

1961

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Recommended Citation

Gilbert D. Stephenson, *Usury--Effectiveness of the General Usury Statutes of Missouri--Sections 408.050 and 408.070*, 26 MO. L. REV. (1961)

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some . . . profound interstitial change in the very tissue of the law." The rule had a reasonably innocuous creation, a startling growth and a slower but nonetheless sure decline. The decline illustrates very well the orthodox process of judicial legislation by exception, elaboration and interpretation.

It is well that such a process is available, for the courts recognized early that the broad general rule of immunity as originally stated would very often produce absurd or unjust results. The process has reached a point in many jurisdictions where it now might well be said that there is in fact no general immunity rule but rather that as a general rule parents and children may sue one another for tortious conduct except where the conduct is only simple negligence. Other jurisdictions would pull up short at the dividing line between intentional and unintentional conduct. This would seem to be the major area of development for the next few years. At any rate it appears that the rule still prevails in all its pristine vigor in only one jurisdiction, Tennessee.

EDWIN D. AKERS
WILLIAM H. DRUMMOND

USURY—EFFECTIVENESS OF THE GENERAL USURY STATUTES OF MISSOURI—SECTIONS 408.050 AND 408.070

I. INTRODUCTION

Usury is generally defined today as "the receiving, securing, or taking of a greater sum or value for the loan or forbearance of money, goods, or things in action than is allowed by law—the exaction of a greater sum for the use of money than the highest rate of interest allowed by law."¹

In ancient Greece and Rome moderate interest on loans was allowed and usury was probably given much the same definition as it is today.² The rising power of the young Christian church put an end to this idea and condemned the taking of any interest whatsoever.³ To the Christian church of that era

1. 55 AM. JUR. *Usury* § 2 (1946).

2. Meth, *A Contemporary Crisis: The Problem of Usury in the United States*, 44 A.B.A.J. 637 (1958).

3. Salin, *Usury*, 15 ENCYC. SOC. SCI. 193 (1935); *Luke* 6:34; *Mat.* 21:12-13. See also *Commonwealth v. Donoghue*, 250 Ky. 343, 351, 63 S.W.2d 3, 6 (1933), in which is quoted one of the orations of St. Basil, the famous Christian orator of the fourth century, as follows: "The griping usurer sees, unmoved, his necessitous borrower at his feet, condescending to every humiliation, professing everything that is villifying; he feels no compassion for his fellow-creatures; though reduced to this abject state of supplication, he yields not to his humble prayer; he is

interest and usury were synonymous. The condemnation of charging even a small interest for the lending of money was incorporated into canon law and continued in Anglo-Saxon civilizations into the middle ages.⁴ However, under capitalistic development interest became tolerated and finally became excessive in many instances, despite the disapproval of the Church.⁵ During the reign of Henry VIII a law was passed in an attempt to regulate the excesses in interest that were being charged in the lending of money.⁶ This law gave official recognition to the legality of charging interest, but made it a penal offense to charge more than ten per cent as interest in a lending transaction. It was generally considered ineffective and was repealed during the reign of Edward VI.⁷ This repealing statute reinstated the prohibition of taking any interest under penalty of forfeiture of principal. This statute later was in turn repealed.⁸ After further changes during the reigns of James I⁹ and Charles II,¹⁰ the solution to the problem of usury was given some degree of permanency during the reign of Anne¹¹ when the prototype of modern usury legislation was enacted.¹²

In the United States the exaction of interest has never been against public policy;¹³ nor does the common law of the United States prohibit the taking of interest, though there is dictum that a contract with interest at an unconscionable rate would be void.¹⁴ But the rates of interest allowable have generally been

inexorable to his entreatie; he melts not at his tears; he swears and protests that he has no money, and that he is under necessity of borrowing himself; he acquires credit to his lies by superadding an oath, and aggravates his inhuman and iniquitous traffic with the grossest perjury. But when the wretched supplicant enters upon the terms of the loan, his countenance is changed; he smiles with complacency; he reminds him of his intimacy with his father, and treats him with the most flattering cordiality. 'Let me see,' says he, 'if I have not some little cash in store, for I ought to have some belonging to a friend who lent it to me on very hard terms, to whom I pay most exorbitant interest for it; but I shall not demand anything like that from you.' By fair words and promises, he seduces and completely entangles him in his snares; he then gets his hand to paper and completes his wretchedness. How so? By dismissing him bereft of liberty." Query whether St. Basil did not accurately forecast the character of some modern-day moneylenders and the plight of some modern-day borrowers.

4. See *Kreibohm v. Yancey*, 154 Mo. 67, 55 S.W. 260 (1900).

5. *Salin*, *supra* note 3.

6. 37 Hen. 8, c. 9 (1545). There were prior attempts to curb usury but they were mainly city ordinances. See 8 HOLDSWORTH, HISTORY OF ENGLISH LAW 102 (1926).

7. 5 & 6 Edw. 6, c. 20 (1551-1552).

8. 13 Eliz., c. 8 (1571).

9. 21 Jac. 1, c. 17 (1623).

10. 12 Car. 2, c. 13 (1660).

11. 12 Anne, c. 16 (1714). This statute was later repealed by 17 & 18 Vict., c. 90 (1854).

12. See *Commonwealth v. Donoghue*, *supra* note 3.

13. See *Collins & Ham, The Usury Law of Arkansas: A Study in Evasion*, 8 ARK. L. REV. 399 (1954); see also *Cobb, Usury: Affirmative Relief Under the Florida Usury Statute*, 7 U. FLA. L. REV. 213 (1954).

14. *Houghton v. Page*, 2 N.H. 42 (1819).

regulated by statute.¹⁵ Only three states have no statutes limiting the interest rates which may be agreed upon by the parties.¹⁶

II. GENERAL APPLICATION OF MISSOURI'S USURY LAWS

A. Lawful Rates of Interest

Missouri, from the time it was a territory to the present day, has always had laws regulating interest rates.¹⁷ The present interest rates are divided into two categories, the classification depending mainly upon whether certain statutory requirements are met.

1. Small Loans

The first category pertains to installment loans up to \$500, as to which the lender may charge as much as 2.218 per cent per month on the unpaid balance¹⁸ if he complies with all the requirements of the small loan act. No loan secured by liens on real estate, non-processed farm products, livestock, farm machinery or crops will qualify under the small loan act,¹⁹ but other than this there is really no clear criterion under the statute for distinguishing small loans from usurious regular loans.

2. General Loans

The second category pertains to all loans, regardless of amount, not meeting the special small loan requirements. There are two rates of interest which apply to this second category: (1) if the parties agree that interest is to be charged but do not agree upon an interest rate, the debtor is obligated to pay the "legal" rate, which is six per cent simple interest,²⁰ or (2) the parties may agree upon a rate not to exceed eight per cent²¹ compounded annually.²²

15. Meth, *supra* note 2, at 638, indicates that 13 states have laws permitting a maximum of 6% interest to be taken, 27 states allow from 7% through 11%, while 9 states allow 12% or more. In the matter of forfeiture for usury, it seems that 13 states require the lender to forfeit the excess interest above the maximum allowable, 18 states require forfeiture of a multiple of interest or excessive interest, 1 state requires a forfeiture of all interest plus 8% of principal, while 5 states require a forfeiture of all interest plus principal. In addition, in 17 states usury is a crime or misdemeanor. Four states have constitutional provisions against usury.

16. See *An Ounce of Discretion for a Pound of Flesh: A Suggested Reform for Usury Laws*, 65 YALE L. J. 105 (1955).

17. See MO. ANN. STAT. § 408.050 (1952) for reference to Missouri's former enactments regulating usury.

18. § 408.100, RSMo 1959.

19. See § 408.100, RSMo 1959.

20. § 408.020, RSMo 1959. Such an agreement may be oral even though the remainder of the contract is written. See *Coombes v. Knowlson*, 193 Mo. App. 554, 182 S.W. 1040 (Spr. Ct. App. 1916).

21. § 408.030, RSMo 1959.

22. § 408.080, RSMo 1959. The agreement to pay eight per cent or compounded interest must be in writing; if such an agreement is oral, the lender is only entitled to six per cent simple interest. See *Coombes v. Knowlson*, *supra* note 20.

B. *Elements and Essentials of Usury*

In Missouri, as in other states, usury rests wholly upon statutes.²³ Missouri's definition of usury is "interest in excess of a legal rate charged to a borrower for the use of money,"²⁴ which seems to be the same as that generally given.²⁵ The elements necessary to render a transaction usurious are:

- (1) unlawful intent; (2) subject-matter must be money or its equivalent;
- (3) a loan or forbearance; (4) the sum loaned must be absolutely, not contingently, payable; and (5) there must be an exaction for the use of the loan of something in excess of what is allowed by law.²⁶

Although there is a stricter requirement as to the other elements, the element of unlawful intent is presumed if the transaction requires the payment of a usurious rate of interest.²⁷ The requirement of a loan or forbearance is strictly adhered to in Missouri,²⁸ but as stated in *Quinn v. Van Raalte*:²⁹

It is not necessary, in order to constitute a loan, that there should be in very terms, an application to borrow, or an agreement to lend. Every advancement of money, for the accommodation of another, to be repaid . . . by the person receiving it, or by any person for him, or by or out of his funds, is literally and legally, a loan of money.

23. *Gehlert v. Smiley*, 114 S.W.2d 1029 (Mo. 1937).

24. *Bahl v. Miles*, 222 Mo. App. 984, 987, 6 S.W.2d 661, 663 (K.C. Ct. App. 1928).

25. See note 1 *supra* and accompanying text.

26. *Allen v. Newton*, 219 Mo. App. 74, 79, 266 S.W. 327, 329 (K.C. Ct. App. 1924).

27. *Securities Inv. Co. v. Rottweiler*, 7 S.W.2d 484, 486 (St. L. Ct. App. 1928), wherein the court stated: ". . . the law will presume the necessary intent from the mere fact that the parties intentionally did what was in fact forbidden by statute." *Osborn v. Payne*, 111 Mo. App. 29, 85 S.W. 667 (K.C. Ct. App. 1905), indicates that the transaction itself, not the intention of the parties, determines the question of usury. *But see Warinner v. Nugent*, 362 Mo. 233, 239, 240, 240 S.W.2d 941, 944 (1951), where defendant persuaded plaintiff to sell her corporate shares and lend him the money. The stock had declined in value due to the depression from the purchase price of \$4400 to \$1000. Defendant promised to repay the original purchase price of \$4400 if plaintiff would sell at the reduced price and lend him the money. The court held that the transaction was not usurious as a matter of law, and further stated: "But again the question is one of purpose and intention. If the agreement was merely a device to evade the usury laws the transaction was usurious. On the other hand if the bargain was collateral to the loan and not a mere device to avoid the law of usury the transaction was not usurious." It seems difficult to imagine how this transaction could be anything other than a usurious loan.

28. *Personal Fin. Co. v. Endicott*, 238 S.W.2d 51 (St. L. Ct. App. 1951), wherein it was held that there was no loan going from the finance company to a purchaser who had bought a chattel from a dealer who arranged the financing through the finance company.

29. 276 Mo. 71, 100, 205 S.W. 59, 67 (1918). The plaintiff had an option on property but was unable to exercise it due to lack of funds. The defendant agreed to buy the property at the option price and then resell it to plaintiff at a large profit. The court held that the transaction was merely a loan from defendant to plaintiff.

However, Missouri courts do sometimes fail to find loans in transactions which courts of other states call loans.³⁰

C. Test of Usury

1. Under Small Loan Act

The test of usury under the small loan acts is whether any sum (except that included as a result of a bona fide error) was charged or received by the lender in addition to the statutory maximum interest rate and the service charges allowed.³¹

2. Under General Usury Statutes

As a general proposition the test used by the courts to determine whether or not a general loan contract is usurious is "whether it would, if performed, result in securing a greater rate of profit on the subject-matter than is allowed by law."³² More specifically, Missouri's basic prohibition against taking excessive interest³³ expressly refers to both the six per cent "legal" interest section and the "specified rate up to eight per cent" section. This statute has been interpreted to mean that a contract is usurious if: (1) the parties expressly agree there is to be interest but no rate is specified and the lender actually takes a sum larger than six per cent per annum on the debt,³⁴ or (2) the specified interest rate is lower than eight per cent but the lender actually takes more than the stated rate,³⁵ or (3) the stated rate is eight per cent but the lender takes an excess,³⁶ or (4) the stated rate is in excess of eight per cent and the lender takes the stated amount.³⁷ The fact that the excess sum is charged as a penalty for the borrower's not having repaid the loan at maturity does not relieve the transaction of its usurious taint.³⁸

30. This is mainly in the area of credit sales where a finance company is involved. See note 119 *infra* and accompanying text.

