IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

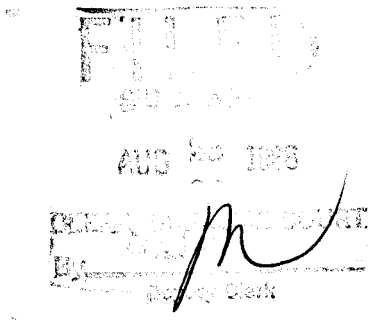
Complainant,

vs.

CHARLES W. STONE,

Respondent

Supreme Court Case No. 71,698



RESPONDENT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

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RESPONSE BRIEF TO REPORT OF REFEREE

This Court is requested to review the report of the Referee, Ted P. Coleman, dated June 14, 1988, and the Amended Report of the Referee dated July 13, 1988, and to impose sanctions upon the respondent, Charles Wm. Stone, other than recommended by the Referee.

Respondent maintains that the Reports of the Referee are not based upon the record, much less clear and convincing evidence, and the suggestion by the Referee that Charles Wm. Stone should be suspended for six (6) months is excessive and inappropriate under the evidence adduced at the Hearings. This request for review is made under Rule 3-6 of the Rules Regulating the Bar.

The original Hearing was scheduled in Ft. Pierce, Florida, on May 26, 1988, as required by the venue rules. The July 6, 1988, hearing was scheduled in Orange County, Florida, where the Referee and Bar Counsel reside but approximately 100 miles North and slightly West of where Charles Wm. Stone resides and practices law. This attorney for the Respondent was not present at that hearing although co-counsel for Charles Wm. Stone, Jeffrey J. Colbath, of Adams, Coogler, Watson & Merkel, West Palm Beach, Florida, was present. There was no transcript of that hearing made available to this Court because The Florida Bar failed to have a reporter present for that Hearing. This absence of a transcript denies fundamental due process to the Respondent. This is particularly true when the second hearing resulted in an Amended Report.

The Referee's Report, establishes that Charles Wm. Stone was not involved in the negotiation or preparation of the Lease dated September 14, 1983, which Lease became involved in the subsequent action brought by Mr. Lange to evict Mr. Chick and the corporation from the junkyard property. The eviction was ultimately successful,

but the Referee did not find that the respondent intentionally failed to disclose the parties to the Lease to Mr. Chick and it is submitted that this finding is well supported by the evidence adduced at the hearing itself. Since the Bar has not taken exception to this finding, it assumes that this comes as a fact established to this Court in its review.

There are no facts to find that there was any harm occasioned by the fact that Charles Wm. Stone undertook to represent "the junkyard" in exchange for some used parts. It is noteworthy that no fee was ever charged to anyone and from Mr. Stone's point of view, he was representing "the junkyard" in exchange for getting parts from time to time. As the complaining witness, Ernest Chick, stated:

> I wouldn't say he put it in that many words; he just represented me at the closing. He didn't say, 'I'm representing you.' (Tr 14).

Thus, in view of the matters with which Mr. Stone was charged, in the words of Mr. McGunegle representing The Florida Bar in examining Harmon Chadwick:

> Now, we're here on two things, not looking into a lease and a usurious loan. Do you know anything about the loan from Mr. Lockhart; do you know anything about that; did Mr. Lockhart ever lend you money? (Tr 103).

And the Referee having already determined there is no evidence to find Mr. Stone knew anything about the Lease, we will now confine ourselves to the so-called "usurious" loan. The testimony in reference to the "usurious" loan was that Herman Chadwick owed Mr. Lockhart $400.00 or $500.00 (Tr. 104); that Herman Chadwick was working and managing C C Salvage and it paid his loan off (Tr. 104). It appears that the Chadwick junkyard was in trouble and Mr. Chick was having problems at the time they all met (Tr. 105). It further appears from the Articles of Agreement which Mr. Stone did prepare, that it was clearly indicated that Christopher Lange owned five (5) shares of stock. It appears clear that Mr. Chick and Herman Chadwick had struck up a deal and simply wanted Charles Wm. Stone to make out a Bill of Sale (Tr. 107, Tr. 65-66).

