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West Virginia Usury Law—
Comments Upon the 1968 and 1969 Acts

William O. Morris*

The West Virginia Legislature during the 1968 Second Session and the General Session 1969 radically changed the laws of West Virginia relating to permissive interest charges and penalties to be imposed with respect to contracts calling for interest for the loan or forbearance of money at a usurious rate.

The scope of this article is to cover problems relating to loans made other than under the Small Loan Company Act or to corporate borrowers.

To constitute usury there must be a borrowing and lending with an intent to exact more interest than is allowed by law or a forbearance in consideration of such interest being paid. Usury is interest exceeding the lawful rate for the loan or forbearance of money, and does not exist where such interest is essentially and honestly a part of the consideration for the purchase of property, even though it be called for in the form of a percentage on a principal sum, and be called interest and be in excess of the lawful rate.¹

It may be interesting to note that in Biblical times usury encompassed any transaction in which interest was charged. It did not matter whether interest was charged in money or in kind.²

In West Virginia, the maximum interest rate which may be lawfully applied to an obligation under various factual situations is prescribed by statute,³ as are the penalties which attach to a usurious transaction.⁴ It will be noted later that the latter statutory provision is not applicable to loans made by a national bank which may be usurious.

Under the 1968 revision of the West Virginia Code, which applies to loans or forbearances made on or after September 14, 1968, the

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¹Reger v. O'Neal, 33 W.Va. 159, 166, 10 S.E. 375, 377 (1889).
²Deuteronomy 23:19.
³W. VA. CODE ch. 47, art. 6, § 5 (Michie Add. Supp. 1968). It should be noted here that the first session of the fifty-ninth legislature made an addition to this section. See W. VA. CODE ch. 47, art. 6, § 5a, Senate Bill No. 221 (March 6, 1969), dealing with interest charges on loans repayable in installments.
⁴W. VA. CODE ch. 47, art. 6, § 6 (Michie Add. Supp. 1968).
legal rate of interest in West Virginia remains at six per cent per annum. The legal rate is the rate of interest which the law prescribes when an obligation calls for interest and the parties had not agreed upon the rate of interest. Judgments on non-interest bearing obligations likewise carry interest at the legal rate until paid. When a judgment is obtained based on an obligation carrying a specified rate of interest, the judgment should carry interest at the rate which was applicable to the underlying indebtedness. Non-interest bearing obligations carry interest at the legal rate from the due date of the obligation while interest bearing obligations continue to carry interest at the agreed rate until the debt is actually paid.

The 1968 law permits a higher rate of interest to be charged for the loan or forbearance of money where the contract is in writing than on an oral agreement. The Code revision reads in part, "No person upon any contract other than a contract in writing shall take for the loan or forbearance of money... interest in excess of six dollars upon one hundred dollars for a year, and proportionately for a greater or lesser sum, or for a longer or shorter period of time."

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6 In Shipman v. Baily the West Virginia Supreme Court of Appeals cited with approval the case of Brooke v. Roan, 1 Call. 177, and stated:
7 In the case at bar the parties were competent to contract and they did contract to pay interest on the debt at the rate of eight per cent. from the date until paid. The rate was legal and authorized by the place of contract and is, therefore, obligatory here. The rendition of a judgment or decree is not a payment of the debt; nor is it such a merger of the original contract as will authorize the court to interfere with the obligation of such contract requiring the parties to pay interest thereon at the rate agreed upon by them. Shipman v. Baily, 20 W. Va. 140, 146-47 (1892).
8 The general rule of law in this, as in other jurisdictions, undoubtedly is, that where the demand of the plaintiff is liquidated, or if unliquidated, can be readily ascertained by computation, as in this case, interest thereon will be allowed, if the demand is for work done or materials furnished, from the time the material is furnished, or work completed, or from the time when by the terms of the contract payment should have been made. Bennett v. Federal Coal & Coke Co., 70 W. Va. 456, 459, 74 S.E. 418, 419 (1912).
This section further provides that parties to a loan of money or forbearance agreement may contract in writing for the payment of interest at a rate "not to exceed eight dollars upon one hundred dollars for a year and proportionately for a greater or lesser sum, or for a longer or shorter time, including points expressed as a percentage of the loan divided by the number of years of the loan contract."

