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Evasion and Avoidance of Florida Usury Laws

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COMMENT

EVASION AND AVOIDANCE OF FLORIDA USURY LAWS

Where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute.—Lord Mansfield, *Floyer v. Edwards*, 1 Cowp. 112 (1774).

Contrary to its desire to attract capital to aid the development of the natural resources of our state, the Florida Legislature has long maintained an arbitrary market rate of interest,[1] disregarding the various risk factors of different types of loans. The investor who sought compensation commensurate with the risk employed various devices to evade or avoid the statute's penalties and forfeitures.

An evasion is a violation of the law; an avoidance is a lawful act which does not come within the proscription of the statute, yet accomplishes the same end as the former. The difference in any given situation is often one of fact and the pre-trial *avoidance* may be viewed as an *evasion* or *vice-versa* by the trier of fact whose findings are not reversible unless clearly erroneous.[2]

While the Florida Supreme Court itself sometimes has difficulty in distinguishing an evasion from an avoidance[3] the reported cases indicate a fairly clear line of demarcation. It is the purpose of this article to describe the coordinates of that line so that the investor may feel more secure in his transactions in our state.

The Statute

Where interest accrues without special contract, the rate is set by statute at 6% per annum with the right to contract in writing for a lesser or greater rate.[4]

The statute describes as usurious any agreement whereby more than 10% per annum is reserved, taken, or required to be paid for the loan or

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1. Fla. Stat. c. 687 (1949).

2. Hawley v. Kendall, 139 Fla. 850, 191 So. 10 (1939); Smith v. Midcoast Inv. Co., 127 Fla. 455, 173 So. 348 (1937); Beacham v. Carr, 122 Fla. 736, 166 So. 456 (1936); Benton v. Wilkins, 118 Fla. 491, 159 So. 518 (1935); Corsentina v. McPherson, 111 Fla. 616, 150 So. 609 (1933).

3. Magee v. Crown Corp., 151 Fla. 422, 10 So.2d 818 (1942) (argued four times: at hearing, rehearing, petition for reconsideration and reconsideration); Beach v. Kirk, 138 Fla. 80, 189 So. 263 (1939) (court split on first hearing and reversed on rehearing); Jones v. Hammock, 131 Fla. 321, 179 So. 674 (1937) (Justice Buford dissented); Richter Jewelry Co. v. Schweinert, 125 Fla. 199, 169 So. 750 (1936) (Chancellor's findings affirmed because court split 3-3); Corsentina v. McPherson, *supra* note 2; Benson v. First Trust & Sav. Bank, 105 Fla. 135, 134 So. 493 (1931), *modified*, 105 Fla. 135, 150, 142 So. 887, 888 (1932), *adhered to*, 105 Fla. 135, 168, 145 So. 182 (1932).

4. Fla. Stat. § 687.01 (1949).

forbearance of money.[5] Future payments of interest are not enforceable[6] and double the amount of interest reserved or taken is forfeited.[7] Instruments may provide for reasonable attorney's fees, charge for exchange or other similar charge.[8] Mortgagees may collect premiums for insurance actually issued on mortgaged property.[9] The parties may provide for reasonable attorney's collection fees not exceeding 10% of the principal sum or for such attorney's fees as the court may determine to be reasonable.[10] "Any person, or the agent, officer or other representative of any person, lending money in this state who shall willfully and knowingly charge or accept any sum of money greater than the sum loaned and an additional sum of money equal to 25% 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, assignment of salary or wages, inspection fees or other fees 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, and on conviction, be fined not more than $100, or be imprisoned in the county jail not more than 90 days"[11] or both.[12] Forfeiture of interest is also prescribed in case of refusal to give receipt for payments, reflecting amount applied to interest and to principal, duly and properly signed.[13] Corporations are denied the right to interpose the defense of usury in any action in any court in this state.[14] Three and one-half percent per month is permitted on loans provided the lender is licensed and the principal sum due from any one borrower never exceeds $300.[15] These are the legislature's express provisions of the usury law; their application follows.