The best way to describe how Charles Wm. Stone became involved in this matter comes from Albert L. Smith, Jr., brother-in-law to the complaining witness, Ernest Chick:

> Q: Was there any discussion about the use of an attorney?
>
> A: Yes. Mr. Chadwick's discussion with Mr. Chick had mentioned that his attorney was Mr. Stone and that his relationship with Mr. Stone was that Mr. Stone was a car buff and they had an arrangement whereby he would allow Mr. Stone to -the use of parts and to work on his automobiles at his junk yard and this is how they -- you know, how he paid for his legal services.
>
> And that -- then again said, you know, that's up to you if you want your own attorney you can have your own attorney or we can both use Mr. Stone and Mr. Stone is well known in Fort Pierce; you know, he's been here a long time and is established. And that was about as much as was discussed about the use of an attorney.
>
> Q: Did you have any further dealings as to the consummation of the sale of this junk yard?
>
> A: The only thing that I did was because the urgency of coming up with the two months back lease payments was that I loaned Mr. Chick some money because they needed cash urgently to make these payments.
>
> Q: Okay.
>
> A: But that was just strictly a loan.
>
> Q: Did you or were you present when the parties met with Mr. Stone?
>
> A: No. I had never met Mr. Stone until the last hearing we held here in Fort Pierce.
>
> Q: So, other than this initial meeting with the Chadwick's, that's your connection with the transaction?
>
> A: That's my only connection.
>
> Q: And was Mr. Stone at that meeting?
>
> A: No. He -- just Mr. Chadwick was the only one there.
>
> THE COURT: And Mr. Chick.
>
> THE WITNESS: And myself. (Tr. 66-67).

The best description as to the alleged "usurious" loan is from Mr. Chick:

Q: Mr. Chick, let me show you what is Bar Exhibit 16, which is the copy and this is the original check. Does that check for $4,000 dated 10-19-85, does that represent a loan that was payable to C C Auto Sales, Inc.?

A: From Mr. Lockhart, yes.

Q: What were the terms of that loan?

A: The loan was to be for duration of 90 days and I was to pay back -- at that time I understood it was $1,000. It is written on the check $4,800.

Q: What does the writing say in the lower left corner?

A: If I can read it?

Q: It's in evidence.

A: It says 4800 with the $4,000 payable in 90 days. (Tr. 17-18)

It is now worth noting that the Referee found that the evidence regarding the allegation in Count II of the Complaint "demonstrate that the respondent was the primary negotiating party in arranging what was clearly a criminally usurious loan. He either negotiated or dictated the terms of repayment of the loan with no suggestion or direction from Mr. Lockhart, the individual who provided the funds for the loan." (Amended Report of Referee, pg. 4). It is submitted that there is nothing in the record to warrant that finding except the following testimony and it is submitted that that testimony fails to bear the required standard of clear and convincing proof:

A: It is my understanding that Mr. Stone represents and handles all of Mr. Lockhart's affairs and has control over -- this is what Mr. Lockhart has told me and I believe Mr. Stone has verified that.

MR. McDONALD: Your Honor, I just move for the record to strike that as hearsay and inadmissible.

THE COURT: Well, hearsay is admissible but he is not even quoting hearsay, he is quoting understandings.

THE WITNESS: Mr. Lockhart told me that Charlie Stone had control of his financial affairs. (Tr. 19)

It is important to bear in mind that the test to be applied in a disciplinary proceeding is, as set forth in the Referee Manual of March, 1987:

(e) WEIGHT AND QUALITY OF EVIDENCE: The evidence to sustain a disciplinary decision against the respondent must be CLEAR AND CONVINCING. It is something less than beyond a reasonable doubt as required in criminal cases and something more than a preponderance of the evidence required in civil cases.
The Florida Bar v. McCain, 361 So. 2d 700, 706 (Fla. 1978, and
The Florida Bar v. Rayman, 238 So. 2d 594, 598 (Fla. 1970).

