IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,017

CHASE FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

vs.

JERRY B. SCHREIBER, as Personal Representative of the Estate of THEADORES WINLACK ROSS,

Respondent.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT, CASE NO 80-1213

ANSWER BRIEF OF RESPONDENT

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INTRODUCTORY STATEMENT

The case below is now cited as Schreiber vs. Chase Federal Savings & Loan Association, 422 So.2d 911 (Fla. 3d DCA 1982).

Respondent was Plaintiff below and will be referred to in this Brief as Respondent. Petitioners, LUIS PEREZ and GLADYS PEREZ, were Defendants below and will be referred to as the PEREZES, in this Brief. Petitioner was co-defendant below and will be referred to in this brief as Petitioner, CHASE.

For the purposes of this brief, Respondent will use the symbol "R" to refer to the Record on Appeal, as prepared for this Appeal, and the symbol "A" to refer to the Appendix, filed with this brief.

The trial in this cause was heard non-jury on two (2) different days, January 7, and February 11, 1980. The testimony of one of the witnesses, Mr. John Constantino, was excerpted after the first day of trial and the transcription of his testimony is filed separately. In addition, the deposition of ELIZABETH A. MERCERET, taken on February 5, 1980, together with copies of certain documents attached thereto, was placed in evidence as Plaintiff's Exhibit 6, and can be located in Volume III, at Pages 384-427, of the RECORD ON APPEAL. Accordingly, the various transcripts will be identified as follows:

Trial held on January 7, 1980 . . . . T-1:

Trial held on February 11, 1980 . . . T-2:

Testimony of Mr. John Constantino, Esquire . . . . . T-Const:

Testimony through deposition of Ms. Elizabeth A. Merceret. . . . . .D-Merc.:

STATEMENT OF THE CASE AND FACTS

During the latter part of 1974, Mr. PETER R. COURNOYER, a Roofer, befriended Respondent's testatrix, THEODORES W. ROSS, an elderly lady approaching (90) years of age at her home in Miami Beach, Florida, after learning she was widowed and without relatives (T-1: 28-31). From that time until August 19, 1977, COURNOYER endeavored to exercise influence and control over MRS. ROSS by "handling all her business matters and financial matters" for her with the appearance that he was helping her out. (R: 1).

The sole intent of COURNOYER was to obtain full control over the assets and property of MRS. ROSS, of which he ultimately succeeded in accomplishing. Throughout that period of time, MRS. ROSS was placed in various nursing and convalescent homes by MR. COURNOYER. On or about March 4, 1977, COURNOYER attempted, by way of a Quit Claim Deed, executed on March 4, 1977, to obtain possession and control of MRS. ROSS'S residence located at 4580 Michigan Avenue, Miami Beach, Florida. COURNOYER'S initial attempt failed because this Quit Claim Deed was witnessed by only one (1) individual, and therefore void. (R: 2).

On August 19, 1977 COURNOYER again attempted to correct this subject Quit Claim Deed by receiving a second Quit Claim Deed, which, on its face, stated that it was "BEING GIVEN WITH THE CONSIDERATION BEING LOVE AND AFFECTION" (Plaintiff's Exhibit 1-c). Of course, at no time, had PETER R. COURNOYER ever been related to the THEODORES W. ROSS, either by blood or marriage. (T-1:28,31).

On October 6, 1977, LUIS PEREZ and GLADYS PEREZ, purchased the subject property from COURNOYER, by virtue of a Warranty Deed issued to them by COURNOYER. (Plaintiff's Exhibit 1-d). At the time of the

purchase, the PEREZES who purchased this property for rental purposes (T-2: 54), relied upon CHASE FEDERAL SAVINGS AND LOAN ASSOCIATION, Petitioner herein, hereinafter known as CHASE, their Mortgage lender, to protect their interests, (T-2: 51,53,54) as they did not retain an attorney for this subject purchase (T-2: 51), even though LUIS PEREZ had been a highly sophisticated purchaser of Real Property since coming to the United States from Cuba (T-2: 55,56). At the time of closing, CHASE took back a Purchase Money Mortgage in the amount of ($32,000.00), in order to finance the PEREZES purchase of the subject property. (Plaintiffs Exhibit 1-e).

On March 7, 1979, suit was filed in the Circuit Court of Dade County, Florida in order to rescind and cancel the Quit Claim Deed, the Warranty Deed, and the Mortgage on the subject property, by Respondent's testatrix, THEODORES W. ROSS. (R: 1-5). The Trial Court granted a motion for separate trials (R: 230), and tried only the Real Property issue on January 7, 1980 and February 11, 1980. On March 4, 1980 the Trial Court rendered its Final Judgment as to the Real Property issue. (A: 1;R: 512 & 513).

The Plaintiff, THEODORES W. ROSS, filed a timely Motion for Rehearing (R: 493-495), which was denied on May 12, 1980. (R: 507). Plaintiff then filed her Notice of Appeal from the Trial Court's Final Judgment (R: 508) seeking review in the District Court of Appeal for the Third District of Florida.

