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Negotiable Instruments and Banking

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NEGOTIABLE INSTRUMENTS AND BANKING

DANIEL E. MURRAY*

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I. INTRODUCTION

Although the Uniform Commercial Code has been in effect in Florida since January 1, 1967, in the field of negotiable instruments, the Florida appellate courts have not decided any cases involving articles 3 and 4 of the Code. Various reasons may be advanced for this dearth of decisional law, but it is submitted that the most probable reason is the backlog of cases in the trial and appellate courts. In accordance with prior Surveys\(^1\) of this area, this Survey will discuss the significant cases and the probable effect (where relevant) of the Code on these cases.

* Professor of Law, University of Miami. The materials surveyed herein extended from 201 So.2d 225 through 225 So.2d 320 and included the legislation enacted by the 1969 Regular Session of the Florida Legislature.

NEGOTIABLE INSTRUMENTS

Portions of the Federal Truth in Lending Act (The Federal Consumer Credit Protection Act of 1968)\(^2\) became effective on July 1, 1969, and the main immediate effect of the Act has been to compel creditors who extend consumer credit to give a full written disclosure of the amount financed, the finance charge, the deferred payment price and the annual percentage rate. The Federal Reserve Board has issued its Regulation Z and has attempted to explain the Act and Regulation Z in a pamphlet obtainable from the Federal Reserve Board.\(^3\) Lawyers should note that additional provisions of the Act which deal with garnishment of debtor's earnings will come into effect on July 1, 1970.\(^4\) Lawyers should also be aware that the Act has attempted to limit the orthodox holder-in-due-course rule in security agreements dealing with real property by giving the debtor a remedy against the assignee of the security interest (mortgage) in certain situations.\(^5\)

II. REAL AND PERSONAL DEFENSES

A. Venue

An interesting aspect of venue was raised in *Papy v. Munroe and Chambliss National Bank of Ocala*.\(^6\) A note was executed by a corporation in Marion County. The note was indorsed by individual indorsers in this county. Later, the individual indorsers issued renewal notes in Dade County to the payee of the original note. The payee-holder later filed suit on the original note in Marion County, and the indorsers pleaded that the proper venue was in Dade County, the place where the renewal notes were executed. The court held that the renewal notes did not discharge the original note in the absence of any agreement that they would be considered as a discharge, and the suit could be laid in Marion County.

B. Acceleration and Default

No right to acceleration of a note and mortgage exists when there have been prepayments by the mortgagor in an amount equal to or greater than the sums that would have been due on future periodic payments if the sole failure of the mortgagor which is alleged in the complaint is that he had failed to make periodic payments when due.\(^7\) Under the Code it would be permissible to provide for acceleration in the note in a case of this type.\(^8\)

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5. Id. at 55.
6. 204 So.2d 42 (Fla. 1st Dist. 1967).
8. UNIFORM COMMERCIAL CODE §§ 3-109(1), 1-208 [hereinafter cited as U.C.C.].
C. Parol Evidence of a Defense

Parol evidence is admissible to prove conditions which were attached to the delivery of a promissory note and to prove that these conditions had not occurred.\(^9\)

Parol evidence is admissible to show that the parties to a mortgage agreed that it was not to become effective until the mortgagee made certain improvements on the mortgaged property which were never made. Parol evidence may not be used to modify a writing but it may be used to show that the writing was subject to a condition precedent which was not performed.\(^10\)

An oral understanding between the maker and the payee of a note that the payee will not assign or indorse the instrument will not constitute the defense of conditional delivery when suit is brought by the holder of the instrument to whom it was indorsed by the payee.\(^11\) The Uniform Commercial Code provides that a holder who is not a holder in due course takes an instrument subject to any defense based upon nonperformance of any condition precedent, nondelivery, or delivery for a special purpose. Conversely, a holder in due course would take free of these defenses.\(^12\)

D. Good Faith and Lack of Knowledge

A holder of a note who has purchased it from his own agent, who is also the maker of the note, will be prevented from being a holder in due course when he sues an indorser of the note.\(^13\)

In a decision based upon the pre-Code law,\(^14\) the fourth district held that a payee of a check cannot be a holder in due course. The holding is not new, but the application is. A drawer gave a payee a check as a down payment for the construction of a swimming pool. That same day, the drawer called the payee and stated that he did not want to go through with the project. The drawer ordered the drawee-bank to stop payment. Two days later, the payee of the personal check exchanged it for a cashier's check. The drawee-bank refused payment of the cashier's check when it discovered that it had overlooked the stop-order on the underlying personal check. The court held that a bank may dishonor a cashier's check on the ground of lack of consideration when it is presented for payment by the payee. The court noted that a payee may be a holder in due course under the U.C.C.;\(^15\) however, it should be noted that the Code's providing that a payee may be a holder in due

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11. Collegiate Baptist Church, Inc. v. Short, 205 So.2d 670 (Fla. 3d Dist. 1968).
12. U.C.C. §§ 3-304, 3-306.
13. Baum v. Spector, 211 So.2d 228 (Fla. 3d Dist. 1968).
15. U.C.C. § 3-302(2).
course does not mean that every payee will be a holder in due course. Good faith, lack of knowledge, and the payment of value are still required for holder in due course status.\textsuperscript{16}

The mere fact that a bank was an escrow agent in a stock-promotion transaction does not put it on notice of any defect or defense, nor cause it to be in bad faith when it later takes a promissory note as an indorsee from the payee-promoter of the stock transaction. Under the Negotiable Instruments Law (section 674.58) the holder must either have actual knowledge of the "infirmity" or knowledge of such facts which show a taking in bad faith.\textsuperscript{17} If this case were decided under the Uniform Commercial Code, the result would probably be the same.\textsuperscript{18}

