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Usury--Conditional Sales Agreement--Extension Agreement (Bonnetti v. United Beauty Supply, Inc., et al., 31 N.Y.S.2d 463 (Spec. Term, Bronx Co., 1941))

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who, in good faith, incur obligations or advance money in reliance upon the apparent ownership of merchandise entrusted to a factor for the purpose of sale.[8] This was unknown to the common law.[9] Under the latter the factor came within the doctrine of the law of property that no one can give away what he does not own.[10] Sometimes the situation of third parties was alleviated by the doctrine of estoppel, but in order to give rise to an estoppel, it is essential that the party estopped shall have made a representation and that someone shall have acted on the faith of this representation in such a way that the innocent party cannot withdraw from the transaction without damage.[11] Thus trade was hampered to no small degree.[12]

Under the Factors' Act the burden of precaution is placed upon the principal who entrusts his goods to another.[13] At the same time the rule is not one-sided; the Act applies only where the relation of the principal and agent exists between the owner and the one having the merchandise or documentary evidence of title thereof in his possession with actual authority to sell or pledge the merchandise.[14] Thus a mere bailee without authority to sell or pledge does not come within the purview of the statute.[15] In a case such as the above it would seem that the only way to prove authority to sell or to pledge is by oral evidence. The admissibility of oral evidence is justified upon the ground that the defendant asserts no right under the written contract, but that his defense is built upon the rights given an innocent pledgee by the Factors' Act.[16] The Factors' Act by statute makes valid a contract which without such Act would have been invalid, because the agent in such cases as the one above had breached the authority conferred upon him by the principal.[17]

I. T.

USURY—CONDITIONAL SALES AGREEMENT—EXTENSION AGREEMENT.—Plaintiff sues in equity to have certain transactions with the defendant involving conditional sales agreements declared usurious and void. On November 6, 1935, plaintiff and defendant entered into

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[8] Freudenheim v. Gutter, 201 N. Y. 94, 94 N. E. 640 (1911).
[9] Smith v. Clews, 114 N. Y. 190, 21 N. E. 640 (1911).
[10] WILLISTON, SALES (2d ed.) § 311.
[11] *Id.* § 312.
[12] 7 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed.) 510.
[13] Cartwright v. Wilmerding, 24 N. Y. 521 (1862).
[14] N. Y. Security & Trust Co. v. Lippman, 157 N. Y. 551, 52 N. E. 595 (1899).
[15] Schwab v. Oatman (*rev'd on other grounds*) 198 N. Y. 545, 92 N. E. 1101.
[16] *See* note 4, *supra.*
[17] *See* note 3, *supra.*

a conditional sales agreement which provided for the payment of $2,463 for certain beauty parlor equipment and the installation thereof by the defendant seller. $543 of this amount was a down payment and $1,920 was to be paid in thirty-two deferred monthly payments of sixty dollars each, for which the plaintiff made and delivered to the defendant thirty-two promissory notes. This sum of $2,463 consisted of: $2,150, price of goods sold; $43, sales tax; and $270, finance charge. On March 1, 1937, the plaintiff and the defendant entered into a second agreement which stated $1,350.95 still due on the prior conditional sales agreement and added $208.95 finance charge, totaling $1,514.90. The old notes were then surrendered to the plaintiff, who issued new notes therefor based on this newly computed sum of $1,514.90. *Held,* the first agreement was valid and not usurious, since the transactions were a sale of merchandise on credit and involved installment payments for the performance of work and the difference between cash and credit prices. The second agreement was void and usurious as an agreement of forbearance extending the time of payment of a loan or debt in consideration of the payment of more than the principal due and legal rate of interest. *Bonnetti* v. *United Beauty Supply, Inc., et al.,* 31 N. Y. S. (2d) 463 (Spec. Term, Bronx Co., 1941).

