

1964

# National American Life Insurance Co. v. Bayou Country Club, Inc. : Brief of Respondent

Utah Supreme Court

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# In The Supreme Court of the State of Utah

NATIONAL AMERICAN LIFE INSURANCE  
COMPANY, successor to CONTINENTAL  
REPUBLIC LIFE INSURANCE COMPANY,

Plaintiff-Appellant,

vs.

BAYOU COUNTRY CLUB, INC., a Utah corporation; FIDELITY INDUSTRIAL CREDIT CO., a Utah corporation; WESTERN ACCEPTANCE CORP., a Utah corporation, BRYCE WADE; FAMILY BUILDING CREDITS CO., a Utah corporation; KEITH R. NELSON d/b/a A.A.A. ELECTRIC SERVICE; WASATCH PLUMBING SUPPLY CO., a Utah corporation; STANDARD BUILDERS SUPPLY COM., INC., a Utah corporation; S. F. FREDRICKSON & MRS. PAUL H. HUPP d/b/a HUPP REFRIGERATION COMPANY, formerly known as PAUL H. HUPP COMPANY; LA MAR KAY d/b/a QUALITY ELECTRIC MOTOR REPAIRS; EDDIE A. BUTTERFIELD d/b/a COOK, INC.; ROBISON DISTRIBUTING COMPANY, INC., a Utah corporation; WETHERBEE FIXTURE CO., WILLIAMS BUILDING SUPPLY COMPANY, a Utah corporation; CLYDE V. BUXTON d/b/a BUXTON HEATING & AIR CONDITIONING; TOWN & COUNTRY INTERIORS; STATE TAX COMMISSION OF THE STATE OF UTAH; ELDRID S. BUNTING d/b/a SCHOPPE SHEET METAL COMPANY; INDUSTRIAL COMMISSION OF THE STATE OF UTAH; NEELEY, INC., a Utah corporation; INTERMOUNTAIN ASSOCIATION OF CREDIT MEN, a Utah corporation; UNITED STATES OF AMERICA; any and all other persons or corporations claiming any right, title, or interest in or to the property as in this Complaint described, said parties being unknown to plaintiff,

Defendants-Respondents.

## BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District Court  
for Salt Lake County, Honorable Merrill C. Faux, Judge

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# The Supreme Court of the State of Utah

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Plaintiff-Appellant,

vs.

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Defendants-Respondents.

Case No.  
10138

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## BRIEF OF RESPONDENT

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## STATEMENT OF THE NATURE OF THE CASE

In an action to foreclose a mortgage on a country club, defendant-respondent, Bayou Country Club, Incorporated, counterclaimed asserting the loan was usurious and claiming forfeiture of unpaid interest, treble the amount of \$14,500.00 paid by defendant to plaintiff in consideration of a \$65,000.00 first mortgage loan; treble the amount of \$2,630.27 which had been allocated to interest by plaintiff; and an attorney's fee.

## DISPOSITION IN LOWER COURT

At pretrial, Honorable Stewart M. Hanson ruled that as a matter of law plaintiff, Continental Republic Life Insurance Company, had violated the usury laws of Utah and that in consequence of said violation the interest on plaintiff's note was forfeited; that the \$14,500.00 paid to plaintiff by defendant be trebled; that the \$2,630.27 allocated by plaintiff to interest on the monthly payments paid by defendant be trebled.

At trial, Honorable Merrill C. Faux, after reviewing all previous orders, depositions and briefs, ruled by way of judgment that as a matter of law plaintiff had violated the usury laws of Utah; that defendant had paid plaintiff for making the loan the sum of \$14,500.00 and had paid additional interest of \$2,630.27, both of which sums were allowed to be trebled; that plaintiff should be awarded judgment for the sum of \$65,293.81, together with an attorney's fee of \$6,000.00



and costs; and that defendant should be granted judgment for \$51,390.81, together with an attorney's fee in the sum of \$5,000.00. Plaintiff, after offsetting defendant's judgment, would receive \$14,903.00, which sum included the \$6,000.00 attorney's fee.

