BURNHISEL v. FIRMAN, ASSIGNEE.

1. Where a party agrees, by note, to pay a certain sum at the expiration of a year, with interest on it at a rate named, the rate being higher than the customary one of the State or Territory where he lives, and does not pay the note at the expiration of the year, it bears interest not at the old rate but at the customary or statute rate.
2. If, however, the parties calculate interest and make a settlement upon the basis of the old rate, and the debtor gives new notes and a mortgage for the whole on that basis, the notes and mortgage are, independently of the Bankrupt Act, and of any statute making such securities void *in toto* as usurious, valid securities for the amount which would be due on a calculation properly made. They are bad only for the excess above proper interest.
3. Where a person owing money, principal and interest, for some time overdue, but secured by mortgage, accounts with his creditor and on computation a sum is found as due for the principal and interest added together, any new mortgage given for the whole and on the same property on which the former mortgage was given, is not, upon satisfaction being entered on the old mortgage, to be considered as a new security and so open to attack under the Bankrupt law if made within four months before a decree in bankruptcy against the debtor. If the old security was not a preference, neither will the new one be so. They are to be considered as being for the same debt.

APPEAL from the Supreme Court of the Territory of Utah.

Firman, assignee of Wright, a bankrupt, filed a bill in the court below against Burnhisel, to set aside a mortgage given by the said Wright, before his bankruptcy, to the said Burnhisel, the bill alleging that the mortgage was void under the Bankrupt Act.

The case was thus:

Wright executed three promissory notes, each payable "in one year from date with interest at 25 per cent."

The first, dated March 26th, 1866, was to Burnhisel, and for $2450.

The second, dated May 9th, 1866, was to Pond, and for $951.

The third, dated May 26th, 1867, was to Burnhisel, and for $950.

All three notes were secured by mortgages on the same property. It did not appear from anything in the case what rate of interest prevailed in Utah Territory when the notes were given; but on the 14th of February, 1868 (by which time all three of the notes had become due), a statute of the Territory enacted that it should be lawful to take 10 per cent. interest per annum when the rate had not been agreed upon by the parties; and by an act passed in 1869 it was enacted directly that parties might agree on any rate of interest, but that when none had been agreed on, the rate should be 10 per cent.

In this state of things, nothing having been paid on either of the notes to Burnhisel, he and Wright, on the 1st of August, 1871—that is to say, three years and more after statute had fixed the rate of interest in Utah at 10 per cent., where the parties had not agreed upon a different rate—made a settlement of the interest due on the two notes to Burnhisel. They computed it at 25 per cent., per annum, during the whole time, from the date of the notes down to the time of the settlement, and so made it amount to $4440. And for this sum, as arrears of interest, Wright gave to Burnhisel another note payable in one year with interest at 10 per cent.

On the 26th of April, 1872, Burnhisel having bought for what appeared due as principal ($951), the note to Pond, he (Burnhisel) and Wright made another settlement; making the sum due by Wright to be $9622, and Wright gave to Burnhisel two new notes secured by mortgage upon the same estate on which the three former notes had been secured. One note was for $4220, payable June 1st following (1872), with interest from 1st May at the rate of 25 per cent. payable monthly till the principal was paid. The other note was for $5402, payable at the same time as the other, with interest at the rate of 10 per cent.; this, too, payable monthly till the principal was paid. Satisfaction was entered on all the old mortgages, and the notes were surrendered to Wright, the words "*Settled by new arrangement and notes, April 26th*, 1872," being written upon them.

Burnhisel was himself examined as witness, when this question was asked and this answer given:

"*Question.* At what rate of interest was the computation made to meet the amount of the two notes of April 26th, 1872?

"*Answer.* The principal at 25 per cent. per annum and the interest which had accrued up to the 1st of August, 1871, at the rate of 10 per cent. per annum, up to the date of the said two notes. There was no interest computed on the Pond note in the settlement of 1872, the same being put in at $951, just what I actually paid."

Wright having been decreed a bankrupt within less than four months after the last two notes, and the mortgage to secure them was given, Firman, the assignee, filed a bill alleging that the mortgage was void under the thirty-fifth section of the Bankrupt Act. The bill set out fully all the notes and mortgages.

