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Wilfried Rossberg v. Leonard A. Holesapple and Irma Holesapple : Brief of Defendants and Appellees

Utah Supreme Court

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**In the Supreme Court
of the State of Utah**

WILFRIED ROSSBERG and
IVY ROSSBERG,
Plaintiffs and Appellants,

vs.

LEONARD A. HOLESAPPLE
and IRMA HOLESAPPLE,
Defendants and Respondents.

FILED

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Supreme Court, Utah

CASE No. 7802

BRIEF OF DEFENDANTS AND APPELLEES

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BRIEF OF DEFENDANTS AND APPELLEES

STATEMENT OF FACTS

While we substantially agree with the appellants' statement of the evidence, we feel it would be proper to state some additional facts which will present a more complete picture to the court of this matter.

In referring to the record, we will cite the page numbers in the lower center of the page.

All of the allegations in appellants' complaint were admitted by the Holesapples in their answer, with the exception that liability upon the \$1600 note was denied under our usury statute (R. 1-5). At the commencement of the trial it was stipulated between counsel that the note which was executed and delivered by the Holesapples to appellants was for the face amount of \$1600 at 6% interest per annum, whereas the Holesapples received only \$1500 from appellants (R. 7-9). The \$100 difference on this ninety-day note was held to be usurious in the court below.

On April 11, 1951 the Holesapples paid \$500 earnest money to the appellant real estate salesman. The preliminary agreement required the Holesapples to pay an additional \$2000 nine days later on April 20th towards the purchase of certain residential property in Salt Lake City (Exhibit A). The real estate salesman (hereinafter called appellant) knew that Mr. and Mrs. Holesapple intended to sell the equity in their present home to pay this \$2000 on the April 20th closing date because the earnest money agreement provided the following:

"Buyer hereby agrees to apply any additional amount above \$2500 received on the sale of (their) property at 355 Marietta Ave. on principal balance of above, up to the amount of an additional \$500." (Exhibit A, lines 15-16).

Nine days (April 11th to 20th) did not prove long enough for the Holesapples to complete the sale of their home. On the tenth day, a Saturday, appellant and M. H. Christensen, owner of Christensen Realty Co.,

called to see Mr. and Mrs. Holesapple (R. 13). Appellant's description of this visit reads as follows:

“Q. Was there any discussion as to what the defendants (Holesapples) might do so as not to forfeit any money under this (earnest money) agreement?

A. Yes. They understood that they would probably have to go through with the transaction * * *. Now the closing date (April 20th) went by, and they were still desirous of having the property. I suggested that I might be able to negotiate a loan for them until the property was sold” (R. 13).

Appellant also testified that the Holesapples stated to him that their troubles would be over if the house were sold (R. 13), and that appellant did mention to them the fact that he thought he might be able to get some money (R. 14).

Appellant called in person on the Holesapples the next morning (Sunday) at 10:30 A.M. and talked first to Mr. Holesapple on the front lawn (R. 57), and then went in the house and talked to Mrs. Holesapple (R. 58). On direct examination appellant stated the following:

“A. * * * Sunday morning somewhere near 10:30 A.M. I did contact the defendant (Holesapple) and told them I felt that I could get the money or at least I would be willing to try to get the money for them; that, however, in obtaining the money that they would have to agree to \$1600 for the fifteen hundred (dollars) which I would put up; and at that time they told me to go ahead and see what I could do for them on it.

Q. Was there any particular discussion as to why they were to pay \$1600?

A. Not particularly except for the fact that I told them I felt that that is the amount it would take to be able to secure the money" (R. 14).

Mr. Holesapple's testimony at the trial differed somewhat from the foregoing. He declared that he did not agree to pay \$1600 for the \$1500 loan until several days later after appellant indicated he had the money, and at the very moment he signed the note. (R. 62-63).

The Sunday morning conversation, according to Mr. Holesapple, was as follows:

"A. Mr. Rossberg (appellant) said that he was going to Logan and possibly could obtain the money, but there would be a \$100 fee, use fee on \$1500. I told him we couldn't pay \$1500 and \$100, as we did not have the hundred dollars to pay out; and he made the statement that he had discussed this with Mr. Christensen and that they had agreed that due to the fact that they were getting a good commission on the sale that they would absorb the hundred dollars, which was later denied by Mr. Christensen" (R. 57-58).

