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COMMENTS

CONSTITUTIONAL PROBLEMS ARISING OUT OF THE STATUTORY TERMINATION OF MORTGAGE LIENS

The Supreme Court of Pennsylvania recently held unconstitutional Pennsylvania statutes designed to eradicate mortgage liens fifty years after maturity of the mortgage debt.¹ In view of the fact that similar Florida statutes² have never been tested as to their constitutionality, it is the purpose of this comment to investigate the various statutes dealing with elimination of old mortgage liens, the constitutional problems involved in these statutes, and the views of the Florida court upon such problems.

Most states have sought to deal with the troublesome problem of old, outstanding, or "stale" mortgages by statute. These statutes may be classified generally as (1) statutes of limitation, (2) statutes defining a marketable title, and (3) statutes dealing with the procedural aspects of extinguishment of the lien.

In states adhering to the lien theory of mortgages, the debt and the lien are considered as being separate and distinct phases of the mortgage. Thus the courts have allowed the foreclosure of a lien even after the debt has been barred by the applicable statute of limitation,³ such remedy probably being allowed due to the early aversion of the courts to statutes of limitation.⁴ Having the separate phases in mind, some states have seen fit to provide a statute of limitation for the lien, separate and distinct from the statute of limitation governing the debt.⁵ Where separate periods of limitation are so provided, the statute controlling the existence of the lien generally makes provision that the lien may be extended by recording an agreement to that effect.⁶ In considering this provision, some courts have concluded that such statutes are not statutes of limitation, but rather

1. PA. STAT. ANN. Tit. 68, §§ 451-457 (Cum. Supp. 1949), *Girard Trust Co. v. Pennsylvania R.R.*, 364 Pa. 576, 73 A.2d 371 (1950).

2. FLA. STAT. §§ 95.28-95.34 (1949). Section 95.28 provides, "The lien of a mortgage . . . shall terminate . . . after the expiration of the following periods . . . (1) If the final maturity . . . is ascertainable . . . twenty years after the date of such maturity; (2) If the final maturity . . . is not ascertainable . . . twenty years from the date of the mortgage."

3. *Bank of Wildwood v. Kerl*, 138 Fla. 527, 189 So. 866 (1939); *Ellis v. Fairbanks*, 38 Fla. 257, 21 So. 107 (1897); 2 JONES, MORTGAGES § 1542 (8th ed. 1928).

4. See *Developments in the Law - Statutes of Limitations*, 63 HARV. L. REV. 1177, 1187 (1950).

5. COLO. STAT. ANN. c. 40, § 122 (1935); ILL. ANN. STAT. c. 83, § 11(b) (Smith-Hurd Cum. Supp. 1949); IND. ANN. STAT. § 2-623 (Burns 1933); MINN. STAT. ANN. § 582.14 (West 1945); MONT. REV. CODES ANN. Tit. 52, § 206 (1947); VA. CODE § 8-11 (1950).

6. See, e.g., FLA. STAT. § 95.29 (1949).

a form of recording statute which would make any extensions subsequent to the time limit set forth ineffective as to subsequent purchasers.⁷

Other states have chosen to treat the debt and the lien as so closely connected as to be inseparable.⁸ Thus, these states have provided that whenever the debt shall be barred by the applicable statute of limitation, the lien is also no longer enforceable.⁹ Where such a statute is in effect, the courts have not granted a retroactive application, on the basis that it would be impossible to do so without impairing the contract right embodied in the debt.¹⁰ This idea of subjecting the lien to the same limitation as the underlying debt has been applied in some jurisdictions even in the absence of statute.¹¹

Instead of directly applying a limitation to the lien, other states have dealt procedurally with the problem. Thus, some statutes are intended to create a presumption of payment after a certain lapse of time.¹² The courts have held that such statutes merely supply a rule of evidence.¹³ In the procedural vein, Connecticut has a statutory provision which is unique in the field.¹⁴ It provides that a mortgagor in possession may, after seventeen years, bring a petition to have the record title cleared of an undischarged mortgage. Since the petition must be served upon all interested parties there is no possibility of a contention of impairment of contract rights. After the petition is served, the court may declare the mortgage invalid and no action to enforce the mortgage may be maintained thereafter.

