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Commercial Law

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I. INTRODUCTION

This survey[1] of commercial law attempts to cover all of the Florida cases and legislation encompassed by the umbrella of the Uniform Commercial Code. In addition, federal and Florida consumer oriented legislation and administrative regulations will be dealt with along with some real property cases which can be fitted by analogy under sale of goods concepts. Attention will also be devoted to garnishment, mortgages, suretyship and aspects of banking not found within articles 3 and 4 of the UCC.

The number of products liability cases has seemed to spiral in the last few years, and a surprising number of security interest cases reached the appellate courts which demonstrated a low level of sophistication (if not total ignorance) in dealing with article 9 of the UCC.

II. SALE OF GOODS

A. *Use of Article Two by Analogy*

The Supreme Court of Florida has held that a complicated stock purchase agreement which provided that the consideration was to be based upon a "cash flow benefit" was not so vague as to be incapable of being specifically enforced. The court cited as analogy for its holding section 2-204 of the UCC, which provides that "even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."[2]

B. *Statute of Frauds*

When the plaintiff-subcontractor alleges in his complaint that he had a contract with the defendant-contractor to install carpeting in houses (owned by a third party), with the plaintiff supplying the labor, padding and metal strips, and with the defendant contractor

1. This survey covers the cases reported in volumes 274 So. 2d through 315 So. 2d, and the legislation enacted by the 1974 and 1975 legislatures.

2. Blackhawk Heating & Plumbing Co. v. Data Lease Financial Corp., 302 So. 2d 404 (Fla. 1974).

supplying the carpeting, this contract may be deemed one for services rather than for the sale of goods; thus it would not come within the statute of frauds provision of the UCC.[3]

C. *Notice of Breach*

The District Court of Appeal, Third District, has held that when a merchant sues on an account stated for goods sold, the defendant customer who has failed to complain about the quality of the goods until the suit is filed four years after the sale has, by his conduct, waived his right of action for damages as alleged in his counterclaim.[4] The court failed to cite section 2-607(3) of the UCC, which states that when a tender has been accepted the buyer must within a reasonable time after he discovers any breach notify the seller or be barred from any remedy.

D. *Unconscionability*

A purchase money installment sales contract for a mobile home which provides for interest at the rate of 11.75% per annum is not unconscionable for this reason alone under section 2-302 of the UCC, and the contract is enforceable. It is interesting to note that this issue of unconscionability was raised by the trial court rather than by the parties, and, in the process, the court failed to rule on other issues raised by the buyers of the mobile home.[5]

E. *Fraudulent Sales*

A seller who knowingly sells stolen property may be held liable for breach of warranty of title and for fraud and misrepresentation, and punitive damages may be awarded.[6]

In a similar vein, a car dealer may be held liable for punitive damages based upon the fraudulent and deceitful sale of a car with a false odometer reading.[7]

F. *Products Liability Cases*

If the undisputed facts show that a defendant foreign manufacturer sold fittings to a Florida corporation which in turn sold

3. Dionne v. Columbus Mills, Inc., 311 So. 2d 681 (Fla. 2d Dist. 1975).
4. Rylander v. Sears Roebuck & Co., 302 So. 2d 478 (Fla. 3d Dist. 1974).
5. Mobile America Corp. v. Howard, 307 So. 2d 507 (Fla. 2d Dist. 1975).
6. Lloyd v. DeFerrari, 314 So. 2d 224 (Fla. 3d Dist. 1975).
7. Roger Holler Chevrolet Co. v. Arvey, 314 So. 2d 633 (Fla. 4th Dist. 1975).

them to the plaintiff, that the foreign manufacturer sold at least $13,000 worth of these fittings to three Florida suppliers for each of the last five years, and that the president of the foreign manufacturer met with the plaintiff concerning the replacement of these fittings, then the foreign manufacturer was doing business in Florida under sections 48.181 and 48.193 of the Florida Statutes and was subject to process under these sections.[8]

Section 2-725(2) of the UCC provides that the cause of action accrues when the breach occurs and that the breach of warranty occurs when tender of delivery is made. The District Court of Appeal, Second District, has cited this section as one of its authorities for the proposition that the proper venue for the sale of a horse was in the county in which the sellers delivered the horse to the buyers rather than in another county in which the contract of sale (which contained the warranties covering the horse) was entered into.[9]

When a jury finds that the operator of a lawn mower was guilty of negligent use of the machine which resulted in a rock being thrown into the plaintiff's eye, the mower's owner (who is vicariously liable for the acts of his son who was operating it) may not secure indemnification from the manufacturer of the lawn mower on the basis of negligent design and breach of warranty.[10]

The District Court of Appeal, Third District, has seemed to indicate that a customer of a self-service laundromat would have a cause of action against the laundromat for breach of an implied warranty when her arm was torn off as a result of a premature starting of a washing machine when she was loading a rug into it.[11] As authority for its holding, the court cited the case of *W. E. Johnson Equipment Co. v. United Airlines*,[12] which held that there may be an implied warranty of fitness when a lessor leases a chattel knowing the particular purpose for which the chattel is leased.

The District Court of Appeal, Third District, has held in a case of first impression in Florida that an automobile manufacturer may be held liable both in negligence and for breach of an implied warranty for a defect in the manufacturing of the interior of a car which causes injury to a passenger when the car is struck by another vehicle. Under this "secondary-impact" holding the manufacturer is under a duty to design and manufacture the vehicle in such a way

8. Dublin Co. v. Peninsular Supply Co. 309 So. 2d 207 (Fla. 4th Dist. 1975).
9. Stanfield v. DeStefano, 300 So. 2d 712 (Fla. 2d Dist. 1974).
10. Dura Corp. v. Wallace, 297 So. 2d 619 (Fla. 3d Dist. 1974).
11. Washwell, Inc. v. Morejon, 294 So. 2d 30 (Fla. 3d Dist. 1974).
12. 238 So. 2d 98 (Fla. 1970).

as to avoid subjecting the user to an unreasonable risk of injury in the event of a collision. In the instant case, the passenger in the rear of the car was propelled forward into the front seat, which slid forward in the seat track, allowing the passenger's head to strike the sharp track and causing fatal injuries.[13]

In a breach of warranty case it is not necessary to prove a specific defect in the goods which caused injury to the user; a defect can be inferred from the fact that the product failed in a certain manner. For example, when a plaintiff user of a relatively new aluminum ladder (which was supplied by his employer) suffered a fall as the result of a sudden break in a "rear upright" of the ladder, he may be able to recover in a suit against the manufacturer of the ladder even though the ladder has disappeared and the user is unable to delineate specifically the particular defect in it.[14] In a similar vein, when a workman was killed because of the failure of an elevator locking device, which allowed the elevator upon which the deceased was standing to fall, his widow "was not under any duty to pin-point any exact mechanical deficiency for or by reason of which the device proved defective and failed."[15]

In a giant step backwards, the District Court of Appeal, First District, apparently has held that when a consumer is injured in her home as the result of an exploding soft-drink bottle purchased from a retailer, she may not recover either in negligence or in implied warranty against the bottling company unless she is able to prove how the bottle was handled from the moment it left the bottling plant until the moment of explosion. The plaintiff consumer may not rely upon the doctrine of res ipsa loquitor unless she is able to prove the foregoing facts. The dissenting judge was of the view that if a possible mishandling of the bottle by the retailer was the defense, this issue could be developed between the bottler and the retailer since both parties were joined as defendants. The dissenting judge also suggested that the obvious result of the majority holding would be to deprive virtually all injured consumers in exploding bottle cases from relief against the bottlers.[16]

The privity notion in implied warranty cases was given an unusual twist in *Mattes v. Coca Cola Bottling Co. of Miami*.[17] A lady

13. Evancho v. Thiel, 297 So. 2d 40 (Fla. 1974).

14. McCarthy v. Florida Ladder Co., 295 So. 2d 707 (Fla. 2d Dist. 1974).

15. Armor Elevator Co. v. Wood, 312 So. 2d 514, 515 (Fla. 3d Dist. 1975).

16. Coca-Cola Bottling Co. v. Clark, 299 So. 2d 78 (Fla. 1st Dist.), *cert. dismissed*, 301 So. 2d 100 (Fla. 1974).

17. 311 So. 2d 417 (Fla. 4th Dist. 1975).

shopper picked up a carton of Coca Cola from a stack of Coca Cola in a grocery store. She turned around, walked five or six steps and then she heard a "bang" followed by the sounds of bottles falling and breaking. She felt pain in both legs which were bleeding. The woman was unable to testify that any of the Coca Cola bottles were defective; the carton of bottles in her hand did not explode. The trial court dismissed the implied warranty claim, and the appellate court affirmed on the ground that the plaintiff was a bystander, not a purchaser or user, and that she failed to show that the bottle was a dangerous instrumentality sufficient to overcome the privity requirement in warranty. The excellent dissenting opinion of Judge Mager advocates the view that privity is no longer a requisite under Florida law and that strict liability in tort under section 402A of the Restatement of Torts (Second) ("Restatement 402A") should be the proper remedy in product liability cases.

The District Court of Appeal, Fourth District, has stated that prior Florida cases have reached the view that "negligent construction or design of an article which is not a dangerous instrumentality per se can subject the *manufacturer* to liability if a user sustains an injury as a result of an inherently dangerous condition in an otherwise innocent looking instrumentality."[18] The court then said that this same rule should be extended to *sellers* of goods which may be dangerous instrumentalities as a result of improper construction or design in light of Restatement 402A, and the court applied the rule to a case where a minor guest was seriously burned as a result of an explosion allegedly caused by the improper construction or design of a patio Hawaiian torch purchased by his hosts. On the other hand, the District Court of Appeal, First District, has again rejected the doctrine of strict liability in product liability cases, and expressly refused to follow the Fourth District's view, which was labeled as dicta.[19]

The Florida law of products liability was further muddled in *Favors v. Firestone Tire & Rubber Co.*[20] Sunrise, the purchaser of a new Ford truck, took it to a Goodyear store to have the tires changed. Plaintiffs, employees of the Goodyear store, did the tire changing; shortly afterwards one of the rims pulled apart, exploded and came off the wheel, seriously injuring the employee tire chan-

18. Keller v. Eagle Army-Navy Dep't Stores, Inc., 291 So. 2d 58, 60 (Fla. 4th Dist. 1974) (court's emphasis).

19. Linder v. Combustion Eng'r, Inc., 315 So 2d 199 (Fla. 1st Dist. 1975), *following* Lipsius v. Bristol-Myers Co., 265 So. 2d 396 (Fla. 1st Dist. 1972).

