

1953

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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
FEB 27 1963
Supreme Court, Utah

SEABOARD FINANCE COMPANY,
a Utah Corporation,
Appellant,

— vs. —

HOWARD G. WAHLEN and
BARBARA M. WAHLEN,
Respondents.

BRIEF OF RESPONDENTS

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IN THE SUPREME COURT
of the
STATE OF UTAH

SEABOARD FINANCE COMPANY,
a Utah Corporation,

Appellant,

vs.

HOWARD G. WAHLEN and
BARBARA M. WAHLEN,

Respondents.

Case No.
7890

BRIEF OF RESPONDENTS

PRELIMINARY STATEMENT

The parties in this brief will be referred to as they appeared in the lower court.

The Statement of Facts as contained in plaintiff's brief, pages 1 to 4, is accurate and the defendants have no additional facts to present that would aid the Court in deciding this case. Based on these facts, the defendants contend that the computation of interest by plaintiff is in excess of the maximum legal interest allowed under the provisions of Section 7-8-3, Utah Code Annotated, 1953.

The defendants contend in this brief that the trial court did not err and that the judgment of the court should be affirmed.

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE NOTE WAS USURIOUS.

POINT II.

THE TRIAL COURT DID NOT ERR IN REFUSING TO MAKE THE FINDINGS OF FACT AS PROPOSED BY PLAINTIFF.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE NOTE WAS USURIOUS.

The argument by plaintiff in Points 1, 2 and 3 of its brief advances the theory that the trial court in determining whether the note in this case was usurious need only compute interest from the face of the note, and if 26% of the face of said note leaves the amount which the defendants received in cash, then the note was not usurious. In support of their contention, they have cited the case of *People's Finance and Thrift Co. v. Varney*, 75 Utah 355, 285 P. 304. This case is the only authority in Utah that has applied the language of an Industrial Loan Statute to a case involving a defense of usury.

In the *Varney* case defendants *applied* to plaintiff for a loan in the sum of \$200.00, said amount to be repaid within ten months. The Industrial Loan Statute then in effect prescribed as the maximum amount of interest 12% per annum, and plaintiff therefore deducted 10% of \$200.00 as interest in advance, and the additional amount of \$2.00 investigating fee. The defendants received the sum of \$178.00 in cash and executed a note payable to plaintiff in the sum of \$200.00. The defendants defaulted on the note, and upon suit by plaintiff, defended on the grounds of usury. The defense of usury was based on the ground that defendants did not have the use of \$200.00 for a ten month period, and therefore the total charge for interest for the money actually loaned to defendants was in excess of 12% per annum. The Supreme Court, in applying the language of the Industrial Loan Statute to the facts, stated the following on page 305:

“* * * When therefore the company deducted 12 per cent per annum as it did on the face of note, as interest in advance for the 10-month period on the loan, it but did what the statute expressly authorized such a company to do. The interest deducted was \$20, which is the interest on \$200 for a period of ten months at the rate of 12 per cent per annum. * * *”

The interesting distinction between the *Varney* case and the case at bar is that in the *Varney* case, the amount originally requested by defendants and the face of the note is identical, while in the case at bar the amount requested by defendants and the face of the note is not

identical. In the situation now before the Court where the amount requested by the borrower and the face of the note is not identical, the Court must determine upon which figure the loan company is permitted to compute its interest. The defendants contend that this figure must be the original amount requested, which in the case at bar would also be the actual amount received. If the lender is required to compute the interest on this figure and then includes this sum in the note, the lender will receive the legal rate of interest on the "face of his loan."

If the face of the note is the figure upon which the interest is to be computed, then the borrower is being charged for money upon which he never received and upon which he should never be required to pay interest. As stated in the case of *McCall v. Herring*, 42 S.E. 469, at page 472, the court cited Webb in his treatise on usury wherein Mr. Webb stated:

"Interest is compensation for the use of money. If the amount of the interest is deducted in advance, it is plain that the borrower never uses the interest so paid. He does not receive the full amount of his loan. He cannot use that which he was to receive unless it is paid to him. He cannot employ money kept out of his possession. It renders the borrower no service, performs no purpose, pays no debts, buys no property, satisfies no wants, and accomplishes nothing, as far as the borrower is concerned, for which he should be compelled to pay interest.' "

If the face of the note is the figure upon which the interest is to be computed, the lender is permitted to

charge more than the lawful rate of interest. In determining the rate of interest for a particular loan the case of *Agostini v. Colonial Trust Co.*, 36 A. 2d 33, presented a formula. The court stated at page 36:

