

1953

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

B. R. Parkinson; Arthur M. Mielsen; Counsel, Amicus Curiae;

Recommended Citation

Brief of Amicus Curiae, *Seaboard Finance Co. v. Wahlen*, No. 7890 (Utah Supreme Court, 1953).
https://digitalcommons.law.byu.edu/uofu_sc1/1808

This Brief of Amicus Curiae is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

**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 AMICUS CURIAE

B. R. PARKINSON
506 Phillips Petroleum Building
ARTHUR M. NIELSEN
510 Newhouse Building
Salt Lake City, Utah
Counsel, Amicus Curiae

FILED

APR 7 1953

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

GENERAL STATEMENT	1
STATEMENT OF POINTS	4
ARGUMENT	5
MANNER OF COMPUTING AND AMOUNT OF INTEREST WHICH MAY BE CHARGED IS STATUTORY	5
THE STATUTE IS SUBJECT TO ONLY ONE INTERPRETATION	8
AUTHORITIES CITED BY RESPONDENT ARE NOT APPLICABLE TO THE INSTANT CASE	15
SUMMARY	19

AUTHORITIES

Cases Cited

Agostini v. Colonial Trust Company (Delaware) 36 A(2d) 33	15
Cobb v. Hartenstein, 47 Utah 174, 152 Pac. 424	12, 13
Connor v. Minier, (California) 288 Pac. 23	16, 17
Covington v. Fisher, 22 Okl. 207, 97 Pac. 615	19
Edelstein v. Hub Loan Company, 130 N.J.L. 511, 22 A(2d) 829	13
Federal Nat'l Bank v. Wilhelm (Oklahoma) 246 Pac. 478	14, 18
Mackenzie v. Flannery, 90 Ga. 590, 16 S.E. 710	15
Maellaro v. Maddison Finance Co., 130 N.J.L. 140, 31 A.(2d) 485	13
Mathis v. Holland Furnace Co. (Utah) 166 P.(2d) 518	13
McCall v. Herring (Georgia) 42 S.E. 468	15
McKanna v. Thorne (Oklahoma) 209 Pac. 1039	18
National Service Corp. v. Gardikis, 110 Utah 275, 172 P.(2d) 120	8
Peoples Finance & Thrift v. Varney, 75 Utah 355, 285 Pac. 304	1, 6, 9, 10, 12
Taylor v. Budd (California) 18 P.(2d) 333	18
Tholen v. Duffy, 7 Kan. Rep. 405	13

Statutes

Compiled Laws of Utah 1917, Sec. 3321	7
Utah Code Annotated 1943: Section 7-6-3	2
Utah Code Annotated 1953: Section 7-8-1 to 12	6
7-8-3	2
7-10-1 to 24	5
15-1-1 to 19	5
15-1-2	19
Laws of Utah 1925, Chap. 116	6
Laws of Utah 1927: p. 72	7
Laws of Utah 1953 (Senate Bill 138)	5
California: Derrings California Fin. C.A. Sec. 18655	18
Statutes of 1917, p. 658	17
Statutes of 1921, p. 729	17
Oklahoma: Compiled Statutes 1921, Sec. 5104	18

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.

BRIEF AMICUS
CURIAE

Case No. 7890

GENERAL STATEMENT

Counsel appreciate the opportunity afforded to file their Brief Amicus Curiae to give what assistance they can to the Court in resolving the issues presented by this appeal.

For years the Banking Commissioner and the various corporations authorized to do business under the Industrial Loan law have agreed upon the interpretation of the provisions of the act with respect to the manner of computing interest and charges—secure in the knowledge that such interpretation and construction had been upheld by this Court in the case of Peoples Finance and Thrift Company vs. Varney, 75 Utah 355, 285 Pac. 304.

In the light of the Court's ruling in the Varney case it is indeed difficult to see how the present case ever arose.

In reviewing the record one can only state that the trial court rendered its decision on the basis of the statements made during the pretrial and perhaps without fully comprehending the nature of the problem presented.

