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 affirmed, with costs.

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*Bank of the United States, Plaintiffs in error, *v.* Herbert G. Waggener, George Wagley and Alexander Miller. [*378

Usury.

The office of the Bank of the United States, at Lexington, Kentucky, in February 1822, held a large amount of notes of the Bank of Kentucky, which had been received in the usual course of business, at the full value expressed on their face, as equivalent to gold and silver, and were so considered by the bank; on the amount of these notes so held, the Bank of Kentucky had agreed to pay interest, at the rate of six per centum, until the same should be redeemed; all the notes of the Bank of Kentucky, held by the Bank of the United States, were finally paid with the interest. In February 1822, when the notes of the Bank of Kentucky were at a depreciation of between thirty-three and forty per cent., Owens applied to the office of the Bank of the United States, for a loan of $5000 of the said notes, saying they would answer his purpose as well as gold or silver; after repeated refusals and re-applications, with the consent of the board of directors of the Bank of the United States, at Philadelphia, the sum of $5000, in the notes of the Bank of Kentucky, was loaned to him, on a promissory note, signed by him, and by Waggener, Miller and Wagley, payable in three years, with interest, at the rate of six per cent. per annum; the money so loaned was paid to the borrower in the notes of the Bank of Kentucky, and in a check on that bank; and the interest on that amount of the notes, being so much of the sum due by the Bank of Kentucky to the Bank of the United States, ceased from the date of the loan. In an action on the note given by Owens and others, the defence was set up, that the transaction was usurious, contrary to the charter of the Bank of the United States, and void: *Held*, that there was no usury in the transaction.

The statute of usury of Kentucky of 1798, declares, that all bonds, notes, &c., taken for the loan of money, where "is reserved or taken" a greater rate of interest than six per cent, shall be void. In this case, no interest at all was taken, the interest being payable at the termination of three years mentioned in the note; and if the case be brought within the statute, it must be, not as a taking, but as a reservation, of more than legal interest.

The ninth article of the fundamental articles of the charter of the Bank of the United States, declares, among other things, "that the bank shall not be at liberty to purchase any public debt whatsoever, nor shall it take more than at the rate of six per centum per annum, for or on its loans or discounts." It is clear, that the present transaction does not fall within the prohibition of dealing or trading, in the preceding part of the same article; according to the interpretation thereof given by this court in the case of Fleckner *v.* Bank of United States, 8 Wheat. 338, 351, to which the court deliberately adhere.

The words of the article are, that the bank shall not take (not, shall not reserve or take) more than at the rate of six per cent. In the construction of statutes of usury, this distinction between the reservation, and the *taking, of usurious interest, has been deemed very material; for the reservation of usurious interest makes the contract utterly void; but if usurious interest be not stipulated for, but only taken afterwards, then the contract is not void, and the party is only liable for the excess. [*379

In the case of the Bank of the United States *v.* Owens, 2 Pet. 527, 538, it was said, that in the charter, the word "reserving" must be implied in the word "taking." This expression of opinion was not called for by the certified question which arose out of the plea; for it was expressly averred in the plea, that in pursuance of the corrupt and unlawful agreement therein stated, the bank advanced and loaned the whole consideration of the note, after deducting a large sum for discount, in the notes of the Bank of Kentucky, at their nominal value.

The case of the Bank of the United States *v.* Owens, 2 Pet. 527, turned upon considerations essentially different from those presented in the present record. The questions certified in that case, arose upon a demurrer to a plea of usury; and the demurrer, in terms, admitted that the agreement was unlawfully, usuriously and corruptly entered into; so that no question as to the intention of the parties, or the nature of the transaction, was put; the transaction was usurious

and the agreement corrupt; and the question there was, whether, if so, it was contrary to the prohibitions of the charter, and the contract void. In the present case, the questions are very different; whether the agreement was corrupt or usurious; or *bonâ fide*, and without any intent to commit usury, or to violate the charter, are the very points which the jury were called upon, and under the instructions, were asked, to decide; the decision in 2 Pet. 527, cannot, therefore, be admitted to govern this; for the *quo animo* of the act, as well as the act itself, constitute the gist of the controversy.

In construing the usury laws, the uniform construction in England has been, and it is equally applicable here, that to constitute usury, within the prohibitions of the law, there must be an intention, knowingly to contract for, and to take, usurious interest; for if neither party intend it, and act *bonâ fide* and innocently, the law will not infer a corrupt agreement.

This principle would seem to apply to the charter of the bank; there must be an intent to take illegal interest; or, in the language of the law, a corrupt agreement to take it, in violation of the charter; the *quo animo* is, therefore, an essential ingredient in all cases of this sort.

There has been no taking of usury, and no reservation of usury, on the face of this transaction. The case, then, resolves itself into this inquiry, whether, upon the evidence, there was any such corrupt agreement, or device or shift, to reserve or take usury; and none of these appear in the case.

Because an article is depreciated in the market, it does not follow, that the owner is not entitled to demand or require a higher price for it, before he consents to part with it; he may possess bank-notes which to him are of par value, in payment of his own debts, or in payment of public taxes; and yet their marketable value may be far less; if he uses no disguise, if he seeks not to cover a loan of money, under the pretence of a sale or exchange of them, but the transaction is *bonâ fide* what it purports to be; the law will not set aside the contract, for it is no violation of any public policy against usury.[1]

*380] ERROR to the Circuit Court of Kentucky. *The plaintiffs in error instituted an action against the defendants, and one William Owens, on a promissory note for $5000, dated the 7th of February 1822, and payable at the office of the Bank of the United States, at Lexington, Kentucky, on the 7th of February 1825, with interest at the rate of six per centum per annum; the defendants were joint and several promisors with William Owens. Upon a plea and demurrer in the suit, a division of opinion was certified by the judges of the circuit court to this court, upon which the opinion of the court was given, as reported in 2 Pet. 527.

Afterwards, at May term 1833, the case having been remanded, judgment was entered against William Owens, for want of a plea, and the other defendants pleaded the general issue; upon which, the cause was tried by a jury, and a verdict and judgment, under the direction of the court, were given for the defendants. A bill of exceptions to the refusal of the court to give the instructions asked by the plaintiffs, and to those given by the court, at the request of the defendants, was tendered on behalf of the plaintiffs, and was sealed by the judges of the circuit court.

