Negotiable Instruments and Banking

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## I. Introduction

The Florida courts have decided an interesting variety of cases during the past two years, and the legislature has made a number of changes in the banking and savings and loan association laws. The legislation and cases in the field of usury\(^1\) and the estoppel and mortgage acceleration cases\(^2\) are particularly interesting and important to the general practitioner. The courts have continued to decide cases without making any reference to the Uniform Commercial Code (UCC), either

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* Professor of Law, University of Miami. The materials surveyed herein extend from 225 So.2d 321 through 250 So.2d 256 and the legislation enacted by the 1970 and 1971 Regular and Special Sessions of the Florida Legislature.

1. Pages 77-79 infra.
2. Pages 81-83, 84-86 infra.
because the facts occurred prior to the effective date of the Code, or because the lawyers failed to assert the Code. Perhaps there is a subconscious feeling that if "we don't talk about it, it may go away." Notwithstanding its limited utilization, it is doubtful that the Code will wither away from non-use. Thus, the author has attempted to fill this judicial omission by comparing the decisions with applicable sections of the UCC.

II. NEGOTIABLE INSTRUMENTS

A. Venue

An interesting aspect of venue was raised in the case of Coon v. Abner. A promissory note was executed and made payable in Orange County, Florida, and the note was secured by a mortgage on land parcels in Dade County, Florida, and in California. The maker brought suit in Dade County to cancel the note on the grounds of usury. A majority of the court, in a per curiam decision, held that since the suit sounded in equity as an action for the cancellation of an alleged usurious note, rather than as a suit to remove a cloud or lien upon real estate, the proper venue was in Orange County rather than in Dade.

Section 47.061 of the Florida Statutes provides that the proper venue on a promissory note lies in the county in which the note was signed by the maker or one of the makers. In spite of this statute, the District Court of Appeal, First District, held in a per curiam opinion that when a note was signed by all of the makers in Orange county, where they all resided, venue was still proper in Bay County, because the note grew out of a building construction and real estate transaction consummated in Bay County. In addition, the note was a replacement note for one originally signed in Bay County.

B. Standing to Sue

Ordinarily, one cannot sue on a negotiable instrument unless he is a party to it. However, if a court in a divorce action orders the maker to pay one-half of the principal and interest to the former wife of a man who had a half-interest in the loan evidenced by the note, the wife has standing to sue on the instrument.

C. Burden of Proof

Section 3-307(2) of the UCC provides that "[w]hen signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense." The Dis-

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3. 246 So.2d 143 (Fla. 3d Dist. 1971). In light of the succinct dissenting opinion of Judge Barkdull, the majority opinion seems questionable. Id. at 144 (dissenting opinion).
District Court of Appeal, Fourth District, has used this Code section as the basis for holding that a summary judgment should not be entered in behalf of the plaintiff-holder of a note until he produces the note, even though the defendant's affidavit virtually admitted that he had signed the note.  

The burden of proof of lack of consideration for a negotiable instrument rests upon the person asserting this affirmative defense, notwithstanding anything to the contrary in Section 68.06 of the Florida Statutes. Payment is also an affirmative defense. The burden of proving this defense would be met when the maker of a promissory note offered a satisfaction of mortgage form (which acknowledged the payment of the note) into evidence even though the form was not a recordable instrument because it only had one witness, and the expiration date of the notary's commission was prior in time to the date of execution. A document may be valid as showing payment even though it could not be recorded.

The burden of proof rules of Windle seem entirely consistent with section 3-307 of the Code. Section 3-603 of the Code, which provides the rules governing payment of a negotiable instrument, is silent as to any necessity for a receipt or satisfaction form to be given in return for payment. However, section 3-505 permits the debtor who presents for payment to require "a signed receipt on the instrument for any partial or full payment and its surrender upon full payment." It is submitted that this latter section is consistent with the holding of Windle.

When a holder of a check claims to be a holder in due course in an affidavit and the drawer sets forth in his affidavit the defense that the holder had possible notice of the defense of conditional delivery, if the drawer fails to set forth facts which would raise an inference of this notice to the holder, summary judgment may be entered in favor of the holder. When the other hand, a trial court may enter a summary judgment against the plaintiff endorsee of a note when he admits that he is not a holder in due course and that he knew at the time he received the note that the defendant maker was not to be held liable on the note.

D. Consideration

The defense of failure of consideration must be properly raised as an affirmative defense to an action on a note. When a note was given as consideration for the purchase of a vessel which was sold "as is, where is," any oral representation or warranty as to the condition of the vessel was excluded.

7. Windle v. Sebold, 241 So.2d 165 (Fla. 4th Dist. 1970) [hereinafter cited as Windle].
8. Kessler v. First State Bank, 247 So.2d 796 (Fla. 3d Dist. 1971).
The Florida Rules of Civil Procedure, as well as the Uniform Commercial Code, provide that failure of consideration must be raised (and established) by the person asserting this defense. Furthermore, the UCC is in accord with the holding that an "as is, where is" sale is a disclaimer of any warranty of quality.

Another problem of consideration may arise when an attorney undertakes to invest his client's money in return for unsecured promissory notes issued by the borrowers. If the client later demands an accounting of the attorney's stewardship in the matter, and the attorney gives the client his personal promissory note when threatened with a grievance complaint to the bar, this note is deemed supported by consideration. The issuance of the note by the attorney in return for the express or implied promise by the client that he will forbear preferring charges before the bar association constitutes sufficient consideration. Further, the issuance of the note by the attorney as agent or trustee of his client as an accounting or settlement will also constitute consideration.

E. Illegality

A note given to an unlicensed real estate agent as payment for a real estate commission is illegal and unenforceable. However, a promissory note given to pay a real estate agent a sum of money for arranging for rezoning of real property is not invalid because of an illegal consideration, as long as the particular efforts of the agent did not constitute the unauthorized practice of law.

According to the UCC, a holder who does not have rights of a holder in due course will be subject to the defense of illegality, and even a holder in due course will take subject to this defense if the illegality is deemed to render the instrument "a nullity."

