Thomas Paterſon, Eſq. - - *Appellant*; Caſe 112.
Archibald Ogilvie, and Anthony Murray, Eſq. *Reſpondents.*

20th *April* 1724.

Proceſs—Qualified Condeſcendance.—In the reduction of a bond, bearing to be for money lent, for want of an onerous cauſe, the defender acknowledges that the conſideration was the future transfer of South Sea ſtock, and ſtates that ſuch transfer was afterwards made accordingly to the purſuer's order. This quality in the condeſcendance did not prove againſt the purſuers.

South Sea Company—Act. 7 G. 1. ſtat 2.

Foreign.—It was no nullity in a bond that it was executed in England, in the Scotch form.

Coſts.—An Affirmance with 40l. coſts to one reſpondent.

ON the 15th of Auguſt 1720, the reſpondents agreed to purchaſe from the appellant 1000*l.* South Sea ſtock, with the Midſummer dividend at 1150*l.* per cent, and the appellant gave to each of the reſpondents a note, obliging himſelf to transfer to each of them 500*l.* South Sea ſtock, with the Midſummer dividend, as ſoon as the books of the ſaid company opened; and the reſpondents executed a bond in the Scots form to the appellant for 11,500*l.* bearing to be for money lent and advanced, payable on the 25th of March then next.

Diſputes afterwards ariſing relative to this bond, the appellant on the 28th of September, raiſed and executed letters of inhibition in Scotland againſt both the reſpondents. In November following a bill was exhibited in their names in the Court of Chancery, againſt the appellant relative to this bond, and the South Sea ſtock; but they afterwards obtained an order to amend their bill, and ſoon after they took an order to diſmiſs the ſame.

The reſpondents thereupon brought an action againſt the appellant before the Court of Seſſion to reduce and ſet aſide the ſaid bond, as being without an onerous cauſe; for that the ſtock which was to have been transferred by the appellant, and which was the only conſideration of the bond never was transferred to them or their order. The Lord Ordinary on the 29th of July 1721, ordered both parties to condeſcend upon the facts in the caſe.

In obedience to this order, the appellant ſtated, that the true cauſe of the granting and delivery of the bond craved to be reduced was his granting and delivering to each of the purſuers an obligatory note for transferring to each of them 500*l.* South Sea ſtock, with the Midſummer dividend, which notes were granted in reſpect the books were then ſhut; and which 1000*l.* was accordingly on or about the 26th of Auguſt 1720, transferred to the purſuers their order *reſpective*, viz. to Mr. Powell of the South Sea Company; and that one of the purſuers having brought to the defender a permit for transferring the ſaid ſtock to Mr. Powell, upon a loan of 4000*l.* he at their deſire did accordingly transfer the ſame, and received the ſaid 4000*l.* and at their deſire, applied the ſame as

follows, viz. at the desire of Mr. Ogilvie 2000*l.* to the credit of Captain Abercromby's account with the defender; and at the desire of Mr. Murray, the other 2000*l.* was applied to Mr. Murray's own credit, in part of a note for 15,925*l.* due by him to the said defender; with which transfer and application of the 4000*l.*, the pursuers were so fully satisfied, that Mr. Ogilvie gave up to the defender the note, obliging him to transfer 500*l.* of the said stock to him; and Mr. Murray was content to have done the same, but declared he had lost his pocket book, and in it the said note. And the defender's procurators further declared that the Midsummer dividend was still ready to be transferred by the defender to the pursuers. And they stated that they made that acknowledgement under protestation, that the same should not be disjoined or separated, but that the same, and every part of it should be understood and received as the true matter of fact, which passed between the pursuer and defender, on which he was willing to make oath.

The respondents on the other hand jointly declared, that at the opening of the books, they concerted that they should cause transfer their two sums of 500*l.* stock to Colonel Francis Farquhar for their joint behoofs; but denied that such stock was transferred by their order, or with their approbation to Mr. Powell, for obtaining a loan of 4000*l.* Mr. Ogilvie acknowledged that the said obligatory note, granted by the defender to him, was retired by him to the defender upon verbal assurance that he had transferred to Colonel Farquhar for his behoof the said 500*l.* stock, which he afterwards discovered never to have been transferred either to Colonel Farquhar, or any other person having power from him.

