

1953

# Seaboard Finance Company v. Howard G. Wahlen and Barbara M. Wahlen : Brief of Appellant

Utah Supreme Court

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Howard J. Jones; EkSayn Anderson; Attorneys for Appellant;

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

FILED

JAN 12 1953

SEABOARD FINANCE COMPANY,  
a Utah Corporation,

*Appellant,*

— vs. —

HOWARD G. WAHLEN, and  
BARBARA M. WAHLEN,

*Respondents.*

Clerk, Supreme Court, Utah

Case No.  
7890

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Appellant's Brief

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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SEABOARD FINANCE COMPANY,  
a Utah Corporation,

*Appellant,*

— vs. —

HOWARD G. WAHLEN, and  
BARBARA M. WAHLEN,

*Respondents.*

Case No.  
7890

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## Appellant's Brief

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In the above entitled action plaintiff is the appellant and appeals from a judgment rendered in the above cause.

### STATEMENT OF FACTS

This action was brought by the plaintiff in the Third Judicial District Court in and for the County of Salt Lake, State of Utah, on a promissory note and chattel mortgage executed by the defendants Howard G. Wahlen and Barbara M. Wahlen in favor of the plaintiff. Said note and mortgage were dated the 2nd day of July 1951.

The face of said note is the sum of Thirteen Hundred Seventy Eight and 38/100 Dollars (\$1,378.38), and is payable to plaintiff in 24 monthly installments of \$57.44 each.

The case came on for pre-trial hearing upon the complaint and answer of the parties, and the court made and entered its original and amended findings of facts and conclusions of law upon the issue and defense raised by the defendant's answer, to-wit: Usury; and thereupon entered judgment in favor of defendants. From the court's judgment in favor of defendants the plaintiff takes this appeal.

The findings of facts and conclusions of law made and entered by the court as amended by stipulation of counsel and ordered by the court (Item 14 of the designation of record as amended by item 19) are as follows: (Tr. P. 11, 12, 20)

## FINDINGS OF FACT

1. That at all times mentioned the plaintiff was a Corporation duly organized and operating by virtue of the Laws of the State of Utah and was engaged in the business of loaning money as an Industrial Loan Corporation.
2. That on or about the 2nd day of July, 1951, the defendants applied to the plaintiff for a loan in an amount sufficient to give them net cash proceeds of at least \$1,000.00, which was to be repaid within 24 months.
3. That on the 1st day of July, 1951, the defendants received from the plaintiff the sum of

\$1,000.00 and the sum of \$20.00 as value received by way of an Insurance Policy, the premium of \$20.00 which was advanced by plaintiff, and thereupon executed a note in the sum of \$1,378.38, payable to the plaintiff in 24 equal installments of \$57.44 each installment.

From the foregoing Findings of Fact the Court makes the following:

## CONCLUSIONS OF LAW

1. That the loan by the plaintiff is usurious and the defendant is entitled to a judgment of No Cause of Action.

Thereupon judgment was entered in favor of defendants (Tr. P. 8).

At the pre-trial hearing the facts were discussed and briefs were ordered to be submitted by respective counsel upon the following issue:

Whether the basis for applying the interest and charges allowed by the statute is the sum of \$1020.00 or \$1378.38.

In addition to the facts which were included in the court's final findings of fact as set forth above; the following facts were stipulated to between counsel at the pre-trial.

a. That the Banking Commissioner of the State of Utah would testify that the computation of the

interest and charges made on the note involved herein conformed to the law and regulations of the State of Utah.

- b. That an officer of the plaintiff would testify that plaintiff relied on defendant's statement in the note as to his ownership of the mortgaged chattels.

Said stipulations were set forth on page one of plaintiff's answer brief submitted to the trial court as referred to above, (Tr. P. 29), and were not controverted by defendants. Said two stipulations were included in plaintiff's proposed findings of fact, (Tr. P. 9A, 9B), but the trial court refused to include said stipulated facts in its amended findings on the ground that they were immaterial. This is one of the grounds upon which this appeal is taken.

