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Contracts--Usury

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tariffs in effect on the date of the issue of the Bill of Lading." While this provision may by contract fix the amount of the freight charges to be paid by the shipper, it does not follow that if a greater amount is paid, the carrier is bound by the written contract to refund the overpayment.

The carrier is, however, bound by an implied contract to make such refund.⁸ On this obligation the provisions of Section 2515 apply. This statute provides that an action upon an implied contract shall be commenced within five years next after the cause of action accrued.

Section 2515 would also be applicable if the action be founded upon mistake, and in addition thereto the claimant could invoke the aid of Section 2519, which reads: "In actions for relief for fraud or mistake, or damages for either, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake; but no such action shall be brought ten years after the time of making the contract or the perpetration of the fraud."

It has been held, however, that this statute runs from the time the mistake, by ordinary diligence, ought to have been discovered.⁹ As the railroads are required by Section 201g-3 of the Statutes to keep their tariffs on file for public inspection, a shipper by reasonable diligence should discover the mistake at the time the charges are paid. The benefits to be derived from Section 2519 are accordingly remote.

In conclusion it is submitted that an action for the recovery of charges in excess of tariff rates is ordinarily barred in five years from the date the charges are paid. If, however, the action presents an administrative question, such as the peculiar meaning of words or the existence of a usage, it is barred in two years unless complaint has previously been presented to the Railroad Commission.

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CONTRACTS—USURY.

A—Early History.

Originally usury meant the reserving of any interest for the use of money.¹ Usury has been recognized and condemned since the earliest times, being prohibited by the early laws of China, in the Hindu Institute of Menu, and the Koran of Mohammed.² The taking of usury was an offense at Common Law, and the usurer was not only punished by the censures of the church in his life time, but was denied

⁸ *Cullen v. Seaboard Air Line R. Co.*, 63 Fla. 122, 58 So. 182, (1912).

⁹ *Provident Assurance Soc. v. Withers*, 132 Ky. 541, 116 S. W. 350, (1909).

¹ *Bowyer's Law Dictionary*, Student's Ed. 1928;

Ex Parte Berger, 193 M. 16, 90 S. W. 759, 3 L. R. A. (N. S.) 530 (1905);

Marshall v. Beeler, 104 Kan. 32, 178 Pac. 245, (1919);

² *Chancellor Kent; Durham v. Gould*, 16 Johns. 376, (1819).

a Christian burial; and, by the laws of Alfred the Great and Edward the Confessor, if, even after death, a man was found to have been a usurer, his goods were forfeited to the Crown, and his lands to the lord of the fee.³ Likewise the Mosaic Law prohibited the exaction of interest: "And if thy brother be waxen poor and his hand faileth thee, then thou shalt uphold him. As a stranger and a sojourner shalt he live with thee. Take thou no usury of him, or his increase, but fear thy God."⁴ The ingenuity of the Jewish mind is apparent when you read in the later provision: "Unto a foreigner thou may lend upon usury, but unto thy brother thou may not lend upon usury."⁵

By the Code of Hammurabia the Babylonian interest rate was set by the King.⁶ Among the Athenians charges were fixed by custom, being twelve per cent.⁷ In 1545 A. D. the first statute allowing the collection of interest was passed in England,⁸ being ten per cent. By subsequent acts, however, this rate was gradually reduced to five per cent,⁹ this statute being a model for a large number of the interest statutes in this country.

The Common Law as adopted in America differed from that of the Common Law in England in that, in the absence of statute establishing a maximum there can be no usury.¹⁰ Practically all American jurisdictions have interest statutes. The first Kentucky interest statute was enacted in 1796. The present statute allows six per cent.¹¹ Today usury is an exaction taken for the loan or forbearance of money above that allowed by law.¹² And that excess is usury with all the objectionable features of the Common Law.

B—Application of Payments

The Common Law doctrine is that the debtor could recover the excess paid above the legal rate of interest.¹³ His action was in the

¹⁰*Bacon's Abrid.*, Title, "Usury";
Gray v. Bennett, 3 Metc. (Mass.) 522, (1842);

⁴*Leviticus* 25, 35-37.

⁵*Deuteronomy* 23, 19-20.

⁶*Code of Hammurabia*, Sec. 51;

⁷*Durham v. Gould*, Note 2, *supra*.

⁸7 *Hen. VIII*, c. 9.

⁹12 *Anne*, c. 16, Sec. 1714.

¹⁰*Houghton v. Page*, 2 N. H. 42 (1819);

Newton v. Wilson, 31 Ark. 484, (1876);

Mo. etc. Co. v. Krumseig, 172 U. S. 351, 19 Sup. Ct. 179, (1899);

Union Estates Co. v. Adlon C. Co., 221 N. Y. 183, 116 N. E. 984, (1917);

Whitworth v. Davey, 279 Mo. 672, 216 S. W. 736, (1919);

¹¹*Ky. Statutes*, Secs. 2218-2219.