“‘The term ‘interest’ is a device of language by which a formula is expressed in a word * * * There are three elements in the formula and each is essential to its proper application. They are: The amount charged, the amount lent, and the time involved. When each element has been accurately determined, application of the formula to ascertain the rate of interest charged requires merely the use of elementary arithmetic * * *

“‘The amount lent means the exact sum of which the borrower obtains the actual use. This may not be the amount stated in the loan contract. Any portion of that stated amount which does not come to the borrower free of conditions which deprive him of his beneficial use cannot be included in the amount lent for the purpose of computing interest. One cannot properly pay for the use of something of which one does not have the use * * *

“‘The time involved means the exact period for which the borrower has the free use of the amount lent. Like rent paid for the use of property, the rate of charge for the use of money necessarily depends on the length of time it is used. The amount of interest charge, in dollars and cents, is not legally significant until the amount lent and the time involved are known. Only when all three factors are known can the rate of charge be computed and reduced to per cent per annum for comparison with the rate allowed by law.’ ”

Applying this formula to the case at bar, the amount charged is \$358.38; the amount lent is the sum of \$1,020.00, and the time involved is for a twenty-four month period. Using simple arithmetic, the interest is 38% rather than the 26% allowed under the statute.

There are other authorities that discuss the problem of usury and the application of statutes that prescribed maximum legal interest.

In *Taylor v. Budd*, (Cal.) 18 P. 2d 333, the plaintiffs borrowed money from the defendants and executed a promissory note for one year in the amount of \$11,000.00 secured by a mortgage on real estate. The note contained provisions for interest at 12% per annum payable monthly in advance. The plaintiffs received the sum of \$10,670.00. The court, in discussing the question of interest in advance and the question as to what should be the test for usury, stated as follows, page 334:

“* * * a note must be tested for usury with a reference to the actual sum given by the lender to the borrower and not by the mere face of the note; * * *.”

In *Conner v. Minier* (Cal.), 288 P. 23, defendant, desiring to borrow the sum of \$300.00 from plaintiff, after executing two different notes and the plaintiff deducting \$1.50 for investigating fee, received \$270.00 in cash. The defendant then defaulted and upon suit by plaintiff for the sum of \$300.00 defended on the grounds of usury. The case is not exactly in point because of the complicated transaction, but the Court does discuss the problem of

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interest. At page 25, the

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Applying this formula charged is \$358.38; the \$1,020.00, and the time month period. Using six 38% rather than the 26

There are other authorities of usury and the applicable maximum legal interest.

In *Taylor v. Budd*, (borrowed money from promissory note for one secured by a mortgage on provisions for interest already in advance. The plaintiff 670.00. The court, in deciding in advance and the question for usury, stated as follows

“* * * a note reference to the the borrower and note; * * *.”

In *Conner v. Mini* desiring to borrow the sum executing two different \$1.50 for investigating defendant then defaulted the sum of \$300.00 due. The case is not exactly in transaction, but the Court

usury and the computation of interest. At page 25, the court states:

“In the present case all the various papers which we have described are manifestly parts of one transaction by which Minier borrowed money from the company, and all must be taken into consideration to determine whether that loan was usurious. On consideration of them all, and of the other facts stated, we have no doubt that it was. Although Minier signed two notes for \$300 each, he actually received only \$270, in addition to which the company paid \$1.50 for a financial report. At the argument before us, it was stated that the deduction of \$30 was made up of one year’s interest on \$300 at 6 per cent, amounting to \$18, * * *.”

The court in discussing the difference between the \$18.00 allowed as interest and the total deduction of \$30.00 stated as follows, page 25:

“* * * When interest or commission is deducted in advance from the amount of a loan, in testing the transaction for usury, the principal sum loaned will be held to be the face amount of the loan less the interest or commission so deducted. *Haines v. Commercial Mortgage Co.*, supra. The total amount loaned in this case, therefore, is \$271.50.”

Another authority is statement in *66 C.J. 210*, which states as follows:

“A contract or obligation for the payment of a sum of money larger than that actually lent to or due from the debtor is usurious if the difference


between the face amount of the obligation and the sum actually received or owed by the debtor, when added to the interest, if any, stipulated in the contract, exceeds the return permitted by law upon the sum actually so received or due, * * *."

