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NEGOTIABLE INSTRUMENTS AND BANKING

DANIEL E. MURRAY*

I. INTRODUCTION	63
II. NEGOTIABLE INSTRUMENTS	64
A. <i>Jurisdiction</i>	64
B. <i>Standing to Sue</i>	64
C. <i>Conflicts of Law</i>	65
D. <i>Consideration</i>	65
E. <i>Illegality</i>	65
F. <i>Coverture</i>	65
G. <i>Completion of Instrument</i>	66
H. <i>Agency</i>	66
I. <i>Unauthorized Signatures</i>	66
J. <i>Usury</i>	68
K. <i>Payment and Accord and Satisfaction</i>	70
L. <i>Interest</i>	71
M. <i>Lost Instruments</i>	71
N. <i>Set-off</i>	71
O. <i>Parol Testimony</i>	71
P. <i>Holder in Due Course and Value</i>	72
Q. <i>Holder in Due Course From a Holder in Due Course</i>	72
R. <i>Attorneys' Fees</i>	72
S. <i>Legislation</i>	73
III. MORTGAGES AND SECURITY INTERESTS	73
A. <i>Statute of Frauds</i>	73
B. <i>Merger</i>	74
C. <i>Insurable Interest</i>	74
D. <i>Jurisdiction</i>	74
E. <i>Joinder of Parties</i>	74
F. <i>Acceleration</i>	74
G. <i>Estoppel</i>	75
H. <i>Election of Remedies</i>	76
I. <i>Foreclosure Sales</i>	76
J. <i>Redemption</i>	77
K. <i>Deficiency Actions</i>	77
L. <i>Relief From Foreclosure Judgment</i>	78
M. <i>Subrogation</i>	78
N. <i>Reforeclosure Against Junior Lien Holders</i>	79
O. <i>Accommodation Parties</i>	79
IV. BANKS AND SAVINGS AND LOAN ASSOCIATIONS	80
A. <i>Payment and Collection of Items</i>	80
B. <i>Joint Accounts</i>	82
C. <i>Administrative Proceedings</i>	83
D. <i>Legislation—Savings and Loan Associations</i>	83
E. <i>Legislation—Banks</i>	84
F. <i>Bad Check Laws</i>	85

I. INTRODUCTION

In the last *Survey* of this subject the author stated that the courts had continued to decide cases without making any reference to the Uniform Commercial Code (UCC).¹ In the last two years the courts have

* Professor of Law, University of Miami. The materials surveyed herein extend from 250 So. 2d 257 through 283 So. 2d 102 and the legislation enacted by the 1972 and 1973 Regular and Special Sessions of the Florida Legislature.

1. Murray, *Negotiable Instruments and Banking, 1969-1971 Survey of Florida Law*, 26 U. MIAMI L. REV. 72 (1971).

reversed this conduct and are now using the UCC with commendable sophistication. The fact patterns in the decisions of the last biennium seem more complex and varied than in previous years, and this is particularly true in the unauthorized indorsement, usury and bank collection cases.

The legislative changes, with few exceptions, seem to be special interest enactments for the benefit of banks and savings and loan associations. In a somewhat inconsistent vein, the Florida Legislature increased the loan limits for small loan companies and this will enable these companies to compete with banks.² This legislation paid lip service to the interests of the consumer by abolishing the holder in due course doctrine in small loan consumer transactions. Inasmuch as the Florida courts have previously eviscerated the doctrine,³ this gesture towards the consumer is more a bone than a boon.

II. NEGOTIABLE INSTRUMENTS

A. Jurisdiction

In *Southwest Cycle Sales, Inc. v. Gold Key Marketing, Inc.*,⁴ a promissory note was given by a non-resident of Florida for partial payment of goods. The note provided that it was deemed to have been made in Dade County, Florida, and that the Secretary of State of Florida was appointed agent for service of process in the event of default by the maker. The maker defaulted; service was made upon the Secretary of State, who accepted it (even though he could have refused it), and copies of the complaint were mailed to the maker. The District Court of Appeal, Third District, held that valid service was made in accordance with the maker's contract.

A Florida husband and wife who journeyed to Ohio to cosign their son's promissory note in Ohio as accommodation makers are subject to Ohio's long arm statute which provides for jurisdiction over any person "transacting any business in this state."⁵

B. Standing to Sue

Foreign corporations may sue on notes which are executed and delivered in Florida without qualifying to do business in this state.⁶

2. Fla. Laws, 1973, ch. 73-192, creating FLA. STAT. § 516.31(2).

3. E.g., *Mutual Fin. Co. v. Martin*, 63 So. 2d 649 (Fla. 1953); *Rehurek v. Chrysler Credit Corp.*, 262 So. 2d 452 (Fla. 2d Dist. 1972); *National State Bank v. Robert Richter Hotel, Inc.*, 186 So. 2d 321 (Fla. 3d Dist. 1966) and 188 So. 2d 18 (Fla. 3d Dist. 1966); and *Industrial Credit Co. v. Mike Bradford & Co.*, 177 So. 2d 878 (Fla. 3d Dist. 1965).

4. 265 So. 2d 390 (Fla. 3d Dist. 1972).

5. *Einhorn v. Home State Sav. Ass'n*, 256 So. 2d 57 (Fla. 4th Dist. 1971).

6. *Al Wilson's Power-Ful Displays, Inc. v. Morgan Adhesive, Inc.*, 259 So. 2d 166 (Fla. 3d Dist. 1972).

C. *Conflicts of Law*

The District Court of Appeal, Fourth District, has held that when a promissory note is payable in New Jersey, the substantive law of that state governs a suit in Florida to enforce the note.⁷

D. *Consideration*

When a maker pleads want of consideration, it is not error for the trial court to refuse to charge the jury as to the defense of a partial failure of consideration.⁸

E. *Illegality*

The District Court of Appeals, Fourth District, has characterized the sale of directorships in Koscot Interplanetary, Inc. as pyramid franchising agreements under section 849.091 of the Florida Statutes and held that a promissory note which was given as consideration for these directorships was void and unenforceable in the hands of an immediate party to the transaction.⁹ It is to be wondered if the court would have held this note to be "void" if it had been in the hands of a holder in due course?¹⁰

F. *Coverture*

Article X, section 5 of the 1968 Constitution of the State of Florida provides that there shall be no distinction between married women and married men in the holding, control, disposition or encumbering of their property. Article XI, section 1 of the 1885 constitution provided that the wife's separate property was not liable for the debts of her husband "without her consent given by some instrument in writing executed according to the law respecting conveyances by married women." The Supreme Court of Florida has held that the 1885 constitutional provision was repealed by the 1968 constitution, and, as a result, a wife who signed a simple promissory note and gave it to a hospital for hospitalization, medicine and services rendered to her husband was liable on it.¹¹

7. *Schaufelberger v. Mister Softee, Inc.*, 259 So. 2d 175 (Fla. 4th Dist. 1972). This case also involved a comparison of pre-Code Florida and New Jersey case law pursuant to section 20 of the UNIFORM NEGOTIABLE INSTRUMENTS LAW, FLA. STAT. § 674.22 (1963).

8. *Holm v. Woodworth*, 271 So. 2d 167 (Fla. 4th Dist. 1972).

