No. 12723

Supreme Court of Illinois

Barnes, et al

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vs.

Whitaker

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95 — 171

David Barnes et al

vs

Spice Whitaker

1859

95

1-25-72

259

-Ctr. 95 - 171

David Barnes et al

vs

Spier Whitaker

Argument for Plffs in Error

Filed May 10, 1859
L. Leland
Clerk

Know all Men by these presents that Whereas in a certain cause determined in the Circuit Court in and for the County of Rock Island and State of Illinois at a Term thereof begun and holden at the Court house in said County on the first Monday in June A D 1858, wherein Spier Whitaker was Plaintiff and David Barnes, Christopher C. Webber and William Bailey were defendants, ~~and whereas~~ judgement was rendered by said Court against said named defendants and Whereas said Barnes and said Webber are about to prosecute a writ of Error to reverse said judgement and apply for an order that said writ shall act as a Supersedeas

Now therefore Know all men that we David Barnes, Christopher C Webber, Fred^k. Ridenbaugh Elisha P Reynolds. John Warner and William Frizzell – of the city and County of Rock Island and State of Illinois have made constituted and appointed and by these presents do make constitute and appoint Milton S Kimball of the same place our true and lawful attorney for us and in our name place and stead to make and execute a Supersedeas bond in said above mentioned cause, said Bond to be for such sum as shall be fixed by the Supreme Court

of said State or any one of the Judges thereof and to be conditioned for the due prosecution of said writ and for the payment of the judgements costs interest and damages in case said judgement shall be affirmed, and we hereby declare that any such bond executed by our said attorney shall be as obligatory on us and each of us as if the same were personally signed by each one of us. And we hereby give and grant unto our said attorney full power and authority to do and perform all and every act whatsoever requisite to be done in and about the premises as fully to all intents and purposes as we could do if personally present hereby ratifying and confirming all that our said attorney or his substitute shall lawfully do or cause to be done by virtue hereof

In witness whereof we have hereunto ~~aff~~ set our hands and seals this 18th day of July A.D. 1858

D. Barnes (Seal)
C. C. Webber (Seal)
F. Ridenbaugh (Seal)
E. S. Reynolds (Seal)
John Warrick (Seal)
[illegible] (Seal)

The above named, will be Satisfactory to us.

Rock Island July 19. 1858

Wilkinson & Pleasants

Attys for Whitakers

IN THE SUPREME COURT OF ILLINOIS,

APRIL TERM, 1859.

DAVID BARNES & CHRIS. C. WEBBER, Pl'ffs in Error,

versus

SPIER WHITAKER, Defendant in Error,

ERROR TO ROCK ISLAND.

For Plaintiffs in Error, E. T. WELLS;

For Def't in Error, WILKINSON & PLEASANT
B. C. COOK and SPIER WHITAKER, *pro se.*

ARGUMENT OF E. T. WELLS.

REGISTER BOOK AND JOB PRINTING HOUSE, ROCK ISLAND, ILL.

IN THE SUPREME COURT OF ILLINOIS.

DAVID BARNES et al., vs. SPIER WHITAKER.

ARGUMENT OF E. T. WELLS.

This was an action of assumpsit brought in the Rock Island County Circuit Court, by the defendant in error against the plaintiffs in error and one William Bailey.

The plaintiff's declaration contained a special count upon a certain promissory note made by the defendants below to the plaintiff, March 11th, A. D. 1857, at Davenport, Iowa, for $2,165 due one hundred and seventeen days after date, with a penalty of two per cent. per month after due, if not paid at maturity, payable at Whitaker & Grant's office Davenport, Iowa.

The defendants at the return term pleaded 1st, "as to the $165, of the $2,165, and as to the penalty of two per cent. &c. *actio non*, because the note declared upon was made at Davenport, in the State of Iowa, and payable there with reference to the laws of that State; that before the execution of the note the legislature of Iowa, had by a certain statute &c., enacted, provided that the rate of interest for the forbearance of moneys should be $10 on the $100 by the year and no more, on all contracts made within that State, and that no person should by any device, shift or indirection receive

more than after the rate in that statute allowed, and setting out the statute in *haec verba* the material portions of which (see pages 8 to 15 of the Record) are as follows:

SEC. 2. "Parties may agree in writing for the payment of interest not exceeding ten cents on the hundred by the year."

SEC. 4. "No person shall directly or indirectly re-
"ceive in money goods or things in action any greater
"sum than in this act prescribed."

SEC. 5. "If it shall be ascertained in any suit
"brought on any contrat that a rate of interest has
"been contracted for greater than is authorized by this
"act either directly or indirectly in money, property or
"other valuable thing, the same shall work a forfeiture
"of ten per cent. per annum upon the amount of
"such contract to the school fund of the county in which
"the suit is brought, and the plaintiff shall have judg-
"ment for the principal sum without without either in-
"terest or costs ———— and in no case when un-
"lawful interest is contracted for shall the plaintiff have
"judgment for more than the principal sum, whether
"the unlawful interest he incorporated with the princi-
"pal or not."

The plea further shows that before the making of the note mentioned in the declaration it was corruptly agreed between Barnes and Whitaker, that Whitaker should lend Barnes $2000 for one hundred and seventeen days, that for the loan of the $2000 for the one hundred and seventeen days, Barnes should pay $165 and that if the $2,165 should not be paid at the end of

one hundred and seventeen days Barnes thereafter should pay interest upon it at the rate of two per cent. per month; that for securing the payment of the $2,165 and the two per cent. per month interest. Barnes, Webber and Bailey should execute their note to Whitaker, in which the $165 should be incorporated with the $2000 as principal, and the two per cent. per month should be named as a penalty, that in part pursuance of this corrupt agreement Barnes Webber and Bailey did execute the note mentioned in the declaration, and that in further pursuance of the same corrupt and unlawful agreement, Whitaker did lend Barnes $2000, that the $165 agreed to be paid for the forbearance of the $2000 for the one hundred and seventeen days, and the two per cent. agreed to be paid thereafter exceeded the rate of ten per cent. per annum &c., contrary to the form of the statute, and that as to the $165 and the penalty the note was and is void.

2d. The same plea but going only to the $165.

The plaintiff below demurred generally to both the above pleas, and the Court sustained the demurer; thereupon the defendants below electing to abide by their pleas, judgment was entered against them and the clerk ordered to assess the damages at the full amount of the penalty, to which the plaintiffs in error then and there excepted.

The questions raised by the assignment of errors are two.

1st Did the Court err in sustaining the demurer to the above pleas.

2nd Did the Court err in instructing the Clerk to assess the damages at the full amount of the penalty.

And first as to the demurrer. The plea certainly exhibits facts sufficient to bring the cause of action declared upon with the provisions of the statute, which is pleaded, and it was not contended on the argument in the Court below, nor by the learned judge who gave the decision there, nor will it, I apprehend, be contended here, that the statute itself is not sufficiently set out; but it was urged and the case of Sherman et al vs Gassett et al* was relied upon, that the plea was insufficient, because the statute pleaded was penal, and therefore local in its operation, and that for this reason the Courts of this State, could not recognize or enforce it, and upon the authority of that case, although his honor, the judge, expressed doubts as to its correctness, ~~that~~ the judgment was rendered below, upon the demurrer.

*4 Gilm. p. 521.

And if it be admitted that that case contains the law, and that the statute pleaded was under a proper construction penal, in its nature, the judgment below upon the demurrer was undoubtedly correct, and as to that point should be sustained.

On the part of the plaintiffs in error, however, we contend, 1st, That the opinion expressed by the majority of this Court in Sherman vs. Gassett is, and we say it with all respect for those learned and honorable judges who gave and concurred in that opinion, not the law; and, 2d, That if admitted to be the law, it has no application to the case presented by this record. The case of Sherman vs. Gassett was a writ of error brought to reverse the judgment of the Cook County Court upon a proceeding by *sci. fa.* instituted there by Gassett & Co., to foreclose a mortgage given to secure a note made by

Sherman *et. al.* to them, drawing ten per cent. interest per annum.