It is to be noted that in the aforementioned section the legislature stated that "parties" may contract in writing for the payment of interest at the rate of eight per cent per annum. When the legislature adopted the use of the word "parties" rather than "party" did the legislature intend to state that the eight per cent annum rate may only be charged when both the lender and borrower sign a writing? Obviously the lender of money seldom signs anything when making a loan nor is the lender contracting to pay. It is difficult to believe that the legislature intended to require both the lender and borrower to be parties to and sign the writing in order for the lender to lawfully charge the borrower interest in excess of six per cent per annum, and the Supreme Court of Appeals is not likely to so construe the language used. It would have been clearer had the Legislature simply provided that one may in writing lawfully contract to pay interest not in excess of eight per cent per annum.

Many lending institutions follow the practice of deducting interest charges on a loan at the time of making the loan. This form of discounting is simply an alternate means of calculating and collecting interest in advance. In the majority of states such discounting of loans at the maximum lawful interest rate is held not to be usurious, even though the transaction, because interest is paid in advance of accrual, results mathematically in an interest charge in excess of the lawful rate and has generally become a recognized legal right. Some jurisdictions by statute forbid the taking of interest in advance. In *Evans v. National Bank,* the United States Supreme Court stated this to be the then rule in Georgia with respect to loans made by

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10 *Id.*
11 *Id.*
12 Goodrich v. Reynolds, 31 Ill. 490 (1863); Columbia Nat. Life Ins. Co. v. Withers, 121 N.J.L. 54, 1 A.2d 436 (1938). This construction was applied originally to the Statute of 12 Anne, Blackstone being of the view that interest may lawfully be received beforehand for forbearing. Vahlberg v. Keaton, 51 Ark. 534, 540, 11 S.W., 878, 879 (1889).
13 251 U.S. 108 (1919).
a state bank. Some states hold that the practice must be limited to commercial transactions. Generally, "[e]xpress authority given to banks and other corporations by statute to reserve interest in advance has been regarded as furnishing a strong implication that other persons were not entitled to take interest in this way."  

The portion of the West Virginia statute dealing with the contract rate of interest makes no mention of the practice of deducting interest in advance, although the 1969 addition authorized such practice at a rate not in excess of six per cent per annum on installment loans. However, another statutory provision states that: "Any banking institution authorized to do, and doing business in this State, may contract for and charge for a secured or unsecured loan, repayable in installments, not in excess of six per cent per annum upon the face amount of the instrument or instrument evidencing the obligation to repay the loan, for the entire period of the loan, and deduct such charge in advance. . . ."  

However, the West Virginia Legislature amended the laws relating to interest by a statute effective March 6, 1969, relating to interest charges on installment loans. This amendment authorized the lender and borrower to contract for the advance payment of interest on an obligation repayable in installments, or to add to the amount of the principal interest at a rate not to exceed six per cent per annum on the principal amount of the instrument. In view of the fact the draftsman used the phrase "principal amount of the instrument" instead of "principal amount of the loan" one may infer that unless the loan is evidenced by a writing one who lends money to be repaid in installments is not entitled to deduct interest in advance.

The Code further provides that nothing contained in the Code "shall be taken or construed as authorizing any charge or charges of any kind or character, including interest, on installment loans by the deduction thereof in advance or by adding the same to the principal amount of the loan which singularly or together shall exceed the six percent maximum provided for in this section." This appears to mean that any costs or expenses incurred in making

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14 See, e.g., Bank of Newport v. Cook, 60 Ark. 288, 30 S.W. 35 (1895).
15 55 AM. JUR. Usury § 41 n.9 (1946).
17 W. VA. CODE ch. 31A, art. 4, § 30, Senate Bill No. 176 (July 1, 1969).
18 W. VA. CODE ch. 47, art. 6, § 5a, Senate Bill No. 221 (March 6, 1969).
19 Id.
the loan, such as recording fees, investigation fees, credit reports cost and the like must be included in the six per cent figure.