On June 30, 1981, that Court filed its opinion in case no. 80-1213, affirming the Final Judgment, Per Curiam. (A: 2). THEODORES W. ROSS, then Appellant, filed a timely Motion for Rehearing En Banc and then Third District Court of Appeal entered an Order on July 27, 1981 granting

the Motion for Rehearing En Banc and Vacating the Court's panel opinion dated June 30, 1981. (A: 3).

On October 12, 1982, the Third District Court of Appeal filed its opinion on Motion for Rehearing En Banc, confirming the granting of Appellant's Motion, vacating the panel decision, and adopting the dissenting panels opinion as the opinion and the decision of the District Court of Appeal for the Third District of Florida, [reported at 422 So.2d 911]. Also on October 12, 1982, that Court certified to the Supreme Court of Florida, that the decision of that Court passed upon a question of great public importance that is:

> What is the proper scope of review for district courts of appeal in granting rehearings en banc? (A: 4).

Also on October 12, 1982, the Third District Court of Appeal granted Appellant's Motion for Substitution of a Proper Party and Jerry B. Schreiber, Personal Representative of the Estate of THEODORES W. ROSS, was substituted as Appellant in that Cause.

The PEREZES filed no Motion for Rehearing from the decision dated October 12, 1982. On November 18, 1982 (A: 5), the PERESES served a Motion for Leave to File Motion for Rehearing which was denied by a Third District Court of Appeal on December 10, 1982. (A: 6).

On December 29, 1982 (A: 7), seventy eight (78) days after the decision of the District Court of Appeal was rendered, the PEREZES served their "Notice to Invoke the Discretionary Jurisdiction of this Court" on the Respondent in Case no.: 63,025 presently pending before this Court. Respondent, on January 10, 1983 (A: 8), served the PEREZES and filed with this Court, a Motion to Dismiss the PEREZES' Appeal for Lack of Jurisdiction over the Subject Matter. The PEREZES have never responded to

this Motion.

On October 27, 1982, CHASE filed a Motion for Rehearing which was denied on December 10, 1982.

It is from this decision of October 12, 1982, that Petitioner seeks certiorari.

ISSUES PRESENTED FOR REVIEW

ISSUE I

IF RESPONDENT IS CORRECT THAT THIS COURT LACKS JURISDICTION TO REVIEW THE APPEAL OF CO-DEFENDANTS PEREZES, PETITIONERS IN CASE NO.: 63,025 PRESENTLY BEFORE THIS COURT, THIS APPEAL AS TO PETITIONER CHASE IS MOOT.

ISSUE II

THE DISTRICT COURT OF APPEAL CORRECTLY DETERMINED THAT LUIS PEREZ AND GLADYS PEREZ ARE NOT BONAFIDE PURCHASERS WITHOUT NOTICE OF THE FAILURE OF CONSIDERATION IN SUPPORT OF THE DEED TO COURNOYER, THEIR GRANTOR, AND THE RESULTING INVALIDITY OF THE DEED.

ISSUE III

WHAT IS THE PROPER SCOPE OF REVIEW TO BE APPLIED IN GRANTING MOTIONS FOR REHEARING EN BANC?

ARGUMENT

ISSUE I

IF RESPONDENT IS CORRECT THAT THIS COURT LACKS JURISDICTION TO REVIEW THE APPEAL OF CO-DEFENDANTS PEREZES, PETITIONERS IN CASE NO.: 63,025 PRESENTLY BEFORE THIS COURT, THIS APPEAL AS TO PETITIONER CHASE IS MOOT.

As can be seen from the Appendix, Exhibits A: 5-8, all issues raised by Petitioner, CHASE, are moot and Petitioner's mortgage is void because, "[T]he general rule is that it is essential to the existence of a mortgage which purports the cover present interest of the Mortgagor, that the Mortgagor hold, or by transaction aquire, some Estate, or interest in land capable of being mortgaged." 36 Fla.Jur. 2d Mortgages, §21.

Furthermore, it is well settled that, "Under Florida Law, a mortgage does not convey title or create any interest in real property". United of Florida Inc., v. Illini Federal Savings & Loan Association, 341 So.2d 793 (Fla. 3d DCA 1977). Southern Colonial Mortgage Company, Inc., v. Medeiros, 347 So.2d 736, 738 (Fla. 4th DCA 1977).

The decision of the District Court of Appeal, Third District of Florida, rendered on October 12, 1982, is final as to the PEREZES, for they have neither extended the time for the finality of the decision of that court as to them by filing a Motion for Rehearing; nor, have they timely filed a Petition for Certiorari in this court. That court, specifically stated [at 422 So.2d 913] in its decision that:

> ". . .[A]ccordingly, the panel decision is vacated, the judgment below is reversed, and the cause is remanded with directions to cancel the deeds to COURNOYER and the PEREZES and the CHASE mortgage and for such other

further proceedings as are not inconsistent herewith." (Emphasis added).