As counsel view the matter the only issue before the trial court and the sole point involved on this appeal is the interpretation of a section of our Industrial Loan Act, to-wit, 7-6-3, Utah Code Annotated, 1943, (now Title 7, Chapter 8, Section 3, Utah Code Annotated, 1953) which provides:

“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 1 per cent or less of the face of such loan per month, and in addition, to require payment in uniform weekly, semi-monthly or monthly installments, with or without an allowance of interest on such installments, and to charge a fee of \$2.00 or less on loans of \$100.00 or less, and a maximum fee of 2 per cent on loans in excess of \$100.00 for expense in examining and investigating the character and circumstances of the borrower; . . .”

The facts stripped of unnecessary verbiage are that the Defendants signed a note with the Plaintiff for a loan. The note was for \$1378.38, payable in 24 equal monthly installments. The Plaintiff deducted 26 per cent from the \$1378.38 or \$368.38 for interest and fee. The borrower received \$1020.00, with \$20.00 of which he purchased insurance.

The question: “Does the Utah Statute above quoted permit this to be done?” While we are convinced that this question has already been answered by the Utah Supreme Court in the Varney case, *supra*, the decision, without the prior decision in the Varney case, would still have

to be the same as the statute is clear and unequivocal; its provisions were followed by the lender.

The statute says the lender may, “. . . deduct interest . . . in advance at the rate of 1 per cent per month or less of the face of such loan permonth. . . .” The Plaintiff deducted 24 per cent from \$1378.38 or \$330.81.

The statute says “. . . and in addition to require payment in uniform weekly, semi-monthly, or monthly installments, with or without an allowance of interest on such installments. . . .” The Plaintiff’s note was payable in 24 uniform monthly installments.

The statute says “. . . and to charge . . . a maximum fee of 2 percent on loans in excess of \$100.00 for expense. . . .” The Plaintiff charged \$27.57(which is 2 per cent of the face of the loan). This fee was paid to Plaintiff by deducting it from the amount Defendants would otherwise have received. The Defendants received the balance of the amount of the note.

The Plaintiff followed the clear and unmistakable language of the statute.

An attempt to confuse the Court has been made by the back door approach of starting with the amount of money that the Defendants received, and the claim that the charges should be *added* to the net proceeds in order to determine the amount of the note. We submit the provision in the statute to “*deduct interest*” in advance is not followed by a process of *addition*.

It has been argued in this case that given the amount of money which the borrower desires to take home with him, it involves the use of higher mathematics to determine the amount of the note. That is not so. The process is one every merchant does constantly in pricing his

goods from his cost price. (An example or two may be in order, i.e. A merchant desires to sell his goods for a price to yield him a gross profit of 30 per cent of his sales price. How does he determine the selling price on an item costing him \$137.20? He knows if 30 per cent of the selling price is profit, then the initial cost to him equals 70 per cent of the selling price. So he divides \$137.20 by 70 to learn 1 per cent (or \$1.96) and multiplies by 100 to obtain the selling price which is \$196.00. Similarly, a borrower wants to obtain cash in the amount of \$550.00 from an industrial loan company. How large a loan must he make on a 15 month basis to yield \$550.00? The amount of the loan is 100 per cent subject to a *deduction* of interest equal to 15 per cent and a deduction of the fee of 2 per cent, or a total *deduction* of 17 per cent. The cash he is to receive will equal 83 per cent of the amount of the loan. Divide \$550.00 by 83 to learn 1 per cent which is \$6.6264. Multiplied by 100 this will give \$662.64 as the amount of loan necessary to yield \$550.00 net proceeds. From the face of the loan (662.64) is deducted interest (15%) in the amount of \$99.39 fee (2%) in the amount of \$13.25, making a total deduction of \$112.64).

In the case before the court, the borrowers applied for a loan—not for \$1000 but for a loan—in an amount sufficient to give them *net cash proceeds* of at least \$1000. (See Tr., Page 20). We submit that the borrowers wanted to make a loan on which there would be the desired amount left, after charges had been deducted.

STATEMENT OF POINTS

For convenience in discussing the matter, counsel have divided this brief into the following points:

THE MANNER OF COMPUTING AND THE AMOUNT OF INTEREST WHICH MAY BE CHARGED IS STATUTORY:

THE STATUTE (SECTION 7-8-3, U.C.A. 1953) IS SUBJECT TO ONLY ONE INTERPRETATION;

THE AUTHORITIES CITED BY RESPONDENTS ARE NOT APPLICABLE TO THE INSTANT CASE.