## RELIEF SOUGHT ON APPEAL

Defendant seeks to have the lower court's judgment of March 31, 1964, affirmed in regard to defendant-respondent's counterclaim. Defendant further seeks to have the \$6,000.00 attorney's fee awarded to plaintiff disallowed, or in the alternative, to have the attorney's fee reduced commensurate with plaintiff's recovery after offsetting defendant's counterclaim.

## STATEMENT OF FACTS

The defendant does not agree with the Statement of Facts as set forth in plaintiff's brief.

At all times during the course of the litigation in the lower court, counsel for plaintiff admitted that the sum of \$15,000.00 had been received by plaintiff in consideration for making the loan. Defendant, during the course of hearings, stipulated that \$500.00 of the \$15,000.00 had been used for an insurance policy on the life of the president of defendant, George Padjen. It was further stipulated by plaintiff and defendant that \$2,630.27 was the correct sum which plaintiff had charged to interest, calculated on the basis of nine per cent (9%) per annum on the sum of \$65,000.00.

Plaintiff commenced an action against defendant for the sum of \$65,298.77, interest and attorney's fees (R. 1, 5).

Defendant did not at any time have knowledge that Frank A. Nelson Jr. was to receive any part of the \$15,000.00. (R. 450, p. 14, 25). Frank A. Nelson Jr., upon instructions from plaintiff, and as an agent of plaintiff, procured from McGhie Abstract Company a check in the sum of \$15,000.00. (R. 448, Exhibit "J". R. 450, p. 16, 17, 20). Frank A. Nelson Jr. then returned to his bank, and upon the instructions of Marvin Bainum, president of Continental Republic Life Insurance Company, deposited the check (R. 450, Exhibit "C"). The sum of \$12,500.00 was deposited to the account of plaintiff. (R. 450, Exhibits "E", "F"). The sum of \$2,000.00 was deposited to the account of Frank A. Nelson Jr. (R. 450, Exhibit "C" and Exhibit "G"). The remaining \$500.00 was remitted to plaintiff for a premium on a life insurance policy on the life of George Padjen, president of defendant (R. 450, Exhibit "C").

Frank A. Nelson Jr. was informed by plaintiff to procure the \$15,000.00 from defendant at the time the loan was closed (R. 450, p. 17, 30). Defendant had orally promised Frank A. Nelson Jr. the sum of \$1,000.00 for his services, which sum was to be paid at a later date (R. 450, p. 14).

Although Honorable Stewart M. Hanson ruled at pretrial on certain segments of the case, Honorable Merrill C. Faux at a hearing held February 13, 1964,

stated that since it was incumbent on him to sign the final judgment he would examine the entire record, including depositions. Thereafter, on March 31, 1964, after concluding the record warranted the judgment, the Honorable Merrill C. Faux signed the final judgment (R. 280).

## STATEMENT OF POINTS AND ARGUMENT

### POINT I

**THE LOWER COURT PROPERLY RULED THAT AS A MATTER OF LAW THE LOAN WAS USURIOUS.**

The pretrial judge, Honorable Stewart M. Hanson, and the trial judge, Merrill C. Faux, each ruled as a matter of law the loan was usurious.

Plaintiff at no time denied that they had not demanded and received the \$14,500.00 as a consideration for making the loan to defendant. The note on its face showed an interest charge of nine per cent (9%) per annum on the sum of \$65,000.00. From this, it is a simple calculation to show that plaintiff was receiving far in excess of the ten per cent (10%) allowed by Section 15-1-2 Utah Code Annotated, 1953, as amended. The \$14,500.00 paid by defendant to plaintiff was 22.31 per cent of the entire loan.

It is the agreement to exact and pay usurious interest and not the performance of the agreement which renders it usurious.

