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June 20, 1973

Robert A. Brown, Acting Bank Comm'r

Banks and Banking

Martin L. Wilk, Assistant

Attorney General

Responsibilities of Bank Commissioner under 9 M.R.S.A.,
§§ 229 and 3082

This will respond to your memorandum dated May 24, 1973 inquiring whether the Bank Commissioner has the power to declare loans, which he finds to be in violation of the statutes, void. For the reasons which follow, it is our opinion that neither § 229 nor § 3082 provide the Bank Commissioner with such power.

9 M.R.S.A. § 229, which relates generally to loans over \$2000, provides, in pertinent part:

" . . . Any such loan of the amount in excess of \$2000, for which a greater rate of interest, consideration or charges than is permitted by this section has been charged, contracted for or received, wherever made, shall be void and the lender shall have no right to collect or receive any principal, interest or charges whatsoever. In any case in which it is found that a lender has violated this section, the Court shall award reasonable attorneys' fees incurred by the borrower."
(Emphasis supplied).

Similarly, 9 M.R.S.A. § 3082, which relates to small loan companies, provides, in pertinent part:

" . . . If interest or charges in excess of those permitted by this section and section 3081, including insurance premiums and finance fees, shall be charged, contracted for or received, the contract of loan shall be void and the licensee shall have no right to collect or receive any principal, interest or charges whatsoever. Upon a finding by the District or Superior Court that interest or charges in excess of those permitted by this section and section 3081 have been charged, contracted for or received, the licensee shall forfeit to the borrower the amount of all payments made as principal and interest payments, and he shall mark and return the note and other papers as provided in section 3083, subsection 3. Reasonable attorneys' fees and costs shall be awarded to the borrower if he is the prevailing party in such action."
(Emphasis supplied).

Neither of the foregoing provisions mentions or refers to the Bank Commissioner. Rather, to the extent that anybody is invested by these provisions with the power to declare loans void, it is the Courts. See our opinion dated September 1, 1967, a copy of which is annexed hereto.

We hasten to add that a borrower may lawfully disregard any loan which violates the prohibitions of either § 229 or § 3082; the statutes declare that such loans "shall be void", and we read the statutes as meaning void in the technical sense, i.e. at inception. See Cuneo v. Bornstein, 269 Mass. 232, 68 N.E. 810 (1929); Modern Finance Co. v. Holz, 307 Mass. 281, 29 N.E. 2d 922 (1940); Bernhardt v. Atlantic Finance Corp., 311 Mass. 183, 40 N.E. 2d 713 (1942). To the extent that the Courts are involved at all, they are involved solely to afford a borrower who seeks to recover payments already made under a void loan with an express avenue for doing so.

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