20. 309 So. 2d 69 (Fla. 4th Dist. 1975).

gers. The employees sued Ford and the Firestone Company, which had manufactured the wheel assembly sold to Ford and incorporated into the truck, on the theories of implied warranty, negligence and strict liability in tort. They also sued Sunrise for breach of an implied warranty. The appellate court held: (*1*) Ford, which assembled a part produced by another manufacturer, is deemed as the manufacturer of the part under prior case law which has not been superseded by the Code; "the implied warranty doctrine developed in Florida prior to adoption of the Uniform Commercial Code is still viable."[21] (*2*) Firestone would also be liable under a warranty theory. (*3*) The allegations of the complaint relating to improper design and manufacture by Ford and Firestone "set forth a sufficient claim for relief for breach of implied warranty within the rule contained in the Restatement of Torts which has been approved in Florida."[22] The court cited section 398 of the Restatement of Torts (Second) without realizing that this section has nothing to do with an "implied warranty." (*4*) The theory of strict liability should be rejected "inasmuch as it has not been recognized in Florida."[23] The court conveniently forgot its own prior case of *Keller v. Eagle Army-Navy Department Stores*,[24] which applied Restatement 402A against a retailer. The dissent brought this case to the attention of the court. (*5*) The implied warranties created by section 2-314 of the UCC would not run to the employees of the Goodyear store because there was no privity between them and the manufacturer of the truck and wheel. (*6*) Sunrise, as owner-bailor of the truck, would not be liable for warranties under section 2-314 since it was not a seller and there is no reason to extend warranties to this type of bailment. Insofar as the fifth holding of the court is concerned, there is no reason for a court to restrict section 2-314 warranties to persons in privity with the seller inasmuch as a comment to section 2-318 (which was cited by the court) virtually encourages courts to extend the reach of warranties.

When a complaint alleges the negligent furnishing of service by a telephone company in installing telephone equipment (the negligent failure to ground the telephone line allegedly resulted in a lightning strike causing the destruction by fire of the customer's office) as distinguished from a sale or bailment of a product, no

21. *Id.* at 71.
22. *Id.*
23. *Id.* at 72.
24. 291 So. 2d 58 (Fla. 4th Dist. 1974). *See* text accompanying note 18 *supra*.

warranty of fitness is implied.[25]

When an expert testifies that the aluminum in an eight-foot ladder manufactured by one defendant and sold by another was of an improper thickness, and his testimony is based upon plans and specifications for a fourteen-foot ladder which were furnished by the defendants and the defendants fail to raise this mistake at the trial, they cannot raise it on appeal. In addition, since the defendants' negligence in part caused this incorrect testimony, they cannot raise this error.[26]

If all the evidence shows that an exploding tire rather than any defect in a tire-changing machine caused the plaintiff's injuries, the court may direct a verdict in favor of the manufacturer of the machine.[27]

When a suit for breach of warranty and negligence for the death of a driver is based upon loss of control of the car resulting from a broken adjustor nut located on the top of the steering gear box, and it is a matter of conjecture as to whether the nut broke as a result of the car leaving the road or as a result of a great force being exerted against it on a prior occasion, it is proper for the trial court to set aside the jury verdict and to enter a judgment for the manufacturer.[28]

Section 672.316(5) of the Florida Statutes provides that the implied warranties of merchantability and fitness for a particular purpose shall not be applicable against the supplier of whole blood, plasma, blood products and blood derivatives "as to a defect that cannot be detected or removed by reasonable use of scientific procedures or techniques." The statute has been interpreted to mean that if a plaintiff is able to show that serum hepatitis is detectable or removable by the use of reasonable scientific procedures or techniques, he may maintain an action for damages against the hospital and physicians who sold and administered blood based upon a hybrid implied warranty of fitness "which departs from the concept of strict liability or liability without fault ordinarily ascribed to such warranty and instead establishes a criteria for recovery which is ordinarily understood by lawyers and judges to be cognizable in negligence."[29]

25. Lauck v. General Tel. Co., 300 So. 2d 759 (Fla. 2d Dist. 1974).
26. Sears, Roebuck & Co. v. McAfoos, 303 So. 2d 336 (Fla. 3d Dist. 1974).
27. Simpson v. Coats Co., 306 So. 2d 573 (Fla. 1st Dist. 1975).
28. Cromarty v. Ford Motor Co., 308 So. 2d 159 (Fla. 1st Dist. 1975).
29. Williamson v. Memorial Hosp., 307 So. 2d 199, 201 (Fla. 2d Dist. 1975).

The relationship of products liability and medical practice was further developed in *E. R. Squibb & Sons, Inc. v. Stickney*,[30] in which Boplant (a calf-bone product) was used as a grafting material for a spinal operation. Three years after the operation the patient again underwent surgery, the Boplant having failed to unite with the vertebrae. The graft failed because the Boplant had been rejected by the antigen-antibody response of the patient to the material. The Boplant was removed and a suit was filed against the manufacturer based upon negligence, breach of express and implied warranties and fraud. The trial court held for the patient, while the appellate court held (in a well analyzed opinion) that regardless of the theory of the suit (whether negligence or warranty), a defect in the product would have to be shown. The court noted that in most product liability cases the plaintiff is able to show some foreign substance in the goods, while in this instance the plaintiff based his case on the proposition that all Boplant was inherently defective at the moment of its production and packaging because the residual antigens present in the implant rendered it useless for bone grafting purposes and unfit for use in surgical operations on human beings. The court noted that Boplant had been successful in 85 to 90 percent of the reported operations in the United States. The medical profession knew that there were residual antigens which Squibb was unable to extract and which, when implanted in some patients, set in motion an antibody rejection process which resulted in a surgical failure. This 10 to 15 percent failure rate did not render the Boplant inherently unfit or defective in light of the high percentage of success realized in thousands of other operations.

A buyer who sues a seller of commercial laundry equipment for delay in shipping the equipment and for defects in the delivered equipment is not entitled to recover for loss of accounts, loss of profits and ensuing bankruptcy of the laundry business unless these items of damage were claimed in the complaint. In the absence of these specific allegations, recovery would be limited to losses such as those dealing with the use or rental value of the equipment during the period of delay. The decision seems to indicate that the court was completely unaware that the transaction was governed by the UCC.[31]

In a suit for damages by the buyer claiming that the seller of a

30. 274 So. 2d 898 (Fla. 1st Dist.), *cert. denied*, 285 So. 2d 414, (Fla. 1973), *cert. denied*, 416 U.S. 961 (1974).

31. Baring Indus., Inc. v. Rayglo, Inc., 303 So. 2d 625 (Fla. 1974).

computer failed to program it properly, it is proper for the trial court to instruct the jury that the amount of damages should be "the difference in the value of the computer as it was programmed, and its value if it had been programmed in accordance with the terms of the contract,"[32] even though the jury awarded $20,000 when the contract price was only $18,240.58.

A mother who brings suit for breach of warranty and negligence, claiming that a drug manufactured by the defendant and consumed by the plaintiff during her pregnancy under directions of an obstetrician caused physical anomolies to her minor child, will not be able to recover for mental pain and suffering in the absence of any "impact" between the drug and the mother and child.[33] If the impact rule is designed to cull-out spurious claims, then it should have no application in a case involving obvious physical harm caused by a drug.

A houseboat owner who is advised by the president of the marine division of an engine manufacturer to purchase and install certain engines and outdrives and does so in reliance upon this advice is the recipient of an implied warranty that the goods shall be fit for the particular purpose for which they are required under section 2-315 of the UCC.[34] These facts would also give rise to an express warranty under section 2-313 of the UCC, but this issue was not discussed by the court.

A shopping center which purchases fireworks from the manufacturer and employs a person to put on a fireworks display is not liable to this employee for breach of an implied warranty when one of the rockets prematurely explodes and injures him, since there was no sale between the employee and the shopping center. The employee recovered (in a companion law suit) against the manufacturer under the theory of negligence and res ipsa loquitor.[35]

In an apparent case of first impression in Florida, the District Court of Appeal, Fourth District, has held that an amusement park ride is not to be equated with a common carrier and, therefore, a passenger who was injured on the ride could not base a suit for breach of an implied warranty of carriage against the operator of the ride.[36]

32. Burroughs Corp. v. Joseph Uram Jewelers, Inc., 305 So. 2d 215 (Fla. 3d Dist. 1975).

33. Pazo v. Upjohn Co., 310 So. 2d 30 (Fla. 2d Dist. 1975).

34. Chrysler Corp. v. Miller, 310 So. 2d 356 (Fla. 3d Dist. 1975).

35. Marini v. Town & Country Plaza Merchants Ass'n, 314 So. 2d 180 (Fla. 1st Dist. 1975) *and* Vitale Fireworks Mfg. Co. v. Marini, 314 So. 2d 176 (Fla. 1st Dist. 1975).

36. Sergermeister v. Recreation Corp. of America, 314 So. 2d 426 (Fla. 4th Dist. 1975).

G. *Disclaimer of Warranties*

In an apparent case of second impression in the United States, the District Court of Appeal, Second District, has held that although section 2-316(3)(a) of the UCC does not specifically state that an "as is" or "with all faults" disclaimer of implied warranties of merchantability and fitness for a particular purpose must be in "conspicuous" print (as does section 2-316(2)), the requirement of conspicuousness is to be read into the sub-section. An "as is" disclaimer which is not conspicuous will be deemed ineffective.[37]

H. *Real Property and Warranty of Quality*

The District Court of Appeal, First District, has held, rather casually, that a swimming pool contractor who contracts to build a pool gives an implied warranty of merchantability; no authority was cited for this proposition of law.[38]

In a suit brought against the developer of a condominium for breach of warranty, a condominium association does not have standing to sue in a representative capacity on behalf of the original owners and purchasers of units. Although this particular case involved real property, the rule would seem analagous in sale of goods cases.[39]

An air conditioning system which is permanently installed in a hotel bears an implied warranty of fitness and merchantability even when it is sold with a warranty which expressly limits "the guarantee to one year."[40]

I. *Revocation of Acceptance*

The District Court of Appeal, Third District, has held that when a buyer of a car brings a suit against the seller for damages, cancellation, rescission and declaratory relief based upon breach of implied and express warranties, these claims were mutually exclusive because a claim for rescission is predicated on disavowal of the contract while a claim for damages is based upon its affirmance. As a result, the court upheld the order of a trial court which suspended action on the suit until the plaintiff elected to proceed either with the rescission claim or the damage claim. It is discouraging to note

37. Osborne v. Genevie, 289 So. 2d 21 (Fla. 2d Dist. 1974).
38. Tropicana Pools, Inc. v. Boysen, 296 So. 2d 104 (Fla. 1st Dist. 1974).
39. Rubenstein v. Burleigh House, Inc., 305 So. 2d 310 (Fla. 3d Dist. 1975).
40. Forte Towers S., Inc. v. Hill York Sales Corp., 312 So. 2d 513, 514 (Fla. 3d Dist. 1975).

that the court seemed to be completely unaware of sections 2-608 (and its accompanying comment 1), 2-711(1) and (3), 2-714, 2-715 and 2-719 of the UCC, all of which reject any notion of election of remedies. For that matter, the court seemed unaware of any law on this point since it cited no authority.[41]

Revocation of acceptance under section 2-608 of the UCC has been judicially sanctioned in a case in which the buyer claimed that carpeting installed by a department store seller was wet when it was installed and the seam had split.[42]

J. *Sales of Beer and Wine*

Section 562.21 of the Florida Statutes provides that all wholesale sales of beer and wine to retailers must be for cash; the statutes do not impose a similar requirement in the sale of hard liquor to retailers, nor do the statutes impose a similar requirement for sales between brewers and their distributors. The Supreme Court of Florida invalidated this section as an "invidious discrimination" against retail beer and wine vendors and an unconstitutional denial of equal protection.[43] In further proceedings, the Court has said (in a very confusing opinion) that since sales of hard liquor may be made to retail vendors on ten days credit according to a statute, retail beer and wine vendors are also entitled to ten days credit in their purchases from suppliers.[44]

K. *Legislation*

Chapter 95 of the Florida Statutes, which governs the time limitations for bringing suit, has been extensively amended, and section 2-725 of the UCC (Florida Statutes section 672.725) has been repealed.[45] Former section 672.725 provided:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach

41. Deemer v. Hallet Pontiac, Inc., 288 So. 2d 526 (Fla. 3d Dist. 1974).
42. Federated Dep't Stores, Inc. v. Planes, 305 So. 2d 248 (Fla. 3d Dist. 1974).
43. Castlewood Int'l Corp. v. Wynne, 294 So. 2d 321 (Fla. 1974).
44. Castlewood Int'l Corp. v. Wynne, 305 So. 2d 773 (Fla. 1974), *noted in* 29 U. MIAMI L. REV. 785 (1975).
45. Fla. Laws 1974, ch. 74-382.

