of the store which the lessor owned. The lower court found in accordance with the lessor and the lessee appealed. The appellate court reversed, holding that the rents should be computed only on the basis of the receipts from sales on the property owned by the lessor. The court recognized that a lease could provide for a different result, but that the lease in question could not be so construed. The lessor argued that nothing would prevent the lessee from moving the non-profitable departments within the store to the part covered by the present lease and that such action would effectively reduce the rent which was contemplated by the parties. In answer to this, the court stated that the record did not reveal such unconscionable diversion. This case also illustrates the importance of careful drafting.

F. Lessor's Recovery of Advance Rental After Eviction

Normally rent becomes due in accordance with the terms of the lease, and absent a lease provision to the contrary, rent is not apportionable as to time. Advance rentals are generally not recoverable by the tenant if he vacates or is evicted lawfully before the expiration of the period covered by the advance rental payment. These general principles were adhered to in Paul v. Kanter, where the court allowed the lessor to recover from the lessee an advance rental payment, past due in accordance with the lease terms, after the lessor had evicted the tenant for nonpayment of rent. The tenant contended that the yearly rental payment which came due should be prorated to include only the three months prior to eviction. The court held that "An advance rental is a contractual promise, by the tenant, to pay for the rent to be used in the future, and to be obligated to make this payment whether he actually uses the property for that period of time or not." The holding is in accord with the holding of the Supreme Court of Florida in Wagner v. Rice. Paul v. Kanter, however, is difficult to reconcile with Deringer.
v. Pappas,\(^{112}\) although the same Justice wrote both opinions and apparently distinguished the cases to his own satisfaction.

In *Deringer*, the lease period was five annual terms running from June 6 to June 5, with the rent being paid in four installments on the first days of January, February, March and April. The tenant was evicted on April 1, and it was agreed that the landlord resumed possession for his own benefit\(^ {113}\) and not for the purpose of mitigating the tenant's liability for the lessor's damages. The tenant contended that he should not be liable at all for the April rental payment since he was evicted on that date, but the court held that the four rental payments were for the entire year's use of the premises and that he should be liable for so much of the year as he had use of the premises. In this case it amounted to ten-twelfths of a year and this included a portion of the April rental payment.

The court in *Kanter* distinguished *Deringer* on the ground that it involved a security deposit and the determination of damages. Although this is true, the cases nevertheless seem in conflict concerning the recovery of rentals. In *Deringer* the court stated: "It is well settled that the landlord may only recover the pro rata share of the rent during the period the tenant actually was in possession."\(^ {114}\) *Wagner v. Rice*,\(^ {115}\) was cited as authority for this statement, but it is submitted that *Wagner* is no authority for a rule of apportionment.\(^ {116}\)

It would seem that if the court were to be consistent with previous holdings, the landlord in *Deringer* should have recovered either all or none of the rental payment of April 1. In view of the fact that the parties treated April 1 as the date of eviction,\(^ {117}\) although actual recovery of possession was not until April 5, the tenant's position of no liability for that payment seems correct. The landlord should not complain because he agreed to the terms of the lease specifying on what days the rent should become due, and he brought about the eviction on the day the rent payment was due. To avoid this result, the court pointed out that the lease was not on a monthly basis and that the rent reserved was for an entire year.\(^ {118}\) Thus, it treated the rent as accruing gradually, in spite of lease provisions to the contrary, and terminated the liability for rent

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\(^{112}\) 164 So.2d 569 (Fla. 3d Dist. 1964).

\(^{113}\) This terminates the landlord-tenant relationship and any further liability of the tenant. Williams v. Aeroland Oil Co., 155 Fla. 114, 20 So.2d 346 (1944); Kanter v. Safran, 68 So.2d 553 (Fla. 1953); Wagner v. Rice, 97 So.2d 267 (Fla. 1957).

\(^{114}\) 164 So.2d 569, at 571.

\(^{115}\) 97 So.2d 267 (Fla. 1957).

\(^{116}\) In fact *Wagner* supports just the opposite conclusion, as the landlord was allowed to recover an advance guaranteed rental payment for the entire year after the landlord had evicted the tenant for not making that payment, and possession was recovered about three months after the due date.

\(^{117}\) 164 So.2d 569, at 571.

\(^{118}\) Ibid.
on the date of eviction; but liability up to that time was ten-twelfths of a year's rental. A rule of apportionment such as applied in *Deringer* has been appraised as being fair, sensible, and desirable, but it is submitted that in Florida it is a departure from previous holdings.

G. **Tenant's Liquor License Subject to Landlord's Lien**

In a case of first impression the first district has held that a liquor license is subject to a landlord's lien for rent. Although recognizing the privilege—right dichotomy, the court reasoned that the scarcity of the license creates a property right. Inasmuch as the landlord's lien attaches to all property of the lessee which is usually kept on the premises, coupled with the requirement that the license be displayed on the licensed premises, the court concluded that the lien attached.

H. **Declaratory Relief—Unreasonable Withholding of Consent to Lessee's Assignment**

Although the Declaratory Judgment Act has not received the latitudinous treatment it should be accorded, it is refreshing to see that its purpose was not frustrated in *Tulip Realty Co. v. Fuhrer*. It should now appear settled that a clause in a lease providing for assignability by the lessee subject to the lessor’s consent, and providing that such consent will not unreasonably be withheld, states a claim which is subject to declaratory relief. The Second District Court of Appeal did not mince any words in holding that the value of the Act is of particular significance in a case such as this.

IV. **ZONING**

As might be expected, zoning has been an active source of litigation. The following principles have been reaffirmed: (1) failure to exhaust administrative remedies precludes judicial review; (2) zoning is a function of the zoning authorities and not the courts; (3) good faith

119. 2 *Powell, Real Property*, § 375, at 228 (1952).

120. Yarbrough v. Villeneuve, 160 So.2d 747 (Fla. 1st Dist. 1964).

121. Although the problem was not raised in the case, it seemed interesting to ponder the question of foreclosing the lien. What would happen upon a sale? The regulatory burdens involved in the ownership of a liquor license, and the difficulty in obtaining approval of the Beverage commission might pose a problem from the standpoint of the purchaser. However, it is clear that any purchaser would have to be able to comply with the Beverage Department's standards before he could use the property he purchased. It is interesting to find that the Beverage Department contemplated a decision such as the one reached here, as Rule 65A-2.06 of the Beverage Department provides in pertinent part:

(7) Forced Sale: In the case of a foreclosure or a forced judicial sale under distress . . . the license involved shall be transferred to the purchaser at such sale upon proper application being made therefor. . . .

122. 155 So.2d 637 (Fla. 2d Dist. 1963).

123. *Bird Road Baptist Church, Inc. v. Stevens*, 155 So.2d 420 (Fla. 3d Dist. 1963).

124. Hillsborough County v. Twin Lakes Mobile Home Village, Inc., 166 So.2d 191 (Fla. 2d Dist. 1964). However, the case affirmed a post decretal order to confirm the owner's
reliance upon existing zoning will raise an equitable estoppel against a
city;\textsuperscript{126} and (4) a property owner has no vested rights in existing zoning
in the absence of expenditures on his land in compliance therewith.\textsuperscript{126}

A. Fairly Debatable Rule—A Nick in the Armor

The well settled rule that zoning decisions of local authorities will
not be disturbed if application of the regulation to the property in ques-
tion is “fairly debatable” has long been a convenient vehicle allowing
judicial avoidance of a review of the merits of zoning cases.\textsuperscript{127} Adherence
to this proposition has been consistent but not inflexible, as challenged
regulations held arbitrary or unreasonable can be characterized as not
“fairly debatable” and therefore without the scope of the rule.\textsuperscript{128}

In \textit{Burritt v. Harris},\textsuperscript{129} the property owner had land which abutted
an airport. His land was zoned Residential A, the most restrictive classifi-
cation, although in fact the predominant zoning in the area was Industrial.
Seven petitions of neighboring owners had been granted changing the
classification to Industrial. Supporting the reasonableness of the indus-
trial classification were the shrill screeches of the screaming jets and the
wafted odors of a nearby paper pulp plant. Nevertheless, this particular
land owner was repeatedly denied rezoning petitions, and thus he sought
equitable relief. The lower court dismissed the suit, and the district
court affirmed on the fairly debatable principle.\textsuperscript{130} The Florida Supreme
Court then granted certiorari and reversed.