F. Depository Bank as a Holder

The case of Coconut Grove Bank v. M. R. Harrison Construction Corp. presented a seeming comedy of errors both in banking practice and law. Harrison Corporation delivered its check to a payee who deposited it for collection and deposit in the Coconut Grove Bank. The bank allowed the payee to draw checks against this uncollections check

13. UCC § 2-316(3).
17. UCC § 3-306.
18. UCC § 3-305(2)(b).
19. 226 So.2d 120 (Fla. 3d Dist. 1969) [hereinafter cited as Harrison].
and also applied most of the proceeds of the check against a promissory note which was owed to the bank by the payee. Harrison stopped payment, and the depository bank reversed its entries crediting the major portion of the check against the debt of the payee and recredited this amount to the payee's account. The bank, purporting to be a holder in due course, then sued Harrison for the amount drawn against the check whose payment had been stopped.

There was no apparent reason for the bank to reverse its entries. If it had not done so, it could have been a holder in due course for the amount involved. The court said that this case was controlled by the UCC, but that all parties had agreed that the pre-Code law was the same as the Code law. It would appear to the author that the parties did not understand the Code provisions applicable to this point. Section 4-208(2) adopts the "first in, first out" system (FIFO) whereby any checks drawn on an account are debited against the oldest deposit until it is exhausted and then the next oldest deposit in sequence until each is exhausted. A cursory glance at the Harrison decision shows that both the trial court and appellate courts deducted the sum of $1,512.50 (which was deposited two days after the check in question) from the amount which the bank claimed as a holder in due course. Under a proper application of the FIFO system, this sum was actually paid by the bank from the check whose payment was stopped, and the bank should have recovered this amount from the drawer—Harrison.

G. Payee as a Holder in Due Course

A Florida court in the case of Exchange National Bank of Winter Haven v. Beshara,20 has finally acknowledged that in accordance with the UCC21 a payee may be a holder in due course. In that case, a sub-contractor entered into a security agreement with a bank under which he assigned to the bank all past, present, and future accounts receivable and all contract rights. The sub-contractor then notified the general contractor to make all payments by check to the sub-contractor and the bank as joint payees. An $18,000 check was issued to these joint payees, and the bank allowed the sub-contractor to deposit the check to his own account, rather than a special account controlled by the bank. The sub-contractor drew on the entire $18,000 amount before the check had cleared, and a large portion was given to the bank in payment of the prior debt of the sub-contractor. When the general contractor stopped payment on the check, the bank claimed to be a holder in due course in its suit against the contractor. The court held that under sections 3-303(1), 4-208(1), and 4-209 of the Code, the bank had a security interest in the check and had given value to the extent of the withdrawals or

20. 236 So.2d 198 (Fla. 3d Dist. 1970).
21. UCC § 3-302(2).
credit extended on the check. In addition, the bank had acted in good faith (honesty in fact in the transaction) and thus was a holder in due course.

H. Usury

A relatively unusual facet of the usury question arose in *Curtiss National Bank of Miami Springs v. Solomon.* Solomon owed money to a bank. During the life of that loan the bank asked Solomon to guarantee payment of an additional loan which the bank had made to a corporation in which Solomon had a substantial interest. Solomon refused to give the guarantee. Subsequently, the corporation defaulted on the loan and the bank charged off the loan as uncollectable. When the Solomon loan matured, the bank threatened to sell stock which it had received as collateral from Solomon. Solomon asked the bank to forbear, and the bank agreed to do so, provided that Solomon paid approximately one-half of the defaulted corporation loan. Solomon executed various promissory notes for the corporate debt (and his own) and eventually these notes were paid. Solomon then sued the bank under sections 687.03 and 687.04 of the Florida Statutes. The court held as a matter of apparent first impression in Florida that:

Under the broad language of the Florida Statutes (§ 687.03) against exaction of excessive interest, directly or indirectly, "by any contract, contrivance or device whatever," it is proper to classify as interest an agreement to pay, in addition to a stipulated rate of interest, the debt of another to the lender for which the borrower is not legally obligated. While the decisions in jurisdictions where that question has arisen are not uniform, we approve those which so hold.

The mere fact that a lender refuses to make a loan to individuals and insists that they incorporate in order for him to exact additional interest is not enough to justify a court in piercing the corporate veil and holding that the loan was, in fact, made to the individuals and therefore usurious. Further, under section 687.11 of the Florida Statutes, a lender who has exacted interest in excess of fifteen percent per annum from a corporate borrower forfeits only the interest exacted, while if the borrowers were individuals the lender would forfeit double such interest.

The case of *Fields v. Wilensky* is another case of first impression in Florida involving an unusual retroactive application of usury statutes. A promissory note was given for a loan on March 16, 1964; the note was

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22. UCC § 1-201(19).
23. 243 So.2d 475 (Fla. 3d Dist. 1971).
24. Id. at 477 (emphasis added by the court).
26. 247 So.2d 477 (Fla. 4th Dist. 1971) [hereinafter cited as *Fields*].
signed by a corporation and guaranteed by an individual. The note provided for more than 25 percent interest per annum. At that time, section 687.07 of the Florida Statutes provided for forfeiture of both principal and interest when more than 25 percent interest yearly was willfully and knowingly charged, irrespective of the borrower's status as an individual or a corporation. In 1965 the Legislature enacted section 687.11 which provided solely for the forfeiture of interest, and the court held (in accordance with prior authority) that this 1965 statute impliedly repealed section 687.07. In 1969, the legislature expressly repealed section 687.07, but it also enacted section 687.071 which provides for forfeiture of interest in excess of ten percent for an individual and 15 percent for a corporation. Section 687.071(1) also provides that "no extension of credit made in violation of any of the provisions of this section shall be an enforceable debt in the courts of this state."

The court held that section 687.071 impliedly repealed section 687.07 where more than 25 percent interest per annum is charged. Consequently, the lender lost both principal and interest, even though the transaction occurred years before the enactment of section 687.071. In Fields the court further stated in dicta, that where the interest charge exceeds ten percent for an individual debtor or 15 percent for a corporate debtor, but is not in excess of 25 percent, the lender simply forfeits the interest. It is interesting to note that the District Court of Appeals, First District, has held27 that section 687.071 is not to be given a retroactive application. Unfortunately, the court failed to cite Fields, and the law will remain uncertain until the Supreme Court of Florida reconciles the conflicting views.