¹²*Gaar v. Louis. Bk. Co.*, 11 Bush (Ky.) 180 (1874);

Stokley v. Buckler, 22 K. L. R. 1740, 61 S. W. 460, 1901);

Guenther v. Wisdom, 27 K. L. R. 230, 84 S. W. 771, (1905);

¹³*Wheaton v. Hibbard*, 20 Johns. (N. Y.) 290, (1822);

Brown v. McIntosh, 39 N. J. L. 22, (1876). For a development of the common law doctrine see this decision by Reed, J.

nature of an action for money had and received.¹⁴ The payments were not deemed voluntary on the debtor in *pari delicto* in making them.¹⁵

If the Statute allows the usurer to recover the principal sum and lawful interest thereon, as it does in Kentucky, usurious payments will first be applied to discharge lawful interest due, and then upon the principal debt.¹⁶ The usury should be applied to extinguish the debt as of the date of payments.¹⁷

When payments are made on a usurious debt the general rule is the Court will regard such payments as applied to that part of the debt which the debtor is legally bound to pay.¹⁸

¹⁴*Brown v. McIntosh*, Note 13, *supra*;
Pearce v. Hedrick, 3 Litt. (Ky.) 109, (1823) (Equity);
Ashbrook v. Watkins, 3 T. B. Mon. (Ky.) 482, (1825) (Equity);
Lawless v. Blakey, 4 T. B. Mon. (Ky.) 488, (1827) (Equity);
Crutcher v. Trabue, 5 Dana (Ky.) 80, (1837) (Recognizing rule but holding no recovery while principal and legal interest due.);
Estill v. Rhodes, 1 B. Mon. (Ky.) 314, (1841) (Recognizing rule but denying creditor right to assert debtor's right without his assent.);
Kirkpatrick v. Wherritt, 7 B. Mon. (Ky.) 388, (1847).
¹⁵Lord Mansfield: *Browning v. Morris*, Cowp. 790-2, 98 Eng. Rep. 1364, (1778), "Law regards payments as made under duress";
Williams v. Hedley, 8 East 378, 103 Eng. Rep. 388, (1807);
Willie v. Green, 2 N. H. 323 (1821);
Cross v. Bell, 34 N. H. 82, (1856);
Ossipee v. Gafney, 56 N. H. 352 (1876);
Albany v. Abbott, 61 N. H. 157, (1881);
Westman v. Dye, 214 Cal. 28, 4 Pac. (2d), 134, (1931);
 27 R. C. L. 272.
¹⁶*Ky. Statutes*, Secs. 2219 (3), Note 14, *Supra*;
Crutcher v. Trabue, Note 14, *supra*;
Stevens v. Lincoln, 7 Met. (Mass.) 525, (1844);
Booker v. Gregory, 7 B. Mon. (Ky.) 440, (1847);
Johnson v. Uttey, 79 Ky. 72, (1880);
Kendall v. Couch, 88 Ky. 199, 11 S. W. 587, (1889);
Neal v. Rouse, 93 Ky. 151, 19 S. W. 171, (1892);
Hill v. Cornwall, 95 Ky. 512, 26 S. W. 540, (1894);
Grenshaw v. Duff, 113 Ky. 912, 69 S. W. 962, (1902);
Paine v. Levy, 142 Ky. 619, 134 S. W. 1160, (1911);
Taulbee v. Hargis, 173 Ky. 433, 191 S. W. 320, Ann. Cas. 1918A, 762, (1917).
¹⁷*Booker v. Gregory*, Note 16, *Supra*.;
Reger v. O'Neil, 33 W. Va. 159, 10 S. E. 375, 6 L. R. A. 427, (1889);
Thompson v. Baird, 17 K. L. R. 403, 31 S. W. 280, (1895);
Day v. Davis, 20 K. L. R. 369, 47 S. W. 769, (1898);
Hawkins et al v. Bldg. Assoc. 28 K. L. R. 243, 39 S. W. 197 (1905)
 (Known as the United States Rule—See cases cited)
¹⁸*Wright v. Laing*, 3 B & C, 165, 107 Eng. Rep. 695, (1824);
Crutcher v. Trabue, Note 14, *Supra*.;
Smith v. Robinson, 10 Allen (Mass.) 130, (1865);
Ellis v. Brannin's Ex'r., 1 Duv. (Ky.) 49, (1863);
Eggen v. Huston, 11 K. L. R. 235, (1889);
Kendall v. Couch, Note 16, *Supra*.;
Cit. Nat. Bk. of Danville v. Forman's Asso., 111 Ky. 206, 63 S. W. 454, (1901);
Cotton v. Thompson, 159 S. W. 455 (1913);
 Note: *Cit. Nat. Bk. of Danville v. Forman's Assoc.*: There being no application of any part of this payment by the debtor to the pay-

The weight of authority will not allow the creditor to apply general payments made by the debtor to discharge usurious interest, but he will be forced to make such applications in reducing legal interest and principal due.¹⁹

Where there is an agreement between the parties that the payments are to be applied to the satisfaction of usury it is held that such an agreement will be set aside as it in fact defeats the policy and purpose of the usury laws.²⁰

Whenever the payments are applied to the payment of legal interest and principal due, then there can be no recovery of usury paid until these are satisfied.²¹

C—Attitude of the Courts

With this background in mind, the Courts usually view the act of the usurer in taking usury in the same light as fraud, deceit, cheating and other wrongs are regarded.