The foregoing points will be discussed in order.

MANNER OF COMPUTING AND AMOUNT OF INTEREST WHICH MAY BE CHARGED IS STATUTORY.

It is apparently well understood that the Legislature may determine within its constitutional limitations what rate or rates of interest may be charged the public with respect to loans of money and may further prescribe how such interest shall be computed. Indeed the Legislature may prescribe, and in our state legislature has prescribed, more than one rate of interest and more than one method of computing it—depending upon the nature of the loan and the qualification of the lender.

The General Interest Law found in Title 15, Chapter 1, Sections 1 to 9, authorizes an interest charge of 10 per cent per annum, computed on the unpaid balance of the loan.

Under the Small Loan Act, Title 7, Chapter 10, Sections 1 to 24, interest is computed on the decreasing unpaid balance of the loan at a stated rate by the actual number of days from payment to payment.

A new Installment Sales Finance Act passed by the 1953 Legislature (Senate Bill 138) provides for the *addition* of 1 per cent per month for the time the contract

is to run on the full amount of the then unpaid balance of the contract.

The Industrial Loan Act, Title 7, Chapter 8, Section 1 to 12, where the interest on the face of the loan is *deducted* in advance.

In addition there is other legislation on the subject of rates for credit unions, pawnbrokers, etc.

Cases interpreting the provisions of one of these statutes are not necessarily applicable to the other. The Varney case, however, decided in 1930, construed our Industrial Loan Act and has been followed as the law of Utah since that time.

At this point it might be well to discuss the actual issues involved in the Varney case and how the problem was resolved not only by the Court but also by legislative action. The note involved in the case was dated March 16, 1927. At that time the Industrial Loan Act (Laws of Utah 1925, Chapter 116) had been in effect less than two years. Insofar as we have been able to ascertain the original law was patterned after the California Industrial Loan Act. The 1925 statute defined an industrial loan company and then authorized said lender to loan money "and to deduct interest thereon in advance at the rate of twelve (12%) per cent of the face of said loan, and in addition, to require uniform weekly, semi-monthly, or monthly installments." It did not provide, as does the present act, that the uniform installments could be required, "with or without an allowance of interest on such installments." And it was the absence of that provision which presumably gave rise to the question raised in the Varney case to the effect that even though the law authorized interest to be deducted in ad-

vance the law had to be read in conjunction with the general interest statute (then Section 3321, Compiled Laws of Utah 1917) which required interest to be calculated on a "per annum or by the year" basis. Thus, argued counsel for Miss Varney, interest, although calculated in *advance* and *deducted* had to be figured on the basis that the borrower received the use of \$200.00 for one month, \$180.00 for the second month, \$160.00 for the third month and so on in reducing proportions on which such reducing portions only could the interest be calculated.

Not only did the Supreme Court repudiate this theory but the Legislature in the interim amended the act (Laws of Utah 1927, p. 72) by inserting the provision "with or without an allowance of interest on such installments" so that both the Legislature and the Court arrived at a mutual understanding and interpretation of what the law intended. ✓

The other argument made by counsel for Miss Varney was that if the Industrial Loan Act was not construed in connection with the general interest statute it would be repugnant thereto and void. At that time the general interest statute made no exception in its provisions to the rate therein authorized. Although the Supreme Court refused to subscribe to Appellant's theory the Legislature in 1935, in amending the general interest statute specifically excepted from the provisions thereof "such exceptions as are otherwise provided by law." ✓

In addition to the 1927 amendment above referred to at which time other amendments were made changing the rate of 12 per cent per annum to 1 per cent per month and fixing a maximum of two years for any such loan, the Legislature in 1945 added a proviso that the 2

per cent charge could not be assessed more often than once in a six months period. Other than these amendments, which indicate some careful regulation of the act, the Legislature has failed in 12 general sessions to modify or change the statute so as to provide for a different method of calculating the interest to be charged by an industrial loan corporation.