In reversing, the supreme court stated:

\begin{quote}
   The constitutional right of the owner of property to make
   legitimate use of his lands may not be curtailed by unreasonable
   restrictions under the guise of police power. The owner will not
   be required to sacrifice his rights absent a substantial need for
   restrictions in the interest of public health, morals, safety or
   welfare. If the zoning restriction exceeds the bounds of necessity
   for the public welfare, as, in our opinion, do the restrictions
   controverted here, they must be stricken as an unconstitutional
   invasion of property rights.\textsuperscript{131}
\end{quote}

\textsuperscript{125} City of Gainesville v. Bishop, 174 So.2d 100 (Fla. 1st Dist. 1965).
\textsuperscript{126} Edelstein v. Dade County, 171 So.2d 611 (Fla. 3d Dist. 1965).
\textsuperscript{127} See cases collected in 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS, § 38.08[4]
(1964).
\textsuperscript{128} Board of Comm’rs of State Institutions v. Tallahassee Bank and Trust Co., 116
So.2d 762 (Fla. 1959); Burritt v. Harris, infra note 129.
\textsuperscript{129} 172 So.2d 820 (Fla. 1965).
\textsuperscript{130} 166 So.2d 168 (Fla. 1st Dist. 1965). Supporting the classification originally were
the following: there were some residences in the area; petitioner’s land did appreciate in
value under the residential classification; industrial uses at that particular location \textit{might}
constitute a flight hazard; the airport \textit{might} be moved.
\textsuperscript{131} Supra note 129, at 823.
The *Burritt* case and the above quoted language has already been used in *Lawley v. Town of Golfview*,\(^\text{132}\) to reverse a lower court decision denying injunctive relief against an oppressive residential classification. Significantly, the Second District Court of Appeal commented on the *Burritt* case as follows:

By this holding the Supreme Court has created an innovation in the zoning law of Florida by casting on the zoning authority the burden of establishing by a preponderance of evidence that the zoning restrictions under attack "bear substantially on the public health, morals, safety or welfare of the community" if the ordinance is to be sustained.\(^\text{133}\)

If the district court's opinion of the effect of *Burritt* is correct, zoning is likely to become substantially less effective than it now is. As buffer parcel after parcel gets judicial relief because the zoning authority cannot prove by a preponderance of the evidence that the public health, safety or welfare depends on the classification, whole communities may rapidly erode. However, the effect in the opinion may be a bit exaggerated. The supreme court itself had stated that the petitioner had sustained the burden of proving his property was unsuitable for any classification more restrictive than Industrial A, and that respondent had failed to demonstrate that the question was debatable.\(^\text{134}\) This would not seem much of a departure, if any, from the established principle that the one attacking the ordinance (the landowner) has the burden of proof to show that it is arbitrary, unreasonable, discriminatory or confiscatory.\(^\text{135}\) The supreme court's statement about a showing that the question was debatable would also seem to put a much lesser burden on the zoning authority than a showing by a preponderance of the evidence that the classification was necessary to protect the public health, morals, safety or welfare. In fact, it suggests that the zoning authority need show only that the relationship between the classification and the legitimate objectives of the police power is debatable, questionable, or possible, and then the decision of the authority will be affirmed under the fairly debatable rule.

Of course, in the last analysis it is a value judgment as to whether a particular classification of a particular piece of property is valid, or fairly debatable on the issue, and the last group of persons to review the case will necessarily have the final judgment. The long range effect of *Burritt*, if any, will have to await the test of time. It does seem likely, however, that at the least it may encourage trial and appellate courts

\(^{132}\) 174 So.2d 767 (Fla. 2d Dist. 1965).

\(^{133}\) Id. at 770.

\(^{134}\) *Burritt* v. Harris, 172 So.2d 820, 823 (Fla. 1965).

\(^{135}\) Cases are collected in 2 Boyer, *supra* note 127, at 1418-1419. That the burden on one attacking a zoning ordinance is an extraordinary one, *City of Miami Beach v. Silver*, 67 So.2d 646, 647 (Fla. 1955); *Miami Beach United Lutheran Church v. City of Miami Beach*, 82 So.2d 880 (Fla. 1955).
to review the merits and evidence more freely and critically in the future. If this should prove to be the case, we will then have, depending on the reader’s viewpoint, more judicial interference or more judicial supervision or participation in the zoning decisional process.

B. What Other Cities Do Is of No Concern to Us

The tongue-in-cheek heading above might facetiously describe the situation in *Harris v. City of Coral Gables*. The property located at an intersection was within the City of Coral Gables and was residentially zoned. Across one street and west of the property was a business district located in the unincorporated area of Dade County. But to the East, South, and across the other street to the North, the land was all zoned residential. The court, citing *Town of Surfside v. Skyline Terrace* Corp., held to the effect that “It was incumbent upon the appellee to demonstrate that the zoning ordinance, as applied to its property by the municipality wherein the property is located, was unreasonable and arbitrary.” The court indicated that if it allowed the rezoning of this particular property it would introduce a “cancer” into the area which could set off a “chain reaction” which could ultimately destroy the master plan the city has always adhered to. Needless to say, holding a line, whether at municipal boundaries or simply at demarcations between zones within a city, is a most difficult task.

C. The Demise of a Sign Ordinance

The Supreme Court of Florida did not temper its disapproval of a patently discriminatory sign ordinance in *Eskind v. City of Vero Beach*. After finding a jurisdictional conflict between the first and second districts, the court invalidated the Vero Beach ordinance. This ordinance prohibited outdoor signs advertising motel rates, but signs advertising other services of motels and signs advertising rates of other business were not prohibited. The court found that regulation of signs is a proper exercise of the police power, but that such exercise must not be discriminatory.

The Court stated:

In the instant case, we can find no justification from an aesthetic viewpoint to prohibit motel signs advertising rates but permitting every other type of motel advertising signs imaginable. . . . It seems obvious to us that a rate sign in front of a

136. 157 So.2d 146 (Fla. 3d Dist. 1963).
137. 120 So.2d 20 (Fla. 3d Dist. 1960).
138. *Supra* note 136 at 147.
139. 159 So.2d 209 (Fla. 1963).
140. Eskind v. City of Vero Beach, 150 So.2d 254 (Fla. 2d Dist. 1963); and Abdo v. City of Daytona Beach, 147 So.2d 598 (Fla. 1st Dist. 1963), *cert. denied*, 151 So.2d 53 (Fla. 1st Dist. 1963).
motel is no more offensive to the aesthetic sensibilities of the traveler or the community than would be a rate sign in the same immediate area advertising the charges of the other business activities.\textsuperscript{141}

D. The Anti-Noise Ordinance, or Miami Beach Is No Longer a "Seasonal" Resort Area

In 1937 the City of Miami Beach enacted an ordinance which prohibited certain noises within an area where tourists might be disturbed. The prohibition only extended to that period of time from December first through March thirty-first. The plaintiff, after being cited for violating this ordinance while building a large hotel, sought injunctive relief against the city. The trial court found, and the appellate court affirmed, that although the ordinance was in the guise of an anti-noise ordinance, in reality it was an anti-building ordinance which had the arbitrary effect of precluding building during one-third of the year. The court stated that although the ordinance might have been reasonable in 1937 when Miami Beach was primarily a "winter resort," it is no longer such a seasonal resort and therefore the ordinance was arbitrary and unreasonable.\textsuperscript{142}

E. Certiorari? And, If So, Which One?

The existence of diverse enabling acts and zoning procedures, not only between counties and municipalities but also between municipalities,\textsuperscript{143} has created difficulties in ascertaining the correct method of obtaining judicial review of zoning decisions reached at the legislative and administrative levels. A number of cases have dealt with this problem during the past biennium and are included for the hopeful enlightenment of the reader. At the outset, a possible source of confusion is the presence of two types of certiorari proceedings: one statutory,\textsuperscript{144} applicable to municipal zoning pursuant to the general enabling act, and the other common law or traditional, applicable generally to judicial review of the rulings of administrative bodies.\textsuperscript{145} The difference between the two types of certiorari is that in traditional, or common law certiorari, the only question is whether the judgment under review is supported by the record established at the time the decision was made. No additional testimony may be taken in traditional certiorari. Statutory certiorari provides

\textsuperscript{141} 159 So.2d 209, at 211.
\textsuperscript{142} Miami Beach v. Seacoast Towers, 156 So.2d 528 (Fla. 3d Dist. 1963).
\textsuperscript{143} Municipalities may be granted zoning authority and procedures in their charter by special act in which case the provisions of Florida Statutes chapter 176 have limited if any applicability. See Thompson v. City of Miami, 167 So.2d 841 (Fla. 1964), discussed infra text following note.
\textsuperscript{144} FLA. STAT. §§ 176.16-176.19 (1963).
\textsuperscript{145} The difference was pointed out in Dade County v. Carmichael, 165 So.2d 227 (Fla. 3d Dist. 1964).
for a trial *de novo*, and the court may take testimony or appoint a referee to determine additional facts in order to treat the problem on its merits.

