MILLER *v.* TIFFANY.

In an action for the price of goods which the purchaser by his own agents examined and selected, and which he himself afterwards received and kept without objection, it is no defence that the price as agreed on was above that of the market; there having been neither fraud, misrepresentation, nor warranty in the case.

A person contracting for the payment of interest may contract to pay it either at the rate of the "place of contract," or at that of the "place of performance," as one or the other may be agreed on by himself and the creditor; and the fact that the rate of the place at which it is agreed that it shall be paid is higher than the rate in the other place, will not expose the transaction to the imputation of usury, unless the place agreed on was fixed *for the purpose* of obtaining the higher rate, and *to evade* the penalty of a usurious contract at the other place.

TIFFANY filed a bill against Miller and wife, in the Circuit Court for the District of Indiana, to foreclose a mortgage which the last-named persons had given to Palmer, a merchant of New York, and Wallace, an attorney at law of Cleveland, Ohio, as assignees of two insolvent firms; which mortgage they, the said Palmer and Wallace, had assigned to him, the complainant.

The facts of the case were essentially these: Two mercantile firms, closely connected with each other and in part composed of the same persons—one in Cleveland, *Ohio*, and one in *New York City*—being unfortunate in business, had made an assignment of their effects, dry goods chiefly, to these two persons, Wallace and Palmer; Palmer being a large creditor of the firms. About $50,000 worth of the goods were at Cleveland under Wallace's charge, and about $73,000 worth in New York, under Palmer's.

In this state of things, Miller, a German trader, resident at Fort Wayne, in *Indiana*, who had a valuable, unincumbered real estate in that State, but who was largely in debt and much embarrassed for ready money, employed two personal friends, Turner and Rufner, to go to New York and raise him money. They went there in February, 1858, and after making, according to Rufner's account, "desperate efforts, for at least four weeks, by publication in the Herald

and Tribune," fell in with a broker, named Anthony, who introduced them to Palmer. The result was, that Palmer entered into a treaty to sell Miller $20,000 worth of that part of the assigned goods in New York, at six months' credit, and to receive in payment for them a mortgage on Miller's real estate in Indiana, payable in five years; the mortgage to provide, however, that if there should be any default in paying the interest, the principal should become due at once. Palmer wrote, on the 15th of February, 1858, to Wallace at Cleveland what he had agreed on, requested him to go to Fort Wayne in Indiana, examine the property and title, and if satisfied with both to have the papers prepared; after which the goods should be delivered to Miller or his agents. Wallace, accordingly, went to Fort Wayne, in Indiana, and being satisfied with the security, a note for the term mentioned was given by Miller, with interest at *ten* per cent., payable, not in New York, where Palmer lived, and where the goods were bought, nor yet in Fort Wayne, the residence of Miller, but in Cleveland (at the Commercial Branch Bank there), the residence of Wallace, with the current rate of exchange on New York.* Matters being thus concluded, Rufner, the friend of Miller, went to New York and selected the goods out of the assigned stock there. They were then shipped to Fort Wayne, where Miller received them.

Six per cent., it is necessary to state, was apparently the lawful rate of interest in Indiana. Ten was allowable in Ohio, under a statute of 14th March, 1850, at that time in

* The note was in these words:

$20,000. CLEVELAND, O., February 22, 1850.

Five years after date, for value received, I, George Miller, of Fort Wayne, Allen County, Indiana, promise to pay Courtland Palmer and Frederick Wallace, assignees, or their order, twenty thousand dollars, *with interest at the rate of ten per centum per annum*, payable semi-annually, after six months from the date hereof, and on failure to pay said interest when due, the whole of said note to become due and collectable; the above note, interest, and principal, *negotiable and payable at the Commercial Branch Bank, Cleveland, Ohio, with the current rate of exchange on New York*, and without relief from valuation or appraisement laws of the State of Indiana.

GEORGE MILLER.

force. Whether *on a sale of goods* ten was in New York, was not so clear. On the loan of money it was not.

