

the Counsel for the respondents. It is sufficient to shew that the evil arises in consequence of the original defect in the construction of the drain,—I mean by that, the construction of the drain with all the accessories to it. That being established, I think there is an end of the case; and I shall move your Lordships to affirm the decree of the Court of Session. Feb. 17. 1830.

*Spankie*.—I hope your Lordships will affirm it with costs: We are contending with very rich bodies—The whole town of Edinburgh belongs to these two bodies; they have immense funds.

LORD CHANCELLOR.—I am of opinion, that there ought to be costs. This is an appeal from the unanimous judgment of the Court below; and I see no reason at all to quarrel with the principle of the judgment. I move your Lordships, that the judgment be affirmed with L.60 costs.

The House of Lords accordingly ordered and adjudged, that the interlocutors complained of be affirmed, with L.60 costs.

*Appellants' Authorities*.—Stair, 2. 7. 8. Ersk. 2. 9. 5. and 2. 9. 12. and 2. 6. 1. Parson of Dundee v. English, July 1687, (14,521.)

*Respondents' Authorities*.—Stair, 1. 9. 5. Ersk. 3. 1. 15. Gray v. Maxwell, July 30. 1762, (12,800.) Downie v. Earl of Moray, June 19. 1824, 3. Shaw and Dunlop, 158. and Nov. 12. 1825, Ib. 4. 169.

SPOTTISWOODE and ROBERTSON—MACDOUGALD,—Solicitors.

ARCHIBALD FARQUHARSON, Appellant.—*Brougham—Alderson*. No. 2.

MISS FRANCES BARSTOW, Respondent.—*Campbell—Jarvis*.

*Usury*.—Where L.12,000 of Government stock, of the value of L. 7620, were sold for an heritable bond of L. 10,000, with interest thereon at 5 per cent; but the payment of the principal was dependent on, and substantially affected by several contingencies; and, in one view, the seller and her heirs were exposed to receive for a perpetuity less than 5 per cent on the sum sold;—Held, (affirming the judgment of the Court of Session), that the transaction was not usurious.

*Title to Pursue*.—Circumstances of confidence between the seller and purchaser of an estate burdened with a bond, found to be no bar to the title of the purchaser to challenge the bond on the head of usury.

MISS FRANCES BARSTOW was possessed of L.12,000, three per cent consols. In 1797 she came to reside in the family of Mr and Mrs Russell of Blackhall, paying board, and contributing to the expense of part of the common establishment. She was a cousin of Mrs Russell, and placed much confidence in the

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Feb. 17. 1830. friendship, honour, and business talents of Mr Russell, who had studied law, and passed at the Scotch Bar. She had also been in the use of giving more or less to him, the temporary command of her funds.

After some communing as to an arrangement proposed to be adopted in relation to the L. 12,000 stock, the following heritable bond was, in 1803, drawn and written by Mr Russell himself; executed by the parties; and delivered into the possession of Miss Barstow; but there was no evidence that she consulted any professional man on the subject: \*—‘ I, Francis Russell of Black-

