COMMERCIAL LAW—THE INDUSTRIAL LOAN ACT—POSSIBILITY OF RECOVERY OF PRINCIPAL BY LENDER EVEN AFTER VIOLATION

In *Georgia Investment Co. v. Norman*,[1] the Georgia Supreme Court held that since the Industrial Loan Act[2] does not permit a lender to disburse a one dollar notary fee to one of its employees from the amount loaned to the borrower,[3] such disbursement will result in usurious interest being charged the borrower.

The contract which was the subject of this litigation was the last of sixteen similar contracts which had been executed over a period of nine years. The plaintiff, Nathaniel Norman, had borrowed money under the contracts from the defendant loan company; the contracts were subject to the provisions of the Industrial Loan Act.[4] The plaintiff-borrower brought suit to have the loan contract declared void, a security deed cancelled, and his money refunded. In its "cross-action," the defendant loan company sought recovery of $2015.50 which it asserted the plaintiff still owed under the contract. The trial court, in granting summary judgment to the plaintiff and denying any recovery to the loan company,[5] held: (1) that the loan company did charge, contract for and receive the notary fee in violation of Ga. Code Ann. §25-9903 (Rev. 1971),[6] (2) that the provision of the Act which declares void all loan contracts in violation of the Act was not "confiscatory,"[7] and (3) that the doctrine of *de minimus non curat lex* was

1. 231 Ga. 821, 204 S.E.2d 740 (1974).

2. GA. CODE ANN. §25-301 *et seq.* (Rev. 1971) is designed to regulate the business of making loans of $2500 or less and limits the interest rate on such loans to eight per cent per annum but permits service charges which may increase total charges to a five per cent per month maximum. GA. CODE ANN. §25-315(b) (Rev. 1971); GA. CODE ANN. §57-117 (Rev. 1971). The Act specifically defines and limits any other charges which may be made. GA. CODE ANN. §25-315 (Rev. 1971).

3. Although a one dollar fee was permitted under the original Act, Ga. Laws, 1955, p. 431 at 440-1, that charge was eliminated by Ga. Laws, 1964, p. 288 at 291. *See* Berrien v. Avco Fin. Services, Inc., 123 Ga. App. 862, 182 S.E.2d 708 (1971).

4. 231 Ga. at 822-3, 204 S.E.2d at 741-2.

5. *Id.* at 822, 204 S.E.2d at 741.

6. This section provides that "[a]ny person . . . who shall knowingly charge, contract for, receive and collect charges in excess of those permitted under such Chapter shall be punished as for a misdemeanor. Any loan contract made in violation of such Chapter shall be null and void."

The trial court stated: "[I]n our view the Loan Company received benefit from the collection of notary fees at least indirectly, in that the job held by Gene Pethel would be more attractive and easier to fill with a qualified person by reason of the additional compensation or supplement to [the] regular salary in the form of notary fees." 231 Ga. at 824, 204 S.E.2d at 743.

7. 231 Ga. at 825, 204 S.E.2d at 743. The court rejected the decision in Orme v. Lendahand Co., 128 F.2d 756 (D.C. Cir. 1942), since that decision also recognized that "the penalty imposed by the Legislature, is '. . .apparently valid as a preventative against usurious interest'." 231 Ga. at 825, 204 S.E.2d at 743.

not applicable in this case.[8]

The Georgia Supreme Court upheld the trial court's decision in full. It then refused to consider the question of whether the loan company could recover the $2015.50 in principal since at the trial the loan company had sought recovery only on the contract and the issue of a recovery for "money had and received"[9] could not be raised on appeal.[10]

The decision of the court is hardly surprising in light of the line of authority which preceded it. Since the passage of the Small Loan Act of 1920,[11] the predecessor of the present Act, Georgia courts have strictly construed these statutory provisions as being in derogation of the common law.[12] Consequently, charges not expressly authorized by the Act have been held to be usurious even when they involved only nominal amounts.[13] These considerations, plus the 1964 Amendment which prohibited the collection of the one dollar fee,[14] made the decision in this case readily predictable.

Perhaps the importance of *Georgia Investment Co. v. Norman* lies in the dictum engaged in by individual members of the court with regard to the question of whether a lender can recover the principal loaned under a loan contract voided as a result of a violation of the provisions of the Industrial Loan Act. Surprisingly, this question has never been fully addressed by the courts since the Act's passage in 1955. This makes the dictum of the individual members of the court quite interesting because the justices hint at their respective dispositions toward this issue.

While refusing to rule on the question of recovery of principal in the instant case, the majority of the court cited the decision of the court of appeals in *Abrams v. Commercial Credit Plan, Inc.*[15] which stated that

> [t]here is law to the effect that an action in assumpsit, or as is commonly termed, 'an action for money had and received' may be available to re-

8. *Id.* "[W]e do not believe we have that discretion in this matter . . . it is our view that we must strictly construe the Industrial Loan Act . . . ."

9. The basis for an action for money had and received is that the "defendant has received money which, in equity and good conscience, should have been paid to the plaintiff and under such circumstances that he ought to pay it over." BLACK'S LAW DICTIONARY 1157 (4th ed. 1968).

10. 231 Ga. at 826-7, 204 S.E.2d at 744.

11. Ga. Laws, 1920, p. 215.

12. *See* Denson v. Peoples Bank, 186 Ga. 619, 198 S.E. 666 (1938).