In *Dade County v. Carmichael*, a property owner took certiorari from the Board of County Commissioners after its denial of his appeal for a change in zoning. The owner requested that the court take additional testimony and evidence in support of his position. The court referred the matter to a referee and upon his findings reversed with directions that the county rezone. The county appealed on the ground that in traditional certiorari, the court had no power to hear additional evidence and was in error in referring the case to a referee. The appellate court sustained the county's position, holding that only in certiorari pursuant to chapter 176 of the Florida Statutes applicable to municipal zoning can review by certiorari be treated as a trial *de novo*.

In *Sun Ray Homes v. County of Dade*, the court stated that:

Although certiorari may not be employed to review a legislative action of the Board of County Commissioners, certiorari is proper for the review of a quasi-judicial action.

In issue was the validity of a sign permit challenged on the basis that it was prohibited by a provision of the Metropolitan Dade County Code. A petition for certiorari was taken after the Board of County Commissioners, on an appeal from the Zoning Appeals Board, affirmed the appeals board. The affirmance of the zoning board by the County Commission was in the form of a resolution denying the appeal. The circuit court denied the petition for certiorari, and an appeal was taken. The appellant's first point was that the Metropolitan Dade County Code section 33-316, which authorizes review by certiorari, is invalid because it provides for review of legislative or non-quasi-judicial activities. The court held that the remedy of certiorari was proper because:

*In the instant case the action of the Board of County Commissioners was clearly quasi-judicial because it was a review of an interpretation and application of an ordinance by the Zoning Appeals Board.*

It also held, however, that denial of certiorari was proper because the record supported the validity of the permit.

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146. 165 So.2d 227 (Fla. 3d Dist. 1964).
147. 166 So.2d 827 (Fla. 3d Dist. 1964).
148. *Id.* at 829.
149. The applicable provision was Code section 33-118, set out in the case at p. 828, regulating the location of signs.
150. This section, set out in footnote 1 of the case at p. 829, requires that administrative remedies be exhausted before seeking judicial review and suggests that certiorari be the method for reviewing decisions of the Board of County Commissioners.
151. 166 So.2d 827, at 829.
In conjunction with the Sun Ray Homes and Carmichael cases, it is necessary to consider Dade County v. Markoe, a case cited in Sun Ray Homes for the proposition that "certiorari may not be used to review a legislative action of the Board of County Commissioners." In Markoe, the Board of County Commissioners, contrary to the recommendation of the Zoning Appeals Board, granted rezoning by resolution. The County Commissioners subsequently, by resolution, rescinded the first resolution and thereby restored the original zoning. The owner sought certiorari, and the circuit court then quashed the commissioners' second resolution. The county appealed, and the third district reversed, stating:

There is no authority of which we are aware that permits a court, in traditional certiorari proceedings, to inquire into and review the acts of a legislative body... in the enactment of legislation... The circuit court found, and we think correctly, that the action of the commission in enacting the second resolution was legislative in character. This being so, there was nothing to review, for only those decisions which have a judicial or quasi-judicial character are subject, in proceedings of this nature, to review.

The distinction between legislative and quasi-judicial activity of the Board of County Commissioners as exemplified in Sun Ray Homes and Markoe is sound and justified. In determining whether a particular action, such as issuing a permit for a sign, is permissible under existing ordinances or regulations, the body is acting in a quasi-judicial capacity. Similarly, if the body is acting as the final arbiter as to whether a variance or special exception should be granted, it is also acting in a quasi-judicial capacity. On the other hand, if the Board of Commissioners is deciding whether or not to enact a new zoning ordinance, or whether to rezone a particular parcel or area, then it is acting in a legislative capacity.

Of the three cases just discussed, Carmichael is the one that appears a little awkward or out of step. The difficulty with Carmichael is not so much with the result, reversing the trial court for ordering a rezoning, but with the basis for reaching it. In basing its reversal upon the impropriety of the court's considering new evidence in a traditional certiorari proceeding, the appellate court appears to be impliedly approving certiorari as a method for reviewing legislative activities as the litigation originated in a request for a change in zoning. It is submitted that the reversal should have been based on the proposition that certiorari did not lie at all. Of course, the fact that certiorari is not available in a particular case does not mean that no review is available. Review by

152. 164 So.2d 881 (Fla. 3d Dist. 1964).
153. Supra note 148.
154. Supra note 152 at 882 (Emphasis added.).
a court of equity in an action for injunctive relief is available to test the validity of the classification.

As indicated in an earlier paragraph, municipal zoning effectuated pursuant to chapter 176 of the Florida Statutes, provides for statutory certiorari in the nature of a trial de novo. The Supreme Court of Florida in Thompson v. City of Miami,\(^{155}\) considered the application of statutory certiorari when municipal zoning is authorized by special charter provisions. In Thompson, the owner sought direct equitable relief from the denial of his petition for a variance by the Miami City Commission. The lower court reversed the commission over the city's objection that the owner had not proceeded in accordance with statutory certiorari as provided in chapter 176. The city appealed and the Third District Court of Appeal held\(^{156}\) that the owner should have sought review by certiorari under chapter 176. The Florida Supreme Court, quashing the district court's finding, held that chapter 176 provisions for certiorari are only applicable to municipal zoning cases when the zoning is authorized pursuant to chapter 176. Accordingly, that procedure was not applicable to City of Miami zoning effectuated under charter provisions.

The Thompson decision also indicated that direct equity action against unconstitutional legislation has long been the traditional method of assaulting the validity of zoning ordinances. The court went on to hold that even had statutory certiorari been applicable, the review by that procedure would not have been able to achieve the result obtained of invalidating the statute as applied to the owner's property.\(^{157}\) The owner attacked the validity of the ordinance as applied to him and in toto. Statutory certiorari under chapter 176 applies to a review of decisions of administrative officials authorized to grant special exceptions or variances but who are not authorized to hold the ordinance invalid.

In summary, the following principles appear established:

1. In attacking a municipal ordinance on the basis of its unconstitutional application, a direct equitable action for injunctive relief should be employed.\(^{158}\)

2. When a municipality has enacted its zoning ordinances pursuant to Florida Statutes, chapter 176, the statutory review by certiorari may be employed to review the administrative acts of the municipality.\(^{159}\)

3. When a municipality has enacted its zoning ordinances pursuant to authority other than chapter 176, statutory certiorari provided in 176 is not applicable.\(^{160}\)

155. 167 So.2d 841 (Fla. 1964).
156. City of Miami v. Thompson, 159 So.2d 877 (Fla. 3d Dist. 1964).
157. 167 So.2d 841, at 843.
158. Thompson v. City of Miami, 167 So.2d 841 (Fla. 1964).
159. Ibid.
160. Ibid.
4. When a Board of County Commissioners acts in a legislative capacity in enacting zoning ordinances, a direct equity action is the only remedy.\textsuperscript{101}

5. When a Board of County Commissioners acts as an appellate body, reviewing in a quasi-judicial capacity decisions of inferior zoning authorities, common law certiorari is the proper remedy.\textsuperscript{162}

F. Legislation—Junkyards and Highways

The state has now awakened to the great advantages derived from the preservation of the natural beauties of the countryside for the aesthetic enjoyment of the speeding motorist. Not the least of such advantages, it may be assumed, is the opportunity to share in federal funds for road construction.\textsuperscript{169} Accordingly, legislation now prohibits the creation of new junkyards along the state's highways. Florida Laws, chapter 65-93, prohibits, except for existing non-conforming uses, the maintenance or operation of a junkyard within 1,000 feet of any highway right-of-way outside the limits of municipalities. Junkyards which were operating within 1,000 feet from any highway prior to July 1, 1965, may continue to operate provided the view from such highway is obscured by natural objects, plantings or fences on the property line. The act also does not prohibit existing junkyards from expanding, enlarging or increasing the size of the junkyard. It also specifies the type of fence that is required and provides that it must be kept in good order and repair, and any advertisement thereon shall be regulated by chapter 479 of the Florida Statutes.

V. Taxation

A. The Agricultural Anomaly

In 1957, the legislature singled out agricultural lands for special tax treatment.\textsuperscript{164} This statute, providing that lands being used for agricultural purposes shall be assessed as agricultural lands upon an acreage basis notwithstanding that all or part thereof may be included in a subdivision plat or real estate development, has been the subject of several cases during the biennium.\textsuperscript{165} The most significant recent expression on the problem has come from the Supreme Court of Florida in

\textsuperscript{161} Dade County v. Markoe, 164 So.2d 881 (Fla. 3d Dist. 1964).
\textsuperscript{162} Sun Ray Homes v. County of Dade, 166 So.2d 827 (Fla. 3d Dist. 1964).
\textsuperscript{163} Highway Beautification Act of 1965 § 101(d)-(m); 79 Stat. 1028; 23 U.S.C. § 131(d)-(m) (1965).
\textsuperscript{165} Markham v. Blount, 175 So.2d 526 (Fla. 1965); Lanier v. Overstreet, 175 So.2d 521 (Fla. 1965); Tyson v. Lanier, 156 So.2d 833 (Fla. 1963); Matheson v. Elcook, 173 So.2d 164 (Fla. 3d Dist. 1965).
In a heavily divided court, the constitutionality of the statute was upheld.