Evasions

Bonus in addition to interest is easily the simplest evasion. Taking two obligations, one for the money loaned with legal interest and the other for the usurious interest, was early denounced as an evasion.[16] While each note appeared to be proper on its face, the latter note was not enforceable since it lacked legal consideration and the interest on the first note was forfeited because the two were part of the same transaction which called for the repayment of the loan with interest at a usurious rate. On the other

5. Fla. Stat. § 687.02 (1949).
6. Fla. Stat. § 687.03 (1949).
7. Fla. Stat. § 687.04 (1949).
8. Fla. Stat. § 687.05 (1949).
9. Fla. Stat. § 687.06 (1949).
10. *Ibid.*
11. Fla. Stat. § 687.07 (1949).
12. Fla. Stat. § 775.06 (1949).
13. Fla. Stat. § 687.08 (1949).
14. Fla. Stat. § 612.62 (1949).
15. Fla. Stat. c. 516 (1949).
16. Mitchell v. Cotton, 3 Fla. 134 (1850); Mitchell v. Cotton, 2 Fla. 136 (1848); Mitchell v. Dogett, 1 Fla. 356 (1847); *accord*, Tucker v. Fouts, 73 Fla. 1215, 76 So. 130 (1917); *cf.* Argintar v. Lydell, 132 Fla. 45, 180 So. 346 (1938).

hand, a usurious contract will not taint other *independent* obligations between the same parties.[17]

Where the usurious interest or bonus is incorporated into the same obligation by taking back a note exceeding the principal sum of the loan by the amount of the bonus, the resulting instrument will appear proper on its face. Where this veil is pierced by proper proof of the actual nature of the transaction and it is shown that the borrower was obligated to repay the loan at a greater interest rate than the statute permits, the forfeitures prescribed by the statute will be enforced.[18] The same holds true where the bonus is hidden by not paying the money over to the borrower immediately or by antedating the note.[19] Payment of the bonus to the general agent of the lender will have the same effect[20] except where the borrower has agreed to pay for actual services rendered to him by the agent.[21] Of course a bonus which, when pro-rated over the term of the loan, does not bring the interest rate above the legal maximum carries no penalty;[22] nor does a bonus paid by a third party[23] unless the borrower is in some way liable for the whole or some part of it.[24]

Interest in advance might also be an evasion for it is treated like a bonus and computations to determine whether the loan is usurious or not are based on the actual principal sum received by the borrower.[25]

Sharing in the profits of the borrower's business venture in addition to receiving the unconditional repayment of the loan together with legal

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17. Stubblefield v. Dunlap, 148 Fla. 401, 4 So.2d 519 (1941).

18. Beacham v. Carr, 122 Fla. 736, 166 So. 456 (1936); Maxwell v. Smith, 119 Fla. 389, 161 So. 566 (1935); Carr v. Cole, 119 Fla. 260, 161 So. 392 (1935); Hopkins v. Otto, 118 Fla. 865, 160 So. 203 (1935); Hormuth v. Dickson, 115 Fla. 790, 156 So. 127 (1934); Sherman v. Myers, 108 Fla. 129, 146 So. 213 (1933); Wilson v. Connor, 106 Fla. 6, 142 So. 606 (1932); McCullough v. Hill, 105 Fla. 680, 133 So. 846 (1931), *aff'd*, 105 Fla. 680, 145 So. 259 (1933); Benson v. First Trust & Sav. Bank, 105 Fla. 135, 134 So. 493 (1931), *modified*, 105 Fla. 135, 150, 142 So. 887, 888 (1932), *adhered to*, 105 Fla. 135, 168, 145 So. 182 (1932). *But cf.* Maule v. Eckis, 156 Fla. 790, 24 So.2d 576 (1946); Jones v. Hammock, 131 Fla. 321, 179 So. 674 (1937); Chandler v. Kendrick, 108 Fla. 450, 146 So. 551 (1933).