Following the entry of the judgment in favor of defendant and against plaintiff, the latter made a motion to amend the same and to enter judgment in favor of plaintiff (Tr. P. 10). This motion was heard by the trial court and resulted in certain corrections being made to the Findings (Tr. P. 11). The Court, however, refused to adopt all of plaintiff's proposed Findings and further refused to amend its judgment. From the order of the Court refusing to amend its original Judgment and enter Judgment in favor of plaintiff and against defendants this appeal is also taken.

## STATEMENT OF POINTS

1. THE COURT ERRED IN ITS DETERMINATION IN ITS JUDGMENT THAT "THE ONLY ISSUE IN THE CASE WAS WHETHER THE LOAN BY THE PLAINTIFF WAS USURIOUS".

2. THE COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE LOAN BY THE PLAINTIFF TO THE DEFENDANTS WHEREBY "THE DEFENDANTS RECEIVED FROM THE PLAINTIFF THE SUM OF \$1,000.00, AND THE SUM OF \$20.00 AS VALUE RECEIVED BY WAY OF AN INSURANCE POLICY", WAS USURIOUS.

3. THE COURT ERRED IN FAILING TO FIND THAT THE BASIS OF COMPUTING INTEREST AND CHARGES UPON THE LOAN IN QUESTION WAS THE SUM OF \$1,378.38, THE FACE AMOUNT OF SAID LOAN.

4. THE COURT ERRED IN REFUSING TO MAKE FINDINGS OF FACTS AS PROPOSED IN PLAINTIFF'S PROPOSED FINDINGS OF FACTS.

5. THE COURT ERRED IN REFUSING TO AMEND ITS JUDGMENT IN FAVOR OF PLAINTIFF.

6. THE COURT ERRED IN REFUSING TO GRANT JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANTS.



## ARGUMENT

Points 1, 2, and 3 will be presented and discussed together for the purpose of argument.

POINT 1. THE COURT ERRED IN ITS DETERMINATION IN ITS JUDGMENT THAT "THE ONLY ISSUE IN THE CASE WAS WHETHER THE LOAN BY THE PLAINTIFF WAS USURIOUS".

POINT 2. THE COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE LOAN BY THE PLAINTIFF TO THE DEFENDANT WHEREBY "THE DEFENDANTS RECEIVED FROM THE PLAINTIFF THE SUM OF \$1,000.00, AND THE SUM OF \$20.00 AS VALUE RECEIVED BY WAY OF AN INSURANCE POLICY WAS USURIOUS.

POINT 3. THE COURT ERRED IN FAILING TO FIND THAT THE BASIS OF COMPUTING INTEREST AND CHARGES UPON THE LOAN IN QUESTION WAS THE SUM OF \$1,378.38 THE FACE AMOUNT OF SAID LOAN.

Section 7-6-3, Utah Code Annotated 1943, as amended by the Laws of 1945, Chapter 73, provides the following with regard to the powers of an Industrial Loan Corporation:

"Every Industrial Loan Corporation shall have power:

(1) To loan money on the personal undertaking of the borrower and other persons, or on personal

security, or otherwise, and to deduct interest thereon IN ADVANCE at the rate of one per cent or less of the FACE OF SUCH LOAN per month, and, in addition, to require payment in uniform weekly, semimonthly or monthly installments, with or without an allowance of interest on such installments, and to charge a fee of \$2 or less on loans of \$100 or less and a maximum fee of two per cent on loans in excess of \$100 for expense in examining and investigating the character and circumstances of the borrower; provided, that such examining and investigating fee shall not be assessed to any borrower more often than once in each six month period, and provided further that no charge shall be collected unless a loan shall have been made." (Emphasis supplied)

This court in the case of People's Finance and Thrift Co. vs. Varney, 75 Utah 355, 285 Pac. 304, construed and applied the provisions of Chapter 116, Laws of Utah 1925, which is the same as Section 7-6-3, Utah Code Annotated 1943 as amended, except that the 1925 act provided for 12% per annum in place of 1% per month provided by the present act. Also the Code has been amended by the 1945 Act in a minor respect not material here with regard to charging but one investigation fee in each six month period.

