Vanderbilt Law Review

Volume 14
Issue 4 *Issue 4 - October 1961*

Article 12

10-1961

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# CREDITORS' RIGHTS AND SECURITY TRANSACTIONS—1961 TENNESSEE SURVEY

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Two cases involving a claim of usury were decided during the period of this survey. However, in one, *Post Sign Co. v. Jemc's, Inc.*,[1] the court did not reach the issue of usury, but instead held that this issue could not be raised by the parties involved. The facts were somewhat complicated. A restaurant owner became financially embarrassed and needed to raise $65,000. The manager of the restaurant, one McAshan, wanted to buy it, but could not raise the money. A lender was found, but for tax reasons the lender bought the property for $65,000, and immediately executed to McAshan a lease with option to purchase for $110,000. Approximately a year later the lessee, McAshan, exercised his option and consummated the purchase by execution of a note in the amount of $106,524, secured by a purchase money trust deed. Two months later McAshan caused the corporation Jemc's to be formed, and this corporation thereafter conducted the restaurant business. McAshan retained title to the real estate for several months, but conveyed his interest therein to Jemc's shortly before a general creditors' bill was filed against Jemc's.

The holder of the $106,524 note intervened in the general creditors' proceeding and sought an order directing the receiver of Jemc's to surrender possession of the real estate for foreclosure under the trust deed. The receiver answered that the note transaction was tainted by usury to the extent of $45,000 (the difference between the option price and the amount the lender paid), that the intervenor was unjustly enriched by that amount, and that the receiver was entitled to have the note purged of this amount. The chancellor upheld these contentions, and entered a decree purging the note of $45,000.

On appeal, the chancellor's decision was reversed, and the court of appeals held that the receiver of Jemc's could not raise the question of usury. The opinion is based upon the proposition that only the victim of usury, or his creditors, may have usury purged from a transaction.[2] As McAshan gave the note, and not the corporation Jemc's of which he was sole stockholder,[3] the court reasoned that only McAshan or his creditors had a remedy for usury.

In response to a contention that Jemc's as grantee from McAshan succeeded to his rights, the court relied upon an earlier Tennessee

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1. 342 S.W.2d 385 (Tenn. App. E.S. 1960).
2. See TENN. CODE ANN. § 47-1617 (1956), quoted 342 S.W.2d at 388.
3. According to the headnotes, 342 S.W.2d 385.

decision to the contrary.[4] The case was not squarely in point, however, as it involved a voluntary purchaser who took with knowledge of a deed of trust, and who presumably paid less by the amount of the alleged usurious note involved. This distinction is noted in the section of an encyclopedia cited by the court,[5] but no mention of it is made in the opinion.

Another contention rejected by the court was that the corporate identity should be ignored. It had been stipulated that McAshan was not personally liable for the debts of Jemc's and the court seemed impressed that McAshan has been "scrupulous in his treatment of the corporation as a separate entity."[6] The court also accepted McAshan's "inadvertent error" explanation for his having given, as additional security for the note involved, a chattel deed of trust on property which the organizational minutes recited as belonging to Jemc's. The opinion acknowledges that some Tennessee cases ignore the corporate entity, but states that this is done only "to prevent injustice, which element appears to us completely lacking in the case at bar."[7] One wonders if usury, which the chancellor found to exist, is not an injustice.

A final argument advanced by the receiver was that the holder of the note was unjustly enriched. To this the court replied that any enrichment was at the expense of the original seller, rather than Jemc's or its creditors. Obviously, however, the creditors of Jemc's would have benefitted by purging the $45,000 alleged enrichment, or the litigation would not have occurred.

An interesting contrast to the Jemc's case is *Williams v. Burmeister*,[8] in which a claim of usury was upheld. The opinion consists largely of a review of the facts, as the court disagreed with the chancellor as to the preponderance of the evidence. Briefly, the facts were as follows. One Williams owned real estate which had been sold to satisfy a judgment. Desperately seeking to redeem the property, Williams first agreed to convey the property if the lender would pay off $17,500 necessary for redemption, and to buy back the property for $50,000 payable in installments. A deed was executed, and the grantee paid $16,000 necessary to set aside the court sale. Later Williams executed a note for $34,400 and a deed of trust to the same property to secure the note. During the negotiations the lender-grantee told Williams he did not want the land but would help him to redeem it. Upon default in payment of installments due on the note, the lender-

4. Nance v. Gregory, 74 Tenn. 343 (1880).
5. 91 C.J.S. *Usury* § 130, at 718-19 (1955), cited 342 S.W.2d at 388.
6. 342 S.W.2d at 389.
7. *Id.* at 390.
8. 338 S.W.2d 645 (Tenn. App. W.S. 1959).

grantee conveyed title to a bona fide purchaser for $32,000.

On these facts the court found a fiduciary relationship to exist between grantor and grantee, a trust, and usury. The warranty deed was declared to be a mortgage, and the transaction purged of all usury. With respect to the usury allegation the court stated that "the entire transaction was clearly usurious. Burmeister agreed to advance funds totalling approximately $20,000. In return therefor he was to be repaid the amount of $35,000 . . . ."[9]

The court then quoted from an earlier case as follows:

> All attempts to evade the usury laws are watched by the courts with anxious jealousy, and promptly put down. Such attempts as the present . . . have been universally held to be usurious, no matter what kind of property has been given instead of money, if the design of the parties at the time was that money was to be obtained upon it. Indeed, vain would be our usury laws if such were not the case. I will not lend you money; oh, no, I cannot legally charge more than 6 per cent for money, but I can charge you what I please for any property . . . [I]t is the worst and most dangerous of all attempts at usury, because, generally, the most difficult of detection.[10]

9. *Id.* at 652.
10. Swanson v. White, 24 Tenn. 373, 378 (1844).