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The buyer of a house trailer gave a chattel mortgage as part of the purchase price and received title. The sheriff attached the trailer pursuant to an order of attachment obtained by two creditors of the buyer. The holder of the chattel mortgage, who was the original seller, brought an action to replevin the trailer. The defense of usury was raised. *Held* for plaintiff. An attaching creditor does not stand in privity with the debtor and therefore cannot raise the debtor's defense of usury.[1]

The general rule is that the plea of usury as a defense is personal to the borrower and those in legal privity with him.[2] But privity here seems to have an unusual connotation.

The courts have split in determining whether a judgment creditor[3] or an attachment creditor[4] can raise the defense.

[1] Commonwealth Trailer Sales, Inc. v. Bradt, 166 Neb. 1, 87 N.W.2d 705 (1958).

[2] Cheney v. Dunlap, 27 Neb. 401, 43 N.W. 178 (1889); cf annotation 5 L.R.A. 465; 55 Am.Jur. Usury § 121, note 7 for extensive listing of cases in other jurisdictions.

[3] Cases allowing the defense: Roesch v. DeMota, 24 Cal.2d 563, 150 P.2d 422 (1944); 1915 C L.R.A. 643. Contra: Mason v. Pierce, 142 Ill. 331, 31 N.E. 503 (1892); 1915 C L.R.A. 645.

[4] Cases allowing the defense: American Rubber Co. v. Wilson, 55 Mo. App. 656 (1893); 1915 C L.R.A. 643. Contra: Fenby v. Hunt, 53 Wash. 127, 101 P. 492 (1909); 1915 C L.R.A. 645. The development of the rule favoring allowing an attachment creditor to raise the defense is as follows: The leading case in the field as to the rights of attaching creditors is Dix v. Van Wyck, 2 Hill (N.Y.) 522 (1842) in which the court held than an execution creditor, who had attached chattels covered by a prior chattel mortgage, could raise the defense of usury in a replevin action by the mortgagee since he had an interest in the property. This case was picked up in Stein v. Swensen, 44 Minn. 218, 46 N.W. 360 (1890) where the Minnesota court applied the rule of execution creditors to attachment creditors in an action analagous to Dix v. Van Wyck, supra, except for the defendants being attachment creditors. The court made this application on the grounds that there was no fundamental reason for distinguishing between an execution creditor and an attachment creditor. Both this case and the position of the New York court was next picked up in American Rubber Co. v. Wilson, supra, where an attachment creditor raised the defense of usury against the holder of a prior chattel mortgage when the mortgagee attempted to replevin the chattel from the sheriff. The court after reviewing the foregoing cases, and the cases supporting the stand taken therein, held that the defense of usury could be raised since the attachment creditor had an interest in the property.

The courts have generally held that this defense cannot be raised by a general creditor[5] since he does not have an interest in the property.[6] This is not applicable to an attachment creditor since he has a lien on the property and thus an interest.[7]

A grantee who assumes[8] or takes subject to[9] a prior usurious lien, and reduces the purchase price by the amount of the mort-

[5] Parker v. Bethel Hotel Co., 96 Tenn. 252, 34 S.W. 209 (1896); 1915 C L.R.A. 642. Contra holdings to this are more in the form of an exception of where the debtor is insolvent. The only state having much of a history recognizing this as an exception is Kentucky. The cases serving to start this trend of holdings in Kentucky were Shanks v. Stephens, 6 Ky. L. Rep. 526, and Hart v. Hayden, 79 Ky. 346 (1881). Care should be taken in examination of the usury statute and whether it only declares the excess void. In Cole v. Bansemer, 26 Ind. 94 (1866) the court allowed action on the grounds that the danger of forfeiture was not present under such a statute.

[6] American Rubber Co. v. Wilson, 55 Mo. App. 656 (1893).

[7] American Rubber Co. v. Wilson, 55 Mo. App. 656, 661 (1893). The court held: "He is not merely a general creditor of the mortgagor, but he has so far connected himself with him as to have laid hold of his property with the process of the court issued at his instance and he is entitled to have out of it all of the interest which the mortgagor may have had in it at the time of the levy of the writ . . ."; Note that in Keene v. Sallenbach, 15 Neb. 200, 18 N.W. 75 (1883) the court held that an attachment creditor acquired a lien upon the interest of the debtor which may be enforced after he acquires judgment. The case was affirmed in National Bank of Columbus v. Hollerin, 31 Neb. 558, 48 N.W. 392 (1891).

