Negotiable Instruments

Daniel E. Murray

Follow this and additional works at: http://repository.law.miami.edu/umlr

Recommended Citation
Daniel E. Murray, Negotiable Instruments, 22 U. Miami L. Rev. 585 (1968)
Available at: http://repository.law.miami.edu/umlr/vol22/iss3/4
NEGOTIABLE INSTRUMENTS

DANIEL E. MURRAY*

I. INTRODUCTION ........................................................... 585

II. REAL AND PERSONAL DEFENSES ......................................... 586
A. Acceleration and Default ............................................... 586
B. Bona Fides and Lack of Knowledge .................................... 586
C. Consideration ........................................................... 588
D. Coverture .................................................................... 588
E. Duress ......................................................................... 590
F. Election of Remedies .................................................... 590
G. Equitable Defenses ........................................................ 591
H. Equities of Ownership .................................................... 591
I. Fraud ........................................................................... 592
J. Indorsements—Authorized and Unauthorized ......................... 593
K. Non-Negotiability .......................................................... 593
L. Parol Evidence of a Defense .............................................. 594
M. Payment .................................................................... 595
N. Presentment and Protest—Waiver of .................................. 595
O. Statutes of Limitations ..................................................... 596
P. Usury .......................................................................... 597

III. DEFICIENCY DECREES AND JUDGMENTS .......................... 598

IV. ATTORNEY'S FEES ......................................................... 599

V. ACCOMMODATION ENDORSERS, SURETIES AND GUARANTORS 600

VI. LEGISLATION ............................................................... 601

VII. LETTERS OF CREDIT .................................................... 601

VIII. BANKS, BANK DEPOSITS AND COLLECTIONS ............... 602
A. General and Special Deposits .......................................... 602
B. Collection of Items ........................................................ 603
C. Joint Savings Accounts ................................................... 603
D. Totten Trusts .................................................................. 604
E. Sale of Collateral .......................................................... 604
F. Garnishment .................................................................. 605
G. Ultra Vires Acts ............................................................ 605
H. Legislation .................................................................... 605

IX. BAD CHECK LAWS ....................................................... 606

I. INTRODUCTION

In accordance with the two prior Surveys of this field,¹ this article will discuss the significant cases which were decided and the legislation which was enacted dealing with the law of negotiable instruments and banks and banking during the preceding two-year period, and then will compare the decisions with the predicted effect of the Uniform Commercial Code. Legislation will be discussed under the appropriate headings.

* Professor of Law, University of Miami. The materials surveyed herein extend from 177 So.2d 328 through 201 So.2d 224 and the legislation enacted by the 1967 Regular Session and three Special Sessions of the Florida Legislature.

II. REAL AND PERSONAL DEFENSES

A. Acceleration and Default

A person who has held a note and mortgage but has then assigned them as collateral security for a loan does not have sufficient ownership and control of the note and mortgage to accelerate payment and file suit for foreclosure when these acts are done without the knowledge or consent of the person who is holding these documents as collateral. The holder of the collateral note and mortgage has the power to accelerate, to institute a foreclosure action and to receive payment, rather than the assignor.2

Although this factual pattern is not expressly covered by the Code, a combination of sections 3-201, 3-301 and 3-603 should lead to a similar result.

B. Bona Fides and Lack of Knowledge

When a payee of a check is the agent of the eventual holder of the check, knowledge of the payee that the drawer is going to stop payment on the check because of duress will not be imputed to the principal-holder when the agent is acting for his own advantage and adversely to the interests of the principal-holder.8

An individual holder who indorsed and assigned a note to himself while purportedly acting as president of the payee-corporation six years after it had been placed in receivership, five years after it had been adjudicated bankrupt and seven or eight years after he had ceased all official connection with the corporation cannot be a holder in due course of the note.4

In the absence of proof of fraud, bad faith or overreaching, a controlling stockholder and officer of a corporation may purchase a purchase money note and mortgage issued by the corporation to a third person which will have priority over the lien of a judgment creditor against the corporation obtained subsequent to his acquisition of the note and mortgage.5

The U.C.C. should not affect the above cases.6

2. Laing v. Gainey Builders, Inc., 184 So.2d 897 (Fla. 1st Dist. 1966). See Soper v. Stine, 184 So.2d 892 (Fla. 2d Dist. 1966), which refused to link a note and mortgage on personal property and a note and mortgage on real property in such a manner that a default on the note and mortgage on the personal property would constitute a default on the note and mortgage on the real property in the absence of some documents linking the separate transactions. See Althouse v. Kenney, 182 So.2d 270 (Fla. 2d Dist. 1966), which refused acceleration of the due date of a mortgage because of estoppel and other equitable considerations.


In a rather cloudy opinion, the third district has seemingly held that when a finance company has taken part in the original conditional sales transaction between the conditional vendor and conditional vendee and the conditional sales contract and promissory note are simultaneously assigned to the finance company, the finance company will not be a holder in due course of the note when the conditional vendee proves a failure of consideration in the underlying transaction.\footnote{Industrial Credit Co. v. Mike Bradford & Co., 177 So.2d 878 (Fla. 3d Dist. 1965), citing Mutual Fin. Co. v. Martin, 63 So.2d 649 (Fla. 1953). It must be confessed that the reasoning in \textit{Martin} was also obscure. It is not certain that the courts are denying a holder in due course status of the finance company because of a presumption that the finance company had notice of a defect in the underlying transaction, or because of a presumed lack of good faith by the finance company.}

The fact that there may be a close association between a financing institution, a manufacturer and a dealer does not necessarily preclude a court from finding that the financing institution is a holder in due course of a note (secured by a conditional sales contract) given by a customer to the dealer which assigned the instruments to the financing institution. Control of the financing institution over the dealer is the key, not just the mere close association.\footnote{National State Bank v. Robert Richter Hotel, Inc., 186 So.2d 321 (Fla. 3d Dist. 1966). Cf. Mutual Fin. Co. v. Martin, 63 So.2d 649 (Fla. 1959).} However, when a financing institution exercises such a degree of control over its dealer in the dealer’s sales of goods and the financing of the dealer’s sales as to indicate that the dealer is an agent of the financing institution, then the financing institution cannot be considered a holder in due course of the commercial paper received from the dealer.\footnote{Compare National State Bank v. Robert Richter Hotel, Inc., 186 So.2d 321 (Fla. 3d Dist. 1966) with National State Bank v. Robert Richter Hotel, Inc., 188 So.2d 18 (Fla. 3d Dist. 1966).}

