

Colonel Francis Charteris, of Ampsfield, - *Appellant*; Case 107.
 The Right Honourable James Earl of
 Hyndford, - - - - - *Respondent*.

23d March 1723-4.

Usury — South Sea Company.—During the rapid rising of South Sea stock, an agreement was entered into, on a Sunday, to sell a certain quantity of stock, at 90 per cent. above the price of the preceding day, the price not to be payable till a year after transfer of the stock; and an heritable bond was afterwards granted in consequence of the transfer, for payment of the agreed price on a day certain: this bond being reduced on the head of usury, the judgment is reversed.

Witness.—In a reduction on the head of usury, a menial servant of the defender who was a subscribing witness to an agreement, being refused to be examined, the judgment is reversed.

The grantee in a bond having proposed to examine a cautioner therein as a witness, with regard to the transaction for which the bond was granted, consenting that what he deponed to should not be of prejudice to him, the Court refused to admit him, but the judgment is reversed.

Appeal.—Interlocutors reversed, and an agreement adjudged of consent.

ON Sunday the 27th of March 1720, a verbal agreement was entered into between the appellant and respondent, for the purchase of 5000*l.* South Sea stock; the appellant agreed to sell at the rate of 410 per cent, which was considerably above the market-price of the day before; but the price was not to be payable by the respondent for the space of a twelvemonth afterwards. The next day a written agreement was executed by the parties, witnessed by the writer of it, and John Gourlay one of the appellant's servants, which was to this effect, that the appellant should transfer to the respondent 5000*l.* South Sea stock; the respondent delivering to the appellant the bond after-mentioned, at the South Sea House, upon Wednesday then next; that the respondent as principal, and Sir John Anstruther as cautioner for him, should in consideration thereof, make and deliver to the appellant an heritable bond for 20,500*l.* sterling, over their estates in Scotland, payable the 28th of March 1721, with interest after the day of payment; and each party bound himself to perform to the other under the penalty of 5000*l.* sterling.

In pursuance of this agreement, the appellant transferred the stock to the respondent on the 30th of March, and the respondent delivered to the appellant an heritable bond dated same day, whereby the respondent and Sir John Anstruther acknowledge to have borrowed and received from the appellant 20,500*l.* sterling, which the respondent as principal, and Sir John Anstruther as cautioner bound themselves conjunctly and severally to re-pay betwixt and the 28th of March 1721, with interest from and after the term of payment.

Some short time afterwards the price of South Sea stock rose to an immense height. But after the total fall of stock, when the term of payment of the said bond was arrived, the appellant was

12 Ann.
c. 16. ft. 2.

obliged to arrest the rents of the estates of the respondent in the hands of his tenants, and bring an action on the said bond before the Court of Session. The respondent brought his counter-action against the appellant for reducing the said bond upon the head of usury, libelling upon the act of parliament, 12 Ann c. 16. ft. 2. and stating as the ground of this counter-action, that 410 per cent, which was the rate at which the purchase was made, exceeded the common price of stock at that time about 90 per cent; and that this advanced price was given for forbearance of payment of the principal money for one year; and that therefore the bond was void. These two actions were conjoined.

When this action came first to be argued before the Lord Ordinary, his lordship, on the 21st of July 1721, “before answer
“allowed both parties to prove at what price South Sea stock
“was bought and sold on the 28th of March 1720, and what
“was the communing and agreement between the parties; and
“the respondent to prove that the appellant had since the date of
“the agreement and bond declared that the addition to the cur-
“rent price of stock upon the 28th of March 1720, was made
“for the forbearance, and because the respondent wanted ready
“money; and the appellant to prove, that the respondent dis-
“posed of what he so purchased at cent. per cent. profit or to a
“great advantage.” And to this interlocutor the Court adhered on the 29th of July, and by another interlocutor of same date,
“Found, that any expression in communings betwixt the re-
“spondent, or any other acting for him in his name, and the
“appellant, in reference to the agreement at the time of the
“bargain making, or before or after, might be proved by the re-
“spondent, by the persons present at those communings; but
“that no proof was to be allowed as to any expressions at other
“times and on other occasions.” On the 28th of November 1721, the Court “adhered to their former interlocutors, with
“this addition, viz. that the appellant be allowed to prove, that
“at the making the transfer of the stock, or at the date of the
“bond, he offered the respondent 500*l.* or some other consider-
“able sum for his quitting the bargain, and that the said offer
“was refused by the respondents.”

A list of witnesses was given into court by both parties, and among those for the appellant were the names of Sir John Anstruther, and John Gourlay, his (the appellant's) servant, who was a subscribing witness to the articles of agreement. The respondent objected to the admissibility of Gourlay, as being the appellant's servant, and the Court, on the 13th of February 1722,
“sustained this objection against Gourlay.”