The note declared on was in the following terms:

"On or before the 7th day of February 1825, we, William Owens, Alexander Miller, Herbert G. Waggener, George Wagley, jointly and severally promise to pay to the president, directors and company of the Bank of the United States, at their office of discount and deposit at Lexington, the sum of five thousand dollars, in lawful money of the United States, with interest thereon, in like money, after the rate of six per cent. per annum, from this day, until paid, for value received, at the said office of discount

[1] See notes to United States Bank *v.* Owens, 2 Pet. 527.

and deposit at Lexington, without defalcation. Witness our hands, this 7th day of February 1822.

WILLIAM OWENS,
ALEXANDER MILLER,
HERBERT G. WAGGENER,
GEORGE WAGLEY."

Witness—JOHN BREEN."

On which note was the following indorsement: "Mem.—Interest is to be charged on this note from the 21st day of May 1822, only, and not from the 7th of February *1822, within mentioned, the former being the day on which the amount was actually received by the makers of the note. [*381

H. CLAY."

The evidence in the case established the following facts: Before the time when the note was given, the office of the Bank of the United States at Lexington, was the holder of a large amount of notes of the Bank of Kentucky, which had been received in the usual course of business, at the full value of the notes expressed upon them, in gold and silver. These notes were considered as valuable to the full extent of their amount, although the Bank of Kentucky had suspended paying their notes in specie. No doubt was entertained by the officers of the office of the Bank of the United States, of the full ability of the Bank of Kentucky so to redeem them. At the time the loan was made to Owens on the note sued upon, the notes of the Bank of Kentucky had depreciated to the amount of between thirty-three and forty per cent. It was also in evidence, that when the Bank of Kentucky suspended specie payments, in 1819, the institution was considerably indebted to the plaintiffs, at the office at Lexington, for her notes taken in the usual course of business, and for government deposits transferred to that office from the Bank of Kentucky and its branches; and that the accounts had been settled between the institutions, the balance ascertained and placed to the credit of the plaintiffs, on the books of the Bank of Kentucky, as a deposit upon which the Bank of Kentucky agreed, in consideration of forbearance of the plaintiffs, to pay interest at the rate of six per cent. per annum; and that said interest, as it accrued, was carried, at stated intervals of time, to the credit of the plaintiffs, on the books of the bank; and that the amount paid Owens on the said check had the effect of stopping the interest on that sum from that time. The balance which remained due from the Bank of Kentucky to the Bank of the United States was finally settled and discharged, in specie or its equivalent, about seven months after the date or time of the said loan to Owens. The Bank of Kentucky did not, for many years after the date of the loan to Owens, generally resume the payment of its notes in specie or its equivalent.

In the state of things existing in 1822, William Owens applied *to the office at Lexington, for a loan of $5000, in the notes of the Bank of Kentucky, assuring the bank that they would answer his purpose as well as gold or silver. The offer was rejected by the directors of the bank; and on its renewal, was again refused. A third time, the loan was applied for, the interference of a gentleman connected with the business of the bank, not a director, to procure it, was solicited and obtained; and the application was referred to the board at Philadelphia, by which the loan was authorized, [*382

a mortgage on real estate being given as an additional security for the loan. The mortgage and note having been executed, the amount of the same was paid to William Owens, by handing him $1100, in notes of the Kentucky Bank, and a check of that bank for $3900, which was paid to him at that bank in its notes.

The defence to the action was, that the transaction was usurious; and therefore, contrary to the act of congress incorporating the Bank of the United States, and void. On the trial, the following instructions to the jury were asked by the counsel for the plaintiffs.

1. That if they believed from the evidence, that the consideration of the note sued on was $3900, paid in a check on the Bank of Kentucky, and $1100 in Kentucky notes, and that the contract was fairly made, without any intention to evade the laws against usury; but that the parties making the contract intended to exchange credits, for the accommodation of Owens; that the Bank of Kentucky was solvent, and so understood to be, and able to pay all its debts by coercion; that the contract is not void for usury, nor contrary to the fundamental law or charter of the bank, notwithstanding it was known to the parties, that said bank did not pay specie for its notes, without coercion, and that the difference in exchange between bank-notes of the Bank of Kentucky and gold and silver, was from thirty-three to forty per cent. against the notes of the Bank of Kentucky.

2. To instruct the jury, that if they believe, from the evidence, that the contract was made on the part of the bank, fairly, and with no intention to avoid the prohibition of their charter, by taking a greater rate of interest than six per cent., or the statutes against usury, but at the instance, and for the accommodation and benefit, of the defendant Owens; and that at the *383] time of the *negotiation and contract for the check on the bank, and the $1100 in bank-notes of the Bank of Kentucky, that bank was indebted to the Bank of the United States, at their office aforesaid, the sum of $10,000 or more, bearing an interest of six per cent., which sum, it was understood and believed by the parties to the contract, at and before its execution, the Bank of Kentucky was well able to pay, with interest, and which sum it did pay, after deducting the $3900, paid to the defendant Owens, with interest, in gold or silver, or its equivalent; that the contract was not usurious, unless they believed that the contract was a shift or device entered into to avoid the statute against usury, and the prohibition of the charter, notwithstanding the jury should find that the check and notes aforesaid were, in point of fact, of less value than gold and silver.

3. If the jury find, from the evidence in the cause, that the defendants applied to the plaintiffs to obtain from them $5000 of the notes of the president, directors and company of the Bank of Kentucky; and in consideration of their delivering, or causing to be delivered, to the defendants, $5000 of such notes; and the said Bank of Kentucky was then solvent and able to pay the said notes, and has so continued up to this time; and that the holders thereof could, by reasonable diligence, have recovered the amount thereof, with six per centum per annum interest thereon, from the time of the delivery of them by plaintiffs to defendants, up to the time of such recovery; and that said arrangement and contract was not made under a device, or with the intent, to evade the statutes against usury, or to evade the law inhibiting the plaintiffs from receiving or reserving upon loans, interest at a

greater rate than six per centum per annum; then the transaction was not in law usurious or unlawful, and the jury should find for the plaintiffs.

4. That unless the jury find from the evidence in the cause, that the advance, sale or loan of the notes on the Bank of Kentucky, made by plaintiffs to defendants, was so made as a shift or device to avoid the statute against usury, or in avoidance of the clause of the act of congress which inhibits the plaintiffs from taking or reserving more than at the rate of six per centum per annum for the loan, forbearance, or giving day of *payment of money, the law is for the plaintiffs, and the jury should find accordingly. [*384

5. That unless they believed, from the evidence in this cause, that there was a lending of money, and a reservation of a greater rate of interest than at the rate of six per centum per annum, stipulated to be paid by defendants to plaintiffs; the law is for the plaintiffs, and the jury should find for them; unless they further find, that there was a shift or device resorted to by the parties, with the intent and for the purpose of avoiding the law, by which something other than money was advanced, and by which a greater rate of interest than six per cent. was allowed.