The legislature has added a method of computation of interest to the Florida Statutes:

For the purpose of this Section [687.03] and Section 687.02, Florida Statutes, the rate of interest on any loan of money shall be determined and computed upon the assumption that the debt will be paid according to the agreed terms, and in the event said loan is paid or collected by court action prior to the term of said loan, any payments charged, reserved, or taken as an advance or forbearance which are in the nature of and taken into account in the calculation of interest, shall be spread over the stated term of the loan for the purpose of determining the rate of interest.28

This amendment was obviously designed to overcome the unique Florida rule which has made otherwise non-usurious loans usurious in the event of acceleration.29

29. See e.g., First Mort. Corp. v. Stellmon, 170 So.2d 302 (Fla. 2d Dist. 1964).
I. Bankruptcy

The filing by the makers of a promissory note of a petition under chapter 12 of the Bankruptcy Act in the federal district court does not operate as a bar to an in personam suit by the holder of the note against the makers nor as a valid defense to the action. Of course, if the makers receive a discharge in bankruptcy, this would constitute a valid defense.

J. Splitting of a Cause of Action

In a case of apparent first impression, the District Court of Appeal, First District, has stated that when interest is provided for by a promissory note, the interest constitutes a separate promise to pay as binding as the promise to pay the principal sum. Each promise may be made the basis of a separate demand even after maturity. As a result, the court denied a defense that one cannot split a cause of action and held that the holder of a demand note may sue for and recover a judgment for interest and then subsequently sue for and recover a judgment for the unpaid principal over the maker's objections that the first judgment for interest would act as a bar to the second suit.

K. Discharge

In a case involving a note executed before the effective date of the UCC in Florida, the District Court of Appeal, Third District, considered the matter of discharge where a note had three co-makers, one of which was a corporation, and the other two individual co-makers who were also the corporate president and secretary. The payee had entered into a compromise arrangement in the bankruptcy court under which he accepted 12\% of the debt from the corporation and discharged it. At the same time he expressly reserved his rights against "any endorser, guarantor or surety." The court held that the two individual co-makers would be discharged under the usual contract rule that a release of one joint contract obligor releases all of them. However, under this same rule if the remaining contract obligors consent to the discharge of one of the joint obligors (the corporate obligor in this case), then they will continue to be liable to the payee of the note. Additionally, the court stated that the clause reserving the payee's rights against "any endorser, guarantor or surety" would not be sufficient to reserve rights against a co-maker. It would appear that the reservation of rights clause would also be ineffective against a co-maker under section 3-606 of the Code.

31. UCC § 3-305(2)(d); see Twinem, Determination of Dischargeability of Debts in Bankruptcy Proceedings, 88 Banking L.J. 591 (1971).
32. First Nat'l Bank v. Freedman, 244 So.2d 183 (Fla. 1st Dist. 1971).
33. Glidden Co. v. Zuckerman, 245 So.2d 639, 640 (Fla. 3d Dist. 1971).
L. Discharge of Underlying Obligation

A sizeable chunk of hard-learned contract case law has been overruled by a new Florida statute which provides that "[w]hen the amount of any debt or obligation is liquidated, the parties may satisfy the debt by a written instrument other than by endorsement on a check for less than the full amount due."38

Under Florida case law it is a question of fact as to whether the cashing of a check which bears the notation, "Payment of Accounts in Full," is an accord and satisfaction of an unliquidated debt.35 The UCC is of little assistance in this area.36

M. Suit on Instrument or on Underlying Obligation

According to a recent case, when a check has been issued as the down payment for the purchase price of real property, and the drawer stops payment on the check and refuses to complete the purchase, the holder of the check (the vendor of the property) may sue upon the check independently of the contract for sale which has been breached.37 This case is entirely consistent with section 3-802(1)(b) of the Code which was not cited by the court.

N. Legislation

For the purpose of borrowing money for a person's own higher education expenses, the nonage disability of minors who have reached the age of sixteen has been removed. Any promissory notes or other instruments executed to secure these loans are valid provided that the interest rate does not exceed seven percent annually.38

III. Mortgages

A. Assignments

An assignee of a construction mortgage, who fails to record his assignment until months after the assignor-mortgagee has satisfied the mortgage as of record, has no claim against the original mortgagors or against a subsequent mortgagee who lent money on a permanent mortgage, when it appears that these latter persons had no knowledge that anything was wrong. It should be noted, however, that this result can occur only when the assignor-mortgagee fails to indorse the note as well as assign the mortgage. If the note is indorsed, then only the holder can

35. See Best Concrete Corp. v. Oswalt Eng'r Serv. Corp., 188 So.2d 587 (Fla. 2d Dist. 1966).
36. See UCC § 3-802.
37. Popwell v. Abel, 226 So.2d 418 (Fla. 4th Dist. 1969).
validly discharge the obligation. Under section 3-603(1) of the UCC, payment must be made to the holder for it to constitute a discharge, and since a mortgage is merely security for a note, if the note is not discharged then neither is the mortgage.

A classical law school examination question was presented by the facts in Criad o v. Milgram. A couple purchased a home and executed a purchase money mortgage (to a mortgage company) with payments to commence on September 1, 1961. On August 16, 1961, the mortgage was assigned by the mortgage company to Milgram who allegedly wrote the mortgagors and told them to begin paying him on September 1, 1961. The mortgagors denied receiving this letter and continued to pay the president of the mortgage company from September 1, 1961 through May 1, 1963, until the president of the mortgage company vanished. Milgram then personally advised the mortgagors of the assignment and demanded payment of future payments. The mortgagors abided by this demand. Milgram admitted that he knew that the mortgagors were paying the vanished president from September 1, 1961 through May 1, 1963, but, in spite of this knowledge, instituted foreclosure proceedings for the “unpaid” amounts which accrued within that time period.

The court held that the evidence amply supported the defense of estoppel and that the mortgage was not in default as the mortgagors were entitled to a credit for the full amount that they had paid to the vanished president, as though it had been paid directly to Milgram. The UCC provides that unless displaced by particular provisions, the principles of law and equity, including the doctrine of estoppel, shall remain in effect to supplement the Code. Hence this case should have continued vitality.