19. Carr v. Cole, 119 Fla. 260, 161 So. 392 (1935); McCullough v. Hill, *supra* note 18.

20. Stoutamire v. North Florida Loan Ass'n, 152 Fla. 321, 11 So.2d 570 (1943); Richter Jewelry Co. v. Schweinert, 125 Fla. 199, 169 So. 750 (1936); Enstrom v. Dunning, 124 Fla. 571, 169 So. 385 (1936); Hopkins v. Otto, 118 Fla. 865, 160 So. 203 (1935); Owens v. State, 63 Fla. 26, 34, 58 So. 125, 128 (1912). *But cf.* Magee v. Crown Corp., 151 Fla. 422, 10 So.2d 818 (1942); Argintar v. Lydell, 132 Fla. 45, 180 So. 346 (1938).

21. Mason v. Cunningham, 111 Fla. 200, 149 So. 331 (1933); Benson v. First Trust & Sav. Bank, *supra* note 18.

22. Smith v. Midcoast Inv. Co., 127 Fla. 455, 173 So. 348 (1937).

23. Pushee v. Johnson, 123 Fla. 305, 166 So. 847 (1936).

24. Tucker v. Fouts, 73 Fla. 1215, 76 So. 130 (1917).

25. Magee v. Crown Corp., *supra* note 3. Hormuth v. Dickson, 115 Fla. 790, 156 So. 127 (1934); Wilson v. Conner, 106 Fla. 6, 142 So. 606 (1932); Purvis v. Frink, 57 Fla. 519, 49 So. 1023 (1909).

interest is also dealt with as an evasion.[26] There appears to be no reason why a lender may not share in the profits in lieu of interest.

Cloaking a usurious loan as a sale with the right to repurchase was the evasion attempted in *Brown v. Banning*[27] where, for a conveyance, the grantor received $35,000, a lease back and a contract to reconvey for an amount equal to the principal sum ($35,000) at 8% plus a bonus of $15,000 and an indebtedness of $20,000 for attorney's fees. The original conveyance, in the form of an absolute deed, was held to be a mortgage and because the transaction was usurious the prescribed penalties and forfeitures followed. Yet there appears no prohibition in law or in equity, against parties entering into such an agreement so long as it is done in good faith and not as a device to evade the usury statutes.

A variation on this scheme also failed where the lender took a deed from the vendor of a $1500 piece of property, paying over $1300 and a $200 note from the true purchaser to whom he gave a contract for sale for $2100 at $35 per month.[28] Here too there appears no reason why the speculative purchase and resale at an advanced price should be prohibited. No doubt the factor upon which the decision hinged was the good faith and intent of the parties. Evidently, where a transaction originates in negotiations for a loan, any agreement other than a loan would, to say the least, be viewed with suspicion and likely be considered an evasion. This does not necessarily follow, however, when the investor is not a party to the original negotiations and the proposition is first presented to him by the borrower's agent in some bona fide form.[29] (This situation will be dealt with in the discussion of avoidances.)

Proof

The burden of proof is on the one setting up the defense of usury[30] and must be established by clear and satisfactory evidence.[31] Though it might seem so, this is not impossible even where the lender requires the borrower to cash the check and return to him, in currency, the bonus for making the loan.[32] Parol evidence can be given by the parties to the transaction in order to show that an obligation valid on its face is in fact usurious.[33] And equity will always look through the form to the substance.[34]

