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Scott Vs. Lloyd

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Decided On : 1835

Appeal No. : 34 U.S. 418

Appellant : Scott

Respondent : Lloyd

Judgement :

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Scott v. Lloyd

34 U.S. (9 Pet.) 418

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR

THE COUNTY OF WASHINGTON IN THE DISTRICT OF COLUMBIA

SYLLABUS

Scholfield applied to Moore to raise or borrow $5,000, securing him on an annuity or ground rent on sufficient real estate for one year. Moore proposed to let him have the money for ten years on the same security. After much discussion, the

parties agreed to divide the difference, and that S. should keep the money for five years. A deed for sufficient real property in Alexandria, in the District of Columbia, securing the annuity was executed by S., and the annuity or ground rent was paid for some years. Scholfield, after the execution of the deed securing the annuity to Moore sold and conveyed the estate, subject to the annuity or rent charge, to Lloyd, and subsequent to the conveyance he gave notice to Lloyd not to pay the rents to Moore on the allegation that there were fraud and usury in the transaction, and that the grant of the annuity was therefore void. At the time this notice was given, Scholfield agreed in writing to indemnify and save Lloyd from loss if a distress should he made for the rent, and he would resist the same by a writ of replevin. This was done by Lloyd. Lloyd and others, as creditors of Scholfield, became afterwards possessed in absolute property by releases from and agreements with Scholfield of all his, Scholfield's, interest in the reversion of the estate on which the rent was secured or any benefit or advantage from the suit, and was discharged by the insolvent law of Virginia, but no release of Scholfield by Lloyd from his responsibility to save him harmless for the resistance of the distress and the action of replevin was executed. On the trial of the action of replevin in the circuit court, Scholfield was examined as a witness in favor of Lloyd to show that the original contract between him and Moore was usurious. *Held* that he was an interested and incompetent witness.

The statute against usury not only forbids the direct taking more than six percentum per annum for the loan or forbearance of any sum of money, but it forbids any shift or device by which this prohibition may be evaded and a greater interest be in fact secured. If a larger sum than six percent be not expressly reserved, the instrument will not of itself expose the usury, but the real corruptness of the contract must be shown by extrinsic circumstances which prove its character.

The court was requested to say to the jury that the facts given in evidence in the trial of the case did not import such a lending as would support the defense of usury. By the court:

"The court was asked to usurp the province of the jury and to decide on the sufficiency of the testimony, in violation of the well established principle that the law is referred to the court, the fact to the jury."

The statute declares

"that no person shall on any contract take, directly or indirectly, for loan of any money . . . above the value of six, for the forbearance of one hundred for a year."

It has been settled that to constitute the offense, there must be a loan, upon which more than six percent interest is to be received, and it has been also settled that where the

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contract is in truth for the borrowing and lending of money, no form which can be given to it will free it from the taint of usury if more than legal interest be secured.

The ingenuity of lenders has devised many contrivances by which, under forms sanctioned by law, the statute may be evaded. Among the earliest and most common of these is the purchase of annuities secured upon real estate or otherwise. The statute does not reach these, not only because the principal may be put in hazard, but because it was not the intention of the legislature to interfere with individuals in their ordinary transactions of buying and selling or other arrangements made with a view to convenience or profit. The purchase of an annuity or rent charge, if a *bona fide* sale, has never been considered as usurious though more than six percent profit be secured. Yet it is apparent that if giving this form to the contract will afford a cover which conceals it from judicial investigation, the statute would become a dead letter. Courts therefore perceived the necessity of disregarding the form and examining into the real nature of the transaction. If that be in fact a loan, no shift or device will protect it.

Though this principle may be extracted from all the cases, yet as each depends on its own circumstances and those circumstances are almost infinitely varied, it ought not to surprise if there should be some seeming conflict in the application of

the rule by different judges. Different minds allow a different degree of weight to the same circumstances.

The covenants in the deed from Scholfield granting the annuity to Moore secure the payment of ten percent forever on the sum advanced. There is no hazard whatever in the contract. Moore must, in something more than twenty years, receive the money he has advanced with the legal interest on it, unless the principal sum should be returned after five years, in which event he would receive the principal with ten percent interest. The deed is equivalent to a bond for five thousand pounds, amply secured by a mortgage on real estate, with interest at ten percent thereon, with liberty to repay the same in

five years. If the real contract was for a loan of money without any view to a purchase, it is plainly within the statute.

An instruction to the jury which would separate the circumstances of the case from each other, and the object of which is to induce the court, after directing the jury that they ought to be considered together, to instruct them that, separately, no one in itself amounted to usury, ought not to have been given.

In the course of the trial of the cause in the circuit court, the counsel for the plaintiff objected to a question put by the defendant's counsel to a witness as being a leading question. By the court:

"Although the plaintiff's counsel objected to this question and said that he excepted to the opinion of the court, no exception is actually prayed by the"

party and signed by the judge. This Court cannot consider the exception as actually taken, and must suppose it was abandoned.

An action of replevin was instituted in March, 1825, by John Lloyd in the Circuit Court of the United States for the County

of Alexandria, against Charles Scott, bailiff of William S. Moore, and a declaration was filed in the common form at September rules of the same year. In November, 1827, the defendant filed the following avowry.

"Charles Scott, bailiff, &c.;, at suit, John Lloyd, and the said Charles Scott, by Robert J. Taylor, his attorney, comes and defends the force and injury, when, &c.;, and as bailiff of William S. Moore well acknowledges the taking of the said goods and chattels, in the said place, when, &c.;, and justly, &c.; because he says that before the said time when the said, the taking of the said goods and chattels, is supposed to have been made, one Jonathan Scholfield was seized in his demesne in fee of four brick tenements, and a lot of ground, whereon they stood, on the east side of Washington Street and north side of Duke Street in the Town of Alexandria and county aforesaid, whereof the said place, when, &c.;, is, and at the said time, when, &c.;, was parcel, and being so seized, as aforesaid, of the said tenements, and lot of ground, he the said Jonathan and Eleanor his wife, afterwards, and before the said time, when, &c.;, to-wit, on 11 June, 1814, at the county aforesaid, by their certain indenture dated on the said 11 June, 1814, and here now to the court shown, in consideration of the sum of $5,000 by the said William paid to the said Jonathan granted, bargained, and sold to the said William one certain annuity or yearly rent of $500, to be enuring out of, and charged upon, the said four brick tenements and lot of ground, whereof the said place, when, &c.;, is parcel, to be paid to the said William, his heirs and assigns, by equal half-yearly payments of $250 each, on 10 December and on 10 June in every year forever thereafter. To hold the said annuity or rent, so as aforesaid charged and payable, to the said William S. Moore his heirs and assigns, to his and their only proper use forever, and the said Jonathan Scholfield, for himself, his heirs and assigns, did by the said indenture, among other things, covenant with the said William S. Moore his heirs and assigns, that he, the said Jonathan Scholfield, his heirs and assigns, would well and truly satisfy and pay to the said William S. Moore his heirs and assigns, the said annual rent of $500, by equal half-yearly payments,

as aforesaid forever, and that if the said rent should not be punctually paid as it became due, then that on every such default it should be lawful for the said William S. Moore his heirs and assigns, from time to time, to enter on the said four tenements and lot of ground, so as aforesaid charged, of which the said place, when, &c.;, is parcel, and to levy by distress and sale of the goods and chattels there found, the rent in arrear, and the costs of distress and sale, of which said rent, so as aforesaid granted, the said William became and was seized under the said deed, and by the perception thereof -- that is to say, on 11 December in the year 1814 at the county aforesaid, and has since remained and yet is seized thereof."

