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Sir George Caswall vs. the Duke of Portland: Financial Contracts and Litigation in the wake of the South Sea Bubble

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In one of the more influential papers in economic history of the past twenty years, North and Weingast (1989) described the connections between a singular event, the English Glorious Revolution of 1688, and the subsequent evolution of political institutions and capital markets in Great Britain. Although it is usually difficult to argue that a particular series of events represents a true watershed in history, the arguments presented in their paper are quite persuasive in regards to public finance. In terms of both scale and unit cost of public finance, there is little similarity between the reigns of the Stuart and of the early Hanoverian monarchs. From about 1688 it is clear that a train events was put in motion that would transform the relation between government and finance. North and Weingast persuasively argued that these events were: 1) royal political revolution, followed by 2) the complete seizure of taxation powers by Parliament and by 3) an extension of Parliamentary oversight of expenditure – all of which were made necessary by the financial exigencies of prolonged large-scale European warfare. These processes were coupled with the rise of a market for tradable government debt, which was in turn accompanied by the development of a smaller market for joint-stock company equity securities. All of these developments are part of the collection of events that is now called the Financial Revolution in England.

This watershed in history can be demarked by a number of events. The Treaty of Utrecht (1712/13) marks the end of large-scale European warfare and the beginning of an extended period of comparative peace until there was world war again later in the 18th century. Although the Northern War was to trundle on to 1720, the core impetus for the European conflagration of the previous 50 years, French expansionism, was ended with the Utrecht treaty. The Hanoverian Succession (1715) too is useful as a marker because it was part of a new political settlement between the Crown, Parliament and the English people. The political settlement had several important aspects: the permanent establishment of frequent Parliaments; the stabilisation of ministerial control of Parliamentary business; the establishment of a stable role for religion in public life and a clear demarcation of the

Crown's role in foreign affairs. But it is the South Sea Bubble of 1720 that particularly interests us as the demarcation of the historical divide described by North and Weingast. In Section VI of their paper, they argued that growth and security of private capital markets paralleled similar growths in the markets for public finance. During the South Sea Bubble and afterwards, however, it was by no means clear that such a parallel development would take place. It did not appear in 1720 that English law was in any way prepared, or was being prepared, to accommodate many of the innovations of the Financial Revolution.

The Bubble Act (June 1720) imposed upon incorporated business enterprise certain limitations which were intended to discourage joint-stock capital structures for companies. New company organisation was thereafter to be encouraged along the lines of partnerships or trusts. The relation between the law and business was left to be worked out in practice and in case-law, but rarely spelled out in the clear terms of legislated law. This argument is one qualification to the North and Weingast thesis that is already well-documented.[1] In this paper we shall attempt to establish another qualification by examining how prepared and how friendly the legal system was towards the development of secondary markets for securities – the very markets in which private property rights to financial assets were exchanged.

There has been no extensive description of the legal environment or aftermath of the South Sea Bubble. Dickson describes how the litigation between the public and the South Sea Company was largely prevented,[2] but a history of private litigation between individuals has not been told except in Banner's description of some of the arguments and judgements that appeared in printed law reports.[3] What can such a history usefully reveal? It can reveal what was the custom in financial contracting and yield insights into the costs and efficiency of financial dealing and markets. The efficiency of financial markets and their completeness will probably be at the heart of any future theory of the South Sea Bubble. Scholars are far

[1] See Harris, *Industrializing English law*.
[2] cf. fn. 5, section II.
[3] cf. fn. 8, section II.

from a formal theory of this great stock market crash, but whenever such a theory is achieved, it will probably depend upon much better information than we currently have about the costs and efficiency of financial contracting in 1720. A second reason for doing such a history is that the cases studied will be revelatory of peoples' hopes and expectations during the South Sea Bubble. This not only fleshes out the social history of the Bubble, but may reveal clues as to what people thought the fundamental value of the South Sea Scheme was. A final reason for commencing a legal study of the Bubble's aftermath is so that it can become a part of the legal history of contract and liability. London was arguably the birthplace of modern financial markets and financial contracts and it would be surprising if the special demands of financial contracting as practiced in London did not leave some special mark on the development of contract law. The plan for this paper is to use the story of the first Duke of Portland as a means of entry into the study of the legal history of the South Sea Bubble and private financial contracts.

The next section is an outline of some important features of the South Sea Scheme and the resulting Bubble. Section II describes the scope of possible legal conflict concerning financial contracts stemming from the events of 1720. Much of this section is a review of what little literature we have on such legal conflicts. In section III I describe the circumstances of trade in South Sea Company liabilities in 1720 and how they defined the special features of the legal conflicts that were to follow. Section IV is a short introduction to the Duke of Portland himself and sources that are useful for the study of his role in the South Sea Bubble. In section V I look at Portland's actions in the markets for securities and show how he came to his financial and legal difficulties. Section VI describes the Duke's legal struggle to escape financial ruin. Section VII contains my conclusions and suggestions for further research.

I. The South Sea Scheme and the South Sea Bubble

What was the South Sea Bubble? More properly, in posing such a question we should employ the term used by people in 1720 and first ask, 'what was the South Sea Scheme?' A commonly-held modern misconception of the South Sea Scheme is that it was primarily a stock flotation, as would occur with the projection of a new railway company in the 19th century or the public offering of stock in an internet company in the late 20th century. There was certainly flotation of new stock in 1720, but it occurred in a stock market very unlike anything we know of today. The most important thing to know about the stock markets of 1720 is that the overwhelming numbers and values of stocks traded and issued in them were stocks in the three so-called 'great moneyed companies'. Since the foundation of the Bank of England in 1694, the re-organisation of the East India Company in 1710 and the foundation of the South Sea Company in 1712, these three institutions tried to expand their respective businesses and competed with each other for more complete control of the supply of the most important component of the asset-side of their balance sheets – the interest-paying debt obligations of the government itself. Although the trading interests of each of these three institutions were quite different, the very existence of each institution depended upon the simultaneous privilege and obligation of lending to the national government.

It was thus for their own survival and to strengthen their legal foundations that the three companies occasionally competed with each other for the political favours of the government. The South Sea Scheme was one such competition in which the South Sea Company sought for itself the <u>complete</u> management of the government's debt. This was by far the grandest of all such competitions. Indeed, it was thought to be so grand and dangerous that, by the end of 1720, the political nation decided that there would never be another such competition. In the post-Bubble legislative settlements of 1721 the relations between the

three great moneyed companies were given stability and the shape they would retain well into the 19th century.[4] It was the connection in peoples' minds between the large-scale revolution in public finances implied by the South Sea Scheme and the future of private property rights that resonates so well with the themes discussed by North and Weingast. To many people in 1720, however, the South Sea Scheme appeared more as a threat to private property rights rather than as a harbinger of better property rights in capital markets.

