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Security Interests -- Commercial Finance Companies in Florida

Richard J. Horwich

never vests in the murderer so that there can be no cry of "forfeiture".

Give the "strict constructionists" a statute they can construe in only one manner — a statute that answers the query: "Can a murderer acquire property by or as a consequence of his crime and keep it?" — in simple terms subject to a single interpretation —— "No!"

ESTELLE L. AGUE

SECURITY INTERESTS — COMMERCIAL FINANCE COMPANIES IN FLORIDA

INTRODUCTION

Florida needs more commerce. Transportation and large-scale financing pose problems that seem best answered by small business, since this type of enterprise is characterized by relatively light investment in fixed assets, a high ratio of manpower to machinery, and individualized products and services that do not compete on a price (including transportation) basis alone.[1]

Small business often raises working capital by the sale of, or borrowing on, current non-cash assets, *i.e.*, the more liquid assets exclusive of cash.[2] Commercial finance companies are typical buyers or lenders in such transactions.[3] Discussed below are the legal positions of commercial finance companies in Florida resulting from their acquiring interests (total or security) in accounts receivable, inventory and chattel paper.[4]

ACCOUNTS RECEIVABLE

Seventy years ago, the Florida Supreme Court held the assignment of a book account valid in equity.[5] There can be little doubt of the assignability of accounts receivable today.[6] Furthermore, by statute, "Any civil action at law may be maintained in the name of the real party in interest."[7] There may be some doubt, however, as to whether the assignor is a necessary party plaintiff in a suit upon a partial assignment.[8]

An account receivable involves two major risks: (1) the solvency

1. DIRKS AND HOPKINS, PRIVATE CAPITAL REQUIREMENTS, 46-48, 53-56 (Board of Governors of the Federal Reserve System, Postwar Economic Studies, No. 5, 1946).
2. *Id.* at 71. This is probably for at least two principal reasons: sheer lack of other assets to borrow on, and the rough correlation between the amount of current non-cash assets and the amount of business activity.
3. They are not the only financial institutions in the field, however.
4. The scope of this discussion was suggested by SEIDMAN, FINANCE COMPANIES AND FACTORS (National Conference of Commercial Receivable Companies, New York, 1949). In fact, this comment is really an application of the cited volume to the law of Florida, omitting two chapters dealing with drop-shipments and with imports and exports. The volume cited also provided valuable practical observations reflected throughout this paper.
5. Sammis v. L'Engle, 19 Fla. 800 (1883).
6. "Under the common law, a right of action, choses in action, future or contingent interests, possible and existing estates or interest, were not assignable, but all of these are now assignable by statute or in equity." Richardson v. Holman, 160 Fla. 65, 71, 33 So.2d 641, 644 (1948).
7. FLA. STAT. § 45.01 (1951); Smith v. Westcott, 34 Fla. 430, 16 So. 332 (1894) (assignee of accounts and due bills).
8. *See* Robinson v. The Springfield Co., 21 Fla. 203, 217-219 (1885).

of the account debtor, and (2) the validity of the account, tested according to whether or not the terms of the underlying contract were met. Generally, no assignee assumes risks of the second type, for the assignor impliedly warrants the validity of the account. The outright purchaser of accounts, in contradistinction to the lender taking an assignment as collateral, risks the solvency of the debtor. The lender who takes an assignment as security will not, of course, lose his loan if the account debtor is insolvent. In effect, the assignor takes only the first type of risk. This distinction has been applied in order to hold that, where the assignee has full recourse against the assignor for any non-payment of the account, the assignee really takes the assignment as security for a loan and the usury laws are applicable.[9] Since a purchaser of accounts risks the account debtor's insolvency, his actual operation, as well as his legal position, is different. His clients wish to share credit risks as well as to raise working capital, and they probably are in better financial condition on the average than the clients of lenders who take assignments as security.

Statutory Protection of Assignments:

The assignee of accounts receivable may become a "protected" assignee under Florida statute[10] if the "assignor's main executive office in the United States is in fact in Florida."[11] This statute applies to the transfer, other than by operation of law,[12] of existing or future rights to the payment of money under an existing contract,[13] but it does not apply to (1) assignments regulated by special federal or state statutes,[14] (2) assignments secured by an interest in the goods which give rise to the account,[15] (3) assignments of rights represented by judgments or negotiable instruments,[16] or (4) assignments of documentary choses in action, *e.g.*, insurance policies, savings accounts.[17] Assignments are within the scope of the act, whether for security or not.[18]

Protection is secured by filing a notice of assignment, signed by the assignor and the assignee, with the Secretary of State.[19] The notice can state that the assignor has assigned, or intends to assign, one or more accounts receivable, without listing the accounts.[20] It protects past assignments from the date of filing for one year and future assignments from

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9. Home Bond Co. v. McChesney, 239 U.S. 568 (1916); Petition of National Discount Co., 272 Fed. 570 (6th Cir.), *cert. denied*, 257 U.S. 635 (1921); *cf.* Brewster Shirt Corp. v. Comm'r of Int. Rev., 159 F.2d 227 (2d Cir. 1947).
10. FLA. STAT. c. 524 (1951).
11. FLA. STAT. § 524.02(1) (1951).
12. FLA. STAT. § 524.01(4) 1951).
13. FLA. STAT. § 524.01(1)(a) (1951).
14. FLA. STAT. § 524.01(1)(b) (1951).
15. FLA. STAT. § 524.01(1)(c) (1951).
16. FLA. STAT. §§ 542.01(1)(d) 1, 2 (1951).
17. FLA. STAT. § 524.01(1)(d) 3 (1951).
18. FLA. STAT. § 524.01(4) (1951).
19. FLA. STAT. § 524.02(1) (1951).
20. *Ibid.*

the date when made for one year after the filing.[21] The arrangement may be extended, one year at a time, by filing renewals signed by the assignor and the assignee.[22] An assignee may extend the protection of past protected assignments, one year at a time, by filing affidavits to the effect that he holds one or more outstanding protected assignments from the assignor.[23] Instruments filed are indexed under the assignor's name,[24] and the filing fee for each instrument is one dollar.[25]

A protected assignee takes subject to judicial liens on the account before his protection begins.[26] As between successive assignees of the same account, the first to file prevails unless he (1) had written notice of a prior assignment, or (2) agreed in writing to other priorities.[27] Aside from the limitations just set out, the protected assignee prevails over creditors and assignees of the assignor as to the account or the proceeds and may recover the proceeds from their possession.[28]

An assignment is not invalidated by the assignor's dealing with the account or returned goods pertaining to it, even if the assignee acquiesces in such conduct.[29] However, the assignment is subject to the defenses of the account debtor existing at the time when he receives written notice of the assignment.[30]

It appears that the statute has not been construed in the reported opinions to date.[31]

Other Assignments

Other assignments are affected by statute to the extent that they are made subject to protected assignments.[32] Outside of this, they would seem to be as effective as they were before the statute.

