THE IOWA USURY STATUTE AND SALES ON CREDIT

It is well settled in most jurisdictions that the difference between the cash-sale price and the credit-sale price of an article is not usury even though it amounts to more than the legal interest.[1] Most statutes defining usury do not, however, expressly refer to credit sales. The Iowa statute is more explicit than most. It provides, in addition to the usual provision regarding a loan of money, that no more than the prescribed "sum or value" shall be received "upon contract founded upon any sale or loan of real or personal property".[2]

A number of states have departed from the general rule stated above. The Minnesota statute contains no specific reference to contracts for the sale of goods.[3] However, the court has adopted the distinction that a sale on credit is usurious if the seller in fact quoted to the buyer a cash price and subsequently sold to him at a higher credit price, but if the credit price only is agreed upon by the parties, there is no usury.[4] The rationale seems to be that if a cash price was agreed upon, the excessively high credit price is merely a subterfuge for the exaction of usury.[5]

A 1933 amendment to the North Dakota statute specifically mentioned the sale of goods for a higher price on credit than for cash plus the lawful interest rate.[6] In construing this statute the court reached the dubious conclusion that the statute applied only to cases where the purpose of the transaction was to evade the prohibition against usury.[7] As the dissenting opinion in the case pointed out, this construction of the language of the statute left the situation just as it was before the provision on credit sales was

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[1] The cases are collected in the following notes: 152 A.L.R. 585 (1944); 143 A.L.R. 238 (1943); 104 A.L.R. 245 (1936); 91 A.L.R. 1105 (1934). Where the sale is actually made on a cash basis and time to pay is later given, states which do not require that the transaction be a loan or forbearance of a pre-existing debt have found usury. Graham v. Lynch, 206 Ga. 301, 57 S.E.2d 86 (1950); *see* Brown v. Crandall, 218 S.C. 124, 61 S.E.2d 761, 763 (1950), 49 MICH. L. REV. 1087.

[2] IOWA CODE § 535.4 (1950). The usury statutes of all states are collected in CAMALIER, PERSONAL FINANCE LAWS (1938 ed.).

[3] MINN. STAT. § 334.03 (1949).

[4] Seebold v. Eustermann, 216 Minn. 566, 13 N.W.2d 739, 152 A.L.R. 585 (1944); *cf.* Bangs v. Midland Loan & Finance Corp., 200 Minn. 310, 274 N.W. 184 (1937), 22 MINN. L. REV. 447; Dunn v. Midland Loan & Finance Corp., 206 Minn. 550, 289 N.W. 411 (1939), 24 MINN. L. REV. 602 (1940).

[5] See Seebold v. Eustermann, 216 Minn. 566, 13 N.W.2d 739, 744, 152 A.L.R. 585 (1944); Midland Loan & Finance Co. v. Lorentz, 209 Minn. 278, 296 N.W. 911, 915 (1941).

[6] N.D. Laws 1933, c. 140, § 1. The amendment was repealed in N.D. Laws 1935, c. 159, § 1. The present statute is N.D. REV'D CODE § 47-1409 (1943).

[7] Sayler v. Brady, 63 N.D. 471, 248 N.W. 673 (1933).

added by the legislature.[8] The Utah statute was amended to cover specifically the handling or service charge on a contract for the purchase of goods.[9] In passing on the amended statute, the court noted that in many states the credit price may be greater than the cash price plus interest but held that the Utah usury statute was more inclusive than the statutes in those states and applied to an excessive credit price.[10] However, four years later it was held, in line with the Minnesota approach, that the statute applied only where a cash price had in fact been set before the higher credit price was used.[11]

Recent decisions in the Texas Civil Appeals Court have developed a logical distinction in finding certain kinds of credit sales to be usurious. Recognizing that under the Texas statute one may lawfully sell at a credit price higher than the cash price plus lawful interest, the court has nevertheless found transactions to be usurious where the difference was actually received by a finance company rather than the seller. A transaction of this type is held to involve a loan rather than a sale.[12] A similar result has recently been reached in Rhode Island.[13]

The Iowa statute seems to have come squarely before the court only twice in regard to an excess of the credit price over the cash price.[14] Both cases involved the sale of sheep with a payment of wool from the annual clip as the alleged usurious interest. In

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[8] *Id.*, 248 N.W. at 676. Nor was it necessary for the majority to base its decision on a construction of the statute. The case involved the sale of an automobile for $1250 on a conditional sales contract. The only evidence that a lesser sum was charged for cash was that the distributor in the area had set $1231 as the selling price and that the dealer had made offers to other people to sell the car for less than $1250. However, in those instances other considerations were involved. There was no evidence that the dealer had ever sold a similar automobile for less than $1250 or offered it to this buyer for less, and the car bore a price tag of $1250 while it was in the showroom. Therefore, there seems to have been no evidence that the statute was violated regardless of its interpretation.

