Usury and the Viruliferous Acceleration Clause in Florida

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USURY AND THE VIRULIFEROUS ACCELERATION
CLAUSE IN FLORIDA*

RALPH E. BOYER** AND PAUL S. BERGER***

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I. INTRODUCTION
A. Possibilities and Actualities

Several decisions1 in the state of Florida have been directed to the usurious effect that an acceleration clause may have on a transaction involving a loan of money evidenced by a promissory note and mortgage. Owing to the esoteric nature of money lending transactions in general, and more particularly to the result reached in the latest expression of the courts, this paper is directed to an examination and exposition of Florida's self labeled "sui generis" position.2 This position is exemplified by First

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1. Home Credit Co. v. Brown, 148 So.2d 257 (Fla. 1962); Ayvas v. Green, 57 So.2d 30 (Fla. 1952); Smith v. Midcoast Inv. Co., 114 Fla. 469, 154 So. 211 (1934); Benson v. First Trust & Sav. Bank, 105 Fla 135, 134 So. 493 (1931), modified, 105 Fla. 135, 142 So. 887 (1932), adhered to, 105 Fla. 135, 145 So. 182 (1932); Maxwell v. Jacksonville Loan & Improv. Co., 45 Fla. 425, 34 So. 255 (1903); Gordon v. West Fla. Enterprises of Pensacola, Inc., 177 So.2d 859 (Fla. 1st Dist. 1965); First Mortgage Co. v. Stellmon, 170 So.2d 302 (Fla. 2d Dist. 1964), cert. denied, 174 So.2d 32 (Fla. 1965).

2. In First Mortgage Co. v. Stellmon, supra note 1, the court stated in 170 So.2d, at p. 304:

The Courts of our sister states have held, for the most part, that an acceleration clause does not, of itself, render the contract usurious, even though the amount of the interest that may become due by reason of the acceleration exceeds the lawful rate, the excess being treated as a penalty that can neither be collected nor retained. . . . The Courts of this state have declined to follow the general rule with respect to the effect of an acceleration clause, and have adopted one which appears to be sui generis. (Emphasis added.)
Mortgage Corp. v. Stellmon, wherein the Second District Court of Appeal held that the existence of an acceleration clause which did not preclude the mortgagee from recovering unearned interest upon default rendered the note usurious. The rationale was that since the mortgagee could have foreclosed on the face amount of the note, the note was usurious although the mortgagee did not seek to accelerate but sought instead to foreclose only for past due installments.

B. General Nature and Characteristics of Acceleration Clauses

An acceleration clause is a contractual device whereby the date for performance is hastened upon a contingency. Although not limited to contracts involving money lending, acceleration clauses have widespread application in the area. Where a borrower is required to make periodic payments at stated intervals in the future, it is generally recognized that a default in any one payment will not cause a breach of any payment that has not yet matured. Accordingly, absent an acceleration clause, the lender is relegated to a suit at law, or to equitable enforcement, upon only those sums which are in default. Thus the acceleration clause is a distinct advantage to the lender.

The clause may be written so that it will become operative in one of two ways. Its activation can be upon the express option of the lender, or it can be absolute in form, thereby becoming operative upon a stated contingency notwithstanding the lender's conduct. Where the clause creates an option in the lender, acceleration becomes operative only at the affirmative election of the lender. Where the clause is automatic in

3. 170 So.2d 302 (Fla. 2d Dist. 1964), cert. denied, 174 So.2d 32 (Fla. 1965). See also infra text following note 53 for further discussion.
4. Any number of contingencies may hasten the maturity, the more common of which are default in the payment of taxes, insurance, or installment payments either of interest or principal or interest and principal combined. Osborne, Mortgages § 326 (1951).
5. Acceleration clauses are also common in leases. The relationship between a clause accelerating future rent and other remedies of the landlord on breach of lease covenants by tenant is discussed in 2 Boyer, Florida Real Estate Transactions § 36.16. (1965).
6. At early common law as well as today, it is a general rule of contracts that the breach of that contract only gives rise to one cause of action. A well settled exception to this general rule is that employed in contracts for the payment of money in installments. In these cases it is generally recognized that such contracts are divisible by their very nature and a cause of action will lie for each breach as it occurs. 1 R.C.L. § 31 (1929). The rule has also been well settled in Florida to the effect that a foreclosure will lie for past due installments only, subject to remaining unmatured installments. E.g., Wordinger v. Wirt, 112 Fla. 822, 151 So. 47 (1933); Miami Mortgage & Guar. Co. v. Drawdy, 99 Fla. 1092, 127 So. 323 (1930).
7. It is generally held that an acceleration clause is inserted for the benefit of the lender. Such a clause gives the lender an option to foreclose on the security before the stipulated maturity of the debt. Osborne, Mortgages, § 326 (1951).
8. See Baader v. Walker, 153 So.2d 51 (Fla. 2d Dist. 1963) and text following note 14 infra.
form, there is a split of authority as to whether the clause is to be con-
strued as self-executing or as optional with the creditor.\(^\text{10}\) The reason for
the latter construction is that the clause is inserted for the lender’s
benefit\(^\text{11}\) and not for that of the borrower. Thus it should create no rights
in the borrower.\(^\text{12}\) The reason for this position is clear. The courts have
refused to allow a clause to become self-executing where the result would
enable the borrower to take advantage of his own breach.\(^\text{13}\) This is
patently evident in an era of declining interest rates. If the clause were to
become self-executing upon the borrower’s default, he would have a built
in prepayment option predicated upon his own breach, and could thus
deprieve the creditor of a favorable high return investment in order to
refinance at a lower rate.

The most recent Florida expression favors enforcing an acceleration
clause according to its express provisions, so that if clearly automatic in
form, the provision will not be treated as optional with the lender. In
\textit{Baader v. Walker},\(^\text{14}\) the Second District Court of Appeal was faced with
an absolute clause. Upon default, the borrowers paid the lender’s\(^\text{15}\) collection
agent\(^\text{16}\) the entire indebtedness. Before remitting the funds to his
principal, the agent went into receivership. The lender then sought to
foreclose the mortgage against the original borrowers, taking the position
that the clause, although absolute on its face, actually created an option
in favor of the lender. Therefore, since the option remained unexercised
by the lender, the borrowers had no right to pay the entire indebtedness.

\(^{10}\) The conflict of authorities is reviewed in \textit{Baader v. Walker}, \textit{supra} note 8.

\(^{11}\) Citations for this and the contrary viewpoint can be found in \textit{Baader v. Walker},
\textit{supra} note 8, 153 So.2d, at 54-55. See also note 13 \textit{infra}.

\(^{12}\) The minority view is that the provision exists for the benefit of the obligor as
well as the obligee and that the courts have no right to make a new contract different from
the expressed words of the parties. 159 A.L.R. 1077, at 1082 (1965). The majority of cases
take the position that if the borrower were allowed to take advantage of the clause, he could
default, then tender and discharge the debt when in fact he obligated himself to keep the
money for a certain number of years without the privilege of prepayment. These courts treat
the absolute clause as creating an option in the lender although not expressly stated. For an
extensive discussion on the question of self executing acceleration clauses, see \textit{Annot.} 159
A.L.R. 1077 (1945).

\(^{13}\) \textit{Summers v. Wright}, 231 Ala. 372, 166 So. 87 (1935), holding that an absolute
acceleration clause exists for the benefit of the mortgagee and is not intended to create a
right in the mortgagor whereby his own default will release him from the obligation to pay
on a specified future date. In \textit{Coman v. Peters}, 52 Wash. 574, 578, 100 Pac. 1002, 1003 (1909),
the court stated:

Thus it is plain that this court is committed to the doctrine and we think
rightly so, that mere default in payment does not mature the whole debt, whether
there be words of option in the agreement or not. Such a provision hastening the
date of maturity of the whole debt is for the benefit of the payee, and, if he does
not manifest any intention to claim it before tender is actually made, there is in
law no default such as will cause the majority of the debt before the regular time
provided in the agreement.

