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Negotiable Instruments--Usury--Latches

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linquished.[13] However, the proposition that there may be a shifting of liability with the relinquishment of the right of exclusive control does not alter the remaining fact that there may be two or more masters of the same servant at the same time for the same act.[14] Where such is the case the weight of authority seems to point that there may be joint and several liability upon such joint masters for the negligent injuries to strangers caused by that servant.[15]

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NEGOTIABLE INSTRUMENTS — USURY — LACHES. — In 1925 *P*, for a loan of $10,000 from the Mortgage Security Corporation of America, gave sixteen six per cent notes and seven subordinate non-interest bearing notes covering certain fees for guaranteeing the notes, obtaining the guarantee of another surety company, and for servicing. Both series of notes were secured by a deed of trust on the property which was improved by the money borrowed. *P* made payments for almost eight years which paid the semi-annual interest to all note holders and retired all the notes but six which were of the principal series. These six notes were then in the hands of defendants, holders in due course. Both guarantors of the notes had become insolvent. *P*, having defaulted, brought this suit to enjoin the apprehended sale of the property under the deed of trust and to purge the loan of usury. The lower court found that the sum evidenced by the subordinate notes with the exception of a few small items was in fact usurious interest charged and gave a decree against the mortgage company (insolvent) for the amount of the usury and interest, dismissing the suit as to the other defendants. On appeal, affirmed. *Held*, one justice dissenting, that the principal and subordinate notes all having been given for one consideration are all tainted with usury; that although the defense of usury is applicable against a holder in due course, *P* is

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[13] Central R. of N. J. v. DeBusley, 261 Fed. 561 (C. C. A. 3d, 1919); Bartolomeo v. Bennett Co., 245 N. Y. 66, 156 N. E. 98 (1927); Charles v. Barret, 233 N. Y. 127, 135 N. E. 199 (1922).

[14] Moore v. Southern Ry. Co., 165 N. C. 439, 81 S. E. 603 (1914); Brow v. Boston & A. R. Co., 157 Mass. 399, 32 N. E. 362 (1892).

[15] Brow v. Boston & A. R. Co., 157 Mass. 399, 32 N. E. 362 (1892); White v. Fitchburg R. Co., 136 Mass. 321 (1884); Williams v. Southern R. Co., 102 Miss. 617, 59 So. 850 (1912); Molling v. Barnard, 65 Mo. App. 601 (1896); Moore v. Southern R. Co., 165 N. C. 439, 81 S. E. 603 (1914); American Cotton Co. v. Simmons, 39 Tex. Civ. App. 189, 87 S. W. 842 (1905).

precluded by his laches from asserting the defense. *Hall v. Mortgage Security Corporation of America.*[1]

The equities of a holder in due course seem greatly to outweigh the equities of the borrower who is at most the innocent party who made possible the suffering. However, there is to be balanced with this, the state's policy against usury evidenced by statutes that declare the usurious interest absolutely void,[2] allow purging of the usury before its payment,[3] and even recovery of it *after* payment[4] with no special statute of limitations imposed.[5] To preserve the concept that the usurious interest is absolutely void, our court, in *Eskridge v. Thomas*,[6] has held that even as against an innocent purchaser for value, the defense lies notwithstanding the Negotiable Instruments Law.[7]

The court in the principal case holds that the defense of usury is good as against innocent holders but takes all force from the argument by holding in effect that *because* the rights of innocent parties have intervened the defense cannot be used. If this be followed, the defense may never be used in cases of this nature against a holder in due course because the borrower by not suing to purge before that person bought his note is barred by his laches, the rights of a third party have intervened.

