ing at the time, only required that the person applying for its benefits should be "a free white person," and not an alien enemy.*

A similar construction was given to the act by the Court of Appeals of New York, in *Burton* v. *Burton*,† and is the one which gives the widest extension to its provisions.

It follows, from these views, that the widow and the two sisters were citizens of the United States upon the decease of the intestate husband. The widow and Margaret Kahoe became such on the naturalization of their respective husbands, and Ellen Owen became such on her marriage. The sisters are therefore entitled to share with the widow in the estate of the deceased, and the decree of the Supreme Court of the District must be

AFFIRMED.

EWING *v.* HOWARD.

1. Usury being a defence that must be strictly proved, a court will not presume that a note dated on one day for a sum payable with interest from a day previous was for money first lent on the day of the date only.
2. Where a defendant on suit upon such a note wishes to rely at any time on usury as a defence, he should raise the question in some form in the court below. If this is not done the defence cannot be made here.

ERROR to the Circuit Court for the Middle District of Tennessee.

A statute of Tennessee, passed in 1860,‡ and which by its terms was to take effect from the 1st of September of that year, allowed 10 per cent. interest (instead of 6 per cent., a former rate) to be taken for money lent, provided that such agreement were expressed "on the face of the contract," whether evidenced by bond, bill, note, or other written instrument. The same statute, however, provided, that if any greater amount of interest than 10 per cent. was paid,

* Act of April 14th, 1802, 2 Stat. at Large, 153. † 38 New York, 373.
‡ Sessions Act, chap. 41, § 1, p. 31.

or agreed to be paid, the whole amount of the interest should be forfeited by the payee. And it made the lending of money at such greater rate a misdemeanor, subject to indictment, and punishable accordingly.

The act was repealed on the 31st of January, 1861. With the exception, therefore, of the five months from the 1st of September, 1860, to 31st January, 1861, it had always been in Tennessee a misdemeanor to lend money at a greater rate of interest than 6 per cent. per annum.

In this state of the law there, Howard sued Ewing, in 1865, in the court below, upon two notes: one (the only one which was the subject of controversy here) having been *dated November 15th*, 1860, and by which he, Ewing, agreed to pay him, Howard, or order, $\$3333\frac{33}{100}$, "with interest at the rate of 10 per cent. per annum, *from and after the 1st day of September last past* till paid." By a memorandum in writing, *dated on the same day as the note*, payment was guaranteed by the father of Ewing; the guaranty speaking of the note as being for money "*heretofore*" lent by Howard to Ewing's son.

The declaration was in the ordinary form of a declaration in assumpsit. Plea the general issue, and nothing else. On the trial the notes were put in evidence without objection, and there being no other evidence in the case, verdict was given for the plaintiff. There was no request for instructions on either side.

From an entry in the record, that "the motions for a new trial and in arrest of judgment were by this court *overruled*," it was to be inferred that motions, both for a new trial and in arrest of judgment, had been made below; but neither were set forth in the record as sent here, and, accordingly, if usury or any other defence had been made in fact, in the court below, to the notes, no evidence of it appeared here.

Judgment having been given for the plaintiff, the defendant now brought the case here.

Messrs. Waterson and Crawford, for the plaintiff in error:

The note is void, being an illegal contract for usury, ap-

parent upon its face. It expresses that it is made for value received on the day of its date, and yet calls for interest from a period two months and a half before that day, viz., from the day when the 10 per cent. law took effect; making the rate of interest in effect more than thirteen per cent. per annum. "Every contract which is prohibited and made unlawful by statute, is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender. The penalty implies a prohibition."*

Moreover, the illegality being apparent on *the face of the instrument which is the subject of the suit*, it is radical and pervading, attaching to the case wherever it may be. The leading Tennessee case of *Isler* v. *Brunson*† is decisive.

Mr. Caruthers, contra:

The question is, whether the note of November 15th, 1860, is illegal on its face? If not, it is not obnoxious to the objection made.

It is a well-settled rule, that the courts will avoid, if practicable by any fair intendment, that construction of a transaction which will subject a party to a contract to a penalty. If this note was for money lent on or before the 1st of September, 1860, it is legal. Now, the written guaranty of Ewing, the father, shows that it was for a previous loan. But independently of that the presumption would be that the loan was made at or before the time from which the interest was to begin to run.