31. See §§ 408.140-150, RSMo 1959.

32. *Kreibohm v. Yancey*, 154 Mo. 67, 85, 55 S.W. 260, 266 (1900).

33. § 408.050, RSMo 1959.

34. *Citizens' Nat'l Bank v. Donnell*, 172 Mo. 384, 72 S.W. 925 (1903) (en banc), where plaintiff charged 12% interest on defendant's overdrafts.

35. *Holmes v. Royal Loan Ass'n*, 166 Mo. App. 719, 150 S.W. 1111 (K.C. Ct. App. 1912), where the specified rate was 6% but the lender also included a "bonus" charge. *Accord*, *Lawler v. Vette*, 166 Mo. App. 342, 149 S.W. 43 (St. L. Ct. App. 1912). *Contra*, *Allen v. Newton*, *supra* note 26, where the specified rate was 7%, and the court indicated that the contract would not be usurious unless an excess of 8% was taken. *Cf.* *Taylor v. Buzard*, 114 Mo. App. 622, 90 S.W. 126 (K.C. Ct. App. 1905).

36. *Osborne v. Fridrich*, 134 Mo. App. 449, 114 S.W. 1045 (St. L. Ct. App. 1908), where the specified rate was 8% but the lender always charged an excess amount when the notes became due.

37. *J. I. Case Threshing Mach. Co. v. Tomlin*, 174 Mo. App. 512, 161 S.W. 286 (K.C. Ct. App. 1913), where the notes drew 10% interest after they became due.

38. *Id.*

D. Penalties Assessed Against Usurious Lenders

As a deterrent to lenders who would charge more than lawful interest, Missouri laws provide both criminal and civil sanctions against such lenders.

1. Small Loans

In the small loan field,³⁹ as a criminal sanction the applicable section provides that for any violation of the small loan acts the lender shall be guilty of a misdemeanor.⁴⁰ Whether or not this is an actual deterrent is somewhat doubtful.⁴¹

The civil remedy is quite drastic in its somewhat limited sphere of applicability. If the lender charges or receives more than the maximum rate allowable, except as a result of a bona fide error, all evidence of the loan and all security therefor are unenforceable.⁴² Thus it seems that if either the lender or the borrower brings suit prior to repayment of the total debt and the loan is proven to be usurious, then the lender forfeits the unpaid remainder of interest and principal. The actual penalty assessed against the lender would depend, of course, on how much of the debt was unpaid at the time of the suit.

The question of whether or not the borrower can recover any part of the principal and legal interest which he has already paid to the lender does not seem to have been answered in Missouri.

2. General Loans

The criminal prohibition against usurious lenders in the general loan field (where the general usury statutes are applicable) is more lenient toward the lender than that in the small loan area. In the general loan area the lender is guilty of a misdemeanor only if he takes or receives or agrees to take or receive more than two per cent interest per month.⁴³ Thus in a general loan the lender must have charged interest at three times the lawful maximum rate of eight per cent per annum before he is subject to criminal prosecution. The ineffectiveness of this law may easily be seen.

The civil remedies for usury in the general loan field, with which the remainder of this article is concerned, penalize the usurious lender in two ways: (1) the borrower may recover the sum paid in excess of principal and legal rate of interest and the lender is liable for the costs of suit, plus a reasonable attorney's fee,⁴⁴ or, if any part of the principal and legal interest is still owed to the lender, the borrower may offset the usury he has paid against such amount;⁴⁵ and (2) the borrower may have declared invalid any lien of personal property which he has pledged or mortgaged to the lender as security for the usurious loan.⁴⁶

39. See note 18 *supra* and accompanying text.

40. § 408.220, RSMo 1959.

41. See *A Symposium on the Small Loan Problem in Missouri*, 16 Mo. L. Rev. 195 (1951).

42. § 408.150, RSMo 1959.

43. § 563.800, RSMo 1959.

44. § 408.050, RSMo 1959. See note 165 *infra* and accompanying text.

45. § 408.060, RSMo 1959.

46. § 408.070, RSMo 1959.

As may be observed from the above discussion, the penalties for usury are assessed solely against the lender and not against the borrower. Thus Missouri has retreated from its previous hard-to-support position that the borrower who pays usury is in *pari delicto* with the lender,⁴⁷ and now follows the doctrine that the wrong is wholly that of the lender.⁴⁸

Although Missouri's usury laws seem to be on a par with those of the majority of the states,⁴⁹ they are inadequate in many instances to protect borrowers from unscrupulous lenders, and the injury is often compounded by the courts, which at times seem to have more sympathy with lenders than with borrowers.⁵⁰

E. Transactions Examined

Some of the transactions examined and discussed in this section are clearly loans, some are directly or indirectly involved with the lending of money, while still others, although resembling loans, have not been held to be such.

1. Brokers' Commissions

If the loan is procured through the borrower's agent or through an independent broker, there is no usury even though the borrower pays a commission to the agent or broker for procuring the loan while, at the same time, paying the maximum lawful rate of interest to the lender.⁵¹ But the courts scrutinize these transactions to determine if the agent purporting to be that of the borrower is in reality the lender or the lender's agent.⁵² Factors taken into consideration in determining whether the agent is that of the lender or the borrower are: closeness of relationship between lender and broker,⁵³ number of prior transactions between lender and broker,⁵⁴ and whether or not the broker is regularly employed by the

47. See *Rutherford v. Williams*, 42 Mo. 18, 35 (1867), wherein it was declared: "So far as it was illegal, the plaintiff [debtor] is in the situation of a wrong-doer as well as defendant [money lender], and equity will not relieve him. . . ."

48. *Missouri Real Estate Syndicate v. Sims*, 179 Mo. 679, 686, 78 S.W. 1006, 1008 (1904): "It is deemed that his (the debtor's) consent to the corrupt contract was obtained by moral duress such as to take from him the character of *particeps criminis*."

49. See note 15 *supra*.

50. See *Tobin v. Neuman*, 271 S.W. 842 (St. L. Ct. App. 1925), where the court refused to declare the transaction a usurious loan partly because the lender would have lost his lien and have been relegated to the position of a general creditor.

51. *Hecker v. Putney*, 196 S.W.2d 442 (St. L. Ct. App. 1946); *Cuendet v. Love, Bryan & Co.*, 57 S.W.2d 701 (St. L. Ct. App. 1933); *Fischman v. Schultz*, 55 S.W.2d 313 (St. L. Ct. App. 1932).

52. *Cavally v. Crutcher*, 9 S.W.2d 848 (Spr. Ct. App. 1928). The court found that the agent-payee was in reality just a conduit for the lender's loan to the borrower and not really the borrower's agent.

53. *State v. Sargent*, 256 S.W.2d 265 (St. L. Ct. App. 1953) (agent was ex-husband of the lender); *Cavally v. Crutcher*, *supra* note 52 (agent was father of lender).

54. *Leavel v. Johnston*, 209 Mo. App. 197, 232 S.W. 1064 (K.C. Ct. App. 1921). (The agent was trustee of a loan fund from his sister's estate; he had made several prior loans.)

lender.⁵⁵ If the intermediate party is found to be the lender's agent, any commission retained by him in addition to the lawful rate of interest going to the lender makes the loan usurious even though the lender received none of the commission charged, or in fact did not know that the agent charged such a commission.⁵⁶ That the parties designate the intermediate party as the borrower's agent will not prevent the court from finding that he is in fact the agent of the lender.⁵⁷ Furthermore, if the intermediate party is the agent of the borrower and agrees to procure a loan for the borrower but instead borrows the money on his own credit and then relends it to the borrower, the courts hold that the intermediate party becomes in fact the lender and he may not legally charge a commission in addition to the interest.⁵⁸

2. Note Discounting or Commission Charging by Lender

A lender and holder of the borrower's promissory notes may "discount" or sell them to a third person at a price which is a fractional part of the face value of the notes and if the transaction is a bona fide sale it could not come within the usury statutes no matter how large the difference between the sale price and the face value of the notes.⁵⁹ At the same time, if the lender "discounts" them from the borrower (gives the borrower less than the face value of the notes) and the difference between the "discount" price and the face amount of the note amounts to more than lawful interest or is in addition to lawful interest, then the loan is usurious.⁶⁰ This is true whether the "discounted" sum is labeled as "additional compensation"⁶¹ for making the loan, "bonus,"⁶² or as "expenses" which were not incurred.⁶³ The courts examine these transactions carefully to determine if the pur-

55. *Wintergirst v. Collateral Loan Co.*, 60 Mo. App. 166 (St. L. Ct. App. 1895) (agent was manager of the loan company).

56. *Western Storage & Warehouse Co. v. Glasner*, 169 Mo. 38, 68 S.W. 917 (1902), where the lender's agent charged the borrower 2% of the loan as his commission. The lender was unaware that the agent had made any charge. Cf. *Landis v. Saxton*, 89 Mo. 375, 1 S.W. 359 (1886), where the agent was the executor of an estate and loaned the borrower \$15,000 of the estate, retaining \$1000 as a bonus. The court indicated that the bonus was illegal, not because the lender's agent retained it, but because the executor should not be allowed to make a profit from his estate.

57. *State v. Sargent*, *supra* note 53; *Wintergirst v. Collateral Loan Co.*, *supra* note 55.

58. *Osborn v. Payne*, 111 Mo. App. 29, 85 S.W. 667 (K.C. Ct. App. 1905). The plaintiff had promised to pay defendant \$25 if defendant would obtain a loan of \$650 for him. Defendant borrowed the money on his own credit and re-loaned it to plaintiff, taking the \$25 in addition to lawful interest. Cf. *Quinn v. Van Raalte*, *supra* note 29. *Contra*, *Tobin v. Neuman*, *supra* note 50.

59. *Personal Fin. Co. v. Endicott*, 238 S.W.2d 51 (St. L. Ct. App. 1951) (promissory notes of value of \$5,084.60 sold for \$4,540.60).

60. *Castorina v. Herrmann*, 340 Mo. 1026, 104 S.W.2d 297 (1937) (note in question drew 6% interest but lender "discounted" it an additional 7%).

61. *Id.*

62. *Lyons v. Smith*, 111 Mo. App. 272, 86 S.W. 918 (K.C. Ct. App. 1905) (note drew 8% interest but lender retained \$40 as a bonus). *Arbuthnot v. Brookfield Loan & Bldg. Ass'n*, 98 Mo. App. 382, 72 S.W. 132 (K.C. Ct. App. 1903) (bonus was 28-1/2%).

63. *Voorhis v. Staed*, 63 Mo. App. 370 (St. L. Ct. App. 1895).

ported third party buyer of the notes is in reality the lender.⁶⁴ For example, in *Anderson v. Curls*,⁶⁵ the plaintiff gave her personal note with a face value of \$400, plus six per cent interest, to an intermediate party who "sold" the note to defendant for \$200. The intermediate party kept \$25 for his services and gave the plaintiff the remaining \$175. The court found that defendant was in fact the lender and not a purchaser of the discounted note, and that the \$200 "discount" was usury.⁶⁶

3. Charges for Services

The ban on retention of commissions by the lender or his agent does not extend to charges for services rendered by the lender or his agent. Missouri's position on charges for such services has been summarized as follows:

. . . [T]he 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.⁶⁷

The services must have actually been performed but they may be directly connected with the loan as in *Stewart v. Boone County Trust Co.*⁶⁸ In that case the plaintiff had obtained a loan from defendant by pledging a number of tax bills as security. The loan contract provided that defendant was to collect the tax bills, and retain the principal debt, eight per cent interest, plus five per cent for services in collecting the bills. The court indicated that the mere fact that the five per

64. *Hecker v. Putney*, *supra* note 51. The court found that there was no bona fide sale of the notes but that the "buyer" was in fact the lender and that the payee of the notes who was the "buyer's" employee was just a straw party. *But see* *General Motors Acceptance Corp. v. Weinrich*, 218 Mo. App. 68, 262 S.W. 425 (K.C. Ct. App. 1924). The court found a bona fide sale of the defendant's note from the dealer-payee to the finance company even though the finance company had participated in the transaction between dealer and defendant. The note, with a face value of \$901, was "sold" to the finance company for \$850. The court found that the \$51 "discount" was legal in spite of the fact that the dealer testified that he was the finance company's agent for a loan to the defendant.

