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# UNJUSTIFIED LIABILITY FOR ACCOMMODATION ENDORSERS

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Two decisions of the Third District Court of Appeal of Florida[1] merit comment, for they mistakenly hold accommodation endorsers liable under circumstances which clearly should have resulted in a discharge of liability under the Negotiable Instruments Law.[2] One of the decisions holds that performance of the conditions of presentment for payment and notice of dishonor, normally prerequisites to the imposition of liability in the absence of waiver, are unnecessary to hold an accomodation endorser liable. Both cases hold that acts which under the NIL constitute a discharge of secondary parties do not discharge an endorser when he assumes the status of a surety by endorsing a negotiable promissory note. While it is possible under certain circumstances to reach these results, both decisions are clearly erroneous on their facts.

To explain briefly how the initial mistake was made is not difficult. The district court erroneously assumed that since the decision in *Camp v. First Nat'l Bank*[3] was rendered subsequent to the enactment of the NIL in Florida, the case must necessarily involve an interpretation of the NIL. Elaboration is required to clarify what followed that assumption.

## A. LIABILITY PRIOR TO THE NIL

Prior to the enactment of the NIL there was a conflict of authority in this country concerning the nature of an accommodation endorser's liability.[4] Having signed the back of an instrument prior to its delivery to the payee, this party was held liable in various capacities. The Florida Supreme Court took the position that the liability was that of a maker.[5] In *Camp v. First Nat'l Bank*,[6] defendants put their names on the back of a note prior to its delivery to the payee for the purpose of lending their credit to the instrument. It was held that:

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1. Central Bank & Trust Co. v. Meltzer, 145 So.2d 766 (Fla. 3d Dist. 1962); Weinstein v. Susskind, 162 So.2d 683 (Fla. 3d Dist. 1964).

2. FLA. STAT. ch. 674-676 (1963), enacted in Florida in 1897 (hereinafter cited NIL).

3. 44 Fla. 497, 33 So. 241 (1902).

4. BRITTON, BILLS & NOTES § 231 (2d ed. 1961).

5. McCallum v. Driggs, 35 Fla. 277, 17 So. 407 (1895); Melton v. Brown, 25 Fla. 461, 6 So. 211 (1889).

6. 44 Fla. 497, 33 So. 241 (1902).

> [U]nder such circumstances it is the settled rule in this state that they are liable as makers, even although it be proved that they wrote their names on the back of the note as sureties for the maker, and without participating in the consideration for which the note was given. Melton v. Brown, 25 Fla. 461, 6 So. 211; McCallum v. Driggs, 35 Fla. 277, 17 So. 407. Under the rule adopted, the status of such irregular endorsers as joint makers is conclusively fixed when it is made to appear that their signatures are affixed before delivery of the instrument, and for the purpose of lending their credit thereto with the payee. . . .[7]

An additional reason urged in the *Camp* case for discharging the surety-endorser was that the payee bank had failed to apply funds of the maker on deposit with the payee (the First National Bank of Ocala) to the satisfaction of the obligation and that consequently this conduct resulted in discharge of the surety-endorser. The court, however, held that the payee was not prejudiced in his rights against the surety by its failure to apply maker's funds on deposit even though the note was payable at the bank.

> The right of a bank to apply a depositor's credit balance to the satisfaction of a debt due the bank is in the nature of a set-off, or application of payments which will not be required by law, in the absence of express agreement or appropriation, so as to benefit a surety.[8]

The maker in *Camp* had neither expressly ordered nor expressly authorized, an application.

Although *Camp* was decided in October 1902 and the NIL was enacted in Florida in 1897, the NIL provided that the act did not apply to instruments made and delivered prior to its passage in 1897.[9] The instrument in question in the *Camp* case was a ninety day note, executed on April 27, 1891. Litigation had commenced as early as 1892 although the decision was not reached until 1902. Therefore, even though *Camp* was subsequent to the enactment of the NIL in point of time, the court still applied the law of Florida as it existed prior to the adoption of the NIL. Accordingly, an assumption that *Camp* altered or interpreted the NIL is without historical foundation.

