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Corporate Law and Securities Regulation

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CORPORATE LAW AND SECURITIES REGULATION*

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* This survey covers the legislation enacted during the 1970 legislative session, and the 1971 regular legislative session and the first two special sessions, and cases reported in volumes 225 to 250 Southern Reporter, Second Series.

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I. CORPORATIONS

A. *New Legislation*

In the years subsequent to the last survey,[1] the Florida Legislature has begun yearly sessions and has produced a number of statutory changes which affect corporations.[2]

1. CORPORATE FORMATION

Possibly the most significant change in Florida corporate law was the reduction in the number of persons required for incorporation. Under the prior incorporation statute,[3] three or more persons were required. Under the new law,[4] a corporation may be organized by one or more natural persons.[5] The passage of this bill, first introduced in 1967,[6] was long overdue.

In accordance with this change, the legislature revised the remainder of Florida Statutes chapter 608 (1969).[7] However, an apparent oversight, not corrected in the 1970 revision, appears in Florida Statutes section 608.13(6) (Supp. 1970) which requires that the number of directors, managers, or trustees shall never be less than three. A recently enacted law[8] corrected this oversight by completely deleting any numerical requirement.

The second major change occurred in the revision of Florida Statutes section 608.03(2)(b) (1969). Previously, under this section, an attorney was required to insert pages of stylized language which constituted a statement of the business that the corporation was empowered to transact. Under the new statute,[9] while the attorney may still use stylized language, he does not have to. Rather, "a statement that the corporation may engage in any activity or business permitted under the laws of the United States and of this state . . ."[10] will suffice to authorize any and all lawful business. This obviates the former necessity of employing archaic language and will greatly aid the attorney in preparing the proposed corporation's articles of incorporation.

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1. Sowards, Mofsky and Dresnick, *Florida Securities Regulation and Corporate Law, 1967-1969 Survey of Florida Law*, 24 U. MIAMI L. REV. 504 (1970).

2. *See, e.g.*, Fla. Laws 1971, ch. 71-136, §§ 633-34, *amending* FLA. STAT. §§ 608.59, 608.67 (1969), which changed certain penalties for corporate improprieties.

3. FLA. STAT. § 608.03(1)(a) (1969).

4. FLA. STAT. § 608.03(1)(a) (Supp. 1970).

5. Due to the nature and purpose of a corporation, that is, limited liability, there would appear to be little reason to restrict incorporators to natural persons in the author's opinion.

6. S.B. 1499, 1967 Sess., Fla. Legislature.

7. This section deals with the statutory regulation of corporations and closely-held corporations.

8. Fla. Laws 1971, ch. 71-355, § 159.

9. FLA. STAT. § 608.03(2)(b) (Supp. 1970).

10. *Id.*

2. CORPORATE NAME

Florida Statutes section 608.031 (Supp. 1970), which deals with the reservation of a proposed corporate name, was also the subject of extensive rewriting. A corporation, foreign or domestic, or a person intending to organize either type of corporation may now reserve a name for a period of 120 days upon the payment of a filing fee not to exceed five dollars by applying to the Department of State, pursuant to the department's rules and regulations. Under the prior law,[11] only incorporators could reserve a name, and then for only a period of 15 days with only one 15 day renewal period available.[12]

3. CORPORATE EXISTENCE

Subject to a 90 day limit, the date of corporate existence may be specified in the articles of incorporation.[13] The incorporators may set a day certain for the beginning of corporate existence, and this provision should make it possible for corporate planners to avoid the situation of inadvertently going into business in advance of official incorporation with a resultant loss of limited liability protection.[14] This date may be at the time of subscription and acknowledgement, provided that the articles of incorporation are filed within five days, are approved, and all fees and taxes are paid.[15] If the date is not specified in the articles of incorporation, existence will begin as provided under the statute prior to its amendment.[16] The effect of the amendment was primarily the transfer of Florida Statutes section 608.041(1) (1969)[17] to Florida Statutes section 608.04 (Supp. 1970).

4. CERTIFICATE OF INCORPORATION

A new section[18] was added to Florida Statutes chapter 608 (1969), the Florida corporation code, which provides that a corporation may integrate all previous amendments to its certificate of incorporation into a single instrument by adoption of the restated certificate by the board of directors. The new certificate, of course, must satisfy all the proper statutory formalities,[19] though it may omit the provisions of the original

11. FLA. STAT. § 608.031 (1969).
12. *See* section I, B, 2, *infra* for applicable cases.
13. FLA. STAT. § 608.04 (Supp. 1970).
14. *Id.*
15. *See* Fla. Laws 1971, ch. 71-359, *amending* FLA. STAT. § 608.05 (1969). Upon the filing of the articles of incorporation, the corporate privilege tax must be paid. *See* section I, K, *infra.*
16. FLA. STAT. § 608.041(1) (1969) (namely after approval by the Department of State).
17. General housekeeping changes have been made in this section which have no effect on the substantive law.
18. FLA. STAT. § 608.061 (Supp. 1970).
19. FLA. STAT. § 608.03 (Supp. 1970) (corporate name, amount of stock, type of business, etc.).

certificate of incorporation which named the incorporator or incorporators, the initial board of directors, and the original subscribers for shares.[20]

Three changes have been made in the requirements for articles of incorporation. First, the legislature has clarified Florida Statutes section 608.03(2)(f) (Supp. 1970) to require that only "the initial street address in this state of the principal office of the proposed corporation" be included in the articles of incorporation. Second, if the corporation will not have directors pursuant to Florida Statutes section 608.72 (1969), this fact must be stated in the articles.[21] Finally, the articles must only be subscribed to by one or more natural persons.[22]

5. EXECUTIVE COMMITTEE

The executive committee's purpose is to perform certain functions, primarily management related, delegated to it by the board of directors. The board of directors may elect an alternate member to the committee to act in the place of an absentee or member disqualified from voting. In the alternative, if the by laws so provide, the members of the committee itself, regardless of whether or not a quorum has been constituted, may unanimously appoint a member of the board of directors to replace an absent or disqualified member of the committee.[23]

6. STOCKHOLDER'S MEETING

The board of directors, *unless prohibited* by the certificate of incorporation or by the by laws, may fix without notice a date not more than sixty days[24] before the date of the stockholder's meeting as the record date of "which the stockholders of record who have the right to and are entitled to notice of and *to vote* at such meeting . . . shall be determined."[25] The prior statute required that notice be published in a newspaper where the principal place of business of the corporation was located at least five days before the date was fixed.

The deletion of the notice requirement will probably have a tremendous impact upon "proxy fights," stock acquisitions, and other contests for control of a corporation under state law. This is because under the present statute, if the annual meeting is forthcoming and the directors are aware of a sudden activity in their corporation's stock, they may fix a record date without notice. The deletion of the notice requirement en-

20. FLA. STAT. § 608.061 (Supp. 1970).

21. FLA. STAT. § 608.03(2)(g) (Supp. 1970). Under the prior statute, three directors were required. *See also* Fla. Laws 1971, ch. 71-355, § 158, which amends the statute to make it applicable to the management of a closely-held corporation by stockholders.

22. FLA. STAT. § 608.03(4) (Supp. 1970). Under the prior statute, three natural persons were required.

23. FLA. STAT. § 608.09(3) (Supp. 1970).

24. Formerly forty days. FLA. STAT. § 608.10(2) (1969).

25. FLA. STAT. § 608.10(2) (Supp. 1970).

ables the directors to fix a date prior to the purchase of stock by their opposition. Therefore, the opposition would not be shareholders of record on the record date declared and thus, would be ineligible to vote those shares purchased after the record date unless they receive a proxy from the prior owners who are listed as the stockholders of record. To avoid the effect of no notice, parties attempting to gain control of a corporation through stock acquisition will have to begin their efforts more than sixty days prior to the stockholder's meeting, and the stock activity, if noticed by the directors, may give them sufficient time to prepare a defense.

7. CORPORATE POWERS: INDEMNIFICATION OF DIRECTORS; INSURANCE; PARTNERSHIPS

Former Florida Statutes section 608.13(15) (1969), dealing with the indemnification of directors, has now been made subsection (a) of Florida Statutes section 608.13(14) (Supp. 1970). Section 608.13(14) allows a corporation, unless otherwise provided by its certificate of incorporation or by laws, to indemnify any person made a party or threatened to be made a party,[26] to any suit threatened,[27] pending or completed action, suit, or proceeding under certain conditions.[28]

In addition to indemnification, the corporation may advance funds to the party involved to pay expenses in an actual proceeding, but not a threatened proceeding, in advance of final disposition, provided the party promises to repay the funds if he is ultimately found not to be entitled to them under Florida Statutes section 608.13(14).[29] The indemnification does not affect any other rights which the party may have and inures to the benefit of his heirs, executors, or administrators.[30] Furthermore, the corporation is expressly authorized to purchase and maintain insurance covering any person for liability asserted against him and incurred by him, regardless of whether or not he would be entitled to indemnification under section 608.13(14).[31] However, it is doubtful whether any insurance company would issue a policy that covered anything more

26. This provision was added to former Florida Statutes section 608.13(15) (1969), which was also expanded to include administrative or investigative proceedings.

27. New provision.

28. *See* FLA. STAT. § 608.13(14)(a) (Supp. 1970) (primarily that the person acted in good faith, reasonably believing that his action would benefit the corporation).

29. *See* note 28 *supra*.

30. FLA. STAT. § 608.13(16) (Supp. 1970).

31. *Caveat*: all subsections of section 608.13 are expressly made subject to the statement, "unless otherwise provided by law." FLA. STAT. § 608.13 (1969). The Securities and Exchange Commission considers indemnification or insurance contracts void as against public policy. 17 C.F.R. § 230.460 (1971). In addition, at least one case, Globus v. Law Research Serv., Inc., 418 F.2d 1276 (2d Cir. 1969), has held an indemnity contract between an issuer and an underwriter void. This case and others that probably will follow, when considered with the declarations of the SEC, could vitiate the indemnification policy of the statute, as case and federal statutory law is presumably what is meant by "unless otherwise provided by law."

than honest or reasonable errors.[32] Finally, the provisions of section 608.13(14) are quite limited in allowing recovery, generally restricting recovery to persons who act in good faith or with reasonable belief in the correctness of their actions.

