CRIMINAL LAW: Civil usury over eight per cent per annum; Criminal usury over two per cent per month.

June 5, 1942

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FILE 4-8

Hon. H. A. Kelso
Prosecuting Attorney
Vernon County
Nevada, Missouri

Dear Sir:

We are in receipt of your letter dated May 28, 1942, in which you request an opinion as follows:

> "In my official capacity as prosecuting attorney I wish to request an opinion on the following state of facts:
>
> "A local motor company sold a motor car to a purchaser for $200.00 receiving a trade-in of an old car as $75.00 leaving $125.00 unpaid on the balance. The car was to be paid for in installments of $10.90 each. After the purchaser had paid eight payments he discovered that the motor car company was still claiming that there was an unpaid balance of $109.00. The purchaser refused to make further payments and removed the car to Kansas. The motor car company demands a warrant for the purchaser for removing mortgaged property. The purchaser demands a warrant for the operator of the motor car company claiming usury. The operator counters with the statement that the

> $71.20 over and above the purchase price is $4.00 sales tax, $1.00 for drawing papers and $66.20 insurance and carrying charges.
>
> "Can the motor car company evade the usury statute by calling the amount of money above 8% in excess of purchase price a 'carrying charge'?

The criminal statute pertaining to usury, is Section 4813 R. S. Missouri, 1939, which reads as follows:

> "Every person or persons, company, corporation or firm, and every agent of any person, persons, company, corporation or firm, who shall take or receive, or agree to take or receive, directly or indirectly, by means of commissions or brokerage charges, or otherwise, for the forbearance or use of money or other commodities, any interest at a rate greater than two per cent per month, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail for a period of not less than thirty days nor more than ninety days. Nothing herein contained shall be construed as authorizing a higher rate of interest than is now provided by law."

Under the above section, in order to obtain a conviction for the crime of usury, the defendant must charge

an interest rate greater than two per cent per month. This section applies to criminal prosecutions.

Where no rate of interest has been agreed upon, the rate that can be collected by a collector, is six per cent per annum, as set out under Section 3226, R. S. Missouri, 1939, which reads as follows:

> "Creditors shall be allowed to receive interest at the rate of six per cent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made."

The civil statute on usury is Section 3227 R. S. Missouri, 1939, which reads as follows:

> "The parties may agree, in writing, for the payment of interest, not exceeding eight per cent per annum, on money due or to become due upon any contract."

Under this section, the maximum amount of interest that can be charged under an agreement in writing is eight per cent per annum.

By reason of the enactment of Section 3227, supra, the legislature enacted Section 3230 R. S. Missouri, 1939,

which reads as follows:

> "Usury may be pleaded as a defense in civil actions in the courts of this state, and upon proof that usurious interest has been paid, the same, in excess of the legal rate of interest, shall be deemed payment, shall be credited upon the principal debt, and all costs of the action shall be taxed against the party guilty of exacting usurious interest, who shall in no case recover judgment for more than the amount found due upon the principal debt, with legal interest, after deducting therefrom all payments of usurious interest made by the debtor, whether paid as commissions or brokerage, or as payment upon the principal, or as interest on said indebtedness: Provided, however, that no corporation shall, after this act takes effect, interpose the defense of usury in any such action, nor shall any bond, note, debt, contract or obligation of any corporation or any security therefor, be set aside impaired or adjudged invalid by reason of the rate of interest which the corporation may have paid or agreed to pay hereon."

Section 3230, supra, permits the debtor to plead usury in a civil action and also sets out the method of applying the payments upon the original debt.

This method was followed in the case of Whitworth v. Davey, 185 S. W. 241, l. c. 246, where the court said:

> "Prior to the passage of this act in 1905, there could be no recovery of usury paid, and since its passage, as we construe the act, a court will look to the contract between the parties, and if it finds there has been a sum paid in excess of the legal interest where 6 per cent. applies, or in excess of the contractual rate where the contract as to interest is reduced to writing, then there must be a recovery under this section of all sums paid by the borrower that exceed the principal plus the legal rate of 6 per cent.; the statute expressly so provides. In other words, if the borower has paid more than 6 per cent. Where only 6 per cent. could be collected, or has paid more than 8 per cent. where only 8 per cent. could be collected, then in either case he has a recovery under this statute for all sums paid in excess of the principal, plus the legal rate, or 6 per cent. simple interest."

Section 7182 R. S. Missouri, 1909, referred to in the case of Whitworth v. Davey, supra, is now Section 3229 R. S. Missouri, 1939.

We are assuming that the chattel mortgage mentioned in your request was an ordinary chattel mortgage and was not made under what is known as the "Small Loan Act", Article VII, of Chapter 39, R. S. Missouri, 1939. Under the Small Loan Act the maximum rate of interest on an amount of One Hundred Dollars, or less, is three per cent a month, and the maximum rate of interest on a loan of One Hundred Dollars to Three Hundred Dollars is two and one-half per cent per month.

