1968

United American Life Insuraance Company, a Corporation, and Zions , First National Bank, Natlonal Association, A Corportion v. Gary J. Willey and Jean M. Willey, His Wife; Horizon Investment Corporation, et al. : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

NITED AMERICAN LIFE INSURANCE OMPANY, a corporation, and ZIONS FIRST ATIONAL BANK, National Association, a rporation,

Plaintiffs-Respondents

vs.

ARY J. WILLEY and JEAN M. WILLEY, is wife, HORIZON INVESTMENT COR-ORATION, a corporation, OAK HILLS REC-EATION CLUB, a corporation, WESTERN TATES INVESTMENT, INC., a corporation, VESTERN STATES TITLE INSURANCE OMPANY, a corporation, TOWNE APTS., a rporation, INTERMOUNTAIN CAPITAL ORPORATION, a corporation, WILLIAM ARCUS, ROCKY MOUNTAIN REFRIGER-TION, INC., HOLBROOK COMPANY, UTAH TATE TAX COMMISSION, IDEAL ELEC-RIC COMPANY, NATIONAL SURETY COR-ORATION, OLYMPIA SALES COMPANY, TAH CONCRETE PIPE COMPANY, FED-RAL BUILDING & LOAN, MELVIN E. NGERSOLL, THE UNITED STATES OF MERICA, R. W. TAYLOR STEEL CO., LUCY TACY, CHARLESWORTH PLUMBING & EATING CO., and DOHRMANN COMPANY,

Defendants-Appellants

BRIEF OF RESPONDENTS

Appeal From a Judgment of the
Second District Court for Weber County
Honorable Charles G. Cowley, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

UNITED AMERICAN LIFE INSURANCE COMPANY, a corporation, and ZIONS FIRST NATIONAL BANK, National Association, a corporation,

Plaintiffs-Respondents

vs.

GARY J. WILLEY and JEAN M. WILLEY, his wife, HORIZON INVESTMENT CORPORATION, a corporation, OAK HILLS RECREATION CLUB, a corporation, WESTERN STATES INVESTMENT, INC., a corporation, WESTERN STATES TITLE INSURANCE COMPANY, a corporation, TOWNE APTS., a corporation, INTERMOUNTAIN CAPITAL CORPORATION, a corporation, WILLIAM MARCUS, ROCKY MOUNTAIN REFRIGERATION, INC., HOLBROOK COMPANY, UTAH STATE TAX COMMISSION, IDEAL ELECTRIC COMPANY, NATIONAL SURETY CORPORATION, OLYMPIA SALES COMPANY, UTAH CONCRETE PIPE COMPANY, FEDERAL BUILDING & LOAN, MELVIN E. INGERSOLL, THE UNITED STATES OF AMERICA, R. W. TAYLOR STEEL CO., LUCY STACY, CHARLESWORTH PLUMBING & HEATING CO., and DOHRMANN COMPANY,

Defendants-Appellants.

Case No. 11086

BRIEF OF RESPONDENTS

NATURE OF THE CASE

This is a suit containing five causes of action which was commenced by plaintiffs for the purpose of foreclosing the liens of a trust deed, a chattel mortgage,

three mortgages, and a conditional sales contract executed by the appellants, Gary J. Willey, Jean M. Willey and Horizon Investment Corporation, in which appellants interposed the defense and counterclaim of usury insofar as plaintiffs' first cause of action was concerned.

DISPOSITION IN THE LOWER COURT

Plaintiffs moved for summary judgment based upon the pleadings, the deposition of defendant-appellant Gary J. Willey and the uncontroverted affidavits attached to plaintiffs' motion. Defendants-appellants also moved for summary judgment, based upon the pleadings and upon a legal memorandum filed by defendants-appellants in support of their motion. The lower court granted plaintiffs' motion for summary judgment and denied defendants appellants' motion. Judgment was entered which (1) dismissed with prejudice defendants - appellants' counterclaims, (2) decreed the amounts due to respondent, United American Life Insurance Company from the defendants-appellants on United American Life Insurance Company's various liens, (3) decreed the amounts due to numerous other parties from defendants-appellants, (4) determined the priority of the liens of respondent and the other parties, and (5) ordered the various properties sold and the proceeds applied in satisfaction of the liens of the various parties in the order of their priority.

After judgment was entered, defendants-appellants, in lieu of filing a supersedeas bond, moved the lower court for an order staying any further proceedings until this

appeal has been heard by the Utah Supreme Court. This motion was denied.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the summary judgment awarded in favor of plaintiff, United American Insurance Company, on the first cause of action, and seek an order extending appellants' redemption rights for a period of six months after termination of this litigation.

STATEMENT OF FACTS

The following are the facts as testified to by the appellant Gary J. Willey in his deposition.

Horizon Investment Corp,. is a corporation which was organized in 1963 by Gary J. Willey and Jean M. Willey, his wife, for the purpose of constructing a Country Club on property located in Weber County, Utah. Gary J. Willey and Jean M. Willey are the sole stockholders of the corporation and Gary J. Willey is its president while Jean M. Willey is its Secretary. (R. 28, P. 4-5) (Unless otherwise stated all references in this Brief to the record will refer to pages in the deposition of appellant Gary J. Willey). By October of 1964 the appellants had become indebted to Zions First National Bank (hereinafter referred to as "Zions") in the sum of TWO HUNDRED SEVENTY THOUSAND DOLLARS ($270,000.00) on prior loans which Zions had made to appellants to finance the construction of the Country Club (p. 13). In October of 1964 appellant Gary J. Willey approached Zions and requested a loan

of FOUR HUNDRED FIFTY THOUSAND DOLLARS ($450,000.00) for the purpose of paying off the existing TWO HUNDRED SEVENTY THOUSAND DOLLAR ($270,000.00) indebtedness and of obtaining additional capital. Zions refused to loan appellants any further money unless appellants would get a written commitment from some insurance company to purchase the loan from Zions should Zions so demand. (p. 14). Zions did not tell appellants from whom to get the commitment. The only thing demanded by Zions was that the commitment would require the company issuing it to purchase the loan from Zions should Zions so demand and that the company issuing the commitment be substantial enough to take up the loan. (p. 17, 18).