Several witnesses were examined; among others for the respondent, Lord Forrester deponed, That he was present at the communing relative to the sale of the 5000*l.* stock on Sunday the 27th March 1720; that the appellant demanded 420 per cent. and the legal interest, and the respondent offered 400*l.*, and by the deponent's advice agreed to give 410*l.*, and that he remembered this agreed price was about 90 per cent. above the current price

price at the time; that it was expressly communed between the parties, that the consideration above the then current price was to be given for the forbearance of payment for a year; and it was reckoned among them how much the premium for forbearance of payment amounted to, but does not remember whether the appellant or respondent made the reckoning, but the deponent himself made the reckoning in their presence. That there passed something about the extraordinary advantages that might be had for the use of money at the time, and that the exchange from Scotland was then very high, and that these were made use of for inducing the respondent to make the bargain; but does not remember that the appellant said these things, but that they were said in the communing.

Lord Forrester, on his cross examination, deponed, that there was no agreement to give so much money as the current price of stock, and by a separate bargain to give so much more for the delay of payment, but the whole was in one bargain. That the appellant insisted for interest from the date of the bond, but was afterwards satisfied with the 410% per cent. in full.

Patrick Macdowall, who prepared the agreement between the parties, and the subsequent heritable bond, deponed, that when the bond was signed, the appellant told the respondent that he was still ready to depart from the agreement; to which the respondent answered he would keep his bargain. The appellant told the respondent he would give him 20 or 30 guineas, or some such sum to give up the bargain, but the respondent answered he would not quit it for 500%.

Colonel Middleton, who had entered into a similar transaction with Sir John Anstruther, in which the respondent was cautioner, deponed, that Sir John had told the deponent that he thought it wrong and in vain in the respondent to dispute his bargain with the appellant; and that he was resolved to have no disputes with the deponent about their bargain; and had since paid deponent 900% of the principal sum.

Some other witnesses proved that about the time of this transaction there were great variations in the price of South Sea stock, within the compass of a day or two; particularly that between the Saturday and Monday immediately preceding stock rose 95% per cent. The appellant likewise produced an account taken from the South Sea books, by which it appeared, that the respondent had borrowed of the Company 26,820% upon stock and subscriptions.

On the 16th of July 1723 the Court pronounced this interlocutor; "Having considered the state of the process, writs produced, and the testimony of the witnesses adduced, and debate thereon, found that the minute of agreement, and bond granted in pursuance thereof, are usurious, and therefore reduce the same." And to this interlocutor the Court adhered on the 30th of same month.

The appellant having also petitioned the Court, praying again that Sir John Anstruther might be examined, the Court, on said 30th of July 1723, "refused the desire of his petition."

Entered,
21 Jan.
1723-4.

The appeal was brought from "several interlocutory orders and decrees of the Court of Session of the 21st and 29th of July, and 28th of November 1721, the 13th of February 1722, and 16th of July 1723, and two other interlocutors of the 30th of the same month."

Heads of the Appellant's Argument.

As to Sir John Anstruther and Gourlay the witnesses refused by the Court to be examined, though Sir John might not be produced as a witness for the respondent, yet he ought to be examined at the instance of the appellant, who consented that whatever he deponed should not be made use of against himself. And though Gourlay was the appellant's servant, yet being a subscribing witness to the bond, the appellant had a right to his testimony.

In this case there was no loan of money or any thing else, but an absolute sale and transfer of stock, in the nature of a time bargain for which a certain gross sum was to be paid at the distance of a year, without any interest. Lord Forrester indeed says that he remembers the agreed price was about 90% per cent. above the *current* price at the time, and that it was expressly communed between the parties, that the consideration above the then current price was agreed to be given for the forbearance of the payment of the price for one year: now it is most certain that there was no *current* price at the *time*, for the time was upon a Sunday, and therefore his lordship was at liberty to reckon it at what rate he pleased. But he could not be sure, that his notion of the price of stock was within 90% per cent. of other people's notions of it, and the only mode he could have of reckoning the price of stock at the time was notional and imaginary; and it might as well have differed 95% per cent. between the Saturday night and Monday morning when the agreement was put in writing, as it did between the Saturday and Monday before. But it manifestly appears that a premium for forbearance of the payment of the price was not reckoned by any body but Lord Forrester; for he swears there was but one bargain, and one agreement for the price, and since no more is given but *that agreed price*, it is not easy to conceive how it could be agreed to give any consideration for forbearance of the payment of that price: there must either have been two separate bargains, first to give a price and then so much for forbearance of payment of that price, which his lordship denies, or there could be nothing given for forbearance of payment. The appellant also proved, that Lord Forrester had made contracts to accept of 10,300% South Sea stock at 56,950%. But though his lordship's evidence had been full in point, yet by the law of Scotland one witness is not sufficient.

