

*Ex parte*

Thomas Brand, of London, Goldsmith (a), *Appellant*; Case 115.  
 Sir Alexander Cumming, of Coulter, Bart. *Respondent.*

27 Jan. 1724-5.

*Promissory Note.*—It is objected to a promissory note, that it was not holograph, nor signed before witnesses, and that therefore the signing and payment of the money ought to be proved: but it having been granted in London, the objections are repelled.

A partial payment was to be deducted, first out of the interest, and afterwards out of the capital. (These before the appeal.)

*Usury.—Proccs.*—A defender having alleged usury against a promissory note granted to the pursuer, the pursuer a goldsmith or banker in London, is ordered to confess or deny the facts, and a commission is granted to Lord Chief Justice King, to take extracts from his books he residing in London.

*Foreign.*—A person residing in London, brings action on a promissory note in Scotland, against which usury is pleaded; the clerk is ordered to retain the note in Court, till the pursuer should transfer to his agent in Scotland, a collateral security in stock which had been granted by the defender.

ON the 20th of June 1720, the respondent then in London, granted to the appellant his promissory note for 3000*l.* mentioned to be for value received, payable one month after date; and he deposited with the appellant, two receipts in the first subscription then taken in by the South Sea Company for 500*l.* each. For these the appellant granted receipt in the following terms, “Received of Sir Alexander Cumming Baronet, two South Sea  
 “ first subscriptions for 500*l.* each, which I promise to return on  
 “ payment of 3000*l.*, on or before the 20th of July next, and  
 “ in default thereof am empowered to sell the same at market  
 “ price, and be accountable to him for the surplus, if any, the  
 “ first and second payments being made thereon.”

The appellant sometime afterwards brought his action before the Court of Session, against the respondent upon the said promissory note, in which he stated, that at the request of the respondent he had continued payment of said note, first to the 25th of August, and then to the 25th of September following, having during that time received payment of 360*l.* part thereof; and that though the appellant several times pressed the respondent, that he might be at liberty to sell the said two subscription receipts, yet he declined to consent thereto.

This cause coming to be heard before the Lord Ordinary, the respondent at first took an objection, that the note not being of his hand writing, nor signed before witnesses, the appellant ought to prove the signing of the note, and payment of the money. The appellant answered, that the note being granted in London, and bearing to be for value received, the appellant was not obliged to prove the payment of the money nor the respondent's signing the

(a) The goldsmiths were at that period also frequently bankers, as the appellant appears to have been.

note,

note, unless he would deny, that he had signed it. The respondent having failed to confess or deny whether the note was granted in London, as directed by the Lord Ordinary, his Lordship on the 12th of July 1723, “repelled the nullity objected, “in respect of the answer, and held the respondent as confessed, “that the note was signed in England; and in respect the respondent refused to prove his defence habilly, decerned conform to the conclusions of the libel.”

Against this interlocutor the respondent presented a representation, insisting that the note was void, because, as he stated, the appellant had taken more than legal interest, and at the rate of six per cent. per month. This the appellant denied, and the Lord Ordinary on the 30th of July 1723, “found that the “appellant having acknowledged that there was 360*l.* of the “sum on the note paid by the respondent, the same was to be “deducted from the interest due on the said note for the time, “and the remainder out of the capital; and before answer allowed the respondent to prove *scripto* or by witnesses, that at “granting the said promissory note there was interest at the rate “of 6 *per cent.* for one month’s forbearance, accumulated and “inserted in the said note, whereby the sum in the note was “made 3000*l.*; and that thereafter, and for the two several and “subsequent months that the payment of the aforesaid note was “continued, there was paid at each of the said continuations a “premium or interest at the rate of 6 per cent for the month:” and granted a commission for examining witnesses, and allowed the respondent to prove *scripto* so far as he should not prove by witnesses.

Against this interlocutor a reclaiming petition was presented for the respondent, and after various proceedings, the Court, on the 23d of January 1724, “ordained the appellant to confess or deny “how much of the sum of 3000*l.* was delivered by the appellant to “the respondent, and whether upon the 20th of July and 25th of “August 1720, he received the sum of 360*l.* in two moieties; and “directed the appellant’s agent to declare what he knew in relation to these facts.” And on the 7th of February thereafter, the Court, “ordained either party to give in condescendances of the “special facts alleged by either, and granted commission to inspect the appellant’s books, and take excerpts out thereof of “what may concern any of the points in the condescendances, “and transmit these excerpts with the report of the commission,” and also to take the depositions of witnesses.