9. *Frye v. Taylor*, 263 So. 2d 835 (Fla. 4th Dist. 1972).

10. Section 3-305(2)(c) of the UCC provides that a holder in due course takes an instrument subject to the defense of illegality which renders the obligation of a party a nullity.

11. *Hallman v. Hospital & Welfare Bd.*, 262 So. 2d 669 (Fla. 1972). Former section 708.02 of the Florida Statutes (1969) provided that a married woman's separate property should not be liable for the debts of her husband "without her consent given by some instrument in writing executed according to the law respecting conveyances by married women." Article X section 5 of the 1968 Florida Constitution provides that there shall be no distinc-

G. Completion of Instrument

Section 3-115(1) of the UCC received an unusual application in *O'Connell v. Citizens National Bank*.¹² The payees sued the makers, and the trial court dismissed the complaint because the note was incomplete. The payees then filed an amended complaint accompanied by a completed promissory note, and the complaint alleged that the payees had completed the note in accordance with the authority given by the makers. The trial court entered judgment in favor of the payees, and the appellate court, without deciding that the trial court may have been in error in sustaining the amended complaint for facts which occurred after the filing of the original complaint, stated that the makers were in no different position than they would have been if the payees had voluntarily dismissed the original action, completed the instrument and thereafter had filed a subsequent action on the completed note. As a consequence, if there was error, it did not prejudice the makers.

H. Agency

Agency law often becomes interwoven with bills and notes questions. For example, in *Anderson, Bryan & Campbell, Inc. v. First National Bank*¹³ the president of a bank was also vice-president of a customer-corporation. This individual had actual authority to draw checks on the corporation's account in the bank in payment of his personal expenses, as did the other officer and stockholder of the corporation. On one occasion, the vice-president received a large check payable to the corporation, stamped the bank's indorsement upon it, deposited it in the bank and then misapplied some of the proceeds. The corporation sued the bank for conversion on the theory that the defalcating individual was acting as agent for the bank and that the bank, therefore, was liable. The trial court held for the bank and the District Court of Appeal, Second District, affirmed upon the basis that it was a question of fact as to whether the defalcating individual was acting primarily under the authority granted him as an officer and part owner of the corporation rather than in his capacity as president of the bank.

I. Unauthorized Signatures

Section 3-404 of the UCC provides that any unauthorized signature is wholly inoperative as that of the person whose name is signed unless

tion between married women and married men in the holding, disposition, etc. of property. The District Court of Appeal, Third District, has held that this statute is inconsistent with the 1968 Florida Constitution and was not preserved in effect, with the result that a married woman was held liable on her signature on a note which was signed without any formalities after the adoption of the 1968 Constitution and before the repeal of section 708.02. *Emhart Corp. v. Brantley*, 257 So. 2d 273 (Fla. 3d Dist. 1972).

12. 254 So. 2d 236 (Fla. 4th Dist. 1971).

13. 258 So. 2d 819 (Fla. 2d Dist. 1972).

he ratifies it "or is precluded from denying it." An unusual application of this section was involved in *Wall v. Hamilton County Bank*.¹⁴ Partners who were engaged in the operation of a tobacco sales warehouse entered into an arrangement with their drawee bank which provided that the partners "hereby [waive] identification on all farmers' checks issued for the payment of tobacco and [guarantee] . . . [the bank] against loss for payment of such checks without identification of [the] party presenting the check for payment."¹⁵ The partners would, in the course of their business, issue checks to payees whose names were written on the checks in longhand. The signatures of the employee authorized to sign the checks were written by use of a facsimile signature; the amount of the checks and the dates were written by a machine. Two checks were stolen and filled in with the machine, and cashed with the drawee bank. The District Court of Appeal, First District, held that in light of the contract between the partnership and its drawee bank, the partners were precluded as a matter of law from asserting that the checks were unauthorized in a suit against the bank, and the summary judgment by the trial court was affirmed.

Section 3-116 of the UCC provides that when an instrument is payable to two or more persons jointly, it may be negotiated, discharged or enforced only by all of the joint payees. A district court of appeal has held that when a joint payee sued the bank cashing such a check on the grounds that his name was forged and that the bank, therefore, converted the check (under section 3-419 of the Code), the bank can defend upon the basis that the proceeds of the check "went where they were intended."¹⁶ This defense can be proven only after a full trial and not during summary judgment proceedings.

When insurance company drafts are payable through a bank, that bank is a collecting bank and not a drawee bank under section 3-120 of the UCC. As a result, when a joint payee forges the names of his co-payees on these drafts and collection is made through the bank named on the draft and through a depository-collecting bank, these banks are liable in a conversion action by the defrauded payees only for the amount of the proceeds of the draft still in the possession of the collecting banks.¹⁷ If the forger has withdrawn all of the proceeds from his depository bank, then neither this bank nor an intermediate collecting bank is liable for *any* amount.¹⁸

In a factually confused case, the District Court of Appeal, Second

14. 276 So. 2d 182 (Fla. 1st Dist. 1973).

15. *Id.* at 182.

16. *Sullivan v. Wilton Manors Nat'l Bank*, 259 So. 2d 194, 195 (Fla. 4th Dist. 1972). See *Murray, Joint Payee Checks—Forged and Missing Indorsements*, 78 *COM. L.J.* 393 (1973).

17. UCC § 3-419(3).

18. *Messeroff v. Kantor*, 261 So. 2d 553 (Fla. 3d Dist. 1972). See *Murray, Drafts "Payable Through" Banks*, 77 *COM. L.J.* 389 (1972).

District,¹⁹ has held that a bank which has issued a cashier's check payable to a husband and wife may refuse to honor the check when it is presented by another bank which cashed the check at the request of the husband, who signed his wife's name and indicated this fact ("Grace Grimaldi by Richard Grimaldi"). The majority opinion failed to cite any authority and also uttered some inaccurate dicta regarding the cashing of cashier's checks made payable to bearer. Judge Mann, in a separate opinion, noted that the check had not been "cashed," but that it had been credited to the joint checking account of the parties, for which the husband had sufficient authority under the terms of the deposit of the check. It is the author's opinion that Judge Mann is correct.

A bonding company which has indemnified a corporate drawer whose employee forged the drawer's name to checks and which has received an assignment of rights from the drawer may sue the drawee bank under conventional subrogation principles. The drawee bank is liable for paying checks bearing the forged signatures of its customer-drawers. The claim of the bonding company under "conventional subrogation"²⁰ principles should not be defeated by the "equitable subrogation"²¹ defense that since the bonding company is a paid surety and the bank has been guilty of no more fault than the surety, the bonding company is precluded from recovering from the bank on the basis that the equities were equal.

J. Usury

The Supreme Court of Florida in reversing the District Court of Appeal, Fourth District,²² has held that in order to prove the defense of usury it is necessary to allege and prove that the lender had a corrupt intent to exact usurious interest, and that this corrupt intent cannot be proved solely by showing that mathematical computations result in excess interest being exacted.