It is also important to note that although Mr. Chick said the money was lent to him, it is clear from the evidence that it was not. See Bar Exhibit 16. The evidence was a check made payable to C C Auto Sales, Inc., which check was endorsed by Harmon Chadwick, and was not even cashed by Mr. Chick. The appropriate portion of the trial transcript at page 40 establishes that fact:

Q: Was this the check that you negotiated right here?

A: I negotiated with Mr. Stone for a $4,000 loan.

THE COURT: I think he means that you took and put in the bank or cashed or whatever you do with it.

THE WITNESS: Yes, sir. Yes.

BY MR. McDONALD:

Q: I ask you to remove the check and look at the back of it.

A: (The witness complies.)

Q: Is that your signature?

A: No, it is not.

Q: Who signed the check?

A: Harmon Chadwick.

BY MR. McDONALD: No further questions. (Tr. 40).

There is no documentary evidence that anything was ever paid under the note, no cancelled check, no proof of payment, no satisfaction of loan. Mr. Chick's testimony is certainly not "clear and convincing" evidence of anything. Mr. Chick testified on his direct examination that he thought he would have to pay back $1,000 (Tr. 17) and when reminded of that fact on cross examination, he confirmed that fact

(Tr. 41-42). Further, Mr. Chick responded that at the time Mr. Lockhart wrote the $4,000 check to C C Auto Salvage, Inc., Chick thought $4,000 would have to be paid back but that is not really clear since Mr. Chick never met Mr. Lockhart (Tr. 42). Mr. Chick was unable to really say how the monies were paid back since Harmon Chadwick was controlling the checking account for C C Salvage (Tr. 43). The testimony of Herman Chadwick thus becomes critical on the subject of the loan which the Referee found to be "clearly criminally usurious". Mr. Chadwick testified that he owed Mr. Lockhart money (Tr. 103) and that C C Salvage paid his loan off (Tr. 104). He further indicated that before Mr. Chick got involved in the junkyard, that it was in trouble (Tr. 104-105) and that Mr. Chick was in trouble at his place in Stuart (Tr. 105). Harmon Chadwick explained the notation admittedly made by Charles Wm. Stone as follows:

> Q: Let me show you the check for $4,000 with the notation on the bottom 4800 with this 4,000 repayable 90 days. Do you know what that means?
>
> A: All right. There was a -- $4,000 is part of a loan. The -- some of this here 800, like I say, I either owed 400 -- I believe it was closer to $400 is what I owed Mr. Lockhart that I hadn't finished paying off yet and being as Chick owed me nearly $6,000 we worked a lot of this stuff off; you know, he would take care of this or that or the other; if he needed money I would give it to him.
>
> The other there I can't describe it all because, like I say, I know that there was about 4 or $500 that was to pay off a loan that I owed.
>
> Q: You negotiated that check?
>
> A: Yes, sir.
>
> Q: Did you have conversation about the notation of that check with anybody?
>
> A: You mean that's wrote on the memo part?
>
> Q: Yeah.
>
> A: I just knew that it was.
>
> Q: Well, how did you know what it was?
>
> A: Well, if you added them all up you add 4,400, you coming up with it. (Tr. 116-117).

We think it is important that this Court address how the actions of Charles Wm. Stone affected the parties to this case. Admittedly, Mr. Stone became involved in representing "a junkyard" when the parties involved in the junkyard did have different and conflicting interests. We think a reprimand should be sufficient to warn Mr. Stone to refrain from such activities in the future. However, we need to explore what caused the loss of the junkyard and it was not Mr. Stone's involvement. As a matter of fact, according to Mr. Chadwick, when asked:

> Q: Why was business bad?
>
> A: Business was bad because of the way Chick ran it. I mean, he was -- he would lie to customers just at no end. He would buy something for 4 or $500 and then when somebody came in and want to buy a part he said, 'No, I don't want to sell that; I want to rebuild that,' and he would have had the yard -- I -- one time I guess we had 75 cars sitting in the middle of the yard that Chick wanted to rebuild.
>
> So, I had nothing to sell parts off of, that was one of the reasons it went under. It was spending three times more than I could bring in the yard.
>
> Q: Okay. At the time you left, the business hadn't failed yet?
>
> A: Not yet.
>
> Q: Did you know when it failed, how it failed, did you know anything after you left?
>
> A: I -- just what I heard about it and stuff like that.
>
> Q: Well, apparently around here we can say what you heard. What did you hear?
>
> A: Oh, I heard several things about the way Chick was running the business; people mentioned to me how the yard had gone down since I left -- (Tr. 111-112).

