HOME BUILDING & SAVINGS ASSOCIATION *v.* SHOTWELL.

Opinion delivered April 27, 1931.

1. USURY—SALE OF PROPERTY.—Where a *bona fide* sale of land is intended, the vendor may charge a higher price for his property on a credit than he would have done for cash without being guilty of usury, for the element of lending and borrowing money is lacking; but if the sale is not *bona fide*, and there an intent, by excess of price, to receive more than lawful interest, the transaction is usurious.
2. USURY—PAROL EVIDENCE.—Parol evidence is admissible to show that a contract legal on its face was in fact an illegal agreement or cover for usury.
3. USURY—NATURE OF TRANSACTION.—No device or shift intended to evade the usury laws will be upheld, no matter what the form of the contract may be.
4. USURY—EXHORBITANT PRICE.—While an exhorbitant price will not of itself constitute usury, yet it is a circumstance to be considered in determining whether a transaction was a *bona fide* sale of property or was intended as a cover for usury.
5. USURY—SALE OF PROPERTY.—A transaction by which a buyer procured lots authorized to be sold for $650 by giving a loan company a note for $1,200, in consideration of which the loan company paid the purchase price of $650, *held* usurious.
6. USURY—NATURE.—A contract in which the real transaction is a loan of money, the lender attempting to receive from the borrower more than the amount allowed by law, is usurious.

Appeal from Sebastian Chancery Court, Fort Smith District; *J. V. Bourland,* Chancellor; affirmed.

STATEMENT OF FACTS.

The Home Building & Savings Association brought this suit in equity against F. C. Shotwell and Rosa Shotwell, his wife, to foreclose a mortgage on certain lots situated in Fort Smith, Arkansas. The suit was defended on the ground that the mortgage debt was tainted with usury and, under our Constitution and laws, was illegal and void.

According to the testimony of F. C. Shotwell, in 1929 he made application for a loan with the Home Building & Savings Association, which was a building and loan corporation doing business in Fort Smith, Arkansas. On the 11th day of April, 1929, he executed a note to said corporation for $1,200, with interest at ten per cent. per annum. The note recited that it was payable at the office of the association at Fort Smith, Arkansas, without demand at the rate of $15 per month. The note was signed by F. C. Shotwell and Rosa Shotwell, his wife. On the same day, he executed a mortgage on the lots situated in Fort Smith, involved in this lawsuit to secure the mortgage indebtedness. The application for the loan was made on the 8th day of April, 1929. The lots were owned by J. P. Barron, and he was represented in the negotiation for the purchase and sale of the lots by his son-in-law, W. F. Norman. Grover H. Webb, a notary public, who was also agent of the Commercial Loan & Investment Company, represented that company in handling the note and furnishing the money. Norman came to the applicant at first and made the arrangement for the loan. Then Webb took the application. Norman was offering the property in controversy for $650 cash. Shotwell did not have the money, and it was arranged to get it through the company represented by Mr. Webb. Webb told Shotwell that his company would take a note payable to the Home Building & Savings Association for $1,200, payable at $12.65 per month for ninety-six months. Shotwell was to get no money, but Norman was to get $650. The

arrangement was that a note should be made to the Home Building & Savings Association for $12.65 per month for ninety-six months without interest. Shotwell made twelve monthly payments at $12.65 per month and then quit paying because they demanded $15 monthly. The whole idea in the trade was to enable Shotwell to pay Norman $650 for the property which Barron was to deed to Shotwell. The agreement was with Webb that all the money furnished by his company was to go to Norman. Shotwell did not know that Webb was trading to Norman an Essex automobile belonging to the Commercial Loan & Investment Company.

According to the testimony of W. F. Norman, he was negotiating to sell the property which belonged to his father-in-law, Mr. Barron, and did not know the fair market value of it. The property consisted of four twenty-five foot lots with a four-room house on it, situated in Fort Smith, Arkansas. Norman had a contract with Shotwell to sell the property to him for $1,200. Norman told Shotwell that he would get some real estate firm to handle the paper. The note or paper was to run ninety-four or ninety-five months. Webb made the proposition that, if his company would agree to it, he would trade Norman a car and $500 in money for the $1,200 note. The car was worth $150, and Norman got $500 and the car from Webb. The agreement between Webb and Norman was signed by them and reads as follows:

"This agreement made and entered into on the 6th day of April, 1929, by and between Grover H. Webb, party of the first part, and W. F. Norman, party of the second part.