"The test to be applied in any given case is whether the contract, if performed according to its terms, would result in producing to the lender a rate of interest greater than is allowed by law." *Seebold v. Eustermann*, 216 Minn. 566, 13 N.W. 2d 739. Annotated in 152 ALR 585.

"Since the usurious character of a transaction is determined as of the date of its inception, if a contract is usurious in its inception, no subsequent transaction will cure it." *Gaitler v. Farmers & M. Bank*, 7 L. Ed. 43.

Although a note was executed and cancelled in the amount of \$15,000.00, this was done only as a subterfuge to obtain the \$15,000.00 from the McGhie Abstract Company.

"A court will look to the substance of every transaction as to which usury is pleaded, and if the lender is securing a greater benefit than that provided by law by any kind of a device, the contract will be held usurious, although it is cloaked under the guise of a commission, bonus or other name." *Wallace v. Zinman*, 200 Cal. 585, 245 P. 964. See also *Haines v. Commercial Mortgage Co.*, 200 Cal. 609, 254 P. 956, and 55 Am. Jur., Usury Section 14.

"A note is to be tested for usury with reference to the actual sum received by the borrower and not by the face amount of the note." *Taylor v. Budd*, 217 Cal. 262, 18 P. 2d 333.

"In testing for a usurious exaction, a fee or bonus beyond the legal rate of interest constitutes an additional charge for interest." *Haines v. Commercial Mortgage Co.*, Supra. See also

*Murphy v. Wilson*, 153 Cal. App. 2d 132, 314 P. 2d 507.

Defendant cannot be estopped from defending on the grounds that usury has been perpetrated as the demand for the payment of \$14,500.00 was made by plaintiff and it is irrational to conceive that a borrower would conspire to create a usurious loan when the need for money to protect a borrower's security is so great that each dollar becomes the difference between success and failure.

"In view of the purpose of the usury statute to protect necessitous and needy borrowers from the oppression of lenders, it is unanimously held that the borrower is not particeps criminis with the lender in the usurious transaction, the lender alone being the violator of the law." *Seebold v. Eustermann*, Supra. See also 55 Am. Jur., Usury, Section 101.

Plaintiff as a proposition that a payment to Frank A. Nelson Jr. by defendant was not usurious because the defendant received full value, sets forth the case of *Mortgage Bond Company v. Stephens*, 181 Okla. 182, 72 P. 2d 831, in which case the court stated:

"No additional burden was placed on borrower as the commission paid in the amount of \$400.00 on a \$10,000.00 loan was not in consideration for making said loan, as an agreement had been previously entered into by which the \$400.00 was to be paid to the agent." See also *Pushee v. Johnson*, 123 Fla. 305, 166 S. 847.

This was not true in regard to the defendant, as de-

fendant had promised Frank A. Nelson Jr. \$1,000.00, which was to be paid at a later date, and the \$14,500.00 demanded and paid to plaintiff was a condition of and in consideration of making the loan, and defendant had no knowledge that Frank A. Nelson Jr. was to receive any of said sum (R. 450, p. 14, 25).

It seems to be unanimously held that the requirement that the borrower pay a commission to the intermediary through whom the loan was actually or apparently negotiated will be held to constitute usury if the court can see that the payment in excess of the lawful interest was really exacted as a consideration for the loan and not as compensation for the services of the intermediary to the borrower. *Tompkins v. Vaught*, 138 Ark. 262, 211 S.W. 361. See also *Dickey v. Phoenix Finance Co.*, 193 Ark. 1145, 104 S.W.2d 806; *Addeson v. B. F. Dittmar Co.*, 124 Tex. 564, 80 S.W. 2d 939. Annot ated in 52 ALR 2d 703.