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26. Beach v. Kirk, 138 Fla. 80, 189 So. 263 (1939); Cooper v. Rothman, 63 Fla. 394, 57 So. 985 (1912). *But cf.* Mackey v. Thompson, 153 Fla. 210, 14 So.2d 571 (1943).
27. 71 Fla. 208, 71 So. 327 (1916).
28. Hawley v. Kendall, 139 Fla. 850, 191 So. 10 (1939).
29. Corsentina v. McPherson, 111 Fla. 616, 150 So. 609 (1933).
30. Phillips v. Lindsay, 102 Fla. 935, 136 So. 666 (1931); Tucker v. Fouts, 73 Fla. 1215, 76 So. 130 (1917).
31. Benton v. Wilkins, 118 Fla. 491, 159 So. 518 (1935).
32. Enstrom v. Dunning, 124 Fla. 571, 169 So. 385 (1936).
33. Wicker v. Trust Co. of Florida, 109 Fla. 411, 147 So. 586 (1933).
34. Hawley v. Kendall, *supra* note 28; Beacham v. Carr, 122 Fla. 736, 166 So. 456 (1936); Brown v. Banning, 71 Fla. 208, 71 So. 327 (1916).

Penalties

The Supreme Court of Florida has had occasion to remand cases because of improper computations of penalties and forfeitures. It appears that the penalty for merely entering into an agreement for usurious interest is that all such interest is forfeited and cannot be enforced in any court in any kind of action—only the principal sum may be collected in law or in equity.[35] To determine the amount due, not only is the excessive interest to be forfeited but no interest at all is to be allowed.[36] On the other hand, the penalty for actually taking usurious interest is the forfeiture of double the amount of any bonus reserved as well as double the amount of any interest payments paid, received, taken or exacted.[37] This forfeiture is deducted from the actual principal sum loaned[38]—the amount actually received by the borrower from the lender. It is even possible that the forfeiture will discharge the debt[39] or exceed it[40] leaving the usurer indebted to his debtor.

Quasi-Avoidances

Evasions which go unpenalized might properly be considered as quasi-avoidances. Obviously, the simplest quasi-avoidance would be the usurious loan which the borrower repays without protest out of some sense of moral obligation or against the foreclosure or enforcement of which he does not raise any defense. This is as much an evasion of the law as is passing through a traffic stop-sign without being apprehended.

The Statute of Limitations[41] would bar any action for forfeiture or penalty unless brought within two years from the time the right of action accrued. In *Hagan v. Neeb*[42] forfeiture of double the amount reserved at the time the note was executed as well as certain interest payments which had been made, was not barred because the Statute of Limitations did not begin to run until maturity of the contract. It would have been more proper to support this holding on the reasoning that the forfeiture was raised as a defense; that an action to enforce the debt would not be barred until the Statute of Limitations had run (from the maturity of the contract); and that the defense, based upon the usurious nature of the contract, survives as long as the action. While the *defense* of usury would not be barred by the statute, any *affirmative* relief might be.[43]

35. Purvis v. Frink, 57 Fla. 519, 49 So. 1023 (1909); Lyle v. Winn, 45 Fla. 419, 34 So. 158 (1903).
36. Purvis v. Frink, 61 Fla. 712, 54 So. 862 (1911).
37. Maxwell v. Smith, 119 Fla. 389, 161 So. 566 (1935); Ross v. Atlas Finance 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); Hagan v. Neeb, 105 Fla. 297, 140 So. 916 (1932); Benson v. First Trust & Sav. Bank, *supra* note 18.
38. *Ibid.*
39. Carr v. Cole, 119 Fla. 260, 161 So. 392 (1935).
40. Maxwell v. Smith, *supra* note 37.
41. Fla. Stat. § 95.11 (6) (1949).
42. 105 Fla. 297, 140 So. 916 (1932).
43. Beekner v. L. P. Kaufman, Inc., 145 Fla. 152, 198 So. 794 (1940).

Laches might bar the action. This was the result when, after seven and a half years, the borrower brought an action to redeem from an extension of what was originally a usurious mortgage providing for interest in excess of the legal maximum by $25 by reason of a $250 bonus on a three year 8% loan of $5000.[44]

Absence of intent to evade saved the investor in *Maule v. Eckis*[45] even though a $3500 bonus on an 18 month 6% note for $68,500 actually exceeded 10% per anum by $172. This excess was found to be due to faulty computation on the part of the attorneys who had been instructed that the investor wanted only 10%.