> of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Section 95.03 as amended provides that "[a]ny provision in a contract fixing the period of time within which an action arising out of the contract may be begun at a time less than that provided by the applicable statute of limitations is void." Amended section 95.11(3)(1) now provides that an action for the sale and delivery of goods, wares and merchandise must be brought within four years, and this is, of course, consistent with section 2-725 of the UCC. Section 95.11(3)(f) also provides that "an action for injury to a person founded on the design, manufacture, distribution or sale of personal property that is not permanently incorporated in an improvement to real property, including fixtures" must be brought within four years. Again, this is consistent with the UCC. However, section 95.031(2) now provides that

> [a]ctions for products liability . . . under subsection (3) of s. 95.11 must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in subsection (3) of s. 95.11, but in any event within 12 years after the date of delivery of the completed product to its original purchaser . . . , regardless of the date the defect in the product . . . was or should have been discovered.

Under the UCC the cause of action normally accrues when the goods are delivered, while under section 95.031(2) the cause of action accrues when the defect was discovered or should have been discovered, and this might extend to almost 12 years.

In a more constructive vein, section 95.11(5) now provides that suits brought for violations of the bulk sales provisions of the UCC must be brought within one year.

A Mobile Home and Recreational Vehicle Manufacturer Act was passed in 1974 to provide, in extensive detail, for the licensing and controlling of mobile home manufacturers.[46] The act further requires that mobile home manufacturers and dealers give warranties of quality as delineated in the act. These warranties are additional to any other remedies offered by the UCC; however, this

46. FLA. STAT. §§ 320.85-.864 (Supp. 1974).

mobile home act forbids the manufacturer and dealers from requiring the buyer "to waive his rights under this act or any other rights under law. Any such waiver shall be deemed contrary to public policy and shall be unenforceable and void."[47]

It is interesting to compare these "mobile home warranties" with the "warranties of fitness and merchantability" provided for in the new Condominiums and Cooperative Apartments Act.[48] The condominium warranties have a life span of either one year, three years or five years depending upon the nature of these warranties of "fitness and merchantability," while the mobile home act goes into detail as to defects, nature of the component parts of a mobile home, etc.

The Deceptive and Unfair Trade Practices Act[49] was enacted in 1973 to protect consumers from suppliers who commit deceptive and unfair trade practices; nevertheless, the draftsmen were apparently unable to define this term since the Act states that in order to construe this term "great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to § 5(a)(1) of the Federal Trade Commission Act . . ., as from time to time amended."[50] The Act further authorized the Florida Department of Legal Affairs to propose rules to the Florida cabinet for adoption by that body. These rules must be consistent with "the rules, regulations and decisions of the Federal Trade Commission and the federal courts in interpreting the provisions of § 5(a)(1) of the Federal Trade Commission Act . . . as from time to time amended."[51] In any event, the Florida cabinet adopted:[52] extensive rules which are designed to forbid "bait and switch" advertising and activities and foreign language tricks in sales; rules governing the labeling of the cooling and heating capacity of air conditioners; regulations of home improvement contracts, future consumer services (such as reducing studios, dance studios, etc.); and regulations governing motor vehicle sales and services, etc.

47. FLA. STAT. § 320.839 (Supp. 1974).
48. FLA. STAT. § 711.65 (Supp. 1974).
49. FLA. STAT. §§ 501.202-.213 (1973).
50. FLA. STAT. § 501.204(2) (1973).
51. *Id.*
52. FLA. ADMIN. CODE chs. 2-7 to 2-20 (1975).

Florida's Fair Trade Law has been repealed effective October 1, 1975.[53]

Congress has enacted a Consumer Product Warranty Act[54] which is applicable to the sale of consumer goods (valued in excess of $5.00 in some cases and $10.00 in others) in interstate commerce. The act requires that any written warranty be in simple language and labeled clearly and conspiciously as a full or limited warranty. A full warranty requires the warrantor to remedy any defect within a reasonable time and without charge, and forbids the warrantor to exclude or limit consequential damages for breach of any written or implied warranty unless such exclusion or limitation conspicuously appears on the face of the warranty; the warrantor must permit the consumer a refund or replacement without charge if a defect cannot be remedied. The Federal Trade Commission is given the authority to articulate rules which may require inclusion in the written warranty of any of the following items (among others): (1) clear identification of the names and addresses of the warrantors; (2) identity of the persons to whom the warranty is extended; (3) the product or parts covered; (4) a statement of what the warrantor will do in the event of defect, etc.; (5) a statement of what the consumer must do; (6) exceptions and exclusions from the warranty; (7) the required procedure for the consumer; (8) information about any informal dispute settlement procedure; (9) description of legal remedies; (10) the period within which the warranty will operate; (11) the period of time within which the warrantor will perform after being notified; (12) characteristics of the products which are not covered by the warranty; and (13) the elements of the warranty in words or phrases which will not mislead a reasonable, average consumer. The warrantor under an express warranty is prohibited from disclaiming any implied warranties but he may (by conspicuous print) limit the duration of any implied warranty to the duration of an express warranty.

The act may be "much ado about nothing" in many cases because it does not compel the giving of any written warranty; it simply requires that a written warranty, if given, must contain consumer safeguards. The result in many trades may well be the total

53. Fla. Laws 1975, ch. 75-15, *repealing* FLA. STAT. ch. 541 (1973).
54. 50 U.S.C.A. §§ 2301-2310 (1975).

elimination of any written warranty, and, again, the consumer may be more hurt than helped by the "do-gooders."

III. Bulk Sales

A. *Recent Cases*

In a short-lived case of first impression in Florida, it has been held that the sale of the assets of a restaurant is not covered by article 6 (the bulk sales provision of the UCC), and, therefore, the creditors of the vendor have no claim against the vendee as they would if the sale were included under that provision.[55] As indicated hereafter,[56] the legislature overruled this case within a few months after it was decided. In a similar vein, it also has been decided that the ordinary beauty salon (which is primarily a service business as compared to a business which deals in the sale of merchandise) is not a business covered under article 6 of the UCC. The court noted, however, that if the testimony should show that the primary function of a beauty salon was the sale of merchandise rather than a service enterprise, it could come within section 6-102(3) and the comment to section 6-102 of the UCC as a "bulk sales" business.[57]

In the sale of a going business when the sales contract provides that the purchase price is to be based upon a balance sheet as of a certain date, it is improper for the seller to change his accounting practices (without notice to the buyer) to show sales orders for future delivery as accounts receivable without also showing a corresponding reduction in inventory or some other indication that goods would have to be purchased to meet these future deliveries.[58]

B. *Legislation*

Under a 1975 amendment to the bulk sales section of the Florida UCC, restaurants which are licensed by the Division of Hotels and Restaurants of the Department of Business Regulation are now subject to all of the bulk sales requirements.[59] This amendment effectively supersedes the case of *De La Rosa v. Tropical Sandwiches, Inc.*[60]

55. De La Rosa v. Tropical Sandwiches, Inc., 298 So. 2d 471 (Fla. 3d Dist. 1974), *noted in* 29 U. Miami L. Rev. 597 (1975).

56. *See* note 59 *infra* and accompanying text.

57. Yarbrough v. Rogers, 300 So. 2d 286 (Fla. 4th Dist. 1974).

58. Baywood Furniture Mart. Inc. v. Kennedy, 295 So. 2d 350 (Fla. 2d Dist. 1974).

59. Fla. Laws 1975, ch. 75-216, *amending* Fla. Stat. § 676.102 (1973).

60. *See* note 55 *supra* and accompanying text.

IV. WAREHOUSING AND TRANSPORTATION OF GOODS

When a bailee redelivers packages to the bailor and receives a receipt for the goods, the receipt does not estop the bailor from alleging that one of the packages was broken into while in the possession of the bailee and goods were removed with responsibility being on the bailee. The receipt is evidence of the fact of receipt of whatever is mentioned in the receipt, but it is not conclusive proof that the goods were received. The parol evidence rule does not apply to receipts so as to preclude the admission of oral evidence contrary to the terms of the receipt.[61]

In order to recover damages from a carrier and to recover insurance proceeds from an insurance company under an all risks policy for damage allegedly occurring during the carriage of goods, it is necessary to show that the goods were in good condition before the shipment and attachment of the risk and that the damage occurred while the goods were in custody of the carrier.[62]

When a shipper ships goods in sealed cartons and the bill of lading states; "Received . . . the property described below, in apparent good condition except . . . (Contents and condition of contents unknown),"[63] and the facts show that the goods were shipped "shipper's load and count,"[64] the burden is on the shipper to show that the goods were in good order when delivered to the carrier if the shipper is claiming that the carrier damaged the goods in transit. This would seem particularly appropriate when the cartons with the damaged contents were delivered by the carrier without any apparent damage to the cartons; the only possible inference was that the damage occurred prior to the delivery to the carrier.

The mere filing of a claim of loss against a common carrier is not tantamount to a limitation on the amount which is eventually recoverable; this is particularly true when the claim specified a reduced amount designed to procure an immediate settlement.[65]

61. International Gem Stone v. Harper-Robinson & Co., 299 So. 2d 160 (Fla. 3d Dist. 1974).

62. Oran Ltd. v. Fireman's Fund Ins. Co., 301 So. 2d 830 (Fla. 3d Dist. 1974).

63. United Steel & Strip Corp. v. Monex Corp., 310 So. 2d 339, 341 (Fla. 3d Dist. 1975).

64. *Id.*

65. Thibadeau v. Santini Bros., 315 So. 2d 550 (Fla. 4th Dist. 1975).

V. NEGOTIABLE INSTRUMENTS

A. *Negotiability*

A promissory note which provides that payment was to be made "from Cigarette Commissions"[66] creates an ambiguity as to whether the creation of the fund was to be a condition precedent to liability of an indorser of the instrument, and testimony would have to be introduced on this issue.