[9] UTAH CODE ANN., § 44-0-2 (1943).

[10] Morgan Motor Finance Co. v. Oliver, 101 Utah 492, 124 P.2d 778 (1942).

[11] Mathis v. Holland Furnace Co., 109 Utah 449, 166 P.2d 518 (1946), quoting with approval from Seebold v. Eustermann, 216 Minn. 566, 13 N.W.2d 739, 152 A.L.R. 585 (1944).

[12] Associates Inv. Co. v. Sosa, 241 S.W.2d 703 (1951); G.F.C. Corp. v. Williams, 231 S.W.2d 565 (1950); Associates Inv. Co. v. Hill, 221 S.W. 2d 365 (1949); Associates Inv. Co. v. Baker, 221 S.W.2d 363 (1949); Associates Inv. Co. v. Thomas, 210 S.W.2d 413 (1948); Associates Inv. Co. v. Ligon, 209 S.W.2d 218 (1948).

[13] Nazarian v. Lincoln Finance Corp., 78 A.2d 7 (R.I. 1951); R.I. GEN. LAWS c. 485, § 2 (1938).

[14] The dearth of Iowa cases is probably due to the fact that in Iowa, unlike those states in which usury voids the contract, the debtor has little to gain by raising the defense of usury since he can only avoid paying the interest he contracted for in excess of 8% per annum. The principal must still be paid to the creditor plus a forfeiture of 8% to the school fund if an action is brought. IOWA CODE § 535.5 (1950); Miller v. Gardner, 49 Iowa 234 (1878); Thompson v. Purnell, 10 Iowa 205 (1859); Smith, Twogood Co. v. Coopers & Clarke, 9 Iowa 376 (1859).

First Nat'l Bank of Marshalltown v. Owen,[15] the court decided that the payment of wool was a part of the purchase price rather than interest or a carrying charge and that even if it were regarded as interest, it was payable in property having a fluctuating value. Therefore, at the time of the making of the contract, it was not certain that the value of the wool would be in excess of the lawful interest. It was conceded, however, that such a contract might under other circumstances be usurious.[16] The second case, *Gilmore & Smith v. Ferguson & Cassell*,[17] involved a contract to buy 196 sheep valued at $588. This amount was to be paid within one to three years. Until it was paid the buyer was to pay also one and a half pounds of wool per head annually. The buyer paid the one and a half pounds of wool per head for three years; the total value of these payments was found by the jury to be $573.30.[18] On the findings of a special verdict, the district court held the contract usurious. The Supreme Court reversed the decision, stating that one may lawfully sell his property for a much higher price on credit than he would for cash. A contract to do so is not usurious unless it is found to be a device to evade the usury laws. The cases cited in support of this construction were from jurisdictions where the wording of the usury statute was not the same as the Iowa statute, but the court considered the difference immaterial. The court also thought the value of the wool could not make the contract usurious because that value was uncertain and could be more or less than the legal interest.[19] In view of the unusual fea-

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[15] 23 Iowa 185 (1867).

[16] The following year, in a case involving promissory notes, the court had occasion to lay down a broad rule of construction of the usury statute which included the credit sale as coming under the statute. Callanan v. Shaw, 24 Iowa 441 (1868).

[17] 28 Iowa 220 (1869).

[18] At the time of making of the contract the market price of wool was 60 cents per pound. At this price the buyer's annual payment of wool would have amounted to interest of 30% per annum. At the time of the first payment under the contract (1864) the price of wool had jumped to 90 cents per pound and the buyer paid about 45% interest. In 1865, with wool worth 55 cents per pound, he paid about 27%; in 1866, 18%. The market price of wool dropped to 30 cents per pound the following year, but to bring the interest within the legal rate, it would have had to average less than 20 cents a pound for the three years interest was paid. There appeared little likelihood that it would do so.