65. 309 S.W.2d 692 (K.C. Ct. App. 1958).

66. A similar finding was made in *Lawler v. Vette*, 166 Mo. App. 342, 149 S.W. 43 (St. L. Ct. App. 1912). In that case the plaintiff went to an intermediate party to request that a \$3000 loan be obtained for her. The intermediate party then went to defendant who agreed to "buy" plaintiff's promissory notes with a face value of \$3000 for \$2500. The court found as a matter of fact there was no sale but that defendant had loaned the money to plaintiff. *But see* *Major v. Putney*, 293 S.W. 81 (St. L. Ct. App. 1927), where the court found a valid sale even though the purchaser was the sole shareholder of the corporate payee.

67. *Stewart v. Boone County Trust Co.*, 230 Mo. App. 120, 126, 87 S.W.2d 223, 226 (St. L. Ct. App. 1935). See also *Crow v. Stevenson*, 274 S.W. 1102 (Spr. Ct. App. 1925). In the *Crow* case the lender contended that his services were in getting borrower's creditors to agree to accept \$.75 on each \$1.00 of the borrower's debts. The court found that no services had been performed and that the \$833.84 charge for such "services" was illegal.

68. *Id.*

cent charge was for services directly connected with the loan would not render the transaction usurious so long as the charge was found to be reasonable, and remanded the case for jury trial on the issues of reasonableness of the charge and whether or not the services were substantial or insubstantial.

Although it is said that charges for services must not be unreasonable,⁶⁹ determinations as to whether or not the charges are reasonable are left to the jury⁷⁰ and the results are not always equitable. A prime example would be the case of *Hansen v. Duwall*,⁷¹ where the lender had sold some of the borrower's promissory notes to third parties but retained the remainder. The court allowed the lender to charge the borrower from twelve and one-half per cent to twenty-five per cent of the royalties of three producing oil wells in exchange for the lender's "services," consisting of his guaranteeing to the third parties payment of the borrower's notes in the amount of \$36,000. The borrower was further obligated to place fifty per cent of the royalties into a trust for the payment of the notes, so it is questionable as to how much of a guarantor the lender really was. In less than one year and eight months the lender had been paid in excess of \$9,000 from the royalty interests for his "services." This also illustrates that courts are reluctant to overturn the findings of the jury even though the court itself might not have reached the same decision. Another example is *Williams v. American Exch. Bank*,⁷² where the court affirmed the jury's findings that \$1040 paid to defendant by plaintiff was compensation for defendant's services (an agreement not to bid at a sale of drug stock), and was not a charge for the use of \$6000 which defendant had loaned to plaintiff.

4. Renewals or Extensions

The prohibition against the lender's "discounting" the borrower's notes in addition to charging legal interest also extends to making such "discounts" or charges upon the renewal or extension of the notes or debt.⁷³ Thus in *Lyons v. Smith*,⁷⁴ where the lender charged the borrower \$40 as a condition to the renewal of a \$400 note, the court declared that the charge had rendered the loan usurious.

As a corollary to the rule relating to charges for renewals, the courts further hold that if there was usury in the original transaction, such usury follows the

69. *Leavel v. Johnston*, *supra* note 54.

70. *Stewart v. Boone County Trust Co.*, *supra* note 67.

71. 333 Mo. 59, 62 S.W.2d 732 (1933). *But see* *State v. Sargent*, *supra* note 53, where a contrary result was had. But in that case the borrower had not been aware that the agent was guaranteeing his notes to the lender.

72. *Williams v. American Exch. Bank*, 222 Mo. App. 483, 280 S.W. 720 (K.C. Ct. App. 1926). *But see* *Western Storage & Warehouse Co. v. Glasner*, *supra* note 56, where a 2% charge for "services" was held to be usury. The "services" were in making the loan, examining the title to the security, examining the security and attending the proposed renewals.

73. *Missouri Real Estate Syndicate v. Sims*, 179 Mo. 679, 78 S.W. 1006 (1904) (\$100 given as consideration for promise to give extension of time on mortgage and note held to be usury); *Adams v. Moody*, 91 Mo. App. 41 (K.C. Ct. App. 1901) (charge of \$2.50 for a three months' extension of note held to be usury).

74. *Supra* note 62.

indebtedness through all its renewals.⁷⁵ The fact that the usurious interest exacted in the first note was included in the renewal note as principal will not prevent the second note from being usurious.⁷⁶ Furthermore, it is not necessary that the borrower have knowledge of the usury in the original transaction for him to avail himself of it in the later renewal.⁷⁷ However, the fact that the original obligation was usurious will not prevent the parties from legalizing the renewal note or extension. This may be done by simply deleting from the new contract or notes that amount which made the original loan usurious.⁷⁸

5. Compounding Interest

Compound interest is generally thought of as interest upon interest, i.e., the interest upon a sum of money being added to the debt, and then bearing interest itself.⁷⁹ Missouri law allows the annual compounding of even the maximum lawful interest rate,⁸⁰ but to compound interest more often than once per year is expressly prohibited.⁸¹ Even annual compounding is not allowed in Missouri unless the parties expressly so agree in writing.⁸² Missouri courts hold that a provision in a contract calling for compounding interest more often than once a year is void even if such compounding was done as a penalty for the borrower's not having made a payment of lawful interest on time.⁸³ However, the courts hold that

75. *Foskin v. Laessig*, 32 S.W.2d 768 (St. L. Ct. App. 1930). (Twelve per cent interest had been paid on the original note which was executed in 1913. In 1924 a new note was substituted. The court held that the usurious taint followed into the new note.) *Hecker v. Putney*, *supra* note 51. See also *Osborne v. Fridrich*, 134 Mo. App. 449 (St. L. Ct. App. 1908), where defendant was an accommodation indorser on notes which were usurious because of charges for renewals. The lender started suit against defendant and as a compromise defendant executed as maker the notes in question which included the usurious charges. The court held that the second notes were usurious also. *But compare* *Coleman v. Cole*, 69 Mo. App. 530 (St. L. Ct. App. 1897), where defendant had been the guarantor of the original notes which were usurious, but later he became joint maker of notes which were substituted for the originals. It was held that the substituted notes were also usurious. This was reversed in *Coleman v. Cole*, 158 Mo. 253, 260, 59 S.W. 106 (1900). The court indicated that the second note was not usurious and stated: ". . . if the transaction is a simple purchase of a previously executed and uttered evidence of debt, it is as legal as any purchase of any other merchantable article."

76. *Johnson v. Grayson*, 230 Mo. 380, 130 S.W. 673 (1910).

77. *Foskin v. Laessig*, *supra* note 75.

78. *Peters Shoe Co. v. Arnold*, 82 Mo. App. 1 (K.C. Ct. App. 1899). (After the parties discovered that an excess charge of \$350 had been included in the note and mortgage and that interest had been illegally compounded, they executed a new note and mortgage stating the correct amounts and deleting the illegal compounding provision. It was held that the second note and mortgage was not usurious.)

79. BLACK, LAW DICTIONARY (4th ed. 1951).

80. § 408.080, RSMo 1959.

81. § 408.080, RSMo 1959.

82. *Citizens' Nat'l Bank v. Donnell*, 172 Mo. 384, 72 S.W. 925 (1903) (en banc); *Coombes v. Knowlson*, 182 S.W. 1040 (Spr. Ct. App. 1916).

83. *Whitworth v. Davey*, 185 S.W. 241 (Spr. Ct. App. 1916). *But see* *Barutio v. New York Life Ins. Co.*, 177 S.W.2d 685 (St. L. Ct. App. 1944), which involved an insurance policy which was kept in force through payment of quarterly premiums. The policy provided that the insured might pay premiums

an illegal compounding provision does not necessarily bring the contract within the purview of the usury statutes.⁸⁴ This holding is based on the fact that the basic usury statute does not specifically refer to the compounding prohibition as it does to the sections regulating interest rates. The reason it does not may be, as one court suggests, that the illegal compounding provisions do not constitute usury but are only "harsh and oppressive" and "tended to usury."⁸⁵ This seems to be a nice distinction in view of the fact that a lender may, by using illegal compounding provisions, stand to gain an illegal profit which is as great or greater than if he had openly charged a usurious interest rate, but still not be subject to the penalties of usury.⁸⁶

6. Installment Loans⁸⁷

Installment loans are typically those which are borrowed in a lump sum but are repaid by periodic installments over a stated length of time.⁸⁸ Because of the complexities in figuring the amounts of interest that can be legally charged on a loan the principal of which is decreased by each installment paid, the installment loan transaction is often a source of illegal profits for the lenders.⁸⁹ The device most often used by the lenders in gaining their illegal profits is that of charging maximum legal interest on the whole sum loaned until the last installment is to be paid. This interest is simply added to the principal debt and paid in proportion to the installment.⁹⁰ For example, in *Hanson v. Acceptance Fin. Co.*,⁹¹

by executing promissory notes, but that if such note was not paid prior to the time another quarterly premium became due then insured would execute a new note which would include the unpaid balance of the prior note, accrued interest on the prior note and a sum sufficient to cover the premium then due. Thus interest was being compounded four times per year. The court found that this did not violate the compounding statute. It is doubtful that such a holding would receive much support in other situations. See *Vaughn v. Graham*, 234 Mo. App. 781, 121 S.W.2d 222 (St. L. Ct. App. 1938), which reached a seemingly contrary result.

84. The somewhat anomalous result is reached that, while the contract calling for this illegal compounding is not usurious, if the borrower has paid all the interest called for in the contract he has paid usury. *Whitworth v. Davey*, 279 Mo. 672, 216 S.W. 736 (1919). *But see Forgan v. Bridges*, 281 S.W. 134 (Spr. Ct. App. 1926), where the note was due in six months and included six months' interest but also provided that the total was to bear interest from maturity.

85. *Whitworth v. Davey*, *supra* note 84.

86. The civil remedies available to the borrower where the loan contract calls for illegal compounding will be amplified further in later sections dealing with specific application of §§ 408.050 and 408.070.

87. Many problems arising in this area will be solved by application of the "small loan" acts rather than the general usury sections.

88. *Hecker v. Putney*, 196 S.W.2d 442 (St. L. Ct. App. 1946). The borrower was obliged to pay back \$725.50 in twelve equal monthly installments after having received only \$560 after the lender had retained a usurious commission.

89. *Hanson v. Acceptance Fin. Co.*, 270 S.W.2d 143 (Mo. 1954).

90. See *Lawler v. Vette*, 166 Mo. App. 342, 149 S.W. 43 (St. L. Ct. App. 1912). The borrower received only \$2500 but the contract stated that she was to repay \$3000 in 40 equal monthly installments, an amount equal to the principal sum plus 6% interest per annum for the 3-1/3 years on the total principal. *Cf. Van Doeren v. Pelt*, 184 S.W.2d 744 (St. L. Ct. App. 1945), where the borrower

the principal debt was \$1663.20, to be repaid in 18 monthly installments. The debt allegedly was to draw eight per cent interest but the lender included the sum of \$226.80 interest to be paid proportionately to the installments. This sum of interest was in excess of the amount which could have been charged had the transaction not been an installment loan. Thus the borrower was paying interest at approximately twice the lawful rate. When such a provision is called to the attention of the court it is declared usurious.⁹²

As a necessary corollary, a lender cannot charge interest for a longer period than the length of time the loan is to run.⁹³ However, if the loan contract does not provide for optional prepayment, the fact that the borrower repays the loan prior to the maturity date will not prevent the lender from legally charging maximum lawful interest for the full period.⁹⁴

7. Salary Purchasing—Assignment of Future Wages

Purported salary purchasing transactions have also fallen under the ban on usury when the profits realized by the "purchaser" are greater than the lawful rate of interest chargeable on the amount the "seller" received. For example, in *Tolman v. Union Cas. & Surety Co.*,⁹⁵ the "seller" received \$83 from the "purchaser" and in return assigned him the right to receive from "seller's" employer \$140 plus six per cent interest from the "seller's" wages which were to be earned over the following year. The court recognized this transaction as a cloak for a usurious loan from the "purchaser" to the "seller" and that the "assignment" was nothing more than security for the loan. The court did not decide whether or not a valid assignment of future wages could be made. And in *Bell v. Mulholland*,⁹⁶ the court indi-

borrowed \$150 from the lender. The lender deducted \$12 interest in advance from the \$150 (8% of \$150 for 1 year). The loan was to be repaid \$3 per week for 50 weeks.