The time having run on the PEREZES, they are bound by the decision of the lower court rendered on October 12, 1982. The deed to the PEREZES is now void, and since the PEREZES no longer hold title to the real property involved, the mortgage to CHASE, Petitioner herein, is void as a matter of law, for as this court stated in Jordan v. Landis, 175 So. 241, 247 (Fla. 1937):

". . . [T]he mortgage predicated upon a void deed is likewise void. . ." See also Shuman v. State, 56 So. 694, 696 (Fla. 1911).

This is not a harsh conclusion for as the record reveals, CHASE'S own attorneys "researched" the abstract and were totally inept in this effort. Through their neglect, they placed a mortgage on property which should not have been there in the first place. Had CHASE properly reviewed the abstract (a point more fully developed in ISSUE II, below) it would not be before this court today. The PEREZES erred not only in fact and in law (see Respondents brief in 63,025 as well as the decision en banc, below), but also procedureally in the court below (A: 5-8).

Accordingly, if Respondent is correct as to this ISSUE, the PEREZES are bound by the decision of the lower court dated October 12, 1982, cf. Barry v. Barnett, 79 Fla. 562, 84 So. 542 (1920); Rabinowitz v. Houk, 100 Fla. 44, 129 So. 501 (1930), and there is no mortgagor with respect to the subject property. Since there cannot be either a mortgage or a mortgagee without a mortgagor, this appeal is now moot.

ISSUE II

THE DISTRICT COURT OF APPEAL CORRECTLY DETERMINED THAT LUIS PEREZ AND GLADYS PEREZ ALONG WITH PETITIONER CHASE ARE NOT BONAFIDE PURCHASERS WITHOUT NOTICE OF THE FAILURE OF CONSIDERATION IN SUPPORT OF THE DEED TO COURNOYER, THEIR GRANTOR, AND THE RESULTING INVALIDITY OF THE DEED.

For the purpose of clarity, this Point will be divided into four (4) subpoints:

A. Duty to make inquiry - authority.

B. Existent facts from the record.

C. Red flags from the facts.

D. Conclusion.

A. DUTY TO MAKE INQUIRY -- AUTHORITY.

For more than 130 years, it has been a basic rule of law in this State that consideration is required to support a deed for the transfer of real property; and if there is no consideration to support a deed, it must be declared invalid. Southern Life Insurance and Trust Company, et al., v. Cole, 4 Fla. 359, 382 (1852).

There are three (3) types of Notice by which a party may be held to have had knowledge of a particular fact:

1. Actual Notice.

2. Implied Notice (or implied actual notice).

3. Constructive Notice.

"Actual Notice" stems from actual knowledge of the fact in question.

"Implied Notice" is a factual inference of such knowledge inferred from the availability of a means of acquiring such knowledge when the party charged therewith had the duty of inquiry. "Constructive Notice" is the inference of such knowledge by operation of law, as under a recording statute. McClausland v. Davis, 204 So.2d 334, 335, 336 (Fla. 2d DCA 1967); Hagan v. Sabel Palms, Inc., 186 So.2d 302, 313 (Fla. 2d DCA 1966); First Fed. Sav. and Loan Ass'n of Miami v. Fisher, 60 So.2d 496 (Fla. 1952); Reinhart v. Phelps, 7 So.2d 783,786 (Fla. 1942); Sapp v. Warner, 105 Fla. 245, 141 So. 124, 143 So. 648 (1932).

As pointed out by the Court in Hagan, supra, at 313, "Implied Actual Notice" or "Implied Notice" is defined and illustrated in the first Sapp opinion, supra, (Text 141 So. 127):

> "Notice is of two kinds, actual and constructive. 'Constructive Notice' has been defined as notice imputed to a person not having actual notice; for example, such as would be imputed under the recording statutes to persons dealing with property subject to those statutes. 'Actual Notice' is also said to be of two kinds: (1) Express, which includes what might be called direct information; and (2) implied, which is said to include notice inferred from the fact that the person had means of knowledge which it was his duty to use and which he did not use, or as it is sometimes called 'implied actual notice.' Cooper v. Flesner, 24 Okl. 47, 103 P. 1016, L.R.A. (N.S.) 1180, 20 Ann. Cas. 29; Simmons Creek Coal Co. v. Duran, 142 U.S. 417, 12 S.Ct. 239, 35 L.Ed. 1063; Hoy v. Bramhall, 19 N.J.Eq. 563, 97 Am.Dec. 687; Acer v. Westcott, 46 N.Y. 384, 7 Am. Rep. 355. Constructive Notice is a legal inference, while implied actual notice is an inference of a fact, but the same facts, may sometimes be such as to prove both constructive and implied actual notice. Knapp v. Bailey, 79 Me. 195, 9 A. 122, 1 Am.St. Rep. 295." (Emphasis added).

> "The Principal applied in cases of alleged implied actual notice is that a person has no right to shut his eyes or ears to avoid information, and then say that

he has no notice; that it will not suffice the law to remain willfully ignorant of a thing readily ascertainable by whatever party puts him on inquiry, when the means of knowledge is at hand. (Cases cited)" (Emphasis supplied by the Court).

