

THE CHANCELLOR:

The question, and the only question in this case, relates to the validity of the act of 1845, as a constitutional exercise of legislative power, so far as concerns pre-existing contracts and engagements tainted with usury.

The defendant insists, that inasmuch as the act of 1704 declares that all bonds, contracts and assurances whatsoever, made after the time therein limited, whereupon, or whereby, more than the rate of interest fixed by that act is reserved, shall be utterly void, it follows that the legislative authority is insufficient to give such contracts validity to any extent whatever.

The argument is, that the present mortgage is an absolute nullity, and any attempt on the part of the legislature to give it efficacy to any extent, or to abridge the right of the defendant to defend himself against it, is equivalent to the legislative creation of a contract, out of elements having no legal existence.

But, notwithstanding the language of the act of 1704 is so strong, it is very certain, that contracts within its provisions are not, under all circumstances, treated as merely void—for it is settled, that if a party goes into a court of equity, asking relief against an usurious mortgage or contract, he must do equity by paying, or offering to pay, the principal sum and legal interest. *Trumbo vs. Blizzard*, 5 *Gill & Johnson*, 18. Nay, he is not even entitled to a discovery as to the usury, unless he offers to pay the principal debt, and legal interest. *Jordan vs. Trumbo*, 6 *G. & J.*, 103. Courts of equity, therefore, have undertaken, upon a principle which seems to have met the approbation of the community, for it is one long since established, to give a reasonable sanction to contracts affected by usury, by refusing to relieve a party against them, unless he would himself do that, which the moral obligation arising from the receipt and appropriation to his own use of the money of another required him to do.

There can be no doubt, that if the legislative department of the government transcends its authority, the courts of justice are bound, in discharge of the functions properly appertaining to them, to pronounce its acts void. *Crane vs. Meginnis*, 1 *Gill & Johns.*, 463.