In a prior decision involving the same case, the district court had also held that in order for a court to find that a loan is usurious there must exist an intent by the lender to willfully and knowingly take more than the legal rate of interest for the use of the money loaned. This knowing intent, however, is not disclaimed by the testimony of the lender that he did not know the legal rate of interest in Florida, because everyone is presumed to know the law. However, the mere fact that the interest charged exceeds the legal limit is not enough to prove this intent to charge usurious interest; there must be an inquiry into the entire transaction in order to establish corrupt intent.²³

19. *Beach Nat'l Bank v. Bank of Hollywood Hills*, 256 So. 2d 251 (Fla. 2d Dist. 1971).

20. *Dispatch Services, Inc. v. Airport Bank*, 266 So. 2d 127 (Fla. 3d Dist. 1972).

21. *Id.*

22. *Dixon v. Sharp*, 276 So. 2d 817 (Fla. 1973), *rev'g* 265 So. 2d 105 (Fla. 4th Dist. 1972).

23. *Sharp v. Dixon*, 252 So. 2d 805 (Fla. 4th Dist. 1971).

The Supreme Court of Florida has reversed the holding in *Fields v. Wilensky*,²⁴ which was discussed in the last *Survey*,²⁵ and has held that usury statutes which provide for criminal penalties for usurious transactions including forfeiture of principal and interest are not to be applied ex post facto to transactions which occurred prior to the effective date of the statute. The court further held that section 67.071 (the loan sharking statute) did not impliedly repeal section 67.11 of the Florida Statutes (1971), as was held by the district court in *Wilensky*.

An assignment of accounts receivable from a retail furniture dealer to a finance company may constitute either a sale of accounts or an assignment as collateral for a loan. If it is the latter and the amount of the "discounts" charged by the finance company exceeds the statutory interest rate, a usurious loan may be present. In a recent case, the court held that when the transaction between the retail furniture dealer and the finance company provided for a right of recourse against the dealer if retail customers failed to pay; that the furniture company guaranteed payment of each account; that it provided for a security interest in present and after acquired accounts; that subsequent accounts were assigned to the finance company, etc., it was sufficient to show that a loan rather than an outright sale was involved. The court further held that even though the loan might not have been usurious at its inception, it might have been at any time during the relationship between the furniture store debtor and the finance company.²⁶

The Supreme Court of Florida has held that when a lender sues a borrower on an allegedly usurious loan and the parties stipulate that the defense of usury will be withdrawn and a renewal note is then entered into between the parties, this stipulation is binding upon the basis of a "waiver" and usury cannot be pleaded as a defense to a suit on the renewal note. In this particular case, the stipulation and renewal agreement seemed to give the lender certain advantages (such as the added guaranty of the note by the wife of the individual signing the note, etc.) not found in the first loan agreement, and this case would seem to be questionable.²⁷

When a mortgagor raises the defense of usury in a mortgage foreclosure action, it is relevant for him to submit interrogatories to the mortgagee-plaintiff inquiring, over the objections of the lender that they were irrelevant and immaterial, about loans made by the mortgagee to other borrowers, because he might discover usurious transactions with others which would be admissible evidence to possibly establish the

24. *Wilensky v. Fields*, 267 So. 2d 1 (Fla. 1972), *rev'g* 247 So. 2d 477 (Fla. 4th Dist. 1971).

25. Murray, *Negotiable Instruments and Banking, 1969-1971 Survey of Florida Law*, 26 U. MIAMI L. REV. 72 (1971).

26. *W.B. Dunn Co. v. Mercantile Credit Corp.*, 275 So. 2d 311 (Fla. 1st Dist. 1973).

27. *Gunn Plumbing, Inc. v. Dania Bank*, 252 So. 2d 1 (Fla. 1971). See the very strong dissent of Justice Dekle.

lender's "general modus operandi and its authorship of the loan documents."²⁸

Section 95.11(6) provides for a two-year statute of limitations for the recovery of usurious interest, and section 687.04 of the Florida Statutes (1971) provides that forfeiture of usurious interest may occur after it has been paid. As a result, when an action is brought within two years after the *payment* of the usurious interest, the suit is timely even though more than two years have elapsed since the loan was in default.²⁹

Usury is a creature of statute and punitive damages are not allowed in addition to the statutory penalties and forfeitures.³⁰

The defense of usury cannot be sustained in a suit brought in Florida to enforce an Indiana note whose interest rate is in accordance with the Indiana small loan law and no greater than that permitted by Florida law under its Small Loan Act.³¹

K. *Payment and Accord and Satisfaction*

The plaintiff-holder of a promissory note does not have the initial burden of proving that the note remains unpaid; the burden is on the defendant to affirmatively allege and prove that the note has been paid.³² Possession of an uncanceled note raises a rebuttable presumption of non-payment, and the burden of proving payment is upon the party asserting payment.³³

The facts in *Rock Springs Land Co. v. West*³⁴ resemble a law school examination question. A buyer under an agreement for deed transaction asked the vendor to inform her of the balance owing. The vendor looked at the wrong amortization table and told the buyer that the balance was \$446.57 rather than the true balance of \$2,561.17. The buyers delivered their check for \$446.57 to the vendor, and the check was marked "paid in full." The vendor accepted the check and gave a deed to the buyers. Subsequently, the vendor discovered his mistake and brought suit for the remaining balance. The District Court of Appeal, Fourth District, held that the unilateral mistake of the vendor was not the result of an inexcusable lack of due care and that the buyers did not rely upon it to their detriment. There was no basis in the evidence that the parties had reached an accord and satisfaction nor that the parties intended that the \$446.57 was to be payment in full, and the buyers were liable for the difference.

28. *Continental Mtg. Investors v. Village by the Sea, Inc.*, 252 So. 2d 833, 835 (Fla. 4th Dist. 1971).

29. *Vance v. Florida Reduction Corp.*, 263 So. 2d 585 (Fla. 1st Dist. 1972).

30. *Moretto v. Sussman*, 274 So. 2d 259 (Fla. 4th Dist. 1973).

31. *Cardaman v. ABC Fin. Corp.*, 264 So. 2d 53 (Fla. 3d Dist. 1972).

32. *Touchberry v. Nemece*, 264 So. 2d 466 (Fla. 4th Dist. 1972).

33. *Speier v. Lane*, 254 So. 2d 823 (Fla. 3d Dist. 1971).

34. 281 So. 2d 555 (Fla. 4th Dist. 1973).

L. *Interest*

A trial court judge does not have the power to assess interest on a promissory note when the plaintiff-holder failed to ask the court to instruct the jury to award interest, the court has not charged the jury in this regard and the jury has simply returned a verdict which does not mention interest.⁸⁵ On the other hand, when a jury returns a verdict which provides that the plaintiff-holder of a note is to receive principal "plus interest,"⁸⁶ it is permissible for the trial court judge to make the mathematical computations of the interest. It is, however, better practice for the jury to make the computations and to articulate the amount of the interest in its verdict.

M. *Lost Instruments*

In an action which is brought under chapter 71 of the Florida Statutes (1971) to reestablish a lost note and real property mortgage, the makers of the note and mortgage are entitled to assurance that the note and mortgage have not been assigned. A district court has held that this assurance has not been made if the plaintiff merely stated that the instruments had not been assigned when it was admitted that other notes and mortgages held by it had been assigned to various parties.⁸⁷ The court failed to mention section 3-804 of the UCC which provides that the court may require indemnity securing the makers of the lost note against loss by reason of further claims on the instrument.

