

12-1-1965

Negotiable Instruments

Daniel E. Murray

University of Miami School of Law

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Law Commons](#)

Recommended Citation

Daniel E. Murray, *Negotiable Instruments*, 20 U. Miami L. Rev. 225 (1965)

Available at: <https://repository.law.miami.edu/umlr/vol20/iss2/2>

This Article is brought to you for free and open access by University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

UNIVERSITY OF MIAMI LAW REVIEW

VOLUME 20

WINTER, 1965

NUMBER 2

NEGOTIABLE INSTRUMENTS

DANIEL E. MURRAY*

I. INTRODUCTION	225
II. JURISDICTION	227
III. AGENCY	228
IV. REAL AND PERSONAL DEFENSES OF THE ORIGINAL PARTIES	229
A. <i>Alteration</i>	229
B. <i>Duress</i>	230
C. <i>Mistake</i>	230
D. <i>Fraud</i>	231
E. <i>Execution of the Instrument</i>	232
F. <i>Consideration</i>	232
G. <i>Equitable Defenses</i>	233
H. <i>Death of a Joint Co-Maker</i>	233
I. <i>Interpretation and Parol Evidence</i>	233
V. ACCOMMODATION INDORSERS, SURETIES AND GUARANTORS	234
VI. FORGED AND UNAUTHORIZED INDORSEMENTS	236
VII. ACCELERATION	238
VIII. USURY	238
A. <i>Legislation</i>	240
IX. PLEDGES	240
X. RIGHTS OF THE REMITTER	240
XI. DISCHARGE OF INSTRUMENTS AND THE UNDERLYING OBLIGATIONS	241
XII. JOINT BANK ACCOUNTS	242
XIII. BANKS AND BANKING	243
A. <i>Legislation</i>	243
XIV. BAD CHECK LAWS	244
A. <i>Legislation</i>	245

I. INTRODUCTION

In the last survey¹ of this field, the author expressed the hope that the 1965 Florida Legislature would adopt the Uniform Commercial Code,² and on June 3, 1965, the Code was adopted with a lack of publicity usually reserved for some special interest bill.³ The U.C.C. will be-

* Professor of Law, University of Miami. The materials surveyed herein extend from 157 So.2d through 177 So.2d 328, and legislation enacted by the 1965 General Session of the Florida Legislature.

1. Murray, *Negotiable Instruments*, 18 U. MIAMI L. REV. 416 (1963).

2. UNIFORM COMMERCIAL CODE, 1962 Official Text with Comments [hereinafter referred to and cited as the U.C.C. or the Code].

3. Fla. Laws 1965, chs. 65-254, FLA. STAT. chs. 671-680 (1965).

come effective in Florida on January 1, 1967, in order to give the Florida Bar an opportunity to become acquainted with its intricacies during the interim period. The former Negotiable Instruments Law⁴ and a few sections of the Florida Banking Code⁵ will be replaced by Articles 3 and 4 of the U.C.C.

Article 3 of the U.C.C. has been described as "substantially old wine in new bottles"⁶ in that it does not drastically change the concepts contained in the former Negotiable Instruments Law. It is submitted that this picturesque metaphor may tend to obscure the fact that, although there are relatively few dramatic changes, there are enough significant changes to warrant a close study of Article 3. Article 3 has codified much of the case law developed under the N.I.L., but a goodly portion of this case law reflects the minority view in the United States and there are enough changes to create traps for the non-discerning lawyer. No lawyer can ignore the commercial code; it affects the law of negotiable instruments, banks and banking, as well as sales, securities, warehouse receipts, bills of lading, bulk sales laws, letters of credit, secured transactions (chattel mortgages, trusts receipts, conditional sales contracts, etc.), contracts, torts, property, corporations, etc.

Space limitations do not permit a comprehensive analysis of articles 3 and 4. Superb analyses of these Articles are readily available to the bar.⁷ It is suggested that every Florida attorney should obtain a copy of the 1962 *Official Draft of the Uniform Commercial Code*,⁸ *Uniform Commercial Code Handbook*⁹ and, if feasible, an annotated edition of the Uniform Commercial Code¹⁰ as a bare minimum working library.

4. FLA. STAT. chs. 674-676 (1963) [hereinafter, N.I.L.].

5. FLA. STAT. §§ 659.26, 659.31, 659.34, 659.37, 659.39-40 (1963) are repealed by FLA. STAT. § 680.10-102(1) (1965).

6. LEARY, *COMMERCIAL PAPER, UNIFORM COMMERCIAL CODE HANDBOOK* 87 (1964).

7. *E.g.*, *Ibid.*; HUGGINS & PHEMISTER, *BANK DEPOSITS AND COLLECTIONS, UNIFORM COMMERCIAL CODE HANDBOOK* 129 (1964); HAWKLAND, *COMMERCIAL PAPER* (1959); CLARKE, BAILEY & YOUNG, *BANK DEPOSITS AND COLLECTIONS* (1963); HAWKLAND, *A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE* 380-565 (1964). For brilliant but trifle dated critiques, see Britton, *Formal Requisites of Negotiability—The Negotiable Instruments Law Compared with the Proposed Commercial Code*, 26 ROCKY MT. L. REV. 1 (1953); Britton, *Transfers and Negotiations Under the Negotiable Instruments Law and Article 3 of the Uniform Commercial Code*, 32 TEXAS L. REV. 153 (1953); Britton, *Holder in Due Course—A Comparison of the Provisions of the Negotiable Instruments Law with Those of Article 3 of the Proposed Commercial Code*, 49 NW. U.L. REV. 417 (1954); Britton, *Defenses, Claims of Ownership and Equities—A Comparison of the Provisions of the Negotiable Instruments Law with Corresponding Provisions of Article 3 of the Proposed Commercial Code*, 7 HASTINGS L.J. 1 (1955).

8. 1962 Official Text With Comments. Many sections of the U.C.C. are unintelligible without the use of the comments; this is particularly true in Articles 2 (Sales), 7 (Warehouse Receipts, Bills of Lading and Other Documents of Title) and 9 (Secured Transactions: Sales of Accounts, Contract Rights and Chattel Paper).

9. Note 7 *supra*.

10. UNIFORM COMMERCIAL CODE (Master ed. 1965); ANDERSON'S COMMERCIAL CODE (2 volumes 1961 with 1965 Cumulative Supplement); BENDER'S UNIFORM COMMERCIAL CODE SERVICE (1965).

The remainder of this article will first discuss the significant cases in the law of negotiable instruments and banks and banking which were decided during the preceding two year period, and then will compare the results obtained with the expected effect of the U.C.C.