### B. The NIL Provisions

One of the major purposes of the NIL was to lay at rest the problem exemplified by the *Camp* Case, and the act contained provisions dealing with the nature of an accommodation endorser's liability and also the

7. *Id.* at 502-503, 33 So., at 242.

8. *Id.* at 504, 33 So., at 243.

9. Fla. Laws 1897, ch. 4524. "The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof."

effect of making an instrument payable at a bank. NIL section 674.65 provides:

> A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed an endorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

The primary purpose of this section was to create uniformity, and to establish the liability of a person who prior to its issuance to the payee signed the instrument on its back as endorser, and not as a maker, acceptor, or guarantor of payment. This result could, of course, differ if the signature clearly indicated otherwise. By making such a signer an endorser, all the law which sprang directly and indirectly from any and all of the NIL sections determining the legal rights, duties and all other legal relations of the regular endorser, became incorporated by reference into NIL action 674.65.[10] This means that the liability of such a signer, unless he indicates otherwise, is conditioned upon due presentment for payment,[11] and upon due notice of dishonor.[12] All of the elaborate provisions of the NIL which declare what facts shall or shall not operate as due presentment for payment, due notice of dishonor, and protest, are thus brought into NIL section 674.65. The important fact is that the law that establishes the legal status of the regular endorser comes in through NIL section 674.65 to establish the legal status of the irregular endorser. Of course, the accommodation endorser is also a surety for someone[13] and NIL section 674.66 spells out to whom that liability runs.

> Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as endorser, in accordance with the following rules:
>
> 1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.
> 2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.
> 3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

This status of secondary liability of the endorser-surety may be lost when the surety assumes liability as a maker of the instrument.[14] Under

10. BRITTON, *op. cit. supra* note 4, § 231.
11. FLA. STAT. § 674.72 (1963).
12. FLA. STAT. § 675.06 (1963).
13. FLA. STAT. § 674.32 (1963).
An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person.
14. A surety for a party to a bill or note may sign as an acceptor or maker, or

this arrangement the surety is primarily liable to the creditor on the instrument, but the surety arrangement still exists, and as between the principal debtor and the surety, the former and not the latter *should* perform.[15] This has led some courts to describe the principal debtor as the "primary party" and the surety as the "secondary party." As can be imagined, confusion could result when the debt is evidenced by the negotiable instrument, for the party "primarily" liable in terms of suretyship might be secondarily liable under the NIL if he was an endorser of the instrument. Also, a person "secondarily" liable in terms of suretyship might be primarily liable under the NIL if he signed the instrument as a maker. But the surety is "secondarily" liable both in the suretyship sense and in the NIL sense when he signs as endorser of the negotiable instrument, unless he clearly indicates otherwise.[16] Hence, had the NIL been applicable to *Camp*, sections 674.65-66 of the NIL would have been applied to limit the endorser's liability to that of a party secondarily liable on the instrument.

The argument in *Camp* that discharge should have resulted because of the payee-bank's failure to apply maker's funds on deposit to the obligation was not without precedent. In fact, some pre-NIL courts had held that even a maker would be discharged if a holder had failed to avail himself of maker's funds on deposit with a bank, and that bank subsequently failed.[17] Consequently, it would appear reasonable to discharge an endorser-surety when the maker's funds available for satisfaction of the debt were lost because of the holder's inaction. In dealing with this problem, section 674.72 of the NIL provides:

> Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But

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as a drawer or indorser. As a surety, his rights and liabilities are the same irrespective of the form of his contract. As a primary party to a bill or note, his liability, obviously, is different from that which it is as a secondary party.

BRITTON, *op. cit. supra* note 4, § 231.

15. SURETYSHIP DEFINED.

Suretyship is the relation which exists where one person has undertaken an obligation and another person is also under an obligation or other duty to the obligee, who is entitled to but one performance, and as between the two who are bound, one rather than the other should perform.

