No. 14347

Supreme Court of Illinois

Innes et al.

vs.

Hadden.

71641 7

STATE OF ILLINOIS,

SUPREME COURT.

Third Grand Division.

14347

No. 79.

Innes
vs
Hadden

362

State of Illinois }
In Supreme Court } Third Grand Division
April Term A.D. 1862.

Peter Innes &
Abiram Spaulding
Appellants
vs
George M. Hadden
Appellee

Appeal

Application for re-hearing

George M. Hadden,

Sir: You are hereby notified that the appellants at the said April Term of said Court, will move the said Court to hear and determine an application for re-hearing of the appeal in the above cause, made at the April Term A.D. 1861, by the said appellants, which application at said April Term A.D. 1861, was continued to the April Term A.D. 1862, in order that you should be notified of the said application for re-hearing of said appeal in said cause - when and where you may attend -

Aurora April 8th 1862

Mentory & Searles
attorneys for Appellants

Served By reading and leaving a copy of which this is a copy April 11 1862

A H Curtis

Supreme Court
of Grant County
Jones &
Spaulding
Appellants
vs
George McFadden
Appellee

Notice

State of Illinois } ss
In Supreme Court } Third Grand Division
April Term A.D. 1862.

Peter Innes &
Abiram Spaulding } Appeal
appellants
vs } Application for
George M Hadden } re-hearing.
appellee

State of Illinois }
Kane County } ss. Asa A Dexter first
City of Aurora } being duly sworn
on oath says

that he personally served by reading and delivering to George M Hadden April 11th A.D. 1862, at the City of Aurora aforesaid in said County and State a written notice of which the within is a true copy. Which notice was served at the request of R.G. Montony of the firm of Montony & Searles attorneys for appellants. And further this deponent says not.

A A Dexter

State of Illinois }
County of Kane } I Charles F Johnston clerk
City of Aurora } of the Court of Common
Pleas of the City of

Aurora aforesaid, do certify that Asa A. Dexter personally known to me as the same person whose name is subscribed to the foregoing affidavit, appeared before me this day in person, at my office in said City, and made oath in due form of law that he had read the said affidavit by him subscribed and that the same is true in substance and in fact.

Given under my hand and seal of said Court of Common Pleas of of the City of Aurora County and State Aforesaid this 16th day April A.D. 1862

Charles P. Johnston

Clerk

79

In Supreme Court
April Term A.D. 1862

Peter Innes &
Hiram Spaulding
Appellants
vs
George M Hadden
Appellee

Notice & aff. for
rehearing

Filed April 22 - 1862
L. Leland
Clerk

State of Illinois ss

In Supreme Court at Ottawa
Of the April Term A.D. 1861

Peter Innes &
Abiram Spaulding
vs
George M Hadden

Appeal from the Court of Common Pleas of the City of Aurora –

Affirmed April Term AD 1860

To the Honorable
The Justices of said Supreme Court

The appellants in the above entitled cause respectfully represent that the opinion of the majority of the Court filed ~~[illegible]~~ states: But it is insisted by the defendant that the usurious interest which he has paid might at any time be recovered back, as for money paid and advanced, or for money had and received; and that having such demand against the plaintiff, he had a right to sett it off in this action – If the premise is correct, the conclusion follows. Whether

that be right; depends on the statute of usury (and then cites the statute) It then further says: "It is manifest that the legislature had no intention of giving a cause of action to the person who has paid usury and fails to make the defense, when sued for the debt upon which the usury has been paid, or agreed to be paid.

2^d^ It is respectfully submitted that the same objection is equally as true to the New York and the English statutes of usury as to that of this state. It is based upon the well known and universal principle of law that when a party has had his day in Court and fails to make his claim or defense that the judgment is conclusive against him. For there must be an end to litigation. See 9 Paige Ch R. 165 and the cases there cited.

2d The court also say in same opinion: "If he voluntarily pays the principal sum due and the usury agreed to be paid upon it, that is an end of the matter so far as this statute is concerned.—

This is freely admitted so far as any remedy being pointed out by the statute— But it is respectfully insisted that the mere fact that the legislature did not give the party paying the usurious interest any right of action in terms, to recover back the excess of usury, manifests an intention on their part to leave him to his common law remedy or right of action— And had they given him a statutory remedy it would not have taken away his common law right of action— See Wheaton vs Hibbard 20 Johns 290

3d The statute of this state prohibits the taking of more than ten per cent per annum— It is the

prohibition and not the penalty that makes the contract illegal. See State Bank v Ensminger 7 Blackford R. 107. Where the Court say that: "Indeed it is the prohibition "to make a contract which renders "it illegal, and not the punishment "inflicted for a violation of the "prohibition –

4 The appellee is no more entitled to the excess of usury under our statute which forfeits the whole interest for violating it than he would be if the legislature had seen fit to forfeit both principal and interest – or in other words had declared it void – "For the excess beyond legal inter-"-est was money to which the "appellee had no right; it belonged "belonged to the appellants –" so says the Court in the case of Wheadon v Hubbard 20 Illinois 290 –