[19] This theory has been followed where there was an agreement for a share of earnings or income from property. Wehrman v. Moore, 186 Iowa 1124, 173 N.W. 154 (1919). However, where it was clearly contemplated that the arrangement would produce a return in excess of the lawful rate of interest the agreement has been held usurious. Weaver v. Burnett, 110 Iowa 567, 81 N.W. 771 (1900). In the instant case it would seem an excessive return was contemplated. See note 18 *supra*. The dissenting opinion pointed out that the statute plainly applied to a credit sale regardless of whether the usurious interest was payable in money or property and that fluctuating value should not be considered since any contract to pay interest in property no matter what the value of the property would then be absolutely non-usurious.

tures of the case,[20] the failure of the majority opinion to discuss the difference in the wording of the Iowa statute as compared with other states, and the persuasive dissenting opinion, this case cannot be taken as final authority for the proposition that an excess of the credit price over the cash price cannot constitute usury in Iowa.[21]

It would seem that the Iowa Court has several avenues open to it in this type of case. The court could hold that an agreement to forbear collecting money is in essence as much a loan as an extension of the use of a sum of money and that regardless of whether the usury statute is expressly applicable to the sale of goods, it should apply.[22] Or it could hold that the distinctive wording of the Iowa statute makes usurious any contract providing for a credit price higher than the established cash price if the excess is greater than the lawful rate of interest.[23] A third approach would draw a distinction similar to the Minnesota rule and require an actual agreement to have been made with the buyer for a lower cash price, the presence of such agreement indicating that the contract was a device to evade the law.[24] A fourth possibility would be to find, as has been done in Texas and Rhode Island,[25] that the transaction is a usurious loan of money where the difference in price is paid to a finance company. Finally, the court could ignore the reference to the sale of goods in the usury statute as North Dakota has done and hold that a loan or forbearance of money is necessary to constitute usury.[26]

Whether as a matter of social and economic policy[27] it is desirable that the usury statute apply to a contract for the sale of prop-

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20 First, the interest was payable in property which the majority held made the value so uncertain as to preclude a finding of usury. Gilmore & Smith v. Ferguson & Cassell, 28 Iowa 220, 223 (1869). This was also the reasoning used in the earlier sheep case. First Nat'l Bank of Marshalltown v. Owen, 23 Iowa 185, 196 (1867). Second, the interest agreed upon was a share of the income or earnings from the property which has been held to preclude a finding of usury. See note 19 *supra*. While neither of these seem to be valid reasons for the result reached, they remain possible bases for distinguishing the case.

21 In Hill v. Rolfsema, 226 Iowa 486, 284 N.W. 376 (1939), the court seemed to treat a conditional sale as coming under the usury statute but found it unnecessary to decide whether there was usury in that particular instance.

22 See Failing v. National Bond & Inv. Corp., 168 Misc. 617, 6 N.Y.S.2d 67 (Roch. City Ct. 1938), *rev'd*, 12 N.Y.S.2d 260 (Co. Ct. 1938), *reversal affirmed*, 258 App. Div. 778, 14 N.Y.S.2d 1011 (4th Dept. 1939). See Collins, *Evasion and Avoidance of Usury Laws*, 8 LAW & CONTEMP. PROB. 54 (1941).

23 See note 21 *supra*.

24 Cases cited in note 5 *supra*. This rule would be well within even the questionable authority of Gilmore & Smith v. Ferguson & Cassell, 28 Iowa 220 (1869), since the requirement of the majority that the contract be a cover for usury is met.

25 See notes 12 and 13 *supra*.

26 Sayler v. Brady, 63 N.D. 471, 248 N.W. 673 (1933).

27 On this problem the following collections of articles are helpful: 8 LAW & CONTEMP. PROB. 148-288 (1941); 2 LAW & CONTEMP. PROB. 139-188 (1935); see also 23 CORNELL L.Q. 619 (1938); 48 YALE L.J. 1102 (1939); 39 YALE L.J. 408 (1930); 35 COL. L. REV. 1322 (1935).

erty on credit is beyond the scope of this article. Indeed, it has even been suggested that it is not properly a matter of consideration by the court.[28] However, the theory has been advanced that whatever the decision on the desirability of the application of the statute may be, it would be desirable to hold that the statute does apply, since the application of the statute may be the best way to bring about a change,[29] either by complete abolition of the provisions relating to sales or by substitution of new statutes similar to the small loan statutes.[30]

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[28] "That our usury law is harsh in its language and effect is obvious from a mere reading. . . . However, insofar as the act establishes a legislative policy, there is and can be no judicial quarrel with legislative policy. The court does its duty when it carefully inquires whether there is a violation of the statute and if there is gives to it the effect prescribed by the Legislature." Seebold v. Eustermann, 216 Minn. 566, 13 N.W.2d 739, 744 (1944).