91. *Supra* note 89.

92. *Hecker v. Putney*, *supra* note 88; *Van Doeren v. Pelt*, *Lawler v. Vette*, *supra* note 90. In *Hanson v. Acceptance Fin. Co.*, *supra* note 89, the court found the contract to be usurious but plaintiff was allowed no relief because he had used the wrong theory for recovery. Plaintiff sought recovery for the lender's fraud and deceit. The contract related and the lender orally declared that the borrower was to pay only eight per cent interest, but the court found that the action of fraud and deceit would not lie even though the borrower was obliged to pay interest at twice that rate. The court said that the borrower was not entitled to rely on the representations of the lender because the contract also specified the amount in dollars that was allotted to interest, and that the borrower should have been able to compute the interest himself and determine that the specified amount did not result from the specified rate. The court further held that there was no relationship of confidence or trust between the parties. Query whether the court had ever read or heard any loan company advertisements.

93. *Van Doeren v. Pelt*, *supra* note 90, where the loan was to be repaid in 50 weeks, but interest was figured for a full year.

94. *Hanson v. Acceptance Fin. Co.*, *supra* note 89.

95. 90 Mo. App. 274 (St. L. Ct. App. 1901).

96. 90 Mo. App. 612 (St. L. Ct. App. 1901). (Assignor assigned to the lender the right to receive \$80 from his wages. The assignor received \$76 for the assignment and had repaid \$4 "interest" each month for over two years. The court restrained the assignee from presenting his assignment to the assignor's employer and also declared the assignment void.)

cated that while a sale or assignment of future wages might possibly be valid if the "seller-assignor" were presently employed, there could be no such assignment if he was unemployed at the time of the assignment or sale.⁹⁷ The court further indicated that a stipulation in the contract to the effect that the transaction was a sale of wages and not a loan would not prevent the court from finding that the transaction was in fact a usurious loan. The fatal blow to these purported salary purchases or assignments was administered by the court in *State v. Salary Purchasing Co.*,⁹⁸ where it was held that such an assignment or sale of future wages was void under the Missouri statute, now Section 432.030, Revised Statutes of Missouri (1959), and could not possibly be anything more than a loan which would be usurious if a profit larger than lawful interest was realized by the lender.

Although an assignment of wages already earned is valid, it is probable that such an assignment would be subjected to close inspection by the courts to determine if it was in reality a cloak for a usurious loan.⁹⁹ It should also be noted that section 408.210¹⁰⁰ provides that any assignment of earned wages of \$400 or less is deemed to be a loan and is regulated by the small loan acts.

8. Sale of Credit

A sale of credit might be thought of as a transaction whereby the "seller" of the credit "sells" to the "buyer" the right to incur obligations with or borrow money from a third person with the representation that if the "buyer" does not pay the obligation then the "seller" will.¹⁰¹ The most common type of this transaction is where the "seller" becomes a guarantor or surety of the "buyer-maker's" promissory notes running to the third person.¹⁰² Missouri's position on these transactions is that:

. . . a sale in good faith . . . of credit, if the seller has no other interest in the transaction, is valid and not open to the objection of usury whatever the price [charged by the seller for his credit].¹⁰³

97. See also *State v. Williamson*, 118 Mo. 146, 23 S.W. 1054 (1893), where the defendant was being criminally prosecuted for embezzlement. He had assigned his future wages to the prosecuting witness, but had collected the wages himself. The court, emphasizing that defendant was a government employee, held that he was not guilty and that the assignment was void as against public policy. The matter was given some degree of permanency by Mo. Laws 1911, at 143, § 1 (now § 432.030, RSMo 1959), which declared that assignments of unearned wages were null and void. See *Henderson v. Tolman*, 130 Mo. App. 498, 109 S.W. 76 (K.C. Ct. App. 1908) (assignment of wages to secure a usurious loan void).

98. 358 Mo. 1022, 218 S.W.2d 571 (1949) (en banc). This was a quo warranto proceeding. The corporation's charter was revoked and it was fined \$5000 for its violations.

99. *Id.*

100. § 408.210, RSMo 1959.

101. *Kelly-Springfield Tire Co. v. Hamilton*, 230 Mo. App. 430, 91 S.W.2d 193 (K.C. Ct. App. 1936); *Jobes v. Miller*, 201 Mo. App. 45, 209 S.W. 549 (K.C. Ct. App. 1919).

102. SIXTH DEC. DIG. *Usury* § 28 (1958).

103. *General Motors Acceptance Corp. v. Weinrich*, 218 Mo. App. 68, 78, 262 S.W. 425, 428 (K.C. Ct. App. 1924).

Missouri courts do, however, occasionally find usurious loans in what are purported sale of credit transactions. In *White v. Anderson*,¹⁰⁴ the purported "seller" issued coupons to the "buyer" in exchange for the "buyer's" promissory notes. The buyer could exchange the coupons for merchandise in several designated stores. The seller redeemed the coupons from the store for cash. The seller's profit was realized from the promissory notes which were of a larger amount than the face value of the coupons, and from the amount for which he redeemed the coupons at a discount from the stores. The court found that there was no actual sale of credit but that this was merely a loan, the loan being usurious because the seller's profit was greater than allowable interest. The court stated the criterion to be used to determine whether there was a genuine sale of credit or whether the transaction was merely a cloak for a loan as follows:

The one important feature which the transaction lacks of being a sale of credit, such as in the sale of a guaranty or indorsement, is that in those instances there is no advance of money made by the guarantor or indorser to or for the party guaranteed or indorsed, and he still owes the debt; while in this case there is an advance of money for the [buyer] by the [seller] in full discharge of his debt and he does not owe anything to the merchant, but does owe the [seller]. When he gave [seller] his note ostensibly for the coupons, it was in reality for the money which [buyer] used in paying for the goods.¹⁰⁵

9. Requiring the Borrower to Buy Insurance

Missouri courts condone the practice of a lender's requiring a borrower to purchase great quantities of life and/or property insurance as a condition precedent to receiving a loan, with the lender being named as beneficiary.¹⁰⁶ The loan may still draw maximum lawful interest.¹⁰⁷ The justification given for this practice is that the lender must have security for his loan. However, this practice has been allowed even though the borrower gave the lender a mortgage on property of twice the value of the loan.¹⁰⁸ In most cases the lender, by a strange coincidence, just happens to be selling the insurance that he requires the borrower to buy and probably draws the same commission from the insurance company that the company pays to its other agents in a comparable sale.¹⁰⁹ But the courts do not find this offensive under the usury statutes.¹¹⁰ To show usury in such a transaction, the

104. 164 Mo. App. 132, 147 S.W. 1122 (K.C. Ct. App. 1912).

105. *Id.* at 138, 147 S.W. at 1124. It seems difficult to reconcile the quoted statement with the court's position in the credit sales transactions.

106. *Hanson v. Acceptance Fin. Co.*, *supra* note 89. The loan was \$1400 and the borrower was obliged to buy \$201.76 worth of life, health and accident insurance, plus \$43.90 worth of insurance for his car.

107. *Id.*

108. *Rukavina v. Accounts Supervision Corp.*, 241 Mo. App. 195, 237 S.W.2d 503 (K.C. Ct. App. 1951). (Plaintiff borrowed \$150, executed a mortgage on \$300 worth of property, but was required to buy life, accident, health, and fire insurance.)

109. See *Birkhead, Illegal Lending in Missouri*, 16 Mo. L. Rev. 251 (1951).

110. And see § 367.170, RSMo 1959, which gives legislative blessing to the practice of requiring insurance in the case of certain loans.

courts would require the borrower to prove that the lender retained all or a portion of the insurance premiums.¹¹¹ This sets an almost impossible task for the borrower since the lender has probably retained possession of the insurance policies and the borrower may never have seen them or even know the name of the insurance company with which he is supposedly insured.¹¹² In the typical transaction the borrower is also forced to borrow the amount of the insurance premiums from the lender so that the lender may not only charge interest on the amount actually received by the borrower but also on the amount loaned for the premiums.¹¹³ Courts of some states have held that requiring the borrower to buy insurance in addition to paying maximum lawful interest renders the loan usurious; but Missouri's position is probably that of the majority.¹¹⁴

10. Credit Sales

Missouri courts refuse to break away from the traditional view that there is no usury in a credit sale transaction even though the seller increases the credit sale price of the goods an unconscionable amount over the cash price.¹¹⁵ Furthermore, it has been held that the inflated unpaid balance can still legally draw maximum lawful interest before and after maturity,¹¹⁶ though it would probably be imprudent for a businessman to rely on this. The courts seemingly base their rationale on the somewhat fallacious theory that "a purchaser is not like the needy borrower, a victim of a rapacious lender, since he can refrain from the purchase if he does not choose to pay the price asked by the seller."¹¹⁷ The courts fail to recognize that the purchaser is often as needy as the borrower since money is generally borrowed, not for its intrinsic value, but solely to make purchases. The courts' lenient attitude toward credit sale transactions is also extended in favor of a finance company which purports to purchase the buyer's promissory notes at a discount equal to the time price differential from the dealer who sold the goods.¹¹⁸ The courts find bona fide sales of these notes to the finance company

111. *Rukavina v. Accounts Supervision Corp.*, *supra* note 108.

112. *Id.*

113. See Annot., 21 A.L.R. 797, 876 (1922).

114. *Id.* See also Annot., 1 A.L.R. 834 (1919).

115. *Wyatt v. Commercial Credit Corp.*, 341 S.W.2d 348 (K.C. Ct. App. 1960). (The unpaid balance of the credit sale price of \$18,512.56 included \$3,332.26 as finance charges.) *Holland-O'Neal Milling Co. v. Rawlings*, 217 Mo. App. 466, 268 S.W. 683 (Spr. Ct. App. 1925).

116. *Holland-O'Neal Milling Co. v. Rawlings*, *supra* note 115. (The cash sale price was \$7900 but was increased by 20% to \$9480 for a credit price. The purchase money note drew 8% interest from date.) *J. I. Case Threshing Mach. Co. v. Tomlin*, 174 Mo. App. 512, 161 S.W. 286 (K.C. Ct. App. 1913). (Note drew 6% before maturity, 10% after. The court declared the 10% charge made the transaction usurious.) Thus it seems that if the increase is given the name of increase in sale price it is legal, while if the same increase is in the form of interest in excess of 8% it is usurious.

117. *General Motors Acceptance Corp. v. Weinrich*, *supra* note 103, at 78, 262 S.W. at 428.

118. *General Contract Purchase Corp. v. Propst*, 239 S.W.2d 563 (Spr. Ct. App. 1951) (sale of automobile on "time," with credit price increase by \$379.19 over cash price—purchaser's purchase money note sold to finance company at \$379.19 discount from face value); *Personal Fin. Co. v. Endicott*, 238 S.W.2d 51

even though it has been involved in the transaction through all its phases.¹¹⁹ The whole problem of credit sales as it relates to usury has been very ably discussed in a recent comment in this *Law Review*.¹²⁰

Missouri courts indicate that they are bound by *stare decisis* and any change must come from the legislature.¹²¹ Courts of other states have not found themselves so bound by tradition and have held credit sale transactions to be loans (made usurious by the inclusion of finance charges) running from the finance company to the buyer for the purchase of the goods from the dealer.¹²²

F. Pleading and Procedure

1. In General

As previously noted, usury may be used either as a basis upon which to predicate an action,¹²³ or as a defense.¹²⁴ As a general rule usury must be specially

(St. L. Ct. App. 1951) (sale of tractor chassis on "time," with credit price increased by \$544 over cash price—purchaser's purchase money note sold to finance company for \$544 less than face value).

119. *General Motors Acceptance Corp. v. Weinrich*, *supra* note 103. The finance company had furnished the auto dealer with mortgage and note forms, and had furnished him with a schedule of "discounts" so that the dealer could determine the amount to increase his credit price over that price at which he could sell the purchaser's notes to the finance company.

120. Willard, *Finance Charges or Time Price Differential in Installment Sales—Usury?*, 24 Mo. L. Rev. 225 (1959).

121. *Wyatt v. Commercial Credit Corp.*, *supra* note 115. See also Anderson, *Retail Installment Sales and Revolving Credit Acts: Missouri Constitution Article III, Section 44*, 25 Mo. L. Rev. 239 (1960).