Another case in point is *McKanna v. Thorne* (Okla.), 209 P. 1039. There, the defendants borrowed from the plaintiff the sum of \$6,000.00 for a period of five years. The maximum amount allowed under the statute was 10%. The defendants were required to repay to the plaintiff as interest on this \$6,000.00 the sum of \$3,454.15. The court stated at page 1039:

"It is clear from the notes executed by the defendants that the defendants contracted to pay to the plaintiff \$454.15 more than the legal rate of interest, which the plaintiff was permitted to charge the defendants under the law. Ten per cent interest being the maximum amount of interest which the plaintiff was permitted to charge the defendants for the use of the money, it is obvious that, when the plaintiff required the defendants to contract to pay him \$3,454.15 for the use of \$6,000.00 for five years, the transaction was tainted with usury. The rule applicable to this case is stated in *Bristow v. Central State Bank* (Okla. Sup.) 173 Pac. 221, as follows:

'When the lender exacts of the borrower as a condition of the loan a sum in addition to the highest legal rate of interest, the loan is thereby tainted with usury and the taint is not removed by giving this charge the name of 'discount'."

Another case in point is *Nevels v. Harris* (Texas), 109 A.L.R. 1464, wherein a note was executed in the sum of \$6,400.00. It was to bear 10% interest from maturity. There were other agreements entered into, but for the purposes of this case, that point is not important. The court states at page 1469:

“* * * Stolley took a note for \$6,400, but he did not lend that amount. He, in fact, only loaned \$6,400 less \$320, or \$6,080. We must therefore treat the last-named figure as the real amount of the loan.” 

The court goes on to state:

“* * * At 10 per cent, the highest legal rate, the interest on \$6,080 for one year would be \$608, and 10 per cent interest for the five-year period the loan was to run would amount to \$3,040. This sum added to the principal actually loaned, \$6,080, would aggregate \$9,120. This last sum is the maximum amount Stolley could have legally charged, and unless the contract calls for the payment of more than that sum it is not usurious.”

The Court will note from these authorities that the primary problem in each case was a determination by the court to see if the lender received more than the lawful rate of interest. If the court so found, the court denounced the practice and held the instrument to be usurious, regardless of the manner or means by which it was accomplished.

In the case at bar the facts clearly show that plaintiff received an amount in excess of the 26% allowed by the statute, and therefore the note is usurious.

POINT II.

THE TRIAL COURT DID NOT ERR IN REFUSING TO MAKE THE FINDINGS OF FACT AS PROPOSED BY PLAINTIFF.

The argument by plaintiff in Point 4 of its brief is presented to this Court as an excuse of plaintiff for the execution of a usurious instrument. All authorities hold that a necessary element of a usurious contract is an intent on the part of the lender to exact usurious interest. A Utah case that is in point is the case of *Cobb v. Hartenstein*, 152 P. 424, at page 427 :

“* * * ‘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;
* * *”

There is an additional rule that is equally established and that rule is that if a note is ~~usurious on its face~~, the required intent is implied. In support of this, defendants direct the Court's attention to 55 Am. Jur. 348, and further the case of *Fagerberg v. Denny* (Ariz.), 112 P. 2d 578, wherein the court stated at page 581 :

“* * * In order to establish usury there must be an intent to violate the law. And while when the

contract is usurious on its face that intent will be presumed. When it is not, we think the circumstances surrounding the transaction are admissible to show the true intent."

The Utah case of *Cobb v. Hartenstein*, supra, discusses this problem at page 430. The court states:

"* * * As we have seen, by the statement of the law quoted from Cyc. which we have adopted in *Fisher v. Adamson*, supra, 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 the contract or transaction which it claims 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."

Again the defendants assert that under the facts presented in this case wherein defendants borrowed the sum of \$1,020.00 and executed a note in the sum of \$1,378.38, this note is usurious on its face. The contract in this case was made by plaintiff and it had knowledge of its contents and that it was exacting as interest 38% of the amount loaned rather than the 26% allowed by statute.

CONCLUSION

In analyzing the brief of the plaintiff, the plaintiff has attempted to establish a new precedent in construing usury statutes. The defendants assert that it would be useless and a waste of this Court's time to cite authorities

holding these statutes are to be strictly construed. The statute involved is specific in stating that the amount of interest is 1% per month and this loan being for twenty-four months, it is elementary that the total interest allowed is 24%. Plaintiff has attempted to convey to this Court by its language and cases cited that this statute was passed for plaintiff's protection itself and that this Court should not construe the statute as a protection to the borrower.

It is difficult for the defendants to conceive that the legislature in passing the statute in question drafted a bill that could be so tortured and misconstrued that a lender could believe he could exact as interest more than the legal rate of 1% per month.

This statute was passed to protect people from the clutches of avaricious money lenders rather than throwing them to their mercy. The total amount of interest that should be allowed for the use of \$1,020.00 is 26% and not 38%.

The trial court held that the note sued upon by the plaintiff was usurious and the defendants herein contend that the trial court's findings were correct and that the judgment of said court should be affirmed.

Respectfully submitted,

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Received copies of the within Brief of
Respondent this day of, A. D. 1953

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