Attention is directed to the fact that the Code now provides that a banking institution may charge and collect a reasonable amount to cover the expenses incurred in procuring reports and information respecting loans and the value of and title to property offered as security therefor, and a charge of three dollars may be made for any loan or forbearance of money or other things where the interest at the rate of six percent per annum would not amount to that sum and the same shall not be a usurious charge or rate of interest.20

One must wonder why a banking institution, which specializes in lending money may in any case charge three dollars for making a loan while a non-banking institution or private individual may in like instances only charge one dollar.21 No West Virginia case has been found in which the Supreme Court of Appeals has considered the validity of such practice. When considering the various provisions of the West Virginia Code it appears that a private lender or state chartered banking institution making single payment loans may not lawfully deduct interest in advance if the amount deducted increases the true interest charge so as to exceed six per cent per annum interest upon an oral obligation or eight per cent per annum upon written obligations.

Where a borrower signed an installment note for money loaned by a banking institution and the interest is deducted by the bank at the time the loan is made and the borrower prepays the obligation "the bank shall make a refund or rebate of such charge in an amount computed on the aggregate installments not due, at the original contract rate of charge. . . ."22 Attention is directed to the fact that this statute places a duty only on a banking institution to adjust interest charges in the event of prepayment of interest on prepayment of the total obligation. Note that this applies only to state chartered banks.23 The Code imposes a duty upon any lender to make an adjustment of interest charges in the event interest was deducted in advance on an installment loan and the balance due was paid in advance of due date.24 The statute provides that "if the entire unpaid

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20 W. VA. CODE ch. 31A, art. 4, § 30, Senate Bill No. 176 (July 1, 1969).
22 W. VA. CODE ch. 31A, art. 4, § 30, Senate Bill No. 176 (July 1, 1969).
23 Id.
24 W. VA. CODE ch. 47, art. 6, § 5a, Senate Bill No. 221 (March 6, 1969).
balance outstanding on the loan is paid on any installment date, prior to maturity, the lender shall make a refund or rebate of such charge in an amount computed on the aggregate installments not due, at the original contract rate of charge. . . ." 25 While the language used in the statutes is not clear, it does not appear that the Code confers on the borrower the right to prepay the obligation and thus have the interest adjusted on the installment obligation unless the right to prepay the obligation had been reserved or granted.

In West Virginia, an installment note may contain an acceleration clause without impairing the negotiable character of the instrument. 26 The rights of a borrower to an adjustment of interest in the event the due date of the obligation is accelerated in the event the interest has been paid in advance is not covered by statute. It is not at all uncommon for an installment note to provide that in the event of default in the payment of any installment the entire obligation will be due and owing either automatically or at the option of the holder of the obligation. For example, suppose Mr. X borrowed $1,000.00 from F Bank. F Bank, at the time of making the loan, deducted $60.00 interest from the $1,000.00 borrowed thus paying over to Mr. X the amount of $940.00. Mr. X agreed to pay the F Bank $1,000.00 in twelve equal monthly installments of $83.34. The note evidencing the indebtedness contained a provision authorizing the bank or holder of the note to accelerate the due date of all unpaid installments in the event the borrower defaults in the payment of any installment. Assume the borrower failed to pay the first installment when due and the holder of the note immediately sued the maker of the note for $1,000.00. Is the plaintiff entitled to recover interest for the full period of the loan in the event he accelerates the due date of payment because of the borrower's default in the payment of an installment? Does the borrower, whose default served as the basis for the acceleration of the due date, forfeit any right to an adjustment of interest paid by having defaulted in the payment of one installment? There appears to be no West Virginia law on this point. It is a fair interpretation of the statute to say that a bank which made an installment loan on which interest was deducted in advance is only under a duty to adjust interest charges when the obligor makes payment "on any installment date, prior to maturity" 27