If there formerly had been any doubt as to whether a corporation could enter into a general or a limited partnership,[33] it is now clear that a corporation may do so.[34] In addition, a corporation may enter into joint ventures, syndicates, pools, associations, and other arrangements in pursuance of the purposes set forth in the articles of incorporation as long as the corporation would have had the power to do so alone.[35]

8. CAPITAL STOCK—PREFERRED

A prior statute[36] stated that the shares of preferred or special stock would

> provide for dividends at such rates, on such conditions and payable at such times and shall be subject to redemption rights at such price or prices and at such time or times as shall be stated and expressed with respect to such division by number and issuance in series, dividends and redemption rights . . . .[37]

The new statute[38] provides that the shares of preferred or special stock shall

> have such relative rights and preferences with regard to dividend rates, redemption rights, conversion privileges, voting power, and such other distinguishing characteristics as shall be stated . . . .[39]

This change appears to have no effect upon the substantive law, however.

9. MERGERS WITH FOREIGN CORPORATIONS

As urged in a prior survey,[40] the Florida Legislature has amended Florida Statutes section 608.21(1) (1969) to permit a Florida corporation to merge with a corporation organized under the laws "of any jurisdiction other than one of the United States," provided that "the laws

32. It is, of course, for the insurer and insured to determine the exact scope of coverage within the limits (as expressed by public policy) of the law.

33. *See* Stein, *Partnership Taxation for a Limited Partnership with a Corporate General Partner—It Can Be Done*, 25 U. MIAMI L. REV. 435 (1971).

34. FLA. STAT. § 608.13(18) (Supp. 1970).

35. *Id.*

36. FLA. STAT. § 608.14(2) (1969).

37. *Id.*

38. FLA. STAT. § 608.14(2) (Supp. 1970).

39. *Id.*

40. Sowards, *Corporations, 1965-1967 Survey of Florida Law*, 22 U. MIAMI L. REV. 339 (1967) [hereinafter cited as Sowards].

under which said other corporation or corporations are formed permit such consolidation or merger."[41]

10. CRIMINAL PROCEDURE

Florida Statutes sections 907.03,[42] 908.03,[43] and 909.08 (1969)[44] have been repealed.[45] However, all the essentials of section 907.03 may be found in the Florida Rules of Criminal Procedure rule 1.150(c); former section 908.03 may be found in rule 1.170(d); and former section 909.08, as it applies to corporations, may be found in rule 1.180(d). Florida Statutes section 901.14 (1969) has been amended[46] and is no longer limited to proceedings before the magistrate who issued the summons. Under the new law, the court which acquired jurisdiction by issuance of a summons must enter a plea of not guilty if the corporation does not appear and then must proceed to trial and judgment without further process.

11. FEES

The amount of incorporating fees payable to the Department of State, has been increased. For example, the fee to register a corporate agent, payable under Florida Statutes section 48.091 (1969), has been increased from one dollar to three dollars. Florida Statutes section 608.05 (1969), covering filing fees and taxes necessary for corporate existence, has been extensively amended[47] and the session laws should be consulted to ascertain the correct fees. Florida Statutes section 608.37 (1969), dealing with the restoration of corporations dissolved for failure to file reports and pay capital stock tax, has been amended to increase the fee from ten to fifteen dollars.[48]

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41. FLA. STAT. § 608.21(1) (Supp. 1970). As indicated in a prior survey (Sowards, *supra* note 40), a problem of jurisdiction over the new corporation is created where the corporation elects to treat the foreign country as the place of incorporation. The original bill, S.B. 1490, which was filed in the Florida Legislature in 1967, provided that the new corporation would be a Florida corporation. However, the current law makes no provision for retention of jurisdiction. Thus, it is possible that the rights of the shareholders might be jeopardized. *See* Sowards, *supra* note 40, at 341.

42. The statute provided for a summons to be issued when the defendant was a corporation.

43. The statute provided, *inter alia*, that if the corporation failed to make an appearance, a plea of not guilty should be entered on the record.

44. The statute provided that a plea of guilty to a felony charge could be accepted on behalf of a corporation even if it was not present at the proceeding.

45. Fla. Laws 1970, ch. 70-339, § 180.

46. FLA. STAT. § 901.14 (Supp. 1970).

47. Fla. Laws 1971, ch. 71-114, § 10.

48. Fla. Laws 1971, ch. 71-114, § 11. The practitioner should also check FLA. STAT. §§ 609.02, 613.02, 617.11, 618.04 and 618.05 (1969), all of which are subject to the fee increases provided by Fla. Laws 1971, ch. 71-114.

12. CORPORATE REGULATION—TAX

Florida Statutes section 608.311 (1969)[49] was created to define a corporation to

> include the following entities and all references to corporate characteristics shall include corresponding or equivalent characteristics of noncorporate business associations:
>
> (1) Corporations, mutual insurers and other nonstock business associations . . . ; and
>
> (2) National banks, state banking and trust companies and savings and loan associations.

If a party falls within this definition, "he"[50] must file a corporate return setting forth the required information. The corporate return is due on the first day of January of the taxable year,[51] although it is not delinquent until the first day of May. Florida Statutes section 608.3211 covers the taxable period from July 1, 1971, through December 31, 1971, and requires the return to be filed on or before November 1, 1971; if an extension is requested prior to the due date, the department may provide an extension of up to 105 days.[52] The amount of the corporate privilege tax due shall be an amount equal to one dollar on each one thousand dollars of the corporation's net worth in excess of fifty thousand dollars.[53] A minimum tax of 75 dollars is due from all corporations.[54] However, it should be made clear that the tax imposed by Florida Statutes section 608.33[55] is subject to the special rules provided in Florida Statutes section 608.333.[56] Section 608.333 is designed to deal with corporations which have not been incorporated or doing business within the year,[57] bankrupt or dissolved corporations,[58] and affiliated corporations.[59] The collection of the tax will be made under chapter 214,[60] which is a new tax administration act.

Foreign corporations are expressly subject to the privilege tax upon

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49. *As amended*, Fla. Laws 1971, ch. 71-359, § 1.

50. "He" includes foreign corporations authorized to do business in Florida and also includes non-profit corporations. FLA. STAT. § 608.32(3) (1969), *as amended by* Fla. Laws 1971, ch. 71-359, § 2 and Fla. Laws 1971, ch. 71-979, § 2.

51. A calendar year for the corporate privilege tax, runs from January 1 to December 31 even though the information and values required shall be determined as of the close of the corporation's annual accounting period immediately preceding the commencement of the taxable period. FLA. STAT. § 608.322, *created by* Fla. Laws 1971, ch. 71-359, § 5.

52. *See* note 51 *supra*. Valuation is the same as provided by Fla. Laws 1971, ch. 71-359, § 5, but is determined as of the close of the corporation's annual accounting period immediately preceding July 1, 1971. Fla. Laws 1971, ch. 71-359, § 6.

53. Fla. Laws 1971, ch. 71-359, § 8. *But see* Fla. Laws 1971, ch. 71-979, § 2.

54. Fla. Laws 1971, ch. 71-359, § 10.

55. *Id.* at § 7.

56. *Id.* at § 12.

57. *Id.* at § 12(1).

58. *Id.* at § 12(2).

59. *Id.* at § 12(3).

60. *Id.* at § 19.

the issuance of a permit to transact business in this state. The payment of the tax is a condition precedent to the issuance of the permit.[61]

B. *Recent Decisions*

1. PRE-INCORPORATION AGREEMENTS

This topic concerns the rights and liabilities of the promoter, the corporation which he promotes, and the third party with whom the promoter has contracted to perform services for the proposed corporation. In a recent case,[62] a promoter had entered into a contract with the plaintiff who was to perform services for the corporation. After default, the plaintiff sued the promoter for payment. The promoter presented two defenses to the court: 1) the contract was a contract of guarantee, and thus, any claim was barred by the Statute of Frauds; and 2) the promoter's liability was secondary, that of a guarantor. The court rejected both arguments, holding that the contract was not barred by the Statute of Frauds and that the liability of a promoter is primary unless the promoter can show that the other party agreed to look only to the corporation to be formed for his recourse.

2. CORPORATE NAMES

Florida Statutes section 608.031 (Supp. 1970) provides that a "corporation," prior to incorporation, may reserve its name. However, once incorporated, no remedy is provided by Florida Statutes chapter 608 (1969) if another corporation should wish to use an identical name. Thus, the right to the use of a corporate name is protected only by common law. While there is a statutory remedy for trademark or trade name infringement,[63] there is a distinction between this remedy and the common law remedy for the protection of the corporate name. However, Florida cases and most cases in other jurisdictions have proceeded from the premise that the protection of the corporate name is really an aspect of the law of unfair competition.[64]

In *Junior Food Stores v. Jr. Food Stores, Inc.*,[65] the respondent incorporated in June 1961 and registered its name first under Florida Statutes chapter 495 (1959). It, as well as the petitioner, entered into a franchise agreement with a chain store and as a result changed its name. While the stores were not in competition initially, expansion brought them into conflict in one area. The parties stipulated that the similarity of their signs and trade names would cause confusion if used in the same loca-

61. FLA. STAT. § 613.02(1) (1969), *as amended by* Fla. Laws 1971, ch. 71-359, § 18.

62. International Design, Inc. v. Rubin's Franchises, Inc., 247 So.2d 778 (Fla. 3d Dist. 1971).

63. *See* FLA. STAT. ch. 495 (1969).