The interest not being paid, and the present bill filed to foreclose the mortgage, Miller set up two principal defences:

1. That the goods were not worth anything like the sum at which they had been sold to him.

2. That the contract for ten per cent. was usurious and void.

As respected the *value* of the goods, the testimony was conflicting. *Evans*, a trader of Fort Wayne, who on Miller's invitation had looked through the goods, "without any special motive, but the same as he would look through any other stock of goods in town, to see what I had to compete with," when interrogated as to their value replied, "This is a difficult question to answer, *one in which, perhaps, no two men would agree.* Their value to any man depends upon *his facilities for getting rid of them. I* should estimate their value to *me*, considering the fact that the stock was an old stock of goods, a great portion of them out of style, being poorly assorted, a large quantity of goods of a particular kind, and few or none of other kinds necessary to make up an assortment in proportion to the whole amount of stock, at from *sixty* to sixty-five per cent. of the invoices."

Walker, another resident of Fort Wayne, who had been "engaged in trading goods for about seven years, railroading some, and a part of the time engaged in outside trading," confirmed this estimate between invoice and *cash* values; adding, "the principal objections to the stock were, that the goods were badly *selected;* large amounts of some kinds, and a few or none of others to make them saleable. A considerable quantity of them were out of style, which is a bad objection in selling goods. Part of the goods were worth more than the invoice price, and a part of them less, making the average value about two-thirds invoiced price."

Gilford, who was a clerk of Miller, when the goods arrived at Fort Wayne, thought that "the general character of the goods was not very good. The goods were principally old styles, and was a hard stock to sell, and the majority of them

were billed to Miller at too high prices for retailing purposes. They were worth, in my opinion, about sixty cents on the dollar."

As respected the matter of usury. It appeared that Mr. Hough, an attorney of Fort Wayne, where Miller lived, was employed by Wallace, on his visit to Fort Wayne, to draw the papers in the case. In giving an account of the circumstances under which the note was made payable, Hough's testimony was, that on the morning of the day when the note was drawn, Miller introduced him to Wallace. The witness stated as follows: "The note and mortgage were drawn up in my office on the 22d of February, 1858. I first wrote a note *payable in New York* for the amount specified, *with ten per cent. interest*, upon which some conversation ensued between Wallace and Miller, when Miller remarked in substance that he would rather pay it to Wallace: 'I know you, Wallace; you are a clever fellow; I would rather pay you, as I don't know Palmer;' and asked if it could not be paid in Cleveland, adding that he expected to trade there, and *it would be easier for him to pay it in Cleveland. Upon the request of Miller*, Wallace wrote a note, and made it payable at the Commercial Branch Bank at Cleveland, which was and is the residence of Wallace."

There was no evidence to contradict this, except so far as it might be found in a correspondence between Palmer in New York and Wallace in Cleveland. Palmer, after concluding the negotiation with Rufner and Turner (Miller's agents in New York), gave Rufner, then on his way through Cleveland to Fort Wayne, an open letter to Wallace—the one already mentioned, and dated 15th February, 1858—and to be delivered by Rufner to him. It ran thus:

"This will be handed to you by Mr. Rufner, one of the parties who have been negotiating with me for the purchase of part of our stock of goods here; the purchase-money to be secured by mortgage on Mr. Miller's property at Fort Wayne. My proposal to them is, to sell $20,000 of our goods, at our regular prices to the country, at six months' credit, and to receive in pay therefor, a bond and mortgage on Mr. Miller's property,—pro-

vided it affords satisfactory security for the amount, and the title is undoubted; the mortgage to be the first lien on the property, and payable on or before five years, bearing *ten* per cent. semi-annual interest; the first interest to be payable in twelve months from the date of the delivery of the goods here; the principal and *interest* to be payable *here*," etc.