In the Varney case, the plaintiff was also an Industrial Loan Company operating under the Laws of the State of Utah. In that case the plaintiff in making the loan deducted from the \$200.00 face of the note \$2.00 as and for an investigating fee and \$20.00 interest in advance, and paid to Varney the balance of \$178.00. The loan involved was for a period of 10 months and interest

was charged accordingly. Also an investigation fee of \$2.00 was charged in lieu of the authorized amount of \$4.00 collection which could have been charged under the statute. Upon a claim of usury being raised by the defendant Varney, the court rendered a judgment against the defendant and in favor of the plaintiff, which judgment was affirmed by this court on appeal. This Court stated:

“... The face of the note is \$200. ... So far as material, it provides that the defendants promised to pay to the order of the plaintiff \$200 ‘in ten installments of \$20.00 each’ ...” (Page 356)

“As is seen ... When therefore the company deducted 12 per cent per annum as it did *on the face of the note*, as interest in advance for the 10 month period of the loan, it but did what the statute expressly authorized such a company to do. The interest deducted was \$20.00, which is the interest on \$200.00 for a period of ten months at the rate of 12 per cent per annum. When the company ‘in addition’ required the loan to be paid in monthly installments of \$20.00 each, it again but did what the statute expressly permitted such a company to do. Such, we think, is not only the reasonable, but the necessary, meaning to be given the statute. We do not see wherein it in such respect is doubtful or uncertain.” (Page 360) (Emphasis supplied)

On the point as to an apparent conflict between the 1925 Statute and the General Usury Statute, the court at Page 361 of the Varney case held that the General Usury Statute must give way to the 1925 Act, and described the 1925 Act as a “special and subsequent act,

and which expressly repeals all laws in conflict therewith.”

It is apparent from the foregoing that the computation of interest was based upon the face of the note which as stated by the court was \$200.00. The Court further emphasized and identified the sum of \$200.00 as being the face of the note by commenting that said amount was the amount promised by the defendants to be repaid “in ten installments of \$20.00”.

From the foregoing it is apparent that the charges authorized by the statute and approved by the Supreme Court in the Varney case were based upon the face amount of the note which was the amount shown on the face of the document as being the amount to be repaid, and not the amount which was actually received by the borrower. The Court further expressly approved the act of the plaintiff in withholding “in advance” the charges made, and stated that the plaintiff’s “but did what the statute expressly authorized such a company to do”.

Now in the present case, as in the Varney case, the plaintiff but did what the statute expressly authorized such a company to do, to-wit: upon the application by the defendants “for a loan in an amount sufficient to give them net cash proceeds of at least \$1,000.00 which was to be repaid within 24 months,” as set forth in paragraph two of the Findings of Fact as stipulated (Page 20 of the Transcript of Record) a computation was made which resulted in the figure of \$1,378.38 as being the face amount of the loan, which when reduced by the

charges authorized by this statute, would leave a balance as required by the defendants. The addition of \$20.00, advanced by the plaintiff as a premium for an insurance policy was value received by the defendants in addition to the \$1,000.00 as set forth in paragraph three of the Findings of Fact.

74%  
74%  
In brief, the computation formula contemplated a total of interest at one per cent per month for the 24 month period of the note, plus the two percent investigation fee, both of which were allowed by the statute. Since a total of 26 per cent was allowed to be deducted by the statute, the remainder to be delivered to the borrower would amount to that percentage remaining, or 74% of the note. Thus the \$1020.00 actually delivered to the borrower and received by him represented 74 per cent of the face of the note. Therefore, by dividing \$1020.00 by 74 and multiplying the quotient by 100, we arrive at 100 per cent of the face of the note or \$1,378.38. To prove the accuracy of this calculation it is only necessary to reduce the face of the note by 26 per cent allowed to be deducted, thus arriving at the \$1020.00 which was the amount received by the borrower.