That section enacts that,

"If any person, being insolvent, within four months before the filing of the petition against him, with a *view* to give *preference* to *any creditor* or person having a claim against him, makes any *pledge or conveyance of any part of his property*, the person receiving such pledge or conveyance, or to be benefited thereby, having reasonable cause to believe such person insolvent, *and such pledge or conveyance is made in fraud of the provisions of this act*, the same shall be void, and the assignee may recover the property or the value of it from the person receiving it, or so to be benefited."

By consent of parties the mortgaged property was sold and the proceeds ($7300) being in court, the question was to whom they should be awarded. The counsel of the assignee alleged that there had been a preference made by the last mortgage:

1st. In that interest, in being calculated for more than one year at 25 per cent., had been calculated on a basis that created a debt voluntarily, and that this debt—the interest, namely, for several years at 25 per cent.—had now, in April, 1872, and in contemplation of bankruptcy, been first secured by the mortgage then made.

2d. That the old debt, both principal and interest, at 25 per cent. for one year, and all other lawful interest, had been satisfied, and that the mortgage of April, 1872, was a new security.

The court below held the case fraudulent within the above-quoted section of the Bankrupt Act, and awarded the money to the assignee in bankruptcy. From that decree Burnhisel appealed.

Messrs. Snow and Hoge, for the appellant:

I. Where a person contracts to pay money, and nothing is said about the rate of interest, the presumption, of course, must be that the interest is to be at the ordinary rate. But that is not this case. Here the party contracted to pay *within one year* with interest at 25 per cent., and he does not pay within the year. Against the will of the other party he violates his promise and keeps in his own hands the money of that party. What is the presumption in that case? The lender, for all the time that he did lend, insisted on 25 per cent., and for all the time that the borrower professed to borrow he agreed to pay that rate. If the borrower, in breach of his contract, in violation of his own duty, and against the lender's will and rights, extend the time, shall he not be held to the rate at which he took the money? The authorities declare that he shall. In *Kohler* v. *Smith*,* in the Supreme Court of California, a person had given a note for $1000, "payable in two months after date, with interest at the rate of 5 per cent. per month;" that is to say, at the enormous rate of 60 per cent. a year. The statute of California gives but 10 per cent. a year for all moneys after they become due, "where there is no express contract giving a different rate of interest." The case, therefore, was just like the one now before the court. The court held that the debtor being in default in not paying the principal, must pay for the use of it at the rate of 5 per cent. a month till he did pay it. That case decides, therefore, that where moneys are

* 2 California, 597.

lent at a *higher* rate of interest than the statutory rate, and are payable at a day fixed, and are not paid at the day, the higher rate, in the absence of agreement otherwise, is to continue.

Ludwig v. *Huntzinger*,* in Pennsylvania, is decided on the same principle of regard to the creditor, when made to suffer for a non-return of his principal by his debtor's breach of contract. There the contract was to pay $1144 in eighteen months from the date of the contract, with 3 per cent. interest per annum. The statutory rate in Pennsylvania is 6 per cent. The debtor, violating his contract by not paying the principal when due, was punished with the higher rate. The California and the Pennsylvania case do not conflict; though in the former the statutory rate was not taken and in the latter it was. In both, the creditor's interest was preferred; and in California the statutory rate was put aside because it would have given him less; while in Pennsylvania it was followed because it would give him more. The American Leading Cases,† speaking about the cases where an obligation to pay interest generally arises, and those where it does not, says:

"In all cases, the question seems to be whether the debtor *is in default.*"

And this seems a reasonable view. Any other invites to and protects breach of contract and fraud. If, for example, a man borrow for one year only at 25 per cent., promising positively to return the principal at the end of that one year, but do not so return it, but on the contrary, in the face of his contract and duty, keep it for two more, and you charge him for those two years but at the rate of ten, has he not managed to borrow during the first year at the rate of 15? Certainly he has. He pays but 45 per cent. for the whole three years, which is at the rate of 15 for each year. By a trick and breach of contract he circumvents his creditor;

* 5 Watts & Sergeant, 60.

† Fifth edition, vol. 1, p. 681 or 506*, note to Selkirk *v.* French.

and the creditor has no means of punishing him. Certainly he should be held in such a case to the highest rate possible.

In addition, the parties, by computing, on their settlement in August, 1871, the rate at 25 per cent. to that date, interpreted their original contract, and showed they meant that 25 per cent. should be paid continually if the debt was not paid within the year.