25 Id.
26 W. Va. CODE ch. 31A, art. 4, § 30, Senate Bill No. 176 (July 1, 1969).
27 Id.
and is under no duty to adjust interest charged when the due date has been accelerated because any payment made after the due date has been accelerated is not made prior to maturity. It is possible that the court may say that the lender is not entitled to retain interest deducted at the time the loan was made for the full maturity period in the event the due date is accelerated, for had the interest not have been deducted in advance, the lender would only have been entitled to interest at the agreed rate from the date of the loan until the borrower actually paid his obligation. That is, if the lender is unwilling to wait until the ultimate maturity date specified in the instrument evidencing the obligation, he forfeits any claim to interest for the period between the ultimate specified due date and the due date resulting from the acceleration. The Legislature should clarify this matter by legislation.

The language used with respect to adjustment of interest when the obligation is paid in advance of the due date simply provides “the bank shall make a refund or rebate...” This apparently presupposes that the lending bank always retains the instrument evidencing the debt. To whom does the borrower look for an adjustment of interest paid in advance on an installment note delivered to a bank when the bank has passed it to a third party? Perhaps the Legislature intended the rebate to be made by lending bank even though it no longer owns the note. Otherwise, the value of an installment note payable to a banking institution on which the interest had been deducted in advance and which contains a prepayment privilege would be so uncertain as to adversely affect its marketability.

Perhaps the most radical change in the 1968 revision of the West Virginia usury law relates to the severity of the penalty which now attaches to a usurious transaction. The only penalty attaching to a usurious contract prior to the 1968 revision was the loss of the usurious portion of the interest.

By the 1968 revision of the law dealing with the penalty for usurious contracts, the lender of money who contracts to charge interest

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28 Id.
29 W. VA. CODE ch. 47, art. 6, §§ 5-6 (Michie Add. Supp. 1968).
30 W. VA. CODE ch. 47, art. 6, § 6 (Michie 1966) provided:
All contracts and assurances made directly or indirectly for the loan or forbearance of money or other thing at a greater rate of interest than six per cent, except where such greater rate is specially allowed by law, shall be void as to any excess of interest agreed to be paid above that rate, and no further except where otherwise specifically provided by law.
in excess of the lawful rate may not collect any interest, but is limited in his recovery to the principal sum remaining unpaid.\textsuperscript{31} The statute further provides an additional deterrent in giving the borrower or debtor the right to recover from the original lender or creditor or other holder not in due course an amount equal to four times all interest agreed to be paid and, in any event a minimum of one hundred dollars. Again it should be noted this provision cannot be applied to usurious loans made by a national bank.

Assuming, without argument, that the severity of the penal provisions with respect to a lender who charges more than the lawful rate of interest is justified, the soundness of the penal provision with respect to one who purchases the claim and who is not a holder in due course is not at all clear.

Under the statute the borrower is not limited to a remedy against the lender to whom he agreed to pay the usurious interest. The borrower may proceed against the original lender, creditor or other holder who fails to qualify as a holder in due course to recover from such person four times all interest which he had agreed to pay and in any event a minimum of one hundred dollars. Under the language used in the act any purchaser of a nonnegotiable claim which is tainted with usury, even though he is an innocent purchaser and is unaware of the usury, is made liable to the borrower for the penal sum. This necessarily follows for such party is a creditor and cannot be a holder in due course since one can only occupy such status if he holds a negotiable instrument. The purchaser of a nonnegotiable instrument cannot be a holder in due course.

If we assume that the instrument evidencing the debt is negotiable, one may still purchase the instrument in good faith and fail to qualify as a holder in due course, and be liable for the penalty which attaches to a usurious transaction. The purchaser may be totally innocent of any knowledge of the usury, as where the usurious interest was deducted in advance and such fact did not appear on the instrument, or where no mention of interest is made but is added to the face amount of the instrument. If one purchases a negotiable instrument after maturity or takes the instrument without proper indorsements, he may not qualify as a holder in due course. The statute leaves unanswered the question of whether one who traces his

\textsuperscript{31} W. VA. CODE ch. 47, art. 6, § 6 (Michie Add. Supp. 1968).
title through a holder in due course, is liable for the penal provisions in the event the transaction is usurious.