If the Legislature did not approve of the interpretation given in the Varney case, they could have so stated. It is not proper to assume that the Legislature does not know what it is doing. The Legislature has, since the decision in the Varney case, legislated on consumer finance a number of times, and has in different acts provided for various ways of computing interest or charges, indicating it does understand the various rates and methods of computation provided for. It cannot be truthfully said that the Legislature is unaware of or indifferent to matters of consumer finance.

This Court interpreted the Small Loan Act of Utah some years ago in the case of National Service Corporation vs. Gardikis, 110 Utah 275, 172 Pac. 2d 120. Under the old act, this Court determined that one lender could have more than one loan with a borrower even though the total exceeded \$300.00. The Small Loan Act was promptly changed to provide that no borrower could owe more than \$300.00 to one lender.

THE STATUTE IS SUBJECT TO ONLY ONE INTERPRETATION

While apparently conceding that the reasoning of the Supreme Court in the Varney case, *supra*, is sound and should not be modified, the Respondents have attempted in their brief on file herein to distinguish that

case from the case here involved. They argue that "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 are identical, which in the case at bar the amount requested by Defendants and the face of the note are not identical." We call attention to the finding made by the trial court (apparently based on stipulations of counsel and which is not assailed on appeal by respondents):

"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."

The foregoing finding certainly negates any such argument as Respondents attempt to advance to the effect that the two cases are not the same. But even assuming that when a person approaches a loan company to negotiate a loan he has in mind and mentions a certain amount of money which he seeks to obtain from the company by way of a loan, that is no factor requiring a different method of computation of the interest. The Plaintiff company in the instant case made its computation of interest and fee exactly in the same manner as did the Peoples Finance and Thrift Company in the Varney case. The facts in the latter case were stipulated to much as they were in the case now before the Court. In the stipulation it was agreed that Miss Varney applied for a loan of \$200.00. It is not known whether she originally asked for the sum of \$200.00 or requested a lesser sum, but whether she asked originally for \$200.00 and learned that she could not receive that amount and contented herself with less or whether she asked for less

and because it was calculated that the loan would have to be for \$200.00 in order for her to realize the amount she desired, the same method of computing is involved.

Miss Varney, the borrower, received \$178.00. She was to repay the loan in ten months by ten equal monthly installments. Ten per cent of \$178.00 is \$17.80 and the lender deducted a \$2.00 fee. If these figures are added together as contended by Responds should be done in this case, the note should have been for \$197.80 and not for \$200.00. In doing that, however, the clear language of the statute is not being followed, because putting together \$178.00 and \$19.80 or any other sum, is not *deducting* but is *adding*. In the Varney case the charges were based on the face amount of the note and the charges in the instant case are also based on the face amount of the note.

Would it make a difference if the full amount of the note is handed to the borrower and then have him pay it back immediately, or paying out only the net proceeds in the first instance? The borrower had the option; he took out the net amount.

If the borrower in the case of Peoples Finance and Thrift Company vs. Varney wanted to have \$200.00 instead of \$178.00 should the rate be different, or the manner of computing the charges be changed? The answer to that question is so obvious that it seems absurd to discuss it. Certainly the statute does not mean that if she wanted \$200.00 the charges should be *added*, but if she wanted \$178.00 they could be *deducted*. That is what the Defendants are contending in the instant case. The position is not tenable.

In the Varney case the borrower wanted net cash

proceeds of \$178.00 and therefore had to make a loan of \$200.00. In the instant case the borrower had to make a loan of \$1,378.38 to obtain the net cash proceeds he desired.

What has been said above with respect to the manner of computing and deducting the interest applies with equal force to the manner of deducting the 2 per cent fee "for expense in examining and investigating the character and circumstances of the borrower." It frequently happens that when a prospective borrower makes application for a loan he does so in order to pay off existing bills, so that the proceeds of the loan are used insatisfying the creditors of the borrower. In such case the borrower may authorize, and the lender may require, that individual checks be made out to the respective creditors for the amounts owing them. In such case the borrower signs what is known as an authorization to pay the proceeds of the loan to specific individuals. One of the borrower's debts created by the making of the loan in the instant case was the debt of 2 per cent of the face of the loan for the lender's expense in examining and investigating the matter. Here again the borrower "authorized" the deduction of the fee from the proceeds payable to him in order that this debt be satisfied. If the borrower had sufficient money to pay the fee from his own pocket, then the amount thereof would not have been retained by the lender but would have been paid to him as part of the proceeds of the loan. Thus in the Varney case, where a fee of \$2.00 was charged, if the borrower had paid the fee from her own funds she would have received \$180.00 instead of \$178.00—the actual amount paid to her after

Diff. 200

deducting the interest and withholding the amount of the fee by the lender.