One type of statute which has attracted considerable attention recently is that which does not set a period of limitation but rather defines what shall constitute a marketable title.¹⁵ Such a statute does more than extinguish a cause of action. Under its operation interests which may not even be assertable by suit may be effectively extinguished.¹⁶ But any interest which it may bar is barred for the same reason that unrecorded deeds are avoided in favor of subsequent purchasers; that is, it provides a result sufficiently harsh to cause owners to record. The effect of this type of

7. *Magnuson v. Breher*, 69 N.D. 197, 284 N.W. 853 (1939). See COLO. STAT. ANN. c. 40, § 122 (1935) (upon failure to record within specified time the lien "... shall have no more effect than an unrecorded instrument.").

8. See 2 JONES, MORTGAGES § 1546 (8th ed. 1928).

9. MISS. CODE ANN. § 719 (1942); MO. REV. STAT. ANN. § 1017 (1939).

10. *Bobb v. Taylor*, 184 S.W. 1028 (Mo. 1916); *Boyd v. Buchanan*, 176 Mo. App. 56, 162 S.W. 1075 (1914).

11. See *Developments in the Law - Statutes of Limitations*, *supra* note 4, at 1247.

12. See, e.g., S.C. CODE § 8864 (1942), *Boyd v. Boyd*, 182 S.C. 498, 189 S.E. 794 (1937).

13. *Aiken Mortgage & Realty Co. v. Altman*, 182 S.C. 300, 189 S.E. 217 (1937).

14. CONN. GEN. STAT. § 7123 (1949). See *Arnold v. Hollister*, 131 Conn. 34, 37 A.2d 695 (1944) (to the effect that the Connecticut statute is not a statute of limitation).

15. MICH. COMP. LAWS §§ 565.101-565.109 (1948). See Note, 33 MINN. L. REV. 54, 65 (1948).

16. See *Aigler, Clearance of Land Titles - A Statutory Step*, 44 MICH. L. REV. 45 (1945).

statute is probably limited to protection of subsequent purchasers, whereas other statutes may constitute a complete bar.

Whatever the type of statute adopted, the purpose is the same; namely, the clearing of record titles so as to provide unrestricted marketability. A state undoubtedly has the police power to pass legislation relating to the recording of deeds¹⁷ in order to assure clear record title, and it should also be able to provide for periods of limitation beyond which a claim may not be enforceable. But where retroactive effect is to be given to the statute some constitutional questions arise.

Retrospective legislation is not forbidden by the United States Constitution.¹⁸ What is forbidden is the impairment of contractual obligations¹⁹ and the deprivation of property without due process of law.²⁰ So the questions usually to be resolved by a court in weighing the constitutionality of retrospective legislation are—in respect to the validity of the statute—does the legislation affect only a remedy, or a substantive right, and does an existing law become a part of a contract and not subject to change? In respect to the effect of the statute the questions become—is the statute in effect a recording statute protecting only subsequent purchasers, and can the statute be pleaded affirmatively or merely as a defense?

Much of the argument dealing with retrospective legislation has centered around the distinction between a right and a remedy. If a vested right is being impaired, then the statute is unconstitutional.²¹ But if only the remedy is affected there is no constitutional question involved, since existing rules of evidence and judicial remedies are not considered as being incorporated into the contract.²² It is generally held that laws existing at the time of the contract are inviolable.²³ But these obligations are the reciprocal rights arising from contracts and a legislature may control and change any rights incidental to a contract.²⁴ Thus, it is a proper exercise of sovereignty to enact laws to alter or enlarge remedies for the violations of contracts. To hold otherwise would be to hold that the contract implies, not only that laws regulating the remedy are incorporated, but further, that such laws cannot be changed and that the remedy is fixed at the time of contract rather than at the time of perfecting the cause of action.²⁵ It has often been held that there is no vested right in a statute of limitation of force even when a cause of complaint accrues,²⁶ and the period allowed for suit

17. *Jackson ex dem. Hart v. Lamphire*, 3 Pet. 280 (U.S. 1830).

