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Sylvia J. Hardaway

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DEBTOR-CREDITOR CONFLICT OVER ACCELERATION

SYLVIA J. HARDAWAY*

Mortgages and similar instruments frequently provide that the whole debt is to become due and payable upon the debtor's failure to pay principal installments or interest, or to comply with other requirements of the mortgage agreement. Such provisions are legal, valid, and enforceable. They are not considered to be against public policy, or to be in the nature of a forfeiture or a contract that would be unconscionable if enforced by a court of equity, because an investor has the right to insist that the loan shall mature unless his security be kept intact.[1] The promise to make interim payments and to perform other interim covenants promptly is unqualified from the inception of the contract. Should this promise not be kept, the obligor will then be bound to pay a larger sum at once, a sum that is, however, no greater than he already owes and must sooner or later pay under any circumstances.

The courts of this country uniformly acknowledge the validity of acceleration clauses. Yet the courts have continually promulgated confusing precedents in construing clauses that mature a debt earlier than the ultimate maturity date established in the contract. This confusion is due in part to the disinclination of the courts to resolve the basic conflict between the interests of the maker and the holder when the case can be determined on some other issue.[2] The business world wants to regulate its affairs according to a concrete rule rather than to be dependent upon a somewhat abstract right involved in the particular case. On the other hand, no court wishes to sacrifice arbitrarily a hapless debtor to the pure reason of the law. Further confusion arises from the fact that innumerable instances involving the enforcement of such clauses arose during the long depression years when the courts were filled with compassion for the plight of those all too numerous mortgagors who were unable to meet their periodic payments solely because of the hard times faced by the entire nation. The judges were not as concerned with the problems of the mortgagees. Thus, in a 1935 case, the Florida Supreme Court observed:[3]

*B.A. 1961, LL.B. 1963, University of Florida; Member of Tampa, Florida, Bar.

1. Treb Trading Co. v. Green, 102 Fla. 238, 135 So. 510 (1931).
2. Note, 101 U. PA. L. REV. 835 (1953).
3. Morris v. Waite, 119 Fla. 3, 6, 160 So. 516, 517 (1935).

> [M]ortgagees, as is shown by official reports of which we may take notice, are predominantly corporations, such as insurance companies, banks, and investment and mortgage companies. These, and such individual mortgagees as are small investors, are not seeking homes or the opportunity to engage in farming.

Even though those hard times have passed, we have retained the law made during that era. Moreover, we continue to have judicial sympathy for the mortgagor whose entire debt has been declared due, coupled with judicial indecision as to precisely what lengths the courts may go in providing actual assistance to the mortgagor.

There are three problem areas that have been particularly troublesome in construing acceleration clauses:

> (1) whether an absolute acceleration clause is self-executing or optional with the mortgagee;
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> (2) under what particular circumstances will equity grant relief to the debtor from the hardship of acceleration; and
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> (3) how shall interest requirements be handled?

In examining each of these questions, the difficulties in reconciling the interests of the debtor and the creditor will become obvious and amply explain the perpetuation of judicial confusion in this area.

Optional or Self-Executing

There are two irreconcilable lines of authority construing clauses providing that default shall cause the entire amount of the debt to become due and payable immediately and which do not specify that the creditor has merely an option to accelerate. Some courts hold that such a provision is self-executing, thus rendering the entire debt due automatically without further action. Other courts hold that it is optional with the creditor to take advantage of the provision with the result that, until the option is exercised, the full amount of the obligation is not considered due.[4]

Minority View

The courts in a numerical minority of jurisdictions unwaveringly follow the strict construction that, if a provision in a note or a mortgage for the acceleration of maturity upon nonpayment of interest or installments is absolute in form and leaves no option to either party, then the entire outstanding amount must become due automatically even though the creditor might prefer to overlook the fail-

4. 8 Am. Jur. *Bills and Notes* §286 (1937); Annot., 159 A.L.R. 1077 (1945); 10 C.J.S. *Bills and Notes* §251 (c) (1938); 59 C.J.S. *Mortgages* §495 (3) (a) (1949).

ure to pay.[5] This rule is based primarily upon the fundamental proposition that the parties made the contract and the courts have no right to make a new contract in variance with the expressed intent.[6] To hold optional a contract, which by its stated terms is plainly absolute, is unwarranted by any rule governing the construction of contracts, and requires that a questionable liberty be taken with the language by which the contracting parties declared their intention.[7] Such a view has the obvious "merit of giving to the unqualified provision that default shall mature the debt its exact meaning, while the opposite view qualified it by an intention arrived at by construction that something else, viz., the option of the creditor, shall be essential to such maturity."[8] The question quickly boils down to one of construction of the language of a contract, and the construction that makes it mean exactly what it says is certainly not unreasonable. Moreover, had an option been intended for the creditor, appropriate language could have been easily inserted in the clause to accomplish this result.[9]

Another basis of the rule is the theory that the provision exists for both the benefit of the debtor and the creditor; therefore, the debtor should have the right to rely upon it to start the running of the statute of limitations. In reply, it is argued that the debtor's promise to make the installments at specified times, thus giving the creditor the benefit of an interest-bearing investment for an agreed period, demonstrates the parties' intention that the debtor could not secure the right to pay the entire debt before the established due dates by breaking his promise to pay each installment at maturity. On the other hand, it has been held that, even though the party invoking the protection of the clause sets it in motion by his own wrongdoing, its automatic operation should remain unaffected. The Kansas court, in the frequently cited case of *First National Bank v. Peck*,[10] pointed out that "this clause is inserted in mortgages usually for

5. Perkins v. Swain, 35 Idaho 485, 207 Pac. 585 (1922), 34 A.L.R. 897 (1925); Snyder v. Miller, 71 Kan. 410, 80 Pac. 970 (1905); First Nat'l Bank v. Peck, 8 Kan. 660 (1871); Druskin v. P. D. R. Constr. Corp., 18 N.Y.S.2d 225 (Sup. Ct. 1939); Banzer v. Richter, 68 Misc. 192, 123 N.Y. Supp. 678 (Sup. Ct. 1910), *aff'd*, 146 App. Div. 913, 131 N.Y. Supp. 1103 (App. Div. 1911); Green v. Frick, 25 S.D. 342, 126 N.W. 579 (1910); Fischer v. Wood, 119 S.W.2d 114 (Tex. 1938); San Antonio Real-Estate, Bldg. & Loan Ass'n v. Stewart, 94 Tex. 441, 61 S.W. 386 (1901); Henry v. Madison Aerie No. 623, Fraternal O. of E., 212 Wis. 589, 250 N.W. 442 (1933).