Appellant Gary J. Willey, through a broker by the name of Jesse Noble, contacted United American Life Insurance Company (hereinafter called "United American") and requested United American to issue the commitment which Zions required as a condition to making appellants the FOUR HUNDRED FIFTY THOUSAND DOLLAR ($450,000.00) loan. (p. 11, 15). Mr. Noble was the agent of appellant Gary J. Willey and neither Mr. Noble, nor his associate, Mr. Robert Campbell, were employees of United American. (p. 15).

After some negotiations, United American agreed to issue its commitment to Zions for a fee of $9,000.00, two per cent of the principal amount of the loan. (p. 21) In addition, appellants agreed to deposit the sum of FORTY FIVE THOUSAND DOLLARS ($45,000.00) with United American. If Zions did not require United

American to purchase the loan or if appellants refinanced the loan, or if appellants obtained some third party to purchase the loan from Zions, then the FORTY FIVE THOUSAND DOLLAR ($45,000.00) deposit would be returned to appellants, with interest. (pp. 45-46, 69-70)

On the basis of United American's commitment Zions loaned appellants FOUR HUNDRED FIFTY THOUSAND DOLLARS ($450,000.00). A little over a year passed, during which time appellants did not refinance the loan or obtain a third party to purchase it from Zions. In January 1966, Zions demanded that United American purchase the loan and United American purchased the loan from Zions as they were required to do by the commitment. (p. 27) Appellants made none of the payments which thereafter came due on the loan and in October of 1966 foreclosure proceedings were instituted. (p. 25)

ARGUMENT

POINT I

ALL OF THE FACTS UPON WHICH THE SUMMARY JUDGMENT IS BASED ARE UNCONTESTED FACTS, BEING THE FACTS AS TESTIFIED TO BY THE APPELLANT, GARY J. WILLEY, IN HIS DEPOSITION, AND, WHERE THERE ARE NO GENUINE ISSUES OF MATERIAL FACT TO BE TRIED, SUMMARY JUDGMENT SHOULD BE GRANTED.

The respondents agree basically with appellant's general statements concerning summary judgment. It is true that summary judgment is a drastic remedy which should be granted only when it is clear that there are no genuine issues of material fact to be resolved. That is exactly the situation which exists in this case.

The facts upon which the summary judgment is based are not the facts as alleged by United American. They are the facts as testified to under oath by the appellant, Gary J. Willey, in his deposition. United American for the purpose of its motion for summary judgment, conceded that everything that Gary J. Willey testified to was absolutely true. Under these circumstances, summary judgment was properly granted. As stated by the Utah Supreme Court in the case of *Samms v. Eccles,* 11 U.2d 289, 358 Pac.2nd 344, 345:

> "A motion for summary judgment is in effect a demurrer to the claims of the plaintiff, saying: Assuming they are true no right to recover is shown."

Assuming that everything which Gary Willey testified to in his deposition is absolutely true, and based upon that deposition, summary judgment should have been granted since the testimony of Gary Willey himself established there was no violation of the usury laws.

As pointed out by the Utah Supreme Court in the case of *Dupler vs. Yates,* 10 U.2d 251, 351 Pac.2d 624 (1960) there can be no stronger evidence in support of a movant's motion for summary judgment than the sworn testimony of the opponent himself. In that case, the the defendant in a fraud action introduced in support of his motion for summary judgment depositions of the plaintiff wherein the plaintiff had testified that he had relied on the statements of persons other than the defendant in entering into the transaction in question. The Supreme Court in holding that defendant's motion for

summary judgment had been properly granted stated at pp. 635-636 of its opinion:

> "In contrast to self-serving declarations usually proffered by movants for summary judgment. these statements are made by the opposing parties themselves. Presenting at most improbable questions of credibility these documentary statements have a high degree of probative value."

In spite of this, the appellants contend that there are genuine issues of fact involved in this action which should be resolved by trial. However, as stated by the Supreme Court in the case of *Menlove vs. Salt Lake County,* 18 U.2d 203, 418 Pac.2d 227 (1966):

> "Rule 56, U.R.C.P. dictates the granting of summary judgment where there is no genuine issue of material fact. The whole purpose of summary judgment would be defeated if a case could be forced to go to trial by a mere assertion that an issue exists."

The six asserted issues of fact which appellants claim should preclude the granting of summary judgment in this case are set forth on page 13 of appellants' brief. The first of these asserted issues is "whether the commissions paid to Noble and Campbell should be considered as interest."

This is the first time that this alleged issue has been raised by the appellants. This claim was never asserted in either the answer and counterclaim of the appellants (R. 5) or in their amended counterclaim (R. 24). It is well settled in this state that the Supreme Court will

not consider issues which are raised for the first time on appeal. In re: Ekkers Estate, 432 Pac.2d 45 (Utah, 1967); *American Oil Company vs. General Contracting Corp.,* 17 U.2d 330, 411 Pac.2d 486 (1966); *Hamilton vs. Salt Lake Company Sewerage Improvement District No.* 1, 15 U.2d 216, 390 Pac.2d 235 (1964); *Tygesen vs. Magna Waer Co.,* 13 U.2d 397, 375 Pac.2d 456 (1962); *Carson vs. Douglas,* 12 U.2d 424, 367 Pac.2d 462 (1962); *North Salt Lake vs. St. Joseph Water & Irrigation Company,* 118 Utah 600, 223 Pac.2d 577 (1950); *Neilson vs. Eisen,* 116 Ut. 343, 209 Pac.2d 928 (1949);

Even if this question had been raised in the lower court the testimony of the appellant Gary J. Willey effectively disposes of this alleged issue. It is almost universally recognized that a payment by a borrower to his own agent of a commission for procuring a loan from a lender cannot make the loan usurious. An extensive annotation on this point is contained in 52 ALR 2d 703 wherein it is stated at page 710:

> "It has generally been held or recognized that a lender cannot be charged with usury on account of any commission or bonus paid by the borrower to his own agent, or to an independent broker, for services in negotiating or procuring the loan."

