

Case 131. Sir Alexander Cuming, Baronet, eldest Son
and Executor of Sir Alexander Cuming,
Baronet, deceased - - - *Appellant;*
Robert Pantoun, late of Rotterdam, but
now of London, Merchant - - - *Respondent.*

28th April 1726.

Lis Alibi pendens.—A defence of *lis alibi pendens* is repelled, where the pursuer produced an order of the Court of Chancery, dismissing a suit which he had instituted upon same grounds with his action in the Court of Session, and a declaration under his hand disclaiming all further proceedings in that suit.

Process.—In a process relative to the advance of a sum of money, the pursuer set forth the tenor of an obligation granted by himself to the defender's father for a *depositum* made by the latter, and certain letters as in the defender's hands: in terms of the act of sederunt, the defender is held as confessed on the tenor libelled, as he neither confessed nor denied the same, and decree given against him thereon.

Usury.—In a loan of money to be repaid by drawing and re-drawing on a foreign merchant, the borrower agreed to pay the exchange and re-exchange: though this by the course of exchange amounted to more than legal interest, it was not usury.

Annual-rent.—A loan agreed to be repaid by a certain day, bore interest after that day, though no interest was stipulated for: exchange and re-exchange, which the borrower agreed to pay, also bore interest from the day of payment: in a decree for payment of a certain sum, part of this is distinguished as principal bearing interest, and part as interest only.

Depositum.—The depositary of a South Sea subscription, was warranted in paying money, and accepting stock, as the principal must have done in terms of an act of parliament.

Costs.—An affirmance with 50*l.* costs. Proceedings relative to these costs, and mode of recovering the same pointed out by the house.

THE respondent in the year 1723, brought an action before the Court of Session against the appellant's late father, therein setting forth; that the respondent having from time to time supplied Sir Alexander Cuming with money, while he was conservator at Campvere, in June 1720, there was due to the respondent 1075*l.* sterling on a balance of accounts; that the respondent being then in London, was, on the 15th of June 1720, applied to for a loan of 2000*l.* more; but not having money sufficient in his own hands, he prevailed with a Mr. Henry Cairns, Merchant, in London, to advance Sir Alexander 3000*l.* of which he applied 2000*l.* to his own use, and paid 1000*l.* to the respondent towards the discharge of the said balance of 1075*l.*; and Sir Alexander having also granted to the respondent three notes of 25*l.* each for the remaining 75*l.*, the respondent released him of the balance of the old account:

That it was then agreed that Cairns should, to reimburse himself, draw bills upon the respondent, for the 3000*l.* payable in Amsterdam, at two months usance, and the respondent was to redraw upon Cairns also at two month's usance; and the respondent's bills thereby falling due on the 5th of October, Sir Alexander was to

pay the money to Cairns on or before the 4th of October; and Sir Alexander deposited in the respondent's hands in further security 1000*l.* South Sea first subscription, (a) whereon 900*l.* had been paid to the company for the first and second payments: and that the respondent thereupon granted to Sir Alexander a note or obligation, under his hand, to which the appellant was a subscribing witness, in the following terms: "I Robert Pantoun, Merchant in Rotterdam, acknowledge me to have received from Sir Alexander Cuming, Baronet, a receipt for the first and second payment of 1000*l.* sterling, first subscription in the South Sea Company, marked No. 1302, which I oblige me to return to the said Sir Alexander, upon his payment to me of the sum of 3000*l.* advanced by me to him as the value of bills, drawn by Mr. Henry Cairns upon me, payable at Amsterdam, viz. 2000*l.* by bills drawn the 17th of June instant, and for 1000*l.* drawn this day, as also upon payment of the equal half of the loss of exchange, &c. in drawing and re-drawing, it being agreed that the profit and loss of the draught and re-draught shall be equal between Sir Alexander and myself; and it is further agreed, that the said Sir Alexander Cuming shall repay the said sum of 3000*l.* betwixt this and the 4th of October next to the above said Mr. Henry Cairns: as witness my hand in London, 21st June 1720. Robert Pantoun." Witness Alexander Cuming:"