II. JURISDICTION

The signing of a promissory note in Florida is not a sufficient act, in itself, to constitute carrying on or engaging in a business venture within the terms of the Florida statute¹¹ which provides for the service of process upon non-residents. However, jurisdiction may be perfected under this statute when (1) the promissory note is signed in order to end litigation which had been commenced by personal service upon the signers, and (2) when the acts of a non-resident corporation (which was doing business within the state) are chargeable to the signers of the note as officers of the corporation.¹²

Under the law of Ohio, a cognovit note which provides that the maker authorizes any attorney in "any Court of record within the United States"¹³ to confess judgment, and which fails to state the place of execution or delivery of the note, is void for uncertainty. A judgment entered in Ohio, pursuant to this clause, is void for lack of jurisdiction. As a result, an Ohio judgment entered pursuant to the confession of judgment clause, *supra*, is not entitled to full faith and credit in Florida.

Cognovit notes are forbidden by a Florida statute¹⁴ as well as the laws of the vast majority of the states. The U.C.C. does not change this rule, but simply provides that a confession of judgment clause does not destroy negotiability even though it may be invalid under a statute or case law.¹⁵

The Florida courts will have jurisdiction when a non-resident plaintiff garnishes the bank account of a non-resident defendant in a quasi-in rem action.¹⁶

The relationship between a bank which issues an irrevocable letter of credit and the beneficiary of the letter is not a relationship of debtor and creditor such as would give the court where the issuing bank is located jurisdiction of a res upon which its judgment can operate. The letter of credit becomes a binding contract when it is delivered to an honoring bank, without any regard to the underlying contract or to any dispute which may arise between the parties. Hence, when a customer deposits

11. FLA. STAT. § 47.16 (1965).

12. *Odell v. Signer*, 169 So.2d 851 (Fla. 3d Dist. 1965).

13. *Henry Bierce Co. v. Hunt*, 170 So.2d 99 (Fla. 3d Dist. 1964), following *Rosen v. Albert*, 165 N.E.2d 844 (Ohio Com. Pl. 1960).

14. FLA. STAT. § 55.05 (1965).

15. U.C.C. § 3-112(1)(d) and Comments, FLA. STAT. § 673.3-112(1)(d) (1965).

16. *Payton v. Swanson*, 175 So.2d 48 (Fla. 3d Dist. 1965).

money in a Florida bank to protect the bank in its issuance of a letter of credit (issued and delivered to a Swiss bank with a Swiss national as the beneficiary), the customer may not enjoin the issuing bank from paying on the letter of credit because of a dispute between the customer and the beneficiary, in the absence of jurisdiction over the letter of credit which is not within Florida.¹⁷

The Code's articulation of the rules governing letters of credit does not expressly cover the jurisdictional aspects of the above case. It does, however, provide that an irrevocable letter of credit, once established with regard to the beneficiary, can be modified or revoked only with his consent,¹⁸ and that the issuer who acts in good faith is not liable or responsible for the performance of the underlying contract, for sale or other transaction, between the customer and the beneficiary.¹⁹ Further, an issuer must honor a draft which complies with the letter of credit "regardless of whether the goods or documents conform to the underlying contract for sale or other contract between the customer and the beneficiary."²⁰ The Code additionally provides that in all other cases the issuing bank may in good faith honor the draft or demand for payment against its customer despite notification from the customer of fraud, forgery or other defect not apparent on the face of the documents, "but a court of appropriate jurisdiction may enjoin such honor."²¹ It would appear that the Code has re-enforced the underlying rationale of this case.

III. AGENCY

In *Schor v. Industrial Supply Corp.*²² promissory notes were signed in the following manner:

Raleigh Water Heater Mfg. Co., Inc.
Leo Schor.

Schor brought suit for reformation of the instruments alleging that they were signed in this fashion by mistake, and that they were intended to be notes of the corporation alone. The court denied the relief holding that if there was any mistake, it was a unilateral one, and furthermore that it would be impossible to put all the parties into the status quo because of the bankruptcy of the corporation. The court stated that "there was no indication that Leo Schor signed in a corporate capacity. . . ."²³ Query: If Leo Schor did not sign in a corporate capacity, who signed the instrument in behalf of the corporation? As stated in the preceding survey,²⁴

17. *Tueta v. Rodriguez*, 176 So.2d 550 (Fla. 2d Dist. 1965).

18. U.C.C. § 5-106(2) and Comments, FLA. STAT. § 675.5-106(2) (1965).

19. U.C.C. § 5-109(1)(a) and Comments, FLA. STAT. § 675.5-109(1)(a) (1965).

20. U.C.C. § 5-114(1) and Comments, FLA. STAT. § 675.5-114(1) (1965).

21. U.C.C. § 5-114(2)(b) and Comments, FLA. STAT. § 675.5-114(2)(b) (1965).

22. *Schor v. Industrial Supply Corp.*, 173 So.2d 710 (Fla. 3d Dist. 1965).

23. *Id.* at 711.

24. Murray, *Negotiable Instruments*, 18 U. MIAMI L. REV. 416, 417 (1963).

the Uniform Commercial Code²⁵ *should* result in a reversal of this Florida rule, which prevents the introduction of parol evidence by the signer in a suit between the immediate parties to show that he signed the instrument as an officer of the corporation and not in his individual capacity, when the instrument discloses the name of a corporation which might be the principal.

In a case of first impression,²⁶ the district court of appeal held that when a person has acquired bearer bonds from the owner by larceny, trick or other fraudulent means, and he then delivers the bonds to a stockbroker as an agent for collection, the stockbroker is not guilty of conversion if he acts in good faith. The rationale is not based upon any theory of negotiation to a holder in due course, because there is no negotiation; there is merely a delivery to an agent for collection. The result is based upon a principle of the law of agency that;

if an agent, on account of his principal, sells a negotiable instrument, the holder of which has the power to pass title, the agent does not convert the instrument if he sells it without notice of the rights of the person entitled to possession, although his principal is not a bona fide holder of the instrument.²⁷

The court also rejected the proposition that the mere fact that the stockbroker accepted bonds from a person who had a bad reputation in the community should be enough to cast the loss upon the broker because of its negligence; if there were any actionable negligence, it was committed by the owner in placing the bonds in the hands of a person with a bad reputation.

The U.C.C. preserves the same rule in somewhat simpler language.²⁸ However, it must be noted that bonds have been removed from the classification of commercial paper and reclassified as "Investment Securities" under article 8 of the Code.²⁹

IV. REAL AND PERSONAL DEFENSES OF THE ORIGINAL PARTIES

The number of cases asserting real and personal defenses of the original parties has shown a dramatic increase over the preceding two year period. It is a debatable question whether this increase demonstrates a lowering of business ethics or an increasing sophistication of the practicing bar.

