No. 13402

Supreme Court of Illinois

Osborn

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vs.

McCowen

Supreme Court---Second Grand Division.

JANUARY TERM, 1861.

ABSTRACT.

SILAS D. OSBORN
vs.
JAMES McCOWEN. } Appeal from Mason.

POINTS MADE.

I. The Court could not render judgment against the plaintiff in error when there was a plea of the general issue on which the defendants had taken issue, without a trial or without the plea having been withdrawn. See Teal vs. Russel, II Scam., 320; Lyon vs. Borney, I Scam., 387; Manloon vs. Burns, I Scam., 390; Covel et als. vs. Marks, I Scam., 391.

II. "Where usury is alleged, it may be proven by parol [evidence,] and as a consequence the written contracts of the parties may, by the same kind of evidence, be varied and contradicted," and the real character of the transaction shown. See Ferguson vs. Sutphen, III Gil., p. 570; III Phillips' Evidence, 1447, note 968 and authorities there cited; Murphy vs. Twiggs, I Monroe, 72; Thompson vs. Potter, V Little's Reports, 74; Fenwick vs. Ratcliff, VI Monroe, 154; Lindly vs. Sharpe, VII Monroe, 248; New Orleans G. L. & B. Co. vs. Dudley, VIII Paige's Ch. Rep., p. 452; Vroom vs. Ditmus, IV Paige's Chy. Rep., p. 526; Smith vs. Nichols, VIII Leigh, p. 330;

III. To constitute usury, it must be with the intent to take more than the legal rate of interest. Grosvenor vs. Flax and Hemp Manf. Co., I Green Ch'y, 452; Price vs. Campbell, II Call, 110.

IV. If it be the intention, at the time the agreement be made, that the principal money should not be paid at the time appointed, and that such clause was inserted in order to evade the statute, it is then within the statute of usury, and the "wit of man cannot find a shift to take it out of the statute." See Floyer vs. Edwards, I Cowper, p. 112; VII Bacon's Abridgement, title C of Usury. In the cases of Roberts vs. Tremayne, III Croke, 507, and Wells vs. Girling, I Brod. & Birgh., 447, show cases where there were penalties fixed for the non-performance of contracts, and where there was no pretence that the parties intended to take usury or evade the laws. The cases of Cutler vs. How, VIII Mass., 257, and Gambrill vs. Doe., VIII Blakf., 140, refer to cases where penalty only was intended, and not usury. In the case of Lawrence vs. Cowles, (XIII Ills., p. 579,) and the case of Barnes et al. vs. Whitaker, (XXII Ills.,) there was no pretence that the parties had tried to evade the statute of usury in drawing up the instruments in those cases sued on, but that the penalties in those cases were bona fide and in good faith.

LYMAN LACEY,
For Appellant.

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Osborn

vs

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applts brief

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Wm Turney

Clk

Supreme Court---Second Grand Division.

JANUARY TERM, 1861.

ABSTRACT.

SILAS D. OSBORN
vs.
JAMES M. COWEN. } Appeal.

This was an action of assumpsit, commenced by the appellee against the appellant, at the October Term, A. D., 1860, of the Mason County Circuit Court. The declaration contained the common money counts, to-wit:

1st. For money lent.
2nd. For money had and received for the use of appellee.
3 3th. For interest on money loaned.
4 4th. For goods, wares and merchandise.
5th. For money found to be due on account stated.

As also the following special count, to-wit:

"James M. Cowen, plaintiff in this suit, by Conwell & Wright, attorneys, complains of Silas D. Osborn, defendant, who was summoned, &c., in a plea of trespass on the case on promises, for that whereas the said defendant, heretofore, to-wit: on the 9th day of June, A. D., 1859, at the county aforesaid, made his certain promissory note in writing of that date, and then and there delivered the same to the said plaintiff in and by which said note, said defendant by the name, style and description of Silas D. Osborn, promised to pay the said plaintiff, by the name, style and description of James M. Cowen, or order, the sum of five hundred and thirty
2 10–100 Dollars, and if not paid at maturity, 20 per cent. interest after maturity until paid, one day after the date, thereof for value received, which period for the payment thereof has now elapsed. By reason whereof and by force of the statute in such case made and provided, the said defendant became liable to pay said plaintiff said sum of money mentioned in said note, and being so liable, in consideration thereof, then and there said defendant promised to pay the said plaintiff the said
3 sum of money according to the tenor of the note; and the said plaintiff avers that said defendant, by reason of the non-payment of said sum of money, according to the terms of the said note, at maturity thereof has become liable to pay the plaintiff the sum of two hundred dollars for interest and damages for the non payment thereof, and being so liable the defendant promised to pay the same.

ASSIGNING COMMON BREACH.

To the said declaration the appellant, by Lacey, his attorney, filed two pleas:
1st. The plea of the general issue.
2nd. A special plea as follows, to-wit:

"And for a further plea in this behalf the said defendant says, as to all the interest claimed on said note, actio non, because he says, at the time of the executing the said note, the said plaintiff agreed with the said defendant that he would give the defendant one year's time, if this defendant would give him 20 per cent. interest,
7 which this defendant agreed to do, and the agent of the said plaintiff then and there draw up the said note, due one day after date, and if not paid at maturity, to draw 20 per cent interest after maturity, solely for the purpose of evading the usury laws; all of which this defendant is ready to verify; to which second plea the appellee filed his demurrer, which said demurrer the court sustained.

The court then gave the following judgment on the sustaining the appellee's demurrer to appellant's second plea, to-wit:

"And the court being fully advised the premises, orders that the plaintiff have judgment against the said defendant in the sum of ($668 72–100) six hundred and
9 sixty-eight and 72–100 dollars. It is therefore ordered by the court that the plaintiff recover of the said defendant the said sum of ($668 72–100) six hundred and sixty eight and 72–100 dollars, being the amount of his damages herein and also the costs in this behalf expended, and that he have execution therefor."

And the appellant brings the cause into this court and assigns the following for error:

1st. The court below erred in sustaining the demurrer to the second plea of the appellant.

2nd. The court below rendered judgment against the appellant when there was a plea of the general issue on file in the cause, undisposed of and without a trial.

3rd. The judgment should have been for the appellant instead of the appellee.

4th. The judgment should have been less by the interest on the note than it is.

LYMAN LACEY,
For Appellant.

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Osborn
vs
McCowen

Abstract

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