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USURY—APPLYING STATE USURY PENALTY TO A NATIONAL BANK WHEN IT IS THE ASSIGNEE OF A CONDITIONAL SALES CONTRACT—*Robertson v. Burnett, Hills v. Burnett* (Neb. 1961).

Companion cases,¹ decided in June 1961 by the Nebraska Supreme Court, were essentially similar with respect to their factual situations. In each, a buyer and a seller contracted for the sale of a house trailer, the transaction consisting of the signing of a promissory note by the buyer in accordance with a conditional sales contract, and a subsequent assignment of the note, by the seller, to a national bank located in Michigan. The certificate of title, which was in the name of the buyer, noted a lien by the national bank, and was at all times in the possession of the bank after the assignment of the note. A payment book was issued by the bank to the buyer, and he made all installment payments directly to the bank.

The Nebraska Supreme Court, affirming the decision of the trial court, held that the transaction was a usurious installment loan rather than a valid time sale. Pursuant to the Nebraska Installment Loan Act,² the bank was ordered to *deliver a clear title to the buyer, together with a remittance of payments of principal and interest previously made.*³ The position taken by the bank was that the federal penalty provision for usury in the National Banking Act preempted the state penalty.⁴ The court held contra,

¹ *Robertson v. Burnett*, 172 Neb. 385, 109 N.W.2d 716 (1961), and *Hills v. Burnett*, 172 Neb. 370, 109 N.W.2d 739 (1961).

² NEB. REV. STAT. §§ 45-114 to -158 (Reissue 1960), hereafter referred to as the Installment Loan Act.

³ On other issues the court held that the bank was subject to statutory service applicable to "foreign corporations," and that there was proper venue. The Nebraska court's holding on this latter question has been appealed to the Supreme Court of the United States. *Michigan Nat'l Bank v. Robertson, petition for cert. filed*, 30 U.S.L. Week 3235 (U.S. January 23, 1962) (No. 628); *Michigan Nat'l Bank v. Hills, petition for cert. filed*, 30 U.S.L. Week 3242 (U.S. January 30, 1962) (No. 669).

⁴ 13 Stat. 108 (1864), 12 U.S.C. § 86 (1959) "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. 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, in an action in the nature of an action of debt, twice the amount of interest thus paid from the association taking or receiving the same: *Provided*, That

however; its rationale being that the transaction consisted of a usurious loan from the seller to the buyer, void from its inception. The fact that there was a subsequent assignment to the bank did not "breathe life back into the void instrument."⁵ In other words, the court felt that the financial arrangements comprised two separate and independent transactions, resulting in the bank being the assignee recipient of a void note.⁶

The National Banking Act of 1864 incorporates the state interest rates for loans into the federal usury provisions.⁷ A national bank must abide by the individual state usury laws, therefore, when charging interest on loans, discounts, notes or other indebtedness. The act further provides, however, that the "taking, receiving, reserving or charging" of a usurious rate of interest by a national bank will result in a *forfeiture of the interest due, plus a remittance of twice the interest paid.*⁸ The cases uniformly hold that the federal penalty will preempt any state penalty when a national bank engages in usurious practices.⁹

As previously indicated, the Nebraska court looked upon the financial negotiations and agreements as being two separate transactions, that is, one between the seller and the buyer, and a second between the seller and the bank. However, the contrary conclusion can also be reached. This conclusion would be that rather than two independent transactions having been involved, there

such action is commenced within two years from the time the usurious transaction occurred."

⁵ Robertson v. Burnett, 172 Neb. 385, 398, 109 N.W.2d 716, 724 (1961).

⁶ See generally, Buetel, *The Interpretation of the N.I.L. and Statutes Declaring Instruments Void*, 83 U. PA. L. REV. 744 (1935); Comment, 40 NEB. L. REV. 433, 457 (1961).

⁷ 13 Stat. 108 (1864), 12 U.S.C. § 85 (1959).

