SIMPSON *v.* SMITH SAVINGS SOCIETY.

Opinion delivered January 21, 1929.

1. USURY—DEDUCTION OF DISCOUNT.—A transaction in which money was loaned through a savings society, the note reciting that it was given for the purchase of an investment certificate, *held* not usurious because the society deducted from the amount of the loan a discount of 10 per cent. for the year, as authorized by Crawford & Moses' Dig., § 7353.
2. USURY—INTENT TO TAKE UNLAWFUL INTEREST.—Although it is not necessary that there shall be a mutual agreement to give and receive unlawful interest to constitute usury, if it be actually "reserved, taken or secured, or agreed to be taken or reserved," there must be an intent knowingly to take unlawful interest to constitute usury.
3. USURY—WHEN NOT INFERRED.—Usury will not be inferred where, from the circumstances, the opposite conclusion can be reasonably and fairly reached, and the defense should be established by clear and satisfactory evidence.
4. USURY—BURDEN OF PROOF.—The burden of proving usury in a transaction rests upon the party alleging it.
5. USURY—COLLATERAL CONTRACT.—The fact that a lender refused to make the loan unless the borrower would enter into another contract, which, apart from the lending, would be fair and legal, does not render the agreement for the loan usurious.

Appeal from Pulaski Circuit Court, Second Division; *Richard M. Mann,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellee brought this suit against appellants on a promissory note for $300, dated May 18, 1927, payable in 10 monthly installments of $30 each, and bearing interest from May 18, 1928, at 8 per cent. per annum.

Simpson admitted the execution of the note, and alleged it was made in pursuance of an agreement to borrow $300 from said savings society, repayable in 10 equal monthly installments of $30 each, with 8 per cent. interest after maturity; that he only received $270 in cash in consideration of said note, and that the society collected $30 in advance, which constituted a charge of usury.

Defendants Moore and Jones admitted they signed the note with Simpson, and adopted his defense of usury.

The case was submitted to the court without a jury, upon an agreed statement of facts, and from the judgment for the amount of the note with 8 per cent. interest from maturity the appeal is prosecuted.

It appears from the agreed statement of facts that, before the date of the execution of the note, the 18th day of May, 1927, Simpson applied to the appellee savings society for a loan of $300 with which to pay off his just debts, and, not having sufficient collateral to procure the loan upon his own indorsement, made application for the loan upon the savings plan of the society, in which it was stated he agreed to purchase from the society a 4 per cent. installment investment certificate for an amount equal to the loan applied for, and agreed to pay for it in 10 equal monthly installments on the 18th day of each month, and to pledge or assign the certificate to the society as additional security for the loan, and that the society could apply the proceeds of the certificate to the liquidation of the note covering the obligation of borrowed money when it became due, if the maker failed to renew or pay it. He expressly retained the right to renew or pay off the note given for the money borrowed and retain the investment certificate, and, if he failed to pay or renew the note for the loan within three days after it became due, it amounted to an election not to retain the certificate of investment, and authorized the society to cancel same and apply the proceeds to the liquidation of the note for the borrowed money when it became due, agreeing to pay the remainder, if any, in cash on demand. His application was accepted, and Simpson purchased the installment certificate No. 28, dated May 18, 1927, giving in payment therefor his note for $300 on same date, payable in 10 equal monthly installments of $30 each, with 8 per cent. interest from maturity, the first due June 18, 1927, and the note was signed by Moore and Jones, as co-makers.

The note recites that it is for the purchase money of the investment certificate, and that the payments shall be applied to its maturity, failure to pay any installment entitling the holder to declare all installments due, and bring suit. It also authorized the holder to apply to the payment of the note, on or before its maturity, any funds or security held by the society belonging to the maker or indorsers or sureties as collateral. Also an agreement that, in the event of failure to pay any installment within one week after it was due, the society, at its election, could charge 5c per $100 or fraction thereof of the face value of the note for each full week each installment is in default, for additional services rendered or expenses incurred on account of default, such sum or penalties to be used to mature the certificate more quickly. The issuance of the 4 per cent. investment certificate was "the sole and only consideration" for the co-makers' note of $300, payable in 10 installments, and that same was issued in pursuance of the terms of the application.