Operators under the Industrial Loan Act originally thought they understood the language of the statute and governed themselves accordingly. That interpretation was challenged and the Utah Supreme Court interpreted the Act in the case of Peoples Finance and Thrift Company vs. Varney and reached the same conclusion as to the meaning of the statute as the lenders had. Business people have followed that interpretation and have loaned in perfectly good faith many millions of dollars. Should it not now be up to the Legislature to change the law if a change is to be made?

This Court in *Cobb vs. Hartenstein*, 47 Utah 174, 152 Pac. 424, said:

“Since usury laws are quasi penal, the court will not hold a contract to be in violation of the usury laws, unless upon a fair and reasonable construction of all of its terms, in view of the dealings of the parties, it is manifest that the intent of the parties was to engage in such a transaction as is forbidden by those laws. If two reasonable constructions are possible, by one of which the contract will be legal, while by the other it will be usurious and invalid, the Court will adopt the former.”

Further in the same case we find:

“It is further stated the offense of usury is not complete unless there is an unlawful intent to violate the usury statute.”

How by any source of reasoning can an attempt or intent to violate the usury law be found in this case when the Appellant has not only followed what appears to be the law, but does exactly what this Court has said is the law.

Cobb vs. Hartenstein, *supra*, was cited with approval by this Court by four of the present members of this Court in Mathis vs. Holland Furnace Company, 166 Pac. 2d 518:

“A contract to be usurious, must be so when made and it is essential that a corrupt or unlawful intent to violate the usury law, at least on the part of the lender be proved to render the contract usurious.”

The penalty for usury being “penal” in nature, this law must be construed strictly in favor of the lender.

Edelstein vs. Hub Loan Company, 33 Atlantic 2d. 829, 130 NJL 511:

“Provision of Small Loan Act permitting borrower to recover from lender any sum paid to lender in connection with loan in event of violation of limitation on charges imposed upon lender is ‘penal’ and as such to be strictly construed in favor of lender.”

And in Maellaro vs. Maddison Finance Company, 31 Atlantic 2d. 485, 130 NJL 140:

“The Small Loan Act is generally ‘remedial’ in nature, but the provisions enjoining the imposition of charges and expenses not specifically authorized are highly ‘penal’ and are therefore to be strictly construed.”

In the case of Tholen vs. Duffy, 7 Kan. Rep. 405, the Defendant Duffy loaned money to Tholen. A note for \$1,000.00 was signed which provided for the payment of 12 per cent interest in advance. Duffy held out \$120.00 and gave Tholen 880.00. Usury was claimed on the ground the interest should have been figured on the sum of \$880.00. The Court held the note was not usurious, stating:

"Twelve per cent is the highest legal ~~interest~~ which by the terms of our law, parties may contract to pay. Exacting this amount in advance, practically gives to the lender more than 12 per cent on the amount the borrower actually has the use of during the time of the loan. It seems difficult upon principal to sustain such a transaction. But in cases where note or bill is given, it is supported by such an overwhelming current of decision, and is a matter of such universal practice, that it may well be considered as engrafted upon the law as a settled rule. It was so settled before the passage of our interest law; and *if the Legislature had intended to change this rule of construction, such intention would have been plainly expressed.*" (Italics added).