A. *Alteration*

The cancellation, by the holder, of the signature of a co-maker of a note operates as a material alteration of the note under the Florida

25. U.C.C. § 3-403 and Comments, FLA. STAT. § 673.3-403 (1965).

26. *McAlister v. Bache & Co.*, 169 So.2d 332 (Fla. 3d Dist. 1964).

27. RESTATEMENT, AGENCY 2d § 349(g).

28. U.C.C. § 8-318 and Comments, FLA. STAT. § 678.8-318 (1965).

29. U.C.C. §§ 3-101, 8-101 and Comments, FLA. STAT. §§ 673.3-102, 678.8-102 (1965).

statute³⁰ and abridges the rights of the other co-maker who signed the note as surety for the co-maker whose name was stricken. As a result, this operates as a discharge of the mortgage given by the surety-co-maker as security for the note.³¹ This same result would obtain under the U.C.C.³²

B. Duress

Duress may be a real or a personal defense, depending upon the degree of duress exercised against the drawer of a check.³³ This distinction in the degrees of duress was seemingly overlooked by the Second District Court of Appeal which held that the holder of a check who took without notice of the alleged duress would be able to enforce payment against the drawer.³⁴

The U.C.C. does not purport to state a uniform rule as to the degrees of duress, but has left this a matter of local policy. As a result, the adoption of the Code will not necessarily result in the overturning of this case.³⁵

C. Mistake

A maker of a renewal note is precluded from asserting the defense of mistake when a partial payment had been made on the original note prior to the execution of the renewal note. This will be true even though the maker may have been unaware that the payment had been made by another, in his behalf, before he executed the renewal note.³⁶

An insurance company which has issued its check in settlement of a claim, and then later discovers that its contract of insurance had lapsed, may stop payment of the check and prevail in an action for rescission of the check upon the ground of unilateral mistake of fact, unless the payee has so changed his position that it would be inequitable to permit rescission.³⁷ Assuming that the payee in the above case was not a holder in due course (a payee may be a holder in due course under the U.C.C.),³⁸ the holding of this case would be the same under the Code.³⁹

In the absence of a showing of fraud, mistake or over-reaching, a court of equity does not have the power to reform a promissory note.

30. FLA. STAT. § 675.32 (1963).

31. *American Mortgage & Safe Deposit Co. v. Rubin*, 168 So.2d 777 (Fla. 3d Dist. 1964).

32. U.C.C. §§ 3-407, 3-606 and Comments, FLA. STAT. §§ 673.3-407, 673.3-606 (1965).

33. BRITTON, *BILLS AND NOTES* 360-362 (2d ed. 1961).

34. *Acker v. First Fed. Sav. & Loan Ass'n*, 173 So.2d 170 (Fla. 2d Dist. 1965). The drawer alleged "that she made this check out under great fear of bodily injury, although it is not disputed that she actually signed the check."

35. U.C.C. § 3-305 and Comments, FLA. STAT. § 673.3-305 (1965).

36. *Watson v. Central Fla. Properties, Inc.*, 172 So.2d 608 (Fla. 2d Dist. 1965).

37. *Maryland Cas. Co. v. Krasnek*, 174 So.2d 541 (Fla. 1965), reversing *Krasnek v. Maryland Cas. Co.*, 158 So.2d 580 (Fla. 3d Dist. 1963).

38. U.C.C. § 3-302(a) and Comments, FLA. STAT. § 673.3-302(2) (1965).

39. U.C.C. § 3-306 and Comments, FLA. STAT. § 673.3-306 (1965).

Further, the maker who seeks reformation of the note must tender payment of those sums of money which he admits are due as a condition precedent to relief.⁴⁰

D. *Fraud*

Some of the dangers inherent in dealing with promissory notes and mortgages were illustrated in *Vance v. Fields*.⁴¹ A husband and wife executed a promissory note and mortgage to a home improvement company. The home improvement company then somehow obtained a second promissory note for the same amount as the original promissory note. The home improvement company then negotiated the second promissory note and the original mortgage to the plaintiffs, but the original mortgage was not delivered to them. The plaintiffs recorded their assignment of the mortgage, and three days later the home improvement company negotiated the original note and original mortgage to the defendants. The court held that the second note did not refer to the original mortgage, and that the negotiation of this note did not give the plaintiffs any interest in the original mortgage. The assignment of the mortgage without the assignment of the debt did not create any rights in the plaintiffs, and their recording of their "assignment" did not afford them any greater protection because the assignment was invalid.

The U.C.C. does not specifically cover all of the facts of the above case; however, it does provide that the "filing of a document does not of itself constitute notice within the provisions of this Article to a person who would otherwise be a holder in due course."⁴² It has been generally held that any purported assignment of the mortgage without the "assignment" of the debt is a nullity, and that an assignment of a mortgage to one person and the subsequent negotiation of the note to another will give the latter person the rights of a holder in due course to the note *and* the mortgage, even though the former "holder" of the mortgage records his assignment first.⁴³ In short, the protection of the recording laws are illusory when one is dealing with notes secured by mortgages. The holding of the above case will probably remain unaffected by the U.C.C.

When a buyer-mortgagor has instituted a suit for damages for the alleged fraud of the seller-mortgagee in the sale of the property, it is proper for the seller-mortgagee to counterclaim for a declaratory decree as to the validity of the note and mortgage.⁴⁴

40. *Freitag v. Simon*, 171 So.2d 918 (Fla. 3d Dist. 1965).

41. 172 So.2d 613 (Fla. 1st Dist. 1965).

42. U.C.C. § 3-304(5) and Comments, FLA. STAT. § 673.3-304(5) (1965).

43. *Foster v. Augustanna College & Theological Seminary*, 92 Okla. 96, 218 Pac. 335 (1923), reviews the authorities on this problem. See also BRITTON, *BILLS AND NOTES* 281 (2d ed. 1961).

44. *Rice v. Fremow*, 165 So.2d 447 (Fla. 2d Dist. 1964).