In the Court below the defendants interposed special pleas of usury, averring that the note was in fact made in Massachusetts, and was in violation of the law of that State, which permitted but six per cent. to be taken: the Court below sustained the demurrer interposed by the plaintiff to these pleas, and upon this point this Court held that the Court below decided correctly upon three separate and distinct grounds, and processes of reasoning. 1st, That the note being made payable generally on its face, and nothing appearing to the contrary by the defendant's plea, and it being secured by mortgage upon lands in this State, must be intended to have been made with reference to the laws of this State. 2d, That the Statutes of Massachusetts, which was pleaded, not declaring the contract void, but recognizing it as valid, and merely imposing a forfeiture for the taking of excessive interest, (which forfeiture they decide to be in the nature of a penalty), was penal and therefore could not be regarded or enforced in the Courts of this State. 3d, That as the enforcement and recovery of the forfeiture imposed by the statute of Massachusetts a peculiar mode was by that statute pointed out which mode of enforcement was adapted to and could be pursued only in the courts of that state. The forfeiture was thus made a part of the remedy and could only be recovered in the courts of Massachusetts. The Court say—

"It might in this case be urged, with great propriety, that a mortgage on real estate should be governed by the *lex situs*, and consequently not to be affected by the

usury laws of the place where it may have been executed or where the money is to be paid; the presumption being that the parties have had the laws of the country in view where the land was situated, and where suit must be instituted in case of foreclosure. The case of *Chapman* v. *Robinson*, 6 Paige, 627, was decided on this principle. In that case a loan was negotiated in England, where the creditor lived, to be secured by personal security and a mortgage on real estate in New York, where the borrower resided. Seven per cent interest was reserved in the mortgage, which was higher than the rate of interest allowed by law in England, although authorized by the laws of New York. Chancellor Walworth, in delivering his Opinion, says: "Upon a full examination of all the cases to be found upon the subject, either in this country or in England, none of which, however, appear to have decided the precise question which arises in this case, I have arrived at the conclusion that the mortgage executed here, and upon property in this State, being valid by the *lex situs*, which also is the law of the domicil of the mortgagor, it is the duty of the Court to give full effect to the security, without reference to the usury laws of England, which neither party intended to violate, by the execution of a mortgate upon the lands here." The Chancellor, in that Opinion, further says: "But if a contract for the loan of money is made here, and upon a mortgage of lands in this State, which would be valid if the money was payable to the creditor here, it cannot be a violation of the English usury laws, although the money is made payable to the creditor in that country, and at a rate of interest which is greater than is allowed in England." This question was fully and ably examined by Judge Martin, in the case of *Depeau* v. *Humphreys*, in the Supreme Court of Louisiana, (20 Martin, 1,) and that the court came to the conclusion, in which the Chancellor says he fully concurs, "that in a note given at New Orleans, upon a

loan of money made there, the creditor might stipulate for the highest legal rate of conventional interest allowed by the laws of Louisiana, although the rate of interest thus agreed to be paid was higher than that which could be taken upon a loan by the laws of the State where such note was made payable." The Chancellor continues: "Here the verbal contract for a loan upon the security of a mortgage on lands in this State, was wholly inoperative, until the mortgage and other written security were executed in this State, and which agreement was consummated by the deposit of money (in England,) to the order of the borrower. It was a contract partly made in this State and partly in England. And being actually made in reference to our laws, and to the rate of interest allowed here, it must be governed by them in the construction and effect of the contract as to its validity. An appeal to the Courts of this State was also contemplated by the parties if necessary to enforce a performance of the written agreement for the re-payment of the loan, although from the residence of the mortgagee in England, it might be necessary to send the money there to make a legal tender of the debt."

In the case of *Robinson* v. *Bland*, 2 Burr. 386, which is a leading case on the subject of the *lex loci*, Lord Mansfield holds the following emphatic language: "In every disposition or contract, where the subject matter relates locally to England, the law of England must govern, and must have been intended to govern. Thus a conveyance or will of land, a mortgage, a contract concerning stocks, must be all sued upon in England, and the local nature of the thing requires them to be carried into execution according to the law here."

Here, then, as it would seem to us, the Court had settled the whole question as to the demurrer; they decide that the notes were payable, not with reference to the laws of Massachusetts, but the laws of *this* State, and all

questions therefore as to what would have been the proper construction of the statutes of Massachusetts which was pleaded, or of the contract, if it had been made under that statute were no longer before the Court.

It is true, that as the Court say, they "did not consider it necessary to place the decision upon this point." to wit: the point which they had just decided, that the contract was to be construed with reference to the laws of Illinois; but having decided that point, the other points which they afterwards proceed to argue and determine—to-wit that the law pleaded was penal, and therefore could not be enforced, and that the forfeiture provided for was a part of the remedy, and the statute could only be enforced in the Courts of Massachusetts —were no longer in the case for determination, and all that part of the opinion of the majority of the Court, therefore, as to these two points last mentioned, was *extra judicial*, and not to be regarded.

If, as the majority of the Judges had most certainly made up their minds, and most unequivocally decide, the contract was governed by the laws of this State; what then had the laws of Massachusetts to do with it? and what right had the Court, or what necessity or propriety was there in any construction of the statute of Massachusetts against usury—or of the contract upon the supposition that it was to be governed by it.

The Court might with the same propriety have proceeded to discuss the statutes of New York against usury; they had just as much relation to the contract, as under their previous decision, the statutes of Massachusetts.

But the Court proceed to decide.

2d. That the demurrer was properly sustained, because the statute of Massachusetts which was pleaded was penal and therefore could not be enforced in the Courts of this State. And here we take direct issue with those honorable judges who thus express their opinions; and we feel the more assurance, in attacking this decision for the reasons, that as above argued it is as to this point of it, *extra*; that the doctrine thre advanced is contrary to natural reason, and is supportd by no *direct* authority precedent to it, and none at all subsequent, so far as by a tolerably thorough investigation we have been able to descorn; and that, upon this point, the Court were divided, his Honor, Judge Koerner, delivering a strong dissenting opinion, with whom concurred Judges Caton and Thomas.

We by no means deny the general principal of the law upon which the Court in the majority opinion base their judgment, that penal and criminal statutes are local in ~~in~~ their operation, and that the criminal jurisprudence of one country can not be enforced in another; but we insist that neither in that case nor in the case now before the Court has that principle any application.

The reason of the rule is that the Criminal laws of every State are for the punishment of offences against the body politic of that particular State: and by the act of connecting himself with the State or community, or continuing the connection in which the accident of birth may may have placed him, every individual gives his assent to those laws and tacitly stipulates to submit himself to the sanction imposed for their breach

when convicted thereof by his fellows of the particular State or community in the manner which the laws of that State or community have appointed; but by no others and in no other way. This arrangement being adopted by common consent supersedes, and in fact takes away, the right which every individual has by the law of nature, to execute vengeance upon offenders against the peace or safety of his own community. Vattel ~~c. 19~~. B. I. c. 19.

But no individual assumes any duties or obligations towards any community save the one to which he may have attached, himself nor has any member of such other community, nor has such other community itself in its aggregate capacity, any jurisdiction over the particular individual in question except for offences done against themselves.

It is therefore against the law of nature, and the law of nations, that one State should assume to punish a citizen of another State, for offences against the laws of that other State. Vattel lib. I. c. 19, sec. 232.

And this is the fullest extent to which this principle is adopted, that the courts of one State cannot execute the *criminal* laws of another State. (Houghton vs. Page, 2 N. H. Rep., p 42.)

The court admit. in Sherman vs. Gassett, that had the contract declared upon, been avoided by the statute of the State where made. transportation could not validate it: it would still be void wherever sued upon—and that this is the law see Houghton vs. Page, *ubi supra*, and McAllister vs. Smith, 17 Ills. Rep.

Will it be seriously contended that a statute declar-

ing the whole principal forfeit for usury is not penal, while one declaring only the interest, (as in the case now before the court), or the interest and a portion of the principal, (as in the case of the statute pleaded in Sherman vs. Gassett), forfeit for usury, is penal?

