

12-1-1963

# Negotiable Instruments

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## Recommended Citation

Daniel E. Murray, *Negotiable Instruments*, 18 U. Miami L. Rev. 416 (1963)

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# NEGOTIABLE INSTRUMENTS

DANIEL E. MURRAY\*

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It is the purpose of this *Survey* to discuss the significant decisions in the law of negotiable instruments and bank deposits during the preceding two year period<sup>1</sup> and to compare them with the 1962 draft of the Uniform Commercial Code.<sup>2</sup> The U.C.C. has been adopted in twenty-nine states and the District of Columbia. In all probability, the U.C.C. will have been adopted in a majority of the remaining states by 1965 and it is hoped that the Florida Legislature will see fit to adopt it at that time.

## I. AGENCY

In *Edwards v. Naugle*,<sup>3</sup> the payee sued a corporation and an individual on three checks signed as follows:

Dade County Nurseries,  
Inc.  
(sg) Richard C. Naugle

Naugle was apparently the president of the corporation, but it is to be noted that he failed to indicate this fact after his signature. The Third District Court of Appeal held that a cause of action was stated against both the corporation and Naugle as drawers; however, both of them could not be held liable. If the payee proves (at the trial upon remand of the case) that Naugle signed as president of the corporation and that he was authorized to do so, then the corporation would be liable and Naugle would not be. On the other hand, since Naugle did not add his representative capacity after his name he could be held liable in his individual capacity. In this latter event, the corporation would not be liable because no one signed for the corporation. It would appear that Naugle would be denied the right at the trial to introduce parol testi-

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1. The materials surveyed herein extend from 125 So.2d 762 through 156 So.2d.

2. UNIFORM COMMERCIAL CODE, 1962 Official Text with Comments, hereinafter referred to and cited as U.C.C.

3. 142 So.2d 365 (Fla. 3d Dist. 1962).

mony which would indicate that he did in fact sign the check "as president" of the corporation, in order to relieve himself of liability. This is the minority rule in the United States<sup>4</sup> under the Uniform Negotiable Instruments Law.<sup>4a</sup>

The adoption of the U.C.C. in Florida would result in an over-ruling of this case because the U.C.C. reflects the majority position that parol evidence may be introduced (in litigation between the immediate parties) by the signer to show that he signed the instrument as an officer of the corporation and not in his individual capacity when the instrument discloses the name of another person who might be the principal.<sup>5</sup>

## II. CONSIDERATION

Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration,<sup>6</sup> and a defendant-maker of a promissory note who fails to assert the lack of consideration in his sworn answer has the burden of proving this fact.<sup>7</sup> The U.C.C. provisions are consistent with these rules.<sup>8</sup> It would seem obvious for example, that if a city forbears from selling tax certificates for delinquent taxes because of the receipt of the landowner's check for the amount due, the landowner has received consideration for the issuance of his check.<sup>9</sup>

Consideration is not required in the case of accommodation indorsers;<sup>10</sup> however, consideration is required when the indorsers sign as guarantors<sup>11</sup> rather than as accommodation indorsers. When stockholders and officers of a corporation and a father of another stockholder-officer guaranteed the payment of a note issued to the payee in return for his agreement to grant an extension of time for the payment of a debt of the corporation, there was sufficient consideration for the guaranty.<sup>12</sup> If the U.C.C. is adopted in Florida, the holding of the case above will be changed to the extent that an extension of time or other concession will no longer be necessary in order to hold the indorsers as guarantors of an instrument.<sup>13</sup>

A Florida statute<sup>14</sup> forbids the payment of a commission to a real

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4. BRITTON, *BILLS AND NOTES* 485-93 (2d ed. 1961); BEUTEL'S *BRANNAN, NEGOTIABLE INSTRUMENTS LAW* 419 (7th ed. 1948).

4a. Hereinafter referred to and cited as N.I.L.

5. U.C.C. § 3-403 and Comments.

6. N.I.L. § 24, *FLA. STAT.* § 674.27 (1961).

7. *Florida Nat'l Bank & Trust Co. v. Smith*, 139 So.2d 438 (Fla. 3d Dist. 1962).

