

JOURNAL OF THE SENATE [May 28, 1971]

STATE OF WISCONSIN

Senate Journal

Eightieth Session

FRIDAY, May 28, 1971.

9:00 o'clock A.M.

The senate met.

The senate was called to order by the president pro tempore of the senate.

The prayer was offered by Senator Swan.

The calling of the roll was dispensed with, upon motion of Senator Roseleip, with unanimous consent.

AMENDMENTS OFFERED

Senate substitute amendment 1 to **Senate Resolution 28** by Senator Lorge.

BILLS INTRODUCED

Read first time and referred:

Senate Bill 564

Relating to a reward for informants of littering violations.

By Senator Lipscomb.

To committee on Natural Resources.

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COMMITTEE REPORT

The committee on Commerce, Labor, Taxation, Insurance and Banking reports and recommends for introduction:

Senate Bill 565

Relating to various highway safety measures, automobile insurance, mandatory arbitration of certain lawsuits, wrongful death, contributory negligence, contingent fees, granting rule-making power and providing penalties.

Introduction; Ayes, 5; Noes, 0.

Read first time and referred to committee on Judiciary.

GERALD D. LORGE,
Chairman.

PETITIONS AND COMMUNICATIONS

Senate Petition 138

A petition by 444 citizens of Wisconsin in opposition to Senate Bill 138.

Introduced by Senator Steinhilber.

Read and referred to committee on Education.

Senate Petition 139

A petition circulated by 98 citizens from Milwaukee County opposing any form of public aid to private and religious schools.

Introduced by Senator Whittow.

Read and referred to committee on Education.

Senate Petition 140

A petition by 26 citizens of the 3rd Senatorial District opposing any form of public aid to private and religious schools, direct or indirect.

Introduced by Senator Kendzierski.

Read and referred to committee on Education.

Senate Petition 141

A petition by 307 residents of the 15th District in opposition to any form of public aid to private and religious schools, direct or indirect.

Introduced by Senator Swan.

Read and referred to committee on Education.

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Senate Petition 142

A petition signed by 1,028 residents of the 27th Senatorial District opposing public aid to private or parochial schools.

Introduced by Senator Bidwell.

Read and referred to committee on Education.

Senate Petition 143

A petition by 229 citizens of the State of Wisconsin petitioning the Senate to strongly oppose any form of public aid to private and religious schools, direct or indirect.

Introduced by Senator Soik.

Read and referred to committee on Education.

Senate Petition 144

A petition by 48 citizens of the County of Milwaukee petitioning the Senate to support the Midwest Medical Center in Madison.

Introduced by Senator Soik.

Read and referred to committee on Health and Social Services.

Senate Petition 145

A petition by 75 residents of the 18th Senatorial District opposing Senate Bill 138.

Introduced by Senator Hollander.

Read and referred to committee on Education.

Senate Petition 146

A petition from 25 constituents from Kenosha County in opposition to any form of public aid to private schools.

Introduced by Senator Lourigan.

Read and referred to committee on Education.

Senate Petition 147

A petition by 60 residents of the 25th Senatorial District supporting Senate Bill 163, and the services offered The Honorable Veterans of Wisconsin at the Grand Army Home at King.

Introduced by Senator Cirilli.

Read and referred to committee on Governmental and Veterans' Affairs.

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Senate Petition 148

A petition by 15 residents of the 25th Senatorial District in opposition to Assembly Bill 584, "Double Bottom Truck Legislation."

Introduced by Senator Cirilli.

Read and referred to committee on Transportation.

To the Honorable Senate:

Pursuant to s. 14.017 (1) (d) I hereby appoint to the Highway Safety Council the following members of the Senate Highway Committee:

Senator Casimir Kendzierski

Senator Reuben LaFave

ROBERT P. KNOWLES,
President Pro Tempore
of the Senate.

**The State of Wisconsin
Department of Justice
Madison**

May 28, 1971.

The Honorable, the Senate:

By **Resolution 11, S**, you have requested my opinion as to the constitutionality of **Bill 277, S**, which would create sec. 138.06 (6), Wis. Stats., to read as follows:

"138.06 (6) In connection with a sale of goods or services on credit or any forbearance arising therefrom prior to October 9, 1970, there shall be no cause of action under this section or allowance of penalties, forfeitures or other relief under this section for violation of s. 138.05, except as to those transactions on which an action has been reduced to a final judgment as of the effective date of this subsection (1971)."