Expurgation of usury by remitting the usury and taking a new agreement will also relieve the lender of any penalty or forfeiture which might have attached to the original contract. Such an agreement will be enforced even though it is entered into after maturity of the first obligation.[46] Apparently, abandonment of the usurious contract is viewed much the same as a waiver of the defense even though an express waiver at the time of making an usurious contract would probably not be enforced.

Avoidances

There are transactions which yield a legal return exceeding 10% per annum. Certain of these are more or less hazardous depending on how closely they resemble evasions. As pointed out before, the intent and good faith of the parties generally will control.[47]

Purchase of negotiable paper or other chose in action (except salaries and wages[48]) would not come within the usury statutes since such a transaction is not a loan. It is even possible, with the aid of a third party or broker, to employ this device to cover a loan. It seems, according to the dissenting opinion[49] in *Corsentina v. McPherson*,[50] that this was the result reached where a mortgage broker who was employed to procure a loan discussed the proposition with the investor as a sale of a mortgage. After inspection of the property which was then under construction an agreement was reached and transmitted to the borrower: he could get $10,000 less the brokerage for a mortgage for $12,500. To close the transaction, the broker, the investor, the borrower and the broker's secretary met at the broker's office where the borrower executed and delivered to the secretary a mortgage and note made payable to her and she then and there executed an assignment to the investor and received his check for $10,000. This

44. Jones v. Hammock, 131 Fla. 321, 179 So. 674 (1937).
45. 156 Fla. 790, 24 So.2d 576 (1946).
46. Clark v. Grey, 101 Fla. 1058, 132 So. 832 (1931).
47. Maule v. Eckis, 156 Fla. 790, 24 So.2d 576 (1946); Jones v. Hammock, *supra* note 44; Clark v. Grey, *supra* note 46; Belden v. Gray, 5 Fla. 504 (1854), *affirming* Gray v. Belden, 3 Fla. 110 (1850); Hayward v. LeBaron, 4 Fla. 404 (1852).
48. See note 11 *supra*.
49. *See* Corsentina v. McPherson, 111 Fla. 616, 150 So. 609 (1933) (dissenting opinion).
50. 111 Fla. 616, 150 So. 609 (1933).

crude subterfuge was not held to be an invasion although the dissenting justice pointed out that the "incidents of the transaction were not only sufficient to put him (the investor) on notice, but they were sufficient to advise him fully that the transaction reeked with usury. . . ."[51]

Advance in credit price over cash price is also not considered a loan and so the parties may legally agree on one price for cash and another on credit[52] even though the credit price far exceeds the agreed valuation of the property[53] except where used to cover a usurious loan.[54]

Compensation for other than loan or forbearance may be taken without incurring the penalties of the usury statutes. It seems perfectly proper for the borrower to reimburse the lender for his traveling expenses incurred in connection with the loan transaction[55] although the court has on occasion held to the contrary.[56]

Application of the loan to discharge existing obligations between the parties would also be permitted if bona fide obligations actually existed.[57] The lender is also entitled to reimbursement for amounts actually expended for property insurance, title insurance, costs of abstracts of title, taxes paid on the mortgaged land, actual and reasonable expenses of examining and appraising the security offered for the loan, costs incidental to closing the transaction and reasonable attorney's fees in case of foreclosure even though, when added to the interest provided for in the contract, they exceed the maximum legal interest.[58] The borrower need not compensate the lender for expenses incurred in connection with raising the money for the loan.[59] The borrower may, however, agree to pay the lender's agent for services rendered, provided that the services for which the lender's agent is compensated are not such as the lender ought to have performed or paid for himslf.[60]

Allowing the lender to be compensated by the borrower for consideration other than a loan is an interesting avoidance which might readily lend itself to cover an usurious bonus. Consider the following situation: The investor, who has been approached for a loan, offers to buy the borrower's property at some figure below the possible market value. This is agreed upon because the borrower wants the money quickly. By the time the abstract is brought to date and the transaction made ready for closing, the picture changes—the borrower offers the lender *compensation for a release*