This statement is supported in the annotation by numerous cases from 31 different jurisdictions.

The appellant Gary J. Willey testified in his deposition that he contacted Mr. Campbell, who in turn, contacted Mr. Noble, who, as agent for appellants in turn approached United American for the purpose of obtaining the commitment required by Zions.

"Q. When did you first contact United American?
"A. The contact was not made by myself.

"Q. Who was it made by?
"A. It was made by a Mr. Jess Noble of Denver, Colorado.

"Q. And who is Mr. Noble?
"A. He was a former employee of United American, and is now — I would say he considers himself a broker. (p. 11)

"Q. Now how did you get in touch with Mr. Noble regarding him procuring a loan?
"A. This was through a gentleman by the name of Robert Campbell of Denver, Colorado. (p. 12)

"Q. Then I assume this was when you approached United American Life?
"A. Yes.

"Q. And you requested them to give Zions a commitment to take out the loan?
"A. This was requested by Mr. Noble, my agent in the matter or broker.

"Q. On behalf of Horizon?
"A. Yes.

"Q. And when did this take place?
"A. November of 1965.

"Q. Now, were all the negotiations for obtaining of this loan commitment from United American made through your agent, Mr. Noble?
"A. You say all of the negotiations?

"Q. Yes.
"A. Through Mr. Noble and Mr. Campbell, the two of them. They both received a fee for this.

"Q. Was Mr. Noble at this time employed by United American?

"A. No.

"Q. No?

"A. No.

"Q. Neither was Mr. Campbell?

"A. No. (pp. 14-15)"

The testimony of Gary Willey is unequivocal on the point that the brokers involved in this transaction were his own agents, and the law is unequivocal on the point that any payments made by a borrower to his own agents for procuring a loan cannot make the loan usurious.

The second, third and fifth alleged issues of fact which appellants claim prevent the granting of summary judgment are, "(2) whether the interest computations should be based upon the face amount of the note or on the amount received by the borrower, (3) whether the interest should be computed on a per annum basis . . . (5) what effect the one year interim period had on the loan." None of these points invlove questions of fact at all. How interest should be computed in determining whether a loan is usurious and whether or not an interim period affects the application of the usury statutes are questions of law.

> "Summary judgment is proper where there is a question of law but no issue of fact. Grant of the motion is not precluded because the question of law is important, difficult or complicated. It is for the court to decide whether full development of the facts and surrounding circumstances will assist it in making a correct determination of the question of law. Normally where the only

> conflict is as to what legal conclusions should be drawn from the undisputed facts, a summary judgment should be entered." 3*Barron and Holtzoff, Fed. Practice and Procedure, Section* 1234, pp. 126-128.

All of the facts concerning the amount and terms of the loan, the interest rate provided by the note and application of the loan proceeds are all described in detail in the deposition of the appellant, Gary Willey, and are set forth and analyzed in points 2, 3 and 4 of this Brief. Based upon these facts, the only question left for the trial court to decide was the legal question as to how the usury statute was to be applied. That the lower court properly applied the law in this case is hereinafter set forth in points 2, 3 and 4 of this Brief.

The fourth alleged issue of fact which appellants claim prevent the granting of summary judgment is "(4) whether there was a sale of credit." That the transaction between appellants and United American involved the sale of credit and not a loan by United American to appellants is covered in detail under Point 2 of this Brief. Suffice it to say at this point that all of the facts concerning this matter are testified to in detail by the appellant Gary J. Willey in his deposition. Where, as here, the evidenciary facts in a case have been established and there is only a conflict as to the conclusion to be drawn from the undisputed facts, summary judgment should be rendered. *Fox vs. Johnson, & Wimsatt, Inc.,* 127 F.2d 729 (U.S. App. D.C. 1942); *U. S. vs. Two Thousand Tubular Plastic Cases,* 231 F.Supp. 236 (D.C. Pa. 1964), affirmed 352 F.2nd 344; *U. S. vs. General*

Instrument Corp., 87 F.Supp. 157 (D.C.N.J. 1949); *Otis & Co., vs. Pennsylvania RR Co.*, 61 F. Supp. 905 (D.C.Pa. 1945), affirmed 155 F.2d 522; *Trinity Universal Insurance Co. vs. Woody*, 47 F.Supp. 327 (D.C.N.J. 1942); 3*Barron & Holtzoff, Section* 1234, supra.

The sixth alleged issue of fact which appellants claim prevents the granting of summary judgment is "(6) whether a service charge was specifically designated." By this, the appellants are apparently referring to whether there was any specific designation concerning the NINE THOUSAND DOLLAR fee paid to United American for its commitment or concerning the $45,000 deposit made by the appellants. The testimony of the defendant Gary J. Willey establishes that there was a specific designation concerning the $9,000 fee as well as concerning the $45,000 deposit. Gary Willey testified at pp. 49 and 50 of his deposition that the $9,000 fee was specifically designated in both the disbursement schedule and the commitment which was given to Zions:

> "Q. What document would the $9,000 be mentioned in?
>
> "A. In the disbursement of the total loan. Disbursement schedule, I am quite sure it was there.
>
> . . .
>
> "Q. Did you ever see a written agreement concerning the $9,000 and what it was to be applied to?
>
> "A. I think the $9,000 is stated in the commitment between United American and Zions as a loan fee for the commitment, from what I recall."