The legislation was no doubt the product of a desire to relieve farmers who were being injured by tax assessments made on a market value basis which contemplated the future use of the land, not for agricultural, but rather for subdivision or other purposes. There are equities on both sides of the question as to whether such treatment should be allowed. However, the abuse of the privilege afforded the farmer was no doubt the reason for the dissenting opinion in the Overstreet case. The dissent pointed to the recent case of Matheson v. Elcock, as an example of an abuse or result inconsistent with constitutional limitations upon classification. In Matheson, the owner of 67.89 acres of land, admittedly worth in excess of two million dollars, challenged an assessment of the land by the assessor at less than 500,000 dollars. He contended that the assessed value should have been 54,312 dollars. His position was that the property was a coconut plantation and although only five of the acres was necessary to accomplish effectively the production of the entire area, it was error for the assessor to have assessed 59.16 acres on a nonagricultural basis. The court reversed the lower court’s finding in favor of the assessor and held that if the property were being used in good faith as agricultural land the benefits of Florida Statute, section 193.11(3) were applicable. Accordingly the court reversed for a determination of the value of the entire parcel as agricultural land. Chief Justice Drew in his dissent in Overstreet was taking an “I told you so” attitude when he referred to the Matheson case. It is submitted that from the standpoint of constitutional law, the dissent makes a great deal of sense. However, the problems attendant upon the farmer may require some special treatment. Chief Justice Drew recognized this but stated that if such treatment or exemption is needed it should be accomplished by constitutional amendment not pursuant to legislative enactment which is patently discriminatory.

166. 175 So.2d 521 (Fla. 1965).
167. The court was divided in a four to three split. Justices Thornal, Caldwell and Ervin concurred in the majority opinion written by Justice Roberts, and Justices Thomas and O'Connell concurred in the dissenting opinion written by Chief Justice Drew.
168. 173 So.2d 164 (Fla. 3d Dist. 1965).
169. The high value was based on use of the land for hotel, motel, or high rise apartment purposes.
170. Chief Justice Drew in the dissenting opinion in Tyson v. Lanier, 156 So.2d 833, 841 (Fla. 1965), stated that:

The burden of taxation in the world in which we now live is one of concern to every citizen—not just those who own agricultural lands. The owners of resort hotels and businesses, operating in seasonal periods, are a class that inevitably have problems peculiar to them. Developers of large real estate subdivisions who hold lots for resale are another. The list is endless. A strict application of the ancient concept of equality and uniformity—buttressed by a myriad of court decisions and constitutional provisions—is the only way to prevent a complete erosion of these basic concepts in an area that has plagued men from time immemorial. We cannot—and must not—in my humble judgment make fish of one and fowl of the other.
B. Just Value—A Workable Definition

The Constitution of Florida in very simple terms declares that the legislature "shall prescribe such regulations as shall secure a just valuation of all property. . . ."171 Pursuant to this Constitutional mandate, the legislature has enacted Florida Statute section 193.021,172 which sets standards and guidelines for assessors to follow in reaching that abstract concept of just valuation. The confusion that has existed in the state with regard to what comports with the just valuation concept would, of necessity, require separate treatment and is beyond the scope of this survey. Suffice it to say that the Supreme Court of Florida, in an opinion which personifies the word clarity, has settled any confusion which heretofore may have existed.173

The court has held that just valuation is synonymous with the term "market value": Market value being defined in well worn definitive language as "(T)he amount a purchaser willing but not obliged to buy, would pay to one willing but not obliged to sell."174

An interesting point which was not considered by the majority opinion was the effect of this definition on the agricultural cases decided the same day. In a short concurring opinion Justice Roberts indicated that he felt that the majority did not go far enough and should have reaffirmed the reasonable classification policy evidenced in the agricultural cases.175

The question of the effect of this case on the agricultural problem was later answered in Stiles v. Brown176 to the effect that agricultural lands must be assessed upon a basis of what a buyer will pay for the purpose of "raising timber, citrus, cattle, or for other farming operations."177

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171. Fla. Const. art. IX, § 1.
172. Fla. Stat. 193.021 provides:
The county assessor of taxes of the several counties shall assess all the real and personal property in said counties in such a manner as to secure a just valuation as required by § 1, art. IX of the state constitution. In arriving at a just valuation, the county assessor of taxes of the several counties shall take into consideration the following factors:
(1) The present cash value of the property;
(2) The highest and best use to which the property can be expected to be put in the immediate future; and the present use of the property;
(3) The location of said property;
(4) The quantity or size of said property;
(5) The cost of said property and the present replacement value of any improvements thereon;
(6) The condition of said property;
(7) The income from said property.
174. Id. at 85, 86.
175. Id. at 86.
176. 177 So.2d 672 (Fla. 1st Dist. 1965).
177. Id. at 676.
C. Procedural Requisites to Challenging Assessments

The question of whether a deposit of the taxes admittedly due or payment of the taxes admittedly due, is necessary before an objection can be made to an assessment has been answered in the negative by the Florida Supreme Court in Collins Inv. Co. v. Metropolitan Dade County.178 Although the statutes seem to be as clear as possible in requiring the deposit or payment with the complaint, the court has held that an offer to do equity is enough to get you into court and the statutes are satisfied if payment is made before final relief is granted.

D. Tax Sales, Foreclosures, Costs, Attorneys' Fees, Notice of Sale

Brooks v. Florida Home Mortgage Co.,179 overruled the first district's prior position in Thomason v. Jernigan,180 to the effect that attorney's fees and abstracting costs could be recovered in foreclosure proceedings of a county tax lien. The court re-examined the Thomason file and found that it was mistaken as to the fact that the city had foreclosed. They stated that when an individual forecloses, there are no provisions for recovery of attorney's fees or abstracting costs, as opposed to provisions in chapter 173 when a city forecloses its own tax lien.181

In McNayr v. Cranbrook Inv., Inc.,182 the Supreme Court of Florida held that in every suit seeking to challenge the validity of tax assessment, the state comptroller must be made a party. The court allowed the plaintiff to amend and reasoned that the amendment making the state comptroller a party would relate back to the date the suit was filed. This was necessary to prevent the application of the sixty day limitation period which would preclude judicial review.183

The question of whether attorney's fees incurred in the foreclosure of a mortgage will take priority over a federal income tax lien perfected after the perfection of the mortgage but prior to the foreclosure proceedings was the subject under consideration in United States v. First Fed. Sav. & Loan Ass'n.184 The second district held that the government's lien took priority. The apparent reason for the decision was a finding that the lien for the attorney's fee did not mature until after the perfection of the federal lien.

178. 164 So.2d 806 (Fla. 1964).
179. 165 So.2d 238 (Fla. 1st Dist. 1964).
180. 151 So.2d 887 (Fla. 1st Dist. 1963).
181. Chapter 173, Fla. Stat. (1963) authorizes the foreclosure and procedures to be followed in municipal tax lien cases. The chapter does not apply to individuals who seek to foreclose a municipal tax lien.
182. 158 So.2d 129 (Fla. 1963).
183. Fla. Stat. § 192.21 provides in pertinent part that:
no assessment shall be held invalid unless suit be instituted within sixty days from
the time the assessment shall become final. . . .
184. 155 So.2d 192 (Fla. 2d Dist. 1963).
In *Alper v. LaFrancis*,\(^{185}\) the second district held that where property is held as a tenancy by the entirety it is necessary to mail a notice of sale for delinquent taxes in *individual* envelopes to *each* spouse.\(^{186}\) It is not enough to mail one notice addressed to both spouses. The dissent by Justice White seems to contain a good deal of logic in applying the force of pragmatics to the situation. His position was that since the statute specifically states that "The failure of the owner . . . to receive such notice shall not affect the validity of the tax deed issued pursuant to such notice,"\(^{187}\) and since in many instances in the commercial world husband and wife participate jointly, the result is unwarranted. He stated that there is no reason to condemn the practice and cause a departure from universal business usage.

E. Legislation

1. Homestead

Florida Law, chapter 65-281, amends Florida Statute section 192.13 providing for homestead taxation exemption to vendees in possession of real estate by adding the words "or deeds of conveyances" after the words "contracts to purchase." The amendment would appear to have limited effect.

2. Assessment Valuation; Alternative Method

Florida Laws, chapter 65-433, creates statute section 193.271, to provide an alternative method by which dissatisfied property owners may challenge a tax valuation placed on their property by the tax assessor. This method is not available, however, until the owner has sought relief from the Board of County Commissioners sitting as an equalization board.

