Andrews Vs. Pond

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Appellant : Andrews

Respondent : Pond

Judgement :

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Andrews v. Pond

38 U.S. (13 Pet.) 65

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE SOUTHERN DISTRICT OF ALABAMA

SYLLABUS

A bill of exchange, in payment of a debt due on a protested bill, was taken in New York from one of the parties to the protested bill. The exchange between Mobile, on which the bill was drawn, was stated to be ten percentum, and was added to

the bill, and the damages on the protested bill, with interest, at the rate of interest in New York, from the time the first bill was protested, were added to the bill. It was sent to Mobile and was placed to the credit of the drawees by the endorsee, who received it before it came to maturity. The bill was afterwards protested for nonpayment. An action was brought in Alabama against the endorsers of the bill, one of whom was in New York when the bill was drawn, and who, being liable to suit on the protested bill, gave the second bill to prevent suit being brought against him. The defendants alleged usury in the second bill, the rate of exchange allowed on the bill, being ten percentum, was given, and it being alleged that the highest rate of exchange on Mobile did not exceed five percentum.

Although the transaction, as exhibited, appears, on the face of the account for which the bill was drawn, to be free from the taint of usury, yet if the ten percentum charged as exchange, or any part of it, was intended as a cover for usurious interest, the form in which it was done and the name under which it was taken will not protect the bill from the consequences of usury, and if the fact be established, it must be dealt with in the same manner as if the usury had been expressly mentioned in the bill itself. But whether the charge of ten percentum for exchange between New York and Mobile was intended as a cover for usury or not is a question exclusively for the jury. It is a question of intention.

In order to enable the jury to decide whether the usury was concealed under the name of exchange, evidence on both sides ought to have been admitted, which tended to show the usual rate of exchange between New York and Mobile, when the bill was negotiated.

There is no rule of law fixing the rate which may be charged for exchange. It does not depend on the cost of transporting specie from one place to another, although the price of exchange is no doubt influenced by it.

The general principle in relation to contracts made at one place to be executed at another is well settled. They are to be governed by the laws of the place of performance, and if the interest allowed by the laws of the place of performance be greater than that permitted at the place of the contract, the parties may

stipulate for the higher interest without incurring the penalties of usury.

When a contract has been made without reference to the laws of the state where it was made or to the laws of the place of performance, and a rate of interest was reserved forbidden by the laws of the place where the contract was made, which was concealed under the name of exchange in order to evade the law against usury, the question is not which law is to govern in executing the contract; unquestionably it must be the law of the state where the agreement was entered into and the instrument taken to secure its performance. A contract of this kind cannot stand on the same principles with a *bona fide* agreement made in one place to be executed in another. In the last mentioned cases, the agreements were permitted by the *lex loci contractus,* and will even be enforced there if the party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws and designed to evade them. In such cases, the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there, it is void everywhere.

A person who takes a bill which on the face of it was dishonored cannot be allowed to claim the privileges which belong to a *bona fide* holder without notice. If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it. There can be no distinction in principle between a bill transferred after it is dishonored for nonacceptance and one transferred after it has been dishonored for nonpayment.

If, in consideration of further forbearance, a creditor receives a new security from his debtor for an existing debt, he cannot enlarge the amount due by exacting anything, either by way of interest or exchange, for the additional risk which he may suppose he runs by this extension of credit, nor on the opinion he may entertain as to the punctuality of payment or the ultimate safety of his debt.

The plaintiff in error instituted a suit on a bill of exchange, dated at New York on 11 March, 1837, drawn by D. Carpenter on Sayre, Converse & Company, Mobile, Alabama, for $7,287.78 in favor of the defendants, Pond, Converse & Company, payable and negotiable at the Bank of Mobile sixty days after date.

The plaintiff in error was a citizen of New York, and the drawers and endorsers of the bill were citizens of Alexandria, Alabama.

The evidence in the circuit court proved that Lewis W. Pond, one of the defendants, was in New York in March, 1837, and being indebted to the plaintiff in the sum of six thousand dollars on a bill which had been returned protested from Mobile, and on which suit was about to be brought by the plaintiff, agreed to pay ten percent, the legal damages on the bill, and ten percent in addition, with the legal interest of New York on the bill for the time of its return, being eighteen days, and the charges of protest and postage, by a bill of exchange on Mobile. The bill was drawn in New York, being for the sum of $7,287.78, and was endorsed by Mr. Pond, in the name of the firm, the defendants in error. The bill was endorsed by the plaintiff in error and was remitted by the plaintiff to S. Andrews, at Mobile, and was by him set to the credit of H. A. Andrews & Company, of New York. It was received by S. Andrews, with the endorsement of the defendants, before its maturity, and it was a cash credit in the account current between H. M. Andrews & Company and S. Andrews. The defendant offered evidence under the issue the statute of New York against usury and certain depositions to prove that the bill of exchange was usurious.