The deposition of appellant Gary J. Willey also establishes that there was a specific designation relating to the $45,000 deposit. In discussing what the $45,000 deposit was for, Gary Willey testified as follows:

> "Q. What happened if you didn't get somebody else to purchase the notes and trust instrument.
>
> "A. They were to keep the $45,000. We'd signed an agreement to that effect.
>
> "Q. Do you have a copy of that agreement?
>
> "A. I don't here, but I sure have one at home, or in the office I should say. I do have a copy." (p. 46)

All six of the alleged issues of fact set forth by appellants on p. 13 of their Brief are either not properly before this court, or are not issues of fact at all but are questions of law which were properly decided by the lower court, or are matters which were conclusively established for purposes of respondent's motion for summary judgment by the sworn testimony of the appellant Gary J. Willey. That there are no issues of fact which would prevent the granting of summary judgment in this case appears to be admitted by the appellants themselves at p. 3 of their Brief wherein they state, "The facts as set forth on file and particularly in the deposition of defendant Gary J. Willey were basically undisputed."

POINT II

THE TRANSACTION BETWEEN UNITED AMERICAN AND APPELLANTS INVOLVED A SALE OF CREDIT BY UNITED AMERICAN TO APPELLANTS SO THAT APPELLANTS ON THE BASIS OF UNITED AMERICAN'S CREDIT WOULD BE ABLE TO OBTAIN A LOAN FROM ZIONS, AND SUCH A LOAN OF CREDIT IS NOT GOVERNED BY THE USURY STATUTES.

According to the testimony of the appellant Gary J. Willey, the $9,000 paid to United American and the $45,000 deposited with United American were paid, not to obtain a loan of money from United American, but to obtain the credit of United American in the form of United American's written commitment to purchase the loan from Zions on Zions' demand, so that Zions, on the basis of United American's credit would make the loan to appellants. United American issued its commitment to Zions and Zions, on the basis of United American's credit, loaned the money to appellants. No money was ever loaned by United American to appellants.

The usury statutes are inapplicable to a transaction such as is described in the deposition of the appellant Gary J. Willey.

> "If a transaction amounts merely to a sale of credit it is well settled that the usury law is inapplicable." 104 *ALR* 245.

This is the law in the state of Utah. As stated by the Utah Supreme Court in the case of *Rossberg vs. Holesapple,* 123 Ut. 529, 260 P.2d, 563, 566 (1953)

> "It is well established that a sale of credit, as distinguished from a loan of money, does not come within the purview of usury laws."

The case which was cited by the Utah Supreme Court in support of this rule is the case of *Oil City Motor Co. vs. CIT Corporation,* 76 F.2d 589 (10th Cir. 1935). This case concerned an involved situation whereby plaintiff automobile dealer purchased automobiles from the manufacturer through sight drafts drawn on and paid by the defendant. Although the fees received by the defendant for this service far exceeded the amounts permitted under the usury laws, the court held there was no violation of the usury statutes.

> "Instead of making a loan of money, defendant lent or extended its credit which plaintiff used in the operation of its retail business. A return demanded and received for a bona fide loan or extension of credit as distinguished from a loan of money does not taint the transaction with usury regardless of the amount."

A case involving a fact situation very similar to the one before this court is *Lynn vs. McCue,* 94 Kan. 761, 147 Pac.808 (1915). This case involved a construction company (the borrower) a trust company and a bank. The facts of the case and the holding of the court are set forth by the court as follows:

> "The construction company applied to the trust company for a loan of $400,000. The trust company at first considered making it, but finally refused to do so on the ground that the highest lawful rate of interest was not sufficient compensation, in view of the risk involved. Then the trust company offered to procure the loan from the bank for a commission of $60,000 and the offer was accepted and carried out. To induce the bank to make the loan, the trust company agreed to take it up at any time on demand of the bank,

and within a short time did so. If the deal was just what it was purported to be, it was legitimate; the $60,000 was paid as a commission and not as interest and did not constitute usury."

The most recent case on this point appears to be *Gilmer vs. Woodson,* 332 F.2d 541 (4th Cir. 1964). The case involved a claim of usury arising out of the development of a subdivision. The developer needed large sums of money to construct improvements in the subdivision. He approached a bank to obtain these funds and the bank agreed to provide the funds, providing the plaintiff would endorse the unsecured notes evidencing the loans. For endorsing the notes the developer was to pay the plaintiff fees of from three to six per cent of the amount of the notes. After lending money to the developer for approximately two years, on this basis, the bank required the developer to execute a trust deed to secure the amounts which had been loaned. The developer later got into financial difficulty the bank demanded payment from the plaintiff of all of the notes which had been endorsed by plaintiff and the plaintiff purchased the notes from the bank and took an assignment of the trust deed. In this case, between the plaintiff and the developer's trustee in bankruptcy the trustee raised the defense of usury, claiming that the interest provided by the notes plus the fees charged by plaintiff were interest charges in excess of those permitted by statute. This contention was rejected by the court, which held that the fees charged by plaintiff were for a loan of credit and did not violate the usury laws. The court stated:

"However, it is clear from the record as found by the District Court that the bank, not Gilmer

was the actual lender, that the bank had no interest whatsoever in such payments and that the fees or charges were not usurious. The District Court properly reversed the findings and conclusions of the referee and held that the endorsements fees to Gilmer, both paid and unpaid, were lawful. See *Chakales vs. Djiovamides,* 161 Va.48, 170 S.E.848 (1933); *Keagy vs. Trout,* 85 Va.390, 7 S.E.329 (1888); Ann. 52 ALR 2d 703,710 (1957)"

Other cases involving similar fact situations are *Murphy vs. Leiber,* 76 Ariz.79, 259 P.2d 249 (1953), and *Kahan vs. Schonwald,* 192 Okla.307, 135 P.2d 971 (1943). In the *Murphy vs. Leiber* case, the court held as follows:

> "The trial court having found as a fact that the conveyance of Section 29 to defendants by plaintiffs was made in consideration of defendants loaning their credit to plaintiff the conclusion of law that the transaction was not usurious is inescapable for the reason that usury laws have no application to a loan or sale of credit."