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51. *See* note 49 *supra* at 617, 150 So. at 610.
52. Nelson v. Scarritt Motors, 48 So.2d 168 (Fla. 1950); Davidson v. Davis, 59 Fla. 476, 52 So. 139 (1910).
53. Stubblefield v. Dunlap, 148 Fla. 401, 4 So.2d 519 (1941).
54. Hawley v. Kendall, 139 Fla. 850, 191 So. 10 (1939).
55. Chandler v. Kendrick, 108 Fla. 450, 146 So. 551 (1933).
56. Belden v. Gray, *supra* note 47.
57. Maxwell v. Smith, 119 Fla. 389, 161 So. 566 (1935).
58. Crompton v. Smith, 140 Fla. 511, 192 So. 186 (1939); McGillick v. Chapman, 134 Fla. 220, 184 So. 26 (1938); Pushee v. Johnson, 123 Fla 305, 166 So. 847 (1936).
59. Stubblefield v. Dunlap, 148 Fla. 401, 4 So.2d 519 (1941).
60. Richter Jewelry Co. v. Schweinert, 125 Fla. 199, 169 So. 750 (1936).

and the lender makes the loan originally contemplated. A situation not too far removed from this was reviewed by the court in *White v. Ladd*.[61] Here the borrower's proposition originally laid before the lender was the purchase of a piece of property to be equally divided between them, part of the borrower's purchase money being advanced by the lender. It later developed that the borrower wanted to acquire the entire property for himself and was willing to give the lender a valuable *consideration for rescission of the original agreement* in addition to legal *interest for a loan* of enough money with which the borrower could complete the purchase price. The resulting note incorporated the loan and the compensation for the rescission and the court held that the chancellor's finding was justified: the note was not usurious.

A *voluntary bonus* payment by the borrower would not be usurious[62] although such a payment would be viewed with suspicion and quite likely would not be considered voluntary.[63] A *fortiori*, a bonus volunteered by a third party is not usurious. In *Pushee v. Johnson*[64] the bonus was paid by the borrower's agent, a mortgage broker to whom the borrower had offered a 10% commission to obtain a loan. To induce the lender to make this loan the broker agreed to split his commission. This was held not usurious since the borrower was not obligated to pay any more; it was not shown that the broker's commission was a subterfuge; or that the agreement to split was preconceived; or that the lender and broker conspired or otherwise cooperated to get more than legal interest.

Compensation for loan or forbearance of other than money is not regulated by statute and any rate can be exacted. For example, requiring 57 bushels of corn in repayment for a loan of 38 bushels of corn is not within the usury statutes.[65]

Computation of interest can easily be employed to increase the yield of a loan to a rate above the legal maximum. Of course, interest in advance or on an antedated note or a post dated check will not be tolerated.[66] But there is nothing improper in requiring interest to be paid semi-annually[67] or applying payments to interest first and allowing interest to continue on the principal until payments, taken together, exceed the interest due and then applying the surplus towards discharging the principal.[68] And while compound interest is illegal, the payment of interest on overdue installments of interest would not necessarily constitute usury,[69] even though

61. 155 Fla. 264, 19 So.2d 836 (1944).
62. Chandler v. Kendrick, 108 Fla. 450, 146 So. 551 (1933).
63. Hormuth v. Dickson, 115 Fla. 790, 156 So. 127 (1934).
64. 123 Fla. 305, 166 So. 847 (1936).
65. Morrison v. McKinnon, 12 Fla. 552 (1869).
66. See note 19 and 25 *supra*.
67. Morgan v. Mortgage Discount So., 100 Fla. 124, 129 So. 589 (1930); Varn v. White, 68 Fla. 329, 67 So. 142 (1914); Graham v. Fitts, 53 Fla. 1046, 43 So. 512 (1907); Columbia County v. King, 13 Fla. 451 (1870).
68. Hart v. Dorman, 2 Fla. 445 (1849).
69. Morgan v. Mortgage Discount Co., *supra* note 67; Columbia County v. King, *supra* note 67.