Article three of the Code has not made any changes in the good faith and lack of notice rules (first enunciated in the N.I.L.) which will overturn these three cases. However, under section 9-206 of the Code, a buyer of non-consumer goods who signs a negotiable instrument and a security agreement as part of one transaction in buying the goods will be held to have agreed not to assert against the assignee (the finance company or bank) any claim or defense which he may have against his vendor when the assignee takes the paper in good faith, for value and without notice of a claim or defense. It is possible, of course, for the Florida courts to continue to adhere to the idea that the close association of the finance company with the vendor prevents it from being in good faith or that it has notice of a defense because of the close association. The courts should, however, consider whether the sophisticated buyers in the above cases needed the protection which a non-sophisticated consumer buyer might require.\footnote{See \textsc{W. Hawkland}, \textit{Commercial Paper and Bank Deposits and Collections} 211-213 (1967).}
C. Consideration

Section 52.08 of the Florida statutes provides that a holder of a negotiable instrument need not allege in his complaint nor prove at the trial that the instrument was given and endorsed for consideration, unless the defendant shall deny under oath that consideration was given. The Supreme Court of Florida has held that the provisions of this statute are "in substantial part inconsistent with current practice (under the Florida Rules of Civil Procedure) and should for this reason be deemed inoperative."

The Code has seemingly made changes in the presumption of due course holding which may cause some strange results.

The introduction into evidence of invoices or sales books of a deceased payee of notes which tend to show that furs were sold to the maker of the notes is sufficient to establish a prima facie case of consideration and to shift the burden of going forward with the evidence to the maker who asserted that the notes were given in advance of the shipment of the furs and that the furs were never delivered by the payee.

When the mortgagor fails to disburse money on a note secured by a mortgage, then no valid lien may attach to the property allegedly encumbered by the mortgage.

Knowledge by a holder that promissory notes were issued for an executory consideration will not prevent the holder from being a holder in due course. This decision is entirely consistent with section 3-304(4)(b) of the U.C.C.

D. Coverture

The U.C.C. is not intended to affect the Florida constitutional provision which requires certain formalities in signatures by married women in order to charge their separate property for their husbands' debts, and, therefore, a wife who signs as a co-maker along with her husband and another person when the consideration is received by the husband alone is not liable on the note unless she signs the note in accordance with the formalities required by the Florida constitution respecting conveyances by married women.

16. U.C.C. § 3-401, Comment 2.
A married woman who borrows money to pay a mortgage on her separate property and gives a mortgage as a single woman to secure this loan thereby subjects her property to the lien of this mortgage despite the fact that it is not executed by her husband. In effect, the wife is estopped from pleading her marital status when she has obtained money by representing that she is a single woman.\textsuperscript{19}

A guarantor of a note made by a husband and wife pursuant to a joint venture by the couple may subject the wife's property to a judgment secured as the result of a suit based upon the guarantor's payment of the note; the rule that a wife's separate property may not be levied upon to satisfy a debt of the husband has no application to a case involving the joint debt of the husband and wife.\textsuperscript{20}

A husband and wife who execute a purchase money note and mortgage on an estate by the entirety are each obligated for the entire amount.\textsuperscript{21}

In \textit{Gulf Shore Dredging Co. v. Ingram},\textsuperscript{22} a married woman, without the joinder of her husband, gave a note and mortgage on her separate real property. Part of the mortgage proceeds were used to pay off an existing mortgage on the property while the bulk of the proceeds was used to improve her property. The fourth district held that the mortgagee could not assert a lien under the Florida constitution and statutes for the amount of the money which was used to pay off the existing mortgage. However, the mortgagee could sue to have the court place an equitable lien on the property for the amount of this pay-off, and the lien could include the other money which was used to improve the property on the basis that once equity acquires jurisdiction it gives full relief. The court mentioned that if the court held otherwise, it would require the plaintiff-mortgagee to split his cause of action into two suits, one for an equitable lien for the pay-off money and a second for a constitutional statutory lien for the improvements, but that this would be contrary to the full relief maxim in equity.

The Supreme Court of the United States has held that the Texas law of coverture provides a married woman with a defense to a Small Business Administration suit to recover from her separate property the unpaid balance of an S.B.A. loan to her and her husband which was negotiated with knowledge by all parties that the loan contract would be subject to the Texas law of coverture. The federal interest in collecting the S.B.A.

\textsuperscript{19} Smith v. Martin, 186 So.2d 16 (Fla. 1966).
\textsuperscript{20} Gallion v. Belk, 180 So.2d 349 (Fla. 1st Dist. 1965). If the debt is not a joint obligation of the spouses, then the wife's separate property may be subject to the claims of the husband's creditors only if she has given an instrument in writing executed according to the law respecting conveyances by married women. Waechter v. General Mills, Inc., 181 So.2d 204 (Fla. 1st Dist. 1966).
\textsuperscript{21} Marsh v. London, 181 So.2d 186 (Fla. 3rd Dist. 1965).
\textsuperscript{22} 193 So.2d 232 (Fla. 4th Dist. 1966).
loan from her separate estate does not warrant overriding the Texas law in favor of the view that a loan from the government is a federal matter which should be governed by federal law. Although the Texas coverture law is different from the Florida law, the Court recognized that this holding might have impact on federal loans granted in Florida.\textsuperscript{23}

Although it is beyond the scope of this article, it should be noted that the constitutional prohibition against subjecting a wife’s separate property for the debts of her husband has no application when the wife executes an indemnity agreement indemnifying a bonding company against any loss it might suffer as the result of the issuance of a performance bond for building construction work undertaken by the husband, when this indemnity agreement was the inducement for the issuance of the bond.\textsuperscript{24}

E. \textit{Duress}

Duress as a defense to an action on a negotiable instrument need not consist of physical pressure brought to bear upon the drawer or maker. If property is held by a person and he wrongfully refuses to surrender it to the lawful owner who issues his negotiable instrument to secure its release, the issuance will be regarded as done under compulsion or duress.\textsuperscript{25}

Inasmuch as the U.C.C. is neutral in articulating the degrees of duress and whether it renders an instrument void or voidable, this case will not be affected.\textsuperscript{26}

F. \textit{Election of Remedies}

If the holder of a chattel mortgage “forecloses” his chattel mortgage by means other than legal action (for example, repossession and private sale), he is precluded from obtaining a judgment on the note for any deficiency. This rule has been extended to a case where the holder of a chattel mortgage on an automobile surrendered the certificate of title to an insurance company after the automobile was wrecked. He received a check from the insurance company as a settlement without the authority of the chattel mortgagor or the person who was in possession of the automobile at the time of its destruction.\textsuperscript{27} Section 9-504 of the Code should effect the overruling of this cabalistic election of remedy notion.