In the *Kahan vs. Schonwald case,* the Supreme Court in upholding the denial of defendant's motion to amend his answer so as to plead the defense of usury stated:

> "The contention that it was error to deny the defendant leave to amend his answer so as to plead usury in the transaction is wholly untenable. The evidence shows that the note involved had been given in consideration of the services of the plaintiff in going surety on a note for $10,000 which defendant executed to the First National Bank to Gutherie to obtain a loan of money from such institution and that as between plaintiff and defendant the relation of borrower and lender was non-existent. Usury can be plead only where the relation of borrower and lender exists between the parties."

The sworn testimony of the appellant Gary J. Willey establishes conclusively that the transaction between United American and appellants in this case involved a sale of credit by United American to appellants, in the form of United American's commitment to Zions, so that Zions, on the basis of United American's credit would make appellant the $450,000.00 loan. The facts as testified to by Gary J. Willey are as follows:

Prior to the time United American ever became involved in this matter, appellants had become indebted to Zions in the sum of $270,000.00. (p. 13) Appellants contacted Zions to have the loan increased to $450,000.00 but Zions refused to loan appellants any further money unless appellants would furnish Zions with a commitment from some third party which would obligate the third party to purchase the loan from Zions, or make a new loan to pay off Zions, should Zions so demand. Zions did not indicate to appellants from whom to get the commitment. It was then that appellants approached United American, through appellants' own agent, and requested United American to give the commitment so that Zions would make the loan to appellants.

"Q. When did you go to Zions, or did you go to Zions to see about increasing this $270,000 loan.

"A. Yes, I did.

"Q. When was that?

"A. That was the latter part of October or the first part of November.

"Q. What did you want it increased to?

"A. Approximately $450,000.00.

"Q. Did you see Mr. Hintze regarding this particular loan?

"A. Mr. Hintze and Mr. Roy Simmons.

"Q. And did Zions at that time make you a $450,000.00 loan?

"A. No. They said it was necessary to secure a long term commitment before they would be willing to issue $450,000.00.

"Q. They wouldn't make the loan unless you had a commitment from somebody else to purchase the loan or make a new loan to take them out?

"A. They made a loan of $270,000.00 without the long term condition. The additional money they required the commitment.

"Q. Did they state from whom they would accept a commitment?

"A. No.

"Q. Then I assume this was when you approached United American Life?

"A. Yes.

"Q. And you requested them to give Zions a commitment to take out the loan?

"A. This was requested by Mr. Noble, my agent in the matter, or broker.

"Q. On behalf of Horizon?

"A. Yes. (p. 14-15)

. . .

"Q. Did you explain to United American that you had applied to Zions for a $450,000.00 loan?

"A. Yes.

"Q. And that Zions had agreed to make you a $450,000 loan providing you could get a com-

mitment from some other organization to purchase it?

"A. It was stated from an insurance company — a commitment from an insurance company, and one that was substantial enough to make the loan. (p. 16-17)

After some negotiations United American issued the required commitment to Zions and Zions made the $450,000 loan to appellants. United American charged appellants $9,000.00 for issuing the commitment and in addition, required appellants to deposit $45,000.00 with United American. If United American was not required by Zions to purchase the loan, or if appellants secured another company to purchase the loan from Zions, or if appellants refinanced the Zions loan, the $45,000.00 deposit would be returned to appellants, with interest.

"Q. Now, when did United American agree to give you a commitment?

"A. It was approximately December 10th that they sent the commitment over. Mr. Campbell and Mr. Noble were here in Salt Lake. They received the commitment by Air Express — REA, I should say, and it was taken into Zions National Bank and discussed with Mr. Hintze. (P. 17)

. . .

"Q. The commitment, did it give Zions the right to require United American to buy this loan from them, was that the form of the commitment?

"A. Would you state that again? Give them the right?

"Q. Did it give Zions the right to require United American to buy the loan that Zions was making to you?

"A. Yes, I would say so, subject to marketable title and various things that were necessary.

"Q. When was your loan closed with Zions, that is your $450,000 loan?

"A. From what I recall, it was approximately December 15. (p. 18-19)

. . .

"Q. Mr. Willey, I'm a little confused by the financing arrangements you had with United American Life and Zions Bank, particularly in regard to $45,000 which apparently you deposited in your account and then wrote a check to, I believe you said, United American Life. Could you explain to me what that was for?

"A. This fee was held strictly for the purpose of them issuing a commitment. If I were to secure another company to take Zions National Bank out of the loan, the fee was to be returned to me.

"Q. It was to be returned to you?

"A. Yes.

"Q. If you found another company?

"A. Yes. (p. 45)

. . .

"Q. Now, the $9,000 that you referred to that you sent to United American Life, that was another fee separate and apart from the $45,000 fee?

"A. Yes.

"Q. Who did that go to?

"A. United American Life. This was for the issuance of the commitment. (P. 48-49)

A little over a year after the commitment was issued Zions demanded that United American purchase the loan pursuant to the terms of the commitment and the loan was purchased by United American from Zions and United American paid Zions for purchase of the loan in January, 1966.

> "A. . . . But United paid Zions off, so it went into '66. I was wrong in December of '66. It was the latter part of January of '66 when United American sent a check to Zions National Bank.
>
> "Q. And purchased this loan from Zions?
> "A. That's right.
>
> "Q. Pursuant to the commitment that they had already issued?
> "A. Yes. (p. 27)

The transaction between United American and appellants is summarized by the appellant Gary J. Willey at pp. 69-70 of his deposition as follows:

> "Q. I just want to go back for a minute, Mr. Willey, on this $9,000 and $45,000. These amounts were paid, you say, to United American to get them to give this commitment to Zions so Zions would make you the loan?
> "A. Definitely.
>
> "Q. And if United American was required by Zions to buy the loan at the end of the year, United American would keep the money?
> "A. Definitely.
>
> "Q. If you went out and were able to get financing somewhere else to pay off Zions so that United American wouldn't have to buy it, then you would get $45,000 back?