\(^{14}\) \textit{Supra} note 8.

\(^{15}\) The plaintiff was not the original lender but the assignee of the mortgage.

\(^{16}\) The servicing agreement between the assignee and the collecting agent provided that
the agent should have sole authority as to matters of collection and should pay the assignee
a stipulated monthly sum whether or not payments by the mortgagor were actually received.
The court first pointed out that the jurisdictions which have considered this problem "can not be reconciled" and then upheld the clause as written. Actually, the specific holding was that the accelerated payment was properly made to the agent under the authority of the servicing agreement. The equities and sympathies of the case were largely with the mortgagor.\textsuperscript{17}

II. ACCELERATION AND USURY: HISTORICAL DEVELOPMENT

A. The Element of Intent Generally

It has long been recognized that an indispensable element of usury and the imposition of the penalties attendant thereto is the element of intent.\textsuperscript{18} In \textit{Hayward v. LeBaron},\textsuperscript{19} the Supreme Court of Florida adopted the United States Supreme Court's language\textsuperscript{20} to the effect that:

\begin{quote}
[T]o constitute usury within the prohibitions of the law, there must be an intention knowingly to contract for or to take usurious interest, for if neither party intend it, but act \textit{bona fide} and innocently, the law will not infer a corrupt agreement. Where indeed the contract upon its very face imports usury, as by an express reservation of more than the legal interest, there is no room for presumption, for the intent is apparent—\textit{res ipsa loquitur}.\textsuperscript{21}
\end{quote}

Usury, of course, is a statutory offense, and a logical beginning for a discussion would be an abstract analysis of the statutes. In this manner the fact patterns of the cases which will subsequently be delineated can be tested against the requirements of the statutes as to intent and the

\textsuperscript{17} In the opinion, 153 So.2d, at 54-55, it is pointed out that the mortgagor had a third grade education and was not versed in the niceties of the law of mortgages and negotiable instruments; that he used his savings to pay the debt in a good faith belief that it was due; and that the plaintiffs had clothed their agent with authority to promote collection and enforce the terms of the note and mortgage, which terms included the acceleration clause. In Boyer & Ross, \textit{Survey of Real Property Law}, 18 U. MIAMI L. REV. 795, 841, n. 287 (1964), after pointing out the above facts, the authors raise the question:

\begin{quote}
Had the acceleration been optional, one might still wonder whether the court might have found that the agent had authority, actual, ostensible or by estoppel, to exercise the option on behalf of the plaintiffs.
\end{quote}

\textsuperscript{18} Frequently the court speaks in terms of "corrupt intent." In \textit{Jones v. Hammock}, 131 Fla. 321, 324, 179 So. 674, 675 (1937), the court stated:

This court has held that one of the requisites of a usurious transaction is that there must exist a corrupt intent to take more than the legal rate for the use of money loaned . . . and that usury is largely a matter of intent and is not fully determined by the fact of whether the lender actually gets more than the law permits, but whether there was a purpose in his mind to get more than the legal interest for the use of his money.

The element of intent is further discussed \textit{infra}, following note 67, under heading III A, "The Disappearance of the Intent Element."

\textsuperscript{19} 4 Fla. 404 (1852).

\textsuperscript{20} The Florida Supreme Court was quoting from the case of U.S. Bank v. Waggoner, 9 Peters 378, 399 (1835).

\textsuperscript{21} \textit{Ibid.}, supra note 19, at 407.
other elements. Logical as that might be, this article employs a different
tactic. It begins with an analysis of the cases in a chronological order with
an occasional reference to the statutory law in effect at the time of
decision. Following the case, the applicable statutes are examined, and
then the cases, particularly the recent ones, are appraised in the light of
the statutory language. The reader who desires to start with statutory
law may do so by turning a few pages.\textsuperscript{22}

B. The Less Recent Cases

The first reported Florida case dealing with the effect of an acceleration
clause on usury is \textit{Maxwell v. Jacksonville Loan & Improvement Co.}\textsuperscript{23} In this case there was a loan of 7,300 dollars with a ten year
amortized payback at seven percent yearly interest. The transaction was
clothed in the form of a deed by the borrower to the lender and a lease-
back of the property to the borrower. The terms of the lease provided for
a rental of $82.13 for 120 months. A separate agreement provided
for reconveyance of the property at the expiration of the lease. In addition
to the initial seven percent interest rate, a clause provided that any
default in the payment of a monthly installment would then begin to
accrue seven percent additional interest, and a ten percent fine was to be
imposed for each month the past due payments remained unpaid. The
facts also disclosed that, although the agreement called for an advance
to the borrower of 7,300 dollars and the interest was computed on that
basis, the borrower actually received only 6,570 dollars.

In addition to the other terms there was an acceleration clause pro-
viding that if there should be a default in the payment of three con-
secutive monthly installments, then the entire debt should become due,
payable, and collectible. In finding that the transaction was infected with
usury, the court stated:

In other words, under all the disguises of the language
employed, the complainant was really lending or advancing
money at the rate of ten percent per annum, with additional
liability to ten percent damages for default of payment of any
one of these monthly instalments, and with additional liability
of 7 percent additional interest on them from the default, and
with liability to have the whole debt mature if any three con-
secutive monthly payments were not made, with no provision in
the contract for eliminating unearned interest, etc., when precipi-
tated to maturity. The possible liability which the defendants
incurred, if these defaults were made for 120 months, amounts
to something like 75,000 dollars on a loan or advance of 6,570
dollars.\textsuperscript{24}

\textsuperscript{22} See \textit{infra} part III, particularly § B following note 77.
\textsuperscript{23} 45 Fla. 425, 34 So. 255 (1903).
\textsuperscript{24} Id. at 466, 34 So., at 268.
The facts in *Maxwell* were clear. There was a discount or prepayment of interest out of the principal. This has not been looked upon favorably by the courts. In addition to the discount, the penalties which could be imposed upon the borrower were rather extreme. But perhaps most important was the court's statement that usury in fact had been committed irrespective of contingencies and penalties. The court stated:

[T]here are two days of interest, even ten percent, embraced in these monthly installments, aggregating about $3.60 usury in the contract, and not depending on any contingency, and not being in the nature of a penalty or liquidated damages.

It must be recognized that at the time the *Maxwell* case was decided the usury statute did not provide the penalties that are now available. The only penalty then in effect was forfeiture of interest, which left the guilty lender in a position to recover his principal. In addition, the act of 1891 did not require the element of wilfulness as a requisite to the subjection of the penalty. The significance of *Maxwell* was, no doubt, due in part to the court having reasoned that the penalties and discount were, under Florida law, considered as interest in the determination of whether usury had been committed.

The next cases in point of time relating to the problem of acceleration

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25. The discount, or taking interest in advance, is patently usurious when interest is at the legal limit and part of the principal upon which the interest runs remains in the possession of the lender at the inception of the transaction. This is best illustrated by the case of Purvis v. Frink, 57 Fla. 519, 49 So. 1023 (1909). The borrower signed a note for $700 to be repaid in one year, with interest at 10 percent quarterly. The lender advanced $682.50, taking the first quarter's interest in advance. The transaction was held usurious. The lender charged $17.50 for quarterly interest on $682.50, and that exceeded the legal limit of 10 percent. Interestingly enough, the court did not employ the then recently adopted double forfeiture civil penalty but rather allowed the lender to recover the principal sum advanced. Supra note 23, 45 Fla., at 467, 34 So., at 269.