RESTATEMENT, SECURITY § 82 (1941).

16. Indicating otherwise is usually accomplished by the endorser surrendering or waiving his NIL rights of presentment for payment, notice of dishonor and protest. Or he may "guarantee payment." A waiver provision was incorporated in the *Camp* case, but since it was a pre-NIL case, Camp's liability as "maker" existed regardless of the waiver. Neither of the cases decided by the Third District Court of Appeal to be discussed herein involved a waiver situation.

17. Wallace v. McConnell, 38 U.S. (13 Pet.) 136 (1839); Lazier v. Horan, 55 Iowa 75, 7 N.W. 457 (1880).

> except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and endorsers.[18]

To what extent this section was intended to exonerate the maker in case of damage by bank failure (the major problem in this type of case) is not explicitly stated in the act. Professor Roscoe Steffen has stated that the commissioner's notes indicate an intention to adopt the position of discharging a maker.[19]

There is a further argument under the NIL to support the position for discharging a maker on failure of the holder to apply deposited funds when the instrument is made payable at a bank. NIL section 675.04 provides:

> Where the instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.[20]

The wording of this section provides makers of such instruments with the following argument: If making the instrument payable at the bank renders a note the equivalent of an order, the note is the equivalent of a bill of exchange.[21] Therefore, the maker has the liability of a drawer of a bill, and a failure to meet the conditions necessary to charge a drawer[22] now also applies to the maker. This argument was presented on behalf of a maker in *Binghampton Pharmacy v. First Nat'l Bank*.[23] The court rejected the argument and stated that this NIL section was to be interpreted as merely authorizing the bank to make such application, but would not put the bank under any duty to do so.

This argument has little to do with the liability of the accommodation endorser of an instrument made payable at a bank. Under NIL section 674.72 presentment for payment is necessary in order to charge the drawer and endorsers; and if the instrument is by its terms payable at a special place, (bank or otherwise) and the person primarily liable is able and willing to pay it there, such ability and willingness are an equivalent to a tender of payment upon the primary party's part. Under NIL section 675.28(2)(d),[24] a person secondarily liable on the instrument is discharged "by a valid tender of payment made a prior party." Section

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18. FLA. STAT.. § 674.72 (1963).

19. Steffen, *Instruments "Payable at" A Bank*, 18 U. Chi. L. Rev. 55, 66 (1950).

20. FLA. STAT. § 675.04 (1963).

21. FLA. STAT. § 676.01 (1963).

> A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer.

22. FLA. STAT. 674.72 (1963). "But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers."

23. 131 Tenn. 711, 176 S.W. 1038 (1915).

24. FLA. STAT. § 675.28(2)(d) (1963).

675.04 of the NIL is merely one way of indicating the authorization, or willingness of the maker, necessary for a tender under NIL section 674.72; a position that the *Binghampton Pharmacy* case recognized. Again we see the *Camp* case changed with respect to instruments payable at banks by the NIL whereby accommodation endorsers are discharged not only by failure to meet the standard conditions precedent to their liability, but also by failure when authorized to apply funds to such instrument under NIL section 675.28(2)(d).

With the foregoing background in mind, one may now consider the two decisions of the Third District Court of Appeal.

### C. Central Bank & Trust Co. v. Meltzer[25]

On February 18, 1960, Katz executed and delivered to the plaintiff, Central Bank and Trust Company, his promissory note in the amount of 10,000 dollars payable to the plaintiff on April 18, 1960, at the bank. Prior to delivery to the plaintiff, the defendant Meltzer, endorsed the back of the note as an accommodation endorser. At the time of the execution of the note, the maker, Katz, had certain funds on deposit with the plaintiff. The provisions of the note and the deposit contract, which Irving Katz had signed, gave the plaintiff the right to apply the funds on deposit against this debt.

On April 18, 1960, the due date of the note, Katz had 27,271.33 dollars on deposit with the plaintiff. Subsequently, Katz withdrew all of his funds from this account.