The testimony of the previous owner, and manager of the junkyard, was that it was a business headed for disaster:

> A: He was just doing a very, very poor job of it. Like I say, people would come up to me, several faithful customers that I had had the whole time I was there would come up to me and talk about the way Chick had done them and knowing that I would not do that and, like, I told them the same story, 'I introduced you to the man; that's just the way he is.'

It was several occasions all kinds of deals like that. He would -- he would just pull some of the most outlandish deals you would ever hear of.

Q: When is the first time Mr. Chick ever indicated to you that Mr. Stone should have looked into a lease? Did he ever say that to you?

A: He had never questioned it. He -- Chick was not worried about a lease because he was a real estate agent before he came up here and that was one of the things that Charlie had mentioned to him in his office, that the original deal when he was seeing it because I did not see a lease, I have never seen that lease until this date.

Q: You knew you were a couple of months behind in the rent?

A: Right. Which we explained all that to Chick right there in the office because I was showing him all my paperwork and everything.

Q: And Chick had access to the books and records and everything else that day?

A: I opened them all out and laid them on the desk and he looked them over.

Q: Did anybody ever have Charlie go over books and records or do a financial study or anything?

A: No.

MR. McDONALD: No further questions -- wait, he may have one last question (pausing).

No further questions.

CROSS EXAMINATION

BY MR. McGUNEGLE:

Q: Mr. Chadwick, Mr. Stone was a good customer of the yard; was he not?

A: I wouldn't actually call him a customer. I mean, he was just a good friend, what have you.

Q: You had a lot of dealings with him?

A: Right.

Q: Traded parts for legal services, that sort of thing?

A: If he needed a part we just, more or less, just, like, give it to him. Charlie never actually quoted us a price, we always knew we owed him because he would do just whatever we needed done in a legal form. (Tr. 113-114).

It is important in evaluating the conduct of the respondent to see that he did not wish to harm anyone, only he tried to involve himself in the junkyard which was doomed from the beginning, in an attempt to help everyone, and obviously that will lead a professional in the practice of law to problems. For his problems, we believe Mr. Stone has been adequately made aware of the fact that he cannot do this in the future. He did not act from "evil intent" but did get involved to an extent which is certainly improper. This is a far cry from finding that Mr. Stone engaged in a "criminal activity" which is the meaning of engaging in "criminal usury".

As we have pointed out, there is only one reported criminal usury case and that is Edwards v. State, 62 FLa. 40, 56 So. 401 (1911). However, to address the law of "usury", we will look at certain civil cases. It is noted that when usury was found to exist, the civil penalties were applied against the lender, and the attorney was not subject to any civil or criminal action. This is true in all reported civil cases involving a violation of the Florida usury law. See Annotations to Chapter 687, Florida Statutes. In addition, the Court in Hamm vs. St. Petersburg Bank, 379 So. 2d 1300 (2(d) 2nd Dist., Fla, 1980,) the Court is sending back issues to be determined at trial and in reversing a Summary Judgment for a lender, said: "Among the issues to be addressed at trial are the true nature of the $5,800 charge (in this case the $800 charge) and whether or not it was truly 'In the nature of interests' and, if so, whether the lender made the loan with the requisite usurious intent." See 379 So. 2d pg. 1306.

The law of Florida on usury is set forth in the landmark Supreme Court case of Dixon v. Sharp and is of interest to point out what this Honorable Court has said in reference with the intent to take more than the legal rate of interest for money borrowed. This Court in Dixon v. Sharp, 276 So. 2d 817, said:

> [2,3] Florida Courts recognize that usury is largely a matter of intent, and is not fully determined by the fact that the lender actually receives more than law permits, but is determined by existence of a corrupt purpose in the lender's mind to get more than legal interest for the money lent.