"A. I would get that returned, plus interest.

"Q. Plus interest?

"A. Yes.

Respondents agree with the general statements contained in appellant's brief to the effect that the court should carefully scrutinize every transaction in which usury is pleaded to determine whether the transaction involved is in actuality a loan of money or whether it is a sale of credit. The principal test apparently used by the courts in determining whether a particular transaction involves a loan of money or a sale of credit is set forth as follows in an annotation on this point at 104 *ALR* 245, 246:

> "Again, consideration must be given to the particular facts to determine whether one of the parties to the transaction is to advance money, or whether the advance is to be made in the first instance by a third party. If, for instance, the transaction is one not contemplating the immediate advance of money by a party thereto, but merely a means of enabling one of the parties to procure funds from a third party, or otherwise meet his immediate financial needs, it is properly deemed a sale of credit, as regards application of the usury statutes, although eventually the party permitting the use of his credit has to advance the money before he is placed in funds or property by the one receiving the credit."

The testimony of Gary J. Willey on this point is clear and definite. The loan to appellants was not made by United American, whom appellants contend exacted the usurious interest, but was made by Zions. The payments made by appellants to United American and the amount deposited with United American by appellants

was a means of appellants obtaining the commitment, thereby enabling appellant's to procure the loan from Zions to meet appellants' immediate financial needs. The transaction between United American and appellants is thus properly deemed a sale of credit as regards the application of the usury statutes. The fact that Zions eventually required United American to purchase the loan and that United American did eventually pay Zions $450,000 and took an assignment of the loan as United American was required to do by the commitment, does not alter the situation.

As pointed out in the case of *Kahan v. Schonwald* and *Gilmer vs. Woodson, supra,* "Usury can be plead only where the relation of borrower and lender exists between the parties." The testimony of Gary Willey is clear on the point that no such relation ever existed between appellants and United American, who appellants claim exacted the usurious interest. The loan was made by Zions to appellants and it was Zions money which was loaned to appellants. (p. 18-21) None of United American's money was ever loaned to appellants. Over a year after the commitment was issued, Zions demanded that United American purchase the loan as United American was required to do by the commitment, and United American sent a check for $450,000 to Zions and purchased the loan from Zions.

The insinuations and innuendos contained in appellants' brief that there existed some insidious scheme between Zions and United American to avoid the usury laws is not only without any foundation in the record,

but is completely refuted by Gary J. Willey in his deposition. Appellants sought the $450,000 loan from Zions, but were informed by Zions that no loan would be made without the required commitment. (p. 12, 14) Zions did not tell appellants from whom they would accept the commitment. (p. 14) Zions only requirement was that the commitment be issued by a company substantial to take up the loan. (p. 16-17) Appellants then contacted United American, through appellants' own agent, and requested United American to give Zions the commitment. (p. 14-15) After some negotiations, details concerning the commitment were worked out between appellants and United American, including the payment of the $9,000 commitment fee and the $45,000 deposit. Zions never knew anything about the requirement of $45,000 deposit. (p. 47)

The testimony of Gary J. Willey establishes beyond question that the transaction between United American and appellants involved a sale of credit by United American to appellants in the form of a commitment, so that Zions on the basis of United American's credit would loan appellants the $450,000. None of United American's money was ever loaned to appellants and the relationship of borrower and lender has never existed between appellants and United American. No scheme ever existed between United American and Zions to evade the usury statutes.

POINT III

THE RIGHT OF UNITED AMERICAN TO RETAIN THE $45,000 DEPOSIT WAS BASED ON A CONTINGENCY WHICH WAS COMPLETELY BEYOND THE CONTROL OF UNITED AMERICAN, AND A CONTRACT IS NOT USURIOUS WHICH PROVIDES FOR THE PAYMENT, ON A CONTINGENCY, OF A RETURN IN EXCESS OF THAT PERMITTED BY STATUTE, WHERE THE HAPPENING OF THE CONTINGENCY IS NOT CONTROLLED BY THE CREDITOR.

Law on this point is set forth in 91 C.J.S. Usury, Section 31 (c) as follows:

> As a general rule, a contract of loan or forbearance is not usurious because stipulating for the payment, on a contingency, of interest or a return in excess of that permitted by law, where the contingency is under the control of the debtor. A debtor may not, by his voluntary act, render a transaction usurious which, but for such circumstances, would be entirely free from a claim of usury. Thus, where the terms of a contract permit the debtor to discharge himself by paying the sum lawfully due on or before a specified date, a provision imposing on him a more burdensome payment, although exceeding the rate of return allowed by law, in the nature of a penalty for a failure to pay by the date so specified, will not render the contract usurious, even though the penalty so imposed is the payment of a flat sum. Similarly, a contract is not usurious although it provides for the payment of an excessive return to the creditor, where it is further stipulated that the obligation may be discharged by the payment of the principal sum and not more than lawful interest within or by a specified time, unless such stipulation for payment is colorable only and made with intent to evade the usury laws.

This is the situation which exists in this case. According to the testimony of the appellant Gary J. Willey, the $45,000 was deposited with United American and could be retained by United American only if United American was ultimately required to purchase the loan from Zions as it was required to by its commitment. If, however, (1) Zions did not make demand upon United American to purchase the loan, or (2) even if Zions did demand that United American purchase the loan but appellants obtained some third party to purchase the loan pursuant to Zions demand, or (3) if Zions demanded that United American purchase the loan but appellants refinanced the loan and paid off Zions, then in any one of the above instances, the $45,000 would be returned to appellants, with interest. The testimony of the appellant Gary Willey on this matter is as follows:

"Q. I just want to go back for a minute, Mr. Willey, on this $9,000 and $45,000. These amounts were paid, you say, to United American to get them to give this commitment to Zions so Zions would make you the loan?