"And afterwards, that is to say on 29 October in the year 1816, at the county aforesaid, the said Jonathan Scholfield and Eleanor, his wife, by their certain deed of bargain and sale, under their seals, dated on the day and year last mentioned, bargained, sold, and conveyed to the said John Lloyd, his heirs and assigns forever certain tenements and lots of ground in the said Town of Alexandria, whereof the said four brick tenements and lot of ground before mentioned, including the said place where, &c.;, is and was parcel, subject by the terms of the said deed to the payment of the said annuity or rent of $500 to the said William S. Moore his heirs and assigns, under and in virtue of which said bargain, sale, and conveyance to him the said John entered upon the said tenements and lots of ground so to him bargained, sold, and conveyed, of which the said place where, &c.;, is, and was parcel, and became thereof seized and possessed, that is to say on the said 29 October in the year 1816, at the county aforesaid, and ever since has continued, and yet is so seized and possessed, and became, after the said bargain, sale, and conveyance to the said plaintiff as aforesaid and after his entry, seizin, and possession of the premises, including the said place where, &c.;, and whilst he so continued seized and possessed as aforesaid, the sum of $250 of the annuity or rent aforesaid, for the half-year ending on 10 June in the year 1824, and the further sum of $250 of the said annuity or rent for the half-year ending on 10 December in the year 1824, became and remained in

arrear and unpaid to the said William S. Moore, he, the said Charles Scott, as bailiff of the said William and by his command and authority at the said time when, &c.;, entered on the said place where, &c.;, being parcel of the said four brick tenements and lot of ground, so as aforesaid charged, with the said annuity or rent, and liable to the distress of the said William, and took and carried away the said goods and chattels in the declaration mentioned, then and there being found in the said place where, &c.;, parcel of the said four tenements and lot of ground, as a distress for the said rent so in arrear as aforesaid, to the said William, as he lawfully might, and this he is ready to verify, &c.; wherefore the said Charles prays judgment for the sum of $1,000, being double the value of the said rent so in arrear and distrained for as aforesaid, with full costs of suit, &c.;, according to the statute in that case provided."

"The plaintiff's attorney thereupon filed four several pleas, the first of which was: "

"And the said John, by Thomas Swann, his attorney, prays oyer of the said indenture from the said Jonathan Scholfield and Eleanor, his wife, to the said William S. Moore in the said cognizance mentioned, and the same is read to him in these words, to-wit; which being read and heard, the said John saith that the said Charles, as bailiff of the said William S. Moore for the reasons before alleged, ought not justly to acknowledge the taking of the goods and chattels aforesaid, in the said place, in which, &c.;, because he saith that before the making of the said indenture, that is to say, on 11 June in the year 1814, at the county aforesaid, it was corruptly agreed between the said Jonathan Scholfield and the said William S. Moore that the said William S. Moore should advance to him the said Jonathan, the sum of $5,000, and in consideration thereof that he the said Jonathan and the said Eleanor, his wife, should grant, by a deed of indenture, duly executed and delivered to him, the said William, his heirs and assigns forever, a certain annuity or rent of $500, to be issuing out of, and charged upon a lot of ground and four brick tenements, and appurtenances thereon erected, on the east side of Washington Street, and on the north side of Duke Street, in the Town of Alexandria, bounded as follows:

beginning at the intersection of said Streets; thence north, on Washington Street, eighty-seven feet, more or less, to the partition wall between the fourth and fifth tenements from Duke Street; thence, east parallel to Duke Street and with said partition wall one hundred and twelve feet to an alley; thence with the line of the said alley eighty-seven feet to Duke Street; thence on Duke Street, west, to the beginning; to be paid to the said William, his heirs and assigns, by equal half-yearly payments of $250, on 10 December and on 10 June forever thereafter."

"And it was further corruptly agreed that he, the said Jonathan, in and by the said deed of indenture, should, for himself, his heirs, executors, administrators, and assigns, covenant with the said William, his heirs and assigns, that he would well and truly pay to him, the said William, his heirs and assigns, the said annuity or rent of $500 by equal half-yearly payments, on 10 June and 10 December in each year forever thereafter, as the same should become due, and that if the same should not be punctually paid, that then it should be lawful for the said William, his heirs and assigns, from time to time, on every such default, to enter on the premises charged, and to levy by distress and sale of the goods and chattels there found, the rent in arrear, and the costs of distress and sale, and if the same should remain in arrear and unpaid for the space of thirty days after any day of payment as aforesaid, and no distress sufficient to satisfy the same could be found on the premises, that then it should be lawful for the said William, his heirs and assigns, to enter upon the premises charged, and from thence to remove and expel the said Jonathan, his heirs and assigns, and to hold and enjoy the same as his and their absolute estate forever thereafter; and it was further corruptly agreed between the said Jonathan and him, the said William, that he the said Jonathan should enter into these further covenants in the said indenture, that is to say, a covenant that he the said Jonathan, at the time of the execution of the said indenture, was then, in his own right, seized in fee simple in the premises charged, free from any condition or encumbrance, other than such as were specified in a deed from the said Jonathan to Robert J. Taylor, dated the ___ day of _____; and that he, the said Jonathan, his heirs and assigns, would forever

thereafter, keep the buildings which then were or thereafter might be erected on the premises charged, fully insured against fire in some incorporated insurance office, and would assign the policies of insurance to such trustee as the said William, his heirs or assigns, might appoint, to the intent that if any damage or destruction from fire should happen, that the money received on such policies might be applied to rebuilding or repairing the buildings destroyed or damaged, and that he, the said Jonathan, his heirs and assigns, would execute and deliver any further conveyance which might be necessary, more completely to charge the premises before mentioned with the annuity aforesaid, and to carry into full effect the intention of the said parties; and lastly that he and his heirs would forever warrant and defend the annuity or rent, so agreed to be granted to the said William, his heirs and assigns, against any defalcations and deductions for, or on account of, any act of him, his heirs or assigns; and the said William did further corruptly agree that he would, in the said indenture, covenant for himself, his heirs and assigns, with the said Jonathan, his heirs and assigns, that if the said Jonathan, his heirs or assigns, should at any time thereafter, at the expiration of five years from the date of the said indenture, pay to the said William, his heirs or assigns, the sum of $5,000, together with all arrears of rent, and ratable dividend of the rent for the time which should have elapsed between the half-year's day then next preceding, and the day on which such payment should be made, he, the said William, his heirs and assigns, would execute and deliver any deeds or instruments which might be necessary for releasing and extinguishing the rent or annuity thereby agreed to be created, which, on such payments being made, should forever after cease to be payable."

"And the said John saith that afterwards, to-wit, on the same day and year aforesaid, at the county aforesaid, the said William, in pursuance and in prosecution of the said corrupt agreement, did advance to the said Jonathan the said sum of $5,000, and the said Jonathan and Eleanor his wife, and the said William, did then and there make, seal, and duly deliver to each other, respectively, the said deed of indenture, as their several acts and deeds, which said deed was duly acknowledged by the said Eleanor, and admitted to record. And

so the said John saith that the said deed of indenture, in the said cognizance mentioned, was made in consideration of money advanced upon and for usury, and that by the said indenture there has been reserved and taken above the rate of six in the hundred, for the forbearance of the said sum of $5,000 so advanced as aforesaid, for the term of one year, and that the said John is ready to verify; whereupon he prays judgment; if he ought to be charged with the rent aforesaid, by virtue of the indenture aforesaid; and for as much as the said Charles hath acknowledged the taking of the said goods and chattels, he, the said John, prays judgment and his damages, on occasion of the taking and unjust detaining of the said goods and chattels, to be adjudged to him, &c.;"

The second plea is in all respects like the first, except it states that the agreement was that Moore should "lend" to Scholfield $5,000. It then states that the parties agreed a deed should be made containing all the covenants set forth in the first plea. It then avers that in pursuance and in prosecution of this corrupt agreement, Moore did advance to Scholfield the sum of $5,000, and that Scholfield and wife, and Moore made and executed the deed aforesaid in pursuance of this corrupt agreement, which was duly acknowledged and admitted to record. And that the deed was made in consideration of "money lent upon and for usury," and that by it there has been reserved and taken above the rate of six in the hundred, for the forbearance of the sum of $5,000 so lent as aforesaid, for the term of one year. This plea concludes as the first does.