And in a recent Washington case, *Ostigui v. A. F. Frank Construction Company*, 55 Wash. 2d 350, 347, P. 2d 1049, in which the borrower was required as a consideration of a loan of \$10,000.00 to pay \$2,000.00 to an attorney, even where it could not be shown that the lender received the \$2,000.00, the court reasoned that even if there is no evidence that lender benefited or received any portion of the \$2,000.00 paid to the attorney, it does not relieve lender of the charge of usury.

Plaintiff contends that the depositions of Frank

A. Nelson Jr. are not part of the record. However, all depositions including two (2) depositions of Frank A. Nelson Jr. were published by the Honorable Stewart M. Hanson at pretrial (R. 202).

## POINT 2

### PAYMENTS MAY NOT BE ALLOCATED TO PRINCIPAL TO MAKE INVALID THE PENALTY CLAUSE OF THE USURY STATUTE.

If we use plaintiff's line of argument, the penalty provisions of Section 15-1-7, Utah Code Annotated, 1953, as amended, would never be allowed or applicable, as it provides therein:

"In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back three times the amount of the interest thus paid from the receiver or taker thereof, and reasonable attorney's fees, provided that such action is commenced within two (2) years from the time the usurious transaction occurred."

The action by such statute must be commenced within two (2) years from the time the usurious transaction occurred, and if we use the facts of this case as an example, the principal sum would not be paid for fifteen (15) years, and by the payment schedule, the \$65,000.00, taking all payments and applying to principal only and not to interest, would not be paid for over eight (8) years, which would then allow plaintiff to

plead the statute of limitation as provided in such statute. This would always allow an unscrupulous lender on long term loans a defense to the penalty provision, as if the action were commenced within the two (2) year statute of limitations he could defend on the ground that all payments are allocated to principal, and if a borrower waited until the principal was paid, the lender would defend on the statute of limitations. This was not the intent of the legislature, as Section 15-1-7, Utah Code Annotated, 1953, as amended, specifically provides: "In case the greater rate of interest has been paid", which does not require the principal to have been paid in full. The plaintiff took the \$14,500.00 as consideration for making the loan and said sum can only be considered as additional interest as the sum was never credited to defendant as principal, as the sum of \$65,000.00 has been claimed by plaintiff at all times in these proceedings. Further, the \$2,630.27 was charged on plaintiff's books as interest, and not allocated to principal.

This principle was applied in the case of *Goodwin v. Alston*, 130 Cal. App. 2d 664, 280 P. 2d 34, in which the borrower was required as a consideration for a loan of \$70,000.00 to give lender 4,000 sacks of potatoes, which the lender sold for \$15,958.00, and in said case the lender contended that, assuming that all payments were made by borrower, they should have been allocated to principal, leaving no basis for a penalty for treble the amount paid. It was argued by lender that neither the \$15,958.00, the proceeds from the 4,000 sacks of



potatoes, nor the sum of \$673.33, which was paid as interest, the amounts which were trebled by the court, were allocated as interest by any of the parties to the transaction, and that since there was no legal obligation here, these amounts should have been allocated to principal. There was evidence that the amount of \$673.33 was allocated to interest by the lender himself when the payments were received. The California court on these facts ruled:

“With respect to the proceeds from the 4,000 sacks of potatoes, they were demanded by lender and received by him purely as a bonus for the making of the loan, and without which the loan would not have been made. As such a bonus, it comes within the provisions of the usury law, and was properly regarded as interest collected in violation of that law. While this was an unprofitable deal for the lender and the penalties were harsh, he entered into these transactions for the purpose of taking profit not permitted by the statute, and is subject to such penalties as are properly applicable.” See also *Brocke v. Naseath* 134 Cal. App. 2d 23, 285 P. 2d 291

Further, in *Home Savings & Loan Assn. v. Sanitary Fish Co.*, 156 Wash. 80, 286 P. 76, in which \$500.00 had been added to a \$3,000.00 note as a bonus, and the lender defended on the grounds that said \$500.00 bonus should be deducted from principal, the court reasoned as follows:

“A usuror could escape any severe penalty for the most outrageous usury by including usurious interest in the nominal principal of the note. For

example, a loan of \$3,000.00 could be made, for which the lender takes a note for twice that amount, or \$6,000.00, payable in one (1) year, without interest, if the law be construed in accordance with the contention of the lender in a suit from this note, in which the grossly usurious nature of the transaction should be established, the lender would nevertheless recover judgment for his \$3,000.00, since the lender could defend on the ground that the \$3,000.00 should be deducted from principal and he should have judgment for the \$3,000.00 actually due him. In such a case, the usuror would run less risk by exacting an obligation for twice or more of the amount of the actual principal of his loan for the use of the money than he would run if he required interest at the rate of thirteen per cent (13%) per annum for the use thereof."

In an 1894 case which plaintiff relies upon, *McBroom v. Scottish Mortgage & Land Investment Company*, 153 U.S. 318, 38 L. Ed. 729, 14 Sup. Ct. Rep. 852, the United States Supreme Court was interpreting a statute in New Mexico, and the court stated that as the statute only imposes a fine and penalty they would not add a penalty not prescribed by the statute, and that a penalty can only be that which a statute prescribes, and the court made the following statement:

"No question is presented in the case before us as to whether the borrower when sued for the principal debt and legal interest may of right set off the amount of any penalty prescribed by the statute of New Mexico."

Further, plaintiff uses for authority a recent case,

*Rukavina v. Accounts Supervision Corporation*, 241 MA 195, 237 S.W. 2d 503, a Missouri case, which did not allow the recovery of interest paid, but the Missouri statute in regard to usury is not similar to Utah's statute on usury, as in Section 3229 of R.S. Missouri 1939, R.S. 1949, Para. 408.050, recovery may only be had for

“sums of money paid in excess of the principal and legal rate of interest.”

### POINT 3

THE PAYMENT OF \$14,500.00 IN CONSIDERATION FOR A LOAN IS SUBJECT TO BEING TREBLED.

Plaintiff is inconsistent in its argument, on one hand saying the \$14,500.00 was paid to Frank A. Nelson Jr. and paid by Nelson to plaintiff, and in the next argument saying the \$14,500.00 was a discount taken by plaintiff and does not comply with the statute as interest paid. This was a commission or bonus paid by defendant. It would not change the result if defendant had used other money of its own to pay plaintiff the usurious bonus, as when the loan was executed the \$14,500.00 became money which was then the personal property of defendant.

Defendant received the sum of \$65,000.00 on which interest was provided at nine per cent (9%) per annum, and when payments were made, plaintiff charged interest on the entire \$65,000.00. The \$14,500.00 received

by plaintiff was additional interest or profit in consideration for making the loan, and would by necessity in general accounting principles be additional interest and reported as income for the year in which the \$14,500.00 was received, as plaintiff on its books showed a loan of \$65,000.00 on which it was charging nine per cent (9%) interest per annum and by the terms of said note would receive the full principal in the amount of \$65,000.00 plus interest.

Plaintiff states that if defendant received the \$14,500.00 and paid it back, there would be no discount, and therefore no usury at all. This is fallacious reasoning in that if defendant had not been required to pay plaintiff the \$14,500.00, this sum would have been available to operate its business, and to pay other creditors. If it was not paid by defendant, where did the \$14,500.00 come from? At all times plaintiff acknowledged the receipt of the \$14,500.00 as a bonus in consideration for making the loan. Plaintiff at no time expected to receive the \$14,500.00 as a discount over the period of fifteen years, but received said sum in advance as a payment from defendant.