The Hagan Court went on to state, at 313:

"It has likewise been held that if circumstances of the transaction are such, or the record indications are of such a nature that inquiry outside of the record becomes a duty, then the failure to make such inquiry in order to determine the true status of the title to the property described in the recorded instrument would constitued a nglegent ommission." (citing Chatlos v. McPherson, Fla. 1957, 95 So.2d 506). (Emphasis supplied by the Court.)

The Supreme Court in Sapp, supra, went on to state at 129:

'"Constructive Notice' as we have heretofore pointed out is an inference the law itself draws, and which can not be refuted when the facts giving rise to it are made to appear. 'Implied actual notice' on the other hand, is an inference of fact which may be drawn by the court as a matter of law, when warranted by the circumstances of a particular case calling for its application in order to do equity *** it is a familiar and thoroughly well-settled principle of realty law that a purchaser has constructive notice of every matter connected with or affecting his estate which appears by recital, reference, or otherwise upon the face of any deed which forms as essential link in the chain of instruments through which he deraigns his title. The rationale of the rule is that any description, recital of fact, or reference to other documents puts the purchaser upon inquiry, and he is bound to follow up the inquiry, step by step, from one discovery to another, and from one instrument to another, until a whole series of title deeds is exhausted and a complete knowledge of all the matters referred to and affecting the estate is obtained. Being thus put upon inquiry, the purchase is presumed to have prosecuted it until its final result and with ultimate success *** the rule of notice thus imputed is based upon the legal presumption that information has been communicated to or acquired by a party. The presumption is not conclusive but rebuttable ***. . .Whenever, therefore, a party has merely received information, or has knowledge of such facts sufficient to put him on inquiry, and this constitutes the sole foundation for inferring a constructive notice, he is allowed to rebut the prima facie presump-

> tion thence arising by evidence; and if he shows by convincing evidence that he did make the inquiry, and did prosecute it with all the care and diligence required by a reasonably prudent man, and that he failed to discover the existence of, or to obtain knowledge of, any conflicting claim, interest, or right, then the presumption of knowledge which had arisen against him will be completely overcome; ... what will amount to due inquiry must largely depend upon the circumstances of each case. If, on the other hand, he failed to make any inquiry, or to prosecute one with due diligence to the end, the presumption remains operative, and the conclusion of a notice is absolute.
>
> . . . [T]he inference of implied actual notice was warranted by the fact that the persons having constructive notice of the record of the guardian's deed must in any event have looked to the proceedings which were necessary to support it, and accordingly, must be charged with implied actual notice of what an inquiry suggested to a prudent man by those proceedings would have disclosed. There is nothing . . . which inhibited the court from finding implied actual notice as a matter of law from the facts . . . since there was no showing that the inquiry suggested by the guardian's proceedings was made. . . ." (Emphasis added).

B. EXISTENT FACTS FROM THE RECORD.

Applying the foregoing authorities to the facts in the instant case, the Quit Claim Deeds contained in the abstract for the subject property as well as specifically admitted into evidence as Plaintiff's Exhibits 1-b and 1-c contained information on consideration for the deeds, readily ascertainable to the examiner of the subject property's record as can be shown in the testimony of MR. JOHN CONSTANTINO, a partner of the law firm representing Petitioner CHASE, in the real property purchase by the PEREZES:

> (T-Const.: 5)
>
> Q. If you refer to the quantity of stamps on both

Plaintiff's Exhibit 1-b and Plaintiff's Exhibit 1-c, there are minimum stamps on both Exhibits, B and C, are there not?

A. Yes.

(T-Const.: 7)

Q. (By the Court) You may respond to the question of what consideration, under the law, do these stamps reflect.

THE WITNESS: It would be no actual valuable consideration.

(T-Const.: 8)

THE COURT: . . . those are minimal stamps which either the Clerk or the Revenue Department requires prior to recording?

THE WITNESS: Yes, Sir.

THE COURT: But it doesn't actually reflect consideration.

THE WITNESS: Right.

MR. CONSTANTINO, in his further testimony (T-Const.: 9-12) goes on to acknowledge that the **position of the Lawyer's Title Guaranty Fund in August, 1977, was that in order for their to be valuable consideration, of love and affection, there had to be a blood or marital relationship.** From MR. CONSTANTINO'S testimony (T-Const.: 18), it is clear that he was not familiar with the Court's decision in Florida National Bank & Trust Co., etc., vs. Havris, 366 So.2d 491 (Fla. 3d DCA 1979), nor the holding at 497, wherein the Court stated:

"It was the finding of the trial court that the only consideration for these deeds was love and affection. Since under the law that can constitute a consideration only as to one who is related by blood or marital affinity (which this Grantee was not), the deeds were without consideration."