The third plea is more general than the first and second. It states that before the making of the indenture -- that is to say on 11 June, 1814 -- it was corruptly agreed between Scholfield and Moore that he, Moore should "advance" to him, Scholfield, the sum of $5,000 upon the terms and conditions, and in consideration of the covenants and agreements in the indenture mentioned and contained, and that in pursuance of this corrupt agreement and in the prosecution and fulfillment of the same, Moore did advance to Scholfield the sum of $5,000, and they, Scholfield and Moore did make, seal, and duly deliver the deed to each party respectively as their act and deed. And that the deed was in consideration

of money advanced upon and for usury, and that by the indenture there has been taken and reserved above the rate of six in one hundred for the forbearance of the sum of $5,000, so advanced as aforesaid for the term of one year. This plea concludes as the first does.

The fourth plea is like the third, except it is stated that the agreement was to "lend" $5,000 upon the same terms stated in the third plea. It then avers that in pursuance and in execution of the corrupt agreement in the indenture mentioned, Moore did "lend" to Scholfield the sum of $5,000; that the deed was duly executed by the parties and recorded; that it was made in consideration of money lent upon and for usury, and that by the said deed there has been reserved and taken above the rate of six in the hundred for the forbearance of the sum of $5,000, so lent as aforesaid, for the term of one year. This plea concludes as the others do.

To each of these pleas there was a special demurrer, and particular causes of demurrer assigned.

The circuit court, in November, 1828, gave judgment for the defendant, and the plaintiff prosecuted a writ of error to this Court. 29 U. S. 4 Pet. 205.

At the January term, 1830 of the Supreme Court, the judgment of the circuit court was reversed and the case was remanded to the circuit court with instructions to overrule the demurrers to the second and fourth pleas and to permit the defendant to plead, and for further proceedings, &c.;, 29 U. S. 4 Pet. 231.

On the coming of the mandate into the circuit court in November, 1830, the demurrers were withdrawn and there was a general replication to the pleas filed in November, 1827. The case was then, on the application of the defendant, removed to Washington, and a transcript of the record of proceedings, with the original papers, was transmitted to the Clerk of the Circuit Court for the County of Washington.

At November term, 1832, of the circuit court, the cause came on for trial, and a verdict and judgment were entered in favor of the plaintiff.

The defendant sued out this writ of error.

On the trial, the counsel of the defendant filed four bills of exception.

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These exceptions are set forth at large in the opinion of the Court, and the evidence given on the trial of the cause is particularly stated in the first exception.

The material parts of the deed from Jonathan Scholfield and wife, to William S. Moore referred to in the pleas of the plaintiff in the circuit court, were:

"The indenture is dated 11 June, 1814, and is from Scholfield and wife, of Alexandria, in the District of Columbia. It recites that in consideration of $5,000 in hand paid by William S. Moore of the same town, he grants, bargains and sells to the said William S. Moore his heirs and assigns forever, one certain annuity, or rent, of $500, to be issuing out of and charged upon a lot of ground [describing the premises], to be paid to the said William S. Moore his heirs and assigns, by equal half-yearly payments of $250 on 10 December and on the 10 June forever hereafter, to hold the said annuity or rent to the said William S. Moore his heirs and assigns, to his and their own proper use, forever. And the said Jonathan Scholfield, for himself, his heirs, executors, administrators and assigns, does hereby covenant with the said William S. Moore his heirs and assigns, as follows -- that is to say that he the said Jonathan Scholfield, his heirs and assigns, will well and truly pay to the said William S. Moore his heirs and assigns the said annuity or rent of $500 by equal half-yearly payments on 10 June and 10 December in each year forever hereafter, as the same shall become due, and that if the same be not punctually paid, then it shall be lawful for the said William S. Moore his heirs and assigns, from time to time, on every such default, to enter on the premises charged and to levy by distress and sale of the goods and chattels there found the rent in arrear and the costs of distress and sale, and if the same shall remain in

arrear and unpaid for the space of thirty days after any day of payment as aforesaid, and no distress sufficient to satisfy the same can be found on the premises charged, then it shall be lawful for the said William S. Moore his heirs and assigns, to enter on the premises charged and from thence to remove and expel the said Jonathan Scholfield, his heirs and assigns, and to hold

and enjoy the same as his and their absolute estate forever thereafter. And further that he, the said Jonathan Scholfield, is now in his own right seized in fee simple in the premises charged aforesaid, free from any condition or encumbrance other than such as are specified and provided for in a deed from the said Jonathan Scholfield to Robert I. Taylor dated the day before the date hereof, and that he the said Jonathan Scholfield, his heirs and assigns, will forever hereafter keep the buildings and improvements which now are or hereafter may be erected on the premises charged fully insured against fire in some incorporated insurance office, and will assign the policies of insurance to such trustees as the said William S. Moore his heirs or assigns may appoint, to the intent that if any damage or destruction from fire shall happen, the money received on such policies may be applied to rebuilding or repairing the buildings destroyed or damaged. And that he, the said Jonathan Scholfield, his heirs and assigns, will execute and deliver any further conveyance which may be necessary more completely to charge the premises before described with the annuity aforesaid, and to carry into full effect the intention of the parties hereto."

"And lastly, that he and his heirs will forever warrant and defend the annuity or rent hereby granted to the said William S. Moore his heirs and assigns against any defalcation or deduction for or on account of any act of him, his heirs or assigns."

"And the said William S. Moore, for himself and his heirs and assigns, does hereby covenant with the said Jonathan Scholfield, his heirs and assigns, that if the said Jonathan Scholfield, his heirs or assigns, shall at any time after the expiration of five years from the date hereof pay to the said William S. Moore his heirs or assigns, the sum of $5,000, together with all arrears of rent, and a ratable dividend

of the rent for the time which shall have elapsed between the half-year's day then next preceding and the day on which such payment shall be made, he the said William S. Moore, his heirs or assigns, will execute and deliver any deed or instrument which may be necessary for releasing and extinguishing the rent or annuity hereby created, which, on such payments' being made, shall forever after cease to be payable. "

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MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

The plaintiff in error, the original defendant, avowed as bailiff of William S. Moore that the goods replevied were distrained for rent in arrear. The plaintiff in replevin, after craving oyer of the deed by which the rent alleged to be in arrear was reserved, pleaded the statute of usury in bar of the claim. The plea alleged that the contract between the parties was a corrupt and usurious lending of the sum of $5,000, upon an interest of ten percentum per annum.

Other issues were joined in the cause, but they are not noticed because they are of no importance.

On the trial, the plaintiff in replevin offered Jonathan Scholfield as a witness, who was objected to by the avowant, but admitted by the court, and to this admission the avowant excepted.

In support of his objection to the competency of the witness, the counsel for the avowant exhibited a deed executed on 11 June, 1814, by Scholfield and wife to William S. Moore,

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by whose authority the distress was made, by which the said Scholfield and wife, in consideration of $5,000 paid by the said Moore to the said Scholfield, granted to the said William S. Moore his heirs and assigns forever, one certain annuity or rent of $500, to be issuing out of and charged upon a lot of ground, and four brick tenements and appurtenances thereon erected, lying in the Town of Alexandria,

and particularly described in the deed.