8. U.C.C. §§ 3-303, 3-306, 3-307, 3-408 and Comments.

9. *City of Valparaiso v. Long*, 141 So.2d 334 (Fla. 1st Dist. 1962).

10. N.I.L. § 29, *FLA. STAT.* § 674.32 (1961).

11. *Marks Bros. Paving Co. v. Mt. Vernon Homes, Inc.*, 156 So.2d 787 (Fla. 3d Dist. 1963).

12. *Ibid.*

13. U.C.C. §§ 3-415, 3-408 and Comments.

14. *FLA. STAT.* § 475.42(1)(d) (1961).

estate salesman rather than to a real estate broker for the sale of real estate. It was held that this statute may not be circumvented by the payor of a commission who issued his promissory note to a salesman and his employer-broker as joint payees.<sup>15</sup> The statute makes the transaction illegal and even if the salesman had transferred his interest to his co-payee, the illegal consideration aspect would not be cured. The result of this case would be unchanged under the U.C.C. Even if the broker-payee were found to be a holder in due course, which was expressly negated in this case, the U.C.C. would seemingly provide against recovery on the instrument.<sup>16</sup>

### III. NEGOTIATION

The N.I.L. provides that a qualified indorsement constitutes the indorser a mere assignor of the title to the instrument.<sup>17</sup> The qualified indorsement may be made by adding the words "without recourse," or any words of similar import, to the indorser's signature.<sup>18</sup> However, it is the general rule in the United States that the use of the word "assignment" accompanying the signature of the indorser does not operate as a qualified indorsement.<sup>19</sup> As a result of a synthesis of these rules, the following was held not to constitute a qualified indorsement: "We hereby assign and set over this note to [assignee] . . . in accordance with the terms thereof, including all our right, title and interest in said note."<sup>20</sup>

The U.C.C. has reiterated the requirement that the magic words "without recourse" (or similar words) be used,<sup>21</sup> and has further codified the majority American rule by providing that "words of assignment, condition, waiver, guaranty, limitation or disclaimer of liability and the like accompanying an indorsement do not affect its character as an indorsement."<sup>22</sup>

The case of *Sorrels Bros. Packing Co. v. Union State Bank*,<sup>23</sup> illustrates the illusory protections afforded by a stop-payment order when the check is negotiated to a holder in due course. Sorrels Bros. issued its check to the payee who deposited it for collection in the Union Bank in Texas. The payee's indorsement was "for deposit only."<sup>24</sup> The payee

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15. *Campbell v. Romfh Bros., Inc.*, 132 So.2d 466 (Fla. 2d Dist. 1961).

16. U.C.C. § 3-305(b) and Comment.

17. N.I.L. § 38, FLA. STAT. § 674.41 (1961).

18. N.I.L. § 38, FLA. STAT. § 674.41 (1961).

19. BRITTON, *BILLS AND NOTES* 138 (2d ed. 1961); BEUTEL'S *BRANNAN, NEGOTIABLE INSTRUMENT LAW* 601 (7th ed. 1948).

20. *Potter v. Smith*, 152 So.2d 513, 514 (Fla. 3d Dist. 1963).

21. U.C.C. § 3-414(1).

22. U.C.C. § 3-202(4).

23. 144 So.2d 74 (Fla. 2d Dist. 1962).

24. *Id.* at 75. This indorsement is a restrictive indorsement under § 3-205(c) of the U.C.C.

then wired Sorrels Bros. requesting it to stop payment of the check and to mail a duplicate check to the payee. The duplicate check was paid by the drawee bank. In the meantime, the Union Bank allowed the payee to withdraw the entire face amount of the uncollected first check. The Union Bank then sued Sorrels Bros. on the first check, upon which payment had been stopped, and claimed that it was a holder in due course because it had allowed the payee to withdraw the amount of the check. The court held, in accordance with the weight of authority, that a collecting-depositary bank may be a holder in due course (if the other conditions of holder in due course status are met) if it has allowed the payee to withdraw the amount of the check even though the initial indorsement was "for deposit only."

