

for even in the courts of law, it has been decided that an action of trover cannot be maintained for goods mortgaged to secure an usurious debt, unless the plaintiff has tendered the amount actually loaned. *Lucas vs. Latour*, 6 *Har. & Johns.*, 100.

There can be no doubt, then, that if the present defendant was seeking, either in a court of law or equity for relief against this mortgage, he could only succeed by paying or offering to pay the amount he actually received from his creditor, together with the legal interest thereon, and consequently the whole effect of the act of assembly is to apply the same equitable principle to the relation which the parties bear to each other in this case. If the mortgagor was the plaintiff, and the mortgagee defendant, either at law or in equity, relief would only be granted upon the equitable principle, of paying the sum borrowed with legal interest. Now, has not the legislature the constitutional power to say that the same rule of honesty shall be observed, when the position of the parties is reversed, for to that extent, and no further does the act go. In this view of the case, it would seem to be no more than the mere exercise of the law making power, over the subject of remedies, their right to regulate, which cannot be disputed.

Upon the whole, my opinion is, that the act is not unconstitutional, and, therefore, I shall pass a decree for the payment of the sum admitted to be actually and fairly due; or for a sale of the mortgaged property, in case such payment is not made in a reasonable time.

---

[No appeal was taken from this decree, but in a subsequent case, the Court of Appeals affirmed the constitutionality of the act of 1845, ch. 352, with reference to pre-existing usurious contracts.]