A promissory note which provides that the "Buyer agrees to pay to Seller"[67] lacks the magic words "to order or to bearer"[68] and is not, therefore, a negotiable instrument. Any assignee of the seller would then be subject to all defenses existing between the buyer and the seller.

When a promissory note mentions that it is secured by a mortgage, this reference does not destroy negotiability; however, when the note recites that "[t]he terms of said mortgage are by this reference made a part hereof,"[69] this renders the note non-negotiable because it does not contain an unconditional promise to pay as required by section 3-104(1)(b) of the UCC and it falls within section 3-105(2)(a) which states that the promise is not unconditional if the instrument states that it is governed by any other instrument. As a result, when this note is endorsed and the mortgage assigned to a third person by the payee, this third person cannot be a holder in due course, but is a mere assignee subject to the defense of fraud between the original parties.

B. *Mistake*

Cancellation by a court of equity of promissory notes is proper when the facts show that all of the parties (makers and payees) were completely mistaken and based their actions upon a misunderstanding of the results of the arrangement reached.[70]

C. *Massachusetts Business Trust*

A Massachusetts business trust is a separate legal entity for the purpose of being sued under the laws of Massachusetts, and if it has qualified to do business in Florida, it is improper to sue individual

66. Rothenberg v. Mellow Music, Inc., 291 So. 2d 234, 235 (Fla. 3d Dist. 1974).
67. Locke v. Aetna Acceptance Corp., 309 So.2d 43, 44 (Fla. 1st Dist. 1975).
68. UNIFORM COMMERCIAL CODE § 3-104(1)(d).
69. Holly Hill Acres, Ltd. v. Charter Bank, 314 So. 2d 209, 210 (Fla. 2d Dist. 1975).
70. Lake Killarney Apartments, Inc. v. Estate of Thompson, 283 So. 2d 102 (Fla. 1973).

trustees of the trust upon a promissory note issued by the trust which on its face negatives their personal liability.[71]

D. *Payment*

In the absence of a dispute between the drawer of a check and the payee as to the amount owed to the payee, the payee's acceptance of and cashing of a check bearing the notation "paid in full to the date of abeyance"[72] does not constitute an acceptance of the check's proceeds as full payment of the debt.

Section 4-405 of the UCC provides that the death of a customer does not automatically terminate the bank's authority to pay a check drawn by the customer prior to his death; the bank can pay at any time if it does not have knowledge of the customer's death and can pay for a period of ten days after death even if it has knowledge, unless someone claiming an interest in the account stops payment. This section was designed to protect banks, and it does not protect a payee of a check who collects the check's proceeds after the death of the drawer. The drawer's executor may, in a proper case, recover the proceeds of the check under section 732.53 of the Florida Statutes.[73]

E. *Usury*

Remedies based upon usury statutes do not create vested rights, but only penalties, and such penalties or forfeitures may be repealed or modified. For example, in *Goodfriend v. Druck*[74] a guarantor of a promissory note agreed to pay interest of 15 per cent per annum if he should be called upon to pay. The maker defaulted and suit was brought against the guarantor for interest at the rate of 15 per cent per annum. Subsequently, section 687.11(1) of the Florida Statutes, which provides that an individual guarantor is not liable for interest in excess of 10 per cent per annum, was enacted. The court held that the guarantor was liable for only 10 per cent per annum.

A statute which imposes certain sanctions for usury may be repealed at any time, with the result that the borrower will be deprived of a remedy. Further, a new usury statute which is enacted in place of the repealed statute will not have a retroactive effect. As

71. Boyd v. Boulevard Nat'l Bank, 306 So. 2d 551 (Fla. 3d Dist. 1975).
72. Roll v. Spero, 293 So. 2d 370, 371 (Fla. 4th Dist. 1974).
73. Black v. Hart, 301 So. 2d 787 (Fla. 3d Dist. 1974).
74. 289 So. 2d 710 (Fla. 1974).

a result, a loan which was subject to the repealed statute will not be covered by the new, and the loan will fall in the gap between the termination date of the old and the effective date of the new statute, leaving the borrower without a remedy.[75]

If a mortgage "finder" is the agent for the lender (rather than the borrower), then the amount of the finder's fees is added to the interest charged, and the total is then apportioned over the period starting with the closing date of the transaction and ending either with the date of the foreclosure judgment or the original maturity date of the loan, whichever is prior in time, in order to determine whether the total sums charged constitute usurious interest.[76]

The usurious nature of a loan is to be determined by the law of the place where the contract is entered into. If the law of that place provides that money advanced for the purpose of a joint venture is not to be deemed usurious, or that a loan will not be deemed usurious because of the possibility that more than the legal rate of interest will be charged where there is an agreement to pay an amount which may be more or less than the legal rate depending upon a reasonable contingency, then the borrower (a resident of Florida) will not be able successfully to plead usury.[77]

A stockholder's agreement providing for a preferential distribution of corporate profits from a condominium development which was to be financed by loans does not infect the transaction with usury even though the close corporation is thinly capitalized and it is characterized as a Subchapter S corporation under federal income tax laws.[78]

A mortgage commitment fee is not a charge for the use of money, but rather it is the price paid for the right to secure a loan by a borrower, and, as a result, it cannot be considered as interest. However, closing costs over and above the actual costs incurred by a lender are to be treated as interest in order to determine the question of usury.[79]

F. *Dead Man's Statute*

When one partner borrows money (evidenced by a series of promissory notes) for the business, the other partner (who is not a

75. Padgett v. First Fed. Sav. & Loan Ass'n, 297 So. 2d 101 (Fla. 4th Dist. 1974).

76. Feemster v. Schurkman, 291 So. 2d 622 (Fla. 3d Dist. 1974).

77. Goodman v. Olsen, 305 So.2d 753 (Fla. 1975), *rev'g* 291 So. 2d 71 (Fla. 3d Dist. 1974).

78. Little v. Caswell-Doyle-Jones Corp., 305 So. 2d 842 (Fla. 1st Dist. 1975).

79. Financial Fed. Sav. & Loan Ass'n v. Burleigh House, Inc., 305 So. 2d 59 (Fla. 3d Dist. 1975).

party to the notes) is an interested witness because of potential legal liability and is therefore incompetent to testify in a suit brought by the widow of the lender against the maker of the note under the dead man's statute, section 90.05 of the Florida Statutes.[80]

A somewhat unusual application of the dead man's statute was made in *Pickard v. Miggins*.[81] The executor of the estate of a payee brought suit against the maker who claimed payment as a defense. A third person testified that the maker gave his check to this third person who cashed it and then paid the proceeds to the payee in payment of the note. Both the trial court and the appellate court agreed that this third person was not a disinterested witness and was therefore incompetent to testify under the statute.

G. *Legislation*

Section 687.03 of the Florida Statutes was amended[82] to clarify the legislature's intention that, for the purpose of determining the question of usury,

> the rate of interest on any loan of money shall be determined and computed upon the assumption that the debt will be paid according to the agreed terms, whether or not said loan is paid or collected by court action prior to the term of said loan, and any payments or property charged, reserved, or taken as an advance or forbearance which are in the nature of and taken into account in the calculation of, interest shall be valued as of the date received and shall be spread over the stated term of the loan for the purpose of determining the rate of interest.

The same section was amended to provide that a loan shall be deemed to be in excess of $500,000 in amount if either the loan has an initial balance in excess of $500,000 or the parties agreed that the loan would exceed this figure during its life even though less than this sum is actually advanced. The amended act further provides that in the event that the loan does exceed $500,000, any stock options and interest in profits, receipts or residual values which are taken by the lender shall not be included in the calculation of interest. Finally, as mentioned in a prior *Survey*,[83] individual guarantors of loans in excess of $500,000 may be charged up to 15 percent interest.

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80. Wasserman v. Weiss, 313 So. 2d 97 (Fla. 3d Dist. 1975).
81. 311 So. 2d 686 (Fla. 3d Dist. 1975).
82. Fla. Laws 1974, ch. 74-232, *amending* FLA. STAT. §§ 687.03, 687.11 (1973).
83. Murray, *Negotiable Instruments and Banking*, 28 U. MIAMI L. REV. 63, 73 (1973).

Under an amendment to section 95.031 of the Florida Statutes, the cause of action on a written instrument which is payable on demand or after date with no specific maturity date accrues against the maker and endorsers, guarantors or other persons secondarily liable upon the first written demand for payment "notwithstanding that the endorser, guarantor or other person secondarily liable has executed a separate writing evidencing such liability."[84] Further, the payment of any part of the principal or interest of any obligation or liability founded upon a written instrument tolls the running of the statute of limitations.

An interesting amendment has been made to the worthless check statutes. In any prosecution under chapter 832, the making, drawing, or delivery of a check, payment of which is refused by the drawee because of a lack of funds, shall be prima facie evidence of intent to defraud (or knowledge of insufficient funds) unless the maker or drawer shall have paid the holder the amount due together with a service charge not to exceed $5.00 or five percent of the face amount of the check, whichever is greater, within 20 days after the holder has made written demand (in accordance with a statutory form) by certified or registered mail.[85]

H. *Impairment of Collateral*

An indorser of a promissory note (which is secured by a mortgage) will be released from the note when the holder satisfies the mortgage without the indorser's knowledge or consent.[86]

VI. MORTGAGES

A. *Documentary Stamps*

When a "wrap-around" note and mortgage are executed for $3,500,000, and $1,858,000 of this sum represents the amount of a note previously executed upon which state documentary stamps have been paid, documentary stamps must now be paid on the total sum of $3,500,000 because the second note does not merely renew the first, but enlarges it. Section 201.09 of the Florida Statutes provides that a renewal note which does not enlarge the original note in any way is exempt from documentary stamp taxes; however, if the second note enlarges the amount of the first, then the tax is due on the entire face amount of the second note.[87]

84. Fla. Laws 1975, ch. 75-234, *amending* FLA. STAT. §§ 95.031, 95.051 (1973).
85. Fla. Laws 1975, ch. 75-189, *creating* FLA. STAT. § 832.07 (1975).
86. National Bank v. Mercer, 292 So. 2d 615 (Fla. 2d Dist. 1974).
87. State Dep't of Revenue v. McCoy Motel, Inc., 302 So. 2d 440 (Fla. 1st Dist. 1974).

B. *Bona Fide Mortgagees*

A prospective lender who is contemplating taking a realty mortgage from a trustee whose trust administration has been a matter of record in the circuit court must make diligent inquiry into the terms of the trust and the authority of the trustee to execute the mortgage and may not rely upon the bona fide purchaser doctrine in accepting the mortgage. If the mortgagee should fail to do so, a court may invalidate the mortgage.[88]

The general rule that a mortgagee takes his rights subject to the rights of purchasers in possession at the time of recordation of the mortgage received an unusual application in *First Federal Savings & Loan Association of Martin County* v. *Ott.*[89] A construction mortgage was used to finance construction of a condominium. The condominium developer entered into a contract of sale with a purchaser for one unit of the condominium, the contract providing that the developer would have the construction mortgage lien on the unit discharged at time of closing. The developer executed a permanent mortgage to the construction mortgagee the day before selling the unit to the purchaser. The purchaser had, however, lived in the unit prior to the execution of this permanent mortgage, and the construction lender had actual knowledge of this fact. The court held that, as a consequence, the purchaser had the right to have this mortgage cancelled.

