

Sir Alexander Cuming of Culter, Baronet,
 Eldest Son, Executor, and Assignee of Sir
 Alexander Cuming, deceased

Case 130.

James Ferguson Esq., of Pitfour

- - Appellant ;

- - Respondent.

23d April 1726.

South Sea Company.—*Act 7 Geo. 1. St. 2.*—An heritable bond is granted in consideration of transferring a sum of South Sea stock, *at the then next opening of the books*; by a separate obligation the grantee was entitled to transfer, at said opening or any time thereafter, *on three days advertisement*; by an act of parliament all contracts for the sale of stock not performed by a certain day were to be registered, or otherwise void: The stock was not transferred at the opening; the bond was registered in due time, but not the separate obligation. In a reduction it is found relevant to reduce the bond, that the transfer was not made at the opening as specified in the bond, &c. and the defence on the separate agreement is repelled, it not being registered in terms of the act of parliament.

But at the bar the parties made an agreement that the bond should be good for part of the sum, and on their agreement the interlocutors are reversed, and the bond ordered to be effectual for that sum.

ABOUT the latter end of June 1720, an agreement was entered into at London, between the appellant's late father, and the respondent, for the sale of 500*l.* South Sea stock. On the 5th of July thereafter the respondent granted an heritable bond over his estates in Scotland, to the late Sir Alexander Cuming, the personal obligation of which was in the following terms:

“ Be it known to all men, me Mr. James Ferguson of Pitfour,
 “ Forasmuch as Sir Alexander Cuming, Baronet, has of this
 “ date granted an obligation, to transfer to me, my heirs, and
 “ assigns the sum of 500*l.* original stock of the South Sea, *at the*
 “ *next opening of the Company's books*, and that together with the
 “ dividend of the said stock, upon my granting of these presents
 “ for the price of the same; therefore I bind and oblige me,
 “ my heirs, and successors, to content and pay to the said
 “ Sir Alexander Cuming, his heirs, executors, administrators, or
 “ assigns in London, on or before the 1st of March next ensuing
 “ 5500*l.* sterling, as the consideration money, or price of the said
 “ stock, at the rate of 1100*l.* for each hundred of stock; together
 “ with 1000*l.* of penalty in case of failure, and annual-rent of
 “ the said principal sum during the not payment after the said
 “ term of payment.”

Of the same date, the respondent received from Sir Alexander Cuming a note or obligation in the following terms:

“ I Sir Alexander Cuming, Baronet, oblige me, my heirs,
 “ executors, and administrators, to transfer to Mr. James Fergu-
 “ son, his heirs, or assigns, 500*l.* sterling of original South Sea
 “ stock, and that at the next opening of the Company's books
 “ *or any time thereafter, on three days advertisement*, having received

“ the value of him by bond of this date, and I hereby declare
 “ that he is entitled to the dividend on this stock.”

The respondent soon after went to Holland, from whence he wrote sundry letters to the appellant's father, which were founded on in the action that arose between the parties. In a letter dated the 26th of July 1720, the respondent writes that he intended to be in London by the opening of the books, and says, “ if you can sell me 500*l.* or 1000*l.* on the same terms you
 “ did the last, I will be your merchant.” In another letter dated the 27th of August, the respondent writes, “ I took a premium
 “ of 20 per cent. on your stock to give the refusal of it at 1500*l.*
 “ I wish it be required.” By a letter of the 6th of September, he informed Sir Alexander that he was far from repenting of his bargain, and though he was upbraided by letters from Scotland for the bargain he had made, yet he was sure he would never complain of Sir Alexander. And on the 24th of September, when stocks were sinking, the respondent wrote that he still continued to have so good an opinion of them, that he wished that all the money he had, or could command, were drowned in the South Sea at the then current price.

Sir Alexander Cuming did not transfer to the respondent the 500*l.* stock with the dividend at the opening of the South Sea books, on the 22d of August 1720. And stock having declined rapidly in value, by the time the respondent returned to London, he refused to accept the transfer, or to pay Sir Alexander the sum contained in his bond.

Sir Alexander thereupon brought an action of mails and duties before the Court of Session, against the tenants of the respondents estate over which he had granted security; and also an action against the respondent himself, for payment of the sum contained in the bond with interest. The respondent brought a counter action for reduction of the said bond; and upon his petition the Court stayed proceedings upon the actions at Sir Alexander's instance, till the action of reduction was disposed of.

When this action came to be heard, the respondent insisted, that the said heritable security having been granted in consideration of the obligation to transfer to the respondent 500*l.* stock with the dividend at the opening, but this consideration not having been performed, the bond was void. He founded also upon two clauses in the act of 7 Geo. 1. stat. 2. which enact, that every contract for the sale or purchase of South Sea stock, unperformed, or not compounded by the parties, on or before the 29th of September 1721, and a memorial of which was not registered, as therein mentioned, before the 1st of November 1721, should be void; and that such contract should also be void, if the seller were not at the time of such contract, or within six days after, actually possessed of or entitled in his own right, to the stock so sold by him. Upon these clauses, the respondent contended, that the contract in question being unperformed and not compounded, the appellant should shew that it was registered, and that he was possessed of stock in terms of the act.