E. Consideration

Even though a promissory note is under seal, the defendant in a suit on the note may assert want of consideration as an affirmative defense (by an answer not under oath) and then assume the burden of establishing the defense by a preponderance of the evidence.\textsuperscript{19} The Uniform Commercial Code provides that when signatures are admitted or established, production of the instrument entitles a holder to recover unless the defendant establishes a defense.\textsuperscript{20} This rule seems consistent with the holding of this case. The court's apparent downgrading of the importance of a seal seems consistent with the comment to section 3-113 of the Code, which states that "[t]he revised wording is intended to change the result of decisions holding that while a seal does not affect the negotiability of an instrument it may affect it in other respects falling within the statute, such as the conclusiveness of consideration." Further, the U.C.C. provides that want or failure of consideration is a defense as against any person not having the rights of a holder in due course.\textsuperscript{21}

The defense of lack of consideration cannot be asserted when suit is brought upon notes which renewed original notes alleged lacking consideration.\textsuperscript{22}

F. Illegality

One of the most popular gimmicks in merchandising goods to the homeowner has consisted in selling goods on a credit arrangement whereby the cost of the goods is supposedly paid by referrals given to the salesman by the buyer. The buyer is to be given so many dollars credit against his promissory note (and a security agreement) for each referral

\textsuperscript{16} U.C.C. § 3-302(2), comment 2.
\textsuperscript{17} Baraban v. Manatee Nat'l Bank, 212 So.2d 341 (Fla. 2d Dist. 1968).
\textsuperscript{18} U.C.C. §§ 3-302(1), 1-201(20), 1-201(25), 3-304.
\textsuperscript{19} Powell v. Walbeck, 209 So.2d 488 (Fla. 3d Dist. 1968).
\textsuperscript{20} U.C.C. § 3-307(2).
\textsuperscript{21} U.C.C. § 3-408.
\textsuperscript{22} Economy Plumbing Co. v. Charles Sales Corp., 204 So.2d 348 (Fla. 3d Dist. 1967).
who purchases similar goods; the buyer is led to believe that this purchase will cost him nothing and he will receive a "profit." New York has chosen to upset these "bargains" on the ground that they are unconscionable under section 2-302 of the U.C.C. A Florida court has also upset this arrangement, but under a different theory. Section 849.091 of the Florida Statutes forbids chain letters and pyramid clubs, and the referral scheme in *M. Lippincott Mortgage Investment Co. v. Children* was characterized as a lottery under the statute because the purchase of the goods was incidental to the "motive" of the buyers to make money from the referrals. The court voided the promissory note given by the buyers. It would appear that if sales promotion people reshape their approach to evade this decision, they may run into the defense of unconscionability.

In accordance with a Florida statute, any mortgage which is given to satisfy the claims of existing creditors while the corporation is insolvent is void. The first district has reaffirmed the Florida rule that the payee of a check which was given by the drawer in payment of a gambling debt incurred in Puerto Rico, where gambling debts are legal, may not enforce the check in Florida on the grounds of public policy. The U.C.C. does not affect this holding.

Confession of judgment clauses in negotiable instruments are void in Florida, but they do not affect the negotiability of the note. Set-off provisions in notes are permissible in Florida, and when a confession of judgment clause and a set-off provision are in a note but are severable, the set-off provision and the note will be valid. The same result should follow under the Code.

G. Joint Tenancy

A mortgage executed by one joint tenant (of a joint tenancy with a right of survivorship) is ineffective against any of the real property after the death of the mortgaging tenant; the surviving tenant takes the entire property free of the mortgage.

H. Coverture

The former Constitution of Florida provided that the separate property of a married woman would not be liable for the debts of her
husband unless she gave a written instrument executed according to the law respecting conveyances by married women. The new constitution has eliminated this restrictive provision and has substituted the following language:

Coverture and Property.—There shall be no distinction between married women and married men in the holding, control, disposition, or encumbering of their property, both real and personal; except that dower or curtesy may be established and regulated by law.

If this new constitutional provision is given a liberal construction, it will result in the reversal of one case which was decided in the period encompassed within this Survey, and a long line of older cases. Under the former constitution, the wife could not escape liability if a purchase-money note and mortgage was given by the husband and wife for property conveyed to the spouses jointly, or if the husband and wife signed a promissory note to a bank in return for a check made out to them jointly, even though the husband used the proceeds of the check for his own purposes.

In a case of first impression, the District Court of Appeal, First District, has held that when a mortgage names the husband alone, with no reference to the wife, her signature alone is insufficient to render the mortgage valid as against homestead property which was also held as an estate by the entirety. It should be noted that the court adopted this view because the facts showed that the mortgage was given as security for a loan made to the husband's business (which the wife had refused to become involved in). Further, the wife's signature was seemingly witnessed by only one witness in fact, although the deed bore the signatures of two witnesses. Whether the court would follow this view in the absence of these factors, is problematical.