One of the witnesses stated that the consideration for this bill was made up by the following account:

E. Hendrick's draft on Daniel Carpenter,

Montgomery, Alabama, protested, dated

at New York, December 20th, 1836, at

sixty days, for $6,000.00

Damages at 10 percent 600

Interest 18 days, at 7 percent. 21

Protest and postage 4.25

------- 625.25

Exchange, 10 percent, being difference

of exchange between Mobile and New

York on 11 March 1837 . . . . . 662.53

$7,287.78

John Delafield, President of the Phoenix Bank, examined on the part of the defendant, stated that the exchange between New York and Mobile on 11 March, 1837, was from three to five per

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cent. This knowledge of exchange was acquired from having dealt an exchange during the period for the Phoenix Bank.

Robert White, cashier of the Manhattan Company, stated that by a reference to the books of the company, the exchange between New York and Mobile was, during the month of March, 1837, from five to seven percent, and Morris Robinson agent for the Bank of the United States in the City of New York, said that during the month of March, 1837, he found by a reference to the books the dealers with the bank were charged from three to five percent -- three for short, and five for long paper.

The plaintiff excepted to the reading of the statute and laws of New York against usury, and in order to disprove the allegation of usury in the transaction, as the

contract was not made subject to the statute laws of New York, and the contract was subject only to the laws of Alabama as to its obligatory form and solidity, and was or was not usurious according to these laws. The plaintiff then offered to prove by Joseph Wood that the banks purchased bills at a far less exchange than others; that they never bought any other than undoubted paper; that from the facility of collecting, remitting &c.;, they had many advantages over the citizens at large, and that the exchange of the banks was therefore much lower than that of the community at large; that there was no fixed rate of exchange between Mobile and New York; that it varied from one to twenty percent, according to the solvency, punctuality, risk, &c.;, of the parties; that exchange was ever fluctuating, and was high or low as the risk was great or small. The court refused to admit this testimony, and the plaintiff excepted.

The plaintiffs asked the court to instruct the jury that if it was satisfied that the excess over legal interest retained in this bill was taken and contracted for innocently by the parties, without intending to violate the laws against usury, it might find for the plaintiff. The court refused to give this instruction, and the plaintiff excepted.

The plaintiff moved the court to instruct the jury that the contract expressed in this bill of exchange, if to be executed in Alabama, was subject alone to the laws of Alabama against usury, and that the usury laws of New York had no force or anything to do with this investigation; this was refused by the court, and plaintiff excepted.

The plaintiff next requested the court to charge the jury that if it believed S. Andrews received the bill before maturity, for a valuable consideration, without any notice of usury, and that the plaintiff received it from S. Andrews, without notice of usury, and before maturity, that the plaintiff might recover notwithstanding plaintiff offered no proof of the consideration he gave for it. The plaintiff excepted to this refusal of the court.

The plaintiff next moved the court to charge that the variance between the bill declared on and the one set up as the same bill by defendant's deposition was

fatal in a plea of usury, to which the court refused, and the plaintiff excepted.

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It appeared that before the bill was delivered by S. Andrews to plaintiff, it had been, while in the hands of S. Andrews, protested for nonacceptance, which appeared on the face of the bill. There was no evidence of any settled account between H. M. Andrews & Co. and S. Andrews or which was creditor or debtor upon the statement of accounts. It was also proved that the expense of transporting specie from New York to Mobile, including insurance and interest, would not exceed one and one-half percentum on the sum transported.

Upon the whole case and the several points stated, the court charged the jury that if it believed from the evidence that by the usages of trade between New York and Mobile, there was an established rate of exchange between those places, the drawers and drawees of the bill of exchange here sued on, had a right to contract for such rates of exchange, and that even a higher rate to a small amount, if under the circumstances it did not appear to have been intended to evade the statute against usury might be allowed by them; but if it believed that no such usage existed, the parties had no right to contract for more than the actual expense of transportation of specie from one place to the other, including interest, insurance, and such reasonable variations therefrom as above stated, and further, if it believed from the evidence that the drawers of the bill of exchange contracted with the drawers in the State of New York, at the time the bill was drawn, for a greater rate of interest than seven percentum per annum for the forbearance of the payment of the sum of money specified in the bill, although it may have been taken in the name of exchange, the contract is usurious, and unless it believed from the evidence that the plaintiff took the bill in the regular course of business and upon a fair and valuable consideration *bona fide* paid by him and without notice of the usury, it ought to find for the defendant; otherwise for the plaintiff, to which opinion and charge of the court the plaintiff by his counsel excepted. The jury found a verdict for the defendants, and the plaintiff prosecuted this writ of error.