When an owner of real property induces a materialman to refrain from filing a notice of commencement under the mechanic's lien law upon the fraudulent statement that the owner was arranging financing and would pay the materialman as soon as the financing was arranged, and as a result, the materialman is deprived of any chance to perfect a mechanic's lien, an equity court may impress an equitable lien against the property. This equitable lien will, however, be inferior to the mortgage lien of a mortgage company which financed the owner, and the mere fact that the owner was a stockholder in the mortgage company will not be enough to charge the mortgage company with having participated in the fraud of the owner so as to subordinate its lien to the equitable lien of the defrauded materialman.[90]

The set-off of a husband's debt owed solely by the mortgagee-husband to the mortgagor is insufficient to satisfy the mortgagor's

88. Hastings Potato Growers Ass'n v. Pomar, 296 So. 2d 55 (Fla. 1st Dist. 1974).
89. 285 So. 2d 695 (Fla. 4th Dist. 1973).
90. Hall's Misc. Iron Works, Inc. v. All S. Inv. Co., 283 So. 2d 372 (Fla. 1st Dist. 1973).

debt to the husband and wife who were mortgagees on property purchased from them as an estate by the entirety, when the wife does not agree to this set-off and has had no part in its creation.[91]

In a case of first impression in Florida, it has been held that a recorded option agreement to create a mortgage creates a valid interest in, and an encumbrance upon, real property. This option agreement (when supported by consideration and when recorded prior to a subsequent mortgage) is superior in right and time to the subsequent mortgage.[92]

C. *Assignments*

When a number of mortgages are being serviced by a collecting bank and the mortgagee assigns these mortgages to an assignee, it is the duty of the assignee to inform the bank in very clear terms about the details of the assignment. If the assignee's notice is unclear and vague, then the bank is not liable if it continues to act in behalf of the original mortgagee rather than the assignee.[93]

The pledge of a mortgage without a pledge or assignment of the note does not vest any rights in the pledgee because the mortgage in a mere incident of the note. In this particular case the pledge was part of a complicated "wrap-around" mortgage, and it was obvious that the draftsmen were so absorbed in the details of the mortgage that they overlooked the note.[94]

D. *Future Advances*

Section 697.04 of the Florida Statutes provides that mortgages on real property may secure advances, whether obligatory or not, provided that the mortgage expresses on its face that future advances may or must be made. The District Court of Appeal, Second District, has held that this condition is satisfied when the mortgage mentions that any construction agreement which may be executed between the parties shall become part of the mortgage because the clause would put a reasonably prudent person on notice to inquire of the parties whether future advances had been or were going to be made. As a result, the mortgagee had priority over mechanic's lien claimants who had perfected their liens subsequent to the recorda-

91. Davis v. Fat Man's Bar-B-Que, Inc., 289 So. 2d 29 (Fla. 1st Dist. 1974).

92. Feemster v. Schurkman, 291 So. 2d 622 (Fla. 3d Dist. 1974).

93. First Nat'l Bank v. Fidelity America Financial Corp., 305 So. 2d 165 (Fla. 2d Dist. 1975).

94. Sobel v. Mutual Dev., Inc., 313 So. 2d 77 (Fla. 1st Dist. 1975).

tion of the mortgage but prior to the making of advances for the construction of improvements.[95]

E. *Subordination*

A mortgage subordination agreement entered into by a first mortgagee with a prospective mortgagee which provides that the prospective mortgagee is to have first priority may not be limited by terms of the first mortgagee's mortgage which provided that subordination would be made only in the event that the subsequent mortgage would be for improvements to be constructed on the property. The prospective mortgagee could not be affected by the terms of the original mortgage to which it was not a party.[96]

F. *Acceleration*

It is reversible error for a trial court to refuse the mortgagee the right to accelerate the mortgage indebtedness upon a breach by the mortgagor of a provision in the mortgage requiring the mortgagor to pay the taxes before they became delinquent. The fact that the failure to pay the taxes was the result of inadvertence or neglect and that the mortgagors had tendered all sums necessary to reimburse the mortgagee who had expended money in redeeming a certificate for delinquent taxes would not be legally sufficient to prevent the mortgagee from accelerating the mortgage.[97]

In a case of first impression in Florida, the District Court of Appeal, Second District, has held that when there is a note and mortgage and the mortgage provides that the entire balance of the note may be accelerated in the event that the mortgagor sells the encumbered property, the acceleration clause in the mortgage "became part of the terms of the note where . . . the two were executed contemporaneously and the instruments referred to each other,"[98] and the mortgagee could accelerate the balance of the note. The court did not answer the question whether a mortgage with a similar provision can be accelerated and foreclosed without proof that the mortgagee has been prejudiced by the sale because the issue was not raised.

It is no defense to an acceleration of a mortgage (by the mortgagee) that the owner of the property had purchased the property from

95. Industrial Supply Corp. v. Bricker, 306 So. 2d 133 (Fla. 2d Dist. 1975).
96. Roberts v. Harkins, 292 So. 2d 603 (Fla. 2d Dist. 1974).
97. Heimer v. Albion Realty & Mortgage Co., 300 So. 2d 31 (Fla. 3d Dist. 1974).
98. Stockman v. Burke, 305 So. 2d 89, 90 (Fla. 2d Dist. 1974).

the mortgagor and had then leased it back to the mortgagor who had defaulted in his lease payments, thereby preventing the owner from using the lease payments to pay the mortgage.[99]

G. *Defenses*

In the absence of unusual factors (such as fraud, for example), a defendant in a mortgage foreclosure action may not allege parol evidence that the parties intended to exclude certain lands from the lien of the mortgage as a defense in an effort to change the express terms of the mortgage.[100]

A failure of the lender-mortgagee to abide by the requirements of the Federal Truth in Lending Act[101] does not result in the invalidation of the mortgage; the act has penalties, but they do not affect the validity of the mortgage.[102]

When a note and mortgage were obtained from a customer by a contractor-mortgagee as a result of fraud and improper workmanship and both instruments were later assigned to a holder not in due course, the holder may recover only the reasonable value of the labor and materials (not the face amount of the mortgage) with no allowance for profit and overhead.[103]

H. *Foreclosure*

Section 45.031(1) of the Florida Statutes provides that a mortgagor may redeem his property at any time before sale; however, it has been held that this statute does not repeal the common law right to redeem at any time until the sale is confirmed. As a result, the mortgagor may redeem until the issuance of a certificate of title as provided for in section 45.031(3) of the Florida Statutues.[104]

It is within the proper discretion of the trial court to set aside a mortgage foreclosure sale when the property is of a substantial value, the bid price was $50.00, and the attorney for the owner-mortgagor who was to represent the owner in bidding at the sale failed to appear because of mistake or inadvertance.[105]

When the mortgagee's right to foreclose is subject to the per-

99. New England Mut. Life Ins. Co. v. Luxury Home Builders, Inc., 311 So. 2d 160 (Fla. 3d Dist. 1975).

100. Venusa Dev. Corp. v. Southeast Mortgage Co., 297 So. 2d 86 (Fla. 3d Dist. 1974).

101. 15 U.S.C. §§ 1601 *et seq.* (1970).

102. Grandway Credit Corp. v. Brown, 295 So. 2d 714 (Fla. 3d Dist. 1974).

103. Darling v. Rose, 301 So. 2d 19 (Fla. 2d Dist. 1974).

104. Walters v. Gallman, 286 So. 2d 275 (Fla. 4th Dist. 1973).

105. Van Delinder v. Albion Realty & Mortgage, Inc., 287 So. 2d 352 (Fla. 3d Dist. 1974).

formance of a condition precedent, the complaint should allege the performance of the condition; however, when the record in the trial court shows that the condition has been performed, a judgment of foreclosure will be affirmed on the basis that the failure to allege the error in the complaint was harmless error.[106]

A dismissal of a suit for the foreclosure of a mortgage on the grounds of a want of prosecution is neither a dismissal on the merits nor is it res judicata of the controversy, and it cannot be pleaded in bar of a subsequent foreclosure suit.[107]

When a vendee gives back a "wrap-around" purchase money second mortgage which includes the amount of an existing first money mortgage and the mortgagor defaults in making payments on the wrap-around mortgage, it is permissible for the second mortgagee to foreclose for the entire amount, including the amount due on the first mortgage, even though the first mortgagee is not a party to the suit and did not desire prepayment.[108]

If the amount bid at a foreclosure sale is inadequate and this is coupled with the additional fact that the sale was conducted three hours later than the time specified in the notice of sale, a court should set the sale aside and order that a new sale be conducted.[109]

A purchaser of the equity of redemption from a landlord-mortgagor who has taken subject to a first mortgage does not assume responsibility for unsecured claims (such as rental deposits) against the landlord and, as a result, the purchaser is entitled to any surplus funds accruing from the foreclosure of second and third mortgages on the property. The purchaser has bought the property free and clear of all liens except the first mortgage.[110]

If the buyers of real property bring a suit for damages for the fraudulent concealment by the sellers of certain facts concerning the zoning of the property, it is reversible error for the trial court (at the request of the plaintiff-buyers) to enter an injunction temporarily restraining the purchase money mortgagee-sellers from bringing any action on the note and mortgage because this would be an impairment of their contractual rights.[111]

Under rule 11-44(a) of the Rules of Bankruptcy Procedure, a petition filed under chapter XI of the Bankruptcy Act by a mortga-

106. Voght v. Galloway, 291 So. 2d 579 (Fla. 1974).
107. Gibbs v. Trudeau, 283 So. 2d 889 (Fla. 1st Dist. 1973).
108. J.M. Realty Inv. Corp. v. Stern, 296 So. 2d 588 (Fla. 3d Dist. 1974).
109. Ohio Realty Inv. Corp. v. Southern Bank, 300 So. 2d 679 (Fla. 1974).
110. Sens v. Slavia, Inc., 304 So. 2d 438 (Fla. 1974).
111. Sepielli v. Wilson P. Abraham Constr. Corp., 313 So. 2d 122 (Fla. 3d Dist. 1975).

gor operates as an automatic stay of any foreclosure proceeding, and any sale conducted thereafter must be set aside.[112]

I. *Lis Pendens*

Under section 48.23 of the Florida Statutes it is an abuse of discretion for a trial court judge to discharge a notice of lis pendens when the plaintiff is suing as an alleged subrogee of a mortgagee, even though the statute provides that "when the initial pleading does not show that the action is founded on a duly recorded instrument . . . the court may control and discharge the notice of lis pendens . . . ."[113]

J. *Attorneys' Fees*

The Supreme Court of Florida has held that in the absence of a clear indication in the promissory note and mortgage that the parties intended to include attorneys' fees on appeal, an allowance for the appeal is improper. A statement in the note and mortgage that "reasonable attorney's fees"[114] are to be paid by the mortgagor in the event of default and foreclosure is not sufficient; the clause would have to specify that the mortgagor was also to pay attorneys' fees for any and all appeals whether taken by the mortgagor or the mortgagee.