122. *Hare v. General Contract Purchase Corp.*, 220 Ark. 601, 608, 249 S.W.2d 973, 977-978 (1952), wherein the court stated: ". . . finance companies have seized upon the 'credit price rule' as a means of obtaining more than a 10% return upon what is in form a sale, but is in substance, a loan. It is obvious that if a prospective purchaser of a car, radio, refrigerator, etc., should borrow \$1,000 directly from a finance company, then buy the article with the money and execute a one year note to the finance company for \$1,200, such transaction would be usurious. But the finance companies are accomplishing the same result by having dealers in cars, radios, refrigerators, etc., handle the sale in the first instance, and under the guise of a credit price, add an excessive charge which inures to the finance company, because the dealer is reasonably confident in advance of the sale that he can transfer the papers to the finance company for his own cash price. Thus the finance company is getting the benefit of the increase. Nor is the increase purely for credit risk, because the car, radio, refrigerator, etc., is usually insured against normal hazards.

"The result is that, by the simple expedient of providing forms, and a rating book to the seller, and buying the conditional sales contract and note from him, the finance companies are receiving a usurious rate of interest." *Jackson v. Commercial Credit Corp.*, 90 Ga. App. 352, 83 S.E.2d 76 (1954) (held transaction was a loan from finance company to the purchaser of the automobile). Cf. *Seebold v. Eustermann*, 216 Minn. 566, 13 N.W.2d 739 (1944).

123. *Crow v. Stevenson*, 274 S.W. 1102 (Spr. Ct. App. 1925) (suit to recover usury).

124. *Central Missouri Trust Co. v. Smith*, 213 Mo. App. 106, 247 S.W. 241 (K.C. Ct. App. 1923) (suit on promissory note—accommodation maker defended on ground that plaintiff became holder as a result of a usurious loan to payee).

pleaded in order that it may be shown at trial,¹²⁵ and while there are exceptions to this rule,¹²⁶ the preferred method would be specially to plead usury in all cases where it is to be shown at trial. To state a cause of action based upon usury there must be alleged the amount of the debt, the length of time the debt is to run, and the fact that the obligee has taken usurious interest on the debt.¹²⁷ The burden of proof is upon the one who seeks to establish usury,¹²⁸ but such usury need only be shown by a preponderance of evidence and need not be established beyond a reasonable doubt.¹²⁹ Questions of fact in legal actions involving usury are left to the determination of the jury,¹³⁰ while the judge is the fact finder in actions involving equitable remedies.¹³¹ The type of relief sought will determine whether the action should be brought on the legal side or on the equity side of Missouri's court system.¹³²

2. Who May Plead

Missouri courts seem more liberal than the majority in their decisions as to who may plead usury.¹³³ Generally it may be said that the question of who may

125. *Zancker v. Northern Ins. Co.*, 238 Mo. App. 110, 176 S.W.2d 523 (K.C. Ct. App. 1943). (Insured sued insurance company on policy, which provided that it was suspended if insured mortgaged certain property. The insured did mortgage the property but contended that the mortgage was void because usury was involved. The court held that the insured must specially plead usury in order to show the mortgage void at trial.) *Missouri Discount Corp. v. Mitchell*, 216 Mo. App. 100, 261 S.W. 743 (K.C. Ct. App. 1924).

126. *Milholen v. Meyer*, 161 Mo. App. 491, 143 S.W. 540 (K.C. Ct. App. 1912) (not necessary to specially plead in order that mortgagor recover from mortgagee damages for wrongful taking of chattel under mortgage void for usury); *Johnson v. Simmons*, 61 Mo. App. 395 (St. L. Ct. App. 1895) (not necessary to specially plead in order that mortgagor replevy chattels from mortgagee who was holding goods under a mortgage void for usury). In *Zancker v. Northern Ins. Co.*, *supra* note 125, at 117, 176 S.W.2d at 527, the court stated: "In any action between a mortgagor and mortgagee, or between parties standing in legal privity with said parties, where the mortgage is the basis of the claim of either such party, usury may be shown without a special plea to invalidate the mortgage. Such rule is applied to particular classes of cases like possessory actions or actions for damages for wrongful conversion by a mortgagee."

127. *Twamley v. E. B. Jones Used Car Arena*, 241 S.W.2d 799 (St. L. Ct. App. 1951). Plaintiff alleged that he was obligated to pay \$1336.80 on a \$900 debt. The court dismissed because of plaintiff's failure to include in the petition the rate of interest charged and the length of time the loan was to run.

128. *Bahl v. Miles*, 222 Mo. App. 984, 6 S.W.2d 661 (K.C. Ct. App. 1928); *Tobin v. Neuman*, 271 S.W. 842 (St. L. Ct. App. 1925).

129. *Auto Money Corp. v. Clark*, 236 Mo. App. 862, 153 S.W.2d 113 (K.C. Ct. App. 1941); 55 AM. JUR. *Usury* § 164 (1946).

130. *Crow v. Stevenson*, *supra* note 123 (suit for recovery of usury paid).

131. *Arbuthnot v. Brookfield Loan & Bldg. Ass'n*, 98 Mo. App. 382, 72 S.W. 132 (K.C. Ct. App. 1903) (bill in equity to cancel note and deed of trust).

132. If the action is simply for a return of usury paid, or replevin for goods held under a void pledge, it would be brought on the legal side, while an action for an accounting in equity would, of course, be brought on the equity side, as in *Bruegge v. State Bank*, 74 S.W.2d 835 (Mo. 1934). Actions for the cancellation of instruments must be brought in equity. See *Snyder v. Crutcher*, 137 Mo. App. 121, 118 S.W. 489 (St. L. Ct. App. 1909), where it was determined that cancellation could not be had in a Justice of the Peace Court which had no equitable jurisdiction.

133. See 55 AM. JUR. *Usury* § 164 (1946).

plead usury depends in great part upon the relief sought. The relief available will be more fully discussed later. Suffice it to say at this point that a corporation may neither bring an action nor make a defense on the ground that the loan in question is usurious,¹³⁴ nor is the plea of usury available to the usurer.¹³⁵

G. Conflict of Laws Problem

Where there is a possibility of conflict between Missouri laws and the laws of another state which allow a higher interest rate, Missouri courts generally apply the rule that, in the absence of any subterfuge to evade the stricter Missouri laws, the intention of the parties governs as to which laws should apply,¹³⁶ and parol evidence is admissible to show such intention.¹³⁷ In the absence of evidence of the intention, the laws of the place of performance of the loan contract prevail.¹³⁸ Performance is said to be the repayment of the loan.¹³⁹ But Missouri's avowed public policy against usurious contracts is not so strong that Missouri courts will refuse to enforce a contract which would be unenforceable under Missouri law because of usury if such contract is legal under the laws of the other state.¹⁴⁰ Therefore, the above rules are sometimes disregarded or modified in order to prevent a loan from being usurious. In *Davis v. Tandy*,¹⁴¹ there was no stipulation as to the intention of the parties and the loan was to be repaid in Missouri. The court indicated that since the interest was usurious under Missouri law, it would be presumed the parties intended the governing law to be that of the state of execution of the contract, in which the interest rate charged was legal.¹⁴² In *Hansen v. Duvall*,¹⁴³ the plaintiff in purchasing property assumed his predecessor-in-title's notes, but later gave defendant-holder his own notes. The court disregarded the facts that the later notes were both executed and payable in Missouri and that both plaintiff and defendant were residents of Missouri, and based its decision on the fact that since plaintiff's predecessor's notes were payable in Kansas plaintiff's notes assumed the same governing law—that of Kansas.

134. § 408.060, RSMo 1959.

135. *Missouri Real Estate Syndicate v. Sims*, 179 Mo. 679, 78 S.W. 1006 (1904). (The court held that the lender could not defend in a breach of contract action on the grounds that the contract was void because he himself had charged usury.)

136. *Davis v. Tandy*, 107 Mo. App. 437, 81 S.W. 457 (K.C. Ct. App. 1904).

137. *Hansen v. Duvall*, 333 Mo. 59, 62 S.W.2d 732 (1933).

138. *Central Nat'l Bank v. Cooper*, 85 Mo. App. 383 (K.C. Ct. App. 1900). But the court indicated that if performance is placed in a state which has no connection with the contract merely as a device to evade Missouri's usury laws, such a device would fail. *But see Cowgill v. Jones*, 99 Mo. App. 390, 73 S.W. 995 (K.C. Ct. App. 1903), which indicated that the law of the place of execution would govern.

139. *Central Nat'l Bank v. Cooper*, *supra* note 138.

140. *Davis v. Tandy*, *supra* note 136.

141. *Id.*

142. *But see J. I. Case Threshing Mach. Co. v. Tomlin*, *supra* note 116, which indicates a statement of place of performance is evidence that the parties intended the law of that place to govern.

143. *Supra* note 137.

III. RELIEF UNDER MISSOURI'S GENERAL USURY STATUTES

A. *Specific Application of Section 408.050*

1. Introduction

Section 408.050, Revised Statutes of Missouri (1959), provides:

No person shall directly or indirectly take, for the use or loan of money or other commodity, above the rates of interest specified in sections 408.020 to 408.040, for the forbearance or use of one hundred dollars, or the value thereof, for one year, and so after those rates for a greater or less sum, or for a longer or shorter time, or according to those rates or proportions, for the loan of any money or other commodity. Any person who shall violate the foregoing prohibition of this section shall be subject to be sued, for any and all sums paid in excess of the principal and legal rate of interest of any loan, by the borrower, or in case of the borrower's death, by the administrator or executor of his estate, and shall be adjudged to pay the costs of suit, including a reasonable attorney's fee to be determined by the court.

This is Missouri's basic prohibition against the taking of usury and was first enacted in its present form in 1905.¹⁴⁴ Prior to 1905 usury was prohibited¹⁴⁵ but any usury recovered from the lender went to the county for the benefit of the schools.¹⁴⁶ The 1905 amendment for the first time allowed the borrower to recover the usurious interest.¹⁴⁷

Although section 408.050 provides that no person shall "take" interest in excess of the specified rates, this is merely the prohibitory provision. The word "take" is defined in the same manner as "paid" in the recovery provision and has a limiting effect upon the recovery.¹⁴⁸ Recovery is allowed under the second sentence of the section, which expressly subjects the taker of the "sums paid" in excess of principal and legal rate of interest to suit brought by the borrower or other designated persons. Notice that the "sums" referred to by the provision are not limited solely to those expressly designated as excess interest but could be the previously discussed "lender's discount," "bonuses" or other devices by

144. Mo. Laws 1905, at 172-173, amending § 3708, RSMo 1899.

145. See *Peters Shoe Co. v. Arnold*, 82 Mo. App. 1 (K.C. Ct. App. 1899).

146. See *Ransom v. Hays*, 39 Mo. 445 (1867).

147. See *Flinn v. Mechanics' Bldg. Ass'n*, 93 Mo. App. 444, 67 S.W. 729 (St. L. Ct. App. 1902), indicating that there was no statute in force at that time which allowed the borrower to recover usury paid.

148. *Rukavina v. Accounts Supervision Corp.*, 241 Mo. App. 195, 237 S.W.2d 503 (K.C. Ct. App. 1951). For purposes of discussion cases decided under § 408.060 will also be included in this section because of the similarity of the relief given to the borrower under § 408.060 to that provided for him under § 408.050. The basic difference in the two statutes is that under § 408.060 the borrower is still indebted to the lender and is allowed to offset the usury he has paid against the principal and legal interest which the lender may recover from him, while under 408.050, the borrower is attempting to recover the usury he has paid but the lender is allowed to retain the principal and legal interest.

which unscrupulous lenders try to make a profit larger than that allowed by law.¹⁴⁹

2. When Is Usury "Paid" and Amount Recoverable Under Section 408.050

a. Generally

In determining when usury is "paid," the courts first determine which interest rate is applicable to the loan in question—(six per cent if no rate is specified but the parties do agree that interest is to be charged, or up to eight per cent compounded annually if the parties so specify). The courts then ascertain whether or not the lender has actually received from the borrower a sum in excess of principal plus the applicable interest rate.¹⁵⁰ If it is so found that an excess has been received by the lender, the lender has been "paid" usury.¹⁵¹

To compute the amount the borrower can recover in his action, the courts look to the language of section 408.050, determine that the lender is entitled only to principal and "legal" interest (six per cent simple interest), and allow the borrower recovery of any sum in excess of this rate.¹⁵² Recovery is determined by the same method whether the usury is paid because of the inclusion of "bonuses" or because of some other illegal device.¹⁵³

149. *Western Storage & Warehouse Co. v. Glasner*, 169 Mo. 38, 68 S.W. 917 (1902); *Holmes v. Royal Loan Ass'n*, 166 Mo. App. 719, 150 S.W. 1111 (K.C. Ct. App. 1912).