⁸ 13 Stat. 108 (1864), 12 U.S.C. § 86 (1959).

⁹ McCollum v. Hamilton Nat'l Bank, 303 U.S. 245 (1938); Evans v. National Bank of Savannah, 251 U.S. 108 (1919) (discount); National Bank of Clowersville v. Johnson, 104 U.S. 271 (1881) (discount); Farmers' & Mechanics' Nat'l Bank v. Dearing, 91 U.S. 29 (1875) (a leading case); Tiffany v. National Bank of Missouri, 85 U.S. (8 Wall.) 409 (1873) (exceeds rate for state banks, but less than that for other financial institutes—held, not usurious); Schumacher v. Lawrence, 108 F.2d 576 (6th Cir. 1940); Panos v. Smith, 116 F.2d 445 (6th Cir. 1940); First Nat'l Bank of Tobias v. Barnett, 51 Neb. 397, 70 N.W. 937 (1897); Lantham v. First Nat'l Bank of Crete, 46 Neb. 663, 65 N.W. 786 (1896); Norfolk Nat'l Bank v. Schwenk, 46 Neb. 381, 64 N.W. 1073 (1895); Rockland-Atlas Nat'l Bank v. Murphy, 329 Mass. 755, 110 N.E.2d 638 (1953); National City Bank of New York v. Levine, 155 Misc. 132, 277 N.Y. Supp. 664 (City of N.Y., Borough of Manhattan, Munic. Ct., 3d Dist. 1933).

was, in reality, a direct loan from the bank to the buyer, in spite of the fact that the form of the transaction will not support this contention. Looking through the form to the substance of the situation, a court could well conclude that there was a direct loan from the bank to the purchaser.¹⁰

In the situation at hand, the buyer was making payments to the bank; a large portion¹¹ of the forms and documents used in the transaction was printed and furnished by the bank, and the bank held the certificate of title to the trailer. In addition, a "customer's statement," (a document listing credit references plus financial assets and liabilities of the buyer) was drawn up by the bank on its own form and signed by the purchaser. All this would tend to lead any normal buyer to believe that his purchase was being financed by the bank, and that the seller was merely acting as the bank's agent in procuring the loan. It should be noted, however, that the court has never gone so far as to make the determination of whether or not there was, in substance, a direct loan from the bank hinge upon what a reasonable buyer would think.¹²

It is submitted that the bank was the actual controlling party in financing the trailer. It is further suggested that if the original contract between the buyer and the seller had not met the approval of the bank, the seller would probably have renegotiated the contract with the buyer and then proceeded to deal with the same bank, rather than attempt to conclude a discount arrangement with another lending agency. This conjecture cannot be substantiated by the record, but it appears to be entirely sound in view of existing business practices.¹³ Another factor tending to justify the above supposition, and also tending to substantiate the

¹⁰ *Curtis v. Securities Acceptance Corp.*, 166 Neb. 815, 91 N.W.2d 19 (1958); *Nelson v. General Credit Corp.*, 166 Neb. 770, 90 N.W.2d 799 (1958); *McNish v. General Credit Corp.*, 164 Neb. 526, 83 N.W.2d 1 (1957); *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956); *Powell v. Edwards*, 162 Neb. 11, 75 N.W.2d 122 (1956); See generally Comment, 40 NEB. L. REV. 433 (1961) (an analysis of Nebraska finance law with respect to the usury statutes).

¹¹ Customer's statement, promissory note, conditional sales contract, and statement of delivery.

¹² It is suggested in 40 NEB. L. REV. 433 (1961) that any activity which goes so far as to lead the normal buyer to the conclusion that he is borrowing money from a financier should be treated as such by the court.

¹³ A normal business practice would be to renegotiate a contract if the assignee of the promissory note and accompanying contract did not approve of the arrangements. See Comment, 40 NEB. L. REV. 433 (1961) (an analysis of Nebraska finance law with respect to the usury statutes).

position that there was a direct loan from the bank, is the fact that it was shown that over the years the bank had purchased between three and four million dollars worth of paper similar to that involved in the present cases.