N. *Set-off*

In a suit brought by the payee of a promissory note against the maker, it is proper for the maker to counterclaim and set-off against the amount claimed, sums of money which may be owed by the payee to the maker on entirely unrelated transactions.⁸⁸

O. *Parol Testimony*

In accordance with section 3-403(2)(b) of the UCC, the District Court of Appeal, Second District, has held that when a check was signed

JIMMY SPEERS AUTO AUCTION

Bruce A. Ryals [longhand]

Ann Marie Speer [machine]

35. *Grayson v. Fishlove*, 266 So. 2d 38 (Fla. 3d Dist. 1972).

36. *Cantor v. Drapkin*, 251 So. 2d 542, 543 (Fla. 3d Dist. 1971).

37. *Shores v. First Fla. Resource Corp.*, 267 So. 2d 696 (Fla. 2d Dist. 1972).

38. *Burton v. Citizens Bank*, 273 So. 2d 91 (Fla. 1st Dist. 1973).

parol testimony was admissible when the payee sued Mrs. Speer personally on the check to show that Mrs. Speer signed as treasurer of the company and that she never undertook to personally "guarantee" (pay) the check, despite the words "GUARANTEED CHECKS" in the margin.³⁹ It should be noted that this suit was between the "immediate parties" (*i.e.*, the payee was suing a drawer of the check) and parol evidence is admissible in this instance. If the check had been indorsed to a third party, parol evidence would not have been admissible under section 3-403(2)(b) of the UCC to show the capacity in which the defendant signed.

P. *Holder in Due Course and Value*

In *Fernandez v. Cunningham*⁴⁰ suit was brought against the estate of a deceased maker of a note who had given it to a corporation which had indorsed the note to its attorneys as payment for legal services. The maker's estate asserted defenses against the payee, and the attorneys claimed to be holders in due course. The plaintiff-attorneys moved for summary judgment and filed an affidavit which merely stated that the note was indorsed to them for attorney's fees, without any evidence as to the nature, extent and value of the legal services rendered prior to the acquisition of the note. The trial court entered a summary judgment in favor of the plaintiff-attorneys, but the District Court of Appeal, Third District, reversed on the ground that the attorneys would be holders for value only to the extent of the value of services rendered prior to the receipt of the note and that they had failed to submit any evidence of the value of their services.

Q. *Holder in Due Course From a Holder in Due Course*

A holder who has holder in due course status as a successor to a holder in due course,⁴¹ having reacquired the instrument after participating fully in the underlying transactions, and having received actual knowledge of the discharge of one of the parties to the instrument, takes subject to that defense of discharge.⁴²

R. *Attorneys' Fees*

The District Court of Appeal, Fourth District, has held that an award of attorney's fees in the amount of \$5,000 for services rendered in a relatively uncomplicated suit on a promissory note for \$10,000 plus interest was excessive, and the amount was reduced to \$2,500.⁴³

39. *Speer v. Friedland*, 276 So. 2d 84 (Fla. 2d Dist. 1973).

40. 268 So. 2d 166 (Fla. 3d Dist. 1972).

41. UCC § 3-201(1).

42. *Coplan Pipe & Supply Co. v. Ben-Frieda Corp.*, 256 So. 2d 218 (Fla. 3d Dist. 1972).

43. *Transportation Mgmt. Co. v. Druck*, 279 So. 2d 88 (Fla. 4th Dist. 1973).

S. Legislation

The Small Loan Business Act has been extensively amended and renamed the Consumer Finance Law.⁴⁴ Small loan companies may now lend up to \$2,500 with maximum interest of 30 percent per annum on the first \$300, 24 percent per annum on the next \$300, and 16 percent per annum on the next \$1,900. Interest shall be simple and not add-on interest or other computations, and must be computed in accordance with the Federal Truth in Lending Act and Regulation Z of the Board of Governors of the Federal Reserve Board.⁴⁵ In addition to a variety of other amendments, the holder in due course doctrine governing security interests has been abolished; a holder or assignee from the small loan company is now subject to all defenses of the consumer-debtor against the seller of those consumer goods or services.⁴⁶ If a creditor takes possession of goods which were subject to a consumer transaction, the consumer shall not be liable for a deficiency unless the unpaid balance of the consumer transaction at the time of default was in the amount of \$2,000 or more.⁴⁷ The rights of lenders to obtain and retain security interests in "cross collateral" were also limited.⁴⁸

Under an amendment to the usury statutes, it is now permissible to charge a maximum of fifteen percent per annum interest to an individual for a loan of money exceeding five hundred thousand dollars in amount.⁴⁹ Upon first glance, it might appear that this statute would not receive daily application. It is suggested, however, that this statute will be widely followed in cases wherein individuals sign as guarantors of promissory notes executed by corporate borrowers.

III. MORTGAGES AND SECURITY INTERESTS

A. Statute of Frauds

The District Court of Appeal, Fourth District, has held that a suit by a borrower against a lender upon an oral contract to lend money in return for the borrower giving a note and mortgage to the lender is not barred by the statute of frauds, because the giving of a mortgage in Florida does not transfer any title or interest other than a lien in real estate. The reader is cautioned that this decision would seem to place Florida in the minority column on this point.⁵⁰

44. FLA. STAT. ch. 516 (1973) [Committee Substitute for S.B. No. 835 (1973)].

45. FLA. STAT. § 516.031 (1973).

46. FLA. STAT. § 516.31(2) (1973).

47. FLA. STAT. § 516.31(3) (1973).

48. FLA. STAT. § 516.31(4) (1973).

49. Fla. Laws 1973 ch. 73-298, amending FLA. STAT. §§ 687.02, .03 (1971).

50. *Martyn v. First Fed. Sav. & Loan Ass'n*, 257 So. 2d 576 (Fla. 4th Dist. 1971). Compare 2 A. CORBIN, CONTRACTS § 403 (1950, Supp. 1971) with G. OSBORNE, MORTGAGES §§ 131-34 (1951) and RESTATEMENT (SECOND) OF CONTRACTS § 195 (1973).

B. *Merger*

As a general rule, when a mortgagor conveys the equity of redemption to the mortgagee, the mortgage ceases to be an incumbrance under the theory of a merger.⁵¹

C. *Insurable Interest*

Under a breach of warranty clause (also known as a standard mortgage or union clause) in a policy of casualty insurance which is designed to insure the interests of the mortgagor and mortgagee, it is not necessary for the mortgagor to be an "owner" of the mortgaged property in order for the mortgagee to recover in case of loss. It is necessary, however, that the mortgagor have an insurance interest in the property; otherwise, the insurance policy will be construed as an illegal wager and the mortgagee will be unable to recover.⁵²

D. *Jurisdiction*

When a mortgage foreclosure action is brought in a state court prior to the institution of bankruptcy proceedings involving the mortgagor, the state court has jurisdiction. The decree of foreclosure cannot be attacked in a collateral proceeding if the bankruptcy court enters a restraining order against the mortgagee which is ignored by him and never asserted by the mortgagor in the state court.⁵³

E. *Joinder of Parties*

It is not necessary to join beneficiaries of a land trust as defendants in a mortgage foreclosure action; however, these beneficiaries may be joined as defendants under rule 1.210(c) of the Florida Rules of Civil Procedure, and they may appear and defend the action in the event that the trustee fails to do so.⁵⁴

When a defendant in a mortgage foreclosure action denies in her answer that the other defendants owned the real estate which they mortgaged (and claims that she is the owner of the property), it is reversible error to enter a judgment of foreclosure in the absence of proof that the mortgagors did in fact own the subject property.⁵⁵

F. *Acceleration*

When a court orders that a mortgagor should have an opportunity to bring his payments up to date prior to the court's judgment for the entire

51. *Floorcraft Distrib., Inc. v. Horne-Wilson, Inc.*, 251 So. 2d 138 (Fla. 1st Dist. 1971).

