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NOTES ON THE LAW OF USURY IN PENNSYLVANIA.

Blackstone gives as the definition of usury that it is an *unlawful contract* upon the loan of money, to receive the same again with exorbitant increase, 4 Bl. Com. 156. That a corrupt agreement is necessary to constitute the offence would seem to be the uniform ruling of all the English cases. In *Hill* vs. *Montague*, 2 M. & S. 377, it was held that a plea of usury to an action of debt on bond, must particularly set forth the *corrupt contract* and the usurious interest; and a plea not stating these was held bad on special demurrer. See also to the same effect, *Tate* vs. *Welling*, 3 T. R. 538; *Ferral* vs. *Shaen*, 1 Saund. R. 295; *Mansfield* vs. *Trears*, Cowp. 671; *Nichols* vs. *Lee*, 3 Anst. 940. The same doctrine seems to have been generally followed on this side of the Atlantic. Thus in *Childers* vs. *Deane*, 4 Rand. 406, it was held that "to constitute usury there must be an *intention* to take more than legal interest." So in *Smith* vs. *Beach*, 3 Day, 268, the court say: "There can be no usury where either of the parties remains ignorant of the usurious consideration. Where more than lawful interest is reserved with the knowledge of the lender, but without the knowledge of the borrower, the transaction is not usurious."

In Pennsylvania, however, the views held at different times upon

this question appear to have been conflicting. In *Lamb* vs. *Lindsay*, 4 W. & S. 453, Kennedy, J. dissenting, says: "To constitute usury so as to subject the party to the penalty of the act, it is sufficiently evident without any argument to prove it, that there must be an usurious contract at the time of the loan, and an usurious taking in pursuance of it, of money or money's worth." And he cites *Scott* vs. *Brest*, 2 T. R. 241; 1 Buls. 20; 1 Saund. R. 295, a. note 1.

On the other hand, Gibson, C. J., in *Kirkpatrick* vs. *Houston*, 4 W. &. S. 115, says: "It is the corruption of the taking and not the corruption of the contract which constitutes the offence to which the penalty is annexed; in which respect there is no essential difference between the British statute and our own."

The rule thus laid down by chief justice Gibson is stated in the late case of *Craig* vs. *Pleiss*, 2 Casey, 272, although it is expressly put upon the distinction between the English and the Pennsylvania statutes of usury, which Judge Gibson denies. In this case, reversing the judgment of the court at N. P., it was held under our statute of 2d March, 1723, that the offence of usury does not consist in the making of a corrupt bargain for more than the legal rate of interest, but for *taking* it "on *any* bond or contract." "The imagined necessity," says Woodward, J. "of a corrupt bargain to complete the offence of usury, favored as it no doubt has been by loose expressions of judges, is wholly without foundation in our statute." How far this case will be held to be law remains to be seen. The point in question, it would seem, did not strictly arise for adjudication, the reserved point disclosing clearly a corrupt contract within the meaning of the English statutes.

Considerable discussion has arisen both in England and this country as to the objects intended to be effected by the laws against usury. The increasingly liberal tone of public sentiment, as well as the course of modern decisions, would seem to construe their enactment as in aid of the indiscretion or inexperience of individuals, rather than as in punishment of a public offence. See a note on this subject by the late H. B. Wallace, in 2 Smith's Leading Cases, 4 Am. ed. 394, with the authorities there cited. See also *Thomas*

vs. *Shoemaker*, 6 W. & S. 183, where Judge Kennedy says: "That money obtained by oppression and by taking advantage of the distresses of others in violation of laws made for their protection, may be recovered back in an action for money had and received, seems to be well settled. And according to that principle it has been held that such action will lie to recover back the excess of interest taken from the plaintiff on an usurious loan to him." It has been uniformly held in Pennsylvania that a contract infected with usury is not void, but that the plaintiff may recover the just principal and lawful interest. *Wycoff* vs. *Longhead*, 2 Dall. 92; S. P. *Turner* vs. *Calvert*, 12 S. &. R. 46; *Vantine* vs. *Wood*, 1 Harris, 270. And C. J. Gibson, in a late case, following the rule laid down in *Oyster* vs. *Longnecker*, 4 Harris, 269, uses the following language: "Formerly a retention or receipt of anything in the shape of interest on an usurious contract was a taking within the statute. But it has been settled both here and in England that until the lender has received *more* than principal and interest (bonus included) for the sum actually advanced, the offence is not consummated." *Brestler* vs. *Mehaffie*, 7 Har. 117.

Whether creditors can take advantage of usury in the contracts of their debtors, is a question of considerable practical importance which has never, it appears, been judicially determined in Pennsylvania. Perhaps the weight of authority in England and this country is against such a proposition. But if the object of the usury laws be, as it undoubtedly is, the punishment of fraud in the one party and the protection from fraud in the other, we cannot see what legal principle, based either on public morals or private interests, forbids the application of such laws to all other parties except those immediately concerned in interest. We know of no essential ingredient in the plea of usury, which should take it out of the equitable rule that the creditor is entitled to stand in the shoes of his debtor. The operation of that rule is perhaps nowhere more forcibly seen than in the case of the execution of powers. "Where a man has a general power of appointing a fund, and he exercises the power in favor of a volunteer, equity will, in exclusion of the appointee, seize upon the fund as assets for the payment of the

debts of the person executing the power." Sugden on Powers, vol. 2, p. 173. So also, if there be a defective execution, or an attempt at execution of a mere power, equity will interpose in favor of creditors. 1 Story Eq. Jur. 169. That equity will not relieve against the *non-execution* of a power, is put upon the plain principle of personal confidence in the donee of the power, a principle which manifestly does not obtain in the case under consideration. Even this restriction of the privileges of creditors is censured by very high authority. See 1 Fonb. Eq., ch. 4, sec. 25.