64. *See* Note, *Corporations: Right to Exclusive Use of Corporate Name*, 28 CALIF. L. REV. 766 (1940).

65. 226 So.2d 393 (Fla. 1969).

tion. The court held that the prior registration of the trade name and sign design did not entitle the respondent to the exclusive use of the trade name under chapter 495—since that chapter is concerned with trademarks and not trade names. However, the registration was effective since it established the basis for the respondent's invocation of common law trade name protection principles which are predicated upon a prior "use"[66] of a trade name as against subsequent use by another. The court then considered the effect of the parties' stipulation and found that the stipulation did not foreclose the petitioner from the right to operate under a form of its corporate name because, at the time the petitioner began operation, its business was far removed from the area served by the respondent. However, under the common law, protection is only extended to the first appropriator of a name within the territorial scope of its business, against the subsequent use of the same or a similar name by another. In the instant case, the stores were neighborhood convenience stores. Because customers who are obliged to pay cash and carry away their purchases will not patronize a store unless it is within their immediate neighborhood, each store drew its trade from a small surrounding territory. Although the chain stores formed one corporation, the court held that each part of the chain must be considered separately. Thus, even though the stores were within the same city, they were in different neighborhoods, and therefore, did not operate within the territorial scope of each other.

The District Court of Appeal, First District, in *First Guaranty Bank and Trust Co. v. First Bank & Trust Co.*,[67] utilized a different approach, the consumer confusion test. Under this test, the party seeking relief must show that because of the similarity of trade names, potential customers of the first appropriator of the trade name are actually doing business with the second appropriator under the mistaken impression that they are doing business with the first. Evidence that there has been misdelivery of merchandise between the two stores is, however, insufficient to sustain the burden of proof.

It is submitted that the territorial scope test would probably not yield the same result as the consumer confusion test, since a bank generally does not draw its clientele from a limited area. Therefore, a court could probably find an overlapping of territories, but not find "consumer confusion."

3. SERVICE UPON A CORPORATION

In any litigation involving a corporate defendant, effective service of process is essential to bind the corporation, and where applicable, its officers, directors or stockholders.[68] Concern has always been mani-

66. *Cf.* Abner's Beef House Corp. v. Abner's Int'l Inc., 227 So.2d 865 (Fla. 1969).
67. 237 So.2d 783 (Fla. 1st Dist. 1970).
68. *See generally* FLA. STAT. ch. 48-49 (1969). *See also* Bayitch, *Conflict of Laws,*

fested by corporations, which have appointed resident agents, over the question of whether service upon the agent is binding service upon the officers, directors or stockholders of the corporation. The District Court of Appeal, First District, has held that service upon the corporate resident agent is *not* sufficient to create personal liability for the officers, directors or stockholders.[69] Once a corporation has appointed a resident agent, service upon that agent confers *in personam* jurisdiction over the corporation upon the court, and a showing that the cause of action arose out of the corporation's activities in Florida is not necessary.[70] Where service of process is attempted upon a corporation pursuant to Florida Statutes section 48.081(1) (1969),[71] Florida's general corporate service of process provision has caused some confusion regarding the proper person to be served and the sufficiency of the sheriff's return of service. According to the statute, service must be attempted in descending order starting with the president and finishing with any officer or business agent.[72] Service made upon a desk clerk pursuant to this statute was held insufficient, despite the fact that the clerk delivered the material to the president of the corporation, where no showing was made that the other classes of officials enumerated by the statute were unavailable.[73] In *Ludlum Enterprises, Inc. v. Outdoor Media, Inc.*,[74] the District Court of Appeal, Fourth District, stated that the statute had to be strictly construed since its purpose is to insure notice, and that the absence of all members of a superior class designated in the statute is a condition precedent to the validity of service upon a member of an inferior class. It is unclear to what lengths the sheriff in serving process must go to determine whether, in fact, the members of the superior class are present within the State of Florida. It is submitted that the sheriff's return, stating specifically that the members[75] of the superior class are absent, accompanied with an affidavit of diligent search,[76] should be sufficient to sustain the service of process.

The validity of service has been attacked on two occasions after

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1969-1971 Survey of Florida Law, 26 U. MIAMI L. REV. 1, 62 (1972) for a review of the cases concerning service of process on foreign corporations.

69. Meiselman v. McKnight, 226 So.2d 437 (Fla. 1st Dist. 1969).

70. Junction Bit & Tool Co. v. Institutional Mortgage Co., 240 So.2d 879 (Fla. 4th Dist. 1970). *See also* FLA. STAT. § 48.081(5) (1969).

71. FLA. STAT. § 48.081(1) (1969):

> Process against any private corporation, domestic or foreign, may be served: (a) on the president or vice-president, or other head of the corporation; and in his absence: (b) On the cashier, treasurer, secretary or general manager; and in the absence of all of the above: (c) On any director; and in the absence of all of the above: (d) On any officer or business agent residing in the state.

72. *See also* FLA. STAT. § 48.081(2)-(5) (1969).

73. Ludlum Enterprises, Inc. v. Outdoor Media, Inc., 250 So.2d 649 (Fla. 4th Dist. 1971).

74. *Id.*

75. The return should quote the statute in listing the members.

76. *See* FLA. STAT. § 49.051 (1969).

default judgment had been entered. In the first case,[77] the sheriff's return showed service upon M. Krieger, resident agent, in the absence of the president, vice-president, cashier, treasurer, secretary, general manager, director, and all other officials. A default was granted and final judgment entered on April 2, 1969. A motion to set aside the default and judgment was filed on May 7, 1969, along with an affidavit of M. Krieger, the vice-president and resident agent, stating that he had never been served. Testimony was taken which showed that the sheriff had no independent recollection of service. The court held, however, that Krieger's uncorroborated testimony was not clear and convincing evidence sufficient to impeach the sheriff's return. The District Court of Appeal, Third District, stated that before a judge can set aside a default, the corporation must allege and prove excusable neglect of an officer or agent. In the instant case, the corporation failed to meet its burden of proof, and the default judgment entered against it was affirmed.[78]

In the second case,[79] the motion to set aside the default was filed more than one year after the entry of the judgment. The return of service stated that service had been made on the manager in the absence of the president and all other officers of the corporation. An amended return was filed stating that service was made

> in the absence of the President, Vice-President or other head of the corporation, cashier, treasurer, secretary, general manager, all the directors of said corporation, any officer and business agent residing in this State, and by then and there showing to him this original and explaining to him the contents thereof.[80]

The court refused to set aside the judgment, holding that it was only voidable[81] and not void since sufficient notice had been provided to the corporation.

Thus, in service of process cases where the adequacy of service is being attacked, the movant must show by clear, convincing and corroborated testimony that the return of service is invalid. Furthermore, where more than a year has passed since entry of the default, a heavier burden is placed upon the party attempting to set aside the default. In this situation, the movant must do more than impeach the sheriff's return.

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77. Winky's, Inc. v. Francis, 229 So.2d 903 (Fla. 3d Dist. 1969).

78. *Id.* The dissenting judge felt that the default should be set aside since the record was sufficient to impeach the sheriff's return of service. It does not appear from the case whether the inconsistency in the sheriff's return was argued. The return stated that, in the absence of the president, vice-president, etc., service was made upon the resident agent. Since Krieger was the vice-president of the corporation, as well as the resident agent, the return was inconsistent on its face.

79. Craven v. J.M. Fields, Inc., 226 So.2d 407 (Fla. 4th Dist. 1969).

80. *Id.* at 409.

81. Thus, it was within the one year time limitation imposed by FLA. R. CIV. P. 1.540(b).

He must show that he did not receive sufficient notice of the pending suit so as to violate his constitutional right of procedural due process.

4. CORPORATE VENUE

Venue is the privilege of the defendant to be sued in a particular locale.[82] It is a personal privilege which cannot be waived by the action of a co-defendant who has failed to assert his venue privilege.[83] Venue for corporations is governed primarily by Florida Statutes section 47.051 (1969).[84] In an action where there are two or more defendants, Florida Statutes section 47.021 (1969) may apply.[85] However, in *Commercial Carrier Corp. v. Mercer*,[86] the District Court of Appeal, Second District, held that section 47.021 is inapplicable when all the defendants are mutual residents of the same county even though one or more corporate co-defendants may also "reside" in other counties.

As could be anticipated, the greatest amount of litigation regarding corporate venue dealt with the problem of where the cause of action accrued. Where allegations of venue are affirmatively made in the complaint, it is the defendant's burden to establish the absence of proper venue.[87] In *B & F of Clearwater, Inc. v. Wesley Construction Co.*,[88] the defendant was unable to meet his burden. The complaint, filed in Pinellas County, asked for damages for breach of contract and *quantum meruit* and alleged the defendant's repudiation of a contract for the construction and delivery of three building units to Dade County. There was also an allegation that the defendant corporation resided in Dade County. The court stated that the general rule was

> [w]here a contract involves the payment of money and no place of payment is expressly agreed on, it may be implied that payment is to be made where the payee resides or has an established place of business, and where payment under the contract may be made. Where there is an express promise to pay, and no place of payment is stipulated, the debtor should seek the creditor unless otherwise provided or agreed. In such cases the cause

82. *See generally* FLA. STAT. ch. 47 (1969).

83. Maloney v. Fleishaker, 238 So.2d 496 (Fla. 2d Dist. 1970).

84. The statute provides:

Actions against corporations.—Actions against domestic corporations shall be brought only in the county or district where such corporation has or usually keeps an office for transaction of its customary business, or where the cause of action accrued, or where the property in litigation is located. Actions against foreign corporations doing business in this state shall be brought in a county or district where such corporation has an agent or other representative, or where the cause of action accrued, or where the property in litigation is located.

85. The statute provides:

Actions against defendants residing in different counties or districts.—Actions against two or more defendants residing in different counties or districts may be brought in any county or district in which any defendant resides.