When a subcontractor takes a promissory note from the contractor and sues on the note and receives a judgment, this unsatisfied judgment does not preclude the institution of a mechanic’s lien suit against the

\begin{footnotes}
26. U.C.C. § 3-305(2)(d) and Comment 6.
\end{footnotes}
property which was improved by the sub-contractor; the remedies are cumulative and not exclusive. 28

G. Equitable Defenses

When an assignee of a mortgage agrees to release certain property from the lien of its mortgage in return for payment, and another lender in relying on this agreement lends money secured by a mortgage on this property, a court of equity will force the assignee to carry out its agreement in order to protect the subsequent lender. 29

H. Equities of Ownership

The case of Guaranty Mortgage and Insurance Co. v. Harris 30 involved an interesting application of the equity of ownership concept. A payee-mortgagee agreed to hold notes and mortgages as pledges for loans made by Harris to the payee-mortgagee. No formal indorsements of the notes or assignment of the mortgages were made. Subsequently, the payee-mortgagee indorsed the notes and assigned the mortgages to Guaranty Mortgage, which took without actual or constructive notice of the prior transaction. At the time of the latter transaction, the notes were in default. The first district held that Guaranty Mortgage took subject to the rights of Harris because Guaranty Mortgage could not be a holder in due course of an overdue instrument, and it was merely an assignee of whatever title its assignor had, which was subject to the prior equitable claim of Harris. However, the Supreme Court of Florida reversed on the theory that Harris should bear the loss because he made the loss possible since he failed to secure and record an assignment of the obligations or even the physical possession of the notes and mortgages, and failed to notify the obligors of the transasion—if any one of these steps had been accomplished the loss might not have occurred. 31

The Code has adopted the view of the first district and the seeming minority view prior to the Code that the bona fide purchaser of an overdue instrument takes subject to equities of ownership. 32 As the Code states it: “Unless he has the rights of a holder in due course any person takes the instrument subject to (a) all valid claims to it on the part of any person; . . .” 33 And a holder who takes with notice that the instrument is overdue cannot be a holder in due course. 34 However, it is possible to

30. 182 So.2d 450 (Fla. 1st Dist. 1966).
34. U.C.C. § 3-302.
reconcile the Code provisions with the holding of the Supreme Court of Florida on the basis that Harris lost his "valid claim" to the instrument on the grounds of estoppel.95

When cashiers' checks have been delivered to the payee to be cashed upon the happening of a condition subsequent and the condition has not occurred, the payee holds the checks as a custodian for the remitter and as custodian may be garnished in a suit filed against the remitter.96

The third district has seemingly held that a holder of a note and real estate mortgage may make a gift of these documents without indorsing the note or assigning the mortgage when the donor also executes a check for the face amount of the note and gives it to the donee after writing on the check that it is a gift to be paid for out of the proceeds of the note and mortgage.97 Of course, the donee would not be the holder of the undorsed note but only a transferee.98 However, the donee "acquires whatever rights the donor had."99

I. Fraud

A maker who relies upon fraud as a defense to the enforcement of a negotiable instrument in the hands of a holder in due course must be free from negligence, and the illiterate maker's allegation that he had no knowledge that he was signing a note and mortgage is vitiated when he has made payments in accordance with the terms of these instruments for approximately three years.40 The result of this case should be the same under the U.C.C.41

When a promissory note is given to a husband and wife as an estate by the entirety and one of the spouses subsequently dies, the maker of the note may testify as to fraudulent representations made by the deceased husband in a suit brought by the wife to collect on the note and an accompanying mortgage over the objection of the dead man's statute.42 The survivor of a husband or wife as to property held by the entireties does not come within the dead man's statute, because the tenant by the entirety does not take by survivorship but continues to hold the entire title by virtue of the original title.43

35. W. Britton, supra, note 32.
37. Lungu v. Walters, 198 So.2d 99 (Fla. 3d Dist. 1967).
39. U.C.C. § 3-201, Comment 2.
41. U.C.C. § 3-305(2) (c) and Comment 7.
42. FLA. STAT. § 90.05 (1965).
43. Gladstone v. Kling, 182 So.2d 471 (Fla. 1st Dist. 1966). This case also involved some questionable applications of the doctrines of res judicata and estoppel by judgment which are beyond the scope of this article.
**J. Indorsements—Authorized and Unauthorized**

If a corporate payee’s indorsement has been made by an employee without any authority to do so and the transferee indorses to another, the latter is only a transferee and not a holder in due course because of the defective indorsement to the intermediate transferee.\(^4\) This case is consistent with section 3-404 of the Code.

When an instrument labeled “Assignment and Endorsement” is not attached to a promissory note in accordance with the former rule\(^5\) that an indorsement must be made on the instrument itself or upon a paper attached thereto, the transaction is an assignment rather than an indorsement.\(^6\) The U.C.C. has continued the requirement that an “indorsement must be written . . . on the instrument or on a paper so firmly affixed thereto as to become a part thereof.”\(^47\)

Under former section 674.11(3) of the Florida Statutes, when an employee furnished his employer with checks bearing the names of fictitious payees and the employer signed the checks without realizing his employee’s duplicity, these checks were payable to bearer and the drawee-bank could charge the account of the employer no matter who indorsed the checks.\(^48\) The confusing word “fictitious” has been eliminated by the U.C.C.,\(^49\) which provides the same ultimate result by stating that “an indorsement by any person in the name of the named payee is effective” if an agent or employee of the drawer has supplied the drawer with the name of the payee while intending that the named payee have no interest in the check.