6. Snyder v. Miller, 71 Kan. 410, 80 Pac. 970 (1905).

7. Green v. Frick, 25 S.D. 342, 126 N.W. 579 (1910).

8. San Antonio Real-Estate, Bldg. & Loan Ass'n v. Stewart, 94 Tex. 441, 445, 61 S.W. 386, 388 (1901).

9. Green v. Frick, 25 S.D. 342, 126 N.W. 579 (1910).

10. 8 Kan. 445 (1871).

the benefit of the mortgagee; but being a valid stipulation the mortgagor has equal right to insist upon it, and receive whatever advantage he can from its enforcement."[11] The debtor might upon good grounds deny his liability upon the contract, in which event the provision would serve the useful purpose of bringing the question at issue to a prompt test.[12] Moreover, the obligor's refusal to pay the installment is not necessarily wrongful. A situation in which the debtor simply did not have the money to pay the installment when it fell due is no reason to assert that setting the clause in operation is unsound.

Courts adhering to the rule that the acceleration clause is self-operative recognize the principle that a person to whom a penalty or forfeiture may accrue is not required to take advantage of it.[13] In this situation, however, no option is left to the creditor, who is forced as a matter of law to recognize the debt as due, although he is not obliged to bring suit upon it after default. Regardless of what action the creditor wishes to take, the statute of limitations is activated by the express terms of the contract that neither person has any right to change without the consent of the other.[14] Some courts have suggested that inequitable results may stem from adherence to the rule that the acceleration clause is absolute and self-executing, and on these grounds refuse to construe the acceleration clause in accordance with its terms. One court demonstrated that it regarded such considerations as unconvincing when it stated that "the cases of supposed hardship are as likely to be contrary to the real facts as in accordance therewith. And in all proper cases equity may afford relief."[15]

Majority View

The majority of jurisdictions have held that an acceleration clause absolute in form is not self-operative, but rather leaves an option to the holder to decide whether he will take advantage of the provision. They hold that without some action on his part to set the clause in motion the full amount shall not become immediately due upon default.[16] It is interesting to observe how frequently this view is de-

11. *Id.* at 447.
12. 1 WOOD, LIMITATION OF ACTIONS 296 (4th ed. 1916).
13. *E.g.*, Harrison Mach. Works v. Reigor, 64 Tex. 89 (1885).
14. Perkins v. Swain, 35 Idaho 485, 207 Pac. 585 (1922); 34 A.L.R. 877 (1925).
15. *Id.* at 489-90, 207 Pac. at 587.
16. Keene Five Cent Sav. Bank v. Reid, 123 Fed. 221 (8th Cir.), *cert. denied*, 191 U.S. 567 (1903); Summers v. Wright, 231 Ala. 372, 165 So. 87 (1935); Sullivan v. Shannon, 25 Cal. App. 2d 422, 77 P.2d 498 (1938); Lowenstein v. Phelan, 17 Neb. 429, 22 N.W. 561 (1885); Carmichael v. Rice, 49 N.M. 114, 158 P.2d 290, 159 A.L.R. 1077 (1945); Wurzler v. Clifford, 36 N.Y.S.2d 516 (Sup. Ct. 1942); Candee

clared by the courts to be the "universal" or "almost universal" rule.[17] This rule, however, can by no means be regarded as unopposed when the authorities representing the minority view are considered.[18] The courts that uphold this "almost universal" rule find no difficulty in construing the clause contrary to its express wording. The constructive insertion of an option into the instrument is analogous to the judicial interpretation of the standard clause in a lease that the term shall cease and be void upon a default in the payment of rent,[19] or of the term "void" in an insurance policy when it is similarly construed to render it voidable at the election of the insurer.[20] Professor Chafee concludes in his authoritative law review article[21] that the option construction of the acceleration clause reaches a just result, since the default clause is merely incidental to the main contract and is nothing more than the means employed to give a holder the right to take quick action to protect his investment at the first sign of trouble, rather than running future risks.[22]

In other words, the majority view maintains that since the basic consideration is that the clause is provided for the benefit of the creditor, he should have the privilege of determining whether such protection is necessary under the circumstances giving rise to the default. The debtor should not be entitled to profit from his own default by causing the automatic acceleration of maturity, because the clause was not intended to give the mortgagor the right to change his own unconditional promise to pay on a given date by merely failing to keep his own agreements.[23] On the contrary, the parties intended the provision to benefit only the creditor by enabling him to demand repayment of the debt pursuant to the agreement.[24] Since the stipulation was made and intended for the creditor's benefit, he should have the right to waive it without suffering disastrous consequences. The creditor's forbearance may have been of the utmost

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Smith & Howland Co. v. Bendish Contracting Co., 148 Misc. 262, 265 N.Y. Supp. 737 (N.Y.C. Munic. Ct. 1933); Core v. Smith, 23 Okla. 909, 102 Pac. 114 (1909); Coman v. Peters, 52 Wash, 574, 100 Pac. 1002 (1909).

17. Putthoff v. Walker, 213 Mo. 228, 248 S.W. 619 (1923); Nickell v. Bradshaw, 94 Ore. 580, 183 Pac. 12 (1919), 11 A.L.R. 637 (1921).

18. Annot., 159 A.L.R. 1077, 1084 (1945).

19. It is well settled that the landlord may waive the forfeiture by subsequent acceptance of rent, and that the tenant will not be allowed to say that he is discharged from his covenants by his own default, unless the landlord chooses to take advantage of the condition.

20. Brumfield v. Union Ins. Co., 87 Ky. 122, 7 S.W. 893 (1888).

21. Chafee, *Acceleration Provisions In Time Paper*, 32 HARV. L. REV. 747 (1919).

22. *Id.* at 766-67.

23. Summers v. Wright, 231 Ala. 372, 165 So. 87 (1935).

24. Lowenstein v. Phelan, 17 Neb. 429, 22 N.W. 561 (1885); Coman v. Peters, 52 Wash. 574, 100 Pac. 1002 (1909).

value to the debtor at the time, and the debtor should not be allowed later to penalize the creditor for it.[25] The federal court in *Keene Five Cent Savings Bank v. Reid*[26] summarized this position quite well:[27]

> The great majority of the cases treat such provisions . . . as designed to further constrain and stimulate the debtor to meet his engagements promptly, and to arm the creditor with a right in the nature of a right to declare a forfeiture or to exact a penalty, which he may or may not exercise, and as a right which the courts will never regard as having been exercised by the creditor, or as having any effect upon the period of maturity specified in a note . . . without some affirmative action on his part . . . that on account of the default he elects to treat the entire indebtedness as due.

Another foundation of this rule is that such an acceleration provision is regarded as being in the nature of a penalty or a forfeiture of which the party to whom it accrues is not bound to take advantage. Thus, the harsh effect of the automatic clause is often mentioned as a factor in a court's decision to treat the clause as optional. Such courts further declare that it is equally for the benefit of the obligor that the provision be construed as permissive. If every default automatically accelerated the total debt, it may bring about the debtor's insolvency if he is unable to raise the entire sum at once. Nevertheless, the creditor would be unable to overlook even a slight delay of interest or installment payments, but would have to enforce the instrument in order to charge secondary parties and avoid the running of the statute of limitations. Otherwise his leniency could unexpectedly be used against him in later years.

