

1952

# Wilfried Rossberg v. Leonard A. Holesapple and Irma Holesapple : Brief of Plaintiffs and Appellants

Utah Supreme Court

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John Farr Larson; Attorney for Plaintiffs and Appellants;

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# In the Supreme Court of the State of Utah

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WILFRIED ROSSBERG and  
IVY ROSSBERG,

*Plaintiffs and Appellants,*

vs.

LEONARD A. HOLESAPPLE  
and IRMA HOLESAPPLE,

*Defendants and Respondents.*

CASE No. 7802

FILED

APR 8 1952

Clerk, Supreme Court, Utah

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## BRIEF OF PLAINTIFFS AND APPELLANTS

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JOHN FARR LARSON,

*Attorney for Plaintiffs  
and Appellants.*

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# In the Supreme Court of the State of Utah

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WILFRIED ROSSBERG and  
IVY ROSSBERG,

*Plaintiffs and Appellants,*

vs.

LEONARD A. HOLESAPPLE  
and IRMA HOLESAPPLE,

*Defendants and Respondents.*

CASE No. 7802

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BRIEF OF PLAINTIFFS AND APPELLANTS

---

## STATEMENT OF FACTS

This is an appeal from a judgment declaring a note and its security to be null, void, and usurious, and an order cancelling the same.

Plaintiff Wilfried Rossberg is a salesman for Christensen Realty Company, owned and operated by Mr. Milton L. Christensen, a licensed real estate broker. In the course of his employment, prior to April 11, 1951, Mr. Rossberg showed defendants a home at 965 Atkin Ave., Salt Lake City, Utah. (R. 4) On April 11, 1951 the defendants, as buyers, and Jack H. Rohlfing and LaVon M. Rohlfing, his wife, as sellers, executed an Earnest Money Receipt and Agreement for the purchase and sale of this home for a price of \$16,500.00. (Exhibit A.) A \$500.00 down payment was made and by the agreement defendants were to pay an additional \$2000.00 on delivery of final contract of sale which was to be on or before April 20, 1951. The balance was to be paid in monthly payments. At closing time (April 20, 1951) defendants were unable to make the \$2000.00 payment, having been unable to obtain the money from relatives as planned. (R. 6) For this reason and the prospects of forfeiting the earnest money the defendants were quite disheartened. (R. 6) There was some talk of the defendant's brother buying the property, instead of the defendants, because he considered it to be a good buy. (R. 7, 36) Later defendants told Mr. Milton L. Christensen they couldn't go through with the deal because they couldn't raise the money. (R. 39) The closing date passed and defendants were still desirous of having the property. On the night of April 21, 1951, upon the invitation of Mrs. Holesapple, Mr. Rossberg and Mr. Christensen stopped at defendants' home. Present, in addition to Mr. Christensen and Mr. Ross-

berg, was Mrs. Holesapple. (R. 7, 8, 37) After some discussion of the problem of finance Mr. Rossberg indicated he might be able to obtain money for them. (R. 8, 37) No decision was made at this time but it was agreed the matter would be discussed the next morning, Sunday, April 22, 1951. (R. 8, 51, 52)

The next morning defendants requested Mr. Rossberg to see what he could do to obtain the money. (R. 8) He explained it would be necessary to obtain the money from some other person, that he would have to go to Logan to contact his father-in-law. (R. 8, 9, 54) Mr. Holesapple testified that Mr. Rossberg indicated he was going to Logan to see his father-in-law and would try to get the necessary money. (R. 52) He understood that Mr. Rossberg was going to try and get the money by use of his (Rossberg's) credit. (R. 53) He also testified that he was told it would cost him \$100.00. (R. 53) He said Mr. Christensen and Mr. Rossberg agreed to absorb this cost although both of these gentlemen deny it. (R. 29, 52) Mr. Rossberg testified he did go to Logan and obtained \$1500.00 from a friend of his father-in-law after his father-in-law had vouched for Mr. Rossberg's credit. (R. 9, 10) Mr. Rossberg agreed to repay to this gentleman \$1500.00 plus interest at 6%. (R. 10) On the morning of April 23, 1951, he told defendants he had obtained the money and they indicated agreement. (R. 11) They informed the company they would be out that night to close the deal but they didn't come. (R. 11, 22).