"A. Definitely.

"Q. And if United American was required by Zions to buy the loan at the end of the year, United American would keep the money?

"A. Definitely.

"Q. And if you went out and were able to get financing somewhere else to pay off Zions so that United American wouldn't have to buy it, then you would get the $45,000 back?

"A. I would get that returned, plus interest.

"Q. Plus interest?

"A. Yes. (p. 69-70)

Whether the $45,000 deposit would be retained by United American, or whether it would be returned to appellants, with interest, was based on three contingencies, the happening of any one of which would require the return of the $45,000 to appellants, with interest. The happening of any of these contingencies was out of the control of United American and the happening of two of the contingencies was within the exclusive control of the appellants.

The payment of the $9,000 to United American as a commitment fee could not, of itself, make the loan usurious. This sum coupled with the eight percent interest provided by the note, does not exceed the amount which appellants could have been charged as interest for the year the commitment was to run, had the note been written at the maximum permissible interest rate of ten per cent.

POINT IV

THE $9,000 PAID TO UNITED AMERICAN FOR THE COMMITMENT, PLUS THE $45,000 DEPOSIT, WHEN ADDED TO THE INTEREST REQUIRED TO BE PAID BY THE TERMS OF THE NOTE, IS LESS THAN THE AMOUNT OF INTEREST WHICH COULD HAVE BEEN LEGALLY CHARGED AND COLLECTED ON THE LOAN OVER THE TEN YEAR PERIOD THE NOTE HAD TO RUN, AND THE TRANSACTION, THEREFORE, DOES NOT VIOLATE THE USURY STATUTES.

Even if United American had made a loan of money rather than a sale of credit to appellants, and even if the $45,000 deposit had not been subject to conditions outside of United American's control, the transaction would

still not violate the usury statutes. The $9,000 commitment fee, plus the $45,000, when added to the interest which appellant were required to pay by the terms of the note, is less than the amount of interest which appellants could have been charged under the Utah Usury Statutes during the term of the loan. It has long been established that the way to determine whether or not a payment made by a borrower to a lender to obtain a loan makes the loan usurious is to compute the total amount of interest which the borrower is required to pay by the terms of the note over the period the note has to run and add to it amount of the payment made by the borrower to obtain the loan. If this amount does not exceed the total amount which the lender could have collected on his loan at the maximum permissible legal rates for the entire term of the loan then the payment made by the borrower to the lender does not make the loan usurious. Cases on this point from a dozen different jurisdictions are collected in an annotation at 57 *ALR* 2*d* 649.

A case directly in point is *Ricord Aragon,* 115 Cal. App. 2d 176, 251 P. 2d 759 (1952). In that case plaintiffs obtained a loan of $27,000 from defendants and to induce the defendants to make the loan agreed to pay defendants a $4,000 bonus. Plaintiffs gave defendants a note for $31,000 representing the $27,000 loan plus the $4,000 bonus, bearing interest at seven per cent on the unpaid balance. Defendants took a trust deed from plaintiffs to secure the note and when plaintiffs default in payments, began foreclosure proceedings under the California Trust Deed Act. The plaintiff brought this action to restrain the foreclosure, to have the loan declared

usurious and to collect the interest previously paid. The court upheld a judgment for the defendant lenders in the case. The bonus of $4,000, plus the seven per cent interest on the note over the 58 months period the note was to run amounted to less than the ten per cent interest rate permitted by law and loan was not usurious.

The most recent case on this point appears to be the case of *Home Savings & Loan Association v. Bates,* 76 N.Mex. 660, 417 P. 2d 798 (1966). Here, the plaintiff made a mortgage loan of $30,000 for a period of thirty years, bearing interest at 6.6 per cent. In addition, the borrower was chaged $1,085 as a fee for the loan. The plaintiffs sought to foreclose the mortgage and the defense was interposed that the loan was usurious because of the $1,085 fee that was charged for making the loan. This contention was rejected by the New Mexico Supreme Court and the judgment ordering foreclosure of the mortgage was affirmed. The court stated:

> A proper test of usury is whether figuring all interest payments, including the portion prepaid, more than the authorized rate is required to be paid for the term the loan has to run. . . . In the present case, the sum, including the loan fee considered and charged as interest upon the loan, does not exceed 10 per cent per annum, computed upon the full term of the loan. The undisputed evidence in the record fixes the interest rate, including and treating the loan fee as prepaid interest, at 6.85 per cent per annum.

The applicable portion of the Utah usury statute is set forth on page 7 of appellants' brief. Under that statute the maximum amount which lenders can charge

for a loan of money in the State of Utah is 4 per cent of the original principal amount of the loan, plus 10 per cent per annum on the unpaid balance. This would permit a lender to charge a total of $282,359.54 on the note involved in this action over the 10 year period the note had to run. (See the computation attached to R. 30). The total interest collectible on the note as it is written with interest at 8 per cent per annum and with principal paymens payable quarterly would require defendants to pay only $211,538.27 over the 10 year period. (See computation attached to R. 30) Add to this the $45,000 deposit and the $9,000 commitment fee and the total amount collectible is still only $265,538.27, or $16,821.27 less than the amount of interest which appellants could have been charged without exceeding the usury statutes.

There appears to be a split of authority as to how the aforementioned calculations should be made. 57 *ALR* 2d 630. One group of jurisdictions holds that in determining the maximum amount which the lender can charge for the term of the loan, the maximum legal rates permitted by statute should be applied to the face amount of the note. e.g. *Ricord v. Aragon* and *Home Savings & Loan Association v. Bates,* supra. Another group of jurisdictions has taken the position that the amount paid by the borrower to the lender for the loan should first be deducted from the face amount of the loan and that the maximum interest rates permitted by law should then be applied to this reduced figure. The latter method is the one which appellants urge should be adopted by this court, since this is the only method of computation by which the amounts paid in this case could be construed

to exceed the interest permitted by the Utah usury statute.