That the respondent same day, put the said subscription into the hands of Mr Cairns with a note in the following terms: "Mr. Henry Cairns, the above is a copy of my obligation to Sir Alexander Cuming, which you are to receive back discharged, when he repays to you the 3000*l.* with the re-exchange and commission, &c. wherein I entreat you will be very exact. The first subscription of 1000*l.* left in your hands is marked No. 1302, to be given to Sir Alexander Cuming upon his paying the money as above:"

That Sir Alexander Cuming having offered to employ some part of the money lent him, in the purchase of South Sea third subscription, and of East India stock, for the joint behalf of himself and the respondent, it was therefore agreed, that if any loss should happen by drawing and re-drawing it was to be equally borne between them; but no stock having been purchased, the respondent wrote to Sir Alexander, from Rotterdam, on the 19th of July 1720, in the following terms, "I wrote you on the 9th current upon my arrival here; since, I have not any from you, whereat I admire, and my nephew arriving here, tells me that you have bought no East India stock for our joint account, howbeit I expected otherwise; I send you therefore by my nephew a new obligation from me obliging me to make good to you the whole profit that may happen upon the re-draught of the 3000*l.* on Mr. Cairns, and you to pay whatever loss and the other charges that may come thereon; seeing as you have given me no interest with you, so I pretend none of the profit,

(a) This first subscription was taken by the South Sea Company at 300*l.* per cent.

“ and you know I ought to pay none of the losfs, and upon ex-
 “ changing I have ordered him to fend me the obligation he is to
 “ receive from you. Pray give my nephew 75*l.* for the three
 “ notes you gave me, seeing he at present wants ready money ;
 “ yea, I promise myself, that you will be assistant to him :” And
 the respondent received a letter from Sir Alexander, bearing date
 the said 19th of July, in the following terms : “ I was favoured
 “ with your’s the other day ; for my part for all I borrowed, I
 “ was not able to purchase any East India stock, nor hardly to
 “ make up my subscription money, which I am even docked of,
 “ and cut off from some that I had assurance of from directors ;
 “ all that I could procure for you was 20 shares of the *poppy oil*
 “ *patent* :”

That the respondent wrote again to Sir Alexander on the 30th
 of July, in similar terms with his former letter, and requesting
 that the 20 shares in the poppy oil patent should be delivered to
 the respondent’s nephew ; and he received an answer from Sir
 Alexander, dated the 15th of August in the following terms, “ I
 “ complied with every thing you desired in relation to your
 “ nephew and have delivered him the 20 shares of the oil patent of
 “ my own stock, and I hope they will turn to good advantage ; it
 “ is very well we did not deal in India stock, as it has happened,
 “ and indeed all stocks seem to decline, but I believe it will not be
 “ long so ; as for your obligation which is done on stamped paper
 “ according to form, there will be no need of renewing it : I
 “ know you will take care that there be as little losfs in re-drawing
 “ as possible, and to advise me which will be the best way to save
 “ myself, for I do not propose that you should pay any part of it,
 “ seeing you did not use any of the money for paying Sir John
 “ Lambert for our joint uses as was at first proposed : such a
 “ trifle of re-drawing will never break squares betwixt you and
 “ me, nor will I desire you to pay any part of it :”

That the respondent paid Mr. Cairns’s bills when they fall due,
 but by reason of the fall of exchange when the respondent came to
 re-draw upon Mr. Cairns, there was lost by the exchange
 28*l.* 7*s.* 5*d.* : on the 16th of August, the date of Sir Alexander’s
 last letter, the respondent drew bills at Rotterdam, upon Mr.
 Cairns, at two usances, for 3200*l.* and for the remaining 87*l.* 7*s.* 5*d.*
 he drew on the 17th of September following :

That the respondent received a letter from Mr. Cairns, bearing
 date the 30th of August 1720, in the following terms, “ I com-
 “ municated to Sir Alexander your draughts of 3200*l.* upon me
 “ for his account which he assured me positively that he will pay
 “ punctually to me against the 4th of October next, conform to
 “ his obligation. Please to take notice that I have now paid the
 “ South Sea-Company 300*l.* for the third payment of Sir Alex-
 “ ander Cuming’s first subscription left in my hands ; for as he
 “ told your nephew and myself, he could not do it at present
 “ being short of money. I proposed to have drawn on you this
 “ day for the said 300*l.* but that the exchange got up to your
 “ place ; however I will do it soon :” And the respondent on the