The respondent gave in a condescendance but the appellant reclaimed against the last interlocutor; and after answers the Court on the 20th of February 1724, “sustained the promissory note “to be a good title of action; and before answer as to the other “points allowed a probation of the several facts in the respondent’s condescendances given in; and granted a commission “to the Lord Chief Justice King, to examine witnesses, and “make inspection of the appellant’s books, and take excerpts “therefrom of all such facts as relate to the points contained in “the condescendance, reserving to the Lords in case of the appellant’s

“pellant’s refusing to produce his books, to consider the import  
 “thereof at advising the probation; and reserving to themselves  
 “after probation, the consideration whether or not, upon the  
 “respondent’s failing of payment upon the day, to which the  
 “payment was last continued, the appellant was necessarily ob-  
 “liged to sell out at market price, the two South Sea subscrip-  
 “tions, deposited in his hands, towards payment of the sum for  
 “which they were deposited:”

The respondent afterwards presented a petition praying that the Court would ordain the clerk of the process to keep in his custody the promissory note granted to the appellant; and ordain the appellant to exhibit and produce in the clerk’s hands, the two deposited subscriptions of 500*l.* each, or to transfer to the clerk such stock as came in place thereof. After answers for the appellant, the Court on the 25th day of February 1724, “ordained  
 “the appellant to transfer to John Hamilton his factor, this  
 “stock which came in place of the subscription; to be made forth-  
 “coming, as the Lords in the event of the process should find  
 “just; or otherwise to find caution to make the same forthcoming  
 “betwixt and the said day; and discharged the clerk to give up  
 “the promissory note, until such time as the deposit was trans-  
 “ferred, or caution found by the appellant as aforesaid.”

The appeal was brought from “several interlocutory sentences  
 “of the Lords of Session of the 23d of January, 7th, 20th, and  
 “25th of February 1724.”

Entered,  
 14 March  
 1723-4.

*Heads of the Appellant’s Argument.*

As the transactions in question happened in England the appellant conceives, that the judgment of the Courts in Scotland, ought to be agreeable to the laws and customs of the place where the transaction was entered into.

He conceives further, that he was neither obliged by the laws of Scotland, nor of England; by himself, or his attorney or agent, to confess how much of the 3000*l.* was paid to the respondent, unless the respondent at same time offered that the note should stand as a security for the money really advanced, and agreed to pay what was really lent; and to waive all penalties.

The examination and inspection of the appellant’s books, for which the commission was granted, was to oblige him, if what the respondent stated were true, to produce evidence to convict him of usury, by which he might be subjected to penalties in England, as well as to the loss of a large sum of money in Scotland, and this without directing any allowance to be made to him of the money that should appear by the books to be inspected, to be really and *bona fide* lent to the respondent. The appellant contends, that this part of the judgment is contrary to the known rules of proceedings in all Courts, and inconsistent with the common rules of justice.

The interlocutor of the 20th of February, which grants a commission, reserves to the Court a power of determining whether the appellant was necessarily obliged to sell the subscriptions on the

respondent's failure to pay the money; but this leaves the whole cause as open and unsettled after the examination of witnesses and production of books, as if no such proceedings had been; so that all the expence and delay to be thereby incurred might be fruitless.

The enjoining the appellant to transfer the South Sea stock, arising from the two 500*l.* subscriptions, (which covers but a small part of the debt), or otherwise to find caution to put the same out of his own power; and the ordaining the clerk, not to give up to the appellant the promissory note entrusted in his hands, are apprehended to be very hard and unusual. They tend to strip the appellant of all means of ever obtaining satisfaction from the respondent, and make him quit the only security he has for payment of a small part of the money due.

Judgment,  
27 Jan.  
1724-5.

This day being appointed to hear counsel upon this petition and appeal, counsel accordingly were called in to be heard; and counsel appearing only for the appellant, proof was made of the due service on the respondent's agent of the order for hearing the said appeal; and thereupon the counsel for the appellants were heard, and due consideration had of what was offered in relation to the cause.

*It is ordered and adjudged that the said petition and appeal be dismissed, and that the several interlocutory sentences therein complained of be affirmed.*

For Appellant,      C. Talbot.      Will. Hamilton.

Cases

*On three Appeals.*

116, 117,  
118.

The Commissioners and Trustees for the

Forfeited Estates,      -      -      -

*Appellants;*

George Lockhart of Carnwath, Esq;      -

*Respondent.*

6th Feb. 1724-5.

*Presumption-Bond.*—Bonds of pension granted to an advocate, afterwards President of the Session, during his continuance to be an advocate, are sued on, after his death by his son, as wholly remaining due, after the lapse of a good many years from their dates; and are sustained till the date of the grantee's becoming President of the Session, his son giving his oath of credulity as to any payments made on the debts acclaimed.

2d appeal.

**R**OBERT Earl of Southesk, deceased, on the 28th of April 1674, granted a bond of pension to Sir George Lockhart, the respondent's father, for the payment of 300 merks yearly to him, his heirs, executors, and assignees, during his continuance to be an advocate, by two half-yearly payments, the first commencing at Martinmas 1674.

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