The procedure consists of the property owner filing a certificate stating the amount he ascertains to be a just valuation of the property. He must also file therewith a written authorization to the tax assessor requesting and empowering him to advertise and conduct a public auction for the purpose of receiving cash offers for the property in amounts of not less than the amount set forth in the certificate. If bids are received equal to or greater than the amounts set forth in the certificate, procedures are provided for an actual sale to the highest bidder, such procedures relating to examination of title, payment of fees, apportionment of taxes and similar items. If the property owner fails to consummate the sale, he shall forfeit the cash deposit or surety bond given to the

\(^{185}\) 155 So.2d 405 (Fla. 2d Dist. 1963).

\(^{186}\) Fla. Stat. § 194.18 provides in pertinent part that:

In addition to the publication of the notice provided for by § 194.16 the clerk of the circuit court shall mail a copy of such notice to the owner of the property. . . . The failure of the owner . . . to receive such notice shall not affect the validity of the tax deed issued pursuant to such notice.

\(^{187}\) Ibid.
tax assessor with the written authorization, and the tax assessor shall pay one-half of this amount to the buyer, together with a return of the amount paid in pursuant to the buyer's bid. This shall be full and complete compensation to the bidder and he shall have no other recourse against the property owner and the tax assessor arising out of any of the measures taken as provided in this section. The tax assessor shall retain the remainder of the forfeited cash deposit or security bond. However the property owner shall not forfeit the cash deposit or surety bond, except for costs not otherwise paid, when he is unable to deliver merchantable title acceptable to the buyer. In such an event the just value shall be determined as otherwise provided by law. If no bid is received at the auction, the amount set forth in the certificate shall be established as a just valuation of the property and shall be entered on the tax rolls of the county.

3. PARAPLEGICS' EXEMPTION

Chapter 65-193 amends Florida Statute sections 192.111 and 192.112, relating to exemptions from taxes on property owned by paraplegic and wheel chair veterans, by adding subsection (3) to each, to extend such exemption on property owned by the entireties to the veteran's widow until she sells it or remarries. She must also reside on said real estate and use it as her domicile to be entitled to the homestead exemption.

V. EMINENT DOMAIN

A. Ratione Soli—An Incorporeal Hereditament which Runs with the Fee

In a four to three decision, the Supreme Court of Florida has held that the Game and Fresh Water Fish Commission cannot prohibit the right of a man to hunt and fish on his own land. In Alford v. Finch, the state commission, in conjunction with the establishment of a game preserve, enacted a regulation which would have prevented the owner from taking game from his land for an indefinite period. The supreme court held that the right to hunt game on one's land is a property right, and inasmuch as neither the state constitution nor implementing legislation conferred on the commission the power of eminent domain, the commission could not under the guise of regulation take the owner's property without compensation. The dissent took the position that the omission or preclusion of the commission's power to employ eminent domain was consistent with the conclusion that they could use their regulatory powers to effect the same result as if eminent domain were used. The dissent also found no authority for the recognition of a property interest in game while it is in a wild state. The decision establishes, however, that although the commission may set periods of time during

188. 155 So.2d 790 (Fla. 1963).
which game may be taken during the year, it cannot prevent a property owner from taking game for any extensive period of time as such action would constitute a taking of private property without just compensation.

B. Valuation—Factors Included and Excluded

Casey v. Florida Power Corp.\(^{180}\) involving the condemnation of an easement for an electrical transmission line, held that possible depreciation of the remaining land because of the existence of the high tension wires could not be considered as it would be too speculative and would be based on fear or ignorance of possible buyers.

A novel question was presented in State Road Dep’t v. Chicone,\(^{190}\) wherein the property condemned depreciated because of the threat of the taking prior to the actual condemnation. The Supreme Court of Florida, evidently impressed with the equities of the situation, held that the property is still to be valued at the time of the taking but that such value should be determined without the debilitating threat of condemnation. The decision is eminently fair, but it may be noted that the rule is different if at the time of taking the property has appreciated. The rule in that situation, and it caused difficulty in the instant case,\(^{191}\) is that the owner receives the value at the time of taking, including the appreciation,\(^{192}\) a somewhat anomalous result.

C. Lessee—Owner within Contemplation of Statute

In State Road Dep’t v. White,\(^{193}\) the Supreme Court of Florida held that a lessee for a term for years is an owner within the contemplation of the condemnation statute providing compensation for business damage.\(^{194}\) The opinion referred to a prior third district case and overruled any language in the opinion inconsistent with the present holding.\(^{195}\)

\(^{189}\) 157 So.2d 168 (Fla. 2d Dist. 1963).
\(^{190}\) 158 So.2d 753 (Fla. 1963); 18 U. MIAMI L. REV. 705 (1964).
\(^{191}\) The Sunday case, infra note 190, was distinguished in Chicone on two bases: (1) Sunday only held that an increase in valuation could be considered, it was not concerned with a decrease in valuation; (2) Sunday dealt with an appreciation arising from a proposed public improvement; Chicone dealt with the effect on value of the imminence of the land itself being taken. The court pointed out that when the land itself is marked for taking it can share none of the benefits to be derived from the proposed improvement because at that time the land will not be available for private use.

\(^{192}\) 161 So.2d 828 (Fla. 1964).
\(^{193}\) FLA. STAT. § 73.10(4) provides in pertinent part that where:

. . . the taking of the property involved may damage or destroy an established business of more than five years standing, owned by the party whose lands are being so taken . . . the jury shall consider the probable effect the denial of the use of the property so taken may have upon the said business, and assess in addition to the amount being awarded for the taking, the probable damages to such business which the denial of the use of the property so taken may reasonably cause. . . . (Emphasis added.)

\(^{194}\) The court overruled Gross v. Ruskin, 133 So.2d 759 (Fla. 3d Dist. 1961). There
D. State versus Private Corporation Condemnations

In a lengthy but well written opinion intended for the edification of the bench and bar, the Supreme Court of Florida has determined the applicability of article XVI, section 29 of the Florida Constitution. This section provides that full compensation shall be paid “irrespective of any benefit from any improvement proposed by such corporation or individual.” The precise point in issue was whether this constitutional provision was in conflict with the legislative mandate that in considering the remainder damage by virtue of the taking by the state road department or other public body, the enhancement of the remaining property shall be used as a set-off.

The court pointed out that eminent domain is an inherent attribute of sovereignty and does not depend upon constitutional provisions. The court then delved into the history of section 29 of article XVI, and concluded that this article was intended to apply only to condemnations by private corporations or individuals. As to condemnations by the state or its agencies, it was concluded that only the more general provisions of the Florida Declaration of Rights, namely, that private property shall not be taken “without just compensation,” was applicable to condemnations by the state or its agencies. It was further concluded that the question of just compensation was a judicial and not a legislative question, but that the state could impose upon itself or upon others exercising the power of eminent domain the obligation to pay more than a “just compensation.” It was accordingly held that the constitutional limitation providing for compensation without allowance for enhancement of value applied only to condemnations by private corporations. The statute, relating to a set-off for enhancement value when the condemnation was by the state or an agency thereof, was not unconstitutional.

E. Miscellaneous

In Zabel v. Pinellas County Water & Nav. Authority, the supreme court held that the denial of a dredge and fill permit was error where it was not established that the granting of the permit would materially affect the public interest. The court stated that the sale of bottom land by the state carries with it the valuable property right to bulkhead and fill.

The question as to whether the condemnor is bound by its estimate were no facts in the Gross opinion but the language was to the effect that a lessee could not recover damages for loss of business.

196. Daniels v. State Rd. Dep't, 170 So.2d 846 (Fla. 1964).
199. Daniels v. State Rd. Dep't, supra note 194.
200. 171 So.2d 376 (Fla. 1965).
of value which is required to be filed was answered in the negative in *Jacksonville Expressway Authority v. Bennett*.\(^{201}\) The court therein held that the estimate of value is not a minimum figure which would preclude the introduction of testimony showing a lower value.

In a case of first impression,\(^{202}\) the first district has held that venue can be changed in eminent domain proceedings notwithstanding the provisions in chapter 73 of the Florida Statutes providing for trial in the county in which the lands are located.\(^{208}\) The condemnee sought the change in venue on the ground that a vast majority of the citizens of the county were shareholders in the condemnor corporation.

In *Jacksonville v. Schumann*,\(^{204}\) the first district was confronted with the question as to whether a complaint alleging a cause of action for inverse condemnation could withstand a motion to dismiss. The court held that

> The constitutional provisions applicable in Florida are consistent with, if they do not affirmatively require, the recognition of the concept of inverse condemnation.\(^{205}\)

The court indicated that Florida has acknowledged that a continuing trespass or nuisance could ripen into a taking of property, and held that the concept of inverse condemnation would be applicable when activity at an airport deprived nearby owners of their free and unmolested use and quiet enjoyment of their property.