I. Nonnegotiability

A nonnegotiable promissory note which contains a warranty (warranting that assigned oil leases would produce a certain dollar amount per month) and a separate guaranty agreement, which provides that the maker of the note is to pay cash or assign additional oil leases if the original leases do not produce the warranted amount, may be con-

32. Fla. Const. art. XI, § 1 (1885).
34. See Federal Deposit Ins. Corp. v. Playford, 217 So.2d 584 (Fla. 2d Dist. 1969) for a liberal construction of Fla. Const. art. X, § 5.
38. Federal Deposit Ins. Corp. v. Playford, 217 So.2d 584 (Fla. 2d Dist. 1969).
strued together. When the original oil leases fail to produce the agreed dollar amount, however, the payee has an adequate remedy at law to sue for each month's default and the fact that this will result in a multiplicity of actions does not authorize equity to order the maker to assign additional oil leases to the payee. In addition, since the guaranty was in the form of an option—the maker could pay additional cash or assign—equity should not grant relief because the maker has the option.40

J. Forgery

A title insurance policy which insures the validity of a mortgage does not cover a loss sustained by the mortgagee as the result of a forgery of the mortgage note. Title insurance only insures against loss resulting from a defect in the title, and it does not cover the validity of the underlying mortgage debt.41

The third district has reaffirmed the principle that when one joint payee of a check forges the name of the other joint payee and receives payment, the payor of the check has not made proper payment and is liable to the payee whose name has been forged.42 The U.C.C. continues the same rule.43

A cause of action for conversion will lie when a check made payable to one collection agency is mistakenly mailed to another collection agency and the latter agency receives payment on the check. Further, punitive damages may be awarded for the conversion of a check when there is fraud, actual malice, deliberate violence, oppression, gross negligence with respect to the rights of others, or where the wrong partakes of a criminal character.44 The conversion concept articulated in this case has been expressly adopted by the Code.45

K. Payment

When a principal delivers checks to its agents for transmittal to a creditor of the principal, and the agent opens a joint bank account in the name of the agent and the creditor (and the signature of the creditor does not appear in the bank's records) and then withdraws funds for the agent's personal benefit, this will not constitute a payment of the underlying debt by the principal.46

40. Bardill v. Holcomb, 215 So.2d 64 (Fla. 4th Dist. 1968).
41. Bank of Miami Beach v. Lawyers' Title Guar. Fund, 214 So.2d 95 (Fla. 3d Dist. 1968).
42. Newman v. Shore, 206 So.2d 279 (Fla. 3d Dist. 1968). The reader is invited to read the first five paragraphs of this opinion and then answer the question: "Why were the payees of the notes suing the indorsers?" The court has either confused the parties in the opinion, or it has been so cryptic that the opinion serves to confuse rather than to clarify.
43. U.C.C. § 3-116(b).
44. Adjustment Spec., Inc. v. Collection Bureau, Inc., 221 So.2d 443 (Fla. 4th Dist. 1969).
45. U.C.C. § 3-419(1)(c).
46. Carberry v. Foley, 213 So.2d 873 (Fla. 1968).
The acceptance and cashing by the payee of a check which bears the notation "payment in full of all obligations" of the drawer will not necessarily constitute an accord and satisfaction (upon a motion for a summary judgment) of disputed accounts between the parties "in the absence of a conclusive showing of a genuine meeting of the minds of these parties as to the intended effect of the check. . . ." The Code probably calls for the same result.  

L. Usury

The U.C.C. is not intended to have any affect on the interest and usury laws of Florida. The 1969 Florida Legislature made changes in the usury statutes which are discussed in a later section of this article.

Usury statutes do not create a vested substantive right but are only enforceable as a penalty, and until the penalty is merged into a final judgment, these statutes may be repealed or modified. As a result, when a lender exacted more than twenty-five-percent interest from a corporate borrower in violation of a Florida statute and the statute was amended during the pendency of the judicial proceedings, the court held that the lender would merely forfeit the usurious interest and not the principal (as would be the case before the statutory amendment). The court further held that the statutory amendment which allows the exaction of fifteen-percent interest from corporations (as compared to ten-percent interest from individuals) is constitutional.

The District Court of Appeal, Second District, has articulated a rather clear, simple formula for determining the question of usury. A corporation borrowed $290,000, and $50,000 was payable at the end of one year and the remaining $240,000 was payable at the end of the second year. Interest of six percent per annum, payable monthly in advance, was charged, and deferred interest and principal payments were to bear interest at fifteen percent per annum until paid. At the closing, the lenders deducted $29,000 as a commission and $1,450 as advance payment of interest for the first month. The borrower cured two defaults, but at the end of twenty-two months it defaulted for the third time and the lenders sued for foreclosure. The borrower alleged that since the lender could have accelerated the entire indebtedness at the time of the first default and since the mortgage and note did not contain any provisions eliminating unearned interest, the court should apportion the "commission," advance payment of interest and the six-percent interest rate over the term of the accelerated indebtedness and that this

47. Burley v. Mummery, 222 So.2d 261, 264 (Fla. 3d Dist. 1969).
50. See note 68 infra.
would amount to over fifteen percent per year. The district court held that:

the determination of whether the type of transaction involved here is usurious is made by apportioning the reserved bonus, commission, or interest over the period commencing with the date of closing and ending with either the date of the decree or the original maturity date, whichever is prior in time. 52

In this case the date of the decree was subsequent to the date of maturity, and the court said that the period from the date of closing to the date of maturity should have been used in computing the amount of interest exacted.

M. Negligence

In the absence of other facts, the mere fact that a construction lender deducted one percent of the loan proceeds to pay for inspection of the work while it was in progress does not create an implied contract between the lender and the borrower that the inspection will be properly performed for the benefit of the borrower. As a result, when the work proves defective, the borrower may not assert the negligence of the inspector as a defense to a suit on the construction loan and mortgage. 53

N. Bankruptcy

A discharge in bankruptcy of the maker of a note will not release an indorser; however, if the holder of the note releases the maker in a Chapter XI arrangement, the indorser will be released. 54

O. Statutes of Limitations

In a case of first impression, 55 the fourth district has held that a maker of a note may testify in a suit brought by the deceased payee's administrator that the letters "L.S." appearing after his (the maker's) name on a promissory note were not there when he signed the instrument nor did he authorize anyone to put them there. The court noted that a maker may testify that a signature appearing on a note is a forgery in spite of the dead man's statute, and he should likewise be permitted to deny that he sealed the instrument. This testimony was of crucial importance because the statute of limitations on an unsealed instrument is five years while it is twenty years on one under seal. The U.C.C. does not provide any statute of limitations for suits on