The N.I.L. fails to cover the above situation, while the U.C.C. has provided specifically:

[A]ny transferee under an indorsement which is conditional or includes the words "for collection," "for deposit," "pay any bank," or like terms . . . must pay or apply any value given by him for or on the security of the instrument consistently with the indorsement and to the extent that he does so he becomes a holder for value. In addition such transferee is a holder in due course if he otherwise complies with the requirements of Section 3-302 on what constitutes a holder in due course.<sup>25</sup>

In accordance with the rule in *Sorrels Bros.*, if the depositary bank allows the payee to withdraw a *portion* of the face amount of the check before it is cleared for payment with the drawee, the depositary bank may be a holder in due course for the amount withdrawn.<sup>26</sup>

In *Antonacci v. Denner*,<sup>27</sup> bearer bonds issued by the Florida State Turnpike Authority were stolen from the owner. Subsequently, the bonds were purchased by Antonacci who filed a declaratory decree action seeking to have himself declared as a holder in due course. The heirs of the deceased owner alleged the fact of the theft and that Antonacci

25. U.C.C. § 3-206. Sections 4-208 and 4-209 also provide for this situation.

26. *Bank of America v. Dade Fed. Sav. & Loan Ass'n*, 154 So.2d 191 (Fla. 3d Dist. 1963). In this case, the face amount of the check was \$7,500 and the depositary-collecting bank permitted \$2,020.82 to be withdrawn prior to collection. This case should be compared with the case of *Bland v. Fidelity Trust Co.*, 71 Fla. 499, 71 So. 630 (1916). In *Bland*, a note for \$1,666.00 was deposited in a bank by the payee. This note was lumped together with other notes for a total deposit of \$61,150.40. The depositary bank allowed the depositor-payee to withdraw slightly over one-half of the total deposit. The court held that the bank was a holder in due course for the entire amount of the note, not just for a fractional interest. The court stated that "if a mere credit . . . does not of itself amount to the payment of a valuable consideration, the withdrawal . . . of a substantial part of the amount so credited is such payment." *Bland v. Fidelity Trust Co.*, 71 Fla. 499, 513, 71 So. 630, 634 (1916).

27. 149 So.2d 52 (Fla. 3d Dist. 1963). It should be noted that the U.C.C. has removed bonds from the classification of commercial paper (U.C.C., art. 2) and re-classified them as "Investment Securities" under art. 8 §§ 3-101, 8-101 and Comments.

had purchased the bonds in bad faith. The court held that when evidence is introduced that the holder had purchased the bonds in bad faith, the burden of proving a good faith purchase shifts to the holder. Further, that when there is alleged a defect in the title—the theft in this case—the burden of proving a good faith purchase also shifts to the holder, and that the holder had failed to carry this burden of proof.<sup>28</sup>

The U.C.C. has amplified the notions of good faith sketchily outlined in the N.I.L. Good faith means "honesty in fact in the conduct or transaction concerned."<sup>29</sup> Under the 1952 draft of the U.C.C., a holder in due course is a holder who takes the instrument "in good faith including observance of the reasonable commercial standards of any business in which the holder may be engaged."<sup>30</sup> The U.C.C. has further restated the concept of burden of proof: "After it is shown that a defense exists a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course."<sup>31</sup>

#### IV. ACCOMMODATION PARTIES

Under the N.I.L.<sup>32</sup> an extension of the time of payment of a promissory note made by the holder to the maker (or his successor in interest), without the consent of accommodation indorsers, operates as a discharge of these indorsers.<sup>33</sup> This holding would not be changed by the adoption of the U.C.C.<sup>34</sup>

A person who indorses a negotiable instrument for the accommoda-

28. The significant facts as found in the record can be summarized as follows:

- (1) plaintiff acquired these bonds from an absolute stranger whose name he could not recall;
- (2) plaintiff never asked the stranger his address or from what source he acquired the bonds;
- (3) plaintiff was in the used car business and had never dealt in bonds before;
- (4) the stranger entrusted one \$1,000.00 bond, a "bearer" instrument freely negotiable, with plaintiff while plaintiff took it to the Riverside Bank;
- (5) plaintiff reached into his pocket and handed the stranger \$8,000.00 in cash, with no witness present and obtaining no receipt or other evidence of payment from the stranger;
- (6) plaintiff from April, 1956 to June, 1962 never cashed any of the interest coupons attached to the bonds, even though coupons in the amount of \$1,787.50 had matured over that period of time, and plaintiff had, in fact, instructed the Riverside Bank not to clip any of the bonds;
- (7) if plaintiff had inquired of any of the paying agents listed on the bonds as to the existence of any infirmities, or if plaintiff had cashed one of the interest coupons, plaintiff could have discovered the existence of the theft. *Id.* at 54.

