The meeting was called to order at 9:11 a.m. Senator Close was in the Chair.

PRESENT:

Senator Close
Senator Hernstadt
Senator Don Ashworth
Senator Dodge
Senator Ford
Senator Raggio
Senator Sloan

ABSENT: None

SB 26 Increases maximum contractual rate of interest.

See minutes of February 28 and February 13 for testimony and discussion.

Senator Close stated that Amendment 230 would be the one that would be under discussion this morning (see Attachment A).

Rennie Ashleman, Attorney, representing the Morgage Brokers of Nevada, stated the intention of this amendment is to leave the mortgage companies of Nevada exempt from any changes made in the usury rates. The bill makes reference to NRS 645B.190 which exempts from 645B, any person doing business under the laws of this state or the United States, relating to banks, mutual savings banks, trust companies, savings and loan associations, common and consumer finance companies, industrial loan companies, credit unions, thrift companies, insurance companies, or real estate investment trusts, attorneys at law, real estate brokers and any firm or corporation which lends money on real property. It is subject to licensing, supervision or auditing by the Federal National Mortgage Association. This also includes any person doing any act under order of any court, or any one natural person, or husband and wife that provide funds for investment loans secured by a lien on real property on their own account, who don't charge a fee or cause a fee to be paid for their service, other than ordinary escrow fees, etc. There are some points other than just the general public policy of leave me alone. The principal one, from the standpoint of our industry, is that we sit on quite a different footing than mortgage banks, banks, and savings and loans. We get our funds from private individuals and they get the rate of interest that is involved in this bill. Therefore, we have relative little difficulty in attracting funds to service our market. Obviously, if we can pay an individual, or cause him to be paid 12% to 16%, depending where we are on the prime rate and the trigger point, we have a more attractive proposition to offer. Between 1977 and 1978, the volume of money lent by the mortgage brokers in this state doubled in response to demand. Right now there are 89 licensees, so

there is no shortage of competition. From the standpoint of all mortgages recorded in the State of Nevada, the Department of Commerce tells me that the mortgage brokers are 2% to 3% of the market. In the strictly residential market it is substantially more, approximately 20%.

Senator Hernstadt stated he had an add which came from a paper in California (see attachment B). This states that the rate is 13%. He asked if the industry would have any objection to saying 12% annual percentage rate, including any commissions, fees or other charges?

Mr. Ashleman stated that they want to be at 12%, or the trigger point as expressed in the act. They wish to retain their rights to charge the brokerage fee or points on a loan. That is how a broker makes his living.

Senator Hernstadt asked what the rate was that the Nevada Mortgage Brokers charged on an APR basis.

Mr. Ashleman stated that if you had a 15% loan, on a 5 year period, and you had 10 points, that would probably put that loan at 16.5%. That would be the affect of the points. He also brought out the point that it is not unusual to have different people under different interest rates and different controls in this state.

Senator Dodge asked why they need this type of Legislation, because the 12% would be within the 18% even with all of the other charges.

Mr. Ashleman stated they do not want special legislation. All they want is to keep what they have now.

Senator Dodge stated he still doesn't understand. If someone else needs to have the higher interest rate, and you can live below it, it should just put you in a better position.

Mr. Ashleman stated that because of the trigger rate, someday they may want to be higher than 18%. The broker's living is made by commission. If you put us up that high you will have a lot of out of state money coming in, which would force most of us out of business. Then when the interest rate subsides our industry would have to start all over. We can not shelve ourselves for two or three years until that interest rate does come down.

Senator Hernstadt asked if there was a straight APR figure that the industry could live with.

Mr. Ashleman stated that he felt there would be a difficulty with that. If you go with a 15% loan over 5 years, the points are worth 10 points spread out over that 5 years. Frequently people borrow the money, then in fact sell their property or

get some deal going with a profit, and then they pay us off. That puts our APR out of sight. So we have a problem because of the points.

Senator Dodge asked what would be the usual point charge on an $80,000 loan.

Mr. Ashleman stated that it would usually be 10 points. Their usual loan is only $15,000 to $20,000, so the points would shade somewhat higher on the larger loan. There would be no problem with the APR if the term is known and everybody stays with that term. What happens in the mortgage industry, is that you get earlier payoffs. This is particularly true in the larger transactions.