18. *Reynolds v. United States*, 292 U.S. 443 (1934). For a suggested classification of constitutionally valid retrospective statutes, see *Seese v. Bethlehem Steel Co.*, 74 F. Supp. 412 (D. Md. 1947).

19. U. S. CONST. Art. 1, § 10.

20. U. S. CONST. AMEND. XIV, § 1.

21. *Campbell v. Holt*, 115 U.S. 620 (1885).

22. *Waggoner v. Flack*, 188 U.S. 595 (1903).

23. *Seese v. Bethlehem Steel Co.*, 74 F. Supp. 412 (D. Md. 1947); *Walters v. Farmers' Life Ins. Co.*, 255 S.W. 666 (Tex. 1923).

24. *Ibid.*

25. *Campbell v. Horne*, 147 Fla. 523, 3 So.2d 125 (1941).

26. *Silurian Oil Co. v. Essley*, 54 F.2d 43 (10th Cir. 1932).

may be shortened, provided a reasonable time is allowed for suit.²⁷ Such decisions point out that a court has interpreted a lien as being only a remedy by which the mortgagee may secure payment of the debt, and not a substantive right within itself.²⁸ Thus, a statute establishing a limitation where none previously existed, or which shortens an existing limitation, may operate on existing contracts since only the remedy is being affected.²⁹

These curative statutes have also been upheld as being recording acts.³⁰ Thus, it has been held that such a statute operates to clear public records and does not impair prior rights.³¹ The effect of this type of statute has been held to establish, not a limitation upon foreclosure, but a limitation beyond which unrecorded extensions of a lien will not have the effect of keeping the lien alive.³² Taking that view, the statutes are treated in the same manner as recording statutes. It is certainly within the power of the legislature to pass recording acts which provide that, if the prior deed is not recorded within the limited time, it shall be ineffective as to subsequent purchasers.³³ This power of the legislature has been held to be the same whether the deed is dated before or after the passage of the recording act.³⁴ Such considerations have been taken into account in determining the power of a legislature to pass acts of limitation, and the effect of these acts will depend upon the nature of the titles involved, and the emergencies which led to their enactment.³⁵

Other statutes have been upheld, not as statutes of limitation, but as statutes intended solely as declarations of rules of evidence to rebut a presumption of payment.³⁶ Rules of evidence are not vested rights and may be changed by retroactive legislation.³⁷ So, where a prior act had set forth a presumption of payment and a subsequent act had marked twenty years as the limit of the lien, it was held that the subsequent act was only a change in presumption and, thus, merely an alteration of a rule of evidence.³⁸

Regardless of the basis for justifying these statutes, whether on the basis of the distinction between a right and a remedy, or as being a mere change in a rule of evidence, or as being a recording statute, it is clear that

27. As to what has been considered a reasonable time, see *Steele v. Gann*, 123 S.W.2d 520 (Ark. 1939) (90 days); *Vanderbilt v. Hegeman*, 157 Misc. 908, 284 N.Y. Supp. 586 (Sup. Ct. 1935) (90 days); *Kendall v. Keith Furnace Co.*, 162 F.2d 1002 (8th Cir. 1947) (the court will not inquire into the reasonableness of the time unless manifestly insufficient).

28. *Baccus v. Banks*, 192 P.2d 683 (Okla. 1947).

29. *Wheeler v. Jackson*, 137 U.S. 245 (1890); *McCloskey v. Eckart*, 164 F.2d 257 (5th Cir. 1947).