53. Rice v. First Fed. Sav. & Loan Ass'n, 207 So.2d 22 (Fla. 2d Dist. 1968).
55. Pitts v. Pitchford, 201 So.2d 563 (Fla. 4th Dist. 1967).
negotiable instruments, and each state is free to follow its parochial limitations statutes.\textsuperscript{56}

Section 733.211(1) of the Florida Statutes provides for a three-year statute of limitations for suits to be filed on claims against an estate when the claims have “not been paid, settled or otherwise disposed of.” When the holder of a note and mortgage signed by the deceased and his widow has filed a claim against the estate and the estate has continued payments on the mortgaged indebtedness (a lien on homestead property), the claim does not fall within the three-year statute and the mortgagee may collect the unpaid balance from the estate.\textsuperscript{57}

P. Merger by Judgment—Joint and Several Liability

In \textit{Corcoran v. Martin},\textsuperscript{58} the payee of a promissory note brought an action against a corporate maker and two individual makers (husband and wife) who had jointly and severally promised to pay. Service of process was made on the corporation which filed defensive pleadings. Subsequently, service of process was made on the husband and on the wife and the corporation withdrew its pleadings, whereupon a summary judgment for the principal, interest, attorney’s fees, and costs was entered against the corporate maker. A judgment for the same amounts was entered against the individual makers. The second district held that the three makers were jointly and severally liable and that the judgment against the corporation was a several judgment which did not merge the cause of action into the judgment, hence the cause of action on the note could still be exercised against the individual makers.

A promissory note signed by two or more persons which provides that “we promise to pay” is the joint and several obligation of the signers, and either signer may be sued without the joinder of the other.\textsuperscript{59} The U.C.C. articulates the same rule.\textsuperscript{60}

Q. Estoppel and Prepayment Penalty

A chattel mortgagee who is present at negotiations between the buyer and seller of the encumbered property and who tells the prospective buyer that he (the chattel mortgagee) has no interest in the property will be estopped from asserting his mortgage against the buyer who purchased the property without actual knowledge of the existence of the recorded mortgage.\textsuperscript{61}

The holder of a note and mortgage which provides for a penalty

\textsuperscript{56} See U.C.C. § 3-113, comment.
\textsuperscript{57} Gibbons v. Crowder, 208 So.2d 296 (Fla. 2d Dist. 1968).
\textsuperscript{58} 202 So.2d 16 (Fla. 2d Dist. 1967).
\textsuperscript{59} Forbes v. National Rating Bureau, Inc., 223 So.2d 764 (Fla. 2d Dist. 1969).
\textsuperscript{60} U.C.C. § 3-118(e).
\textsuperscript{61} Scotti v. Maysles, 202 So.2d 817 (Fla. 3d Dist. 1967).
for prepayment is not entitled to the prepayment penalty when the en-
cumbered property is taken by eminent domain proceedings. 62

R. Legislation

The "home improvement" industry has been a prolific source of fraudulent activities in many states; the "aluminum siding" cases alone would fill a law school casebook. In the typical case, the home improve-
ment company uses high pressure tactics to induce people to sign re-
modeling contracts, promissory notes, and mortgages in return for work of inferior quality. Usually the homeowner signs incomplete negotiable instruments which the company later fills in to its advantage, and often the home owners do not even realize they are signing promissory notes and mortgages and only learn of their mistake when they are given no-
tice by an alleged holder in due course of their negotiable instrument. Hopefully, many of these abuses will be curtailed by the effective en-
forcement of the Florida Home Improvement Sales and Finance Act, 63
which minutely regulates the activities of home improvement companies. A complete discussion of this Act is beyond the scope of this Survey; however, two sections are relevant—sections 520.74 and 520.30 of the Florida Statutes. Section 520.74(1) prohibits any home improvement contract from containing any clause whereby the homeowner agrees not to assert against any assignee of the contract any defense which he may have against the contractor. The next subsection 64 prohibits the holder of the contract from arbitrarily and without reasonable cause accelerat-
ing the maturity of any part or all of the amount owing in the absence of the buyer's default in the performance of any of his obligations. Fi-


Every promissory note or mortgage shall bear on the side of the note or mortgage which contains the maker's signature the fol-

It is obvious that if any home improvement promissory note contains the words (as required by the act) "payment of this note or mortgage is subject to the terms of a home improvement installment contract" it

62. Assoc. Schools, Inc. v. Dade County, 209 So.2d 489 (Fla. 3d Dist. 1968).
64. FLA. STAT. § 520.74(2) (1969).
will not be negotiable and the finance company which takes this note will be a mere assignee. What will be the result, however, if a contractor fails to place this legend upon the note and negotiates it? It is submitted that if the indorsee-finance company takes without knowledge of the home improvement source of the note, in good faith and for value, it can be a holder in due course. Of course, it would be difficult in the ordinary case for the indorsee-finance company to show that it did not know that its indorser was in the home improvement game, and the Florida courts will, no doubt, be hostile to any "white heart-empty head" assertion by the finance company.

In an effort to eliminate loan sharking and shylocking activities, the legislature has provided that the wilful and knowing "extension of credit" at a rate exceeding twenty-five percent but not more than forty-five percent per annum shall constitute a misdemeanor and that any extension of credit for more than forty-five percent per annum shall constitute a felony. Further, any knowing or wilful "extortionate extension of credit" (use of violence or other criminal means to cause harm to a person or his reputation or property for his delay or failure to make repayment) will constitute a felony to be punished by not more than ten years imprisonment or a $10,000 fine, or both.

Minors between the ages of sixteen and twenty-one may now sign valid promissory notes in order to borrow money for educational purposes, provided that the simple rate of interest does not exceed seven percent per annum.