Before the legislative settlements of 1721 were put in place, however, there was the famous Bubble speculation about the shape and ultimate success of the South Sea Scheme. The real core of the speculation was about the future structure of national public finances. The times then were so different and the Scheme, even in its own context, was so grandiose that it is impossible to offer analogies that would make the concerns of people in 1720 understandable to modern readers. The arguments in the great majority of the polemical literature and the emphasis in debates in Parliament and in private correspondence concerning the South Sea Scheme were not so much about possible earnings, profits and payouts; the arguments were mostly about private property rights, legal rights, control of public finance, control of Parliament and the very control of government itself.

II. The Legal Conflict to Come

The extent and direction of liability in financial contracts was at the heart of many of the debates stemming from the South Sea Scheme in 1720. There has been little literature on this debate, especially in terms of how it actually played out in the courts. A good way to organise our discussion is to first consider two basic strands in the controversy: i) there was one debate on the liability that came from the South Sea Company's relations with the public

[4] This summary of the more long-term effects of the South Sea Bubble are those discussed in more detail by Dickson (1967, Chapter 8).

and ii) there was another debate on liabilities between private persons that were generated in the course of the South Sea Bubble.

The debate on the liabilities generated between the public and Company can itself be broken into two parts: i) there was the more important issue surrounding the Company's proper relationship with the holders of government annuities and ii) the less important questions about the Company's proper relationships with the public subscribers for shares in cash. The former is given prominence in the histories of the Bubble and concerns the terms by which those government annuitants were to obtain South Sea securities in return for the annuities they held in 1720. When the resulting terms were shown to be unfavourable to the annuitants, public interest was turned towards the proper restitution (if any) that should be undertaken. The resulting political struggle threatened the very foundations of public finance in Britain that had been successfully laid more than two decades previously. That threat was finally brought to an end by the legislative manoeuvrings of Robert Walpole.[5]

Less extensively discussed is the debate about the Company's relationships with its cash subscribers. This was arguably not as important a debate as the one concerning the annuitants. Only a small portion of the South Sea Company's equity liabilities was affected by the cash subscriptions for shares in 1720; in the South Sea Scheme the liability side of the Company's balance sheet was being restructured primarily by the issue of large amounts of new debt (to be held by the Treasury, for the most part) and large amounts of new equity that were going to be issued directly to owners of government annuities. Nevertheless, until the Company's new relations with the government and the annuitants were put on a final footing, the cash subscriptions for shares in 1720 were the primary means by which the Company raised cash for its operations.[6] Many persons saw the cash subscriptions as the means by

[5] Dickson, *The Financial Revolution in England*, chapters 7 and 8, Financial Relief and Reconstruction.
[6] The Company also managed to raise short-term cash (£1 million) by borrowing Exchequer Bills from the Treasury.

which the Company financed its most nefarious behaviour in 1720. The legal and political standing of the cash subscriptions is analysed in another paper.[7]

The only study relevant to private financial contracting during and after the South Sea Bubble is Banner's survey of treatises, judgements and reports on cases.[8] Of direct concern to this study are his conclusions with regard to absolute liability in contract. In section III of Chapter 2 he starts with a brief analysis of Sir David Dalrymple's treatise[9] on time bargains and then reviews the implications for the judgements handed down in Thomson vs. Harcourt.[10]

There were several South Sea pamphlets of the 1720's that were evidently written by lawyers. The most extensive and interesting document of this type was Dalrymple's *Time Bargains*. It is an important document because it is argued closely and is careful in its definition of terms. Dalrymple also did not fear to reveal his authorship (which was unusual) and, as a prominent legal officer serving in the government until shortly before the South Sea Bubble,[11] his opinion might be accorded some special authority. Dalrymple was indeed impressed with his own authority, wrote contemptuously of what he called coffee-house talk, and his writing was dedicated ironically to 'my Brethren Animals, the Impudent and Ignorant'. His overriding concern was to address the large question of 'what will become of Time Bargains? Will they be good or not?'[12] He declined to discuss the Common Law's view on the matter because, as he admitted, it was too great a subject for his small volume. He took his arguments from Equity and the Civil Law, on which he could write with more authority as a one-time Scottish law officer. One of his first points was that on the one question of time bargains alone, Parliament must come in with an Act or Acts to regulate or put an end to disputes,

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[7] Shea, 'Financial market analysis can go mad', in particular, appendix II.
[8] Banner, *Anglo-American security regulation*, chapter 2, section III and chapter 3, section III.
[9] Dalrymple, *Time Bargains*.
[10] Thomson vs Harcourt, 1 Brown 193, 1 *English Reports*. See also *Cases of the appellant and respondent in the House of Lords* (HL/PO/JU/4/3/4, HLRO).

> I think this one Question affords such a fund for Law Pleas, that is Consequence enough to deserve the Parliament's Notice (...) The Parliament ought to give their Determination in all Cases, which they take Notice of, according to the Laws of Nature and Nations, and the universal Rules of Equity;[13]

He wrote that in Equity and Civil Law a contract must be *quid pro quo*. Since no one expects to be a loser going into a contract, if they are a loser coming out by being wronged, 'then the Law ought to assist him'.[14] The Civil Law is hostile to bargains that result in sales at less or more than a good is worth, but the Common Law is more *laissez-faire* in this regard, everyone to be left to make the best bargains they can, be what they may.[15] As far as time bargains were concerned, Dalrymple distinguished between three types: a) Bargains on Stock; b) Bargains on first and second subscriptions and c) Bargains on third and fourth subscriptions.

Bargains on Stock were of three types: i) transfers of stock; ii) the assignment of subscription receipts or iii) the taking of security (bills, bonds or other) for the price 'between the Buyer and Seller, the Stock &c. still remaining in the Name and Possession of the Seller.' The form of the bargains was of two sorts: a) '(…) the Stock, &c. was sold a great deal above the Market Price at the Time, and a Bill or Bond taken for the Money payable at some time after' or b) 'Others were sold at the Market Price, and a Bond or Bill taken for the Price with Common Interest from the Date. This last sort hardly deserves the Name of Time Bargains. However, we shall now consider them as such, and discuss them first, because whatever Argument is good in Law against them, will be good against every one of the rest'.[16]

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[11] Sorenson, 'Dalrymple'.
[12] Dalrymple, *Time bargains*, p.4.
[13] Ibid. Parliamentary intervention in such matters was delayed by a resolution of 19 December in the Commons. (Boyer, *The political state of Great Britain*, Vol. 20, pp. 584-5). Dalrymple discussed these matters at further length in *Time bargains*, pp. 41-2. The need for a general 'annulling Act' was a theme in many other tracts written in the period and, of course, soon such Acts became a reality with 7 Geo. 1, c. 5 and 7 Geo. 1, stat. 2. More details are found in the analyis of appendix II in Shea, "Financial market analysis can go mad".
[14] Dalrymple, *Time bargains*, pp. 5-6.
[15] Ibid, pp. 6-8.
[16] Ibid, pp. 10-11.