E. *Execution of the Instrument*

A promissory note signed by a husband and wife, without the wife's signature being formalized in accordance with the law respecting conveyances by married women, will not subject her separate property to the claim of the payee during coverture or after the marriage has been dissolved by divorce.⁴⁵ The U.C.C. is not intended to affect any local statute which requires signatures to be formalized in any specific manner.⁴⁶

There is no presumption that a signature appearing on an instrument is genuine, and when a proper plea denies its genuineness it must be proved by the holder of the instrument. If the holder brings suit against the maker's estate, which denies the genuineness of the maker's signature, the holder's affidavit of genuineness is inadmissible under the dead man's statute.⁴⁷

Under the narrow facts of the above case, the results would be the same under the U.C.C. However, when suit is brought against an alleged signer of an instrument who is alive, the U.C.C. provides that the burden of proof of establishing the genuineness of the signature after it has been denied by the alleged signer is upon the party claiming under the signature but he is aided by a presumption that it is genuine.⁴⁸

F. *Consideration*

A Florida statute⁴⁹ forbids the payment of a commission to a real estate salesman (or an unlicensed salesman) rather than to a broker. This statute is not violated when the buyer of a piece of property agrees to assume the burden of paying a real estate commission and issues a promissory note to a broker who simultaneously agrees to assign a portion of the proceeds to an unlicensed salesman, who subsequently assigns his interest to another person. In effect, the maker of the note (or his successor in interest) may not plead as a defense to an action on the note that the payee has assigned an interest in the proceeds of the note to an unlicensed real estate salesman. If the note is made payable originally to the broker and the unlicensed salesman, it is voided by the statute;⁵⁰ but if it is made payable to the broker alone, he may assign an interest in it without coming into conflict with the statute.⁵¹ Although this decision would appear to be a triumph of form over substance, it does preserve the commercial concepts underlying the field of negotiable instruments.

45. *Pilson v. Guillery*, 168 So.2d 547 (Fla. 3d Dist. 1964).

46. U.C.C. § 3-401, Comment 2, FLA. STAT. § 673.3-401 (1965).

47. *Link v. Patterson*, 175 So.2d 213 (Fla. 3d Dist. 1965).

48. U.C.C. § 3-307 and Comments, FLA. STAT. § 673.3-307 (1965).

49. FLA. STAT. § 475.42(1)(d) (1965).

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

51. *Newcomer v. Rizzo*, 163 So.2d 312 (Fla. 3d Dist. 1964).

G. *Equitable Defenses*

In a suit at law on a purchase money mortgage note after the mortgage has been foreclosed, the trial court must take into consideration whether the mortgaged property has been re-acquired by the holder of the note, the value of the property and "other equitable considerations."⁵² In short, the equitable defenses to a deficiency decree in a court of equity are now equally applicable to a suit on the note in a court of law.

H. *Death of a Joint Co-Maker*

At common law the death of a joint co-maker of a promissory note extinguished the obligation as to him, and only the surviving co-makers were liable. This common law rule has been changed by statute.⁵³ In a case of first impression,⁵⁴ the second district has held that this survival statute does not make it mandatory for the holder of a promissory note to file a claim against the estate of the deceased co-maker as a condition precedent to holding the surviving co-makers liable on the note. The holder may, of course, file his claim in probate, but he need not do so. The surviving co-makers may also file their contingent claims for contribution against the estate.

The U.C.C. does not provide specifically for the above fact situation; however, it does preserve the concept that a prior presentment for payment is not necessary in order to charge primary parties,⁵⁵ and that presentment for payment is entirely excused when a primary party to a note has died, even though there happen to be secondary parties (indorsees), which was not true in the above case.⁵⁶

I. *Interpretation and Parol Evidence*

When the parties at the execution of the note strike from the note a provision for the payment of interest after maturity, this creates an ambiguity which permits the parties to introduce testimony showing that they intended to exclude interest both before and after maturity.⁵⁷ The U.C.C.⁵⁸ articulates a number of rules of construction for ambiguous terms; the purposes of this section are to protect holders and to encourage the free circulation of negotiable paper by precluding resort to parol evidence except for reformation of the instrument. Except as to reformation, these rules cannot be varied by proof that any

52. *Maudo, Inc. v. Stein*, 171 So.2d 403, 404 (Fla. 3d Dist. 1965).

53. FLA. STAT. § 45.11 (1965).

54. *Phillipi Creek Homes, Inc. v. Arnold*, 174 So.2d 552 (Fla. 2d Dist. 1965).

55. U.C.C. § 3-501 and Comments, FLA. STAT. § 673.3-501 (1965).

56. U.C.C. § 3-511(3) and Comments, FLA. STAT. § 673.3-511(3) (1965).

57. *Southeastern Home Mortgage Co. v. Roll*, 171 So.2d 424 (Fla. 3d Dist. 1965).

58. U.C.C. § 3-188 and Comments, FLA. STAT. § 673.3-118 (1965).

party intended the contrary.⁵⁹ Although the precise situation presented in the above case is not described in section 3-118, its general tenor and purpose may restrict the operation of the above holding except in cases of reformation.

Under the N.I.L., a note in which no time for payment is expressed is payable on demand,⁶⁰ but parol testimony is permissible between the maker and the payee to show that the parties intended that the note was not to mature until some indefinite time in the future upon the payment of certain debts. This same rule seemingly would apply when the note was "assigned" to a holder who would not be a holder in due course because the note was not complete and regular on its face.⁶¹

The Code also provides that an instrument is payable on demand when "no time of payment is stated."⁶² It is submitted that it is unwise to permit parol testimony when a statute provides for the construction of an instrument; there is no ambiguity calling for parol evidence when a statute clearly provides an interpretation.

When a demand note provides for "interest at 6% per annum after maturity until paid," interest accrues from the date of issuance and not from the date of demand.⁶³ It is difficult to predict what effect the U.C.C. will have on this holding. The U.C.C. provides that "unless an instrument provides otherwise, interest runs . . . from the date of demand"⁶⁴ which is an express rejection of the underlying rationale of the above case; however, the courts may construe the wording of the above note as coming within the phrase "unless an instrument provides otherwise." It is submitted that the courts should follow the mandate of the U.C.C., unless the wording of the demand instrument *clearly* shows that interest was intended to run from a date different from the date of demand.

V. ACCOMMODATION INDORSERS, SURETIES AND GUARANTORS

In the case of *Weinstein v. Susskind*⁶⁵ it was held that when a married woman, who was a stockholder in a corporation, indorsed a note of the corporation *prior* to delivery, she was primarily liable on the note. Since she was primarily liable, no presentment for payment was necessary in order to charge her on the note. Further, the fact that the holder of the note delayed for more than five years after maturity in enforcing the note would not discharge her because of her status as being primarily

59. U.C.C. § 3-118, Comment 1.

60. FLA. STAT. § 674.09 (1963).

61. *Michael v. Schekter*, 176 So.2d 581 (Fla. 3d Dist. 1965).

62. U.C.C. § 3-108 and Comments, FLA. STAT. § 673.3-108 (1965).

63. *Bryan v. First Baptist Church*, 158 So.2d 140 (Fla. 2d Dist. 1963).