[29] One writer states that if finance companies believe they are hurt by such a holding, they will quickly solicit the legislature for a change, whereas the unorganized and inarticulate consumers may be unable effectively to present their problem if it is held that the statute does not embrace the credit sale. Berger, *Usury in Installment Sales*, 2 LAW & CONTEMP. PROB. 148, 171 (1935); see also 23 CORNELL L.Q. 619 (1938). It must be remembered that in Iowa such a holding would not have nearly so drastic an effect under the Iowa penalty provisions as it would have under the penalty provisions of many states which make void the contract on which the usurious interest was charged. Compare IOWA CODE § 535.5 (1950) with MINN. STAT. § 334.05 (1949).

[30] For the view that individual laws should be passed for each type of financing rather than a uniform usury law, see Bogert, *Future of Small Loan Legislation*, 12 U. OF CHI. L. REV. 1, 18 (1944); Hubachek, *The Drift Toward a Consumer Credit Code*, 16 U. OF CHI. L. REV. 609 (1949); 38 HARV. L. REV. 993 (1925).

ATTRACTIVE NUISANCE IN IOWA

The Iowa Supreme Court has repeatedly recognized an attractive nuisance doctrine founded upon a theory of implied invition.[1] Acceptance was first announced in *Edgington v. Burlington, C.R. & N. Ry.*[2] A railroad company maintained a turntable on an unfenced lot near a public alley through which children were known to pass. Several of these children were attracted to and played upon the turntable. The plaintiff, a seven year old girl, was permanently injured when the fastening was released by one of the children. The gist of the cause of action was the keeping of an ill-guarded dangerous machine in a place where children might reasonably be expected to play upon it. The question whether the fastening was such that it showed due care by the defendant to guard against such injuries and the question of the plaintiff's capacity to appreciate the danger were left to the jury. Judgment for the plaintiff was affirmed. Although a child in such a case is technically a trespasser to whom the owner owes no duty beyond refraining from affirmative acts of harm, the attractiveness of the dangerous agency was construed to be an implied invitation taking the child out of the trespasser class and making him an "invitee." Thus, under a duty to make the premises safe for an invitee the owner was held liable to the child for injuries sustained because of breach of that duty.

Since the *Edgington* case general rules for the application of the doctrine have been developed. The agency, of course, must be attractive to children or there is no implied invitation.[3] The defendant must know or be chargeable with knowledge that the instrumentality is dangerous.[4] It must be artificial and not a natural object such as a pond or stream,[5] *i.e.*, it must be created by the positive act of the owner. It is also excluded from the doctrine when it is not inherently dangerous,[6] does not have an inviting and ready means of access or approach,[7] or is a necessity of business and in-

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[1] See, *e.g.*, Harriman v. Afton, 225 Iowa 659, 662-664, 281 N.W. 183, 185 (1938).

[2] 116 Iowa 410, 90 N.W. 95 (1902).

[3] Anderson v. Fort Dodge, D.M. & So. R.R., 150 Iowa 465, 130 N.W. 391 (1911) (alternative holding). A boy jumped to the roof of defendant's building from a boxcar and was injured striking an electric wire while jumping back. There was no implied invitation since nothing on the roof attracted the boy.

[4] Wilmes v. Chicago G.W.R.R., 175 Iowa 101, 156 N.W. 877 (1916).

[5] Blough v. Chicago G.W.R.R., 189 Iowa 1256, 179 N.W. 840 (1920) (pond formed by natural drainage).

[6] Massingham v. Illinois Cent. R.R., 189 Iowa 1288, 179 N.W. 832 (1920).

[7] Cox v. Des Moines Elect. Light Co., 209 Iowa 931, 229 N.W. 244 (1930).