The first has for its object the suppression of usury: and the objects of both the others are the same; they differ only in the *quantum* of the forfeiture imposed, and there is no single reason which can be given for construing one to be penal, which does not apply equally, and indeed with greater force to the others.

In Houghton vs. Page, above cited, and this is the earliest case so far as we have been able to discover, in which this question arose, an action was brought upon a note made in Massachusetts, drawing more than six per cent. interest, and which by the law of that State as it then was, was wholly void. This statute of Massachusetts was pleaded, and the Court upon demurrer sustained the plea, and in a very learned opinion decided expressly that the statute of Massachusetts *was penal, but that, as applicable to contracts, all the laws of the place where the contract is made, whether penal or not, have equal force*, citing 1 Wm. Bl. 236, 2 Burr. 1094, 2 D. & E. 52, 1 Eq. Ca. ab. 299. 2 I. R. 356 and 506, and see Dewolf vs. Sohnson et al. 10 Wheaton R.

The court say, "As applicable to the remedy, no foreign law, whether penal or not, is enforced. * * The extent of the exception seems to be only this, that as penal statutes are a part of the criminal jurisprudence of a country, their operation, breach and punishment are all local, (Vattel, lib 1.) Hence when broken, whether at

home or abroad, no suit can be instituted abroad to enforce this penalty.

"But contracts of the kind now in suit are personal, and the breach of the law can be punished abroad as well as at home, and if their considerations are void by the law of the country where executed, we see no reason to take this contract out of the action and effect of the general rule of the *lex loci*, and by a transportation over the boundaries of the State, metamorphose an agreement null and void, into an agreement pure and actionable.

"We do not apprehend it to fall within the exception that the penal statutes of one State cannot be enforced in another State, (3 D & E 733, 5 Esp. Ca. 173 n, 2 John, Ca. 363, 14 J R 340."

If then the statute of Massachusetts, which was pleaded in Sherman vs. Gassett, be penal, so also, and most highly penal, was the statute of the same State, pleaded in Houghton vs. Page: the last was enforced by the courts of New Hampshire, and those Judges of this Court who concurred in the majority opinion in Sherman vs. Gassett, admitted that had the statute pleaded there declared the whole principal forfeit. they must have enforced it. Can any reason be assigned why one penal law should be enforced extra territorially and another not? The one operates upon the contract, so does the other; the one is intended to prevent usury as opposed to the policy of the particular State by which it is adopted, and so is the other; in every particular except as to the *quantum* of the forfeiture, as before said, they are precisely similar.

But we contend that in no proper sense are either the statute of Massachusetts which was pleaded in Sherman vs. Gassett, or the statute of Iowa which was pleaded in this case, penal; they are no part of the criminal code of their respective States; they do not subject the usurer to indictment, nor to an action by an informer *qui tam*; the penalty, if penalty there be, is strictly personal to the usuree, and can be sued for or taken advantage of only by him.

The statute simply operates *upon the contract*, and gives the usuree the right, if he see fit to exercise it, of avoiding the contract *pro tanto*: and all *dicta* going upon the supposition that the statutes of usury in any State make the contract *void*, are wide of the mark; for so far as we have been able to discover, no statute of usury that ever was enacted assumes to anything more than to make the contract *voidable* by the *usuree*, (see Ferguson vs. Sutphens, 3 Gilm. 547.) This is a right which as it is a part of the contract, follows it everywhere.

In Gray vs. Bennett. 3 Metcf. 529, the Court of Massachusetts had, long before the decision in Sherman vs. Gassett, construed this very statute, which in that case the majority of the judges of this court held to be penal, not to be penal but *remedial* in its nature.

That was a Bill in Chancery, brought by the assignee of a certificated bankrupt, to recover the triple penalty for usury received of the bankrupt previous to the asssignment; and it was argued by counsel for the defendant in error, that the statute was penal, and that the right to recover the penalty was personal and did not pass by the assignment in bankruptcy; and that this position is correct see 12 Wend 297.

The cause was very learnedly argued, Hon. B. R. Curtiss being of counsel with the plaintiff in error, and the Court say upon this point: "Instead of a forfeiture of the whole debt and subjecting the offender to criminal prosecution and an action *qui tam*, the offence is now merged into a private offense against the individual, and the party's remedy is by an action of debt or by bill in chancery. * * The present law while it is penal to some extent in its consequences, may be said to be adopted into the family of remedial statutes, and although a brother of the half-blood, is entitled to a share of its inheritance, or in other words has the like privilege of a liberal construction," (citing Stanly vs. Wharton, 9 Price, Reed vs. Inh., Northfield 13 Pick, Brandon vs. Pate, 2 H. Bl. Brandon vs. Sands 2 Ves. Jr.)

This decision as it would seem to us, is not only supported by authorities, but is consistent with reason, and the broadest principle of justice.

Every statute regulating interest is framed doubtless with the same double object in view, to-wit: the punishment of the usurer, and the protection of his victim.

In reference to the first end to be attained, they may all perhaps be said to be in some sense penal, but as to the second, we can conceive of no class of statutes which may with more propriety be termed *remedial:* and as operating upon the contract, these statutes can in no sense be called penal: penal statutes operate upon persons, not upon contracts.x Particularly is this true of the statute of Iowa, which was pleaded in this case. The statute establishes ten per cent by the year as the

x Hubbell vs Gale. 3. Vt. 266.
McAdgale vs Knowlton [illegible]
p. 148;
Middleton vs Wynn. Willes 597
Ward vs Snell. 1 H.Bl. 10.

highest lawful rate of interest, and declares that if in any action upon any contract, it shall be ascertained that a greater sum has been reserved or taken than after the rate in that statute provided, the defendant shall forfeit ten per cent per annum on the amount of the contract to the school fund of the county in which the action is brought, and the plaintiff shall recover his full principal without interest or costs.

The statute if penal then at all, was penal only as to the defendant, the usuree: it is not by its language made penal: it is not declared that the usurer shall forfeit anything, or that he shall pay any penalty, and we insist that the statute if penal at all ought to be construed strictly, and held penal as to those provisions only which by the words used appear to have been intended by the Legislature as penal.

It may perhaps be said that the statute indirectly imposes a penalty upon the usurer, to the amount of the ten per cent interest; making him pay it *through the usuree*: But we say no; the statute operates upon the contract, and declares its legal effect, and a contract to pay money with more than ten per cent interest, is, under that statute, a contract to pay the principal without interest, and the usurer does not forfeit the interest, because under that law from the moment of making the contract he never had any right to it.

It was contended on the argument of this cause below, that the court ought not to regard this law, because it could not be enforced as a whole—because the court could not give judgment for the penalty in favor of the State of Iowa, to the use of the school fund of Rock Island County.

But why not? There is nothing in the statute to restrict the provision to the courts, or the counties of Iowa; as a matter of fact the school system of this State is organized similarly to that of Iowa: there being a specific fund appropriated to the schools of each county; and such perhaps is the system in every State in the Union; and this fact may, without any great stretch of imagination, be presumed to have been within the knowledge of the legislators of the sovereign State of Iowa, and the State of Iowa may as well be trustee for the school fund of any county of this State, as the State of Illinois itself, or any private individual.

But there is no authority in the law for this idea, that the statute, because portions of it cannot be enforced. ought to be entirely disregarded. It might with as much reason be contended that no man should or might lawfully be punished for any specific offense, unless also the whole criminal code might be enforced against him; that no court or judge ought to imprison a man for larceny unless he could also hang him for murder, slit his nose and give him the bastinado.

So far as the law of Iowa, which was the *lex loci* of this transaction, operates upon the contract that law must govern, the world over; and this statute does operate, not upon the usurer, but upon the contract which he has thus corruptly entered into, making it a contract to pay no interest, and void *pro tanto*.

Curtis vs Leavitt, 15 N.Y. (1 Smith. Ch. Appeals) p. 230. Story's Conf. Laws. 529.

The case of Richards vs. Marshman, 2 G. Greene's Iowa Reports, page 217, is in point to this.