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\* Previous to the bond being granted, Mr Russell wrote to Miss Barstow in these terms: ‘ 1st, On your part, you are to assign over to me, in full right for ever, your  
‘ right and interest in L. 12,000 three per cent consolidated Government annuities,  
‘ with the dividends accruing due thereon in July next 1803 years, as part of the sum.  
‘ 2dly, On my part I am bound to give you, and your heirs or executors, ample mort-  
‘ gage security for the sum of L. 10,000 sterling money of Great Britain, as on the 20th  
‘ day of June next 1803 years, with interest from and after that day and term, during  
‘ the whole period I shall be due the said sum of money, at the rate of 5 per cent per  
‘ annum, payable half-yearly every 20th day of December and 20th day of June for  
‘ the half-year respectively preceding; beginning the first half-yearly and termly pay-  
‘ ment upon the 20th day of December next 1803 years, for the half-year immediately  
‘ preceding, and so on half-yearly, paying to you L. 250 sterling every half-year,  
‘ while I remain debtor in the said principal sum of L. 10,000 sterling. 3dly, That,  
‘ during your life, I shall, at your pleasure, be bound to hold the said sum of money,  
‘ and to pay you interest therefor, at the rate of 5 per cent yearly, and payable as above  
‘ half-yearly in equal portions, and that unless interest of money shall be reduced by  
‘ law to a lower rate. 4thly, That it shall not, however, be lawful for you to demand  
‘ or exact payment of the said principal sum from me or mine, until two years after it  
‘ shall be signified to me, by a writing under your own or your agent’s hand, that the  
‘ said 3 per cent consolidated Government annuities are currently sold at the Stock Ex-  
‘ change in London, to the broker for purchasing up the National Debt, or other pub-  
‘ lic character, in sums exceeding in the course of a year one million of said stock, at  
‘ the rate of L. 83. 10s. sterling for each L. 100 of said 3 per cent consolidated an-  
‘ nuities: But that, in six months after I have received said notice, it shall be lawful  
‘ for you, at any time during the whole course of your life, to demand, and I shall be  
‘ bound to pay up the whole of said principal sum. 5thly, But that it is fully agreed  
‘ and settled between us, that in the event of said principal sum remaining due at the  
‘ time of your decease, or of mine, that no greater part of said principal sum than  
‘ L. 2000 sterling shall be payable on demand in a shorter period than two years there-  
‘ after; and that the remaining L. 8000 shall be payable in two equal instalments of  
‘ L. 4000 each, at these periods,—the first at four years from such event, and the last at  
‘ six years from such event; and that it shall not be in the power of either your heirs,  
‘ or executors or successors, to demand payment in any shorter or other terms or por-  
‘ tions. 6thly, That in case and in the event of your marriage, I shall, in one month  
‘ thereafter, be bound to pay you L. 6000 sterling, provided the 3 per cents have reach-  
‘ ed but 75 per cent; and at all times, on forty days’ notice, I shall be bound to pay  
‘ you, for any want and purpose of yours, L. 1000 sterling, on either of such payments  
‘ being properly discharged in part of my bond and mortgage in your favour.’  
Miss Barstow answered:—‘ March 21. 1803.—Dear Sir, I received a letter from

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‘ hall, advocate, hereby grant me to have borrowed and received,  
 ‘ and to be, at the date of these presents, justly resting owing  
 ‘ and indebted to Miss Frances Barstow, only daughter,’ &c. ‘ in  
 ‘ and of the sum of ten thousand pounds sterling money of  
 ‘ Great Britain, whereof I hereby acknowledge the receipt, re-  
 ‘ nouncing all objections to the contrary: Therefore, I hereby  
 ‘ bind and oblige myself, my heirs, executors, and successors  
 ‘ whomsoever, (renouncing all benefit of discussing them in or-  
 ‘ der), to content and repay to the said Miss Frances Barstow,  
 ‘ or to the executors or trustees now appointed, or to be ap-  
 ‘ pointed by her, for carrying into execution the disposal of her  
 ‘ property and effects at her decease, either by her last will or  
 ‘ settlement now actually made, or by any latter will or settle-  
 ‘ ment which she may at any future period of her life think fit to  
 ‘ make, expressly barring and secluding all other heirs, and all  
 ‘ other executors, the said sum of ten thousand pounds money afore-  
 ‘ said, and that at and against the terms, and under the condi-  
 ‘ tions after mentioned, with penalty,’ &c.; ‘ and with the due and  
 ‘ ordinary interest or annual rent of 5 per cent per annum of the  
 ‘ said principal sum, from and after the 20th day of June next, &c.  
 ‘ and that at two terms in the year, viz. the 20th day of December  
 ‘ and 20th day of June, by equal portions, beginning the first  
 ‘ term’s payment of the said interest upon the 20th day of De-  
 ‘ cember next, for the half-year immediately preceding, and the  
 ‘ next upon the 20th day of June thereafter; and so forth termly  
 ‘ and proportionally, during the not-payment of the said princi-  
 ‘ pal sum,’ &c. ‘ with penalty; but always with and under the fol-  
 ‘ lowing conditions and provisions: And it is hereby expressly  
 ‘ conditioned and provided by me, That it can or shall in no

