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Opinions of the Attorney General

Nels G. Johnson

OPINIONS OF THE ATTORNEY GENERAL

USURY LAWS—AUTOMOBILE FINANCING

March 6, 1947

Mr. George S. Register
State's Attorney
Bismarck, North Dakota

Dear Mr. Register:

Re: State v. Murphy Finance Company
(Leo Dinsen, Defendant).

This will acknowledge your letter of March 5, 1947, concerning the above criminal action.

This action involves a charge of usury under the penalty provisions of section 47-1409 of the 1943 Revised Code. The facts as disclosed by your letter are as follows:

On October 28, 1946, one Andrew L. Schaffer, borrowed money from the Murphy Finance Company in the sum of $178.00. He gave as security for the repayment of this sum a chattel mortgage on a car in the sum of $178.00. The Murphy Finance Company insisted on insurance on the car against loss by fire, lightning and transportation, and theft. This insurance cost $8.00 and was actually purchased from a local agent. The borrower actually received $170.00 in cash.

Mr. Schaffer stated that he had an understanding or agreement with the Murphy Finance Company to pay $27.35 per month for a period of 8 months to liquidate the loan, or a total of $218.80.

The mortgage describes the note for $178.00, dated October 28, 1946 and due June 28, 1947, and lists it in the amount of $178.00. Nothing is said in the note or in the mortgage as to interest. The insurance policy purchased for $8.00 states that "under coverages, single interest $218.80." It also refers to "encumbrance" $218.80. In other words, the insurance policy would seem to bear out the actual understanding and agreement as given by Mr. Schaffer. Mr. Schaffer has paid one payment of $27.35 which was accepted by Mr. Dinsen.

At the preliminary hearing of the above action, the original papers were disclosed. The note for $178.00 shows no reference to interest. The inference would be that it does not draw interest and that it would not be enforceable except for its face of $178.00.

Attached to this note on a separate sheet of paper with a perforation between the actual note and this other paper is a document which reads as follows:

"This is not a note and is not enforceable

Bismarck, North Dakota, October 28, 1946.

I/We agree to pay to the Murphy Finance Company at the place designated by them, at my/our option, both as to time and amount, the sum of $40.80, without interest.

(Signed) Andrew L. Schaffer.

Note: In no event shall or will any payment be paid, received or applied hereon, until after any legal obligation to the herein named payee has been paid in full."

Under the facts as given, the question arises whether or not the defendant is guilty of a criminal violation of the usury law of this state. The argument of the defendant at the preliminary hearing was to the effect that there was no agreement to pay interest and that the borrower was liable for $178.00, and upon payment of the same was entitled to demand the cancellation of his note and the satisfaction of his mortgage, and that

he was not in any way liable for the $40.80 or any part thereof except at his option as to time and amount. In other words, it was the contention of the defendant that the $40.80 document was not enforceable against the defendant and that consequently there was no violation of the usury law by the defendant.

Under out statute, section 47-1411 of the 1943 Revised Code, any person, whether in his own individual right or as the agent, servant, or representative of any individual, firm, corporation, or association, who shall take, receive, reserve, or charge a usurious rate of interest, in addition to being liable for the penalties and forfeitures specified in the preceding section, is guilty of a misdemeanor and may be punished by imprisonment in the county jail for not more than ninety days, or by a fine of not more than three hundred dollars, or by both. Under the document calling for $40.80, did the defendant reserve or charge what amounts to a usurious rate of interest? The borrower, Mr. Schaffer, has paid only $27.35, which, under the theory of the defendant, must be applied on the principal of $178.00. The defendant, therefore, has not taken nor received a usurious rate of interest. Has he reserved or charged a usurious rate of interest? It would appear that he has not. Since there is no enforceable contract against the borrower for the payment of the $40.80, the defendant has not reserved or charged a usurious rate of interest on the transaction involved. He has by a clever scheme apparently avoided the consequences of the penalty provisions of the usury statute. But it appears that Mr. Schaffer at no time was legally bound to pay this $40.80, and in fact the instrument he signed clearly states that he agrees to pay to the Murphy Finance Company at his option as to both time and amount. In other words, if he did pay any part or portion of the $40.80, he did so entirely on a voluntary basis. He had signed no document imposing upon him a legal and enforceable obligation. Since the document calling for the $40.80 was not a legal and binding contract, the loan was not usurious and the penalty provisions of the usury statute have not been transgressed.