Florida case law on the assignment of accounts has developed principally in situations where the assignee sues the debtor (with an exception discussed later). The assignee stands in the shoes of the assignor,[33] but adjustments between the debtor and the assignor after notice to the debtor of the assignment form no defense to the assignee's action against the debtor — up to the amount of the assignee's real interest, *i.e.*, the loan secured by the assignment.[34] As a procedural matter, the debtor was limited under a 1931 statute[35] to counterclaims arising out of the same transac-

21. Fla. Stat. §§ 524.03(1), 524.04(1) (1951).
22. Fla. Stat. § 524.03(1) and (2) (1951).
23. Fla. Stat. § 524.03(3) (1951).
24. Fla. Stat. § 524.02(2) (1951).
25. Fla. Stat. § 524.02(5) (1951).
26. Fla. Stat. § 524.04(2)(a) (1951).
27. Fla. Stat § 524.04(2)(b) (1951).
28. Fla. Stat. § 524.04(3) (1951).
29. Fla. Stat. § 524.05 (1951).
30. Fla. Stat. § 524.06 (1951).
31. Fla. Stat. Ann., c. 524 (Supp. 1952).
32. Fla. Stat. § 524.04(2)(b) (1951).
33. Florida East Coast Ry. v. Eno, 99 Fla. 887, 128 So. 622 (1930).
34. Howard v. Pensacola & A.R. Co., 24 Fla. 560, 5 So. 356 (1889).
35. Fla. Laws 1931, c. 14823.

tion.[36] The same was true under an earlier statute,[37] but even such counterclaims may have been unavailable to the debtor under the earlier statute since it only allowed the set-off of "mutually existing" claims.[38] Under the present statute,[39] the debtor's counterclaims arising out of the same transaction are compulsory,[40] while all others are permissive.[41] The last provision certainly should not be understood to increase the substantive rights of the debtor.

The assignment by a contractor of rights to progress payments has brought a fourth party into the picture in three cases where the debtor was a governmental unit and required the contractor to have a surety.[42] The problem required an application of the theory that the surety is subrogated to the rights of the governmental unit upon paying it the damages caused by default. In the first case, the town retained less than the percentage of progress payments it was entitled to retain. The court, holding for the surety, reasoned as follows: (1) the lending assignee stands in the shoes of the contractor, (2) the surety is subrogated to the position of the town, (3) the contractor had no right to payment from the town at the time of default, and (4) therefore the surety prevails over the assignee.[43]

The Federal Court of Appeals for the Fifth Circuit held in the second case for the assignee because the town had no right to retain the proceeds, and the assignee showed that the loan was used in furthering the work.[44]

While the first two cases are somewhat unusual as regards the ordinary financing of accounts by commercial finance companies, they form a background for the important case of *Coconut Grove Exchange Bank v. New Amsterdam Casualty Co.*,[45] which involved the assignment of contract rights against the federal government. The dissenting judge, drawing on the law of the two preceding cases, felt that the assignee had failed to prove an equitable position equivalent to that of the assignees in those cases;[46] but the court held that the surety had failed to prove any such useless diversion of the loans as would avoid the effect of what the court held to be the controlling federal statute.[47] That statute makes assign-

36. Panama City v. Federal Reserve Bank, 97 F.2d 499 (5th Cir. 1938).
37. Fla. Comp. Gen. Laws of 1927, § 4326; Birmingham Trust Co. v. Jackson County Mill Co., 41 Fla. 498, 27 So. 43 (1899); *accord*, Kilcrease v. White, 6 Fla. 45 (1855) (overdue note).
38. Fla. Comp. Gen. Laws of 1927, § 4326. See the reasoning in Birmingham Trust Co. v. Jackson County Mill Co., 41 Fla. 498, 503-506, 27 So. 43, 44-45 (1899).
39. FLA. STAT. § 52.11 (1951).
40. FLA. STAT. § 52.11(1) (1951).
41. FLA. STAT. § 52.11(2) (1951).
42. *Infra* notes 43, 44, 45.
43. Union Indemnity Co. v. City of New Smyrna, 100 Fla. 980, 130 So. 453 (1930).
44. Town of River Junction v. Maryland Cas. Co., 110 F.2d 278 (5th Cir.), *cert. denied*, 310 U.S. 634(1940),*second appeal* 133 F.2d 57 (5th Cir. 1943).
45. 149 F.2d 73 (5th Cir. 1945).
46. *Id.* at 79-81.
47. REV. STAT. § 3477 (1875), as amended, 54 STAT. 1029 (1940), 31 U.S.C. § 203 (1946).

ments of contract rights against the federal government valid for all purposes if certain notices are given, as they were in the instant case. Therefore this statute fills one of the express gaps in the Florida act.[48]

INVENTORY

Generally speaking, a lender may protect his security interest in the borrower's inventory or stock in trade by (1) giving public notice of his interest, (2) divesting the borrower of control over the goods, or (3) neither.[49] It follows that a discussion of inventory loans, like Gaul, is divided into three parts: mortgages, pledges and trust receipt transactions.

The reader might keep in mind the differences between an inventory of raw materials which may be transformed into other goods by manufacturing or processing but which is not likely to be sold, and an inventory of finished goods which is ready for and intended for sale. However, these differences are not specially reflected in the Florida law, with the possible exception of the Uniform Trust Receipts Law.[50]

Mortgages of Inventory

"Mortgages" includes any conveyance in writing of a property interest from a debtor to or for his creditor as security for the payment of money.[51]

The lender must protect his mortgage by recording it or by taking possession of the goods mortgaged.[52] If the lender fails to record his mortgage but later takes possession, an intervening mortgagee for value without notice prevails.[53]

A mortgage is void in law to the extent that it covers stock in trade retained by the debtor if the debtor has the express or implied power to sell the goods as usual and need not account to the mortgagee for the proceeds.[54] However, the arrangement may be a valid pledge if the debtor or his employee segregates the mortgaged inventory and holds it as agent for, and accounts to, the mortgagee.[55] A lender may successfully defend his lien by showing that a *new arrangement* of the pledge type has been substituted for an earlier void mortgage.[56] Nevertheless, the general rule defeats one of the major attractions of inventory loans as well as of loans on current assets in general: the asset will be converted into cash in a short time under normal operations so that the debt can be paid. Stated in another way, the general rule seems to prevent an inventory mortgage from being a self-liquidating arrangement.

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48. FLA. STAT. § 524.01(1)(b) (1951) (recording act not applicable to assignments regulated by special federal statutes).
49. See later discussion of unrecorded trust receipts.
50. FLA. STAT. c. 673 (1951).
51. FLA. STAT. § 679.01 (1951).
52. FLA. STAT. § 698.01 (1951).
53. Spellman v. Beeman, 70 Fla. 575, 70 So. 589 (1916).
54. Eckman v. Munnerlyn, 32 Fla. 367, 13 So. 922 (1893); Logan v. Logan, 22 Fla. 561 (1886).
55. Garrett & Co. v. Mercantile Nat. Bank, 120 F.2d 821 (5th Cir. 1941).
56. First Nat. Bank v. Wittich, 33 Fla. 681, 15 So. 552 (1894); see the explanation of this case in Garrett & Co. v. Mercantile Nat. Bank, 120 F.2d 821 (5th Cir. 1941).