While at common law usury was not illegal, by statute in New York it is provided that the rate of interest to be charged upon a loan or forbearance of money, goods or things in action shall not exceed six per cent.[1] This shall not be done directly or indirectly.[2] These usury statutes, however, have been held not to apply to a *bona fide* sale of merchandise on time.[3] Sales on credit, which charge prices in excess of six per cent over the cash price of the article sold are not usurious *per se.*[4] However, in the case of *Universal Credit Co.* v. *Cora Lowell*[5] the court decided that a carrying charge added to

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[1] N. Y. GENERAL BUSINESS LAW § 370: "The rate of interest upon a loan or forbearance of money, goods, or things in action, except as otherwise provided by law, shall be six dollars on one hundred dollars, for one year, and at that rate, for a greater or lesser sum, or for a longer or shorter time."

[2] N. Y. GENERAL BUSINESS LAW § 371: "No person or corporation shall, directly or indirectly, take or receive in money, goods or things in action, or in any other way, any greater sum or greater value, for the loan or forbearance of any money, goods or things in action, than is above prescribed."

[3] Lamula v. Morris Plan Industrial Bank of New York, 173 Misc. 874, 19 N. Y. S. (2d) 357 (1940); Failing v. National Bond and Investment Corp., 12 N. Y. S. (2d) 260 (1938), *rev'g,* 168 Misc. 617, 6 N. Y. S. (2d) 67 (1938), *aff'd,* 258 App. Div. 778, 14 N. Y. S. (2d) 1011 (4th Dep't 1939).

[4] Levine v. Nolan Motors, 169 Misc. 1025, 8 N. Y. S. (2d) 311 (1938); Florida Land Holding Corp. v. Burke, 135 Misc. 341, 238 N. Y. Supp. 1 (1929), *aff'd,* 229 App. Div. 853, 243 N. Y. Supp. 799 (1st Dep't 1930) (contract for the payment of money is not usurious because it provides that credit price exceeds cash price by a greater per cent than provided by the Statute); McAnsh v. Blauner, 222 App. Div. 381, 226 N. Y. Supp. 379 (1st Dep't 1928), *aff'd,* 248 N. Y. 537, 162 N. E. 515 (1928).

[5] Universal Credit Co. v. Cora Lowell, 166 Misc. 15, 2 N. Y. S. (2d) 743 (1938). Herein, the plaintiff brought an action to replevin an automobile sold

the price of an automobile sold under a conditional sales agreement was a usurious rate of interest, and stated that "the usury statute applies to the forbearance of a debt created out of the sale of either realty or personalty". In the case of *Archer Motor Co., Inc.* v. *Relin* [6] a similar transaction was held to be valid and not to constitute usury since the additional finance charge was not to be paid "for the loan or forbearance of any money". This latter case is clearly in line with the majority of opinions in this state and with the instant case. While at first glance the former case seems entirely inconsistent with the latter and the instant cases, it is not as irreconcilable as it appears. In the former action the court scrutinized the entire transaction, compared the carrying charge with the cash price and came to the conclusion that the real facts disclosed usury. It is true the court added to this finding that the usury statutes apply to sales of merchandise on credit. However, this was not essential to the decision, for the form of the transaction is never controlling in determining whether it is usurious, since transactions in the form of sales may be in fact loans and usurious.[7] Hence, if a pretended sale of goods is made the underlying scheme for a loan of money upon usury, the courts will be vigilant to judge the transaction by its real character rather than by the form the parties seek to give it.[8] Therefore, although the principle stated in the *Universal Credit Co.* case is clearly *contra* to the principle that a sale of merchandise on credit at a rate greater than six per cent over the cash price is not usury, the decision may be sustained today on the other grounds stated.

An agreement of forbearance extending the time of payment of a loan or debt in consideration of the payment of more than the principal due plus six per cent, is usurious.[9] The Court of Appeals, however, has affirmed a decision which stated that the charging and accepting more than six per cent for extending payment due under a conditional sales contract did not constitute usury.[10] In the instant

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under a conditional contract of sale. The cash selling price was $792 and a carrying charge of $130.27 was added. *Held,* court will scrutinize the transaction and discover the real facts and actual intent and, herein, the "differential" was the charge of an illegal rate of interest of 24½ per cent.