Chandler v. Kendrick, 108 Fla. 450, 146 So. 551 (1933); Jones v. Hammock, 131 Fla. 321, 179 So. 674 (1938); Maule v. Eckis, 156 Fla. 790, 24 So. 2d 576 (1946); Shaffran v. Holness, Fla., 93 So. 2d 94; Stewart v. Nangle, 103 So. 2d 649 (Fla. App. 1958); Connecticut Mutual Life Insurance Co. v. Fisher, 165 So. 2d 182 (Fla. App. 1964). To work a forfeiture under the statute the principal must knowingly and willfully charge or accept more than the amount of interest prohibited. Chandler v. Kendrick, supra; Argintar v. Lydell, 132 Fla. 45, 180 So. 346 (1938).

Relative to the purpose of the usury statute and the definition of willfully and knowingly, this Court in Chandler v. Kendrick, supra, 146 So. at 552 succinctly states,

'The very purpose of statutes prohibiting usury is to bind the power of creditors over necessitous debtors and prevent them from extorting harsh and undue terms in the making of loans. Under the law and the decisions, usury is a matter largely of intent. It is not fully determined by the fact of whether the lender actually gets more than the law permits, but whether there was a purpose in his mind to get more than legal interest for the use of his money, and whether, by the terms of the transaction and the means employed to effect the loan, he may by its enforcement be enabled to get more than the legal rate. Benson v. First Trust & Savings Bank [105 Fla. 135, 134 So. 493], 142 So. 887 [145 So. 182];1 R. C. L. pp. 223, 224.'

'A thing is willfully done when it proceeds from a conscious motion of the will, intending the result which actually comes to pass. It must be designed or intentional, and may be malicious, though not necessarily so. 'Wilful' is sometimes used in the sense of intentional, as distinguished from 'accidental,' and, when used in a statute affixing a punishment to acts done willfully, it may be restricted to such acts as are done with an unlawful intent. Clark v. Grey, 101 Fla. 1058, 132 So. 8322; United States v. Boyd, (C.C.[Ark.]) 45 F. 851, text 855; State v. Clark, 29 N.J. Law 96.'

[4] He who alleges usury to avoid or to defeat an obligation to pay money must establish his charge by clear and satisfactory evidence. Wicker v. Trust Co. of Florida, 109 Fla. 411, 147 So. 586 (1933); Benton v. Wilkins, 118 Fla. 491, 159 So. 518 (1935); Shaffran v. Holness, 102 So. 2d 35 (Fla. App. 1958); Diversified Enterprises, Inc. v. West, 141 So. 2d 27 (Fla. App. 1962).

Originally the trial court in the instant case determined that there was insufficient evidence to show that plaintiffs had willfully and knowingly charged or accepted the sum of money lent plus a sum in excess of the legal interest rate. Then upon reversal and remand the trial court erroneously interpreted the decision of the Fourth District Court of Appeal to mean that a simple mathematical computation can determine necessary intent to make a debt unenforceable. If a mere mathematical computation is determinative of intent then the words 'intent' and 'willfully and knowingly' have no force or effect and might just a well be deleted from the statute.

[5] For the defense of usury to be established, the circumstances surrounding the entire agreement must be proved, and they must be carefully scrutinized by the court. Griffin v. Kelly, 92 So. 2d 515 (Fla. 1957); Diversified Enterprises, Inc. v. West, supra.

The Court explicitly asserted in River Hills, Inc. v. Edwards, Fla. App, 190 So. 2d 415, 423, as follows:

'The intent is not fully determined by whether or not the lender actually gets more or charges more than the law permits but by whether or not there was an improper motive in his mind to get more than the legal interest (Clark v. Grey, supra; Stewart v. Nangle, supra; Shaffran v. Holness, Fla. App., 102 So. 2d 35) at the time the loan agreement is entered and, if usurious at that time, no subsequent transaction will purge it. (Shorr v. Skafte, Fla., 90 So. 2d 604) The difference between a lawful transaction and usurious one, therefore, is the difference between 'good faith' and 'bad faith'. The parties are permitted to testify as to their purposes and intentions, and the question of intent is to be gathered from the circumstances surrounding the entire transaction. (See Diversified Enterprises, Inc. v. West, Fla. App., 141 So. 2d 27, 31; Kay v. Amendola, Fla. App. 129 So. 2d 170).'