26. The *Maxwell* court was operating under the usury statute enacted in 1891. It provided only one penalty, which has been retained in the present statute but has not been applied. It provides for the forfeiture of all interest but allows the recovery of principal. See text following note 77 infra for the statutes.

27. The act of 1891 provided:

That it shall not be lawful for any person . . . to reserve, charge or take, for any loan or advance of money . . . a rate of interest greater than ten percentum per annum . . .

28. The act of 1891 provided:

It shall be usury and unlawful for any person . . . to reserve, charge or take for any loan or advance of money . . . a rate of interest greater than ten percent per annum . . .

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**FLA. STAT.** § 687.03 (1965) provides:

It shall be usury and unlawful for any person . . . to reserve, charge or take for any loan or advance of money . . . a rate of interest greater than ten percent per annum . . .

**FLA. STAT.** § 687.04 (1965) provides: "Any person wilfully violating the provisions of § 687.03 . . ." (Emphasis added.)

In commenting on the distinctions between the 1891 act and the 1909 revision which included the wilful concept, the court held in Coe v. Muller, 74 Fla. 399, 77 So. 88 (1917), that the act of 1891 was one which penalized all usurious contracts, whether the lender possessed wilfulness or not. The court then stated that: The act of 1909 repealed "all laws and parts of laws in conflict herewith," and contained no saving clause. This undoubtedly repealed that part of the act of 1891 which penalized usurious contracts, and by the use of the word "wilfully" before the words "violating the provisions" abolished the harsh rule of the act of 1891, and substituted therefor a more liberal one. (Emphasis added.)
and usury are Graham v. Fitts and Holman v. Hollis. For purposes of emphasis a discussion of these cases is postponed.

In Benson v. First Trust & Sav. Bank, the court was faced with a transaction which was usurious in its inception. The borrower had executed a note and mortgage in the amount of 14,000 dollars with interest at eight percent per annum. The borrower had received 11,500 dollars, 2,500 dollars being a bonus to the lender at the outset of the loan. The trial court found that the mortgagee had not charged or accepted interest in an amount equal to twenty-five percent yearly but that he did charge in excess of ten percent. The court thus held that the mortgagee should forfeit only the interest. On appeal the mortgagors contended that when the bonus was added to the interest over the period of the loan to the date of acceleration, the amount recovered would in effect be in excess of twenty-five percent per annum for the use of the money. In more specific terms, the borrowers would have to pay $3,962.22 for the use of 11,500 dollars for one year, three months, and twenty days.

The court refused to hold that the acceleration would require the proration of the bonus over the shortened period of the loan. They reasoned that under the criminal section of the statute the lender must "charge or accept" twenty-five percent or more "knowingly and willfully." The court stated:

To hold that the effect of an acceleration clause, coupled with the borrower's default, is to render the principal sum subject to forfeiture because the term of the loan is shortened, is to hold that by the same token the borrower by his own default has made his lender guilty of a crime which he would not otherwise be deemed to have committed.

The court affirmed the lower decision insofar as the interest forfeiture was concerned, thereby applying the least harsh penalty under the act. Apparently concerned with why the double interest forfeiture penalty should not have been employed, the mortgagors applied for a rehearing. On rehearing the court modified its original position and applied the double interest penalty as to the 2,500 dollars bonus which was reserved.

The sum and substance of the Benson case was in effect a resolution

29. 53 Fla. 1046, 43 So. 512 (1907).
30. 94 Fla. 614, 114 So. 254 (1927).
31. See text following note 63 infra.
32. 105 Fla. 135, 134 So. 493 (1931), modified, 105 Fla. 135, 142 So. 887 (1932), adhered to, 105 Fla. 135, 145 So. 182 (1932).
33. 105 Fla. 135, 144, 134 So. 493, 497 (1931). (Emphasis added.)
34. The least harsh penalty amounts to forfeiture of the interest but recovery of the principal. See infra § III B following note 77.
35. 105 Fla. 135, 142 So. 887 (1931). The facts also indicated that the borrower had paid $85 in interest at the time the suit was commenced. Accordingly this sum was doubled and forfeited as well, since the double interest civil penalty applies to reserved as well as paid usurious interest. See Fla. Stat. § 687.04 (1965), reprinted text following note 77 infra.
of several concepts: (1) the reservation of an advance bonus which results in the borrower receiving an amount which is less than the principal stated in the note generally results in usury as it is elemental that the computation of interest can only be made on the amount that is actually advanced; 36 (2) Where the bonus, when added to the interest, amounts to less than twenty-five percent over the entire period of the loan, but more than ten percent, it is proper to impose the double interest penalty; (3) Where a loan is accelerated under a state of facts as exist under (2), the fact that lender would receive an amount in excess of twenty-five percent by virtue of the shortened period over which the bonus could be computed does not automatically result in a finding of criminal usury. The imposition of the criminal penalty requires that the lender knowingly and willfully charge and accept an amount equal to twenty-five percent or more per annum, and the mere fact that the lender files suit upon exercise of the acceleration clause does not justify a finding that he has charged in excess of the twenty-five percent. This is especially true when the lender has not actually received any interest in excess of twenty-five percent.

The Benson case contained two important dissents. Justice Terrell dissented on the basis that the very act of filing suit was evidence of the intent to charge or accept knowingly and willfully an amount which would be in excess of twenty-five percent. 37 Justice Brown also dissented and stated:

The lender, having taken a contract giving it the right to accelerate the entire debt upon default . . . , and then subsequently, upon such default having deliberately exercised the option to accelerate the entire debt to maturity, and having filed its bill to foreclose for the full amount, at a time when the bonus retained and the interest provided in the contract together constituted more than 25 percent per annum upon the principal sum loaned, necessarily "charged" such prohibited sum. 38

These dissenting opinions have, in essence, become the law as evidenced by the later cases. 39

In point of time, Smith v. Midcoast Inv. Co. 40 must be next considered. In Smith there was a substantial bonus taken in advance and an

36. This is consistent with prior holdings. Wilson v. Conner, 106 Fla. 6, 142 So. 606 (1932); Purvis v. Frink, supra note 25.
37. This is made patently clear by the following statement, 105 Fla. 135, 159, 142 So. 887, 891 (1932), in the dissent:
   We think, therefore, that the transaction or contract challenged was usurious, and that, when appellee filed its bill to foreclose, and sought to enforce the payment of an amount of interest which, added to the bonus, made a sum in excess of 25 percent per annum of the amount actually loaned, it in effect "charged" the appellant with a sum in clear violation of section 4855, Rev. Gen. St. Florida. (the criminal usury statute which is now Fla. Stat. § 687.07 (1963)). (Emphasis added.)
38. 105 Fla. 135, 166, 142 So. 887, 893 (1932).
39. See text following notes 50 and 53 infra.
40. 127 Fla., 455, 173 So. 348 (1937).
acceleration before maturity.\textsuperscript{41} The court took the first Benson position, that in considering whether criminal usury has been involved, the court should consider the full length of the loan. However, the court continued, when an acceleration clause exists in a situation where the lender has taken a bonus or reserved interest and takes advantage of the acceleration, the amount of the bonus should be prorated only over the period of time the lender has elected to let the obligation run.