Also a deed between the said Scholfield and wife of the first part, John Lloyd the plaintiff in replevin of the second part, and Andrew Scholfield of the third part; conveying to the said John Lloyd the lot out of which the annuity or rent charge of $500, had been granted to William S. Moore. This deed contains several covenants, and, among others, a stipulation that the lot shall remain subject to the annuity to William S. Moore.

Also the following letter from Scholfield to Lloyd.

"Alexandria, June 9 1824"

"Sir -- As you hold under me the property on which I granted a rent charge of $500 a year to William S. Moore, I now give you notice, the contract by which that rent charge was created I consider to be usurious, and that I shall take measures to set aside the same, and I hereby require you to withhold from William S. Moore the payment of any further money on account of this rent charge, and in case distress should be made upon you for the rent, I promise to save you harmless if you will resist the payment by writ of replevy. I wish you to understand that if you make any further payments after receiving this notice, that you make them at your own risk."

"I am with great respect, yours,"

"JONATHAN SCHOLFIELD"

"To Mr. JOHN LLOYD."

This letter was delivered to Mr. Lloyd on the day of its date.

Also a deed of 18 November, 1826, from said Scholfield, making a conditional assignment of one-fifth of said annuity of $500 to Thomas K. Beale in which he recites and

acknowledges his responsibility to Lloyd, on account of the distress for rent made by William S. Moore.

Also an exemplification of the record of the proceedings in the County Court of Fairfax, in the Commonwealth of Virginia, upon the insolvency and discharge of the said Scholfield as an insolvent debtor in May, 1822.

Whereupon the plaintiff in replevin, to support the competency of the said Scholfield, laid before the court the following documents.

A release from said Scholfield to the plaintiff in replevin, dated 13 June, 1831, whereby said Scholfield, in consideration of $5,000 released to him by the said Lloyd, out of a debt due by him to Lloyd, grants to said Lloyd all the right, title, and interest which he has or may have from the decision of the suit depending for the annuity or rent charge granted to Moore or which he has or may have thereafter to the brick buildings upon which the said annuity or rent charge is secured. He also releases the said Lloyd from all covenants or obligations, expressed or implied, arising out of the deed of assignment from him to said Lloyd, and also from all claims, &c.;, which now exist or may hereafter arise out of the said deed, &c.; Also a release from the same to the same, dated 25 April, 1828, in which Scholfield releases to Lloyd all his right, &c.;, to the said suit, &c.;, and to all sums of money which may accrue, and from all actions, &c.;, on account of the said suit, &c.;

Also a release of the same date from Thomas K. Beale and James M. McCrea releasing the said Jonathan Scholfield from $950, part of a debt of $2,000 due from him to them.

Also a release from Joseph Smith, of same date, releasing $1,150, part of a debt of $3,000 due to him from said Scholfield.

Also a release of William Veitch and Benoni Wheat discharging the said Scholfield from $250, part of a debt of $800 due to them from him.

Also an engagement of John Lloyd dated 25 April, 1828, binding himself to the several persons who executed the foregoing releases for the several sums

released by them in the

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event of his succeeding in the suit then depending between himself and Charles Scott, bailiff of William S. Moore.

Also a release from John Lloyd, stating, that whereas Jonathan Scholfield stood indebted to him in a large sum of money, he had agreed to release, and did thereby release the said Scholfield from $5,000, part of the said debt.

In discussing the competency of the witness, some diversity of opinion prevailed on the question whether he could be received to invalidate a paper executed by himself, but without deciding this question, a majority of the Court is of opinion that he is interested in the event of the suit. His letter of 9 June to John Lloyd, the tenant in possession, requiring him to withhold from William S. Moore the payment of any further sum of money on account of this rent charge, contains this declaration:

"And in case distress should be made upon you for the rent, I promise to save you harmless if you will resist the payment by writ of replevy. I wish you to understand that if you make any further payments after receiving this notice, that you make them at your own risk."

This is an explicit and absolute undertaking to assume all the liabilities which Mr. Lloyd might incur by suing out a writ of replevin, if an attempt should be made to levy the rent by distress. Mr. Scholfield then is responsible to Mr. Lloyd for the costs of this suit. This is a plain and substantial interest in the event of the suit, from which Mr. Lloyd alone can release him. This liability was incurred before the sale and release from Scholfield to Lloyd of 13 June, 1831, and Mr. Scholfield's responsibility depended on the decision of the suit in which he was called as a witness, unless his release to and contract with Lloyd of 13 June, 1831, could discharge him from it. That contract transferred to Lloyd all the interest of Scholfield in the ground charged with the rent to Moore, but did not transfer with it his obligation to save Lloyd harmless for resisting the claim of Moore to the rent in

arrear. It produced a state of things which removed all motives, on the part of Scholfield, for incurring fresh liabilities, but did not discharge him from liabilities already incurred. It placed in his hands the entire management of the suit, but did not enable him to undo what was done or to relieve himself from the claim of Moore to costs should the suit terminate in his favor.

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The responsibility of Lloyd to Moore continued, and the correlative responsibility of Scholfield to Lloyd still continued also, unless Lloyd had released him from it. Now there is no expression in the contracts between the parties which purports to be such a release. It has been inferred as the result of the change in the situation of the parties, but we do not think the inference justified by the fact. The obligation is unequivocal; is expressed in plain and positive terms; is dependent on the event of a suit, and independent of the ownership of the property. The parties enter into a contract by which the property is transferred, without making any allusion to this obligation. It remains, we think, in full force, and consequently Jonathan Scholfield was an interested and incompetent witness.

In the progress of the examination, the plaintiff's counsel put to the witness the following question:

"Did you, in the course of your discussions as to the time you were to keep the money, state your object in the application to be to have the use of the $5,000 for a limited time?"

To which the defendant's counsel objected as being a leading interrogatory. The plaintiff's counsel then varied the question as follows: "Did you or did you not, in the course of your discussions," &c.;

To which the defendant's counsel made the same objection, but the court overruled the objection and permitted the question to be put, and the defendant excepts to that decision.

Although the plaintiff's counsel objected to this question and said that he excepted to the opinion of the court, no exception is actually prayed by the party, or signed by the judge. This Court therefore cannot consider the exception as actually taken, and must suppose it was abandoned.

Evidence was given by the plaintiff in replevin conducing to prove that the contract between Scholfield and Moore under which the sum of $5,000 was advanced by the latter to the former originated in an application for a loan of money, not for the purchase and sale of a rent charge or annuity. Scholfield applied to Moore to raise or borrow $5,000, securing him on an annuity or ground rent for one year; Moore proposed to let him have the money for ten years on the same security. After much discussion, the parties agreed to split the

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difference, and that Scholfield should keep the money five years. Scholfield says his first proposition was to allow ten percent and to secure it by an annuity or ground rent on the houses mentioned in the deed. No other interest but ten percent was mentioned; Scholfield had no intention of selling the property. It was also in evidence that Moore was a money lender, and was in the habit of advancing money, secured on ground rents or annuities, and that Scholfield was a money borrower, and that the property was an ample security for the money lent and for the annuity.

On the part of the avowant it was proved that the usual value of those ground rents or annuities charged on lots in Alexandria was such as to afford an interest of ten percent per annum on the principal sum advanced, and it was admitted by Scholfield that he gave Moore no promise, stipulation, or security for the return of the $5,000, other than is contained in the deed itself.

Many witnesses were examined, and a great deal of testimony, bearing more or less directly on the contract, was adduced.