17th of September wrote to Sir Alexander as follows: "I had
 " your's very acceptable of the 16th past. I find by the fall of
 " the stocks, and particularly that of the East India Company,
 " that you conclude it best, that we had no concern, half in com-
 " pany therein, and that thereby none of your money was em-
 " ployed on that account, and so I am nowise liable to any share of
 " the damages upon the bills re-drawn upon Mr. Cairns. Here-
 " with I send you an exact account of the 3000*l.* that Mr. Henry
 " Cairns drew upon me, for your account and accommodation,
 " amounting to 33,649 guilders, 4 stivers, as also an account of
 " the bills I have drawn on him for re-imbursment of the same,
 " being 3287*l.* 7*s.* 5*d.* or 33,649 guilders, 4 stivers, which I
 " assure myself you will punctually pay; for you will find that I
 " have not charged one penny for my pains in this matter, yea
 " not so much as for post of letters I paid; wherefore pray fail
 " not, upon receipt hereof, to pay the above 3287*l.* 7*s.* 5*d.* time-
 " ously to Mr. Henry Cairns for discharging my aforesaid bills,
 " as also the 300*l.* that he paid to the South Sea Company for
 " your account; for all this must be certainly done, either by
 " selling the 1000*l.* first subscription that lies in his hands, or by
 " impignoring the same in another's hands, and so pay the
 " money early to him for punctually discharging all the above
 " bills. I am sorry your loss in the re-draught runs so high, yet
 " I can assure you that all was done in the easiest manner possible;
 " yea by this you will see what unavoidable loss I had, when I
 " was necessitated to draw and redraw for the money I lent you;
 " and to conclude this matter, pray let nothing hinder your punc-
 " tually paying all the above, by which you know I have not one
 " penny profit, and did it alone for your accommodation, and at
 " your entreaty:"

That Sir Alexander never answered this letter, and notwith-
 standing repeated promises to Mr. Cairns and to the respondent's
 nephew, he did not pay the money to Cairns on the 4th of Octo-
 ber, to his utter ruin; for the bills were returned upon the re-
 spondent under protest, who paid the same with re-exchange in
 Holland amounting to 3645*l.* 1*s.* which added to the 300*l.* for
 the third payment on the said 1000*l.* South Sea subscription, and
 another 300*l.* for the fourth payment on the same also disbursed
 by the respondent, made the aggregate sum due by Sir Alexander
 amount to 4065*l.* 1*s.* :

That the respondent, having come to England, in July 1721,
 filed his bill in Chancery against Sir Alexander, who stood in con-
 tempt to a sequestration, and would not put in his answer, but
 went and resided in Scotland; whereby the respondent was obliged
 to commence the present action against him, to compel payment of
 the said 4065*l.* 1*s.* and interest since the first of November 1720,
 and he founded upon his note granted to Sir Alexander on the
 21st of June 1720, and his letter to Sir Alexander of the 19th
 of July thereafter, as in the hands of the defender.

To this libel Sir Alexander Cuming put in the following de-
 fences, "1st, That there is a *lis alibi pendens*, by a suit in Chancery
 "depending,

“ depending, at the pursuer’s instance, against the defender, upon
 “ the very same grounds libelled. 2d, That the libel, in
 “ manner and form as it is set forth by the pursuer, is neither
 “ relevant; nor, 3d, is it true.”

AA of fe-
 derunt, 16th
 Feb. 1723.

At a hearing before the Lord Ordinary, it was contended for the respondent, that in terms of the act of sederunt 16th February 1723, Sir Alexander should produce the obligation and letter from the respondent libelled on, or confess or deny the tenor thereof; and if he refused to do so, that he should be held as confessed as to the tenor. His lordship, on the 25th day of June 1724, pronounced this interlocutor: “ In regard that the
 “ libel recites the obligation and missive letter written by the
 “ pursuer to the defender, as of a special tenor particularly li-
 “ belled, and that it bears these writs to be in the defender’s own
 “ hands, and that the defender in his defences returned with the
 “ process has neither particularly acknowledged nor denied the
 “ said writs to be of the tenor libelled, nor his having them in
 “ his hands as the act of sederunt directs; therefore held the
 “ defender confessed upon the tenor as libelled, and that the said
 “ writs are still extant in his own hands; and ordained parties pro-
 “ curators to debate in the cause, according as if the said writs of
 “ the tenor libelled were produced.”