"Witnesseth: That the said party of the first part agree to buy notes against house located at 4400 Kincaid Avenue and three lots in Fort Smith, Arkansas, for consideration of $1,200 to be paid as follows:

"$500 cash in hand and putting in an Essex car at consideration of $700.

"This deal is pending and subject to sale of said property, said deal is to be completed Monday."

On April 8th, Norman and Webb executed an instrument in writing, which reads as follows:

"(In ink) Ft. Smith, Ark.

"(In ink) April 8th, 1929.

"This is to certify that the deal between Norman and Webb mentioned in a certain contract of agreement, dated April 6, 1929, has not yet been fully completed.

"Said Webb now has warranty deed in his possession to be held in escrow and to be delivered by him to C. F. Shotwell and wife when they sign $1,200 mortgage made payable to the Home Building & Savings Association. Then said Webb is to deliver to W. F. Norman $500 and an Essex car in lieu of said mortgage.

"Should the above deal in any way fail, the said note or mortgage shall revert back to W. F. Norman."

Norman explained to Webb his agreement with Shotwell.

Grover H. Webb testified that he was a notary public and took the acknowledgment to the deed and mortgage in controversy. He was working at the time for the Commercial Loan & Investment Company and was not working for the Home Building & Savings Association. The latter corporation took the mortgage. Webb said that he and Norman reached an agreement, and that he did not tell Norman that they were borrowing $650. Webb handled the real estate department of the Commercial Loan & Investment Company, and they occasionally made real estate loans. He testified that the property in question was worth $1,500 at the time the transaction took place.

According to the testimony of L. E. Prall, he was secretary and general manager of the Home Building & Savings Association, and president of the Commercial Loan & Investment Company. The two companies were entirely separate. The former was a building and loan business, and the latter deals in real estate loans. Prall passed on this loan and authorized a disbursement of the money to the proper parties. He examined a check for $690 and said that it showed the disbursement of that

amount of money by the Home Building & Savings Association to the Commercial Loan & Investment Company. The car involved in the transaction belonged to the Commercial Loan & Investment Company. The Commercial Loan & Investment Company and the Home Building & Savings Association occupy the same offices in Fort Smith. At the time the transaction was entered into between the parties, Norman delivered to Webb a warranty deed executed by Barron, his father-in-law, which was delivered to Shotwell when the latter and his wife signed the note and mortgage payable to the Home Building & Savings Association. When this was done, the Home Building & Savings Association paid over to Norman $500 and the Essex car, valued at $150.

The chancellor found the issues in favor of the defendants on the question of usury, and held the note and mortgage void on that account. It was therefore decreed that the complaint of the plaintiff be dismissed for want of equity, and that the note and mortgage executed by the Shotwells be canceled and held for naught, and that the title to the property in controversy be quieted in the defendant Shotwell against the Home Building & Savings Association. The case is here on appeal.

Hardin & Barton, for appellant.

A. M. Dobbs and *Pryor & Pryor,* for appellee.

HART, C. J., (after stating the facts). When a *bona fide* sale of land is intended, the vendor may charge a much higher price for his property on a credit than he would have done for cash for the element of lending and borrowing money is absent from the transaction; but if the sale is not *bona fide,* and there is an intent under its form, by excess of price, to receive more than lawful interest, the transaction will be usurious. *Heytle* v. *Logan,* 1 A. K. Marsh (Ky.) 529; *Quackenbos* v. *Sayer,* 62 N. Y. 344; *Barr* v. *Collier,* 54 Ala. 39; *Collier* v. *Barr,* 64 Ala. 543; and *Ford* v. *Hancock,* 36 Ark. 248. Our later decision have adhered to this rule and have been applied according to the facts in the particular case. *Tillar* v. *Cleveland,* 47 Ark. 287, 1 S. W. 516; *Ellenbogen* v. *Griffey,*

55 Ark. 268, 18 S. W. 126; *Blake Bros.* v. *Askew & Brummett,* 112 Ark. 514, 166 S. W. 965; *Smith* v. *Kauffman,* 145 Ark. 548, 224 S. W. 978; and *Edwards* v. *Wiley,* 150 Ark. 480, 235 S. W. 54.