86. 226 So.2d 270 (Fla. 2d Dist. 1969).

87. B & F of Clearwater, Inc. v. Wesley Constr. Co., 237 So.2d 790 (Fla. 2d Dist. 1970).

88. *Id.*

> of action accrues where the default occurred, though it be in the county where the plaintiff resides, and the action may be maintained in such county for the defendant's breach.[89]

In the case at bar, if the plaintiff had fully performed the contract and then sued the defendant to recover the contract price, performance of the contract by the defendant, that is, payment, would be due in Pinellas County. The fact that the defendant repudiated the contract does not alter this result since the gravamen of the complaint is not limited to recovery for lost profits.

While it is the defendant's burden to show that venue is improper, if the plaintiff is to maintain his suit in a county other than the defendant's residence, the complaint must allege facts which show that venue is proper under Florida Statutes section 47.051 (1969).[90] This requirement was not met in *James A. Knowles, Inc. v. Imperial Lumber Co.*,[91] where the complaint alleged facts which showed a breach of contract whereby the defendant promised to pay the subcontractor and the plaintiff-materialman jointly. The court said that the "critical determination in all these [contract] cases is where *performance* is called for by the contract, not where its benefits are to be enjoyed."[92] In the *Knowles* case, the breach was not a failure to pay money owed by the defendant, but a failure to aid the plaintiff in securing a debt owed by another. Therefore, venue was proper at the principal offices of the defendant since there were no facts from which it could have been assumed that venue was proper at the site of construction.

The District Court of Appeal, First District, in a per curiam opinion, held that the doctrine of forum non conveniens is applicable in Florida[93] and dismissed an action without prejudice on the authority of *Adams v. Seaboard Coast Line R.R.*[94]

5. SEPARATE ENTITY PRIVILEGE

The separate entity privilege is the privilege of a corporation to be treated as an entity apart from those who created it. This privilege is generally the primary reason for incorporating since it affords the incorporators liability limited to the extent of their investment. However, "when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."[95] The Florida courts have followed this rule in three cases decided during the survey period.

89. *Id.* at 792.
90. James A. Knowles, Inc. v. Imperial Lumber Co., 238 So.2d 487 (Fla. 2d Dist. 1970).
91. *Id.*
92. *Id.* at 489.
93. Shaw v. Seaboard Coast Line R.R., 229 So.2d 275 (Fla. 1st Dist. 1969).
94. 224 So.2d 797 (Fla. 1st Dist. 1969).
95. United States v. Milwaukee Ref. Transit Co., 142 F. 247, 255 (C.C.E.D. Wisc. 1905).

In the first case, *Plank v. Arban*,[96] the District Court of Appeal, Fourth District, "pierced the corporate veil" to prevent possible fraud or injustice. In *Plank*, the complaint alleged an oral agreement to purchase and operate a drug store. A corporation was organized to consumate the purchase with the two contracting parties having equal control and ownership. The corporation was authorized to issue one thousand shares of stock and accepted an assignment of the contract to purchase the drug store from the plaintiff, who had obtained the contract with the approval of the defendant. The defendant was issued 500 shares of stock, and the plaintiff was given an option to purchase the other 500 shares. Once in control, the defendant caused the corporation to authorize an additional one thousand shares of which one hundred were sold to him. The plaintiff then attempted to exercise the option on the condition that his shares would constitute 50 percent ownership, but was refused. The fourth district held that the complaint stated a cause of action. In response to the defendant's contention that the plaintiff's stock option agreement had no provisions regarding 50 percent ownership, the court noted that the corporation and the defendant were identical. Thus, it was held that the stock option agreement with the corporation was only one aspect of a larger oral contract between the plaintiff and defendant and had to be treated as such.

In the two other cases, the court refused to pierce the corporate veil. In *Tel Service Co. v. General Capital Corp.*[97] the Supreme Court of Florida held that the mere fact that a lender had the borrower incorporate in order to charge a higher rate of interest was not sufficient to establish that the loans were actually made to individuals.[98] The court adopted the rationale of a New Jersey decision based upon similar facts[99] where the court had refused to allow the borrower to assert the defense of usury in a foreclosure action because: 1) the lender had a legitimate policy of dealing only with corporations; 2) the borrower corporation had a) a bank account, b) adopted corporate resolutions in connection with other borrowers, c) paid taxes, etc., d) acted as a valid legal entity; and 3) because the chief stockholder had capable legal advice before forming the corporation and was a knowledgeable businessman. The New Jersey court held for the lender despite the fact that the sole reason the lender dealt only with corporations was to be able to charge a higher rate of interest.

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96. 241 So.2d 198 (Fla. 4th Dist. 1970).

97. 227 So.2d 667 (Fla. 1969).

98. *Cf.* Gilbert v. Doris R. Corporation, 111 So.2d 682 (Fla. 3d Dist. 1959); Atlas Subsidiaries of Florida, Inc. v. O. & O., Inc., 166 So.2d 458 (Fla. 1st Dist. 1964). In both cases, the corporate entities were disregarded due to findings that loans were made to individuals and that the corporations were devices to evade the usury laws. The court in *Tel Service* affirmed the rulings in those cases because the only difference lay in the application of the principles to the facts of each case.

99. Monmouth Capital Corp. v. Homdel Village Shops, Inc., 92 N.J. Super. 480, 224 A.2d 35 (1966).

Lastly, *St. Petersburg Sheraton Corp. v. Stuart*[100] involved a merger where a tort claimant attempted to sue the parent organization. The parent, International Telephone and Telegraph (ITT), entered into an agreement with Sheraton America approximately one year after the "accident." The agreement stated that ITT or its subsidiary was to receive all stock of Sheraton America in exchange for a proportionate amount of ITT stock (a triangular merger).[101] An ITT subsidiary was incorporated by three ITT officers. The transfer of assets was accomplished and ITT, in a report to the Securities and Exchange Commission, reported a merger of Sheraton America with the ITT system. The court first stated that the fact that ITT labeled the transaction a merger did not necessarily make it a merger. The court also followed the general rules that the ownership of all of the stock of one corporation by another corporation does not destroy the legal identity of the subsidiary corporation, and that the legal identity of the subsidiary is not destroyed by the fact that the stockholders or officers of both companies are identical.

In the instant case, the plaintiffs failed to prove sufficient control by the parent corporation over the subsidiary to warrant a finding that it was a mere instrumentality of the parent corporation. Therefore, although its subsidiary was liable for the obligations of the dissolved corporation, ITT was not since there had been no merger between ITT and the dissolved corporation.

6. DIRECTORS, OFFICERS AND AGENTS

A number of cases have arisen during the survey period concerning the sufficiency of affidavits made by corporate officers in support of, or in contravention to, a motion for summary judgment. According to the Florida Rules of Civil Procedure rule 1.510(e), affidavits must be made on personal knowledge and must set forth facts that would be admissible in evidence and affirmatively show that the affiant is competent to testify to the matters stated in the affidavit. In the first of these cases, *P & T Electric Co., Inc. v. Spadea*,[102] the president of the plaintiff corporation stated that the facts in the affidavit were true to "his best knowledge, information and belief." This affidavit was held insufficient to prevent the entry of a summary judgment for the defendant. However, in *United Bonding Insurance Co. v. Dura-Stress Inc.*,[103] the District Court of Appeal, Second District, held that an affidavit of a corporation's president which lacked the language "made on personal knowledge," was sufficient. The court stated that the directors of a corporation[104] are

100. 242 So.2d 185 (Fla. 2d Dist. 1970).

101. The purpose of a triangular merger is to protect the parent company from any hidden liabilities of the firm which it wishes to acquire.

102. 235 So.2d 510 (Fla. 1970). *Accord*, Hurricane Boats, Inc. v. Certified Ind. Fab., Inc., 246 So.2d 174 (Fla. 3d Dist. 1971).

103. 243 So.2d 244 (Fla. 2d Dist. 1971).

104. Under FLA. STAT. § 608.40 (1969), the president of a Florida corporation is required to be a director.

chargeable with knowledge of corporate affairs since it is their duty by proper diligence to keep informed of the facts which the corporate records and books disclose. Thus, when a director of a corporation makes an affidavit on behalf of the corporation, "it is not necessary that he should state the sources of his knowledge, or information and belief . . . ,"[105] as such knowledge is presumed.

Consent was a key issue in an action against a president and secretary of a corporation which had filed a voluntary petition in bankruptcy. A creditor of the corporation accepted a compromise and satisfaction against the corporate maker and then brought an action against the president and secretary who had cosigned the note. The court had to determine whether the co-maker was still liable on the note in the absence of an express reservation by the creditor, after the compromise was effected by the corporate debtor. The lower court entered summary judgment in favor of the defendants. The District Court of Appeal, Third District, reversed, holding that the pleadings raised a question of fact as to consent. The note in question, executed prior to the adoption of the Uniform Commercial Code in Florida, was governed by the Uniform Negotiable Instruments Law (UNIL). Under the UNIL, the release by the holder of a promissory note of one of its co-makers does not release the other co-maker where the release is granted at the request of or with the consent of the other co-maker. Consent of the co-maker need not be expressed, but may be implied from the relationship and conduct of the parties together with the facts and circumstances surrounding the release. Thus, a question of fact as to consent is presented where the corporation's president executes the note in dual capacities (both individually and on behalf of the corporation) and is active in procuring the release of the corporate debt.[106]

In *Varnall Warehouse & Transfer Inc. v. Three Ivory Brothers Moving Co.*,[107] the District Court of Appeal, Second District, reiterated the general rule that a "court will not substitute its judgment for that of corporate management, *absent* a clear showing of bad faith, discrimination or abuse of business judgment . . . ,"[108] and upheld the action taken by the board of directors.