Thereafter, plaintiff sued defendant, as accommodation endorser, for the unpaid balance of 9,000 dollars together with interest, costs and reasonable attorney's fees. The defendant, Meltzer, set forth the defense that the plaintiff bank's failure to apply the funds of the maker on deposit with it at maturity, against the obligation of the maker to the plaintiff, discharged the defendant endorser from all liability under said note. The trial court entered a summary judgment in favor of the defendant on the theory that under NIL section 675.04, the plaintiff was required to apply the funds of the maker on deposit against his obligation on the note.

On appeal, the court stated that the sole issue presented was whether the accommodation endorser of a promissory note payable to, and at a bank, is relieved of liability by the failure of the bank to apply funds on deposit at maturity in the account of the maker against the note, which the bank had a right to so apply. The court held that the defendant, as an accommodation endorser, was not relieved of liability by the failure of the plaintiff bank to apply the deposited funds against the note payable to it. The court relied on the following authority for this holding:

25. 145 So.2d 766 (Fla. 3d Dist. 1962).

> In Camp v. First National Bank of Ocala, . . . our Supreme Court, faced with an almost identical factual situation, decided that the bank had a right, but was not obligated, to apply the funds on deposit in satisfaction of the note. . . . The Camp case was decided in October, 1902, whereas § 675.04 F.S.A., was first enacted in 1897. . . . Therefore, it cannot be said that § 675.04 altered the effect of the Camp decision. Further, while there appears to be no Florida cases interpreting § 675.04 it is noted that this section is the same as § 87 of the Uniform Negotiable Instruments Act which has been interpreted simply as authorizing a bank, at which an instrument is made payable, to pay same for the account of the principal debtor. It creates a right but does not impose a duty upon the bank. Binghampton Pharmacy v. First National Bank, 1915, 131 Tenn. 711, 176 S.W. 1038.[26]

The basic error in Meltzer was that the court, by failing to recognize that *Camp* was a pre-NIL decision, also failed to examine the NIL provisions that distinguish the liability of a maker as opposed to an accommodation endorser. Not only did the court completely disregard NIL section 674.72, providing for discharge of an endorser on failure of presentment, but it also failed to recognize that *Binghampton Pharmacy* established the authorization necessary to constitute the tender which would result in the endorser's discharge under NIL section 675.28(2)(d).

After failing to distinguish between makers and endorsers, the court then went on to confuse the terms "endorser" and "surety."

> We further point out that the defendant signed this note as an accommodation endorser before delivery and therefore is regarded as surety and not an endorser. This rule is unchanged by §674.65 F.S.A., providing that a person not signing as maker, drawer or acceptor and not indicating intention to be bound in another capacity, is an endorser. A surety is an insurer of the debt and may be sued as a promisor.[27]

There are two interpretations which may be given to this last sentence. The apparent implication is that a surety is a person who under every conceivable circumstance (other than payment by the principal)[28] must pay the debt. As previously indicated this statement is untrue under the NIL, particularly with respect to the endorser-surety. If, on the other hand, the court meant that the liability of a surety is subject to qualifica-

26. *Id.* at 768.

27. *Ibid.*

28. Though satisfaction of the obligation by the principal was not stated as a possible exception to this generalization, it is doubtful that the court would require the endorser-surety to pay under this circumstance, even though unaware of NIL sections 675.28(2)(a), 675.28(1)(a) and (b) providing for discharge of an endorser on payment by the principal or an accommodated party.

tion, the statement is true but meaningless without an examination of those qualifications or conditions.

Apparently, the court failed to recognize that a suretyship relation can be created in a number of ways. When the obligation is evidenced by a negotiable instrument, the contractual relationship that exists may vary depending upon the manner it is assumed, be it as maker, endorser or otherwise. As a consequence, "surety" and "endorser" are not exclusive terms.

Generally stated, a surety is an "insurer" of the debt and may be sued as a promisor, for indeed he has made a promise by signing the instrument. But what is the extent or nature of that promissory liability? To make this determination we are forced to examine the NIL. This the court failed to do.