Our supreme court, in the case of *Weicker v. Stavely*, 14 N. D. 278, held that there must have been an agreement to pay the excessive charge. Here the agreement negatives the obligation to pay. So it is my opinion that under the facts as stated the defendant has cleverly avoided the consequences of the criminal penalty for usury. I believe that under the arrangement, Schaffer, upon payment of the $178.00, may demand cancellation of his note and satisfaction of the mortgage, and that if he never pays any part or portion of the $40.80, the Murphy Finance Company cannot enforce it against him, and since it cannot enforce it against him, it must follow that it has not violated the usury statute criminally.

Assuming that Mr. Schaffer had paid the entire amount of $218.80, which apparently he agreed informally to pay, although the written documents do not bear out that agreement except by inference, the situation might be a violation of the usury statute, particularly section 47-1410 of the 1943 Revised Code, and might subject the defendant to civil liability for usury. It will be noted that under that statute, taking, receiving, reserving, or charging of a rate of interest greater than is allowed by the laws of this state relative to usury shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it or which has been agreed to be paid thereon, and in addition thereto, a forfeiture of twenty-five percent of the principal thereof. Furthermore, in case the greater rate of interest has been paid, the person by whom it has been paid or his legal representative may recover back twice the amount of interest thus paid, together with twenty-five percent of the principal from the person taking or receiving the same, or offset twice the amount of such interest against any indebtedness which the person who paid the same owes to the party receiving such usurious interest. In other words, under the civil liability for usury, the actual taking or receiving of what amounts to usurious rate of interest might be the basis for a civil liability. In this connection, since the borrower has not paid

more than $27.35, and since that amount must necessarily be applied on the principal obligation of $178.00, the civil liability statute for usury is not applicable. If he had, however, paid the entire $218.80, it is my thought that the Murphy Finance Company might have been liable under the civil liability statute for usury. In the case of *Wood v. Cuthbertson*, 3 N. D. 328, 21 N.W. 3, our court held that when illegal interest has been stipulated for, and not paid, then only the principal without interest can be recovered.

It is, therefore, the opinion of this office that the transaction referred to in your letter is not of such a nature as to enable the state to maintain successfully a criminal action against the defendant under the penalty provisions of the usury law. The civil liability is another matter if the $218.80 had been fully paid.

The scheme used in the transaction of the Murphy Finance Company with Schaffer is contrary to the principles of equity, and while it is not within the penalty provisions of the usury law, it is objectionable and should be condemned.

Yours very truly,

NELS G. JOHNSON
Attorney General.

CORRELATION OF SESSION LAWS WITH THE CODE—DUTIES OF SECRETARY OF STATE

March 17, 1947

Hon. Thomas Hall
Secretary of State
Bismarck, North Dakota

Dear Mr. Hall:

I received your letter of March 15, 1947, in which you request an opinion concerning your duties under chapter 46-03 of the 1943 Revised Code, and particularly sections 46-0310 to 46-0315, inclusive, in view of the enactment of Senate Bill 217, amending and reenacting section 46-0311 of the 1943 Revised Code.

Section 46-0311, as amended by Senate Bill 217, provides that "the secretary of state shall correct proof and supervise the publication of the laws in a manner and form prescribed by the legislative research committee, correlating each year's laws with the session laws of preceding legislative assemblies and the North Dakota Revised Code of 1943. He shall secure a copyright of the session laws of each session of the legislative assembly before the same are distributed, for the exclusive use and benefit of the state, the procurement of such copyright to be printed properly in each volume of said session laws."

Senate Bill 217 does not take effect until July 1, 1947. It does not provide any appropriation for the payment of the expense that will be involved in the correlation and publication of the laws of the special legislative session of 1944 and of the 1945 session with the 1943 Revised Code. I understand that you have funds available only for the purpose of publishing the popular and authenticated edition of the 1947 Session Laws.

In view of the provisions of Senate Bill 217, the question arises whether it is necessary for you, as secretary of state, to publish both the popular and the official and authenticated editions of the Session Laws of 1947 as provided by sections 46-0312 and 46-0314 of the 1943 Revised Code.