52. *Airvac, Inc. v. Ranger Ins. Co.*, 266 So. 2d 178 (Fla. 4th Dist. 1972).

53. *American Calmal Corp. v. Alderman*, 264 So. 2d 454 (Fla. 3d Dist. 1972).

54. *Cowen v. Knott*, 252 So. 2d 400 (Fla. 2d Dist. 1971).

55. *Epstein v. Deerfield Beach Bank & Trust Co.*, 280 So. 2d 690 (Fla. 4th Dist. 1973).

accelerated amount but the mortgagor fails to pay the current payments, he is in no position to complain that the court permitted the acceleration of the entire indebtedness of the mortgage.⁵⁶

In accordance with section 3-119 of the UCC, the District Court of Appeal, Fourth District, has held that a note and mortgage should be construed together in order to determine the intent of the parties as to acceleration rights of the holder, and that the acceleration provision in the mortgage should control the clauses of the note regarding acceleration since the mortgage provided "anything in said note or herein to the contrary notwithstanding."⁵⁷

In the eyes of the District Court of Appeal, Second District, it is unconscionable for a second mortgagee to accelerate payment of the second mortgage because the second mortgagee had paid two monthly payments to the first mortgagee upon default of the mortgagor when he had failed to make a bona fide effort to reach the mortgagor about the default and the facts failed to indicate that the first mortgagee intended to immediately foreclose.⁵⁸

In the absence of any material acts committed by the mortgagees which might have misled the mortgagors, the mortgagees have a legitimate right to accelerate the entire principal balance of the mortgage one month after a default in a mortgage payment has been made by the mortgagors. The fact that it will cost the mortgagors a higher interest rate in borrowing funds to pay the accelerated mortgage is not enough to preclude the acceleration.⁵⁹

A court may deny acceleration of a note and mortgage under proper circumstances even though the mortgagors were in default; however, the mortgagors may then be liable for attorney's fees which were incurred by the mortgagee as a result of the mortgagors' default.⁶⁰

G. Estoppel

Interesting aspects of legal estoppel and the rights of an assignee to a mortgage were illustrated in *Dubbin v. Capital National Bank*.⁶¹ A corporation conveyed land by a general warranty deed to a grantee. The land was subject to an existing mortgage, but no mention was made of this fact, and the contract of sale called for the grantor to deliver a title insurance policy to the grantee showing that the property was free of any liens. Subsequently, the mortgagee assigned the note and mortgage to the grantor, who subsequently assigned them to its assignee. The assignee then sued to foreclose, and the grantee counterclaimed to quiet

56. *Jay Bar Dan Corp. v. Maran Washing, Inc.*, 277 So. 2d 811 (Fla. 3d Dist. 1973).

57. *Grier v. M.H.C. Realty Corp.*, 274 So. 2d 21 (Fla. 4th Dist. 1973). This rule is inapplicable to a holder in due course who takes without notice of a limitation of his rights on the instrument contained in the separate agreement. UCC § 3-119.

58. *Walsh v. Combs*, 255 So. 2d 565 (Fla. 2d Dist. 1971).

59. *Guynn v. Brentmoore Farms, Inc.*, 253 So. 2d 136 (Fla. 1st Dist. 1971).

60. *Rockwood v. DeRosa*, 279 So. 2d 54 (Fla. 4th Dist. 1973).

61. 264 So. 2d 1 (Fla. 1972).

title to the property. The court held that when the grantor conveyed a defective title and then subsequently acquired the title which he had purported to convey, the perfected title inured to the grantee. In addition, since the grantor was estopped to assert the mortgage against its grantee, the assignee of the mortgage could not acquire any greater rights and was also estopped to assert the mortgage against the grantee of the property.

H. *Election of Remedies*

The Supreme Court of Florida has held that an election to sue on a mortgage note and the receipt of a judgment which remains unsatisfied does not act as a bar to a subsequent suit for foreclosure of the mortgage.⁶²

A mortgage lien is not extinguished until the mortgage debt is satisfied, and, as a result, a holder of a note and mortgage may sue on the note in a law action and if payment of the judgment is not forthcoming he may then sue to foreclose the mortgage. The defense of election of remedies is not a bar to the subsequent foreclosure action in the absence of payment.⁶³

I. *Foreclosure Sales*

When an appealing mortgagor fails to obtain a supersedeas of a judgment of foreclosure, the trial court may proceed with the foreclosure sale of the property. If the judgment of foreclosure is reversed upon appeal, the trial court should set the sale aside if the property was purchased by the mortgagee at the sale. On the other hand, if a bona fide third party purchases the land at the foreclosure sale, he will be protected even though the decree of foreclosure is held invalid as between the mortgagor and mortgagee.⁶⁴

Judicial sales for the foreclosures of mortgages will not be set aside for slight defects or merely technical irregularities. However, when the trial court ordered a mortgagor to pay certain monies to the mortgagee within a five-day period while the estate of the mortgagor was within the jurisdiction of the bankruptcy court and the mortgagor was unable to comply with the trial court's order; then the trial court subsequently proceeded on the basis that there had been a default judgment entered against the mortgagor when it had not been, and the court then ordered the clerk to sell the property pursuant to a statute which had been repealed six months previously, etc., the totality of the errors re-

62. *Junction Bit & Tool Co. v. Village Apts., Inc.*, 262 So. 2d 659 (Fla. 1972).

63. *Floorcraft Distrib., Inc. v. Horne-Wilson, Inc.*, 251 So. 2d 138 (Fla. 1st Dist. 1971).