'That the lender willfully and with corrupt intent charged or accepted more than the prohibited interest must be specifically and affirmatively pleaded and established by clear and satisfactory evidence. (Chandler v. Kendrick, 108 Fla. 450, 146 So. 551; Argintar v. Lydell, 132 Fla. 45, 180 So. 346; Benton v. Wilkins, 118 Fla. 491, 159 So. 518) The requisite corrupt or purposeful intent, however, is satisfactorily proved if the evidence establishes that the charging or receiving of excessive interest was done with the knowledge of the lender. (Stewart v. Nangle, supra; MacRackan v. Bank of Columbus, 164 N.C. 24, 80 S.E. 184, 49 L.R.A., N.A. 1043, Ann. Cas., 1915D, 105; Shorr v. Skafte, Supra; Jones v. Hammock, 131 Fla. 321, 179 So. 674; Shaffran v. Holness, supra) (emphasis supplied)

In Stewart v. Nangle, supra, the District Court of Appeal, Second District, considered all the circumstances surrounding the loan transaction to make its determination that the lender did not have the requisite willful intent to charge a usurious rate of interest. Therein after a lengthy discussion of the elements of usury with emphasis on the element of intent, the court concluded that the trial court's action, because of misconception of the force and effect of the word 'willfully' as used in the usury statute, in disregarding the fact that lenders entered into a loan agreement in absolute good faith without any thought of its usurious charcter was improper.

The important thing is that the Referee did find that Charles Wm. Stone has been a practicing member of The Florida Bar since 1955; that he has practiced law for approximately 33 years with only one reported disciplinary matter against

him which resulted in a private reprimand. It seems clear that he did represent different parties who had different interests but that representation was not kept secret and his sole interest appeared to be in trying to keep the junkyard going. It is submitted that a public reprimand would be appropriate and sufficient punishment from this Court to inflict upon a 72 year old attorney who is presently retiring from the practice of law. It appears that a public reprimand is in keeping with the commentary found at page 37 of the Florida Standards for Imposing Lawyer Sanctions.

The Court is respectfully requested to read the entire testimony of Mr. Stone on this subject. It is also requested to read the testimony of Mr. Chick. It appears that Mr. Chick was the party who attempted to take advantage of an unfortunate situation and to resolve his financial loss by blaming Mr. Stone. It is submitted that Mr. Chick's financial loss came from a failure to pay rent and a failure to properly run his business. Mr. Stone's problems derived from the fact that he attempted to help out the junkyard so that apparently he could continue to get used parts. That is his selfish motive and is hardly a selfishness which would require virtual disbarment of this 72 year old attorney who at this point is entitled to retire in peace and with dignity. Even probation and supervised retirement (and this attorney would volunteer for that position) would not be an inappropriate remedy.

There is a Motion filed to disqualify the Referee because he attempted to have Charles Wm. Stone prosecuted criminally before entering his final report. That perhaps is the meaning of the statement that Charles Wm. Stone "is fortunate he was not prosecuted for criminal conduct." (Amended Report page 6).

With respect to the findings of fact as contained in The Report as to each item of misconduct, we will restate those findings and then demonstrate from the record that the findings are not factually correct, much less meeting the "clear and convincing" evidentiary requirement of this Court. We mention only the pendency of the Motion because it may result in a new Referee reviewing the record, or requiring

a complete record to be made, and making a different recommendation to this Court. If not that, it is a reason why this Court may wish not to follow the Referee's recommendation in this case. We feel at some point, the pending Motion must be brought to this Court's attention and for that reason, we do so at this time. However, the Referee was not without errors in his Amended Report and we will now discuss those errors.