To believe that a generalization such as that found in the last sentence of the court's opinion is a proposition adequate for the handling of this case recalls to mind a comment Professor Hart made several years ago in reference to the Supreme Court of the United States:

> But few of the Court's opinions, far too few, genuinely illumine the area of law with which they deal. Other opinions fail even by much more elementary standards. Issues are ducked which in good lawyership and good conscience ought not to be ducked. Technical mistakes are made which ought not to be made. . . .[29]

### D. WEINSTEIN v. SUSSKIND[30]

In the second of the two cases with which this article deals the court was presented with an opportunity to correct the errors it committed in *Central Bank & Trust v. Meltzer*. Rose Weinstein endorsed several notes of a corporation in which she was the owner of stock. The corporation was the maker and several corporate officers and stockholders (the latter group including Rose) endorsed the notes before delivery. Rose appealed from a circuit court judgment against her for 99,900 dollars in a suit to collect on three notes totalling 100,000 dollars. She urged her release from liability on the grounds that holder had failed to properly present the notes for payment, and had also extended and modified the terms of the notes without her consent. To the first argument the court replied:

> Returning now to the question of whether or not the appellant Rose Weinstein was primarily liable on the note, it appears that she, as a stockholder, endorsed the note of her own corporation prior to delivery. Under the law as set out in Central Bank and

29. Hart, *Foreward: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 100 (1959).
30. 162 So.2d 683 (Fla. 3d Dist. 1964).

> Trust Co. v. Meltzer, . . . Rose Weinstein, as endorser prior to delivery, was primarily liable on the note.[31]

As a consequence, the court held:

> Appellant's point directed to an alleged failure of the owner to properly present the notes for payment is without merit since, as an accommodation endorser before delivery, the appellant was primarily liable. No presentment for payment is necessary in order to hold one primarily liable on a note.[32]

With regard to the extension of the terms of the note, the court held:

> It is true that the owner failed to enforce payment on the notes for some five years after the due date but we know of no law which requires presentment at any specific time after maturity in order to charge a party primarily liable on a note.[33]

If the premise stated was correct, then the conclusion reached was correct. But the premise that Rose Weinstein was primarily liable was incorrect for the decision in *Central Bank & Trust v. Meltzer* was erroneous. Rather than compounding the error of *Central Bank & Trust v. Meltzer*, the court should have referred to the appropriate NIL sections namely: section 674.01, that the person "primarily" liable on an instrument is the person who, by the terms of the instrument, is absolutely required to pay the same, all other parties being "secondarily" liable; section 674.65, that a person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed an endorser unless he clearly indicates otherwise; section 674.72, that presentment for payment is necessary in order to charge the drawer and endorsers; and to section 675.28(2)(e), that a person secondarily liable on the instrument is discharged by any agreement binding upon the holder to extend the time of payment, unless the right of recourse against such party is expressly reserved.

Technical mistakes were made which should not have been made, this time in the amount of 99,000 dollars plus costs.

### E. PRESENT AND FUTURE TRANSACTIONS

Because of the unfortunate historical error, and the overlooking of the appropriate NIL provisions, these two cases are in direct conflict with a 1907 decision of the supreme court. Why this decision was overlooked and *Camp* cited as authority in *Meltzer* is unknown.

In *Baumeister v. Kuntz*[34] the defendant endorsed several notes prior

31. *Id.* at 685.
32. *Id.* at 686.
33. *Ibid.*
34. 53 Fla. 340, 42 So. 886 (1907).

to delivery to the payee as accommodation to the maker. When sued on his endorsement his defense was failure of presentment for payment and notice of dishonor by the payee. The court held that the endorser had waived these conditions and therefore was liable. However, the court clearly stated that in the absence of waiver an accommodation endorser is discharged under the NIL when the holder fails to present for payment and give notice of dishonor.