13. An excess charge of only 12 cents in one month resulted in forfeiture in Hartsfield Co. v. Fulwiler, 59 Ga. App. 194, 200 S.E. 309 (1938). Likewise, 24 cents was held to be usurious in Jobson v. Masters, 32 Ga. App. 60, 122 S.E. 724 (1924). However, in Bailey v. Williams, 155 Ga. 806, 118 S.E. 354 (1923), it was held that a mistake of a few cents in calculation would not result in forfeiture unless purposely made.

14. *See* note 3, *supra.*

15. 128 Ga. App. 520, 197 S.E.2d 384 (1973). This too was a case in which the lender sought recovery only on the contract at the trial level and thus the court, on appeal, refused to consider the question of whether the lender could recover its principal as "money had and received."

> cover money to which one party is entitled, and which the opposing party, in equity and good conscience is not entitled to retain.[16]

Justice Jordan, in his dissent, was of the opinion that no recovery of principal was allowable under the Act.[17] However, Justices Gunter and Ingram stated that a lender could recover in "an appropriate assumpsit claim."[18] They noted that while the Small Loan Act of 1920 and its Amendment in 1935 prohibited any recovery of principal,[19] the Legislature repealed that provision, substituting Ga. Code Ann. §25-9903 which merely provides that the loan contract "shall be null and void."[20] Thus they maintained that even though the loan contract was null and void, there remained "an implied obligation on the borrower to repay the actual money loaned to him."[21]

The cases cited in *Abrams*[22] indicate a possible means of recovery of principal which has apparently gone unnoticed by attorneys representing lending institutions[23] and legal scholars considering the Act.[24] These earlier cases cite the common law form of action of "indebitatus assumpsit" by which payment may be enforced where the terms of the special agreement have been performed on one side, and nothing is to be done on the other except make a money payment.[25] Furthermore, the court in *Meager v. Linder Lumber Co.* stated that this implied promise to pay "will still be recognized by our courts."[26] Later cases, cited in *Abrams*, serve as authority for the proposition that "a count based upon an express contract may be joined with a count alleging facts to raise an implied promise to pay for services, i.e. *quantum meruit*, in one petition."[27] From these considerations, it would appear that a lender could reserve at least the possibility

16. *Id.* at 522, 197 S.E.2d at 385-6.

17. 231 Ga. at 828, 204 S.E.2d at 745.

18. *Id.* at 827, 204 S.E.2d at 744.

19. Ga. Laws, 1920, p. 215 at 219, stated: "[I]f interest or charges in excess of those permitted by this Act shall be charged, contracted for or received the contract of loan shall be null and void and the licensee shall have no right to collect or receive any principal, interest, or charges whatsoever."

20. *See* note 6, *supra.*

21. 231 Ga. at 828, 204 S.E.2d at 745.

22. *See* note 15, *supra.*

23. Although in both *Abrams* and *Georgia Inv. Co.* an action for "money had and received" was asserted, it was used only on appeal and thus could not be considered. *See* notes 10 and 15, *supra.*

24. *See* Saliba, *The Georgia Industrial Loan Act: An Analysis,* 7 MERCER L. REV. 297, 302 (1956); Moore, *The Georgia Industrial Loan Act: The Debtor's Perspective,* 24 MERCER L. REV. 545, 547 (1973).

While neither of these articles expressly considered the issue, both assume that the penalty imposed by GA. CODE ANN. §25-9903 requires a forfeiture of principal as well as interest.

25. *See* Hill v. Balkcom, 79 Ga. 444, 5 S.E. 200 (1888); Hancock v. Ross, 18 Ga. 364 (1855).

26. 1 Ga. App. 426, 428, 57 S.E. 1004-05 (1907) (dictum).

27. Millican Elec. Co. v. Fisher, 102 Ga. App. 309, 116 S.E.2d 311, 312 (1960). *See also* Miller v. Southern Ry., 21 Ga. App. 367, 94 S.E. 619 (1917); Brannen v. Lanier, 97 Ga. App. 30, 102 S.E.2d 96 (1958); Kraft v. Rowland & Rowland, 33 Ga. App. 806, 128 S.E. 812 (1925).

of the recovery of his principal, in the event that recovery on the contract was denied, by joining the action on the contract with an action for "money had and received" in two counts in one petition.

If one wonders why this method has not been utilized in the past, the answer probably lies in the fact that since the 1920 Act expressly provided for the forfeiture of principal,[28] it has been generally assumed that the same penalty existed under the 1955 Act even though the "forfeiture of principal" provision was deleted from the penalty clause.[29] Another reason for the oversight may be the fact that only with the increase of the maximum loan amount from $300 to $2500[30] have the sums recoverable risen above the expense of litigation in these suits.[31]

Whatever the reason for this theory of recovery of principal not being used in the past, in light of the dicta in *Georgia Investment Co. v. Norman,* it now seems that one's chances of recovery under this theory are good. If the application of this theory does, in fact, "eviscerate" the Act's deterrent effect on "loansharking,"[32] it might be suggested that the remedy lies with the Legislature since nowhere does Ga. Code Ann. §25-9903 provide for the forfeiture of principal.

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28. *See* note 19, *supra.*

29. *See* note 24, *supra.*

30. Ga. Laws, 1920, p. 215 at 219, limited the amount of loans under the Small Loan Act to $300 while Ga. Laws, 1955, p. 431 at 432 limits loans under the Industrial Loan Act to $2500.

31. *See* Moore, *supra* note 24, at 574.

32. This fear was expressed by Justice Jordan in his dissenting opinion. 231 Ga. at 828, 204 S.E.2d at 745.