**K. Non-Negotiability**

A provision in a note and mortgage that the maker-mortgagor shall not be held personally liable and that the mortgage will be limited to the security afforded by the mortgage does not preclude foreclosure on the ground that the mortgage is ineffective because it is not supported by an obligation when it is a purchase money mortgage.\(^50\)

The second district has held that a clause in a mortgage (it is not clear whether it was a purchase money mortgage) providing that the subject property will be the only security for a promissory note and that the makers of the promissory note shall not be personally liable is effective between the maker and the payee. However, the court expressly dis-

---

\(^{44}\) Ederer v. Fisher, 183 So.2d 39 (Fla. 2d Dist. 1965).

\(^{45}\) FLA. STAT. § 674.34 (1965).

\(^{46}\) Balogh v. Cleys, 181 So.2d 363 (Fla. 3d Dist. 1966).

\(^{47}\) U.C.C. § 3-202(2).

\(^{48}\) Bay Fin. Corp. v. Bay Nat'l Bank & Trust Co., 200 So.2d 248 (Fla. 1st Dist. 1967).

\(^{49}\) U.C.C. § 3-405(1)(c).

\(^{50}\) MacArthur v. Merwitzer, 180 So.2d 164 (Fla. 3d Dist. 1965).
claimed any consideration of the question whether the limitation of liability clause in the mortgage destroyed the note's negotiability and if the clause would be a sufficient defense against subsequent parties.\textsuperscript{51}

There seems to be little question that any clause in a note which limits the liability of the makers of a note to the security afforded by the mortgaged land renders the promise to pay conditional and destroys the negotiability of the note unless it is issued by a governmental agency or unit or by a partnership, unincorporated association, trust or estate which limits payment out of the entire assets of the issuer. Under this rule, a partnership could issue a note and give a mortgage which would be limited to its entire assets which might consist of only one piece of real property, and the note would be negotiable.\textsuperscript{52}

L. \textit{Parol Evidence of a Defense}

The parol evidence rule bars parol evidence of an extrinsic agreement as to the mode of payment or the amount of payment of a negotiable instrument. However, a prior or contemporaneous oral agreement to concede a credit or counterclaim as offsetting the obligation of a negotiable instrument is a separate transaction which is not dealt with in the instrument, and parol evidence is permissible to prove this prior or contemporaneous agreement.\textsuperscript{53}

The Supreme Court of Florida, in reversing the third district\textsuperscript{54} and silently agreeing with the author's critique of the third district's decision,\textsuperscript{55} has held that when a promissory note has been issued with the date left blank, the note is payable on demand pursuant to statute\textsuperscript{56} and parol evidence may not be introduced to show that the parties had agreed on a different date of maturity. This decision will remain the law under Code sections 3-108 and 3-118.\textsuperscript{57}

A maker, when sued on a promissory note, may introduce parol evidence to show that the note was not to become a binding obligation until the payee delivered a promissory note and chattel mortgage which arose out of a different transaction.\textsuperscript{58}

Parol evidence of past dealings between the parties cannot be introduced to show that the indorser of a promissory note did not intend to

\textsuperscript{51} Policastro v. Rudt, 180 So.2d 472 (Fla. 2d Dist. 1965).
\textsuperscript{52} U.C.C. § 3-105(1)(g)(h)(2) and Comments.
\textsuperscript{53} Little River Bank & Trust Co. v. North Am. Mortgage Corp., 186 So.2d 263 (Fla. 2d Dist. 1966).
\textsuperscript{54} Schekter v. Michael, 184 So.2d 641 (Fla. 1966), rev'd Michael v. Schekter, 176 So.2d 581 (Fla. 3d Dist. 1966).
\textsuperscript{56} Fla. Stat. § 674. 09 (1965).
\textsuperscript{57} See U.C.C. § 3-118, Comment 1.
\textsuperscript{58} Evans v. United Benefit Fire Ins. Co., 192 So.2d 87 (Fla. 2d Dist. 1966).
give an unqualified indorsement and that the indorsees, therefore, were not holders in due course. 59

In Horvath v. Five Points National Bank of Miami 60 the third district dissolved a temporary injunction which forbade a bank to sell collateral held as security for promissory notes because the holder-bank had allegedly orally agreed to extend the maturity of the notes at the time of their execution even though the notes contained fixed maturity dates. The court based its decision on the ground that the makers had not tendered into court the interest admittedly due on the notes. It is submitted that the court was correct for the wrong reason—the holding should have been based on the parol evidence rule that oral agreements prior to or contemporaneous with the execution of a note may not be admitted into evidence to show that the parties had agreed on maturity dates different from those expressed in the notes.

The parol evidence rule bars the mortgagor from showing that a mortgage was given to secure the mortgagee on a construction bond which it was to issue in conjunction with a building contract which the mortgagor was bidding on with the United States Navy (even though the mortgagor alleged that his bid was not accepted and the performance bond was not issued by the mortgagee), when the mortgage made no reference to this alleged bidding. 61

M. Payment

Whether the cashing of a check which has a notation that it is “payment of account in full to date” constitutes an accord and satisfaction of all accounts between the drawer and the payee is a question of fact. When there are other accounts in addition to those referred to in a letter which resulted in the issuance of the check, the check may not necessarily be considered as an accord and satisfaction. 62 The area of accord and satisfaction is not clearly encompassed within the Code. 63

N. Presentment and Protest—Waiver of

When a negotiable instrument provides in the body of the instrument for waiver of protest and notice of protest, all parties, including sub-

60. Horvath v. Five Points Nat'l Bank, 182 So.2d 22 (Fla. 3d Dist. 1966). The special concurring opinion of Pearson, J., expressed the correct reasoning in the opinion of this author.
62. Best Concrete Corp. v. Oswalt Eng'r Serv. Corp., 188 So.2d 587 (Fla. 2d Dist. 1966).
63. See § 3-802 of the U.C.C. as to the effect of an instrument taken for an underlying obligation, and W. HAWKLAND, COMMERCIAL PAPER AND BANK DEPOSITS AND COLLECTIONS 176-179 (1967) for a succinct review of the problem presented in the Best case.
sequent indorsers, are bound by it.\textsuperscript{64} This decision virtually tracks section 3-511(6) of the U.C.C.