64. *Sundie v. Haren*, 253 So. 2d 857 (Fla. 1971), *dismissing petition for cert.*, 233 So. 2d 417 (Fla. 3d Dist.).

quired that the appellate court set the sale aside and remand the entire case to the trial court for further proceedings.⁶⁵

J. *Redemption*

In a case decided under former section 45.031 of the Florida Statutes (1969) (which allowed redemption of mortgaged real property to be made within ten days after the foreclosure sale), the District Court of Appeal, Third District, held that when a junior mortgagee is not a party to the proceeding, the purchaser at the foreclosure sale takes the premises subject to the omitted junior mortgagee's right to redeem from the first mortgagee. This right of redemption could be exercised until the sale is confirmed by the execution and filing of a certificate of title.⁶⁶

In a case of first impression in Florida, the District Court of Appeal, Fourth District, has held that when lands are sold in accordance with a foreclosure judgment but subsequently are redeemed by the mortgagors prior to vesting of title in the buyer by the filing of the clerk's deed, they remain subject to a judgment lien which encumbered the lands before the foreclosure.⁶⁷

K. *Deficiency Actions*

In the event that the holder of a third mortgage exercises his right to redeem the mortgaged property and proceeds to foreclose the second mortgage, purchases the property at the foreclosure sale (under section 702.02 of the Florida Statutes), and subsequently brings an action on the mortgage note, the third mortgagor is entitled to assert as a pro tanto equitable defense that the property had a fair market value at the time of foreclosure in excess of the sum of the prior encumbrances.⁶⁸

Section 9-504(3) of the UCC provides that when a secured creditor takes possession of collateral, it must give the debtor notice of the time and place of any public sale or reasonable notification of the time after which any private sale is to be made. The District Court of Appeal, Second District, has held that when a creditor fails to give this required notice to the debtor, the creditor may not hold the debtor (a maker of a promissory note) liable for any deficiency.⁶⁹ It should be pointed out that some courts have held that when notice is not given the creditor may recover a deficiency unless the debtor proves that the failure to give him notice caused damage.⁷⁰

65. *U-M Publishing, Inc. v. Home News Pub. Co., Inc.*, 279 So. 2d 379 (Fla. 3d Dist. 1973).

66. *Akeley v. Miller*, 264 So. 2d 473 (Fla. 3d Dist. 1972). The statute was amended in 1971 to limit redemption to before sale, rather than filing of the certificate of title ten days later. FLA. STAT. § 45.03(1) (1971).

67. *Roy v. Matheson*, 263 So. 2d 604 (Fla. 4th Dist. 1972).

68. *Ogle v. Pepin*, 253 So. 2d 270 (Fla. 4th Dist. 1971).

69. *Turk v. St. Petersburg Bank & Trust Co.*, 281 So. 2d 534 (Fla. 2d Dist. 1973).

70. *E.g., Weaver v. O'Meara Motor Co.*, 452 P.2d 87 (Alaska 1969); *Universal C.I.T.*

L. *Relief From Foreclosure Judgment*

Rule 1.540(b) of the Florida Rules of Civil Procedure provides that relief from a judgment may be obtained upon the basis that the prior judgment upon which the judgment is based has been reversed or otherwise vacated. In *Riley v. Gustinger*,⁷¹ Riley retained Gustinger as his attorney in a law suit and gave Gustinger a note and mortgage for \$2,500 to secure payment of the legal fees. The judge in the lawsuit awarded a fee of \$1,600, and the client appealed. While the appeal was pending, Gustinger foreclosed the note and mortgage. Subsequent to the foreclosure, the appellate court reversed the original award of attorney's fees and the client sought to have the foreclosure judgment vacated upon the basis of the appellate decision. The District Court of Appeal, Third District, held that in light of the rule, the foreclosure judgment would be vacated and a new trial awarded in order to determine the amount of legal fees owed by Riley to Gustinger.

M. *Subrogation*

An interesting aspect of subrogation was involved in *Fortenberry v. Mandell*.⁷² Owners of land leased it for 99 years and the lease provided that the lessee would improve the property and that the improvements were to belong to the owners upon the termination of the lease. The lease also provided that if the lessee should borrow money to improve the property, the owners would join in any mortgage encumbering the land and the improvements. The lessee executed a note and mortgage, and the owners paid it. The lessee also defaulted on the lease, and the owners took possession. The owners then brought suit against the lessee on the basis of subrogation. The court held that the owners' payment of the note to the creditor entitled the owners to subrogation in equity to the position of the creditor. The owners succeeded to all rights of the creditor, which would include the right to recover a legal judgment on the note. The owners were also entitled to reasonable attorney's fees to be fixed by the trial court.

The case of *First National Bank v. Cooper*⁷³ presented a complex problem of first impression in Florida dealing with subrogation, mortgages and estates by the entirety. A widower purchased a home and assumed payment of an existing mortgage which encumbered the premises. On the following day he married, and approximately one week later he conveyed the home property to himself and his wife as an estate by the entirety. The new wife never assumed payment of the existing mortgage.

Credit Co. v. Rone, 453 S.W.2d 37 (Ark. 1970); Grant County Tractor Co. v. Nuss, 6 Wash. App. 866, 496 P.2d 966 (1972).

71. 252 So. 2d 583 (Fla. 3d Dist. 1971).

72. 271 So. 2d 170 (Fla. 4th Dist. 1972).

73. 266 So. 2d 191 (Fla. 2d Dist. 1972).

The husband later died, and the mortgagee filed claim against the estate. The mortgagee then assigned the mortgage to an assignee who filed a claim against the estate in her own right. Subsequently, the assignee sued the estate and secured a judgment against it. The administrator of the estate then filed suit for a declaratory judgment to determine whether if the administrator should pay the judgment obtained by the assignee, the estate would be subrogated to the lien of the mortgage against the property or entitled to a lien upon the mortgaged property to secure indemnity for payment of the judgment. The District Court of Appeal, Second District, held that the note and mortgage were the sole obligation of the deceased husband (the wife never having assumed payment); that if the husband had paid the debt during his lifetime he would not have had any claim against his wife; and that the administrator of his estate should not be given any greater rights than those possessed by the deceased husband. The court cited a Connecticut case which held (on somewhat similar facts) that the widow would be entitled to exoneration by her deceased husband's estate from the mortgage debt. It would appear that the holding of the Florida court in favor of the wife in this declaratory judgment action would result in a judgment closely resembling an exoneration judgment which compels the estate to exonerate the widow's real property from the mortgage lien.

N. *Reforeclosure Against Junior Lien Holders*

When a mortgagee forecloses his mortgage and junior lien holders are inadvertently omitted as defendants in the suit, the mortgagee may subsequently institute another foreclosure action against the junior lien holders, and the mortgage will be reinstated and then foreclosed against these defendants.⁷⁴

O. *Accommodation Parties*

It would appear that if a holder of a note should accept payments of 2-1/2 percent rather than the agreed 5 percent from the maker, this may constitute a material alteration sufficient to discharge a guarantor of the note; at least this defense of alteration is sufficient to withstand a motion to strike filed by the holder of the note.⁷⁵ However, the Supreme Court of Florida reversed on the ground that the guarantors had agreed in the guaranty agreement that extensions, renewal, alterations, amendments or waivers of any of the provisions of the promissory note, including the method, manner, amount and times of payment, could be made any time without notice to or consent by the guarantors, and that the complained of changes were, therefore, binding upon the guarantors.⁷⁶

74. *Raskin v. Otten*, 273 So. 2d 433 (Fla. 3d Dist. 1973).

75. *Van Valkenberg v. Chris Craft Indus., Inc.*, 252 So. 2d 280 (Fla. 4th Dist. 1971).