A corporate defendant was requested pursuant to Florida Rules of Civil Procedure, rule 1.340, to answer interrogatories through its president. The interrogatories were not answered, and the court issued an order requiring the corporate defendant through its president to answer them. The corporation's secretary, who answered the interrogatories in

105. United Bonding Ins. Co. v. Dura-Stress, Inc., 243 So.2d 244, 246 (Fla. 2d Dist. 1971).

106. Glidden Co. v. Zuckerman, 245 So.2d 639 (Fla. 3d Dist. 1971). *See generally* Murray, *Negotiable Instruments and Banking, 1969-1971 Survey of Florida Law*, 26 U. MIAMI L. REV. 72 (1972).

107. 226 So.2d 887 (Fla. 2d Dist. 1969).

108 *Id.* at 889 (emphasis by the court).

full, stated that the corporation's president was unable to comply with the court's order because he was incarcerated. The court then entered a default judgment against the corporation because of its failure to comply with the court's order. On appeal, the District Court of Appeal, Fourth District, phrased the issues presented as:

> [W]hether under this rule [Rule 1.340] the propounder of an interrogatory served upon a corporate party has the right to designate the specific officer or agent who must answer the interrogatories. A corollary question is whether in cases where interrogatories are served upon a corporate party under this rule, the trial court may order such corporate party to answer the interrogatories by an officer or agent designated by the propounder or by the court.[109]

The Fourth District answered both questions in the negative. The court found no basis for either the propounder or the court to require a specific individual of a corporation to answer interrogatories. If the propounder does seek to question a specific corporate officer, he may do so by oral deposition.[110]

7. LIABILITY OF A CORPORATION FOR ACTIONS OF ITS AGENTS OR EMPLOYEES

In *McArthur Jersey Farm Dairy, Inc. v. Burke*,[111] an employee, driving carelessly on the company premises, struck another person who was performing work for the company.[112] The District Court of Appeal, Fourth District, held that

> to impose liability it is necessary to show that: (a) the employee is engaging in or shows a propensity to engage in conduct that is in its nature dangerous to members of the general public; (b) the employer has notice that the employee is acting or in all probability will act in a manner dangerous to other persons; (c) the employer has the ability to control the employee such as to substantially reduce the probability of harm to other persons; and (d) the other person must in fact have been injured by an act of the employee which could reasonably have been anticipated by the employer and which by exercising due diligence and authority over the employee the employer might reasonably have prevented.[113]

109. Ohio Realty Inv. Co. v. Lawyer's Title Ins. Corp., 244 So.2d 176, 177 (Fla. 4th Dist. 1971).

110. *See* FLA. R. CIV. P. 1.310(a).

111. 240 So.2d 198 (Fla. 4th Dist. 1970).

112. The accident did not occur while the employee was within the scope of his employment. Recovery under the doctrine of *respondeat superior* was, therefore, not possible. *See* Beckham & Chopin, *Torts, 1969-1971 Survey of Florida Law*, 26 U. MIAMI L. REV. 128, 133-34 (1972).

113. McArthur Jersey Farm Dairy, Inc. v. Burke, 240 So.2d 198, 201 (Fla. 4th Dist. 1970).

The interpretation placed on subsection (c) is the unusual aspect of the decision. The court found that the superintendent of the company had previously threatened to discharge the employee from his job unless he ceased driving upon company premises. Further, the employee, a minor, was subject to the control of his father, who was also an employee of the company. Implicit in the finding of liability is the court's belief that the company should have threatened both employees with the loss of their jobs, and if necessary, fired both of them for the acts of the minor employee.

The question of corporate liability for the acts of its employees was presented to the District Court of Appeal, First District, in *Alford v. Parker's Mechanical Constructor's, Inc.*[114] In *Alford*, the employee, despite the corporation's instructions to the contrary, took a company truck after-hours for his own personal business. He obtained access to the truck with his key, supplied to him by the corporation. The court found that the employee took the vehicle from a locked area without the employer's knowledge or consent. Therefore, the corporate owner was not liable for the damages arising out of the accident in which the corporate vehicle and the employee were involved.

The question of control was litigated in *McMillon v. Sinclair Refining Co.*[115] The plaintiff was injured by a truck labeled with the Sinclair name and colors and which carried the Sinclair product. However, Sinclair neither owned the truck nor had any control over its type, size, routes or schedules. The plaintiff was not allowed to recover from Sinclair since it had no control over the delivery of its products.

The right of the injured plaintiff to recover punitive damages from a corporation was litigated in two cases during the survey period. In *Joab, Inc. v. Thrall*,[116] the employee committed an intentional tort in the course of his employment. The jury returned a verdict of compensatory damages against the employee and the corporation, but assessed punitive damages against the corporation alone. The corporation argued that the plaintiff must recover punitive damages against the agent in order to sustain an award of punitive damages against the principal (the corporation). The court rejected this argument.

The District Court of Appeal, Third District, in affirming a similar award for punitive damages, avoided the contention of the corporate defendant that it could not be held liable in punitive damages for the intentional torts of its employees where it was not shown that the corporate defendant was guilty of conduct which constituted a punishable offense.[117] The court, after stating that it did not agree with the question as framed, found sufficient competent evidence in the record to sustain the jury ver-

114. 241 So.2d 759 (Fla. 1st Dist. 1970).
115. 236 So.2d 151 (Fla. 1st Dist. 1970).
116. 245 So.2d 291 (Fla. 3d Dist. 1971).
117. Wackenhut Corp. v. Greene, 238 So.2d 431 (Fla. 3d Dist. 1970).

dict since the jury could have found that the acts of the defendant's employees were committed in furtherance of the defendant-employer's business or interest.

8. SHAREHOLDER'S RIGHTS

New shareholders of a corporation initiated a suit against the corporation's former officers and directors for the return of a management fee. These officers and directors were also the officers and directors of the corporation to whom the management fee was paid. The court held that where the prospective purchasers of a corporation have knowledge, prior to the sale, of a fee to be paid to a corporation which has a directorate similar to the purchased corporation, the purchasers may not thereafter complain where the services billed were actually rendered.[118]

In a related area concerning the transfer of a right connected with corporate ownership, the owners of an incorporated apartment complex attempted to allow the tenants of the buildings to use the lake on which the complex bordered. The lake bed was owned substantially by a homeowner's association, composed of single family home owners bordering the lake. The tenants of the complex "took over" the lake to almost the virtual exclusion of the home owners. The association brought suit to enjoin the tenants from using the lake surface. The District Court of Appeal, Third District, was faced with the question of whether the corporation, through its owners, could multiply its right to use the lake surface by the number of tenants in the complex. The court held that it could not, stating that only the owners of the land lying under the lake may use all of the surface waters of the lake. The court reasoned that this was a reasonable classification which treated all owners equally; there was, therefore, no denial of equal protection. The remedy of injunction was necessary in order for the association to preserve its right to beneficial use of its property.[119]

9. PROHIBITED TRANSFERS BY A CORPORATION

Florida Statutes sections 608.30, 608.54, and 608.55 (1969) are designed to prevent a corporation, by transfers in dissolution or otherwise, from escaping liability for its lawful debts and obligations. During the survey period, several cases involving prohibited transfers by corporations interpreted these sections. In the first case,[120] a corporation sold its motel to another corporation. Subsequent to the sale, the seller corporation dissolved, selling its assets and "assigning" a purchase money mort-

118. Riviera Cond. Apts., Inc. v. Weinberger, 231 So.2d 850 (Fla. 3d Dist. 1970).

119. Silver Blue Lake Apts., Inc. v. Silver Blue Lake Home Owners Ass'n, Inc., 225 So.2d 557 (Fla. 3d Dist. 1969). Query: could the corporation circumvent the effect of this decision by issuing shares in the corporation to the tenants of the building, and thus make each tenant an "owner" of the corporation?

120. Godshall v. Hessen, 227 So.2d 506 (Fla. 3d Dist. 1969).

gage to the stockholders of the dissolved corporation. The plaintiff obtained a judgment against the dissolved corporation, but execution was returned unsatisfied. The present suit was begun by the plaintiff judgment creditor to discover the assets of the dissolved corporation. The District Court of Appeal, Third District, found that the judgment had become final prior to the transfer of the second mortgage (which was received from the purchaser corporation in the sale of the motel) by the seller corporation to its stockholders. Therefore, the transfer was invalid, and the purchaser corporation was ordered to apply the second mortgage payments to the satisfaction of the plaintiff's judgment.

In the second case,[121] the District Court of Appeal, Fourth District, stated in a brief opinion that the record was sufficient to show a prohibited transfer by the corporation to its officers and directors in violation of Florida Statutes section 608.55 (1969), which subjects the transferees to personal liability[122] to the corporate creditors.

In the final case,[123] the plaintiff sold stock to the defendant, but retained the stock certificates as collateral to secure the payment of the purchase price. Once in control, the defendant sold the corporation to a realty company which dissolved the corporation. Obviously, the effect of the dissolution was to render worthless the stock held by the plaintiff as collateral. The plaintiff instituted suit to either collect the entire purchase price, or obtain substitute collateral. The District Court of Appeal, Third District, held that until there was a default in the payment, there could be no relief. The court reasoned that there was no destruction of the collateral at the time the action was brought. In addition, the court stated that the assets of a dissolved corporation are deemed by law to exist for the benefit of creditors for a period of three years.[124] The court also found that the plaintiff had legal rights of recovery under a guarantee which had been executed by the purchasers of the stock.

10. DISSOLUTION AND RESTORATION

When a corporation fails to pay its capital stock tax within six months of the due date, the corporation will not be permitted to maintain or defend an action in any court in this state until such taxes are paid.[125] If a domestic corporation fails to pay the tax for a period of one year, then the corporation is subject to dissolution.[126] In a case arising under

121. Felix Special Sausages, Inc. v. PBR Eng'rs & Associates, Inc., 231 So.2d 542 (Fla. 4th Dist. 1970).

122. The statute provides that liability is to the full extent of any loss such creditors and stockholders may sustain by the statute's violation.

