

STRACHAN  
v.  
GRAHAM.

Copies of the plans were put into the hands of the Jury, his Lordship telling them, that they were not to consider the plans as evidence.

The case proceeded, and the Jury returned a verdict, finding that the pursuer did not get the whole land, and assessing the damages at L. 435.

*Mathison and Robertson, for the Pursuer.*

*Jeffrey and Marshall, for the Defender.*

PRESENT,

THE LORD CHIEF COMMISSIONER.

STRACHAN v. GRAHAM.

1824.  
July 12.

Finding for the  
defender in a re-  
duction on the  
ground of usury.

AN action of reduction of a bond on the ground of usury.

ISSUE.

“ It being admitted, that, on the 29th day  
“ of November 1810, the pursuer, along with  
“ Charles Gray, Esquire of Carse, granted to  
“ the defender the bond in process, for the  
“ sum of L. 2000 Sterling, lent by the de-  
“ fender to the said Charles Gray, under con-

“ dition to pay legal interest from the date of  
 “ the said bond,—

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“ Whether, before granting the said bond,  
 “ it was usuriously stipulated and agreed, be-  
 “ tween the defender and the said Charles  
 “ Gray, that the said Charles Gray should pay,  
 “ and the said defender should receive, more  
 “ than at the rate of the sum of L. 5 by the  
 “ year, for the forbearance of the payment of  
 “ every L. 100 of the said sum of L. 2000,  
 “ lent by the said defender to the said Charles  
 “ Gray on the said bond? and, whether the  
 “ said bond was executed in pursuance of the  
 “ foresaid agreement?”

When the first witness was called,

*Jeffrey*, for the defender, objected.—He is nephew to the pursuer, and is participant in the wrong.

A nephew reject-  
 ed as a witness,  
 there not being  
 necessarily a *pe-  
 nuria testium*.

*Cockburn*, for the pursuer.—There is here a *penuria testium*, and usury is an occult transaction.

LORD CHIEF COMMISSIONER.—The objection here is that of relationship, but it is said the objection ought to be waived, on account of the occult nature of the transaction; but a

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loan of money is a public act. Another objection might be started, whether a person situate, as this witness is said to be, may not be interested.

It might have been more satisfactory to the Court and the parties, if the whole case had been proved before a decision was called for on this point; but I think there is enough proved to warrant it being now decided. I am then of opinion, that this is not one of the cases of *penu-ria testium*, where the occult nature of the transaction is such as to lead the Court to waive the general rule. This is different from a domestic case; where the transaction is a family transaction, and necessarily confined to the family, in which case the exception has been admitted. But the present is not a case in which the Court should allow the rule to be violated.

His Lordship was requested to take a note of the decision, and that the objection was taken purely on the ground of relationship.

LORD CHIEF COMMISSIONER.—The objection certainly is taken purely on the ground of relationship, but it is impossible for the Court to decide on that, independent of the circumstances of the case.

*Shaw* opened the case for the pursuer, and stated, That he would prove an agreement to pay  $7\frac{1}{2}$  per cent., which vitiated the bond, and subjected the party to penalties.

*Jeffrey*.—The pursuer has failed to prove his case. The letters produced refer to a sum of L. 3000, which it was intended to lend on annuity, but that intention was altered, and L. 2000 was lent on bond. There is no evidence to take off the presumption of innocence.

LORD CHIEF COMMISSIONER.—When a party brings his case into a court of justice, however constituted, the facts must be distinctly alleged, and distinctly proved.

This case is founded on a statute which applies to a loan of money, but if the money is exposed to hazard, the statute does not apply. This is a penal statute, and one part of it voids the bond,—another renders the party liable in penalties; but, before the statute can apply, the facts must be distinctly proved, and must not rest on conjecture.

The question in the issue is, whether? &c. The allegation was, that there was an usurious agreement, and that the bond was granted in pursuance of that agreement. In proof of this, the pursuer rests on the admission in the issue;

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1 Hume 492.  
Plowden, p. 152.

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his next step is to prove, that, though the bond was for 5 per cent., the agreement was for  $7\frac{1}{2}$ . We are not to conjecture what the witness would have proved, had he been admitted; we are only to look to what is proved. One of the letters states a wish to get as high interest as possible, but, in a penal action, is it not reasonable to hold that expression applicable to an annuity where higher interest is lawful on account of the risk?

His Lordship then commented on the terms of the letters, and an article in the answers to the condescendence which had been put in evidence, and stated that the positive evidence had failed, and that the shortest return was a finding for the defender; but that, if, on perusal of the papers, they saw any thing to induce them to find for the pursuer, that it would be better to make the return in terms of the issue.

**Verdict—For the defender.**

*Cockburn and Shaw, for the Pursuer.*

*Jeffrey and More, for the Defender.*

(Agents, *J. F. Gordon, w. s., and John Brown.*)