Still another argument supporting this view that the acceleration clause is optional is rooted in the judicial recognition of the economic necessity for the free negotiability of these credit instruments. In order to preserve negotiability, the instruments must possess certainty as to the time of payment. This requirement is dictated by both practical business and legal considerations. Uncertain time leads to highly speculative valuation of the paper, and increases both the danger of taking overdue paper and the difficulty of making presentment and giving notice of dishonor at the proper time.[28] In the case of *Core v. Smith*,[29] the court pointed out other problems:[30]

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25. See Annot., 159 A.L.R. 1077, 1091 (1945).
26. 123 Fed. 221 (8th Cir.), *cert. denied*, 191 U.S. 567 (1903).
27. *Id.* at 224.
28. Note, *supra* note 2, at 836.
29. 23 Okla. 909, 102 Pac. 114 (1909).
30. *Id.* at 924, 102 Pac. at 119 (1909).

> It would seem anomalous to hold that the owner of a negotiable promissory note, secured by a mortgage on real estate containing . . . [an acceleration] clause . . . could not implicitly rely upon the face of his note to inform him when his right of action thereon accrued, but must exercise continual care to see that the mortgagor, perhaps in a distant state, did not, by failing to pay taxes on the premises, start the running of the statute against him, and thereby bar his note by the statute, which perhaps was not yet due on its face.

Thus, it is urged that to hold an acceleration clause self-executing would tend materially to destroy the value of negotiable paper, even though the acceleration provisions as such may not affect the negotiability of a note. It has been declared that a court should be eager to lend its sanction to any useful, legitimate circulating medium, and that if an instrument is to circulate freely, a ruling that the acceleration provision is optional is mandatory.[31] This is admittedly an important consideration since, despite the testimony of the late J. P. Morgan[32] that the basis of commercial credit is character, bankers apparently still attach considerable importance to collateral.[33]

The Florida View

In the 1934 case of *Hotel Management Co. v. Krickl*,[34] the pertinent acceleration provision in a mortgage provided that:[35]

> If any sum of money herein referred to, or referred to in the notes or 99-year lease herein mentioned, or any of them, be not promptly and fully paid within thirty (30) days after the same become due and payable, or if each and every stipulation, covenant, agreement and condition of said promissory notes, and this mortgage, and the said 99-year lease, or either of them are not duly, fully and completely performed, complied with or abided by, then, in any of such events the aggregate sum of money mentioned in the said notes as shall then be outstanding and unpaid, shall immediately without notice and demand, become due and payable to the same extent and in the same manner as though stipulated to be paid on that day, anything in the notes or herein contained to the contrary notwithstanding.

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31. Candee Smith & Howland Co. v. Bendish Contracting Co., 148 Misc. 262, 265 N.Y. Supp. 737 (N.Y.C. Munic. Ct. 1933).
32. H.R. REP. No. 1593, 62d Cong., 3d Sess. 136 (1913).
33. Chafee, *supra* note 21.
34. 117 Fla. 626, 158 So. 118 (1934).
35. *Id.* at 628, 158 So. at 119.

Although the question of an optional, as opposed to the self-executing, interpretation of the clause was not before it, the Florida Supreme Court did note that the mortgagee could upon default exercise the option in the mortgage to declare the balance of the debt due and payable, and institute foreclosure proceedings for its collection. The court's dicta implies that an acceleration clause of a mortgage does not ipso facto mature the whole debt on default, but merely confers on the mortgagee the option of declaring the acceleration of the due date, even though the mortgage provides that on failure to perform certain stipulated conditions the entire debt is to become due, and that notice to the mortgagor is unnecessary for the operation of the provisions for acceleration.

In *Baader v. Walker*,[36] the only Florida case in which the point has been directly passed upon, the pertinent acceleration clause reads as follows: "upon default in payment of principal and/or interest due on any note secured by said mortgage, all notes so secured and remaining unpaid *shall forthwith become due and payable notwithstanding their tenor.*"[37] The defendant-mortgagors made regular installment payments to the plaintiffs' collecting agent. The payment due on December 20, 1960, however, was not paid until January 10, 1961, at which time the defendants paid the entire balance of the indebtedness to the agent. Soon afterwards the agent went into receivership and the sum collected was not remitted to the plaintiff-mortgagees. The plaintiffs subsequently sued to foreclose; the defendants pleaded payment and counterclaimed for an order directing that the mortgage be satisfied of record. The plaintiffs contended in effect that the acceleration clause was not self-executing and that the agent was not authorized to collect principal in advance of specified maturity dates or prior to the plaintiffs' election to declare the entire indebtedness due and payable. Plaintiffs' position was that the law furnishes an option to accelerate only to the creditor; such a provision was conspicuously absent from the written instrument in this case. On the other hand, the defendants simply pointed to the unqualified language of the acceleration clause. The Florida court recognized the conflicting decisions in other jurisdictions, but ruled that the better view gave the terms of the instrument their full and plain meaning and nothing more.[38] Therefore, the court ruled that the acceleration clause was absolute in its terms, and after a default in payment on the mortgage, the entire balance became due ipso facto; payment of the entire balance to the holders' collecting agent discharged the mortgage since the agent had full authority to receive the whole amount.

36. 153 So. 2d 51 (2d D.C.A. Fla. 1963).
37. *Id.* at 52. (Emphasis added.)
38. The court referred to the rule of Green v. Frick, 25 S.D. 342, 126 N.W.

The Florida court further observed in *Baader v. Walker*[39] that, although the decision in the case was based upon substantive doctrines dealing with the construction of unqualified acceleration clauses, a contrary ruling would have violated the equitable principle that, if one of two innocent parties must suffer, the person making the situation possible should bear the loss.[40] The court concluded that the defendants-mortgagors acted reasonably in their understanding that the entire indebtedness was due and payable, and that the plaintiffs' actual and ostensible collecting agent suggested nothing to the contrary.

The *Baader* court was probably more concerned with the immediate problem of rendering justice under the particular circumstances of the case than with the substantive issues. There is a saying[41] that tough cases make bad law and the validity of this is demonstrated rather vividly in the *Baader* case. The court could have adhered to the view favoring options and also have satisfied justice had it construed the acceptance of the entire sum by the agent of the mortgagee as an exercise of the option. Moreover, the court could have disposed of the case on equitable grounds by simply refusing to grant affirmative aid to assist one party in securing an inequitable result under the circumstances of the case.

The Florida court would have set better precedent by applying the majority interpretation of acceleration clauses that provide that the debt becomes due and payable upon default. That view contemplates the necessity of the exercise of the creditor's implicit option to accelerate in order to render the full debt due. Although such a construction does read additional terms into the acceleration provision, it can be justified because it gives that protection to the creditor that the clause was intended to provide. The soundness of the precedent being established should be controlling in making an important determination of law, rather than ruling solely on the basis of the equities of a particular case.

The Power of Equity To Give Relief From the Operation of the Clause

The majority view that an acceleration clause is optional, even though it is phrased in absolute terms, in effect provides a creditor and debtor with relief from automatic inequitable acceleration. A court of equity will usually interfere with the operation of an acceleration clause for one of two reasons:

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579 (1910) and quoted extensively from that case.