150. *Osborne v. Fridrich*, 134 Mo. App. 449, 114 S.W. 1045 (St. L. Ct. App. 1908).

151. *Quinn v. Van Raalte*, 276 Mo. 71, 205 S.W. 59 (1918). (Approximately \$20,000 usury had been paid.) *Crow v. Stevenson*, 274 S.W. 1102 (Spr. Ct. App. 1925). (\$833.84 usury had been paid.)

152. *Gehlert v. Smiley*, 114 S.W.2d 1029, 1034 (Mo. 1937), where the court stated that the statute gives the right "to recover anything paid in excess of the actual debt with legal interest." *Whitworth v. Davey*, 185 S.W. 241, 245-246 (Spr. Ct. App. 1916), wherein the court stated: "In enforcing (§ 408.050) the court must first look to the contract between the parties and ascertain what was the lawful amount that was due from the borrower to the lender, and after determining that, then determine whether the payments made exceeded that amount. If it finds that there was an excessive payment, and that that excessive payment exceeded the lawful contract rate as contracted, then follows the remedy that is to be applied, which is, by the very terms of the statute, a recovery of all sums paid over and above the principal lent, plus legal interest, or 6 per cent. per annum simple interest." See also *Snyder v. Crutcher*, 137 Mo. App. 121, 118 S.W. 489 (St. L. Ct. App. 1909), where the trial court allowed the borrower to recover \$43.36, but the appellate court reversed because the plaintiff had been allowed equitable relief in a Justice of the Peace Court and because of errors in the referee's allowances. *But see Crutcher v. Sims*, 184 Mo. App. 488, 170 S.W. 430 (Spr. Ct. App. 1914), where the borrower was allowed recovery of the amount paid in excess of eight per cent. If any of the debt is still owing to the lender, the borrower may, under 408.060, offset against that sum any amounts he has paid in excess of principal and the six per cent "legal" rate. *Seaver v. Ray*, 137 Mo. App. 78, 119 S.W. 527 (K.C. Ct. App. 1909); *Arbuthnot v. Brookfield Loan & Bldg. Ass'n*, 98 Mo. App. 382, 72 S.W. 132 (K.C. Ct. App. 1903). *But see Little v. Hooker Steam Pump Co.*, 122 Mo. App. 620, 100 S.W. 561 (St. L. Ct. App. 1907), where the borrower was only allowed to offset the amount in excess of eight per cent, but the borrower had only asked for relief to that extent.

153. *Western Storage & Warehouse Co. v. Glasner*, *supra* note 149, at 47, 68 S.W. at 919, wherein the court stated: "It will be thus observed that under the law, all payments, whether made in the shape of interest, or commissions or

b. Recovery of Illegally Compounded Interest

Prior to 1919, recovery of usury paid out under illegal compounding provisions was computed and allowed in the same manner as in other usurious contracts.¹⁵⁴ This is best exemplified in the Springfield Court of Appeals' decision of the case of *Whitworth v. Davey*.¹⁵⁵ There the loan drew interest at eight per cent and the loan contract had provisions for the compounding of interest not only annually but also semi-annually in violation of statute. However, the facts indicated that the borrower had repaid no more than the principal amount plus eight per cent interest compounded annually. The court reiterated the former holdings of the appellate courts of Missouri that the illegal compounding provision did not make the contract usurious per se, but that the provision was void. The court then logically found that since the interest compounding provision was void, the lender was not entitled to receive interest compounded annually since that would be in effect making a new contract for the parties, but was entitled to only eight per cent simple interest. But because the lender had received more than eight per cent simple interest he had been "paid" usury and the borrower was entitled to recover the sum paid in excess of principal and six per cent "legal" interest. At the request of the concurring judges the case was certified to the Supreme Court of Missouri. In 1919 in its decision of the *Whitworth* case,¹⁵⁶ the Supreme Court of Missouri agreed that the compounding provision was void, but the court felt no compunction in making a new contract for the parties. The court held that the lender was entitled to eight per cent interest compounded annually, and there was no usury in the contract because the lender had not yet received more than principal plus eight per cent interest compounded annually. The court reached this decision in spite of the fact that interest may be compounded only if the parties expressly so contract and the fact that it had just declared the compounding provision void. The court gave two reasons why there could be no recovery in this case: (1) because there had been no payment in excess of principal plus eight per cent interest compounded annually, and (2) because section 408.050 does not specifically refer to the compounding section as it does to other interest regulating sections. Apparently the lack of reference takes precedence over the words "directly or indirectly take" in the prohibitory language of section 408.050. Query if the court would have allowed recovery if more than principal and eight per cent interest compounded annually had been paid to the lender.¹⁵⁷

brokerage or as principal, may be deducted from the sum actually loaned with legal interest added, and if the sum so paid in any of the said shapes or forms, or by whatever name it might be called, equals the loan and legal interest, the debt is considered paid and discharged."

154. *Kessler v. Kuhnle*, 176 Mo. App. 397, 159 S.W. 768 (St. L. Ct. App. 1913).

155. *Supra* note 152.

156. 279 Mo. 672, 216 S.W. 736 (1919).

157. The court also stated that equity would follow the law, so it seems that if there could be no recovery under § 408.050 there could be no recovery under any theory.

c. Recovery in Installment Loans

The Supreme Court's decision in the *Whitworth* case seemingly put to rest the conflict between the appellate courts as to when a borrower may sue to recover usury when the loan is being repaid in installments. The case of *Lawler v. Vette*¹⁵⁸ had held that where the usurious loan was being repaid in installments no usury was paid and no action would lie for its recovery until a sum in excess of principal and lawful interest had been paid to the lender. In contrast, *Long v. Green County Abstract & Loan Co.*¹⁵⁹ had indicated that in a usurious installment loan the borrower could either sue after each installment was paid to recover back the sum paid in excess of the principal and legal interest of that particular installment, or he could sue to recover the usury after the total principal and interest were paid. Using the Supreme Court's reasoning in the *Whitworth* case, later decisions on installment loan transactions have held that the borrower cannot recover any amount until a sum in excess of the total principal and lawful interest have been paid to the lender.¹⁶⁰

The *Whitworth* decision's adverse effect upon the already questionable relief afforded to the borrower may be seen in the case of *Rukavina v. Accounts Supervision Corp.*¹⁶¹ The *Rukavina* case involved an installment loan which was to be repaid in twelve monthly installments. The loan itself drew interest at eight per cent per annum and the loan contract not only contained illegal interest compounding provisions but also required that the borrower pay other usurious charges as well. The lender conceded that each monthly payment contained one-twelfth of the total usurious interest provided for by the contract and that he had received such interest in the two payments which the borrower had paid, but he contended, and the court so found, that the borrower was not entitled to recover usurious interest on the two payments which he had made. The court refused to accept the argument that if the loan is to be repaid in installments any excess paid on an installment beyond principal due and lawful interest constitutes usury and hence should come within the meaning of "all sums paid in excess of principal and legal rate of interest" of section 408.050.

Had the holding in the *Long* case been followed through the years, the lenders of usurious loans might have been subjected to the possibility of suits each time they received an installment, which might have proven to be a deterrent to those lenders. However, the lenders might have avoided suits simply by tendering the usury to the borrower after the latter threatened suit.¹⁶²

d. Suggested Reform of Procedural Steps

At best, under Missouri law, the determination of when usury has been "paid" and when the borrower may recover such usury is somewhat involved and decidedly not in the borrower's best interest. Apparently because of the word

158. 166 Mo. App. 342, 149 S.W. 43 (St. L. Ct. App. 1912).

159. 252 Mo. 158, 158 S.W. 305 (1913).

160. *Major v. Putney*, 293 S.W. 81 (St. L. Ct. App. 1927).

161. 241 Mo. App. 195, 237 S.W.2d 503 (K.C. Ct. App. 1951).

162. See *Van Doeren v. Pelt*, 184 S.W.2d 744 (St. L. Ct. App. 1945), for the application of § 408.060 to a usurious installment loan transaction.

"take" which is contained in the prohibitory language of section 408.050, the loan contract may be plainly usurious but the borrower must have repaid the principal and the lawful rate applicable plus a usurious sum before he can recover anything.¹⁶³ Then, in his recovery, he is referred back to the six per cent "legal" interest provision and may then recover all sums paid in excess of principal and interest at that rate. This method seems to require unnecessary steps and limits the effectiveness of section 408.050.

It is submitted that perhaps the following approach might be somewhat easier to follow, or in any event, it would be more beneficial to the borrower. It should be first determined that the word "take" does not have the same definition as "paid" and does not have a limiting effect upon the recovery provisions. The whole transaction should be thoroughly examined to determine whether or not it requires the borrower to repay more than the principal sum loaned plus lawful interest. If the transaction does require such an excess payment, then it should be declared usurious whether or not the borrower has actually paid any excess. Without the limiting effect of "take," the borrower could then invoke the recovery provision and sue to recover any sum in excess of principal and "legal" interest, and if it is determined that he has actually paid such an excess, he would be allowed recovery even though the excess would not have brought the total interest above the maximum allowable. Actually the only effect this proposed approach would have would be to let the borrower sue and recover a lesser sum at an earlier date rather than force him to pay more of the usury and then at a later date sue to recover the aforementioned lesser sum plus that paid in the interim. By using this approach, the courts would simply be punishing the perpetrator of an illegal contract before he realizes the benefits from it.¹⁶⁴

e. Cost Allowances Under Section 408.050

Section 408.050 expressly provides that the lender who is subject to be sued for the usury he has received is also liable for the costs of the suit including an attorney's fee.¹⁶⁵ The amount the borrower will be allowed under the costs provision is largely within the discretion of the trial court, though it may be determined either by the trial judge¹⁶⁶ or by the jury.¹⁶⁷ As stated in *Crutcher v. Sims*:¹⁶⁸

163. See Birkhead, *Illegal Lending in Missouri*, 16 Mo. L. REV. 251 (1951).

164. This is the procedure used in the application of § 408.060. See *Foskin v. Laessig*, 32 S.W.2d 768 (St. L. Ct. App. 1930).

165. § 408.060 also provides that all costs of the action are taxed against the usurious lender. *Farmers & Merchants Bank v. Zook*, 133 Mo. App. 603, 113 S.W. 678 (K.C. Ct. App. 1908).

166. *Crutcher v. Sims*, *supra* note 152. (The borrower recovered \$9.75 as usury and \$25 attorney's fees.)

167. *Quinn v. Van Raalte*, *supra* note 151, where the usurious sum was approximately \$20,000 but recovery was had for \$21,000, so approximately \$1,000 was allowed for costs. *Crow v. Stevenson*, 274 S.W. 1102 (Spr. Ct. App. 1925), where approximately \$830 usury and approximately \$350 attorney's fees were recovered by the borrower.

168. *Supra* note 152, at 491, 170 S.W. at 431.

That evidence as to what is a reasonable attorney's fee in a particular case is merely advisory to either judge or jury cannot be questioned There is no doubt in our minds that a judge who is expert on the value of legal services can, from his own knowledge of a case tried before him, fix the amount of a fee to be allowed to an attorney in the case without any advisory testimony as to their value.

Thus it seems that while a certain amount could be prayed for and evidence would be admissible to support the prayer, this would not be binding upon the court. The allowances go to the party and not the attorney,¹⁶⁹ but an inclusion in the petition of a prayer for a certain sum for these allowances will not be added to the amount of usury prayed for in order to make up the jurisdictional amount required for a trial in certain courts when the amount of usury itself is insufficient for the court's jurisdiction.¹⁷⁰

Although a statute expressly allowing a party to recover costs and attorney's fees is unusual, its actual worth is questionable. Seldom will the amount allowed be sufficient to offset the actual costs of the suit.¹⁷¹ Furthermore, if the borrower is still indebted to the lender the court may set off the borrower's allowances against his debt to the lender.¹⁷² Another factor which detracts from the value of this provision is that unless the borrower is successful in his suit, he will not be entitled to the allowances.¹⁷³ Thus even though the loan contract is plainly usurious, if the borrower is premature in bringing his suit for recovery he must stand his own costs.¹⁷⁴

3. Pleading and Practice

Section 408.050 expressly allows the borrower, his administrator or executor to recover usury, and the courts have extended this right to others. A person who is an accommodation indorser or surety of notes and is obliged to pay them may

169. *Bruegge v. State Bank*, 74 S.W.2d 835 (Mo. 1934) (allowed \$1,000 as attorney's fee).