64. U.C.C. § 3-122 and Comments, FLA. STAT. § 673.3-122(4) (1965).

65. *Weinstein v. Susskind*, 162 So.2d 683 (Fla. 3d Dist. 1964).

liable. Finally, although a pledge by a wife of security on a note upon which her husband is primarily liable amounts only to a pledge of the security and not an unqualified indorsement, this rule does not apply when a wife indorses in blank and pledges her security as an accommodation "indorser" (the court must have meant accommodation maker rather than indorser) of a note issued by a corporation because she is primarily not secondarily liable. A similar result should obtain under the U.C.C.⁶⁶

Section 46.11 of the Florida statutes⁶⁷ provides that when a final judgment is paid by a surety, indorser, or guarantor, the holder of the judgment is to assign it (upon request) to the paying surety, indorser or guarantor who will then be entitled to all the rights and remedies of the original plaintiff in the judgment to "enforce the collection of the same from the defendants who are liable as *makers* of the instruments sued upon."⁶⁸ The second district has held that this statute does not permit one co-guarantor of a note to pay the judgment, have it assigned to him and then levy execution on the judgment against his co-guarantor because the statute speaks of makers, not secondary parties.⁶⁹

The above section of the Florida statutes has not been expressly repealed by the adoption of the U.C.C., thus the holding of the above case should remain unimpaired.

When a mortgage is given to secure the payment of a note issued by a third party, the mortgagors are discharged from their undertaking when the creditors take a new note from the third party which extends the time of payment. This result is based upon the concept that the mortgagors are acting as sureties, and any binding extension of time to the debtor without the consent of the sureties discharges them.⁷⁰ The Code should not affect the result of this case. The Code provides that 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. . . .⁷¹

The Comments to this section explain that these suretyship defenses are not limited solely to parties who are "secondarily liable," but are

66. U.C.C. §§ 3-415, 3-501 and Comments, FLA. STAT. §§ 673.3-415, 673.3-501 (1965).

67. FLA. STAT. § 46.11 (1965).

68. *Freed v. Giuliani*, 164 So.2d 234, 236 (Fla. 2d Dist. 1964). The Court refused to follow the contrary decision of *Knight v. Weeks*, 115 Fed. 970 (5th Cir. 1902).

69. *Ibid.*

70. *Cole v. Exchange Nat'l Bank*, 183 So.2d 195 (Fla. 1966), reversing *Exchange Nat'l Bank v. Cole*, 161 So.2d 715 (Fla. 3d Dist. 1964).

71. U.C.C. § 3-606 and Comments, FLA. STAT. § 673.3-606 (1965).

available to any party who is in the position of a surety, and he has a right of recourse either on the instrument or dehors it.⁷² The Code further provides that the word surety includes guarantor.⁷³ It would appear that the holder of a note who extends it for an additional period (even if for a lesser amount) thereby releases the guarantor under the Code unless the holder expressly reserves his rights against the guarantor. On the other hand, a guarantor of a promissory note will be released from liability when the creditor has altered the original note without the consent of the guarantor; has failed to take due care of the primary collateral for the loan; has failed to notify the guarantor of the misuse of the loan funds; has failed to notify the guarantor of the refusal of the Small Business Administration to approve the loan, and has altered the interest rate of the original loan without the consent of the guarantor.⁷⁴ Section 3-407 of the U.C.C.⁷⁵ provides that an alteration which is both material and fraudulent discharges any party whose contract is thereby changed unless that party assents or is precluded from asserting the defense. There would seem little doubt that the above case would be resolved the same way under the Code. This view is further re-inforced by section 3-606⁷⁶ which provides that the holder discharges any party to the instrument to the extent that, without such party's consent, the holder "unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he was a right of recourse" unless he expressly reserves his rights against the surety.

Under the doctrine of election of remedies, the payee may not proceed against indorsers or guarantors of chattel mortgage notes if the payee has repossessed the collateral for the chattel mortgages. If the collateral is in the possession of the payee and he fails to explain the reason for his possession, the court may apply the doctrine of election of remedies.⁷⁷

VI. FORGED AND UNAUTHORIZED INDORSEMENTS

An alleged indorser whose "indorsement" appears in the form of a typewritten indorsement cannot be held liable in the absence of proof that he authorized the typewritten "indorsement" or adopted it as his own.⁷⁸ The U.C.C. seems to preserve a similar rule.⁷⁹

72. U.C.C. § 3-606, and Comments, FLA. STAT. § 673.3-606 (1965).

73. U.C.C. § 1-201(40), FLA. STAT. § 671.1-201(40) (1965).

74. Miami Nat'l Bank v. Fink, 174 So.2d 38 (Fla. 3d Dist. 1965).

75. U.C.C. § 3-407 and Comments, FLA. STAT. § 673.3-407 (1965).

76. U.C.C. § 3-606 and Comments, FLA. STAT. § 673.3-606 (1965).

77. Romanach v. A. J. Armstrong Co., 172 So.2d 444 (Fla. 1965), reversing A. J. Armstrong Co., Inc. v. Romanach, 165 So.2d 817 (Fla. 3d Dist. 1964).

78. Southeastern Home Mortgage Co. v. Roll, 171 So.2d 424 (Fla. 3d Dist. 1965).

79. U.C.C. §§ 3-401, 3-404 and Comments, FLA. STAT. §§ 673.3-401, 673.3-404 (1965).

A complaint which alleged that the drawee paid a check bearing the forged indorsement of the wife, one of two joint payees, is subject to dismissal for failure to state a cause of action when it fails to allege that the plaintiff-drawer sustained any damage by the payment to this check. If the plaintiff-drawer had alleged that the debt for which the check was given was not collected, or that he was being subjected to a claim by the wife-payee on the original debt, this would be a sufficient allegation of damage.⁸⁰ The U.C.C. does not seem to provide expressly for this situation. Ordinarily, suit against the drawee bank for conversion would be brought by the payee whose signature was forged, rather than by the drawer, but suit may be brought by the drawer upon a proper allegation of damage as indicated by the principal case.⁸¹ The Code does provide that the drawer-customer of a bank must report any unauthorized indorsement to the drawee-payor bank within three years after receiving the check from the drawee-payor bank⁸² as a condition for holding the bank liable.