29. U.C.C. § 1-201(19).

30. U.C.C. § 3-302(1)(b). Somewhat similar wording is included in the sales article of the 1962 draft. U.C.C. § 2-103(1)(b).

31. U.C.C. § 3-307(3).

32. N.I.L. § 120, FLA. STAT. § 675.28 (1961).

33. *L. & S. Enterprises, Inc. v. Miami Tile & Terrazzo, Inc.*, 148 So.2d 299 (Fla. 3d Dist. 1963). N.I.L. § 120(6), FLA. STAT. § 675.28 (1961) permits the holder to reserve his right of recourse against secondary parties.

34. U.C.C. § 3-606 and Comments.

tion of the maker before the instrument is delivered to the payee is regarded as a surety and not as an indorser, under the N.I.L. As a result, the accommodation-maker may be sued as a promisor without any prior resort to the maker or drawer of the instrument.<sup>35</sup> A similar result would obtain under the U.C.C.<sup>36</sup>

A president of a corporation who indorsed a corporate promissory note as an accommodation indorser after the note was in default was held liable upon his indorsement.<sup>37</sup> This holding would remain unchanged under the U.C.C.<sup>38</sup>

Accommodation indorsers of notes which are secured by a mortgage may be held liable in a deficiency decree action in the event of a foreclosure of the mortgage, and the deficiency decree may include costs incurred in the foreclosure action.<sup>39</sup> It is not entirely clear as to what effect the adoption of the U.C.C. would have on the rule of this case. The U.C.C. provides that "as between the obligor and his immediate obligee or any transferee the terms of an instrument may be modified or affected by any other written agreement executed as part of the same transaction. . . ."<sup>40</sup> The official comment indicates that this section was designed to cover mortgages and other security interests. However, the comment adds the thought that "other parties, such as an accommodation indorser, are not affected by the separate writing unless they were also parties to it as a part of the transaction by which they became bound on the instrument."<sup>41</sup> It would appear, perhaps, that the costs of foreclosure (which are usually provided for in the average mortgage) would "modify or affect" the promise to pay a sum certain of money as provided in the promissory note. If this be true, it would seem necessary for an accommodation indorser of the note to be a party to the mortgage before he could be held liable under the U.C.C. for the foreclosure costs.

If a maker gives his promissory note to a bank and the maker has funds on deposit with the same bank, the bank may at its election apply the amount of the deposit against the amount owing on the note at its maturity. However, the bank is not required to apply the deposit against the amount of the note even though as a result of this failure an accommodation indorser (who is in the position of an accommodation maker-surety) may be called upon to pay the full amount of the note after the principal maker has withdrawn his deposit.<sup>42</sup>

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35. *Central Bank & Trust Co. v. Meltzer*, 145 So.2d 766 (Fla. 3d Dist. 1962).

36. U.C.C. § 3-415 and Comments.

37. *Conn v. Boulevard Nat'l Bank*, 148 So.2d 758 (Fla. 3d Dist. 1963).

38. U.C.C. § 3-408 and Comments.

39. *Tendler v. Gottlieb*, 126 So.2d 308 (Fla. 3d Dist. 1961).

40. U.C.C. § 3-119.

41. Page 252 of 1962 Official Text.

42. *Central Bank & Trust Co. v. Meltzer*, 145 So.2d 766 (Fla. 3d Dist. 1962).