If the Directors were in no way culpable and if the Stock was bought of a man in no way concerned in the mismanagement of the Company, then if a man was mistaken in the

> real Value of the Thing bought (…) (h)is promise therefore being founded in Presumptione facti quod non ita se habet is in itself void, and by the Civil Law, the buyer is certainly Free, because the Læsio or Loss he sustains by the Bargain, is ultra dimidium valoris rei venditæ and likewise because there was a latent Defect in the Thing Sold, which if the Buyer had known, he would never had promised so much for it:

and he has grounds for an action against the seller even if the seller was ignorant of the defect.[17]

Dalrymple was also sympathetic to the application of the statutes against usury against certain styles of time bargains (such as in Thomson's and Harcourt's contract). For example, he would have certainly argued that when forward buyers and sellers were mutually agreed that future values would be high, then if they contract to deliver stock forward at a high price relative to the present price, the forward seller is certainly practicing usury upon the buyer.[18] As we shall see, Portland's advisors were quite interested in the argument that the Duke was a hapless victim of usury.

Banner cites the final judgments in Thomson vs. Harcourt and concludes that the rule of absolute liability that prevailed in courts of law was easily adapted to cases involving financial contracting during the South Sea Bubble and afterwards. This conclusion is reinforced in section III of chapter 3 in which he recites the case reports that show, "From the beginning, the courts were willing to enforce contracts to buy or sell securities to the same extent as contracts to buy and sell any other item".[19] In the reports which he reviews he concludes that all involved cases in which sellers were trying to hold buyers to their agreements to buy securities at agreed higher pre-crash prices. None of these cases failed on grounds that the agreements were themselves *executory agreements* – requiring performance

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[17] Ibid., pp. 12-13. This is a basic theme, which is echoed in much other pamphlet literature such as (Anon.), *Queries*.
[18] Dalrymple, *Time bargains*, pages 31-2.
[19] Banner, *Anglo-American security regulation*, p.111.

in exchange of monies and securities in the future. In his opening summary of the section he even goes so far to write, "Judges tended to give as much latitude as possible to the securities market, by enforcing even the more speculative transactions and narrowly construing would-be statutory limits on trading…"[20]

However well rules of absolute liability were affirmed in cases like Thomson vs. Harcourt, there is still much we need to learn from the processes in which they were applied. In particular we need to know how long and costly legal processes were. On 18 June 1720, Thomson agreed to deliver to Harcourt South Sea stock at a future unknown date (dependent upon when the South Sea Company was willing to transform government annuities into company stock) at the rate of £920 per share. This date was just a few days prior to the closing the Company's ledgers for transferring stock in order to make up the midsummer dividend on the stock. The closing period was anticipated to be about two-months long. There are many instances in the historical record of persons agreeing to forward purchases and sales of stock for an array of dates after the transfer books were to be reopened at the end of August 1720 and the Thomson/Harcourt agreement was but a typical example. What was also typical of their agreement is the forward delivery premium that was built into it. On 18 June the value of South Sea share for immediate delivery was about £750 per share. The forward premium in their contract was thus large; £920 is 22.67 p.c. higher than £750 and, considering that the forward contract could have been expected to be completed in about three month's time, this would imply a forward premium of about 100 p.c. p.a. This is a large number, but it is not an atypically large number for the early summer of 1720.[21] There could be several reasons for such a premium. Perhaps everyone at that time, including Thomson and Harcourt, were mutually optimistic and in agreement on probable future values for South Sea shares. Or on the other hand, perhaps there were a significant number of forward sellers who worried about the substantial risk that future South Sea share values might turn out to be

[20] Ibid.

low. In writing an array of forward contracts such persons might expect that the typical forward buyer would attempt to renege on his contracts. A premium to compensate forward sellers for this risk might have been typical in forward delivery contracts. It is hard to imagine forward premia of this size being common in a legal environment in which the rule of absolute liability in executory agreements was readily, cheaply and certainly applied. After all, small forward premia are achieved in modern-day forward markets, not through enforcement in courts, but through marking-to-market settlement systems that are a feature of modern-day futures exchanges. Thomson's route to justice and restitution was a long and (probably) an expensive one and his suit was only partially successful.

Banner's work here depends primarily on printed law reports. Law reports were written and collected to be used in arguments and were at times accepted in court as precedents. They would thus tend to highlight aspects of cases that would be most useful for those purposes. The case that was most likely to go unreported was one in which all the legal principles involved were already well established. Although Banner's survey establishes that the eighteenth-century financial contract for future performance was considered to be just another form of executory agreement, it does not show whether it was as easy or cheap to enforce as any other executory agreement. In particular, it does not tell us if the balance of litigation that followed in the wake of the South Sea Bubble favoured reneging buyers or fairly protected the sellers. To answer these questions would require an extensive survey of the bills presented, cases heard and their resolutions. No matter how well financial contracting fitted into the existing principles of contract law, there may have been something about financial contracts during and after the South Sea Bubble that made them easy to void. If so, and more importantly, if it was widely understood to be so, surely this would have implications for how people drew up contracts and valued them.[22] To perform this research is

[21] This was an example of one type of bargain on stock described by Dalrymple. cf. fn. 16.
[22] Further evidence is found section III and supplementary appendix III (re the South Sea Company's third-subscription shares) in Shea, "Financial market analysis can go mad".

a large task, but we argue that one very good place to start would be to look at a sample of cases outside of those that found their way into the law reports. It would be especially useful if these cases have a history that is also supported by private legal documents. Unlike a law report on a case in judgement, if we could look at how lawyers prepared strategically, how they looked at the law and formed strategies to use in the defence of their clients' interests, we might discover something more like the true dimensions to the problem of obtaining efficiency in financial markets. I will argue that the Portland cases are one such sample of cases.