The first such fact (minor as it may be), is "The remaining 5 shares were owned by Herman B. Chadwick, as trustee, Harmon D. Chadwick, and Claude C. Chadwick." This appears in the first paragraph on second page of Amended Report of Referee. The record demonstrates that this is an incorrect fact (Tr. 33) and is only mentioned to show that even the Referee can make a mistake. We do not contend in this Appeal that Charles Wm. Stone did not make a mistake, on the contrary, we readily admit that he made a mistake in this transaction for which he has been subjected to a civil suit which has not yet been determined. However, the mistake made by Mr. Stone does not justify the severe sanction recommended by the Referee that this Court impose on him.

Clearly, the Referee in paragraph 8 at page 3 of his Amended Report indicates that Mr. Stone has done more than simply be "a simple scrivener". However, it is also clear from Mr. Stone's uncontradicted testimony that he had nothing to do with structuring the business deal as such. Mr. Chick tried to imply that he did, and the reason paragraph 8 is deceiving is that the agreement, according to Mr. Chick's own relative, was struck before Mr. Stone ever became involved in reducing the agreement made by the parties to writing. (Tr. 69-71).

We have no fault to find with the simple finding of fact that on or about October 19, 1985, Charles Wm. Stone, acting on behalf of R. C. Lockhart, an old friend, arranged a $4,000.00 loan to C C Salvage, Inc. We also agree that Mr. Stone made a notation that $4,800.00 was to be repaid to R. C. Lockhart. The reason for that

sum to be repaid was well explained to the Referee and has been cited to this Court in some detail. The $4,800.00 included an additional $400.00 or $500.00 already borrowed from Mr. Lockhart by Harmon Chadwick. Moreover, there is no showing in the record by documentary proof that the sum was ever paid, nor when it was paid. It is further submitted that the inferences from this finding of fact are unwarranted, all of which has been fully discussed in this response to the Referee's Report.

The Report seems to incorrectly apply a criminal usury standard to Charles Wm. Stone's involvement in the notation on a $4,000 check that "$4,800" is to be repaid. The penal nature of remedies provided by the usury statute enjoys no commonlaw or constitutional protection or status. See Coe v. Muller, 574 Fla. 399, 77 So. 88(1917). It is important to note that the instant loan was "a corporate loan" and it is clear under the case of Wilensky v. Fields, 267 So. 2d 1 (Fla. 1972) that with respect to corporate loans made before July 1, 1979, bearing an interest in excess of 25% per year, this COURT held that former 687.11, Florida Statutes, repealed the criminal penalties that otherwise would apply by virtue of 687.071. However, it now appears that all loans, no matter what amount, in which interest rates exceed 25%, are subject to criminal penalties as now set forth in 687.071, but that is a long way from adjudging Charles Wm. Stone to be guilty by "clear and convincing" evidence of the offense of criminal usury as set forth in 775.082, Florida Statutes. Further, the clear and convincing evidence in this case is there is no showing by any document as to when and how the loan was repaid, there is a showing that the real amount borrowed was $4,400 or $4,500, there is no documentary or other evidence to justify a conclusion that the interest was "usurious" at all and there is no showing that Mr. Stone benefited in any way from this transaction. His desire was to keep the junkyard going so he could get "free" parts.

It is apparent from the record that the "Referee" was offended by the way that Mr. Stone obtained his "legal fees". Perhaps this 72 year old lawyer is not

attuned to the present way of generating fees in the present day competitive law office. However, it would appear that if Mr. Stone had been, it would hardly be a problem because the $800 over and above the check itself could have well gone toward legal fees which would have been absolutely permissible. Mr. Stone preferred to try to save the "junkyard" and try to help the parties. He did not personally profit. He did not charge customary legal fees. As Hon. Parker Lee McDonald, Chief Justice of the Supreme Court of Florida, in his Chester Bedell Memorial Lecture of June 12, 1987, said:

> "When we created an integrated bar, it was necessary to trespass to some extent on the individual independence of the lawyer. We at least regulate ourselves. Nevertheless, we must be alert to not over regulate. With modest self control by lawyers, the way we employ our thoughts, our skills, our talents and, yes, our ethics, we need not do so.