The deed from Scholfield and wife to W. S. Moore, by which, in consideration of $5,000, the annuity or rent charge of $500 per annum was created, contains a

covenant

"That the said J. Scholfield, his heirs and assigns, will well and truly pay to the said W. S. Moore his heirs and assigns, the said annuity or rent charge of $500 by equal half-yearly payments on 10 June and on 10 December in each year forever hereafter, as the same shall become due, and that if the same be not punctually paid, then it shall be lawful for the said W. S. Moore his heirs and assigns, from time to time, on every such default, to enter on the premises charged and to levy, by distress and sale of the goods and chattels there found, the rent in arrear and the costs of distress and sale, and if the same shall remain in arrear and unpaid for the space of thirty days after any day of payment as aforesaid, and no distress sufficient to satisfy the same can be found on the premises charged, then it shall be lawful for the said W. S. Moore, his heirs and assigns, to enter on the premises charged and from thence to remove and expel the said J. Scholfield, his heirs and assigns, and to hold and enjoy

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the same as his, and their, absolute estate forever thereafter. . . . And that the said J. Scholfield, his heirs and assigns, will forever hereafter keep the buildings and improvements which now are or hereafter may be erected on the premises charged fully insured against fire in some incorporated insurance office, and will assign the policies of insurance to such trustees as the said W. S. Moore his heirs or assigns, may appoint, to the intent that if any damage or destruction from fire shall happen, the money received on such policies may be applied to rebuilding or repairing the buildings destroyed or damaged."

"And lastly that he and his heirs will forever warrant and defend the annuity or rent charge hereby granted to the said W. S. Moore his heirs and assigns, against any defalcation or deduction for or on account of any act of him, his heirs or assigns."

The deed contained a further covenant that if at any time after five years the said J. Scholfield should pay to the said W. S. Moore the sum of $5,000, with all arrears of rent, &c.;, the said W. S. Moore will execute any deed releasing or extinguishing

the said rent or annuity.

When the testimony was closed, the counsel for the defendant and avowant prayed the court to instruct the jury

"That the contract between said Jonathan Scholfield and William S. Moore such as it is evidenced by the deed from said Scholfield and wife to said Moore set out in the proceedings, and given in evidence by the plaintiff as aforesaid, was lawful and free of the taint of usury, and in order to impeach it of usury, and support the issues of fact joined in this cause on the part of the plaintiff, it is necessary for the plaintiff to prove that besides the contract imported by the terms of said deed, there was an actual contract between said Scholfield and Moore for the loan of $5,000 as usurious interest, to-wit, at the rate of ten percent per annum, to be disguised under the form and name of an annuity or rent charge, and that such sum was actually lent by said Moore to said Scholfield, and said deed given in pursuance and execution of such contract and loan, securing the said usurious interest under the form and name of such annuity or rent charge; that the facts given in evidence to the jury as aforesaid to support the issues above joined on the part

of the plaintiff, did not import such a lending of money by Moore to Scholfield at usurious interest, as was sufficient to support the issues joined on the part of the plaintiff in replevin, upon the second and fourth pleas by the plaintiff in replevin, pleaded to the cognizance in this case."

Which instruction the court refused to give, to which refusal the defendant and avowant by his counsel prayed an exception, which was signed.

The substantial merits of the case are involved in the subsequent instructions which the court actually gave, and it will be apparent when we proceed to the consideration of those instructions that if they ought to have been given, this ought to have been refused. There are, however, objections to the manner in which these instructions are framed which ought not to have been overlooked by the

court. The statute against usury not only forbids the direct taking of more than six percentum per annum for the loan or forbearance of any sum of money, but it forbids any shift or device by which this prohibition may be evaded and a greater interest be in fact secured. If a larger sum than six percent be not expressly reserved, the instrument will not of itself expose the usury, but the real corruptness of the contract must be shown by extrinsic circumstances which prove its character. Those circumstances must, of course, be viewed in connection with the contract. The counsel for the avowant asks the court to separate the instrument from its circumstances and to inform the jury that the instrument itself was lawful and free from the taint of usury, and that to fix this taint upon it, the plaintiff in replevin must prove, besides the contract in the deed, an actual contract stipulating interest at the rate of ten percentum per annum for the loan of $5,000. Had this instruction been given, circumstances which demonstrated the intention of the parties and explained completely the contract actually made, if such existed, must have been disregarded by the jury. The court is next requested to say to the jury that the facts given in evidence did not import such a lending as would support the issue.

The court is thus asked to usurp the province of the jury and to decide on the sufficiency of the testimony, in violation of the well established principle that the law is referred to the court,

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the fact to the jury. The court did not err in refusing to give this instruction.

"The plaintiff then prayed the court further to instruct the jury that the matters shown in evidence to the jury as aforesaid are proper for the consideration of the jury to determine, from the whole evidence, under the instruction of the court, as already given to them in this cause, whether the said contract so made between the said Moore and Scholfield was in substance and effect a loan at usurious interest or a *bona fide* contract for the bargain and sale of a rent charge, and if the jury, from the said whole evidence under the instructions as aforesaid, shall believe it to have been such a loan, they should find for the plaintiff; if otherwise,

for the defendant."

The court gave this instruction, and the defendants excepted to it. Its correctness is now to be examined.

The statute declares "that no person shall, upon any contract, take, directly or indirectly, for loan of any money," &c.;, "above the value of six, for the forbearance of one hundred for a year," &c.;

It has been settled that to constitute the offense, there must be a loan upon which more than six percent interest is to be received, and it is also settled that where the contract is in truth for the borrowing and lending of money, no form which can be given to it will free it from the taint of usury if more than legal interest be secured.

The ingenuity of lenders has devised many contrivances by which, under forms sanctioned by law, the statute may be evaded. Among the earliest and most common of these is the purchase of annuities secured upon real estate or otherwise. The statute does not reach these, not only because the principal may be put in hazard, but because it was not the intention of the legislature to interfere with individuals in their ordinary transactions of buying and selling or other arrangements made with a view to convenience or profit. The purchase of an annuity, therefore, or rent charge, if a *bona fide* sale, has never been considered as usurious, though more than six percent profit be secured. Yet it is apparent that if giving this form to the contract will afford a cover which conceals it from judicial investigation, the statute would become a dead letter. courts therefore perceived the necessity of disregarding the

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form and examining into the real nature of the transaction. If that be in fact a loan, no shift or device will protect it.

Though this principle may be extracted from all the cases, yet as each depends on its own circumstances, and those circumstances are almost infinitely varied, it

ought not to surprise us if there should be some seeming conflict in the application of the rule by different judges. Different minds allow a different degree of weight to the same circumstances.

King v. Drury, 2 Lev. 7, is a very strong case in favor of the avowant, and has been much pressed on the court by his counsel.

Brown agreed to assign to Drue a lease of a house for forty years for the sum of 300. Drue not having the money, Drury, by agreement with Drue, paid the 300, took the assignment to himself, and then let the house to Drue for thirty-nine and three quarter years at a rent, of which 30 was payable to himself. Drury covenanted that if at the end of four years, Drue paid the 300, he would convey the residue of the term to Drue. Per Hale, C.J.:

"This is not usury within the statute, for Drue was not bound to pay the 300 to Drury. . . . It is no more in effect than a bargain for an annuity of 30 pounds yearly, for thirty-nine and three quarter years, for 300 to be secured in this manner, determinable sooner if the grantor pleases, but the grantee hath no remedy for his 300. . . . And so the acceptance of the 7 10 shillings is not usury. But if Drury had taken security for the repayment of the 300, or it had been by any collateral agreement to be repaid, and all this method of bargaining a contrivance to avoid the statute; this had been usury."

This case has been cited to prove that, without an express stipulation for the repayment of the money advanced, a contract cannot be usurious, whatever profit may be derived from it. It must be admitted that although Lord Hale does not say so in terms, the case, as reported, countenances this construction. But the accuracy of the report must be questioned, and it is believed that such a principle would not now be acknowledged in the courts of England.