> Prior to the enactment of the negotiable instruments law (chapter 4524, p. 25, Acts 1897), this court held that when a party who is neither the maker nor the payee of a promissory note, for the purpose of enabling the maker to raise money on it, and before the note passes to the payee, endorses said note in blank (by simply writing his name on the back or any other part of the note), he thereby became liable as one of the makers of the note. Melton v. Brown, 25 Fla. 461, 6 So. 211; McCallum v. Driggs, 35 Fla. 277, 17 So. 407; Camp v. First Nat. Bank, 44 Fla. 497, 33 So. 241. . . . By the terms of the statute, [NIL] when a person not otherwise a party to the negotiable instrument places thereon his signature in blank before delivery, his status is fixed as that of an endorser. Where the statute fixes the status of a party to a negotiable instrument as being that of an endorser, parol evidence is not admissible to vary such status.
>
> Under the statute an endorser of a negotiable promissory note is not liable thereon, if due presentment is not made to the maker for payment, and notice of dishonor is not given, unless such presentment and notice are excused, dispensed with, or waived. The rights of an endorser of a negotiable promissory note to have due presentment and notice before liability attaches to him thereon are annexed by law for the benefit of the endorser, and under the terms of the statute such presentment and notice may be expressly or impliedly waived. . . . Of course, if presentment for payment be waived, the notice of dishonor to the endorser is dispensed with.[35]

Perplexing as these two decisions are to present and future transactions completed under the NIL, it appears that a remedy does exist in that in an appropriate case the conflict between the two cases and *Baumeister v. Kuntz* could be pointed out and the jurisdiction of the supreme court invoked if necessary.

It remains to be considered what effect the Uniform Commercial Code[36] will have on transactions such as these. The UCC will supersede the NIL and effect transactions entered into after January 1, 1967.[37]

35. Id. at 345-7, 42 So., at 887-8.
36. Fla. Laws 1965, ch. 65-254 (hereinafter cited UCC).
37. F.S.A. § 680.10-101 (1965).

Under UCC section 673.3-415(1), "an accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it." The purpose of this section is to make it clear that an accommodation party is always a surety and that this is his only distinguishing feature. He only differs from other sureties in that his liability is on the instrument, and he is a surety for another party to it. His obligation on the instrument is determined by the capacity in which he signs. "An accommodation maker or acceptor is bound on the instrument without any recourse to his principal, while an accommodation endorser may be liable only after presentment, notice of dishonor and protest."[38]

Again, an endorser may waive these conditions.[39] The words "payment guaranteed," or equivalent words, added to a signature mean that the signer promises that if the instrument is not paid when due he will pay it according to its tenor without resort by the holder to any other party. When words of guaranty are used, presentment, notice of dishonor and protest are unnecessary to charge the user of those words. But unless waived, under the UCC, as under the NIL, failure of presentment would discharge an accommodation endorser such as Rose Weinstein.

Rose Weinstein's defense under NIL section 675.28(2)(e), providing for discharge of secondary parties by an extension of time, is now handled under UCC section 673.3-606 on Impairment of Recourse of Collateral:

> The holder discharges any party to the instrument to the extent that without such party's consent the holder without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person, except that failure or delay in effecting any required presentment, protest or notice of dishonor with respect to any such person does not discharge any party as to presentment, protest or notice of dishonor is effective or unnecessary . . . .

The words "any party to the instrument" remove the uncertainty under the original NIL section 675.28 and make it clear that suretyship defenses under the UCC are not limited to parties who are "secondarily liable." Rather, they are available to any party who is in the position of a surety, having a right of recourse either on or off the instrument, including an accommodation maker.[40] Under the UCC this section would have been available to Rose had she signed as an accommodation maker let alone as an accommodation endorser.