6. That if the defendants applied to the plaintiffs for a loan of $5000 of the notes of the Bank of Kentucky, and agreed to give therefor their note for $5000, payable three years thereafter, with interest, and the Bank of Kentucky was then, and continued thereafter to be, solvent, and the said Bank of Kentucky did thereafter pay and discharge to the holders thereof the said notes, the said contract was not unlawful—although the notes of the Bank of Kentucky would not then command, in gold or silver, their nominal amount, when offered for sale or exchange as a commodity or money.

7. That if they found from the evidence, that the defendants obtained from the plaintiffs $5000 of the notes of the Bank of Kentucky, or $3900 in a check upon said bank and $1100 of its notes, and in consideration thereof made the note sued upon, the said transaction was not, therefore, unlawful or usurious—although the notes of the Bank of Kentucky were then at a depreciation in value of thirty-three per cent., in exchange for gold or silver.

8. That there was no evidence in this cause, conducing to prove, that there was a loan by the plaintiffs to the defendants of notes on the president, directors and company of the Bank of Kentucky.

The court refused to give these instructions, and on motion of the defendants instructed the jury: "That if they find from the evidence, that the only consideration for the obligation declared upon was a loan made by the plaintiffs to Owens, of $5000 in notes of the Bank of Kentucky, estimated at their nominal amounts, part paid in the notes themselves, and the residue *in a check drawn by the plaintiffs on the Bank of Kentucky, on the understanding and agreement that the said Owens was to receive the notes of said bank in payment thereof, and he accordingly did so; that the Bank of Kentucky had, before that time, suspended specie payments, and did not then pay its notes in lawful money; that the said notes then constituted a general currency in the state of Kentucky, commonly passing in business and in exchange at a discount of between thirty and forty per cent. below their nominal amounts, and could not have been sold or passed at a higher price; that the said facts were known to the plaintiffs and said Owens, yet the plaintiffs passed the said notes to the said Owens, the [*385

borrower, at their nominal amounts ; then the transaction was in violation of the act of congress incorporating the plaintiffs, the obligation declared on is void, and the verdict ought to be for the defendants." The plaintiffs prosecuted this writ of error.

Sergeant, for the plaintiffs in error, submitted the following printed argument.

The errors assigned are : 1. That the court erred in giving the instructions prayed by the defendants. 2. That they erred in not giving the instructions prayed by the plaintiffs.

The case presented and adjudicated by this court, in *The Bank* v. *Owens*, 2 Pet. 527, was essentially different from the case now submitted. There, unfortunately, the plaintiffs, by demurring to the defendant's plea, admitted all the allegations it contained, in their strongest sense, including the allegation of corrupt and usurious intention. In short, they confessed that the contract was properly characterized as corrupt, usurious, and in violation of the charter. The court were thus compelled to declare the law as applied to a contract thus alleged on one side, and confessed on the other, with all its offensive description, without the power of looking into the true merits of the case, and ascertaining whether the transaction was really such as it was represented to be. To this their decision was limited.

*386] *The real state of the case is now brought before the court upon the evidence ; from which it will be perceived, at once, that the injurious charges of the plea, so incautiously admitted by the demurrer, have no support whatever from the facts ; and that the judicial prejudice the bank has suffered, as well as the extensive prejudice in public opinion, are wholly unmerited. The transaction was innocent and just, entered into with the fairest intentions, upon a full and adequate consideration, and with no view to any gain by the bank, or any loss to Owens. The bank, literally, did not gain one cent by the negotiation ; it did not even gain the interest, for interest, at the same rate, was payable at the Bank of Kentucky. Neither did it, by the negotiation, convert capital that was dead, into active capital ; a long credit being allowed. On the other hand, Owens did not lose. He declared, that what he received was, to him, equal to gold or silver ; and it must be taken for granted, that it proved to be so, for there is no evidence, nor even an allegation, to the contrary. It further appears, that this negotiation was at the earnest instance of Owens, and for his accommodation. When he thought his own instances insufficient, he sought the aid of others, and especially applied to Mr. Clay, who was counsel of the bank, and to the late Colonel Morrison, who had been president of the office, to use their influence, as his friends, to aid him in obtaining what he asked. And finally, it appears that the application, from the beginning, was for the notes of the Bank of Kentucky, which, to him, were equal to gold or silver. These facts are conclusively proved by the depositions of the witnesses, and especially by the minutes of the office, and Mr. Cheves's letter of the 27th March 1822, in the record.

The instruction given by the court was, that the "transaction was in violation of the act of congress incorporating the plaintiffs, the obligation declared on is void, and the verdict ought to be for the defendant." Is this

instruction correct? This is the question, and the only question, in the case. The plaintiffs in error submit, that it is not.

The words of the charter, are that, in its loans or discounts, *the bank shall not take more than at the rate of six per centum per [*387 annum. The negotiation with Owens cannot, with any propriety (now that the evidence is disclosed), be termed "a loan or discount," within the meaning of this section of the act of congress. The language of the act is properly applicable to the lending of money, that is to say, gold or silver. It is very true, that borrowers seldom receive in gold or silver. They commonly take bank credits, or notes of the bank which makes the loan; but these give a present right to demand gold or silver, and are taken by the borrower, for his own convenience, as the evidence that he has so much gold or silver in the bank. Here, there was no such loan. There was no discount, in the ordinary way of discounting; but a special agreement, the nature of which will be presently considered. The bank did not "take more than at the rate of six per centum per annum." If we look at the terms of the agreement, we find the rate of interest agreed upon was precisely six per centum per annum, neither more nor less. So particular was the learned counsel of the bank in observing precisely the spirit as well as the words of the charter, that he took care, by an indorsement on the note, to prevent the interest from beginning to run before the day when the consideration was actually received by Owens, which happened to be some time after the date of the note.

The decision, however, in *The Bank* v. *Owens*, 2 Pet. 527, rested entirely upon a position which admitted the express and apparent terms of the contract to be quite consistent with the provision of the act of congress already quoted. The position was, that it presented "one of those cases in which a device is resorted to, by which is reserved a higher profit than the legal interest, under a mask thrown over the transaction." This, the court say, is a fraud upon the statute, and "a fraud upon a statute is a violation of the statute." From this conclusion the court derive another, namely, that such a contract is entirely void, and no court will aid its being enforced. Upon the pleadings in the case just cited, this conclusion was deduced by the court, but even upon those pleadings, it was deduced with hesitation, only upon the authority of a case which decides, that "the confession of the *quo animo*, implied *in a demurrer, will affect a case with usury." Immediately after, it is added by the court, "a very similar case in [*388 the same book, in which the plaintiff had traversed the plea, was left to the jury with a favorable charge." The decision of the court, therefore, turned entirely upon the *quo animo* averred in the plea, and admitted by the demurrer, and was confined entirely to a case so brought up, with a very strong intimation, that upon a traverse the result would be different.