C. The Ayvas Rule

In Ayvas v. Green\textsuperscript{42} the lender had advanced $2,152.50, and the borrower signed a note for 2,700 dollars upon which six percent interest was to be paid over thirty-five months, the principal to be paid at the end of three years. The borrower defaulted in the first payment and the lender brought suit to foreclose pursuant to an acceleration provision. The trial court found that there was not sufficient proof to sustain a finding of usury and allowed the lender to foreclose. On appeal, the court took the position that if the note and mortgage had run to maturity the bonus plus interest would have exceeded ten percent but would have been less than twenty-five percent. The court then went on to say that the presence of the acceleration clause which could shorten the period of the loan did not give rise to a conclusive presumption that the lender "wilfully and knowingly" charged an amount equal to twenty-five percent. In effect the court held that in testing whether a loan is criminally usurious at its inception, the whole period of the loan is considered. If not criminally usurious at that point, but only civilly usurious, it will not necessarily become criminally usurious merely by the exercise of the acceleration clause, notwithstanding the language in Smith to the effect that if the acceleration clause were exercised the situation must be tested by the length of time the lender had allowed the obligation to run. The court made very clear that the lender in this case was not seeking to recover the full face value of the note, but only the amount actually lent. The court also made it clear that if the bonus were large enough so that the effect, even if prorated over the entire period, amounted to criminal usury, the transaction could not be purged of its vices by merely suing for the amount actually lent.

D. A Brief Resumé

A concise summary of the foregoing cases will be helpful to an understanding of the later developments. In Maxwell, there was a discount in advance, severe penalties which the court treated as interest under Florida law, and an attempt by the borrower to recover everything

\textsuperscript{41} Although all the facts in the case were not set forth in complete form, it is clear that the lender advanced $7,849.05 in return for the borrower's note the face amount of which was $10,000 bearing interest at 8 percent per annum.

\textsuperscript{42} 57 So.2d 30 (Fla. 1952).
he could upon default and acceleration. In addition, there was usury in the inception.\textsuperscript{43} The statute under which the case was decided did not provide that the lender must act wilfully.\textsuperscript{44}

In Benson, the court was faced with an admittedly usurious instrument.\textsuperscript{45} The lender had exacted a bonus. The court declined to find criminal usury by the exercise of the acceleration clause but did, on rehearing, impose the double forfeiture penalty. The first Benson opinion held that in testing for usury, interest is calculated over the entire period of the loan. However, on rehearing the opinion stated that the interest should be prorated over the actual period the loan had run.

In Smith, there was a substantial bonus,\textsuperscript{46} and the question was simply whether the bonus should be prorated over the full period or the accelerated period. The court took the position that in an unexercised case, the full period of the loan should be considered, whereas in a case where the acceleration clause was exercised, the bonus should be prorated over the actual period the lender allowed the obligation to run.

In Ayvas, there was usury in excess of ten percent by virtue of the bonus, but less than twenty-five percent if the loan had run to maturity. The borrower argued that on the basis of Smith, since the lender had accelerated, the computation should be made for the accelerated period, thus making the interest calculation in excess of twenty-five percent. The lender did not seek to recover the full amount on acceleration but only the actual principal loaned. In dismissing the applicability of the Smith rule the court stated:

[B]ut we are not persuaded that this rule should be applied to make criminally usurious that which was only civilly usurious in its inception and where the lender is not seeking to recover the full face value of the note, but only the amount actually loaned.\textsuperscript{47}

E. The More Recent Cases: Doctrine Extended

The most troublesome cases, ones which no doubt will require the greatest amount of explanation in the future, will be Home Credit Co. v. Brown\textsuperscript{48} and First Mortgage Co. v. Stellmon.\textsuperscript{49} The extension of pre-

\textsuperscript{43} See text accompanying note 26 supra.
\textsuperscript{44} Supra note 28.
\textsuperscript{45} The court stated at 105 Fla. 155, 134 So. 495:
By the exercise of the option to take advantage of the acceleration clause the complainant . . . has attempted to force the defendant to pay interest and what is termed a bonus combined in the sum of $3,962.22 for the use of, at most, $11,500 for a period of one year, three months, and twenty days.
\textsuperscript{46} Supra note 41.
\textsuperscript{47} Supra note 42, at 33.
\textsuperscript{48} 148 So.2d 257 (Fla. 1962).
\textsuperscript{49} 170 So.2d 302 (Fla. 2d Dist. 1964).
vious doctrine effectuated by these two cases is difficult to grasp unless a clear analysis of the earlier cases is kept firmly in mind.

In *Home Credit* a rather complicated transaction between the parties developed from a home improvement construction and the execution of "non-interest" bearing notes in an amount sufficient to cover interest for the entire period the notes were to run. The notes contained acceleration provisions which were invoked after default.

The district court of appeal held that the assignee of the notes could not avoid the consequences of usury by its willingness to reduce its claim to the principal indebtedness plus interest to date (as opposed to an election to sue for the full amount of the notes), when such willingness was not exhibited until after the trial was under way. The Supreme Court of Florida, although disagreeing with some of the lower court's reasoning, affirmed by discharging the writ of certiorari.

According to the supreme court, computations under the usury law must be based on a determination of the scope of acceleration rights which a note or contract purports to give a lender or holder, not upon the sums actually claimed by him. The vice of usury is said to be that which inheres in the agreement of the parties itself. The results of an exercise of an acceleration clause must be evaluated under the literal terms of the contract whether or not the plaintiff seeks recovery of all the sums.

The court added, however, that the presence of the acceleration clause contingent on default did not alone warrant a finding of usury at the inception of the transaction. Furthermore, in testing the results of the exercise of the option to accelerate, the reserved interest must be calculated as payment for the use of the borrowed money until the acceleration option becomes effective by the entry of the decree. Note that the significant date is not the time of the election to accelerate, nor the filing of suit, but the entry of the decree.

The effect of this case would seem to be that where the face value of the note is enlarged to include the total amount of interest accruing over the period of the loan, the agreement is not per se usurious, even when it provides for acceleration on default. If, however, the lender elects to accelerate, even if he does not seek all unearned interest, the effect so far as usury is concerned is the same as if he did, but the period will be measured not from the time of acceleration but from the entry of the decree.

50. The summary of this case is essentially the same as found in Boyer & Ross, *Survey of Real Property Law*, 18 U. MIAMI L. REV. 799, 843 (1964), but the footnote numbering has been changed. Very similar to Home Credit on the facts, and following that decision to the same result is Gordon v. West Fla. Enterprises of Pensacola, Inc., 177 So.2d 859 (Fla. 1st Dist. 1965).


In the *First Mortgage* case\textsuperscript{53} the court was faced with a note and mortgage which, on its face, reflected that the principal sum of $20,320 dollars was to be repaid in monthly installments of $167.65 over a ten year period. The lenders had advanced $12,700 dollars and had computed the interest over the ten year period and included the interest in the face amount of the non interest bearing note. The parties stipulated that if the note had run to maturity the lender would have received slightly less than ten percent per annum. An acceleration clause in the note and mortgage contained language to the effect that if default occurred in any installment, the entire sum in the note or the unpaid remaining balance would become payable at the option of the holder. Upon default in the payment of some of the installments, the lender sought to foreclose only on those payments in default, subject to the remaining unmatured installments. The trial court found that the note was civilly usurious on the ground that it contained an acceleration clause which did not provide for the elimination of unearned interest in the installments which were precipitated to maturity in the event of default. The court then applied the double interest penalty; the result was extinguishment of the debt.