Lous Schuman, President of the Mortgage Brokers Association of Nevada stated that in California the usury is 10%. In addition to the 10%, a mortgage broker can charge up to 15 points. In this state 10 points is maximum. This is not legislated, competition has mandated it. In answer to Senator Dodge's question, he believes from statistics from the Commerce Department, if you eliminate the large commercial loans, which are made by people other than the average mortgage broker, the average loan made is around $12,500. With regard to the APR, our primary function is to take the money available from pension and profit sharing plans in this state, and give them the maximum return. Under normal conditions that return is 12% with a prepayment penalty which goes to the lender. He stated that there is the Federal Truth in Lending Act, which the industry is bound to follow. This is enforced by the Federal Reserve Board. However, this is not covered on commercial loans, but few of them are made by the mortgage brokers.

Senator Raggio asked if only certain types of loans were subject to disclosure.

Mr. Schuman stated that only commercial loans were. However, he feels it is good sound business to let anyone know on any loan, and most of the industry does this. On business loans this is not required.

Don Roddin, representing the Mortgage Bankers Association stated he did not feel the bill was well drafted. It does not define what fees or charges are. It doesn't say what is considered part of the 15%. He felt there were a lot of questions in the bill, but that they could live within the 18% as written.

George Vargas, General Counsel for the Nevada Bankers Association, stated that they have no quarrel with the brokers. However, he does not want the bill to get into a debate of constitutionality if it is passed with the currently proposed Amendment 230. If this amendment is passed there would be two definitions of interest in one Statute. It would deal with general usury

on one hand, and the mortgage brokers on the other. It is the mortgage brokers stand that they are merely mainting the status quo, that is not true. If you are talking about a mortgage broker as being an individual or organization that is hired by a borrower to go out and find a source of money, that type of mortgage broker is not under the usury law at all. That has been stated the Supreme Court case of Pease vs. Taylor (see Attachment C). There is nothing in the law now like what they are asking for in Subsection 3 of Amendment 230. Under this law, they would be under the 12%, but they would be able to charge points at the outset that are wholly uncontrolled. He stated he felt that if you took out Subsection 3 of this bill it would solve the problem, because that would leave the mortgage brokers where they say they want to be.

Senator Close asked Mr. Ashleman if this would be agreeable with his people.

Mr. Ashleman stated that he could see no problem with that, as he had not requested that in the language which he originally proposed.

AB 158 Eliminates limitation on admissibility of evidence of transactions or conversations with or actions of deceased persons.

Barbara Bailey, representing the Trial Lawyer's Association read a statement that was prepared by the Association in support of AB 158 (see Attachment D).

George Vargas, representing the American Insurance Association stated that a dying declaration is admissible as exception to the hearsay rule. Apparently in the course of human experience it is thought that when someone is facing their maker, they are more inclined to tell the truth. A dying declaration is one that is made with the person being cognizant of the fact that he is dying. He feels this has rule and merit and should be retained in the law.

No action was taken on this measure at this time.

AB 172 Revises provisions for placement of children for adoption and permanent free care.

Bill Ivers, Gloria Handley, and Miss Lee from the Welfare Division stated they had passed out their proposals on this bill to the Committee (see Attachment E).

Miss Lee stated that they feel the intent of previous Legislation is that independent adoptive placement should not be made without prior notification of the proposed placement to the Welfare Division. This bill would strengthen that intent.

Senator Ford stated that on Page 2, Lines 28 thru 32, the rights of the people are being changed considerably.

Miss Lee stated that was not their intent.

Senator Ashworth stated that perhaps this came out of the bill drafters office. They may have felt that the people have those rights under statute, whether specified here or not.

Senator Close stated he felt that the reporting time should be 6 months on the investigative time limit.

Joe Braswell, Director, Inter-Tribal Council of Nevada stated he wished to propose two simple admendments to the Committee, and read the reason for their change (see Attachment F)..

No action was taken on this bill at this time.

As the Committee had to go into session on the floor, Senator Close stated they would take AB 168 up at a later date. The meeting was adjourned.

Respectfully submitted,

Virginia C. Letts, Secretary

APPROVED:

Senator Melvin D. Close, Jr., Chairman

ATTACHMENT "A"

1979 REGULAR SESSION (60TH)

ASSEMBLY ACTION	SENATE ACTION	Senate AMENDMENT BLANK
Adopted ☐	Adopted ☐	AMENDMENTS to Senate
Lost ☐	Lost ☐	Bill No. 26 ~~Joint Resolution No.~~
Date:	Date:	BDR 8-187
Initial:	Initial:	Proposed by Committee on Judiciary
Concurred in ☐	Concurred in ☐	
Not concurred in ☐	Not concurred in ☐	
Date:	Date:	
Initial:	Initial:	

Amendment No. 230

May be adopted only after Amendment No. 216

Replaces Amendment No. 170

Amend the bill as a whole by renumbering section 3 (as renumbered) as section 4 and inserting a new section designated section 3, following section 2 (as renumbered), to read as follows:

"Sec. 3. Chapter 645B of NRS is hereby amended to read as follows:

1. For an extension of credit which is secured by a deed of trust or mortgage of real property and which is made by or through a mortgage company, the rate of interest must not exceed the greater of:

(a) Twelve percent per annum; or

(b) If the lowest daily prime rate at the three largest United States banking institutions is 9 percent or more, that lowest daily prime rate plus 3.5 percent.