39. 153 So. 2d 51 (2d D.C.A. Fla. 1963).

40. *Id.* at 55.

41. Class materials compiled by Dean Fenn for use in the course Contracts I,

(1) acceleration creates an unconscionable hardship upon the mortgagor; or,

(2) the factual situation requires the application of estoppel and waiver doctrines.

There is no rigid rule that equity must enforce the terms of a mortgage regardless of the surrounding circumstances; equity applies the law, but not slavishly. For example, equity will prevent the enforcement of a forfeiture upon nonperformance of conditions subsequent and refuse to implement a covenant for liquidated damages if the effect of such action would be equivalent to a penalty.[42]

Relief From Hardship

It is generally acknowledged that a court of equity has the power to relieve the debtor from the effect of an operative acceleration clause if his default was the result of some unconscionable or inequitable conduct of the creditor.[43] In the absence of some act by the mortgagee that a court of equity would be justified in considering unconscionable, the creditor is clearly entitled to the benefit of the covenant.[44]

Perhaps the most lucid analysis of the problems involved in a case of this sort is found in the majority and dissenting opinions of *Graf v. Hope Building Corp.*[45] In that case, the clerical assistant of the defendant corporation made an arithmetical mistake in computing the amount of interest due, which resulted in a default of part of the interest payment. Through a further office error, the defendant's president was not informed of the default after the clerical assistant discovered her miscalculation. The plaintiff took advantage of a provision that accelerated the maturity of the mortgage debt after twenty days following default in the payment of interest, and at the expiration of twenty-one days instituted an action of foreclosure. The defendant then promptly tendered the deficiency, but the mortgagee refused tender and elected to assert the acceleration. The majority of the judges denied relief to the owner of the mortgaged property and stated that a rejection of the mortgagee's legal right could rest only on

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42. Kothe v. R. C. Taylor Trust, 280 U.S. 224 (1930).

43. *E.g.*, Parker v. Mazur, 13 S.W.2d 174 (Tex. Civ. App. 1929); see Annot., 70 A.L.R. 993 (1931).

44. Johnson v. Guaranty Bank & Trust Co., 177 Ark. 770, 9 S.W.2d 3 (1928).

45. 254 N.Y. 1, 171 N.E. 884 (1930), 70 A.L.R. 993 (1931). This case no longer represents the attitude of the New York courts; see, *e.g.*, Castert v. Anderson Apartments, 94 N.Y.S.2d 521 (1949), holding that the strict enforcement of the provisions for optional acceleration upon any default would, under the particular factual situations of the case, approach an oppression like that of a penalty.

compassion for the defendant's negligence. The court observed that the stability of contractual obligations must not be undermined by judicial sympathy for a particular debtor and that certainty and security in real estate transactions requires the enforcement of contract provisions. Judge Cardozo reasoned in an impassioned dissent that, although it is not generally unconscionable to insist that payment shall be made according to the letter of the contract, it might be if the default is the product of a mistake by the mortgagor and if the mortgagee indicates by his conduct that he appreciates the mistake and has attempted by silence and inaction to turn it to his own advantage. The vital point to the dissenting justices was that the creditor appreciated the blunder and was unwilling to avert it.

In at least one early case, the Florida Supreme Court evinced an attitude similar to that of the majority in the *Graf* case. Thus, in *Morris v. Waite*[46] the court declared that:[47]

> [A] court of chancery may not withhold from the complainant in foreclosure suit the decree of foreclosure which is warranted under the law and facts merely because of adverse economic conditions and the resultant misfortunes of the defendant. The result of general adverse economic conditions must be assumed to operate on all alike, and therefore that the mortgagor and mortgagee have come alike under the hardships incident thereto. Contracts of this character are made in anticipation of the fact that conditions may change and that the time may come when the mortgagee can only look to his security pledged in the mortgage for the payment of his debt, and also that the security may have so depreciated in value as to be insufficient to bring the amount of his debt.

Similarly, the Florida court stated in *Home Owner's Loan Corp. v. Wilkes*[48] that the mortgagor cannot defeat foreclosure after the mortgagee's exercise of the option by interposing equitable defenses of misfortune, unemployment, and inability to work, because the obligation of the mortgagor to pay in accordance with the terms of the note and mortgage is absolute and not contingent on the borrower's health, good fortune, or ill fortune, or the regularity of his employment. The court explained its position by declaring dogmatically that:[49]

> In the early history of equity jurisprudence, when the chancellor was the mouthpiece of the crown and his prerogatives and

46. 119 Fla. 3, 160 So. 516 (1935).
47. *Id.* at 8, 160 So. at 517-18.
48. 130 Fla. 492, 178 So. 161 (1938).
49. *Id.* at 498, 178 So. at 163.

> duties were loosely understood and his decrees could not be resisted, he sometimes acted on the dictates of conscience and what appeared to be natural justice, but today the rules and maxims governing equity are as definite and certain as those governing other tribunals and by them the chancellor is bound rather than by what he conceives to be right and just in a particular case.

An early Florida decision that foreshadowed later opinions was *Jaudon v. Equitable Life Assurance Society of the United States.*[50] In construing a provision that the sum becomes, at the option of the mortgagee, immediately due and payable without further notice, the court ruled that in many instances equity may require advance notice of the mortgagee's intent to accelerate, especially if the failure to make a comparatively small installment payment is the sole basis for the choice to accelerate the entire debt. The court noted further that equity may also require the mortgagee to afford an opportunity to the mortgagor to pay delinquent installments before the mortgagee may entertain a foreclosure suit. Thus, the Florida court provided an early illustration of subsequent judicial sympathy and liberality towards the debtor.

In the following recent decisions, the Florida courts have completely shifted to the view espoused by the dissenting justices in *Graf.* This more liberal view grants relief to the mortgagor from the hardships of the acceleration clause if the default was caused by an accident, a good-faith mistake of the mortgagor, or unusual circumstances beyond his control.

An illustration of this approach is contained in the decision of *River Holding Co. v. Nickel.*[51] The Florida Supreme Court held that a decree of foreclosure was improper since the defendant, mistaken as to the date when his next note payment became payable, attempted to pay the installment upon learning that it was overdue; in addition, he did not have actual notice that the mortgagees had exercised their option to declare the entire amount of the note due until he tendered the delinquent installment. The court commented upon "the sincere, honest and diligent efforts of appellant to pay his obligation as it matured — a quality much to be commended — even to the extent of driving some seventy-five miles to do so when the note he assumed called for payment at a local bank . . . ."[52] The court ruled that in order to accelerate the due date of a note, the decision to do so must be disclosed to the payor in some *effective manner* before payment is tendered. This is, of course, consistent with the

50. 102 Fla. 782, 136 So. 517 (1931).
51. 62 So. 2d 702 (Fla. 1952).
52. *Id.* at 704.

view that a tender of payments in arrears due on a mortgage containing an acceleration provision prevents the operation of the clause if it is made prior to the exercise of the option.[53] After such a tender, there is no longer any default for which the option could be exercised.[54] Although this is a sound theory, the court's decision in *Nickel* was clearly influenced by the hardship being created for this good-faith debtor.