Perhaps an example showing the severity of the penalty is in order. One borrows $10,000.00 at nine per cent per annum to be repaid in equal monthly installments over a twenty-year period. The interest is to be paid monthly on the unpaid balance. At nine per cent per annum the borrower would have agreed to pay interest totalling $11,592.80 over the twenty-year period. As soon as the contract is entered into the borrower is given a cause of action against the lender for four times the amount of interest which he had agreed to pay, or $46,371.20. In such a case, the borrower may pay off the loan and have a profit of $36,371.20 from the usurious transaction.

In *Reger v. O'Neal* the West Virginia Supreme Court of Appeals, in quoting from *Norvell v. Hedrick,* said with respect to a usurious transaction: "It is well settled that as long as the debt is unpaid the debtor can, if he see proper, have it applied as payment on the debt." In view of the language used in the 1968 act, a borrower who has agreed to pay interest at an usurious rate may in every case have the lender’s claim reduced by the amount to which he is entitled under the penal provisions of the act.

It may be interesting to speculate how the West Virginia Supreme Court of Appeals would apply the 1968 statute to a factual situation as is found in *Janes v. Felton.* In the *Janes* case the plaintiff as a condition to making a loan at the maximum lawful rate of interest exacted from the defendant a promise to pay two judgments owed by a third party to the plaintiff. The West Virginia Supreme Court of Appeals stated, "It is well settled law that a contract is usurious when any premium, profit, bonus, or charge, exacted or required by the lender in excess of the money actually loaned which, in addition to the interest stipulated, renders the return to the lender greater than the lawful rate of interest." Under the 1968 provision it would seem that the borrower, under the facts of the *Janes* case, would be entitled to recover four times the amount of the interest which was agreed to be paid plus four times the amount of the

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32 33 W. Va. 159, 10 S.E. 375 (1889).
33 21 W. Va. 523 (1883).
34 33 W. Va. 159, 165, 10 S.E. 375, 377 (1889).
36 Id. at 415, 129 S.E. at 484.
judgments which the borrower agreed to pay as a consideration for the loan.

With respect to a note given in renewal of a usurious transaction the renewal note is tainted with the usury of the prior note. As the West Virginia Supreme Court of Appeals said in Miller v. Banking and Trust Co.:37 "A renewal of an usurious contract between the same parties partakes of the infirmity of the original agreement. The original taint attaches to all consecutive obligations or securities growing out of the original vicious transaction. . . ."

On more than one occasion the West Virginia Supreme Court of Appeals has stated that it is settled law in West Virginia that the taint of usury will follow notes into the hands of purchasers for value without actual notice of the usury. As the 1968 statute states, "All contracts and assurances made directly or indirectly for the loan or forbearance of money or other thing at a greater interest than is permitted by law shall be void as to all interest provided for in any such contract or assurance. . . ."39 and the borrower is permitted to plead usury as a defense even against a holder in due course. In Astrip v. Peters40 the West Virginia Supreme Court of Appeals said, "Under statutes expressly declaring usurious contracts void, the defense of usury may be set up against a bona fide holder of apparently valid negotiable paper. . . . The denial of recovery does not go to the whole instrument unless the statute so provides, but goes to the amount declared by law to be forfeited."41 The Uniform Commercial Code does not, by implication or otherwise, repeal, limit or qualify in any degree or in any particular the statue relating to usury. However, if the purchaser of a negotiable instrument tainted with usury qualifies as a holder in due course of the instrument he will not be liable for the penalty provided by the statute but will simply be denied the right to recover any interest.