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‘ you, dated the 16th of this month, containing the particulars of a bargain proposed  
 ‘ between us, which I again repeat I think greatly for my interest and advantage,  
 ‘ of which the following are particulars;’ and after reciting the particulars in the  
 exact terms above quoted, she closed the transaction in the following terms:—‘ I  
 ‘ have only to declare, that the above-written articles of an agreement are entirely  
 ‘ agreeable in conformity to what has been settled between us; and I hereby oblige  
 ‘ myself to execute what is incumbent upon me in consequence of this agreement, by  
 ‘ assigning the said L. 12,000, 3 per cent consols, in your favour, as soon as a proper  
 ‘ security can be made out and executed by you in my favour, in the terms of your  
 ‘ letter above referred to: And as the said 3 per cent stock does not at this time sell  
 ‘ above 63 and a half per cent, I cannot but consider this transaction as much to my  
 ‘ advantage; and therefore, in case at the period of my decease the said bond shall re-  
 ‘ main unpaid, it is my desire and request, and thereafter, until it shall sell so that the  
 ‘ said L. 12,000 shall yield the sum of L. 10,000 sterling, that it shall remain in your  
 ‘ hands at the rate of 3½ per cent, until that price can be obtained.’

Feb. 17. 1830. ' case be lawful for the said Miss Frances Barstow, or her  
' above written, or any other in her name or right, to call upon  
' me for repayment of the said principal sum of ten thousand  
' pounds money foresaid, and that neither I nor my foresaids  
' shall be bound to repay the same, beyond the sum of two thou-  
' sand pounds thereof in an event herein after specified, until the  
' space of two full years and six months has elapsed from and  
' after the day on which the Government stock or fund denomi-  
' nated 3 per cent consolidated annuities shall have been pub-  
' licly and currently sold at the Stock Exchange in London, to  
' the broker employed by Government for purchasing up the na-  
' tional debt, or other public character or agent, in sums exceed-  
' ing in the course of one year one million of said stock, (the  
' said term of delay to count and run, however, from the first  
' day on which any sum to the amount of twenty thousand of  
' said stock shall be so purchased), at the rate and price of  
' eighty-three pounds ten shillings sterling for each or every hun-  
' dred pounds stock in said consolidated annuities, nor until six  
' months after I shall have received a notice and requisition in  
' writing, subscribed by the said Miss Frances Barstow, or her  
' agent, or her above written, that said stock has been sold two  
' days before the date of said notice at the above rate, and re-  
' quiring me to pay up said principal sum in six months there-  
' after, the amount and notoriety of the sale being as above de-  
' scribed; declaring nevertheless, that, in the event of the said  
' Miss Frances Barstow her marriage, I shall be, and am bound,  
' in two months after such event, to pay to her the sum of six  
' thousand pounds sterling, to be credited to me, however, in the  
' payment of the sums contained in the bond, at the rate at which  
' the 3 per cent consols shall then sell; that is, allowing in my  
' favour whatever they then sell for below eighty-three pounds ten  
' shillings per hundred pounds stock; and that at all times, and  
' for any purpose of her's, I shall be constantly bound in one  
' month to pay up to her any sum not exceeding one thousand  
' pounds sterling, on the same terms as above expressed, in the  
' event of her marriage; and both or either of such payments  
' being first duly discharged to me, as in part payment of the  
' money due by me in virtue of this bond and obligation: it be-  
' ing, however, expressly conditioned and provided on my part,  
' that, in the event the principal sum shall remain unpaid by  
' me or my foresaids at the time of the decease either of myself or  
' that of the said Miss Frances Barstow, and that whether from the  
' circumstances of the said stock never having arisen to the said