The Court having upon the petition of the respondents directed the appellant to make answer to several other facts then charged by them, the appellant's procurators acknowledged that between the 22d of August 1720, and the 29th, the day of making the transferance to Powell on their behalf, he, the appellant, had made further transferance on the loan of 5000*l.* South Sea stock to Mr. Powell; that the loan stood charged on the appellant's account in the company's books, neither did they know of any document, or legal evidence for making it appear, that the said stock or the reversion thereof was truly vested in the pursuers, so as that they had access to redeem and sell, or dispose of it upon payment of the loan; and that the same was in trust in the appellants person, wherewith the respondents were satisfied when Mr. Ogilvie delivered up the note to the appellant; and that the appellant was always ready to deliver to the respondents an order on the treasurer of the South Sea Company, to entitle them to redeem the said stock, but the same was never demanded.

Thus far the respondents proceeded jointly in this action of reduction; but the respondent Murray who was indebted in a large sum of money to the appellant, having made some agreement with him, ordered the action to be deserted on his part.

After this the respondent Ogilvie proceeded in the action for himself, and prayed that the appellant should be ordered to condescend upon

upon what ſtock he was entitled to in his own right on the 15th of Auguſt 1720, or within ſix days thereafter. The Lord Ordinary made ſuch order accordingly, and the appellant offered in general terms to prove that at the time of the ſale he was entitled to a much greater quantity of ſtock than he ſold to the reſpondents, but he declined to ſet forth an account of all his tranſactions as unreaſonable.

Upon hearing the cauſe, the reſpondent inſiſted upon theſe grounds of reduction, 1ſt, that the bond was null, having been executed in England, in the Scotch form. 2dly, That the bond was granted without a valuable conſideration. 3dly, That in terms of the act of parliament 7 Geo. 1. ſtatute 2. it was void, the appellant not being poſſeſſed of, or entitled to the ſtock in terms of the act. And 4thly, That the contract being unperformed on the 29th of September, 1721, in terms alſo of ſaid act ought to have been regiſtered, which it was not, and that therefore the ſame was void and null. After a hearing upon theſe points, the Court on the 1ſt of Feburary 1724, "repelled the reaſon of reduction, "that the bond was executed in England, after the Scots form; but "found that the cauſe of granting the bond craved to be reduced, "was the defender's obligatory note, for transferring to the purſuer "Ogilvie 500*l.* capital South Sea ſtock, with the Midſummer "dividend; and that the defender's declaration of the ſpecial "fact does not qualify or prove that a transfer was accordingly "made, or that any benefit did accrue to the purſuer for the "500*l.* ſtock which ought to have been transferred: and alſo found "that the contract not having been performed, ought to have been "regiſtered, conformably to the act of Parliament; and alſo found, "that the defender not having given in a ſpecial condeſcendance "of any ſtock in his perſon, at the date of the bond, nor within "ſix days thereafter, he is preſumed to have had none."

The appeal was brought from "part of an interlocutory ſentence "or decree of the Lords of Seſſion, made the 1ſt day of February "1724." Entered 13 Feb. 1723-4.

Heads of the Appellant's Argument.

As the only proof made uſe of to ſet aſide the bond in queſtion was the acknowledgment of the appellant, that it was given in conſideration of an agreement for the ſale of ſtock; ſo if the reſpondents would take any benefit from that acknowledgement they muſt take it altogether, and admit that part likewiſe to be true which mentions that the ſtock was transferred to their order. If the reſpondents have taken this as their only proof, it would be extremely hard upon the appellant, if one part of the proof were to be ſupported, and the other not, eſpecially in a caſe where there were no parties to the real tranſaction, but the appellant and reſpondents. The actual tranſfer of the ſtock to the order of the reſpondents appears alſo by the circumſtance of the reſpondent Ogilvie's delivering up to the appellant his obligatory note, which was his ſecurity for the transfer of the ſtock, and the conſideration for granting the bond. And the reſpondent Murray would have done the ſame, had he not loſt his pocket book and the note in it.

The counter allegations of the reſpondent Ogilvie ought not to have been taken as true, without proof.

This transfer, like all others upon loans, was made abſolutely, without any power of redemption expreſſed; but theſe transfers being made to an officer named for that purpoſe, a retransfer would have been made at any time upon payment of the money. The appellant was always ready to have given the reſpondents any declaration, if they had deſired it, that the ſtock was theirs, but they never did.