This trend towards recognition of equitable considerations as a basis for judicial relief from acceleration was continued in *Lieberbaum v. Surfcomber Hotel Corp.*[55] The court emphasized that the plaintiffs knew from past experience that some excusable oversight was the cause for nonpayment of the installments, and that plaintiffs could have secured payment by a single demand. In refusing to permit an inequitable result under the circumstances, the court observed that the plaintiff "was desirous of regaining possession of the two hotels and that he believed that acceleration would render it impossible for defendants to protect their equity in the hotels, after the severe economic reversal in the hotel industry in Miami Beach the preceding year."[56] The court's ruling was based solely upon the equitable considerations involved.

In *Overholser v. Theroux*,[57] the court, faced with perhaps a classic factual situation, ruled that equity will relieve a party from the effect of the acceleration. The business arrangements had become chaotic, primarily as a result of the mortgagee's failure expressly to exercise his acceleration option, and his acceptance and subsequent repudiation of checks as payments due, thus preventing the mortgagor's grantee from knowing from day to day whether his account was current, past due, or paid. The court believed that even though the mortgagee made no conscious attempt to accelerate by fraud or artifice, it would be inequitable and unconscionable to permit him to accelerate and foreclose; furthermore, the security had not been harmed by virtue of the default and the security far exceeded the balance due on the note and mortgage.

Florida courts of equity have relieved a debtor from the exercise of an acceleration clause for a multitude of reasons. Such reasons have so often been founded in the economic misfortunes of the debtor that it almost appears as though enforcement of a contractual provision for acceleration upon default is a matter of judicial discretion. Thus, the principles guiding equity in its determination to withhold

53. Kreiss Potassium Phosphate Co. v. Knight, 98 Fla. 1004, 124 So. 751 (1929).
54. River Holding Co. v. Nickel, *supra* note 51.
55. 122 So. 2d 28 (3d D.C.A. Fla. 1960).
56. *Id.* at 29.
57. 149 So. 2d 582 (3d D.C.A. Fla. 1963).

acceleration have become hazy and vague, and the stability of secured transactions must suffer as a consequence.

Estoppel and Waiver

Estoppel and waiver are intertwined throughout many of the cases in which equity prohibited the exercise of an acceleration clause. It is universally recognized that a mortgagee may induce the mortgagor to believe and act upon the belief that he will not enforce it, and, because of his conduct, he may be estopped from doing so.[58] Moreover, if a mortgagee does not declare the whole indebtedness due within a reasonable time after default, he will be deemed to have waived such right, especially if this delay operated to the mortgagor's detriment.[59] Similarly, the mortgagee's acceptance of past-due interest generally constitutes a waiver of the option to accelerate.[60]

The leading mortgage acceleration case in Florida illustrating estoppel and waiver is *Kreiss Potassium Phosphate Co. v. Knight.*[61] The mortgagors had expended large amounts in developing the mortgaged property, and this greatly increased the value of the adjacent property belonging to the plaintiff-mortgagee. The court considered the mortgagee's delay in accelerating the maturity of the obligation, the fact that the value of the improved property was approximately twelve times the amount of the debt, and the possibility that the improvements were being made while the mortgagor was in default. In refusing to allow the mortgagee to accelerate without giving the mortgagors the opportunity to pay only the delinquent installments, the court commented:[62]

> [W]e cannot say that the defendants were not lulled into a feeling of security and led to belief that such payments would not be insisted upon without notice to them or by some outward act of the complainant manifesting his intention to declare the whole amount due unless interest and taxes were paid.

In *Harrell v. Lombard,*[63] the court held that although the plaintiffs were not estopped from accelerating their first mortgage against the mortgagor, the plaintiffs had waived or were estopped from enforcing that acceleration clause as to holders of a second mortgage on the property. The estoppel was based upon correspondence and

58. Koschorek v. Fischer, 145 So. 2d 755 (2d D.C.A. Fla. 1962).
59. Kreiss Potassium Phosphate Co. v. Knight, 98 Fla. 1004, 124 So. 751 (1929).
60. *Id.* at 1018, 124 So. at 756.
61. 98 Fla. 1004, 124 So. 751 (1929).
62. *Id.* at 1018, 124 So. at 756.
63. 122 So. 2d 625 (2d D.C.A. Fla. 1960).

negotiations between plaintiffs and the holders of the second mortgage, coupled with plaintiffs' acceptance of various payments. The second mortgagees were required by the court to bring the first mortgages to their current status. On the other hand, in *Rathbun v. Merchants Bank of Miami*,[64] the court found that the mortgagee's retention of checks covering delinquent payments received *after* a foreclosure suit was instituted was not a waiver of the right to accelerate.

In *Koschorek v. Fischer*,[65] the defendant defaulted by nonpayment of a single insurance premium, but continued to make the regular monthly mortgage payments. The plaintiff demanded that the defendant pay the premium, and a month later filed a complaint in which he elected to accelerate the entire indebtedness. The plaintiff contended that equity should not consider as a defense payments made on principal while the creditor is allowing the debtor to rectify a default of premium payments, and that to do so would penalize a mortgagee who does not accelerate immediately. Defendant urged that after the default she continued to make monthly payments on principal for six months, and because these were accepted and retained, defendant was led to believe that plaintiffs had waived their right to accelerate. Defendant argued that it would be unconscionable to permit the plaintiffs to reap the benefits of receiving payments on the mortgage during the default period in excess of ten times the default, and then seize the advantage offered through acceleration. The court affirmed the denial of plaintiff's motion for summary judgment and stated that waiver and estoppel could be applied and that the chancellor could refuse enforcement of the acceleration clause if it would result in an unconscionable decision.

In the case of *Equity Capital Co. v. 601 West 26 Corp.*,[66] the appellees failed to make a single payment upon two mortgages in the total sum of $280,000. The appellees admitted their default, but requested the court to exercise its equity jurisdiction by relieving them of their default, and by allowing them to tender payment of the full amount of the arrearage. The court held that a mere statement and an answer to the effect that the security will not be impaired, is not sufficient to justify the chancellor's relieving the mortgagor from his default. There must also be a showing of an equity in favor of the mortgagor that would require the awarding of relief from default.