Repeatedly the Nebraska court has held that it will look not to the form of the contract, but to its substance, in ascertaining whether a certain transaction is a valid time sale or a usurious installment loan.¹⁴ In the *Hills* case the court looked directly to the form of the transactions in reaching its ultimate decision. The bank took the position that if the court should hold the transactions to be usurious, it must be done on the theory that there was a direct loan from the bank, and if this were so, then the applicable penalty would be that prescribed by the National Banking Act.¹⁵ In answering this contention the court pointed out that the note was made payable to the seller, and thus concluded that the usurious loan must have come from the seller.

A federal case, *Daniel v. First Nat'l Bank of Birmingham*,¹⁶ supports the position that there was a direct loan from the bank. The transactions there were similar to those present in the cases at hand¹⁷ and it was held that the actual transaction was a "cash price accompanied by a loan or extension of credit to which the Bank was privy throughout."¹⁸ This holding was reached despite the fact that an Alabama court, in applying its own case law, could quite conceivably have arrived at the conclusion that the transaction was a valid time sale.¹⁹ The *Daniel* case points to the fact that the federal courts will also look to the substance of a transaction to determine where, in fact, the loan actually originated.

¹⁴ *Nelson v. General Credit Corp.*, 166 Neb. 770, 90 N.W.2d 799 (1958); *McNish v. General Credit Corp.*, 164 Neb. 526, 83 N.W.2d 1 (1957); *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956); See generally Comment, 40 NEB. L. REV. 433 (1961).

¹⁵ 13 Stat. 108 (1864), 12 U.S.C. § 86 (1959) (forfeiture of interest due plus remittance of twice the interest paid).

¹⁶ 227 F.2d 353 (5th Cir. 1955), *aff'd on rehearing*, 228 F.2d 803 (5th Cir. 1956), *modified*, 239 F.2d 801 (5th Cir. 1956).

¹⁷ The forms were furnished by the bank and there was a printed assignment on the back of the note. The bank showed the seller how to make the necessary computations and the bank paid directly for the benefit of the purchaser.

¹⁸ *Daniel v. First Nat'l Bank of Birmingham*, 227 F.2d 353, 357 (5th Cir. 1955).

¹⁹ *First Nat'l Bank of Birmingham v. Daniel*, 239 F.2d 801, 802 (5th Cir. 1956).

If, as herein contended, the transactions in the cases under discussion were, in reality, direct loans from the bank, *Farmers' and Mechanics' Nat'l Bank v. Dearing*²⁰ would appear to govern the present situation, and the National Banking Act would therefore preempt the Nebraska law. This would mean that the bank would be forced to forfeit the interest due plus an amount equal to twice the amount of interest paid, rather than forfeit both principal and interest as the principle cases held.²¹

For reasons herein expressed, it is submitted that the Nebraska Supreme Court could have found the National Banking Act provision for usury applicable to the present situation. The policy of the court in holding the note and accompanying conditional sales contract to be usurious is not questioned, inasmuch as the court has many times held that it will not let a device or subterfuge of any nature disguise a usurious installment loan in the form of a valid time sale.²² What is questioned, however, is the court's conclusion that the usurious loan was between the buyer and seller, and that the bank was the recipient of a void note and accompanying conditional sales contract by assignment.

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²⁰ 91 U.S. 29 (1875); See text at note 9 *supra*.

²² *Curtis v. Securities Acceptance Corp.*, 166 Neb. 815, 91 N.W.2d 19 (1958); *Nelson v. General Credit Corp.*, 166 Neb. 770, 90 N.W.2d 799 (1958); *McNish v. General Credit Corp.*, 164 Neb. 526, 83 N.W.2d 1 (1957); *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956); *Powell v. Edwards*, 162 Neb. 11, 75 N.W.2d 122 (1956).