The next day, 26th, a minute was made in the cause, stating that the defender’s counsel had consented and undertaken that if the Lord Ordinary would allow them a few days to send to their client, they would either produce the said writings or admit them to be of the tenor libelled; the Lord Ordinary, of same date, “ allowed the defender’s procurators to produce the writs above-
 “ mentioned, betwixt and the 2d day of July next with certifica-
 “ tion.” At next calling, however, the defender’s counsel craved further time, stating that they were yet without instruc-
 “ tions; but the Lord Ordinary, on the 4th of July, “ ad-
 “ mitted the declaration and missive by the pursuer to the
 “ defender to be of the tenor libelled; and found the libel re-
 “ levant and proven, and decerned in the terms thereof ac-
 “ cordingly.”

Sir Alexander’s counsel gave in a representation against this interlocutor, stating, amongst other things, that the defence of *lis alibi pendens* had been overlooked; and the Lord Ordinary, on the 14th of July, “ refused the desire of the said representation,
 “ except as to the defence of *lis alibi pendens*, as to which, or-
 “ dained the other party to see and answer the same.” In an-
 “ swer, the respondent produced an order of the Court of Chan-
 “ cery dismissing his bill; and by a declaration under his hand, he
 “ disclaimed all further proceeding in that suit. The Lordordi-
 “ nary thereupon, on the 16th of July, “ repelled the defence of
 “ *lis alibi pendens*.”

The appellant’s father thereupon presented a reclaiming petition to the Court, stating, amongst other things, that the minutes of debate were unduly drawn up, which bore that the defender’s counsel had undertaken, in case the Lord Ordinary would give them a few
 days

days to send to their client, they would either produce the writings or admit them to be of the tenor libelled; whereas in fact they neither had made, nor had authority to make such undertaking. After answers for the respondent, the Court, on the 25th of July 1724, “ Found that Sir Alexander was obliged to
 “ produce the above declaration, or to have set forth the tenor
 “ thereof in his answer, and adhered to the Lord Ordinary’s in-
 “ terlocutor, holding him as confessed upon the tenor thereof as
 “ libelled; and in regard he had so delayed to produce the same,
 “ found him liable to pay to the pursuer, before he could be
 “ heard upon the principal, when produced, 50*l.* sterling, in
 “ name of damages and expences.”

Sir Alexander next contended, that even according to the respondent’s own shewing, he ought only to have been charged with interest on 3000*l.*, and that the drawing and redrawing was a fiction to evade the law of usury. After answers, and a debate upon this point, the Court, on the 3d of December 1724, “ Found
 “ that the declaration and obligation libelled upon by Mr. Pan-
 “ toun. the pursuer, and accepted of by Sir Alexander Cuming,
 “ the defender, did import a personal obligation on Sir Alexander
 “ to pay the sums therein contained; as also repelled the de-
 “ fences founded upon the usury.”

Upon the respondent’s application to the Lord Ordinary to apply this interlocutor, Sir Alexander insisted upon this new defence, that the respondent, before obtaining any decree, ought to restore the *depositum* in the same state and condition he got it. The respondent answered, that in pursuance of a subsequent act of parliament he had lodged the subscription receipt with the South Sea Company, of which he produced certificate, and had also paid 600*l.* to the company for the 3d and 4th payments; for which he also craved a decree. The Court, on the 9th of December 1724, “ Repelled the new defence in respect of the an-
 “ swer, and ordained the pursuer to give in an account of his
 “ additional demands for advances made by him upon the said
 “ subscription, and the defender to give in written objections
 “ thereto.”