In this case, it is submitted that to suspend Charles Wm. Stone for six months from the practice of law during his "nearly retired" years, is an inappropriate penalty.

We do, and believe Mr. Stone should make it clear to the Court, do not dispute the Referee's findings (1)-(3) as to Count I. What we do dispute is finding (4) as to Count I and finding (1) as to Count II. We agree with the Referee that the respondent should not be found guilty of violating any other matter and we limit this response to the question of negligence and the question of engaging in illegal conduct involving moral turpitude. We submit that those two findings cannot be sustained from the evidence. Particularly we submit that there is no justification for the last finding and absolutely no justification to suggest that "it has been suggested that the respondent was not aware that what he did was criminal in nature". Frankly, the only person who has reviewed this case, and there have been many, to make that conclusion was the Referee, Ted P. Coleman. In so doing, the Referee fails to follow the law as to criminal intent, fails to follow the legal requirement that the evidence against

the respondent must be "clear and convincing" and we believe that because of that erroneous belief on the part of the Referee, his recommendation that the respondent be suspended for a period of six months is excessive. We are at an absolute loss to understand why the Referee could recommend that additional costs over and above those requested by the Bar be assessed against the respondent.

We believe the appropriate sanction to be imposed against Charles Wm. Stone is the sanction of a public reprimand. If some type of probation and supervision is required while Mr. Stone continues his closing down of his office so that he may enjoy full retirement, we submit that such a condition would not be inappropriate and one that can be easily filled by Mr. Stone's colleagues in the local Bar. The letters submitted to this Court as recommendations for Mr. Stone would show that such legal supervision is available. For the foregoing reasons, it is requested that this Court spare to a practitioner before this Bar of some 35 years, the embarrassment of a six months' suspension when such suspension is unnecessary to adequately protect the public. We need not dwell on the fact that it is the law of Florida that a disciplinary proceeding is primarily to protect the public and not to punish the attorney. See e.g., The Florida Bar, v. Pincus, 300 So. 2d 16 (SCt., FL 1974).

It is hard to see how the Referee could have found costs over and above those requested by The Florida Bar. It is difficult to justify the Referee's statement that "It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the respondent" when the Referee concluded (without evidence) that it "is apparent that other costs have or may be incurred." (See page 6, Amended Report). The Referee seems intent on punishment of the respondent in an arbitrary and to an excessive degree.

In reviewing the case authority and the decisions of this Court in reference to matters such as this, it appears that the recommendation of the Referee is excessive.

Although we recommend and urge the Court to simply do a public reprimand, with possible probation of some type, we submit that the outer limits for punishment in this case would be a thirty day suspension with automatic reinstatement. See Florida Bar Baccus, 376 So. 2d 5 (SCt, 1979). However, we still believe a public reprimand would be most appropriate and in keeping with those matters of impropriety which this record establishes this respondent did when applying the correct rule, namely, clear and convincing evidence. Certainly Mr. Stone's conduct is not nearly as grievous as Mr. Donaldson's conduct in Florida Bar v. Donaldson, 466 So. 2d 216 (SCt, 1985).

CONCLUSION

It is submitted that this Court should find that Charles Wm. Stone is subject to Bar discipline and that the discipline to be imposed against him would be a public reprimand, which might include some type of probation, with the maximum possible disciplinary action to be a thirty day suspension with automatic reinstatement upon paying costs as taxed.

Respectfully submitted,

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I HEREBY CERTIFY that the original and seven copies of the foregoing have been furnished to Clerk of Supreme Court, and one copy to each of the following, this the 23rd day of August, A.D., 1988:

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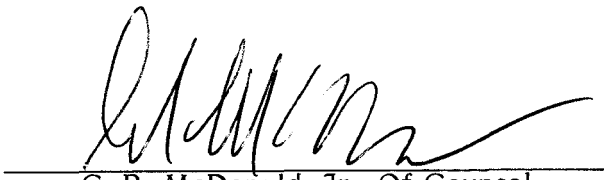

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