Assuming that there is no power of sale, a mortgage on a fluctuating inventory would apparently be valid in Florida against the mortgagor, for the court has held that a mortgage can by its terms create an equitable lien on after-acquired property which attaches when the property comes into the mortgagor's possession.[57] However, there was only the barest intimation that the lien would be valid against third parties,[58] and a contrary view is possible.[59] The unresolved problem is important both as to inventories ready for sale and as to inventories to be used in manufacture. The latter case will probably include the former in that the mortgage will attempt to cover raw materials, goods in process and finished products: newly purchased raw materials are to be after-acquired raw materials at first, after-acquired goods in process while they are being changed, and after-acquired finished products when they are in final saleable form. However, all of this is to little avail if the lien is not valid against third persons. A different approach, possible if the raw materials form the major part of the finished product, is to apply the doctrine of accession to the mortgagee's interest in the raw materials.[60] Finally, certain Florida statutes have limited applicability, as discussed below.

Unless otherwise provided, mortgages on livestock extend to the offspring.[61] Future crops may be mortgaged if the land on which they are to be raised is described,[62] but the lien does not attach until the crop reaches the first stage of growth.[63] Therefore, if a mortgage on the land which by its terms includes the crops is already in default when the crop reaches the first stage of growth, that mortgage prevails over a specific mortgage on the crops.[64] Aside from the foregoing provisions for mortgaging "agricultural inventory", the question of whether or not a mortgage can validly attach to goods manufactured in the future remains unanswered at this point.

The Florida Legislature has created a statutory lien which — like a mortgage — is a voluntary arrangement and ought to be recorded.[65] At first glance it appears to be a solution: "Any person who shall procure a loan or advance of money . . . to aid him in the business of planting farming, timber getting *or any other kind of business in this state*, . . . shall . . . be held to have given to the lender . . . a statutory lien of prior dignity to all other incumbrances," except liens for labor and in favor of landlords, upon all the timber, crops, products "or anything else made

57. Marion Mortgage Co. v. Teate, 98 Fla. 713, 124 So. 172 (1929).
58. *Id.* at 718, 124 So. at 174.
59. Zartman v. First Nat. Bank, 189 N.Y. 267, 82 N.E. 127 (1907); *see* Carlton v. Marion Mortgage Co., 105 Fla. 445, 446, 141 So. 304, 305 (1932) (concurring opinion).
60. *Cf.* Bancroft Steel Co. v. Kuniholm Mfg. Co., 301 Mass. 91, 16 N.E.2d 78 (1938) (holder of retained title to steel recovers baby strollers).
61. FLA. STAT. § 699.04 (1951).
62. FLA. STAT. § 700.01 (1951).
63. E. C. Fitz & Co. v. Eldridge, 129 Fla. 647, 176 So. 539 (1937).
64. Neal v. Bradenton Production Credit Ass'n, 146 Fla. 208, 200 So. 845 (1941).
65. FLA. STAT. § 85.22 (1951).

or grown . . . through the assistance of said loan . . . ." Although Florida has no Factors' Lien Act[66] to protect the security interests in inventories held by complying lenders, the statute just quoted seems comparable. However, the statute requires an instrument to be recorded in the county "wherein such *business of planting, farming, or timber getting* is conducted." Furthermore, the court has held demurrable the plaintiff-lender's failure to allege that the borrower was in the business of producing citrus fruit.[67] It appears that this provision, too, is applicable only to loans on "agricultural (and lumbering) inventories".

In summary, the utility of a mortgage is doubtful if the inventory will normally be sold or subjected to manufacturing or processing. The financing of inventory not constantly in use can be done by pledge (as discussed below). A pledge need not be recorded; and one type of pledge, field warehousing, requires very little inconvenience. All in all, financing inventories by mortgage seems a poor choice for the lender.

Pledges of Inventory

The simplest pledge is a transfer of possession to the lender as security. As long as a party acting on the lender's behalf retains control of the property, the pledge remains valid.[68] The possession necessary is that discussed in the matter of void mortgages replaced by pledges.[69]

Practically, goods which are constantly being worked, processed or sold by the borrower are not susceptible of pledge. Rather, goods are amenable to pledge when their form is "static" or "passive". Generally, this is during transportation or storage. Most lenders are in neither business, yet they do want control. Therefore, a two-step arrangement is used: (1) the carrier or warehouseman issues a receipt to the borrower-shipper or borrower-depositor which is a unique document and is essential to anyone trying to secure the goods from the carrier or warehouseman, and (2) the borrower transfers the document to the lender. The carrier is usually in interstate commerce[70] and the transactions are governed by the Federal Bills of Lading Act.[71] The law of bills of lading will not be covered in this discussion.[72]

Florida has substantially adopted the Uniform Warehouse Receipts

66. See N.Y. PERS. PROP. LAW § 45.
67. Plant City Agricultural Credit Co. v. Pool, 103 Fla. 806, 139 So. 595 (1931).
68. Therrell v. Filer, 101 Fla. 192, 133 So. 861 (1931). Although the school board released the bank's pledge of bonds, the state comptroller's approval—required by statute—had not yet been given. *Held:* the statute was a part of the contract and the pledge was still valid.
69. See notes 52, 53 *supra*.
70. See Chase & Co. v. Atlantic Coast Line R. Co., 94 Fla. 922, 115 So. 185 (1927); Atlantic Coast Line R. Co. v. Roe, 91 Fla. 762, 109 So. 205 (1926).
71. 39 STAT. 538 (1916), 49 U.S.C. §§ 81 *et seq.* (1946).
72. While nonnegotiable bills of lading do not represent title and should not be adequate for a valid pledge of goods, they nevertheless may be useful in the financing of current assets: an assignor of accounts receivable is sometimes required to give the assignee copies of straight (nonnegotiable) bills of lading as proof of delivery of the goods to the carrier.

Act.[73] Before discussing the Act, it should be noted that at least two major types of warehousing are possible under the provision, "Warehouse receipts may be issued by any warehouseman."[74] Under one type, the goods can be deposited in a public warehouse along with the goods of other depositors, and the parties choose to do so. In field warehousing, the parties find it necessary or desirable to have the warehousing company merely segregate a part of the borrower's inventory right on the borrower's premises and appoint its agent to control the "branch public warehouse". The agent is often a person who would otherwise be employed by the borrower, but the agent is employed by and accountable to the warehousing company for the duration of the arrangement.

Warehouse receipts may be negotiable or nonnegotiable.[75] A nonnegotiable receipt is one stating that the goods are deliverable to a specified party or to the depositor,[76] and it must be marked "nonnegotiable" by the warehouseman or else a deceived holder for value may treat it as negotiable.[77] A nonnegotiable receipt is advantageous in that (1) a holder through a thief cannot get good title, and (2) the receipt need not be presented in order for the depositor or the specified party to get each and every partial delivery.[78]

A receipt to order or to bearer is negotiable,[79] and all other copies of it must be marked "duplicate" by the warehouseman.[80] Negotiable receipts seem more useful since they imbue holders with greater rights. In fact, a person taking a warehouse receipt by negotiation has rights substantially analogous to those of a holder in due course of a negotiable demand note[81] except that (1) the indorsers do not guarantee the warehouseman's performance of his obligations[82] and (2) the warehouseman has a possessory lien[83] for all lawful charges and claims enumerated on the receipt and for charges for storage subsequent to the date of the receipt, even though the amounts of the charges and claims are not stated.[84] If the warehouseman issues a negotiable receipt for goods, he must take up and cancel the receipt when delivering the goods[85] or, at least, mark the receipt when delivering part of the goods;[86] and he need not deliver the goods to attaching or levying parties unless the receipt is surrendered to him or impounded by the court.[87] Furthermore, the proper holder of a duly negotiated

73. Fla. Stat. c. 678 (1951).
74. Fla. Stat. § 678.01 (1951).
75. Fla. Stat. §§ 678.05, 678.04 (1951).
76. Fla. Stat. § 678.04 (1951).
77. Fla. Stat. § 678.07 (1951).
78. Fla. Stat. § 678.09 (1951).
79. Fla. Stat. § 678.05 (1951).
80. Fla. Stat. § 678.06 (1951).
81. Fla. Stat. §678.43 (1951).
82. Fla. Stat. § 678.47 (1951).
83. Fla. Stat. § 678.29 (1951).
84. Fla. Stat. § 678.30 (1951).
85. Fla. Stat. § 678.11 (1951).
86. Fla. Stat. § 678.12 (1951).
87. Fla. Stat. § 678.25 (1951).

receipt gets title to the goods equivalent to that of a purchaser in good faith for value from the depositor,[88] thus invoking the distinction between void and voidable titles.

