

ANDERSON *v.* SHOUP.

Opinion delivered January 27, 1930.

1. USURY—RECOVERY OF VOLUNTARY PAYMENTS.—In the absence of a statute making provision for recovery of money paid on usurious accounts or contracts, plaintiff, making payments on account without protest until final payment and settlement, when he paid the amount demanded at which time he objected to the exaction of usury, cannot recover from the creditor's executor anything more than the usurious interest exacted, since his payments must be considered as voluntary.
2. USURY—VOLUNTARY PAYMENTS—SUFFICIENCY OF COMPLAINT.—Where a complaint seeking to recover the amount paid on an usurious account showed that the payments were voluntary, and alleged that the defendant had tendered to plaintiff the usurious

interest exacted, a demurrer to the complaint was properly sustained.

Appeal from Woodruff Circuit Court, Northern District; *W. D. Davenport*, Judge; affirmed.

STATEMENT OF FACTS.

Appellant brought suit against the executor of the estate of D. P. Shoup, deceased, to recover \$635.19, the amount of an account alleged to have been paid the deceased, with usurious interest, on the 2d or 3d of November, 1928, claiming the usurious interest paid rendered the account void, and entitled him to the recovery of the whole amount thereof.

Appellant, employed by the decedent, was also a sharecropper upon the farm of the deceased Shoup, and was furnished supplies by him from his store, and small amounts of money along during the crop year in a running charge account, crediting the monthly salary paid to appellant by deceased on the account as it was earned, and charging on the whole account \$44.13 as interest for advances made. Credits had been allowed on various dates in sufficient amounts on the general account to show a balance of \$31.04 due on October 25, 1928. No agreement to pay more than 6 per cent. interest had been made, and more than \$32 had been wrongfully charged in excess of lawful interest, which rendered the bill or account void as to principal and interest, and entitled appellant to a recovery of the whole amount thereof.

It was admitted that the amounts appearing as credits on the account as "by cash" were correct amounts, but they had not been paid by actual delivery of the cash to the defendant or the executor of the deceased; that, on the second or third of November, appellant delivered to the mercantile company in Augusta a bale of cotton and seed, for which the company paid by drawing a check in favor of the creditor, payable to him, which plaintiff took to the creditor, who thereupon handed appellant the account showing the balance due of \$31.04, and deducted this amount from the proceeds of the amount of the check for

said bale of cotton and seed, and "in this manner compelled plaintiff to pay said account." It was alleged appellant complained of the excessive interest charged, and, after some argument, the creditor returned to him \$3 charged for a specified loan for a certain amount on money advanced for picking cotton, and refused to pay any further part of the amount alleged to be overcharged as usurious until after appellant filed his duly verified demand and exhibited it to the executor, demanding the full amount of principal and interest paid on said account, whereupon "the defendant tendered to the plaintiff \$30, which it was agreed is the correct amount of the difference between 6 per cent. interest and the interest retained by defendant on the advances in the bill or account." A copy of the account, showing the different amounts of money paid out and the interest calculated thereon was exhibited with the complaint, as was also a copy of the claim as filed with the executor. A demurrer was filed to the jurisdiction of the court, and a general demurrer to the complaint and amended complaint. The demurrer was sustained, and, appellant refusing to plead further, the complaint was dismissed, and the appeal is prosecuted from that judgment.

Elmo Carl Lee, for appellant.

W. J. Dungan, for appellee.

KIRBY, J., (after stating the facts). The allegations of the complaint show the items of the account charged against appellant and the amount of interest also, and that the interest charged exceeds the amount allowed by law, and was usurious in the sum of \$30, the correct amount alleged to be agreed upon. It was shown, however, that the whole amount of the account had been voluntarily paid by appellant without objection to the payment of the alleged usurious interest, until the final settlement was made, and, although the complaint alleges that the different payments were made under protest, and were not voluntary, the allegations showing the method of payment do not show such payments to have

been otherwise than voluntarily made. According to the allegations, when the last bale of cotton and seed had been sold, the appellant had the check made payable to the landlord, and his account was given to him, and the balance of the amount of the check over the amount shown to be due him by the account was returned to appellant. He objected at this time to the settlement, claiming usury had been charged and exacted to him, and later presented his account to the executor of the estate of the deceased landlord, claiming to be entitled to an allowance for the whole amount of the account he had paid to the landlord, including the interest thereon.

The statute makes no express provision for the recovery of the money paid on usurious accounts or contracts, although it prohibits the taking of excessive or usurious interest, and declares void all notes and obligations providing therefor. The payments made on the account under the allegations of the complaint should, we think, be treated as having been voluntarily made, the amount of the account and lawful interest, and held not recoverable, under the doctrine of our cases. *Kendall v. Davis*, 55 Ark. 318, 18 Ark. 185; *Murphy v. Citizens' Bank*, 82 Ark. 131, 100 S. W. 891, 11 L. R. A. N. S. 616, 12 Ann. Cas. 535. See also 39 Cyc. 1030, paragraph H.

The complaint alleged that the tender of the amount agreed to be the amount of excessive or usurious interest exacted had been duly made, and the court correctly sustained the demurrer; and the judgment of the court sustaining the demurrer and dismissing the complaint is correct and must be affirmed. It is so ordered.