If this were not all so, and if statute in any event would govern such a case as this one, the statutes here which fix 10 per cent. interest, were both passed after these contracts were made. To make the statutes operate on *these* contracts, the statutes must be made to operate retrospectively; a mode of operation always disfavored.

II. The whole debt and interest for which the new mortgage was given, was secured by the old mortgages. What the parties did in April, 1872, when the new notes and mortgage were given was to have a settlement for the amount due, reduce all things to writing, and, by taking a new mortgage, which, of course, they recorded, give notice to third parties of what was done. The whole debt for which the new mortgage was given was secured by the previous mortgages, though part of it was for unpaid interest, a matter which third persons would not know except by some such thing as was here done. Of course, therefore, there was no purpose to give a preference. At worst the new mortgage could be bad only for any interest added, upon a wrong basis of calculation, to what was really due.

Messrs. C. M. Hawley and T. Marshall, contra, for the assignee:

I. The interest at 25 per cent. was due for one year only. It was an enormous rate. Suppose the debtor did break his contract, how does he become bound to pay in the second year an illegal rate because he agreed to pay it in the first? If he pays it as he contracted to pay, it is enough. For the rest he pays the usual rate. Twenty-five per cent. cannot have been a usual rate in Utah on the expiration of any of the first three notes, or a statute would not have been passed so near to that date fixing it at ten. The interest fixed in August, 1871, as the true amount of interest due was, therefore, more than the debtor was bound to pay. And he gave the last mortgage to secure a debt which the first one did not secure. That was a preference.

II. The three old notes and the old mortgages given to secure them were extinguished and satisfied when the new notes and mortgages were given. These last are to be looked upon as a new security, and as such as having no virtue of a date earlier than the day when they were given.* This was April 26th, 1872, within four months of the bankruptcy.

Mr. Justice SWAYNE delivered the opinion of the court; considering the two questions raised in the argument, in the order in which they were raised:

I. The bases of the calculation of interest made by Burnhisel and Wright were wrong, and the result was the aggregate amount of the two notes of April 26th, 1872, which was a sum much too large. Burnhisel was then entitled,

1st. To the face of the two original notes to him, with 25 per cent. interest upon each for one year, and the lawful rate of interest of the Territory where no rate is specified down to the date of the settlement; and,

2d. To the face of the note to Pond with the like lawful rate of interest after its maturity down to the same period.† The implication of the "act relative to interest," of February 14th, 1868, is exactly the same as the affirmation of the act upon the same subject of 1869. The latter act was, therefore, unnecessary.‡ Both these acts fix the rate at 10 per cent. where no rate has been agreed upon. What it was in such cases, prior to the taking effect of the first act, we are not advised.

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* Wallas *v.* Long, 16 Alabama, 738; Banks *v.* Boyd, 38 Id. 625; Headley *v* Gounndry, 41 Barbour, 279; Hadlock *v.* Bulfinch, 31 Maine, 246; Fowler *v.* Bush, 21 Pickering, 230; Marritt *v.* Handy, 8 Gill, 41.

† Brewster *v.* Wakefield, 22 Howard, 127; Young *v.* Godbe, 15 Wallace, 562.

‡ United States *v.* Babbitt, 1 Black, 61.

For the amount due upon the two original notes to Burnhisel and upon the one to Pond, transferred to Burnhisel, the two later notes, with the rate of interest stipulated in them, and the mortgages securing them, were, aside from the objection arising under the Bankrupt law, unquestionably valid securities.* In Pennsylvania, where there is a statute making usury penal, but not declaring the contract void, a usurious bond and mortgage may be enforced for the amount actually due.†

II. In order to bring a security for a debt within the provision of the Bankrupt law, relied upon by the appellee, it is necessary that all the prescribed conditions should concur. If either element of the combination be wanting, there is no infringement of the law. Among them, and the cardinal one, is that the security should be given by the bankrupt within the time specified, "with the view of giving a preference to a creditor or person having a claim against him." Are the securities here in question liable to this objection? The facts must give the answer, and they are undisputed. The several securities upon which the notes and mortgage attacked were founded, and for which the later ones were substituted, were given not only more than four months, but more than five years, before the filing of the petition in bankruptcy. The later ones were for the same liabilities consolidated, and for nothing else. The mortgage was upon the same property as the prior mortgage, and none other. They were intended to be for the amount due upon the former securities. They were for too much, as we now adjudge the law of Utah to be. In the view of equity they are as if they had been taken for the proper amount. The excess is a nullity. It has no efficacy or validity for any purpose. The bankrupt's estate, to be administered by his assignee, is just what it would have been if the new notes