In a case decided under the pre-Code law, the second district held that a waiver of presentment and a consent to an extension contained in a promissory note was a consent to several extensions of payment by the holder without notice to the indorsers. The court noted that under section 3-118(F) of the U.C.C., a consent to extension of payment authorizes only one extension for not longer than the original period unless the instrument specifies otherwise.\textsuperscript{65}

\begin{center}
O. Statutes of Limitations
\end{center}

When a promissory note has been executed in California, payable to a Florida payee, the statute of limitations of the place of performance (Florida) governs and not the state of execution (California). Further, the statute of limitations would be tolled during the time that the California maker was not a resident of Florida; an action against a foreign maker will not be barred when the total time of his residence in Florida did not exceed the five year period provided by the Florida statute of limitations.\textsuperscript{66}

The U.C.C. conflicts of law provision states that:\textsuperscript{67}

\begin{quote}
[W]hen a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. \textit{Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.}
\end{quote}

Under the above italicized wording, the Florida courts could continue to apply the law of the place of performance of a negotiable instrument rather than the law of the place of execution.\textsuperscript{68} The Code has not attempted to affect the statute of limitations of the various states insofar as the bringing of suits on negotiable instruments is concerned. However, it should be noted that the Code has provided that a customer of a bank has one year in which to notify the bank that his signature has been forged and three years in which to report an unauthorized indorsement.\textsuperscript{69}

The contract of indorsement is a separate contract from that of the maker. Hence, when an unsealed indorsement of a sealed promissory note is made, the five-year statute of limitations for a suit against the indorser is applicable rather than the twenty-year statute on a sealed instrument.

\begin{footnotes}
64. Roepke v. Kaenel, 182 So.2d 651 (Fla. 1st Dist. 1965).
66. Aviation Credit Corp. v. Batchelor, 190 So.2d 8 (Fla. 3d Dist. 1966), construing FLA. STAT. §§ 95.11(3), 95.10 and 95.07 (1965).
67. U.C.C. § 1-105(1) and Comments (emphasis added).
69. U.C.C. § 4-406 and Comments.
\end{footnotes}
Further, even if the maker makes part payment of the note within the period of limitations this does not toll the running of the statute as to the indorser.\(^7\) The Code takes a neutral position as to the legal effects of a sealed instrument and the statute of limitations.\(^7\)

P. Usury

The Florida interest and usury laws remain unaffected by the Code\(^7\) and any action by the 1967 Legislature.

The "criminal usury" statute in Florida provides for a forfeit of both principal and interest. The "civil usury" statute provides for forfeiture of double the amount of the interest. If both of these statutes are given cumulative effect, a lender would, in some cases, forfeit all of the principal and interest as well as an additional penalty based on a double the interest computation. The first district has held that when the facts show a violation of the civil usury statute and the forfeiture of double the interest paid in fact exceeds the principal and interest owing on the mortgage, the separate usury statutes will not be given a cumulative effect so as to exact an additional penalty in excess of these amounts. Further, the cancellation of the mortgage because of its usurious nature prevents the imposition of attorney's fees and costs incident to the foreclosure.\(^7\)

When a note provides for interest at the rate of five per cent per annum and "this note and deferred interest payments shall bear interest at the rate of nine (9) per cent, per annum until paid,"\(^7\) the increased interest rate may not be assessed against the remaining unpaid principle when there has not been an acceleration of the principal amount because of late payments. However, the nine per cent interest rate may be assessed against each monthly payment which was not paid on the due date.

If a lender and borrower orally agree to fifteen percent interest per year and the borrower pays this amount of interest, he may plead usury even though the written notes fail to provide for any set percentage of interest. The fact that the borrower may have suggested the payment of usurious interest does not relieve the lender from a charge of usury when he charges the usurious interest.\(^7\)

A claim of usury will be unavailing when a retail automobile dealer assigns all of its retail installment sales contracts to a finance company.

70. First Nat'l Bank v. Davis, 193 So.2d 228 (Fla. 1st Dist. 1966).
71. U.C.C. § 3-113 and Comments.
74. Breitbart v. Zaucha, 185 So.2d 496, 497 (Fla. 3d Dist. 1966).
75. Ross v. Whitman, 181 So.2d 701 (Fla. 3d Dist. 1966).
at a large discount since the transaction will be regarded as a sale rather than a loan even though the dealer guarantees payment of the contracts.\footnote{76}

A second mortgage note which provides for four periodic payments of interest and two periodic payments of principal and the last payment of principal is twice as large as the only other payment of principal is a "balloon mortgage" under the Florida statutes,\footnote{77} and it must have the proper statutory notice imprinted thereon. If it fails to have this wording, the holder will forfeit all interest provided for in the note, and the last payment "is to be divided by the [amount of the] regular . . . periodic payment and the quotient so secured is to be the number of . . . periods the maturity date of the mortgage is extended. The mortgagor shall continue to make such . . . periodic payments [as extended] until the principal of the mortgage is paid."\footnote{78}

Section 687.05 of the Florida Statutes provides that any provision in a loan agreement which requires the borrower to pay for charges "for exchange" will not be computed in ascertaining whether the loan agreement is tainted with usury. This "exchange" concept includes actual expenses for making available at a particular place funds on deposit at another place, but it does not include the difference in currency values under the ratios established by international rates of exchange. Hence, when a lender agrees to lend 25,000 dollars to a borrower and the borrower agrees to pay for the costs of exchange this does not give the lender the right to exact 2,500 dollars based upon the fact that the lender will have to spend 27,500 dollars of his Canadian dollars to purchase 25,000 American dollars. Further, when the loan agreement and the evidence disclose that the lender knowingly and intentionally provided for payment in an amount which would amount to usury, the burden of proof is on the lender to explain away all legal inferences of corrupt intent.\footnote{79}

III. DEFICIENCY DECREES AND JUDGMENTS

When a deficiency decree is not requested or it is requested but overlooked by the chancellor, the mortgagee may sue in law for the deficiency. However, when the chancellor in one county expressly reserves jurisdiction to determine the question of a deficiency decree in the future, the mortgagee may not institute a law action in another county against the mortgagor and then have the chancellor in the equity action terminate jurisdiction in an ex parte proceeding.\footnote{80}