This plea has been withdrawn, and is no longer before the court. The unfortunate demurrer has gone along with it. In lieu of it, the general issue of *non assumpsit* has been pleaded, and issue joined thereon, which is at least as beneficial to the plaintiffs as a traverse of the former plea would have been. Such an issue presented to the jury the question of *quo animo*, which was closed up in the former case by the issue of law, and led to the decision by this court. Upon the very principle, then laid down by this court, according to the authority of *Bedingfield* v. *Ashley*, Cro. Eliz. 741,

this question ought to have been left to the jury. The counsel of the plaintiffs asked for instructions to that effect, but the learned judge refused those instructions, and gave the instruction prayed by the defendant's counsel, taking the inquiry from the jury, and deciding, as a question of law, that the contract was void. The plaintiff was entitled to have the whole question of intention, or *quo animo*, left to the jury; and he was entitled to more, that is, to have it left to the jury, "with a favorable charge." Was there, or was there not, "a device resorted to," or "a mask thrown over the transaction," to disguise and cover an intention, scheme or plan, to violate or evade the charter, by taking more than lawful interest? There could not be, unless such an intention existed. Was there, then, such an intention? The evidence is full and clear, to show that there was not. The whole transaction was fair and *bonâ fide*, in the best good faith on the part of the bank, and with no disguise or concealment whatever. The court erred in not so leaving it to the jury.

Mr. Sergeant also contended at the bar: 1. That the negotiation was at
*389] the repeated instance of *Owens. The office twice declined his application, and then he employed the influence of his friends, Mr. Clay and Colonel Morrison, to obtain an order from the parent board. 2. That, according to his own statement, the notes he received were to him equal to gold and silver; he, therefore, sustained no loss. 3. That the bank gained nothing by the negotiaton. The notes were settled in account with the Bank of Kentucky, and were bearing interest; there was no gain in interest; there was no gain in time, but the contrary; the notes would have been paid much sooner by the Bank of Kentucky. The bank did not even gain the advantage of converting dead capital into active capital; it had less activity than before. 4. That the value of this paper was not to be ascertained by the value of paper in circulation. It was not in circulation; it was held by agreement, as evidence of debt, bearing interest; which no note in circulation bears. 5. That upon a fair estimate, the debt of the Bank of Kentucky was at the time, and is now, fully proved to have been worth more than the debt for which it was exchanged. 6. That the negotiation on the part of the bank was innocent, and without intention of usury, or any unlawful profit.

He then proceeded to argue, that there was error in the instruction given at the instance of defendants, and the refusal to give the instructions asked for by the plaintiffs in the court below. The court assumed, that the question was for the court, and as such, decided it as a question of law; when it really was a question of fact and intention, to be decided by the jury. This is manifest from the former decision of this court, when the case came up, on demurrer. *Bank* v. *Owens*, 2 Pet. 527.

There are two ways in which usury may be committed. 1. By agreeing for more interest than is allowed by law. 2. By some device which is a cover for the same thing.

1. The first may be decided by the court. This is the meaning of the case of *Roberts* v. *Trenayne*, Cro. Jac. 507. It is apparent to the court; *res ipsa loquitur*.

2. This is invariably a question for the jury. Ord on Usury *208;
*390] *Massa* v. *Darling*, 2 Str. 1243; *Lowe* v. *Waller*, 2 Doug. 736; 1 Esp.
But it has been decided in the *Bank* v. *Owens*, that we are not to be

affected by the usury laws of the states. 1. Was this a violation of charter? 2. If it were, how are we affected by it?

1. The charter meant only to fix the rate of interest on discounts; but this was no discount at all. It was a specific negotiation, and that negotiation was an innocent one. The bank gave a full consideration, with no view to gain; it did not gain. All its debt was paid in less than half the time. It was an exchange of credits.

2. The act is simply prohibitory. The effect, where there is nothing more, is only to relieve against the excess; or to enable the party to recover it back. The statutes of usury declare the contract void; but wherever the case is in the power of a court, either of law or equity, they compel the payment of principal and interest. A motion to set aside judgments upon the ground of usury, was refused in the exchequer. *Mathews* v. *Lewis*, 1 Anst. 7; Ord 118.

If one voluntarily pay the money and legal interest, he cannot recover it back; if more, only the excess. *Astley* v. *Reynolds*, 2 Str. 915; Ord 118–19. So, if he sue for a pledge or security. *Fitzroy* v. *Gwillim*, 1 T. R. 153. So, in equity, before a party can get relief, he must pay the money and lawful interest. *Bosanquett* v. *Dashwood*, Cas. temp. Talb. 38. Cited also, Ord on Usury 141; *Barnard* v. *Langley*, Toth. 117; *Proof* v. *Hines*, Cas. temp. Talbot 111; *Scott* v. *Nesbitt*, 2 Bro. C. C. 641; Ord 143–6; *Taylor* v. *Bell*, 2 Vern. 170; *Barker* v. *Vansommer*, 1 Bro. C. C. 149. The rule is the same in Pennsylvania. The same principle has been established in this court. *Bank of the United States* v. *Fleckner*, 8 Wheat. 355. The cases to the contrary are against public morals, or against some great public policy, mostly involving a misdemeanor, and criminally offensive.

On either ground, the plaintiffs in error are entitled to have the judgment reversed.

*A printed argument, prepared by Messrs. *Crittenden* and *Monroe*, counsel for the defendants in the circuit court, was delivered to the [*391 court. They contended, that upon the case presented in the record, the only questions that can arise, relate to the propriety of the decision of the court, in giving the instruction asked on the part of the defendants and in refusing those asked on the part of the plaintiffs. All these questions depend on the proper construction and application of that part of the ninth section of the fundamental rules of the bank-charter, which declares that the bank shall not "take more than at the rate of six per centum per annum, for or upon its loans or discounts."