It is clear that the modern-day creditor in Florida must take all possible precautions to insure that his conduct is clear to all and fair to the mortgagor when he seeks to exercise his rights under an acceleration clause. The judiciary, recognizing that the acceleration

64. 138 So. 2d 539 (3d D.C.A. Fla. 1962).
65. 145 So. 2d 755 (2d D.C.A. Fla. 1962).
66. 166 So. 2d 769 (3d D.C.A. Fla. 1964).

clause was inserted in the instrument to protect the creditor against the debtor's insolvency and other serious difficulties, is impelled to protect against an acceleration without good cause by an avaricious creditor. If a creditor were permitted continuously to threaten acceleration, the business transactions of the bothered and bewildered debtor would become confused and uncertain. The other party to the credit transaction, however, equally deserves to have his rights protected by the courts. The creditor has entered into a contract upon which he believes he can rely and he often adjusts his own affairs in reliance upon it. The clause is intended for his protection and the right of strict enforcement is necessary for the clause to be effective. This may be vital to the creditor since he may be relying on a payment to provide him with funds to satisfy his own obligations. Furthermore, unless such acceleration provisions are strictly enforced, the debtor is obviously more likely to disregard the installment date requirements, to wait until the last minute, and then to seek relief. Enforcement of acceleration clauses has the effect of encouraging debtors to meet their obligations on time. Although requiring absolute compliance with the contract provisions may be petty at times, in some instances a lapse of time may be costly. For instance, failure by a debtor to make timely payments of insurance premiums on property that subsequently burns could have a ruinous effect upon the security of the creditor.

THE INTEREST PROBLEM

If the amount and due date of a debt is certain, interest is considered a legal incident to the debt.[67] The theory supporting this result is that money may always be put to work by the debtor in order to earn interest,[68] but difficult questions arise with regard to the calculation of interest when a creditor accelerates the maturity of the debt as a result of some default of the debtor.

If the interest is determined upon acceleration as though the debt had actually been paid over the period of time originally contemplated by the credit instrument, the creditor has in effect then received a double recovery of interest. Double recovery is the logical result of a situation in which the creditor has not only recovered the anticipated interest payments, but has received his money back as well. The repaid funds can again be placed in the open market in order to earn still further interest. On the other hand, if such interest is not permitted, a debtor might purposely default in order to force the creditor to accelerate. This would give the debtor the right of pre-

67. Myrick v. Battle, 5 Fla. 345 (1853).
68. Everglade Cypress Co. v. Tunnicliffe, 107 Fla. 675, 148 So. 192 (1933).

payment of the debt, thereby permitting him to avoid payment of high interest after seeking a lower interest rate. Moreover, it has been suggested that the loss of the stipulated interest is an element of the damage caused by the maker's breach of contract, and therefore ought to be included in any judgment.[69] Thus, the acceleration provision in installment notes and mortgages might be comparable to the clause in a contract for the delivery of goods providing that the entire agreement may be canceled on nondelivery of any installment. The purchaser may subsequently recover for the loss of the future benefit that he would have received except for the breach of contract. Following this reasoning, a holder of a note under which the maker has failed to make the first installment should recover the exact amount of interest in his judgment as he would have received if all installments had been regularly paid. Consequently, the acceleration clause would not permit the debtor to take unfair advantage of his own wrongdoing by cutting off his duty to pay the stipulated interest rate. The line of reasoning that unearned interest is not collectible after acceleration has generally been adopted by the Florida courts. The Florida Supreme Court held in *Graham v. Fitts*[70] that acceleration has reference to the amount of the principal note and the interest due thereon at the time the option is acted on, rather than to any interest that would accrue subsequent to such time if no action were taken on the option.

The court ruled similarly in *Holman v. Hollis*,[71] holding that a mortgage clause providing that "should the mortgagors sell or dispose of the property herein conveyed as security the whole debt unpaid at that time shall immediately become due and payable . . ." will not be enforced except upon the cancellation of the unearned interest. Otherwise, the lender would recover interest beyond the time of repayment of the debt, and it would be unconscionable to permit this.

Acceleration Creating Usury

Even if unearned interest is not recoverable by a creditor after acceleration, in certain cases the possibility exists that acceleration may cause the amount of interest due at the time of acceleration to exceed the legal rate and thereby create usurious interest. This possibility is particularly notable when a debtor receives from his creditor less than the face value of his obligation; the difference is sometimes labeled as a "discount," "bonus," or "deduction." Although it is clear that such a possibility tremendously affects the

69. Note, 34 HARV. L. REV. 741, 766-67 (1920).
70. 53 Fla. 1046, 43 So. 512 (1907).
71. 94 Fla. 614, 114 So. 254 (1927).

utility of an acceleration clause to a creditor, it is difficult for such a creditor to predict the precise consequences of an election to accelerate.

Many courts adhere to the view that a provision rendering the entire indebtedness, whether including interest for the whole term or to the date of default, due upon the debtor's default does not constitute usury, even though the amount of such interest may exceed the legal rate. The excess interest is considered by such courts to be penal, rather than usurious, but at the same time the penalty can neither be collected nor retained. The somewhat circuitous line of reasoning leading to this theory has been that under a proper construction of the contract, only the principal and the accrued or earned interest can be collected upon default. Furthermore, since the note could not be declared due and payable unless the unearned interest were canceled, the contract is not usurious.[72]

The decision of the Texas court in *Shropshire v. Commerce Farm Credit Co.*[73] contains a well-reasoned analysis of this problem. On the one hand, it was argued that, since the borrower was entitled to use the money for a specific period, the interest he agreed to pay was to be paid, not for the use of the money for each of the years considered separately, but for its use during the whole term of the loan. The opposing argument offered was that the creditor's election to accelerate deprives the borrower of the right to retain and use the money beyond the date of default. The court further contemplated the proposition that, if the debtor can avoid the payment of the greater, accelerated amount by the payment of the smaller sum at an earlier date, the contract is not usurious and the larger sum is merely a penalty.[74] Under the penalty theory the contract should be upheld because the debtor had it within his power to prevent the increase of his debt by promptly discharging his installment payments. The court pointed out that this penalty doctrine, while generally followed, has been criticized because it:[75]

> [O]verlooks the possibility that for want of money the debtor will be unable to avail himself of this relief; this is the very inability, with its distressing consequences, from which it is deemed humane and politic by statutes against usury to shield him. . . . If the creditor's power over the necessitous to extort oppressive terms at the lending is deserving of legal check,

72. Annot., 84 A.L.R. 1283 (1933).

73. 120 Tex. 400, 30 S.W.2d 282 (1930), 84 A.L.R. 1283 (1933).

74. *Id.* at 406, 30 S.W.2d at 283, citing 3 WILLISTON, CONTRACTS §1696 (1st ed. 1922).

75. *Id.* at 411, 30 S.W.2d at 283, citing SUTHERLAND, DAMAGES §318, at 977-1000 (4th ed. 1918).

> why limit that restriction to the period of credit? High rates of interest to commence at the end of that period are as likely to be oppressive as when applied before, and more likely to be assented to.

The court recognized the argument that election to accelerate does not render a contract usurious, although it causes the debtor to pay more for the use of money than the rate permitted by law, because the holder of the note ought not to be held responsible for the subsequent default of the debtor.[76] The court similarly noted the view set forth in *Miller v. Life Insurance Co.*[77] that the question of usury does not depend upon whether or not the lender actually receives more than the legal rate of interest, because it could never be determined whether there was usury until the money was paid back. This would amount to no more than locking the stable after the horse was stolen. Instead, the determination depends upon whether it was the lender's purpose at the inception of the contract to take more than the legal interest for the use of money, and whether he might, by enforcing the terms of the loan transaction, be enabled to collect more than the legal rate; if so, the transaction is usurious.