170. *Wade v. Markham*, 106 S.W.2d 939 (K.C. Ct. App. 1937), where plaintiff sued for recovery of \$20.80 as usury plus \$150 attorney's fee. Suit was in the circuit court. The court dismissed the action because the required \$50 jurisdictional amount was not present. The court stated that the attorney's fees are costs to be determined by the court and are not sufficient to give jurisdiction.

171. See *Birkhead*, *supra* note 163, at 261, discussing a case where the attorneys for the borrower went to the Missouri Supreme Court twice and spent over 500 hours on the case. A total of \$120 was recovered.

172. *Bruegge v. State Bank*, *supra* note 169, where the court offset the \$1000 attorney's fees allowance against the \$21,000 which the borrower still owed to the lender.

173. *Rukavina v. Accounts Supervision Corp.*, *supra* note 161.

174. "One cannot bring another into court and tax him with cost in defending against a nonexistent right . . ." *Lawler v. Vette*, 166 Mo. App. 342, 352, 149 S.W. 43, 46 (St. L. Ct. App. 1912). *But see* *Bruegge v. State Bank*, *supra* note 169, where the borrower brought an action in equity to determine how much was owed to the lender. The court determined that \$21,000 was still owed, but allowed the borrower \$1,000 attorney's fees.

bring suit,¹⁷⁵ as may the borrower's trustee in bankruptcy.¹⁷⁶ A borrower's heirs at law may also sue.¹⁷⁷

Section 408.050 may be used as a basis for bringing suit,¹⁷⁸ or it may be used as a counterclaim when the borrower is being sued.¹⁷⁹

As to whom the borrower may sue, it is said in *Snyder v. Crutcher*¹⁸⁰ that a person who loans the money, who receives the interest paid, and who owns the notes given for the loan, is the only necessary or proper party in an action at law to recover usurious interest, and a third person to whom the notes were made payable is not a proper or necessary party. Although recovery might be had against a holder who took the usurious notes with full knowledge of the usury and to whom the usury has been paid, if the notes are sold to a holder in due course who takes without any indication of the taint, the borrower may not recover any usury he has paid to such holder.¹⁸¹

4. Effectiveness of Section 408.050

It is submitted that section 408.050 neither affords much relief to the borrower nor penalizes the lender to any degree. Seldom will the amount that the borrower recovers reimburse him for the time and money spent in court proceedings; nor will it be of sufficient amount to induce him to assume the risk of the court's finding against him on the issue of usury.

B. Specific Application of Section 408.070

1. Introduction

Section 408.070, Revised Statutes of Missouri (1959), provides that:

In actions for the enforcement of liens upon personal property pledged or mortgaged to secure indebtedness, or to maintain or secure possession of property so pledged or mortgaged, or in any other case where the validity of such a lien is drawn in question, proof upon the trial that the party holding or claiming to hold such lien has received or exacted usurious interest for such indebtedness shall render any mortgage or pledge of personal property, or any lien whatsoever thereon given to secure indebtedness, invalid and illegal.

This section was first enacted in 1891,¹⁸² and apparently is Missouri's first provision for cancellation of liens because of the involvement of usury.¹⁸³

175. *Osborne v. Fridrich*, 134 Mo. App. 449 (St. L. Ct. App. 1908).

176. *Securities Inv. Co. v. Rottweiler*, 7 S.W.2d 484 (St. L. Ct. App. 1928). See also *McDonnell v. DeSota Sav. & Bldg. Ass'n*, 175 Mo. 250, 75 S.W. 438 (1903).

177. *Id.* It would seem that § 408.060 would be available to any person who was being sued on the debt. See note 4 of the annotations of § 408.060, Mo. ANN. STAT. (1952).

178. *Crow v. Stevenson*, *supra* note 167.

179. *Crutcher v. Sims*, *supra* note 152.

180. 137 Mo. App. 121, 118 S.W. 489 (St. L. Ct. App. 1909).

181. *Hamilton v. Fowler*, 99 Fed. 18 (6th Cir. 1899) (applying Missouri law).

182. Mo. Laws 1891, at 171, § 2.

183. See *Ransom v. Hays*, 39 Mo. 445 (1867).

2. When Applicable

a. "Received or Exacted"

Usury, as used in the application of this statute, could arise from any of the usurious devices or transactions previously discussed. Section 408.070 expressly states that it is to be applicable if the party holding the lien has "received or exacted" usurious interest. "Received" is given the same meaning as "take" and "paid" as used in section 408.050.¹⁸⁴ However, "exacted" is given a much broader meaning, and it is from the inclusion of this word that section 408.070 gets most of its effect. Unlike "take" or "paid" in section 408.050, there is no need for actual payment of an amount in excess of principal and lawful interest to bring the transaction within the meaning of "exacted" in section 408.070.¹⁸⁵ In fact there is no need for a repayment of any amount. So long as the obligor has agreed to pay usury and the obligee has demanded a pledge to secure it this is "exacting" usury within the meaning of section 408.070.¹⁸⁶ As stated in *Drennon v. Dalincourt*,¹⁸⁷ "where the mortgagee or pledgee exacts usury, or receives it without exacting it, on his debt he loses his lien."

b. Illegal Compounding Provision Not "Exacting"

As previously stated, because the prohibitory language of the usury statutes does not specifically refer to the compounding section, a loan contract which calls for illegal compounding of interest is not, without more, usurious. Nor does this illegal provision bring the contract within the meaning of "exacted."¹⁸⁸ As stated in *Western Storage & Warehouse Co. v. Glasner*,¹⁸⁹ "it was never construed that this section (prohibiting compounding more often than once per year) had any effect upon . . . the mortgage, lien or pledge given to secure the loan." Under the Supreme Court's holding in the *Whitworth* case, section 408.070 would apply to such a contract only if the lender had actually received more than the principal plus eight per cent interest compounded annually.

3. Section 408.070 Applied

a. Liens, Pledges, or Mortgages of Personal Property

Section 408.070 expressly provides that if the lender has exacted or received usurious interest upon an indebtedness, then any lien, pledge, or mortgage of personal property given as security for such indebtedness shall be invalid and illegal. Because of its remedial nature, the courts declare that this statute shall be liberally construed.¹⁹⁰ This liberality may be best seen by the fact that,

184. *Johnson v. Vette*, 77 Mo. App. 563 (St. L. Ct. App. 1898).

185. *Missouri Discount Corp. v. Mitchell*, 216 Mo App. 100, 261 S.W. 743 (K.C. Ct. App. 1924).

186. *Johnson v. Vette*, *supra* note 184.

187. 56 Mo. App. 128, 133 (K.C. Ct. App. 1893).

188. *Kessler v. Kuhnle*, 176 Mo. App. 397, 159 S.W. 768 (St. L. Ct. App. 1913) (eight per cent interest compounded twice per year).

189. 169 Mo. 38, 46, 68 S.W. 917, 919 (1902).

190. *Central Missouri Trust Co. v. Smith*, 213 Mo. App. 106, 247 S.W. 241 (K.C. Ct. App. 1923).

although relief under section 408.070 may be sought in equity, there is no requisite that the one seeking relief must do equity (tender the amount legally due the lender) before he may have the mortgage, pledge, or lien of personal property declared invalid.¹⁹¹ Instead, the pledge, lien or mortgage of the personal property may be cancelled and the property returned to the pledgor upon the showing that the lender has received or exacted usury¹⁹² no matter how much of the debt may still be owing.¹⁹³ This attitude of the courts was well stated in *Lyons v. Smith*.¹⁹⁴

There is no equity for plaintiff to do as a condition precedent to relief. Defendant, of his own volition, corrupted his security. His mortgage is and was void ab initio, and he cannot, as he seeks to do, predicate rights upon a lien that never existed.

Notice that in the above quotation the court declared the mortgage was void ab initio. This is the usual declaration when such a pledge, lien or mortgage is declared invalid, and such a holding may be of real value when the pledgee or mortgagee has disposed of the pledged or mortgaged property before suit is brought. Thus the pledgee or mortgagee would be liable for conversion of the property even though the disposal might have been otherwise legal.¹⁹⁵ This ab initio effect is explained in *Voorhis v. Staed*¹⁹⁶ in the following manner:

The ground of the power of the court under this act to declare a lien of the instrument or pledge invalid and illegal is the fact that usurious interest was received or exacted. The judgment of the court in so declaring can not be rendered until after proof upon a trial of the antecedent reception of usury, but the effect of the judgment is coextensive with its cause; hence is retrospective and renders the mortgage or pledge invalid and illegal from the date when the usurious interest was received or exacted, and not merely from the date of the trial and the adduction of evidence ascertaining the prior fact of usury.

Since the lien or pledge is void ab initio, a foreclosure of the pledged property with sale to the pledgee is of no consequence and gives the pledgee no better title than he had before.¹⁹⁷ However, this ab initio effect cannot be used to

191. Compare note 220 *infra* and accompanying text.

192. *Winfrey v. Strother*, 145 Mo. App. 115, 128 S.W. 849 (K.C. Ct. App. 1910).

193. *Smith v. Becker*, 192 Mo. App. 597, 184 S.W. 943 (K.C. Ct. App. 1916).

194. 111 Mo. App. 272, 277, 86 S.W. 918, 919 (K.C. Ct. App. 1905).

195. *Hilgert v. Levin*, 72 Mo. App. 48 (K.C. Ct. App. 1897). Lender was a pawnbroker who took the borrower's diamond shirt stud as security for a usurious loan. Lender sold it when it was not redeemed within the 60 day statutory period. The court held that he had converted it because his possession based on a usurious loan was wrongful in the first instance.

196. 63 Mo. App. 370, 374 (St. L. Ct. App. 1895).

197. *Central Missouri Trust Co. v. Smith*, *supra* note 190. The pledgor had pledged promissory notes of which he was the named payee as security for a usurious loan from pledgee.

destroy the rights of a bona fide purchaser of the mortgage or the goods,¹⁹⁸ but the transactions are examined carefully to determine whether the purchaser is really bona fide or whether he had knowledge of the taint of usury.¹⁹⁹

Another area of liberal construction in the application of section 408.070 is that of classifying what is "personal property" within the meaning of the statute. The courts include not only tangible personal property, such as furniture²⁰⁰ and automobiles,²⁰¹ but also intangibles such as wage assignments,²⁰² corporate shares²⁰³ and promissory notes²⁰⁴ as well. These pledged promissory notes may be those of which the pledgor was payee or a holder,²⁰⁵ or they may be notes of which the pledgor was maker.²⁰⁶ In any case the pledgee or mortgagee may not retain possession of the goods after the pledge or mortgage has been declared invalid. Retention of possession by the pledgee after demand for their return by the pledgor is a conversion of the pledged goods.²⁰⁷

The courts further declare that if there is a doubt whether the transaction is a pledge or a conditional sale of the goods, the presumption will be that of a pledge.²⁰⁸

In a given case where the pledgor or mortgagor has actually paid usury he may use section 408.070 in conjunction with section 408.050 and not only have the pledged or mortgaged goods returned to him but may also recover the usury and costs under section 408.050.²⁰⁹ However, if section 408.070 is used separately there can be no recovery of usury actually paid.²¹⁰ Furthermore, if section 408.070 is used singly or in conjunction with section 408.050 but recovery is not allowed under section 408.050, there can be no recovery of costs.²¹¹ The courts refuse to construe sections 408.050 and 408.070 together to this degree even

198. *Smith v. Mohr*, 64 Mo. App. 39 (St. L. Ct. App. 1895), but the court found that the plaintiff, who was attempting to foreclose the mortgage on household goods, was not a bona fide purchaser but had acquired the mortgage with knowledge of its usurious taint.

199. *Id.*

200. *Johnson v. Vette*, *supra* note 184.

201. *Leavel v. Johnston*, 209 Mo. App. 197, 232 S.W. 1064 (K.C. Ct. App. 1921).

202. *Henderson v. Tolman*, 130 Mo. App. 498, 109 S.W. 76 (K.C. Ct. App. 1908) (assignment cancelled).