MR. CHIEF JUSTICE TANEY delivered the opinion of the Court.

The action was brought by the plaintiff as endorsee, against the defendants as endorsers of a bill of exchange in the following words:

"Exchange for $7,287 78/100 New York, March 11, 1837"

"Sixty days after date of this first of exchange, second of same tenor and date unpaid, pay to Messrs. Pond, Converse & Wadsworth or order seven thousand two hundred and eighty-seven 78/100 dollars, negotiable and payable at the Bank of Mobile, value received, which place to the account of"

"Your obedient servant"

"D. CARPENTER"

"To Messrs. Sayre, Converse & Co."

"Mobile, Alabama"

The case as presented by the record appears to be this. The defendants were merchants residing in Mobile, in the State of Alabama. H. M. Andrews & Co. were merchants residing in New York, and before the above mentioned bill was drawn, the defendants had become liable to H. M. Andrews & Co. as endorsers upon a former bill for $6,000 drawn by E. Hendricks on Daniel Carpenter, of Montgomery, Alabama. The last mentioned bill was dated at New York, and fell due on 21 February, 1837, and was protested for nonpayment. The defendant Pond, it seems, was in New York in the month of March, 1837, shortly after this protest, when H. M. Andrews & Co. threatened to sue him on the protested bill, and the defendant Pond, rather than be sued in New York, agreed to pay H. M. Andrews & Co. ten percent damages on the protested bill and ten percent interest and exchange on a new bill to be given, besides the expenses on the protested bill.

According to this agreement an account, which is given in the record, was stated between them on 11 March, 1837, in which the defendants were charged with the protested bill and ten percent damages on the protest and interest and expenses, which amounted altogether to the sum of $6,625.25, and ten percent upon this sum was then added, as the difference of exchange between Mobile and New York, which made the sum of $7,287.78, for which the defendant Pond delivered to H. M. Andrews & Co. the bill of exchange upon which this suit is brought, endorsed by the defendants in blank. The bill was remitted by H. M. Andrews & Co. to S. Andrews at Mobile for collection. The drawees refused to accept it, and it was protested for nonacceptance, and after this refusal

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and protest, it was transferred by S. Andrews to J. J. Andrews, the present plaintiff. It is stated in the exception that after this transfer it was a cash credit in the account between H. M. Andrews & Co. and S. Andrews. The bill was not paid at maturity, and this suit is brought to recover the amount.

There is no question between the parties as to the principal or damages of ten percent charged for the protested bill of $6,000; nor as to the interest and expenses charged in the account hereinbefore mentioned. The defendants admit that the principal amount of the protested bill, the damages on the protest which are given by the act of assembly of New York, and the interest and expenses, were properly charged in the account. The sum of $6,625.25 was therefore due from them to H. M. Andrews & Co. on the day of the settlement, payable in New York. The dispute arises on the item of $662.53, charged in the account as the difference of exchange between New York and Mobile, and which swelled the amount for which the bill was given to $7,287.78. The defendants allege that the ten percent charged as exchange was far above the market price of exchange at the time the bill was given, and that it was intended as a cover for usurious interest exacted by the said H. M. Andrews & Co. as the price of their forbearance for the sixty days given to the defendants. This was their defense in the circuit court, where a verdict was found for the defendants under the directions given by the court.

Many points appear to have been raised at this trial, which are stated as follows in the exception taken by the plaintiff.

The defendant offered evidence:

1. To prove that the said bill of exchange was usurious according to the statute and laws of the State of New York. The plaintiff objected to the reading of the statute and depositions aforesaid because the contract was not made with a view of the statute or laws of New York. But the bill of exchange was usury or not by the laws and statutes of Alabama, and that the contract was subject only to the laws of the State of Alabama as to its obligatory force and validity, and he further objected that if this contract were to be decided by the statute of New York, that this proof could not be given under this issue, but the court overruled all these objections and permitted the depositions and statute to be read to show the bill of exchange to be void by the laws of New York, to all which plaintiff excepts.