Appellant told the Holesapples that the party in Logan required that \$1600 be paid for the \$1500 loan for the use of a "quick loan" (R. 58). Appellant specifically admitted that the \$100 "fee" was not not to cover any of the expenses of the trip to Logan where he said he obtained the money (R. 26, 27, 59).

The record is devoid of any evidence whether or

not appellant telephoned to Logan prior to his Sunday afternoon trip to determine whether \$1500 awaited him there, but there is no dispute that he and his wife saw his father-in-law while there (R. 15), and that the next morning he offered the Holesapples the loan of \$1500 if they would agree to pay him back \$1600 (R. 17). Appellant admitted he would receive a commission of \$306 if the sale to Holesapples went through, and indicated he was desirous, "as any salesman would be," of the sale going through at the time he scheduled his trip to Logan (R. 33). M. H. Christensen indicated that the Holesapples told him they would prefer to get the loan from a source other than appellant (R. 50), but Mr. Holesapple said that he couldn't do anything else, because they had five hundred dollars of his money (R. 59).

There was some testimony by appellant of another transaction (R. 30-37) he handled for Christensen Realty Co. where a person named Miller was asked to sign a note by appellant in a real estate transaction (R. 30). In that matter appellant knew that a third party had some property for sale for \$4900 (R. 31). Appellant learned that Miller was anxious to buy said property, but appellant could not remember whether or not he advised the seller that Miller was anxious to purchase the property although he had no down payment (R. 33). The property in question was thereupon purchased by appellant (R. 31) and sold to Miller for \$5500 (R. 32). In addition, appellant received a commission on selling

to himself. Appellant and Mr. Christensen split the real estate commissions on the sale from the third party to appellant (R. 32, 37).

On Tuesday, April 24, 1951, after Holesapples had not acted on appellant's offer to loan them \$1500 for \$1600, M. H. Christensen telephoned Mr. and Mrs. Rohlfing, the sellers on the earnest money agreement with the Holesapples (Exhibit A), and had them come in to sign two sets of uniform real estate contracts (R. 20-21, 38, 44-45, 46). Both sets were said to be identical except that on one the appellants were shown as purchasers and on the other the Holesapples were the purchasers (R. 38), although the contract with appellants' names as purchasers was destroyed (R. 43). M. H. Christensen apparently was to have a one-half interest in the contract of appellants (R. 47), although his name did not appear thereon. The testimony of Mr. Rohlfing, when asked what his purpose was in signing two sets of contracts, was as follows:

“Well, that's a good question. My idea was to get it closed, and it had gone along and was three or four days overdue, and my wife and I felt that we wanted to get it cut and dried once and for all, so the morning we went to the real estate office there was these two sets of contracts. Mr. Christensen explained it to us, and we both agreed on it, and we signed both copies” (R. 39).

The concluding testimony of Mr. Holesapple is set forth below:

“Q. Did you at any time on the occasion of

this conversation in your home on this Sunday prior to the closing of this deal or at any other time request Mr. Rossberg to go to Logan or elsewhere to negotiate a loan for you?

A. I did not.

Q. Did you at any time agree to pay him a hundred dollars for so doing?

A. Not until I signed the note. It was on the note.

Q. Prior to the execution of the note, did you ever at any time agree to pay him a hundred dollars for negotiating this loan or any loan for you?

A. No, I did not.

Q. And when you signed the note, of course, you agreed to pay the sixteen hundred dollars. That's in the note itself?

A. Yes, that's in the note" (R. 62-63).

STATEMENT OF POINTS

I.

Intent is not an element to be proved where, as here, usury is apparent, either on the face of the instrument, or can be clearly inferred from existing facts.

II.

This transaction involved neither a sale of credit nor a sale of services with incidental expenses, because it was simply a loan of money which demanded a usurious amount for the use of the money loaned.

ARGUMENT

I.