On the second day of Trial, February 11, 1980, Defendant, LUIS PEREZ testified. He and his wife were the subsequent purchasers of the subject property from PETER R. COURNOYER. Amongst other matters, he testified (T-2: 51) that he did not have a lawyer representing him in this purchase, but that he was represented by the Petitioner CHASE. His further testimony (T-2: 54-56) indicated he was far from an inexperienced purchaser of real estate as he was the owner of two businesses and seven apartment complexes. Regardless, the sum total of his testimony indicates he retained no one to protect his interest in the purchase of the subject property, but relied solely upon CHASE, and its expertise. See Rafkind, et al., v. Beer, et al., 8 FLW 448,449 (Fla. 3d DCA, Case No. 81-426, February 1, 1983).

Next CHASE called MR. JOSEPH MALEK, COURNOYER'S former attorney, as a witness. In his testimony, (T-2: 71) the following exchange occurred:

> Q. And from having that document in your possession, you could have determined that there was no consideration for Plaintiff's 1-b, (Quit Claim Deed of March 4, 1977) on the basis of the 30¢ stamps; is that correct?
>
> A. I could have so determined if I made an analytical study of the thing.
>
> Q. Had you looked at it?
>
> A. I looked at it.
>
> Q. So there being no consideration for the first deed, you prepared a second deed, which you know there was no consideration for because you corrected the first deed; am I correct?
>
> A. Yes.

From the foregoing testimony, Plaintiff's Composite Exhibit 1, and the abstract of title for the subject property, Plaintiff's Exhibit 2, the Petitioner's loan file and the attorney's file, Plaintiff's Composite 3 all in evidence, it is clear that the documents available to the PEREZES, and CHASE, were sufficient to put them on notice as to the lack of consideration for the Quit Claim Deeds between MRS. ROSS and COURNOYER.

It is further abundantly clear from the record, as a whole, and from the fact that there is no testimony to the contrary, the following:

1. The, PEREZES took no independent action upon themselves to protect their interests, but relied solely upon CHASE; and, furthermore,

2. A thorough review of the record evidences no inquiry into the consideration for the Quit Claim Deeds, whatsoever, by CHASE or the PEREZES; or any attempt to explain why there was no inquiry into the relationship between MRS. ROSS and COURNOYER; or why there were no documents contained in the abstract of title supporting a blood or marital relationship between MRS. ROSS and COURNOYER.

C. RED FLAGS FROM THE FACTS.

Appellant's witness, Attorney JOSEPH A. McGOWAN, testified (T-1: 87), that, in 1977 the Deed of August 19, 1977 would raise certain questions:

1. Consideration of $10.00 and no/100 is typed in the top of the deed and then in the body of the Quit Claim Deed is the statement that the consideration being given is love and affection.

2. There are minimal documentary stamps on the Deed.

3. There is a statement on the top stating that the Deed is a "Corrective Deed" which would require an examination to find out what Deed it was correcting.

It was MR. McGOWAN'S testimony that love and affection could be good consideration in Florida; however, in order for love and affection to be good consideration, the Grantor and Grantee would have to be related either by blood or marital affinity (T-1: 88). As a basis for his opinion, MR. McGOWAN cited Havris, supra, as well as the August 19, 1977 pamphlet published by the Lawyer's Guaranty Fund which had an article on the same topic (Plaintiff's Exhibit 4). Thereafter, (T-1: 89), the following testimony was obtained:

Q. Sir, if you had been representing a buyer in this subject transaction and came across this Deed from the prospective seller where he obtained the property through love and affection, what would you have required in order to allay or set aside your fears?

A. I'd like proof by affidavit of the relationship between the Grantor and the Grantee.

Q. Sir, did you find any such affidavit contained in the abstract of the subject property?

A. No, sir.

The crux of this cause is brought out on MR. McGOWAN'S cross examination (T-1: 93) in the following exchange:

Q. When you say the Deed is suspect, you don't mean its invalid? Its' just suspect if you were examining the title?

A. Until I get the facts, I don't know if it's valid or invalid. (Emphasis added).

Appellant called as a rebuttal witness, MS. ELIZABETH A. MERCERET, an underwriter for Chicago Title Insurance Company. Her testimony, by deposition, was admitted into evidence, as Plaintiff's Exhibit 6, and was

given in the capacity as a rebuttal expert witness.

In her testimony, (D-Merc.: 14-30), MS. MERCERET testified that Chicago Title would not issue a title policy to a subsequent purchaser from COURNOYER after reviewing the Deeds of March 4, 1977, and August 19, 1977. The basis for her position was the fact that the face of the Deeds recited that the only consideration being given was love and affection and that there was no monetary consideration or its equivalent given. In addition, there was no affidavit filed of record (in the abstract) indicating whether or not there was a blood or marital relationship between ROSS and COURNOYER (D-Merc.: 31). Thereafter, beginning at (D-Merc.: 31), the following exchange occurred:

> Q. With respect to subsequent purchasers from MR. COURNOYER, would not Chicago Title take the position that the subsequent purchasers were bonafide purchasers without notice of any defect in the transaction?
>
> A. No, sir, we would not, because . . .
>
> Q. Why?
>
> A. Okay. We would not do this because we'd examine the title abstract, and this is what's called a weak link, in the chain of title. We would have to -- we'd examine every link in the chain of title.
>
> Q. Why would you?
>
> A. Because every link must be firm in order to put good record title in the ultimate purchaser of the property. The . . . both the recitation of love and affection and the minimal stamps recited on the top are red flags to a title examiner, putting them immediately on the alert of a possible problem. A subsequent purchaser from COURNOYER has notice of everything on the record, and a duty to inquire as to the meaning of every instrument within the chain of title. (Emphasis added).