38. UCC § 3-415 comment 1.
39. See note 16 *supra*.
40. UCC § 3-606 comment 1.

Furthermore, UCC section 673.3-604(3) provides for discharge on tender of payment, as did NIL section 675.28(2)(d). "Where the maker or acceptor of an instrument payable otherwise than on demand is able and ready to pay at every place of payment specified in the instrument when it is due, it is the equivalent to tender." This section rewords NIL section 674.72, interpreted by cases such as *Binghampton Pharmacy*, to mean that makers and acceptors of notes and drafts payable at a bank were not discharged by failure of a holder to make due presentment of such paper at the designated bank. This article reverses that rule, for under UCC section 673.3-501(2)(c), unless excused, "presentment is necessary to charge . . . the maker of a note payable at a bank." In the event of a failure to present, UCC section 673.3-502(1)(b) provides that any maker of a note payable at a bank who, because the drawee or payor bank becomes insolvent during the delay is deprived of funds maintained with the drawer or payor bank to cover the instrument, may discharge his liability by written assignment to the holder of his rights against the drawee or payor bank in respect to such funds, but such maker is not otherwise discharged. In addition, *any* party making tender of full payment to a holder when, or after it is due, is discharged to the extent of all subsequent liability for interest, costs and attorney's fees under UCC section 673.3-604(1).

As far as the endorser is concerned, under UCC section 673.3-604(3), "where the maker of an instrument payable otherwise than on demand is able and ready to pay at every place of payment specified in the instrument when it is due, it is equivalent to tender." UCC section 673.3-604(2) provides, "The holder's refusal of such tender wholly discharges any party who has a right of recourse against the party making the tender." An accommodation endorser, having recourse against the accommodated maker, would therefore be discharged.

The limited discharge of the maker and the total discharge of the endorser are both dependent upon the existence of a tender. Tender by domiciling an instrument under UCC section 673.3-604(3) occurs when there is, (1) ability and (2) readiness of the maker to pay when it is due. Funds on deposit would indicate the "ability." The "readiness" under the UCC (or "willingness" as the NIL provides)[41] can of course be created by expressly ordering or authorizing the bank to pay the instrument when due. In *Central National Bank v. Meltzer*, both the deposit contract and the note itself authorized such application of funds, and the endorser should therefore have been discharged.

However, the NIL and the UCC differ in their treatment of the situation in which no express order or authorization has been given. Under NIL section 675.04 making the instrument payable at a bank

41. FLA. STAT. § 674.72 (1963).

constituted an order, or at least if *Binghampton Pharmacy* was followed, an authorization to pay. Under UCC section 673.3-121 alternative sections were offered to the states for adoption. Alternative A provided:

> A note or acceptance which states that it is payable at a bank is the equivalent of a draft drawn on the bank payable when it falls due out of any funds of the maker or acceptor in current account or otherwise available for such payment.

This alternative clearly indicates that making an instrument payable at a bank is a tender under UCC section 673.3-604, giving limited discharge to the maker and discharge to the endorser.

However, under alternative B, which was adopted in Florida:

> A note or acceptance which states that it is payable at a bank is not of itself an order or authorization to the bank to pay it.

This alternative not only does not make an instrument payable at a bank an order, it is not even an authorization to pay.[42] Consequently, unless such authorization is expressly given by the deposit contract, a provision of the note or in some other manner, making an instrument payable at a bank would seemingly not constitute a tender under UCC section 673.3-604. Upon the Legislature's adoption of the alternative B provision the statement in *Meltzer* that Florida followed the *Binghampton Pharmacy* "authorization" rule has been changed. Therefore, the mere making of the instrument payable at a bank cannot constitute a tender under the UCC.

### F. Conclusion

Professor Grant Gilmore observed:

> When a "statute," having been in force for a time, has been interpreted in a series of judicial opinions, those opinions themselves become part of the statutory complex: the meaning of the statute must now be sought not merely in the statutory text but in the statute *plus* the cases that have been decided under it.[43]

It is sincerely hoped that *Central Bank & Trust v. Meltzer* and *Weinstein v. Susskind* will not become a part of our "statutory complex" and that when the problems of these cases are subsequently encountered, the court will refer to the undefiled text.

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42. See UCC § 3-121 comment.
43. Gilmore, *Legal Realism: Its Cause and Cure*, 70 Yale L.J. 1037, 1043 (1961).