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' stipulated price of eighty-three pounds ten shillings sterling per  
 ' hundred, or from her, or her above written, not having thought  
 ' fit to raise and call up the same; in either case, that no  
 ' greater part of the said principal than two thousand pounds  
 ' sterling shall be payable by me, or my foreaids, in a shor-  
 ' ter or less period than two years; but that such sum of two  
 ' thousand pounds, or any sum or sums not exceeding that  
 ' amount appointed by her in any will or other settlement of her's,  
 ' shall be payable to the executors or trustees named by her as afore-  
 ' said; one thousand pounds thereof in six months from her decease,  
 ' and the remainder thereof within said space of two years next  
 ' thereafter; and that the remaining eight thousand pounds shall  
 ' be only payable by two equal portions or instalments; the one or  
 ' first in four years after such decease, and the other not until six  
 ' years after such decease; and it being further expressly provided  
 ' and declared, that, in the event of said principal sum remaining  
 ' due at the period of the decease of the said Miss Frances Barstow,  
 ' from its having never hitherto been exigible from me or my fore-  
 ' aids, in respect of the said three per cent stock having, at no time  
 ' since the date hereof, attained the said price of eighty-three and a  
 ' half per centum, then and in that event, not only as that above pro-  
 ' vided, I shall not be bound and obliged to repay said principal sum  
 ' until such price can be obtained, but also, that, after the decease  
 ' of the said Frances Barstow, I shall only be liable in, and bound  
 ' to pay interest therefor, at the rate of three and one-half per cen-  
 ' tum per annum; and it being hereby conditioned and declared,  
 ' that the said principal sum shall remain unpaid in my hands, se-  
 ' cured as hereby secured, until it arises that said three per cent  
 ' stock shall reach and attain the said stipulated price and value of  
 ' eighty-three and a half pounds sterling per hundred thereof, and  
 ' for two years and six months after such event shall so have taken  
 ' place; the said interest, however, to be payable in the portions,  
 ' and at the half-yearly terms above herein conditioned for payment  
 ' of the higher interest: And, lastly, it is hereby expressly provid-  
 ' ed and conditioned by me, and declared to be the full meaning  
 ' of the said Frances Barstow, and the condition under which this  
 ' bond and obligation is granted by me to her, that I or my foreaids  
 ' can, on no ground or pretence whatever, be obliged or compel-  
 ' led, either by herself or her above written, or by any having right  
 ' from them, to pay up the said sum of ten thousand pounds ster-  
 ' ling, sooner, or until two years and six months after the said three  
 ' per cent stock shall have attained the said price of eighty-three  
 ' and one-half pounds sterling by the hundred of such stock, other-

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‘ wise than in the event and to the extent above specified; I being,  
 ‘ however, expressly bound and obliged, during all the days of the  
 ‘ said Frances Barstow’s life, to pay her in all events the interest  
 ‘ of the said principal sum of ten thousand pounds sterling money  
 ‘ aforesaid, and that always at the rate of five per centum per an-  
 ‘ num, at the terms and in the half-yearly proportions above speci-  
 ‘ fied; and in respect of the mutual conditions, considerations, and  
 ‘ provisions hereby made, to keep and hold the said principal sum at  
 ‘ that rate of interest during all the days of her life, if she shall so  
 ‘ incline and require, and that without regard to what the ordinary  
 ‘ rate of interest may fall; and for the said Miss Frances Barstow;  
 ‘ and her above written, their further security and more sure pay-  
 ‘ ment of the sums of money, principal, interest, and penalties  
 ‘ above specified, and without prejudice to the above personal obli-  
 ‘ gation, but in farther corroboration thereof, under, nevertheless,  
 ‘ the above written restrictions and provisions in my favour, I, the  
 ‘ said Francis Russell, bind and oblige myself, and my foresaids,  
 &c. Then followed obligations to infest in the barony of Strachan  
 and others, with precept of sasine and other usual clauses.