First, then, as to the propriety of the instruction given at the instance of the defendants. The usury laws of Kentucky, like the charter of the bank, forbid the taking of a greater interest than six per cent. per annum upon loans; and it has been repeatedly decided by the court of appeals of that state, that the lending of depreciated bank paper, and taking the bond or note of the borrower for its nominal amount in specie, with legal interest only, is usurious, and a plain and direct infraction of the statute forbidding the taking of more than six per centum per annum. *Freeman* v. *Brown*, 7 T. B. Monr. 263; *Rodes's Executors* v. *Bush*, 5 Ibid. 477; *Boswell* v. *Clarkson*, 1 J. J. Marsh 47. That court has invariably proceeded on the principle, that the current value of the depreciated paper, at the time of

lending and borrowing, was to be considered its real value ; and that if the payment stipulated for by the borrower, exceeded the amount of the current value of the depreciated paper at the time, and legal interest thereon, that it was against law, and usurious.

The lender who receives an interest of six per cent. upon a greater sum than he actually lends, is most clearly, we think, as much and as directly a violator of the law, as he who reserves more than six per cent. upon the sum actually loaned. The facts on which this instruction is predicated, are incontestably established by the evidence ; and the legal conclusions drawn from them, as stated in said instruction, are confidently believed to be correct, and to be maintained by the decision of this court, upon this case, when formerly before it. The *facts on which this instruction is founded *392] are the same, in effect, that were alleged in the plea that was then decided to be a good and sufficient bar to the action. We conclude, therefore, that this instruction is proper, and according to law.

Secondly, as to the instructions moved on the part of the plaintiffs, and refused by the court: we contend, that they are all either impertinent, as having no application to the case as it appears in proof ; or that they are embraced and negatived by the considerations and authorities urged in support of the instruction given at the instance of the defendants. That the refusal of them was correct, and could not prejudice the plaintiffs.

The uncontested facts make an apparent case of usury. The application of Owens was for a loan—a loan was made to him of $5000, in Kentucky Bank paper, depreciated between thirty-three and forty per cent. And for the nominal amount of this paper, the note in question was taken, payable in lawful money of the United States, with six per centum interest thereon. About these facts, there can be no dispute. They make, *per se*, a case of usury, and "cannot by intendment have any other construction"—*res ipsa loquitur*. *Roberts* v. *Trenayne*, Cro. Jac. 508. Yet to give it some "other construction," by one "intendment" or other, is the object of all the instructions moved on the part of the plaintiffs, that are applicable to the case.

In the case above referred to in Croke, the distinction is taken between cases where usury is apparent from the circumstances, and where it is only "implied." Here, from indisputable facts stated, it is apparent, that the plaintiffs, by the note in suit, have attempted to secure to themselves a much greater amount than the value which they loaned, and six per centum interest thereon. This is not the evidence of usury, it is usury itself. And its legal character and effect cannot be changed or evaded, by any fairness of mere intention, that may be ascribed to the lender. It is manifest, that the plaintiffs did intend to do, and did in fact do, everything necessary to constitute an usurious loan ; that they did take more than at the rate of six per centum per annum upon this loan to Owens ; and did intend to do all *they did do ; it was, therefore, in vain for them to allege afterwards, *393] they did not intend to violate the law.

No error of the officers of the bank, as to the effect of the transaction under the law, can give validity to the paper taken in violation of the law. Their supposition, that the loan of depreciated paper, at its nominal amount, to be repaid in lawful money, with interest upon it, was authorized by their charter and lawful, could not make it so. Where there was a controversy

as to what the transaction was, in fact, the intention of the parties may have effect in determining its character; but when the fact, and intention to do what was acted, are manifest, the law is only to be appealed to, for the effect and consequences. Here, that the transaction was a loan is unquestionable; and the instruction given by the court is predicated on this, together with the other facts, to be found by the jury. The conclusion of law pronounced by the court was inevitable.

Story, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Kentucky, to revise a judgment of that court, in a case where the plaintiffs in error were original plaintiffs in the suit. The suit was an action of debt brought upon a promissory note, dated the 7th of February 1822, whereby the defendants, on or before the 7th of February 1825, jointly and severally promised to pay the president, &c., of the Bank of the United States, at their office of discount and deposit, at Lexington, $5000, with interest thereon, after the rate of six per cent. per annum, until paid, for value received. And by a memorandum on the back of the note, the interest was to be charged only from the 21st of May 1822, that being the day on which the money was actually received by the makers of the note.

The plea of payment was put in, upon which issue was joined; and it was agreed between the parties, that either party, under the issue, might give in evidence any special matter which could be specially pleaded. At the trial, a verdict was rendered for the defendants, upon which, judgment passed in their favor; and the cause is now brought before us for revision, upon a bill of exceptions taken at the trial, and for matters of law therein stated.

*From the evidence at the trial, it appears, that prior to the time when the note was given, viz., in 1819, the Bank of Kentucky, which [*394 had previously been in high credit, suspended specie payments; and at that time, the institution was indebted to the plaintiffs, the Bank of the United States, in a large sum of money, for notes of the Bank of Kentucky, taken at par, in the usual course of business, and for government deposits transferred to the office at Lexington, from the Bank of Kentucky and its branches. The accounts had been settled between the two institutions, the balance ascertained and placed to the credit of the plaintiffs, on the books of the Bank of Kentucky, as a deposit; upon which the Bank of Kentucky agreed, upon consideration of forbearance, to pay interest at the rate of six per cent. per annum; and the interest, as it accrued, was carried, at stated intervals, to the credit of the plaintiffs, on the books of the bank. This agreement was punctually performed by the Bank of Kentucky, and the balance, which remained due to the plaintiffs, was finally settled and discharged in specie, or its equivalent, in about seven months after the negotiation, which will be immediately noticed.

In this state of things, Owens, one of the defendants, made repeated applications to the Lexington office of the Bank of the United States, for an accommodation of $5000, in Kentucky Bank notes, of which the office had a considerable sum on hand, stating that such notes would answer his purpose as well as gold or silver, and agreeing to receive them at their nominal amounts. These applications were rejected; and finally, at his

urgent suggestions, an application was made to the parent bank at Philadelphia, to permit the Lexington office to grant the application; and the parent bank accordingly gave the permission. The note now in suit was accordingly given, with a mortgage of real estate, as collateral security; and $1100 was received in Kentucky Bank notes, and the remaining $3900 was paid by a check drawn on the Bank of Kentucky, which was duly honored; the amount of the check was deducted from the balance due to the plaintiffs, and interest thereon immediately ceased.