On appeal, the second district affirmed. Within the affirmance, it is submitted that the court extended a concept which was never intended to have application to a set of facts involving no usury but for the acceleration clause. The court reviewed the cases of *Maxwell*, *Benson*, *Smith*, *Aywas*, and *Home Credit*, and in the final analysis, took the position that:

> It is admitted that the obligation in the case under consideration, if it had run to maturity, would have carried slightly less than ten per centum interest per annum. The lender did not elect to exercise the option to accelerate the entire amount due, but sought only to foreclose upon the past due installments.\textsuperscript{54}

The court then proceeded to narrow its precise problem in the form of a question posed as follows:

> Does the rule in Benson, as stated in Home Credit Company, have any application to these facts? While the declination of the appellee to exercise the acceleration option in the instant case, distinguishes it from the facts in Benson and Home Credit Company, in a material aspect, the rule may have its place in the answer.\textsuperscript{55}

The answer was a quote from *Shorr v. Skafte*\textsuperscript{56} to the effect that:

\begin{itemize}
\item \textsuperscript{53} Supra note 49.
\item \textsuperscript{54} 170 So.2d, at 310.
\item \textsuperscript{55} Ibid.
\item \textsuperscript{56} 90 So.2d 604 (Fla. 1956). In *Shorr* the court was faced with a situation where a lender had advanced $5,000 in return for a note which was non interest bearing having a face amount of $6,000. The length of the loan was to have been 6 months. The court refused to accept the plaintiff's argument that the interest of $1,000 was not for six months but in reality was far in excess of six months as several extensions were made. The plaintiff argued that the interest of $1,000 should be prorated over the period until suit was brought to determine the rate of interest. The court would not accept this argument stating: "We
We cannot agree that a contract usurious in its inception can be purged of its vices by mere delay in its enforcement.\(^{57}\)

The court then went on to say that:

Declining to exercise the acceleration option as we see it, is in the same category as delaying to enforce the obligation. In both instances it may be a device to avoid the penalties attendant upon usury.\(^{68}\)

**F. A Critique**

An attempt will now be made to place this court's rationale in its proper perspective. The *Benson* rule as restated in *Home Credit* is found in the following language:

[W]e find no persuasive reason for abandoning the actual rule of the *Benson* case by which reserved interest is prorated over the period of time for which the *lender has elected to allow the obligation* to run, to the date when his right to payment is legally determined by court decree whenever suit has become necessary.\(^{59}\)

It must be noted at the outset that the reserved interest in the *Benson* case was interest which, at the inception of the transaction, was in the possession of the lender. When the acceleration clause was exercised, the effect was to call in a note upon which interest had already been paid and which had been in fact, retained by the lender. When the lender called the loan by exercising the acceleration clause, it had the obvious effect of shortening the length of time the principal would remain at the disposal of the borrower. Accordingly, it is not unreasonable to prorate the interest taken at the beginning of the loan over that period of time the *lender had elected to allow the obligation to run*. However, it is submitted that there is a world of difference between the *Benson* situation and *First Mortgage*. In *First Mortgage* the lender had advanced all the funds upon which interest would run. The only reservation of interest in the transaction was the inclusion in the face amount of the note of the interest for the entire period, admittedly less than ten percent per annum.

cannot agree that a contract usurious at its inception can be purged of its vices by mere delay in its enforcement." The note stated on its face that it would come due in six months. This would have made the $1,000 charged as interest amount to 40 percent.\(^{57}\) *Id.* at 606. It is reiterated, however, that the contract in *First Mortgage* was not usurious in its inception if the acceleration clause and possible default of the borrower were disregarded. (Emphasis added.)

\(^{58}\) *Supra* note 49, at 310. The court's equating of delay in the *Shorr* case with failure to exercise the acceleration clause in *First Mortgage* is the basic flaw in the analysis. In *Shorr* there was usury at the inception ($1,000 interest for $5,000 loan for six months). The *Shorr* court correctly held that mere delay would not cure the usury that was evident at the inception. However, in *First Mortgage* there was no computational usury at the inception of the transaction. In fact the only way there could be usury would be upon exercise of the acceleration clause and in fact *recovery* of the unearned interest.

\(^{59}\) *Supra* note 48, at 260.
Stated in example, the Benson case represented a situation whereby a lender agreed to advance 1,000 dollars for one year at ten percent. He advances 900 dollars to the borrower and requires a note to be signed, the face amount of which is 1,000 dollars with interest at X percent. In this situation it is usurious in the inception without any acceleration clause. With the injection of the acceleration clause into the picture, the computations must be made on the length of time the funds are in the hands of the borrower. Thus, if after six months the lender exercises the clause upon the borrower's default, the effect is to increase the percentage rate of interest applicable to the prepaid 100 dollar charge over the contemplated period of the loan because of the shortened length of time the principal is outstanding.

In the First Mortgage case, the lender advanced the 1,000 dollars and had the borrower sign a non interest bearing note, the face amount of which was 1,100 dollars. Without an acceleration clause there was no possibility of usury. Injection of the presence of an acceleration clause would not change anything. If the default of the borrower enabled the lender to call the note, the only way there would be any possibility of receiving interest in excess of ten percent would be if the lender sought to and could in fact recover the face amount of the note. For then we would be in the same position as the Benson case, with the interest for the entire period possibly being prorated over a shorter period of time. Without the exercise of the acceleration clause, coupled with the fact that the lender could collect the face amount of the note, there is no possibility of usury.

The fact of the matter is, that the court has formulated a rule which makes usurious the mere presence of an acceleration clause which does not expressly state that on default and acceleration the unearned interest shall not be collectible. Not only is it usurious, but it is criminally usurious if the recalculated interest rate equals or exceeds twenty-five percent. This is the result although the lender does not seek to accelerate at any particular time during the transaction as the court will have to assume that he could have; it is this feature which is especially invidious.

The extension that is worked thereby is only clear when we note that the reasoning of Benson, restated and applied in Home Credit, was applied to a situation where no usury existed but for the acceleration concepts which had heretofore been applied only to cases where there was usury in fact without consideration of the acceleration clause or its exercise. It is one thing to consider the acceleration clause in determining the amount of usury for purposes of imposing the civil or criminal penalty after usury of some kind is found exclusive of the acceleration clause. It is quite another thing to use the acceleration clause to determine usury in the first instance. Even here, however, the use may be justified in cases involving a bonus or advanced reservation of interest,⁶⁰ that is, in cases

⁶⁰ The problem of the statutory meaning of reservation of interest is discussed in text following note 78 infra.
where the interest has in fact been paid, and the creditor has in fact accelerated\(^6\) so that the debtor has had use of the money, already paid for, (at least in part), over a shortened length of time.

It must be emphasized that the facts of First Mortgage were not only devoid of any advance interest retained by the borrower, but the lender never exercised the option to accelerate. In this situation the case is not only different in a material respect as the court indicated,\(^6\) but there was no call for the application of rules appropriate to those cases where either usury is present in the inception or where the lender seeks to recover the full amount of the note before actual maturity.

In point of fact, the rule which should have been applied, a rule whose origin is closer to the facts of First Mortgage than any other case cited in the opinion, is the rule of Graham v. Fitts.\(^6\) In Graham the principal note was accompanied by coupon notes for interest payable semi-annually over the life of the loan. An acceleration clause in the mortgage provided:

\[
\text{[I]f default be made in the payment of any interest note, or any portion thereof, for the space of ten days after same becomes due and payable, then all said principal and interest shall, at the option of ... the legal holder hereof, become due and payable without further notice.}\]

The complaint sought recovery of “all interest and principal due and owing to him.” The court distinguished the Maxwell case contending that in Maxwell the court was faced with amounts in excess of the legal rate of interest on default of interest payments whereas the present case did not involve any such excess.