2. Plaintiff then offered to prove by Joseph Wood that the banks purchased bills at a far less rate of exchange than others; that they never bought any than undoubted paper; that from the facility of collecting, remitting, &c.;, they had many advantages over the citizens at large, and that the exchange of the banks was therefore much lower than the community at large; that there was no fixed rate of exchange between Mobile and New York; that it varied from one to twenty percent according to the solvency, punctuality, risk, &c.; that exchange was ever fluctuating, and was high or low as

the risk was great or small. The court rejected this testimony also, to which plaintiff excepts.

3. Plaintiff asked the court to instruct the jury that if it was satisfied that the excess over legal interest retained in this bill was taken and contracted for innocently by the parties, without intending to violate the laws against usury, that they might find for plaintiff, but the court refused this also, and plaintiff excepts.

4. Plaintiff moved the court to charge the jury that the contract expressed in this bill of exchange, if to be executed in Alabama, was subject alone to the laws of Alabama against usury, and that the usury laws of New York had no force or anything to do with this investigation. This was refused by the court, and plaintiff excepts.

5. Plaintiff next requested the court to charge the jury that if it believed S. Andrews received the bill before maturity for a valuable consideration without any notice of usury, and that plaintiff received it from S. Andrews, without notice of usury and before maturity, that the plaintiff might recover notwithstanding plaintiff offered no proof of the consideration he gave for it. To this refusal there was also an exception.

6. Plaintiff next moved the court to charge that the variance between the bill declared on and the one set up as the same bill by defendants' deposition was fatal in a plea of usury, to which the court refused, and plaintiff excepts.

7. It appeared that before the bill was delivered by S. Andrews to the plaintiff, it had been, while in the hands of S. Andrews, protested for nonacceptance, which appeared on the face of the bill. There was no evidence of any settled account between H. M. Andrews & Co. and S. Andrews, or which was creditor or debtor upon the statement of accounts. It was also proved that the expense of transporting specie from New York to Mobile, including insurance and interest, would not exceed one and one-half percent on the sum transported. Upon the whole case and the several points stated, the court charged the jury that if it believed from the evidence that by the usages of trade between New York and Mobile there was an established rate of exchange between those places, the drawers and drawees of the bill of exchange here sued on had a right to contract for such rates of exchange, and that even for a higher rate to a small amount, if under the circumstances it did not appear to have been intended to evade the statute against usury, might be allowed by them.

8. But if they believed that no such usage existed, the parties had no right to contract for more than the actual expense of transportation of specie from one

place to the other, including interest, insurance, and such reasonable variations therefrom as above stated.

9. And further, if it believed from the evidence that the drawers of the bill of exchange contracted with the drawee in the State of New York, at the time the bill was drawn, for a greater rate of interest than seven percentum per annum for the forbearance

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of the payment of the sum of money specified in the bill, although it may have been taken in the name of exchange, the contract is usurious, and unless they believe from the evidence that the plaintiff took the bill in the regular course of business and upon a fair and valuable consideration *bona fide* paid by him and without notice of the usury, it ought to find for the defendants; otherwise for the plaintiff.

From the manner in which the points are arranged in this exception and the similarity of the questions presented in some of them, we shall be better understood by expressing our opinion on the whole case as it appears before us, without regarding the order in which the questions are stated in the exception and without examining separately each one of the instructions asked for by the plaintiff and refused by the court.

The transaction, upon the face of it, does not profess to charge any interest for forbearance. It is a bill of exchange in the usual form, and in the account stated at the time, and which formed the basis of the bill, the only item in relation to interest is the small sum charged for the eighteen days which intervened between the time when the first bill became due and the present one was given. This interest is charged at seven percent, which is the legal rate of interest established in New York. The transaction, taken altogether, was indeed a ruinous one on the part of the defendants. A debt of $6,000, payable at Mobile on 21 February, was converted into a debt of $7,287.78, payable at the same place on 25 April following, being an increase of $1,287.78 in the short space of eighty-one days.

Yet if the defendants brought it upon themselves by their failure to take up the first bill at maturity, and the transaction was not intended to cover usurious interest, they must meet the consequence of their own improvidence. The sum of $6,625.25 was undoubtedly due from them to H. M. Andrews & Co. on the day the bill in question was drawn. They were entitled to demand that sum in New York, or a bill that was equivalent to it at the market price of exchange, and if ten percent discount was the usual price at which others purchased bills of this description in the market of New York, they had a right to take the bill at that rate, in satisfaction of their debt. There is nothing, therefore, upon the face of the papers from which the Court can undertake to say that usurious interest was exacted.