2. If the rate of interest exceeds 12 percent:

(a) The lender shall certify on the loan document, under penalty of perjury, what the lowest prime rate is on the date of execution of the final loan document.

(b) The lender shall not impose any charge or penalty for

E & E
LCB File
Journal
Engrossment ✓
Bill

Date 3-5-79 Drafted by EWD:ml

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prepayment of all or any part of the loan.

(c) The lender shall not require any compensating balance or use any other device to increase the cost to the borrower of borrowing the net amount of the loan.

3. For the purposes of this section, "interest" means the periodic charge made for the use or forbearance of money, and does not include any charge made or amount included in the principal sum at the time of extending credit as an inducement to extend the credit or as compensation for any service performed in arranging the extension.".

Amend the title of the bill (as amended), after:

"components of interest;" by inserting "providing separately for mortgage companies;".

ATTACHMENT "B"

ATTACHMENT "C"

ARTHUR E. PEASE, A.K.A. EMERY ARTHUR PEASE, APPELLANT, *v.* WESLEY S. TAYLOR, RESPONDENT.

No. 5909

May 4, 1972 496 P.2d 757

Appeal from action on promissory note. First Judicial District Court, Douglas County; Richard L. Waters, Jr., Judge.

Action by lender against borrower to recover amount allegedly due on note. Upon remand, 86 Nev. 195, 467 P.2d 109 (1970), the district court entered judgment for plaintiff, and defendant appealed. The Supreme Court, ZENOFF, C. J., held that where lender deposited $12,000 in escrow through which he received 90-day note for $16,500, and sum in escrow was diminished by $1,100 in "loan fees" paid to lender's agents, the transaction was usurious, and lender could recover only the actual cash advance of $10,900 without any interest thereon. The Court further held that lender was entitled to recover attorney's fees, even though the transaction was usurious where borrower made no offer of judgment nor offer of payment of principal, and lender relied on prior decision which was overruled as to issue of usury in his action, but award of $2,500 for attorney's fee would be modified to $1,500.

Affirmed, as modified.

THOMPSON, J., dissented in part.

Ross & Crow, of Carson City, for Appellant.

Lester H. Berkson, of Stateline, for Respondent.

Prince A. Hawkins and *F. DeArmond Sharp,* of Reno, Amicus Curiae.

1. USURY.
   Burden of proving that a transaction is usurious rests upon the party attacking it.
2. USURY.
   Standard of proof in usury actions is preponderance of the evidence.
3. USURY.
   Extraction of a broker's fee by the lender or his agent is to be considered in computing amount of interest due from the borrower.
4. USURY.
   Court will look to the substance of the transaction and the intent of the parties in determining whether an agreement is usurious.

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5. USURY.

In absence of actual expense, extraction of additional compensation for the use of money under guise of "broker's fee" violates the spirit, if not the letter, of the laws prohibiting usury.

6. USURY.

Although brokers who negotiate loans may be lawfully reimbursed for their services, and extraction by agent, who is authorized to lend money for his principal, of money from the borrower for his own benefit, without knowledge or authority of such principal, does not make the transaction usurious, when a lender, through his authorized agent, makes loans under a general agreement that the lender's agent must look to the borrower for a commission, such action may make the contract usurious, whether the lender knew of the charge or not.

7. USURY.

In light of evidence establishing that broker's commissions in connection with loan were not legitimate loan expenses, and inferring that lender either charged the fee himself or ratified such a charge, broker's fee would be computed as interest in determining whether the agreement was usurious.

8. USURY.

A note is to be tested for usury with reference to the actual sum given by the lender to the borrower, and not by the face of the note.

9. USURY.

In testing for a usurious exaction, a fee or bonus beyond the legal rate of interest constitutes an additional charge for interest.

10. USURY.

Generally, a usury statute is penal in character and must be strictly construed.

11. STATUTES.

To strictly construe a statute does not require a court to emasculate its purpose.

12. USURY.

A usury statute manifests a legislative intent to make it more drastic against usurer and more favorable to the borrower.

13. USURY.

"Excessive rate of interest," within statute providing that any agreement for greater rate of interest than therein specified would be null and void and of no effect as to such excessive rate of interest, includes all interest and not solely the excess. NRS 99.050, subd. 2.