In *Smith v. Cavagliero Mortgage Company*, 111 Cal. App. 136, 295 P. 366, the borrower received \$105,000.00 and signed a note for \$110,000.00, and the court reasoned that lender's exaction of a bonus represented by a note for an amount greater than the amount of the loan, although usurious, is not payment of usurious interest, which under the statute is prerequisite to the

penalty. The court's decision was based on whether the borrower received the money first and then paid same to lender, and the court further stated:

"The debt is regarded as paid by the debtor if it is paid by a third person in accordance with an agreement between such third person and the debtor."

Advance interest or bonus paid by defendant is subject to being trebled under Utah statute 15-1-7, Utah Code Annotated, 1953, as amended.

#### POINT 4

### THE USURY LAWS OF UTAH ARE CONSTITUTIONAL.

The cases as set forth in plaintiff's brief are in the whole cases questioning the constitutionality of special laws as exclusions to the general usury laws. The plaintiff in his brief sets forth no cases which have specifically declared the general laws of usury to be unconstitutional.

It is a basic principle of constitutional law that where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional, and by the other it would be valid, the court should adopt the construction which would uphold it.

"It is the duty of the courts to adopt all construction of a statute that will bring it into harmony with the constitution if its language will

permit." *Salter v. Nelson*, 85 Utah 460, 39 P. 2d 1061. See also 11 Am. Jur., Constitutional Law, Section 97.

Plaintiff alleges that the laws of usury in Utah which allow certain exceptions to the usury law would make the entire usury law unconstitutional, under Article 1, Section 24, of the Utah Constitution, "All laws of a general nature have uniform operation."

In the case of *Justice v. Standard Gilsonite Company*, 12 Utah, 2d 357, 366 P. 2d 974, as quoted in plaintiff's brief, Judge Crockett, in a concurring opinion, made the following statement:

"I agree that a statute such as the one under consideration, which attempts to include some and exclude others, is unjustly discriminatory, unless the exclusions are on the basis of uniform classification so that all who fall within the same class are affected alike and the classification bears some *reasonable* relationship to the objectives sought to be accomplished by the statute."

In our present usury laws which allow exclusions to various money lenders such as small loan companies, credit unions, banks and savings and loan companies, etc., there are special laws which control each of these classifications. All classifications are treated alike and are subject to regulation and licensing by the State of Utah. There is no discrimination as to classes within the exclusions and the legislature by their prerogative found valid reasons why these segments should be excluded from the general usury law.

In the case of *Acme Finance Company v. Huse*, 192 Wash. 96, 73 P. 2d 341, the Washington Supreme Court was not considering a case on the usury laws of Washington, which has stood unassailed for many years. This particular case had to do with criminal law, which made it a misdemeanor for certain individuals to charge more than twelve per cent on loans less than \$300.00. Part of this law had been vetoed and what was left of the law had so many exceptions as to who could legally charge more than twelve per cent without being guilty of a misdemeanor, it was found to be a special law without reasonable classification.

Further, in the Nebraska case of *Stanton v. Mattson*, 175 Nebr. 767, 123 N.W. 2d 844, the Nebraska court found a law which authorized a time price differential for a motor vehicle or other goods sold under retail installment contract to be allowed a certain rate of interest as unconstitutional. However, in further statements, the court stated:

“The legislature may make reasonable classifications of persons, corporations and property for the purpose of legislation concerning them, but classification must rest upon real difference in situation and circumstance surrounding members of class relative to subject of legislation, rendering appropriate its enactment, and, to be valid, law must operate uniformly and alike upon every member of class so designated.”

In the above case, the usury laws of Nebraska were not attacked, but was based on class legislation as an exception to usury statute.

The rule applicable to the validity of usury statutes is stated in 55 Am. Jur., Usury Section 4, as follows:

“The power of the legislature to regulate the rate of interest receivable for the use of money has been exercised from an early period in the history of this country. Usury statutes are considered valid police regulations for the protection of borrowers whose necessities often place them at the mercy of the lender. The legislature is considered as having very broad powers in regard to this matter and enactments fixing maximum rates of interest generally will *not* be held invalid as class legislation if it is possible to avoid such a conclusion.” See also *Straus v. Elless Company*, 245 Mich. 558, 222 N.W. 752.