This question of method of computation has never been decided by this court. The matter was never even raised in the case of *National American Life Insurance Company v. Bayou Country Club, Inc.*, 15 Ut.2d 417, 403 P. 2d 26, which appellants cite in support of their position.

The method which appellants urge this court to adopt is founded upon a logical inconsistency which respondents contend should prevent its adoption. They begin by stating that the $9,000 commitment fee and the $45,000 deposit should be applied in reduction of the principal balance of the $450,000 loan, thereby reducing this balance to $396,000, and it is this $396,000 figure to which the maximum permissible interest rates should be applied to determine the maximum amount of interest which could be collected on the loan. Appellants then turn around and state that the $9,000 commitment fee and the $45,000 deposit should be considered to be interest and should be added to the interest payments required by the terms of the note. This double application of the $9,000 commitment fee and the $45,000 deposit — stated by appellants in one breath to be a payment in reduction of the principal balance, and in the next, to be a payment of interest — should be rejected by this court. It is suggested that perhaps a borrower should have his choice as to whether to consider such payment as a payment of interest, or whether it should be applied in reduction of principal, but it is inconceivable that appellants could have it at once be a payment in reduction of principal and, at the same time, a payment of interest.

POINT V

THERE IS NO AUTHORITY UNDER UTAH LAW FOR A COURT TO EXTEND A REDEMPTION PERIOD IN FORECLOSURE ACTIONS, AND NO EXTENSION OF THE REDEMPTION PERIOD SHOULD BE GRANTED WHERE APPELLANTS FAILED TO AVAIL THEMSELVES OF AN ADEQUATE REMEDY WHICH IS PROVIDED BY LAW.

The appellants have requested this court for an order extending their redemption rights until six months after termination of this litigation. Rule 69 (f) (3), Utah Rules of Civil Procedure provides for a six month redemption period following the date of the Sheriff's Sale. There is no provision, either in the Rules or in Chapter 37 of Title 78, dealing with mortgage foreclosures, which provides for any extension of this six month period of redemption.

Rules 62(d) and 73(d), Utah Rules of Civil Procedure, dealing with superseadas bonds, provided appellants with adequate protection in this case. By filing a superseadas bond the appellants could have prevented Sheriff's Sale of the property from having taken place at all until after this appeal had been heard. This, the appellants decided not to do. Instead, appellants filed a motion with the District Court to stay the sale of the property. This motion was made without any notice whatsoever to any of the dozen other parties to the law suit who were also seeking to have the property sold to satisfy their liens. (R. 38) Under the circumstances the District Court had no alternative but to deny appellants motion for a stay.

The appellants, having failed to avail themselves of the protection which is afforded them by the filing of a superseadas bond, should not at this late date be awarded a remedy which is sanctioned by neither rule nor statute.

CONCLUSION

All of the facts upon which the summary judgments is based are the facts as testified to by the appellant Gary J. Willey in his deposition. There can be no stronger case in support of a motion for summary judgment than the sworn testimony of the person opposing the motion. In contrast to self-serving affidavits which are often made the basis for a motion for summary judgment, the foundation for the summary judgment in this case is the sworn testimony of appellant Gary J. Willey himself. It is his testimony which establishes that the usury claim of appellants is baseless and without merit.

The appellant testified over and over again that the $9000 commitment fee and the $45,000 deposit were paid to United American, not to obtain a loan from United American, but to obtain the credit of United American in the form of a commitment, so that Zions, on the basis of United American's credit would make the loan to appellants. The loan was not made by United American to appellants, but was made by Zions on the basis of United American's credit. The testimony of appellant Gary J. Willey further establishes that the transaction was not some scheme between United American and Zions to violate the usury statutes. Gary J. Willey testified that Zions did not tell appellants from whom to

obtain the required commitment; that appellants contacted United American through appellants own agents and requested United American to give Zions the commitment so that Zions, on the basis of that commitment, would make the loan to appellants; that Zions never even knew of the $45,000 deposit. The law is well settled that a sale of credit as is established by the testimony of appellant Gary J. Willey in this case does not come within the purview of the usury laws. The appellant Gary J. Willey was insistent in his claim that the right of United American to retain the $45,000 deposit was conditioned upon contingencies which were beyond the control of United American. He testified that should Zions not make demand upon United American to purchase the loan, or even if such demand was made but appellants obtained some third party to purchase the loan, or if appellants refinanced the loan and paid off Zions so that United American did not have to buy it, that not only would the $45,000 be returned to appellants, but that it would be returned with interest. It has generally been held that a charge of usury cannot be predicated upon such a conditional payment where the contingencies upon which the payment is made are outside the control of the creditor.

Even if the transaction involved in this case had not constituted a sale of credit, and even if the retention by United American of the $45,000 had not been subject to contingencies outside of United American's control, the transaction would still not violate the usury laws, since the amount of the commitment fee and the amount of the deposit, when added to the total amount of interest

which appellants were required to pay by the terms of the note, is less than the amount appellants could have been charged as interest had the note been written at the highest lawful rate. The only way the commitment fee and deposit involved in this case could make the loan usurious, would be if this court adopted a method of computation which would apply the deposit and commitment fee in reduction of the principal amount of the loan, and at the same time, treat them as payments of interest.

Between December of 1965 and March of 1966, United American loaned appellants an additional $45,000 to aid appellants in establishing a successful venture. Twenty-five thousand of this amount was loaned to the appellants without interest. None of it was ever repaid. In the more than 20 months between the date Zions made its loan to appellants and the date these foreclosure proceedings were instituted, appellants made no payments whatsoever on the loan. The appellants should not be permitted through insinuation and innuendo, through strained construction of the facts and through urging the court to adopt illogical rules of law, to turn the shield of the usury statutes into a sword. The decision of the lower court should be affirmed.

Respectfully submitted,

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