14. USURY.

Where lender deposited $12,000 in escrow through which he received 90-day note for $16,500, and sum in escrow was diminished by $1,100 in "loan fees" paid to lender's agents, the transaction was usurious, and lender could recover only the actual cash advance of $10,900 without any interest thereon; overruling Kline v. Robinson, 83 Nev. 244, 428 P.2d 190 (1967). NRS 99.050.

15. USURY.

Lender, in action against borrower to recover amount allegedly due on note, was entitled to recover attorney's fee, even though the transaction was usurious, where borrower made no offer of

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judgment nor offer of payment of principal, and lender relied on prior decision which was overruled as to issue of usury in his action, but award of $2,500 for attorney's fee would be modified to $1,500.

OPINION

By the Court, ZENOFF, C. J.:

Respondent Taylor commenced this action against appellant Pease to recover $16,500, which he claimed was due under the terms of a 90-day promissory note, plus attorney's fee and costs. The note did not recite any interest rate but did provide that the makers, in case of suit (there were two other makers, but these were not named party defendants in this action), would pay all costs and expenses and such additional sums as the court may adjudge reasonable as an attorney's fee in said suit or action. The district judge found in favor of Taylor and against Pease and awarded him a judgment in the sum of $16,500 plus interest at seven percent per annum running from the date of the note and $2,500 attorney's fee.[1]

Pease has challenged the judgment of the district court on the grounds that (1) the $16,500 award is excessive because it includes usurious interest, (2) the $2,500 awarded as attorney's fee is not an amount supported by the record, and (3) the trial judge erred in allowing seven percent interest from the date of the note on the $16,500 award.

Taylor deposited but $12,000 in the escrow through which he received the note here concerned, and this sum was diminished by $1,100 in "loan fees" paid out of the escrow to his agents. Thus, we are concerned with a $16,500 note representing an actual cash advance of $10,900.[2]

[Headnotes 1, 2]

1. The burden of proving that a transaction is usurious rests upon the party attacking it. McCullough v. Snow, 432

[1]This is the second time this case is before us. See Pease v. Taylor, 86 Nev. 195, 467 P.2d 109 (1970), where we remanded the case to the district court so that adequate findings of fact and conclusions of law could be made by the trial judge, to the end that the issues presented on appeal could be considered by this court.

[2]The same agents also received $2,500 in "loan fees" from another contemporaneous transaction involving appellant, who asks us to view such fees as diminishing further his obligations in the instant case. We decline to do so because the record is unclear concerning the other transaction's relationship to the one before us and concerning the present status of the obligation involved therein.

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P.2d 811 (N.M. 1967); Brocke v. Naseath, 285 P.2d 291 (Cal.App. 1955). A great number of jurisdictions require the usual standard of proof in civil matters, i.e., "preponderance of the evidence," which we now adopt. See Brocke v. Naseath, supra; Knoll v. Schleussner, 247 P.2d 370 (Cal.App. 1952); Dambooraijan v. Woodruff, 214 N.W. 113 (Mich. 1927); 51 A.L.R.2d 1087 (1957).

[Headnote 3]

2. The exaction of a broker's fee by the lender or his agent is to be considered in computing the amount of interest due from the borrower. National American Life Ins. Co. v. Bayou Country Club, 403 P.2d 26 (Utah 1965); Clarke v. Horany, 27 Cal.Rptr. 901, 903 (Cal.App. 1963).

[Headnotes 4–6]

The court will look to the substance of the transaction and the intent of the parties in determining whether an agreement is usurious. Kline v. Robinson, 83 Nev. 244, 428 P.2d 190 (1967). In the absence of actual expense, the exaction of additional compensation for the use of money under the guise of a "broker's fee" violates the spirit, if not the letter, of the laws prohibiting usury. Brokers who negotiate loans may be lawfully reimbursed for their services, as for example, where one negotiates a loan through a third party with a money lender and the latter bona fide lends the money at a legal rate of interest, the transaction is not made usurious merely by the fact that the intermediary charges the borrower with a broker's commission, the intermediary having no legal or established connection with the lender.[3] Or, when an agent authorized to lend money for his principal exacts, without knowledge or authority of such principal, money from the borrower for his own benefit, this does not make the transaction usurious. However, when a lender, through his authorized agent, makes loans under a general agreement that the lender's agent must look to the borrower for a commission, this may make the contract usurious, whether the lender knew of the charge or not.