After weighing the considerable number of arguments on both sides, the *Shropshire* court concluded that a contract is usurious when it gives a creditor an option, in case of the debtor's default in discharging annual installments of interest, to require that payment of a sum in excess of the amount of the debt and legal interest. Upon rehearing,[78] the Texas court stated that the contract derived no validity from the fact that the promised payment, which exceeded the highest allowable conventional interest, was contingent upon the creditor's option to require such excessive compensation. The contractual stipulation for more interest than the law allows on a contingency involving no risk of principal and lawful interest condemns the contract. Once the acceleration clause is considered as obligating the debtor to pay more than permissible conventional interest, rather than merely stipulating for a penalty, the invalidity of the contract is inevitable.

The Florida Decisions

Florida decisions have touched upon three aspects of the problem of finding usury upon acceleration of a debtor's obligation:

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76. Seymour Opera House Co. v. Thurston, 18 Tex. Civ. App. 417, 45 S.W. 815 (Ct. Civ. App. 2d Dist. 1898).

77. 118 N.C. 392, 24 S.E. 484 (1896).

78. Shropshire v. Commerce Farm Credit Co., 120 Tex. 412, 416, 39 S.W.2d 11, 13 (1931).

(1) the relative contribution to the creation of usurious interest by the lender's own act in acceleration;

(2) the ascertainment of a basis upon which to recalculate the interest rate when a note is accelerated; and

(3) whether it should be required that the usurious character of a contract be determinable from its inception.

In *Benson v. First Trust & Savings Bank*,[79] the Florida court distinguished the *Shropshire* case on the grounds that the words "charge or accept" used in the Florida statutes[80] in connection with the words "sum of money" means more than a mere demand that has not yet been judicially enforced; instead, it carries the connotation that the proceeds have actually been received and retained by the lender in violation of the law. The court continued by stating that in order to establish usury:[81]

> [T]he 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 special 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.

In this instance, the court determined that the contract was usurious at its inception, and therefore a mortgage could not properly be foreclosed under the acceleration clause because of failure to make regular interest payments, since such interest was not legally enforceable.

Although the *Benson* case involved a contract that was originally usurious, there were several opinions containing important dicta about the relationship of acceleration to usurious extraction of interest that were written upon rehearing.[82] In his dissenting opinion, Justice Terrell discussed the doctrine that upon default under a contract with an acceleration provision, such a contract will not be usurious although the additional sums so required will become an uncollectible penalty. He stated that:[83]

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79. 105 Fla. 135, 134 So. 493 (1931), *modified on rehearing*, 105 Fla. 150, 142 So. 887, *aff'd on second rehearing*, 105 Fla. 168, 145 So. 182 (1932).

80. FLA. STAT. §687.07 (1963): "Any person . . . lending money in this state who shall willfully 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 per cent per annum upon the principal sum loaned . . . shall forfeit the entire sum, both the principal and interest . . . ." (Emphasis added.)

81. Benson v. First Trust & Sav. Bank, *supra* note 79, at 144, 134 So. at 496.

82. Benson v. First Trust & Sav. Bank, 105 Fla. 150, 142 So. 887 (1932).

83. *Id.* at 156, 142 So. at 890.

> This doctrine is grounded on the fact that the debtor has the power to forestall the operation of the acceleration compact and prevent the increase of his debt by promptly discharging his installment payments, but it overlooks the distressing consequences thus precipitated by inability of the debtor to respond which the statutes prohibiting usury were designed to forestall. The statute invoked is directed to the lender, and, by its terms, any contract, contrivance, or contingency whereby he directly or indirectly gets more than the legal rate of interest is infected with the vice of usury. It [the statute] in no way imputes evil to a debtor who does not pay under his contract. It presumes that he will comply with his contract and prescribes the bounds within which they may be made.

Further dictum is found in the dissent of Justice Brown.[84] He stated that the inclusion of an acceleration clause does not render it usurious since it could hardly have been within the parties' contemplation, at the time the loan was made, that the borrower would later default. Since acceleration provisions are present in practically all mortgages, its inclusion is not evidence of a usurious intent in and of itself. It was the opinion of Justice Brown, however, that when the lender accelerated the debt, upon default, at a time when the bonus retained and the interest provided in the contract together constituted more than twenty-five per cent per annum upon the principal sum loaned, he then "charged" a prohibited sum. Although the creditor cannot be held responsible for the borrower's default, the contract became usurious when he accelerated and charged interest, because he is responsible for his own act of exercising the option.[85]

The second problem, that of ascertaining the proper basis upon which to recalculate the interest rate when a note is accelerated, was touched upon in *Smith v. Midcoast Investment Co.*[86] In this case the court held that Florida was committed to the rule requiring the prorating of obligations over the actual period the debt runs in order to determine the rate of interest being charged. Thus, if a mortgage is given to secure a loan for an amount less than the principal expressed in the note and mortgage, any bonus or discount reserved by the lender at the time of making the loan will be considered as additional interest and will be prorated over the full term of the loan. If the note and mortgage contained an acceleration clause of which

84. *Id.* at 160, 142 So. at 892.

85. The court was evenly divided on the second rehearing of the *Benson* case and therefore adhered to the original opinion of Justice Whitfield in the first rehearing.

86. 127 Fla. 455, 173 So. 348 (1937).

the lender takes advantage, however, 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.

Closely related to the problem of determining over what period a discount or bonus will be prorated is the problem of determining the usurious nature of a contract. In *Ayvas v. Green*,[87] the Florida court considered the possibility of criminally usurious interest being charged as a result of the exercise of an acceleration clause. According to the findings of fact of the master in that case, if the loan was allowed to run the full term it would have carried an interest rate of more than ten per cent but less than twenty-five per cent. The supreme court held that the fact that the mortgage contained an acceleration clause did not give rise to a conclusive presumption that the lender did *"willfully and knowingly"* charge or accept any sum of money greater than the sum of money loaned. The court noted the *Smith* decision, but declined to apply this rule if to do so would be to make criminally usurious that which was only civilly usurious in its inception. The *Smith* theory is particularly inapplicable if the lender is not seeking to recover the full face value of the note, but only the amount actually loaned. Thus, if the lender accelerates a debt under a contract that is civilly but not criminally usurious at its inception, such acceleration does not render the contract criminally usurious. This is true even though the rate charged exceeds the legal rate when prorated only over the period for which the lender has elected to allow the obligation to run. The court warned, however, that the rule of the *Ayvas* case would not be construed to permit a lender to purge the taint of usury in a contract simply by suing to recover only an amount to which he would be legally entitled, when the excess interest, if prorated over the full period of the loan, was criminally usurious at its inception.