On the 22d February, 1858, Wallace, who, in pursuance of this letter, went, as already mentioned, to Fort Wayne, in Indiana, having, as he says, "concluded the business for which I came here," writes to his co-assignee Palmer, from that place, late in the evening and when "tired," a long letter and "in full," "how he found things and what he had done." He gives an account of some accidents on the way, his being detained by "a blockade of snow," how he had examined the property thoroughly with Mr. Hough, a full account of the character and value of the property, &c., and after a mention of some other things proper enough to be reported to his co-assignee or principal, his letter contained this sentence, the only one having any reference whatever to the place where the interest on the mortgage-note was to be paid, or as to *why* Palmer's instructions on that point had been departed from:

"I have taken the liberty *to vary from your instructions in reference to the place where the note is made payable. Seven* per cent. being, as I understand, the legal rate of interest in New York, and *six* per cent. *being the rate in Indiana, the note would seem to be open to the plea of usury both here and in New York* if made for *ten* per cent. So, *to avoid this, I* made it payable *in Ohio*, and *dated it there, where ten per cent. is the legal rate with exchange on New York, which results the same.*"

Wallace, who was himself examined as a witness, gave this account. After confirming Hough's statement that the note was originally drawn so as to make interest payable in New York, and that it was by *Miller's* request that it was finally made payable in Cleveland, Wallace continued:

"Upon *this request of Mr. Miller*, I consented that I would take his note, payable as he had desired, with exchange on New York;

to which he agreed; and the note in suit was thus drawn up by myself, and executed by Mr. Miller. The note was so executed by Miller, and received by me in the utmost good faith, on my part, as to the place where it was dated and made payable, *and mainly for the reason expressed by Miller, that it would enable him to pay it in his home currency. Perhaps another reason* which induced me to consent to the change proposed by Miller was, that I understood that by the laws of New York seven per cent. was the legal rate of interest; and as Mr. Palmer had informed me that the note was to draw ten per cent. interest, it occurred to me that perhaps the contract *might upon its face be opened to the plea of usury if payable in New York; and not having time to examine the question, and as the laws of my own State allowed parties to contract for ten per cent. interest*, and beliveing that I had the same right to make the note payable at my place of residence (as we were joint assignees in both New York and Cleveland), as at the domicile of Mr. Palmer, I thought it would remove that *apparent* objection *upon the face*, if the note was made payable at *my* residence in Ohio."

A sharp cross-examination got no very different result. The witness said:

"I regarded my knowledge as very imperfect upon the subject, for I had no knowledge of the *construction* of the statute of New York. I only had *queries* in my mind in reference to it, and fears that the contract *might* be regarded *upon its face* as usurious. I knew that the legal rate of interest in New York was seven per cent., and at the same time I had that confidence in Mr. Palmer's experience as a business man that *he* must know the statute of his own State in respect to interest upon all contracts, that he would not have bargained blindly for an *illegal* rate. Hence my *doubts* as to whether or not it was usurious upon its face. I regarded the contract as important, and I had a good deal of interest; but I had less personal anxiety in regard to it, and did not *investigate* questions connected with it as I should have done, had I not known that Palmer, before consummating the sale, *would consult his lawyer* in New York, Mr. Charles Tracy."

On the other hand, there were some *indications* in the evidence that the whole business, so far as Miller was con-

cerned, was a scheme of his, and perhaps of Rufner's, to get the goods by fraud, and without paying anything to anybody for them. It appeared, at least, that after Wallace, late at night—near midnight—had written his letter to Palmer of 22d of February, 1858, a copy of it—either at his request and because he was tired, or at the request of Rufner, and for some purpose, honest or dishonest, of his—had been taken by Miller's clerk; and that copy, containing the remark as to the reason why the interest had been made payable at Cleveland, was now produced accordingly. Rufner also swore that when he and Turner were making the treaty or negotiation with Palmer, in New York, for the goods, nothing was said about the rate of interest: that *he* expected it was to be *seven* per cent., the New York rate; and that the first intimation he had to the contrary, was Palmer's open letter to Wallace, given to him, Rufner, to be delivered. Giving an account further on of the report, which, on getting to Fort Wayne, in Indiana, he had made to his principal and friend Miller, Rufner said:

"I did report to Mr. Miller the terms as were written to Mr. Wallace, *it being the only evidence in writing that we had in relation to the whole transaction up to that time.* Mr. Miller swore that by **** ten per cent. would eat him up; he might as well surrender at once, and that the idea of his wife joining in a mortgage and note was a thing he had never been called upon to do, and he could not consent to accept such a ****** proposition, and that he had better let his business go to ****. I told him of course he was the judge in the matter; that these were the terms; I knew they were hard, but it was the best and only thing I could do with Mr. Palmer, and that, in my opinion, if he objected to any portion of Palmer's written instruction to Mr. Wallace, he might as well abandon the whole; that I had understood *Mr. Wallace had no power to act in the matter. I said I thought that the contract with ten per cent. interest was a usurious one.*"

This conversation was just before Wallace arrived in Fort Wayne to examine and conclude matters, and at Miller's request changed the place of paying the interest.

It appeared that immediately after the mortgage was executed and forwarded to Palmer at New York, Rufner, who now went to New York to select the goods, wrote, on the 25*th of February*, to Miller, about the subject of his business there. The contents of his letter were to be inferred from the reply. Miller writes back on the 2d of March, 1858, that is to say, *ten days after* the conclusion of matters at Fort Wayne, between himself and Wallace, thus:

"*Friend Rufner:* Yours of the 25th February was received this morning, and contents particularly noticed, and in reply, have but little to say, knowing that your good judgment will enable you to see and do things for me and yourself far better at this late day than I could suggest, being so far from the place of action, and knowing so little of the surroundings and influences under which you will have to act, in order to accomplish the object of your visit to New York. . . . . *Be sure you preserve a copy of Mr. Wallace's letter to Mr. Palmer.*"

And he adds in a postscript:

"P. S. In regard to the ten per cent. matter, let the Palmer party do all the talking themselves, *and keep perfectly cool and shady* on that subject. Don't let Turner see this letter."

The court below made a decree of foreclosure, and from that decree the present appeal was taken; the questions here being the same as below.

Mr. Evarts and Mr. Gilette for Miller and wife, the appellants:

1. The testimony shows that the goods were not at all worth the prices charged. They were unmarketable goods, the residuum, after the season of sales, of a bankrupt firm. Palmer was a heavy creditor of the firm, nursing its assets from interest, as much as he was bound to nurse them from duty. The goods were bought before they were really seen. The selection took place after the mortgage was executed and in possession of Palmer.

2. The negotiations and the transactions were commenced and completed in the city and State of New York. Palmer

having for sale in the city of New York a stock of dry goods belonging to the assigned estate of a bankrupt firm of that city, treats there with Miller's agents, and concludes all the terms of the bargain, leaving open merely an inquiry into the value of Miller's property to be mortgaged. Upon the report of his agent in this inquiry, Palmer received the securities, now in suit, from Miller's agents in the city of New York, and there delivered the goods which formed the subject of the bargain. The circumstances and the motives under which the note, instead of being dated at Fort Wayne, Indiana, where it was made and signed, was dated at Cleveland, Ohio, and made payable there, instead of at New York, refute the pretension that it was an element or ingredient of the contract between the parties, and one upon which its terms were adjusted, that the price of the goods sold in New York was to be paid in Ohio. Palmer in his letter states the terms of the bargain to be, that the bond and mortgage were "to be drawn payable on or before five years, bearing ten per cent. semi-annual interest, the first interest to be payable in twelve months from the date of the delivery of the goods here; *the principal and interest to be payable here;*" and Wallace gives the whole reason of the *place of payment* being varied, on the face of the securities, as follows: "I have taken the liberty to vary from your instructions in reference to the place where the note is made payable. Seven per cent. being, as I understand, the legal rate of interest in New York, and six per cent. being the rate in Indiana, the note would seem to be open to the plea of usury, both here and in New York, if made for ten per cent.; so, *to avoid this*, I made it payable in Ohio, and dated it there, where ten per cent. is the legal rate, with exchange on New York, which results the same." The charge of "*exchange on New York*" being added to the face of the price, thus to be paid at Cleveland, shows that *New York remained the place of payment in the intent of both payer and payee, and as a term of the bargain*, notwithstanding the formal change in the tenor of the note.