The West Virginia court has stated that the usury statute is based on public policy and stands over and above any agreement between the parties.42 If a contract is usurious in the first instance it cannot be validated either by ratification or estoppel. The West Virginia

37 63 W. Va. 107, 59 S.E. 977 (1907).
38 Id. at 116, 59 S.E. at 980.
40 114 W. Va. 819, 174 S.E. 524 (1934).
41 Id. at 821, 174 S.E. at 525.
Supreme Court of Appeals in *Hall v. Mortgage Security Corporation of America* clearly expressed the public policy of this state with respect to the application of the provisions of a usury statute when it said: "Because the usury statute is based upon public policy, necessarily it is arbitrary and should not be set aside haphazardly or because of sympathy."

The West Virginia statute also makes allowance for a bona fide mistake which results in making the obligation usurious. It provides that "[e]very usurious contract and assurance shall be presumed to have been wilfully made by the lender or creditor, but a bona fide error, innocently made, which causes such contract or assurance to be usurious shall not constitute a violation of this section if the lender or creditor shall rectify the error within fifteen days after receiving notice thereof."

The burden of proof of usury is on the party who alleges it. It has been stated that usury must be proven beyond any ground for fair questioning.

The 1968 interest statute retains the provision from the prior act that permits one entitled to interest to any loan or forbearance of money to charge one dollar for such loan or forbearance without being guilty of usury even though this amount exceeds the otherwise permissive charge for the loan or forbearance.

By the express provisions of the West Virginia statute, banking institutions are expressly authorized to make charges for making a loan to cover the expenses incurred in procuring reports and information respecting loans and the value of and title to property offered as security therefor in addition to the maximum lawful interest charges.

In *Liskey v. Snyder*, by the way of dicta the Supreme Court of Appeals of West Virginia recognized that a private lender may "upon strict and full proof, such as to preclude the existence of any shift or device to evade the statute against usury, . . . be allowed any just and reasonable expenses incurred by [him] in making [his] loan, and not already paid by the defendant." The court appears to

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43 *Id.*
44 *Id.* at 149, 192 S.E. at 150.
47 56 W. Va. 610, 49 S.E. 515 (1904).
48 *Id.* at 641, 49 S.E. at 528.
be saying that a lender may lawfully charge the borrower the cost of making the loan in addition to the maximum lawful interest rate.

While the authorized maximum interest rate set forth in West Virginia is applicable to laws made by national banks doing business in this state, the penal provisions for usury are not applicable to usurious loans made by a national bank doing business in this state. The penal provisions applicable to usurious loans made by a national bank are controlled by federal law.

The West Virginia usury statute is silent as to any statute of limitations on the borrower's cause of action for the penal sum provided for in the act. Should the period of the statute of limitations begin to run from the date of making the agreement or should it begin to run from the date of the last payment? This issue should be clearly resolved by legislation. The federal act does provide a statute of limitations with respect to claims against a national bank. The state statute should do no less.

In order to assure equality of opportunity between state chartered banks and national banks with respect to charges which a national bank may make for loaning money Congress enacted the following provision:

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal Reserve District where the bank is located, whichever may be the greater, and no more, except where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter.

This section permits national banks to take, receive reserve and charge on any loan or discount the rate of interest allowed by the laws of the state in which it is located subject to the provision re-

51 W. VA. CODE ch. 47, art. 6, § 6 (Michie Add. Supp. 1968).
53 Id.
specting the Federal Reserve discount rate in the event it should be higher than the maximum interest rate permitted by state law.\textsuperscript{55}

State laws relating to interest charges, only in so far as they establish the maximum rate of interest which may be lawfully charged, are applicable to loans or discounts made by a national bank.\textsuperscript{56} The rate of interest which a national bank may lawfully charge is established by federal law, although it is for the most part measured in each instance by the laws of the state in which it is engaged in business.\textsuperscript{57}