Attorneys' fees may not be awarded to the mortgagee's attorneys for legal services rendered in attempting to collect usurious interest in a mortgage foreclosure action; fees must be limited to services performed in foreclosing the mortgage for the legally enforceable amount of the debt.[115]

It is permissible to award attorneys' fees in a mortgage foreclosure action based upon affidavits rather than testimony as to the reasonable value.[116]

A trial court may refuse to award attorneys' fees even though they are provided for in a mortgage note when the mortgagee fails to make any request for attorneys' fees and fails to introduce any evidence at the trial to support an award.[117]

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112. Heritage Family Pub, Inc. v. First Fed. Sav. & Loan Ass'n, 315 So. 2d 558 (Fla. 2d Dist. 1975).

113. Mapia v. Equitable Dev. Corp., 302 So. 2d 418 (Fla. 1st Dist. 1974).

114. Ohio Realty Inv. Corp. v. Southern Bank, 300 So. 2d 679, 682 (Fla. 1974), *followed in* Goodfriend v. Druck, 309 So. 2d 236 (Fla. 4th Dist. 1975).

115. Feemster v. Schurkman, 291 So. 2d 622 (Fla. 3d Dist. 1974).

116. Young v. Charnack, 295 So. 2d 665 (Fla. 3d Dist. 1974).

117. Milgen Dev., Inc. v. Goodman, 302 So. 2d 491 (Fla. 3d Dist. 1974).

A mortgagee who brings a foreclosure action for the failure of the mortgagor to make the mortgage payments is entitled to attorneys' fees (in accordance with a term of the mortgage) even though the mortgagee had refused to release one lot from the lien of the mortgage in accordance with the request of the mortgagor made pursuant to a term in the mortgage. The mortgagee may be liable for damages for his wrongful refusal to release the lot from the lien, but he does not forfeit his right to attorneys' fees.[118]

When a receiver is appointed to manage the subject property in a mortgage foreclosure action, he may employ an attorney to render services to the receiver and be awarded a reasonable sum to pay the attorney's fees even when he did not receive prior court approval for employing the attorney. However, it would be better practice for the receiver to obtain court approval before employing the attorney.[119]

VII. SURETIES AND GUARANTORS

An interesting aspect of the law of guaranty was involved in *Ruwitch v. First National Bank of Miami*.[120] The president, vice-president, and secretary-treasurer of a corporation originally signed personal guaranties of a $25,000 line of credit extended to the corporation which was managed by the secretary-treasurer. For several years, this line of credit increased in stages to $140,000, each increase accompanied by written guaranties purportedly signed by all three officers. In fact the secretary-treasurer had forged the signatures of the other two officers to secure the increased line of credit. Subsequently, the forgeries were discovered and the two guarantors were held liable to the lending bank on the grounds that they permitted the fraud to be consummated and, as between themselves and the bank, the loss ought to fall on them. The bank was, therefore, entitled to a judgment for $22,352.46, which was the difference between the amount of the loss ($120,000) and the amount paid to the bank by the surety company ($97,647.54) because of the forgery. The court then held that the equities of the surety (which was a paid surety) were not superior to the equities of the guarantors, and therefore, the paid surety would not be able to recover its losses from the guarantors.

118. Dixon v. Peace, 307 So. 2d 868 (Fla. 3d Dist. 1975).

119. Creative Property Management, Inc. v. General Elec. Credit Corp., 314 So. 2d 807 (Fla. 3d Dist. 1975).

120. 291 So. 2d 650 (Fla. 3d Dist. 1974).

A security interest in inventory may be given by a corporation as security for a preexisting debt represented by promissory notes which had been indorsed by an officer for the benefit of the corporate borrower; if the lender should release inventory from the security interest without the knowledge or consent of the indorser, he is discharged under section 3-606 of the UCC on the grounds of an unjustifiable impairment of collateral.[121]

VIII. Banks and Savings and Loan Associations

A. *Bank Collection Problems*

The Supreme Court of Florida has held that it was a jury question whether a collecting bank's miscoding was the proximate cause of loss of the proceeds of a check, reversing the District Court of Appeal, First District, which had reversed a jury verdict.[122]

In *Peoples Bank in North Fort Myers v. Bob Lincoln, Inc.*,[123] a used car dealer purchased a new car from a new car dealer, the car to be titled in the name of a third person. The new car dealer called Peoples Bank and was told that the bank would honor the sight draft given in payment by the used car dealer. The bank received the draft on March 30 and dishonored it on April 9. The court held that in failing to dishonor within the "midnight deadline"[124] (midnight of the banking day following the banking day of receipt), the bank became accountable[125] to the new car dealer for the face amount of the sight draft. The opinion is unfortunately cluttered with irrelevant statements and citations which serve to confuse the simple issue of accountability.

When a holder of a check deposits it in his bank for credit and receives provisional credit under section 4-201(1) of the UCC, this provisional credit may be revoked under section 4-211 and charged back against his account under section 4-212(1) if the bank acts within times provided in section 4-212. As a result, the depositor will have no cause of action against his depository bank when the check is dishonored by the drawee bank as long as compliance is made with the requirements of these sections of the UCC.[126]

A bank which cashes a forged check may not be liable to the

121. Guida v. Exchange Nat'l Bank, 308 So. 2d 148 (Fla. 2d Dist. 1975).

122. Exchange Bank v. Florida Nat'l Bank, 292 So. 2d 361 (Fla. 1974), *rev'g* 277 So. 2d 313 (Fla. 1st Dist. 1973).

123. 283 So. 2d 400 (Fla. 2d Dist. 1973).

124. Uniform Commercial Code § 4-104(1)(h).

125. Uniform Commercial Code § 4-302.

126. Heumann v. United Nat'l Bank, 287 So. 2d 99 (Fla. 3d Dist. 1973).

payee for the amount of the check except for any proceeds still remaining in the bank's hands, provided that the bank shows that it cashed the check in good faith and in accordance with reasonable commercial standards applicable to such bank in accordance with section 3-419(3) of the UCC.[127]

UCC section 3-419(3) received an unusual application in *Keane v. Pan American Bank*.[128] A member of a three-man law firm withdrew from the partnership. Subsequently, a check made payable to the withdrawing partner and one of the other two partners was received by the remaining two partners, who instructed their bookkeeper to deposit it in the old account still carried in the name of the three partners. The bookkeeper used a rubber stamp "For deposit only HARKAVY, MOXLEY & KEANE 035-602,"[129] deposited the check and eventually the proceeds were withdrawn by Harkavy and Moxley and put in their new checking account. Keane sued the depository bank and Moxley. The court held that there was expert testimony that the handling of the check by the bank was in accordance with reasonable commercial standards. Although the bank knew that the firm had dissolved, it was proper to have the original checking account kept open for the purpose of depositing fees for services rendered before the dissolution of the firm. The bank was not obligated to make inquiry into the correctness of processing this check as similar checks had been handled in the past.

If a bank has actual knowledge that funds deposited in a customer's account belong to a third person, it may not assert its banker's lien against these funds for a claim which it has against its customer.[130]

B. *Joint Bank Accounts*

Section 665.271 of the Florida Statutes provides that when a savings account is maintained in a savings and loan association in the name of two or more persons in such form that the money in the account is payable to either or the survivor or survivors, then such account shall be the property of these persons as joint tenants, and the account shall be payable to the surviving tenant or tenants. In a recent case this statute was held to govern an account which was opened prior to the effective date of the statute because the statute

127. Robert A. Sullivan Constr. Co. v. Wilton Manors Nat'l Bank, 290 So. 2d 561 (Fla. 4th Dist. 1974).

128. 309 So. 2d 579 (Fla. 2d Dist. 1975).

129. *Id.* at 580.

130. 4715 Realty Corp. v. Central Bank & Trust Co., 301 So. 2d 792 (Fla. 3d Dist. 1974).

uses the word "maintained," and if the account is "maintained" while the statute is in force, it governs the account. The court also held that this statute would grant rights of survivorship to joint tenants even when there was no evidence that the parties entered into any kind of a survivorship contract between themselves and the savings and loan association. Further, the court held that when the same parties opened a checking account as joint tenants with rights of survivorship and the evidence showed that one tenant furnished all the funds and had a donative intent to give the other tenant rights in the account, there was a presumption of a gift which had not been rebutted and the surviving tenant would take the entire account even without the aid of any statute.[131]

In a case of first impression in Florida, it has been held that when a savings account is in the name of two people, "payable to either or the survivor,"[132] and both people become mentally incompetent, there remaining no evidence available as to the actual ownership interests in the account, a guardian does not have the power, nor may a court authorize the guardian, to terminate the joint account and to divide the moneys equally. The right to terminate the account is one personal to the ward and not to the guardian. Each owner will continue to have the right of survivorship should the other die, and either guardian has the right to withdraw funds from the account for necessities only of his incompetent ward.

C. *Garnishment*

The United States Supreme Court has invalidated the Georgia garnishment statutes on the grounds that they violated the due process clause of the fourteenth amendment. The statutes permitted the garnishment of bank accounts without any provision for an early hearing at which the creditor must show probable cause for the garnishment. It should be noted that the case involved the garnishment of a business' checking account, not the bank account of a consumer.[133] It would appear that the Florida garnishment statutes,[134] which provide that the courts "shall always be open for hearing motions to dissolve the garnishment," are not subject to the same vulnerability as Georgia's.

When a bank account has been garnished, the bank is obligated to obey the writ and to retain funds of its customer; the court has

131. Teasley v. Blankenberg, 289 So. 2d 431 (Fla. 4th Dist. 1974).
132. *In re* Guardianship of Williams, 313 So. 2d 411, 412 (Fla. 1st Dist. 1975).
133. North Ga. Finishing, Inc. v. Di-Chem, Inc., 95 S. Ct. 716 (1975).
134. FLA. STAT. § 77.07 (1973).

no power to authorize the bank to proceed to pay certain checks from the customer's account.[135]

Section 61.12 of the Florida Statutes provides that attachment or garnishment may be made against the property of a head of a family in Florida to enforce orders for alimony, suit money or support, or other orders in actions for divorce or alimony. However, if the order for attorneys' fees has been reduced to a judgment and execution is authorized, attachment or garnishment may not be levied against the bank account of the head of a family.[136]

Florida's garnishment statutes (chapter 77) are silent as to the right of a garnishee to amend its answer, and the District Court of Appeal, Fourth District, has held that in view of Florida's liberal policy of allowing amendments to pleadings in general, the trial court should, in the proper exercise of its discretion, allow a garnishee to amend its answer when justice so requires.[137]

In a case of first impression in Florida, it has been held that a codefendant who is jointly liable for a judgment cannot be named as a garnishee under the Florida garnishment statutes.[138]

The Supreme Court of Florida has decided[139] that the provision of the Federal Consumer Credit Protection Act of 1968[140] which limits the maximum amount of wages of a non-head of a family which may be subjected to garnishment to 25 percent of his disposable earnings for the week or the amount by which his disposable earnings for the week exceeded thirty times the federal minimum hourly wage preempts sections 77.01 and 77.06 of the Florida Statutes, which do not prescribe any ceiling on the amount of wages which may be garnished. The remaining Florida garnishment provisions are not in conflict with the Consumer Credit Act and are valid.