The validity of the transaction, then, depends on the law of New York, the true "place of the contract;" and Cleve-

land having been made the "place of performance," not as a substantive item of the agreement, but only as one in evasion of the "place of the contract," cannot furnish the rule for the exposition or government of what was done.

[3. The counsel contended, under this head, that by the statute of New York the contract was usurious, whether it was regarded as a sale, with a note and mortgage given in payment, or whether considered in the light, which was its true one, of a loan, under the guise of a sale; the purpose being that Miller should sell the goods *en masse* at auction.]

Mr. Coombs, on the other side:

1. The defence set up from failure of consideration breaks down completely. The first witness produced to sustain it, *dis*proves it. The value of the goods, he says, is matter of opinion; a question, "in which, perhaps, no two men would agree." It would depend, he swears, on the party's "*facilities* for getting rid of them." "The goods were badly *selected*," says a second witness. But who selected them? Miller's own agents. Moreover, what did this witness, who had been engaged in "railroading some," and in "railroading" as much as in trade, know on the subject? A third witness considered that they were "billed" too high; but is every man who has goods "billed" too high to him to set up successfully, failure of consideration, after he has inquired the price, received the goods and disposed of them for himself? Trade would not flourish under such a rule.

2. The general principle in relation to contracts made in one place to be executed in 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 is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalty of usury.*

We admit that there is one exception to this general rule, and that where the note is made payable at a place foreign

* Andrews *v.* Pond, 13 Peters, 78.

to the residence of either of the parties, and to the subject-matter of the contract, *for the purpose* of obtaining a higher rate of interest than the laws of the place of contract allow, with *intent to evade said law*, the contract will be usurious, if the rate of interest specified exceed the rate allowed by the *lex loci contractus*. Nor shall we dispute the proposition, that where the note is made payable at a place other than the residence of either of the parties, and foreign to the subject-matter of the contract, and a higher rate of interest is stipulated for than the laws of the place of contract permit, the parties will be *presumed* to have intended a fraudulent evasion of those laws. This presumption, however, can never arise when the note is made payable at the place of the domicile of one of the parties, especially when it is done at the request of the payor, and for his accommodation. In the case at bar, it will be hard to show any good reason, in law or in morals, why Wallace had not as good a right to require that the note should be made payable at the place of his domicile, as Palmer had to require its payment in New York; even if the payor had been indifferent, instead of desiring that it should be made payable at Cleveland, in preference to New York.

3. Under this head, the counsel replied to the argument on the New York statute; contending that the transaction was a sale, not a loan; and that being so it was protected by the case of *Cutler* v. *Wright*,* which recognized the English case of *Beete* v. *Bidgood*.†

Mr. Justice SWAYNE delivered the opinion of the court:

Two defences to the mortgage are relied upon:

1. That the goods sold to the defendant, which formed the consideration of the note secured by the mortgage, were worth largely less than the amount for which the note was given. It is claimed, therefore, that there has been a partial failure of consideration.

The evidence upon the subject is conflicting. It has failed

* 8 Smith, 472. † 7 Barnewall & Creswell, 453.

to establish to our satisfaction the fact alleged. Fraud or misrepresentation by the vendor is neither averred nor proved. It is in proof that the goods were carefully examined by the agents of Miller before they were bought, and that they were selected when the purchase was made. They were sold at the regular prices of the establishment. It does not appear that Miller made any objection, either to the prices or quality, when he received them; or that he ever made any objection, until it was set up in his answer in this case, more than a year after the goods were delivered to him.

The objection comes too late. The sanctity of contracts cannot thus be trifled with. The common law, unlike the civil law, does not imply a warranty from a full price. Where there is neither fraud nor warranty, and the buyer receives and retains the goods, without objection, he waives the right to object afterwards, and is finally concluded. In such cases the rule of *caveat emptor* applies.*

2. The defence chiefly relied upon is usury. The result of our inquiry upon that subject must depend upon the *lex loci* that governs the contract.