The standard of care of a warehouseman is that of a reasonably careful owner of similar goods.[89] He must keep the goods separate,[90] except that he may commingle fungibles,[91] in which case the depositors are tenants in common and suffer any nonnegligent loss pro rata.[92]

Warehousemen have a reasonable time to determine opposing rights[93] and may interplead adverse claimants.[94] There are special provisions for sales to satisfy a warehouseman's lien[95] and for sales of perishable,[96] hazardous,[97] or unclaimed[98] goods.

Significant Florida decisions to date have dealt with the nature of a warehouse receipt. Although as a written contract its terms cannot be varied by parol, its use as mere evidence of the amount converted by a depositor results in the admissibility of parol evidence to vary the quantity and condition of goods set forth in the receipt.[99] The sale of a warehouse receipt was held not to be within the Uniform Sale of Securities Law.[100] The court said, "Such bonded warehouse certificates . . . constitute evidence of title to personal property . . . . The title . . . is transferred by the assignment and transfer of the certificate . . . ."[101] It appears that the lender who protects his security interest in the borrower's inventory by taking a negotiable receipt issued by a sound warehouseman is in as good a position as if he took possession himself.

Trust Receipts

Florida enacted the Uniform Trust Receipts Law in 1951.[102] The most significant effect of this law upon the general picture of inventory loans in Florida is that the lender — for a limited period of time — can acquire a security interest in personal property of the borrower valid against judgment creditors by a mere agreement, and without giving public

88. FLA. STAT. § 678.43 (1951).
89. FLA. STAT. § 678.21 (1951); Dixie Frozen Food & Storage v. Cox, 158 Fla. 88, 27 So.2d 672 (1946).
90. FLA. STAT. § 678.22 (1951).
91. FLA. STAT. § 678.23 (1951).
92. United States v. Jacksonville, 167 F.2d 366 (5th Cir. 1948). In this case, the amount remaining after the loss was sufficient to meet all claims because of accumulated excess fractions of units deposited, but the court held that the depositors and the unascertained titleholders of the excess must all share the nonnegligent loss pro rata.
93. FLA. STAT. § 678.18 (1951).
94. FLA. STAT. § 678.17 (1951).
95. FLA. STAT. § 678.33 (1951).
96. FLA. STAT. §§ 678.34 ,678.37 (1951).
97. FLA. STAT. § 678.34 (1951).
98. FLA. STAT. § 678.37 (1951).
99. Wicoma Inv. Co. v. Pridgeon, 137 Fla. 540, 188 So. 597 (1939).
100. Mutual Bankers Co. v. Terrell, 130 Fla. 583, 178 So. 399 (1938). The Uniform Sale of Securities Law lists warehouse receipts as securities, FLA. STAT. § 517.02(1) (1951), but exempts sales by or for pledgees or mortgagees. FLA. STAT. § 517.06(1) (1951). The court mentioned neither provision.
101. *Id.* at 587, 178 So. at 401.
102. FLA. STAT. c. 673 (1951).

notice or in any way divesting the borrower of possession. A detailed outline of the law follows.

Certain definitions appear crucial before any analysis of the Act. "Goods" includes personal chattels other than money, choses in action, or fixtures.[103] "Documents" includes any document of title to goods.[104] "Instruments" includes negotiable instruments, stocks and bonds, and "credit or investment instruments of a sort marketed in the ordinary course of business or finance."[105] "Value" is given where chattels are taken for consideration adequate to support a simple contract, or are taken in satisfaction of or as security for an antecedent obligation;[106] but "new value" is not given in the latter case, nor does "new value" include renewals or extensions of existing obligations.[107]

A valid trust receipt is the conveyance in writing of a security interest to a lender[108] pursuant to a trust receipt transaction.[109] A trust receipt transaction has three essentials.

First, there must be a transaction of a particular *nature*. Either the lender or another delivers goods, documents or instruments to the borrower in which the lender has, or for new value promptly gets, a security interest; or the lender gives new value for a security interest in instruments exhibited to the lender but retained by the borrower; or the lender gives new value for a security interest in goods or documents whether or not the borrower has possession before or after of the goods or documents and whether or not the borrower retains possession of the goods thereafter.[110]

Secondly, the borrower must sign and deliver a conveyance of the security interest, or there must be a written contract to give such a writing[111] (the latter is as effective as the former throughout the Act).[112]

Finally, the transaction must have a particular *purpose* or the substantial equivalent. The purpose of the borrower's possession of goods, documents or instruments must be their sale or exchange; or, in the case of goods or documents, the preparation of the goods for sale — including manufacturing, processing, transporting and storing —; or, in the case of instruments, the delivery to a principal or depositary or registrar for collection of the instruments and the like.[113]

The usefulness of the law, aside from the protection afforded bailors of instruments, is principally in transactions common to inventory loans.

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103. FLA. STAT. § 673.01(4) (1951).
104. FLA. STAT. § 673.01(2) 1951).
105. FLA. STAT. § 673.01 (5) (1951).
106. FLA. STAT. § 673.01(15) (1951).
107. FLA. STAT. § 673.01(7) (1951).
108. "Lender" will be used where the act reads "entruster" and "borrower" where it reads "trustee."
109. FLA. STAT. § 673.02(2) (1951).
110. FLA. STAT. § 673.02(1) (1951).
111. FLA. STAT. §§ 673.02(1) 1, 2 (1951).
112. FLA. STAT. § 673.04 (1951).
113. FLA. STAT. § 673.02(3) (1951).

Some of these are lending to borrowers so that they can pay for goods presently being delivered to them, delivering negotiable warehouse receipts to borrowers so they can reacquire some or all of their inventory, and lending on inventory already in the borrowers' possession if there is an active purpose for that possession. The sale of inventory and the use of it for manufacturing or processing are plainly within the contemplation of the Act.

