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

" to be void from the time I am diſplaced from ſuch buſineſs;
" and this obligation to take place and commence again, if at
" any time I am replaced in buſineſs under the government, till
" the above ſum is ſatisfied. And whereas Mr. Paterſon intends
" to ſue Sir John Lambert, and Sir Theodore Janſen to make
" void a bargain of 6000*l.* South Sea ſtock, he bought of them
" at 1000*l.* per cent; if Mr. Paterſon ſucceeds in making void his
" bargain with them, then I am diſcharged from this obligation;
" if he ſhould not, then this obligation is to be made good by me
" according the conditions expreſſed."

The appellant after the date of this obligation made a tranſaction with Sir John Lambert, and Sir Theodore Janſen, by which he was freed of 42,000*l.* part of the price of ſaid 6000*l.* ſtock, but 18,000*l.* which he had paid them at the time of the purchaſe was retained by them; and no ſuit was brought by the appellant againſt them. The reſpondent conceiving himſelf to be relieved of his obligation in conſequence of this tranſaction, refuſed to implement the ſame.

The appellant thereupon in 1723, brought his action againſt the reſpondent before the Court of Seſſion, to compel him to make payment of the arrears of the ſaid annuity, and to pay the ſame thereafter as it fell due.

The reſpondent inſiſted, that the appellant in terms of the obligation entered into by the reſpondent, ſhould have ſued the directors to be rid of his bargain, which was a neceſſary ſtep to validate the reſpondent's obligation: at all events the reſpondent contended, that the appellant ſhould communicate to him an eaſe on his obligation, proportionate to that granted by the directors to the appellant on his bargain with them.

The cauſe being argued on theſe points, the Lord Ordinary on the 24th of December 1723, " found that the appellant's proſe-
" cuting the two directors to be free of the 6000*l.* capital ſtock
" ſold to him at 60,000*l.* was a condition which he ought to have
" implemented; but found it relevant to ſubject the reſpondent
" to a ſhare of the ſum in his obligation, in proportion to the
" ſhare of the 6000*l.* tranſacted by the appellant with the direc-
" tors, that the appellant entered into a tranſaction with them for
" a certain ſum of money, to be paid by him, to be proved *ſcripto*,
" and aſſigned the 10th day of February thereafter for that pur-
" poſe." And to this interlocutor his lordſhip adhered on the 26th of the ſaid month of December.

The appellant reclaimed, and after anſwers for the reſpondent the Court on the 16th of January 1724, " adhered to the firſt
" part of the Lord Ordinary's interlocutor, finding that Mr.
" Paterſon's proſecuting the two directors to be free of 6000*l.*
" capital South Sea ſtock, ſold to him at 60,000*l.* was a con-
" dition which he ought to have implemented, but with this
" quality, that he might alſo have tranſacted with them; and
" found that Mr. Cockburn, by the conception of the obligation
" purſued on, is entitled to a proportional abatement of the ſum
" of 1000*l.* purſued for effeiring to the abatement granted by the
" directors

" directors to Mr. Paterſon, and found the directors giving up " the ſum of 18,000*l.* to the Houſe of Commons, as the ſum paid " by Mr. Paterſon to the directors as the price of the 6000*l.* " capital-ſtock, ſold by them to Mr. Paterſon, is a ſufficient " proof of the terms of the tranſaction; and found it probable " by writ or witneſſes, as alſo the terms of the ſaid tranſaction, " reſerving *contra producenda*." And to this interlocutor the Court adhered on the 19th day of February thereafter.

The appeal was brought from " ſeveral interlocutory ſen- " tences of the Lords of Seſſion of the 24th and 26th of " December 1723, and the 16th of January and 19th of " February 1724." Entered, 3 March 1723-4.

Heads of the Appellant's Argument.