B. Balloon Mortgages

The Florida Supreme Court has upheld the constitutionality of the balloon mortgage statute.

C. Estoppel

An interesting aspect of estoppel was illustrated in Lupoff v. Hartog. A woman lent an attorney money through the intercession of her accountant. The attorney-mortgagor prepared all of the instruments, but he failed to indicate on the mortgage that it was a balloon mortgage in accordance with section 697.05(2)(a) of the Florida Statutes. When the mortgagee instituted foreclosure proceedings, the attorney-mortgagor attempted to assert the balloon mortgage rule which provides that unless

40. 237 So.2d 596 (Fla. 3d Dist. 1970).
41. UCC § 1-103.
42. Winner v. Westwood, 237 So.2d 151 (Fla. 1970), upholding FLA. STAT. § 697.05 (1969).
43. 237 So.2d 588 (Fla. 4th Dist. 1970).
a mortgage exhibits on its face that it is a balloon mortgage, the lender forfeits all interest and attorney's fees. The District Court of Appeal, Fourth District, held that the attorney was estopped from asserting this defense inasmuch as he had assumed the responsibility for properly preparing the note and mortgage when he was dealing with a widow who had no independent legal advice.

In a mortgage foreclosure action, a husband and wife claimed the mortgage was invalid as an encumbrance against homestead property, and because the two subscribing witnesses who signed the mortgage were not present when the mortgage was executed. The court held that they were estopped to assert these defenses since they had knowledge of the alleged defects and other provisions of the instrument from the date of its execution. In addition, they had made monthly payments for seven years, and the note and mortgage were at the time of the foreclosure held by a holder in due course of the note who was the third holder of the note and mortgage.\(^44\)

A classic case of estoppel was illustrated in *Edelstein v. Peninsular Lumber Supply Co.*\(^45\) A husband and wife were involved in divorce proceedings, and a suit to foreclose the mortgage was brought against them. Prior to this suit, the husband conveyed his interest in the property to the wife as part of the divorce settlement. Service of process in the foreclosure action was made on the husband in his own behalf, and service was also made on the wife by leaving a copy of the summons with the husband. The husband never informed the wife of the summons. The mortgagee did not know of the husband's failure to inform his wife of the summons, but she did have knowledge of the foreclosure proceedings, and they were continued for two months in order to give her an opportunity to pay the amount owing. The wife was unable to secure the needed funds. The property was then foreclosed and sold to a corporation controlled by her former husband. The corporation constructed a building on the property and then defaulted on a new mortgage given by it to the same mortgagee. The mortgagee brought foreclosure proceedings against the corporation and the former wife. The lower court held that the former wife was estopped from attacking these proceedings because she stood by with knowledge of the construction of the building for a period of approximately fifteen months without raising her claim. It should be noted that the wife was simultaneously raising the alleged fraud in the court which handled the original divorce proceedings.

Acceleration for failure to make a monthly payment has been denied upon the ground of estoppel when a payment was not made within a ten day grace period, but which was made within a former fifteen day grace period, as originally provided for in the note and mortgage. Since the facts showed that the mortgagees had accepted similar "late" payments

\(^{44}\) Harris v. Dikman, 235 So.2d 529 (Fla. 3d Dist. 1970).
\(^{45}\) 247 So.2d 721 (Fla. 2d Dist. 1971).
in the past, and since the instant payment check and the notice of acceleration crossed in the mail, acceleration was not permitted. As previously stated in this article, the doctrine of estoppel has been incorporated by reference into the UCC.

D. Priorities

Under Florida Statute section 713.56 (1969) (formerly 85.07), an after-acquired personal property provision in a real estate mortgage will have priority over a subsequent statutory lien for labor obtained by an electrical contractor who apparently furnished equipment, materials and labor to the encumbered real property. In a case dealing with this point, the court was careful to note that the equipment remained personal property and that the contractor (for some undisclosed reason) obtained a judgment awarding him this statutory lien rather than an equitable or a vendor's lien.

A mortgage which is recorded prior to the recordation of a judgment lien against the secured property continues to have priority over the judgment lien. This is true, even though the mortgagor gives a replacement note to the mortgagee as a renewal of the debt subsequent to a default in payment of the original note and mortgage.

E. Forgery

The Supreme Court of Florida has affirmed a district court of appeal decision in *Bank of Miami Beach v. Lawyers' Title Guaranty Fund* (which was discussed in the last Survey), but has chosen to approve the decision upon a different basis. The supreme court held that even though a mortgage note was void because it was forged, this would not invalidate the mortgage which contained genuine signatures. Consequently, since the mortgage was valid, there would not be any loss under a mortgage guaranty title insurance policy which guaranteed that the mortgage was a valid mortgage lien on the property. The District Court of Appeal, Third District, had held that the loss attributable to the defect in the note was not within the coverage of the mortgage clause of the title policy. Both courts decided that the title insurance company was not liable, but the legal perspectives varied.

The party asserting that signatures appearing on a deed and two mortgage releases, allegedly executed by a person now deceased, are

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47. See note 41 supra and accompanying text.
49. Silver v. Rubin, 225 So.2d 429 (Fla. 3d Dist. 1969).
forgeries has the burden of proving it by a preponderance or greater weight of the evidence and not by clear and convincing evidence as was formerly required in fraud cases.\footnote{52}

F. Election of Remedies

The holder of a note and mortgage may sue on the note rather than foreclose the mortgage, and this act will not discharge an indorser on the note. After receiving a judgment on the note, the holder may then foreclose the mortgage if the original judgment remains unsatisfied. Although it was not mentioned by the court, in a recent case involving this point,\footnote{53} the reader is cautioned that it may be unwise to sue on the note rather than to foreclose the mortgage when an indorser of the note is involved, because the indorser may assert that this act unjustifiably impaired his rights against the collateral under section 3-606(1)(b) of the Code. Of course, a proper utilization of section 3-606(2) (express reservation of rights) would eliminate all problems.