INTENT IS NOT AN ELEMENT TO BE PROVED WHERE, AS HERE, USURY IS APPARENT, EITHER ON THE FACE OF THE INSTRUMENT, OR CAN BE CLEARLY INFERRED FROM EXISTING FACTS.

The major contention set forth by appellants is that the decree of the court below, which declared the note for \$1600 usurious and void, should be reversed because of failure to prove the existence of a "corrupt intent" to violate the usury statute. Prime reliance in support of this position is placed upon the 1915 case of *Cobb v. Hartenstein*, 47 Utah 174, 152 Pac. 424.

The foregoing case clearly is not applicable to support the contention of appellants. It involved a transaction between two stockbrokers who were both members of the Salt Lake Stock and Mining Exchange. The disputed transaction involved two printed contracts with blanks for only the names of the seller and buyer, the number of shares and the kind of stock and the amounts of money involved. The sole question in the case was whether these contracts, which were in daily use on the Salt Lake City stock exchange, were to cover a sale as they appeared to be, or if they were actually a device to cover a pretended sale which was in reality a loan of money at a usurious rate. The court held that under the facts of the case, the contracts were not usurious, and ruled that the transactions were not usurious because there was no corrupt intent. The

analysis of the court at page 430 is worthy of consideration:

“Where the contract on 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 a legitimate one, and is one that is frequently used by stockbrokers, but it is nevertheless contended that it is a mere shift, cloak, or cover for usury, then it requires substantial evidence of a corrupt intent, *or some fact or facts from which such an intention may be clearly inferred.* (Emphasis supplied)

When appellant stipulated that he required the Holesapples to sign a note for \$1600 when he gave them only \$1500 to apply on their real estate contract (R. 7-8), that fact alone would either make the note usurious (in effect) on the face of the matter, or is at least a fact from which a usurious intent could be clearly inferred. The statement of facts, *supra*, clearly sets forth additional facts from which the court could properly infer such an intention.

There are many cases which have held that a note or other obligation which is for an amount in excess of the amount actually loaned, is usurious and void. In *Bohicchio v. Petrocelli*, 126 Conn. 336, 11 A. 2d 356 (1940), the Connecticut Supreme Court of Errors was called upon to determine whether a note for \$1650, with interest at 6% per annum, which was given for a loan of \$1500, was usurious. The court, in the following language, held that it was:

“The original note in this case having been payable on demand and having been made for a sum in excess of the amount actually loaned, it was within the power of the payee to exact a return greater than at the rate of 12 per cent per annum upon the money actually loaned, and the note on the face of it was usurious.”

See also the following cases, all of which involved notes or other obligations for an amount in excess of the amount actually loaned, all of which were declared to be usurious and void: *Levenson v. Cohen*, 250 Mich. 31, 229 N.W. 433 (1930), which involved a \$10,000 contract for a loan of \$8,200; *Wolfe v. Stevenson*, 129 Okla. 148, 264 P. 182 (1928), concerning a note for \$200 with interest at 10% when only \$175 was actually loaned; *Temple Trust Co. v. Moore*, 133 Tex. 429, 126 S.W. 2d 949 (1939), a note for \$2800 providing for 7% interest which was given for a loan of \$2230; *Temple Trust Co. v. Haney*, 133 Tex. 414, 126 S.W. 2d 950 (1939), which involved one note for \$2500 given for \$2230, and another note for \$2240 for a loan of \$2000; *Glenn v. Ingram*, 133 Tex. 431, 126 S.W. 2d 951 (1939), concerning a note for \$3200 face amount, with interest at 7%, given for a loan of \$2800; and *Van Doren v. Pelt*, 184 S.W. 2d 744 (1945, Missouri Appellate Court), where the note was made out for \$150 and the loan was \$135.

In *Independent Foods, Inc. v. Lucas Co. Savings Bank*,Ohio App., 70 N.E. 2d 139 (1946), the court in holding the transaction before it to be usurious, stated the following:

“There is a seeming confusion in some of the cases as to the place and importance of intent in determining whether charges by a lender are to be considered usurious. However, the cases uniformly hold that where the transaction is in the form of a loan and the charges exceed the interest permitted by law, the loan is held to be usurious without any proof of an intent by the parties to make a usurious loan.”