III. Private Financial Contracts in 1720

It was typical in this period that ledgers become occasionally disabled from normal day-to-day work so that they could be used to bring up to date the company's larger scale book-keeping. The primary instance of this would be when stock ledgers would be closed so that a company's clerks could use them to calculate and allocate dividends. Or whenever there was going to be any general change in the definition of the Company's nominal capital, such as in a rights issue or in an exchange of shares for government annuities, the lumbering pace of eighteenth-century bookkeeping would require the stoppage of recorded trades in a company's liabilities. In the South Sea Company's case there were two periods in 1720 in which the stock ledgers were closed: a) they were closed for an announced two-month period from 22 June through 22 August 1720 and b) they were closed on 31 August, to remain shut until 22 September, but were suddenly reopened on 12 September.[23] This latter closing of the transfer books was a product of the South Sea directors' usual chaotic style of financial management. As soon as a fourth cash subscription for shares was announced, there was

[23] A forward financial contract whose performance was tied to the re-opening date that ended this period was the object of dispute in Maber vs. Thornton. We find the Company decision to close the ledgers in BL, Add. MS

discussion in committees about how it would subsequently be managed and whether it might not be converted into a rights issue for original shareholders or whether yet another (fifth) issue of shares should be a rights issue. While these matters were discussed, the Directors determined it would be best if the transfer ledgers were shut. Whether on a regularly announced basis or not, private persons had to be prepared to occasionally make their own markets for trade in company liabilities as best they could. Private financial contracting was instrumental in this process.

Private financial contracting was also used to make the markets in company liabilities more complete. There clearly was a demand for contingent claims (options) in company liabilities. A large part of this demand may have been met in the ready-made markets for subscription shares,[24] but there may have been much other demand that could only be met through private contracting. Call options on shares were the most common from the evidence that we have. Options would use very much the same contractual forms as were used in forward delivery agreements. That is, the contracts would be written as bilateral contracts, using very similar legal language to bind one party and the other to perform in the contract.[25]

IV. The Duke of Portland: Background and Sources

Henry Bentinck (1682-1726) was the son of William Bentinck, who was a great favourite of William III and who rose in the King's service as a diplomat and soldier. He was given the revived title of Earl of Portland, a title that the son (Henry) assumed upon the father's death in 1709. In 1716 Henry was created the first Duke of Portland. The fortune that had been accumulated by his father in England was greater than the estates in Holland to

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25,499, *Court minutes*, 26 August 1720. In the same source the ledgers are ordered (11 September) to be re-opened the next day.

[24] My thesis in "Understanding financial derivatives during the South Sea Bubble" is that the Company's subscription shares were a form of compound call option on the firm's own shares.

which Henry's half brother, Willem succeeded.[26] The Duke supplemented this inherited fortune by marriage to Elizabeth Noel (d.1736), first daughter of the second Earl of Gainsborough. As will be shown later, it was by borrowing from his own estate trust that Bentinck was able to leverage much of his speculative activity during the South Sea Bubble. It was also in his role as trustee that he later tried to protect some portion of this fortune from his creditors.

The Portland(London) manuscripts at the University of Nottingham (class PL) are a collection of legal, financial and estate records that came to Nottingham in 1947 after sustaining considerable war damage in the London law offices of Bailey, Shaw and Smith, solicitors to the Dukes of Portland since the late 1830's. This collection is the main repository of legal and financial records of the Portland estate that go back to the early eighteenth century. There is also that portion of the Portland Manuscripts taken from Welbeck Abbey, not residing with the rest of the Portland Manuscripts at the British Library, which reside at the University of Nottingham (class Pw). These too contain many papers that are complementary to the PL-class financial and legal papers.

Although Bubble historians have long known that Portland suffered some great reverses in 1720, without the PL and Pw classes of papers, no real history of his troubles could be written. Many of the papers are highly disordered and so a time-line can be difficult to discern in Portland's legal affairs. Many of the papers are also unavailable whilst they await conservation. The manuscript curators at the University of Nottingham, however, have gone to great lengths to bring forward the conservation schedule for some of the most important documents so that they can be consulted and in other ways provided information from other papers that simply cannot be handled by anyone but a professional conservator. It is only

[25] Examples of option contracts from this period are not numerous, but what few exist are quite alike in their legal language. See BL, Add. Ms. 22,639, fff. 193,195 and 203, as examples.
[26] Dunthorne and Onnekink, 'Bentinck, Hans Willem , first earl of Portland (1649–1709)'.

thanks to the efforts and co-operation of the Manuscripts Collection staff at the University of Nottingham that this paper is possible.

V. The Duke of Portland: His Actions during the Bubble

The Portland manuscript collection contains several distinct sources of information about the Duke's speculative contracts:

a) contracts and draft contracts - There are twenty-four such contracts and drafts in the PL class, but there are a number of others in the Pw class, amongst which are the contracts most ruinous to the Duke. Table 1 describes some of the rough details of PL-class contracts. The reader should not at this point work too hard in making sense of the contractual terms. Some of the contracts' special characteristics, such as side-agreements and guarantees, will be explained later;

b) small ledgers and notebooks recording contracts - Complementing the contract documents are several notebooks and ledgers in which payments associated with some of the contracts were recorded. Importantly, these notebooks also contain references to contract-related payments for which no manuscript contracts exist. We have placed a transcript of one of the more useful of these (Pw B 164) in Appendix 1[27] and

c) memoranda discussing the contracts and resulting transactions - The details of many other contracts and related transactions can also be had from references in letters and legal documents. The memoranda often contain quite detailed legal analyses.

From these sources we can trace the rough outlines of the Duke's speculative activities. The Duke was known to a wide circle of individuals who helped him in his financial stratagems. For reasons never stated, it appears that the Duke decided upon on a highly aggressive attempt to control as much South Sea stock as he could through leverage. We do

[27] Three other such sources are also useful, Pw B 165 and PL F2/6/179 and PL F2/6/310.

not know what his holdings were near the beginning of 1720, but by the time that the South Sea Scheme was fully underway with the South Sea Company's Act (6 Geo 1, c.4) coming into force by later April, the Duke was starting to move aggressively.[28]

The first such action that we can identify was his borrowing of £83,575 from the Portland estate trust. Created in 1689, the trust was augmented by extensive grants to the Duke's father and by the Duke's marriage to Elizabeth Noel in 1704. The trustees were the Duke's two lawyers Sir John Eyles and M. Joseph Eyles and the banker Comrade de Gols. The Duke used the money, supplemented with his own cash to buy 160 South Sea shares.[29] According to a later (and perhaps deliberately misleading legal strategy document) the 160 shares were to be under control of the estate trustees with instructions to collect payouts and to sell the shares if their value fell to £700 p.s. or below. How the trustees were to have control of the shares however is difficult to see for the shares were re-transferred to six other individuals exclusive of the trustees.[30] We see these individuals named again as contracting to sell back to the Duke these shares (with the 10 p.c. midsummer stock dividend) at about £705 p.s. for the opening of the transfer ledgers.[31] Portland's own promise to re-purchase the shares for about £705 each was the only protection accorded to the trust's outlay of £83,575. In a hypothetical case document from May 1722, counsel's opinion was asked whether trustees, who failed to collect dividends and who failed to sell the stock they held in trust at values higher than the monies lent out on that stock, were liable to make good the monies lost.[32] The hypothetical discussion contained in this document was clearly a trial argument to see if the blame for the estate trust losses could be pinned on the trustees and not on the Duke.