203. *Smith v. Becker*, *supra* note 193.

204. *Securities Inv. Co. v. Rottweiler*, 7 S.W.2d 484 (St. L. Ct. App. 1928).

205. *Id.*; *Central Missouri Trust Co. v. Smith*, *supra* note 190.

206. *Winfrey v. Strother*, *supra* note 192.

207. *Holmes v. Schmeltz*, 161 Mo. App. 470, 143 S.W. 539 (K.C. Ct. App. 1912).

208. *Smith v. Becker*, *supra* note 193. Defendant made the somewhat ridiculous contention that plaintiff's predecessor in title had sold (with an option to repurchase) to him \$20,000 worth of corporate stock for \$100.

209. *Rukavina v. Accounts Supervision Corp.*, 241 Mo. App. 195, 237 S.W.2d 503 (K.C. Ct. App. 1951) (mortgage was cancelled but no recovery under § 408.050 because usury had not yet been paid).

210. *Flinn v. Mechanics' Bldg. Ass'n*, 93 Mo. App. 444, 67 S.W. 729 (St. L. Ct. App. 1902).

211. *Rukavina v. Accounts Supervision Corp.*, *supra* note 209.

though both sections are in the same chapter and both are aimed toward the same general end.²¹²

If the pledgor or mortgagor has not paid all that is legally due the pledgee or mortgagee, cancellation of the pledge or mortgage under section 408.070 does not affect the validity of the principal note or debt.²¹³ The borrower still owes the principal plus legal interest even though his security has been returned to him.²¹⁴ And the debt is still valid even though the lender may have charged so much interest that he will be subject to criminal prosecution.²¹⁵ Further, even though the pledge or mortgage is void, the property can still be reached on ordinary process in satisfaction of the debt.

b. Usurious Transactions Involving Real Property

Section 408.070 expressly applies only to liens, pledges or mortgages of personal property and the courts refuse to apply it to transactions in which real property security is involved.²¹⁶ However, section 408.070, applied in conjunction with sections 408.050 and 408.060, does have some effect upon a usurious transaction involving real property. These sections will cancel that part of the contract calling for the illegal interest.²¹⁷ Moreover, the borrower may have a deed of trust or mortgage of real property cancelled²¹⁸ or a foreclosure sale by the lender enjoined²¹⁹ if the security transaction was tainted with usury. However, these latter two remedies will be available only if the mortgagor shows a willingness to do "equity." This "equity" is generally construed to be either an unconditional tender to the mortgagee of the amount legally due him or a payment into court for his benefit.²²⁰ In some cases an allegation in the petition that the plaintiff is willing to pay the lender whatever the court finds to be due him will suffice.²²¹ The amount that must be tendered or paid is usually held to be the amount of the principal due and legal interest plus any foreclosure expenses that the mortgagee may have incurred.²²²

4. Purging the Contract of Usury

The fact that the lender has once "exacted" usury from the borrower will not prevent the parties from removing the usury from the contract when they

212. See Birkhead, *supra* note 163.

213. Leavel v. Johnston, *supra* note 201.

214. Henderson v. Tolman, *supra* note 202.

215. Seaver v. Ray, 137 Mo. App. 78 (K.C. Ct. App. 1909).

216. Cavally v. Crutcher, 9 S.W.2d 848, 852 (Spr. Ct. App. 1928), wherein the court stated: "Usury in this state does not invalidate a real property mortgage or deed of trust. . . ."

217. Gehlert v. Smiley, 114 S.W.2d 1029 (Mo. 1937).

218. Arbuthnot v. Brookfield Loan & Bldg. Ass'n, 98 Mo. App. 382 (K.C. Ct. App. 1903).

219. Hecker v. Putney, 196 S.W.2d 442 (St. L. Ct. App. 1946).

220. *Id.*; Long v. Greene County Abstract & Loan Co., 252 Mo. 158, 158 S.W. 305 (1913); Major v. Putney, 293 S.W. 81 (St. L. Ct. App. 1927).

221. Arbuthnot v. Brookfield Loan & Bldg. Ass'n, *supra* note 218.

222. Anderson v. Curls, 309 S.W.2d 692 (K.C. Ct. App. 1958); Long v. Greene County Abstract & Loan Co., *supra* note 220. *But see* Ruppel v. Building Ass'n, 158 Mo. 613, 59 S.W. 1000 (1900), where the court held that there was no unconditional tender because the mortgagor refused to tender all that the mortgagee demanded.

discover that it is usurious, thus forestalling the application of section 408.070. In *Peters Shoe Co. v. Arnold*,²²³ the court declared that:

While the taint of usury will follow an indebtedness through all its renewals however remote yet the parties are not incapacitated from legalizing the illegal contract by withdrawing from it the element which made it unlawful.

Thus if the parties have withdrawn the usurious element, there is no "exacting" under section 408.070 even though the loan at one time bore usurious interest. However, the purging must be in good faith and must be consented to by both parties.²²⁴ A mere tender back of the usurious amount after suit is filed will not withdraw the usury from the contract.²²⁵ In *Adams v. Moody*,²²⁶ where the usury was credited upon the principal debt after the borrower had protested, the court held:

The fact that when plaintiff ascertained there were objections raised to his exacting usury and receiving same he afterwards credited the money he so received as payments can not avail him as the statute prohibits not only the receiving but also the exacting of usurious interest. After he had either exacted or received usury in the note the provisions of the statute in question then and there characterized the nature of the transaction, and his subsequent action of giving credit on the note for the moneys already exacted and received did not have the effect of relieving him of the penalties of the law.

A loan transaction which is outwardly usurious may also be purged of such usury if, at the trial, the lender can show that the amount which makes the contract usurious was inadvertently included as a result of a mistake made by either the lender or a third party.²²⁷

5. Pleading and Practice

Section 408.070 contains no mention of who may enjoy its use, but it may be said as a general rule that anyone who has an interest in the property might have a lien, pledge or mortgage of the property declared invalid. More specifically, the courts have held that section 408.070 would be available to the borrower, his administrator or executor,²²⁸ the borrower's heirs at law,²²⁹ his trustee in bankruptcy,²³⁰ a subsequent mortgagee where the prior mortgage was tainted

223. 82 Mo. App. 1, 6 (K.C. Ct. App. 1899).

224. *Sheridan v. Post*, 140 Mo. App. 96, 119 S.W. 500 (St. L. Ct. App. 1909).

225. *Id.*

226. 91 Mo. App. 41, 48 (K.C. Ct. App. 1901).

227. *Missouri Discount Corp. v. Mitchell*, 216 Mo. App. 100, 261 S.W. 743 (K.C. Ct. App. 1924). The usurious charges were finance charges which the mortgagor had paid to the wholesaler from whom he had purchased the automobiles, but which had also been included in the mortgages to the finance company which had financed the purchases from the wholesaler.

228. *Securities Inv. Co. v. Rottweiler*, *supra* note 204.

229. *Id.*

230. *McDonnell v. DeSota Sav. & Bldg. Ass'n*, 175 Mo. 250, 75 S.W. 438 (1903).

by usury,²³¹ an attaching creditor of the borrower,²³² an assignee of the property pledged for a usurious loan,²³³ and a maker of notes where the holder has pledged them to secure a usurious loan.²³⁴ Although there is authority to the contrary,²³⁵ a subsequent purchaser of the mortgaged goods probably may also have the prior usurious lien or mortgage declared invalid.²³⁶ As stated in *Davis v. Tandy*:²³⁷

[A] grantee of the entire title to property encumbered by a lien securing usury is in privity with the grantor and may enter the plea of usury as effectually as the grantor himself could, for the grantor has transferred to him that right.

A creditor of the borrower who has not connected himself with the borrower's property may not have a pledge or mortgage declared invalid under section 408.070.²³⁸

Section 408.070 may be used as a basis for an action,²³⁹ or it may be used as a defensive measure.²⁴⁰

6. Effectiveness of Section 408.070

Whether section 408.070 affords any real, lasting relief to the borrower is highly questionable. Although the security for the loan may be cancelled, the debt is still valid and under Missouri law the lender could again regain possession of or a lien on the property through levy or attachment. Only if the borrower

231. *Western Storage & Warehouse Co. v. Glasner*, *supra* note 189.

232. *Marx v. Hart*, 166 Mo. 503, 66 S.W. 260 (1901). (The borrower had previously pledged the attached property for a usurious loan.) *Voorhis v. Staed*, *supra* note 196, where the borrower had previously mortgaged the attached property for a usurious loan. *American Rubber Co. v. Wilson*, 55 Mo. App. 656 (K.C. Ct. App. 1894).

233. *Personal Fin. Co. v. Endicott*, 238 S.W.2d 51 (St. L. Ct. App. 1951); *Smith v. Becker*, *supra* note 193.

234. *Johnson v. Grayson*, 230 Mo. 380, 130 S.W. 673 (1910). (The borrower was an accommodation payee of the defendant's promissory note and had pledged it to the plaintiff as security for a usurious loan. Plaintiff sued defendant on the note. The court held that plaintiff's suit was also for the enforcement of a lien which was void because he had become the holder of the note through a usurious transaction.) *Keim v. Vette*, 167 Mo. 389, 67 S.W. 223 (1902). (The holder of negotiable promissory notes had entrusted them for safekeeping to a bailee. The bailee wrongfully pledged them to defendant as security for a usurious loan. The true owner was allowed to replevy them. The court held that while the defendant was a holder in due course in other respects his possession of the notes was wrongful because of his exaction of usury.)

235. *Straus v. Tribout*, 342 Mo. 511, 116 S.W.2d 106 (1937). (The court's main basis was that the purchaser had taken his deed expressly subject to the usurious mortgage.)

236. *Missouri Discount Corp. v. Mitchell*, *supra* note 227; *Leavel v. Johnston*, *supra* note 201.

237. 107 Mo. App. 437, 442, 81 S.W. 457, 458 (K.C. Ct. App. 1904).

238. *Griebel v. Imboden*, 158 Mo. 632, 59 S.W. 957 (1900).

239. *Johnson v. Simmons*, 61 Mo. App. 395 (St. L. Ct. App. 1895) (suit to replevy goods held by mortgagee under usurious mortgage).

240. *Davis v. Tandy*, *supra* note 237. (Action by mortgagee under a usurious mortgage against purchaser of mortgaged cattle from mortgagor for conversion of the cattle.)

was insolvent would the lender be penalized. Further, because of the lengths to which the lenders go to prevent the borrower from realizing any relief and because there is no recovery of costs under section 408.070, the expenses of bringing or defending the suit will often prohibit the use of this section. Moreover, if the borrower does pursue his remedy he may find when he next applies for a loan that the lenders in his area will make no more loans to him.

IV. CONCLUSION

Missouri courts profess to have a deep and abiding animosity towards usurious lenders²⁴¹ and they do, at times, carry this animosity into effect with results beneficial to the borrower. However, the courts are, on the whole, too prone to treat usury as an economic factfinding rather than a moral problem. Although the laws themselves are inadequate, the courts compound the injury by refusing to extend their coverage as much as might be done even under the restrictive language of the statutes.

The laws themselves are woefully inadequate not only to prevent usury, but also to give the borrower adequate relief when such usury is brought into the open. Missouri's general usury laws do not really penalize the lender nor greatly benefit the borrower. At most the lender may lose his lien or pledge or be forced to relinquish the usury and costs, or both. But, in any case he may retain or recover the principal debt plus legal interest.

It is recommended that the legislature put more teeth into Missouri's general usury laws by providing that the usurious lender forfeit part of the principal as well as the usury. Further, the scope of the laws should be extended to include transactions in which real property is taken as security for usurious loans, loan contracts calling for purchases of great quantities of insurance, contracts which contain illegal interest compounding provisions, and various other devices presently used to skirt the usury laws. Credit sales should also either be brought under the ban on usury or other legislation should be enacted to prevent excessive time price differentials.

If usury is such a violation of public policy as it is said to be, then both courts and legislature should be less reluctant to act in favor of the borrower who in many cases is ill equipped to fend for himself.

GILBERT D. STEPHENSON

241. "No imaginable act or contrivance to cover up and conceal the usury will avail the parties. They will not be permitted successfully to evade the provisions of the statute by any conceivable scheme or expedient." *Webster v. Sterling Fin. Co.*, 355 Mo. 193, 203, 195 S.W.2d 509, 514 (1946).