It is quite evident to me that you must publish the popular edition of the 1947 Session Laws as provided by section 46-0312 of the 1943 Revised Code. It also appears that if and when the legislative research committee attempts to correlate the laws of the special session of 1944 and of the sessions of 1945 and 1947 with the 1943 Revised Code that you are required merely to correct the proof and supervise the publication of such laws and

to secure a copyright thereof before the same is distributed and see that such copyright is plainly printed in each volume of said laws. Since no funds are available for the publication of the correlation of these laws with the Revised Code of 1943, it is apparent that if this is to be done the legislative research committee must provide the funds to pay the expenses of the publication of same, if any funds are available to the legislative research committee for that purpose. It is also apparent that it is up to the legislative research committee to arrange for the correlation of these laws and for their publication. You are merely to correct the proof and supervise the publication.

It is important for the officials of the state and the courts that the official and authenticated edition of the 1947 Session Laws be available to them as soon as possible and on or before July 1, 1947, so that they may have ready access to an official publication of the 1947 Session Laws. It is up to the legislative research committee to take the initiative under Senate Bill 217, and you are merely to correct the proof and supervise the publication of the laws when the work is undertaken by the legislative committee, and as there is no specified date when this work must be done, or commenced, by the legislative research committee, it appears to me that you must proceed to publish the official and authenticated copy of the 1947 Session Laws as provided by section 46-0314 of the 1943 Revised Code. It is conceivable that the legislative research committee might take the best part of a year to properly correlate the laws of the special session of 1944 and the session laws of 1945 and 1947, and that, therefore, it would not be sufficient to merely print 2000 copies of the popular edition of the 1947 Session Laws as provided by section 46-0312 of the 1943 Revised Code. Orderly government procedure requires that the officials charged with the administration and enforcement of the laws of the state have access to an official and authenticated edition of such laws as soon as possible, and since Senate Bill 217 does not refer to section 46-0314 nor repeal it, it sees to me that Senate Bill 217 is not in conflict with your official duties under section 46-0314 of the 1943 Revised Code, and that you should proceed as soon as convenient to publish the official and authenticated edition of the 1947 Session Laws, so that all of the officials of the state and the courts may have the use of same. Furthermore, there is no legislative intent to be gathered from Senate Bill 217 to the effect that the correlation of the laws therein provided shall be and is a substitute for the publication of the official and authenticated edition of the 1947 Session Laws. If that had been the intent of the legislative assembly, then reference could have been made to section 46-0314 and the same repealed. Furthermore, no one can tell when the correlation of the laws of the special session of 1944 and of the sessions of 1945 and 1947 may be accomplished and become available to all officials, both local and state. Therefore, to avoid confusion and to procure for the use of all officials as soon as possible an authenticated edition of the 1947 Session Laws, I deem that you should proceed to print and distribute the same as you have done in the past.

Accordingly, it is the opinion of this office that you proceed under the terms of sections 46-0310 to 46-0315 of the 1943 Revised Code, to print both the popular and authenticated editions of the 1947 Session Laws, and that if and when the legislative research committee decides to operate under the provisions of Senate Bill 217, that you correct the proof and supervise the publication of the laws of the special session of 1944 and the regular sessions of 1945 and 1947, as therein provided, as it appears that the correlation of these laws with the 1943 Revised Code is left to the legislative research committee, and the funds for the printing and publication thereof must be furnished by the committee, if available, as no legislative provision now exists for the purpose of defraying the expense of such printing and publication.

Yours very truly,
NELS G. JOHNSON
Attorney General.

SENATE BILL 151—HEIRSHIP PROCEEDINGS

March 21, 1947

Mr. Jacob Sonderall, Deputy
Clerk of Court
Hettinger, North Dakota

Dear Mr. Sonderall:

This will acknowledge your letter of March 14, 1947, in which you state that you have received a copy of Senate Bill 151 regarding the collection of filing fees in district and probate courts. I note that you take the position that heirship proceedings do not come within the provisions of this law.