With regard to the objections upon the act of parliament, that the tranſaction was not completed, the appellant transferred what he was deſired to do; and he always was willing upon payment of what was due to him upon the bond, to transfer the Midſummer dividend upon ſaid ſtock, and all the profits thereof to the reſpondents. But ſince the reſpondents gave the appellant a bond for the payment of a certain ſum of money, though that bond was given in conſideration of notes to transfer ſtock, yet there could be no occaſion to regiſter the ſame; for nothing is required by the act to be regiſtered but contracts for the ſale of ſtock, which in no ſenſe a bond for payment of money was; and eſpecially ſince before that act, the appellant had performed his part and transferred the ſtock. For the ſame reaſon the appellant was not obliged to make it appear, that he was poſſeſſed of ſtock at the time of granting the bond, or ſix days after. He was ready to prove that at the time he was entitled to a much greater quantity of ſtock, but he declined to give any account of his particular circumſtances, as he apprehends he might juſtly do.

Heads of the Reſpondent Ogilvie's Argument.

The confeſſion of a party would be entirely uſeleſs, if he were permitted to add other facts foreign to the queſtion, and that thoſe facts ſhould be taken to be true upon his bare allegation. In this caſe the appellant acknowledged, that though the bond was expreſſed to be for money lent, yet it was really given for ſtock, to be transferred at a future time; and this muſt be taken to be true. But *he muſt prove* that the ſtock was actually transferred. As he hath ſet forth the matter, ſeveral facts muſt be admitted inſtead of being proved; firſt that the reſpondent ordered him to transfer the ſtock to Powell; 2dly, That he ordered him to borrow and receive the money upon it; and 3dly, That he ordered him to apply that money to his own uſe, in diſcharge of a debt due to him from another perſon. And after all the appellant admits that the reſpondent could not have redeemed the ſtock if it had riſen, without an order from the appellant, and which never was given; nor does he pretend that he gave the reſpondent any note, or receipt whereby the latter might charge Captain Abercromby with the 2000*l.*

The reſpondent's note was gained from him by ſurprize, upon the appellant's affirming that he had transferred the ſtock to Colonel Farquhar, which was not true; and it is contrary to all law, that any one ſhould profit by his own deceit.

It appears even from the appellant's own ſhewing, that the contract was not performed; for he admits, that he transferred the ſtock to Powell, not in truſt for the reſpondent but for himſelf and that part of the ſtock, viz. 100*l.* was never transferred at all; and as to the other part of the contract, viz. the payment of the money, it is ſo far from being performed, that the appellant's action is to have a performance of it, and therefore it is plainly within the act, and is void, not having been regiſtered. And as the appellant declined condeſcending upon what ſtock he had, it muſt be held that he had none, and ſo the contract was alſo void by the act, on that account.

After hearing counſel *It is ordered and adjudged that the petition and appeal be diſmiſſed, and that ſo much of the interlocutory ſentence or decree as is therein complained of be affirmed; and it is further ordered, that the appellant do pay, or cauſe to be paid to the reſpondent Archd. Ogilvie the ſum of* 40l. *for his coſts in reſpect of the ſaid appeal.* Judgment, 20 April 1724.

For Appellant, *P. Yorke. Dun. Forbes. Will. Hamilton.*
For Reſpondent Ogilvie, *C. Wearg. C. Talbot.*

The reſpondent Murray in this caſe, put in a long and ſpecial anſwer, mentioning that the condeſcendance appearing in his name in Scotland, had been put in without his knowledge or conſent.

Thomas Paterſon, Eſq. - - *Appellant;* } Caſe 113.
Charles Cockburn, Eſq. - - *Reſpondent.*

11*th Jan.* 1724-5.

Mutual Contract, South Sea ſtock.—At compromiſing a tranſaction relative to South Sea ſtock, one of the parties grants an obligation to the other, to pay him a certain ſum with this proviſo, that whereas the obligee intended to ſue two of the directors to make void his own bargain, if he ſucceeded, the obligor was to be free of his obligation. The obligee having got an abatement by compromiſe from the directors, the obligor was entitled to a proportional abatement.

IN 1720, ſome tranſactions took place between the parties, relative to South Sea ſtock, which was ſold by the appellant to the reſpondent; but every matter relative to the purchaſe not having been finally arranged, after ſtock had completely fallen in value, a compromiſe was made between them, in conſequence of which the reſpondent on the 10th of November 1720, granted the appellant his note, or obligation in the following terms:

" I promiſe to pay to Thomas Paterſon Eſq., or his executors, and " adminiſtrators, 100*l. per annum*, to commence from Chriſtmas " next, in half yearly payments, till the ſum of 1000*l.* is paid, " provided I continue in any buſineſs under the government of " the yearly value of 100*l. per annum*, otherwiſe this obligation