That was an action of assumpsit upon certain promissory notes, drawing interest as the evidence showed,

at thirty three per cent. per annum; pleas of usury were interposed. The then statute of Iowa, was, as may be gathered from the decision, very similar to the statute pleaded in this case, except that the rate of interest allowed was twenty per cent. per annum, and the penalty for usury twenty-five per cent.; and it was contended that the statute prohibiting the usury, made usurous contracts void *in toto*. But the Court say, "we regard it as the clear intention of the law to leave all such contracts in full force, between the parties *except the usurious portion*. * * * * * We are of the opinion therefore, that the Court below erred in deciding that the entire contract was void, merely because one portion of it was forbidden by law: although that portion is obviously devisible and under our statute has no impairing effect upon the rest." Here, then, the contract being decided "to be in force, *except as to the usurious portion*," the unavoidable inference, from the reasing of the Court, is, that *as to the usurious portion* the contract is void, and not in force: the defendant's pleas then, correctly averred that, as to the $165 and the penalty &c., the note was and is void."

If the Courts of this State will, as they do, and as the Courts of all other States do, where the question has arisen, regard and enforce foreign statutes against usury: where they declare the contract void *in toto* or rather (see Ferguson vs Sutphen *ubi supra*) recognize the right of the usuree, to avoid the contract, though made in a foreign State, *in toto*, where the laws of that State give him that right; upon what principle of law or justice can this law be disregarded, which gives the usuree as a part of his contract, the right to avoid it *pro tanto?*

The dictum of the majority therefore, in Sherman vs. Gassett, is as we think we have shown, without foundation inreason; neither is it supported by a single authority. The case of Gale vs. Eastman 7 Metcalf, upon which alone they rely, goes upon an entirely different ground *to wit:* that the forfeiture provided for by the statute of New Hampshire was required to be enforced by a particular mode of proceeding which was inapplicable and could not be pursued by the Courts of Massachusetts, and the remedy being thus made a substantial and necessary part of the forfeiture, it could only be enforced in the Courts of New Hampshire; and to this effect astutely argue the dissenting judges.

But the statute of Iowa so far from connecting the rights of the usuree in respect to the contract with any peculiar local form of remedy, only provides that "If it *shall be ascertained* in any action brought upon any contract. that a rate of interest has been contracted for greater than is authorized by this act, * * * the same shall work a forfeiture of ten per cent. per annum &c., * * * and the plaintiff shall have judgment for the principal sum, without interest or costs * * *"

It makes the usuree, it is true, a competent witness, but it does not like the statute of New Hampshire, *requre* his oath; it does not prohibit him from establishing the fact of usury by any other competent testimony.

The statute may be fairly construed to read "that if in any action upon any contract made in the State of Iowa, whether brought in the Courts of Iowa, or of any other State, *it shall be ascertained*, according to the peculiar mode of trial adopted by the laws of the State in

which the action may be brought, that more than the interest allowed by the laws of Iowa, has been taken or reserved; the plaintiff shall be *entitled* to recover but the principal" It does not assume to dictate to the Courts of foreign States, but simply settles the rights of the parties to contracts made in that State: and the Comity of States requires, that this law operating as it does upon the contract, should be regarded and enforced in the Courts of every other Christian nation.

And this comity exists between all civilized States, and is binding upon all Courts until the legislative power shall have ordained otherwise. Story's Confl. Laws, Sec 25; Bank of Augusta vs Earle 13: Peters 519.

If we are corect in these positions, the first point raised by the assignment of errors is well taken and the judgmeut below should, for this error be reversed; and as the Record does not show what the judgment of the Court should have been, had this error not intervened, the cause should be remanded.

Howell vs Bassett, 3 Gilman, 434;
Jackson vs Haskell, 2 Scammon 565.
Heyl vs Stapp, 3 Scammon, 95;
Mager vs Hutchinson, 2 Gilman, 266;

As to the second error complained of, the point is too plain, and the authorities too uniform to require or admit of an argument.

2nd, Parsons on cont's, Sec ed, p 436, note F;
Mead vs Wheeler, 13, N. H., 351;
Sessions vs Richmond, 1, R. I., 298;
Richards vs Marshman, 2, G Greene's Ia. 217;
Gower vs Holt, 3d, Penn Clarke, 244.

In the last named case, the Supreme Court of Iowa construe the statute which we rely upon here, and that construction is a part of the law and of this contract.—Shelby vs Gray, 11, Wheat. R 361.

We respectfully submit that the judgment should be reversed and the cause remanded.

E. T. WELLS, Counsel for the pl'ffs in Error.

No. 95 — 171

David Barnes et. al.

vs

Spier Whitaker

Argument for Plffs in error

Filed May 10, 1859
L. Leland
Clerk

SUPREME COURT OF ILLINOIS.

Third Division—April Term, 1859.

DAVID BARNES *et al*
vs.
SPIER WHITTAKER.

DEFENDANT'S BRIEF.

The demurrer to the 2d and 3d pleas of plaintiff below, were properly sustained.

1st. Because the said pleas do not sufficiently set forth the transaction between the parties to the contract, to enable the court to determine whether or not the contract was in fact usurious, under the laws of Iowa.

3 Scammon, 333.

2d. Because said pleas themselves show the contract was not void by the Statute of Iowa therein pleaded.

4 Gilman, 521; 7 Metcalf 14.

Said statute being penal, must be construed strictly and literally, and cannot be extended by construction.

1 Dutch. (N. J.) 252; 2 N. J. 623.
20 Ohio, 7; 1 Hemp. 469, 481, and 487.

3d. The courts of one State will not enforce the usury laws of another, where the *contract is not declared void.*

7 Metcalf 14; 4 Gilman 521; 3 Johns 267;
14 Johns 337; 1 H. Black 135; Cowper 343.

4th. The penalty of two per cent per month after maturity, would not be usury anywhere. The party could have relieved himself from its payment by complying with his contract.

13 Ill. 577; 8 Mass. 257; 8 Blackford 140; Bac. Abr. *Usury* C.

GLOVER, COOK & CAMPBELL,
Attorneys for Defendants.

95-171

David Bennett et al

vs

Lyon Whitaker

Dft's Brief

Filed May 11. 1859

L Leland

Clerk

STATE OF ILLINOIS.

In the Supreme Court, April Term, 1859.

DAVID BARNES and CHRISTOPHER C. WEBBER, Plaintiffs in Error,

versus

SPIER WHITAKER, Defendant in Error.

ERROR TO ROCK ISLAND.

For Plaintiffs in Error, E. T. WELLS.

For Defendants in Error, WILKINSON & PLEASANTS, and SPIER WHITAKER, *pro se.*

ABSTRACT OF THE RECORD.

Page of Record.

3 May 21st, A. D. 1858: The defendant in error sued out of the office of the Clerk of Rock Island Circuit Court his writ of summons in assumpsit, against the plaintiffs in error and one William Bailey, returnable to the June Term, A. D. 1858; damages, $3,000.

5, 6 & 7. May 21, 1858: Defendant in error filed his declaration in assumpsit, against plaintiffs in error, containing a special count upon a promissory note, made at Davenport, Iowa, by plaintiffs in error and said Bailey to defendant in error, dated March 11th, A. D. 1857, for $2165 00, payable one hundred and seventeen days after date, at Davenport, Iowa, with a penalty of two per cent. per month after due, if not paid, and also the common counts.

June 8th, 1858: The plaintiffs in error entered their appearance, and plead to the declaration.

8 1. The General Issue.

8 to 15. 2. As to the $165, and as to the penalty in note mentioned: that the note mentioned in the declaration was made at Davenport, in the State of Iowa, and was made payable there, with reference to the laws of that State, setting up *in haec verba* the statute of Iowa regulating interest; averring that, in compliance with its terms, said statute was published, &c., and became of force; that before the making of the note in the declaration, Whitaker agreed to lend Barnes $2000 for one hundred and seventeen days—that for the loan of the $2000 for the time aforesaid, Barnes agreed to pay $165, and two per cent. per month on the $2165, after due; and that it was further agreed, that Barnes, Webber and Bailey should execute their note for $2165, with two per cent. per month after due, as a penalty. That in pursuance of the above corrupt agreement, defendants in error and said Bailey did execute the note declared upon, and that Whitaker did lend Barnes the $2000; that as to the $165, and the penalty, the note was and is void.