From the foregoing, and in consideration of the holding in Havris, supra, it is clear that there was no consideration given for the Quit Claim

Deeds between ROSS and COURNOYER, and this was the holding of the Trial Court in it's Final Judgment of March 4, 1980 (A: 1; R: 512-513).

D. CONCLUSION.

THE PEREZES and CHASE are not bonafide purchasers. In order to charge a person with notice of information which might have been learned by inquiry, the circumstances must be such as should reasonably suggest inquiry. Chatlos v. McPherson, 95 So.2d 506 (Fla. 1957). A review of the record, including the testimony, and legal and loan files of CHASE, clearly indicates that no inquiry was made with respect to the validity of the Quit Claim Deeds between ROSS and COURNOYER, and no inquiry was made with respect to the relationship between Appellant and PETER R. COURNOYER, PEREZES' Grantor. Furthermore, MR. PEREZ'S own testimony indicates he took no steps to protect his own interest but relied solely on CHASE to represent his interests in this matter (T-2: 51) and CHASE'S records indicate it did nothing in regard to the issue of consideration for the Quit Claim deed. As early as 1935, this Court stated that it was:

> "[T]oo well-settled to require the citation of authorities that one who has either actual or constructive information and notice sufficient to put him on inquiry is bound, for his own protection, to make that inquiry which such information or notice appears to direct should be made, and, if he disregards that information or notice which is sufficient to put him on inquiry and fails to inquire and to learn that which he might reasonably be expected to learn upon making such inquiry, then he must suffer the consequence of his neglect."

Sickler v. Melbourne State Bank, 118 Fla. 468, 159 So. 678, 679 (1935). The abstract, Plaintiff's Exhibit 2, clearly indicates that there is nothing filed of record with respect to this property as to the relationship between MRS. ROSS and the PEREZES' Grantor, PETER R. COURNOYER. The testimony of MESSRS. CONSTANTINO, CHASE'S own attorney, and MALEK was derived from facts obtained from the face of the Quit Claim Deeds to COURNOYER, or contained in the abstract of title. It is unquestionable that in October of 1977, when CHASE was reviewing the abstract and the record to the subject property, prior to loaning money for the purchase of same by the PEREZES, that the same information existed on the face of the deeds and in the abstract of title. The information that the Trial Court used in order to make a finding of fact that there existed at no time a blood relationship between Plaintiff, THEADORES W. ROSS and Defendant, PETER R. COURNOYER, and the fact that there was no consideration for either Quit Claim Deeds was available in 1977 -- as it is today! See also Judge Nesbitt's recent opinion in Rafkind, et al v. Beer, et al., supra, at 449.

The failure to make an inquiry is fatal. With reasonable prudent inquiry on the part of the PEREZES and CHASE, the true facts concerning title to the property could have been learned; and these facts were readily ascertainable. A thorough review of the record evinces no inquiry whatsoever by the Petitioner, or any attempt to explain why such inquiry would have been futile. For from the record, the Petitioner offered no testimony to show that an inquiry was made or that any reasonable inquiry would have been futile. From the foregoing, it is presumed that due inquiry would have disclosed the existent facts. Henson v. Bridges, 126 S.E. 2d 226, 228 (Ga. 1962).

In Sapp, supra, at 128, the Court said:

> "If, in the investigation of a title, a purchaser, with common prudence, must have been apprised of another right, notice of that right is **presumed** as a matter of implied actual notice. Reeder v. Bar, 4 Ohio 446, 22 Am.Dec. 762; Singer vs. Scheible, 109 Ind. 575, 10 N.E. 616; American Inv. Co. v. Brewer, 74 Okl. 271, 181 P. 294; Cambridge Valley Bank v. Delano, 48 N.Y. 326; Blake v. Blake, 260 Ill. 70, 102 N.E. 1007. **Means of knowledge, with the duty of using them, are in equity equivalent to knowlege itself.** Cordova v. Hood, 17 Wall 1, 21 L.Ed. 587 (1873). See also, Taylor v. American Nat, Bank, 63 Fla. 631, 57 So. 678, Ann. Cas. 1914A, 309; Hunter v. State Bank of Florida, 65, Fla. 202, 61 So. 497; McRae v. McMinn, 17 Fla. 876; Figh v. Taber, 203 Ala. 253, 82 So. 495. (Emphasis added).