Mr. Christensen and Mr. Rohlfling, the seller, testified that "three or four days" after the closing date two real estate contracts were signed by Mr. Rohlfling and wife, one of which was Exhibit B, bearing date of April 23, 1951. Both testified they were identical documents, except for the names of the buyers. (R. 32, 38) Exhibit B shows the defendants as buyers, while the other document showed the plaintiffs as buyers. At this signing it was agreed, and both testified, that Mr. Christensen was to give Holesapples the opportunity to purchase and if they did not then Mr. and Mrs. Rossberg were to purchase. (R. 33, 43, 40) The length of time during which defendants could purchase was to be determined in Mr. Christensen's discretion. (R. 33, 40). He testified of a discussion with Mr. and Mrs. Holesapple wherein he advised of the seller's desire to close the deal and if they wanted to buy, the deal would be closed with them, but if they didn't want to buy, Mr. and Mrs. Rossberg would purchase. (R. 39) He was told by the Holesapples that as far as they were concerned they couldn't go through with it and inquired if they could have their money returned. Mr. Christensen agreed they could. (R. 39) After being advised the Holesapples could not go through with the deal, Mr. and Mrs. Rossberg signed the Real Estate Contract which had previously been signed by the sellers, Mr. and Mrs. Rohlfling. (R. 14, 41) Mr. Christensen and Mr. Rossberg each testified that Mr. Rossberg made a payment of \$1250 pursuant to this contract. (R. 13, 19) This was further supported by Exhibit C, a check for \$1250.00 payable to Christensen

Realty Co. Mr. Christensen testified that following this he informed defendants the home had been purchased by Mr. Rossberg and wife. (R. 41)

The next day defendants contacted Mr. Christensen and told him they would now like to buy the house if they could get the money from Mr. Rossberg. (R. 16, 42) Mr. Christensen stated it was agreeable with him if agreeable with Mr. Rossberg. Later that day the defendants came in and signed Exhibit B, and the real estate contract previously signed by Mr. and Mrs. Rossberg was destroyed. (R. 15, 42).

At this time defendants also signed a 90-day note for \$1600.00 as set forth in paragraph I of the complaint, and the assignment described in paragraph II of the complaint, assigning their contract interest to Rossbergs as security for the note. Plaintiffs were not present at this signing. Plaintiffs had previously made available to defendants \$1250.00 by releasing the payment made pursuant to the contract with Rohlfings, and \$250.00 by check, total \$1500.00. At the time of closing Mr. Holesapple understood Mr. and Mrs. Rossberg had purchased the property and that they were giving up whatever rights they had in the property in favor of the Holesapple purchase. (R. 53). In signing the note he did not intend to violate the law and had no knowledge of what constituted usury. (R. 54) He understood the note included a \$100 fee for obtaining the money and he was agreeable to sign. (R. 53) He testified he could do nothing else but sign because, "they had five

hundred dollars of my money'', although he testified Mr. Christensen had offered his check back and told him he could have his money back on several occasions. (R. 53).

Mr. Christensen testified the value of the property at the time of the sale was \$1000.00 more than the sale price. (R. 49).

Upon defendants' failure to pay the note upon maturity plaintiffs brought action to require the sale of the security to satisfy the amount due and owing plaintiffs, and for a deficiency judgment if the security failed to satisfy the amount due and owing. Defendants pleaded usury. This was the only issue in the trial court.

The District Court found the note and assignment of security were executed and delivered by defendants to plaintiffs; that the note for \$1600.00 was given in consideration of the payment of \$1500.00 and that no further consideration whatsoever was given by plaintiffs to defendants for said note. The court found the note to be usurious and void and ordered that judgment be granted to defendants against plaintiffs for no cause of action and that the note and assignment were declared to be null, void, and usurious and ordered them canceled.

## STATEMENT OF POINTS

POINT No. 1. The decree holding the note and assignment to be null and void and usurious cannot stand because there is no pleading, evidence, or finding of a corrupt intent, a necessary element of usury.