But although the transaction, as exhibited in the account, appears on the face of it to have been free from the taint of usury, yet if the ten percent charged as exchange, or any part of it, was intended as a cover for usurious interest, the form in which it was done and the name under which it was taken will not protect the bill from the consequences of usurious agreements, and if the fact be established, it must be dealt with in the same manner as if the usury was expressly contracted for in the bill itself. But whether this item was intended as a cover for usury or not is a question exclusively for the jury. It is a question of intent. And in order to

enable the jury to decide whether usury was concealed under the name of exchange; evidence on both sides ought to have been admitted which tended to show the usual rate of exchange between New York and Mobile when this bill was negotiated. There is no rule of law fixing the rate which may be lawfully charged for exchange. It does not altogether depend upon the cost of transporting specie from one place to another, although the price of exchange is no doubt influenced by it. But it is also materially affected by the state of the trade, by the urgency of the demand for remittances, and by the quantity brought into the market for sale, and sometimes material changes take place in a single day, although no alteration has happened in the expenses of transporting specie. The Court therefore can lay down no rule upon the subject. H. M. Andrews & Co., when about to take this bill in payment of an existing debt, had a right to include in it a fair allowance for the

difference in exchange. Whether they exacted more or not for the forbearance of their debt is a question for the jury to decide, and in order to enable them to decide it correctly, they must be allowed to hear the evidence which either of the parties may offer as to the rates of exchange for such a bill as this, which was payable in specie and not in any depreciated currency. Taking this view of the subject, we think the court below erred in rejecting the testimony of Joseph Wood, who was offered by the plaintiff to prove the rate of exchange and also in the direction given to the jury that if there was no fixed rate of exchange, the creditor had a right to take no more than the actual expense of transporting the specie, or a small amount more, where the addition was not intended to cover usury.

Another question presented by the exception and much discussed here is whether the validity of this contract depends upon the laws of New York or those of Alabama. So far as the mere question of usury is concerned, this question is not very important. There is no stipulation for interest apparent upon the paper. The ten percent in controversy is charged as the difference in exchange only, and not for interest and exchange. And if it were otherwise, the interest allowed in New York is seven percent, and in Alabama eight, and this small difference of one percent per annum upon a forbearance of sixty days could not materially affect the rate of exchange and could hardly have any influence on the inquiry to be made by the jury. But there are other considerations which make it necessary to decide this question. The laws of New York make void the instrument when tainted with usury, and if this bill is to be governed by the laws of New York, and if the jury should find that it was given upon an usurious consideration, the plaintiff would not be entitled to recover unless he was a *bona fide* holder without notice and had given for it a valuable consideration, while by the laws of Alabama he would be entitled to recover the principal amount of the debt, without any interest.

The general principle in relation to contracts made in one place

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to be executed in another is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the laws of the place of

performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury. And in the case before us, if the defendants had given their note to H. M. Andrews & Co. for the debt then due to them, payable at Mobile in sixty days with eight percent interest, such a contract would undoubtedly have been valid, and would have been no violation of the laws of New York, although the lawful interest in that state is only seven percent. And if in the account adjusted at the time this bill of exchange was given it had appeared that Alabama interest of eight percent was taken for the forbearance of sixty days given by the contract, and the transaction was in other respects free from usury, such a reservation of interest would have been valid and obligatory upon the defendants and would have been no violation of the laws of New York.

But that is not the question which we are now called on to decide. The defendants allege that the contract was not made with reference to the laws of either state and was not intended to conform to either. That a rate of interest forbidden by the laws of New York, where the contract was made, was reserved on the debt actually due, and that it was concealed under the name of exchange, in order to evade the law. Now if this defense is true and shall be so found by the jury, the question is not which law is to govern in executing the contract, but which is to decide the fate of a security taken upon an usurious agreement which neither will execute. Unquestionably it must be the law of the state where the agreement was made and the instrument taken to secure its performance. A contract of this kind cannot stand on the same principles with a *bona fide* agreement made in one place to be executed in another. In the last mentioned cases, the agreements were permitted by the *lex loci contractus,* and will even be enforced there if the party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws and designed to evade them. In such cases, the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there, it is void everywhere, and the cases referred to in Story's Conflict of Laws 203 fully establish this doctrine.