Section 5 of the act, amending section 27-0740 of the 1943 Revised Code, reads as follows:

"Before a petition for letters testamentary, of administration, or guardianship is filed in a county court of this state, the petitioner, or someone on his behalf, shall pay a filing fee of seven dollars and fifty cents into the county treasury of the county in which the court is located."

Section 6 of the act, amending section 27-0741 of the 1943 Revised Code, insofar as is pertinent, reads as follows:

"When a filing fee for an estate or for a guardianship is paid to the treasurer of the proper county, he shall execute therefor duplicate receipts one of which shall be filed with the county auditor and one with the judge of the county court. * * * "

The question arises as to whether or not under the terms of these two amendments an heirship proceeding deals with an estate. In the past, the county courts have collected the same filing fee for the filing of a petition for heirship as were collected for filing of letters testamentary or letters of administration.

Section 27-0706 of the 1943 Revised Code states:

"The county court of a county shall have jurisdiction to take the proof of a will and to grant letters testamentary, to grant letters of administration, or to determine heirship, as the case requires, if:

1. The decedent at the time of his death was a resident of such county, whether his death happened there or elsewhere;

2. There is property within such county which remains unadministered and if the decedent at the time of his death was not a resident of this state, no matter where the death occurred; or

3. The application therefor was first made in such county and if the jurisdiction as defined in the preceding subsection of this section might be in two or more counties."

It is apparent that the jurisdiction of the county court to entertain heirship proceedings is on the same basis as its jurisdiction to deal with letters of administration, letters testamentary, and guardianship. Heirship proceedings are a probate matter and in the determination of the heirship proceedings the county court makes a finding as to who the heirs are and the shares to which each heir is entitled under the law of succession in the property of the decedent.

On the basis of the custom of the county courts throughout the state, as far as I have been able to determine, no distinction has been made between an heirship proceeding and other probate proceedings as far as the filing fee was concerned, and although section 27-0740 of the 1943 Revised Code does not specifically mention heirship proceedings, it has

been interpreted to include them and filing fees have been charged on the same basis for heirship proceedings as other probate proceedings.

Accordingly, it is my opinion that heirship proceedings are within the terms of sections 5 and 6 of Senate Bill 151, and that you should charge filing fees for heirship proceedings in the sum of $7.50 for each heirship proceedings.

Yours very truly,

NELS G. JOHNSON
Attorney General.

By
P. O. Sathre
Assistant Attorney General.

SAME—MISCELLANEOUS

April 18, 1947

Mr. Harold D. Arnold
Clerk of the District Court
Cass County
Fargo, North Dakota

Dear Mr. Arnold:

This will acknowledge your letter of April 9, 1947, with reference to Senate Bill 151 of the 1947 session. You want to know whether the filing fee of $7.50 provided by subsection 1 of section 11-1704 of the 1943 Revised Code, as amended by section 3 of Senate Bill 151, should be charged in divorce actions, quieting title actions, discharges of old mortgages, trusts, deposit actions and adoptions.

Undoubtedly the $7.50 filing fee should be charged in the filing of divorce actions and quieting title actions. I do not believe it should be charged in ex parte proceedings dealing with the discharges of old mortgages.

You will note that subsection 1 of section 11-1704 of the 1943 Revised Code was the only subsection amended. Accordingly, it must have been the intent of the legislative assembly to leave the fees enumerated in subsection 2 to 22 of that section the same as they have always been. Subsection 21 specifically states that "for all services in adoption proceedings, three dollars." The three dollar filing fee has always been charged in adoption matters as far as I can determine. Subsection 22 states that "for all services in proceedings for deposit in court, three dollars." Accordingly, a $3.00 filing fee charged for deposits is the same as it always has been.

I am not entirely clear as to what you mean by trusts and accordingly this opinion does not cover trusts at all. If you will explain further what you mean by trusts, I shall be glad to go into that matter.

It is the opinion of this office that Senate Bill 151 does not change the filing fees set forth in subsections 21 and 22, dealing with adoption proceedings and for proceedings for deposits in court. Senate Bill 151 covers only the filing fee in what constitutes an action such as divorce cases, quieting title cases, and other cases involving civil remedy. All the other fees enumerated in section 11-1704 of the 1943 Revised Code remain as they have always been.

Yours very truly,

NELS G. JOHNSON
Attorney General.