[Headnote 7]

In the instant case the evidence establishes that the commissions were not legitimate loan expenses. Uncontroverted evidence inferred that the lender either charged the fee himself or ratified such a charge. Pease having met his burden, the

[3]See Altherr v. Wilshire Mortgage Corporation, 104 Ariz. 59, 448 P.2d 859 (1968).

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broker's fee may be computed as interest in the determination of these issues.

[Headnotes 8, 9]

3. A note is to be tested for usury with reference to the actual sum given by the lender to the borrower, and not by the face of the note. Taylor v. Budd, 18 P.2d 333 (Cal. 1933). In testing for an usurious exaction, a fee or bonus beyond the legal rate of interest constitutes an additional charge for interest. Haines v. Commercial Mortgage Co., 255 P. 805 (Cal. 1927); Devers v. Greenwood, 293 P.2d 834 (Cal.App. 1956); Bochicchio v. Petrocelli, 11 A.2d 356 (Conn. 1940); Lydick v. Stamps, 316 S.W.2d 107 (Tex.App. 1958); Gilcrist v. Wright, 94 N.W.2d 476 (Neb. 1959).

4. NRS 99.050 provides in pertinent part:

"1. Parties may agree, for the payment of any rate of interest on money due, or to become due, on any contract, not exceeding, however, the rate of 12 percent per annum . . .

"2. Any agreement for a greater rate of interest than herein specified shall be null and void and of no effect as to such excessive rate of interest."

The note in this case made no express provision for any interest payment. Nevertheless, for the reasons hereinafter set forth, NRS 99.050(2) should be read to bar the lender from recovering any interest if the *rate* has exceeded the allowable 12 percent.

The purpose of laws prohibiting usury is stated in 91 C.J.S. 570–71, Usury § 5:

"Usury statutes form a part of the public policy of the state, so that contracts which are usurious are contrary to the public policy of the state. The intent of usury statutes is to prevent the charge of an excessive rate of interest, or usurious practices, on any pretext whatever. The intent or purpose of the statute applies to extension and forbearance as well as to the original loan.

"Such statutes are enacted for the protection of the borrower and are for the prevention of extortion and unjust oppression by unscrupulous persons who are ready to take undue advantage of the necessitites [sic] of others. They proceed on the theory that a usurious loan is attributable to such an inequality in the relation of the lender and borrower that the borrower's necessities deprive him of freedom in contracting and place him at the mercy of the lender. [Footnotes omitted.]"

As stated by Justice Traynor in Stock v. Meek, 221 P.2d 15, 20 (Cal. 1950):

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"The theory of [the usury] law is that society benefits by the prohibition of loans at excessive interest rates, even though both parties are willing to negotiate them.

". . .

"If no loophole is provided for lenders, and all borrowers save fraudulent ones are protected, usurious transactions will be discouraged."

In the construction of our own statute, the foregoing purpose must be kept in mind. It is also to be remembered that "usury was not illegal at common law; therefore, a statute which prohibits the exaction of usury is the source from whence stems the power of the court in dealing with such matters." Hawthorne v. Walton, 72 Nev. 62, 294 P.2d 364, 59 A.L.R.2d 519 (1956) (overruled on other grounds, 83 Nev. 244, 428 P.2d 190 (1967)).

[Headnotes 10–12]

As a general rule, a usury statute is penal in character and must be strictly construed. Crisman v. Corbin, 169 Ore. 332, 128 P.2d 959 (1942). But to strictly construe a statute does not require a court to emasculate its purpose. A usury statute manifests a legislative intent to make it more drastic against the usurer and more favorable to the borrower. Milo Theater Corp. v. National Theater Supply, 71 Idaho 435, 233 P.2d 425 (1951). The construction of the usury statute by this court in Kline v. Robinson, 83 Nev. 244, 250, 428 P.2d 190 (1967), that the sole penalty for a usurious contract consists of the denial to recover the interest exceeding the 12 percent rate, is a much too mild reprimand.

When compared to our sister jurisdictions, this reprimand amounts to no penalty at all.

The statute (NRS 99.050) makes null and void any agreement calling for a greater "rate of interest . . ." No reference is therein made to the excessive amount of interest as in the statutes of Delaware, Missouri, Ohio, Pennsylvania and Tennessee.[4] It seems logical that all interest be forfeited if the rate is illegal because our statute refers only to the rate, not the excess. By such result the true concept that usury is wrong and should be penalized is thereby met. Instead, by the view upon

[4]*Delaware, Code Ann., Title 6, § 2304:*

"(b) When a rate of interest for the loan or use of money exceeding that established by law has been reserved or contracted for, the borrower or debtor shall not be required to pay the creditor *the excess over the lawful rate . . .*"

Missouri Ann. Code, § 408.050:

". . . Any person who shall violate the foregoing prohibition of this

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which the lower court relied, the lender suffers no penalty at all for charging an illegal rate.