The cause of action by a payee of a check in conversion against a collecting bank which has collected the check by means of an unauthorized indorsement begins to run when the payee discovers the unauthorized indorsement. Further, since the payee's cause of action is based upon conversion of funds paid on the check, it is not an action founded upon an instrument of writing, and the three year statute of limitations is applicable rather than the five year limitation statute governing actions predicated upon an instrument in writing.⁸³

The Code provides that a collecting bank which has acted in good faith and in accordance with reasonable commercial standards "is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands."⁸⁴ Hence, a collecting bank which has remitted the proceeds of a check which has a forged indorsement would not be liable to the owner; to this extent the rule of the above case will be overturned. The Code preserves the idea that the drawee of a check who pays it on the strength of a forged or unauthorized indorsement is liable under the theory of conversion and not on the instrument itself under any theory of acceptance of the instrument.⁸⁵

80. *Bank of Miami Beach v. Newman*, 163 So.2d 333 (Fla. 3d Dist. 1964) Pearson, J., (dissenting) was of the view that in an action based upon a breach of contract all that the complaint is required to state is the making of the contract, the obligation assumed and the breach. "The complaint is complete when these statements are supplemented with a statement of the amount claimed in a prayer for relief." *Id.* at 334.

81. U.C.C. § 3-419(1)(c) and Comments, FLA. STAT. § 673.3-419(1)(c) (1965). See also BRITTON, *BILLS AND NOTES* 406-407 (2d ed. 1961).

82. U.C.C. § 4-406(4) and Comments, FLA. STAT. § 674.4-406(4) (1965).

83. *Fidelity Nat'l Bank v. Valachovic*, 163 So.2d 33 (Fla. 2d Dist. 1964).

84. U.C.C. § 3-419(3) and Comments, FLA. STAT. § 673.3-419(3) (1965).

85. U.C.C. § 3-419(1) and Comments, FLA. STAT. § 673.3-419(1) (1965).

VII. ACCELERATION

A clause in a promissory note which provides for acceleration of the principle indebtedness upon default in the performance of the note "or any instrument now . . . securing this note"⁸⁶ should be construed to include a default upon a mortgage securing the note. If this mortgage is a second mortgage which provides that a default in the payment of the first mortgage constitutes a default in the second mortgage, then the default in the first mortgage accelerates the principal amount due under the promissory note.

When the makers of a promissory note simultaneously execute a separate written agreement to furnish collateral to the satisfaction of the payee's attorneys, and this agreement provides that the payment of the note may be accelerated if the security is not furnished, this separate agreement enables the payee to accelerate the maturity of the note in the same manner that an acceleration clause in a mortgage enables the holder to accelerate the maturity of a promissory note.⁸⁷

The rule of the above cases apparently has been codified in the U.C.C.⁸⁸

VIII. USURY

The U.C.C. will have no effect on the existing Florida interest and usury laws, which shall take precedence over the Code.⁸⁹

In a case of apparent first impression in Florida,⁹⁰ the first district has held that a "Morris Plan Bank" (now known as an "Industrial Bank") may not deduct the statutory⁹¹ rate of interest of eight percent per annum for more than one year, nor may it collect repayments of principal on an installment basis during the term of the loan without coming within the scope of the usury laws. Under this ruling, an Industrial Bank which makes a three year loan at eight percent interest may not discount twenty-four percent interest (three years times eight percent interest), and then require the borrower to repay the loan in monthly installments without committing usury. This holding seems to confine the Industrial Banks to making one year loans and requiring the borrower to buy a certificate of deposit for the face amount of the loan payable in installments. After all the installments have been made in the purchase of the certificate of deposit, the certificate is then accepted by the bank in payment of the original note. This holding also

86. *Barone v. Waters*, 165 So.2d 442, 443 (Fla. 3d Dist. 1964).

87. *Street v. Sugerman*, 167 So.2d 112 (Fla. 3d Dist. 1964).

88. U.C.C. § 3-119 and Comments, FLA. STAT. § 673.3-119 (1965).

89. FLA. STAT. § 680.10-104 (1965).

90. *Silver Sands v. Pensacola Loan & Sav. Bank*, 174 So.2d 61 (Fla. 1st Dist. 1965).

91. FLA. STAT. § 656.17 (1965).

appears to be a triumph of form over substance because the borrower will still pay a large sum for the loan; however, the holding does seem to be a perfectly correct tracking of the statute.⁹²

A promissory note which calls for payment of interest at five and one-half percent per annum is not rendered usurious by a provision which states that "past due principal and interest shall bear interest from maturity at 10% per annum until paid."⁹³ As to the principal, the note merely provides for a higher rate of interest if the principal amounts are not paid at maturity. As to interest, although the clause provides for the payment of interest upon interest, it is not usurious, nor does it amount to a provision for the paying of compound interest. The computation of interest upon interest is a substitute for prompt payment and indemnifies the creditor for his forbearance. It should be noted that if the borrower were able to prove a corrupt, usurious intent on the part of the lender by showing that defaults in the payment of interest were planned in order to charge a higher rate of interest upon interest, usury would be proved. However, usury will not be presumed. On the other hand, when a lender's agent exacts a bonus or commission from the borrower which makes the loan apparently usurious, there is a presumption that the agent acted within the scope of his authority in exacting the bonus and the burden of proof lies upon the lender to rebut this presumption.⁹⁴

A note which provides for a non-usurious rate of interest for the stated term of the note will be rendered usurious under an acceleration clause which does not contain a provision for the elimination of unearned interest in the installments precipitated to maturity in the event of default. This result will hold true even though the holder does not elect to exercise the option to declare the entire amount of the note due, but only to foreclose upon the past due installments. The majority rule in the United States is apparently contra to this Florida rule which has been characterized as "sui generis."⁹⁵

The usury laws of Florida may not be circumvented by the lenders insistence that the borrowers form a corporation as the ostensible borrower and then individually guarantee the payment of the promissory note. It would appear, perhaps, that the transaction will be upheld if lenders make the loan through a foreign corporation and the note provides that it is to be governed by the laws of a foreign state which does not have usury laws similar to Florida's.⁹⁶

92. FLA. STAT. ch. 656 (1965).

93. Connecticut Mut. Life Ins. Co. v. Fisher, 165 So.2d 182, 183 (Fla. 3d Dist. 1964).

94. Applebaum v. Laham, 161 So.2d 690 (Fla. 3d Dist. 1964).

95. First Mortgage Corp. v. Stellmon, 170 So.2d 302 (Fla. 2d Dist. 1964).

96. Atlas Subsidiaries, Inc. v. O. & O. Inc., 166 So.2d 458 (Fla. 1st Dist. 1964).

A. Legislation

The usury laws were amended by providing that no individual secondarily liable as indorser, guarantor, surety or otherwise on any corporate obligation shall be required by any court to pay any interest in excess of ten percent per annum. "No corporation, in any such proceeding in the courts of this state where the interest is proved to exceed fifteen (15%) percent per annum, shall be required to pay any interest, and in such event all interest shall be forfeited."⁹⁷ This amendment is not to have any effect on existing statutory provisions governing the interest rates charged by banks, Morris plan banks, discount consumer financing companies, small loan companies and domestic building and loan associations.