POINT No. 2. The decree cannot stand because the evidence shows a sale of plaintiff's credit rather than a loan of money from plaintiff, the latter being an essential element of usury.

POINT No. 3. The judgment is faulty because the evidence fails to show an exaction of more interest than is allowed by law.

POINT No. 4. The decree of the District Court should not be sustained because it defeats the announced purpose of the usury statute.

## ARGUMENT

### PRELIMINARY STATEMENT

Since many factors are common to most of appellants' points it seems advisable to set forth in a preliminary statement the applicable statutes, the law on the construction of usury laws, burden and quantum of proof, and the necessary elements of usury.

#### STATUTES:

The following are from Utah Code Annotated, 1943:

"44-0-2. Maximum Rates. The parties to any contract may agree in writing for the payment of interest for the loan or forbearance of any money, goods or things in action, not to exceed, except as otherwise provided by law, ten per cent per annum; \* \* \* ."

"44-0-6. Usury. Contracts Void. All bonds, bills, notes, assurances, conveyances, stocks, pledges, mortgages and deeds of trust, and all other contracts and securities whatsoever, whereupon or whereby there shall be reserved or taken

or secured, any greater sum or greater value for a loan or forbearance of any money, goods or things in action than is prescribed shall be void.”

“44-0-9. Usury. Restraining Action on Usurious Contract — Return of Securities. Whenever it shall satisfactorily appear that any bond, bill, note, assurance, pledge, conveyance, mortgage, deed of trust, contract, security or other evidence of debt has been taken or received in violation of the provisions of this title, the court shall declare the same to be void, and enjoin any prosecution thereon, and shall order the same to be surrendered and canceled, and any property, real or personal, embraced within the terms of such contracts, and all securities, to be delivered up, is in possession of the defendant in the action; or, if the same are in the possession of the plaintiff, provision shall be made in the judgment or decree in the action removing the cloud of such usurious contracts or securities from the title to such property.

#### CONSTRUCTION OF USURY LAWS:

The construction to be given these statutes has been clearly enunciated by this court in *Cobb v. Hartenstein*, 47 Utah 174, 152 P. 424, in which the court adopted the following words from 39 Cyc. 917 as the rule in determining whether a given contract or transaction is tainted with usury:

“Since usury laws are quasi penal, the courts will not hold a contract to be in violation of the usury laws, unless upon a fair and reasonable construction of all its terms, in view of the dealings of the parties, it is manifest that the intent of the parties was to engage in such transaction

as is forbidden by those laws. If two reasonable constructions are possible by one of which the contract will be legal and valid, while by the other it will be usurious and invalid, the court will always adopt the former. In short, the general rule of interpretation and construction of such contracts may be said to be that the contract is not usurious when it may be explained on any other hypothesis."

And from *Rosenblum v. Gomall, et al.*, 52 Utah 206, 173 P. 243:

"In view of the drastic provisions of our statute the proof must be clear and convincing respecting the usurious character of the instrument."

The Utah Court in *Culmer Paint and Glass Co. v. Gleason*, 42 Utah 344, 130 P. 66, in discussing our usury statute said:

"This is a most drastic statute, since it forfeits the creditors entire claim. The statute authorizes more than confiscation for public use, since the debtor seems to be entirely relieved from his obligation to pay, in case usury is established. Courts always abhor forfeitures, and this is especially true of courts of equity. Forfeitures, therefore, especially such as have the effect of taking property from one and giving it to another, should be enforced only when the proof is clear and convincing, if not beyond a reasonable doubt."

"It is usually said that usury laws, penal in nature—that is, statutes which make the taking of illegal interest an offense and prescribe a penalty therefor—should be construed with reasonable strictness." 55 Amer. Juris. 327.

## BURDEN AND QUANTUM OF PROOF:

The burden of proof is upon the party who alleges the usury to establish it by at least clear and convincing evidence and not merely by a preponderance thereof. *Brown v. Johnson*, 43 Utah 1, 134 P. 590. See also *Van Noy v. Goldberg*, 98 Cal. App. 604, 277 P. 538.