In Arizona, if usurious interest is charged, the lender receiving such usurious interest loses the right not only to the excess interest but all interest as well. ARS 44–1202.

In Oregon, the usury statute provides, "[i]f it is ascertained in any action or suit brought on any contract that a rate of interest has been contracted for greater than is authorized by this chapter in money, [ORS 82.010(2) authorizes a maximum of 10 percent] . . . it shall be deemed usurious, and shall work a forfeiture of the entire debt so contracted to the county school fund of the county wherein such suit is brought." ORS 82.120(5). This statute was construed in Crisman v. Corbin, supra.

In California, when an agreement is usurious, any stipulation to pay interest is null and void, and no interest whatsoever is recoverable by the lender. West's Civil Code, § 1916–2; Stephans v. Herman, 225 Cal.App.2d 671, 37 Cal.Rptr. 746 (1964). As summarized by E. Glushon, The California Usury Law, 43 Cal. St. B. J. 56, 65 (1968).

"The borrower may recover all interest paid within two years on an usurious loan, not merely the usurious excess, in an action for money had and received. Such action must be brought within two years of payment but where the lender sues, the statute of limitations does not preclude the borrowers from offsetting all interest paid, so as to reduce the principal of the loan. [Footnotes omitted.]"

Furthermore, in California, a plaintiff is entitled to recover treble the amount of interest paid under the note during the

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section shall be subject to be sued, for any and all sums of money *paid in excess* of the principal and legal rate of interest of any loan . . ."

Ohio Rev. Code Ann., § 1343.04:

"Payments of money or property made by way of usurious interest, whether made in advance or not, *as to the excess of interest* above the rate allowed by law at the time of making the contract, shall be taken to be payments made on account of principal; and judgment shall be rendered for no more than the balance found due, after deducting the excess of interest so paid."

Pennsylvania Stat. Ann., Title 41, § 4:

"When a rate of interest for the loan or use of money, exceeding that established by law, shall have been reserved or contracted for, the borrower or debtor shall not be required to pay to the creditor *the excess over the legal rate* . . ."

Tennessee Code Ann., § 47–14–112:

"A defendant sued for money may avoid *the excess over legal interest*, by a plea setting forth the amount of the usury." (Emphasis supplied.)

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year preceding the action. Taylor v. Budd, 18 P.2d 333, 334 (Cal. 1933); West's Civil Code § 1916–3(a).[5]

Even in Nevada, in legislation entitled the Nevada Installment Loan and Finance Act (NRS 675.010–675.480, applicable to loans under $7,500), the legislature provided penalties comparable to those in the jurisdictions above related for any violation of the statutory provisions. NRS 675.480 provides:

"Penalties for charging, contracting for, or receiving amounts in excess of charges permitted by chapter.

"1. If any amount in excess of the charges permitted by this chapter is charged, contracted for, or received, except as the result of an accidental and bona fide error of computation, the contract of loan shall be void, and the licensee shall have no right to collect or receive any principal, charges or recompense whatever.

"2. The licensee and the several members, officers, directors, agents and employees thereof who shall have participated in such violation shall be guilty of a misdemeanor." See also in this connection NRS 97.305.

[Headnote 13]

Therefore, it is our interpretation of NRS 99.050(2), stating that "[a]ny agreement for a greater rate of interest than herein specified shall be null and void and of no effect as to such excessive rate of interest[,]" that such excessive rate of interest includes all interest and not solely the excess.

The Nevada case holding contrary to the foregoing position, Kline v. Robinson, supra, can be distinguished on two grounds. First, the major issue in that case was whether a borrower could recover excess usurious interest voluntarily paid. Hawthorne v. Walton, supra, was overruled, and the court's attention

[5]West's Civil Code § 1916–3 also includes the following:

"(b) Any person who willfully makes or negotiates, for himself or another, a loan of money, credit, goods, or things in action, and who directly or indirectly charges, contracts for, or receives with respect to any such loan any interest or charge of any nature, the value of which is in excess of that allowed by law, is guilty of loan-sharking, a felony, and is punishable by imprisonment in the state prison for not more than five years or in the county jail for not more than one year. This subdivision shall not apply to any person licensed to make or negotiate, for himself or another, loans of money, credit, goods, or things in action, or expressly exempted from compliance by the laws of this state with respect to such licensure or interest or other charge, or to any agent or employee of such person when acting within the scope of his agency or employment." (Amended by Stats. 1970, c. 784, p. 1497, § 1, subject to approval by the people at a special election consolidated with the general election to be held Nov. 3, 1970.)