76. *Chris Craft Indus., Inc. v. Van Valkenberg*, 267 So. 2d 642 (Fla. 1972). The reader is

An interesting application of the law of suretyship was presented in *Commercial Bank v. Andersen*.⁷⁷ A couple purchased a tractor and the purchase price was secured by a note and a security agreement. The couple subsequently sold the tractor, and the purchaser assumed in writing to pay the balance of the payments. The purchaser subsequently defaulted in his payments, and the bank agreed to waive its right to accelerate the remaining indebtedness if the purchaser would make interest payments. When the final payment of principal became due, the bank accelerated the indebtedness, foreclosed and sold the tractor. A deficiency resulted, and the bank sought to hold both the original and subsequent purchasers liable for the deficiency. The court held that when the subsequent purchaser assumed the indebtedness, he, in relationship to the original purchasers, became the principal debtor and they became sureties, but that this change of relationship could have no effect on the lender-bank. The fact that the bank accepted payments of interest could not turn the extension of payments into a novation and thereby release the original purchasers. With all due respect to the court, the court missed the mark. The issue was not one of novation, but one of suretyship law—if the creditor extends or modifies the obligation of the principal debtor without the consent of the surety (or without reserving rights against the surety) the surety is released.⁷⁸

When the consideration for both a promissory note and the guaranty is the same, a partial failure of consideration is a defense to the guarantor.⁷⁹

When a guarantor guarantees a line of credit to be extended to a corporation by a bank upon condition that the bank secures the corporation's accounts receivable as the primary collateral for the loan, the bank may not recover against the guarantor when it is unable to show that it complied with the condition.⁸⁰

IV. BANKS AND SAVINGS AND LOAN ASSOCIATIONS

A. *Payment and Collection of Items*

Under section 4-202(1)(a) of the UCC, a collecting bank must use ordinary care in presenting or sending a check for payment. In *Florida National Bank v. Exchange Bank*,⁸¹ a depository bank sent a counter check which had not been encoded with the drawee-payor bank's code

cautioned that the supreme court's use of the term "alteration" in the holding is very questionable. The court confused alteration of the instrument (in the sense of physical changes in the writing itself—see section 3-407 of the UCC) with "alteration" as used in a suretyship-guarantyship setting, meaning a change in the principal obligation by subsequent agreement without any physical changing of the original writing.

77. 260 So. 2d 871 (Fla. 2d Dist. 1972).

78. UCC § 3-606 and comments.

79. *Schaufelberger v. Mister Softee, Inc.*, 259 So. 2d 175 (Fla. 4th Dist. 1972).

80. *Northwestern Bank v. Cortner*, 275 So. 2d 317 (Fla. 2d Dist. 1973).

81. 277 So. 2d 313 (Fla. 1st Dist. 1973).

number to a collecting bank. The collecting bank made a mistake and wrote the wrong encoded number on the check. As a result, it reached the wrong bank, which mailed it back to the collecting bank. The check was then lost in the mails. If the check had been properly presented to the drawee-payor bank it would have been paid. It was not paid, and the collecting bank charged the amount of the check back against the account of the depository bank, which then sued the collecting bank. The majority of the court held that the proximate cause of the loss was not the mistake in encoding, but rather it was the negligence of the United States mails. The majority of the court then overturned a jury verdict in favor of the depository bank. The dissent was of the view that a jury could find that had the collecting bank not committed the error in encoding, the check would have been presented to the drawee-payor bank, and it would have been paid.

In a case of first impression, the District Court of Appeal, First District, has held that a depository-collecting bank is not liable to the drawer of a check when the bank deposits only a part of the check to the account of the corporate payee and cashes the remainder of the check upon instructions from the officers, directors and sole stockholders of the corporate payee. The holding was based upon the following grounds: (1) That portion of the check which was turned into cash actually reached the corporate payee, hence no loss was suffered by the drawer because all of the proceeds of his check actually reached the corporate payee. (2) In accordance with authority from other states, a drawer of a check has no direct cause of action against banks other than the drawee-payor bank. There is no conversion action by the drawee because the beneficial interest in the check is in the payee and not the drawer. The drawer has no cause of action against the collecting bank for moneys had and received because if the payment of the check by the drawee-payor is wrongful as to the drawer, then the drawee-payor bank has paid out its own funds to the collecting bank and no loss has been suffered by the drawer. (3) The warranty of the collecting bank does not run to the drawer of the check, but only to other collecting banks and the drawee-payor bank.⁸²

Under sections 3-417(2)(b), 4-207(2)(b) and 4-207(3) of the UCC, a collecting bank warrants to the drawee-payor bank that all signatures are genuine or authorized. Hence, when a drawer issued two checks made payable to "Firebird International, Inc.," both checks were indorsed by a person who indorsed as president of this nonexistent company, and the drawer then successfully recovered the amount of the checks from the drawee-payor bank, the drawee bank may then recover over against the depository-collecting bank.⁸³

A bank which has made an oral agreement with one of its customers

82. *Jett v. Lewis State Bank*, 277 So. 2d 37 (Fla. 1st Dist. 1973).

83. *First Bank & Trust Co. v. County Nat'l Bank*, 281 So. 2d 515 (Fla. 3d Dist. 1973).

to allow him the right to draw against uncollected checks may revoke this agreement without notice to the customer; this is particularly true when the agreement resulted in an amount of credit in excess of the legal loan limits under federal law and the bank has changed its management.⁸⁴

Section 9-207 of the UCC provides that a secured party must use reasonable care in the custody and preservation of collateral in his possession. In *Tallahassee Bank & Trust Company v. Bryant*⁸⁵ warrants for the purchase of stock were pledged with a bank by a borrower. The stock warrants had to be exercised within a certain date or they became worthless. The borrower, with the consent of the bank, sold 7,200 of the 8,200 warrants which were pledged. The bank did not inform the borrower of the remaining 1,000 warrants; however, the borrower had records which disclosed that he owned these 1,000 warrants. The bank failed to sell the warrants and they became worthless. The borrower sued the bank, and the trial court held in favor of the borrower. The appellate court held that section 9-207 did not cast an absolute duty upon the bank to inform the borrower of their existence. It was a jury question as to whether the bank was negligent for failing to inform and whether the borrower was precluded from asserting negligence on the part of the bank by his knowledge or what he should have known.

Funds which are in escrow are not subject to garnishment unless all of the conditions of the escrow have been met and the funds are absolutely due to the judgment debtor.⁸⁶

B. Joint Accounts

When a wife draws a check on the spouses' joint checking account to the order of a payee who deposits the check in his bank in Nassau County, which subsequently collects from the drawee bank in Palm Beach County after the death of the wife, the surviving husband's cause of action against the collecting payee is properly laid in Palm Beach County, the place of payment, rather than in Nassau County, where the depository bank is located.⁸⁷

The District Court of Appeal, First District, has held that when bank and savings and loan accounts are established in the name of a husband and wife as joint tenants with the right of survivorship, the wife has the right without the knowledge or consent of her husband to close out the accounts and to give the proceeds to her niece, thereby cutting off any right of recovery from the niece.⁸⁸

In order to prove a gift inter vivos to a wife of a joint share ac-

84. *Radionoff v. First Nat'l Bank*, 281 So. 2d 530 (Fla. 3d Dist. 1973).

85. 271 So. 2d 190 (Fla. 1st Dist. 1972).

86. *Cosentino v. Elson*, 263 So. 2d 253 (Fla. 3d Dist. 1972).