30. *Gary-Wheaton Bank v. Helton*, 337 Ill. App. 294, 85 N.E.2d 472 (1949).

31. *Magnuson v. Breher*, 69 N.D. 197, 284 N.W. 853 (1939).

32. See note 30 *supra*.

33. See note 17 *supra*.

34. *Ibid.*

35. *Ibid.*

36. *Boyd v. Boyd*, 182 S.C. 498, 189 S.E. 794 (1937).

37. See note 13 *supra*.

38. *Ibid.*

the statutes find their justification in necessity rather than in constitutional logic.³⁹ Any form of limitation is, by its very terms, arbitrary, the person having a valid reason for delay being barred the same as the person who negligently delays bringing an action. However, though the differentiation between substantive and procedural rights may not be clear cut, such differentiation can be used as a suitable basis for decision when the court must determine whether a rule is one in which stability is of prime importance or if the rule is one in which flexibility is a more important value.⁴⁰

Statutes limiting the lien of a mortgage have, in some instances, been held to be unconstitutional. Where an actual transfer of ownership is involved, a statute of limitation cannot operate retroactively.⁴¹ There is a wide distinction between requiring one, having a mere right to sue, to pursue the right speedily, and converting an estate in possession into a mere right of action and limiting the time for bringing the action. Thus, one who is in actual or constructive possession of property is under no obligation, nor can he be compelled, to take measures against an opposing claimant; and a law depriving him of his property is in no sense a limitation law but, rather, an unlawful confiscation.⁴² And, an act making an unrecorded deed void unless recorded within a certain time has been held invalid where no time was given the holder to record.⁴³ The fact that the act provided for a delay of six months before it would become effective was not regarded as providing time for registering prior claims.⁴⁴ Another act was held unconstitutional where the life of the mortgage was limited irrespective of the life of the debt it secured.⁴⁵ The court held that it took away the remedy without leaving a remedy of equal or similar value.⁴⁶ While a distinction has been drawn between laws relating to the rights of parties and those applying only to the remedy, this doctrine is subject to the limitation that a remedy must remain which is complete and secures all the substantial rights of the parties.⁴⁷ Thus, any law which amounts to a

39. *Birkby v. Wilson*, 92 Colo. 281, 19 P.2d 490 (1933). See *Lutz v. Dutmer*, 286 Mich. 467, 282 N.W. 431 (1938) (to the effect that such statutes should be given a liberal interpretation).

40. See *Chase Securities Corp. v. Donaldson*, 325 U. S. 304, 314 (1944). See *Holmes, J.* in *Danforth v. Groton Water Co.*, 178 Mass. 472, 476, 59 N.E. 1033, 1034 (1901) ("It may be that sometimes it would have been as well not to attempt to make out that the judgment of the court was consistent with constitutional rules, if such rules were to be taken to have the exactness of mathematics. It may be that it would have been better to say definitely that constitutional rules, like those of the common law, end in a penumbra where the Legislature has a certain freedom in fixing the line, as has been recognized with regard to the police power.").

41. *Stewart v. Keyes*, 295 U.S. 403 (1935); *Murrison v. Fenstermacher*, 166 Kan. 568, 203 P.2d 160 (1949).

42. *Leavenworth v. Cloughton*, 197 Miss. 606, 19 So.2d 815 (1944).

43. *Farmers' Nat. Bank & Trust Co. v. Berks County Real Estate Co.*, 333 Pa. 390, 5 A.2d 94 (1939).

44. *Ibid.* *Contra*: *Connecticut Mutual Life Ins. Co. v. Talbot*, 113 Ind. 373, 14 N.E. 586 (1887); *Davis v. Savage*, 50 N.M. 30, 168 P.2d 851 (1946).

45. *Steward v. Nelson*, 54 Idaho 437, 32 P.2d 843 (1934).