A wife who signs a note and mortgage as an accommodation co-maker of a *non*-purchase money mortgage on homestead property is obligated after the death of her husband to make the installment payments (principal and interest) until the debt is paid. However, if she makes the payments, as a surety, she is entitled to be subrogated to the rights of the holder of the mortgage, provided that the entire debt is paid. If the remaindermen elect to make the payments, they in turn are to be subrogated to the rights of the holder of the mortgage with the right to foreclose against the widow. The remaindermen may elect to pay the mortgage and then bring suit against the widow, who is the principal obligor as to the holder of the mortgage. After the widow has satisfied the judgment, however, she may exercise her right of subrogation and foreclose on the homestead property.<sup>43</sup> The subrogation facets of this case would apparently remain unchanged under the U.C.C.<sup>44</sup>

#### V. CONSTRUCTION AND EFFECTS OF ACCELERATION CLAUSES

The supreme court of Florida has attempted a definitive articulation of the computation rules to be used in ascertaining whether a loan is tainted with usury when interest is deducted or reserved in advance and the note is subjected to acceleration upon demand of the holder when the maker is in default. "When a note upon its face vests in the holder . . . an option upon default to accelerate maturity of the total obligation, including unearned interest, then the results of its exercise must be evaluated under the literal contract terms whether or not the complaint in fact seeks recovery of all such sums."<sup>45</sup> The court further held that in testing the results of the exercise of the acceleration clause, the reserved interest must be calculated as payment for the use of the actual outstanding principal sum until the date that the acceleration option becomes effective. This holding apparently makes it mandatory for lenders to provide in the promissory notes that in the event of the acceleration of the principal indebtedness, there shall be a decrease in the principal amount of the note computed to the date that the acceleration option becomes effective.

In the case of *Morton v. Ansin*,<sup>46</sup> the court was faced with determining the differing amounts of interest due after default in the payment of a promissory note and mortgage. The note provided for an interest rate of five per cent per annum, but in the case of default the note stated:

While in default the whole of said indebtedness, including unpaid principal, accrued interest and other charges, shall bear

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43. *Furlong v. Leybourne*, 138 So.2d 352 (Fla. 3d Dist. 1962).

44. U.C.C. § 3-415(5) and Comments.

45. *Home Credit Co. v. Brown*, 148 So.2d 257, 260 (Fla. 1962), *affirming* *Brown v. Home Credit Co.*, 137 So.2d 887 (Fla. 2d Dist.).

46. 129 So.2d 177 (Fla. 3d Dist. 1963).

interest at the rate of ten per cent (10%) per annum. If this Note shall continue in default for a period of thirty (30) days, then the whole of said indebtedness shall, at the option of the holder, become immediately due and payable, without notice, and until fully paid shall bear interest at the rate of ten percent (10%) per annum.<sup>47</sup>

The court held that *matured* and unpaid principal installments, accrued interest and other charges, were to bear interest at ten percent per annum commencing immediately after these sums matured. However, the *unmatured* principal indebtedness of the note would bear the ten percent interest only after the note remained in default for thirty days and then only after the holder of the note had exercised his option to accelerate and had declared the whole principal amount due and payable. In effect, the court apparently held that the holder had to notify the maker as to the holder's election to accelerate (in spite of the fact that the note provided that this could be done without notice) in order for the holder to receive the increased charge of interest.

In a subsequent case, another district court of appeal held that when the note read that "if said default shall continue for a period of ten days, then the entire principal amount shall at the option of the holder hereof become at once due and collectible without notice,"<sup>48</sup> this wording provided for a right to accelerate without notice at the option of the holder in event of a default. In this case, the report failed to indicate clearly that there would be an increased interest charge after default; however, the cases do seem inconsistent on the concept of notice.

In the case of first impression in Florida, the court held that when an acceleration clause provides: "[U]pon default in payment of principal and/or interest due on any note secured by said mortgage, all notes so secured and remaining unpaid *shall* forthwith become due and payable notwithstanding their tenor,"<sup>49</sup> the result will be an automatic acceleration which becomes effective immediately upon the default in payment. As a consequence of this reasoning, when there is a default and the makers-mortgagors have paid the entire remaining balance of the note and mortgage to the mortgage servicing agent (appointed by the holders of the note and mortgage), the note and mortgage will be considered satisfied, and a loss caused by the insolvency of the agent will fall upon holders of the note and mortgage.