Usury Statutes form a part of the public policy of the State,²² and are intended to prevent the charging of an excessive interest or other usurious practices.²³ Usury laws are directed against the lender,²⁴ and

ment of interest, as such, the law will not presume an application of it to an illegal or void obligation; nor will it permit the creditor to take such an application."

¹⁹*Rohan v. Hanson, et al.*, 11 Cush. (Mass.) 44, (1853);

Green v. Tyler, 39 Pa. 361, (1861);

Fay v. Lovejoy, 20 Wis. 403, (1866);

Adams v. Mahnken, 41 N. J. Eq. 332, 7 Atl. 435, (1886);

Danforth v. Nat. State Bk., 48 Fed. 271, 1 C. C. A. 62, 17 L. R. A. 622, (1891);

Kendall v. Couch, Note 16, *Supra.*;

Paine v. Levy, *ibid.*

²⁰*Browning v. Thompson*, 13 B. Mon. (Ky.) 387, (1852);

Booker v. Gregory, Note 16, *Supra.*;

Neal v. Couch, *ibid.*;

Kendall v. Couch, *ibid.* ("Any payments theretofore made will be treated as having been paid upon principal and legal interest without regard to how they were in fact made or received.")

39 Cyc. 1028.

²¹*Crutcher v. Trabue*, Note 14, *supra.*;

Booker v. Gregory, Note 16, *Supra.*;

McBroom v. Inv. Co., 153 U. S. 318, 38 L. Ed. 729, (1894);

Crenshaw v. Crenshaw, 24 K. L. R. 600, 69 S. W. 711, (1902);

Paine v. Levy, Note 16, *Supra.*;

Cambron v. Boldrick, 147 Ky. 524, 144 S. W. 374, (1912);

Taulbee v. Hargis, 173 Ky. 433, 191 S. W. 320, Ann. Cas. 1918A,

762.

²²*Williams v. Eagle Bank*, 172 Ky. 541, 189 S. W. 883, 1916);

Moll v. Lafferty, 302 Pa. 354, 153 Atl. 557, (1931) and cases cited;

Commonwealth v. Donoghue, 250 Ky. 343, 63 S. W. (2d) 3, (1933);

²³*Central Mo. Trust C. v. Smith*, 213 Mo. App. 106, 247 S. W. 241, (1923);

Mo. Disc. Co. v. Mitchell, 216 Mo. App. 100, 261 S. W. 743, (1924);

Van Noy v. Goldberg, 98 Cal. App. 604, 277 Pac. 538, (1929).

²⁴*Marshall v. Beeler*, Note 1, *Supra.*

are intended for the protection of the borrower,²⁵ being construed strongly against the lender,²⁶ the Courts looking to the whole transaction and allowing no scheme or device to hide usury.²⁷

Stanley, J., in *Commonwealth v. Donoghue*²⁸ admirably expresses the Kentucky Courts' view of usury: "We think the better comparison or analogy is to look upon the offense and the law as fraud, deceit, cheating, and kindred wrongs are viewed."

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²⁵*Madison Uni. v. White*, 25 Hun (N. Y.) 490, (1881) and cases cited;

Caldwell & Co. v. Lea, 152 Tenn. 48, 272 S. W. 715, (1925).

²⁶*Emig's Admr. v. Mut. Ben. L. Ins. Co.*, 127 Ky. 588, 106 S. W. 230, 23 L. R. A. (N. S.) 828, (1907). (Where the court says: "Our laws against usury and other devices and schemes resorted to by lenders, to enable them to charge debtors more than the legal rate of interest, are rigidly enforced, and no plan, however ingenious, will be allowed to defeat them.")

²⁷*Tomlin v. Morris*, 26 K. L. R. 681, 82 S. W. 373, (1904), cases cited;

Emig's Admr. v. Mut. Ben. L. Ins. Co., Note 26, *Supra.*;

Klein v. Title G. Co., 166 Fed. 365, 29 L. R. A. (N. S.) 620, (1909);

Williams v. Eagle Bank, Note 22, *Supra.*

²⁸*Commonwealth v. Donoghue*, 250 Ky. 343, 63 S. W. (2d) 3, (1933). Note: Stanley's, J. discussion is one of the best and most exhaustive to be found in the books.