Again, in *Federal National Bank vs. Wilhelm*, 246 Pac. 478 (an Oklahoma case decided in 1926) the borrower claimed that he borrowed \$1,500.00 from the bank and executed a note for \$1,666.50, the \$166.50 being charged as interest; that said \$166.50 was usurious because it exceeded 10 per cent. The statute there provided:

"The interest which would become due at the end of a term for which a loan is made, not exceeding one year's interest in all, may be deducted from the loan in advance if the parties thus agree." In upholding the transaction, the Court said:

"The note was for \$1,666.50, and ran for a term of one year. Ten per cent interest on the note for one year would amount to \$166.65. Deducting this from the amount of the note, leaves \$1,499.85. The Plaintiff admits he received \$1,500.00 or 15 cents more than he was entitled to after interest was deducted. Since 15 cents less than 10 per cent of the principal was deducted as interest, the original note was therefore not usurious."

AUTHORITIES CITED BY RESPONDENT ARE NOT APPLICABLE TO THE INSTANT CASE

We have examined the various authorities cited and quoted by respondents and find that in every case the statute involved was different from that now before the court for interpretation. However, in several of the cases the court's decision by dictum upholds the views herein expressed: In the case of *McCall vs. Herring* (Georgia) 42 S.E. 468, the court first determined that "A money lender cannot, in this state, lawfully contract for or reserve any greater rate of interest than 8 per cent. per annum." However, even in the absence of a statute authorizing the *deduction* of the interest *in advance*, the Georgia Supreme Court had previously determined in the case of *Mackenzie vs. Flannery*, 90 Ga. 590, 16 S.E. 710, that "to take 8 per cent interest in advance by way of discount on short loans, in the usual and ordinary course of business, is not usurious." A fortiori, if the legislature of the state of Georgia had enacted a statute authorizing the deduction of interest in advance, no question would have been presented in the *McCall* case, *supra*.

In the case of *Agostini vs. Colonial Trust Company* (Delaware) 36 A(2d) 33, the court was concerned with a loan made under the Delaware General Interest Statute which provides:

"Legal Rate; Usury; Penalty:—The lawful rate of interest for the loan or use of money, in all cases where no express contract shall have been made for a less rate, shall be six per cent per annum; and when a rate of interest for the loan or use of money *exceeding that established by law* shall have been reserved or contracted for, the borrower or debtor

shall not be required to pay the creditor the excess over the legal rate . . .” (Italics added).

It will be noted that the above statute is similar to our general interest law in excepting those situations where the statute otherwise authorizes a greater rate or different rate of interest to be charged. In discussing this matter the court, in the Agostini case, stated that “unless justified by some other statute or rule of law, the rate actually called for by the agreement must be held unlawful.” The lender contended that the agreement was authorized by the “Small Loan Act.” This Act authorized a lender, qualifying under the law, to loan an amount not exceeding Five Hundred Dollars and “charge in advance the legal rate of interest of six per cent upon the entire amount of the loan and may make such loan repayable in weekly, monthly or other periodical installments” plus a two per cent investigation fee. The court went on to hold that deducting interest in advance on short term loans was well recognized and not repugnant in law, even in the absence of statute. The actual face amount of the loan was \$8,000.00, which was in excess of the amount authorized to be loaned under the Act and the Court went on further to hold that the loan was for a long term and therefore interest could not be deducted in advance. Under our state there is both a limitation of the amount of the loan and the time within which it must be repaid. The Appellant has complied with both of these requirements and no issue is raised that the loan was either in excess of the authorized amount or that it was for a longer period than authorized by the Act.

In the case of Connor vs. Minier, (California 1930) 288 Pac. 23, the Appellate Court had before it the ques-

tion of determining whether the loan was usurious under the general usury law of California. The defendant raised the issue in its answer to the cross-complaint that it was qualified to do business under the industrial loan law of California, but the court in reviewing this matter on appeal held:

“ . . . this was an affirmative allegation, which it was required to prove. If this fact is a defense to the charge of usury, the plaintiff might also have proved it under the statutory replication given him by Section 462 of the Code of Civil Procedure. But the record discloses neither proof of this fact nor attempt to prove it.”