But even if this were not so, yet on this writ of error the court below cannot be put in the wrong, by the making of an objection here that was not made there. If the defendants desired to make such a defence as that now set up, it should have been done then, and the judgment of the court taken upon it. That would have made a question for this court of errors to sustain or correct. This is a court to correct erroneous decisions made by the court below, on points of defence presented, and not for the origination of new

* 1 Smith's Leading Cases, page 622, 6th ed. † 6 Humphreys, 277.

defences, which the inferior court was not called upon to adjudicate.

Reply: The case of *Isler* v. *Brunson*, already cited, answers the objection that the objection is first made here, and seems to be decisive of the case presented by this record:

"If a party plaintiff bring into a court, either of law or equity, an illegal contract that it may be enforced, and this illegality is shown and set forth *by himself*, and not disclosed by plea or allegation from the defendant, it is the duty of *either court*, on ground of public policy, to repel the plaintiff *and refuse its action on his behalf*. Thus, if in a declaration on a security for money profert be made of the security, and upon its face it appears to have stipulated for more than legal interest, no judgment can be rendered for the plaintiff notwithstanding the act of 1835 only avoids the usurious excess."

Mr. Justice CLIFFORD delivered the opinion of the court.

Judgment in this case was for the plaintiff in the court below, and the defendants in that court sued out a writ of error and removed the cause into this court. The action was assumpsit, and the cause of action was the two promissory notes set forth in the bill of exceptions. Plea was the general issue, and the bill of exceptions shows that the plaintiff, to maintain the issue on his part, introduced in evidence the two promissory notes on which the suit was founded. They were introduced without objection, and the bill of exceptions states to the effect that there was no other evidence introduced by either party. Defendants moved for a new trial, and also in arrest of judgment, but the court overruled both motions, and the defendants excepted to the rulings of the court.

Settled rule of the court is that a motion for a new trial is addressed to the discretion of the court, and that the ruling of the court in granting or denying such a motion is not the proper subject of exceptions.*

Motions in arrest of judgment present questions of law

* Henderson *v.* Moore, 5 Cran. 11; Blunt *v.* Smith, 7 Wheaton, 248.

when they are so framed as to call in question the sufficiency of an indictment or of a declaration in a civil suit; but the transcript does not contain the motion, and the declaration appears to be in due form and sufficient to sustain the judgment.

Defects of form in the writ or declaration, not pointed out by demurrer, are not in general regarded in this court as good cause for reversing a judgment brought here by writ of error, as the Federal courts possess the power to permit such imperfections to be amended in their discretion and upon such terms and conditions as the rules of the court prescribe.*

Neither of the objections taken to the action of the Circuit Court and embodied in the bill of exceptions are urged in this court, and being in themselves entirely untenable, they must be considered as having been abandoned. Nothing else remains to be considered in the case except what arises from the form and tenor of the notes, which are set forth at large in the bill of exceptions, but without any comment or any objection being made to the right of the plaintiff to recover.

Examined throughout, the transcript shows no objection to the right of the plaintiff to recover on the second note in the case, and as it is not suggested by the defendants that there is any defence to that note, further comment in that behalf is unnecessary. Attention of this court is invited only to the other note, and the argument is that it is illegal and void, because it secures by its very terms usurious interest. Legal interest in that State is six per cent. per annum, unless otherwise agreed between the parties, but contracts between the borrower and the lender of money may be made for a higher rate not exceeding ten per cent. per annum, as in this case, provided the agreement to that effect is expressed "in the face of the contract," whether evidenced by bond, bill, note, or other written instrument.†

* 1 Stat. at Large, 91; Stockton *v.* Bishop, 4 Howard, 155; Railroad *v.* Lindsay, 4 Wallace, 650.

† Sess. Act, chap. 41, § 1, p. 31.

Opinion of the court.

Debts created for the loan of money under an agreement to pay ten per cent., expressed as required in the statute, may be subsequently renewed for the same rate of interest, but the provision is that if any greater amount of interest than ten per cent. per annum is paid or agreed to be paid for the use of money, "the whole amount of interest so paid, or agreed to be paid, shall be forfeited by the payee." Provision is also made by the sixth section of the act, that any person or persons who shall violate the provisions of that law shall be subject to indictment, as in other cases of misdemeanor, and be punished as therein provided.*

Principal reason now urged for the reversal of the judgment is, that the first note described in the bill of exceptions is illegal, because the makers of the same promised to pay interest on the principal at the rate of ten per cent. per annum, commencing the computation two months and a half before the date of the note. Date of the note is November 15, 1860, and the agreement, as expressed in the note, is to pay interest at the rate of ten per cent. per annum from and after the first day of September last until paid.