[8] Cheney v. Dunlap, 27 Neb. 401, 43 N.W. 178 (1889); McKnight v. Phelps, 37 Neb. 853, 56 N.W. 308 (1893); Building & L. Asso. v. Bilan, 59 Neb. 458, 81 N.W. 308 (1899); 21 A.L.R. 495; 82 A.L.R. 1153. The defense has been allowed when clear intent to contrary has been shown. National Mutual Building & Loan Assn. v. Retzman, 69 Neb. 667, 96 N.W. 204 (1903); Lankford v. Holton, 187 Ga. 94, 200 S.E. 243 (1938); John Hancock Mut. Life Ins. Co. v. Davis (Tex.Civ.App.), 163 S.W.2d 433 (1942).

[9] Central Holding Co. v. Bushman, 238 Mich. 261, 213 N.W. 120 (1927) on grounds that equivalent to an appropriation by the vendor of a portion of the purchase money for the payment of the usurious debt; Howard v. Kirkpatrick, 263 App.Div. 776, 31 N.Y.S.2d 182 (1941) on grounds that a conveyance subject to a usurious morgtage constituted a waiver of the defense of usury by the debtor. Contra: Chandler v. Cooke, 163 Miss. 147, 137 So. 496 (1931) is contra by words of court but grantee had a partial interest in the subject land at time of the mortgage; Lloyd v. Scoot, Dist. Co., 29 U.S. 205 (1830) is example of contra case due to wording of statute being void. If the purchase price has not been reduced to the amount of the usurious mortgage the grantee may be allowed to raise defense. National Mutual Building & Loan Assn. v. Retzman, 69 Neb. 667, 96 N.W. 204 (1903); Watt v. Cecil, 368 Ill. 510, 15 N.E.2d 292 (1938).

gage, is generally refused the right to raise the debtor's defense of usury, since he has consented to the usury, and, if the defense is allowed, he will obtain a windfall.[10] It has been held that the grantee can raise the defense, although the mortgage has been assumed, where it is clearly indicated that payment of the usurious interest is not intended and the purchase price has only been reduced to take into consideration a legal rate of interest since there is then no element of consent or windfall.[11]

Although there is an apparent lack of uniformity on the treatment of junior lien holders[12] most, if not all, of the cases may be reconciled by determining whether he has consented to the prior usurious mortgage.[13] If consent is found the defense is rightfully denied since the junior lien holder has a choice whether or not to take such a lien, and second, allowing the defense under such circumstances would result in a windfall.[14]

The above objections do not apply to an attachment creditor, under the facts of the principal case, since the lien holders had no choice of property to levy upon, and there is no question of windfall since the attachment creditors will only be allowed to satisfy their legal claims.

The Nebraska statute in point[15] declares such a contract as here involved to be void. Accepting the court's opinion that void means voidable, which position finds high support,[16] still the change of terminology would seem to indicate at least some intent to expand the effect of the statute.[17]

[10] See National Mutual Building & Loan Assn. v. Retzman, 69 Neb. 667, 96 N.W. 204 (1903).

[11] Supra, note 10.

[12] See 1915 C L.R.A. 645; 59 A.L.R. 342; 121 A.L.R. 879 for exhaustive collection of cases on this question.

[13] Levitch v. Schaengold, 42 Ohio St. 44, 181 N.E. 821 (1931); First National Bank v. Niklosson, 116 Neb. 713, 218 N.W. 744 (1928).

[14] Supra, note 13.

[15] Neb. Rev. Stat. § 45-138 (Supp. 1957). ". . . Any contract of loan made in violation of this section, either knowingly or without the exercise of due care to prevent the same, shall be void and the licensee shall have no right to collect or receive any principal, interest, or charges on such loan."

[16] See 17 Iowa L.R. 402 (1931) for discussion of the use of the term void, and listing of cases where the term has been construed in usury statutes.

[17] Ludington v. Harris, 21 Wis. 239 (1867) where the question of whether a grantee by quitclaim could raise the defense of usury was considered. The court held: "Where the contract is declared void by the statute, there is good ground for saying that anyone whose property is affected by it may take advantage of the fact."

It is submitted that the Nebraska court erred in holding an attachment creditor could not raise the defense of usury. The attachment creditor has an interest in the property, has in no way consented to the usurious contract since it is an involuntary lien he holds, and there is no question of his receiving a windfall. Thus, in view of the Nebraska statute holding such contracts to be void, it seems that an attaching creditor should be held to be in such a relation to the debtor that he may raise the defense of usury.

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