123. Berger v. Levin, 231 So.2d 875 (Fla. 3d Dist. 1970).

124. *See* FLA. STAT. § 608.30(1) (1969).

125. *See* FLA. STAT. § 608.35(1) (1969), *repealed by* Fla. Laws 1971, ch. 71-359, § 15. *But see* Fla. Laws 1971, ch. 71-979, § 4, which prohibits a corporation from maintaining or defending any action if it fails to pay the annual privilege tax, net income tax, or fails to file its annual report.

126. *See* FLA. STAT. § 608.36(1) (1969). A foreign corporation's permit to do business in this state will be cancelled for failure to pay the tax.

the latter situation, a motion to dismiss was granted because the plaintiff corporation had been dissolved due to failure to pay the stock tax. A motion for rehearing and for reinstatement of the cause was filed, and a telegram from the secretary of state was introduced to prove that the corporation had been reinstated.[127] The motions were denied. The District Court of Appeal, Third District, reversed, holding that where a complaint has been dismissed due to the involuntary dissolution of the corporation because of failure to pay taxes, a timely motion for rehearing and reinstatement should be granted upon submission of proof to the trial judge that the corporation has, in fact, been reinstated.[128]

11. RECEIVERSHIP

Receivership[129] is a judicially guided attempt to reorganize a corporation or business that is undergoing financial difficulties in an effort to prevent bankruptcy. The receiver, as an officer of the court, is not subject to suit for actions undertaken in that capacity in the absence of an enabling statute. However, the court which appointed the receiver may grant leave to a party to sue the receiver. When a receiver exceeds his authority or acts in a personal capacity and not as a receiver, he cannot claim the court's protection. Therefore, a receiver guilty of misfeasance or negligence may be sued as an individual, and leave of court is not a prerequisite to maintenance of the suit.[130]

In managing the affairs of a large business, the receiver will probably find it necessary to utilize the services of attorneys, accountants, and such other specialists as the exigencies of the particular business may demand. Consequently, upon completion of his services the question of payment arises. It is clear that the receiver is entitled to fees from the corporation for his work and costs, when his work has benefited the receivership estate. Following this rationale, the District Court of Appeal, Third District, permitted the recovery of attorney's and accountant's fees in *Johnson v. Kruglak*.[131]

12. USURY—LOANS TO CORPORATIONS[132]

Two cases have arisen during the survey period interpreting Florida Statutes sections 687.071 (1969) (criminal usury), and 687.11 (1969) (interest rates). In *Fields v. Wilensky*,[133] suit was initiated against a guarantor who raised the affirmative defense of usury. At the time the note was executed, Florida Statutes section 687.07 (1963)[134] provided

127. *See* FLA. STAT. § 608.37(1) (1969).
128. Prestress Erectors, Inc. v. James Talcott, Inc., 235 So.2d 739 (Fla. 3d Dist. 1970).
129. *See generally* FLA. STAT. chs. 56, 69 (1969).
130. Murtha v. Steijskal, 232 So.2d 53 (Fla. 4th Dist. 1970).
131. 246 So.2d 617 (Fla. 3d Dist. 1971).
132. *See generally* FLA. STAT. ch. 687 (1969).
133. 247 So.2d 477 (Fla. 4th Dist. 1971).
134. *Repealed by* Fla. Laws 1969, ch. 69-135, § 2.

that both principal and interest on a usurious loan would be forfeited. The District Court of Appeal, Fourth District, held that Florida Statutes section 687.11 (1969)[135] repealed the conflicting provisions of section 687.07 by implication. Furthermore, those provisions of section 687.11 which conflicted with section 687.071[136] were also impliedly repealed. Therefore,

> insofar as transactions involving an interest rate in excess of twenty-five percent the provisions of section 687.071(7) render any debt thereunder unenforceable both as to principal and interest; however, insofar as any transaction where the interest as to individuals is in excess of ten percent but not more than twenty-five percent and as to corporations is in excess of fifteen percent but not more than twenty-five percent, *only the interest is forfeited* and the principal of such debt is recoverable in the courts of this state.[137]

The court held that retroactive application of section 687.071 presented no problem since retroactive application of certain civil remedies was permissible.[138]

13. STOCKHOLDER'S DERIVATIVE ACTION

A stockholder's derivative action is an action brought by a stockholder who is attempting to enforce a right that belongs to the corporation, but which the corporation refuses to enforce. It is for this reason that the courts have held that it is improper for a complaint to contain separate counts where both the plaintiff's individual right and the corporation's right to recover are pleaded.[139] It follows that if one claim is settled, the settlement would not have a *res judicata* effect upon the other claim.[140] However, the defense of *res judicata* may be available if it clearly appears that the claim could have been brought with a previously litigated action.[141]

In *Brown v. Epstein*,[142] the plaintiff recovered damages in a stockholder's derivative action. The court also awarded, $4500 in attorney's fees and $1200 in accountant's fees. The plaintiff's motion to tax the fees

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135. *Created by* Fla. Laws 1965, ch. 65-299, § 2.

136. *Created by* Fla. Laws 1969, ch. 69-135, § 2.

137. Fields v. Wilensky, 247 So.2d 477, 482 (Fla. 4th Dist. 1971).

138. *Id. But see* Staros v. Avalon Shores, Inc., 249 So.2d 448 (Fla. 1st Dist. 1971), where it was held that the penal provisions enacted in Fla. Laws 1969, ch. 69-135, § 1, do not apply retroactively to loans made prior to that date.

139. *See* Karnegis v. Lazzo, 243 So.2d 642 (Fla. 3d Dist. 1971), where the court dismissed the complaint for misjoinder, without prejudice to the plaintiff to file a separate action on the cause of action not included in the amended complaint. *See also* General Dynamics Corp. v. Hewitt, 225 So.2d 561 (Fla. 3d Dist. 1969).

140. Horowitz v. United Investors Corp., 227 So.2d 719 (Fla. 3d Dist. 1969).

141. *Id.* The action which was settled was brought in New York, and the court does not indicate whether New York law would have permitted the joinder of the two claims.

142. 227 So.2d 245 (Fla. 4th Dist. 1969).

as costs to the defendant was granted *in toto* for the accountant's fees and in part for the attorney's fees. The District Court of Appeal, Fourth District, reversed the trial court's award, holding that under Florida Statutes section 608.131(5) (1969), the expenses of maintaining the action including the awarded fees were to be paid out of the fund recovered by the plaintiff for the benefit of the corporation and are not properly taxable as costs.

14. RECOVERY OF CORPORATE STOCK

In an action involving extensive litigation, the plaintiff recovered a judgment which called for the transfer of stock to his name. The defendant posted two supersedeas bonds and appealed the decision of the trial court. The defendant's appeal was unsuccessful, and the trial court's judgment was affirmed. In the time that elapsed because of the appeal, the stock depreciated approximately $25,000 in value. The plaintiff then filed a motion to assess damages on the supersedeas bonds. The trial court awarded the plaintiff damages in the full amount of the depreciation. The trial court's entry of judgment against the surety was appealed by the principal.[143] Both supersedeas bonds contained a clause which provided that the principal would pay "damages for delay, use, *detention and depreciation of any property involved in the event said appeal is dismissed or the said judgment or order is affirmed* . . ."[144] if the principal failed to do so. Where a supersedeas bond is involved, Florida Appellate Rule 5.9 governs the conditions of the bond. According to that rule, "the elements to be considered in fixing the amount and conditions of the bond shall be the cost of the action . . . , *damages for delay, use, detention, and depreciation of any property involved.*"[145] The District Court of Appeal, Third District, held that the decline in the market value of the stock was a type of depreciation of property contemplated by Florida Appellate Rule 5.9. Since the plaintiff was deprived of ownership of the stock while the defendant appealed, the defendant and his surety were liable for the economic loss occasioned by the declining market value of the stock.

15. MISCELLANEOUS CASES

The effect of registering stock certificates in joint names was litigated in *Sullivan v. American Telephone and Telegraph Co.*[146] The District Court of Appeal, Fourth District, held that registering the stock in the names of both the son and the mother who purchased the stock created a presumption of a gift from the mother to the son. However, if the presumption was rebutted, proof of the other essential elements of a gift would be necessary to sustain the validity of the gift.

143. Price v. Rome, 237 So.2d 835 (Fla. 3d Dist. 1970).
144. *Id.*
145. *Id.* at 836.
146. 230 So.2d 18 (Fla. 4th Dist. 1969).

In *Bernstein v. Coats*,[147] the defendant corporation counterclaimed for malicious prosecution, seeking both compensatory and punitive damages. The trial judge's instruction to the jury that embarrassment was not a proper element of damages for a corporation was contested on appeal. The District Court of Appeal, Third District, agreed with the trial court and affirmed the judgment.

The Florida Supreme Court, answering a query posed by the governor, stated that section five of article VII of the 1968 Constitution prohibits a corporate income tax. However, the recently-enacted constitutional amendment in Florida, which was necessitated in large part because of this opinion, has mooted this problem.[148]

II. SECURITIES REGULATION

A. *New Legislation*

1. DEPARTMENT OF BANKING AND FINANCE

Pursuant to the notes contained in the 1969 Florida Statutes, Florida Statutes section 517.02(9) has been officially amended to read: " 'Department' shall mean the department of banking and finance."[149] Under the new governmental reorganization, this department will now dispose of all matters previously handled by the Florida Securities Commission. In addition, Florida Statutes section 517.03 (1969) has been amended[150] to authorize the department to make all rules and regulations necessary for the proper administration and enforcement of the securities law.[151]

2. EXEMPT TRANSACTIONS

Florida Statutes section 517.06 (1969) has been substantially broadened by recent amendments.[152] Prior to amendment, section 517.06(10) granted an exemption from registration of securities of a corporation trust or partnership, if the subscriptions for such securities did not exceed 25 (and if other requirements of the statute were also met). However, this exemption was limited to corporations, trusts or partnerships organized under Florida law. Under the new amendment,[153] the requirement that the corporation be "organized under the laws of this state" has been

147. 247 So.2d 725 (Fla. 3d Dist. 1971).