Mr Russell regularly paid the interest of the bond during his life. Soon after his death, in 1806, Miss Barstow took infestment, and Mr Russell’s widow, his general disponee, continued the payment. In 1818 Archibald Farquharson married one of Mr Russell’s daughters, on which occasion Mrs Russell conveyed to him the lands, burdened with Miss Barstow’s bond; and he paid the interest down to June 1823.

At the date of the transaction with Mr Russell, the L. 12,000 stock was worth about L. 7,620 sterling, and produced an annual dividend of L. 360. The stock did not rise to 83½ until the lapse of fourteen or fifteen years; after that they rose much higher. In 1824 they were at 96.

In March 1824, Mr Farquharson brought an action of reduction of the heritable bond, on the ground that the contract was usurious, and null and void by the 12. Anne, Sess. II. c. 16. and was also null and void under the statute, (commonly called the Bubble Act), 7. Geo. II. c. 8. § 1.; and concluding that the bond and sasine should be reduced, and the whole sums of money received in name of interest should be paid back to the pursuer; or that the principal sum in the bond should be restricted to L. 7,620, with legal interest thereon, and against it should be placed all sums received as interest from Mr Russell, Mrs Russell, and the pursuer, which by a calculation was shown to reduce the restricted capital of L. 7,620, to about L. 3,768.

Miss Barstow objected to Mr Farquharson's title to pursue, on Feb. 17. 1830. the ground that he derived his title from Mr Russell, who had taken him bound to pay this debt. His obligation to pay this burden was coexistent with his title to the estate; and besides, as in the circumstances of the case Mr Russell could not have challenged the bond, so neither could Mr Farquharson. On the merits she maintained, that the transaction was not usurious, and was not affected by the Bubble Act.

The Court, on the report of the Lord Ordinary, (31st January 1827), sustained the title to pursue, but assoilzied Miss Barstow, with expenses.\*

Mr Farquharson appealed.

*Appellant.*—The question is, whether there has been usury or not, which is one purely of law, and in relation to which a plea of hardship or inexpediency is irrelevant. The inquiry is simply, what had Mr Russell received, and what had he undertaken to pay? He only got L. 7,620, in respect of which he was bound to pay L. 500 of interest annually, and he was farther bound to repay, not L. 7,620, but L. 10,000. Thus for years there was paid an interest greatly exceeding the lawful interest of the principal advanced. It was an improbable event, that the stock would rise to 83½. It is no doubt true, that open and substantial transactions in the public funds, whereby a party, on receiving a sum to-day, stipulates to pay the price of a future day, is legal; but here the shape adopted was merely a colour to conceal the vice which contaminated the whole contract. It is also true, that where there are contingencies whereby the principal, or principal and interest, are put in hazard, there is no usury; but here the contingencies were too remote and too slender to infuse legality into the arrangement. If fictitious or distant endangerments or risks, which the lender has in his own power at once to remove or avoid, were to give validity to such transactions, there would be an end to the law of usury. Neither was it meant to be contended, that a stipulation for an annuity for life, amounting to much more than legal interest on the principal, is usurious. But here the period was indefinite, and the annual sum might be exigible for a perpetuity.

LORD CHANCELLOR.—If it were, the whole payments of interests would be less than legal interest; since one period is definite, and

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\* 5. Shaw and Dunlop, No. 150. p. 251.

Feb. 17. 1830. the other indefinite. The parties apparently contradict themselves two or three times. But I think that you will find, that while L. 1000 may be called up, whether the stock rose to  $83\frac{1}{2}$  or not, the rest, if the rise did not take place, would lie at three and a half per cent. By this transaction, Mr Russell is not obliged to pay the L. 10,000, until the stock he has purchased is worth that sum. In the meantime, he is to pay more than five per cent on the selling value of the stock; that is, more than legal interest: But, on the other hand, he has this advantage, that he is not obliged to pay the price whenever the stock is actually worth the L. 10,000, but he is entitled to take two years and a half longer, and, during that time, to speculate on the stock being higher; and he is to have the whole benefit of the speculation. It would appear, then, that the benefit of the chance is an equivalent for the excess of the interest.