Between the lender and borrower the terms of the trust receipt are valid, but there can be no forfeiture except in the case of articles manufactured by style or model.[114] The lender, upon default, can retake possession peaceably,[115] and a lender in possession may sell after notice and ten days.[116]

The lender may protect his interest by filing or by taking possession.[117] While protected, the security interest is valid against all parties[118] except (1) good faith purchasers for value of negotiable instruments or documents;[119] (2) parties having specific liens usual in the course of activities prior to sale, *e.g.*, warehousing, if such liens arose from contract and excepting landlords' liens;[120] (3) lien creditors without notice whose liens were perfected before filing, or who secured the issuance of process before filing, and levied or attached promptly after the issuance of process;[121] (4) *buyers in the ordinary course of trade* if the borrower has apparent authority to sell;[122] and (5) good faith *purchasers* for value, other than buyers in the ordinary course of trade, who obtain possession before filing.[123] "Buyers in the ordinary course of trade" includes generally any good faith vendee for value but not pledgees, mortgagees, lienors, nor transferees in bulk.[124] "Purchasers" includes persons taking security interests created by contract and transferees in bulk.[125] Most of the exceptions obviously apply to a recorded (filed) trust receipt rather than one where the goods have been reduced to possession by the lender. The recorded trust receipt is more like a mortgage than an unrecorded trust receipt in that the lender's security interest is protected by public notice, or occasionally, by possession both in the case of a recorded trust receipt and a mortgage. However, it is far more convenient to discuss all trust receipts together.

While the recorded trust receipt may be compared to a mortgage,

114. FLA. STAT. §§ 673.05, 673.06(5) (1951).
115. FLA. STAT. § 673.06(2) (1951).
116. FLA. STAT. § 673.06(3)(b) (1951).
117. FLA. STAT. § 673.07(2) (1951).
118. FLA. STAT. § 673.07(1)(a) (1951).
119. FLA. STAT. § 673.09(1)(a) (1951).
120. FLA. STAT. § 673.11 (1951).
121. FLA. STAT. § 673.08(2) (1951).
122. FLA. STAT. § 673.09(2)(a) and (c) (1951).
123. FLA. STAT. § 673.09(2)(b) (1951).
124. FLA. STAT. § 673.01(1) (1951).
125. FLA. STAT. § 673.01(11) 1951).

there is little in Florida law resembling the situation created by the unrecorded trust receipt under which the borrower retains possession. The reader is forewarned that the period of thirty days appears several times in the provisions for the validity of trust receipts. That is because the law gives an unrecorded trust receipt a certain validity for thirty days, but protection against third parties is substantially reduced after that time unless the trust receipt is recorded.

Exceptions (1), (2) and (4) to the validity of a recorded trust receipt, as described above, are also exceptions to the validity of an unrecorded receipt.[126] Purchasers other than buyers in the ordinary course of trade take clear of the trust receipt if they give *new value* during the first thirty days and secure delivery before the trust receipt is recorded, or if they give *value* after the thirty-day period and secure delivery before the trust receipt is recorded.[127] A transferee in bulk cannot qualify under the first test.[128] It is clear that the description of exception (5) to the validity of *recorded* trust receipts is incomplete in that there is the additional requirement of prevailing purchasers that they give *new* value if they purchase within the first thirty days after the trust receipt transaction. An unrecorded trust receipt is valid against all creditors of the borrower,[129] with or without notice, for thirty days; but after thirty days it is void against one who, after the thirty day period, becomes a lien creditor without notice,[130] or against a trustee in bankruptcy if the petition is filed after the thirty day period.[131] Therefore, the description of exception (3) to the validity of *recorded* trust receipts is incomplete in that the creditor who is to prevail must perfect his lien after the thirty-day period as well as before recording.

To summarize the disadvantages of the unrecorded trust receipt not attached to the recorded trust receipt, a division in time may be made. During the first thirty days, good faith purchasers for *new value*, including mortgagees and pledgees, but excluding transferees in bulk, take clear of the unrecorded trust receipt. After thirty days, good faith purchasers for *value* — including transferees in bulk[132] — take clear of the unrecorded trust receipt, and the unrecorded trust receipt is void against lien creditors who become such without notice after thirty days and against trustees in bankruptcy if the petition is filed after thirty days.

The thirty-day line of demarcation, coupled with the contemplation of active purposes discussed earlier, makes the unrecorded trust receipt a unique device. The active purpose in the case of inventory loans is generally the acquisition or release of inventory for some step that will

126. See notes 119, 120, 122 *supra*.
127. FLA. STAT. 673.09(2)(b) (1951).
128. *Ibid.*
129. FLA. STAT. § 673.08(1) (1951).
130. FLA. STAT. § 673.08(2) (1951).
131. FLA. STAT. § 673.08(2)(b) (1951).
132. *But cf.* FLA. STAT. c. 726 (1951) (Bulk Sales Law).

bring it closer to final sale. The final sale will produce proceeds which may be used to pay off the underlying loan, thus terminating the security interest. A thirty-day time limit is contemplated. Thus, the unrecorded trust receipt transaction should normally be a promptly self-liquidating arrangement.

The security interest will not continue as long as the borrower owes any debt to the lender. The trust receipt is security only for the obligation incurred during the transaction, or for obligations for which the property held under a trust receipt was previously security; but the security does not extend to other past obligations or to any future obligations.[133]

Generally, a lender has rights, as against all parties in regard to whom his security interest is valid, to the identifiable proceeds of the property covered by the trust receipt and to debts owed the borrower by any purchasers or buyers who prevail against the trust receipt.[134] If the lender fails to demand an accounting within ten days of learning of the existence of proceeds, he waives his special rights to the identifiable proceeds.[135] However, if he demands an accounting within ten days after the proceeds come into existence, or a petition in bankruptcy is filed with regard to the borrower in that same period, the lender has a priority for the value of the proceeds, whether identifiable or not.[136] In effect, the lender had better demand an accounting within ten days after sale — another reason why the trust receipt transaction should be a self-liquidating arrangement.

The Florida Trust Receipts Law apparently has not been construed by the court.[137] In dealing with a trust receipt issued under the law of another state, and prior to the passage of the Florida Act, the court held it ineffective under facts which would probably lead to the same conclusion in Florida today.[138] However, the court used language somewhat discouraging to the proponents of trust receipts: the plaintiff "required the dealer to execute what is termed a trust receipt, which appears from the record to be an instrument which might be either construed as a receipt for property to be held in trust or a chattel mortgage. If construed as a receipt for property to be held in trust, it carried with it authority to sell and dispose of the property, and to account for the proceeds thereof."[139] In an earlier case, the court also reached the result indicated by the present statute by applying the law of conditional sales and agency to a trust receipt transaction.[140] Surely the court would have no difficulty in identi-

133. FLA. STAT. § 673.14 (1951).
134. FLA. STAT. § 673.10 (1951).
135. FLA. STAT. § 673.10(c) (1951).
136. FLA. STAT. § 673.10(b) (1951).
137. FLA. STAT. ANN. c. 673 (Supp. 1952).
138. Wooton v. Carrollton Acceptance Co., 103 Fla. 237, 137 So. 390 (1931).
139. *Id.* at 239-240, 137 So. at 391.
140. Glass v. Continental Guaranty Corp., 81 Fla. 687, 88 So. 876 (1921).

fying a trust receipt and determining its basic effects under the present statutes.