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[28] Portland was certainly at as a high, probably higher, social level than either Lord Londonderry or Chandos in 1720. Yet the dealings of these two were more varied and sophisticated than are Portland's dealings. It does not appear that his dealings had a logical direction except one based upon presumed advances, forever and upward, in South Sea shares values. For Londonderry's and Chandos's South Sea histories, see Neal, '"For God's Sake, Remitt Me"'.

[29] I follow the usual convention in defining £100 nominal South Sea stock as one South Sea share.

[30] PL F2/6/179, page 12.

[31] Pw B 165, pages 23-4. The Earl of Warwick contract contained in Table 1 is one of these contracts and is dated 31 May 1720.

[32] PL F2/6/180.

The Duke's next move was to borrow £8,000 and then £70,000 from the South Sea Company on the security of another 160 shares (20 shares transferred to South Sea Director Robert Surman and 140 shares transferred to a Mr. Shaw).[33] This is remarkable and shows that the Duke was especially favoured by the Company in the allocation of loans on stock in which the Company's stated bye-laws on the loan programme stipulated that no more than £4,000 would be lent to anyone individual nor would monies be lent at a higher rate than £400 per pledged share.[34] A parallel record of these loans can be found in the South Sea Company's ledger of the loans on stock. This was a document of some importance in the deliberations of the Parliamentary Committee of Secrecy at the end of 1720.[35] Under a heading for 13 June, the Duke is shown to have borrowed from the Company £84,000 (not £78,000) on the pledged security of 151 original shares and 20 shares in the first cash subscription.

In the meantime the Duke was creating a number of forward purchase agreements with a wide range of people. From what contracts or drafts of contracts that exist (see Table 1) we see the Duke typically agreeing to repay money lent to him by individuals and in return receiving back from them some South Sea stock. The contracts also typically stated that the Duke would undertake the receipt of the stock (making him liable to an action on the case, if he were to default) and also stated that the other party held the stock in trust only as a trustee (also making that party liable to an action) and the money to be repaid was a loan to the Duke (additionally making the Duke liable to an action of debt). In some of the contracts an exchange of securities was specified. For example, a certain amount of South Sea securities in the counterparty's hands could be sold if stock prices fell to a sufficiently low level. Sometimes these securities were to be held in trust by yet another party (e.g. the Sword Blade

[33] This is probably Joseph Shaw, a broker with heavy dealings with the South Sea directors. Abstracts of his ledgers showing his dealings with the directors are found in Box 158, parchment collection, HLRO.
[34] There were several different packages of loans that were made to shareholders. The first was in late April and the so-called Third Loan was in June 1720. See discussion of these loans in BL, Add. Ms. 25,499, *Court Minutes*.

Bank) and there could even be a provision that additional stock would be given to such trustees if stock prices fell. A final guarantee usually built into these contracts was the traditional double penal sum long found in written contracts of debt. Given the stupendous size of some of the Duke's contracts, it is striking to see this penal sum provision retained in an unreduced form.[36]

The Duke was active in forming forward purchase agreements in the spring of 1720, usually for settlement before the closing of the transfer ledgers at the end of June 1720. We have some evidence that the Duke was successful in fulfilling these contracts.[37] At the same time he was settling these earlier contracts, he was promising to undertake delivery of more stock at even higher prices for the opening of the Company's ledgers at the end of August. He also formed some more long-term forward purchase agreements for settlement in the autumn and end of year 1720, with two more large contracts for settlement in March 1721. It was these latter contracts that were the largest and therefore potentially the most ruinous to the Duke's fortunes.

In Table 1 we see three of the contracts that were to give Portland difficulties. There was first the relatively long-term forward purchase agreement with Edward Eure. The manuscripts show that Eure planned to make a good tender of shares to Portland, for there is a letter from Eure to Portland commanding his presence on 21 March 1721 to take receipt of the 50 shares for the contract price of £1,000 p.s.[38] But elsewhere we find a signed statement by three clerks of the South Sea Company that 21 March was not a regular transfer day, therefore to make a good tender Eure would have had to attend at the South Sea House all day, which he did not do.[39]

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[35] *An abstract of the ledgers of the loan on stock*, Box 157, parchment collection, HLRO.
[36] We shall see later that a penal sum of £200,000 originating from the Duke's two £50,000 forward purchase agreements with George Caswall was the final claim still in dispute between Caswall and the second Duke in 1741.
[37] Pw B 165 is filled with descriptions of the terms under which these contracts were settled.
[38] Pw B 143.
[39] PL F2/6/145. The tender of shares had to be made at South Sea House where the transfer ledgers were lodged.

In a number of the Portland cases it is alleged, at least as a trial argument, that good tender of stock was not made at the stipulated time. The argument appears in a number of unrelated cases found in the *English Reports* as well. If these are to be believed and incredible as it may seem, some number of people, who had the opportunity to sell shares from £900 to £1,000 p.s. when shares were worth only about £150 p.s., apparently passed up the opportunity to do so.[40] In other papers we see the Duke's advisors checking that the Eure contract was properly registered and that Eure was actually in possession of sufficient stock to make the tender when the contract was signed. These were all requirements under the 1721 Act 7 Geo. 1, stat. 2 and were systematically checked for in many other contracts to which Portland was a party.[41] The Eure contract, if fairly settled, would have cost Portland about £43,000 net and he could have been liable for £100,000 in a penal sum in the worst case scenario.