It further appeared, at the trial, that the Bank of Kentucky was never insolvent, but had always sufficient effects to pay its debts; that it had been several times sued for its debts, which *had been always paid in *395] specie, or other arrangements had been made satisfactory to the creditors. It had discharged the greater part of its debts, and had distributed among its stockholders ten dollars in specie and seventy dollars in notes of the Commonwealth Bank of Kentucky (which were at a great depreciation), and that all its funds had not yet been distributed. The Bank of Kentucky never resumed specie payments, and at the time of the negotiation above stated, the notes were depreciated from thirty-three to forty per cent., and were current as a circulating medium at this rate of depreciation. They were, however, by law, receivable for state taxes and county levies at par, and had accordingly been so received. Upon this evidence, the plaintiffs moved the court to instruct the jury as follows:

1. That, if they believe from the evidence, that the consideration of the note sued on was $3900, paid in check on the Bank of Kentucky, and $1100 in Kentucky Bank notes; and that the contract was fairly made, without any intention to evade the laws against usury, but that the parties making the contract intended to exchange credits, for the accommodation of Owens, that the Bank of Kentucky was solvent, and so understood to be, and able to pay all its debts by coercion, that the contract is not void for usury, nor contrary to the fundamental law or charter of the bank, notwithstanding it was known to the parties that said bank did not pay specie for its notes without coercion, and that the difference in exchange between bank-notes of the Bank of Kentucky, and gold and silver, was from thirty-three to forty per cent., against the notes of the Bank of Kentucky.

2. To instruct the jury that, if they believe from the evidence, that the contract was made on the part of the bank fairly, and with no intention to avoid the prohibition of their charter, by taking a greater rate of interest than six per cent., or the statutes against usury, but at the instance, and for the accommodation and benefit, of the defendant Owens; and that at the time of the negotiation and contract for the check on the bank, and the $1100 in bank-notes of the Bank of Kentucky, the Bank of Kentucky was indebted to the Bank of the United States, at their office aforesaid, the sum of $10,000 or more, bearing an interest of six per cent.; which sum, *it was understood and believed by the parties to the contract, at and *396] before its execution, the Bank of Kentucky, with interest, was well able to pay, and which sum it did pay, after deducting the $3900 paid to the defendant Owens, with interest, in gold or silver, or its equivalent, that the contract was not usurious, unless they believe that the contract was a shift or device entered into to avoid the statute against usury, and the prohibition of the charter, notwithstanding the jury should find, that

the check and notes aforesaid were, in point of fact, of less value than gold and silver.

3. If the jury find from the evidence in the cause, that the defendants applied to the plaintiffs to obtain from them $5000 of the notes of the president, directors and company of the Bank of Kentucky, and in consideration of their delivering, or causing to be delivered, to the defendants, $5000 of such notes, and the said Bank of Kentucky was then solvent and able to pay the said notes, and has so continued up to this time; and that the holders thereof could, by reasonable diligence, have recovered the amount thereof, with six per centum per annum interest thereon, from the time of the delivery of them by plaintiffs to defendants, up to the time of such recovery, and that said arrangement and contract was not made under a device, or with the intent, to evade the statutes against usury, or to evade the law inhibiting the plaintiffs from receiving or reserving upon loans, interest at a greater rate than six per centum per annum; then the transaction was not in law usurious or unlawful, and the jury should find for the plaintiffs.

4. That unless the jury find, from the evidence in the cause, that the advance, sale or loan of the notes on the Bank of Kentucky, made by plaintiffs to defendants, was so made as a shift or device to avoid the statute against usury, or in avoidance of the clause of the act of congress, which inhibits the plaintiffs from taking or reserving more than at the rate of six per centum per annum for the loan, forbearance, or giving day of payment of money, the law is for the plaintiffs, and the jury would find accordingly.

5. That unless they believe, from the evidence in this cause, that there was a lending of money, and a reservation of a greater rate of interest than at the rate of six per centum per *annum, stipulated to be paid by defendants to plaintiffs, the law is for the plaintiffs, and the jury should find for them; unless they further find, that there was a shift or device resorted to by the parties, with the intent and for the purpose of avoiding the law, by which something other than money was advanced, and by which a greater rate of interest than six per cent. was allowed. [*397

6. That if the defendants applied to the plaintiffs for a loan of $5000 of the notes of the Bank of Kentucky, and agreed to give therefor their note for $5000, payable three years thereafter, with interest, and the Bank of Kentucky was then, and continued thereafter to be, solvent, and the said Bank of Kentucky, did thereafter pay and discharge to the holders thereof the said notes, the said contract was not unlawful, although the notes of the Bank of Kentucky would not then command, in gold or silver, their nominal amount, when offered for sale or exchange as a commodity or money.

7. That if they find from the evidence that the defendants obtained from the plaintiffs $5000 of the notes of the Bank of Kentucky, or $3900 in a check upon said bank, and $1100 of its notes, and in consideration thereof, made the note sued upon, the said transaction was not, therefore, unlawful or usurious, although the notes of the Bank of Kentucky were then at a depreciation in value of thirty-three per cent. in exchange for gold and silver.

8. That there is no evidence in this cause, conducing to prove, that there was a loan by the plaintiffs to the defendants, of notes on the president, directors and company of the Bank of Kentucky.

The court refused to give any of these instructions; and upon the prayer of the defendants, instructed the jury as follows: "That if they

find from the evidence, that the only consideration for the obligation declared upon was a loan made by the plaintiffs to Owens of $5000, in notes of the Bank of Kentucky, estimated at their nominal amounts, part paid in the notes themselves, and the residue in a check drawn by the plaintiffs on the Bank of Kentucky, on the understanding and agreement that the said Owens was to receive the notes on said bank in payment thereof, and he accordingly did so; that *the Bank of Kentucky had, before that *398] time, suspended specie payments, and did not then pay its notes in lawful money; that the said notes then constituted a general currency in the state of Kentucky, commonly passing in business and in exchange, at a discount of between thirty and forty per cent. below their nominal amounts, and could not have been sold or passed at a higher price; that the said facts were known to the plaintiff and said Owens, yet the plaintiffs passed the said notes to the said Owens, the borrower, at their nominal amounts; then the transaction was in violation of the act of congress incorporating the plaintiffs, the obligation declared on is void, and the verdict ought to be for the defendants."

The statute of usury of Kentucky of 1798, declares, that no person shall hereafter contract, directly or indirectly, for the loan of any money, wares, merchandise or other commodity, above the value of six pounds for the forbearance of one hundred pounds for a year, and after that rate, for a greater or lesser sum, or for a longer or shorter time; and all bonds, contracts, &c., thereafter made for payment or delivery of any money or goods so lent, on which a higher interest is reserved or taken than is hereby allowed, shall be utterly void. This clause of the act is substantially a transcript of the statute of 12 Ann., stat. 2, c. 16, § 1, and therefore, the same construction will apply to each. In the present case, no interest at all has been taken by the plaintiffs on the $5000. There was no discount of the accruing interest from the face of the note, and the interest was payable only with the principal, at the termination of the three years mentioned in the note. If the case, therefore, can be brought within the statute, it must be, not as a taking, but as a reservation, of illegal interest.