Sir

Sir John Anstruther has paid part of the money, and makes no scruple of paying the rest upon his bond, wherein the respondent is bound as his security to Colonel Middleton, which was given upon a bargain made by the appellant with Sir John for 1000*l.* South Sea stock, upon the very same terms as this agreement was made with the respondent.

Heads of the Respondent's Argument.

With regard to Sir John Anstruther, the application to have him examined was made not only after issue joined, but after the proof was concluded, and both parties circumduced from bringing further proof. Besides Sir John was surety in the bond, and a party in the suit, and so was not a proper evidence in this case, unless the appellant would have put the whole issue upon his oath, according to the law of Scotland, which the appellant refused to do. With regard to Gourlay; by the law of Scotland no menial servant can be examined for his master, being supposed to be under influence, and the appellant opened nothing material, that he intended his servant should be examined to.

This was not a naked sale of stock, but at worst a loan intermixed with and adjected to a sale, the stock was transferred, the value of it lent, or which is the same thing, a forbearance of payment of it given for a year, and a high interest exacted on that account. The circumstances of the case make it plain, that the loan or credit given for the money, was the principal if not the only thing that brought the respondent into the bargain with the appellant; for if a sale and purchase only had been intended, the respondent must have purchased from another at the difference of 90*l.* per cent cheaper.

The appellant contended that the money given above the current price, was given for the hopes of gain by the rise of stock; but this is impossible, for if the respondent had purchased from any other person at the current price, he would have had better prospect of gain by the rise of stock. It is plainly proved that the forbearance of payment for one year, was commuted upon as the consideration for which the advanced sum above the current price was given, and that it was calculated how much it came to in the way of interest.

It is proved that stock had a certain current value on the day the bargain was concluded, viz. from 316*l.* to 320*l.* per cent. And it is proved, that the bargain proceeded upon the footing and supposition, that that was the current price of stock; and consequently the advanced sum covenanted to be paid, was according to the intention of parties at the time for some other cause than the value of stock, which could only be the forbearance.

There is no resemblance between a time bargain and the contract in question. In a time bargain, nothing is transferred to the buyer, nothing is lent to him, no use of money nor value of merchandize is given him, there is no forbearance of payment; and therefore usury cannot take place in such a bargain. The chance

is equal both on the side of the buyer and seller. In a time bargain, the value of stock is not to be computed as at the time of the contract, but at the time of implementing it; for till then, there is neither sale nor loan, but a personal obligation on the one side to deliver, and on the other to receive and pay: it may happen, that the seller has no stock on the day of the bargain, and is forced to buy it at a high price on the day of the delivery.

Judgment,
23 March
1723 4.

After hearing counsel, the counsel for the appellant having informed the House, "that the appellant had that regard to the respondent and the loss sustained by him in the stocks, that he would consent that the bond and infestment in question, though found good by the House should be restricted to the sum of 11,000*l.* payable at Martinmas next, with interest from this day, and to the further sum of 2000*l.* by way of penalty over and above the said 11,000*l.* and interest from this day, in case the said 11,000*l.* and interest be not paid at the day aforementioned," and the appellant being present in person declared his consent thereto to the House; *It is ordered and adjudged that the several interlocutory orders and decrees complained of in the said appeal be reversed; and in regard of the appellant's consent above-mentioned, it is further ordered, that all further proceedings be stayed upon the said bond and infestment till Martinmas next; and in case the sum of 11,000*l.* sterling with interest from this day be then paid to the appellant, or his order, that from thenceforth the said bond and infestment shall be esteemed to be fully satisfied and discharged, and shall be delivered up and vacated in due form of law; and in default of payment of the said 11,000*l.* with interest from this day, at the time aforesaid, the said bond and infestment shall be restricted to the said sum of 11,000*l.* and interest, and the further sum of 2000*l.* in name of penalty; and the appellant shall be at liberty thenceforth to pursue and carry on his suit upon the said bond and infestment, under the restrictions aforesaid, in the same manner as if no stay of proceedings had been ordered, and upon his recovering and being paid the said sum of 11,000*l.* and interest from this day, and the said penalty of 2000*l.*, the said bond and infestment shall thenceforth be esteemed fully satisfied and discharged, and shall be delivered up or vacated in due form of law.*

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

This decision is in some degree interesting, as relating to the appellant, the famous Colonel Charteris. His conduct at the hearing of the appeal is certainly not of a piece with many things alleged against him on all quarters; he there gave up to the respondent a very large sum of money, which would have been his, if the interlocutors had been simply reversed, which they would probably have been.

The witness Gourlay was also famous in his day.