“The burden of proving that a transaction is infected with usury lies upon him who attacks it, and that fact, it is held, must be established by clear and convincing evidence. Even though the law does not wholly avoid the contract, it has been held that the proof of usury must be clear and satisfactory, and this would seem to be particularly true where the effect of usury is to render the contract void.” 55 Amer. Juris. 437.

The Utah Court in *Cobb v. Hartenstein*, *supra*, quoted with approval from *Wood v. Babbitt*, 149 Fed. 822:

“It is not enough that the circumstances proved render it highly probable that there is a corrupt bargain; such a bargain must be proved, and not left to conjecture.”

In the same case (*Cobb v. Hartenstein*) the court quoted from *Lusk v. Smith*, 71 Kans. 556, 81 P. 175:

“Again, the existence of a usurious contract is never presumed. Where an agreement to pay interest is subject to two constructions, one of which would make it usurious, and the other not, the court will adopt the latter \* \* \*. The burden is upon the party seeking to impeach the transaction to show guilty intent, and that the contract was a cover for usury.”

The court further stated in *Cobb v. Hartenstein*, *supra*, at page 428:

“The courts also differ with respect to the quantum of proof that is required; some holding that the proof should be beyond a reasonable doubt. Under our statute the taking or receiving of a greater sum of money, or goods, or things in action of greater value than permitted by the statute for a loan or forbearance of money constitutes, as we have seen, a misdemeanor and is punishable as such. In order to convict under the statute upon a criminal charge, no doubt, proof beyond a reasonable doubt would be required. Where the action, however, merely involves civil liability, we think that proof beyond a reasonable doubt is not required; but the evidence must, nevertheless, be strong, clear, and convincing; that is, it must be of such a character as to convince the understanding and satisfy the judgment of the court or jury. See *Culmer, etc., Co. v. Gleason*, 42 Utah 344, 130 P. 66; *Brown v. Johnson*, 43 Utah 3, 134 P. 590, 46 L.R.A. (N.S.) 1157; *Fisher v. Adamson*, 151 P. 351.”

#### ELEMENTS OF USURY:

The Utah Court has repeatedly affirmed its position as to the essential elements of usury. In *Cobb v. Hartenstein*, *supra*, and *Fisher v. Adamson*, *supra*, the court quoted with approval a statement from 39 Cyc. 918:

“In deciding whether any given transaction is usurious or not, the courts will disregard the form which it may take, and look only to the substance of the transaction, in order to determine whether all the requisites of usury are present. These requisites are: (1) An unlawful intent;

(2) the subject matter must be money or money's equivalent; (3) a loan or forbearance; (4) the sum loaned must be absolutely, not contingently, repayable, and (5) there must be an exaction for the use of the loan of something in excess of what is allowed by law. If all of these requisites are found to be present, the transaction will be condemned as usurious, whatever form it may assume and despite any disguise it may wear. But if any one of these requisites is lacking, the transaction is not usurious although it may bear the outward marks of usury."

To the same effect see 55 Am. Jur. 331; *Teschcer v. Roome*, 106 Or. 382, 212 P. 473.

The appellants, with these matters in mind, now respectfully request consideration of their points.

#### POINT NO. 1.

THE DECREE HOLDING THE NOTE AND ASSIGNMENT TO BE NULL AND VOID AND USURIOUS CANNOT STAND BECAUSE THERE IS NO PLEADING, EVIDENCE, OR FINDING OF A CORRUPT INTENT, A NECESSARY ELEMENT OF USURY.

The law in this state is very clear that a willful intent to violate the usury law is a necessary element of usury and must be proved and not left to conjecture. This doctrine is approved in *Cobb v. Hartenstein, supra*, *Fisher v. Adamson, supra*, *Mathis et al. v. Holland Furnace Co.*, 109 Utah 499, 166 P. (2) 518; *Brown v. Johnson*, 43 Utah 1, 134 P. 590, 46 L. R. A. (N.S.) 1157, Ann. Cas. 1916C, 321.