In one case, the mortgagors (a husband and wife) testified that they recorded mortgage payments in a ledger book about a week or ten days after the date of payments (some type of work by the mortgagors was apparently to be treated as payments on the mortgage). The District Court of Appeal, Fourth District, held that it was erroneous to admit this ledger under either the Shop Book Act (section 92.37 of the Florida Statutes) or the Uniform Business Records as Evidence Act (section 92.36 of the Florida Statutes), because the entries in the book were not made contemporaneously with the transactions, nor were they made in the regular course of business.\footnote{54}

When a mortgagor asserts a valid defense to the payment of a mortgage, it is error for the trial court to enter a pendente lite order relieving the mortgagor of his duty to make the payments. Instead, the court should order that all payments be deposited with the court.\footnote{55}

G. Acceleration

A series of three cases\footnote{56} discloses a conflict between the District Court of Appeal, Third District, which refuses to use any kind of an unconscionability brake to acceleration of mortgages by lenders, and the District Court of Appeal, Second District, which apparently conditions the right to accelerate upon some showing of substantial harm to the

\footnote{52} Pate v. Mellen, 237 So.2d 266 (Fla. 1st Dist. 1970). See Rigot v. Bucci, 245 So.2d 51 (Fla. 1971) as to the change in the Florida rule regarding the standard of proof required in proving allegations of fraud.

\footnote{53} Lisbon Holding & Inv. Co. v. Village Apt., Inc., 237 So.2d 197 (Fla. 3d Dist. 1970).

\footnote{54} E.Z.E., Inc. v. Jackson, 235 So.2d 337 (Fla. 4th Dist. 1970).

\footnote{55} Itvenus, Inc. v. Poultry, Inc., 241 So.2d 452 (Fla. 3d Dist. 1970);

\footnote{56} Campbell v. Werner, 232 So.2d 252 (Fla. 3d Dist. 1970); Clark v. Lachenmeier, 237 So.2d 583 (Fla. 2d Dist. 1970); Schechtman v. Groibel, 226 So.2d 1 (Fla. 2d Dist. 1969).
lender by actions of the debtor. The UCC uses a good faith test in the limited area of acceleration of instruments which permit acceleration "at will," while another more generalized section of the Code provides that "every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." The law of mortgages is a hybrid of real property law and the law of negotiable instruments and, as a consequence, the field is not entirely controlled by the Code. It is submitted, however, that the concepts of good faith and unconscionability should not be entirely foreign to the question of acceleration.

When a mortgagee has elected to accelerate (by filing a foreclosure action) the payment of the mortgage after a default in an installment payment by the mortgagor, it is reversible error for the trial court to deny acceleration and foreclosure on the grounds that the mortgagor had expended large sums of money in improving the property prior to the default and that he was willing to pay up the amount of the defaulted installment. On the other hand, it has been held that when a mortgage provides that the mortgagee has the right to accept or reject the mortgagor's grantee, the mortgagor conveys the property without the consent of the mortgagee, and the mortgage provides that the mortgagee may accelerate for any breach of the mortgage by the mortgagor, a court of equity will not allow the mortgagee to accelerate in the absence of a showing that harm has resulted to the mortgagee as a result of this "breach."

In *Schechtman v. Grobbel*, a "rider" to a mortgage provided that

> [i]n order to provide an escrow for the payment of County and City taxes, mortgagors shall pay together with and in addition to the regular monthly payment a sum equal to one-twelfth (1/12th) of the current annual taxes . . . .

The mortgagors for a period of time paid the principal, interest, and one-twelfth of the taxes monthly to the mortgagee. Subsequently, the mortgagors paid the tax payment into an escrow bank account and refused to pay the amounts monthly to the mortgagees. The mortgagees brought suit to foreclose, and the trial court refused foreclosure on the grounds that the quoted clause created an ambiguity and that the security was never in jeopardy. The District Court of Appeal, Second District, held that the clause was not ambiguous and that the trial court erred in ordering the tax payments paid into the registry of the court. However, the appellate court affirmed the denial of foreclosure, even though there

57. UCC § 1-208.
58. UCC § 1-203.
59. Campbell v. Werner, 232 So.2d 252 (Fla. 3d Dist. 1970). The court reviewed the cases which have held that only in the most extreme situations will a court be justified in denying acceleration of the mortgage upon default by the mortgagor.
60. Clark v. Lachenmeier, 237 So.2d 583 (Fla. 2d Dist. 1970).
61. 226 So.2d 1 (Fla. 2d Dist. 1969).
62. Id. at 2 (emphasis added).
was a technical breach, because the security was never in jeopardy. The appellate court also held that the trial court was incorrect in refusing to award attorney's fees. This was because the mortgage provided for the fees in the event that an attorney was employed by the mortgagees due to a failure of the mortgagors to abide by all of the covenants of the mortgage. The attorney's fees should not be measured by the same standard as if there had been a foreclosure, but a reasonable fee should be awarded as a result of the mortgagor's default.

An interesting tactical delaying defense to acceleration and foreclosure was presented in *Adams v. Citizens Bank of Brevard*.

A bank filed suit to foreclose a mortgage upon the ground that the mortgagors failed to make interest and tax payments and breached certain provisions of a construction loan agreement for which the mortgage was given. The mortgagors counterclaimed alleging that the bank had breached its construction loan agreement which caused the mortgagor to default, and the counter-claimant demanded a jury trial of this issue. The District Court of Appeal, Fourth District, held that the counterclaimant was entitled to a jury trial on this issue, and the trial court was in error in entering a judgment of foreclosure.

A mortgage which provides that it may be accelerated at the option of the mortgagee in the event that the mortgagor should convey the mortgaged property without the mortgagee's written consent and without the assumption of the mortgage by the grantee may not be accelerated when the land is sold without such written consent if the grantee does assume and agree to pay the mortgage.

**H. Deficiency Actions**

A mortgagee, who forecloses his mortgage and subsequently receives a deficiency judgment against the mortgagors which remains unsatisfied, may assert this deficiency against an insurance carrier which is admittedly liable for a fire loss which occurred prior to the foreclosure action. It has also been held that a trial court should not enter a deficiency judgment in favor of a first mortgagee during the pendency of a suit filed by the second mortgagee to redeem the property. Only after the conclusion of the suit to redeem will a court be in a position to determine the amount, if any, of the deficiency.