* Wearse v. Pierce, 24 Pickering, 141; Abbe v. Newton and wife, 19 Connecticut, 20; Rood v. Winslow, 2 Douglass, Michigan, 68; Mackey v. Brownfield, 13 Sergeant & Rawle, 239; United States v. Bradley, 10 Peters, 343.

† Wycoff v. Longhead, 2 Dallas, 92; Turner v. Calvert, 12 Sergeant & Rawle, 46.

and mortgage had never existed. The rights of other creditors were in no wise affected by the substitution. The mortgaged premises, when sold, yielded a sum less than sufficient to pay the amount due on the original securities. It cannot be justly said that any property was withdrawn or any preference given within the four months. The withdrawal and the preference were years before. The new securities were only the recognition and continuity of those which preceded them. The change was one of form rather than of substance. It is as much the purpose of the law to sustain all valid claims arising beyond the time specified as it is to strike down the frauds within that time which it denounces. The assignee took the estate subject to the rights, legal and equitable, of all other parties.* Our views in this case are in harmony with those expressed in several recent cases in which we had occasion to consider this section of the Bankrupt law.† We hold that the section does not affect securities within the category of those before us.

There is another ground upon which a judgment for the appellant may well be placed. As before remarked, the new securities were intended to take the place of the prior ones. If the new ones are adjudged invalid, the cancellation and surrender of the prior ones will have been without the shadow of a consideration. If the cancellation and surrender are permitted also to stand, Burnhisel will have lost his debt without fault on his part, and contrary to the intent of both debtor and creditor in making the change of securities. Burnhisel will be in no better situation than if he had given up the old securities upon being paid in coin or currency which he believed to be good, but which turned out to be counterfeit. Where there is a failure of consideration and fraud or mistake in such cases, a court of equity will annul the cancellation and revive the securities. Upon being so revived they resume their former efficacy. This is an ordinary exercise of the jurisdiction of such tribunals.

* Gibson v. Warden, 14 Wallace, 244.

† Wilson v. The City Bank, 17 Id. 473; Tiffany v. The Boatman's Savings Institution, 18 Id. 375; Cook v. Tullis, Ib. 332.

"It is a rule in equity that an incumbrance shall be kept alive or considered extinguished as shall most advance the justice of the case."*

The application of this principle occurs most frequently in cases of usury. It is well settled that if a security founded upon a prior one be fatally tainted with that vice, and the prior one were free from it but given up and cancelled, and the latter one thereafter be adjudged void, the prior one will be revived, and may be enforced as if the latter one had not been given. The cases to this effect are very numerous.† A vendor's lien may be revived under the same circumstances.‡ In the same suit, wherein there is a failure to recover upon the void security, the valid one, on account of which it was given, may be enforced. In the case before us all the notes and mortgages are fully set out in the bill. There is, therefore, no obstacle arising from the state of the pleadings.

Embarrassment sometimes occurs in such cases from the attaching of intervening rights. Here there are none, and as regards the assignee there can be none. If the later securities were void, as insisted by the appellee, then the appellant would be entitled to relief in this view of the case.

DECREE REVERSED, and the case REMANDED, with directions to enter a decree

IN CONFORMITY WITH THIS OPINION.

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* Starr v. Ellis, 6 Johnson's Chancery, 395; Neville v. Demeritt et al., 1 Green's Chancery, 336; Barnes v. Camack, 1 Barbour, Supreme Court, 396; Loomis v. Hudson, 18 Iowa, 416; East In. Co. v. Donald, 9 Vesey, 284; Hore v. Becher, 12 Simons, 465.

† Parker v. Cousins, 2 Grattan, 389; Farmers' and Mechanics' Bank v. Joslyn, 37 New York, 353; Cook v. Barnes, 36 Id. 521; Rice v. Welling & Fake, 5 Wendell, 595.

‡ Crippen v. Heermance, 9 Paige, 211.