Sir Alexander again petitioned the Court, stating, amongst other things, that the respondent was indebted to him for conservator fees, received by the respondent, and prayed that the respondent might upon oath confess or deny the facts therein stated. The respondent in answer set forth, that the alleged facts were all prior in date to the transactions now in question, and he produced a discharge executed by Sir Alexander, witnessed by the appellant, bearing date the 20th of June 1720, whereby Sir Alexander discharged the respondent of “ all bonds, debts, ac-
 “ counts, and sums of money, due by him,” preceding that date. The Court, on the 31st of December 1724, “ Found that what
 “ was demanded in the above petition was unnecessary.” And by another interlocutor, on the 1st of January 1725, they “ ad-
 “ hered to their former interlocutor in presence, of the date the
 “ 3d day of December last, and also to the Lord Ordinary’s inter-
 “ locutor

“ locutor concerning redelivery of the foresaid subscription, and
 “ refused the desire of the bills.”

The respondent having given in an account of his additional demand, and craved the Lord Ordinary to decern for the same, Sir Alexander contended, that there could be no decree, 1st, because the respondent had intromitted with Sir Alexander’s fees as conservator: 2d, That there could be no interest due upon the 300*l.*, because none was agreed for: and, 3d, Because there was no deduction for the dividends received upon the subscription. The respondent answered, that the 1st was *res judicata*; 2d, that interest was due as much as the principal, the money being paid through Sir Alexander’s fault; and, 3d, that he would reform the account and give credit for the dividends. The Lord Ordinary, on the 9th of January 1725, “ repelled the two first allega-
 “ tions in respect of the answers; and, as to the third, ordained
 “ the pursuer to reform the account, and to give credit to the
 “ defender for the respective dividends recovered from, or allowed
 “ by the South-Sea company, on the foresaid subscription, and the
 “ defender’s counsel to see the said account when reformed, and
 “ be ready to object thereto.”

The respondent thereupon reformed his account, and after giving Sir Alexander credit for the dividends, and for the additional stocks and annuities granted to the holders of South Sea stock by act of parliament, to Christmas 1724, (though some were not received), he stated a balance due to him of 4712*l.* 10*s.* 5*d.* for principal and interest. Sir Alexander objected, first, that the respondent ought not to be allowed the fourth payment of 300*l.* upon the subscription, because that payment was not necessary; and, 2dly, that the respondent had reckoned interest not only for the principal sums, but for the exchange and re-exchange, and for the said 300*l.*, which he ought not to have done. This matter being debated before the Lord Ordinary, his lordship, on the 19th of January 1725, “ Repelled the objection made against
 “ the article of the fourth payment, made by the pursuer to the
 “ South Sea Company, upon the subscription deposited in his
 “ hands, and sustained the said article, and adhered to his former
 “ interlocutor as to the annual rents; and found annual rents
 “ due for the exchange and re-exchange, as well as for the prin-
 “ cipal sums, and also for the two moieties paid by the pursuer
 “ to the South Sea Company upon the said subscription; and
 “ having considered the reformed account given in for the pur-
 “ suer, approved of the same, and found that after allowance
 “ therein given to the defender of all the dividends issued by the
 “ company upon the said subscription, and received by the pur-
 “ suer, and also of the last Christmas dividend, though not re-
 “ ceived by him, there remained due to the pursuer, of principal
 “ and interest, upon the 1st of January current, the sum of
 “ 4712*l.* 10*s.* 5*d.* sterling money, whereof 4065*l.* 1*s.* being the
 “ amount of the sums paid out by the pursuer is a principal sum
 “ bearing interest; and, therefore, decerned for the said sum of
 “ 4712*l.* 10*s.* 5*d.* sterling, and for the annual rent of the said
 “ principal

“ principal sum of 4065. 1s. from and since the 1st of January
 “ current, and in time coming during the not-payment, and or-
 “ dained the pursuer upon payment, to transfer, in favour of
 “ the defender, the stock and annuities, which came in place of
 “ the subscription, with all the dividends, which should arise
 “ thereupon from Christmas last.”

The appellant's father reclaimed, again complaining of the minutes, as to his counsel's concession to produce the respondent's note or letter, or to admit the tenor as libelled, and insisting upon several other points before determined. After answers, and a hearing upon this petition, the Court, on the 5th of February 1725, “ Found that none of the interlocutors pronounced were
 “ founded upon the controverted concession by Sir Alexander's
 “ counsel, and alleged to be wrongfully placed in the minutes,
 “ and therefore refused the desire of the bill, craving the minutes
 “ to be rectified, and likewise as to the other points thereof.”