The reasoning on which the courts hold the Negotiable Instruments Law inapplicable to the defense of usury is that a usurious note being void in whole or in part is to that extent a mere nullity in whosesoever hands it is; that to hold otherwise would make the statute which presumes to make it void itself a nullity.[8] The court

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[1] 192 S. E. 145, dissent, p. 393 (W. Va. 1937).
[2] W. VA. REV. CODE (1931) c. 47, art. 6, § 6.
[3] As defense, *id.* at § 7; basis for action, *id.* at § 8.
[4] *Id.* at § 9.
[5] Mr. J. Kenna's dissent, 192 S. E. 393 (W. Va. 1937).
[6] 79 W. Va. 322, 91 S. E. 7 (1916), cited with approval in Artrip v. Peters, 114 W. Va. 819, 174 S. E. 524 (1934).
[7] NEGOTIABLE INSTRUMENTS LAW § 57; W. VA. REV. CODE (1931) c. 47, art. 4, § 7.
[8] Eskridge v. Thomas, 79 W. Va. 322, 91 S. E. 7 (1916); Notes (1920) 5 A. L. R. 1447; (1935) 95 A. L. R. 735. Is not the statute though enforced a nullity? Since the lender can in any case get back his original investment plus legal interest, he is almost encouraged to take his chances at collecting the usurious interest too. See Sabine v. Paine, 223 N. Y. 401, 119 N. E. 849 (1918). In New York the whole note is forfeited for usury. Therefore the argument carries more weight. See Baker v. Butcher, 106 Cal. App. 358, 289 Pac. 236 (1930) pointing out this distinction. See also Davenport v. Kendrick, 148 Va. 479, 139 S. E. 295 (1927) in which the defense was not allowed against a holder in due course because the statute did not make the excess void but illegal consideration.

in the principal case by holding that the notes in the hands of the defendants were tainted with usury recognized that part of the obligations they held were void. By analogy to the reasoning above mentioned, laches cannot make enforceable what is from the beginning by statute unenforceable.

It is admitted in the case that had defendants sued on the notes, the plaintiff would have had his defense. The holders' means of enforcing their claim, *i. e.*, by sale under the deed of trust, therefore determines the amount of protection the borrower receives. It is submitted that sections seven and eight, article six, chapter forty-seven of the Code were meant to give equal protection in the alternative.

Should the policy against usury be stronger than the policy in favor of the innocent purchaser of negotiable paper? This case may be the proper compromise — allow recovery of the usury from the actual wrongdoer thereby (theoretically) protecting the borrower, but protect the innocent purchaser of the notes. There were at least two logical means open to the court to reach this result. First, it might have expressly repudiated the doctrine of *Eskridge v. Thomas.*[9] Secondly, it might have on the authority of *Davisson v. Smith*[10] treated the sets of notes as divisible, the principal series valid and the subordinate void. The usury already having been paid there was open to the plaintiff only an action to recover it.

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[9] 79 W. Va. 322, 91 S. E. 7 (1916). The legislature's action in passing c. 55, art. 9, § 6 in 1931 overruling Twentieth Street Bank v. Jacobs, 74 W. Va. 525, 82 S. E. 320 (1914) in which a defense of illegal consideration was allowed against an innocent holder lends moral support to such action.

[10] 60 W. Va. 413, 418, 55 S. E. 466 (1906), "Though the taking of a separate obligation for the excess of interest above the legal rate, does not free the entire transaction from the taint of usury, (29 Am. & Eng. Ency. Law 484) still no reason for holding that the parties cannot determine, or have not determined, what particular payment or obligation shall represent, or be regarded as made on account of, the usurious interest, is perceived, and, moreover, there are well considered decisions which assert, not only that it can be and is done, but also that the courts will recognize the binding force of such stipulations, and treat the particular payment as one of usurious interest *eo nomine.*" Bowers v. Douglass, 39 Tenn. 376 (1859) for clear exposition of the doctrine applied to a law like the West Virginia law and facts similar to those in the principal case. See also 1 JOYCE, DEFENSES TO COMMERCIAL PAPER (2d ed. 1924) § 467. *Contra*: *id.* at 638.