The second contract that gave the Duke trouble was the contract for £17,600 with John Edwin. Edwin and his brother (Charles) adopted a particularly aggressive and noncompromising stance towards the Duke. The first discoverable communications from these brothers to Portland were in the most threatening tones.[42] We know also that they were the most active in trying to build legal coalitions against Portland amongst his other contract partners.[43] They even tried latterly to have Portland's goods and chattels distrained.[44] There

[40] We later see that Sir John Meres actually did this because, as he wrote, he thought it was accommodating to Portland to be allowed more time to settle with Meres. Perhaps other contracting parties felt the same way. Certainly Caswall's correspondence with the Duke regarding Portland's account with the Sword Blade bank also expresses this sentiment. cf. fn. 59.
[41] Such references are found in a number of places, but mostly in PL F2/6/145.
[42] Pw B 36-7.
[43] In March 1722 Sir John Meres (Pw B 57 and Pw B 64/1) was asked by the Edwins to join them in suits against the Duke. Similarly, in Pw B 74-8, Thomas Wynne plaintively wrote to the Duke just before his departure for Jamaica that he was being pressurised by the "unmerciful Edwins" to join them against the Duke. For his contract with the Duke, see Pw B 164 (Appendix 1). In their letters to the Duke, Charles and John Edwin state that they have successfully brought others into their hounding of the Duke. On 14 October they remind him their affairs with him involve others quite prominent, "one is a gentleman of Norfolk a relation of Mr Walpoles & Neighbor of Lord Townsends who has very little to do in the South Sea affairs except in this unfortunate transaction with your Grace, another is a Daughter of your neighbour Sir Roger Hill who has once had the honour to be acquainted with her Grace the Duchess, a third is a Lady of her acquaintance." Pw B 36.
[44] PL F2/7/7, a letter reference to a writ of *distringas*, purchased by the Edwins, which was in the hands of the Sheriff of Buckinghamshire in December 1725

are two contracts with Sir George Caswall in the table, the second being just a compounding of the first contract. To that contract we must add two others, both for 50 shares at £1,000 p.s., each with £200,000 penal sums contained therein.[45] These were the main contracts that the Duke, his widow and his successor, the second Duke fought so strenuously to renege upon throughout the 1720's and, in the case of the Caswall contracts, as late as 1741. On the contracts to Eure, Edwin and Caswall alone Portland's net liability would have been about £180,000 if fairly settled. Added to that there would have been about another £100,000 in net liability stemming from all his other unfavourable forward purchase agreements that we have discovered. His potential liabilities from these contracts would have been a very large portion of his potential net worth at that time and may have well sunk the entire Portland fortune if they had been fully honoured.[46]

[45] cf. fn. 66.

[46] Dunthorne and Onnekink report that the value of his father's estate was about £850,000 when it was passed to the Duke in 1709. The estate was heavily encumbered with debts even prior to the South Sea Bubble. See PL F2/6/106-110.

Table 1	**Contracts in the Portland(London) Manuscripts**				
Acc. No.	**Date**	**Stock**	**Payment**	**Settlement Terms**	**Seller**
PL F2/6/111	23 April 1720	£2,000	£6,400	12 Aug 1720 or next opening	Charles Ottway
PL F2/6/112	16 May 1720	£2,000	£8,200	On or before Xmas 1720	Thomas Seabright
PL F2/6/113	1 June 1720	£1,000	£6,400	On or before next closing	Earl of Uxbridge
PL F2/6/114	31 May 1720	£1,000	£7,050	On or before next shutting or within 3 days of the opening	Earl of Warwick
PL F2/6/115	1 June 1720	£3,000 1st Sub	£12,000	For the opening	Henry Temple
PL F2/6/116	1 June 1720	£2,000	£12,800	On or before next shutting	Richard Bayliss
PL F2/3/117	1 June 1720	£2,000	£11,600	On or before next shutting	Thomas Martin
PL F2/6/118	1 June 1720	£1,000	£5,900	On or before next shutting	John Shurkbrugh
PL F2/6/119	1 June 1720	£1,000	£9,350	For the opening	Sir William Gage
PL F2/6/120	10 June 1720	£5,000	£50,000	On or before 25 March 1721	Edward Eure
PL F2/6/121	28 June 1720	£1,000	£10,000	Within 14 days of opening	Alexander Gordon
PL F2/6/122	18 June 1720	£2,000 1st Sub	£10,000	On demand (the Duke executes almost immediately)	Robert Surman
PL F2/6/123	23 June 1720	£1,000	£8,900	For the opening	John Marke, goldsmith
PL F2/6/124	23 June 1720	£1,500	£13,875	For the opening	Daniel Carroll
PL F2/6/125	23 June 1720	£1,000	£6,650	For the opening	Isaac Hern. Nunes
PL F2/6/126	23 June 1720	£1,000	£6,550	For the opening	Phosaunt Crisp
PL F2/6/127	23 June 1720	£1,000	£8,900	For the opening	John Marke
PL F2/6/128	23 June 1720	£5,000	£33,000	For the opening	Sir George Caswall
PL F2/6/129	2 July 1720	£3,000 1st Sub	£11,000	Within 8 days of the opening	Thomas Martin
PL F2/6/130	22 Aug 1720	£1,100	£7,300	On 23 Nov 1720	Isaac Hern. Nunes
PL F2/6/131	23 Aug 1720	£3,500	£22,000	On or before 24 Nov 1720	William Bowles
PL F2/6/132	23 Aug 1720	£3,000	£17,600	On or before 23 Nov 1720	John Edwin
PL F2/6/133	23 Aug 1720	£5,500	£36,300	On or before 24 Nov 1720	Sir George Caswall
PL F2/6/134	23 Aug 1720	£1,100	£7,200	On or before 24 Nov 1720	Phosaunt Crisp

VI. Portland's Defence

What defensive stratagems did Portland adopt? One thing that is clear from the manuscripts is a substantial uniformity in his contracts. If he could not discover a legal stratagem that would defeat them all, they would have to be defeated piecemeal, with perhaps the weakest opponents being singled out for the most ruthless dismissal. There is strong evidence that Portland's advisors chose their adversaries in this way. They of course opposed those persons who posed the greatest threats to the Bentinck fortune. They ignored the claims of those who, out of post-Crash poverty, were too weak to pursue Portland legally.[47] The first thing was to discover every potential opponent's weaknesses. Portland's lawyers, directed by John Lucas, were first ordered to check each contract thoroughly to see if had been properly registered at the South Sea House as stipulated in 7 Geo 1, stat. 2. Second, every possible bit of evidence, no matter how far fetched, that would show that a forward seller was not diligent in the proper presentation of his claims to the Duke was gathered. Finally, the best legal opinion of the day was polled on the validity of the contracts themselves.

It is in the statements of strategic legal opinion that we find the most interesting papers amongst the Portland manuscripts. Whilst pleas can be found in archives and whilst judgements can be found in the legal reports, it is rare to find a collection of communications between lawyers and clients in which a range of legal strategies is discussed. Such communications show the known extent to which legal opponents could use the law to achieve their purposes. Such documents appear in the Portland collection from about September 1721. At that time the prominent King's Sergeant, Sir John Chesshyre, [48] was asked to look over the Edwin contract and to give his opinions.[49]

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[47] Such were the fates of Alexander Gordon and the Duke's agent and financial correspondent, Pheasunt Crisp. See Pw B 38-41 and Pw B 21.
[48] Lemmings, 'Chesshyre, Sir John (1662–1738)'. Chesshyre was to become the King's First Serjeunt in 1727.
[49] PL F2/6/200, reproduced here in full as Appendix 2. My thanks to Kathryn Summerwill who helped in the decipherment of Serjeunt Chesshyre's difficult hand.