Chief Justice Hale considers the transaction simply as a bargain for an annuity, not as a loan of money. Whether

the circumstances of the case warranted this conclusion or not, it is the conclusion he drew from them. The negotiation between Drue and Drury by which the latter advanced the money became the assignee of the term, and then loaned it to the former, accompanied with a power of redemption, are totally overlooked by the judges. It had no influence on the case. It was not considered as affording any evidence that the transaction was in reality a loan of money. The principle of law announced by the judge is simply that a bargain for an annuity is not usury. He adds that if the repayment of the 300 had been secured and all this method of bargaining a contrivance to avoid the statute, this had been usury.

He connects the bargaining, being a contrivance to avoid the statute, with a security for the repayment of the sum advanced, as if he thought this security indispensable to the effect of the bargaining, without which the contract could not be usurious.

It is obvious that if this inference of law from the fact be admitted without qualification, it will entirely defeat the statute. If an express stipulation for the repayment of the sum advanced be indispensable to the existence of usury, he must be a bungler indeed who frames his contract on such terms as to expose himself to the penalties of the law. If a man purchases for $500 an annuity for 200 per annum redeemable at the will of the grantor in ten years, without any express stipulation for the repayment of the $500, this, according to *Drury's Case,* as reported, would be no more than a bargain for an annuity; and yet the grantor would receive excessive usury, and the grantee would be compelled, by the very terms of the contract, to repay the $500 as certainly as if he had entered into a specific covenant for repayment, on which an action could be maintained. Lord Hale cannot have intended this. He has not said so in terms, and we must believe that he did not mean to require more than that the contract should not be such as, in effect, to secure the principal sum advanced with usurious interest. It would be a very unusual stipulation in the grant of an annuity that the money should be returned otherwise than by the annuity itself.

So in *Finch's Case,* reported in Comyn on Usury 43, Canfield secured to Finch more than the legal interest on the money

advanced by a rent issuing out of land, and the court determined that it was not usury, though Canfield had applied for a loan of money which Finch refused, offering at the same time to let him have the sum by way of annuity or rent. This was held not to be usurious. "This," said the court, "is not a contract commenced upon a corrupt cause, but an agreement for a rent which it is lawful for everyone to make." But it was said that if twelve pounds in the hundred had been offered to be paid (the legal interest was then ten percent) and the other had said that he would accept it, but that this would be in danger of the law, and therefore he did not like to contract upon these terms, but that if the other party would assure him an annual rent for his money then he would lend it, and upon this an agreement for the rent had been made; this would have been within the statute. The same principle is decided in Cro.James 252. These cases turn on the evidence which shall be sufficient to prove a loan to be the foundation of the contract, but do not withdraw the case from the statute, if a loan be its foundation. They decide that a mere application for a loan does not convert a subsequent annuity, which yields a profit beyond legal interest, into a usurious contract; but that an actual contract for the loan, if converted into an annuity in order to avoid the law, is within the statute.

In these cases, the court decides upon the fact and determines that a variation in it, the importance of which is not distinctly perceived, would bring the contract within the law. In all of them, we think it probable that a court of the present day would leave it to the jury to say whether the contract was a fair purchase or a loan, and would direct the jury to find for the plaintiff or defendant as their opinion on that fact might be.

In *Fuller's Case,* 4 Leon. 208, and in *Symonds v. Cockrell,* Noy 151 and Brownlow 180, a distinction is taken between the purchase of an annuity without any communication respecting a loan and a purchase where the negotiation commences with an application to borrow money, though no contract of loan followed such application.

In a case between Murray and Harding reported in Comyns on Usury 51, Markham, an attorney, at the request of Robert Harding, rector of Grafton Regis, applied to Mrs. Mary Murray to lay out 120 in the purchase of an annuity

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of 20 a year for the defendant's life, charged on his rectory of Grafton, redeemable by him at the end of the first five years upon the payment of 109 10 shillings. There was no communication with her about a loan, but merely about the purchase of such redeemable annuity, although Harding had mentioned to his attorney Markham, a wish to borrow 100 or upwards.

This case was brought before the court. In giving his opinion on it, Chief Justice De Grey said,

"Communication concerning a loan has sometimes infected the case and turned the contract into usury, but then the communication must be mutual. . . . I know no case where even a meditated loan has been *bona fide* converted into a purchase and afterwards held to be usurious. To be sure, it is a strong and suspicious circumstance, but if the purchase comes out to be clearly a *bona fide* purchase, it will notwithstanding be good."

"If a power of redemption be given, though only to one side, it is a strong circumstance to show it a loan, as in *Lawley v. Hooper.* But that alone will not be conclusive."

The Chief Justice added, "in the present case, the principal is precarious and secured only by the life of a clergyman, and his continuing to be beneficed."

In *Lawley v. Hooper,* 2 Atk. 278, Thomas Lawley, being entitled to an annuity of 200 a year for life; sold 150, part thereof, to Rowland Davenant for 1,050, with power to repurchase, on giving six months notice. After the death of Davenant, Lowry brought this bill against his executors for an account, and that upon payment of what should be due, the defendants might reassign the annuity to the plaintiff.

In giving his opinion, the Chancellor said,

"There has been a long struggle between the equity of this court and persons who have made it their endeavor to find out schemes to get exorbitant interest and to evade the statutes of usury. The court very wisely hath never laid down any general rule beyond which it will not go."

"In this case, there are two questions to be considered. 1. Whether this assignment is to be considered as an absolute sale, or a security for a loan."

"As to the first, I think, though there is no occasion to

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determine it; there is a strong foundation for considering it a loan of money, and I really believe in my conscience that ninety-nine in a hundred of these bargains are nothing but loans, turned into this shape to avoid the statutes of usury."

The Chancellor then proceeds to state the circumstances under which the contract was made and the character of the contract itself, and although there was no treaty about a loan, he considers it as one. After enumerating the circumstances, he concludes with saying,

"Therefore, upon all the circumstances, I think it was and is to be taken as a loan of money turned into this shape only to avoid the statute of usury, but I do not think I am under any absolute necessity to determine this point, for I am of opinion that this is such an agreement as this court ought not to suffer to stand, taking it as an absolute sale."

The relief asked by the plaintiff in his bill was granted.

In the noted case of *Chesterfield, Executor of Spencer v. Janssen,* reported in 1 Atk. and 1 Wils., 5,000 was advanced by Janssen on the bond of Mr. Spencer, to pay 10,000 should be survive the Duchess of Marlborough. After the death of Mr. Spencer, this bond was contested by his executor, and one of the points made was that it was usurious. The cause was argued with great ability, and determined

not to be within the statutes because the principal was in hazard. In giving this opinion, the judges define usury in terms applicable to the present case. "To make this contract usurious," said Mr. Justice Burnet,

"it must be either because it is within the express words or an evasion or shift to keep out of the statutes. . . . Whatever shift is used for the forbearance or giving day of payment will make an agreement usurious, and is by a court and jury esteemed a color only. Suppose a man purchase an annuity at ever such an under price; if the bargain was really for an annuity, it is not usury. If on the foot of borrowing and lending money, it is otherwise, for if the court is of opinion the annuity is not the real contract, but a method of paying more money for the reward or interest than the law allows, it is a contrivance that shall not avoid the statute."

The Lord Chancellor said,

"If there has been a loan of money and an insertion of a contingency which gives a higher rate of interest than the statutes allow, and the contingency goes to

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the interest only, though real and not colorable, and notwithstanding it be a hazard, yet it has been held usurious. Where the contingency has related to both principal and interest, and a higher interest taken than allowed by the statute, the courts have then inquired whether it was colorable or not."

Wilson reports the chancellor to have said,

"Courts regard the substance and not the mere words of contracts. Loans, on a fair contingency to risk the whole money, are not within the statute; a man may purchase an annuity as low as possible, but if the treaty be about borrowing and lending, and the annuity only colorable, the contract may be usurious, however disguised."