The certificate showed it was a 4 per cent. installment investment certificate, and that the said $300 note was given for the purchase money thereof; that, upon payment of the certificate, the society would pay to the purchaser or his assigns, one year from its date, the full face value of the certificate, plus 4 per cent. interest for the mean time of the payments made thereon, after the contract of purchase had been fully performed. Also, in lieu of cash settlement, the purchaser, when the certificate was matured, if it was not otherwise pledged, could keep or retain same and draw 4 per cent. annual interest thereon and then 2 per cent. interest every six months thereafter, with an agreement that the society would repurchase the certificate from the holder, with accrued interest, at any interest-paying period, if it was not assigned or hypothecated as collateral for a loan with the society. He could pay off the loan note at any time before maturity and be allowed an 8 per cent. rebate for the unexpired time.

The defendant, after receipt of the installment certificate, pledged same to the society on May 18, 1927, to secure the payment of the collateral note for $300, due one year from said date, and the society accepted such at 10 per cent., and gave the defendant, Simpson, $270 in cash to be used to pay off his debts. The collateral note for $300 was signed by Simpson only, due in one year, with 8 per cent. interest from maturity, and recites that, to secure it and any other liability to the society due or to be contracted, the 4 per cent. installment investment certificate No. 28 was assigned as collateral, with consent that any payments made or interest accrued on such certificate could be applied at the option of the society to the liquidation of any indebtedness of Simpson's, should default be made in the payment of the note in three days after maturity. It also recited it had been discounted 10 per cent. by the society, and that the maker should have the right to pay or discharge same before maturity, and, when so paid, he should receive a cash interest rebate of 8c. on each dollar on the principal sum for the full calendar year and *pro rata* for each full calendar month the note lacked of reaching maturity when repaid, and expressly that no unlawful interest should be charged the borrower.

Neither of the defendants made any payments upon the note given for the installment certificate, and there was due, when suit was brought, the sum of $300, with interest at 8 per cent. from May 18, 1928, until paid. Moore and Jones, co-makers of the note given for the investment certificate, received no part of the money borrowed by Simpson upon his collateral $300 note, which was discounted 10 per cent. No action had been taken towards the collection of the $300 collateral note executed by Simpson, who has the election either to pay off his collateral note in cash or to pay out his investment certificate and to use the certificate upon its maturity to cancel the debt created by the Simpson $300 collateral note executed by Simpson, who has the election either to pay off his collateral note in cash or to pay out

his investment certificate and to use the certificate upon its maturity to cancel the debt created by the Simpson $300 collateral note. The suit upon the note in issue does not invalidate the worth of the investment certificate.

The court found the transaction was not usurious, and rendered judgment for appellee for the amount sued on, from which this appeal is prosecuted.

Vivion O. Brack, for appellant.

Troy W. Lewis and *Clayton Freeman,* for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in not holding the transaction usurious and void and rendering judgment accordingly.

The appellee society only deducted from the amount loaned on the $300 collateral note the discount of 10 per cent. for the year, as it had the right to do under our law, and the reservation of or discount of the paper for that sum did not constitute usury. Section 7353, C. & M. Digest; *Newport Bank* v. *Cook,* 60 Ark. 288, 30 S. W. 35, 29 L. R. A. 761, 46 Am. St. Rep. 171; *Vahlberg* v. *Keaton,* 51 Ark. 534, 11 S. W. 878; *Beard* v. *Millwood,* 51 Ark. 548, 11 S. W. 881.

Castleberry v. *Wild,* 142 Ark. 627, 219 S. W. 739, is not an authority to the contrary, the facts being different, and the 10 per cent. for an entire year having been deducted there from the face of the note, which was due in 10 months. Neither are the cases of *Dickinson-Reed-Randerson Co.* v. *Stroup,* 169 Ark. 277, 275 S. W. 520, and *Virgil R. Coss Mortgage Co.* v. *Jordan,* 167 Ark. 34, 267 S. W. 590, in point as authority against this holding.

The contract too provides that no unlawful interest is intended to be charged or paid, and although it is not necessary that there shall be a mutual agreement to give and receive unlawful interest to constitute usury, if it be actually "reserved, taken or secured, or agreed to be taken or reserved," there must be an intent to knowingly take unlawful interest to constitute usury. *Garvin* v. *Lennon,* 62 Ark. 370, 56 S. W. 781; *Scruggs* v.