In *Cobb v. Hartenstein, supra*, the court said:

" \* \* \* in order to establish usury, the existence

of an unlawful or corrupt purpose is one of the essential elements which must be clearly proved to exist at the time of the contract or transaction which is claimed to be usurious is entered into. Where the contract upon its face is usurious, the intention may be inferred, and the inference may be so strong that no express denial can avoid the same. Where, however, as here, the contract is legitimate, \* \* \* , but it is nevertheless contended that it is a mere shift, cloak, or cover for usury, then it requires substantial evidence of a corrupt or unlawful intent, or some fact or facts from which such an intention may be clearly inferred."

To emphasize this point the court quoted from *Bank v. Waggener*, 9 Pet. 399, 9 L. Ed. 163, in which Mr. Justice Storey of the Kentucky Supreme Court said:

"It must be proved that there was some corrupt agreement or device, or shift, to cover usury, and that it was in the full contemplation of the parties." (Italics supplied by the Utah Court.)

The court in *Cobb v. Hartenstein*, *supra*, made it clear in the following language that usury is not made out even though it is apparent that more than the lawful rate of interest upon the contract was asked or received, and that such was in the full contemplation of the parties.

"The mere fact that one may pay to another an excessive rate of interest pursuant to a contract is not always sufficient to authorize a finding of usury. If that were so, every contract upon which more than the amount permitted by the statute were paid would be usurious regardless of the intention of either the borrower or the lender. If that were the law the intention would

cease to be an element in the law of usury. In order to constitute usury, as Mr. Justice Storey puts it, 'there must be a corrupt agreement', ( in addition to the payment of an excessive rate of interest."

If, for the sake of illustration, we concede that there was an excessive rate of interest in this case, where is the evidence that the parties fully contemplated a corrupt agreement to violate the usury law, or a device or shift, to cover usury? No such evidence was presented and there is no evidence from which it may be inferred. An unlawful intent may be inferred if a usurious interest is apparent upon the face of the note or contract. The note in this case is bona fide upon its face. This being so the corrupt intent must be proved. There being ( no proof of the same, and no finding of a corrupt intent, the judgment cannot stand since such intent, as we have seen, is an essential element of usury in this state.

## POINT NO. 2.

THE DECREE CANNOT STAND BECAUSE THE EVIDENCE SHOWS A SALE OF PLAINTIFF'S CREDIT RATHER THAN A LOAN OF MONEY FROM PLAINTIFF, THE LATTER BEING AN ESSENTIAL ELEMENT OF USURY.

A careful examination of the facts reveals that the substance of the transaction between plaintiffs and defendants was a sale of credit rather than a loan of money. In determining whether usury is present the courts look to the substance of the transaction rather than the form. See *Cobb v. Hartenstein, supra*, *Fisher v. Adamson, supra*, *Mathis et al. v. Holland Furnace Co.*,

*supra*, *Brown v. Johnson*, *supra*.

The defendants were unable to borrow money. (R. 39) There were apparent attempts to borrow, but for some unnamed reason, presumably lack of security, poor credit, or otherwise, defendants' were unable to accomplish it. There was some discussion of defendants' inability in this respect. (R. 7, 8, 37) In these discussions it was known that plaintiff had no money to loan, that he would have to travel to Logan to contact third persons to attempt obtaining the money. (R. 8, 9, 54) This was agreeable to defendants. Plaintiff testified and defendant stated he understood plaintiff would use his credit to obtain the money. (R. 54) Plaintiff obtained \$1500.00 from a third person and agreed to pay 6% interest. At the time the note was signed defendant understood it included a hundred dollar fee for obtaining the money. (R. 53) A man's credit has monetary value. It is developed through years of fair dealings and is a commodity that can be rightfully sold. In this instance a reasonable fee was agreed upon for the sale of plaintiff's credit.

The law is clear that a sale of credit is not within the usury Statute. See *Seeman, et al. v. Philadelphia Warehouse Co.*, 47 Sup. Ct. 626; *Oil City Motor Co. v. C.I.T. Corp.*, 76 F (2) 589; *Title Guaranty and Surety Co. v. Klein*, 178 F. 689.

