St. John's Law Review

Volume 10
Number 2 *Volume 10, April 1936, Number 2*

Article 31

Usury--Right to Foreclose Usurious Mortgage After Return of Property Usuriously Taken (Bowery Savings Bank v. Nirenstein, 269 N.Y. 259 (1935))

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USURY—RIGHT TO FORECLOSE USURIOUS MORTGAGE AFTER RETURN OF PROPERTY USURIOUSLY TAKEN.—The mortgage sought to be foreclosed was originally $20,000 but was reduced by payment on account of principal to $12,000. Subsequently the mortgage was transferred to plaintiff's assignor and at the same time the principal sum was increased to $14,000 and an extension of the maturity of this total sum for three years arranged. The defense of usury set up in the answer is based upon the retention by the plaintiff's assignor of $420 of the $2,000 increase, for expenses and disbursements. In reliance on Section 376 of the General Business Law,[1] an order was entered by the Special Term fixing the usurious excess at $210, upon deposit of which sum judgment of foreclosure and sale should follow. Upon appeal from the affirmation of the judgment by the Appellate Division, *held,* for the defendant, order reversed. The statute is peremptory and unequivocal in enacting that the usurious obligation is absolutely void.[2] *Bowery Savings Bank* v. *Nirenstein,* 269 N. Y. 259, 199 N. E. 211 (1935).

It is the definite and expressed policy of this state that the usurer shall forfeit all rights under the usurious contract.[3] Section 376 must not be read literally. It must be construed in the light of prior provisions, now repealed, which imposed a penalty of treble damages and in addition subjected him to criminal prosecution.[4]

This section must be read with the practice of the chancery court under the statute prior to 1837 in mind.[5] The provisions of the statute prior to 1837 definitely declared the usurious obligation void. Despite the plain declaration of the statute these courts required the borrower to repay what he had received under the usurious contract as a condition precedent to filing a bill of discovery to recover the property held as security by the lender. The statute contained a specific provision which made available the bill of discovery to the borrower and there was connected with and included in the same section a provision for immunity which is identical with our

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[1] N. Y. GENERAL BUSINESS LAW (1909) § 376: "Every person who shall repay or return the money, goods or other things so taken, accepted or received, or the value thereof, shall be acquitted and discharged from any other or further forfeiture, penalty or punishment, which he may have incurred by taking or receiving the money, goods, or other thing so repaid, or returned as aforesaid."

[2] N. Y. GENERAL BUSINESS LAW (1909) § 373; Sabine v. Paine, 223 N. Y. 401, 119 N. E. 849 (1918).

[3] N. Y. GENERAL BUSINESS LAW (1909) § 373: "All bonds, bills, notes, * * * all other contracts or securities whatsoever except bottomry and respondentia, * * * whereupon there shall be taken or reserved, any greater sum * * * or value * * * than is above prescribed, shall be void." (The second paragraph following the above orders the court to declare void all items listed above taken in violation of the foregoing provision.)

[4] 1 Colonial Laws, 909 c. 328 (1717)—expired by its terms in 5 years. Re-enacted in substance in 1737.

[5] Fanning v. Dunham, 5 Johns. Ch. 122 (N. Y. 1821); Early v. Mahan, 19 Johns. Ch. 147 (N. Y. 1821); Livingston v. Harris, 11 Wend. 329 (N. Y. 1833); see Curtiss v. Teller, 217 N. Y. 649, 112 N. E. 1056 (1913), for a comprehensive review of chancery practice under usury statutes.

Section 376.[6] Thus we have chancery requiring repayment of the value received as the loan and the statute offering immunity to the lender upon making discovery and restitution to the borrower. Thus the procedure adopted and the statutes applied enabled these courts to carry out its long established principles of equity.

By Section 4 of the Laws of 1837, Chapter 430, the practice of chancery was abolished. Section 5 ordered the court to declare the usurious contract void and to compel the same to be surrendered and cancelled.[7] In so far as the practice to which it applied has been abolished, Section 376 has been stripped of all force and effect. Its remaining force, if any, must be construed to apply to the penal provisions relating to violations of the usury statutes.[8] The present section relied upon by the plaintiff must, therefore, be construed to require the return of not only the usurious excess but of the entire amount involved in the usurious transaction.

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[6] N. Y. REVISED STATUTES (1830) pt. 2, c. 4, tit. 3, § 7.

[7] N. Y. Laws of 1837, c. 430:

§ 4. "Whenever any borrower of money, goods or things in action, shall file a bill in chancery for relief or discovery or both * * * it shall not be necessary for him * * * nor shall any court of chancery require or compel the payment or deposit * * * as a condition of granting relief or discover * * *."

§ 5. "Whenever it shall satisfactorily appear by the admissions of the defendant, or by proof that any bond, bill, * * * has been taken in violation of the provisions of said title * * * the court of chancery shall declare the same to be void and enjoin any prosecution thereon and order the same to be surrendered and cancelled."

[8] Curtiss v. Teller, 217 N. Y. 649, 112 N. E. 1056 (1913).