## VI. TRAVELER'S CHECKS

The case of *Winter v. American Auto. Ass'n*<sup>50</sup> presented a rarely-litigated facet of the law dealing with traveler's checks. The issuer of

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47. *Id.* at 179.

48. *Jacobs v. Automotive Repair Center, Inc.*, 137 So.2d 263 (Fla. 1st Dist. 1962).

49. *Baader v. Walker*, 153 So.2d 51, 52 (Fla. 2d Dist. 1963).

50. 149 So.2d 386 (Fla. 3d Dist. 1963). See BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENTS LAW 441 (7th ed. 1948).

the traveler's checks, American Express Company, delivered them (for the purposes of sale) to the American Automobile Association under an agreement that the Association would insure the checks against theft, which the Association failed to do. A number of these checks were stolen and subsequently paid by the Express Company. The Express Company sued the Association claiming damages for the breach of the contract to insure against theft. As an affirmative defense in mitigation of damages, the Association showed that it had notified American Express of the theft and that payment was made after notice of the theft was received. In order to overcome this defense, American Express alleged the inconsistent contentions that: (1) it was under a legal duty to honor the checks; and that (2) it had a right to dishonor the checks even though not under a duty to do so since if the checks were dishonored, irreparable damage to its business would result. The court held that there was no legal duty to honor the checks under the law of New York where the checks were paid. As to the second contention, the court stated:

[I]t might have been able to sustain this proposition in the trial court had it been presented in reply to the affirmative defense or any proof tendered to establish the facts now urged on the appeal. . . . This reply to the defendant's [the Association's] affirmative defense of opportunity to mitigate was clearly a burden of the plaintiff in the trial court.<sup>51</sup>

Inasmuch as the defendant established its mitigating defense, the burden of proof then shifted to the Express Company to establish its rights to ignore the doctrine of mitigation, and the Express Company failed to carry this burden.

## VII. FORGED SIGNATURES

If a drawee bank honors a check bearing the forged indorsement of the payee, it is unable to charge the account of the drawer and must absorb the loss unless it can recover the amount of the payment from the recipient under quasi-contractual principles of unjust enrichment<sup>52</sup> or because the recipient has by his indorsement guaranteed the authenticity of the payee's signature.<sup>53</sup> The latter principle was applied in *Riverside Bank v. Florida Dealers & Growers Bank*,<sup>54</sup> wherein a check bearing the forged indorsement of the payee was deposited in the defendant bank and collected from the drawee bank under an indorsement providing for the guarantee of all prior indorsements. The result was that the drawee bank was allowed to recover from the depositary bank.

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51. *Winter v. American Auto. Ass'n*, 149 So.2d 386, 388 (Fla. 3d Dist. 1963).

52. BRITTON, *BILLS AND NOTES* 392 (2d ed. 1961).

53. *Id.* at 397.

54. 151 So.2d 834 (Fla. 1st Dist. 1963).

The U.C.C. has wisely dispensed with any requirement that liability should depend upon the form of the indorsement used by the depository and collecting banks; by operation of law the depository or collecting banks are deemed to have warranted that the payee's signature is genuine when the check is presented for payment to the drawee.<sup>55</sup>

### VIII. DISCHARGE

Payment of a negotiable instrument is an affirmative defense which places the burden of proof upon the party asserting it.<sup>56</sup> This rule would appear to be unchanged by the U.C.C.<sup>57</sup>

The District Court of Appeal, Third District, has apparently held that a plea of payment to an account stated is not supported when the only evidence submitted consisted of a paid check which bore the notation, "this check is in settlement of the following invoices. If not correct, return, no receipt necessary."<sup>58</sup> It should be noted that the 1952 draft of the U.C.C. provided:

Where a check or similar payment instrument provides that it is in full satisfaction of an obligation the payee discharges the underlying obligation by obtaining payment of the instrument unless he establishes that the original obligor has taken unconscionable advantage in the circumstances.<sup>59</sup>

The 1962 draft of the U.C.C. has substituted the following rather poorly-phrased provision:

Unless otherwise agreed where an instrument is taken for an underlying obligation . . . the obligation is suspended pro tanto until the instrument is due or if it is payable on demand until its presentment. If the instrument is dishonored action may be maintained on either the instrument or the obligation; discharge of the underlying obligor on the instrument also discharges him on the obligation.<sup>60</sup>

The adoption of either version of the above sections of the U.C.C. would apparently result in an overruling of the *East Coast* case.<sup>60a</sup>

The N.I.L. provides that when any signature on a negotiable instrument appears to have been canceled, "the burden of proof lies on the party who alleges that the cancelation was made unintentionally, or

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55. U.C.C. §§ 3-417(1)(a), 4-207 and Comments.

