

55(4) places the burden of proof upon the claimant to show that its claim is free from usury. In my opinion Merit's claim is not free from usury and such usurious charges must be disallowed.

To creditors and leaders in the business community who are constantly asking why there is such a large number of bankruptcy petitions filed in Tennessee each year,² an analysis of the financing charges in the loans under consideration in this opinion furnishes one of the principal answers.

USURY

In the United States the meaning of usury is the taking or reserving of illegal interest. The test of usury in a contract is whether it would, if performed, result in securing a greater rate of profit than is allowed by law. The form of the agreement is immaterial, since any shift or device by which illegal interest is arranged to be received or paid is usurious.

"A profit made or loss imposed on the necessities of the borrower, whatever form, shape or disguise it may assume where the treaty is for a loan and the capital is to be returned at all events, has always been adjudged to be so much profit taken upon a loan, and to be a violation of these laws which limit the lender to a specified rate of interest." *Bank of United States v. Owens*, 27 U.S. 527.

Lenders often seek to augment the interest which they charge for a loan by requiring borrowers to pay for pretended services rendered or for fictitious expenses incurred by the lender.

"The cupidity of lenders and the willingness of borrowers to concede whatever may be demanded or to promise whatever may be exacted in order to obtain temporary relief from financial embarrassment have resulted in a great variety of devices to evade the usury laws. To frustrate such evasions the courts look beyond the form of transactions to their substance. The general rule is that a court in determining whether or not a contract or transaction is usurious will disregard its form and look to the substance, condemning it when it finds the requisites of usury present, regardless of the disguises they may wear. No case is to be judged by what the parties appear to be or represent themselves to be doing, but by the transaction as disclosed by the whole evidence, and if from that it is in substance a receiving or contracting for the receiving of usurious interest for a loan or forbearance of money, the parties are subject to the statutory consequences, no matter what device they may have employed to conceal the true character of their dealings." 55 Am. Jur., Usury, at p. 332.

It is often contended that the parole evidence rule bars evidence of intent, but the rule is otherwise. Parole evidence always is admissible to show that the party intended an illegal contract even though the evidence contradicts the recitals or varies the promises of written instruments.

Such an exception to the parole evidence rule is obviously sound, for to bar oral evidence of intent would make it possible for anyone to avoid the penalties of the law by the simple expedient of casting an unlawful transaction in the form of a written contract having the appearance of legality on its face, in which form it would be unassailable.

By their nature, devices to conceal usury have the appearance of legality: the disguised transaction is usurious for the very reason that the true intent of the parties to the transaction differs from the apparent or professed intent. It is, therefore, necessary to discover every fact that shows the true character of the transaction and to apply the fundamental principles of interest and usury, regardless of the disarming form in which the transaction may have been cast.

INTEREST

Interest is the compensation which may be demanded by the lender from the borrower, or the creditor from the debtor, for the use of money. Tennessee Code Annotated 47-14-103. The legal rate of interest in this state is fixed by Tennessee Code Annotated 47-14-104 at the rate of six dollars (\$6.00) for the use of one hundred dollars (\$100) for one (1) year. "... and every excess over that rate is usury."

² 9,281 petitions filed in Tennessee during the fiscal year ending June 30, 1965. This number was exceeded only in three states—Alabama, California, and Ohio. *Report of the Administrative Office of the U.S. Courts.*