If enacted into law **Senate Bill 277** would have the effect of retroactively abrogating the civil and criminal penalties for usury in sec. 138.06, Stats., as applied to credit sales of goods or services prior to October 9, 1970, the date on which the Wisconsin Supreme Court handed down its decision in *State v. J. C. Penney Co.* (1970), 48 Wis. (2d)

125, 179 N. W. (2d) 641. Although the bill would prohibit the application of these penalty provisions as to certain past transactions, it would not affect the prohibition against usury nor would it affect any common law or other remedy for usury not set forth in sec. 138.06, Stats.

It is a general rule of statutory construction in Wisconsin that statutes are not to be construed as having a retroactive effect unless it shall plainly appear that it was so intended by the legislature, and not even then if such construction would impair vested or constitutional rights. *Department of Revenue v. Dziubek* (1970), 45 Wis. (2d) 499, 173 N. W. (2d) 642; *Mosing v. Hagen* (1967), 33 Wis. (2d) 636, 141 N. W. (2d) 194; *Pawlowski v. Eskofski* (1932), 209 Wis. 189, 244 N. W. 611; *State v. Atwood* (1860), 11 Wis. *423; sec. 990.04, Stats. Since it is quite clear that Senate Bill 277 is intended to apply retroactively, the principal question is whether the bill would impair any vested or constitutional rights.

It is well-settled that there is no vested right in a penalty or forfeiture under the usury laws, but that parties to usurious contracts hold any right they may have to penalties subject to legislative modification or repeal so as to affect causes of action and defenses even in pending actions upon contracts previously made. *Ewell v. Daggs* (1883), 108 U. S. 143, 27 L. Ed. 682, 2 Sup. Ct. 408; *Petterson v. Berry* (9th Cir. 1903), 125 F. 902; *Tel Service Co. v. General Capital Corporation* (Sup. Ct. Fla. 1969), 227 So. (2d) 667; *Davis v. General Motors Acceptance Corporation* (1964), 175 Neb. 865, 127 N. W. (2d) 907; 45 Am. Jur. (2d), Interest and Usury, sec. 13, at 26; 16 CJS, Constitutional Law, sec. 254, at 1246; 82 CJS, Statutes, sec. 439 at 1014. Each of the above cases involved the retroactive repeal of statutory penalties permitting either the recovery of all interest or all interest and principal under usurious contracts. Similarly, under sec. 138.06, Stats., any contract charging in excess of the usury law maximum is rendered unenforceable as to all interest and the first \$2,000 of principal and the borrower may recover said amounts if paid. Section 138.06 (1) and (3), Stats.

As to the constitutionality of the retroactive repeal of such penalties, Justice Matthews in the leading case of *Ewell v. Daggs*, supra, at 108 U.S. 150, stated as follows:

"The effect of the usury statute of Texas was to enable the party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform, construction placed upon such statutes. And it has been quite as generally decided that the repeal of such laws, without a saving clause, operated retrospectively, so as to cut off the defense for the future, even in actions upon contracts previously made. And such laws, operating with that effect, have been upheld, as against all objections on that ground that they deprived parties of vested rights, or impaired the obligation of contracts.'"

Although there is no Wisconsin law with respect to the retroactive abrogation of statutory penalties under the usury law, the retroactive repeal of statutes providing penalties has been upheld in numerous other areas of the law. See *Plankinton Packing Co. v. Wisconsin Tax Comm.* (1929), 198 Wis. 368, 224 N. W. 121; *Miller v. Chicago & N. W. R. Co.* (1907), 133 Wis. 183, 113 N. W. 384; *State v. Stone* (1877), 43 Wis. 481; *Rood v. The Chicago, Milwaukee and St. Paul Railway Co.* (1877), 43 Wis. 146. Thus, there exists ample precedent supporting the proposition that the usury penalties in sec. 138.06, Stats., may be retroactively abrogated.

Since Senate Bill 277 does not purport to prohibit any remedy other than those specifically contained in sec. 138.06, Stats., the borrower still possess the common law right to recover any interest paid in excess of the maximum usury rate in an action for money had and received. *Fay v. Lovejoy* (1866), 20 Wis. *403; *Wood v. Lake* (1860), 13 Wis. *84. In addition, a usurious contract of portions of such a contract may be determined by the Courts to be void as violative of the prohibition against usury in sec. 138.05, Stats. *Austin v. Burgess* (1874), 36 Wis. 186; *Morton v. Rutherford* (1864), 18 Wis. *298. And see *Perma-Stone v. Merkel* (1949), 255 Wis. 565, 39 N. W. (2d) 730; *Menominee River B. Co. v. Augustus Spies L. & C. Co.* (1912), 147 Wis. 559, 571, 132 N. W. 1118; *Harper v. Middle States Loan, Bldg. & Const. Co.* (1904), 55 W. Va. 149, 46 S. E. 817; *Baum v. Thoms* (1898), 150 Ind. 357, 50 N. E. 357. Thus, the proposed statute would not take away all remedies of the borrower and, therefore, would not violate Art. I,