46. *Ibid.*

47. *Ibid.*

denial of rights accruing under a contract, though professing to act only on the remedy, is forbidden.⁴⁸ Other retrospective statutes have been held unconstitutional on the basis that insufficient time was provided for the forfeiting of prior rights.⁵⁰

In the most recent decision concerning the validity of statutes eliminating the liens of mortgages in default, the Pennsylvania Supreme Court,⁵¹ in adopting the opinion of the lower court,⁵² found the Pennsylvania statutes⁵³ objectionable on two grounds. First, they required the bringing of a court action where no controversy existed and, secondly, they applied to mortgages still in force as well as to mortgages in default. This latter objection was found to be valid in regard to perpetual mortgages issued by railroad companies to secure bond issues, and also to ground rent estates, a common law type of estate still existent in Pennsylvania.

Turning to the Florida statutes,⁵⁴ it is obvious that the major objections present in the Pennsylvania statutes are not of concern to the Florida court. First, Florida has no ground rent estates and, secondly, railroad mortgages have been specifically exempted from the operation of the statutes.⁵⁵ In addition, no court action is required by the Florida statutes, in order to preserve a lien.⁵⁶ Thus, it would seem only necessary to consider the Florida court's past views on the general objections to retrospective legislation. There is, however, an additional factor which must be taken into consideration. Article III, section 33 of the Florida Constitution provides, "No statute shall be passed lessening the time within which a civil action may be commenced on any cause of action existing at the time of its passage."

It is settled in Florida that the prohibition as to ex post facto laws applies only to criminal cases.⁵⁷ And, the type of contract which is to be protected against retroactive legislation is a voluntary contract based on the assent of the parties involved.⁵⁸ Thus the court has found no objection to curative acts which do not infringe upon any contractual right.⁵⁹ But, a statute which goes so far as to take away all remedies and leave no substantial remedy in place thereof would be void as impairing the obligation of contracts.⁶⁰ However, the extinguishment of a lien can hardly be classified

48. *Ibid.*

49. *Edwards v. Kearzey*, 96 U.S. 595 (1877).

50. *Blevins v. Northwest Carolina Util., Inc.*, 209 N.C. 683, 184 S.E. 517 (1936).

51. *Girard Trust Co. v. Pennsylvania R.R.*, 364 Pa. 576, 73 A.2d 371 (1950).

52. *Girard Trust Co. v. Pennsylvania R.R.*, No. 2341, C.P. No. 5, Philadelphia County, Pa., December term 1949.

53. PA. STAT. ANN. Tit. 68, §§ 451-457 (Cum. Supp. 1949).

54. FLA. STAT. §§ 95.28-95.34 (1949).

55. FLA. STAT. § 95.32 (1949).

56. FLA. STAT. § 95.29 (1949).

57. *Crooks v. State*, 141 Fla. 597, 194 So. 237 (1940); *Forbes Pioneer Boat Line v. Everglades Drainage Dist.*, 80 Fla. 252, 86 So. 199 (1920), *rev'd on other grounds*, 258 U.S. 338 (1922).

58. *Mahood v. Bessemer Properties, Inc.*, 154 Fla. 710, 18 So.2d 775 (1944).

59. *Charlotte Harbor & N. Ry. v. Welles*, 78 Fla. 227, 82 So. 770 (1919).

60. *Cragin v. Ocean & Lake Realty Co.*, 101 Fla. 1324, 135 So. 795 (1931).

as curative legislation in the same manner as legislation providing for the curing of technical defects in deeds after a certain lapse of time. The lien is a right whether substantive or remedial, and not an irregularity such as a mere defect in the execution of a deed.