But decisions are not wanting which tend to deny the doctrine that usury is a personal privilege, and to let in the creditor to repudiate the usurious excess, or where the statute makes it void, to annul the contract altogether. Thus in *Gray* vs. *Brown*, 22 Ala. R. 273, the court say: "We do not understand this principle that usury is a personal privilege intended only for the benefit of the borrower, to assert that the principal debtor alone can avail himself of the usury, for if this were the law, the surety would often be bound beyond his principal. Such, however, is not the law. The rule is, that when the party who makes the corrupt or usurious contract, sues upon such contract, the security can avail himself of any valid defence which his principal might set up, and an accommodation endorser may have the same relief."

And in an earlier case in the same court it was said that, "were it an open question, we should think as to the unlawful per cent. the mortgage would be without consideration, and that the actual amount borrowed with legal interest only could be retained by the mortgagees against the plaintiff in execution." *Harbinson* vs. *Harrell*, 19 Ala. R. 760.

In *Wells* vs. *Chapman*, 13 Barb. 563, the exceptions to the rule that usury is a personal privilege with the borrower, were stated to be cases of assignees in bankruptcy, and voluntary trustees for the payment of creditors.

In *Dix* vs. *Van Wyck*, 2 Hill, 522, the court held that "a deed or contract can be avoided for usury by the party who made it or some one standing in legal privity with him, and not by a mere stranger to the transaction; the executor or the heir may set up

the usury. So also one who is privy in estate, as the grantee of him who made the usurious conveyance. *A creditor who has obtained a judgment and execution cannot be regarded as a mere stranger*, and he may try the title of any one who sets up a prior lien or incumbrance affected by usury."

The case, however, which goes further than the rest, and is in fact decisive of the creditor's right, is that of *Lee* vs. *Fellowes*, 10 B. Mon. 118. In this case it was decided that "where the borrower has paid usurious interest, his creditor cannot, without his consent, sue for and recover of the usurer the amount of the usury so paid. But where the usury has not been paid, and where the matter in contest between creditors is what sum each may lawfully and equitably assert against the debtor whose means are insufficient to pay all his debts, we apprehend that the rule is and ought to be different. The sum legally due to a creditor is all that in good conscience he ought to be permitted to assert to the prejudice of the claims of other bona fide creditors. It does not at all affect the usurer's demand against his debtor as between themselves. If the latter does not choose to rely on the usury, or if he desires to pay it, be it so. But as the taking of usury is expressly discountenanced by law, we only say that the usurer and his debtor shall not be permitted to increase the demands of the one against the other by the addition of illegal interest, to the prejudice of other creditors."

And as an instance of the tendency of legislation on this subject, it may be stated that in Tennessee, the act of 1844, c. 182, authorizes suits in equity to recover usurious interest for the benefit of creditors.

Some modification in the operation of the usury laws has been effected by the recognition of the principles of building associations. In *Silver et al.* vs. *Barnes*, 6 Bing. N. C. 180, where loans from the stock fund were made by a mutual benefit society to those of its members offering the highest premium in addition to legal interest, Tindal, C. J. decided, that the contract was not usurious; that the question was whether the transaction was a loan of money or a dealing with the partnership fund. If it was a loan it was usurious. But in this case the court thought it was a dealing with the partner-

ship fund, in which the member bringing the suit had an interest in common with the other members of the society, and that it was not a loan. And he cites a decision of Chief Baron Alexander, in 1828, where an advance from a similar society to one of its members had been held a partnership transaction and not a loan.

This distinction between a loan and an advance of the partnership stock was also taken in *Seagrave* vs. *Pope*, 15 Eng. L. & E. R. 477. And in *Doe d. Morrison* vs. *Glover*, 15 Q. B. 103, where the funds of a building society were put up for sale to the highest bidder, who received shares at the rate of his bidding, upon which interest was payable, it was held that its practices did not deprive the society of the protection against the usury laws afforded by the statute 6 and 7 W. 4, c. 32, sec. 2: and that whether the regulations of such a society were a mere color for usury would be a question for a jury.

In Pennsylvania, however, in the case of *Bechtold* vs. *Brehm*, 2 Casey, 269, a building association had taken the bond of one of its members for the amount of a loan made to him by the association, with premium and legal interest. In a suit upon the bond, the Supreme Court, by Lowrie, J., reversing the decision of the District Court, held that the legitimate purpose of the bond was to enforce the contributions of the defendant as a member. That the association, by depriving him of his membership, had elected to treat the transaction as a loan; that as a loan it was clearly usurious; and that the act of 8th May, 1855, validated such a transaction only so far as it was used to enforce the payment of the contributions of members until the time for distribution of the society's effects shall arrive.

The act of 8th May, 1855, here referred to, is in these words: "That in investments by building associations in loans to members thereof, the premiums given for preference or priority of loan, shall not be deemed usurious." P. L., p. 519.[1]

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[1] The reader will find an interesting discussion of the provisions of the New York statute in Hunt's Merchant's Magazine, for September 1857, p. 312.