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Sec. 10, of the United States Constitution, relating to the impairment of contracts, or Art. I, Sec. 9, of the Wisconsin Constitution, relating to the guarantee of a remedy for all injuries or wrongs. See *Forbes Pioneer Boat Line v. Board of Commissioners* (1922), 258 U. S. 338, 66 L. Ed. 647, 42 Sup. Ct. 325; *State ex rel. Blockwitz v. Diehl* (1929), 198 Wis. 326, 223 N. W. 852; *Von Baumbach v. Bade* (1859), 9 Wis. *559.

The only additional constitutional question is whether the proposed legislation involves an unreasonable classification. In light of the strong presumption in favor of the legislature's judgment in establishing reasonable classifications, it is my opinion that Senate Bill 277 would withstand challenge on this ground. See generally *State ex rel. Baer v. Milwaukee* (1967), 33 Wis. (2d) 624, 148 N. W. (2d) 21; *State ex rel. Ford Hopkins Co. V. Mayor* (1937), 226 Wis. 215, 276 N. W. 311; *State ex rel. Carnation M. Co. v. Emery* (1922), 178 Wis. 147, 160, 189 N. W. 564; *Kiley v. Chicago, M. & St. P. R. Co.* (1910), 142 Wis. 154, 125 N. W. 464. This conclusion is reenforced by the specific application of this rule in the area of usury. See *Country Motors v. Friendly Finance Corp.* (1961), 13 Wis. (2d) 475, 485, 109 N. W. (2d) 137; 45 Am. Jur. 2d, Interest and Usury, Sec. 6, at page 20. As stated in the *Country Motors* case, *supra*, at 13 Wis. (2d) 485 (citing *State v. Neveau* (1941), 237 Wis. 85, 99, 294 N. W. 796, 296 N. W. 622) :

“‘[T]he classification made by the legislature is presumed to be valid unless the court can say that no state of facts can reasonably be conceived that would sustain it.’”

It is, therefore, my legal opinion that the Courts would find Senate Bill 277 constitutional if it were enacted into law. This opinion is provided pursuant to the request as set forth in Senate Resolution 11 which relates solely to the issue of constitutionality. This opinion does not address itself to the several important public policy questions raised by such proposed legislation.

Sincerely yours,

ROBERT W. WARREN,
Attorney General.

CAPTION: Senate Bill 277, relating to the retroactive abrogation of penalties under sec. 138.06, Stats., would be constitutional if enacted into law.

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MESSAGE FROM THE ASSEMBLY

By Thomas P. Fox, chief clerk.

Mr. President:

I am directed to inform you that the assembly has adopted and asks concurrence in:

Motion Under Joint Rule 26:

A joint certificate of Congratulations by Representative Azim; co-sponsored by Senator Roseleip for Millard H. Gundlach on being named outstanding vocational agriculture instructor for 1971 in the U.S.

Read and concurred in.

And Assembly Joint Resolution 20

And passed and asks concurrence in:

Assembly Bill 130

MESSAGE FROM THE ASSEMBLY CONSIDERED

Assembly Joint Resolution 20

A joint resolution relating to establishing a second home for veterans.

By Representatives Atkinson, Looby, Rutkowski and Lynn.

Read and referred to committee on Governmental and Veterans' Affairs.

Assembly Bill 130

An act to repeal 6.92 (3) (i); to amend 6.10 (4), (6) and (8) and 6.92 (3) (h) and (j); and to create 6.30 (4) and 6.92 (3) (k) to (p) of the statutes, relating to residency qualifications for voting.

By Legislative Council.

Read first time and referred to committee on Governmental and Veterans' Affairs.

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Upon motion of Senator Kendzierski the senate adjourned
until 10:00 A.M. Tuesday, June 1.

CHIEF CLERK'S CORRECTIONS

Suggested by Legislative Reference Bureau.

Senate Bill 375

In line 1, "894.45" is changed to "895.45".

Senate Bill 259

On page 3, line 10, change "not" to "nor".