### F. Legislation

Chapters 73 and 74, Florida Statutes, have been extensively amended by Florida Laws, 1965, chapter 65-369. The effective date of the changes was October 1, 1965, and condemnation proceedings after that date are governed by the new legislation. Delineation of the changes would unduly prolong this article.

Florida Laws, chapter 65-248, amends Florida Statutes section 74.141, relating to the power of eminent domain applicable to public utilities, by extending the authorization to cover sewage distribution lines, collection lines, interceptor lines, effluent lines and force mains only. The chapter also creates Florida Statute section 361.07 to permit any corporation owning or operating a sewer system for the public, upon making due compensation, to enter upon and appropriate any land necessary for the operation of such sewer system.

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201. 158 So.2d 821 (Fla. 1st Dist. 1964).
204. 167 So.2d 95 (Fla. 1st Dist. 1964).
205. Id. at 102.
VII. VENDOR AND PURCHASER

A. Insurance—Whither Indemnity Principle?

The practical problems of insurance and its relationship to the sale of real property is always of concern to the practitioner when representing either the vendor or vendee. It is for this reason that *Springfield Fire & Marine Ins. Co. v. Boswell*[^206^] must be discussed.

In *Springfield*, the plaintiffs were issued a 6,000 dollar fire policy. Subsequently they entered into a contract for the sale of the property, the purchase price being 12,500 dollars with a 500 dollar deposit. The contract required the purchasers to insure against fire in an amount of at least 7,500 dollars. The purchasers obtained a policy in an amount of 15,000 dollars. The property was destroyed by fire and the vendees paid the vendors 12,000 dollars which they had received from their insurance, in return for a deed from the vendors. The vendors then sought recovery on their own 6,000 dollar policy.

The insurance company defended on the ground that the plaintiffs had not suffered any loss since they had received the full amount under the contract with the vendees, and that insurance is a contract of indemnity which contemplates payment only if a loss is sustained. The first district allowed the vendors to recover on the theory that insurance is a contractual arrangement. The court adopted the New York, or majority rule, to the effect that a pecuniary loss is not necessary, if at the time of the loss the plaintiffs had an insurable interest that was covered by the policy[^207^]. The valued policy statute[^208^] aided in reaching this result.

Sound policy arguments can be made either for or against this decision, but these writers endorse it while recognizing that it does erode the underlying insurance concept of indemnity. The desirability of prompt payment in case of total loss without haggling after the fact as to the value of the destroyed property may outweigh an occasional windfall to the insured. Further, a contrary rule may well result in windfalls to insurers in form of premiums for which no coverage is provided because of multiple policies. The court recognized the danger of overin-

[^206^]: 167 So.2d 780 (Fla. 1st Dist. 1964).

[^207^]: The court referred to its prior decision in *Rutherford v. Pearl Assur. Co.*, 164 So.2d 213 (Fla. 1st Dist. 1964) where the court held that the insurable interest of a vendor by virtue of a vendor's lien was sufficient for recovery. The Court held that the vendor did not have to go beyond a showing of the insurable interest and further allege a pecuniary loss when she was suing for only the unpaid portion of purchase price and not for face amount of policy. This was the first case to adopt the so called New York Rule as the Florida position on whether the contract of insurance is one of indemnity or contract when viewing a fire policy. The court in *Rutherford*, however, by way of dictum expressed a preference for the indemnity principle in determining the measure of recovery. This dictum was rejected in *Springfield*, supra note 204.

urance, but concluded that if remedial action were necessary, the legislature should take it. It was also pointed out that the insurer could have limited or prohibited additional insurance in the instant case but instead expressly permitted it without providing for apportioning the loss in case of casualty.

Another interesting insurance case, dealing with condemnation, was presented to the second district in *Peninsular Fire Ins. Co. v. Fowler* \(^{209}\). On the day that the owners of the property were served with process in a condemnation proceeding, they procured a policy of insurance on the property. Some months later the owners stipulated to an amount that would be paid in the condemnation proceeding. Pursuant to the stipulation, the condemnor placed the amount into the registry of the court. The property was subsequently destroyed by fire and the owners received the funds from the registry of the court. A suit was thereupon brought by the condemnor and condemnee seeking the proceeds of the fire policy. The lower court found that the final decree in the condemnation proceeding which was entered prior to the fire vested the fee simple title in the condemnor, but that inasmuch as the condemnee had not received the funds, they had at the time of the loss an insurable interest. Accordingly the court ordered that the insurance proceeds be paid to the condemnees and that the condemnees pay the funds over to the condemnor. On appeal the decision was reversed. The appellate court found that at the time of the loss the condemnees had no insurable interest. This position was supported on the basis that at the time of the loss the condemnors had both legal and equitable title to the property. The statutes dealing with eminent domain prevented the condemnors from withdrawing the funds from the registry of the court. Accordingly, at the time of the loss the condemnees had neither equitable nor legal title.

The decision is logically sound, but perhaps a little harsh. The lower court sought to reach a result that would appear more equitable, at least from a layman’s viewpoint. However, there seems little doubt but that risk of loss increases as soon as the condemnees cease to occupy the property. This fact might very well cause the policy to be cancelled, and if so, and if the property in question were unoccupied at the time of the loss, the correctness of the decision is further substantiated.

**B. Marketable Title**

The doctrine of *de minimis non curat lex* \(^{210}\) was employed as one of two bases for granting a vendor specific performance in *McLaughlin v. Block*. \(^{211}\) The vendee refused to complete the transaction involving the

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\(^{209}\) 166 So.2d 206 (Fla. 2d Dist. 1964).

\(^{210}\) The law does not care for, or take notice of, very small or trifling matters. BLACK, LAW DICTIONARY 482 (4th ed. 1951).

\(^{211}\) 159 So.2d 920 (Fla. 3d Dist. 1964).
sale of waterfront property because the vendors failed to deliver quit
claim deeds or other suitable instruments which would indicate a divest-
ment of all outstanding possible interests in and to a dock that was on
the property as well as all possible outstanding interests in the riparian
property included in the sale. The lower court found that the vendors
had failed to comply with the provisions of the deposit receipt agreement
in this regard, but that such failure was not so substantial that the vendee
would have a right to rescind. The appellate court affirmed, finding that
even if the *de minimis* doctrine were not employed, the decision was
supportable on the ground that an encroachment upon a riparian right
is not an encroachment upon the title and is not enough to support
rescission.

In *Peters v. Spielvogel*, the parties entered into a contract for the
sale of a restaurant which included realty as well as personalty. The
vendors' prior tenant instituted a replevin action on some of the per-
sonalty and fixtures and the vendors posted a bond and remained in pos-
session of the property. The vendees took the position that the litigation
by the prior tenant rendered the title unmarketable and sought return
of the deposit. The vendors sought specific performance. The lower court
found for the vendees and the vendors appealed. The appellate court
affirmed, holding that the contract for sale contemplated a conveyance of
marketable title to both the realty and the personalty, and unless both
could be so conveyed the entire contract was voidable by the vendees.

Although pending litigation by the third party former tenant would
render title to the affected personalty in doubt and therefore un-
marketable, it is to be noted that the former tenant had won and had
satisfied its judgment out of the bond that the vendor posted. No time
sequence as to the tenant's suit against the vendor was indicated other
than that the suit was probably pending at the time of entry into the
contract. There was no indication as to when the suit was settled and
recovery satisfied against the bond. It is submitted, however, that if the
alleged cloud on the title was removed by satisfaction from the bond
prior to the time required for conveyance of the marketable title under
the contract terms, then the result should have been to the contrary
because the time for performance is the time that the obligation to furnish
a marketable title matures.

C. Specific Performance and the Temporary Injunction

A vendor invited the vendee to come upon the property and use it
pending completion of construction and consummation of the contract
for sale. The property was a golf course and the vendee was not required
to maintain the property except that one of its employees acted in a
supervisory capacity. The vendee indicated that it was going to vacate the premises pending further negotiations on the contract. The vendor then obtained a mandatory injunction which in effect ordered the vendee to stay in occupancy. The vendee appealed and the court reversed finding that an injunction against the breach of a contract is tantamount to a suit for specific performance. Accordingly, without irreparable damage there is no justification for granting it. The only damage that would have been caused was the loss of the supervisory employee of the vendee. The court also found that the invitation to use the property pending completion of the contract did not give rise to any additional contract rights or obligations separate and apart from the main contract.213

D. General Principles Reaffirmed

Florida Statute section 731.051, rendering unenforceable an oral contract to devise, is a statute of frauds which is an affirmative defense which cannot be raised by motion;214 carpeting installed by the tackless method remains personalty and does not become a fixture;215 and an optionee for consideration has a right during the option period that cannot be avoided by the optionor by action which will make his performance impossible or more difficult.216

VIII. Covenants, Easements, Water Law

A. Covenants

In *Harris v. Sklarew*,217 a grantor who never had title, conveyed by means of a special warranty deed which provided:

And the said grantor(s) do(es) hereby fully warrant the title to said land, and will defend the same against the lawful claims of all persons whomsoever claiming or to claim the same, by, through and under the grantor(s) herein.218

The grantee brought suit for breach of the special warranty deed alleging that the deed did not eliminate the common law covenant of seisin. The court held that the limitation as set forth above limited all the common law covenants, and judgment for the defendant was affirmed.