15 to 19. 3. Same as 2d, but goes only to the $165 00.

20 & 21. 4. Set-off: Fifth payment.

Page of Record.

25 June 14, 1858: The defendant in error filed his general demurrer to the 2d and 3d pleas, and joined issue as to the 1st, 4th and 5th.

26 June 15th, 1858: Demurrer to 2d and 3d pleas sustained by the Court. Plaintiffs in error withdrew 1st, 4th and 5th pleas, and judgment is entered for defendant in error by default; the clerk being ordered to assess the damages, reports the same at $2252 44, which is approved by the Court, and final judgment entered.

28 June 15th, 1858: Plaintiffs in error tender their bill of exceptions to the assessment; signed and sealed by the Judge.

The errors assigned are:

1st. That the Court erred in sustaining the demurrer to the 2d and 3d pleas.

2d. That the Court erred in approving the assessment.

3d. That the Court erred in rendering judgment for the plaintiff.

4th. That the Court erred in not rendering judgment for the defendant.

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Abstract of the Record

David Barnes et al.

v

Spice Whitaker

Error to Rock Island

Filed April 19, 1859
G. Leland
Clerk

IN THE SUPREME COURT OF ILLINOIS,

APRIL TERM, 1859.

DAVID BARNES & CHRIS. C. WEBBER, Pl'ffs in Error,

versus

SPIER WHITAKER, Defendant in Error,

ERROR TO ROCK ISLAND.

For Plaintiffs in Error, E. T. WELLS;

For Def't in Error, WILKINSON & PLEASANT
B. C. COOK and SPIER WHITAKER, *pro se.*

ARGUMENT OF E. T. WELLS.

REGISTER BOOK AND JOB PRINTING HOUSE, ROCK ISLAND, ILL.

IN THE SUPREME COURT OF ILLINOIS.

DAVID BARNES et al., vs. SPIER WHITAKER.

ARGUMENT OF E. T. WELLS.

This was an action of assumpsit brought in the Rock Island County Circuit Court, by the defendant in error against the plaintiffs in error and one William Bailey.

The plaintiff's declaration contained a special count upon a certain promissory note made by the defendants below to the plaintiff, March 11th, A. D. 1857, at Davenport, Iowa, for $2,165 due one hundred and seventeen days after date, with a penalty of two per cent. per month after due, if not paid at maturity, payable at Whitaker & Grant's office Davenport, Iowa.

The defendants at the return term pleaded 1st, "as to the $165, of the $2,165, and as to the penalty of two per cent. &c. *actio non*, because the note declared upon was made at Davenport, in the State of Iowa, and payable there with reference to the laws of that State; that before the execution of the note the legislature of Iowa, had by a certain statute &c., enacted, provided that the rate of interest for the forbearance of moneys should be $10 on the $100 by the year and no more, on all contracts made within that State, and that no person should by any device, shift or indirection receive

more than after the rate in that statute allowed, and setting out the statute in *haec verba* the material portions of which (see pages 8 to 15 of the Record) are as follows:

SEC. 2. "Parties may agree in writing for the payment of interest not exceeding ten cents on the hundred by the year."

SEC. 4. "No person shall directly or indirectly re. "ceive in money goods or things in action any greater "sum than in this act prescribed."

SEC. 5. "If it shall be ascertained in any suit "brought on any contrat that a rate of interest has "been contracted for greater than is authorized by this "act either directly or indirectly in money, property or "other valuable thing, the same shall work a forfeiture "of ten per cent. per annum upon the amount of "such contract to the school fund of the county in which "the suit is brought, and the plaintiff shall have jndg- "ment for the principal sum without without either in- "terest or costs ———— and in no case when un- "lawful interest is contracted for shall the plaintiff have "judgment for more than the principal sum, whether "the unlawful interest he incorporated with the princi- "pal or not."

The plea further shows that before the making of the note mentioned in the declaration it was corruptly agreed between Barnes and Whitaker, that Whitaker should lend Barnes $2000 for one hundred and seventeen days, that for the loan of the $2000 for the one hundred and seventeen days, Barnes should pay $165 and that if the $2,165 should not be paid at the end of

one hundred and seventeen days Barnes thereafter should pay interest upon it at the rate of two per cent. per month; that for securing the payment of the $2,165 and the two per cent. per month interest. Barnes, Webber and Bailey should execute their note to Whitaker, in which the $165 should be incorporated with the $2000 as principal, and the two per cent. per month should be named as a penalty, that in part pursuance of this corrupt agreement Barnes Webber and Bailey did execute the note mentioned in the declaration, and that in further pursuance of the same corrupt and unlawful agreement, Whitaker did lend Barnes $2000, that the $165 agreed to be paid for the forbearance of the $2000 for the one hundred and seventeen days, and the two per cent. agreed to be paid thereafter exceeded the rate of ten per cent. per annum &c., contrary to the form of the statute, and that as to the $165 and the penalty the note was and is void.

2d. The same plea but going only to the $165.

The plaintiff below demurred generally to both the above pleas, and the Court sustained the demurer; thereupon the defendants below electing to abide by their pleas, judgment was entered against them and the clerk ordered to assess the damages at the full amount of the penalty, to which the plaintiffs in error then and there excepted.

The questions raised by the assignment of errors are two.

1st Did the Court err in sustaining the demurer to the above pleas.

2nd Did the Court err in instructing the Clerk to assess the damages at the full amount of the penalty.

And first as to the demurrer. The plea certainly exhibits facts sufficient to bring the cause of action declared upon with the provisions of the statute, which is pleaded, and it was not contended on the argument in the Court below, nor by the learned judge who gave the decision there, nor will it, I apprehend, be contended here, that the statute itself is not sufficiently set out; but it was urged and the case of Sherman et al vs Gassett et al was relied upon, that the plea was insufficient, because the statute pleaded was penal and therefore local in its operation, and that for this reason the Courts of this State, could not recognize or enforce it, and upon the authority of that case, although his honor, the judge, expressed doubts as to its correctness, that the judgment was rendered below upon the demurrer.

4 Scam. 521

And if it be admitted that that case contains the law, and that the statute pleaded was under a proper construction penal, in its nature, the judgment below upon the demurrer was undoubtedly correct, and as to that point should be sustained.

On the part of the plaintiffs in error, however, we contend, 1st, That the opinion expressed by the majority of this Court in Sherman vs. Gassett is, and we say it with all respect for those learned and honorable judges who gave and concurred in that opinion, not the law; and, 2d, That if admitted to be the law, it has no application to the case presented by this record. The case of Sherman vs. Gassett was a writ of error brought to reverse the judgment of the Cook County Court upon a proceeding by *sci. fa.* instituted there by Gassett & Co., to foreclose a mortgage given to secure a note made by

Sherman *et. al.* to them, drawing ten per cent. interest per annum.