III. MORTGAGE FORECLOSURES; DEFICIENCY JUDGMENTS AND OTHER RELIEF

It is somewhat surprising to discover that during these allegedly prosperous times, eleven mortgage-foreclosure cases directly or indirectly involving actual or potential deficiency judgments (or some other type of supplemental relief in addition to foreclosure) were decided.

The mere fact that a holder of a promissory note which is secured by a mortgage sues on the note and secures a judgment does not constitute an abandonment of his rights under the mortgage nor an election of remedies which precludes him from subsequently suing to foreclose the mortgage when the judgment has not been paid.

When an automobile is sold by a conditional sales contract under the Motor Vehicle Sales Finance Act, the conditional vendor (or its assignee) may repossess the automobile, sell it, and then sue for a deficiency judgment against the conditional vendee under former section 520.11 of

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69. Id.
71. Klondike, Inc. v. Blair, 211 So.2d 41 (Fla. 4th Dist. 1968).
the Florida Statutes. It should be noted, however, that section 520.11 was repealed by the adoption of the U.C.C. However, the U.C.C. has adopted the rule that the creditor may repossess the collateral, sell it, and then sue for a deficiency judgment against the debtor.

A possibility that a resale of foreclosed property will result in a higher price is not an adequate ground for ordering a resale in the absence of any irregularity in the original sale.

In affirming the Third District Court of Appeal, the Supreme Court of Florida has held that the bid price in a foreclosure sale conducted under chapter 702 of the Florida Statutes is final insofar as the sale of the property is concerned. This bid price, however, "is not conclusive as to the value of the property in a subsequent law action for a judgment at law upon the note." The Second District Court of Appeal has held that when foreclosed property is sold by the clerk of the circuit court under the provisions of section 702.02(5) of the Florida Statutes, the foreclosure sales price does not conclusively establish the value of the mortgaged property so as to bar evidence of value offered by the mortgagor against whom a deficiency judgment or decree is sought. This is true even though the mortgagor has made no objection to the sales price within the period specified in the above statute. The court noted that "[a]n interpretation that would permit the statutory provision to thus restrict [restrict an equity court’s power to prevent unfairness, injustice and fraud] the basic and inherent nature of the court’s function should and would render the legislation invalid."

It is submitted that the court raised a red herring; the legislature merely provided a clear, simple method of ascertaining the value of mortgaged property which the court invalidated even though the mortgagor did nothing to protect his own interests under the statute.

When a complaint for mortgage foreclosure contains a prayer for general relief and the chancellor reserves jurisdiction in the foreclosure decree to enter a deficiency decree, the chancellor may enter such a decree more than ten days after the sale of the mortgaged property.

If a mortgagee should foreclose a mortgage and not ask for a deficiency decree, it is permissible for the court, in a subsequent law action for the deficiency, to add to the amount of the deficiency interest computed from the date of the foreclosure sale in the original equity action.

72. General Motors Accept. Corp. v. Hurst, 212 So.2d 335 (Fla. 1st Dist. 1968).
73. FLA. STAT. § 680.10-102(1) (1967).
74. U.C.C. §§ 9-504, 9-505.
75. Connelly v. Wintermantel, 211 So.2d 49 (Fla. 3d Dist. 1968).
76. R. K. Cooper Constr. Co. v. Fulton, 216 So.2d 11, 13 (Fla. 1968) (emphasis supplied by the court), aff'g Fulton v. R. K. Cooper Constr. Co., 208 So.2d 863 (Fla. 3d Dist. 1967).
78. Boyles v. Atlantic Fed. Sav. & Loan Ass'n, 201 So.2d 909 (Fla. 4th Dist. 1967).
79. Maudo, Inc. v. Stein, 201 So.2d 821 (Fla. 3d Dist. 1967). It might be noted that this suit involved the granting of a deficiency judgment on a purchase-money mortgage.
When a receiver of a corporation receives refunds as late payments on the corporation's ordinary business assets which were subject to a mortgage which has been foreclosed, the mortgagor (who was the successful bidder at the foreclosure sale) has a prior claim to these funds as against the claim of the United States for unpaid income taxes when the tax lien was filed after foreclosure but before the receipt of the refund checks.80

In Watson v. Vafides,81 the mortgagor entered the highest bid at a foreclosure sale, but he was unable to produce the cash when he was asked to do so by the clerk of the circuit court. The clerk then accepted a new bid from Watson, a judgment creditor of the mortgagor, in an amount $11,000 lower than Watson had bid at the original public sale. The chancellor refused to confirm the sale and ordered that a new public sale be made. The District Court of Appeal, Second District, affirmed and held that when the highest bidder is unable to produce the cash amount of his bid, the person conducting the sale may resell the property before the original bidders disperse. If the original bidders have dispersed, then the resale may be made only by the publication of notice of the time and place to the public.

Unless the question of unpaid taxes has been adjudicated in mortgage-foreclosure proceedings, the buyer of the property has no right to claim that surplus funds remaining after the payment of the mortgage debt should be used to pay these taxes, and these surplus funds will be subject to a judgment creditor of the mortgagor.82

IV. ATTORNEY'S FEES

Under a promissory note which provides:

In the event this note is placed in the hands of an attorney for collection, or in case the holder shall become a party either as plaintiff or as defendant in any suit or legal proceeding in relation to the property described or the lien created in the mortgage securing payment of this indebtedness or for the recovery or protection of said indebtedness, the maker hereof will repay on demand all costs and expense arising therefrom, including reasonable attorney's fees, with interest thereon at the rate of 10 percent per annum until paid,83

it is error to award attorney's fees based solely upon the face amount of the instrument when the attorney's services were necessary in litigation involving the holder (either as a plaintiff or a defendant) in relation to property (which secured the note) or for the recovery or protection

80. United States v. Whyte, 216 So.2d 471 (Fla. 3d Dist. 1968).
81. 212 So.2d 358 (Fla. 1st Dist. 1968).
82. Cohen v. Keyes Co., 212 So.2d 661 (Fla. 3d Dist. 1968).
83. Holcomb v. Bardill, 214 So.2d 522, 523 (Fla. 4th Dist. 1968).
of the indebtedness. Attorney’s fees should be awarded for work involved in the overall transaction.