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The appellant stated in answer to this, that the consideration of granting the bond, was the obligation from the appellant to transfer stock at the opening, or at any time after, on three days advertisement; and that this alteration did not allow him to transfer at the opening of the books when the respondent was in Holland; that the transaction could not be said to be unperformed, but was completed by granting the bond and obligation; and, therefore, that it was not necessary that the contract should have been registered, or that the appellant should shew he was possessed of stock in terms thereof. He stated, however, that he had registered the bond granted by the respondent within the time limited by the act; but that the obligation granted by himself was not registered, having been out of his custody. The Lord Ordinary on the 17th of November 1722, ordered the appellants' father to give in a particular condescendance, in terms of the act of parliament of the stock he was possessed of, or entitled to at the time of the contract between the parties; and the Court on the 7th day of November thereafter adhered to the Lord Ordinary's interlocutor. The late Sir Alexander, accordingly gave in a condescendance, which satisfied the Court upon that point.

After various further proceedings, the Court on the 15th of December 1724, "found the reasons of reduction relevant and proved, that Sir Alexander Cuming did not perform in terms of the said bond; and repelled the defence made upon the alternative clause or condition of the obligation, granted by Sir Alexander Cuming, in regard the said obligation, (though a part of the contract) was not registered nor any abstract or memorial thereof entered in terms of the act of parliament 7mo. *Georgij Regis.*" Sir Alexander having reclaimed, after answers for the respondent, the Court on the 9th of January 1725, "found the reason of reduction relevant and proved, that Sir Alexander Cuming did not perform in terms of the obligation as recited in the bond, by transferring or tendering a transfer at the opening of the books; and found that the writs constituting this bargain of sale, or an abstract or memorial thereof, ought to have been registered, conform to the act of parliament 7mo *Georgii*, and found that the registration of the bond, (which did not contain the alternative clause mentioned in the separate obligation,) was not a sufficient registration of the contract, and therefore repelled the defence founded on the said alternative clause, and adhered to their former interlocutor, and refused the desire of the petition."

The late Sir Alexander Cuming died on the 5th of February 1725, having previously assigned to the appellant the said heritable bond, and all interest due thereon.

The appeal was brought from "an interlocutor of the Lords of Session of the 15th of December 1724, and the affirmance thereof the 9th of January following."

Entered,
3 Feb.
1725-6.

Heads of the Appellant's Argument.

Sir Alexander, from the obligation given by him, could not have sold out the stock in order to insist on the difference, because if stock had risen, the respondent would not have been bound by such transfer, but he might have called for that 500*l.* stock to be transferred to him, at any time afterwards, upon three days' notice: besides the respondent knew very well, that the stock was not transferred at the opening of the books, and he was so far from complaining of that neglect, that he wrote after that time to the appellant's father, that he was desirous to be a purchaser of more South Sea stock.

The act 7th George has no reference to the present question; the contract for the sale of stock was performed, the appellant's father having given the respondent a note for transferring the stock, and the respondent having given an heritable bond for so much money, which was taken as payment for the stock.

But, for greater caution, the appellant's father did actually sign and register an exact copy of the said bond, agreeably to the directions of the said act. There was no occasion for the appellant's father to register the note given by him to the respondent; it was in the hands of the respondent, who might have registered it, if he thought fit; besides, the bond which is registered, recites the note, and ought to be considered as equivalent to the registering of the note itself.

If the alternative in the note varied the original bargain, that was in favour of the respondent, giving him a larger interest, and putting him under no necessity to attend the transfer at the opening, and obliging the appellant's father to be answerable for the stock whenever he should think fit to call for it: the registering of the note therefore, if it had been necessary, lay upon the respondent, but the appellant does not lay hold of this note to create any obligation upon the respondent; he only uses it to prove a matter of fact necessary to be cleared. No one can doubt, but the respondent's consent to the not transferring or tendering the stock at the opening, proved by letters or otherwise, would be a proper answer to any objection, that the stock was not transferred or tendered; and yet it will hardly be supposed that such letters, or a memorial of such evidence ought to have been registered.

Heads of the Respondent's Argument.

No evidence can be given of any contract or agreement not registered. It appears upon the face of the bond granted by the respondent, which was registered by Sir Alexander Cuming, that Sir Alexander was to transfer to the respondent 500*l.* stock at the then next opening of the books; *in consideration whereof*, the respondent granted his bond for the price payable on the 1st of March following. This was clearly a contract for the sale of stock unperformed, in the proper sense of the act. And Sir

Alexander neither transferred the stock, in terms of the contract recited in the bond, which he might have done, though the respondent was not present; nor did he register any other agreement.

Though the respondent had in his custody, the obligation granted by Sir Alexander, yet he must be supposed to have known what was the tenor of that obligation, and might have registered a memorial of it if he had thought fit; as he neglected this the respondent can have no advantage from this obligation.

Counsel being called in to be heard upon this appeal, "Mr. Attorney General, on the part of the appellant, having first stated the nature of the case, did then acquaint the house, that the said parties were come to an agreement, and that the same was put in writing, which if their lordships pleased they desired might be confirmed; and Mr. Solicitor General likewise acquainting the house, that the respondent did consent to the said written agreement.

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"And the same was thereon signed by both parties at the bar; and it being then read and delivered in, the counsel were directed to withdraw; and being withdrawn, and consideration had in relation to this matter,"

It is ordered and adjudged, *according to the said written agreement, that the interlocutors complained of be reversed, and that the bond and infestment in question be restricted to 1000l. sterling to be paid at Christmas next with interest from this day; and that upon such payment and delivering up the note or obligation for transferring the 500l. South Sea stock, with the Midsummer dividend, the appellant do deliver up to the respondent, the said bond and sasine, and grant or procure to be granted a valid renunciation and discharge thereof with all that followed thereupon; but in default of payment of the said 1000l. and interest as aforesaid, the appellant be at liberty to take out execution upon the said bond for the said restricted sum of 1000l. and no more, except such costs and charges as may be occasioned thereby.*

Judgment.

For Appellant, P. Yorke. Dun. Forbes.
For Respondent, C. Talbot.