56. *Schaner v. Wollowick*, 143 So.2d 509 (Fla. 3d Dist. 1962).

57. U.C.C. § 3-307(2).

58. *East Coast Dry Goods Co. v. Somerset Sportswear, Inc.*, 151 So.2d 68 (Fla. 3d Dist. 1963).

59. U.C.C. § 3-802.

60. U.C.C. § 3-802(b) and Comments.

60a. *Supra* note 58.

under a mistake or without authority."<sup>61</sup> The Second District Court of Appeal has held that this burden of proof was not sustained when one witness testified that the payee (deceased at the time of the trial) tore the note into quarters, but then pasted the pieces together with transparent tape after the witness told her "not to be foolish, that some day she might be able to collect something on it."<sup>62</sup> Section 3-605 of the U.C.C., which is designed to be the counterpart of section 123 of the N.I.L., unfortunately fails to spell out the question of burden of proof in cases of cancelation, and the burden of proof section of the U.C.C.<sup>63</sup> does not seem to cover the problem with the specificity of the N.I.L. However, the result of this case would seemingly have been the same under the U.C.C.

If a note and mortgage are held by a husband and wife as an estate by the entirety, neither one alone may discharge, cancel or make a gift of the instruments (as a method of discharge), to the makers-mortgagors.<sup>64</sup> The N.I.L. has no provision covering the power of one joint-payee to cancel or otherwise discharge the instrument and the cases in the United States have been in conflict.<sup>65</sup> The U.C.C. has wisely provided that "an instrument payable to the order of two or more persons . . . if not in the alternative is payable to all of them and may be negotiated, discharged or enforced only by all of them."<sup>66</sup>

#### IX. CONFLICTING CLAIMS TO BANK DEPOSITS

A Florida statute<sup>67</sup> provides to the effect that mere notice to a bank or trust company that an adverse claim is being made to a deposit which is in the name of another is ineffectual unless the adverse claimant secures an injunction against the bank or trust company. In *Griffin v. Gulf Life Ins. Co.*,<sup>68</sup> the adverse claimant secured an injunction against the depositor rather than the bank. The claimant's attorney telephoned the president of the bank and informed him of the injunction. The president of the bank agreed to "tag" the savings account to prevent withdrawals. Subsequently, the depositor overdrew her checking account and the bank withdrew funds from her savings account to cover the overdraft. The First District Court of Appeals held that after the bank was informed of the injunction and after the president agreed to prevent withdrawals, the bank could not charge the amount of the check as a setoff against the savings account. The court seemingly attempted to justify its rather

61. N.I.L. § 123, FLA. STAT. § 675.31 (1961).

62. *Klein v. Witte*, 142 So.2d 789 (Fla. 2d Dist. 1962).

63. U.C.C. § 3-307.

64. *Burke v. Coons*, 136 So.2d 235 (Fla. 2d Dist. 1961).

65. BRITTON, *BILLS AND NOTES* 112 (2d ed. 1961).

66. U.C.C. § 3-117(b) and Comments.

67. FLA. STAT. § 659.38 (1961).

68. 146 So.2d 901 (Fla. 1st Dist. 1962).

broad construction of the statute by holding to the effect that the injunction was in rem against the savings account and that the bank, as "custodian of the funds,"<sup>69</sup> had no further control over them subsequent to the injunction. It is submitted that the court was incorrect in labeling the bank as a "custodian"; the bank is a debtor of the depositor-creditor. There is no res—the money in a savings account is not "kept in a bag." The court should have ruled in favor of the bank because the claimant did not follow the simple terms of the statute.