5 It may be that if the appel-lants had sought to insist upon a forfeit of the whole interest – which would be

insisting upon the penal portion of the Statute — that the Court might with propriety require him to plead his defense specially — But here the appellants ask that the Court will allow them to have the benefit of the excess either by way of set off or payment pro tanto of the principal and such a defense is meritorious and not to be discouraged by the Courts — it being money in his hands belonging to them and they have the meritorious right to have the same applied to the principal see Ball v Leonard 24 Ill. 146

6" Under the general issue the appellants had the right to have the illegal excess after the discharge of the lawful interest applied on the principal — The Court say in the case of Smedes & Marshall R. 640. "For although it be true that by law partial pay-ments must be first applied

insisting upon the penal portion of the Statute - that the Court might with propriety require him to plead his defense specially - But here the appellants ask that the Court will allow them to have the benefit of the excess either by way of set off or payment pro tanto of the principal and such a defense is meritorious and not to be discouraged by the Courts - it being money in his hands belonging to them and they have the meritorious right to have the same applied to the principal see Ball v Leonard 24 Ill. 146

6" Under the general issue the appellants had the right to have the illegal excess after the discharge of the lawful interest applied on the principal - The Court say in the case of Snider & Marshall R. 640, "For although it be true that by law partial payments must be first applied

to the interest and the party receiving them would have a right so to apply them, yet this would not be the case with illegal interest. The law does not apply payments to illegal purposes. See Wheaton v Hibbard 20 Johns 290; Bartholomew v Yaw 9 Paige Ch. R. 165; Sanders v Lambert 7 Gray's R. 484; Snead v Green 5 Porter 308.

7th The Court say: suppose the party sued upon an usurious note fails to make the defense authorized by the statute, but suffers judgment to go against him for the principal and the usurious interest, and pays it, the statute gives him no right to recover back the interest thus paid. This is certainly correct and it would be equally correct if our statute should have made the usurious contract void like the English statute. For when the defendant is sued on his usurious note made in New York or England and

he does not show that fact
but fails to make the defence
the judgment is conclusive
against him both at law and
equity. See 9 Paige. R. Ch 165
& cases there cited - Neither the
New York nor the English statute
gave the party paying usurious
interest any right of action
where he was sued for the
principal and usurious interest
and failed to make his defence
See those statutes as cited in
Whalen vs Hubbard 20 Johns
290 - But under a common
law defence - that is to say
plea of payment, or general
issue or plea of set off, he might
show the usury and have all
that he has paid as usurious
interest applied first to the pay-
-ment of the principal and legal
interest - And if he has paid more
than the principal and legal
interest, then he would have
a right to have judgment under
plea of set off for the balance
as money had and received & c
And this is not because the statute

has given any remedy of this sort but because the Statute has prohibited the contracting for and receiving of any rate of interest beyond the amount prescribed by it. And that, therefore, the usurer has no legal or equitable title whatever to the excess of usury for he got it when the law prohibited him from receiving it. And shall have no advantage by his possession for the other party is not in pari delicto with the usurer. See the cases already cited.

8th Where a statute is substantially or literally copied from one in another State which has there received a construction which is consistent with the spirit and policy of our laws such a construction may with propriety be adopted by our courts and there are many decisions of this court adopting this principle which are not necessary to cite. Our legislature has adopted

in regard to usury the Southern Statutes in substance rather than the New York or English Statute - See Kentucky Statute approved Feb. 6th 1819; Georgia Statute passed 23d Dec. 1822: South Carolina Statute passed 18th Dec. 183 : Tennessee of 1819; of 1835; Mississippi Statute passed June 25 1822; Alabama Statute passed Jan. 17. 1834; Texas Statute in 17 Texas R. 803 & first point made by Thompson counsel for appellee Bennett:

The following decisions were made under those Statutes allowing the money paid ~~either~~ as the excess of usury to be recovered back as for money had & received 'or set off - as the particular case might require - See 12 B. Monroe 87: Smede & Marshall R. 631; 1 Georgia R. 241: 10 Georgia R 389; 7 Yerger 545; 17 Texas R 794; Clark v. Hunter 2 Spear R 83. 85 5 Dana 80:

See also
Fleming & al. v. Jenks & al. 22 Ill. 477.

Wherefore and for that there were errors in the record and proceedings aforesaid and also in the rendition of the judgment aforesaid, the said appellants pray a re-hearing of this cause and that the judgment aforesaid in form aforesaid given may be reversed and in all things held for naught

Montony & Seeds
attys for appellants

Charles C. Bonney
of counsel -

301-79

Innes & al.

v.

Hadden

Petition
for Rehearing

Filed Apl 20. 1861 -
L. Leland
Clerk

Rehearing Denied