A mortgagee who is a named beneficiary under a mortgage clause in an insurance policy is entitled to an award of attorney’s fees when he proceeds against the insurance company after a casualty loss to the insured property.84

In a case of first impression, the fourth district has held that a contractual clause in a mortgage providing for attorney’s fees for collection “whether by foreclosure or otherwise” permits an appellate court to award attorney’s fees for services rendered in prosecuting or defending an appeal from a foreclosure decree.85

V. ACCOMMODATION INDORSERS

An interesting aspect of accommodation indorsements was involved in Beardmore v. Abbott.86 A life insurance salesman sold a large policy of insurance to a client. The client was unable to pay the first year’s premium and borrowed money on a promissory note from a bank for the amount of the premium. The agent signed the note as an accommodation party, and the bank held the life insurance policy as collateral. The insured was unable to pay the second annual premium, and he defaulted on the note. The bank applied the cash value of the policy against the note and demanded the difference from the accommodation indorser. The accommodation indorser-agent received for selling the policy constituted indemnification. The insured alleged that the failure of the accommodation indorser to tell the insured the amount of the commission that the accommodation indorser-agent received for selling the policy constituted a breach of faith and would be a defense to the suit. The court held that there was no duty to disclose the amount of the commission, and the fact that a commission was received did not constitute the receiving of value by the indorser so as to deprive him of his right of indemnification as an accommodation indorser.

A person who signs a note immediately below the signature of the maker after the note is in default and at the request of the original maker who was advised by the holder that he would sue the original maker unless he produced a cosigner “to guarantee the payments”87 is an accommodation party for the maker, and both of them may be joined as defendants in the same suit by the holder.

84. Underwriters Ins. Co. v. Sisung, 202 So.2d 231 (Fla. 3d Dist. 1967).
85. Empress Homes, Inc. v. Levin, 201 So.2d 475 (Fla. 4th Dist. 1967). See United Bonding Ins. Co. v. Inter Nat’l Bank, 221 So.2d 20 (Fla. 3d Dist. 1969), which deals with the question of attorney’s fees when the promissory note provides for them while a surety bond for the payment of the note does not.
86. 218 So.2d 807 (Fla. 3d Dist. 1969).
87. Ebeling v. Lowry, 203 So.2d 506 507 (Fla. 4th Dist. 1967).
VI. BANKS AND SAVINGS AND LOAN ASSOCIATIONS

A. Statutory Controls

A minority stockholder in a bank does not have a right to inspect the bank's stock book which contains the names, addresses, and number of shares owned by all of the bank's stockholders. The Florida Supreme Court has upheld the constitutional validity of section 665.02(1) of the Florida Statutes, which forbids any corporation from using the word "savings" as part of its title or name unless the corporation is organized under the provisions of the law relating to building and loan associations. The court approved a decree enjoining the Greater Miami Financial Corporation from doing business under the fictitious name of Greater Miami Savings Center. The court held, however, that section 659.52(1) of the Florida Statutes (which forbids nonbanking corporations or persons from soliciting or receiving deposits, or from advertising that they are accepting deposits and issuing notes or certificates therefor) does not apply to a corporation which does not accept deposits for which it has any responsibility. The Greater Miami Savings Center never received funds from its customers, and its primary function was to put its customers in touch with savings institutions which pay a high rate of interest. It operated as a broker for the transfer of money from its customers to savings and loan associations located in foreign states. The Greater Miami Savings Center did not pay interest, issue or honor checks drawn upon it, issue savings account passbooks, lend money, or charge interest; it had none of the characteristics of a savings and loan association.

B. General and Special Deposits

The Supreme Court of Florida, in affirming the decision of the Fourth District Court of Appeal, has held that when a deposit of money is made in a bank in the name of a depositor with the words "trustee" or "as trustee" appearing after the depositor's name, this puts the bank on notice that the money deposited may be the property of a third person. The bank may not, therefore, set-off against the deposit debts which may be owing by the depositor to the bank in the absence of an inquiry to determine whether the trustee does in fact have the right to use these funds for his personal obligations.

An attorney who is holding his client's funds in a trust account for a specific purpose (to be paid to the client's wife in a divorce matter)

89. Greater Miami Fin'l. Corp. v. Dickinson, 214 So.2d 874 (Fla. 1968).
90. Id.
91. Home Fed. Sav. & Loan Ass'n v. Emile, 216 So.2d 443 (Fla. 1968), aff'g Emile v. Bright, 203 So.2d 328 (Fla. 4th Dist. 1967).
does not have a retaining lien for a fee on these funds, and, as a result, the judgment-creditor wife may garnish these funds in the hands of the attorney.\textsuperscript{92}

C. Payment and Collection of Items

A bank is not liable for erroneously paying a postdated check in advance of the date unless the drawer notifies the bank in writing of the complete description of the check, including the payee's name, the date, the number, and the amount thereof.\textsuperscript{93} If the drawer intends to stop payment, he must then deliver a written stop order to the bank in accordance with the requirements of section 674.4-403 of the Florida Statutes.