The meaning and extent of application of the aforementioned constitutional provision must also be investigated.⁶¹ The purpose of this section is to prevent a subsequent statute from having a retrospective effect by reducing the statute of limitation after the statute has already begun to run against a cause of action.⁶² This section has been held to prevent a reduction of time for bringing an action on a sealed instrument under a non-claim statute.⁶³ Where, however, the retroactive statute reduced the period of limitation in a non-claim statute from twelve to eight months, the court felt it necessary to distinguish non-claim statutes from ordinary statutes of limitation and limited the application of this provision to only general statutes of limitation.⁶⁴ The court indicated that even retroactive statutes, affecting a general statute of limitation, would not be in violation of the constitutional provision against impairment of contracts, but thought that such a statute would not be valid in Florida in view of Article III, section 33.⁶⁵ Subsequent cases have pointed out that such a view would not be applicable to causes of action where no previous period of limitation existed.⁶⁶ To hold otherwise would in effect prevent any statute of limitation being passed which affects existing rights if there was no applicable statute of limitation in existence at the time the constitution of 1885 was adopted.⁶⁷

An idea as to the views of the Florida court can be gathered from the case of *Mahood v. Bessemer Properties, Inc.*,⁶⁸ which concerned the validity of the retrospective application of a statute limiting the life of contracts to purchase land. The court was of the opinion that one of their functions must be to see whether the legislation is addressed to a legitimate end and the measures taken are reasonable. Recognizing that the contract impairment clause⁶⁹ does not affect the police power of the state, the court must consider the welfare of the people of the state as a whole. Even though the remedial law in force at the time the contract is made is considered as entering into and becoming a part thereof, the parties have no vested right in any particular remedy and the state may modify the remedy, provided that another be substituted therefor.⁷⁰ Thus, a statute which imposes

61. For a discussion of the applicability of FLA. CONST. Art. III, § 33 to FLA. STAT. §§ 95.28-95.34 (1949), see 22 FLA. L. J. 153 (1948).

62. *Lee v. Lang*, 140 Fla. 782, 192 So. 490 (1940).

63. *State Bank of Orlando & Trust Co. v. Macy*, 101 Fla. 140, 133 So. 876 (1931).

64. *In re Wood's Estate*, 133 Fla. 730, 183 So. 10 (1938).

65. *Ibid.*

66. See *Buck v. Triplett*, 159 Fla. 741, 32 So.2d 753 (1947); *Campbell v. Horne*, 147 Fla. 523, 524, 3 So.2d 125, 126 (1941).

67. *Campbell v. Horne*, *supra* note 66, at 126.

68. 154 Fla. 710, 18 So.2d 775 (1944). See *James Alexander, Inc. v. United States*, 128 F.2d 82 (5th Cir. 1942) (discussion of retrospective aspects of Murphy deeds).

69. See note 19 *supra*.

70. *Mahood v. Bessemer Properties, Inc.*, 154 Fla. 710, 18 So.2d 775 (1944).

additional duties upon the owner of a contract so that he must take certain steps in order to preserve his rights is not void, provided that the statute allows a reasonable time in which to take the necessary steps.⁷¹

The concurring opinion in the *Mahood* case directly attacked the problem of the effect of Article III, section 33, and reached the conclusion that where a reasonable time is provided for the preservation or enforcement of existing claims, a statute should not be held to violate this provision.

The court has placed much emphasis upon public policy and the existing emergencies which necessitate such statutes. The land boom and crash of the Twenties still affect our property,⁷² and statutes seeking to remove the impediments imposed by speculative contracting and mortgaging should be considered in the light in which the United States Supreme Court considered the Minnesota Moratorium on Mortgages,⁷³ that is, the welfare of the state as a whole.

Regardless of the emergency which prompted the Florida statutes⁷⁴ enactment, the legislature has taken the outstanding precautions to eliminate constitutional objections. Mortgagees were given the reasonable time of one year to prosecute or extend their prior claims,⁷⁵ the remedy of foreclosure cannot be extinguished prior to the barring of the right contained in the debt,⁷⁶ and specific types of mortgages, used as security for bond issues, were exempted from the operation of the statutes.⁷⁷

As for the possibility that the statute of limitation as to the debt may be tolled by part payment, so that the lien might conceivably be extinguished prior to a barring of the debt, the statutes may be considered as imposing an additional duty upon the mortgagee. If the mortgagee wishes to allow the statutes to be tolled in regard to the debt then he must take steps to extend his lien too, and one year was provided for those already in that situation. The remedy is changed, but it appears that an adequate remedy remains.