148. *In re* Advisory Opinion to the Governor, 243 So.2d 573 (Fla. 1971). FLA. CONST. art. VII, § 5 provides:

> No tax upon estates or inheritances or upon the income of residents or citizens of the state shall be levied by the state, or under its authority. . . .

But see the new constitutional amendment which permits a corporate profits tax. H.J. Res. 7-B, 1971 Sess., Fla. Legislature. *See also* Florida Income Tax Code, Fla. Laws 1971, ch. 71-984.

149. Fla. Laws 1971, ch. 71-377, § 195.

150. Fla. Laws 1971, ch. 71-377, § 196.

151. *Id.* The remainder of FLA. STAT. § 517.03 (1969), dealing with the composition of the Securities Commission, has been repealed due to the governmental reorganization.

152. Fla. Laws 1971, ch. 71-96, § 1.

153. Fla. Laws 1971, ch. 71-96, § 1.

deleted, and any proposed corporation, trust or partnership, domestic or foreign, may qualify for this exemption. The exemption was previously conditioned by the requirement that no commission, compensation, or remuneration be "paid or given for or in connection with the sale or disposition of such securities." Remuneration may now be paid to those obtaining subscriptions. However, the statute limits the potential beneficiaries to dealers and salesmen registered under Florida Statutes section 517.17 (1969).[154]

Section 517.06(16) (1969) has also undergone major alteration. An exemption can now be obtained by an issuer for his securities if he has filed a registration statement with the Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934,[155] and if the registration statement is effective at the time of the sale.[156]

3. REGISTRATION BY COORDINATION

Florida Statutes section 517.08 (1969), providing for registration by notification, has been repealed.[157] The section which replaces former section 517.08 provides for registration by coordination.[158] The new section provides that securities which meet certain qualifications shall be entitled to be registered for sale in Florida by coordination. The major requirements to be so registered are: 1) a registration statement filed with the Securities and Exchange Commission under the Securities Act of 1933;[159] 2) an offering supported by a firm committment,[160] or the securities being registered are offered in exchange for the securities of another issuer; 3) an issuer in continuous business operation for at least three years; 4) no default by the issuer in the payment of any fixed obligation or dividends during the current year and the past two years; 5) the issuer's earnings, net of tax effect, equal or exceed one hundred thousand dollars, not including extraordinary items, for the current and past two years; and 6) no material alteration in the earning capacity of the business.[161]

154. *See* J. MOFSKY, BLUE SKY RESTRICTIONS ON NEW BUSINESS PROMOTIONS 21-22 (1971).

155. Securities Exchange Act of 1934 § 12(g), 15 U.S.C. § 78(1)(g) (1970).

156. Fla. Laws 1971, ch. 71-96, § 1.

157. Fla. Laws 1971, ch. 71-96, § 2.

158. *Id.*

159. Securities Act of 1933, 15 U.S.C. § 77 (1970).

160. Under the firm commitment method the underwriter, promising to purchase all the shares being offered, acts as a principal buying for his own account. Under the "best efforts" approach, the underwriter, using his best efforts to sell the stock, acts as an agent for the issuer, and therefore, is not liable for any unsold shares. A third method is the ½, ¼, ¾, etc., or none agreement, where the underwriter places the funds derived from the sale of the shares in an escrow account until the specified percentage of stock is sold. If the specified percentage is not sold, the purchaser's money is returned, and the underwriter is not liable for any unsold shares. *See* 1 L. LOSS, SECURITIES REGULATION 159-73 (2d ed. 1961).

161. *See generally* J. MOFSKY, BLUE SKY RESTRICTIONS ON NEW BUSINESS PROMOTIONS (1971) [hereinafter cited as MOFSKY].

If the issuer determines that he qualifies under the above requirements, he then files a registration statement.[162] The registration statement must contain the information required by Florida Statute section 517.08 (2).[163] The Florida registration statement then becomes effective concurrently with the federal registration statement, provided the registrant has submitted the required additional information[164] to the Department of Banking and Finance at least one business day before the effective date of the registration statements. If the registrant fails to comply with any or all of the requirements, the Department may enter a stop order without notice or hearing and retroactively deny effect to the registration statement.[165]

4. REGISTRATION BY QUALIFICATION

Florida Statutes section 517.09 (1969), providing for registration by qualification, was amended[166] to avoid any inconsistency with Florida Statutes section 517.08 (1969), which now provides for registration by coordination. For example, section 517.09(1) was amended to state "registration by coordination" rather than "registration by notification," which was the procedure provided by former section 517.08. Additionally, section 517.09(5), providing for compensation for the sale of securities registered by qualification, was amended to permit the Department of Banking and Finance to fix the maximum discounts, commissions, expenses, remuneration and other compensation to be paid for or in connection with the sale or offering for sale of any security in this state.[167]

5. REGISTRATION BY ANNOUNCEMENT

Florida Statutes section 517.09(1) (1969) provides that any securities which have been outstanding and in the hands of the public for not less than one year may be registered by announcement. The intent of the statute has been preserved, though a number of changes have been made.

The statute now requires a dealer to file, in addition to the information that he had to file under the old statute, the name and address of each officer, trustee or partner of the issuer; a brief description of the

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162. The statement must be filed at least five days prior to the effective date of the federal registration statement. However, the Department has the authority to waive the time requirement. Fla. Laws 1971, ch. 71-96, § 2, *amending* FLA. STAT. § 517.08(3)(d) (1969). A filing fee of one-tenth of one percent of the aggregate sales price of the securities is due upon filing, but the fee shall be not less than twenty nor more than one thousand dollars. FLA. STAT. § 517.08(6) (1969), *as amended*, Fla. Laws 1971, ch. 71-96, § 2.

163. FLA. STAT. § 517.08(2) (1969), *as amended*, Fla. Laws 1971, ch. 71-96, § 2.

164. FLA. STAT. § 517.08(5) (1969), *as amended*, Fla. Laws 1971, ch. 71-96, § 2, requires that the registrant inform the Department of Banking and Finance of all expenses incurred due to the registration, of the maximum offering price, and of all discounts or commissions. This provision may be waived by the Department.

165. *See generally* MOFSKY, *supra* note 161, at ch. VII.

166. Fla. Laws 1971, ch. 71-96, § 3. No substantial changes were made to the statute.

167. *See* MOFSKY, *supra* note 161, at ch. VII.

business of the issuer; the name and address of each person owning ten percent or more of the securities being registered; a description of all of the issuer's authorized and outstanding securities; the name and address of the transfer agent, a description of the circumstance by which the securities came into the hands of the public, and a copy of the issuer's financial statement.[168]

The registration is effective for one hundred twenty days after the end of the issuer's fiscal year in which the registration becomes effective. However, the registration may be "renewed" by the submission of a new application in accordance with the requirements of section 517.091.

One addition has been made to the list of persons for whom securities registered by announcement may not be sold, a controlling person.[169] The addition was apparently made to close a possible loophole in this statute which prevents registration by announcement for any securities to be sold directly or indirectly for the benefit of the issuer.

6. CONSENT TO SERVICE

Florida Statutes section 517.10 (1969), providing for consent to service of process, has been amended to avoid conflict with the statutes dealing with registration.[170] Now, any issuer not domiciled in Florida, who registers by coordination, qualification or announcement, must file a consent to service of process for any suits arising under Florida Statutes chapter 517 (1969).

7. REGISTRATION—DEALERS AND SALESMEN

Under Florida law, any person wishing to be a dealer or salesman of securities must register with the Department of Banking and Finance, and the registration must be renewed annually.[171] However, if an application for registration is granted on or after November first, the registration is effective for the ensuing calendar year. Previously, Florida Statutes section 517.12 (1969) provided for a reduced fee for those dealers who registered with the commission after July first. With the addition of the November first provision, however, this fee reduction was repealed.[172]

The dealers registered under section 517.12 must maintain such books and records as the department may prescribe, and the department has the authority to examine such records.[173] The dealer must post a bond concurrently with his registration, and the form of the bond has

168. FLA. STAT. § 517.091 (1969), *as amended*, Fla. Laws 1971, ch. 71-96, § 4.

169. Although the statute is silent as to the definition of a "controlling person," it may be assumed that a control person under Florida law is the same as a control person under the federal securities laws. *See, e.g.*, Securities Act of 1933, § 15, 15 U.S.C. § 77(n) (1970); Sommer, *Who's "In Control"?—S.E.C.*, 21 BUS. LAWYER 559 (1966).

170. FLA. STAT. § 517.10 (1969), *as amended*, Fla. Laws 1971, ch. 71-96, § 5.

171. FLA. STAT. § 517.12 (1969), *as amended*, Fla. Laws 1971, ch. 71-96, § 6.

172. FLA. STAT. § 517.12(6) (1969), *as amended*, Fla. Laws 1971, ch. 71-96, § 6.

173. Fla. Laws 1971, ch. 71-96, § 6, *adding* FLA. STAT. § 517.12(9).

been modified to accommodate any registrations which are granted on or after November first.[174]

8. PENALTY FOR VIOLATION OF CHAPTER 517

In conjunction with the revision of the penalty provisions,[175] Florida Statutes section 517.302 (1969)[176] now provides that any person who violates any of the provisions of the Florida Securities laws is guilty of a felony of the third degree, punishable as provided in recently-enacted Florida Statutes sections 775.082,[177] 775.083,[178] or 775.084.[179]

B. *Recent Decisions*

1. WHAT IS A SECURITY?

In *Florida Discount Centers, Inc. v. Antinori*,[180] the appellant sold sewing machines and cookware for substantially below the nationally advertised price. The purchaser of the sewing machine or cookware became a "founder" eligible to earn sixty dollars upon recruitment of each subsequent founder. When there were three thousand founders, or less if the appellant deemed practicable, a discount store would be opened. The funds to build the store were supplied from money paid in by the founders who, thereafter, would earn commissions on sales to the people whose names were supplied by each founder. Each founder was to supply the names of one hundred families. The discount store was to be operated in accordance with the market plan formulated by the corporation, and each founder would either make a monthly payment to cover the overhead expenses of the store, or suffer a reduction in his commission on sales. The stock of the corporation selling the sewing machines or the cookware was privately held and was not involved in any way with the "deal."