87. *Blair v. Davis*, 281 So. 2d 247 (Fla. 4th Dist. 1973).

88. *Simpson v. Schoenemann*, 263 So. 2d 854 (Fla. 1st Dist. 1972).

count in a credit union, it is necessary to prove that the donor had donative intent at the time he opened the account. Hence, that the signature card was signed only by the husband, that the account was in existence for approximately ten years without any deposits or withdrawals by the wife, who was seemingly unaware of the account, coupled with the fact that the husband bequeathed the account to his wife and his five sons, show that the husband did not have the requisite donative intent.⁸⁹

C. *Administrative Proceedings*

Under the Supremacy Clause of article VI of the Constitution of the United States, the federal government has preempted the regulation and supervision of federal savings and loan associations. As a result, a state court does not have jurisdiction to enjoin a federal savings and loan association from proceeding before the Federal Home Loan Bank Board for permission to establish a branch office.⁹⁰

The procedures under section 665.441 of the Florida Statutes (1971) which are necessary to process an application for a branch office of a savings and loan association are quasi-executive or quasi-legislative rather than quasi-judicial in character, and, therefore, the Administrative Procedure Act⁹¹ does not apply to the proceedings.⁹²

An order of the Comptroller which approves the application of a savings and loan association for a branch office is quasi-executive or quasi-legislative in nature and the district court of appeal is without authority to review this order by an original proceeding in common law certiorari. The Comptroller will therefore be entitled to a writ of prohibition to prohibit the district court of appeal from proceeding.⁹³

D. *Legislation—Savings and Loan Associations*

Section 665.032 has been added to the Savings and Loan Act, and provides for the imposition of fees and assessments on applications and examinations of savings and loan associations.⁹⁴

In accordance with the addition of section 665.215 of the Florida Statutes, any savings and loan association incorporated under the laws of Florida may, with the approval of the Department of Banking and Finance, "make any loan or investment or exercise any such power which such association could make if it were incorporated and operating as a federal association domiciled in this state."⁹⁵

89. *Williams v. Williams*, 255 So. 2d 273 (Fla. 4th Dist. 1971).

90. *Washington Fed. Sav. & Loan Ass'n v. Balaban*, 281 So. 2d 15 (Fla. 1973).

91. FLA. STAT. ch. 120 (1973).

92. *Dickinson v. Washington Fed. Sav. & Loan Ass'n*, 281 So. 2d 603 (Fla. 3d Dist. 1973).

93. *Dickinson v. Judges of the Dist. Ct. of App., First Dist.*, 282 So. 2d 168 (Fla. 1973).

94. Fla. Laws, 1973, ch. 73-49, creating FLA. STAT. § 665.032.

95. Fla. Laws, 1973, ch. 73-225, creating FLA. STAT. § 665.215.

Savings and loan associations may now invest in bankers' acceptances which are eligible for purchase by federal reserve banks; may make reasonable charges for early withdrawals of classified savings accounts; may make inducements not in excess of \$15.00 for the opening or increasing of savings accounts; and with authorization of the Department of Banking and Finance may operate facilities other than a home office or branch office "which will increase the viability of such association in promoting thrift and home financing."⁹⁶

The Savings Association Act was amended to permit (among other things) savings associations to classify their customers' savings accounts according to the character, amount or duration thereof and to pay differing rates of interest which shall not exceed three percent over the rate of earnings paid on all savings accounts based on such calculations. The amendments also permit state and federal mutual associations to convert to capital stock associations and allow the conversion of Florida stock associations to federal associations.⁹⁷

The annual meeting of members of a savings association shall now be held during the first three months of the fiscal year at a time fixed by the bylaws of the association.⁹⁸

Under an amendment to section 665.321 of the Florida Statutes, virtually all fiduciaries, corporations, municipalities, etc., may now invest funds held by them in savings accounts of savings associations which are under state supervision, and in accounts of federal savings associations. In addition, these savings deposits are now legally acceptable in any case where state laws provide for the deposit of securities for any purpose, and, when the law provides for a bond with security, these savings deposits shall be acceptable as security.⁹⁹

E. Legislation—Banks

Section 659.06 of the Florida Statutes was amended to provide that commercial banks, with prior written approval of the Department of Banking and Finance, may operate one drive-in and walk-up facility within one mile of the main banking building in order to relieve burdens on the public because of traffic congestion. A similar privilege was extended to industrial savings banks.¹⁰⁰

Under a 1972 amendment to chapter 659 of the Florida Statutes, it is now unlawful for a bank, trust company or holding company whose operations are principally conducted outside of the state of Florida to

96. Fla. Laws, 1973, ch. 73-285, *amending* FLA. STAT. §§ 665.361, .191(4), .441(3), .101, .231(5) (1971); *creating* FLA. STAT. § 665.442.

97. Fla. Laws, 1973, ch. 73-224, *amending* FLA. STAT. §§ 665.021(6), .021(13), .031(5), .041(1), .331; *creating* FLA. STAT. §§ 665.021(25), .701-717.

98. Fla. Laws, 1973, ch. 73-168, *amending* FLA. STAT. § 665.091(1) (1971).

99. FLA. STAT. § 665.321 (Supp. 1972).

100. Fla. Laws, 1973, ch. 73-103, *amending* FLA. STAT. § 659.06(2) (1971).

acquire or retain directly or indirectly all or substantially all of the assets or control of any trust company (or a company which furnishes investment advisory services to trust companies) having a place of business in this state. The act provides for exemptions in certain cases.¹⁰¹

Extensive amendments were made to the statutes governing state income taxation of banks and savings associations; space limitations do not permit any discussion of these changes.¹⁰²

Under an amendment to section 659.061 of the Florida Statutes, any Florida trust company may now operate "trust service offices" in any bank which is organized under Florida or federal law with its principal place of doing business in Florida, provided that it secures the consent of the majority of stockholders and directors of these banks and the approval of the Department of Banking and Finance.¹⁰³

Section 658.08 of the Florida Statutes was amended to provide for the imposition of and increase in the amount of various application fees for banks, and section 656.22 was amended to provide that these same fees are applicable to industrial savings banks.¹⁰⁴

F. *Bad Check Laws*

The crime of forgery has not been committed when a man opens a checking account under an assumed name and utters worthless checks signed with this assumed name with the intent to defraud the payee; forgery requires the writing of a name which purports to be the writing of another. The act of signing a worthless check under an assumed name will, however, constitute the crime of obtaining property in return for a worthless check.¹⁰⁵

101. FLA. STAT. § 659.141 (Supp. 1972).

102. Fla. Laws, 1973, ch. 73-152, *amending* FLA. STAT. §§ 220.62, .63, .64, .65 (Supp. 1972); *creating* FLA. STAT. §§ 220.67, .68, .69 (1973); *amending* FLA. STAT. § 665.501(4) (1971).

103. Fla. Laws, 1973, ch. 73-119, *amending* FLA. STAT. § 659.061(1)(a) (1971).

104. Fla. Laws, 1973, ch. 73-69, *amending* FLA. STAT. §§ 658.08(3)-(4) (1971).

105. *Rap v. State*, 274 So. 2d 18 (Fla. 4th Dist. 1973).