The price bid at a foreclosure sale, especially when this price is con-

\footnotesize{76. B & D, Inc. v. E-Z Acceptance Corp., 186 So.2d 29 (Fla. 3d Dist. 1966).
77. Fla. Stat. § 697.05(3) (1965).
78. Bellman v. Yarmark Enterprises, Inc., 180 So.2d 663 (Fla. 3d Dist. 1965).
79. River Hills, Inc. v. Edwards, 190 So.2d 415 (Fla. 2d Dist. 1966).
80. First Fed. Sav. & Loan Ass'n v. Consolidated Dev. Corp., 195 So.2d 856 (Fla. 1967), aff'g First Fed. Sav. & Loan Ass'n v. Consolidated Dev. Corp., 184 So.2d 471 (Fla. 4th Dist. 1966).}
firmed by the chancellor, is a conclusive test as to the value of the property as between the parties in the event of an application for a deficiency decree in equity or a judgment in law. As a result; if the price bid is inadequate as compared to the real value of the property, the chancellor should not confirm the sale.\textsuperscript{81}

In the absence of collusion, accident, mutual mistake, breach of trust, fraud or other grounds, the mere fact that the value of foreclosed property is approximately twice the amount paid for it upon foreclosure sale is not enough to authorize a court to set the sale aside.\textsuperscript{82}

The third district has held that it is a proper exercise of discretion for a chancellor to refuse to grant a deficiency decree when the value of the foreclosed property is equal to the amount of the mortgage. However, it was error for the chancellor to refuse to award a deficiency decree for unpaid interest, attorney's fees, and court costs which exceeded the value of the property.\textsuperscript{83}

If a real property mortgage gives the mortgagee the right to apply any insurance proceeds resulting from storm damage to the payment of the note and mortgage or to give the proceeds to the mortgagor, the mortgagee who forecloses subsequent to the occurrence of storm damage is entitled to the proceeds of the insurance policy even though he does not apply for a deficiency decree or sue on the note in law for the difference between the amount owing and the amount bid at foreclosure.\textsuperscript{84}

IV. ATTORNEY'S FEES

A judge may award attorney's fees of ten percent of the principal and interest on a promissory note (which provides for the recovery of reasonable attorney's fees) based upon the testimony of the holder that it has agreed to pay its attorneys this percentage without any testimony that this is a reasonable sum.\textsuperscript{85}

The maker is not entitled to an award of attorney's fees when the holder of a note and mortgage has misplaced or lost the instruments and is unable to deliver them to the maker upon his tender of payment and the maker brings suit to reestablish the lost instruments.\textsuperscript{86} The Code does not cover the above problems.

\textsuperscript{82} Guerra v. Mutual Fed. Sav. & Loan Ass'n, 194 So.2d 15 (Fla. 1st Dist. 1967).
\textsuperscript{83} Larsen v. Allocca, 187 So.2d 903 (Fla. 3d Dist. 1966). See First Fed. Sav. & Loan Ass'n v. Consolidated Dev. Corp., 184 So.2d 471 (Fla. 4th Dist. 1966) which involved two suits for foreclosure and deficiency decrees—one in equity and one in law.
\textsuperscript{84} Sea Isle Operating Corp. v. Hochberg, 198 So.2d 336 (Fla. 3d Dist. 1967).
\textsuperscript{85} Horvath v. Five Points Nat'l Bank, 190 So.2d 586 (Fla. 3d Dist. 1966).
\textsuperscript{86} Schwartz v. Biscontini, 187 So.2d 81 (Fla. 3d Dist. 1966). It is to be noted that normally the holder who has lost a negotiable instrument will bring the action—not the maker. \textit{See} U.C.C. § 3-804.
V. ACCOMMODATION INDORSERS, SURETIES AND GUARANTORS

Although a wife is not liable when she signs a promissory note for the debt of her husband unless her execution of the instrument complies with the Florida constitution, she is liable when she and her husband sign as accommodation makers of a note executed by a corporation even though her husband has an interest in the corporation.

A husband and wife who signed a note executed as part of a purchase price of a business by a corporation in which they held stock, when the word "individually" was typewritten after their names, are personally liable as accommodation makers. The defense of the couple that there was no consideration for their signatures was, of course, unavailing under the N.I.L. rule that no consideration need be present to bind accommodation parties. A similar result will follow under section 3-415 of the Code.

An agreement to pay the promissory note of another must be in writing, and if a written offer of a guaranty of the promissory note is offered subject to a condition precedent which is not accepted, the offer is not enforceable.

A guaranty of a promissory note in Florida does not have to be acknowledged or witnessed. As a result, even if a guaranty were altered by adding the names of witnesses and an acknowledgment this would not be a defense to the guarantor because the alteration would not change his liability. The Code does not require the witnessing or acknowledgment of the guarantor's signature; hence this decision should remain effective.

One who guarantees payment of a promissory note is liable upon default, and the holder is not required to first resort to the maker. Likewise, a judgment against the maker does not affect the independent liability of a guarantor. If two or more guarantors jointly and severally guarantee the payment of a note, a judgment against one guarantor will not bar an action against the other. Conversely, if the liability is joint, a judgment against one guarantor will bar a suit against the other.

The Code reaffirms the rule that the holder need not resort to the maker before proceeding against a person who guarantees payment.

An interesting aspect of the law of guaranty arose in Miami National Bank v. Sobel. Sobel and other individuals were guarantors on a loan

87. See notes 16-24 supra.
88. Marinelli v. Weaver, 187 So.2d 690 (Fla. 2d Dist. 1966).
89. Marinelli v. Weaver, 187 So.2d 690 (Fla. 2d Dist. 1966).
90. Juliana, Inc. v. Salman, 181 So.2d 3 (Fla. 3d Dist. 1965).
91. Morton v. Mercantile Nat'l Bank, 185 So.2d 172 (Fla. 3d Dist. 1966).
92. U.C.C. § 3-416 and Comments.
93. Quarngesser v. Appliance Buyers Credit Corp., 187 So.2d 662 (Fla. 3d Dist. 1966).
94. U.C.C. § 3-416(1).
95. 198 So.2d 841 (Fla. 3d Dist. 1967).
NEGOTIABLE INSTRUMENTS

from a bank to a corporation. Sobel gave a mortgage on real property and pledged corporate stock as security for his guaranty. The lender defaulted, and the bank foreclosed the real estate mortgage. Subsequently, the bank sued the other guarantors but omitted Sobel from the suit. The other guarantors were successful in having the court relieve them of their guaranty on the grounds of an unperformed conditional delivery and other defenses. Sobel then brought suit against the bank based upon the facts as found in the separate suit. The court held that the facts raised in this suit could have been raised by Sobel as defenses in the foreclosure action, and a failure to plead these defenses was not a basis for relief from the decree. It would appear that if Sobel had joined the other guarantors as third party defendants, the entire loss would not have fallen on him.