Palmer and Wallace, the payees of the note, were the assignees of an insolvent firm, which did business under one name in New York, and under another at Cleveland, Ohio. Palmer resided at New York and Wallace at Cleveland. About $50,000 worth of the goods, covered by the assignment, were at the former city, and about $75,000 worth at the latter. The negotiation for the sale was commenced by Palmer and concluded by Wallace. The note is as follows: [His Honor here read the mortgage-note, already described.†] Miller lived in Indiana. The note and mortgage were executed in that State. The mortgaged premises are situated there. Wallace was present at the execution of the securities. They were transmitted to Palmer, at New York, and the goods were thereupon shipped thence to Indiana. The note and mortgage have been assigned to the appellee.

We lay out of view the imputation upon Palmer and Wal-

* Hargous *v.* Stone, 1 Selden, 73. † See *ante*, p. 299, note.

lace, of a fraudulent purpose to evade by shift or device the usury statute of Indiana or New York. It is wholly unsupported by the evidence. They were acting in a fiduciary character, and could have had no motive to engage in such a transaction. There is no reason to believe that such a conception entered into their minds. On the other hand, we are by no means satisfied that it was not the deliberate purpose of Miller, when the arrangement was made, to involve them in the toils of this defence, and if possible to escape with the goods without paying anything for them. Our business, however, is to ascertain and apply the law of the case. We shall not discuss the evidence bearing upon the ethics of his conduct.

"The general principle in relation to contracts made in one place to be performed 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 law of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury."* The converse of this proposition is also well settled. If the rate of interest be higher at the place of the contract than at the place of performance, the parties may lawfully contract in that case also for the higher rate.†

These rules are subject to the qualification, that the parties act in good faith, and that the form of the transaction is not adopted to disguise its real character. The validity of the contract is determined by the law of the place where it is entered into. Whether void or valid there, it is so everywhere.‡

When these securities were executed the statute of Ohio of the 14th of March, 1850, upon the subject of interest, was

* Andrews *v.* Pond, 13 Peters, 77, 78; Curtis et al. *v.* Leavitt, 15 New York, 92; Berrien *v.* Wright, 26 Barbour, 213.

† Depeau *v.* Humphrey, 20 Howard, 1; Chapman *v.* Robinson, 6 Paige, 634.

‡ Andrews *v.* Pond, 13 Peters, 78; Mix et al. *v.* The Madison Ins. Co., 11 Indiana, 117; Corcoran & Riggs *v.* Powers et al., 6 Ohio State, 19.

in force. According to its provisions parties might lawfully contract for any rate of interest not exceeding ten per cent. per annum. The contract of Miller was therefore valid.

DECREE AFFIRMED WITH COSTS.

UNITED STATES *v.* D'AGUIRRE.

Where from a tract of land known by a particular name grants of two parcels had been made, and a petition for a grant of the surplus remaining was presented to the Governor of the Department of California, and to the description of the land solicited, these words were added, "the extent of which is about five leagues more or less"—*Held*, that these words were not a limitation upon the quantity solicited, but a mere conjectural estimate of the extent of the surplus.

The case distinguished from *The United States* v. *Fossat* (20 Howard, 413), and *Yontz* v. *The United States* (23 Id., 499).

APPEAL by the United States from the District Court for the Southern District of California; the case being thus:

D'Aguirre, in right of his wife Donna Maria Estudillo, claimed a tract of land in California under a grant from the Mexican Government. The tract was parcel of a larger tract, known as the "Rancho of Old and New San Jacinto." Two grants had been made of parts from this general tract; *the surplus embracing, in fact, about eleven leagues*, being that which was claimed by the respondent.

Having presented a petition to the Board of Commissioners, appointed by act of March 3d, 1851, to ascertain and settle private land claims in California, for a confirmation of his claim, D'Aguirre's title as it appeared before the board was thus:

His original petition to the prefect for the land, made in behalf of his wife, set forth "that there was remaining a '*sobrante*,' or surplus," in the tract or rancho of San Jacinto, and that his wife "requiring the said *remnant*, ... solicited the prefect's assistance to obtain the *mentioned land*, the extent of which was about *five* leagues" within the limits of the known rancho of San Jacinto, the general plat of which is