Under the Negotiable Instruments Law,\textsuperscript{94} a drawee-bank is not liable to the holder of a check until and unless it accepts or certifies the check. Therefore, the Second District Court of Appeal has held that a holder who has been refused payment by the drawee-bank may not sue in tort for malicious interference with a business transaction; a tort theory (rather than a contract theory) may not be used to circumvent the obvious purpose of the statute.\textsuperscript{95} The U.C.C. has virtually re-adopted the N.I.L. language, and this decision should remain intact.\textsuperscript{96}

The proper venue for a suit on a dishonored cashier's check is in the county where the issuing bank is located and not in the county where the payee resides.\textsuperscript{97}

D. Joint Checking and Savings Accounts

Parol evidence may be introduced to show that a husband had created an estate by the entireties in a checking account when he changed it from his personal account to an account in the names of his wife and himself, even though the signature cards did not contain any language as to the nature of the account.\textsuperscript{98}

The Second District Court of Appeal held that when a wife's federal savings account is subsequently changed to a joint tenancy with right of survivorship with her husband, and the signature card provides that any deposit by one party "shall be conclusively intended to be a gift and delivery at that time of such funds"\textsuperscript{99} to the other party and that the association could accept checks for deposit made out to only

\textsuperscript{92} Wilkerson v. Olcott, 212 So.2d 119 (Fla. 4th Dist. 1968).
\textsuperscript{94} Fla. Stat. § 676.52 (1965).
\textsuperscript{95} Elmore v. Palmer First Nat'l Bank & Trust Co., 221 So.2d 164 (Fla. 2d Dist. 1969).
\textsuperscript{96} U.C.C. §§ 3-409, 3-411.
\textsuperscript{97} Bank of Hallendale v. Joe W. Sullivan's Concrete Serv., Inc., 216 So.2d 260 (Fla. 3d Dist. 1968), construing Fla. Stat. § 47.051 (1967).
\textsuperscript{98} Hilton v. Upton, 204 So.2d 352 (Fla. 1st Dist. 1967).
\textsuperscript{99} Brees v. First Fed. Sav. & Loan Ass'n, 217 So.2d 334, 335 (Fla. 2d Dist. 1969). See Graham v. Ducote Fed. Credit Union, 213 So.2d 603 (Fla. 1st Dist. 1968), which held that there was sufficient evidence to show that a daughter had created a valid inter vivos gift of a
one of the spouses with the right of the association to add missing indorsements, the association is not liable to the heirs of the wife because it permitted the husband to withdraw all of the funds from the account. This holding was seemingly based upon section 665.15 of the Florida Statutes, and it was restricted to the question of nonliability of the association. Query: Will this statute protect the husband if he is sued by the heirs of the wife?

A deposit by the wife of a check made payable to her husband in their joint account after his death and in the absence of any prior instruction by him to deposit it to his sole account would be proper only if the husband had made a gift of the check to the wife. The wife would then have the burden of proof of showing that a gift was in fact made.

The probate court does not have jurisdiction to determine the ownership rights to an uncashed check which bears the names of a husband and wife as payees. Only the circuit court has the power in appropriate proceedings to determine whether the deceased payees held the check as an estate by the entirety or as an estate in common.

E. Garnishment

A garnishment of the bank account of an alleged debtor should be dissolved by the court when it is shown that the debtor has assets independent of the bank account sufficient to pay the creditor's claim and the creditor has admittedly failed to investigate the extent of the debtor's assets.

When service of process of a writ of garnishment has been made upon an employee of the corporate garnishee but not upon an officer, director, or general manager and the garnishee has failed to file an answer resulting in a default judgment being entered against it, the court should set aside the default when the garnishee shows that, if the writ had been served on a proper person, proper attention would have been given to it.

F. Prohibited Loans

An interesting application of the dichotomy between a savings and loan association and the holding corporation which controlled it was involved in Central Savings Association v. Central Plaza Bank & Trust Co. A Kansas savings and loan association was controlled by Tower Credit Corporation. Tower borrowed money from a Florida bank which required that the Kansas savings and loan association acquire and main-

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100. Sharps v. Sharps, 214 So.2d 492 (Fla. 3d Dist. 1968).
101. Constant v. Tillitson, 214 So.2d 91 (Fla. 1st Dist. 1968).
104. 223 So.2d 50 (Fla. 2d Dist. 1969).
tain a certificate of deposit as collateral for the loan to Tower. Tower defaulted and the Florida bank applied the certificate of deposit against the defaulted loan. The appellate court held that federal law prohibits the loan association from making any loan or extension of credit to any company owning it, and that the certificate of deposit could not be applied in satisfaction of the debt owed by Tower.

G. Duty of Nondisclosure

In a case of first impression in Florida, the Third District Court of Appeal has held that there is an implied contractual duty between a bank and its depositors that the bank will not disclose information to third parties concerning the accounts of its depositors without their consent and that the bank is liable for damages for negligently, intentionally, or maliciously disclosing this information. In dicta the court recognized that disclosure may be made when it is compelled by court order, general credit information between banks, disclosures required by law, etc.