The decision is believed correct, and one of the authors herein gratefully acknowledges the court's citation219 to his writing in support thereof.

217. 166 So.2d 164 (Fla. 3d Dist. 1964).
218. Id. at 165.
219. Id. at 166.
A little conceptual difficulty is encountered, however, in the exact application of the court's rationale. The theory is that the common law title covenants were included in the deed but that they were modified by the limiting words "by, through and under the grantor." This is a logical approach, but how do you apply it to a covenant of seisin? The grantor covenants that he is seized "by, through and under the grantor?"; seisin in Florida being an affirmation that he has the very estate he purports to convey, it is difficult to modify the covenant by the above words.

An alternative basis for the decision would be that the covenant of seisin was not included in the deed. Covenants for title are not implied but must be expressed in conveyances of real estate. However, the statutory deed in Florida incorporates by reference the usual common law covenants, one of which, of course, is the covenant of seisin. Statutes in derogation of the common law are strictly construed, therefore, it could be argued, the form of the statutory warranty deed must be literally followed in order to incorporate the title covenants. In the instant case the statutory form was followed except that the general covenant of warranty (the only one expressed in the statutory form) was modified by an addition of words which converted it into a special warranty. It is submitted that this alteration changes the whole nature and purpose of a statutory warranty deed, and therefore neither the covenant of seisin or any other title covenant should be implied or incorporated without express words to that effect.

*Headley v. Lewis,* held that a covenant to make subdivision improvements such as streets, sidewalks and curbs was a personal agreement which did not run with the land, and therefore could not be avoided by conveyance of the fee. The original subdividers had contracted with the city to make the improvements, and then they conveyed to defendants who agreed in both their contract and deed to complete the improvements. The grantees defaulted and in turn conveyed after time for completion of the improvements had passed. After the subdividers completed the improvements at the request of the city, they sued their assuming grantees. In holding the grantees liable, the court also stated that even if the covenant was one to run with the land so as to be obligatory on subsequent grantees, a prior party could not escape by conveyance from liability for improvements that should have been made prior to the transfer.

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221. 3 *Am. Law of Property* § 12.124 (Casner ed. 1952).
224. See *supra* note 221.
225. 160 So.2d 172 (Fla. 3d Dist. 1964).
B. Easements

In Kingdon v. Walker,226 a grantor had provided that he would convey a permanent easement in a good roadway within a reasonable period of time. This provision was not in the deed, but rather in the contract for the sale of the land. At the time of suit the grantor had built a roadway in an area which was not owned at the time of the original transaction. The grantee brought an action for definition of a contractual easement, and the lower court denied declaratory relief. On appeal the second district held that after-acquired property can be the subject of specific performance, and located the easement thereon. The court also held that the declaratory judgment act could be applied to the case at bar. The location of the easement originally not specifically defined was rendered certain under the principle of practical construction by the conduct of the parties.

The proposition that an easement, once granted and fixed in terms of location, cannot be changed at the whim of the grantor is vividly brought to light in Florida Power Corp. v. Hicks.227 The defendant property owner bought the property in question subject to an easement in favor of the power company. The company had erected lines and one of the guy wires was in the easement. The defendant wanted to build a filling station but could not do so and have an effective flow of traffic unless the guy wire was relocated. The defendant’s requests for relocation failed and he began to construct the station anyway. The power company sought injunctive relief on the ground that allowing the continuation of the building would be an invasion of the company’s easement rights and in addition would result in the operation of a hazardous business adjacent to the power lines. The lower court granted a temporary injunction but required the company to post a bond to compensate the owner for damages if he had been wrongfully enjoined from continuing. The owner counterclaimed seeking relocation of the wire. The lower court ordered a relocation of the wire to another portion of the owner’s land as long as it did not impede the flow of traffic into the station. In addition, the court assessed over 1,400 dollars costs against the company and gave the owner a 7,500 dollar judgment against the company and its surety for damages. On appeal, the court held that the owner of the land has no right to interfere with the location of the easement once established, and reversed the lower court’s decision in toto.

It is submitted that the court was confronted with two unyielding positions. The owner requested the relocation which was denied. In spite of the denial he went ahead and commenced construction of the station. The power company refused to relocate and in fact sought affirmative relief when the owner began the construction. Although the opinion does not make it picture clear how difficult it would have been

226. 156 So.2d 208 (Fla. 2d Dist. 1963).
227. 156 So.2d 408 (Fla. 2d Dist. 1963).
for the power company to relocate, it does make it clear that the wire was "In front of the filling station. . . ."228 The result seems to be an admonition to owners to respect easements on their property and not to assume that they will be relocated or interfered with at the whim of the owner.

An illustration of the doctrine of balancing the relative conveniences is Ortega Co. v. Justiss.229 The grantor sought a mandatory injunction for violation of a restrictive covenant against use of the property as a trailer park. The court denied the injunctive relief as it would have required the grantee to go to considerable expense and the benefit to the grantor would have been very small. The lower court transferred the case to the law side for damages. The appellate court affirmed finding that the doctrine of balancing the relative conveniences of the parties finds its most general application in cases of encroachment, but that the "rationale of the decisions make application of the doctrine equally applicable to cases involving violation of restrictive covenants."230

Cartish v. Soper,231 has established the proposition that an easement of access to water which was granted to all property owners in a subdivision carries with it the implied grant to the use of the riparian rights. The easement was created over one lot in order to give the owners in the subdivision access to the water which lay in front of the subdivision. The fee owner of the burdened lot attempted to plant shrubs and flowers around the lot and the owners brought a class action to enjoin such action. They also sought to establish their right to rebuild a dock in front of the lot. The appellate court held that the riparian rights to build the dock were implied from the easement which gave access to the waterway.

The implied easement which exists by virtue of a conveyance of landlocked property was the problem in Walkup v. Becker.232 The court found that the common law way of necessity which has been incorporated into the statutory law of this state contemplates a reasonable and practicable way of ingress and egress. The fact that the owner had use of an old road which had existed for forty-five years was not enough to prevent the implication of the easement in view of the fact that the old road became impassable in rainy weather.

C. Water Law

1. SURFACE WATER

New Homes of Pensacola, Inc. v. Mayne,233 reaffirmed the proposition that the servitude that the owner of higher adjoining land has on
the lower land is one limited to the surface water flowing naturally. The court stated that:

No person has the right to gather, by drainage ditches, dams, or other means, surface waters that would naturally flow in one direction, and divert them from their natural course, and cast them onto the lands of a lower owner to his injury.234

2. ACCRETION, DEDICATION AND RIPARIAN RIGHTS

A subdivider had dedicated a street on the easterly portion of the subdivision and had reserved riparian rights. The street ran along a navigable body of water. After a number of years accretions formed on the easterly side of the road. The owners of the lands in the subdivision brought suit to be declared the owners of the accretions and sought injunctive relief against the city to prevent any interference with their rights in the accretions. The lower court held in favor of the city and the appellate court affirmed235 holding that the accretions became a part of the dedicated street. The Supreme Court of Florida reversed,236 finding that the city had an easement in the street, and that the lot owners had the fee interest. Although it was true that the accretions would be burdened by the easement, as was the street, it did not follow that the city could obtain the fee interest in the accretions. The court held that the fee interest was in the owners but that the city also had an easement in the accretions. The owners could not fill the submerged land bordering on the accretions, but at the same time the city could not exercise any riparian rights that were not implied by virtue of the easement. In other words, the city could keep the accretion area open as the general public had a right to ingress and egress to the navigable waters, but the city could not do anything which was a riparian right by virtue of fee ownership.

IX. CONDOMINIUMS

A number of amendments were enacted to the Florida Condominium Law.237 These amendments were primarily for the purpose of clarification and to make the provisions more certain. One amendment of a substantive nature, however, is the provision that the rule against perpetuities shall not be applied to defeat a right given any person or entity by the declaration for the purpose of allowing unit owners to retain reasonable control over the use, occupancy and transfer of units.238 Thus, preemptions and options provided for in the declaration of condominium are excepted from the rule against perpetuities. The amendment says nothing about the rule prohibiting direct restraints on alienation, but

234. Id. at 347.
235. Burkart v. City of Fort Lauderdale, 156 So.2d 752 (Fla. 2d Dist. 1963).
236. Burkart v. City of Fort Lauderdale, 168 So.2d 65 (Fla. 1964).
237. FLA. STAT. § 711.01-711.23 (1963).
perhaps threats of invalidity from that rule were not as serious as those arising from the application of the rule against perpetuities. 239

Another provision of a substantive nature is the statute permitting a condominium association to acquire possessory or use interests in land and recreation facilities for the benefit of unit owners. 240 Such facilities may be acquired whether or not they are contiguous to condominium lands. Acquisition of such interests are subject to the limitation imposed by the declaration and by-laws, and the declaration and by-laws may provide that the expenses of rental, membership fees, operations, replacements and other undertakings in connection therewith are common expenses.