In the Court below the defendants interposed special pleas of usury, averring that the note was in fact made in Massachusetts, and was in violation of the law of that State, which permitted but six per cent. to be taken: the Court below sustained the demurrer interposed by the plaintiff to these pleas, and upon this point this Court held that the Court below decided correctly upon three separate and distinct grounds, and processes of reasoning, 1st, That the note being made payable generally on its face, and nothing appearing to the contrary by the defendant's plea, and it being secured by mortgage upon lands in this State, must be intended to have been made with reference to the laws of this State. 2d, That the Statutes of Massachusetts, which was pleaded, not declaring the contract void, but recognizing it as valid and merely imposing a forfeiture for the taking of excessive interest, which forfeiture they decide to be in the nature of a penalty, was penal and therefore could not be regarded or enforced in the Courts of this State. 3d, That as the enforcement and recovery of the forfeiture imposed by the statute of Massachusetts a peculiar mode was by that statute pointed out which mode of enforcement was adapted to and could be pursued only in the courts of that state. The forfeiture was thus made a part of the remedy and could only be recovered in the courts of Massachusetts. The Court say –

"It might in this case be urged, with great propriety, that a mortgage on real estate should be governed by the *lex situs*, and consequently not to be affected by the

usury laws of the place where it may have been executed or where the money is to be paid; the presumption being that the parties have had the laws of the country in view where the land was situated, and where suit must be instituted in case of foreclosure. The case of *Chapman* v. *Robinson*, 6 Paige, 627, was decided on this principle. In that case a loan was negotiated in England, where the creditor lived, to be secured by personal security and a mortgage on real estate in New York, where the borrower resided. Seven per cent interest was reserved in the mortgage, which was higher than the rate of interest allowed by law in England, although authorized by the laws of New York. Chancellor Walworth, in delivering his Opinion, says: "Upon a full examination of all the cases to be found upon the subject, either in this country or in England, none of which, however, appear to have decided the precise question which arises in this case, I have arrived at the conclusion that the mortgage executed here, and upon property in this State, being valid by the *lex situs*, which also is the law of the domicil of the mortgagor, it is the duty of the Court to give full effect to the security, without reference to the usury laws of England, which neither party intended to violate, by the execution of a mortgate upon the lands here." The Chancellor, in that Opinion, further says: "But if a contract for the loan of money is made here, and upon a mortgage of lands in this State, which would be valid if the money was payable to the creditor here, it cannot be a violation of the English usury laws, although the money is made payable to the creditor in that country, and at a rate of interest which is greater than is allowed in England." This question was fully and ably examined by Judge Martin, in the case of *Depeau* v. *Humphreys*, in the Supreme Court of Louisiana, (20 Martin, 1,) and that the court came to the conclusion, in which the Chancellor says he fully concurs, "that in a note given at New Orleans, upon a

loan of money made there, the creditor might stipulate for the highest legal rate of conventional interest allowed by the laws of Louisiana, although the rate of interest thus agreed to be paid was higher than that which could be taken upon a loan by the laws of the State where such note was made payable." The Chancellor continues: "Here the verbal contract for a loan upon the security of a mortgage on lands in this State, was wholly inoperative, until the mortgage and other written security were executed in this State, and which agreement was consummated by the deposit of money (in England,) to the order of the borrower. It was a contract partly made in this State and partly in England. And being actually made in reference to our laws, and to the rate of interest allowed here, it must be governed by them in the construction and effect of the contract, as to its validity. An appeal to the Courts of this State was also contemplated by the parties if necessary to enforce a performance of the written agreement for the re-payment of the loan, although from the residence of the mortgagee in England, it might be necessary to send the money there to make a legal tender of the debt."

In the case of *Robinson* v. *Bland*, 2 Burr. 386, which is a leading case on the subject of the *lex loci*, Lord Mansfield holds the following emphatic language: "In every disposition or contract, where the subject matter relates locally to England, the law of England must govern, and must have been intended to govern. Thus a conveyance or will of land, a mortgage, a contract concerning stocks, must be all sued upon in England, and the local nature of the thing requires them to be carried into execution according to the law here."

Here, then, as it would seem to us, the Court had settled the whole question as to the demurrer; they decide that the notes were payable, not with reference to the laws of Massachusetts, but the laws of *this* State, and all

questions therefore as to what would have been the proper construction of the statutes of Massachusetts which was pleaded, or of the contract, if it had been made under that statute were no longer before the Court.

It is true, that as the Court say, they "did not consider it necessary to place the decision upon this point." to wit: the point which they had just decided, that the contract was to be construed with reference to the laws of Illinois; but having decided that point, the other points which they afterwards proceed to argue and determine—to-wit that the law pleaded was penal and therefore could not be enforced, and that the forfeiture provided for was a part of the remedy, and the statute could only be enforced in the Courts of Massachusetts —were no longer in the case for determination, and all that part of the opinion of the majority of the Court, therefore, as to these two points last mentioned, was *extra judicial*, and not to be regarded.

If, as the majority of the Judges had most certainly made up their minds, and most unequivocally decide, the contract was governed by the laws of this State; what then had the laws of Massachusetts to do with it? and what right had the Court, or what necessity or propriety was there in any construction of the statute of Massachusetts against usury—or of the contract upon the supposition that it was to be governed by it.

The Court might with the same propriety have proceeded to discuss the statutes of New York against usury; they had just as much relation to the contract, as under their previous decision, the statutes of Massachusetts.

But the Court proceed to decide.

2d. That the demurrer was properly sustained, because the statute of Massachusetts which was pleaded was penal and therefore could not be enforced in the Courts of this State. And here we take direct issue with those honorable judges who thus express their opinions; and we feel the more assurance, in attacking this decision for the reasons that as above argued it is as to this point of it *extra*; that the doctrine thre advanced is contrary to natural reason, and is supportd by no *direct* authority precedent to it and none at all subsequent, so far as by a tolerably thorough investigation we have been able to descever, and that upon this point the Court were divided, his Honor, Judge Koerner, delivering a strong dissenting opinion, with whom concurred Judges Caton and Thomas.

We by no means deny the general principal of the law upon which the Court in the majority opinion base their judgment, that penal and criminal statutes are local in in their operation, and that the criminal jurisprudence of one country can not be enforced in another; but we insist that neither in that case nor in the case now before the Court has that principle any application.

The reason of the rule is that the Criminal laws of every State are for the punishment of offences against the body politic of that particular State: and by the act of connecting himself with the State or community, or continuing the connection in which the accident of birth may may have placed him, every individual gives his assent to those laws and tacitly stipulates to submit himself to the sanction imposed for their breach

when convicted thereof by his fellows of the particular State or community in the manner which the laws of that State or community have appointed; but by no others and in no other way. This arrangement being adopted by common consent supersedes, and in fact takes away the right which every individual has by the law of nature to execute vengeance upon offenders against the peace or safety of his own community. Vattel ~~c. 19.~~ B. I. c. 19.

But no individual assumes any duties or obligations towards any community save the one to which he may have attached, himself nor has any member of such other community, nor has such other community itself in its aggregate capacity, any jurisdiction over the particular individual in question except for offences done against themselves.

It is therefore against the law of nature and the law of nations that one State should assume to punish a citizen of another State for offences against the laws of that other State. Vattel lib. I. c. 19, sec. 232.

And this is the fullest extent to which this principle is adopted, that the courts of one State cannot execute the *criminal* laws of another State. (Houghton vs. Page, 2 N. H. Rep., p 42.)

The court admit, in Sherman vs. Gassett, that had the contract declared upon been avoided by the statute of the State where made, transportation could not validate it: it would still be void wherever sued upon—and that this is the law see Houghton vs. Page, *ubi supra*, and McAllister vs. Smith, 17 Ills. Rep.

Will it be seriously contended that a statute declar-

ing the whole principal forfeit for usury is not penal, while one declaring only the interest (as in the case now before the court) or the interest and a portion of the principal, (as in the case of the statute pleaded in Sherman vs. Gassett), forfeit for usury, is penal?

The first has for its object the suppression of usury: and the objects of both the others are the same; they differ only in the *quantum* of the forfeiture imposed, and there is no single reason which can be given for construing one to be penal which does not apply equally, and indeed with greater force to the others.

In Houghton vs. Page, above cited, and this is the earliest case so far as we have been able to discover, in which this question arose, an action was brought upon a note made in Massachusetts, drawing more than six per cent. interest, and which by the law of that State as it then was, was wholly void. This statute of Massachusetts was pleaded, and the Court upon demurrer sustained the plea, and in a very learned opinion decided expressly that the statute of Massachusetts *was penal, but that, as applicable to contracts, all the laws of the place where the contract is made, whether penal or not, have equal force,* citing 1 Wm. Bl. 236, 2 Burr. 1094, 2 D. & E. 52, 1 Eq. Ca. ab. 299. 2 I. R. 356 and 506, and see Dewolf vs. Sohnson et al, 10 Wheaton R.

The court say. "As applicable to the remedy, no foreign law, whether penal or not, is enforced. * * The extent of the exception seems to be only this, that as penal statutes are a part of the criminal jurisprudence of a country, their operation, breach and punishment are all local, (Vattel, lib 1.) Hence when broken, whether at

home or abroad, no suit can be instituted abroad to enforce this penalty.