Attention is again called to the fact that the applicable statutory provision sets forth the maximum interest in advance.\textsuperscript{58} As previously stated, there is an applicable provision for interest deduction in advance by a banking institution on an installment loan.\textsuperscript{59} The above provision is only applicable to state chartered banking institutions. Congress has enacted legislation which controls loans made by a national bank, and provides the bank may "take, receive, reserve, and charge on any loan or discount made" interest at the rate allowed by the laws of the state.\textsuperscript{60} In reading the federal and state provisions together the court of this state may say that a limitation appearing in the state statute with respect to deducting interest in advance applies only to installment loans made by a banking institution chartered under the laws of this state, while a national bank, may deduct interest in advance upon any loan by such bank at the maximum rate permitted by the laws of the state in which it operates.\textsuperscript{61} If this be true then it follows that a national bank is in a preferred position with respect to this matter.

The legislative history of the National Bank Act clearly shows that the national policy as established by Congress is to keep the matter of penalties to be assessed against a national bank for contracting for or receiving usurious interest in the exclusive control of Congress.\textsuperscript{62} The Alabama court in \textit{Slaughter v. First Nat. Bank}\textsuperscript{63} considered

\textsuperscript{57} Union Nat'l Bank v. Louisville, New Albany & Chicago Ry., 163 U.S. 325, 331 (1896).
\textsuperscript{58} W. VA. CODE ch. 47, art. 6, § 5 (Michie Add. Supp. 1968).
\textsuperscript{59} W. VA. CODE ch. 31A, art. 4, § 30, Senate Bill No. 176 (July 1, 1969).
\textsuperscript{61} Id.
\textsuperscript{63} 109 Ala. 157, 19 So. 430 (1896).
an Alabama statute which made it a misdemeanor for any banker to discount commercial paper at a higher rate than eight per annum and held that it did not apply to national banks.

Section 86 of Title 12 of the United States Code provides specific penalties which may be assessed against a national bank which has contracted for or has collected interest on loans or discounts in excess of the rate permitted by Section 85 of Title 12. The text of Section 86 is as follows:

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of interest thus paid from the association taking or receiving the same: Provided, That such action is commenced within two years from the time the usurious transaction occurred.

Section 86 takes into account two factual situations: first, where the usurious interest has not actually been paid by the borrower, but has been contracted for; and secondly, where the usurious interest has in fact been paid by the borrower.

The New York court in Schlesinger v. Gilhooly recognized the supremacy of the federal act with respect to national banks which had engaged in usurious practices by saying:

[T]he principle that national banks are not subject to state legislation without the permission of Congress, and that the national banking act covers the entire subject of usury and forfeitures therefor, so far as such banks are concerned, when considered in connection with the parity clause of our state's banking act, necessarily controls the decision in this case. . . .

In Evans v. National Bank of Savannah the United States Supreme Court decided that when the rate of interest prescribed by

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64 189 N.Y. 1, 81 N.E. 619 (1907).
65 Id. at 11, 81 N.E. at 622.
66 251 U.S. 108 (1919).
state law is not exceeded, the provisions of the National Banking Act are satisfied, although there is an advance charge of interest, and the transaction is not tainted with usury merely because such advance interest deduction would have been usurious under state statute. The United States Supreme Court quoted with approval the following statement found in Flickner v. Bank:\(^{67}\)

> It has always been supposed, that an authority to discount, or make discounts, did, from the very force of the terms, necessarily include an authority to take the interest in advance. And this is not only the settled opinion among professional and commercial men, but stands approved by the soundest principles of legal construction. . . .

Associations organized under the National Bank Act are plainly empowered to discount promissory notes in the ordinary course of business. To discount, *ex vi termini*, implies reservation of interest in advance; and, under the ancient and commonly accepted doctrine, when dealing with short-time paper such a reservation at the highest interest rate allowed by law is not usurious. Recognizing prevailing practice in business and the above state doctrine concerning usury, we think Congress intended to endow national banks with the power, which banks generally exercise, of discounting notes reserving charges at the highest rate permitted for interest.\(^{68}\)

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\(^{67}\) 21 U.S. (8 Wheat.) 338, 354 (1823).