A relatively unusual mortgage problem was presented in *Symon v. Charleston Capital Corp.* A mortgagee held one mortgage on land in North Carolina and another on land in Florida, the latter mortgage being given as additional security for the original loan secured by the North Carolina mortgage.
Carolina property. The loan went into default, and the mortgagee foreclosed on the North Carolina property. This was done in accordance with North Carolina law which permits direct sale of land by a trustee under a deed of trust without the necessity of judicial foreclosure. The mortgagee bid in the North Carolina property and then brought suit to foreclose the Florida mortgage. The mortgagor asserted the events in North Carolina as a defense. The Florida court held that:

[W]here a mortgagee holds two mortgages on different parcels of land to secure the same debt which is in default, and seeks to foreclose such mortgages successively, it is not necessary to obtain a deficiency judgment in the one which is foreclosed first as a prerequisite to foreclosing the other. However, the defendant in the second foreclosure suit is entitled to the same equitable considerations as a defense, either in full or pro tanto, as would have been available to the mortgagor in the first suit had the mortgagee bid in the property and thereafter sought a deficiency judgment.\(^6\)

Under this reasoning, the District Court of Appeals, Fourth District, approved the actions of the trial court in finding that the true value of the North Carolina property was to be offset against the amount owed in the second foreclosure ($46,175, rather than the bid price of $25,000).

An interesting deficiency judgment question was presented in Peterson v. Sutton.\(^6\) Foreclosure of mortgage proceedings took place in Georgia. The mortgagees who held the purchase-money mortgage bid in the property for $40,000 which left $5,000 unpaid on the mortgage. The Georgia court confirmed the sale and the mortgagees brought suit in Florida for the remaining $5,000. The trial and appellate courts agreed that inasmuch as the testimony showed that the property was in fact worth $45,000 and that the mortgagees now held the property, Florida could refuse to award a deficiency judgment in spite of the fact that the Georgia court confirmed the sale.

I. Redemption

When a foreclosure judgment does not state a definite period within which the mortgagor may redeem the property, he may do so at any time prior to the issuance of the master's deed at a foreclosure sale, unless the court should order otherwise. Further, the equity of redemption may be exercised at any time before the judge approves the sale by entering an order confirming the master's report of the foreclosure sale.\(^7\)

A second mortgagee will be precluded upon the basis of unclean hands from redeeming mortgaged property after it has been foreclosed

\(^{68}\) Id. at 768.  
\(^{69}\) 230 So.2d 493 (Fla. 3d Dist. 1970).  
\(^{70}\) Rosen v. Hunter, 227 So.2d 689 (Fla. 3d Dist. 1969), modifying 224 So.2d 371 (Fla. 3d Dist. 1969).
by the first mortgagee and sold at a judicial sale when the second mortgagee took part in the foreclosure sale. In a recent case which so held, the second mortgagee did not bring an action until nine years after his cause of action accrued and after the purchaser had substantially improved the property. The amount owing (principal and interest) to him had been deposited into the registry of the court, and it was admitted that the second mortgagee was trying to obtain title to property worth more than $1,000,000 for approximately $20,000.71

J. Legislation

Original section 697.04(1) of the Florida Statutes provided that any mortgage or other instrument creating a lien on real or personal property which provided for future advances was required to provide for the maximum amount of the future advances and for a period not to exceed 20 years. This section was in conflict with a UCC provision, section 679.9-204(5) of the Florida Statutes. As a result, section 697.04 has been amended to delete any reference to personal property.72

A guardian of property may now execute a deed, lease, or mortgage in the name of the ward. The guardian may then convey, lease, mortgage, or release any actual or apparent interest of the ward in any property including homestead property.73

IV. Accommodation Parties

A guarantor of payment of a negotiable promissory note becomes liable upon default by the makers of the note, and there is no duty incumbent upon the holders to first sue the makers before filing suit against the guarantor. Further, the guarantor is not relieved of liability by the failure of the holder to notify the guarantor of default, nor by the fact that the holder has extended the time of payment or has accepted partial rather than full payments of installments. Finally, if there is consideration between the maker and payee of the note, it also constitutes consideration supporting the promise of the guarantor.74 Section 3-416 of the UCC codifies the various holdings of this case.

An accommodation party on a negotiable instrument may sign as a maker for the accommodation of an indorser and may recover from the indorser any amounts which have been paid to the holder of the instrument.75 Section 3-415 of the UCC is in accord.

The District Court of Appeal, First District, has held that where a husband and wife gave a letter to a bank which stated that in consider-

71. Sponder v. Equity Capital Co., 248 So.2d 251 (Fla. 3d Dist. 1971).
75. London Distrib. Co. v. Bastone, 244 So.2d 550 (Fla. 3d Dist. 1971).
ation for the bank making loans to a corporation from time to time, the
couple "jointly and severally [would] guarantee repayment of all such
loans now outstanding or hereafter created . . . ." the couple were
liable as guarantors for loans actually made by the bank to the corpora-
tion under the law of guarantyship and not under sections 3-119(1),
3-416(1), 3-118(6), 3-401, 3-606(1) or 3-102(1) of the UCC. The
court was careful to point out that if the guaranty had been written on
the notes which were given by the corporation to the bank, then the
guaranty would be governed by the Code. However, when the guaranty
is in fact a guaranty of the loans as distinguished from the notes, then
the Code has no application.

V. BANKS AND SAVINGS AND LOAN ASSOCIATIONS

A. General and Special Deposits

When a bank escrow agreement provides that checks are to be paid
upon the co-signature of two persons and the bank honors checks bearing
the sole signature of one cosigner who applies the funds to his own use,
the bank is liable to the corporation which furnished the funds.77

A bank does not have the right to deduct from a married woman's
account the face amount of a check which had been endorsed by her
husband after it was drawn by another person.78

In an action for the "conversion" of a federal savings and loan asso-
ciation account, brought by the depositor against "converters," the three
year statute of limitations under Florida Statute section 95.11(5)(c)
commences to run from the date that the depositor knows, or in the exer-
cise of ordinary business care would have discovered the fact of conver-
sion, rather than from the date of the wrongful "conversion."79