"But contracts of the kind now in suit are personal, and the breach of the law can be punished abroad as well as at home, and if their considerations are void by the law of the country where executed, we see no reason to take this contract out of the action and effect of the general rule of the *lex loci*, and by a transportation over the boundaries of the State, metamorphose an agreement null and void, into an agreement pure and actionable.

"We do not apprehend it to fall within the exception that the penal statutes of one State cannot be enforced in another State, (3 D & E 733, 5 Esp. Ca. 173 n, 2 John, Ca. 363, 14 J R 340."

If then the statute of Massachusetts, which was pleaded in Sherman vs. Gassett, be penal, so also, and most highly penal, was the statute of the same State, pleaded in Houghton vs. Page: the last was enforced by the courts of New Hampshire, and those Judges of this Court who concurred in the majority opinion in Sherman vs. Gassett, admitted that had the statute pleaded there declared the whole principal forfeit, they must have enforced it. Can any reason be assigned why one penal law should be enforced extra territorially and another not? The one operates upon the contract, so does the other; the one is intended to prevent usury as opposed to the policy of the particular State by which it is adopted, and so is the other; in every particular except as to the *quantum* of the forfeiture, as before said, they are precisely similar.

But we contend that in no proper sense are either the statute of Massachusetts which was pleaded in Sherman vs. Gassett, or the statute of Iowa which was pleaded in this case, penal; they are no part of the criminal code of their respective States; they do not subject the usurer to indictment, nor to an action by an informer *qui tam*; the penalty, if penalty there be, is strictly personal to the usuree, and can be sued for or taken advantage of only by him.

The statute simply operates *upon the contract*, and gives the usuree the right, if he see fit to exercise it, of avoiding the contract *pro tanto*: and all *dicta* going upon the supposition that the statutes of usury in any State make the contract *void*, are wide of the mark; for so far as we have been able to discover, no statute of usury that ever was enacted assumes to anything more than to make the contract *voidable* by the *usuree*, (see Ferguson vs. Sutphens, 3 Gilm. 547.) This is a right which as it is a part of the contract, follows it everywhere.

In Gray vs. Bennett, 3 Metcf. 529, the Court of Massachusetts had, long before the decision in Sherman vs. Gassett, construed this very statute, which in that case the majority of the judges of this court held to be penal, not to be penal but *remedial* in its nature.

That was a Bill in Chancery, brought by the assignee of a certificated bankrupt, to recover the triple penalty for usury received of the bankrupt previous to the assignment; and it was argued by counsel for the defendant in error, that the statute was penal, and that the right to recover the penalty was personal and did not pass by the assignment in bankruptcy; and that this position is correct see 12 Wend 297.

The cause was very learnedly argued, Hon. B. R. Curtiss being of counsel with the plaintiff in error, and the Court say upon this point: "Instead of a forfeiture of the whole debt and subjecting the offender to criminal prosecution and an action *qui tam*, the offence is now merged into a private offense against the individual, and the party's remedy is by an action of debt or by bill in chancery. * * The present law while it is penal to some extent in its consequences, may be said to be adopted into the family of remedial statutes, and although a brother of the half-blood, is entitled to a share of its inheritance, or in other words has the like privilege of a liberal construction," (citing Stanly vs. Wharton, 9 Price, Reed vs. Inh., Northfield 13 Pick, Brandon vs. Pate, 2 H. Bl. Brandon vs. Sands 2 Ves. Jr.)

This decision as it would seem to us, is not only supported by authorities but is consistent with reason, and the broadest principle of justice.

Every statute regulating interest is framed doubtless with the same double object in view, to-wit: the punishment of the usurer, and the protection of his victim.

In reference to the first end to be attained, they may all perhaps be said to be in some sense penal, but as to the second, we can conceive of no class of statutes which may with more propriety be termed *remedial:* and as operating upon the contract, these statutes can in no sense be called penal: penal statutes operate upon persons, not upon contracts. Particularly is this true of the statute of Iowa, which was pleaded in this case. The statute establishes ten per cent by the year as the

X Hubbell v Pate 3 M.T.
Woodgate v Knatchbull. 2 T.R. 148.
Middleton v Wynn Mills.
Ward v Snell. M.Bl. 10.

highest lawful rate of interest, and declares that if in any action upon any contract it shall be ascertained that a greater sum has been reserved or taken than after the rate in that statute provided, the defendant shall forfeit ten per cent per annum on the amount of the contract to the school fund of the county in which the action is brought, and the plaintiff shall recover his full principal without interest or costs.

The statute if penal then at all, was penal only as to the defendant, the usuree: it is not by its language made penal; it is not declared that the usurer shall forfeit anything, or that he shall pay any penalty, and we insist that the statute if penal at all ought to be construed strictly, and held penal as to those provisions only which by the words used appear to have been intended by the Legislature as penal.

It may perhaps be said that the statute indirectly imposes a penalty upon the usurer, to the amount of the ten per cent interest; making him pay it *through the usuree*: But we say no; the statute operates upon the contract, and declares its legal effect, and a contract to pay money with more than ten per cent interest, is, under that statute, a contract to pay the principal without interest, and the usurer does not forfeit the interest, because under that law from the moment of making the contract he never had any right to it.

It was contended on the argument of this cause below, that the court ought not to regard this law, because it could not be enforced as a whole—because the court could not give judgment for the penalty in favor of the State of Iowa, to the use of the school fund of Rock Island County.

But why not? There is nothing in the statute to restrict the provision to the courts, or the counties of Iowa; as a matter of fact the school system of this State is organized similarly to that of Iowa: there being a specific fund appropriated to the schools of each county; and such perhaps is the system in every State in the Union; and this fact may, without any great stretch of imagination, be presumed to have been within the knowledge of the legislators of the sovereign State of Iowa, and the State of Iowa may as well be trustee for the school fund of any county of this State, as the State of Illinois itself, or any private individual.

But there is no authority in the law for this idea, that the statute, because portions of it cannot be enforced, ought to be entirely disregarded. It might with as much reason be contended that no man should or might lawfully be punished for any specific offense, unless also the whole criminal code might be enforced against him; that no court or judge ought to imprison a man for larceny unless he could also hang him for murder, slit his nose and give him the bastinado.

So far as the law of Iowa, which was the *lex loci* of this transaction, operates upon the contract that law must govern, the world over;* and this statute does operate not upon the usurer, but upon the contract which he has thus corruptly entered into, making it a contract to pay no interest, and void *pro tanto*.

*Curtiss vs. Leavitt 15. N.Y. (1. Smith Ct. appeals) on p. 250. Story's Confl. Laws §291.

The case of Richards vs. Marshman, 2 G. Greene's Iowa Reports, page 217, is in point to this.

That was an action of assumpsit upon cert in promissory notes, drawing interest as the evidence showed,

at thirty three per cent. per annum; pleas of usury were interposed. The then statute of Iowa, was, as, may be gathered from the decision, very similar to the statute pleaded in this case, except that the rate of interest allowed was twenty per cent. per annum, and the penalty for usury twenty-five per cent.; and it was contended that the statute prohibiting the usury, made usurous contracts void *in toto*. But the Court say, "we regard it as the clear intention of the law to leave all such contracts in full force, between the parties *except the usurious portion*. * * * * * We are of the opinion, therefore, that the Court below erred in deciding that the entire contract was void, merely because one portion of it was forbidden by law: although that portion is obviously devisible and under our statute has no impairing effect upon the rest." Here, then, the contract being decided "to be in force, *except as to the usurious portion*," the unavoidable inference, from the reasoning of the Court, is, that *as to the usurious portion* the contract is void, and not in force: the defendant's pleas, then, correctly averred that, as to the $165 and the penalty &c., the note was and is void."

If the Courts of this State will, as they do, and as the Courts of all other States do, where the question has arisen, regard and enforce foreign statutes against usury where they declare the contract void *in toto* or rather (see Ferguson vs Sutphen *ubi supra*) recognize the right of the usuree, to avoid the contract though made in a foreign State, *in toto*, where the laws of that State give him that right; upon what principle of law or justice can this law be disregarded, which gives the usuree as a part of his contract, the right to avoid it *pro tanto*?