55 Am. Jur. 343 provides:

"It is well settled that the usury law is inapplicable to a transaction amounting merely to a loan or sale of credit, and a loan of money, to

facilitate which a loan of credit is made, is not rendered usurious by the payment of, or agreement to pay, a sum exacted for the loan of the credit. However, it is difficult to lay down any general rule as to what amounts to a sale of credit as distinguished from a loan. Although the transaction must not be a mere cover for usury, and in the decision of this question the intent of the parties is important, generally speaking, consideration must be given to the particular facts in order to determine whether one of the parties to the transaction is to advance the money, or whether the advance is to be made in the first instance by a third party."

In this case it is clear that the money in the first instance was advanced by a third party upon the credit of plaintiff. (R. 9, 10, 54.) A good discussion of this point is found in 104 A.L.R. 245. The following cases seem particularly applicable to this situation and support the general proposition: *White v. Anderson*, 164 Mo. App. 132, 147 S.W. 1122; *Palmer v. Jones*, 23 N. Y. S. 584.

The present transaction being in fact and in substance, a sale of credit, and a sale of credit not coming within the usury law, it follows that usury has not been established.

### POINT NO. 3.

THE JUDGMENT IS FAULTY BECAUSE THE EVIDENCE FAILS TO SHOW AN EXACTION OF MORE INTEREST THAN IS ALLOWED BY LAW.

The fact that the amount of a note exceeds the sum actually loaned by a sum greater than the interest

charge sanctioned by the statute does not conclusively establish an intent to transgress its terms. *Atlas Realty Corp. v. House*, 132 Conn. 94, 192 A. 564.

In the case of *Fisher v. Adamson*, *supra*, the Utah Court laid down the rule that a charge for services rendered, in connection with obtaining the loan, in addition to the highest rate of interest upon the money loaned, does not render the transaction usurious. In that case a note was given providing for payment of \$300.00 in 60 days without interest to maturity and the maximum legal rate of interest after maturity. The lender paid the borrower \$290.00, he having deducted \$10.00 for services rendered in looking up the security. The court adopted the following statement from 39 Cyc. 981:

“The circumstances attendant upon the making of a loan may require many kinds of services to be rendered to the borrower by the lender or his agent. For such services rendered in good faith the lender may properly require of the borrower a reasonable compensation in addition to the highest legal rate of interest upon the money loaned. Nor will an honest agreement for such compensation render the loan illegal, even though service rendered may be such as the lender would ordinarily perform in his own interest.”

The Restatement of Contracts, Section 533, and Williston on Contracts, Vol. 6, Section 1694, Page 4792, are to the same effect.

Conceding, for the sake of argument only, that a

loan by plaintiff is involved, let us look to the substance of this transaction to see what compensation might be allowed for services rendered and other credits before a computation of interest is made.

The testimony indicated that plaintiff made a trip to Logan to obtain the money. The expense consisted of gasoline and oil, wear and tear upon plaintiff's automobile, meals, plaintiff's time and services, and what plaintiff termed his "reputation", obviously a reference to his credit. (R. 23, 24). No monetary amount was placed upon these items, except gasoline, but for the purpose of illustration to show the expenses were not unreasonable we make the following comments. The distance from Salt Lake to Logan and return is 170 miles, and it is not unreasonable that plaintiff traveled 10 miles in addition. Eight cents per mile is a common rate paid by several companies. Testimony indicated the trip was made on a Sunday, considered the best day of the week for real estate business. A charge of \$45.00 for plaintiff's time and service would not be unreasonable. Plaintiff agreed to pay interest of 6% to the third party from whom he obtained the money. To determine usury then it is suggested a computation might be made as follows:

## CASH AND SERVICES

|  |           |
|--|-----------|
| Travel (Salt Lake, Logan, vicinity<br>and return) 180 mi. @ .08..... | \$ 14.40  |
| Meals .....  | 4.00      |
| Plaintiff's time and services.....                                   | 45.00     |
| Interest to third party.....   | 22.50     |
| Cash paid for defendants' benefit.....                               | 1500.00   |
| <hr/>  |           |
| TOTAL CASH AND SERVICES.....   | 1585.90   |
| Maximum allowable interest.....                                      | 39.75     |
| <hr/>  |           |
| TOTAL CHARGE PERMITTED UNDER LAW.....                                | \$1625.65 |
| <hr/>  |           |
| TOTAL AMOUNT OF NOTE (including<br>interest for 3 mo.).....          | \$1624.00 |

Although the burden is upon defendants to show usury, the presumption being there is no usury, it is obvious from the above that the total charge of \$100.00 was not unreasonable for plaintiff's expenses and services.