We are also assuming that the chattel mortgage was not made to a loaning investment company, as set out in Article VIII, of Chapter 33, R. S. Missouri, 1939, which allows a charge of not more than Twenty Dollars on a loan made upon a motor vehicle. The purpose of the charge being on account of the extra hazard involved in the loan. In your request your main question is contained in your second paragraph, which reads as follows:

> "Can the motor car company evade the usury statute by calling the amount of money above 8% in excess of purchase price a 'carrying charge'?"

Since you have mentioned eight per cent as being the rate of interest, we are assuming that you are inquiring as to the civil statute, and not the criminal statute, on usury. The courts of this State have allowed commissions and other charges to be added to the amount of the loan which are not considered as part of the interest charge. Each case depends upon the actual facts, as set out in each transaction.

In the case of Fischman v. Schultz, 55 S. W. (2d) 313, l. c. 318, the court said:

> "Plaintiff further contends that the instruction for a directed verdict should have been given, because the commission paid by defendants as shown by their testimony was usurious. This contention may well be ruled against plaintiff on the ground that usury was not pleaded. Section 2843, R. S. 1929 (Mo. St. Ann. Sec. 2843); Bond v. Worley, 26 Mo. 253. Besides, usury does not conclusively appear from this record. The charge of a commission by the agent of the borrower, or by an independent broker, is not usurious. * * * * * *."

Also, in the case of Cuendet v. Love, Bryan & Co. et al., 57 S. W. (2d) 701, l. c. 704, the court said:

> "This brings us to the question, therefore, of whether Love, Bryan & Co. had the right to charge for such separate services, and we think the answer must obviously be given in the affirmative. Of course, one who lends his own money is not entitled, under the guise of charging a commission, to exact such charge in addition to the lawful rate of interest, without falling within the inhibition of the usury laws. But if the circumstances attendant upon the transaction require the rendition of services separate and apart from the mere making of the loan, if they are not mere pretended services, and if they are actually rendered in good faith, then the lender may properly require the borrower to pay a reasonable compensation in addition to the highest legal rate of interest upon the money loaned. * * "

Also, in the case of Stewart v. Boone County Trust Co., 87 S. W. (2d) 223, l. c. 226, the court said:

> "We find, according to the weight of the authorities, that where a contract for a loan, which requires in terms, or from necessary implication, the rendition of services by the lender for the benefit of the borrower, a fair and reasonable charge, for the services over and above the highest legal rate of interest on the money

> loaned, does not render the contract usurious. However, we also find, according to the weight of the authorities, that, no matter in what form the contract appears, no matter how fair it may appear on its face, courts are not bound to take the contract as if it were what it appears to be, but may inquire into the facts and circumstances in order to determine whether or not it is in good faith for real, substantial services and that the amount of the compensation set out for the rendition of such services is reasonable and not excessive. In other words, the nature of the services, whether they are substantial, necessary, and valuable, and whether the amount attempted to be exacted for the rendition of the services is reasonable, are determinative factors in construing whether the contract be for the rendition of services alone or merely a cloak whereby excess interest over the legal rate may be collected by the lender."

And, the court in holding that it was a question of fact, at page 227 of the same case, said:

> "We are clearly of the opinion that reasonableness of the charge, and whether the services were substantial or insignificant and unsubstantial, are questions of fact and determinative factors in reaching a conclu-

> sion as to the nature of the 5 per cent. clause in the contract, and therefore the issues should have been submitted to the jury."

Also, in the case of Hansen et al v. Duvall, et al., 62 S. W. (2d) 732, l. c. 736, the court said:

> "* * * '* * * But on accepted principles a charge or commission for alleged services cannot be made for the purpose solely of evading the usury laws, and therefore, to be sustained as lawful and to rescue the contract from the taint of usury, the additional charge must be shown to be based on some service rendered, some trouble encountered, or inconvenience sustained, or risk assumed by the lender, other than the advance of money.'"

In all of the cases cited the question involved as to extra charges was whether or not the alleged services were made for the purpose solely of evading the usury laws, but if the extra charges were made for services actually performed by the person who loaned the money, then the courts have held that it should be considered as an extra charge, and not as an evasion of the usury laws.

In your request you stated that a charge of Sixty-six Dollars and Twenty Cents was made for insurance and carrying charges. The facts are not very clear as to the exact overcharges made, but if the extra charges were such that they could be considered lawful, as set out in the four cases herein quoted from, then the extra charges should not be considered as interest, but, if the extra charges were made solely for the purpose of

evading the civil usury laws, then the extra charges could be counted in as part of the interest and the present owner of the motor car, if he has paid more than eight per cent interest could defend a suit brought against him on the ground of usury, or could institute a suit for the amount of money overpaid.

CONCLUSION

In view of the above authorities, it is the opinion of this department, that a motor car company cannot evade the civil usury statute by calling the amount of money charged above eight per cent, in excess of the purchase price, a carrying charge, unless the carrying charge consisted of charges made that were for services actually performed for the benefit of the debtor, and were not made for the purpose of evading the civil usury statute.

It is further the opinion of this department, that in order to obtain a conviction on criminal usury, the defendant must have charged more than two per cent per month as interest on a loan.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

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