The dictum of the majority therefore, in Sherman vs. Gassett, is as we think we have shown, without foundation inreason; neither is it supported by a single authority. The case of Gale vs. Eastman 7 Metcalf, upon which alone they rely, goes upon an entirely different ground *to wit:* that the forfeiture provided for by the statute of New Hampshire was required to be enforced by a particular mode of proceeding which was inapplicable and could not be pursued by the Courts of Massachusetts, and the remedy being thus made a substantial and necessary part of the forfeiture, it could only be enforced in the Courts of New Hampshire; and to this effect astutely argue the dissenting judges.

But the statute of Iowa so far from connecting the rights of the usuree in respect to the contract with any peculiar local form of remedy,only provides that "If it *shall be ascertained* in any action brought upon any contract, that a rate of interest has been contracted for greater than is authorized by this act, * * * the same shall work a forfeiture of ten per cent. per annum &c., * * * and the plaintiff shall have judgment for the principal sum,without interest or costs * * *"

It makes the usuree, it is true, a competent witness, but it does not like the statute of New Hampshire, *requre* his oath; it does not prohibit him from establishing the fact of usury by any other competent testimony.

The statute may be fairly construed to read "that if in any action upon any contract made in the State of Iowa, whether brought in the Courts of Iowa, or of any other State, *it shall be ascertained*, according to the peculiar mode of trial adopted by the laws of the State in

which the action may be brought, that more than the interest allowed by the laws of Iowa, has been taken or reserved; the plaintiff shall be *entitled* to recover but the principal" It does not assume to dictate to the Courts of foreign States, but simply settles the rights of the parties to contracts made in that State: and the Comity of States requires, that this law operating as it does upon the contract, should be regarded and enforced in the Courts of every other Christian nation.

And this comity exists between all civilized States, and is binding upon all Courts until the legislative power shall have ordained otherwise. Story's Confl. Laws, Sec 25; Bank of Augusta vs Earle 13: Peters 519.

If we are corect in these positions, the first point raised by the assignment of errors is well taken and the judgmeut below should, for this error be reversed; and as the Record does not show what the judgment of the Court should have been had this error not intervened, the cause should be remanded.

Howell vs Bassett, 3 Gilman, 434;
Jackson vs Haskell, 2 Scammon 565.
Heyl vs Stapp, 3 Scammon, 95;
Mager vs Hutchinson, 2 Gilman, 266;

As to the second error complained of, the point is too plain, and the authorities too uniform to require or admit of an argument.

2nd, Parsons on cont's, Sec ed, p 436, note F;
Mead vs Wheeler, 13, N. H., 351;
Sessions vs Richmond, 1, R. I., 298;
Richards vs Marshman, 2, G Greene's Ia. 217;
Gower vs Holt, 3d, Penn Clarke, 244.

In the last named case, the Supreme Court of Iowa construe the statute which we rely upon here, and that construction is a part of the law and of this contract.—Shelby vs Gray, 11, Wheat. R 361.

We respectfully submit that the judgment should be reversed and the cause remanded.

E. T. WELLS, Counsel for the pl'ffs in Error.

SUPREME COURT OF ILLINOIS,

Third Division—April Term, 1859.

DAVID BARNES *et al.*
vs.
SPIER WHITTAKER.

DEFENDANT'S BRIEF.

The demurrer to the 2d and 3d pleas of plaintiff below, were properly sustained.

1st. Because the said pleas do not sufficiently set forth the transaction between the parties to the contract, to enable the court to determine whether or not the contract was in fact usurious, under the laws of Iowa.

3 Scammon, 333.

2d. Because said pleas themselves show the contract was not void by the Statute of Iowa therein pleaded.

4 Gilman, 521; 7 Metcalf 14.

Said statute being penal, must be construed strictly and literally, and cannot be extended by construction.

1 Dutch. (N. J.) 252; 2 N. J. 623.
20 Ohio, 7; 1 Hemp. 469, 481, and 487.

3d. The courts of one State will not enforce the usury laws of another, where the *contract is not declared void.*

7 Metcalf 14; 4 Gilman 521; 3 Johns 267;
14 Johns 337; 1 H. Black 135; Cowper 343.

4th. The penalty of two per cent per month after maturity, would not be usury anywhere. The party could have relieved himself from its payment by complying with his contract.

13 Ill. 577; 8 Mass. 257; 8 Blackford 140; Bac. Abr. *Usury* C.

GLOVER, COOK & CAMPBELL,
Attorneys for Defendants.

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David Barker et al

vs

Spicer & Whitaker

Dfts Brief

Filed May 11. 1859

L. Leland

Clerk

STATE OF ILLINOIS.

In the Supreme Court, April Term, 1859.

DAVID BARNES and CHRISTOPHER C. WEBBER, Plaintiffs in Error,

versus

SPIER WHITAKER, Defendant in Error.

ERROR TO ROCK ISLAND.

For Plaintiffs in Error, E. T. WELLS.

For Defendants in Error, WILKINSON & PLEASANTS, and SPIER WHITAKER, *pro se.*

ABSTRACT OF THE RECORD.

Page of Record.

3 May 21st, A. D. 1858: The defendant in error sued out of the office of the Clerk of Rock Island Circuit Court his writ of summons in assumpsit, against the plaintiffs in error and one William Bailey, returnable to the June Term, A. D. 1858; damages, $3,000.

5, 6 & 7. May 21, 1858: Defendant in error filed his declaration in assumpsit, against plaintiffs in error, containing a special count upon a promissory note, made at Davenport, Iowa, by plaintiffs in error and said Bailey to defendant in error, dated March 11th, A. D. 1857, for $2165 00, payable one hundred and seventeen days after date, at Davenport, Iowa, with a penalty of two per cent. per month after due, if not paid, and also the common counts.

June 8th, 1858: The plaintiffs in error entered their appearance, and plead to the declaration.

8 1. The General Issue.

[illegible] to 15. 2. As to the $165, and as to the penalty in note mentioned: that the note mentioned in the declaration was made at Davenport, in the State of Iowa, and was made payable there, with reference to the laws of that State, setting up *in haec verba* the statute of Iowa regulating interest; averring that, in compliance with its terms, said statute was published, &c., and became of force; that before the making of the note in the declaration, Whitaker agreed to lend Barnes $2000 for one hundred and seventeen days—that for the loan of the $2000 for the time aforesaid, Barnes agreed to pay $165, and two per cent. per month on the $2165, after due; and that it was further agreed, that Barnes, Webber and Bailey should execute their note for $2165, with two per cent. per month after due, as a penalty. That in pursuance of the above corrupt agreement, defendants in error and said Bailey did execute the note declared upon, and that Whitaker did lend Barnes the $2000; that as to the $165, and the penalty, the note was and is void.

15 to 19. 3. Same as 2d, but goes only to the $165 00.

20 & 21. 4. Set-off: Fifth payment.

Page of Record.

25 June 14, 1858: The defendant in error filed his general demurrer to the 2d and 3d pleas, and joined issue as to the 1st, 4th and 5th.

26 June 15th, 1858: Demurrer to 2d and 3d pleas sustained by the Court. Plaintiffs in error withdrew 1st, 4th and 5th pleas, and judgment is entered for defendant in error by default; the clerk being ordered to assess the damages, reports the same at $2252 44, which is approved by the Court, and final judgment entered.

28 June 15th, 1858: Plaintiffs in error tender their bill of exceptions to the assessment; signed and sealed by the Judge.

The errors assigned are:

1st. That the Court erred in sustaining the demurrer to the 2d and 3d pleas.

2d. That the Court erred in approving the assessment.

3d. That the Court erred in rendering judgment for the plaintiff.

4th. That the Court erred in not rendering judgment for the defendant.

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Abstract of the Record

David Barnes

v

Silas Whitaker

Circuit Court Rock Island County

Filed April 19. 1859

C. Leland

Clerk