Further, in 12 Am. Jur., Constitutional Law, Section 506, the following rule is set forth:

“It is a recognized right of the legislature with respect to the matter of usury to deal with different classes of money lenders and money borrowers in different ways, provided there is nothing apparently unreasonable in creating such distinctions and all members of each class are treated alike.” See also *Norris v. Lincoln*, 93 Neb. 658, 142 N.W. 114.

In *Corozza v. Federal Finance and Credit Company*, 149 Md. 223, 131 A. 332, corporations were excluded from protection from the usury statute, and the court stated as follows:

“The only restriction on power of legislature to suspend operation of general law is that it must result in a suspension which is uniform both in privileges confirmed and liabilities imposed,



and which shall not be an arbitrary classification.”

In plaintiff's brief, cases from Kentucky and Tennessee are set forth as authority for the proposition:

“In all cases where general law can be applicable, no special law shall be enacted.” Article VI, Section 26, Utah Constitution.

The cases all have to do with an attack on special statutes which were exceptions to usury laws in those states and the special laws were found to be unconstitutional and not the general usury statutes.

“There is no nation known to history with any considerable financial or commercial structure which has not had laws against usury. Indeed, it has always been recognized that in the power of the lender to relieve the wants of the borrower lies the germ of oppression.” *Malmud v. Blackman*, 251 App. Div. 192, 295 N.Y.S. 398, 16 N.E. 2d 391.

“Although usury laws may be and often are harsh in their language and effect, yet insofar as they establish a legislative policy the courts must apply and enforce them; a court does its full duty when it carefully inquires whether there is a violation of the law, and, if there is, gives to it the effect prescribed by the legislature.” *Seebold vs. Eustermann*, Supra.

On the question of morality, this particular case and the facts thereof become a prime example of why usury laws are a necessity and morally and legally sound. The plaintiff in this instance demanded as consideration for a \$65,000.00 loan the sum of \$14,500.00,

a payment of 22.31 per cent, almost one-fourth of the entire loan, and, in addition thereto, charged the sum of nine per cent (9%) interest on the total \$65,000.00 loan. Morally, how far can a lender go when he realizes the financial necessities of a borrower?

The Utah Supreme Court, although not directly considering the question set forth herein, in the case of *Seaboard Finance Company v. Wahlen*, 123 Utah, 529, 260 P. 2d 566, stated very clearly their opinion in this matter.

Mr. Justice Crockett in the majority opinion in that case said:

“It is the prerogative of the legislature and not of the courts to prescribe the rules as to usury. It is our function to interpret and apply, but not to question the wisdom of legislation. We can with judicial propriety call attention to situations which may appear to them to be unreasonable, inconsistent or undesirable, so that due consideration may be given thereto and a remedy provided, if deemed advisable by that body.”

Mr. Justice Wolfe in a concurring opinion in the above entitled case said:

“The plaintiff, as well as other finance companies licensed and regulated by the State, is engaged in a legitimate and necessary business. While the interest which it charged the defendants may on the surface seem high, it was clearly within the charge permitted by statute. The legislature took into consideration these factors when it established the maximum rates. Long before

remedial loan statutes were passed in Utah, more than one legislature had before it the data as to the cost of investigating and losses sustained by companies engaged in carrying on the small loan business in the various levels of capital employed without the security of chattels or real estate, but on the security of personal sureties only. Knowing nothing of the earnings of the plaintiff or other finance companies, I cannot say that their charges are 'unconscionable', nor do I think their conduct can be properly classified as a 'scheme'."

Mr. Justice McDonough concurred in the above observation of Mr. Justice Wolfe.

Mr. Justice Wade in an concurring opinion in the above entitled case said:

"About the only benefit that can result from this litigation is that certain vicious results from the statutes on usury may be pointed out to the legislature for consideration in the future."