VI. LEGISLATION

Section 46.11 of the Florida Statutes, which deals with the joinder of makers, indorsers, sureties and guarantors of promissory notes, has been amended and transferred to section 46.041 of the Florida Statutes. Section 3-803 of the Code supplements this joinder statute and its provisions should be followed by a secondary party when the plaintiff has failed to join primary parties under section 46.041.

The venue statute for actions concerning unsecured negotiable or non-negotiable promissory notes, former section 46.05 of the Florida Statutes, has been amended and transferred to section 47.061.

VII. LETTERS OF CREDIT

In Cooper's Finer Foods v. Pan American World Airways, a letter of credit was issued by an American bank providing that a Latin American consignor could draw sight drafts on shipments of shrimp when the shipment was accompanied by a "copy of non-negotiable airway bill of lading showing consignment to First National Bank of Miami." The consignor delivered the shrimp to the airline in Venezuela and received twelve copies of the bill of lading. The airline returned the shrimp to the consignor because of a lack of space on board the aircraft and picked up eleven copies of the airway bill but omitted to pick up copy number nine which bore the notation "For Sales Agent." The consignor then presented copy number nine and his sight draft to a Venezuelan bank which made payment on the strength of the letter of credit. The consignee sued the issuing bank and the airline, and the court held that payment was pro-

96. Fla. Laws 1967 ch. 67-254, S.B. No. 441. Former section 45.05 of the Florida Statutes, which deals with the contribution rights of sureties, has been amended and transferred to Section 46.011 of the Florida Statutes. Fla. Laws 1967. Ch. 67-254, S.B. No. 441.
98. 178 So.2d 62 (Fla. 3d Dist. 1965).
99. Id. at 63.
erly made on the letter of credit by the issuing bank because the letter of credit did not require the presentment of one of the first three copies which were designated as "original" bills of lading; the letter of credit merely specified that the consignor must present a "copy." However, the airline was negligent in not picking up copy number nine which bore its reception stamp, and the undeserved payment could not have been made if the airline had picked up this particular copy.

VIII. BANKS, BANK DEPOSITS AND COLLECTIONS

A. General and Special Deposits

A depository bank which credits a check to the account of a depositor and permits him to withdraw most of the funds prior to the collection of the check becomes a holder for value of the check and may sue the drawer. This rule does not preclude the depository bank from suing the depositor (instead of the drawer of the check) on the theory that the bank has paid money for the use and benefit of the depositor. The Code provisions follow this holding.

When a customer of a bank deposits a check for collection and notifies a bank official that the proceeds of the check are to be used to pay creditors of the customer-depositor, the deposit is a "special deposit or a deposit for a specific purpose," and the bank may not offset obligations due it by the customer after collection is made. In a general deposit, the depository bank may set off any claims which it may have against the depositor. It would seem that the Code has countenanced a similar view.

A corporation which opens a bank account by delivering a corporate resolution with very broad powers to the bank has no cause of action against the bank for the misappropriation of the corporation's funds by the corporation's president in the absence of proof that the bank was guilty of fraud, collusion or any negligence in the honoring of the checks drawn by the president.

When a check is made payable to a corporation and the president of the corporation indorses the check as president and deposits the proceeds in his own account in furtherance of his scheme to embezzle from the corporation, the loss falls on the bank rather than the corporation on the theory that the bank has paid without securing a genuine indorsement. The president's indorsement then constitutes a representation to the bank.

---

100. Florida-Patsand Corp. v. Central Bank & Trust Co., 177 So.2d 533 (Fla. 3d Dist. 1965).
101. U.C.C. §§ 4-208, 4-209 and 4-212.
103. U.C.C. §§ 1-103, 4-201 and 4-208 and Comments.
104. S. & V. Corp. v. Miami Beach First Nat'l Bank, 196 So.2d 194 (Fla. 3d Dist. 1967).
that his actions are proper, and the president is guilty of grand larceny in stealing the funds of the bank.\(^{105}\)

The U.C.C. has adopted a similar notion that the presenter of a check (the president in the above case) warrants that he has title to the check or is authorized to obtain payment.\(^{106}\)

**B. Collection of Items**

The Supreme Court of Florida, in reversing the third district, has held that payment by a collecting bank to a husband who indorsed his own name and forged the signature of his wife as payees of a check made out to them as an estate by the entirety does not constitute a discharge of the instrument, and the collecting bank remains liable to the wife for one-half of the proceeds of the check.\(^{107}\) The holding of this case is entirely consistent with section 3-116 of the U.C.C.

**C. Joint Savings Accounts**

Generally, a co-owner of a joint bank account who withdraws all of the funds from the account cannot be guilty of larceny unless the other co-owner had a special property interest superior to that of the accused.\(^{108}\)

When a husband signs a "joint account" signature card for a bank account but the wife fails to do so and then the bank allows her to withdraw all of the funds from the account after the husband has been declared incompetent, the husband must bring suit against the bank within the three year statute of limitations rather than the five year statute. The signature card did not contain any express promise by the bank. Hence the five year statute governing suits on a written contract would not be controlling. The deposit by the husband created an implied agreement by the bank that it would pay the money or return it to him upon proper written demand; hence, the three year statute was applicable.\(^{109}\)

The fourth district has given full force to exculpatory pass-book provisions designed to protect a savings and loan institution. A man opened a savings account with his stepdaughter as joint tenants with right of survivorship. The pass-book provided that all withdrawals were to be honored only upon satisfactory verification of signatures and upon pres-

---

106. U.C.C. §§ 3-417 and 4-207.
109. Bambrick v. Citizens Nat'l Bank, 192 So.2d 68 (Fla. 4th Dist. 1966), construing Fla. Stat. §§ 95.11(3) and (5) (1965). See Maier v. Bean, 189 So.2d 380 (Fla. 2d Dist. 1966) for an extensive review of the law governing the creation of joint bank accounts and the right of the survivor to the accounts on the basis of a gift.
entation of the pass-book. However, any payment made in good faith to any person producing the pass-book, either before or after the death of the account holder, "shall be a valid payment to discharge the Association in the absence of written notice that the book has . . . fallen into the hands of unauthorized person or persons."110 Subsequently, the stepfather gave a power of attorney to his wife authorizing her to deal with the account. Still later, the stepfather was adjudicated incompetent and his wife, acting under the power of attorney, withdrew all of the funds from the joint account. Subsequently, the stepfather died, and the stepdaughter brought an action against the savings association. The court held that in the absence of actual knowledge by the association that the stepfather was adjudicated incompetent and in the absence of any notice that his wife was not authorized to possess the pass-book, the association could in good faith make payment to her and this would be a discharge of its obligations under the wording of the pass-book provisions.