Home Credit Co. v. Brown[88] is a recent Florida case of great significance to the relationship between the acceleration of a debt and the determination of the usurious nature of the contract. The transaction in the *Home Credit* case involved a rather complicated financing arrangement. Home Credit Co. was the assignee of the defendant's note and mortgage. Two thousand five hundred dollars of the face amount of the note was the actual cost of the improvement to be constructed upon the defendant's land. The remaining $2,499.20 was represented to be an "add on" price of slightly less than ten per cent per annum for permitting payment to be made by 120 monthly installments over a ten-year period. For removing encumbrances on the property under improvement, the creditor was to receive another

87. 57 So. 2d 30 (Fla. 1952).
88. 148 So. 2d 257 (Fla. 1962).

note from the defendant in the face amount of $3,750. This figure represented $2,500 in encumbrances to be removed plus $1,250 as a five per cent per annum "discount" for permitting payment over the ten-year period. The defendant executed two negotiable notes and a mortgage to secure them. Both notes were identical except that one reflected a face amount of $4,999.20 to be paid over a ten-year period and the other reflected a face value of $3,750 to be paid over a ten-year period. Both notes were noninterest bearing on their face and both provided for acceleration of the entire unpaid amount if there was a default on any installment. Neither acceleration clause provided for the elimination of any unearned "interest" contained in the installments should the notes be precipitated to maturity by operation of the clauses. The Second District Court of Appeal held that the acceleration clauses rendered the transaction criminally usurious at its inception, or alternatively, that it became so under the *Ayvas* doctrine when Home Credit sought to recover the full face value of the notes.[89]

Upon appeal,[90] the Florida Supreme Court held that the presence of the acceleration option that was contingent on default did not alone warrant a finding of usury in 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 being a payment for the use of the actual outstanding principal sum until the acceleration option became effective by entry of a decree thereon. The court commented that:[91]

> [I]f the issue were one of first impression it might logically be argued that a provision for a rate of return which might even upon a contingency be excessive would render an obligation usurious in the inception, and a reservation of interest would then always result in usury if under any circumstances the date of maturity could be accelerated so as to convert the obligation into a demand note. Perhaps even more reasonably it might be said that such an arrangement is not usurious at the outset and will not become so merely because a default precipitates liability under the contract for the excessive sums. Such, however, is not the effect of the earlier decisions, where the problem of usury resulting from a bonus or reserved interest is apparently affected by a contingent early maturity "if the note and mortgage contained an acceleration clause *of which the lender takes advantage.*" This treatment of the acceleration

89. Brown v. Home Credit Co., 137 So. 2d 887 (2d D.C.A. Fla. 1962).
90. Home Credit Co. v. Brown, *supra* note 88.
91. *Id.* at 259.

> problem in our cases thus represents an anomalous but long standing disregard of the general rule that the usurious character of a contract must be determined or determinable at its inception.

The court's adherence to the rule of the *Benson* case that reserved interest is prorated over the period of time the lender actually allowed the obligation to run appears to be somewhat inconsistent with its statement that the determination of usury must be based upon the face of the note rather than the sum the lender actually attempted to recover. It would certainly seem more logical to calculate the rate of interest upon the basis of the sum the creditor requested by acceleration if the rate is similarly to be determined on the basis of the time at which the creditor decided to accelerate. Instead, the court looked only to the face amount of the note but not to the face period of time for which the loan is to remain outstanding. Thus, the court circumscribed the significance that was attached to the absence of excessive creditor's demands by the court in the *Ayvas* case.

The *Home Credit* opinion creates a severe legal problem for which a practical solution is not immediately evident. The court held that computations under the usury statute must be made as of the time the decree ending litigation will be entered and must be based on the scope of acceleration rights that a note purports to give the lender. If such a note vests the holder with an option, upon default, to accelerate maturity of the total obligation, including unearned interest, then the results of its exercise must be evaluated under the literal contract terms whether or not the complaint seeks recovery of all such terms. The *Home Credit* ruling, which determines the character of the contract at the time of acceleration, but does so through the use of some of the literal contract terms, is anomalous with the general rule that the determination of usury must be made on the basis of the character of the contract at its inception. It is further inconsistent with the burden of evidence that is required in order to establish a criminally usurious loan. The Florida courts have held, in reversing a finding of usury, that "the assumption is that a contract is made for and will accomplish only lawful purposes . . . ."[92] Similarly, the evidence must *clearly* show the intent to evade the usury laws.[93] The only evidence, however, in the previously discussed cases of intent to charge usurious rates has been the intent to exercise the option to accelerate upon default. Furthermore, the effect of such a holding is to give the debtor a tremendous

92. Diversified Enterprises, Inc. v. West, 141 So. 2d 27, 30 (2d D.C.A. Fla. 1962).

93. Indian Lake Estates, Inc. v. Special Invs., Inc., 154 So. 2d 883 (Fla. 1963).

power over the creditor since the possibility of a charge of usury is dependent upon the stage at which the debtor defaults upon his obligation, rather than upon the rate of interest contracted for at the inception of the agreement. As a result, the debtor is in a superior bargaining position once the contract has been entered into because, if he should default during the early period of his obligation, not only may the creditor possibly be accused of charging usurious rates of interest, but the debtor also has the funds he desperately needed. The creditor is left between Scylla and Charybdis since the exercise of the acceleration clause is the only effective remedy available to him.

It would clearly be the better part of valor to draft acceleration clauses in the future so as to expressly eliminate the possibility of any unearned interest being accelerated upon the exercise by the creditor of his option. The difficulty with acceleration under the present standard clause is whether an attempt by the creditor, upon acceleration, to give a credit to the debtor for unearned interest, will be accepted by the Florida courts. In the *Ayvas* case the creditor sued only to recover the amount actually loaned whereas in the case of *Home Credit* the lender sought to recover the full face value of the notes. Although the Florida Supreme Court has declared that controlling effect could not be given to the attempted credit for unearned interest,[94] it is to be hoped that in future decisions the Florida courts will permit a creditor to utilize this solution in order to avoid the accusation of usury in a contract not usurious at its inception.

THE DEBTOR-CREDITOR CLASH

The courts are faced with almost insurmountable difficulties in these acceleration cases. There is, of course, a tremendous gulf between the interests of the debtor and the creditor that adds to the courts' difficulties. The judiciary tends to be sympathetic to the debtor, but it recognizes at the same time that business transactions must be upheld and enforced in order for our economic system to prevail.

The state of Florida has long been known as a "debtor's haven." In the examination of the three areas created by the Florida courts' treatment and construction of acceleration provisions, it has been clearly observed that the judiciary has continuously protected the debtor. While the Florida courts have repeatedly stepped in to prevent an acceleration clause from operating according to its express terms because it would impose a hardship upon the debtor, the judiciary has at the same time refused to construe an acceleration clause, which was absolute on its face, to be optional with the

94. Home Credit Co. v. Brown, *supra* note 88, at 259.

creditor, a construction that would unquestionably be advantageous to the lender. Moreover, the possibility that the rate of interest may be determined upon acceleration to be usurious has further decreased the strength and utility of the acceleration clause to the lender.

The high-risk character of commercial financing is evident. Unless some judicial protection is provided, it is inevitable that commercial financing, which has been of such great importance to the growth of an expanding economy, will be seriously curtailed.