Before concluding the subject of inventory loans, it seems worth noting that under the Uniform Trust Receipts Law an attempted pledge, which does not qualify as a trust receipt transaction and wherein the borrower retains possession, is valid as a security interest against all creditors of the borrower with or without notice for ten days if (1) the lender gives new value in reliance thereon, or (2) if the lender gives the borrower possession of pledged property for a temporary and limited purpose.[141] The pledge is otherwise invalid against creditors and is invalid generally against good faith purchasers for value, until the lender takes or retakes possession.[142]

Chattel Paper

When a businessman sells chattels on credit to the consuming public, he often gets notes secured by interests in the chattels sold. This is a normal arrangement for the sale of automobiles, furniture and household appliances. A businessman may lend cash rather than credit to a member of the general public and take as protection a security interest in chattels already owned by the borrower. The notes and the documents giving the businessman a security interest in the chattels constitute chattel paper for the purposes of this discussion. (If the documents are conditional sale agreements, the term "conditional sales paper" will be used; and if the documents are chattel mortgages, "chattel mortgage paper"). The businessman may turn his chattel paper into working capital by selling it, or by transferring it to a lender as collateral for a loan.

The financing of chattel paper giving security interests in automobiles is affected to some extent by statutes. The motor vehicle title registration provisions create a comparatively certain test as to the validity of contractual liens on automobiles.[143] While that law may impose certain annoying formalities, these requirements generally protect the holder of the chattel paper. One chapter of the Florida statutes contains an attempt to prevent the manufacturer or distributor of motor vehicles from coercing retail dealers into financing their chattel paper with a designated lender.[144] Whatever effect this law may have on the economic problems involved, it voids the contract between the manufacturer or distributor and the dealer,[145] but apparently does not affect the validity of the financing arrangements.

Statutes in Florida also deal with the field of smaller loans or extensions of credit to consumers. A chapter grants licensed small loan businesses the right to charge interest[146] at the annual rate of forty-two per

141. Fla. Stat. § 673.03 (1951).
142. *Ibid.*
143. Fla. Stat. §§ 319.15 *et seq.* (1951).
144. Fla. Stat. c. 545 (1951).
145. Fla. Stat. §§ 545.10, 545.02 (1951).
146. Fla. Stat. c. 516 (1951).

cent,[147] but if they violate the provisions of the law the offending loans are unenforceable.[148] Another chapter[149] allows registered persons who extend three hundred dollars credit or less to consumers to charge more than is otherwise legal.[150] However, such charges by unregistered persons for extending a similar amount make the contract void[151] — but conditional sales of automobiles are expressly exempted from the law;[152] and the general usury laws apply to interest on loans, but apparently not to carrying charges added to conditional sales prices.[153] Furthermore, it is probable that a party financing licensed small loan companies and unregistered extenders of small amounts of consumer credit would be protected if he were a holder in due course of negotiable instruments.[154]

Courts and legislatures which hope to protect the innocent public against the villains of the commercial world[155] may well place the finance company in its dealings with chattel paper in a position substantially different from that which it has when lending on inventory or dealing with accounts receivable. In the latter two cases, the finance company is usually thrown into conflict with other members of the commercial world; but, in financing chattel paper, the company must sooner or later meet the members of the general public in legal battle.

Generally, chattel paper may consist of notes accompanied by (1) a chattel mortgage, or (2) a conditional sale contract.[156] Although either serves the same general purpose, the legal principles and results are quite different, even between original parties to the transaction.[157] Therefore, the transferring of the two types of chattel paper will be treated separately.

Chattel Mortgage Paper

Since chattel mortgages are used less frequently in Florida for consumer credit transactions than conditional sales contracts,[158] the law is not as well developed. It seems sound to add to the law of chattel mortgages by engrafting upon it the law of real estate mortgages wherever applicable, *i.e.*, wherever the nature of the property should have no effect on the decision. For instance, both chattel mortgages and real estate mortgages should be recorded,[159] but the statutes require the recording of

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147. FLA. STAT. § 516.14 (1951).
148. FLA. STAT. § 516.18(2) (1951).
149. FLA. STAT. c. 519 (1951).
150. FLA. STAT. § 519.08 (1951).
151. FLA. STAT. § 519.06 (1951).
152. FLA. STAT. § 519.18 (1951).
153. FLA. STAT. § 687.02 (1951); Nelson v. Scarritt Motors, 48 So.2d 168 (Fla. 1950).
154. A transferee of negotiable paper without notice of usury is expressly exempt from the operation of the general usury law. FLA. STAT. § 687.04 (1951). This suggests a similar holding in the case of special usury laws, such as Chapters 516 and 519.
155. See Mutual Finance Co. v. Martin, 63 So.2d 649 (Fla. 1953).
156. See Comment, *Conditional Sales—Remedies of the Seller in Florida*, 7 MIAMI L. Q. 385 (1953).
157. *Id.* at 386.
158. *Id.* at 385.
159. Chattel mortgages, FLA. STAT. § 698.01 (1951); real estate mortgages, FLA. STAT. § 695.01 (1951).

assignments of real estate mortgages only.[160] All mortgages are foreclosed in equity.[161] A deficiency decree is within the sound discretion of the court; or the mortgagor may sue for the deficiency at common law, unless he is the original mortgagee under a purchase money mortgage and has bought the property at the foreclosure sale.[162]

The mortgage is incident to the debt and follows the note;[163] a conveyance of the mortgage without the debt is inoperative.[164] On the other hand, a duly recorded release of the mortgage is effective against a later assignee of the mortgage,[165] while cancellation of the note by mistake will not avoid the mortgage since equity reinstates the debt.[166]

That a mortgage accompanies a note does not make the note non-negotiable.[167] If the transferee of mortgage paper otherwise qualifies, he has the privilege of a holder in due course of a negotiable note as to foreclosing the mortgage.[168] The mortgagor cannot raise the defenses of failure of consideration[169] or — if he did not secure the note — of payment.[170]

Aside from the note, the assignee of a mortgage has the same rights under the mortgage as the assignor,[171] and the same is true if the note is overdue.[172] However, it is no defense to foreclosure proceedings by the assignee that the assignor had obligations to the defendant unrelated to the assignee's mortgage.[173]

Then the transferee of chattel mortgage paper is best protected by taking an accompanying negotiable note before maturity. Otherwise, he has only the rights which the transferor had. Despite the apparent simplicity of the situation, problems do arise.

Since the mortgage follows the debt, what is to happen if the debt is represented by several notes which mature at different times and which end up in the hands of different indorsees? Florida follows the rule that gives priority to the holder of the senior (earliest maturing) note;[174] but

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160. FLA. STAT. § 701.02 (1951).
161. FLA. STAT. § 702.01 (1951).
162. FLA. STAT. § 702.06 (1951).
163. Johns v. Gillian, 134 Fla. 575, 184 So. 140 (1938); Drake Lumber Co. v. Semple, 100 Fla. 1757, 1771, 130 So. 577 (1930).
164. Morin v. Dehon, 139 Fla. 848, 191 So. 1 (1939); Hemphill v. Nelson, 95 Fla. 498, 116 So. 498 (1928) (both cases involved quitclaim deeds).
165. Baltzell v. Daniel, 111 Fla. 303, 149 So. 639 (1933).
166. Drake Lumber Co. v. Semple, 100 Fla. 1757, 1771, 130 So. 577 (1930).
167. Scott v. Taylor, 63 Fla. 612, 58 So. 30 (1912).
168. Mullan v. Bank of Pasco County, 101 Fla. 1097, 133 So. 323 (1931). *But cf*, Mutual Finance Co. v. Martin, 63 So.2d 649 (Fla. 1953).
169. Mullan v. Bank of Pasco County, 101 Fla. 1097, 133 So. 323 (1931).
170. Scott v. Taylor, 63 Fla. 612, 58 So. 30 (1912).
171. FLA. STAT. § 701.01 (1951).
172. Chandler v. Davis, 139 Fla. 469, 190 So. 873 (1939).
173. Pelot v. Loeb, 119 Fla. 15, 160 So. 525 (1935) (assignee of holder of first mortgage can foreclose against holder of second mortgage, although before the assignment parties including the holder of the first mortgage bought the property and assumed both mortgages).
174. Miami Oil Co. v. Florida Discount Corp., 102 Fla. 209, 135 So. 845 (1931).