In construing the effect of the acceleration clause, the court stated that the acceleration clause as written in the note,

\[
\ldots\text{has reference to the amount of the principal note and the interest due thereon [at the time the option is acted on], and does not refer to interest that would accrue subsequent to such time if no action were taken on the option.}\]

In reality the court read the acceleration clause as not contemplating the

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61. In Home Credit it is possible that the supreme court concluded that this set of facts applied since it spoke of reserved interest and the creditor did accelerate. See the excerpt text accompanying note 77 infra. In accord with Home Credit on facts essentially the same is Gordon v. West Fla. Enterprises of Pensacola, Inc., 177 So.2d 859 (Fla. 1st Dist. 1965). The applicability of “reserved interest” to the Home Credit situation is questioned in text following note 80 infra.

62. See the quotation in the text accompanying note 55 supra.

63. 53 Fla. 1046, 43 So. 512, (1907).

64. Supra note 63, 53 Fla., at 1054, 43 So., at 513. The clause in Graham could have been interpreted as requiring that on default the interest contained in all the notes would become due and payable.

65. Ibid.
recovery of all the interest coupons on default. This construction has had widespread application in other jurisdictions and is a common method utilized to avoid finding usury when an acceleration clause does not provide that in the event of default only accrued interest shall be recoverable.66

It is clear that the Graham case is factually closer to First Mortgage than any of the cases discussed or cited by the court. Graham was concerned with the possibility of collecting unearned interest upon acceleration when there was no usury otherwise involved. The case is still cited for the general proposition that unearned interest cannot be collected upon default and acceleration notwithstanding that the note provides "all said principal and interest" shall be due and payable. Similarly, the court in Holman v. Holliss67 held that an acceleration clause, providing that "the whole debt" shall become due and payable on disposition of the property by the mortgagor, will not be enforced except upon cancellation of the unearned interest. The court indicated that any other rule yields the unconscionable result that the lender recovers interest for a period of time in excess of the repayment period. If in fact a court will not allow recovery of unearned interest even if it were attempted to be collected, how then can the same court say that the potentiality that it could be collected is the vice that permeates the transaction and renders it void?

The First Mortgage case would have been closer to the facts of the

66. Armstrong v. Alliance Trust Co., 88 F.2d 449 (5th Cir. 1937); Mathews v. State Sav. Ass'n, 132 Ark. 219, 200 S.W. 130 (1918), the stipulation provided that upon default, the creditor could proceed to enforce the loan "with interest thereon"; Lyle v. Mandeville Mills, 68 Ga. App. 88, 22 S.E.2d 186 (1942), holding that adding the interest on to the principal amount in the face of the note is not usurious when accelerated because recovery would be limited to accrued interest; Easton v. Butterfield Live Stock Co., 48 Idaho 153, 279 Pac. 716 (1929); Hurt v. Crystal Ice & Cold Storage Co., 215 Ky. 739, 286 S.W. 1055 (1926); Tobin v. Holmboe, 172 Okla. 546, 54 F.2d 716 (1935); Long Realty Co. v. Breedin, 175 S.C. 233, 179 S.E 47 (1935); Dugan v. Lewis, 79 Tex. 246, 14 S.W. 1024 (1890); Mathis v. Holland Furnace Co., 109 Utah 449, 166 P.2d 518 (1946); Cissna Loan Co. v. Gawley, 87 Wash. 438, 151 Pac. 792 (1915).

67. 94 Fla. 614, 114 So. 254 (1927).
Graham case had there been a series of notes aggregating the combined principal and interest payable over the ten year period with each installment note providing that upon default all of said principal and interest would become due. In such event, (as it seems likely if the result would have been the same as that of the Graham case, or if the Holman rule of uncollectibility of unearned interest were applied), it is submitted that First Mortgage is analytically fallacious and generally erroneous.

III. STATUTORY CONSTITUENTS

A. The Disappearance of the Intent Element

One of the most fascinating aspects not only of First Mortgage but of Home Credit as well, is the seeming disregard of the intent element. In both cases the court was so concerned with the computations involving the acceleration clause that it lost sight of the overall picture. In Home Credit the trial court found that there was usury, but applied only forfeiture of interest, allowing recovery of the principal. On appeal the second district reversed, finding that the transaction was criminally usurious for two reasons: (1) That under Shorr v. Skafte "the acceleration clauses rendered the instant transaction criminally usurious at its inception" or (2) "[T]hat even if not, however, it became so under the proscription set out in the quoted portions of Ayvas v. Green . . . when Home Credit sought to recover the full face value of the two notes as exhibited by the face of its complaint."

The court's conclusion based on Shorr was prefaced by the statement that: "Said Clauses (in Home Credit) rendered the transaction usurious at its inception and Home Credit being practiced in the lending profession, can be held to have known and intended the usurious consequences resulting from early default." The alternative holding was that the Ayvas case indicated that the Smith rule would apply in a case where the lender sought to recover the face amount of the loan. However, the Ayvas case established only that a loan which was civilly usurious would not become criminally usurious on acceleration where the lender did not seek to recover the full face value of the loan.

Home Credit is also interesting from the standpoint of the respective roles of the trial and appellate courts in the determination of facts. The case stated the rule that the function of the trial court was to evaluate the

68. In Holman v. Hollis, ibid, it is stated that there is no difference in the principle involved in the law applicable to a case where the notes are made, one note for principal and a separate note for interest, and in a case where one note is made for principal plus interest to maturity date.
69. Supra note 56.
70. 137 So.2d 887, 893 (Fla. 2d Dist. 1962).
71. Ibid.
72. Supra note 70 at 892.
73. See text following note 42 supra.
facts and determine whether there was usury, and that an appellate court should not seek to re-evaluate those facts, and continued, "So do we hold in this case insofar as the question of intent to commit usury is concerned." However, the court then took a finding of the trial court that there was usury but which applied only the penalty for civil usury, and decided that there was criminal usury. To find criminal usury it is necessary to find that the lender acted not only wilfully, but "wilfully and knowingly." The appellate court decided the case of intent under criminal usury by merely stating that the lender should have known, citing a case in which the facts indicated that in its inception the trans-
action was criminally usurious.

The Supreme Court of Florida on conflict certiorari affirmed. The court readily distinguished the Shorr case upon which the lower appellate court relied as one basis for its decision. As to the alternative holding of the appellate court, dealing with the fact that the transaction became criminally usurious when Home Credit sought to recover the full face value of the notes, the court indicated that the language in Ayvas could not be given that controlling effect. The rule which was applied by the supreme court was stated as follows:

We hold in sum, that the presence of the acceleration option contingent upon default did not alone warrant a finding of usury in the inception of the transaction here involved, and that in testing the results of its exercise the reserved interest must be calculated as payment for the use of the actual outstanding principal sum until the acceleration option became effective by entry of a decree thereon on May 11, 1961. Upon application of this rule to the facts at bar, set forth in the opinion below, we conclude that the resulting rate of interest nevertheless exceeded 25 percent and the ultimate disposition of the cause in the district court by forfeiture of principal and interest under Sec. 687.07, supra, was proper.

The absence of a discussion of the necessity under section 687.07 for the lender to have acted wilfully and knowingly was conspicuously ab-

74. Supra note 70, at 891.
76. 148 So.2d 257 (Fla. 1962). The supreme court stated that jurisdiction was satisfied under Fla. Const. art. V, § 4, by virtue of the Benson and Ayvas cases being decided contrary to the decision rendered by the second district in the instant case.
77. The court stated, 148 So.2d, at 258, that:
The case of Shorr v. Shafte (sic) . . . was cited below in support of the conclusion that the acceleration clauses rendered the instant transaction criminally usurious at its inception. That case adjudicates the point that willfulness may, in the absence of contrary evidence, be inherent in the act of contracting for an excessive return. There was presented no problem of intervening contingency without which the excess could not become payable. (Emphasis added.)
78. Supra note 76, at 260. (Emphasis added.)
B. What is a Reservation of Interest?