The trial court held that the merchandising plan was a "security", and restrained the appellant from further sales under the plan. On appeal, the District Court of Appeal, Second District, affirmed.[181] On certiorari to review the district court's opinion, the Supreme Court of Florida affirmed[182] and adopted the decision of the district court as being in accordance with the public policy of protection for investors.[183]

174. FLA. STAT. § 517.13 (1969), *as amended*, Fla. Laws 1971, ch. 71-96, § 7.

175. Fla. Laws 1971, ch. 71-136.

176. *As amended*, Fla. Laws 1971, ch. 71-136, § 488.

177. *Created by* Fla. Laws 1971, ch. 71-136, § 2 (a term of imprisonment in the state penitentiary not exceeding five years).

178. *Created by* Fla. Laws 1971, ch. 71-136, § 2 (a fine in lieu of, or in addition to, any punishment described in FLA. STAT. § 775.082, up to five thousand dollars).

179. *Created by* Fla. Laws 1971, ch. 71-136, § 2. This is the enhanced punishment statute, which provides a term not to exceed ten years for a felon subsequently convicted of a third degree felony.

180. 232 So.2d 17 (Fla. 1970).

181. Florida Discount Centers, Inc. v. Antinori, 226 So.2d 693 (Fla. 2d Dist. 1969).

182. *Id.*, 232 So.2d 17 (Fla. 1970).

183. *See generally* FLA. STAT. ch. 517 (1969).

The purpose of the founders was found to be profit both from the commissions on obtaining other founders and from the commissions on the sales from the store to be opened. The supreme court found that this arrangement was thus directed toward the possibility of gain, and quoting the district court's opinion,[184] held that the founder's contracts constituted an " 'interest in or under a profit-sharing or participation agreement or scheme' within the meaning of Florida Statutes § 517.02 (1) . . . ."[185]

2. PURCHASER'S ACTION TO RECOVER THE PURCHASE PRICE OF STOCK

In *Bond v. Koscot Interplanetary, Inc.*,[186] the plaintiff's second cause of action was for the recovery of the purchase price of securities which the plaintiff alleged were sold in violation of state securities laws. Upon defendant's motion, the trial court dismissed the plaintiff's complaint with prejudice for failure to state a cause of action. On appeal, the District Court of Appeal, Fourth District, reversed the trial court and held that a complaint for recovery of the purchase price of stock is sufficient where it alleges: 1) the existence of the contract of sale; 2) that the profit to be made by a distributor lies not in the sale of a product, but in the securing of other distributors; 3) that the contracts were securities which were not restricted, in violation of Florida Statutes chapter 517; 4) that the contracts were not within any exemption provided by chapter 517 for the sale of securities; and 5) that such sale was in violation of the provisions of the securities law.

In *Florida Peach Corp. v. Barron*,[187] the witness in an affidavit, asserted that at the time he purchased the stock he was a bona fide resident of Florida. However, at trial, the witness asserted by affidavit that he was a bona fide resident of Ohio at the time of purchase. The plaintiff had claimed that the association whose shares she purchased was not entitled to an exemption because all of the association's stockholders were not bona fide legal residents of Florida.[188] As proof of her contention that all the shareholders were not Florida residents, she offered the witness' affidavit. The District Court of Appeal, First District, held that the trial court should have stricken the affidavit, holding that a witness

184. The dissenting judge argued that the contracts did not constitute a security, citing Gallion v. Alabama Market Centers, Inc., 282 Ala. 679, 213 So.2d 841 (1968). The corporation in *Gallion* appears to be the Alabama counterpart of the Florida corporation involved in this litigation, as the contracts used by the Alabama corporation are almost identical to the contracts used by the Florida corporation. Florida Discount Centers, Inc. v. Antinori, 226 So.2d 693, 695 (Fla. 2d Dist. 1969) (dissenting opinion).

185. Florida Discount Centers, Inc. v. Antinori, 232 So.2d 17, 18 (Fla. 1970).

186. 246 So.2d 631 (Fla. 4th Dist. 1971). A recent article indicates that the SEC is contemplating action against Koscot. Miami Herald, Jan. 7, 1972, at 8C, col. 3.

187. 249 So.2d 67 (Fla. 1st Dist. 1971).

188. The association claimed an exemption under FLA. STAT. § 517.05(10) (1967) which grants an exemption to an agricultural co-operative, all of whose shareholders are residents of Florida. The requirement of Florida residence was stricken by FLA. STAT. § 517.05(10) (1969).

cannot induce an action of another party by representing one set of facts and subsequently refute such facts by the execution of a contrary affidavit.[189]

In *Dokken v. Minnesota-Ohio Oil Corp.*,[190] another action to recover the purchase price of securities, the defendants were able to claim an exemption for an isolated sale on the ground that they were not issuers.[191] The trial court found that the plaintiff entered into the agreement with the president of the defendant corporation to purchase an interest in an oil lease. At the time the agreement was made, the interest purchased by the plaintiff was neither owned by the defendant corporation nor by its president. Likewise, neither of them controlled or developed the lease. The corporation accomplished the transfer of the interest to the plaintiff at no profit for itself or for the corporation's president.

The District Court of Appeal, Second District, in *Dokken,* found that both the defendants and the plaintiff were minority interest holders in a producing oil well, and that the defendants had no greater control over the operation than did the plaintiff.[192] The court also noted that the defendants were in the business of selling oil leases, but not in Florida. The court held that under these facts the defendants were not issuers because the defendants lacked control over the enterprise.[193] Furthermore, the court did not take into account the business activities of the defendants outside of the State of Florida, holding that it was immaterial in determining whether the sale of a security in Florida was an isolated sale. With this evidence excluded from consideration, there was no evidence that the sale to the plaintiff was part of a general plan or purpose or that it was a sale by persons in the business of making sales in Florida in violation of the securities laws. Therefore, the defendants were entitled to an exemption.

3. MISCELLANEOUS CASES

In *Economic Research Analysts, Inc. v. Brennan*,[194] the appellee worked as a salesman for Economic Research Analysts, Inc., a dealer in securities. The employment agreement provided that Brennan would not work for any other dealer in the south Florida area for a period of six months after the termination of the agreement. The agreement expressly provided that the relationship of employer-employee did not exist. Bren-

189. The court also indicated that the absence of the word, "legal", from the affidavit of residency is not a fatal deficiency since the terms, bona fide resident and legal resident, are equivalent.

190. 232 So.2d 200 (Fla. 2d Dist. 1970).

191. *See* FLA. STAT. § 517.06(3) (1969).

192. Dokken v. Minnesota-Ohio Oil Corp., 232 So.2d 200 (Fla. 2d Dist. 1970). The Florida cases cited by the court do not deal with situations where the sale is voidable; rather they hold that an instruction on estoppel is erroneous where the sale is void.

193. *Id.* at 203.

194. 232 So.2d 219 (Fla. 4th Dist. 1970).

nan was registered with the Florida Securities Commission as a registered agent or salesman for Economic Research. Economic Research was required by statute[195] to supervise Brennan's conduct, and any sales of securities made by Brennan were to be made through the company who paid commissions to him. Brennan could not sell securities for another dealer without the express permission of the dealer under whose name he was registered. The court upheld the agreement not to compete, holding that the defendant was an agent of the plaintiff.[196] Therefore, the agreement to restrain Brennan from carrying on or engaging in a similar business within a limited time and area was valid since it came within the exception provided by Florida Statutes section 542.12(2) (1967).[197]

An action was brought in circuit court against a stockbroker alleging fraud, etc., in a transaction where the plaintiff was sold stock on margin. The margin agreement provided that the contract was to be governed by New York law and that any controversy was to be settled by arbitration. The circuit court refused to stay court proceedings pending the outcome of arbitration, and an appeal was taken. The District Court of Appeal, Third District, held that the policy of the Florida Securities Law[198] was paramount to the Florida Arbitration Code.[199] The court held further that arbitration of the issues of alleged fraud, misrepresentation, and breach of fiduciary duties was not consistent with policy and language of Florida Securities Law.[200]

In *Easton v. State*,[201] a six count indictment was returned against the defendant. Three counts alleged the unlawful sale of securities, while three others alleged that the defendant unlawfully engaged in business as a dealer in securities without being registered. The defendant was convicted, and the trial court entered sentences on each count. On appeal, however, the District Court of Appeal, Second District, reversed, holding that where an indictment contains more than one count, and each count is a facet or phase of the same transaction, only one sentence may be imposed.

195. FLA. STAT. § 517.12 (1969).

196. Economic Research Analysts, Inc. v. Brennan, 232 So.2d 219 (Fla. 4th Dist. 1970).

197. The statute is still in effect. FLA. STAT. ch. 542 (1969) deals with combinations restricting trade or commerce.

198. *See generally* FLA. STAT. ch. 682 (1969).

199. FLA. STAT. ch. 682 (1969).

200. Shearson, Hammill & Co., Inc. v. Vouis, 247 So.2d 733 (Fla. 3d Dist. 1971). The court failed to discuss the conflicts of law problem, and there is no indication why the court applied Florida law instead of the *lex voluntatis*, New York law. *See generally*, Bayitch, *Conflicts of Law, 1969-1971 Survey of Florida Law*, 26 U. MIAMI L. REV. 1 (1972).

201. 250 So.2d 294 (Fla. 2d Dist. 1971).