the indorser-assignor, or an indorsee-assignee who had notice of a prior transfer, cannot take advantage of the rule for obvious equitable reasons.[175]

If a lender is to take only a security interest in chattel paper, the problem is to protect both his and the borrower's positiions. The borrower will not be prejudiced by a mere assignment of the mortgage to the lender, even though absolute by its terms, since the lender cannot give his assignee any greater right than he had and since the borrower may prove by parol evidence that the lender had only a security interest.[176] The rule extends to the case where the lender also has and transfers the note if the transfer is after maturity.[177] From the lender's point of view, the mere hypothecation of the mortgage and note to him seems like little protection; for instance, it appears that the borrower may thereafter execute a valid extension agreement with the mortgagor.[178] Even if the lender takes possession of the note and the mortgage, he may return them to the borrower for a paticular purpose, such as foreclosure. In one case the borrower foreclosed and bought in, but instead of mortgaging the land to the lender he deeded it to his own daughter gratuitously. The court enforced the lender's equitable lien against the daughter.[179] The lender might have even better protection under a trust receipt transaction (the mortgage note being an "instrument"),[180] but even that arrangement would be no protection against one who became a holder of the note in due course.[181] Again, it is evident that the transferee of chattel mortgage paper must look to the note.

Conditional Sales Paper

Basically, the transferee of conditional sales paper has the same remedies against the obligor as the transferor and must make the same election between repossession and enforcement of the debt.[182] Even though the transferee has no right to possess, his ratification of repossession by the transferor bars the transferee from an action for the purchase price.[183] The election doctrine would probably be invoked by the very negotiation of the notes by the transferor-vendor to the transferee,[184] but the court has expressly upheld a provision in a conditional sale contract that the negotiability of the notes would not waive the retention of title.[185]

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175. *Ibid.* (assignment of real estate mortgage recorded before negotiation of the senior note); McClure v. Century Estates, 96 Fla. 568, 120 So. 4 (1928) (assignor assigned one note, held the others).

176. Hulet v. Denison, 146 Fla. 478, 1 So.2d 467 (1941).

177. *Ibid.*

178. *Cf.* Aultman v. Wilcox, 138 Fla. 11, 188 So. 800 (1939).

179. Folsom v. Farmers' Bank, 102 Fla. 899, 136 So. 524 (1931).

180. See earlier discussion.

181. FLA. STAT. § 673.09(1)(a) (1951).

182. Universal Credit Co. v. McKinnon, 106 Fla. 849, 143 So. 778 (1932). For a complete discussion of the transferor's (vendor's) remedies, see Comment, *Conditional Sales—Remedies of the Seller in Florida*, 7 MIAMI L.Q. 385 (1953).

183. Hamilton v. Vero Beach Reserve Mortgage Co., 107 Fla. 65, 144 So. 362 (1932).

184. Voges v. Ward, 98 Fla. 304, 321-322, 123 So. 785, 791 (1929).

185. *Ibid.*

Aside from the possibility of being bound by one of the "hidden" elections just discussed, the transferee of conditional sales paper — upon default[186] — may carefully make the same choice open to the transferor-vendor, *i.e.*, repossession or collection of the debt; but the rules governing the transferee's use of each remedy may vary from those governing the vendor's use of them.

Peaceful repossession by self-help surely implies the right to possess. The right to possess is necessary to replevin,[187] and it is from the replevin cases that one may determine when the transferee has the right to possess. The transferee derives the right to possess from the assignment of the conditional sale contract.[188] An assignment for the purpose of partial collection will not support replevin.[189] A lender-transferee has no title where the borrower-transferor, as collateral, has indorsed the notes but only deposited the contract; the right to replevin remains in the borrower-transferor.[190]

When the transferee does get an assignment of the contract, his title and his right to replevy upon default are broadly upheld. Repossession by the transferor places all title in the transferee, and a bona fide purchaser for value from the transferor gets nothing.[191] Levying creditors of the transferor are similarly denied execution on chattels repossessed by the transferor.[192] In replevin, the transferee may secure damages for unlawful detention,[193] but these can probably be reduced by any defenses or claims of the obligor arising out of the original contract, such as a claim for breach of warranty.[194]

The transferee of conditional sales paper takes the notes involved by indorsement ordinarily. Mere reference on the notes to the accompanying conditional sale contract does not destroy the negotiability of the notes unless the reference clearly shows the note to be burdened with the terms of the contract.[195] If the notes are negotiable by this test, the next problem is whether or not the transferee of the conditional sales paper is a holder in due course.

There were indications that transferees are holders in due course,[196]

186. The transferee is fully liable for his repossession before default. Commercial Credit Co. v. Willis, 126 Fla. 444, 171 So. 304 (1936).
187. FLA. STAT. §§ 78.01, 78.06 (1951).
188. Delco Light Co. v. John Le Roy Hutchinson Properties, 99 Fla. 410, 128 So. 831 (1930). See Brown, J., concurring at 423, 128 So. at 836.
189. Harman-Hull Co. v. Burton, 106 Fla. 409, 143 So. 298 (1932).
190. Roof v. Chattanooga Wood Split Pulley Co., 36 Fla. 284, 18 So. 597 (1895).
191. Commercial Credit Co. v. Neel, 91 Fla. 505, 107 So. 639 (1926).
192. Baer v. General Motors Acceptance Corp., 101 Fla. 913, 132 So. 817 (1931).
193. FLA. STAT. § 78.18 (1951).
194. FLA. STAT. §§ 78.16, 52.11(1) (1951); *see* Delco Light Co. v. John Le Roy Hutchinson Properties, 99 Fla. 410, 422, 128 So. 831, 836 (1930) (concurring opinion).
195. Mutual Finance Co. v. Martin, 63 So.2d 649 (Fla. 1953); Fowler v. Industrial Acceptance Corp., 101 Fla. 259, 134 So. 60 (1931); Voges v. Ward, 98 Fla. 304, 123 So. 785 (1929). *But cf.* Hamilton v. Vero Beach Reserve Mortgage Co., 107 Fla. 65, 144 So. 362 (1932).
196. *Cf.* Fowler v. Industrial Acceptance Corp., 101 Fla. 259, 262, 134 So. 60, 61 (1931); Voges v. Ward, 98 Fla. 304, 312, 123 So. 785, 788 (1929).

but the recent case of *Mutual Finance Company v. Martin*[197] has indicated another view. The parties involved were the transferee-finance company, the transferor-vendor and the obligor-vendee. The following facts were among those stipulated:[198] the company prepared the notes and contracts for the vendor under a general financing plan, the company investigated and approved the vendee before the sale, the vendor misrepresented the goods, the company retained a reserve of about one-tenth against the contract, and the company undertook to improve the chattel before it sued. This last fact was stipulated not to charge the company with notice of the misrepresentations or failure of consideration. It was held that the company could not be heard to say that it was a purchaser in good faith since it was a party from the beginning.