The case of Champion Map Corp. v. Chamco, Inc.80 is one of first
impression in Florida under the UCC. Champion employed Chamco to
solicit orders for its maps which Champion would send directly to the
customers. The customers would then pay Chamco which was supposed
to deposit the money in Champion's account in a Florida bank. Unfortu-
nately, Chamco deposited the collections in its own account. Subse-
quently, the arrangement was modified to provide that the retail buyers
of the maps would pay Champion directly, but again some of the cus-
tomers' money found its way into Chamco's bank account. The bank
filed a financing statement against Chamco's bank account, and Champion
knew of this filing. When Champion subsequently claimed the money in
Chamco's account, the bank claimed priority as being the first to file a
financing statement. The District Court of Appeal, Fourth District, re-

76. Fewox v. Tallahassee Bank & Trust Co., 249 So.2d 55 (Fla. 1st Dist. 1971).
78. Graham v. First Marion Bank, 237 So.2d 793 (Fla. 1st Dist. 1970).
80. 235 So.2d 50 (Fla. 4th Dist. 1970).
versed a summary judgment for the bank and held that the arrangement between Champion and its agent Chamco may have constituted an assignment of contract rights to Champion under which Champion was also to perform. If this is true, then section 9-104(6) of the UCC would control, and such an assignment is specifically excluded from the provisions of UCC Article 9 with the result that Champion might have priority over the bank. Testimony would have to be taken to ascertain which of the claimants to the account should prevail.

B. Payment and Collection of Items

The District Court of Appeal, Fourth District, has held in a pre-code transaction that a collecting bank and a drawee bank are liable in conversion to a co-payee of a check when both banks honor a check which does not bear the indorsement of the co-payee, since the law requires the indorsements of all joint payees. However, the co-payee's recovery is limited to his provable interest in the proceeds rather than the full amount of the check.\(^{81}\) Section 3-116(b) of the UCC provides that a check made payable to two or more persons is "payable to all of them and may be negotiated, discharged or enforced only by all of them." Under section 3-419 of the Code, the collecting bank is not liable in conversion "beyond the amount of any proceeds remaining in his hands." This rule will usually result in the non-liability of collecting banks, since the proceeds will not be in their possession, but in the possession of the wrongdoers.

In a very cryptic opinion, the District Court of Appeals, Third District, has held that in accordance with section 3-409(1) of the UCC a drawee bank is not liable on a check until it accepts (certifies) it.\(^{82}\) Section 4-104(1)(g) of the UCC (Section 674.104(1)(g) of the Florida Statutes) which deals with the definition of the word "item" was amended by adding the additional wording:

> and a photographic or other similar reproduction of an item may be treated in all respects as the original item by any payor bank or non-bank payor of the item, upon being furnished with an affidavit that the original item has been lost or destroyed and being furnished with security satisfactory to such payor.\(^{83}\)

C. Cashiers' Checks

It is legally improper for a bank to refuse to pay a cashier's check which it issued and which is in the hands of a holder in due course.\(^{84}\)

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82. Eastern Air Lines v. Coral Gables First Nat'l Bank, 240 So.2d 87 (Fla. 3d Dist. 1970).
83. Fla. Laws 1971, ch. 71-44.
84. Sani-Serv. Div. of Burger Chef Systems, Inc. v. Southern Bank, 244 So.2d 509 (Fla. 4th Dist. 1970). This case also reached the same result on another theory dealing with adequacy of consideration.
D. Gifts of Savings Accounts

A valid inter vivos gift requires three things: donative intent, delivery and acceptance by the donee. The recent case of *Wood v. Mc-Clellan*\(^\text{85}\) involves an unusual combination of these requisites. A father had a savings account in a federal savings and loan association. His daughter secured forms from the association to change the account to a new one in the joint names of the father and daughter. An employee of the association told the daughter that a change in the account to a joint status prior to December 29th would result in a loss of interest. The father and daughter signed the forms, but the daughter was in agreement with the association that the account should not be changed until after December 31st. This action was, according to the court, either in accordance with the father's instructions or with his consent. On December 23rd, the father died, and the association, not being aware of the father's death, made the change in the account on December 29th. The association sent the interest check to the decedent. The court held that there was insufficient proof of a valid gift inter vivos because there was no donative intent until after the due date of the interest (December 29), and there had been no acceptance until this date. Both of these factors occurred six days after the death of the alleged donor, hence his death prevented the completion of the gift. The holding of the *Wood* case should be compared with a subsequently adopted statute\(^\text{86}\) which provides that whenever an account (including a certificate of deposit) is opened in a bank in the names of two or more persons whether minors or an adult, payable to either of the survivors, it shall be presumed that the depositors intended that upon the death of any of them that the account (and additions thereto) should vest in the survivor or survivors. This presumption "may be overcome only by proof of fraud, undue influence, or clear and convincing proof of a contrary intent." In the absence of such proof, all rights to the account shall vest in the survivor notwithstanding the absence of proof of any donative intent or delivery, possession, dominion, control or acceptance on the part of any person, and notwithstanding the provisions hereof may constitute or cause a vesting or disposition of property or rights or interests therein, testamentary in nature which except for the provisions of this section, would or might otherwise be void or voidable.\(^\text{87}\)

It should be noted that this statute applies only to banks. Hence the validity of the *Wood* case (which involved a savings and loan association) would not be affected.

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\(^{85}\) 247 So.2d 77 (Fla. 1st Dist. 1971).


\(^{87}\) Id.
E. Gifts to Minors Act

Section 710.08 of the Florida Statutes (the Gifts to Minors Act) was substantially reworded with respect to the resignation, death, or removal of custodians, the appointment of successor custodians, performance bonds, and the like. It is interesting to note that a minor who is fourteen and who does not have a guardian has the power under this amended section to designate a successor custodian.88

F. Garnishment

Sections 77.24 and 77.07 of the Florida Statutes provide means by which a writ of garnishment (of a bank account) may be discharged or dissolved. A discharge or dissolution under these sections is sufficient for the person whose bank account has been unlawfully garnished to bring a suit for wrongful garnishment against the garnishor.89

The Supreme Court of Florida, in reversing the District Court of Appeal, Third District, has held that a husband and wife may hold a checking account as an estate by the entirety so as to preclude a creditor of the husband from garnishing the account.