It has been held that a bank which not only fails to notify a customer for over a month that a writ of garnishment of the customer's accounts has been served on the bank, but places a "hold" on only two of the four accounts held by the customer, must, because of its negligence, bear resulting losses. These losses occurred when the customer drew checks which were dishonored by the bank and the bank was forced to pay money to the garnishor. When the

135. Kipnis v. Taub, 286 So. 2d 271 (Fla. 3d Dist. 1973).

136. Costa v. Costa, 285 So. 2d 665 (Fla. 3d Dist. 1973).

137. Florida Power & Light Co. v. Crabtree Constr. CO., 283 So. 2d 570 (Fla. 4th Dist. 1973).

138. Scogin v. Scogin's Inc., 287 So. 2d 712 (Fla. 2d Dist. 1974), *interpreting* FLA. STAT. ch. 77 (1973).

139. Phillips v. General Fin. Corp., 297 So. 2d 6 (Fla. 1974).

140. 15 U.S.C. § 1673 (1970).

customer's credit, etc. has suffered, and it is impossible to put the parties back to status quo, the bank may not recover the amount paid from the customer.[141]

If a garnishee does not owe any money to a judgment debtor, then the garnishment ought to be dissolved. For example, when a lessee corporation assigns its leasehold interest to an officer of the corporation and the lessee, the assignee officer and the original lessor subsequently agree that the assignee is to pay rent directly to the lessor, this constitutes a novation, and since the assignee officer pays rent directly to the lessor, she does not owe funds to the lessee corporation. A judgment creditor of the lessee corporation, therefore, has no rights of garnishment against the assignee officer.[142]

Although an order dissolving a writ of garnishment is a final order subject to an appeal, an order denying a motion to dissolve a writ of garnishment is an interlocutory order. A motion to rehear the order denying the motion to dissolve does not, therefore, toll the running of the time within which to file an interlocutory appeal.[143]

D. *Purchases of Bank Stock*

Section 659.14 of the Florida Statutes provides that whenever a person (or group of persons, or a corporation) proposes to purchase "the majority of the outstanding capital stock of any state bank or trust company," such person must first make application to the commissioner for a certificate of approval. In a case of first impression, this statute has been construed to mean that a person may acquire any amount of stock less than a majority without the approval of the commission even though he may have the intent to purchase eventually more than a majority of the stock.[144]

E. *Legislation*

Section 77.06(2) of the Florida Statutes has been amended to require the garnishee bank or financial institution to report in its answer the name and address of the defendant if known to the garnishee. Then the plaintiff (within five days after receipt of the garnishee's answer) is to serve upon the defendant a copy of the garnishee's answer and a copy of the writ of garnishment.[145]

141. Central Plaza Bank & Trust Co. v. Parker, 300 So. 2d 735 (Fla. 2d Dist. 1974).
142. Reeves v. Don L. Tullis & Associates, 305 So. 2d 813 (Fla. 1st Dist. 1975).
143. Hamilton v. Hanks, 309 So. 2d 229 (Fla. 4th Dist. 1975).
144. Interbay Citizens Bank v. Weaner, 311 So. 2d 835 (Fla. 2d Dist. 1975).
145. Fla. Laws 1974, ch. 74-98.

Under section 678.102(3) of the Florida Statutes (UCC section 8-102(3)) a "clearing corporation" is a corporation "all of the capital stock of which is held by or for a national securities exchange or association registered under a statute of the United States such as the Securities Exchange Act of 1934." Under a 1974 amendment to the Florida Statutes, Florida banks and trust companies may now invest in the stock of clearing corporations up to 10 percent of the unimpaired capital and surplus of the bank or trust company.[146] Further, fiduciaries who hold securities may deposit these securities in a clearing corporation.[147]

State banks may now lend up to $10,000 instead of the former maximum of $5,000 for home improvement loans secured by second mortgages.[148]

Applications, examination reports and investigation reports of banks and trust companies[149] and savings and loan associations[150] may now be disclosed in response to a legislative subpoena, and these records while in the possession of any legislative body or committee must be kept confidential and may not be disclosed to the public except in cases involving investigation of charges against any officer subject to impeachment.

The savings and loan associations statutes which deal with real estate loans were amended: to provide that the associations may now participate in real estate loans with approved F.H.A. mortgages; to empower associations to make loans on real estate located outside the primary lending area up to 20 (from the former 10) percent of the assets of the association; to require associations to increase their reserves to at least five percent of all savings accounts within a period not in excess of 20 years; and to provide that state chartered associations should have the same loan and investment powers and authority as federally chartered associations.[151]

It is now permissible to create an inter vivos trust in credit union accounts in addition to those previously permitted in banks and savings and loan associations.[152]

After many years of resistance by the legislature, branch banking has come to Florida. Any bank may now establish up to two

146. Fla. Laws 1974, ch. 74-223, *amending* FLA. STAT. § 659.20 (1973).

147. Fla. Laws 1974, ch. 74-224, *creating* FLA. STAT. §§ 518.115, 518.116 (1974).

148. Fla. Laws 1974, ch. 74-164, *amending* FLA. STAT. § 659.17(3)(d)(4)(1973).

149. Fla. Laws 1974, ch. 74-84, *amending* FLA. STAT. § 658.10(1) (1973).

150. Fla. Laws 1974, ch. 74-83, *amending* FLA. STAT. § 665.111(1) (1973).

151. Fla. Laws 1974, ch. 74-55, *amending* FLA. STAT. §§ 665.381(2)(b)(1), 665.381(2)(c), 665.201, 665.215 (1973).

152. Fla. Laws 1974, ch. 74-78, *amending* FLA. STAT. § 689.075(2) (1973).

branches per year within the limits of the county in which the parent bank is located, and any bank may also establish branches by merger with other banks located within the county in which the parent is located. As a condition precedent to the establishing of a branch, the parent bank must secure the approval of the Department of Banking upon such conditions as the department may prescribe, including a satisfactory showing by the bank that the public convenience and necessity will be served by the establishing of the branch.[153]

Section 659.062 of the Florida Statutes has been created[154] to provide for the electronic transfer of money between banks, savings and loan associations and credit unions. The section seems to state that banks and savings and loan associations are liable to their customers for unauthorized withdrawals caused by the failure of the institutions to maintain "reasonable procedures" to prevent such withdrawals. The inference is that if the withdrawals are accomplished in spite of these "reasonable procedures," the loss falls on the customer. It would seem that *Price v. Neal*[155] may be dead in the electronic age.

UCC section 4-104(1)(g) (section 674.104(1)(g) of the Florida Statutes) has been amended to provide that an "item" includes an instrument or electronically recorded, stored or transmitted message for the payment of money.[156]

Under a 1975 amendment to the Florida banking laws, the Department of Banking and Finance must examine the financial condition of each state bank at least twice every 18 months and each state bank and trust company is now required to perform an annual internal audit.[157]

IX. SECURITY INTERESTS

A. *Venue*

When goods are sold to a foreign corporation for delivery in Seminole County to third parties who are residents of Orange County and the vendor has a security interest in these goods, it may sue the vendee in Polk County, where the cause of action for breach

153. Fla. Laws 1975, ch. 75-217, *amending* FLA. STAT. § 659.06(1)(a) (1973).

154. Fla. Laws 1975, ch. 75-134.

155. 3 Burr. 1354 (1762); *see* UNIFORM COMMERCIAL CODE §§ 3-417, 3-418 for the codified version of *Price v. Neal*.

156. Fla. Laws 1975, ch. 75-73.

157. Fla. Laws 1975, ch. 75-162, *amending* FLA. STAT. § 658.07(1)(a), (2)(a).

of the sales contract accrued. In addition, the vendor may seek foreclosure of the security interest in Polk County over the protest of the third party that the proper venue lies in Seminole County, where the goods are located.[158] Section 47.041 of the Florida Statutes specifically provides for laying venue in one county when causes of action which arose in different counties are joined.

B. *Perfection and Priorities of Security Interests*

The Supreme Court of Florida has held that under section 9-302(1)(c) of the Code, a seller of farm equipment need not file a financing statement to perfect a security interest in farm equipment which is sold under one contract when each of several separate items costs less than $2,500, even though the total purchase price of the items exceeds $2,500. The court further held that under sections 9-312(4) and (5) of the Code, a party with a perfected security interest in after-acquired property does not take priority over another party with a purchase money security interest which was not perfected within 10 days after the debtor took possession of the farm equipment-collateral.[159] The court's holding regarding the question of whether to separate or to lump together the various pieces of equipment in order to determine the $2,500 valuation is questionable, but since the question may become moot if Florida adopts the 1972 version of section 9-302, no further discussion will be offered. However, the court's second 4-3 holding that a perfected security interest in after-acquired property does not take priority over another party with a purchase money security interest which was not perfected within 10 days after the debtor took possession of the collateral is absolute nonsense. As Professor Henson simply resolves the problem:[160]

> If a seller or a third party advancing the funds for the purchase of goods fails to file within ten days after the debtor receives the goods, the purchase money priority is lost and priority will be determined according to the rules of Section 9-312(5). This will usually mean that priority is determined in the order of filing, so that an earlier filed financier of equipment claiming after-acquired goods would have priority over a later purchase money financier who did not file within ten days.

158. Motsinger v. E.B. Malone Corp., 297 So. 2d 839 (Fla. 2d Dist. 1974).

159. International Harvester Credit Corp. v. American Nat'l Bank, 296 So. 2d 32 (Fla. 1974), *noted in* 29 U. MIAMI L. REV. 384 (1975).

160. R. HENSON, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERICIAL CODE 78 (1973).

It must be noted that Justice Carlton in dissenting clearly portrayed the egregious error of the majority in using "unspecified contractual constitutional requirements" and "equitable principles"[161] to misconstrue sections 9-312(4) and (5) of the UCC.

In *Dyer v. First National Bank at Orlando*,[162] a court in a 1964 chapter X bankruptcy proceeding provided for repayment of a debt to unsecured creditors by means of a sinking fund which was to be secured by a security interest in the debtor's state racing permit. In a 1971 reorganization proceeding it was discovered that section 9-401 of the Florida UCC had not been complied with in that the financing statement did not list the racing permit as covered property. The trustee in the 1971 proceedings maintained that the security interest was, therefore, invalid. It was held, however, that the court had the power to uphold the validity of the 1964 plan, not as an attempt to modify the plan (which would be improper), but to effectuate it in accordance with the original plan.

The United States District Court for the Southern District of Florida has decided that a financing statement which describes the collateral as "various equipment, see Schedule 'A' attached hereto"[163] is a sufficient description (against the trustee in bankruptcy of the debtor), even though the referred to schedule was not attached to the financing statement, in light of the intent of the UCC that the function of a financing statement is to put future creditors, security interest holders, etc. on notice.