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was focused primarily on that facet of the case. The statement that only the excess (as opposed to all) interest would be recovered was interjected summarily. Second, when the court in *Kline* stated, 83 Nev., at 250, that "such excessive rate of interest over that allowed by statute" is recoverable by the borrower, the court considered neither legislative intent nor public purpose and cited no authority in support of its statement "over that allowed by statute." Therefore, the precise issue was not subjected to such judicial deliberation as to forestall questioning at this time.

[Headnote 14]

We conclude therefore that NRS 99.050(2) should be construed, as is clearly permitted by a reading of its words, so that any agreement for a usurious rate of interest is null and void as to all interest whatsoever.

[Headnote 15]

Under the circumstances the award of attorney's fee, having been predicated on the trial court's assumption that the full recovery was proper, becomes excessive. Litigation was unnecessary and the client should be responsible for his attorney's fee. Yet, the borrower made no offer of judgment nor offer of payment of the principal and we expect that the lender relied upon our Kline v. Robinson, supra, which we now overrule as to the issue of usury. Under the circumstances we allow the attorney's fee modified, however, to the sum of $1,500. Further discussion concerning computation of interest is obviated.

The judgment of the trial court is affirmed, but modified, so that judgment will enter for $10,900 plus $1,500 attorney's fee and costs of the suit.[6]

Affirmed, as modified.

BATJER, MOWBRAY, and GUNDERSON, JJ., concur.

THOMPSON, J., dissenting in part only:

Parties may agree for the payment of any rate of interest not exceeding, however, the rate of 12 percent per annum. NRS 99.050(1). Any agreement for a greater rate of interest is void and of no effect as to such excessive rate of interest. NRS

[6]The court wishes to express its appreciation to Prince A. Hawkins and F. DeArmond Sharp of the law firm Hawkins, Rhodes & Hawkins for filing an Amicus Curiae brief in this appeal at the request of the court.

EXHIBIT C

99.050(2). It is clear to me that an agreement for a rate of interest greater than 12 percent per annum is void only as to "such excessive rate," that is, the rate in excess of 12 percent per annum. In Kline v. Robinson, 83 Nev. 244, 428 P.2d 190 (1967), this court so ruled. Although we have no duty to follow an absurd or obsolete decision and blindly adhere to stare decisis (see dissenting opinion, Sargeant v. Sargeant, 88 Nev. 223, 495 P.2d 618 (1972)), the interpretation placed upon NRS 99.050 by this court in Kline is sensible. Consequently, I think that it is unwise to void such a recent holding and intrude upon the legislative province. Otherwise, I agree with today's opinion.

FRANKLIN DELONAR HIMMAGE, APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 6246

May 4, 1972 496 P.2d 763

Appeal from conviction of burglary. Second Judicial District Court, Washoe County; John F. Sexton, Judge.

A motion to suppress evidence was denied, and defendant was convicted in the district court and he appealed. The Supreme Court, MOWBRAY, J., held that where the parolee as a condition of his parole had agreed in writing that his parole officer could search his person, his residence or auto at any time of the day or night upon any occasion when the officer believed there was reasonable cause to conduct such search, and where additionally the parolee at time of search gave his parole officer express permission to search the parolee's apartment, and the search was made as a result of information received from a police officer that the parolee had been involved in a burglary, a nighttime search of the parolee's apartment by the parole officer was constitutionally permissible.

Affirmed.

H. Dale Murphy, Public Defender, and *William Whitehead, III*, Deputy Public Defender, Washoe County, for Appellant.

Robert List, Attorney General, Carson City; *Robert E. Rose*, District Attorney, and *Gary R. Silverman*, Deputy District Attorney, Washoe County, for Respondent.

EXHIBIT C

[illegible]

to leave [illegible] [illegible] [illegible] [illegible]
[illegible] x it would [illegible]
only [illegible] [illegible].

"[illegible] the [illegible] [illegible]"
"[illegible] [illegible] [illegible] [illegible]
the rate of % [illegible] by
[illegible] [illegible].

[illegible] would [illegible]
Heustadt. [illegible] [illegible] to
[illegible] "interest rate" [illegible] in [illegible].

Under [illegible] [illegible] are [illegible] to [illegible]

"Can [illegible] line with
10% w/o [illegible]
"Certainly not"

10 points common to industry

[illegible] [illegible] [illegible]
[illegible] [illegible] x

Can If you [illegible] line with 10%
why do you need this.