In the ordinary banking transaction, a bank cannot be charged with knowledge that funds deposited as a general deposit in a checking account of a depositor are the property of another. However, if the bank has actual knowledge that the funds deposited in the account of a depositor in fact belong to another person, the bank may not apply the deposit to pay an indebtedness owed by the depositor to the bank.<sup>70</sup>

If a bank has issued its cashier's check to a payee who indorsed it to a holder who deposited the check for collection with another bank, the issuing bank will be protected if it has paid the check after a writ of garnishment was served upon it (the garnishment was ancillary to a suit against the payee); this is particularly true if the issuing bank acted in good faith under the assumption that the holder of the check was a holder in due course.<sup>71</sup>

The U.C.C. has wisely provided for this situation:

The liability of any party is discharged to the extent of his payment or satisfaction to the holder even though it is made with knowledge of a claim of another person to the instrument unless prior to such payment or satisfaction the person making the claim either supplies indemnity deemed adequate by the party seeking the discharge or enjoins payment or satisfaction by order of a court of competent jurisdiction in an action in which the adverse claimant and the holders are parties.<sup>72</sup>

Under the above provision, the payor bank need not concern itself with whether the holder may be a holder in due course; the bank may make payment to any holder (unless the instrument is held by a thief or a bad faith taker from a thief, or unless the instrument has been restrictively indorsed and the payment would be contrary to the indorsement). The burden is now placed on the adverse claimant rather than on the bank.

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69. *Id.* at 902.

70. *Central Bank & Trust Co. v. Shipman*, 137 So.2d 707 (Fla. 2d Dist. 1961).

71. *Universal C.I.T. Credit Corp. v. Broward Nat'l Bank*, 144 So.2d 844 (Fla. 2d Dist. 1962).

72. U.C.C. § 3-603 and Comments. See also §§ 3-306(d), 4-303 and Comments.

## X. LEGISLATION

A Florida statute<sup>73</sup> provides that a check or draft received for payment by a solvent payor or drawee bank is not to be deemed paid until the amount is charged to the account of the drawer or unless the drawee retains the check or draft longer than the end of the business day following its receipt. This statute was amended<sup>74</sup> by the addition of a proviso that a bank may now return the check or draft without payment by the end of the business day following the business day of its receipt even though the instrument was charged to the account of the drawer. Any check which is so returned is to be considered dishonored notwithstanding any contrary markings or notations on the instrument. This amendment is not to be construed as imposing an obligation upon the bank to reverse any charge at the instance of the drawer or any other person. The amendment seems to give greater latitude to the bank than do the comparable sections of the U.C.C.<sup>75</sup> and the Bank Collection Code.<sup>76</sup>

Section 674.76 of the Florida Statutes (section 73 of the N.I.L.) was amended by the addition of the following provision which indicates proper places of presentment for payment:

Where the instrument is drawn upon or payable at a bank which is a member of a clearing house in the same city where said bank is located and the instrument is presented by another bank at such clearing house;

Where the instrument is drawn upon or payable at a bank and the instrument is presented by another bank at a place specified or requested by the drawee or payor bank.<sup>77</sup>

The documentary stamp tax on promissory notes has been raised from ten cents to fifteen cents per hundred dollars of indebtedness.<sup>78</sup>

Section 659.29 of the Florida Statutes has been amended<sup>79</sup> to provide that when a bank deposit is in the name of two or more persons (payable to either or payable to either or the survivor), it may be paid to either the person or to the guardian of the property of one of the depositors who is incompetent. In this situation, payment would be proper whether or not the other depositor or depositors are living or incompetent. The receipt or acquittance of the person receiving payment shall constitute a sufficient release and discharge to the bank.

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73. FLA. STAT. § 676.55 (1961).

74. Fla. Laws 1963, ch. 63-323.

75. U.C.C. §§ 4-213, 4-301, 4-302 and Comments.

76. BANK COLLECTION CODE § 3.

77. Fla. Laws 1963, ch. 63-109.

78. FLA. STAT. § 201.08 (1961) as amended by Fla. Laws 1963, ch. 63-533.

79. Fla. Laws 1963, ch. 63-472.