The ninth article of the fundamental articles of the charter of the Bank of the United States (act of 1816, ch. 44, § 11) declares, among other things, that the bank "shall not be at liberty to purchase any public debt whatsoever; nor shall it take more than at the rate of six per centum per annum for or upon its loans or discounts." It is clear, that the present transaction does not fall within the prohibition of dealing or trading, in the preceding part of the same article, according to the interpretation thereof given by this court, in **Fleckner* v. *Bank of the United States*, 8 Wheat. 338, *399] 351, to which we deliberately adhere.

It is observable, that the words of the article are, that the bank shall not take (not shall not reserve or take) more than at the rate of six per cent. In the construction of the statutes of usury, this distinction between the reservation, and taking of usurious interest, has been deemed very material; for the reservation of usurious interest makes the contract utterly void; but if usurious interest be not stipulated for, but only taken afterwards, then the contract is not void, but the party is only liable to the penalty for the excess. So it was held in *Floyer* v. *Edwards*, Cowp. 112. But in the case of the *Bank of the United States* v. *Owens*, 2 Pet. 527–8, it was said,

that in the charter, "reserving" must be implied in the word "taking." This expression of opinion was not called for by the certified question, which arose out of the plea; for it was expressly averred in the plea, that in pursuance of the corrupt and unlawful agreement therein stated, the bank advanced and loaned the whole consideration of the note, after deducting a large sum for discount, in the notes of the Bank of Kentucky, at their nominal value.

It is in reference to the usury act of Kentucky, and this article of the bank charter, that the various instructions asked or given are to be examined. But before proceeding to consider them, severally, it may be proper to remark, that in construing the usury laws, the uniform construction in England has been (and it is equally applicable here), that to constitute usury, within the prohibitions of the law, there must be an intention knowingly to contract for or to take usurious interest; for if neither party intend it, but act *bonâ fide* and innocently, the law will not infer a corrupt agreement. Where, indeed, the contract, upon its very face, imports usury, as by an express reservation of more than legal interest, there is no room for presumption, for the intent is apparent; *res ipsa loquitur*. But where the contract on its face is for legal interest only, there it must be proved, that there was some corrupt agreement, or device or shift, to cover usury; and that it was in the full contemplation of the parties. These distinctions are laid down and recognised as early as the cases of *Button* v. *Downham*, Cro. Eliz. 642; *Bedingfield* v. *Ashley*, Cro. Eliz. 741; *Roberts* *v. [*400
Trenayne, Cro. Jac. 507. The same doctrine has been acted upon in modern times, as in *Murray* v. *Harding*, 2 W. Bl. 859, where GOULD, Justice, said, that the ground and foundation of all usurious contracts, is the corrupt agreement; in *Floyer* v. *Edwards*, Cowp. 112; in *Hammet* v. *Yea*, 1 Bos. & Pul. 144; in *Doe* v. *Gooch*, 3 Barn. & Ald. 664; and in *Solarte* v. *Melville*, 7 Barn. & Cres. 431. The same principle would seem to apply to the prohibition in the charter of the bank. There must be an intent to take illegal interest, or, in the language of the law, a corrupt agreement to take it, in violation of the charter; and so it was stated in the plea, in the case of the *Bank of the United States* v. *Owens*, 2 Pet. 527. The *quo animo* is, therefore, an essential ingredient in all cases of this sort.

Now, it distinctly appears in the evidence, as has been already stated, that no interest or discount whatsoever was actually taken on the note; and on the face of the note, there was no reservation of any interest but legal interest. So that there has been no taking of usury, and no reservation of usury, on the face of the transaction. The case then resolves itself into this inquiry: whether, upon the evidence, there was any corrupt agreement, or device or shift, to reserve or take usury; and in this aspect of the case, the *quo animo*, as well as the act of the parties, is most important.

With these principles in view, let us now proceed to the examination of the instructions prayed by the plaintiffs. The substance of the first instruction is, that if the contract was fairly made by the parties, without any intention to evade the laws against usury, but that the parties making the contract intended to exchange credits, for the accommodation of Owens, that the Bank of Kentucky was solvent, and able to pay its debts by coercion, then the contract was not void for usury, nor contrary to the charter of the bank, notwithstanding the parties knew that the Bank of Kentucky

did not pay specie for its notes, without coercion, and that these notes were in exchange at a depreciation of from thirty-three to forty per cent. below par. We are of opinion, that this instruction ought to have been given. It excludes any intention of violating the laws against usury; and it puts the case as a *bonâ fide* exchange, of credits for the accommodation of Owens.

*401] Such an exchange is not, *per se*, illegal; though it may be so, if it is a mere shift or device to cover usury. If the application be not for a loan of money, but for an exchange of credits or commodities, which the parties *bonâ fide* estimate at equivalent values, it seems difficult to find any ground on which to rest a legal objection to the transaction. Because an article is depreciated in the market, it does not follow, that the owner is not entitled to demand or require a higher price for it, before he consents to part with it. He may possess bank-notes, which to him are of par value, because he can enforce payment thereof, and for many purposes, they may pass current at par, in payment of his own debts, or in payments of public taxes; and yet their marketable value may be far less. If he uses no disguise; if he seeks not to cover a loan of money, under the pretence of a sale or exchange of them; but the transaction is, *bonâ fide*, what it purports to be; the law will not set aside the contract, for it is no violation of any public policy against usury.

We are also of opinion, that the second instruction ought, for similar reasons, to have been given; and, indeed, it stands upon stronger grounds. It puts the case, that there was no intention to violate the charter or the statute against usury; that the contract was for the accommodation of Owens; that the Bank of Kentucky was indebted to the plaintiffs in a sum exceeding $10,000, bearing an interest of six per cent. (which the check would reduce *pro tanto*); that the Bank of Kentucky was able to pay the amount with interest, in gold or silver, and did pay it, after deducting the check of $3900; and then asserts, that under such circumstances, the contract was not usurious, unless the jury believe that the contract was a shift or device entered into to avoid the statute against usury, notwithstanding the check and the bank-notes were, in point of fact, of less value than gold and silver. So that, in fact, it puts the instruction upon the very point upon which the law itself puts transactions of this sort—the *quo animo* of the parties. Did they intend usury, and make use of any shift or device to cover a loan of money? Or did they, *bonâ fide*, intend a loan of bank-notes, which to the lender were of the full value of their numerical amount, and were so treated *bonâ fide* by the borrower? Unless the court were prepared to say (which we certainly are not), that all negotiations for

*402] *the sale or exchange of bank-notes, under any circumstances, must, to escape the imputation of usury, or the prohibition of the charter, be merely at their marketable value at the time, though worth more to both parties, the instruction was in its terms unexceptionable.