It is difficult to state what sets of facts will have the same effect upon the status of the finance company because the court twice limited the decision to the particular facts and emphasized the limiting words each time.[199] The reasoning, far less restricted, was that the finance company was more worldly than the consumer; was better able to check on the vendor; and, therefore, should stand the risk of the vendor's insolvency.[200] Such broad reasoning, and even the limited holding, cast doubt on a good many financing arrangements involving the transfer of chattel paper.

So far the rights of the transferee of conditional sales paper under the contracts and under the notes have been discussed separately. It should be noted that the express terms of a conditional sale contract may give many of the rights to the holder of the notes *and* the contract.[201]

The transferee generally requires the engagement of the transferor to pay any deficiency resulting upon repossession and resale. Certainly the transferor is liable on his indorsement of the notes, but he guarantees the maker's performance only to holders in due course[202] — which may not include the transferee under certain facts.[203] If the transferor merely guarantees the obligor's payments, can the transferor invoke the doctrine of election of remedies? An affirmative answer was given in one case,[204] and with this as a basis the court reasoned as follows: the transferor owed the transferee nothing after repossession; without an underlying debt the transfer of the conditional sales paper could not be an unrecorded mortgage; therefore, the transferor's levying creditor could not get at repossessed cars in the transferor's possession. A later case held that the transferor's independent promise to pay any deficiency, as opposed to a mere guaranty of the obligor's debt, remained actionable after reposses-

197. 63 So.2d 649 (Fla. 1953).
198. *Id.* at 650.
199. *Id.* at 652, 653.
200. *Id.* at 653.
201. See Voges v. Ward, 98 Fla. 304, 329, 123 So. 785, 793 (1929).
202. FLA. STAT. § 674.68 (1951).
203. See Mutual Finance Co. v. Martin, 63 So.2d 649 (Fla. 1953).
204. Baer v. General Motors Acceptance Corp., 101 Fla. 913, 132 So. 817 (1931).

sion.[205] It may follow then that a transfer of conditional sales paper is a mortgage if the transferor gives his independent promise to pay any deficiency arising upon repossession and resale.

COMMON PROBLEMS

Certain parts of the law will affect the financing of more than one of the three types of assets discussed. For instance, both transfers of chattel paper and assignments of accounts receivable have parts of the law of assignments in common. A loan on (as distinguished from a purchase of) any of the three assets is subject to the usury laws.[206]

Perhaps the most important common problems are those of safeguarding the chattels involved in an inventory loan or in dealing with chattel paper. First is insurance.

A covenant by a mortgagor to keep the property insured gives the mortgagee an equitable lien on the proceeds.[207] The transferee of a mortgage and note has no insurable interest unless he gains privity with the insurer by being mentioned in the standard mortgage clause,[208] but the transferor has an insurable interest to the extent of his liability on the note;[209] therefore the transferee must sue the transferor on the note to secure his part of the proceeds.[210]

Suppose that the destruction of a chattel is covered by the insurer under a policy with a standard mortgage clause including the transferee of the conditional sales paper, but that the destruction is caused by an inherent defect. Can the insurer subrogate himself to the rights of the vendee-obligor as a defense against the transferee's right to the proceeds? It has been held that there can be no such subrogation if the insurer has not yet paid the vendee his share of the proceeds.[211] It was suggested in the same case that the insurer would have no defense against the transferee, even if the insurer paid the obligor-vendee,[212] because in Florida a standard mortgage clause has been held to create an independent obligation of the insurer to the mortgagee, unaffected by the mortgagor's breach of warranty.[213]

Another problem in safeguarding chattels is the control of many types of goods by statute.[214] Special taxes may be levied on certain

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205. White Motor Car v. Briles, 137 Fla. 268, 188 So. 222 (1939).

206. See Comment, *Evasion and Avoidance of Florida Usury Laws*, 5 MIAMI L.Q. 493, 498 (1951).

207. Sumlin v. Colonial Fire Underwriters, 158 Fla. 95, 27 So.2d 730 (1946); Atwell v. Western Fire Ins. Co., 120 Fla. 694, 163 So. 27 (1935).

208. Whitlock v. American Central Ins. Co., 107 Fla. 13, 144 So. 412 (1932).

209. Whitlock v. American Central Ins. Co., 122 Fla. 363, 165 So. 380 (1936).

210. Whitlock v. American Central Ins. Co., 107 Fla. 13, 144 So. 412 (1932).

211. Federal Ins. Co. v. Tamiami Trail Tours, 117 F.2d 794 (1941).

212. *Id.* at 796.

213. Fire Ass'n v. Evansville Brewing Ass'n, 73 Fla. 904, 75 So. 196 (1917).

214. *E.g.*, FLA. STAT. cc. 576-580 (1951) (agricultural supplies); FLA. STAT. c. 327 (1951) (oil and gas); FLA. STAT. c. 398, § 500.16 (1951) (narcotics and new drugs).

goods.[215] The forfeiture of an innocent party's interest in an automobile seized for carrying alcoholic beverages on which the tax is unpaid is not unconstitutional,[216] but it was held not to be the intent of the Florida Legislature to make forfeit the interest of an innocent transferee of conditional sales paper.[217] However, the Federal statute does imply such a forfeiture,[218] and conditional sales contracts may hopefully include covenants of the vendee not to use the chattel for such a purpose.[219]

Other state and local taxation is an additional problem common to all three classes of assets. The notes or other written instruments involved will lead to a documents tax.[220] Under the intangible personal property tax,[221] it is possible that companies should file a tax return for all the accounts in their control. As an analogy, banking, loan and trust companies must return any "credits",[222] which includes "every claim and demand for money or other valuable thing, and every annuity or sum of money receivable at stated periods, due or to become due."[223] Similarly, lenders on inventory may someday be asked to return tangible personal property held by them as owners, controllers, managers or custodians.[224] And were the finance companies to avoid those types of taxes, they could not escape a basic license tax.[225]

RICHARD J. HORWICH

215. *E.g.*, FLA. STAT. c. 210 (1951) (cigarettes); FLA. STAT. cc. 207-209 (1951) (motor fuels).
216. J. W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, (1921); Scarborough v. Newsome, 150 Fla. 220, 7 So.2d 321 (1942).
217. General Motors Acceptance Corp. v. State, 152 Fla. 297, 11 So.2d 482 (1943).
218. J. W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505 (1921).
219. See White Motor Car v. Briles, 137 Fla. 268, 275, 188 So. 222, 225 (1939).
220. FLA. STAT. c. 201 (1951).
221. FLA. STAT. c. 199 (1951).
222. FLA. STAT. § 193.09 (1951).
223. FLA. STAT. § 193.01 (1951).
224. FLA. STAT. § 200.08 (1951).
225. FLA. STAT. § 205.49 (1951) (covers cases where no other laws require licenses. Fee: one hundred dollars).