In the present case the application of the statute is exactly the same as in the Varney case. In both cases the charges were based upon the face of the note, and in both cases the amounts to be repaid were shown upon the face of the instruments as the amounts which the respective borrowers were obligated to repay in a given number of monthly installments, which monthly installments were authorized by the statute. The only differ-



ence between the two cases is that the defendants Wahlen in the present case wanted to receive a specified amount, and the face of the note had to be arrived at by calculation in order to leave the desired amount for delivery to defendants after making the charges and interest deductions in the same manner as approved by the Supreme Court in the Varney case.

In the case at bar the statute expressly authorizes the taking of interest in advance and it is noted that that authorization applies to the particular class of lenders which qualify under the provisions of Title 7 of our Code. It is stipulated and a fact that plaintiff so qualifies and is entitled to the benefits of that particular statute. Accordingly our case is not governed by the general statutes on usury but by the particular provisions of Title 7, as stated by this Court in the Varney case.

The application of the statute to the facts of the case at bar is very clear. Conformity was made very strictly to the provisions of the statute in the computation of the interest and charges made herein. This court has ruled on the validity and superceding effect of the statute as applied to Industrial Loan Companies, of which plaintiff is a member. That decision also affirmed the application of the statute to a similar factual situation. There was no occasion for confusing interpretations of the statute in that case, as there are none in this case. The provisions of the statute are clear and the application thereof to the facts in the case at bar is likewise clear. In such a situation there is no basis for a different

interpretation, and certainly no ground for a forfeiture.

Further, on the question of forfeiture, this Court said in the case of *Rospigliosi vs. Glenallen Mining Co., et al.*, 69 Ut. 41, 252 Pac. 276, at Page 279:

“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 construction.”

In 25 *Corpus Juris*, Page 339, “Face Value” is defined as, “The value ~~expressed on the face of a writing in the commodity in which it is payable.~~”

In *Corpus Juris Secundum*, Volume 35, Page 382, “Face Value” is defined as:

“The value expressed on the face of a writing in the commodity in which it is payable; the value which can be ascertained from the language of the instrument without any aid from extrinsic facts or evidence; and when applied to interest bearing notes and like instruments, the phrase has been held to mean the amount named on the notes.”

The expression “face amount of the loan” was used in the California case of *Connor vs. Minier*, 288 Pac. 23, at Page 25, a case involving a note payable in the sum of \$300.00 and wherein after expense and interest were

deducted the sum of \$270.00 cash was actually received. In that case the "face amount of the loan" was the \$300.00 as shown to be payable by the express wording of the note.

In the case of *Bowden vs. Gabel*, (Mont.), 76 Pac. 2nd 334, the expression "face of the note" was interpreted as being the amount shown payable by the express wording of the note and was not the amount of money which actually was received by the borrower.

These two cases are cited on this point of definition of "face of loan" but are inapplicable on other points.

#### POINT 4. THE COURT ERRED IN REFUSING TO MAKE FINDINGS OF FACT AS PROPOSED IN PLAINTIFF'S PROPOSED FINDINGS OF FACT.

In plaintiff's proposed findings of fact found on Pages 9 A and B of the Transcript of Record, it was submitted that the following facts were stipulated and agreed to by counsel at the pre-trial hearing and should be included in the findings of facts:

"4 (b) That the banking commissioner of the State of Utah would testify that the interest and charges made on the note involved herein conforms to the law and regulations of the State of Utah."

"4 (c) That an officer of the plaintiff would testify that plaintiff relied on defendant's statement in the note as to his ownership of the mortgaged chattels."