The appeal was brought by the appellant, as eldest son and executor of his late father, from “ several interlocutors of the
 “ Lords of Session of the 25th and 26th of June, the 4th and
 “ 25th of July, and the 3d and 9th of December 1724, the 1st,
 “ 9th, and 19th of January, and 5th of February following.”

Entered,
 3 Feb.
 1725-6.

(The abstract of the argument used by the parties is contained in the preceding statement of the proceedings in the cause.)

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the several interlocutors therein complained of be affirmed: and it is further ordered that the appellant do pay or cause to be paid to the respondent the sum of 50l. for his costs in respect of the said appeal.*

Judgment,
 28 April
 1726.

For Appellant, *John Willes. Wi. Wynne.*
 For Respondent, *Ro. Dundas. C. Talbot.*

On the 16th of May 1726 a petition of the respondent was presented to the House of Lords, stating that the appellant had been served with a copy of the judgment, but refused to pay the 50l., and therefore praying for “ such relief as to their lordships should seem meet.” And thereupon George Pantoun was called in and examined upon oath, touching the allegations of the said petition, and having acknowledged that he had no letter of attorney, or other power from the petitioner for demanding the money; and being withdrawn: “ It is ordered that the said petition be re-
 “ jected.”

Journal,
 16 May
 1726.

On the 23d of the same month of May another petition was presented to the House of Lords, stating that he had empowered George Pantoun of London, Gentleman, by letter of attorney, to demand and receive payment of the 50l. costs, but that Sir Alexander refused to pay the same; and praying that the House would grant the petitioner such relief as to their lordships should seem meet: and thereupon the said George Pantoun being called in, and examined upon oath touching the allegations of the said petition: “ It is ordered, that the said Sir Alexander Cuming
 “ shall

23d May.

“ shall pay or cause to be paid to the respondent the said sum of
 “ 50*l.* costs within ten days; and if he shall fail therein, that
 “ then his recognizance to his majesty in the sum of 100*l.* for
 “ payment of such costs as the House should appoint, in case the
 “ several interlocutors from which he appealed should be af-
 “ firmed, shall be estreated into his majesty’s Court of Exche-
 “ quer, in order to have the same speedily put in process
 “ there.”

Case 132. Mr. Walter Stirling, Writer in Edinburgh *Appellant*;
 Edgar,
 1 Jan. 1725. William Gray, of Invereighty - - *Respondent*.
Ex parte (a).

13th Feb. 1726-7.

Penal Irritancy.—Homologation.—A collector of taxes, during Cromwell’s usurpation, enters into an agreement with a person who had a commission to sue, compound, transact, and agree on the part of the Crown: to this commissioner the collector granted bonds for certain sums, and the commissioner obliged himself to deliver to the collector, *by a day certain*, a release from the Crown, otherwise the parties to remain as they were before the bonds were granted: it is found that this is no penal irritancy, and not to be purged after elapsing of that day.

A payment by the collector, after the elapsing of that day, was no homologation, or passing from the resolute clause.

Prescription.—Though 40 years elapsed after this alleged homologation, and no declarator brought on this resolute clause, it was still competent to plead it.

Appeal.—5*l.* costs given against the appellant, who deserted his appeal.

UNDER the Commonwealth, and during Cromwell’s usurpation, William Gray of Haystoun, the respondent’s ancestor, was employed as collector of the taxations and other public impositions in the shire of Forfar. After the Restoration, in 1662, an act of indemnity and oblivion was passed in Scotland, but with a great many exceptions; one of which related to the accounts of persons who had intromitted with or received any part of the public money from the year 1639 to the year 1660.

In 1670, the then Earl of Dumfermling obtained a grant or commission from the Crown, under the privy seal, empowering him to call to an account, in proper processes before all or any of his majesty’s courts, all intromitters with public money during the years abovementioned, and to recover all public monies in their hands unaccounted for. The commission contained a power to the earl of granting discharges or acquittances upon payment, and of transacting and compounding; and a clause, obliging the earl and his heirs to account to the Crown for his receipts.

(a) This statement is taken from the respondent’s case only, the appellant not having appeared at the hearing, and, I presume, having presented no case.

The