The usury statutes in Florida are threefold in nature. Section 687.03, Florida Statutes provides:

It shall be usury and unlawful for any person . . . to reserve, charge, or take for any loan, or for any advance of money, or for forbearance to enforce the collection of any sum of money . . . a rate of interest greater than ten percent per annum, either directly or indirectly, by way of commission for advances, discounts, exchange, or by any contract, contrivance or device whatever, whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received, together with interest at the rate of ten percent; . . .

Section 687.04 provides the civil penalties for violation of Section 687.03:

Any person wilfully violating the provisions of § 687.03 shall forfeit the entire interest so charged, or contracted to be charged or reserved, and only the actual principal sum of such usurious contract can be enforced in any court in this state either at law or in equity; . . .

Section 687.04 then goes on to provide:

And when said unsurious interest is taken or reserved, or has been paid, then and in that event the person, who has taken or reserved, or has been paid, either directly or indirectly, such usurious interest, shall forfeit to the party from whom such usurious interest has been reserved, taken or exacted in any way, double the amount of interest so reserved, taken or exacted; . . .

The criminal usury provision is contained in Section 687.07:

Any person . . . who shall wilfully and knowingly charge or accept any sum of money greater than the sum of money loaned, and an additional sum of money equal to twenty-five percent per annum upon the principal sum loaned, by any contract, contrivance or device whatever, directly or indirectly, by way of commissions, discount, exchange, interest, pretended sale of any article . . . or for forbearing to enforce the collection of such moneys or otherwise, shall forfeit the entire sum, both the principal and interest, to the party charged such usurious interest, and shall be deemed guilty of a misdemeanor, . . .

From these statutes, it is immediately apparent that there are actually three penalties which may be imposed upon a usurer. The first, and least severe, is the forfeiture of interest only, allowing the recovery of the principal.

Prior to the act of 1909, the only penalty for violation of the usury
laws was forfeiture of interest only,79 the usurer being entitled to recover the principal sum advanced. This was true notwithstanding the amount of usury involved. With the advent of the 1909 act and the introduction of the second penalty, viz., double interest forfeiture, the courts had great difficulty in attempting to apply the less severe penalty.80 In fact the courts have not sought to distinguish between the civil penalties, but have simply taken the position that any time the interest rate is in excess of ten percent but less than twenty-five percent the penalty is double interest forfeiture. It is submitted that a real distinction exists between the proscriptions and the civil penalties that are to be imposed for their violation. The first portion of Section 687.04 seems to indicate that any wilful violation of Section 687.03 will result in forfeiture of interest. However, the double forfeiture interest provision in Section 687.04 seems to apply only in cases where the usury has passed the mere contracting stage and the lender has actually received at least some portion of the usurious interest.

This distinction has significance in our discussion of the Home Credit and First Mortgage cases. The obvious question at the outset of any discussion must necessarily focus upon what is meant by the word “reserved.” There is no affirmative indication of a precise legal definition of the word.81 The concept of reserved interest would appear, however, to at least encompass a situation in which a lender withholds as an interest payment a certain amount of the principal which he agreed to lend. Where this advance reservation of interest is in the form of a discount, the lender has possession of the prepaid interest at once.

The discount or prepaid interest situation, although prima facie similar, is distinguishable from the “add on” transaction. In the “add on” transaction the interest which will accrue over the period of the loan is included in a non interest bearing note. In such a case the borrower receives possession of the actual amount upon which interest is calculated. The difference is that although the face amount of the note represents principal and interest, and thus in a sense could be said to include a reservation of interest, it is not the same kind of reservation in the sense of the lender holding back a portion of the principal being advanced. The statutory provision with respect to double interest forfeiture seems to speak in terms of taking or reserving in a past tense, not a taking or

79. See textual discussion accompanying note 27 supra.
80. The first and second Benson case is an excellent example of this point. In the first opinion rendered, 105 Fla. 135, 134 So. 493 (1931), the court affirmed insofar as the lower court had declared forfeiture of the interest and allowed principal recovery only. However, on rehearing the court modified the original position, reversed and remanded for purposes of imposing the double interest forfeiture penalty. 105 Fla. 150, 142 So. 887 (1932), adhered to, 105 Fla. 168, 145 So. 182 (1932). See also text following note 32 supra.
81. Reserve is defined as “To keep back, to retain, to keep in store for future or special use, and to retain or hold over to a future time.” BLACK, LAW DICTIONARY 1473 (4th ed. 1951).
reserving in the context of adding on interest as was the case in *Home Credit* or *First Mortgage*. In fact, all the cases prior to *Home Credit*, involved a reservation by the lender in the context of a *discount in advance* taken from the principal as expressed in the note.

Admittedly, in both situations there is a fictitious principal. In the discount situation the lender may receive 900 dollars for a principal amount of 1,000 dollars as expressed in the note. But every discount case dealing with the problem also indicated that there was a provision for interest running on the fictitious principal in the note. The invidious nature of this transaction is obvious. The note could be sold to a holder in due course who would have no way of knowing that the lender had advanced only the smaller sum. This point and policy were raised in the briefs of the appellee in *First Mortgage* but was never discussed by the court. Although in the add on note the facts may be similar from the standpoint of a good faith purchaser not knowing what amount was actually advanced to the borrower, the fact remains that no interest is running on the face amount of the loan. The absence of any interest on the face of a note being repaid in monthly installments should indicate to a purchaser that interest is included. If it does not indicate the fact of included interest, at least it should indicate that the possibility exists, and the burden should then be on the purchaser to check and ascertain if the interest is in excess of the amount allowed by law. Thus, from the aspect of the probability of the note being transferred to a holder in due course, there remains a real distinction between the discount and add on types of reservation of interest.

C. What Penalty?

As indicated earlier, the cases prior to *Home Credit* all involved transactions where the reservation of interest in advance was retained by the lender. Reverting to the language of the double interest forfeiture provisions, there is no difficulty in saying that the amount retained should be doubled and forfeited. In fact, what happened in *Benson* was that the 2,500 dollars retained by the lender was doubled and forfeited in addition to 85 dollars also paid as interest. These sums were the only interest that was paid by the borrower until the time of the suit. No interest beyond that was doubled or forfeited. However, in *Home Credit* and *First Mortgage* the court not only doubled and forfeited the interest paid

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82. In *Maxwell* the lender advanced $6,570 and the borrower signed a note for $7,300; in *Benson* the lender advanced $11,500 and the borrower signed a note for $14,000; in *Smith* the lender advanced $7,849.05 and the borrower signed a note for $10,000; and in *Ayvas* the lender advanced $2,152.50 and the borrower signed a note for $2,700.

83. In *Maxwell* the note bore 7 percent interest on the fictitious principal; in *Benson* the note bore 8 percent interest on the fictitious principal; in *Smith* the note bore 8 percent interest on the fictitious principal; and in *Ayvas*, the note bore 6 percent interest on the fictitious principal.

84. *Supra* note 82.
by the borrower to date, but also required a double forfeiture of all interest included in the note, most of which the lender never received.\(^{85}\) The forfeiture, however, was limited so as not to exceed an amount necessary to effect a cancellation of the indebtedness and mortgage. This was predicated on the notion that the penalty for criminal usury, forfeiture of both interest and principal, was intended to be the most severe penalty. The court, incidentally, also concluded that the lender in both cases was guilty of criminal usury. The answer to which penalties should be applied in the discount situations is well settled.\(^{86}\) The effect of this rule can best be seen by example. Assuming a note for 1,000 dollars was executed to carry interest at ten percent for three years, interest payable semiannually, and at the inception of the transaction the borrower received $900 and further assuming that the borrower made an interest payment of fifty dollars after six months had passed, the following would result as a consequence of the usury. The 100 dollars advanced would be doubled and forfeited as well as the 50 dollar payment that was accepted. So, in actuality the lender would only be entitled to 600 dollars (the difference between the amount actually advanced [900 dollars], and the doubled interest penalty for the 100 dollars reserved and the 50 dollars accepted.)