The materiality of the stipulated fact relating to the testimony of the Banking Commissioner is shown by the Cobb vs. Hartenstein and the Culmer Paint and Glass Company vs. Gleason cases discussed hereafter. Since such stipulated testimony of the Banking Commissioner is material, it is submitted that it was error for the Court to refuse to amend the findings to include such statements.

In Cobb vs. Hartenstein, Utah, 152 Pac. 424, the Supreme Court stated at page 427:

“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.”

The Court also cited a Kansas case with approval and added its own emphasis by saying:

“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.*” (Emphasis by Utah Court)

The Court stated at Page 431:

“In our judgment, the trial court was too greatly influenced by the fact that the plaintiff did, in fact, pay to the defendant more than the amount permitted by our statute. After the fact was found the court seemingly deduced every inference against the legality of the transactions.

No other conclusion is permissible. That view, as we have seen is wholly repudiated by the courts. This case, therefore, affords another instance where too much stress is laid upon ex post facto acts and conduct."

The Cobb case involved stock brokerage transactions, margins and similar transactions. The Court held that there was not sufficient intent on the part of the lender, and therefore no usury.

In Culmer Paint and Glass Company vs. Gleason, (Utah), 130 Pac. 66, a case involving two notes and mortgages, on the subject of policy and construction, the court said, at page 68:

"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. Counsel for appellant practically concede that by computing interest upon one method there is, perhaps, no usury, but that, if it be computed upon another, then there is usury in the transaction. This, to say the least, leaves the matter in doubt, and in view of such doubt we ought not to enforce the forfeiture."

Also, see Rospigliosi vs. Glenallen Mining Company, *supra*.

In the case at bar, the defendant contends that interest should have been computed on the amount of cash received by the defendant and the amount thereof

ADDED TO the cash received, the total thus derived being the amount of the note. This contention is diametrically opposite to the express language of the statute which provides "and to DEDUCT interest thereon IN ADVANCE at the rate of one per cent or less of the FACE OF SUCH LOAN per month." By no interpretation or construction, however strained, can the language of the statute be said to contemplate a method of computation which embraces the principle of ADDING interest to arrive at the amount of the note. The construction and computation contended for by the plaintiff follows the express provisions of the particular statute governing Industrial Loan Companies and is the only reasonable construction and computation possible under the language of the statute. There is nothing whatever to indicate that such construction was availed of for the purpose of evading the law. Therefore, it is respectfully submitted that no forfeiture should be declared in this case, and that the decision of the lower court should be reversed and plaintiff granted judgment.

The stipulated testimony as to reliance by the plaintiff on defendant's statement in the note as to his ownership of the mortgaged chattels is material as a basic fact supporting a judgment against the defendants which would not be dischargeable in bankruptcy, as having been secured by fraud of the defendants. Accordingly, such stipulation was material which should have been included in the amended findings.

Section 17 of the National Bankruptcy Act relating to debts not affected by discharge, and particularly sub-

section (2) provides that liabilities for obtaining money or property by false pretenses or false representations shall not be discharged.

POINT 5. THE COURT ERRED IN REFUSING TO AMEND ITS JUDGMENT IN FAVOR OF PLAINTIFF.

POINT 6. THE COURT ERRED IN REFUSING TO GRANT JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANTS.

The judgment granted by the court in favor of defendants was not based upon the facts and the law. The plaintiff was entitled to judgment, and the court erred in refusing to grant judgment in favor of plaintiff and against the defendants.

The Court also erred in refusing to amend its judgment upon motion of plaintiff and grant judgment in favor of plaintiff.

## CONCLUSION

In summary, this case involves a loan made under authority of the Industrial Loan Act of the State of Utah, with charges authorized by the express provisions of such act. It was also made in accordance with the construction and interpretation of such act heretofore made by this Court. Further, it conforms to the regulations of the Banking Commissioner of the State of Utah. Accordingly, it is respectfully submitted that the

loan herein was legal and valid and was not usurious,  
and that the decision of the lower court should be re-  
versed and plaintiff granted judgment.

Respectfully submitted,

HOWARD N. JONES

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