A clarifying amendment occurred in the statute defining condominium as a form of ownership. The amendment substituted for the words "by different owners" the phrase "one (1) or more." 241 The statute now reads in part "form of ownership of condominium property under which units of improvements are subject to ownership by one or more owners, and there is appurtenant. . . ." The purpose of the amendment was to eliminate ambiguity as to whether a condominium would cease to be a condominium if all units were purchased by an individual, or a single developer (declaror) must first sell one unit subsequent to recording the declaration before there exists a condominium form of ownership.

Florida Statute section 711.12(2), relating to the powers of the association, was amended by the addition of the words "and shall have power to execute contracts, deeds, mortgages, leases, and other instruments by its officers." 242 These words were added to make it clear the authority of the non-corporate condominium association was not limited to contracting, bringing suits, and being sued, but included the power to execute any and all instruments affecting real property interests, as if it were a corporation.

Another amendment relating to the powers of the association provides that, whether or not incorporated, the association shall have the power, unless prohibited by the declaration, articles of incorporation, or by-laws of the association, to purchase units in the condominium and to acquire and hold, lease, mortgage and convey the same. 243 The purpose of the amendment was to eliminate any doubt that the association, whether it be incorporated or not, should have such powers so long as the declaration did not specifically forbid them.

243. Id. § 5, amending FLA. STAT. § 711.12 (1963) by the addition of subsection (8).
The statute relating to termination was amended by changing "undivided interest" in both subsection 1 and subsection 2 to read "undivided share."244 These amendments make no change in substance but are designed to make the terminology more consistent with the other provisions of the act. Another amendment added to the original act a sentence to make it clear that subsequent to the termination of a condominium in any manner, the liens upon the condominium parcel shall be upon the respective undivided shares of the owners as tenants in common.245

The statute relating to zoning was amended to make it clear that although condominium parcels are recognized for certain purposes as individual residential dwellings, laws, ordinances, building regulations, and zoning applicable to other type buildings used for a similar purpose are also applicable to condominium projects.246 The amended section is longer and more explicit than the original statute.

X. Mechanics' Liens

There were no reported decisions under the new Florida Mechanics' Lien Law,247 but a number of amendments were enacted. Florida Statute section 84.031(3), providing liens for professional services, was amended by the addition of a provision that no lienor under this section shall be required to file a mandatory notice to the owner.248

Section 84.041, relating to subdivision improvements, was changed from "any person who, pursuant to a direct contract" to "any lienor, who regardless of whether in privity" performs services for subdivision improvements shall have a lien as provided by this section.249 The amendment thus broadens the coverage from those who were in privity (pursuant to a direct contract) to improvers whether in privity or not. The statute also makes it clear that the enumeration of improvements therein is not exclusive but that other improvements might also qualify. This is accomplished by the addition of the words "but shall not be limited to" in enumerating the improvements. Construction of canals has been added to the improvements enumerated.

Section 84.051, relating to liens on persons in privity, was amended250 by deleting the phrase relating to priority because the phrase was repetitious of the language used in section 84.071. The amended act also provides that no lienor under this section shall be required to serve the

249. Supra note 248, at § 2.
250. Supra note 248, at § 3.
mandatory notice to the owner. It appears that the amendment provides that a lienor not in privity with the owner who later becomes in privity with the owner need not serve the mandatory notice.

Section 84.061(3), relating to liens of persons not in privity and proper payments, was amended by the addition of subsection (3)(c)4. This provides that a lienor who did not serve the mandatory notice to the owner but who is named in a contractor's affidavit shall not be paid until all lienors giving notice, and lienors listed in the affidavit whose time for serving such notice has not expired, have been paid in full. Thereafter, payment shall be made to the lienors who fail to serve a timely notice to the extent of such balance due to the contractor "provided, this shall not be construed to permit any claim or demand whatsoever by said persons failing to serve timely notice against the owner." This last provision is not clear but probably means that the added paragraph shall not be construed to allow a claim against an owner by a lienor who fails to serve the mandatory notice.

A provision is added to subsection (3)(d)2 that lienors listed in the contractor's affidavit, not giving notice, may be paid nevertheless.

Subsection (4) of section 84.061, which was repetitious of section 84.071, and provided that liens would take effect from recording the notice of commencement was repealed.

Section 84.071, relating to priority of liens, was amended by deleting from subsection (3) the words, "except as otherwise provided for liens under this chapter." This subsection provides that mortgages recorded prior to the time a lien attaches, and any proceeds thereof, regardless of when disbursed, shall take priority over the lien. The deletion eliminates the question of what the quoted language meant and assures protection for the construction mortgage as long as it is recorded before recordation of the notice of commencement.

Subsections 4 and 5 of the 1963 section 84.071 are combined in subsection 4 by the 1965 legislation. The terms default and abandonment have been replaced by "ceases before completion." It is probably desirable to eliminate any distinction between default and abandonment, but it is doubtful whether the amendment increases the certainty of determining the priority of liens for materials and services furnished subsequent to recommencement.

Section 84.081(3), relating to the claim of lien, was amended by

251. Supra note 248, at § 4.
252. Ibid.
253. Supra note 248, at § 5.
254. Supra note 248, at § 6.
255. Ibid.
adding a blank space in the lien form for the name of the lienor when the claim of lien is executed by a person other than the lienor.256

Section 84.091, authorizing a single claim of lien for improvements on more than one lot and similar situations, was amended by deletion of the word "except" prior to enumeration of the circumstances under which the 1963 act intended a single claim of lien to be sufficient.257 The addition of the word "except" under the 1963 act actually excluded those circumstances from authorizing the use of a single claim of lien. The amendment eliminates an obvious ambiguity.

Section 84.131, relating to notice of commencement, was amended by adding to subsection (1) a provision that an owner shall record a notice of commencement "whether or not a project has a payment bond complying with section 84.231 F.S."258

Subsection 4 was added to the notice of commencement statute to provide that an owner constructing subdivision improvements described in section 84.041 need not file a notice of commencement.259 Subsection 5 was also added which provides that the notice of commencement, unless otherwise provided therein or in an amended notice, shall not be effective as to any person acquiring title or any interest in real property from the owner or under him after one year from the date of recording the notice of commencement.260 It is uncertain what effect the provision has where a project has not been completed for more than ninety days at that time. The reason for this statement is that a lienor may under section 84.081 file his claim of lien at any time during the progress of the work or thereafter but not later than ninety days after the final furnishing of the labor, services or materials by the lienor.

Section 84.161, relating to demands for a copy of contract and statements of account, is amended by the requirement that the demand must be a "written" demand of an owner or a lienor.261

Section 84.181, relating to the manner of serving notices, was amended by deleting the requirement of receipt of registered or certified mail by the person to be served notice, and substituting "and evidence of delivery."262 It is not clear whether the act as amended means evidence of delivery to the person to be served or evidence of delivery to such person's last known address.

Section 84.191, relating to the assignments of liens, was amended

256. Supra note 248, at § 7.
257. Supra note 248, at § 8.
258. Supra note 248, at § 9.
259. Ibid.
260. Ibid.
261. Supra note 248, at § 10.
262. Supra note 248, at § 11.
by deletion of the requirement that the assignment of lien shall be by written instrument signed and acknowledged in the manner provided for recording conveyances of real property. The act now simply provides that a lien, except that of a laborer, may be assigned at any time before its discharge.

Section 84.221, relating to the duration of liens, was amended by adding to subsection (2) a provision for an election to shorten the time for enforcing a claim against a bond or other security under Florida Statute section 84.231 or section 84.241. The original statute for shortening the period did not include the provision relating to a claim against a bond.

Section 84.231, relating to payment bond, was amended by insertion of the word “original” before the words “contract price.” The act now provides that the amount of the bond must be at least the amount of the original contract price.

Section 84.241, relating to transfer of liens to security, was amended in subsection (4) by the addition of a provision requiring the clerk of the circuit court to return the security deposited with him when it appears that the transferred lien has been satisfied of record.

Florida Statute section 84.261, relating to consolidation and intervention, was repealed.

263. Supra note 248, at § 12.
264. Supra note 248, at § 13.
265. Supra note 248, at § 14.
266. Supra note 248, at § 15.
267. Supra note 248, at § 16.