Clearly, the PEREZES and the Petitioner failed to exercise due diligence to avail themselves of information and knowledge of another's right which was within their reach. As no efforts were made in this regard, the PEREZES and the Petitioner must suffer the consequence of their neglect. Sickler v. Melbourne State Bank, supra at 679; Chatlos v. McPherson, 95 So.2d 506 (Fla. 1957); Niccolls v. Jennings, 92 So.2d 829 (Fla. 1959). Therefore, the PEREZES cannot be considered to be bonafide purchasers. MacEwen v. Peterson, 427 P.2d 527 (Ariz. 1967); David v. Kleindienst, 62 Ariz. 251, 169 P.2d 78; University of Richmond v. Stone, 148 Va. 686, 139 S.E. 257. See Zaucha v. Town of Medley, 66 So.2d 238 (Fla. 1953). As the Petitioner's mortgage is dependent upon the validity of its Mortgagor's deed, then too, Petitioner's mortgage must also fall. Jordan v. Landis, supra.

From the foregoing evidence and law, it is abundantly clear that the PEREZES and CHASE cannot be considered to be bonafide purchasers, without notice of any infirmity, and that both legal and equitable title of

the subject property should vest with Respondent, and that CHASE'S mortgage should be cancelled. Accordingly, the writ should be discharged.

ISSUE III

WHAT IS THE PROPER SCOPE OF REVIEW TO BE APPLIED IN GRANTING MOTIONS FOR REHEARING EN BANC?

A. DECISIONAL CONFLICT THEORY

The two dissenting opinions beginning at 422 So.2d 914, historically derive the development of Rule 9.331. The dissent then determines that, at 914, since the en banc rule owes its existence to the substitution of a district court's jurisdiction for that formerly exercised by the Supreme Court - consequently, the power to be exercised by a district court of appeal must be the same as formerly exercised by the Supreme Court. The rationale being that, "If the scope of review for granting en banc rehearings is broader than that standard utilized by the Supreme Court in the exercise of its discretionary jurisdiction, then it will extend to the district court of appeal an unconstitutional power never contemplated under any version of the judicial articles of the Florida Constitution from 1956 to date" [at 914]. The dissent then goes on to demonstrate that proper basis for the scope of review of en banc rehearing is "decisional conflict" as defined in Nielson v. City v. City of Sarrasota, 117 So.2d 731, 734 (Fla. 1960).

However articulate Nielson is, and however beneficial Nielson is, in determining the scope of review for the Supreme Court, it does not properly define and limit the scope of review for en banc hearings. As stated in Nielson, also at 734:

> ". . .[I]n Order to sanctify the decisions of the Courts of Appeal with an aspect of finality . . . the jurisdiction of this Court to exercise certiorari powers

> and to set aside the decisions of the Courts of Appeal on the conflict theory was expressly limited by the Constitution itself. Ansin v. Thurston, Fla., 101 So.2d 808.
>
> When our jurisdiction is invoked pursuant to this provision of the Constitution we are not permitted the judicial luxury of upsetting a decision of a Court of Appeal merely because we might personally disagree with the so-called "justice of the case" as announced by the Court below. In order to assert our power to set aside the decision of a Court of Appeal on the conflict theory we must find in that decision a real, live and vital conflict within the limits above announced." (Emphasis added).

The scope of Rule 9.331 is not to set aside prior decisions of a Court of Appeal on the "conflict theory", - but to maintain uniformity in the court's decisions within a district before they are rendered. This is a much broader scope of authority than was envisioned by the limitations of Nielson. It is for these reasons that the Nielson formula which limits the authority of the Supreme Court to a real, live and vital conflict is not applicable to the scope of review for Rule 9.331.

B. RULE 9.331

The purpose behind Rule 9.331, is to establish a procedure within a District Court of Appeal wherein that Court could sit en banc to resolve intra-district conflict. As noted by this Court in In Re Rule 9.331, etc., 416 So.2d 1127, 1128 (Fla. 1982), ". . . [I]f intra-district conflict is not resolved within the district courts by en banc decision, totally inconsistent decisions could be left standing and litigants left in doubt as to the state of law. The new appellate structural scheme, including the en banc process, was intended to solve that problem and to provide litigants with a clear statement of the law within any given district." (Emphasis

added).

This, then, is the acknowledged aim of Rule 9.331: **"TO PROVIDE LITIGANTS WITH A CLEAR STATEMENT OF THE LAW WITHIN ANY GIVEN DISTRICT."** Furthermore, in conformity with this purpose, it is mandatory that an attorney filing a motion for rehearing en banc execute the statement contained in Fla. R. App. P. 9.331 (c)(2). The operative phrase of the statement is "to maintain uniformity of decisions in this Court".

Initially, Rule 9.331 (c)(1) specifically states that a motion for rehearing en banc shall be in conjunction with a motion for rehearing, "(solely on the ground that such consideration is necessary to maintain uniformity in the Court's decisions"). Next, there will be no vote on a motion for rehearing en banc unless one is requested by a judge on the panel that heard the proceeding, or by any judge in regular active service on the court. Unless a vote is requested, the court's non-panel judges are under no obligation to even consider the motion.