IX. PLEDGES

The pledgee of a pledged promissory note which is in default may maintain an action on it irrespective of the status of the obligation for which the note was pledged, because the pledgee in suing on the pledged note is not enforcing the obligation for which it was pledged but is simply reducing the pledged note to judgment. The payee-pledgor is not an indispensable party to this action, and any sums recovered by the pledgee will be held mutually for his own benefit and the benefit of the payee-pledgor.⁹⁸

The holding of the above case will remain constant under the U.C.C.,⁹⁹ although it would appear that the pledgee ("secured party" under the wording of the Code) will be entitled to his collection costs in reducing the note to judgment.¹⁰⁰

X. RIGHTS OF THE REMITTER

A remitter who purchases a bank draft drawn by one bank upon another bank and made payable to the remitter must offer to indemnify the drawer-bank (upon its request), if he attempts to hold the drawer-bank as a constructive trustee when his name has been allegedly forged by the person who received the draft.¹⁰¹ The U.C.C. provides that the owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his own name, and recover from any party liable thereon, upon proof of his ownership and the facts which prevent his production of the instrument. The court may require

97. FLA. LAWS 1965, ch. 65-299.

98. *Fontainebleau Hotel Corp. v. James Talcott, Inc.*, 164 So.2d 264 (Fla. 3d Dist. 1964).

99. U.C.C. §§ 3-201(1)(2), 3-303, 9-207(1) and Comments, FLA. STAT. §§ 673.3-201(1)(2), 673.3-303, 679.9-207(1) (1965).

100. U.C.C. §§ 9.207, 9-501-9-504 and Comments, FLA. STAT. §§ 679.9-207, 679.9-501, 679.9-504 (1965).

101. *Cornwall v. First Fed. Sav. & Loan Ass'n*, 159 So.2d 677 (Fla. 2d Dist. 1964).

security to indemnify the defendant against loss by reason of any further claims on the instrument.¹⁰² The word "action" is defined in the Code as including "recoupment, counterclaim, set-off, suit in equity and any other proceedings in which rights are determined."¹⁰³ It would appear, therefore, that the Code has re-affirmed the holding of the above case.

XI. DISCHARGE OF INSTRUMENTS AND THE UNDERLYING OBLIGATIONS

Under a plea of partial payment of a note and mortgage, the mortgagor is entitled to prove that he and the mortgagee orally agreed that the mortgagee would accept payments from a third person who had purchased other property from the mortgagor under some kind of a payment installment contract.¹⁰⁴ The opinion failed to indicate whether the third party had bound himself to make these payments to the mortgagee. It would appear that the U.C.C. has specifically provided for this situation by stating that "[p]ayment or satisfaction may be made with the consent of the holder by any person including a stranger to the instrument."¹⁰⁵

When the holder and the maker of a promissory note enter into an accord and satisfaction agreement, the holder cannot unilaterally return a minor portion of the satisfaction (certain equipment) and then claim that an accord and satisfaction was never reached because it was executory.¹⁰⁶

The U.C.C. does not attempt to cover the field of accord and satisfaction, but it does provide that any party to an instrument may be discharged from his liability on it by any other act or agreement with another party which would discharge his simple contract for the payment of money.¹⁰⁷ Under this provision, the parties to an instrument may agree to the receipt of merchandise or equipment in payment of a negotiable instrument.

Cancelled checks in the hands of the drawer coupled with his testimony that he was not indebted to the payee are not sufficient to prove the existence of a debt owed to the drawer by the payee who died after the checks were paid. A cancelled check is not per se indicative of a debt between the payee and the drawer; it may evidence a sale of property, a gift, or some other transaction.¹⁰⁸

102. U.C.C. § 3-804 and Comments, FLA. STAT. § 673.3-804 (1965).

103. U.C.C. § 1-201(1) and Comments, FLA. STAT. § 671.1-201(1) (1965).

104. *Azar v. Lewis*, 175 So.2d 234 (Fla. 3d Dist. 1965).

105. U.C.C. § 3-603(2) and Comments, FLA. STAT. § 673.3-603(2) (1965).

106. *Rosenfeld v. Glickstein*, 159 So.2d 670 (Fla. 1st Dist. 1964).

107. U.C.C. § 3-601(2) and Comments, FLA. STAT. § 673.3-601(2) (1965).

108. *Stebnow v. Goss*, 165 So.2d 251 (Fla. 2d Dist. 1964). The court held in passing that the drawer's testimony that he was not indebted to the payee was objectionable be-

There must be an express agreement that the giving of a negotiable instrument should constitute payment of an account before it will be given this legal effect.¹⁰⁹ This rule has been preserved by the U.C.C.¹¹⁰

In case of first impression in Florida,¹¹¹ the second district has held that under the Florida statutes,¹¹² a drawee bank which fails to return a check which has been delivered to it for payment, before the end of the business day following its receipt, is deemed "to have paid the check,"¹¹³ and it may not return it later because the drawer's account was insufficient to cover the check.

The above sections of the Florida statutes will be repealed by the Code when it becomes effective.¹¹⁴ Under the Code, a "payor" bank becomes accountable for a check if it "retains the item beyond midnight of the banking day of receipt without settling for it or, regardless of whether it is also the depository bank, does not pay or return the item or send notice of dishonor until its midnight deadline."¹¹⁵ It is to be wondered if the time limits prescribed by the Code are not too restrictive?

XII. JOINT BANK ACCOUNTS

One of the dangers implicit in joint savings accounts was illustrated in *Kramer v. First Nat'l Bank*.¹¹⁶ An account was established with the defendant-bank in the name of the plaintiff and her minor daughter as joint tenants. The mother became ill and the daughter and her aunt (the sister of the mother) signed forms that the passbook had been lost; the bank apparently permitted the withdrawal of all of the funds from the account. The court held that the Florida statutes¹¹⁷ permit a minor joint tenant to withdraw all the funds from an account. The bank had a rule that passbooks must be presented for all withdrawals; however, the court "did not reach the question of whether the rule relative to passbooks could be waived by the bank and one joint depositor."¹¹⁸

cause it was an attempt to testify indirectly to a fact which he could not testify directly because of the "Dead Man's Statute," FLA. STAT. § 90.05 (1963). In the absence of the disinterested testimony, it would appear that the dead man's statute effectively blocks recovery in a case of this type.