At that time the statutes of California (from which it appears that our own Industrial Loan Act was taken) authorized an industrial loan corporation “To loan money on personal security, or otherwise, and to *deduct interest therefor in advance* at the rate of six per cent per annum, or less, and, in addition, to receive and to require uniform weekly or monthly installments on its certificates of investment, purchased by the borrower simultaneously with the said loan transaction, or otherwise, and pledged with the corporation as security for the said loan, *with or without an allowance of interest on such installments.* (St. 1917, p. 658; St. 1921, p. 729) “From the italicized portion of the statute it can readily be observed where our legislature obtained the phrase “deduct interest therefor in advance” as well as the phrase “with or without an allowance of interest on such installments.” Under the holding of the court in the Connor Case, there appears no doubt that the court would have upheld the deduction of interest in advance, (just as our court did in the Varney Case) if the lender had proved that it qualified under the

Industrial Loan Act. In the instant case there is no dispute but that Appellant was qualified under the Industrial Loan Act, and the lower court so found.

In the later California case cited by respondents (Taylor vs. Budd, 18 P. 2d 333) the loan was not made under the Industrial Loan Act, but even if it were claimed so to be, the rate charged was 12 per cent in advance, instead of the six per cent authorized by that Act.

(It may be noted that the Industrial Loan Act of California, quoted above, has since been amended so that a different rate of interest may be charged depending upon the amount of the loan—ranging from $2\frac{1}{2}$ per cent per month to 10 per cent per annum. Deering's California Finance Code Ann., Sec. 18655. Under our statutes the rate of interest varies from 3 per cent per month to 10 per cent per annum. In each case the particular statute involved indicates whether the interest is paid on the unpaid balance or calculated in advance and deducted from the face of the note).

Respondents also refer to the case of McKanna vs. Thorne (Okla. 1922) 209 Pac. 1039, where the Court held that under the law of Oklahoma, 10 per cent interest is the maximum amount which the lender was permitted to charge. The loan in that case, however, was for the sum of \$6,000.00 for a period of five years. At that time Oklahoma had a law (Compiled Statutes 1921, Section 5104) authorizing interest to be deducted in advance "if the parties thus agree" where the loan is for a term of one year. In construing this statute the Court in the later case of Federal National Bank vs. Wilhelm, *supra*, authorized the interest to be *deducted in advance* as

provided by the statute. See also *Covington vs. Fisher*, 22 Okla. 207, 97 Pac. 615.

SUMMARY

In conclusion, counsel again desire to express their appreciation for the opportunity afforded to file the foregoing Brief. The matter before the Court might well affect the validity of thousands of loans and millions of dollars advanced by sound and reputable finance institutions who have qualified to do business under the Industrial Loan Act and whose operations are subject to supervision and audit by the Banking Commissioner of Utah, similiar to banks and trust companies. While we have not attempted to go into the social aspects of the law there is much that might be stated in justification of an "industrial loan rate" of interest as well as a "small loan rate"—separate and distinct from the general interest rate prescribed under Title 15, Chapter 1, Utah Code Annotated, 1953. As a matter of fact, if the interpretation given the Industrial Loan Act by the lower court is upheld (which would require the overruling of the *Varney* case, *supra*) there would be very little, if any, difference in the rate of interest which might be charged under the general interest statute and under the Industrial Loan Act. As we view the entire picture relating to loan transactions there are three general gradations of interest which might be charged, the industrial loan rate, being the middle, the small loan rate authorizes 3 per cent per month while the general interest statute (15-1-2 U.C.A. 1953) authorizes 1 per cent per month on amounts of \$100.00 or less and 10 per cent per annum on amounts in excess of \$100.00.

We submit that both the Legislature and the Supreme Court of this State have heretofore and for a long period

of time recognized the plain, clear, convincing, unequivocal and specific language of the Industrial Loan Act which authorizes a person qualified under such Act "to deduct interest . . . in advance at the rate of 1 per cent or less of the face of such loan per month." The authorities cited and relied upon by Respondents are not in point, but in any event, do not indicate that a different construction of the language of the Act should be made. In fact most of the authorities referred by Respondents do recognize the validity of *deducting interest in advance* where it is authorized by statute, or accepted by commercial practice on loans for short periods of time.

We urge the Court to affirm the decision of the Varney case by determining that upon the basis of the facts and the findings of the Court, the loan here in question was not usurious but that the method of calculating the interest and the deduction of such interest and fee was proper under the statute.

Respectfully submitted,

B. R. PARKINSON
ARTHUR H. NIELSEN
Counsel, Amicus Curiae.