Scottish Mortgage Co., 54 Ark. 571, 16 S. W. 563; *American Farm Mortgage Co.* v. *Ingraham,* 174 Ark. 578, 297 S. W. 1039.

Usury will not be inferred where, from the circumstances, the opposite conclusion can be reasonably and fairly reached, and the defense should be established by clear and satisfactory evidence. *Leonard* v. *Floyd,* 68 Ark. 162, 56 S. W. 781; *First Natl. Bank* v. *Waddell,* 74 Ark. 242, 85 S. W. 417; *Citizens' Bank* v. *Murphy,* 83 Ark. 31, 102 S. W. 697; *Everett* v. *Hart,* 87 Ark. 534, 113 S. W. 213; *Briggs* v. *Steel,* 91 Ark. 458, 121 S. W. 754; *American Farm Mtg. Co.* v. *Ingraham, supra.*

The burden of proving usury in the transaction rests upon the party alleging or setting it up. *Holt* v. *Kirby,* 57 Ark. 251, 21 S. W. 432; *Citizens' Bank* v. *Murphy, supra;* 13 Clark, Ency. Evidence, page 390; *Hollan* v. *American Bank of Commerce & Trust Co.,* 159 Ark. 141, 252 S. W. 359.

The two contracts were separate and distinct, and if the one for the purchase of the investment certificate had been carried out according to its terms, the interest required on all the transactions, the investment certificate bearing 4 per cent. and agreed to be taken when matured in settlement of the money borrowed upon the collateral $300 note when it became due, would have reduced the amount of interest or discount on the loan below 10 per cent. instead of increasing it. *Reeve* v. *Ladies' Building Assn.,* 56 Ark. 316, 19 S. W. 917, Ann. Cases 1914C, p. 1307.

The note sued on was given for the payment of the purchase money of the investment certificate, and it makes no difference that the amount agreed to be paid was in 10 monthly installments, since the certificate was not matured until the end of 12 months, when the loan note was due, and neither was it the note upon which the money was loaned, but was given for purchasing an investment certificate to be used as collateral thereto.

There is a computation made in the brief showing the result of the whole transaction if the collateral note

given for the $300 borrowed should not be paid when due, but renewed for another 10 months, with the same interest rate with the matured investment certificate and interest, security therefor. The renewal note would be paid in 10 monthly installments, $300; the interest allowed on the certificate for 10 months, $10; interest on the renewal note meantime at 8 per cent., $11, showing $617 paid by the borrower, from which is deducted the amount of the collateral note and interest, leaving a net saving to Simpson, the investor, the certificate and interest amounting to $306. The investor only paid $41 for $300 for one year and 10 months, or 7.92 per cent. simple interest annually, and accumulated $306 for himself while doing so.

This transaction is analogous to the system pursued by building and loan associations in requiring borrowers to subscribe and pay for stock in the association in order to the making of the loans, which are made only to members of the association, and upheld as not usurious on that account. *Reeve* v. *Ladies' Bldg. Assn.,* 56 Ark. 316, 19 S. W. 917; *Taylor* v. *Van Buren B. Assn.,* 56 Ark. 321, 19 S. W. 918; *Black* v. *Thompkins,* 63 Ark. 502, 39 S. W. 553; *Farmers' Saving Assn.* v. *Ferguson,* 69 Ark. 352, 63 S. W. 797; *Bell* v. *Southern Home B. & L. Assn.,* 140 Ark. 371, 27 R. C. L. 210.

It has also been held that the exactment of a collateral advantage additional to the highest rate of interest allowed to be charged as a condition to the loan does not constitute usury, same being a separate and distinct charge from the amount agreed to be paid for the advancement of money. *Citizens' Bank* v. *Murphy, supra.* See also *Cockle* v. *Flac,* 93 U. S. 344, 23 U. S. (L. ed.) 949, and *Union Cent. Life Ins. Co.* v. *Hilliard,* 63 Ohio St. 478, 59 N. E. 230, 53 L. R. A. 462.

It is said in 27 R. C. L., § 31, page 230: "It is very generally held that the circumstance that the lender refused to make the loan unless the borrower would enter into another contract, which, apart from and un-

connected with the lending, would be fair and legal, does not render the agreement for the loan usurious."

We hold that the finding of the trial court in favor of appellee is supported by the testimony, and that the transaction was not usurious, and the judgment must be affirmed. It is so ordered.