The third instruction is governed by the same reasoning. It puts the case, that the application was made for a loan, not of money, but for notes of the Kentucky Bank, to the amount of $5000, in consideration of the note sued on; that the Bank of Kentucky was solvent and able to pay its notes; that the holders thereof could, by reasonable diligence, have recovered the amount thereof, with interest at the rate of six per cent. per annum; and that there was no device or intent to evade the statute against usury, or the

prohibition of the charter; and then asserts, that under such circumstances, the transaction was not, in law, usurious. And here, it may be added, that if the case was as stated (and the evidence manifestly conduced to establish it), it is clear, that the plaintiffs could not, by the negotiation, entitle themselves to more interest than they were already entitled to against the Bank of Kentucky. It would be a mere exchange of securities, by which the plaintiffs did not reserve, and could not obtain, more than the legal rate of interest. If A. holds the note of B., for one hundred dollars and legal interest, and he exchange it with C., for his note for the same sum and legal interest, and B. and C. are both solvent, the transaction in no manner trenches upon the statute against usury.

The fourth instruction puts the case in a more general form; but the same principles apply to it.

The fifth instruction puts the case in the most pointed manner, whether there was an intended loan of money and a reservation of illegal interest, and a shift or device to cover it, and evade the law by advancing something other than money on the loan. If there was not, then it asserts (and in our judgment correctly) that the jury ought to find for the plaintiffs.

The sixth and seventh instructions fall under the same considerations, and are equally unexceptionable.

The eight instruction was properly refused, and ought not to have been given. The court could not judicially say, that there was no evidence conducing to prove, that there was a *loan by the plaintiffs of the notes of the Bank of Kentucky. There was evidence proper for the consideration of the jury; and the intent was to be gathered by them, from the whole circumstances of the transaction. [*403

In regard to the instruction given by the court upon the prayer of the defendants, it was probably given under the impression, that the case was governed by the decision of this court, in the *Bank of the United States* v. *Owens*, 2 Pet. 527. That case, however, in our opinion, turned upon considerations essentially different from those presented by the present record. The questions certified in that case arose upon a demurrer to a plea of usury, and the demurrer, in terms, admitted, that the agreement was unlawfully, usuriously and corruptly entered into; so that no questionas to the intention of the parties, or the nature of the transaction, was put. The transaction was usurious, and the agreement corrupt; and the question then was, whether, if so, it was contrary to the prohibitions of the charter, and the contract was void. In the present case, the questions are very different. Whether the agreement was corrupt and usurious, or *bonâ fide*, and without any intent to commit usury, or to violate the charter, are the very points, which the jury were called upon, under the instructions asked of the court, to decide. The decision in 2 Pet. 527, cannot, therefore, be admitted to govern this; for the *quo animo* of the act, as well as the act itself, constitute the gist of the controversy.

In our opinion, the instruction asked by the defendants, ought not to have been given. It excludes altogether any consideration of the *bona fides* of the transaction, and the intention of the parties, whether innocent or usurious; and puts the bar to the recovery (after selecting a few facts) substantially upon the ground, that the bank-notes loaned were a known depreciated currency, passing in exchange and business, at a discount of

from thirty to forty per cent., and were passed at their nominal amounts by the plaintiffs to the defendants; without any reference to the fact, whether there was any design to commit usury, or whether the notes were, in reality, of a higher intrinsic value, or of their full nominal value, to the parties; or whether there was, in the transaction, either a taking or a reser-
*404] vation of more than six per cent. *interest contemplated by the parties. From what has been already stated, these constituted the turning-points of the case; and the instruction could not properly be given, without making them a part of the inquiries before the jury, upon which their verdict was to turn.

Upon the whole, we are of opinion, that the first seven instructions prayed by the plaintiffs, ought to have been given to the jury; and the instructions given by the court, at the request of the defendants, ought to have been refused; and therefore, for these errors, the judgment ought to be reversed, and the cause remanded to the circuit court, with directions to award a *venire facias de novo.*

Judgment reversed.

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*405] *Robert Piatt, Appellant, *v.* Charles Vattier and others, and The Bank of the United States.

Statute of limitations.—Adverse possession.

A bill was filed in the circuit court of Ohio, for a conveyance of the legal title to certain real estate in the city of Cincinnati; and the statute of limitations of Ohio was relied on by the defendants; the complainant claimed the benefit of an exception in the statute, of non-residence and absence from the state; and evidence was given, tending to show that the person under whom he made his claim in equity was within the exception; the non-residence and absence were not charged in the bill, and, of course, were not denied or put in issue in the answer: *Held*, that the court could take no notice of the proofs; for the proofs, to be admissible, must be founded upon some allegations in the bill and answer. If the merits of the case were not otherwise clear, the court might remand the cause for the purpose of amending the pleadings.

There was in this case a clear adverse possession of thirty years, without the acknowledgment of any equity or trust estate in any one, and no circumstances were stated to the bill, or shown in evidence, which overcame the decisive influence of such an adverse possession. The established doctrine of the law of courts of equity, from its being a rule adopted by those courts, independent of any legislative limitations, is, that it will not entertain stale demands.[1]

Piatt *v.* Vattier, 1 McLean 146, affirmed.

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[1] Courts of equity, acting on their own inherent doctrine, of discouraging, for the peace of society, antiquated demands, refuse to interfere in attempts to establish a stale trust, except where the trust is clearly established, or where the facts have been fraudulently and successfully concealed by the trustee, from the knowledge of the *cestui que trust.* Relief, in such cases may be sought; but the rule is, that the *cestui que trust* should set forth in the bill, specifically, what were the impediments to an earlier prosecution of the claim, and how he came to be so long ignorant of his alleged rights, and the means used by the respondent to keep him or her in ignorance, and how he or she first come to the knowledge of their rights. Godden *v.* Kimmell, 99 U. S. 211; Badger *v.* Badger, 2 Wall. 87. Where a party appeals to the conscience of the chancellor, in support of the claim, where there has been *laches* in prosecuting it, or long acquiescence in the assertion of adverse right, he should set forth in his bill, specifically, what were the impediments to an earlier prosecution of the claim; and if he do not, the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer, or any formal plea of the statute of limitations, contained in the answer. Marsh *v.* Whitmore, 21 Wall. 185. And see Brown *v.* Buena Vesta County, 95 U. S. 161.