a 10% loan with semi-annual interest bearing interest coupons actually might return 10½% per annum.[70]

Conflicts of laws are resolved so as to uphold the validity of an agreement and the law of the forum will not be applied where it requires forfeiture or penalty.[71] Where a note is executed and made payable in one state and secured by a mortgage on lands in another, it will be governed as to the rate of interest it may bear by the laws of the former.[72] This can result in a forfeiture where the foreign law so provides.[73] On the other hand it would appear that making a note payable in another state, whose maximum interest rate is higher than 10%, would effectively avoid the local statutes,[74] provided this were done for a legitimate purpose.[75]

Corporate borrowers are expressly denied the defense of usury.[76] The law is constitutional[77] and binding on all corporations even though organized before the statute came into effect.[78] Yet, while the corporate borrower cannot plead usury as defined by one statute,[79] the small loan licensee cannot enforce a usurious loan against a corporation if the loan is larger than $300 and at a rate exceeding that authorized by another statute, the Small Loan Act.[80]

Acceleration and penalty clauses, incorporated as standard provisions in most notes and mortgages, have usually been employed only for the purpose of insuring prompt payment. In *Maxwell v. Jacksonville Loan & Improvement* Co.[81] both clauses were employed in what the court decided was an evasion. In this case interest in advance for the full term of the loan was added to the principal, a 10% bonus was deducted in advance and a 10% penalty in case of default and acceleration of the entire debt in case of three consecutive defaults were provided for. Upon careful examination it becomes clear that the loan was not usurious when first made: it was a 7% loan of $7300 for 10 years with equal monthly payments—the equivalent, after deducting the 10% bonus, to a loan of $6570 (the principal sum received by the borrower) at 10% per annum. If the borrower had carried out his agreement, as originally contemplated, he would never have

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70. Graham v. Fitts, *supra* note 67.
71. Mackey v. Thompson, 153 Fla. 210, 14 So.2d 571 (1943).
72. Porter Interests of Florida v. Missouri State Life Ins. Co., 105 Fla. 550, 141 So. 741 (1932); Thomson v. Kyle, 39 Fla. 582, 23 So. 12 (1897).
73. Porter Interests of Florida v. Missouri State Life Ins. Co., *supra* note 72.
74. Seeman v. Phila. Warehouse Co., 274 U.S. 403 (1926); Junction R.R. v. Bank of Ashland, 79 U.S. 226 (1870); Miller v. Tiffany, 68 U.S. 298 (1863).
75. *Ibid.*
76. See note 14 *supra*.
77. 759 Riverside Ave. v. Marvin, 109 Fla. 473, 147 So. 848 (1933).
78. Matlack Properties v. Citizens & Southern Nat. Bank, 120 Fla. 77, 162 So. 148 (1933).
79. Matlack Properties v. Citizens & Southern Nat. Bank, *supra* note 78; Deauville Casino Corp. v. Miami Beach Furn. Homes Corp., 112 Fla. 55, 150 So. 226 (1933); 759 Riverside Ave. v. Marvin, *supra* note 77; see notes 1, 14 *supra*.
80. Smetal Corp. v. Family Loan Co., 119 Fla. 497, 161 So. 438 (1935); see note 15 *supra*.
81. 45 Fla. 425, 34 So. 255 (1903).

been obliged to pay more than the legal rate of interest. While a 10% penalty for default in a monthly payment could not be considered liquidated damages, since the maximum value of a loan or forbearance of money is set by statute, it should not have been held usurious but only penal and non-enforceable for that reason. It is difficult to understand why the default of the borrower should make an otherwise innocent lender a usurer.