[6] Archer Motor Co., Inc. v. Relin, 255 App. Div. 333, 8 N. Y. S. (2d) 469 (4th Dep't 1938). The owner of an automobile agreed to sell for $125 in cash, but before the sale was completed, a conditional sales agreement whereby $10 was added to the purchase price, over and above six per cent interest was entered into by the parties. *Held,* not a usurious transaction.

[7] *In re* Bechtold's Estate, 159 Misc. 725, 289 N. Y. Supp. 838 (1936); Wilkie v. Roosevelt, 3 Johns. Cas. 206, 2 Am. Dec. 149 (1802).

[8] Archer Motor Co., Inc. v. Relin, 255 App. Div. 333, 8 N. Y. S. (2d) 469 (4th Dep't 1938); Hull v. Eagle Insurance Co. of London, England, 151 App. Div. 815, 136 N. Y. Supp. 724 (1st Dep't 1912), *aff'd,* 211 N. Y. 507, 105 N. E. 1085 (1914); Quackenbush v. Sayer, 62 N. Y. 344 (1875).

[9] La Monte v. Handy, 250 App. Div. 657, 296 N. Y. Supp. 135 (3d Dep't 1937); Malmud v. Blackman, 232 App. Div. 765, 248 N. Y. Supp. 879 (2d Dep't 1931); Church v. Maloy, 70 N. Y. 63 (1877); Real Estate Trust Co. v. Keech, 69 N. Y. 248 (1877); Lovett v. Diamond, 4 Edw. 22 (N. Y. 1839).

[10] P. J. Tierney Sons, Inc. v. Bajowski, 258 N. Y. 563, 180 N. E. 333

case this decision was not followed, but the general rule above expressed was clearly adopted.[11] Although the subsequent forbearance agreement fell as usurious, this did not affect the first valid agreement. It has long been held that an obligation, valid when created, is not rendered usurious by a latter agreement calling for an illegal rate of interest, but the latter agreement alone is void.[12] Except for the few inconsistencies above stated [13] the law as expressed in the instant case is unchallenged.

S. C.

WORKMEN'S COMPENSATION—DEDUCTION OF ATTORNEY'S FEES IN COMPUTING EMPLOYER'S LIEN OR DEFICIENCY AWARD—SUBROGATION.—Claimant's husband, an employee of the City of New York, died February 2, 1938 as the result of injuries sustained in the course of his employment, which were caused by the negligence of a third person. On March 21, 1938, pursuant to the provisions of Section 29 of the Workmen's Compensation Law, claimant served a notice that an action had been commenced against the third person and that she made claim for all benefits due her under the Act. On March 22, 1938, an award of compensation was filed with the Department of Labor giving claimant $10.39 per week, and the City promptly gave notice that the first payment of compensation had been made. Thereafter, the action against the third person was settled for $14,000 with the employer's written consent. The widow's share in the recovery (after allowing for children) was $3,551.70 after deducting disbursements and attorney's fees, but was $4,368.37 without deduction of such fees. The employer claimed it was liable only for the deficiency between the amount of the recovery and the compensation provided or estimated, and that attorney's fees should not be deducted in computing the amount of the recovery "actually collected". *Held,* Workmen's Compensation Law § 29, subdivisions 1 and 4, must be read together, and when so read, provide that where a claimant has recovered from a third person the employer is liable to pay any deficiency between the compensation provided, or estimated, and the claimant's recovery *less* disbursements and attorney's fees. *Curtin* v. *City of New York,* 287 N. Y. 338, 39 N. E. (2d) 903 (1942).

A person whose employment falls within the scope of the Workmen's Compensation Act may not sue his employer at common law

(1932), *aff'g,* 233 App. Div. 766, 250 N. Y. Supp. 189 (2d Dep't 1931); *cf.* London v. Toney, 263 N. Y. 439, 446, 189 N. E. 485, 4 (1934), "Interest and forbearance do relate to a money debt originating otherwise than by a loan."

[11] *See* note 9, *supra.*

[12] Hinman v. Brundage, 13 N. Y. S. (2d) 363 (Sup. Ct. Del. Co. 1939); La Monte v. Handy, 250 App. Div. 657, 296 N. Y. Supp. 135 (3d Dep't 1937).

[13] *See* notes 5 and 9, *supra.*