109. *Wishart v. Gates Rubber Co. Sales Div., Inc.*, 163 So.2d 503 (Fla. 3d Dist. 1964).

110. 108 U.C.C. § 3-802 and Comments, FLA. STAT. § 673.3-802 (1965).

111. *Exchange Nat'l Bank v. C. D. Sheffield*, 166 So.2d 807 (Fla. 2d Dist. 1964). The fifth circuit has held the same way in its interpretation of Florida law. *General Fin. Corp. v. Central Bank & Trust Co.*, 264 F.2d 869 (5th Cir. 1959).

112. FLA. STAT. §§ 676.07-08, 676.55 (1963).

113. Note 109 *supra*, at 808.

114. FLA. STAT. § 680.10-102 (1965).

115. U.C.C. 4-301 § 4-302(a) and Comments, FLA. STAT. §§ 674.4-301, 674.4-302(1) (1965).

116. 163 So.2d 341 (Fla. 3d Dist. 1964).

117. FLA. STAT. §§ 656.32, 656.33, 659.28, 659.29 (1963).

118. *Supra* note 114, at 342.

A donee-wife has the right to withdraw all of the funds from joint bank accounts during the last illness of her husband even though he *might* have been incompetent at the time she withdrew the funds, when it was shown that the bank accounts "were created as joint accounts, sufficient to establish an inter-vivos gift by donative intent for transfer of a present interest, delivery of the right of full withdrawal, and acceptance by the donee."¹¹⁹

The vexing evidentiary questions involving "donative intent" (which were raised in the above case) in joint savings accounts in federal savings and loan associations, should at long last be cured by an amendment to the Florida statutes which provides:

The establishment of a stock account, savings share account, or investment share account in joint and survivorship form shall, in the absence of fraud or undue influence, *be conclusive evidence*, in any action or proceeding to which either the association or the surviving shareholder or shareholders may be a party, of the intention of all such shareholders or account holders to vest title to such share accounts, and the additions thereto, in such survivor or survivors.¹²⁰

XIII. BANKS AND BANKING

It is not error for a trial court to set aside a default judgment and a writ of scire facias against a garnishee-bank which proved that the officer who had the duty to answer the original garnishment proceedings was suddenly hospitalized without warning and was prohibited by his doctor from transacting any business until after the writ of scire facias was issued.¹²¹

A. Legislation

Section 4-403 of the U.C.C. provides that oral stop orders will be binding upon banks for a period of fourteen days; however, this provision has been eliminated from the Florida version¹²² of the U.C.C. In Florida all stop-orders will have to be in writing and a bank will not be liable for paying a check on the same day in which a written stop-order is received unless the payment is in "willful and intentional disregard of such order." Further, the bank which pays a check in violation of a stop-order will be liable for not more than

119. *McGillen v. Gumpman*, 171 So.2d 69, 70 (Fla. 3d Dist. 1965). For a case holding that there was insufficient evidence for donative intent, see *Demps v. Graham*, 157 So.2d 534 (Fla. 1st Dist. 1963).

120. FLA. LAWS 1965, ch. 65-463 amending FLA. STAT. § 665.15 (1963). (Emphasis added.)

121. *Terrazzo & Marble Supply Co. v. Columbia Bank*, 173 So.2d 475 (Fla. 2d Dist. 1965). For a case holding a bank liable for the fraudulent actions of one of its officers in releasing collateral security for a letter of credit, see *Central Bank & Trust Co. v. Banner Trading Co.*, 157 So.2d 201 (Fla. 3d Dist. 1963).

122. FLA. STAT. § 674.4-403 (1965).

the actual loss incurred by the customer resulting from the wrongful payment . . . , not exceeding the amount of the item unless the bank is guilty of gross negligence or unless such wrongful payment was made as a result of the wilful and intentional disregard by the bank of such order.

In addition to adopting the Code, the Legislature also made changes in the general banking laws. Section 654.04 of the Florida statutes was amended by providing that Florida savings banks which have deposits belonging to the estate of any deceased person whose residence was in another state at the time of his death *shall* pay the amount of the deposits to foreign personal representatives at any time after three months from the time that the foreign personal representative received his letters of authority, unless the bank has received written notice of the appointment of a Florida personal representative. Payment to the foreign personal representative shall be a valid discharge for the money so paid.¹²³ A similar provision was enacted providing that banks *may* deliver the contents of safety deposit boxes to foreign personal representatives, unless a Florida representative was appointed.¹²⁴ It is to be wondered why the mandatory word "shall" was used in the first statute above and the permissive word "may" in the latter statute?

Section 659.05 of the Florida statutes was amended by providing that a bank or trust company upon opening for business "shall have power to engage in a general banking or trust business and to exercise, subject to law and the approval of the commissioner, all such incidental powers as may reasonably promote its general banking or trust business."¹²⁵

Non-banking institutions which sell money orders, checks and travelers checks are now to be regulated under the "Sale of Money Orders Act" which provides for very detailed licensing requirements.¹²⁶ Although the act would seem directed at protecting the public, it seems rather obvious that its main purpose is to protect the banks from competition.

Section 659.20(2) and (3) of the Florida statutes was amended by designating certain types of securities eligible for investment by banks and trust companies without limitation in amount and other types of securities eligible for investment in limited amounts.¹²⁷

XIV. BAD CHECK LAWS

A drawer of a worthless check who gives it in exchange for his prior worthless check is guilty of obtaining "a thing of value" by means

123. FLA. LAWS 1965, ch. 65-107, amending FLA. STAT. § 654.04 (1963).

124. FLA. LAWS 1965, ch. 65-108.

125. FLA. LAWS 1965, ch. 65-37, amending FLA. STAT. 659.05 (1963).

126. FLA. LAWS 1965, ch. 65-174.

127. FLA. LAWS 1965, ch. 65-177, amending FLA. STAT. § 659.20(2) and (3) (1963).

of the second worthless check.¹²⁸ The value concept rests on the notion of inducing the payee of the first check to return it by parting with the evidence of a debt and of a crime represented by the first check (the crime consisting in the obtaining of money in exchange for the first check).¹²⁹

A. *Legislation*

The Legislature has adopted a statute¹³⁰ providing that whoever stops payment on a check for which he has received goods or services with the intent to defraud shall be guilty of a felony (punishable by not more than two years imprisonment) if the goods or services are valued at fifty dollars, or of a misdemeanor if the goods and services are valued at less than this amount.

128. FLA. STAT. § 832.05(3) (1963).

129. *McCormick v. State*, 161 So.2d 696 (Fla. 2d Dist. 1964).

130. FLA. LAWS 1965, ch. 65-413.