In the course of the opinion, the court cites several texts on this general subject, some of which are as follows:

Williston on Contracts, Vol. 6, page 4807: “Ignorance of the law is generally no excuse and where a transaction, unmistakably a loan, is made for a rate of interest exceeding that permitted by law, the transaction would appear necessarily usurious.”

Restatement of the Law of Contracts, Vol. 2, Note to Sec. 526, page 1022: “The extent to which intent is important, in determining whether a transaction is usurious, both in criminal and in civil cases, has caused great differences of statutory interpretation and judicial decisions. Thus, there are many decisions that a wrongful intent is one of the necessary elements of usury; yet, at least in civil cases, it may be doubted whether intent is of any importance, if the facts clearly establish usury and the parties were acting under no mistake.”

The Ohio court indicates that the following are cited to indicate cases where the intent may be of importance in determining whether the transaction was usurious:

Williston on Contracts, Vol. 6, page 4809:

“Intent is chiefly important as characterizing transactions not in the form of loans. The law does not permit parties to evade usury statutes by giving the form of a sale or exchange, bailment or lease to what is really intended as a loan of money, and the validity of such transactions depends on whether the parties were using an apparently legal form as a mere device or in good faith intended to make such a bargain in reality as they did in appearance.”

Restatement of the Law of Contracts, Vol. 2, page 1022: “Where, however, the transaction is not in the form of a loan, a wrongful intent, at least of the lender, to use the device of a sale or lease as a means of making what amounts in effect to a loan, is universally held essential in order to make the transaction usurious.”

II.

THIS TRANSACTION INVOLVED NEITHER A SALE OF CREDIT NOR A SALE OF SERVICES WITH INCIDENTAL EXPENSES, BECAUSE IT WAS SIMPLY A LOAN OF MONEY WHICH DEMANDED A USURIOUS AMOUNT FOR THE USE OF THE MONEY LOANED.

It is a well settled principle not requiring citation that, where a contract for a loan provides for the rendition of services or incurring of reasonable and proper expenses incidental thereto by the lender, a fair charge, in addition to the legal rate of interest on the money loaned, does not render the contract usurious. *Fisher v. Adamson*, 47 Utah 3, 151 Pac. 351 (1915), is such a case; see also 27 Ruling Case Law 231. It is also fundamental that the usury laws apply only to the

reserving, taking or securing of a sum greater than the prescribed limit for a "loan or forbearance of any money, goods or things in action" (U.C.A., 1943, 44-0-6). In other words, usury laws have not applied to sales, and appellant contends that this transaction was not a loan but was, in reality, a sale of appellant's credit. Of course the testimony of appellant himself was that he might be able to negotiate a *loan* for the Holesapples until their property could be sold (R. 13), and the only evidence in the record upon which appellants now seek to rely is that Mr. Holesapple stated on cross-examination that he understood appellant would use his credit to obtain the \$1500 when the Holesapples had difficulty in completing the sale of their house.

The cases involving an exception for the sale of credit have not been recognized by our courts. These cases apparently are limited to situations involving commission merchants, produce dealers seeking to finance their business, warehousemen, etc., and transactions which involve the exchange of commercial paper in the regular, ordinary course of business. Such cases seem clearly to have no application to the present case. The two cases cited on page 18 of appellants' brief actually hold the transactions contained therein are not sales of credit, as contended, but were usurious loans of money. *White v. Anderson*, 164 Mo. App. 132, 147 S.W. 1122; *Palmer v. Jones*, 23 N.Y.S. 584.

The general question concerning expenses incident to a loan are discussed in 21 A.L.R. 797; 53 A.L.R. 743;

63 A.L.R. 823; and 105 A.L.R. 795; and need no discussion under the facts of this case because there was clearly no agreement to pay any expenses as is required under the cases discussed in the foregoing annotations.

CONCLUSION

It is appellees' position that the transaction now before the Court was a loan of money and not a sale, and that the loan was usurious under the facts and the law. Wherefore, it is respectfully urged that the judgment of the trial court be sustained.

Respectfully submitted,

WOODROW D. WHITE,

*Attorney for Defendants
and Respondents*