Richards qui tam v. Brown, Cowper 770, was an action on the statute of usury. Richard Heighway applied to Brown for a loan of money, to which Brown assented, and advanced part of the money, promising to advance the residue,

being 400, in a fortnight. After some delays, Brown said he could not raise the money himself, but would try to get it of a friend in the city, who was a hard man. Heighway said he would give twenty or thirty guineas rather than not have the money. Brown said, "that his friend never lent money but on an annuity at six years purchase. However," he added, "if you will take the money on those terms, I will engage to furnish you with money to redeem in three months' time." Heighway executed a bond and warrant of attorney, for conveying the annuity to one Waters. The money was really advanced by Brown, and the name of Waters was used by him. Heighway deposed that Brown first proposed the annuity. He himself would not have granted one. Heighway pressed for the money to redeem, but Brown refused it.

Lord Mansfield told the jury that if they were satisfied,

"That, in the true contemplation of the parties, this transaction was a purchase by the one, and a sale by the other, of a real annuity, how much soever they might disapprove of, or condemn the defendant's conduct, they must find a verdict for him. But on the contrary, if it appeared to them to have been in reality and truth, the intention of both parties, the one to borrow and the other to lend, and that the form of an annuity was only a mode forced on the necessity of the borrower by the lender, under color of which he might take an usurious and exorbitant

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advantage, then they might find for the plaintiff, notwithstanding the contingency of the annuitant dying within three months."

The jury found for the plaintiff.

On a motion for a new trial, Lord Mansfield said,

"The question is what was the substance of the transaction and the true intent and meaning of the parties, for they alone are to govern, and not the words used. The substance here was plainly a borrowing and lending. Heighway had no idea of selling an annuity, but his declared object was to borrow money. . . . It is true there

was a contingency during three months. It was that which occasioned the doubt whether a contingency for three months is sufficient to take it out of the statute."

The new trial was granted.

In the case of *Irnham v. Child,* 1 Br.Ch. 93, Lord Thurlow is reported to have said (referring to previous *dicta*),

"all therefore that seems to be meant is this that the annuity shall be absolutely sold without any stipulation for the return of the principal, and that it shall not be intended as a means of paying interest until such principal is returned. But where there is a sale it is not usurious to make it redeemable."

In *Drew v. Power,* 1 Schoales & Lefroy 182, the plaintiff being much embarrassed in his circumstances, communicated to the defendant his desire to raise money to extricate himself from his debts. After approving his purpose and increasing sufficiently his anxiety for its accomplishment, the defendant informed him that two of his estates, Poulagower and Knockavin, would shortly be out of lease, and that if he would make the defendant a lease of them for three lives, at the rent of 200 per annum, he would, from friendship, advance him money sufficient to pay all his debts. The plaintiff assented to this proposition. The bill then proceeds to charge much unfairness and oppression on the part of the defendant in making advances towards paying the debts of the plaintiff, and states that he claimed a balance of 1,015 and 15 shillings, for which he demanded the plaintiff's bond. This was given. The defendant then required a lease for Poulagower and Knockavin, which was executed for three young lives, at the rent of 200 per annum, which was greatly below their value. The defendant also obtained other leases from the plaintiff.

The bill details a great variety of other transactions between the parties, which are omitted as being inapplicable to the case now before this Court. The bill was brought for a full settlement of accounts, and that on payment of the balance fairly due to the defendant, the leases he had obtained from the plaintiff might be set aside.

The defendant, in his answer, denied the charges of oppressive and iniquitous conduct set up in the bill, and insisted that the lands called Poulagower and Knockavin, having been advertised to be let, he agreed to take them at a valuation, and insisted that he paid a fair rent for them.

The cause came on to be heard before the Master of the Rolls, who directed several issues to try whether the full and fair value of the lands were reserved on the leases granted by the plaintiff to the defendant, and whether either, and which of them were executed, in consideration of any and what loan of money, and from whom.

The case was carried before the Lord Chancellor, who disapproved the issues, and gave his opinion at large on the case. After commenting on the testimony respecting the leases, he says,

"Hastings has distinctly proved, that the loan of money was the inducement to this lease, and if it was, it vitiates the whole transaction. I do not mean advancing money by way of fine or the like, but where it is a distinct loan of money to a distressed man, for which security is to be taken, and he is still to continue a debtor for it. If I were to permit this to be considered as a transaction which ought to stand, I should permit a complete evasion of the statute of usury."

The chancellor concluded a strong view of the testimony, showing a loan of money to be the consideration on which the leases were granted, with saying, "there is no reason to send this case to a jury. . . . There is sufficient to satisfy the conscience of the court, that these leases ought not to stand."

The case of *Marsh v. Martindale,* 1 Bos. & Pul. 153, was a judgment on a bond for 5,000. The consideration on which the bond was given, was a bill drawn by Robert Wood on Martindale, Filet & Co., for 5,000, payable three years after date. The bill was accepted, the interest discounted by Sir Charles Marsh, and the residue of the money paid to

Martindale, for the purpose of enabling him to discharge certain annuities for which he was liable.

On a motion for a new trial, Lord Alvanley, Chief Justice, said,

"It was contended that the transaction was to all intents a purchase of an annuity, and this certainly was the strongest ground which the plaintiff could take, for it has been determined in all the cases on the subject, that a purchase of an annuity, however exorbitant the terms may be, can never amount to usury. But if the transaction respecting the annuity be under cover for the advancement of money by way of loan, it will not exempt the lender from the penalty of the statute, or prevent the securities from being void. Then is this transaction the purchase of an annuity or is it not?"

After restating the transaction, the judge asked "what is this but forbearing for three years to take the sum of 4,250, for which forbearance, he was to receive interest on 5,000."

The judge referred to the case in Noy 151 as applicable to this. "There," he said,

"a question having arisen, whether a deed securing a rent charge were void for usury, the court agreed that if the original contract were to have a rent charge, that is not usury, but a good bargain;, but if the party had come to borrow the money, and then such a bargain had ensued by security, then that is usury."

Doe, on the demise of Grimes, assignees of Hammond (a bankrupt) v. Gooch was an ejectment. Hammond had taken ground on a building lease at the rent of 108 per annum. He assigned the premises to Roberts for 2,300, a sum considerably above their then value, and at the same time took a lease from Roberts at the increased rent of 395, containing the same covenants for building as were in the original lease, together with a stipulation that he should be at liberty, on giving six months' notice, to repurchase the premises at the same price for which he had sold them to Roberts. Hammond completed the houses, and, having become a bankrupt, his assignees brought this action against the tenant of Roberts. The judge left it to the jury to say whether the transaction between

Hammond and Roberts was substantially a purchase or a loan, and told them "that if they thought it was a loan, the deeds were void, the transaction being usurious." The jury found a verdict for the

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plaintiff. On a motion for a new trial, counsel contended that the deeds imported a purchase. That the principal money was altogether gone, unless Hammond chose to redeem, and, though it may be his interest so to do, this will not make it an usurious transaction. If a person have an annuity secured on a freehold estate, it may be clearly his interest to redeem it, but such a power will not make the bargain usurious. Here Bailey, Justice, observed,

"in that case, the principal is in hazard from the uncertain duration of life. Here it is in the nature of an annuity for years, and there is no case in which an annuity for years has been held not to be usurious where, on calculation, it appeared that more than the principal, together with legal interest, is to be received."

The new trial was refused.

In the case of *Low v. Waller,* Doug. 735, Lord Mansfield told the jury,

"that the statute of usury was made to protect men who act with their eyes open; to protect them against themselves. . . . They were to consider whether the transaction was not in truth a loan of money, and the sale of goods a mere contrivance and evasion."