[illegible]

Barbara Bailey
Trial Lawyer's Association

The "dead man"statute has its roots in the mid-1500's, when the courts precluded people from testifying on their own contracts. It was called "interest disqualification." The basis of the disqualification was grounded in the belief that people are basically dishonest and would certainly lie to further their own ends.

In 1971, Nevada adopted the Federal evidence code and repealed the "dead man" statute. By the next session of the Legislature, the statute was re-adopted to require corroboration of a deceased's testimony. The only states to date which retain the law are Nevada and New Mexico, the remaining states follow the Federal rules of evidence,

The dead man's statute applies in both civil and criminal cases. The problem is that the testimony of a decedent is always hearsay. The exception to the hearsay rule would be a dying declaration, but at that point it must be corroborated by two individuals if it is to be admitted into evidence.

Example: Case of man beat to death in Clark by police,when dying, identified guilty party. Not admissible, only one witness.

The defenders of the rule conclude that the estates of the dead must not be in jeopardy. But to draw on the philosophy of Wigmore on Evidence, first published in 1904, "are not the estates of the living endangered daily by the keeping of the rule."

The fact that evidence, otherwise admissible, is excluded under this rule, precludes a fair and just resolution of a problem.

The repeal of the statute has the support of the Clark County district judges, the Clark County District Attorney, and the Nevada Trial Lawyer's Association. Their comments have been that the law is "illogical," and "fosters injustice."

I urge passage of AB 158.

ADOPTION LEGISLATION - NRS CHAPTER 127

SECTION 127.240

We feel that the intent of previous adoption legislation was that an independent adoptive placement should not be made without prior notification of the proposed placement to the Welfare Division. Some attorneys have felt that prior notification is not required if natural parents or guardians arrange the adoptive placements. Currently NRS 127.240 does not mention the requirement of prior notification. Approximately 2/3 of all independent adoptive placements are made without prior notification. We have found the courts reluctant to remove children from independent adoptive placements even though the Welfare Division has found the placements unsuitable. These placements have occurred because the Welfare Division did not receive notification of the proposed placement.

Therefore we recommend adding to NRS 127.240 that the requirements of NRS 127.280 apply for placements arranged by parents or guardians.

SECTIONS 127.260 and 127.270

We recommend deleting NRS 127.260 and revising NRS 127.270 since temporary licenses can no longer be issued for child placing agencies.

SECTION 127.280

We propose the revision of NRS 127.280 to simplify procedures. Currently the law requires one investigation when a petition for adoption is filed and another investigation when a notification of a proposed adoptive placement is received. This revision would eliminate the need for two investigations. Currently both types of investigations cover the same areas.

SECTION 127.310

We propose the revision to NRS 127.310 to clarify that other pertinent sections of this chapter apply to this section. As it is currently written, NRS 127.310 only allows for the adoptive placements by licensed child placing agencies. It does not allow for placements by the Welfare Division, natural parents or guardians. Therefore we propose adding references to the other sections of the chapter that allow for placements by the Welfare Division, natural parents and guardians.

ML/fb

INTER-TRIBAL COUNCIL OF NEVADA

SOCIAL SERVICES PROGRAM
ROOM 121, CAPITAL PLAZA BUILDING
1000 EAST WILLIAM STREET
CARSON CITY, NEVADA 89701
TELEPHONE (702) 882-6663

March 6, 1979

MEMORANDUM

TO : Committee on Judiciary of the Senate, 60th Nevada Legislature

FROM: Joe Braswell, Director, ITCN Social Services Program Joe Braswell

RE : A.B. 172.

I wish to propose two simple amendments to A.B. 172 as follows:

At line 13 on page 1, insert before Sec. 2, "4. The authority to accept relinquishments and consent to the adoption of children does not apply in situations where the Indian Child Welfare Act of 1978 (25 USC §§ 1901 et seq.) applies".

At line 8 on page 2, insert before Sec. 3, "This section does not apply when an Indian tribe or Indian tribal organization makes a placement under the provisions of the Indian Child Welfare Act of 1978 (25 USC §§ 1901 et seq.)".

The reason for these amendments is that a Federal law was enacted by the last session of Congress which broadened the authority of Indian tribes in matters of child custody cases for Indian children, including adoptions and free permanent care. This authority of the tribe extends beyond the boundaries of the reservation when a child is domiciled off-reservation. Therefore, I believe State statutes should make it clear that a license from the welfare division as a child placing agency does not allow such agency to place Indian children in contravention of P.L. 95-608, the Indian Child Welfare Act of 1978. I also believe Nevada statutes should make it clear that the regulatory authority of the State does not extend to Indian tribes or tribal organizations making placements of Indian children off-reservation under the provisions of the Indian Child Welfare Act of 1978.