Logically, it would seem that a similar rule of forfeiture should apply in the situation where the interest is not retained by the lender in advance as a discount, but is merely added to the face amount of the note payable in equal installments. If this were done, then the only portion the lender receives as interest would be the amount included as interest in each installment payment made to the date of default. Thus, that figure should be doubled as was done with the 50 dollars in the discount hypothetical. What about the remaining interest that has not as yet been received or accepted by the borrower but which is also included in the note? Should it be doubled and forfeited, or otherwise computed in determining criminal usury? If the lender attempts to recover the amount in the face amount of the note, it might be considered not unduly harsh to double and forfeit it, or take it into consideration in determining criminal usury. This is what happened in the Home Credit case.\(^{87}\)

But should the interest be doubled and forfeited or considered over the shortened period for criminal purposes in a situation where the lender

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85. In the add-on situation the interest is computed over the life of the loan and is included in the face amount of the note. However, the lender never receives the interest in toto until all the installment payments are made. Gordon v. West Fla. Enterprises of Pensacola, Inc., 177 So. 2d 859 (Fla. 1st Dist. 1965), on facts similar to Home Credit, imposed double forfeiture of interest not exceeding cancellation of the debt. The recalculated interest was civilly usurious but not criminally so.

86. Maxwell v. Smith, 119 Fla. 389, 161 So. 566 (1935); Ross v. Atlas Fin. Corp., 113 Fla. 793, 152 So. 410 (1934); Ceraola v. Smith, 112 Fla. 399, 150 So. 611 (1933); Sherman v. Myers, 108 Fla. 129, 146 So. 213 (1933); Wilson v. Conner, 106 Fla. 6, 142 So. 606 (1932); Hazan v. Neeb, 105 Fla. 297, 140 So. 916 (1932); Benson v. First Trust & Sav. Bank, 105 Fla. 135, 134 So. 493 (1931).

never seeks to recover it? The court's answer in *First Mortgage* was "yes." It is submitted that the very language of the portion of the statute providing for double interest forfeiture indicates that it should only be done where the lender has "taken or reserved or has been paid" the usury. Thus, the effect of *First Mortgage* is to hold that the addition of principal and interest in the note is enough of a taking or reservation to warrant the double forfeiture penalty. This seems incongruous in view of the fact that the lender would not be permitted to recover the unearned interest either in equity or at law on the basis that to allow such a recovery would be unconscionable. It is submitted that the more unconscionable lender is the one who has exacted the interest in advance by reducing the principal, and that if he is allowed to suffer only double the amount he has exacted at the outset, plus interest paid to date, then the lender who has not reduced the principal at inception, but merely included interest in the amount of the note, should suffer no greater penalty. As to criminal usury, the lender must wilfully and knowingly charge or accept such sum of interest. If the contract is not usurious at all but for the acceleration clause, and the lender has not sought to recover such interest, can it be truthfully said that he has charged or accepted such sum?

In logic, consistent with the image of the unconscionable money lender, the *First Mortgage* case may be considered sound. It might be argued that the very nature of the transaction is a facade, and that if on default the lender sought to recover the face amount of the note, it could be recovered. This is only partially true, however, as any such attempt could be defeated immediately by the defense of usury or even by disallowing the claim for unearned interest. Of course, usury is an affirmative defense and may be waived.) Should the borrower pay the face amount of the loan without forcing the lender to bring suit, the borrower is still not without a remedy as usury can be the basis of an affirmative cause of action after it has been paid.

**IV. CONCLUSION**

Throughout this paper comments have been made on the included cases. For the most part these comments will not be repeated or further

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88. *Supra* note 42.
89. Dezell v. King, 91 So.2d 624 (Fla. 1956). In Young v. Wilder, 77 So.2d 604 (Fla. 1955) the Supreme Court of Florida when considering the question of a cause of action for the borrower under the usury statutes stated at 605:

> At this point it is not amiss to point out that plaintiff's grounded their prayer for affirmative relief on Sections 687.03, 687.04, and 687.07 F.S.A. The substance of these statutes require that any person who willfully violates Section 687.04 (sic) shall forfeit the entire interest charged. Any person who willfully violates Section 687.07 shall forfeit the entire sum loaned, both principal and interest. That these statutes provide for a forfeiture there can be no question and that recovery of such a forfeiture by way of an action for affirmative relief may be brought within the contemplation of Section 95.11(6) F.S.A. is not beyond the bounds of reason. (Emphasis added.)
labored. There remains, however, the task of formulating a value judgment as to the propriety of the decisions or the desirability of a particular solution when the problem involves usury and acceleration. Of the decisions herein examined, the most challenging one from the viewpoint of an attempt at rational justification is *First Mortgage Corp. v. Stellmon*. For convenience and emphasis the facts are briefly reviewed.

In *First Mortgage* interest was computed on the actual sum the borrower received. The rate of the interest if no default occurred would never have been in excess of ten percent yearly. The interest was then added to the actual sum advanced; and the total was divided into equal monthly payments of principal and interest. The face amount of the note never bore interest on a fictitious amount of principal. Thus, the installments which were prorated over the life of the loan contained a fixed interest charge that remained constant. In the early portions of the loan, the interest in relation to the principal outstanding was at a far lower rate than would be true later on. So, in effect, if the arrangement were accelerated at an early date, and unearned interest not allowed to be recovered, the lender would be receiving less in the way of effective interest than in the later years after a substantial return of principal had taken place. On default, the lender only sought to recover the principal and interest accrued to date, not the face amount of the note.

In determining whether an instrument is usurious in the inception, the mathematical computations should be made taking into consideration the good faith of the parties and the intention to allow the obligation to run to maturity.\(^9\) This was the position taken in *Benson*, where the court could not justify a finding that the effect of an acceleration clause which became operative because of the borrowers' default should operate to make the lender guilty of a crime.\(^9\) In *Ayvas*, the court struggled with the acceleration problem and decided that it should not operate to make criminally usurious that which was civilly usurious at its inception absent exercise of the clause and a lender taking advantage of it. It is submitted that an acceleration clause should not render usurious that which was never usurious simply because of the possibility of recovering a windfall sum upon acceleration. The failure of the lender to exercise and demand unearned interest is evidence of the good faith of the lender in not seeking to recover more than the law will allow. This should be the test. If acceleration occurs and the lender seeks recovery of the unearned interest, such attempt may be prima facie evidence of intent to recover more by the exercise of an acceleration clause that would allow such recovery. But absent such an affirmative act, the failure specifically to

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90. The courts have held that the contract begins with an assumption that it is entered into for lawful purposes, Diversified Enterprises, Inc. v. West, 141 So.2d 27 (Fla. 2d Dist. 1962), and that when criminal usury is alleged it must clearly show an intent to evade the usury laws. Indian Lake Estates, Inc. v. Special Invs., Inc., 154 So.2d 883 (Fla. 1963).

91. See text accompanying note 33 supra.
provide that unearned interest could not be recovered should never act as conclusive evidence that the lender at the inception of the transaction had the necessary corrupt intent\textsuperscript{92} so as to warrant the imposition of the civil or criminal usury penalties.

92. In Jones v. Hammock, 131 Fla. 321, 324, 179 So. 674, 675 (1937), the court stated: This court has held that one of the requisites of a usurious transaction is that there must exist a corrupt intent to take more than the legal rate for the use of money loaned. . . . (Emphasis added.)