The jury found the contract to be usurious. On a motion for a new trial, Lord Mansfield said, "the only question in all cases like the present is what is the real substance of the transaction, not what is the color and form."

Gibson v. Fristoe, 1 Call 62, was an action of debt brought by Gibson against Fristoe, in the District Court of Dumfries. Issue was joined on the plea of the statute of usury. Verdict and judgment for the defendant, and appeal to the Court of Appeals.

The case was shortly this, John Fristoe being indebted to John Gibson, by bond, for 445, 11 shillings, and 2 pence sterling, on 17 December, 1787, assigned him bonds of perfectly solvent obligors for 780 currency, at the agreed value of 382, 8 shillings, and 2 pence sterling, and gave a new bond with two sureties for a balance of 106, 17 shillings, and 2 pence sterling, payable in March following.

Mr. Washington, for the appellant, said,

"in all these cases the first inquiry is if there be a loan. I admit that if a real loan is endeavored to be covered under any disguise whatever, it is still usury."

He contended that here was no loan, "but a purchase of property, for bonds are property."

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In giving his opinion, Mr. Pendleton, the president of the Court of Appeals, said,

"An agreement by which a man secures to himself, directly or indirectly, a higher premium than six percent for the loan of money, or the forbearance of a debt is usury. If the principal or any considerable part be put in risk, it is not usury, because the excess in the premium is the consideration of that risk. . . . But if the bargain proceeds from and is connected with a treaty for the loan or forbearance of money, it is usury, because the vendor is supposed to have submitted to a disadvantageous price under the influence of that necessity which the statute meant to protect him against."

The judgment of the circuit court was affirmed.

Clarkson's Administrator v. Garland, and another reported in 1 Leigh was a bill in chancery, brought by the plaintiff to be relieved against several contracts, bonds and deeds of trust, alleged to be usurious. The bill states numerous usurious and oppressive transactions, which are generally and particularly denied in the answers. Testimony was taken, and the case, so far as it is applicable in principle to that under consideration, is thus stated.

Clarkson, wanting to raise $2,235, applied to Jacobs, and offered him as many slaves as would command that sum. Jacobs advanced him, on 23 March, 1815, $2,335, and took an absolute bill of sale for sixteen slaves. It was at the same time agreed that the slaves should remain in Clarkson's possession on hire for one year, and if at the end of the year, Clarkson shall pay Jacobs $2,935, Jacobs shall, in consideration thereof, resell the slaves to him. The plaintiff charged that his application to Jacobs was to borrow money, and that the substance of the transaction was a loan, reserving a higher interest than is allowed by law.

On 22 May, Clarkson again applied to Jacobs, and obtained from him the further sum of $2,666.26 cents. For this sum he also gave Jacobs a bill of sale for fourteen slaves, redeemable by the payment of $3,394 on or before 23 March, 1816.

The plaintiff avers that this also was a loan, and that the pretended sale of slaves was a device to cover the taking of usurious interest.

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Jacobs, in his answer, avers that both contracts were in truth what they purport to be, *bona fide* agreements to purchase and resell the slaves therein mentioned.

The slaves not being redeemed, Garland, with full knowledge of the usury, as the bill charges, became jointly interested with Jacobs in both contracts. In August, 1816, they procured Clarkson's bond for $7,000, being the aggregate of both debts, with further usury for forbearance.

The court declared both contracts to be usurious.

Douglass v. McChesney, 2 Randolph 109, was a bill, to be relieved from two bonds and a deed of trust, given by the plaintiff to the defendant. The bill states that Douglass applied to McChesney to borrow $500; McChesney replied that it was his practice, whenever he lent money, to sell a horse, which Douglass professed his willingness to purchase. Sometime afterwards the complainant went by appointment to the house of McChesney, who showed him a horse for which he

asked $400. The plaintiff avers that the horse was not worth more than $80 or $100, but urged by his necessities, and knowing that he could not get the $500 from McChesney, without giving his price for the horse, he assented to the proposal, and executed two bonds for the money, which were secured by a deed of trust. When the bonds became due, McChesney advertised the property for sale, and this bill was brought to enjoin further proceedings, and to be relieved.

The testimony proved that the horse was not worth more than $100, and that it was reported to be McChesney's practice when he lent money, to sell a horse at an exorbitant price to cover an usurious gain.

The chancellor dissolved the injunction, and the plaintiff appealed.

The Court of Appeals was of opinion that a tacit understanding between the parties, founded on a known practice of the appellee to lend money at legal interest, if the borrower purchased of him a horse at an unreasonable price, would be a shift to evade the statute of usury.

The decree was reversed, but the court being of opinion that the questions of fact would be decided more understandingly by a jury on *viva voce* testimony, remanded the cause

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to the court of chancery, with directions to have issues tried to ascertain the value of the horse, and whether Douglass was induced to purchase him at the price of $400 by the expectation of a loan.

The covenants in the deed of 11 June, 1814, granting the annuity, have been stated. They secure the payment of ten percent forever on the sum advanced. There is no hazard whatever in the contract. Moore must, in something more than twenty years, receive the money which he advanced to Scholfield, with the legal interest on it, unless the principal sum should be returned after five years, in which event he would receive the principal with ten percent interest till repaid. The deed is equivalent to a bond for $5,000, amply secured by a mortgage on real property,

with interest thereon at ten percentum per annum, with liberty to repay the principal in five years. If the real contract was for a loan of money, without any view to a purchase, it is plainly within the statute of usury; and this fact was very properly left to the jury. There is no error in this instruction.

The counsel for the defendant then prayed the court to instruct the jury, that if they shall believe from the evidence aforesaid, that the land out of which the said rent charge mentioned in said been from Scholfield to Moore was to issue, was in itself, and independently of the buildings upon the same, wholly inadequate and insufficient security for said rent; that then the jury cannot legally infer, from the clause in said deed, containing a covenant on the part of said Scholfield to keep the said houses insured, anything affecting said contract with usury or illegality, which instruction the court refused, whereupon the defendant prayed the court to instruct the jury as follows, to-wit, that if the jury shall believe from the evidence, that the fair and customary price of annuities and rent charges, at the date of the said deed from Scholfield, was in the market of Alexandria ten years' purchase, and so continued for a period of years; then, from the circumstances of the rent being ten percentum on the amount advanced, the jury cannot legally infer from such circumstance, anything usurious or illegal in the contract.

But the court refused to grant the said instructions, or either of them, as prayed by the counsel for the defendant, whereupon,

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the said counsel excepted to the said opinion of the court, and its refusal to give either of the said instructions as prayed.

It is obvious that the instructions given by the court, at the prayer of the plaintiff's counsel, cover the whole matter contained in this prayer of the defendant. It is, in truth, an effort to separate the circumstances of the case from each other, and to induce the court, after directing the jury that they ought to be considered together, to instruct them that, separately, no one of them amounted in itself to usury. The court ought not to have given this instruction. It was proper to submit the case,

with all its circumstances, to the consideration of the jury, and to leave the question whether the contract was, in truth, a loan, or the *bona fide* purchase of an annuity, to them.

There is no error in the opinion of the court refusing the second and fourth instructions prayed by the defendant and avowant in the court below, nor in giving the instructions prayed by the plaintiff in replevin, but this Court is of opinion, that the circuit court erred in deciding that Jonathan Scholfield was a competent witness for the plaintiff in that court. This Court doth therefore determine that the judgment of the circuit court be

Reversed and annulled, and that the cause be remanded to that court with directions to set aside the verdict, and award a venire facias do novo.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel, on consideration whereof it is ordered and adjudged by this Court, that the judgment of the said circuit court in this cause be, and the same is hereby reversed and annulled, and that this cause be and the same is hereby remanded to the said circuit court with directions to set aside the verdict and award a *venire facias de novo.*

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