The legal questions and opinions are undisguisedly directed at defending against actions that might arise from the contract dated 23 August with John Edwin.[50] There is little joy in Sergeant Chesshyre's opinions for the Duke. Amongst the "facts" put to the lawyer was that the £17600 the Duke was supposed to pay on 23 Nov 1720 for 30 South Sea shares was split into a loan of £16,000 and £1600 interest for 3 months. The claim is made that this amounts to a loan at an interest rate of 40 p.c. p.a. and is clearly usurious.[51] When asked whether the Duke could claim the statutes of usury, Chesshyre is quite clear that the agreement will not be looked upon as usurious merely on the Duke's or any other person's say-so.[52] He will have to prove the "Loan to be or having an usurious sum for forebearance..." and it must be "…in such a case the proofs be clear and manifest."[53] Chesshyre also warns in so many words that the Duke cannot simultaneously deploy all the legal weapons that he has at his disposal. If he is going to seek relief on the grounds of usury, he cannot simultaneously take Edwin to task for not performing on the contract. If the Duke were to claim that Edwin took unfair advantage of him under the terms of the contract, he would also affirm the contract's legality.

To set these arguments in their financial context, consider that when the contract was signed on 23 August, South Sea shares were worth about £750 p.s. One or both parties to the contract were clearly pessimistic about the future value of such shares on 23 November when the contract was to expire. £17,600 promised in payment for 30 shares would imply a delivery price of a little more than £580 p.s. The facsimile contract, which Chesshyre was inspecting, specified that Edwin could sell the 30 shares he was holding if their value fell below £600 p.s. and the Duke would still guarantee that on 23 November he would pay Edwin the residual up to the fully specified £17,600. Certainly by the second re-opening of the firm's share ledgers (12 September), South Sea share values had not fallen below £600

[50] PL F2/6/132.
[51] App. 2, lines 1-16.
[52] App. 2, line 36, "Paroll proofs…will not be allowed..."

p.s. What the Duke's legal advisors wanted to claim, however, was that Edwin had got rid of the 30 shares well before 12 September. This would have put Edwin into a double bind. In the first instance, the original contract stated that the shares were the Duke's and Edwin was holding them in trust. Therefore the use of the shares for Edwin's benefit would be against the terms of the contract. Secondly, by the time Chesshyre was doing his work, 7 Geo 1, stat. 2 required that for contracts that had yet been unperformed, sellers of stock had to be in possession of adequate stock within six days of the contract's date. If Edwin had disposed of the 30 shares too quickly, the Duke would be liable to purchase only the shares Edwin was actually in possession of within the six-day window around the contract date. These were the issues addressed to Chesshyre and to which he responded.[54]

In his last advice, Chesshyre warned the Duke that if he claimed there were wrongful advantages to Edwin resulting from his dealing in the Duke's stock, he had better make sure that the advantages to Edwin actually exceeded the Duke's liability to Edwin under the contract. For by making this argument, the Duke would again affirm the validity of the contract.[55] Such a balance was not very likely to be in the Duke's favour. In a small book, which we might call an inventory and collection of memoranda about the Duke's contracts, we find that Portland's advisors had discovered, while looking at the South Sea stock ledgers, that Edwin was in possession of only 6 shares on 31 August 1720. The value of South Sea shares at the signing of the contract was about £750 p.s. and was certainly still above £600 p.s. until about 14 September. So, according to the contract Edwin would have prematurely disposed of 24 shares he was holding for the Duke. But the maximum net advantage to Edwin of having done this (prior to further price declines below £600 p.s.) would be only 24×(£750-£600) = £3600. Balanced against this the Duke, by affirming the contract, would have obliged himself to (at the very least) a liability to purchase the 6 shares for about £586

[53] App. 2, lines 40 and 53.
[54] App. 2, lines 18-22, 29-30 and 61-70.
[55] App. 2, lines 77-80.

p.s., when they were worth then only about £150 p.s. The danger of admitting to this liability is that Edwin might even still later prove that he had control of all the required 30 shares by trust arrangements with others. At least this was the claim made by Edwin that was noted in another source.[56]

In the end, Edwin may or may not have fulfilled his side of his contract, but the Duke was in the position of having to affirm the validity of the contract in order to discover in court whether this was true or not. What did he do? We have not yet discovered the full proceedings of Edwin against the Duke; all we know so far is that they were strenuous and threatening and from this we might guess that Edwin was pursuing the Duke for full performance of the contract, plus costs, at least. This would have been an obligation to repurchase all 30 shares for £17,600 when they were worth only £4500. Furthermore, Edwin might have pursued the Duke for the penal sums resulting from default on the contract, £35,200. In an undated memorandum we see noted only some instructions to delay the Edwins' actions by presenting a bill to relieve the Duke of his contract with Edwin on the grounds of usury and improper use and benefit of the 30 shares – precisely the two grounds that Chesshyre warned should not be used simultaneously.[57]

We have outlines of how the Duke was planning to proceed against his other antagonists. We have seen that against Edwin and Crisp the Duke was going to proceed on the grounds that, under 7 Geo 1, stat. 2, these persons were deficient in the stock they needed to have when the contracts were signed. There were also a few instances in which his advisors believed they had discovered that contracts had not been properly registered, as required under that Act. The most important instance of this concerned the Duke's first contract with Sir George Caswall. Our sources suggest that his legal advisors thought that

[56] PL F2/6/137.
[57] PL F2/6/145. Because the memorandum is undated, it may very well have predated Chesshyre's advice. The same document shows that the Duke intended to give Pheasunt Crisp the same treatment he was going to mete out to the Edwins. The similar contract with Crisp (PL F2/6/134, Table 1) was to be opposed on the same grounds – usury and not having enough stock within six days of the contract date.

usury was still useful grounds for relief against the contracts with Edwin, Caswall (3rd contract), Crisp and Bowles. By far the most common defence that was deployed against the creditors, however, is that they failed to make good tender of stock to the Duke. This was to be used against Bowles, Meres, Nunes, Crisp, Eure, Seabright and Caswall.[58] We cannot yet be sure how far in advance or after Chesshyre's advice that the Duke's legal defences were fully operating, but we do know that from late 1720 and through much of 1722 the Duke was actively reneging and delaying his creditors.