D. Totten Trusts

The guardian of an incompetent who, prior to the order adjudicating his incompetency, established a Totten Trust does not have the authority to withdraw the funds from the trust unless a court which has jurisdiction over the guardianship orders the revocation of the Totten Trust because the funds are required for the support and care of the trustee-incompetent.111

E. Sale of Collateral

A former wife has no cause of action for conversion against a bank which sold securities which she and her husband pledged with the bank as collateral for a loan when the promissory note provided:112

As security for the payment of the foregoing note and/or of any and all such liabilities, the undersigned hereby pledge(s) to the bank . . . The undersigned, if more than one, shall be jointly and severally liable hereunder and upon the foregoing note and all provisions hereof regarding liabilities or security of the undersigned shall apply to any liability or any security of any or all of them.

Under this clause, the bank could sell the pledged collateral and apply the proceeds to pay other loans incurred by the then husband of the ex-wife. This is particularly true when the ex-wife learned that the bank had sold the pledged securities and she made no complaint when she paid the balance on the note in order to obtain the remainder of the securities from the bank.

110. Millman v. First Fed. Sav. & Loan Ass'n, 198 So.2d 338 (Fla. 4th Dist. 1967).
111. First Nat'l Bank v. First Fed. Sav. & Loan Ass'n, 196 So.2d 211 (Fla. 2d Dist. 1967).
112. Feledy v. Bank of Palmetto, 194 So.2d 625 (Fla. 2d Dist. 1967).
F. Garnishment

A Florida statute\(^\text{113}\) provides that upon the rendering of a final judgment in garnishment proceedings the judge shall award a reasonable attorney's fee to the garnishee. This statute does not authorize the court to award attorney's fees to the garnishee during the pendency of a case and prior to final judgment.\(^\text{114}\)

G. Ultra Vires Acts

A national bank is not permitted by law to guarantee the payment of a promissory note in a transaction to which the bank is a stranger with no consideration flowing to it. As a result, when a national bank promises to purchase a new note given in substitution for an existing one and the bank is not a party to either note, the bank cannot be held liable on its promise.\(^\text{115}\)

H. Legislation

Under an amendment to section 659.051 of the Florida Statutes, the annual meetings of stockholders of state banks and trust companies may be held either in January or February of each year in accordance with the by-laws of the corporation.\(^\text{116}\)

Section 674.4-213(1) of the Florida “Uniform” Commercial Code, which relates to the final payment of items by payor banks, has been amended by inserting the clause “and has not returned the item directly to the depositary bank within the time and manner provided in §674.4-212(2)” within subsection (d). This clause will aid banks in resisting a claim that they have made final payment of checks by bookkeeping entries.\(^\text{117}\)

Section 658.07 of the Florida Statutes was amended to require that state banks perform an internal audit every eighteen months and file a copy of the audit with the State Commissioner of Banking.\(^\text{118}\)

Section 661.13 of the Florida Statutes was amended to provide that the comptroller may appoint the Federal Deposit Insurance Corporation as receiver or liquidator of any banking institution which is insured by the F.D.I.C. and which has been closed by the comptroller.\(^\text{119}\)

Section 659.20(2) of the Banking Code was amended to provide that banks and trust companies may invest without limitation in bonds issued by the State Board of Education.\(^\text{120}\)

---

115. Ferguson v. Five Points Nat'l Bank, 186 So.2d 45 (Fla. 3d Dist. 1966).
Banks and trust companies, under amended section 660.11 of the Florida Statutes, have been authorized to invest managing agency funds in a common trust fund established by the bank or trust company.\textsuperscript{121}

Industrial savings banks are now required under an amendment to section 656.18 of the Florida Statutes to hold only first mortgages with the exception of second mortgages which are held as additional security. Secondary liens which are made under the provisions of the Servicemen’s Readjustment Act of 1944 will not be considered as second mortgages, and they may be held by industrial savings banks.\textsuperscript{122}

Under an amendment to section 660.12 of the Florida Statutes, the prohibition of banks and trust companies from investing common trust funds in mortgages has been eliminated.\textsuperscript{123}

Domestic savings and loan associations which are members of the federal home loan bank system and are also insured by the federal government may now (with the approval of the state comptroller) make loans or investments in the same manner as federal savings and loan associations.\textsuperscript{124}

Banks and trust companies may now grant stock options to their employees; however, no more than ten percent of the par value of stock may be set aside for this purpose.\textsuperscript{125}

\textbf{IX. Bad Check Laws}

Section 674.19(1) of the Florida Statutes formerly provided that “where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable.” As a result, the second district has held that when a person alters the marginal figures on the check but does not alter the amount payable as called for by the words, there is no forgery.\textsuperscript{126} The Code provides a different approach: “Words control figures except that if the words are ambiguous, figures control.”\textsuperscript{127}

Florida Statutes, section 832.05, which makes it a crime to pass worthless checks, has been held to be constitutional.\textsuperscript{128}

A conviction for uttering a forged instrument in violation of section 831.02 of the Florida Statutes based upon the premise that proof of
falsity of the instrument may be presumed from proof that the maker of the instrument is a fictitious person must be reversed when there is inadequate proof that the maker of the instrument is a fictitious person. This proof is inadequate when it is based upon the testimony of an investigating officer that he was unable to find the business establishment of the alleged maker because it failed to show the extent of the investigation. This is especially true when the record reveals that the business establishment did have an account in the bank at a time prior to the date of the alleged offense.\(^{120}\)

A person who has possession of stolen traveler’s checks and fills in a fictitious name as the name of the purchaser and then signs this same fictitious name for a fraudulent purpose may be guilty of forgery and of uttering a forged instrument under the criminal laws.\(^{120}\)

\(^{120}\) Maura v. State, 181 So.2d 231 (Fla. 3d Dist. 1965).
\(^{120}\) Folk v. State, 192 So.2d 44 (Fla. 3d Dist. 1966), construing FLA. STAT. §§ 831.01 and 831.02 (1965).