So long as a bank account contract or signature card is drafted in a manner consistent with the essential unities of the entireties estate, and so long as it contains a statement of permission for one spouse to act for the other, the requirement of form of the estate will have been met. However, since the form will be similar to that of a joint tenancy, and since the spouses may or may not intend that a tenancy by the entireties should result, the intention of the parties must be proven unless the instrument creating the tenancy clearly bears an express designation that the tenancy is one held by the entireties.90

The garnishment statutes were amended to provide that a garnishee-bank which has deposits in its possession in the names of a defendant named in the writ and in a name of another (or others) should state this fact in its answer by giving the names and addresses of these other depositors. The plaintiff should then, within five days of receiving this answer from the garnishee-bank, serve upon these persons notice of the writ of garnishment and the answer of the garnishee-bank. Further, service of a writ of garnishment shall now render the garnishee "liable as provided . . . in any fiduciary or representative capacity held by him if the fiduciary or representative capacity is specified in the writ."91

89. Dynatronics, Inc. v. Knorr, 247 So.2d 71 (Fla. 2d Dist. 1971).
G. Legislation Affecting Banks, Trust Companies and Industrial Savings Banks

Section 656.21 of the Florida Statutes was amended to provide that the Commissioner of Banking may furnish a copy of all examinations of industrial savings banks to the Federal Reserve Board and require that these banks submit annual reports of their income and dividends. A similar addition was made to section 658.07 of the Florida Statutes, which deals with banks and trust companies. In addition, the minimum par value per share of capital stock which may be issued by an industrial savings bank has been reduced from $10 to $5, and a similar rule has been provided for banks and trust companies.

Industrial savings banks may now take second mortgages “if the principal amount secured by the first and second mortgages, in the aggregate, does not exceed seventy percent of the appraised value of the encumbered real estate” and may charge a discount not to exceed 8 percent per annum “upon the total amount of the loan from the date thereof until the maturity of the final installment, notwithstanding that the principal amount of such loan is required to be repaid in installments.” These banks may also levy a five percent late payment charge on any late principal or installment payment. In other legislation affecting industrial savings banks, sections 656.031(2) and 656.22 of the Florida Statutes were amended to provide for a fee to accompany applications for the organization of industrial savings banks and fees for the semiannual examinations and assessments on total assets. Similar amendments were made to section 659.02(2) of the Florida Statutes which deals with state banks and trust companies.

The legislature also enacted several laws relating to banking operations. Section 659.06(2) of the Florida Statutes dealing with the operation and location of bank facilities was slightly amended to remove references to drive-in and walk-up banking facilities. Banks and trust companies may now close during periods of emergency (storms, floods, strikes, riots, civil commotions, etc.) when declared by the Commissioner of Banking or by an authorized officer of the bank. The closing of banks during this emergency period is to be treated as a legal holiday insofar as the making of protest, clearance of banking items and other time requirements are concerned. Under an amendment to section

658.10(1) of the Florida Statutes all reports made by banks and trust companies to the Department of Banking and Finance are confidential communications and shall not be made public without the consent of the Commissioner of Banking, or pursuant to a court order. A similar amendment was made to section 656.211 of the Florida Statutes with regard to reports of industrial savings banks.

Changes affecting the scope of permissible investments available to banks and the utilization of a bank's investment portfolio were also made. Section 656.24 and 659.20 dealing with permitted investments of industrial savings banks, banks, and trust companies were extensively reworded as to permitted stock investments, investments in savings and loan shares, community help projects, and other investments. Also, banks and trust companies may now invest up to five percent of their unimpaired capital and surplus in small business investment companies which are organized under the provisions of the United States Code. In addition, section 659.16(1) of the Florida Statutes was amended to provide that

\[ \text{the par value of eligible securities which are owned by the bank free of pledge or encumbrance, and that portion of the par value of eligible securities which is in excess of the deposit to which pledged may be utilized in meeting reserve requirements.} \]

Other legislation was enacted which expands the investment outlets of foreign banks and sets down stock ownership requirements for the directors of all banks. Foreign banks are now authorized to enter into mortgage servicing contracts with persons authorized to transact business in Florida. A director of a bank and trust company must now own voting common stock of the bank of which he is a director in an amount of at least $1,000 par value free of any lien or pledge agreement. A similar amendment was made to section 656.121 of the Florida Statutes with regard to directors of industrial savings banks.

It is not required by the Florida Banking Code or the Administrative Procedure Act for the Florida Commissioner of Banking to conduct an open hearing in approving an application for individuals to organize a corporation to transact a general banking business in a com-

112. FLA. STAT. §§ 659.01-659.56 (1969).
113. FLA. STAT. §§ 120.011-120.331 (1969).
munity, nor is an open hearing required under the due process clauses of the federal and state constitutions.\textsuperscript{114}

H. \textit{Legislation Affecting Building and Loan Associations}

Section 665.091 of the Florida Statutes was amended to provide that only 25 members of a building and loan association need be present personally or by eligible proxy at an annual or any special meeting in order to have a proper quorum.\textsuperscript{115}

Subject to annual percentage limitations, building and loan associations may now sell loans "with recourse."\textsuperscript{116} However, building and loan associations must now invest at least sixty percent of their assets, other than liquid assets, in direct reduction loans on home property or in direct reduction loans on primarily residential property, or both.\textsuperscript{117}

Section 665.361 of the Florida Statutes which relates to investments of building and loan associations was substantially reworded to provide that a building and loan association may invest all of its assets in direct obligations of the United States or of obligations fully guaranteed as to principal and interest by the United States. However, if the obligations are issued by a federal agency and are not fully guaranteed, then no more than 25 percent of the association's assets may consist of these securities.\textsuperscript{118}

The "Savings Association Act" was amended by adding sections 665.55 through 665.65 to allow building and loan associations, and savings and loan associations to operate and lease safety deposit facilities. The amendment provides, in detail, for the rights of box holders, their successors, and adverse claimants.\textsuperscript{119}

\textsuperscript{114} Bay Nat'l Bank & Trust Co. v. Dickinson, 229 So.2d 302 (Fla. 1st Dist. 1969).
\textsuperscript{115} Fla. Laws 1971, ch. 71-91.
\textsuperscript{118} Fla. Laws 1971, ch. 71-90.
\textsuperscript{119} FLA. STAT. §§ 665.55-.65 (Supp. 1970).