*Brougham.*—But observe the situation in which Miss Barstow placed Mr Russell. He was not entitled to pay her, unless she consented: not only could he not do so during the lady's life, but we do not see how he could have done so after her death. As to the preliminary point, we perhaps ought to have alluded to the strange objection of personal exception, as if intimacy of acquaintance or mutual confidence could nullify the statute. But the Court below have sustained the title to pursue—with this anomaly, however, that while the Court sustain the title, they concur in every word of the opinion of one of their Lordship's number, who is quite clear that the appellant was barred; that is, that the appellant is barred, and not barred. We are bound, out of respect to the last opinion, to regard the first as an absurdity; but the Court were as clear on the one point as on the other. We have never met with any satisfactory answer to our objection, founded on the 7th Geo. II. c. 8. We have only to add, that this is not a mere question of Scotch law; we are entitled to ask, how would it be dealt with in the Courts of this country? and we submit, that there should be a remit, to ascertain how much of the principal and interest of the actual sum lent, namely L. 7620, remains due.

*Respondent.*—Neither of the statutes founded on by the appellant have any application. The bond contains numerous contingencies, which affected the principal, and controlled the recovery of it. This is not the case of an ordinary loan of money—it is a purchase of Government stock, for a price payable only if the stocks reached a certain high rate, and for an annuity if they did not. Each party had then chance of gain or of loss. Therefore the statute of Queen Anne cannot apply. Neither can the statute



7. Geo. II. c. 8.; for here the respondent sold stock of which she was actually possessed, and over which she had the sole and absolute controul. Feb. 17. 1830.

LORD CHANCELLOR.—The difficulty of this case arises from the conditions in the bond being so complicated. But before we can reach a sound judgment, we must be sure that we thoroughly comprehend every part of its bearing. I was looking to the letters for the contract; but I perceive that the contract itself materially differs from them, and we must take the bond as the contract between the parties. If this be a perpetual annuity, this lady would receive less than five per cent on the value of the stock; and in one event it is a perpetual annuity.

LORD WYNFORD.—It appears to me that there is only L.1000 which this lady was ever sure of getting back again, and that struck me a long while ago as very far deciding this case.

LORD CHANCELLOR.—We think, under these circumstances, that this cannot be considered an usurious transaction, and that, consequently, the judgment must be affirmed.

LORD WYNFORD.—I am of opinion, that there ought to be costs given in this case; though I do not agree that the party could not take the objection, yet, in my opinion, it is a most unrighteous objection.

The House of Lords therefore ordered and adjudged, that the interlocutors be affirmed, with L.50 costs.

*Appellant's Authorities.*—Comyn on Usury, 156. and cases cited. Colville, Jan. 25. 1709, (6825.)

*Respondent's Authorities.*—3. Wilson's Reports, 390.; Atkinson, 340.; Comyn on Usury, 22.; Cro. Eliz. 741.; Atk. 301.; Ambl. 371.; 5. Espinasse, 164.; Robertson's Ap. Cases, 471.

RICHARDSON and CONNELL—A. MUNDELL,—Solicitors.

SEA INSURANCE COMPANY of SCOTLAND, Appellants.  
*Campbell—Spankie.*

No. 3.

JOHN GAVIN and Others, Respondents.—*Lushington—Brougham.*

*Insurance.*—Found, (affirming the judgment of the Court of Session), That a policy of insurance 'to Barcelona, and at and from thence, and two other ports in Spain,' &c. covered a total loss, which happened while the ship insured lay in the roadstead of Saloe, although there were no artificial works or other usual protections for loading and unloading, but the place was resorted to by vessels for trade, and it was treated as a port by the Spanish and British Governments.