Finally, Rule 9.331 (c)(3) completes the availability of this Rule by defining the various orders that a court of appeals might issue when a request for a rehearing en banc is made. How then can excessive use of this Rule come about? It is up to the active participating judges in our district courts to determine whether or not to invoke this rule and not the adversary members of the Bar.

C. UNIFORMITY OF DECISIONS

The Court of Appeal below [912 n.1] stated that the practical standard to be used in determining whether or not decisions lacked uniformity is, "[W]henever it appears that they are so inconsistent and

disharmonious that they would not have been rendered by the same panel of the court." This is a practical and useable standard for it can be measured by anyone concerned with a particular decision.

The dissent in SCHREIBER belabors the proposition that this practical standard can and most certainly will result in untold abuses of this Rule. It is respectfully submitted that these forebodings are pure fiction. The Rule itself provides for safeguards to prevent abuse or excessive use as was discussed above.

If active participating judges in a district court are using judicial time to determine whether or not there is a clear statement of the law applicable to that particular district, and that the decision of the case under review, before any opinion is published and before any decision is officially rendered, is so inconsistent and disharmonious with that prior statement of the law as it can be said that this new decision would not have been rendered by the same panel of the court, they then invoke this Rule. For not only can the en banc process be used to ensure adherence to precedent, but it can also be used by our various courts of appeal to develop new precedent, within the district, in conformance with court decisions of other districts. Therefore, implementation of this scope of review can also lead to the development of **uniformity of the law within this State**. Clearly then, this is **not** excessive use of this Rule, but a truly analytical approach to the development of the law.

As pointed out by the decision in SCHREIBER, n.1 at 912, the entire thrust of this Rule is to provide and preserve "uniformity" **before** any decision or opinion has been rendered at all. Therefore, the particular "form" in which the non-uniform results are expressed - whether by

written opinion, per curiam affirmance, or otherwise - cannot jurisdictionally matter. This is the obvious distinction between "uniformity" and the pre-requisite of "decisional conflict" between district court decisions which is necessary to support Supreme Court review jurisdiction. For Supreme Court review, decisional conflict was necessary when Nielson was rendered, and is mandatory now, under Art. V §3 (b)(3), Fla. Const. (1980) ("expressly and directly conflicts"); for Rule 9.331, decisional conflict is not applicable.

Whether or not the fears of the dissenting opinions of SCHREIBER are valid and that excessive use of this Rule will result, will be dependant upon the quality of the judges sitting on our various courts of appeal and not upon the logical and practical standard for determining "uniformity of decisions".

It is therefore respectfully submitted that the proper scope of review to be applied in granting motions for rehearing en banc is whether or not it can be said that, **"Decisions lack uniformity whenever it appears that they are so inconsistent and disharmonious that they would not have been rendered by the same panel of the court."** This then is the significance of Rule 9.331.

The Question certified to this Court having been answered, the writ should be discharged.

CONCLUSION

From the foregoing cases and law, it must be initially stated that this court does, in fact, lack jurisdiction over the subject matter of this Appeal. The PEREZES have not complied with the Rules of Appellate Procedure by timely seeking certiorari. They have not preserved their issues in order to bring them to this court's attention and within this Court's jurisdiction. As the deed is void, the mortgage is similarly void, and this appeal is now moot.

If, however, this Court disagrees with Respondent's initial point, the record on appeal and the foregoing law clearly demonstrates that the Petitioner and the PEREZES were not, and can not be deemed to be, bonafide purchasers, for value, without notice. The Petitioner and the PEREZES had implied actual notice, as a matter of law, of the failure of consideration for the deed to PEREZES' Grantor not only from the record of title, the record in this cause, but also, as there was no showing that any inquiry suggested by the face of the deed was made. CHASE'S mortgage must be cancelled.

While it may be said that for adversary members of the Bar, Rules of Court should be strictly construed and technically adhered to in order to preserve and maintain the efficient administration of justice, such should not be the standard when Rules of Court are established for the judges of our courts of appeal and for this Court. These Rules should provide for maximum flexibility and scope in order for our courts to keep up with the ever changing, living law within the frame work of their constitutional jurisdiction. Indeed, therefore, it is unquestionable that the proper scope of review for Rule 9.331 is whether or not, "Decisions lack unifor-

mity whenever it appears that they are so inconsistent and disharmonious that they would not have been rendered by the same panel of the court." This scope of review, as annunciated by Judge Schwartz in Schreiber, will not only bring about a clear statement of the law within any given district, but also, it will facilitate the development of uniformity of the law within this State. It is for these reasons, then, that this standard is eminently correct.

Therefore, even if this Court should accept certiorari, the Question certified to this Court has been answered, and the writ should be discharged.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 22nd day of February, 1983 to: Therrell, Baisden, Stanton, Wood and Seitlin, 1111 Lincoln Road, Suite 600, Miami Beach, Florida 33139; Frank Gramling, Esquire, 7550 Red Road, Suite 203, South Miami, Florida 33143; and John H. Duhig, Esquire, Suite 1133, City National Bank Building, 25 West Flagler Street, Miami, Florida 33130.

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