In the case of *De Wolfe v. Johnson,* 10 Wheat. 383, this Court held that the *lex loci contractus* must govern in a question of usury, although by the terms of the agreement the debt was to be secured by a mortgage on real property in another state. And the case of *Dewar v. Shaw,* 3 T.R. 425, shows with what strictness the English courts apply their own laws against usury to contracts made in England. In the case under consideration, the previous debt for which the bill was negotiated was due in New York; a part of it -- that is to say the damages on the protest of the first bill --

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were given by a law of that state, and the debt was then bearing the New York interest of seven percent, as appears by the account before referred to. And if in consideration of further indulgence in the time of payment the parties stipulated for a higher interest and agreed to conceal it under the name of exchange, the validity of the instrument, which was executed to carry this agreement into effect, must be determined by the laws of New York, and not by the laws of Alabama.

In this aspect of the case another question arose in the trial in the circuit court. By the laws of New York as they then stood, usury was no defense against the holder of a note or bill who had received it in good faith, and to whom it was transferred for a valuable consideration and without notice of the usury. The present plaintiff claims the benefit of this provision. But upon the evidence in the case, it is very clear that he does not bring himself within it. The bill of exchange was protested for nonacceptance while it was in the hands of S. Andrews, the agent of H. M. Andrews & Co., to whom it had been sent for collection, and this fact appeared on the face of the bill at the time it was transferred to the plaintiff. Now a person who takes a bill, which upon the face of it was dishonored cannot be allowed to claim the privileges which belong to a *bona fide* holder without notice. If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it. There can be no distinction in principle between a bill transferred after it is dishonored for nonacceptance and one transferred after it is dishonored for nonpayment, and this is the rule in the English courts, as appears by the case of *Crossley v. Ham,* 13

East 498. Now it is evident that no consideration passed between Carpenter, the drawer of the bill, and the defendants, who are the payers and endorsers. The bill was made and endorsed by the defendants, for the purpose of being delivered to H. M. Andrews & Co. in execution of the agreement for further indulgence. And if that agreement was usurious, then the bill in question was tainted in its inception, and that taint must continue upon it in the hands of the present plaintiff.

There is one other direction given by the circuit court which remains to be considered. It is the third, as stated in the exception. The vagueness and generality of the terms in which this instruction was asked for by the counsel for the plaintiff justified the court in refusing it. It will be seen from what we have already said that if the rate of exchange taken upon this bill was a fair one, and was not intended to cover usurious interest, the plaintiff is entitled to recover, and if the payer means nothing more than this, there could be no objection to it. But if it was intended to maintain that although a higher rate of exchange was allowed than the fair market price, and that this was done in consideration of the forbearance of payment, under the belief that the law would not in that shape regard it as usury, the mistake of the parties in this respect

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will not alter the character of the transaction. The instruction as asked for was framed in such general terms that it might have misled the jury, and the court therefore was not bound to give it.

In fine, if the parties intended to allow no more than a fair rate of exchange, testing it by the market price of good bills of this description, it was not usury and the plaintiff is entitled to recover. If, on the contrary, more was intended to be taken, it was usury and the plaintiff is not entitled to recover. It is true that after this bill had been negotiated between H. M. Andrews & Co. and the defendants, other persons might have lawfully purchased it at a much greater discount than the market rate of exchange, and might have considered and estimated in the price they gave for it, the known embarrassments, the want of punctuality, and the loss of credit of the defendants, whose former bill had already been protested. But as between the

debtor and his creditor, no difference in the rate of exchange can be made on that account. If, in consideration of further forbearance, the creditor receives a new security from his debtor for an existing debt, he cannot enlarge the amount due by exacting anything either by way of interest or exchange on account of the additional risk he may suppose he runs by this extension of credit nor on account of any doubts he may entertain as to the punctuality of payment or the ultimate safety of his debt.

It is hardly necessary to add that the right of the defendant to offer in evidence, under the plea of *nonassumpsit,* that the instrument was given upon an usurious contract has been too well settled to be now disputed, and we see nothing in the record upon which a question for the court could be raised upon the supposed variance between the bill mentioned in the testimony produced by the defendants and the bill declared on by the plaintiff.

Upon the whole, we dissent from the circuit court in the second and eighth points in the exception, as we have already mentioned, and we concur with them in the residue.

The judgment of the circuit court must therefore be

Reversed with costs.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Alabama, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the judgment of the said circuit court in this cause be and the same is hereby reversed with costs, and that this cause be and the same is hereby remanded to the said circuit court with directions to award a *venire facias de novo.*