In this connection, it may be stated that parol evidence is admissible to show that the contract, although legal upon its face, was in fact an illegal agreement or cover for usury. Otherwise the very purpose of the law in forbidding the taking of usury under any kind of trick would be defeated. *Houghton* v. *Burden,* 228 U. S. 161, 33 S. Ct. 491; *Tillar* v. *Cleveland,* 47 Ark. 291, 1 S. W. 516; and *Roe* v. *Kiser,* 62 Ark. 92, 34 S. W. 534, 54 Am.

In *Ellenbogen* v. *Griffey,* 55 Ark. 268, 18 S. W. 126, the court, speaking through Mr. Justice Hemingway, said:

"In a *bona fide* sale of land or chattels usury cannot enter, for the element of lending and borrowing is absent; but, if the sale is a mere device to cover a loan and exact excessive interest, it will not be protected by its false cover. *Davis* v. *Garr,* [6 N. Y. 124] 55 Am. Dec. 387, 393, and cases cited; *Struthers* v. *Drexel,* 122 U. S. 487 [7 S. Ct. 1293]. In the cases in this court relied upon by appellee, the transactions were found to be in fact loans of money, put in the form of sales to evade the statutes against usury; and the court held that they were usurious loans, and that the false color given them could not defeat the statute. *Ford* v. *Hancock,* 36 Ark. 248; *Driver* v. *Driver,* 46 Ark. 50; *Tillar* v. *Cleveland,* 47 Ark. 291, [1 S. W. 516]."

This court has uniformly recognized that borrowing and lending money is indispensable to constitute usury; but that, no matter what the form of the contract may be, no device or shift intended to evade the usury laws will be upheld. The court has also recognized that, while an exhorbitant price will not of itself constitute usury, yet it is a circumstance to be considered in determining whether the transaction was a *bona fide* sale of property or was intended for a cover for usury. It has been frequently judicially stated that one of the most

usual forms of usury is a pretended sale of goods or other property.

It seems to us that the transaction in question was a buying of land at an exhorbitant price to obtain a loan, and was therefore usurious. Shotwell wished to buy the lots in controversy; and Norman, who was the agent of his father-in-law, the owner of the lots, was authorized to sell them for $650 and was willing to sell them for that price. Webb represented a real estate loan company and arranged that Shotwell should execute a note to his company for $1,200 before he would lend him the money. Shotwell never got any of the $1,200, and it was not intended that he should get any of it. The plaintiff in this case and the company represented by Webb occupy the same offices and had the same president. It was never intended that the plaintiff should furnish any one $1,200. They only agreed to furnish to Norman, the agent of the owner of the property, $650, which was his price for it. $500 of this was paid in cash, and $150 of it was the purchase price of a second-hand automobile which was owned by the Commercial Loan & Investment Company, whose agent Webb was.

As was stated in the case of *Jones* v. *Phillips,* 135 Ark. 578, 206 S. W. 40, usury laws are enacted to protect the weak and necessitous from oppression; and the lender of money, by no device or deception, is allowed to deceive the borrower so as to conceal the fact that he is taking usury. When the real transaction is a loan of money, and the lender attempts to receive from the borrower more than the amount actually advanced, no matter under what pretext, it contravenes the policy of our usury law, and such contract can not be enforced. As aptly said in *Heytle* v. *Logan,* 1 A. K. Marsh (Ky.) 529: "In the language of Lord Mansfield on a like occasion, it may be truly said, 'it is impossible to wink so hard as not to see,' what was expected by this contract—that its end was more interest on the money advanced than the law authorized."

Under the facts stated in the record, we are of the opinion that the chancellor was justified in finding that the real transaction was the borrowing and lending of money, and that the contract contemplated a greater charge of interest than allowed by law, and that it was a mere device or shift to avoid our usury laws. It follows that the decree will be affirmed.