As if the Supreme Court of Florida had not done enough damage to the UCC in the *International Harvester*[164] case, the court continued to demonstrate a woeful ignorance of the UCC and an apparent inability to do adequate research in Florida law in its handling of *Greyhound Rent-A-Car, Inc. v. Austin*.[165] In *Greyhound*, used rental cars owned by Greyhound were placed by it on the used car lot of Family Cars with either actual authority to sell (as stated by the majority of the court) or apparent authority to sell (as stated by dissenting Justice McCain) to the public. Between 300 and 1,000 cars were sold by this method, wherein Greyhound would hold the title certificate until it received payment from Family, and it would then transfer the title certificate to the purchaser. Austin purchased a car in this fashion; Family failed to pay Greyhound, which replev-

161. 296 So. 2d at 40.
162. 502 F.2d 1011 (5th Cir. 1974).
163. *In re* Stegman, 15 UCC REP. SERV. 225, 226 (S.D. Fla. 1974).
164. *See* note 159 *supra* and accompanying text.
165. 298 So. 2d 345 (Fla. 1974).

ined the car from Austin. Austin claimed title, and the trial court and District Court of Appeal, Fourth District, held that title was acquired by Austin. The majority of the Supreme Court held that sections 319.21 and 319.22 of the Florida Statutes, which provide that a purchaser does not acquire a "marketable title" without issuance of a certificate of title, do not prevent a valid legal title from being acquired by a bona fide purchaser when the true owner authorizes a dealer to sell the car to the public. The 1957 case of *Motor Credit Corp. v. Woolverton*[166] was cited as authority for holding that the purchaser prevails over the record title holder, Greyhound. The majority made no mention of sections 2-403 and 9-307(1) of the UCC which directly cover this issue.

Justice McCain in dissent did mention section 2-403. He stated, however, that section 2-102, which provides that the UCC does not impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers, leaves unimpaired chapter 319 of the Florida Statutes, and that section 2-403(2) is in direct conflict with sections 319.21 and 319.22 of the Florida Statutes, concluding that section 2-403, therefore, has no applicability to this case. Both the majority and the dissent failed to cite *Stroman v. Orlando Bank and Trust Co.*,[167] *Correria v. Orlando Bank & Trust Co.*[168] and *Harmony Homes, Inc. v. Zeit,*[169] all of which held quite correctly that section 2-403(2) is not inconsistent with sections 319.21 and 319.22 of the Florida Statutes, and that if the owner of a motor vehicle entrusts it with a dealer who deals in the sale of motor vehicles, he has the power to pass on valid title (although not marketable title) to a buyer in ordinary course of business even though a title certificate is retained by the original owner and never delivered to the buyer in ordinary course. The majority decision in *Greyhound* comes to the right result, but the authority cited is out of date, while the dissenting decision cites the right sections of the UCC and then proceeds to misconstrue them.

The District Court of Appeal, Fourth District, in citing a prior *Survey*[170] by the author, has held that former section 697.04 of the Florida Statutes, which required that the "maximum principal amount" of future advances be specified in security agreements in order to make the future advances valid, was inconsistent with section 9-204 of the UCC (the future advance provision), which does

166. 99 So. 2d 286 (Fla. 1957).
167. 239 So. 2d 621 (Fla. 4th Dist. 1970).
168. 235 So. 2d 20 (Fla. 4th Dist. 1970).
169. 260 So. 2d 218 (Fla. 1st Dist. 1972).
170. Murray, *Negotiable Instruments and Banking*, 26 U. MIAMI L. REV. 72, 88 (1971).

not have such a provision, and was superseded by the adoption of the UCC in accordance with section 680.104(3) of the Florida Statutes.[171]

A lease which provides that it may not be assigned without the consent of the lessor is a "contract right" under section 9-106 of the UCC, and the District Court of Appeal, Fourth District, has held that this contract right may be encumbered by a security agreement which provides that it covers "all of its [the lessee's] contract rights."[172] The court made no determination as to the rights of the lessor vis-a-vis the holder of the security interest.

A security agreement encumbering accounts which describes the accounts as consisting of:[173]

> (i) all accounts owned by Borrower at the date of this agreement; (ii) all accounts at any time hereafter acquired by Borrower; (iii) all Borrower's existing contract rights and all of Borrower's contract rights which come into existence at any time hereafter; and (iv) all proceeds of all such accounts and contract rights . . .

amply identifies the collateral; sums collected by the executrix of the account borrower which were for work done by the borrower prior to his death were proceeds of these accounts and the lender has a security interest in these proceeds under section 9-306(1) of the UCC.

C. *Fixtures*

It is erroneous for a court in a mortgage foreclosure action to enjoin a plaintiff in a replevin action from removing "free-standing" appliances[174] from the mortgaged premises when the replevin plaintiff claims a properly perfected security interest in these appliances. The question of priority ought to be determined in the replevin action. If the mortgagee of the land and building wishes to prevent the repossession of the appliances pending the outcome of the replevin suit, he should post a bond under section 78.067 of the Florida Statutes.

The District Court of Appeal, First District, was able to avoid applying the fixture section (9-313) of the UCC by upholding a trial court's decision that a hot water heater, sink, plumbing attachments, countertop and backsplash, dishwasher, disposal unit,

171. Mason v. Avdoyan, 299 So. 2d 603 (Fla. 4th Dist. 1974).
172. Gould, Inc. v. Hydro-Ski Int'l Corp., 287 So. 2d 115, 116 (Fla. 4th Dist. 1974).
173. Barnett Bank v. Fletcher, 290 So. 2d 533, 534 (Fla. 1st Dist. 1974).
174. General Elec. Co. v. O'Keefe, 309 So. 2d 231 (Fla. 4th Dist. 1975).

lights, cabinets, range hood and drop-in range installed by Sears, Roebuck and Company pursuant to a conditional sales contract with home mortgagors did not constitute fixtures. Therefore, Sears, Roebuck was legally justified in its removal of the above items over the protest of a first mortgagee which claimed all after-acquired improvements or fixtures installed in the home subsequent to the execution of the mortgage. The conditional sales contract recited that the goods were not to become fixtures, and the court held that this agreement between the conditional vendor and the mortgagors could not bind the mortgagee; however:[175]

> the lower court in its final judgment holding the items to be personalty states that there was no evidence of intent to "make the annexation a permanent accession to the freehold". Since the intention of the party making the annexation has been held to be a primary test in determining whether an article is a fixture, a finding of no evidence of intent requires a ruling that the articles were in fact not fixtures.

D. *Mechanics' Liens Versus Security Interests*

A mechanic who has a valid mechanic's possessory lien on an aircraft pursuant to section 713.58 of the Florida Statutes for repairs made on the aircraft as a result of work done for the owner has priority under section 9-310 of the UCC over a prior security interest in the aircraft which has been recorded under federal law. Security interests in aircraft must be perfected under federal law, but compliance does not accord priority because the relative priorities of mechanics' liens vis-a-vis security interests are matters of state law.[176]

E. *Repossessions and Collections*

A creditor who mistakenly credits a debtor's check to the wrong account and then tells the debtor that if he does not make the "overdue" payment his car will be repossessed may be held liable for damages resulting from the debtor's being forced to sell his car at a substantial loss, for loss of use of the car, loss of his job as a result of a lack of transportation, and mental anguish, nervousness, humiliation and inconvenience. In this particular case, the balance of the loan was less than $3,000 and the jury awarded the debtor

175. First Fed. Sav. & Loan Ass'n v. Stovall, 289 So. 2d 32 (Fla. 1st Dist. 1974).
176. Carolina Aircraft Corp. v. Commerce Trust Co., 289 So. 2d 37 (Fla. 4th Dist. 1974).

$10,500; in some cases the value of extra-judicial repossession may be overrated.[177]

When a vendor on credit seeks to replevin the goods before the payment is due from the vendee and the court rules, therefore, in favor of the vendee, the vendee is not entitled to recover the value of the unpaid goods, but only the amount of any special interest that the vendee may have in the goods in accordance with sections 78.21 and 78.19 of the Florida Statutes.[178]

Although it is not entirely clear, it would appear that the District Court of Appeal, Third District, has held that when a security agreement authorizes the secured party to enter the debtor's property in order to repossess property upon default in payment, the secured party is free from liability in doing so if the repossession is done without breach of the peace. The court made no mention of section 9-503 of the UCC.[179]

Under former section 78.19 of the Florida Statutes, when a conditional vendor (the holder of a security interest) has received one or more payments from the vendee and has brought a replevin action aginst the vendee because of a default in payments, the vendor is entitled to a judgment for the balance of the unpaid purchase price, not the original purchase price; the judgment may be satisfied by recovery of the balance owing or by the recovery of the goods.[180]

Florida Statutes sections 679.503 and 679.504, which provide for a secured creditor's rights peacefully to repossess secured collateral upon default of a debtor and then sell it, have been again upheld as valid under the Constitution of the United States.[181]

Section 559.72 of the Florida Statutes prohibits, in collecting consumer claims, the use of any communication which simulates legal or judicial process in any manner or which gives the appearance of being authorized or approved by a government or an attorney at law. A violation of the statute will subject the wrongdoer to civil liability for actual damages or $500, whichever is greater, together with attorney's fees, court costs and punitive damages, if appropriate. In a case of first impression, the District Court of Ap-

177. Hialeah-Miami Springs First State Bank v. Hogeland, 303 So. 2d 357 (Fla. 3d Dist. 1974).

178. Modine Mfg. Co. v. Israel, 294 So. 2d 369 (Fla. 3d Dist. 1974).

179. Westchester Nat'l Bank v. Corey, 293 So. 2d 796 (Fla. 3d Dist.), *appeal dismissed*, 303 So. 2d 28 (Fla. 1974).

180. American Employers' Ins. Co. v. Piedmont Sewing Supply, Inc., 287 So. 2d 111 (Fla. 3d Dist. 1973), *cert. denied*, 295 So. 2d 307 (Fla. 1974).

181. Shirey v. Government Employee's Corp., 287 So. 2d 729 (Fla. 3d Dist. 1974), *following* Northside Motors, Inc. v. Brinkley, 282 So. 2d 617 (Fla. 1973).

peal, First District, held that a communication which brackets the names of the "creditor" and "debtor" in a style similar to a summons and contains some language identical to that used in legal process might prima facie indicate a violation of the statute when the facts are so pleaded in a complaint.[182]

X. CREDIT CARDS

The State of Florida under a parens patriae theory may not bring a class action in behalf of Florida credit card holders against the issuer of the cards to recover alleged usurious interest charged because the general welfare and health of the state is not involved.[183] In prior suits the same court had held that a class action by one credit card holder in behalf of the class would not lie.[184] Inasmuch as the amounts involved would not normally justify an individual's suing the corporate credit card issuer, it seems plain that a company can charge usurious rates until it is threatened with a suit and then can render it moot by agreeing to reform.[185]

182. Tester v. National Credit Exch., Inc., 299 So. 2d 46 (Fla. 1st Dist. 1974).

183. Shell Oil Co. v. State, 295 So. 2d 648 (Fla. 3d Dist. 1974).

184. Syna v. Shell Oil Co., 241 So. 2d 458 (Fla. 3d Dist. 1970); Federated Dep't Stores, Inc. v. Pasco, 275 So. 2d 46 (Fla. 3d Dist. 1973).

185. *See* Shell Oil Co. v. State, 295 So. 2d 648 (Fla. 3d Dist. 1974).