In conclusion, Florida, in adopting a statute of limitation as a means of eliminating "stale" mortgage liens, appears to have met the usual constitutional requirements in regard to retrospective statutes. A reasonable time was provided for the enforcement or preservation of existing claims. Special exceptions were made for certain types of mortgages which would

71. *Ibid.*

72. *See State v. Culbreath*, 140 Fla. 634, 640, 192 So. 814, 819 (1939) ("Terrellism: 'The pots of gold metamorphosed from town lots and cut over land by the optimism and phychosis of that era changed suddenly to a medley of pyramided mortgages and delinquent tax certificates.'").

73. *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

74. FLA. STAT. §§ 95.28-95.34 (1949).

75. FLA. STAT. § 95.34 (1949). FLA. STAT. § 95.31 (1949) specifically denies any saving because of disabilities. Disability does not per se bestow immunity. There must be a legislative saving in such person's favor. *See Vance v. Vance*, 108 U.S. 514 (1883); *Barbour v. Williams*, 196 Miss. 409, 17 So.2d 604 (1944).

76. The period of limitation for a debt founded upon an instrument under seal is twenty years. FLA. STAT. § 95.11(1) (1949).

77. FLA. STAT. § 95.32 (1949).

otherwise have been adversely affected. Mortgagees were provided with a means of extending their liens by registration, there being no necessity for court proceedings as in the invalid Pennsylvania law. The most serious problem is the applicability of Article III, section 33 of the Florida Constitution. But, the court has indicated that this provision would not be applicable where no prior statute of limitation existed. Further, in *Mahood v. Bessemer Properties, Inc.*, the concurring justice expressed the view that that constitutional provision is satisfied if a reasonable time is provided for the enforcement of existing claims. In view of these opinions, it seems unlikely that the Florida statutes will meet a fate of being declared unconstitutional as did their Pennsylvania counterpart.

HERBERT A. WARREN

THE PRECARIOUSNESS OF THE RIGHT OF SURVIVORSHIP IN JOINT BANK ACCOUNTS

There is considerable uncertainty as to whether the survivor of a joint bank account or the personal representative of the deceased should receive the funds of a joint account. The question has been clouded, so far as the layman is concerned, by the adoption in nearly every state of "Deposit in Two-Name" statutes.¹ Laymen are of the opinion that when they sign a bank signature card, as demanded by these statutes, providing that the funds are payable to either or survivor, they have made all the arrangements for their co-depositor to receive the funds upon death. Actually, these statutes merely protect the bank in case of payment to the survivor after the death of the joint depositor.

It is proposed to show, first, the modern theories used in deciding whether or not the survivor of a joint account will receive the account; secondly, the problem as it exists under the Florida decisions; and thirdly, a suggestion as to how Florida might clarify the joint account dilemma.

When the common law was first formulating in England, personal property was of relatively little importance. Men of wealth had many acres of land, but only a few personal effects. As a result the law of the time was predominantly concerned with realty. Real property could be held in four different ways: in severalty, in joint-tenancy, in coparcenary and in common.² Each of these theories had requirements which had to be met before the estate could have legal effect.³ One of the primary reasons for determining the type of estate that existed was to establish the rights of survivor-

1. Every state except Kentucky has "Deposit in Two-Name Acts." See, e.g., FLA. STAT. § 653.16 (1949). These acts provide that the signing of a signature card, which states that the account is payable to X or Y or survivor, protects the bank in paying the survivor after the death of a joint depositor.

2. 2 BL. COMM. *343

3. *Ibid.*