Argument for the defendants is that the contract is usurious, and that, inasmuch as the loaning of money at a greater rate of interest is prohibited by law, and the violation of the provision is declared to be a misdemeanor, the contract expressed in the note is illegal, and that the judgment should have been for the defendants.

Suppose it be admitted that the presumption is as contended by the defendant, that the note was given for the loan of money, and that the contract is illegal, still the presumption is not a conclusive one, as the note may have been given for the purchase of goods, chattels, or lands, and the bargain may have been made and the property actually transferred on the exact day specified in the note, as the time from which interest is to be computed.

Promissory notes, if given under those circumstances, though bearing interest anterior to their date, are neither

* Sess. Act, p. 33, Code, 863.

usurious nor illegal, unless the day described in the contract from which to compute the interest is anterior to the actual date of the transaction and the transfer of the subject-matter of the purchase and sale, and it is quite clear that promissory notes in such a case, as between the original parties, are open to explanation.

Where the defendant intends to make such a defence he should plead it in the court of original jurisdiction, or raise the question in some form and present it for the decision of the court. Doubtless he may raise the question by plea, by objection to the introduction of the note in evidence, or by a prayer for instruction to the jury, but he cannot remain silent in the subordinate court and then present the objection for the first time in the court of errors, when it is too late for the plaintiff to offer any explanations, or to show what was the real nature and character of the transaction.

Nothing of the kind was done or suggested in this case by the defendants, but they pleaded the general issue, giving no notice of any such defence, and the note was introduced at the trial without objection, and there is nothing in the record to show, or tending to show, that the circuit judge ever made or was requested to make any ruling upon the subject.

Parties relying upon such an objection should raise it at the trial before the jury, when the other party would have an opportunity to offer any explanations in his power to show that the contract was legal and valid.

Bills or notes promising the payment of interest from a time anterior to their date, if the bills or notes so written are to be considered as conclusive evidence that they were given for money lent on the day of their date, would properly be regarded as usurious, but it is well known that bills and notes are often given subsequent to the transaction which constitutes their consideration and for property sold, and upon other transactions as well as for money lent. "Usury is a defence that must be strictly proved, and the court will not presume a state of facts to sustain that defence where the instrument is consistent with correct dealing."*

* Marvin *v.* Feeter, 8 Wendell, 533; Holden *v.* Pollard, 4 Pickering, 173.

Syllabus.

Universal rule is that where an instrument will bear two constructions equally consistent with its language, one of which will render it operative and the other void, the former will be preferred.*

Theory of the defendants is that the note is usurious and illegal on its face, but the authorities are clearly the other way, that the presumption is that the note was given upon a state of facts which authorized the taking of the instrument, and that the contract was lawful and valid.†

Tested as matter of principle, or by the decided cases, the better opinion is that the presumption is that such a contract is valid and not usurious, and that the burden to prove the contrary is upon the party who makes the charge.

JUDGMENT AFFIRMED.

EX PARTE MCCARDLE.

1. The appellate jurisdiction of this court is conferred by the Constitution, and not derived from acts of Congress; but is conferred "with such exceptions, and under such regulations, as Congress may make;" and, therefore, acts of Congress affirming such jurisdiction, have always been construed as excepting from it all cases not expressly described and provided for.
2. When, therefore, Congress enacts that this court shall have appellate jurisdiction over final decisions of the Circuit Courts, in certain cases, the act operates as a negation or exception of such jurisdiction in other cases; and the repeal of the act necessarily negatives jurisdiction under it of these cases also.
3. The repeal of such an act, pending an appeal provided for by it, is not an exercise of judicial power by the legislature, no matter whether the repeal takes effect before or after argument of the appeal.
4. The act of 27th of March, 1868, repealing that provision of the act of 5th of February, 1867, to amend the Judicial Act of 1789, which authorized appeals to this court from the decisions of the Circuit Courts, in cases of *habeas corpus*, does not except from the appellate jurisdiction of this

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* Archibald *v.* Thomas, 3 Cowen, 290.

† Andrews et al. *v.* Hart et al., 17 Wisconsin, 307; Leavitt *v.* Pell, 27 Barbour, 332; Levy *v.* Hampton, 1 McCord, 147.