Uncontroverted evidence was presented that defendants were in default on the contract to purchase the property, and thereafter that plaintiffs signed an agreement with the seller of the property, and, in fact, made payment of \$1250.00 towards such purchase. Defendants understood that plaintiffs had acquired an interest in the property and were giving it up. The respective rights of plaintiffs and defendants in the property when plaintiffs had signed the uniform real estate contract, it is true, were not litigated. The saving of a possible loss of defendants' earnest money is a

factor that should be considered not only in determining the advantage to the borrower but to show the good intention of the plaintiffs. It is suggested that the settlement of a claim which might be a cloud upon a title (Plaintiff's rights in the property) is entirely proper. Testimony was given that the property had a market value of \$1000.00 above the selling price (R. 49) Since plaintiffs were going to have a one-half interest in the property a credit of \$500.00 might be given. If this is added to the above figure of \$1625.65 making a total of \$2125.65 it is difficult to see how an agreement to pay \$1624.00 would be usurious.

#### POINT NO. 4.

THE DECREE OF THE DISTRICT COURT SHOULD NOT BE SUSTAINED BECAUSE IT DEFEATS THE ANNOUNCED PURPOSE OF THE STATUTE.

The purpose of usury statutes is set forth in *Rospigliosi v. Glenallen Mining Company*, 69 Utah 41, 252 P. 276:

“It is, however, argued by appellants that, by reason of the language of our statute, the Legislature not only intended to protect the borrower, as do the statutes of many other states, but that the legislative intent was also to penalize the lender by providing for the forfeiture of not only the interest but of the debt itself, and also by making the lender contracting for usurious interest guilty of a misdemeanor. Granting that the language of the statute is drastic, nevertheless the primary purpose and object of the law re-

mains. That object, as agreed by all the courts under the statutes as comprehensive as ours, is not the punishment of the lender but the protection of the borrower. That conceded purpose of the Legislature, as stated by the Supreme Court of Wisconsin, enters into, and to a very large extent controls, the interpretation of the statutes, and the courts have so been influenced in the construction of these laws. It is true that it is the duty of courts to enforce the plain intent of the statute when the parties entitled to the benefit of the statute ask for its protection. Courts do not, however, and ought not, so interpret a legislative act that the property of one citizen is forfeited and lost to another, unless the plain and unequivocal mandate of the Legislature admits of no other rational construction.”

Defendant testified that he borrowed the money because they (Christensen Realty) had \$500.00 of his money. He admitted, however, that he was told the money would be refunded to him without loss if he wanted it. This was not a situation, therefore, in which defendants were at the mercy of the plaintiffs.

If the lower court's decision is allowed to stand it will result in the taking of property from the plaintiffs and awarding the same to the defendants. Such a result would exceed the announced purpose of the usury law, that of protecting the borrower, by depriving plaintiffs of property and awarding it to defendants. Such a policy we submit is not in the public interest. A borrower with the secret intention of enriching himself can do so by negotiating a loan with interest in excess of

that allowed by law. What was intended as a shield becomes a sword under such doctrine.

In the words of Mr. Justice Frick, in *Cobb v. Har-  
tenstein, supra*:

“To enforce a judgment under such circum-  
stances would be to perpetuate a wrong, not to  
vindicate one.”

### CONCLUSION

Appellants contend that usury was not proved in the trial court. Three essential elements are lacking, namely:

1. A corrupt intent to violate the usury law;
2. A loan of money by plaintiffs to defendants; and
3. The exaction of more interest than is allowed by law.

To sustain the lower court would be going against the law as heretofore announced by the Supreme Court.

Appellants respectfully urge the Court to reverse the judgment of the trial court and grant the relief prayed for in their complaint.

Respectfully submitted,

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and Appellants.*