The agreement between the appellant and reſpondent was, that in caſe the contract with the directors ſhould be declared void, and the appellant thereby have the money returned, which he had paid upon the contract, then the reſpondent ſhould have his note delivered up to him. The only event in which the reſpondent was to have any benefit, was if the agreement was made void, and it was the only one in which he could deſire any benefit; for as the appellant's original agreement with him was for 1000l. per cent., the ſame price at which he had agreed with the directors, and the appellant had already compounded with the reſpondent for 1000l. there could be no handle for any further agreement or compoſition, unleſs the appellant ſhould have made void his agreement with the directors, and received back his whole money, the benefit of which he intended to communicate to the appellant.

It can never be imagined, that the appellant, or any man in his right ſenſes, after he had already given ſo great an eaſe to the reſpondent, as to agree to accept of 1000l. payable in ten years, and that ſubject to a contingency, in lieu of 10,000l. would agree to communicate to him the benefit of any tranſaction he might make with the directors, eſpecially if upon the footing of that tranſaction, the appellant was to pay more than the ſum in any event payable by the reſpondent: in this caſe the appellant has paid 3000l. for every 1000l. ſtock, and the ſum payable by the reſpondent, conſidering the different times at which it is to be paid, and the contingency it is ſubject to, cannot be valued at more than 5 or 6 hundred pounds. Since then the appellant pays almoſt ſix times as much for every 1000l. ſtock he bought from the directors, as the appellant in any event is to pay for the like quantity of ſtock, with what equity or juſtice can the reſpondent claim any benefit from this tranſaction, or inſiſt upon a proportional abatement?

The appellant apprehends he was under no neceſſity to ſue the directors, it was entirely optional to him: he did indeed adviſe with counſel upon his caſe, and by their advice the tranſaction was made whereby the appellant loſt the ſaid ſum of 18,000l. it being the opinion of counſel the ſaid agreement would not be voided and ſet aſide. And the appellant believes there are few inſtances,

inſtances, where any South Sea contract has been compounded at a more eaſy rate, than this with the reſpondent.

Heads of the Reſpondents' Argument.

Since the expreſs condition of the obligation was, *that in caſe the appellant prevailed in the ſuit againſt the directors, the obligation was to be void*, this neceſſarily implied, that the ſuit was to be inſiſted in, and the appellant could not by any voluntary tranſaction of his, without the conſent of, or notice given to the reſpondent, deprive him of the benefit of that condition; and conſequently ſince the appellant has made ſuch tranſaction without the conſent of, or notice to the reſpondent, the condition muſt be looked upon as fulfilled in the reſpondent's favours.

Upon the ſuppoſition, that the appellant might lawfully have compounded with the directors inſtead of inſiſting in his ſuit, then ſtill the reſpondent ought to have a proportional benefit by that tranſaction, and ſince he was to have paid nothing in caſe the appellant had been relieved entirely of the ſum of 60,000l. now that the appellant is relieved of 42 parts of the 60, the reſpondent ought likewiſe to be relieved proportionally of the 1000l. contained in his obligation. If it were otherwiſe, then it muſt follow, that if the appellant had paid only 5*l.* to the directors, the reſpondent muſt have paid him the whole 1000l. which the reſpondent apprehends is highly abſurd.

If it be true, as the appellant has himſelf affirmed, that the 1000l. ſtock, with which he would charge the reſpondent, was a part of the 6000l. purchaſed by him from the directors; and if it be likewiſe true, as the appellant affirmed by a letter under his own hand to the reſpondent, that he ſold the ſtock, with which he charges the reſpondent, at 525l. per cent., then he gained upon this very 1000l. ſtock, 225l. per cent., ſince by the tranſaction with the directors, he paid but 300l. per cent. for it; and conſequently he can have no juſt demand on this account againſt the reſpondent.

Judgment, 11 Jan. 1724-5. After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the ſaid ſeveral interlocutory ſentences therein complained of be affirmed.*

For Appellant, *Dun. Forbes.* *Will. Hamilton.*
For Reſpondent, *Ro. Dundas.* *C. Wearg.*