H. Legislation

Chapter 665 and portions of chapters 666 and 667 have been repealed by a new act dealing with Florida savings and loan associations. Space limitations do not permit an extended discussion of this thirty-six page, fine-print act which is designed to control the formation, operation, and dissolution of state savings and loan associations. Some discussion, however, of sections which may affect the general public would seem to be in order. First, although the act is directed primarily at state savings and loan associations, it permits the conversion of a state association into a federal savings and loan association, and vice versa. This somewhat hybrid approach is further developed in section 26, which authorizes savings accounts by married women and minors in state as well as federal savings and loan associations and provides that married women and minors may withdraw from their accounts as if they are sui juris. A parent of a minor account holder, however, may notify the association in writing not to let the minor withdraw or otherwise deal with the account without the joinder of the parent or guardian. Section 27 also applies to joint accounts in both state and federal savings and loan associations, and it provides that when an account is payable to two or more persons or the survivor or survivors, then, in the absence of fraud or undue influence, the money may be paid to either person or to the survivor. The troublesome question of whether a gift was intended seems to have been provided for:

105. Milohnich v. First Nat'l Bank, 224 So.2d 759 (Fla. 3d Dist. 1969).
106. Fla. Laws 1969, ch. 69-39, § 52, which provides that no tax shall be imposed on any savings and loan association “which is greater than the least onerous imposed by that state on any other financial institution” has received widespread condemnation in the Florida press, and it will probably be amended.
107. Id. § 6.
The opening of the account in such form shall, in the absence of fraud or undue influence, be conclusive evidence in any action or proceeding to which either the association or the survivor or survivors is a party, of the intention of all of the parties to the account to vest title to such account and the additions thereto in such survivor or survivors.\textsuperscript{108}

In addition, all of the parties to an account may deliver written instructions to the association providing that the signatures of more than one tenant during their lifetime or more than one survivor shall be required to make any withdrawals from the account and the association must abide by this instruction. Section 30 provides that when an account holder is adjudicated incompetent, the association (whether state or federal) may pay or deliver the withdrawal value of the account and accrued earnings to the guardian upon proof of his appointment and qualification. If the association has not received written notice, however, and is not on actual notice that its account holder has been adjudicated incompetent, it may pay the funds from the account to the holder and the receipt or acquittance of such holder shall be a valid and sufficient release and discharge of the association for the payment.

Any Florida bank now has the power to make loans or to extend credit to any person, firm, or corporation in amounts not exceeding $5,000 for each such loan or extension of credit on a credit card or overdraft financing arrangement. The interest rate may not exceed one and one-half percent per month simple interest on the unpaid balance of any loan or extension of credit computed on a monthly cycle.\textsuperscript{109}

Banks which are depositories of the funds of the state or any political subdivision, municipality, commission, board, or body need not provide any security for these funds to the extent that the deposits are insured under the Federal Deposit Insurance Act. Further, any notes, bonds, or other securities, other than shares of stock, in which a state bank is authorized by law or regulation to invest any of its funds shall be accepted as satisfactory security for the deposit of state and municipal funds.\textsuperscript{110}

All state banks are required to maintain a cash reserve of at least twenty percent of their total deposit liability. This cash reserve may include cash on hand, cash on demand deposit with other banks, or investments in securities which are direct obligations of the United States or which are fully guaranteed as to principal and interest by the United States.\textsuperscript{111}

Section 659.52 of the Florida Statutes was amended to provide that bank holding companies registered under the United States Bank Hold-
ing Company Act of 1956 may utilize a name or title which contains
the words "bank," "banker," or "banking," or any plural form thereof.\textsuperscript{112}

Section 659.17 of the Florida Statutes was substantially reworded in
providing for loans to officers and directors and to other persons insofar
as the percentage of the loan to the unimpaired capital and surplus of
banks and trust companies is concerned. The amended statute also pro-
vides for the documentation required in first-mortgage loans on real
estate and permits second-mortgage loans in certain situations.\textsuperscript{113}

Section 656.24(2)(f) of the Florida Statutes was amended to re-
move the former limitation on investment of the funds of industrial
savings banks in federal intermediate credit bank consolidated trust
debentures, federal home loan bank consolidated notes, central bank
cooperatives, and federal land bank bonds.\textsuperscript{114}

\section{I. Totten Trusts}

Chapter 689 of the Florida Statutes was amended to provide that
when the settlor is made sole trustee, the trust instrument shall be exe-
cuted in accordance with the formalities for the execution of wills re-
quired at the time of the execution of the trust instrument in the
jurisdiction where the trust instrument is executed.\textsuperscript{115} Under a literal
construction of this statute it would appear that any instrument creating
a Totten trust in a savings account in a bank would have to comply with
the above formalities or be deemed invalid. The author has been informed
that immediately after the passage of this statute, banks and savings and
loan associations went through a short period of panic and were com-
pelled to have their old depositors enter into amended Totten trusts.
Fortunately, this statute was amended a few months later to provide
that it was not applicable to bank and savings and loan association ac-
counts, share accounts, certificates of deposit, etc.\textsuperscript{116}

\section{VII. Bad Check Laws}

Section 832.05(3) of the Florida Statutes provides that it is a crime
to obtain goods or other things of value by means of a check when the
\textit{maker} does not have sufficient funds on deposit to pay the check. The
same subsection provides that no crime may be charged when the
\textit{payee} knows that the drawer of the check did not have sufficient funds on
deposit to pay the check. The ingenious defendant in \textit{George v. State}\textsuperscript{117}
contended that inasmuch as he had drawn a check payable to himself
as payee and then indorsed the check to indorsees in return for goods

\begin{footnotesize}
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\item \textsuperscript{112} Fla. Laws 1969, ch. 69-227, amending Fla. Stat. \textsection{659.52} (1967).
\item \textsuperscript{113} Fla. Laws 1969, ch. 69-297, amending Fla. Stat. \textsection{659.17} (1967).
\item \textsuperscript{116} Fla. Laws 1969, ch. 69-174, amending Fla. Stat. \textsection{689.075}(2) (1969) (special
session of the Legislature).
\item \textsuperscript{117} 203 So.2d 173 (Fla. 2d Dist. 1967).
\end{itemize}
\end{footnotesize}
and money, he was not guilty because he, as *payee*, knew that his account could not cover the check. The court stated that under a liberal construction of this statute, the word *payee* was intended to encompass not only the nominal payee on the check but any person (indorsee) to whom it was passed. The actions of the defendant came within the ambit of the statute's criminal charge and his conviction was affirmed.