Utah usury statutes are constitutional as it is the right of the legislature with respect to the matter of usury to deal with different classes of money lenders in different ways, provided all members of each class are treated alike.

## POINT 5

**PLAINTIFF'S ATTORNEY FEE SHOULD BE DISALLOWED, OR IN THE ALTERNATIVE, REDUCED COMMENSURATE WITH ITS RECOVERY.**

Plaintiff argues that defendant's attorney fee is partly based on the amount of recovery and yet offsetting defendant's judgment plaintiff would receive only \$8,903.00 and plaintiff was allowed a \$6,000.00 attorney fee.

In *Land Mortgage Investment and Agency Company of America v. Gillam et al*, 49 So. C. 345, 26 S.E. 990, the court stated:

"The intention of our usury statute is to allow the plaintiff to recover only the sum advanced less penalties on counterclaim; and to allow an attorney's fee for foreclosure would be to add to the statute."

And in *Glenn v. Lavendar et al*, Texas Civ. App. 130 S.W. 2d 391, in which case the lender was claiming attorney's fees of ten per cent (10%) on the total amount of certain notes, the Texas Supreme Court allowed lender's attorney a ten per cent (10%) attorney's fee on difference between claim of lender and offset of borrower on usury claim. And further, in *Ceraols v. Smith*, 112 Fla. 399, 150 So. 611, the court allowed a penalty offset of \$3,000.00 to be deducted from an original loan of \$4,500.00, and therein the court stated:

"The amount allowed lender for attorney's fees should have appropriate relation to amount recovered."

In Washington and many other states which provide that the lender may only recover the principal

amount of his claim less any penalty offsets, the courts have ruled that the lender may not recover any attorney's fee. In some of the states with statutes similar to Utah such as Florida and Texas, the courts have allowed lender attorney's fees based on the amount of recovery and not on the original amount of the mortgage or note.

If we take an example wherein a lender is claiming \$5,000.00 plus attorney's fees and if there are penalty offsets provided by the usury statute which would eliminate entirely the \$5,000.00 claim by the lender, it would not seem logical or reasonable to allow lender an attorney's fee on the \$5,000.00 or any attorney's fee at all because he recovers nothing. *Maxwell v. Smith*, 119 Fla. 389, 161 So. 566.

By the testimony of plaintiff's attorneys (R. 420), approximately 197 hours of the 328 hours spent on the case were spent in the defense of the usury action, and it would be improper for plaintiff's attorneys to be allowed attorney's fees for this defense on their foreclosure action. The attorney fees granted to plaintiff's attorneys should be based entirely upon time spent on the foreclosure action, taking into consideration the amount recovered of \$8,903.00.

## CONCLUSION

There was no issue of fact as plaintiff did not deny, and in fact, admitted that the \$14,500.00 was received in consideration for making a \$65,000.00 first mortgage

loan, and further admitted that the \$2,630.27 additional interest had been charged as interest by their own calculations (Point 1).

Furthermore, if payments were allowed to be allotted to the reduction of principal, the penalty clause of the usury statute would become inoperable, as any unscrupulous lender would always have a defense as to the penalty (Point 2).

Furthermore, the payment of \$14,500.00 in consideration for a loan is subject to being trebled because it is an additional payment of interest under the Utah usury statute (Point 3).

Furthermore, the usury statutes are constitutional because the legislature has the sole responsibility in this field and because there are no discriminations as to classes within the exclusions and the legislature found valid reasons why certain lending institutions should be excluded from the general usury statutes (Point 4).

Furthermore, plaintiff's attorney fee should be disallowed or reduced as the attorney fee awarded was based on time expended by plaintiff's attorneys, most of which time was spent in the defense of the usury counterclaim, and if any attorney fee is granted it should be based upon the amount of recovery (Point 5).

Respectfully submitted,

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