The question of whether exercising the option in the acceleration clause would change the character of the contract was raised in *Benson v. First Trust & Savings Bank.*[82] The loan here involved was admittedly usurious since the borrower, who was obligated to repay $14,000 at the end of three years and make regular installment payments of interest at 8% per annum, had only received $11,500. But further, the interest which was demanded in the action, when taken together with the bonus of $2500 was more than 25% per annum (criminal usury) for the term for which the loan was permitted to run (1 year, 3 months, 20 days). After some difficulty, the court reached the decision that *bringing an action* was not such a *demand* as to charge the lender criminally. Here the court discounted the claim for interest and saved the usurious lender from complete forfeiture while in the *Maxwell* case the court refused to eliminate the unearned interest from the lender's claim and the loan contract, otherwise legal, became an usurious instrument.

The situation was further confused in *Collins Ave. & Ocean Investment Co. v. Crawford*[83] where a $900 bonus had been retained on a 3 year, 8% loan of $19,100 and foreclosure was commenced after eight months. The court felt that to come into equity with clean hands the lender should have remitted such part of the bonus as was *made usurious because of his exercise of the option to foreclose.*

Justice Buford, speaking for the court in Smith v. Midcoast Inv. Co.,[84] lays out the rule established in a prior case [84a] (where the court refused to prorate the bonus over the shortened period) about acceleration clauses as follows:

> . . . the legal consequences of such an arrangement must be tested by the results contemplated by the parties on the assumption that both lender and borrower will fully carry out their agreement rather than the results which may follow, but are not necessarily certain to ensue, when the borrower breaches a covenant which accelerates the maturity of the principal at the option of the lender.[85]

In the immediately following paragraph he goes on to say:

> . . . So, we are committed (in the instant case) to the rule that if a negotiable note and mortgage are executed payable over a period of

82. See note 3 *supra.*
83. 114 Fla. 469, 154 So. 211 (1934).
84. 127 Fla. 455, 173 So. 348 (1937).
84a. Benson v. First Trust and Sav. Bank, *supra* note 3.
85. See note 84 *supra,* at 459, 173 So. at 350.

> years, and are given to secure a loan for an amount less than the principal expressed in the note and mortgage and the note and mortgage are allowed to run for the full period named therein, any bonus or deduction reserved by the lender at the time of making the loan will be prorated over the full term of the loan, *but if the note and mortgage contain an acceleration clause of which the lender takes advantage, then the bonus or excess will be prorated only over the period of time for which the lender has elected to allow the obligation to run.* (Emphasis added.)

The pre-payment penalty clause which requires the payment of a minimum compensation without regard to the actual time for which the loan was outstanding, has not been ruled on by the court. There is no reason why the lender should be required to accept repayment of his money before the agreed term expires. It, therefore, appears perfectly legal to require additional compensation, not for the loan but for the release before the time agreed upon. Nor should it make any difference whether this compensation were liquidated in advance or at the time of the tender and offer to redeem. However, in the light of the cases last discussed[86] the courts might easily decide that these sums were penal or even usurious, except that the equities are different: we deal not with the overburdened borrower but with the mortgagor who has accumulated sufficient funds and is prepared to pay off his lender even before the time required.

From this review of the Florida statute and cases it becomes apparent that any transaction which involves more than a 10% per annum return on an investment is subject to attack. Any fact situation can be considered non-usurious or, just as easily, a subterfuge to evade the usury laws, for, *sub silentio*, great weight is given to the equities of the case.

A modern, stream-lined usury statute and a modern, stream-lined corporation statute[87] would be two of the most important factors in stimulating the full development of the natural resources of this state. Capital and industry could be attracted from other fields which are no more lucrative—and surely no more fertile—if Florida could offer the investor and entrepreneur greater security and promote confidence in the stability of the law.

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86. See notes 81 and 84 *supra*.

87. See Wright, *Past and Present Trends in Corporation Law: Is Florida in Step?*, 2 MIAMI L. Q. 69 (1947).