Not all creditors were successfully turned away, although many of the letters in the Portland archives are plaintive appeals to the Duke. The best preserved collection of letters is from Sir John Meres. Alternatively begging, cringingly obsequious and threatening, the Meres letters to Portland provide some of the best amusement to be found in any South Sea archive. That they were ultimately successful with the Duke may be due to their writer's persistence, but it is more probable that, as one of the six clerks in Chancery, Meres was ideally placed to advance his claims against Portland along a legal fast-track - or so he would occasionally darkly threaten.

> "Feb 15 1721 - My Lord Duke, I may now reasonably Compute that besides the loss of £11170 by the 1st and 2nd Subscriptions which I bought & fairly advanced & paid for to your Grace, I have lost about the value of £5000 by your Grace's Neglect or delay of Accepting the South Sea Stock which you Bought of Me.
>
> I will not trouble Yo'r Grace again with Circumstances or a long Letter, tho' it might be usefull to Your Self & other Sufferes by the South Sea Directors, because I hear the length of my last was Complain'd of: And if I may not be admitted the honour of Discoursing with You, or hearing from Yo'r self on this Occasion, I shall not trouble Yr'r Grace any further than by such or better Agents than You have used towards Mee, if You can think I have deserved no better from You, who (to my great Loss & Inconvience in whatever I have transacted with Yo'r Grace) have shew'd myself to be with all respect & kind intention towards YOU!
>
> I have already intimated to Your Grace how this matter may be made easy, & it will be entirely owing to Your Unkindness if I am any way troublesome or pressing; tho' I meet with no favour on the like Occasions.
>
> Your Grace has brought me under a necessity of doing the same things Thrice already that I might be Supplied with Money for Performing my Contracts with others: And I

[58] PL F2/6/137 and PL F2/6/145, memoranda and observations concerning contracts.

> must once more raise Money at any loss before the Books of the South Sea Company will be again Open'd; however I give Your Grace this Timely Notice that I will so soon as the South Sea Books shall be Open'd for that Purpose Transfer a 2d time or tender to be transferred to your Grace, or Your Order the £3500 South Sea Stock at the price of £22000, which I pray you to accept, or Cause to be Accepted accordingly; It is extremely uneasy to me that I am Compelled to Act thus, who am MY Lord Duke Your Grace's etc..."[59]

This was a typical and, by Meres's standards, not a long-winded effort to get satisfaction from the Duke. In March and April of 1722 Meres sent one begging or threatening letter after another to the Duke. He wrote that he had a series of unsatisfactory meetings with the Duke's representatives and that the ever redoubtable Edwin brothers had been at him to join in a coalition against the Duke.[60]

Some further light is shed upon Meres' frustration and irritation with the Duke by the pleading he filed in Chancery at this time.[61] In this document he complained to the Lord Chancellor that Portland was using Meres' loss of a promissory note to claim that the note never existed in the first place. This was not just any promissory note, but was the very note by which the Duke had promised to pay the £22,000 referred to in his letter above. The existence and validity of this note is evidenced in numerous places in the Portland papers. In the pleading, Meres asked the Court to compel the Duke to produce the witnesses and evidence for the note, which he knew existed. Meres' persistence soon obtained results to his satisfaction for he wrote on 5 June 1722, "My Lord Duke, Permit Me once more to Kiss Yo'r Grace's hand….."[62] in thanks for all the ways in which his demands had been met. His descriptions of these devices were incomplete, but we do know that earlier (21 March 1721) the Duke had somehow arranged for Meres to purchase (for £5,000) a £8,000 judgement against the Duke that had been enrolled in 1718.[63] Meres had before acknowledged that £5,000 was a bargain price for the judgement because, from the time he had obtained it, other

[59] Pw B 48.
[60] Pw B 55-61.
[61] NA, C11/852/14, 21 March 1722.
[62] Pw B 63.

enemies of the Duke (again, the Edwin brothers) had offered more than £6,000 for it.[64] Meres related in his June 1722 letter the final arrangements by which the judgement was released to him. He also mentioned a series of other notes and securities from the Duke that had been finally accepted by Meres' creditors.[65]

The Duke's settlement with Meres was probably quite an expensive one. In a series of agreements brokered by Pheasant Crisp, the Duke had agreed to buy £3,500 South Sea Stock (35 shares) and £1,000 each of receipts in the first and second South Sea subscriptions. By late November 1720 when all these agreements should have been settled, the stocks the Duke had agreed to buy would have been worth no more than £9,000, but he had agreed to pay nearly £32,000 for them. A realistic net liability to Sir John Meres thus would have been on the order of £20,000. Meres was clearly such a dangerous adversary with a large, but not too large, claim upon the Duke's assets that he had to be satisfied. Although Meres might have shared some losses with the Duke and others in the South Sea Bubble, he was in the end not financially disabled. Later in the 1720's he was to remain active in finance and business as an officer in the Royal African Company (subGovernor) and York Buildings Company (Governor).

There was one dangerous antagonist whose claims the Duke clearly could not afford to satisfy, Sir George Caswall. It was not until the 1730's that Sir George Caswall, co-partner with Jacob Sawbridge and Elias Turner in the Sword Blade Bank, began to use legal means to press his claims. Amongst the Portland legal papers of the 1730's we find a "rough draft of the defendant's case and proofs" in which there is a copy of letter dated to mid1722 in which Caswall lays before the Duke the totality of the Sword Blade's claims,

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[63] PL F2/7/30.

[64] Pw B 64/1. An enrolled judgement would be a debt senior to other debts, such as the rest of the Duke's debts to Meres. A judgement would not only be paid first, but would also be useful as a legal weapon with which to harry the Duke. It is thus quite telling of the Duke's financial problems in 1721 that his highest grade debt had a market discount of at least 25 p.c.

[65] We do not know what the complete accounting of these arrangements were, but we do know that amongst them was the assignment to Meres of the fee farm rents of Wingham in Kent that Meres would later sell on for £3400. We also know that a number of East India bonds were sold for Meres' benefit. See PL E8/6/34,43.

"A Copy of the letter & Account vizt.
Rt Honourable

My Lord the very great calamity that hath befallen all persons concerned in Stocks hath in a more particular manner been exceeding grievious to my self & Copartners for over & above the loss of money we have suffered the disgrace of doing that which in the course of 22 years trade we never did before I mean to refuse paying what we owed at demand whereby we have lost 20,000L p.annm.

I have delayed sending your account untill this time because I was persuaded your Grace would cause all your accounts to be stated that you might know what condition your Grace's affairs were in to satisfy the demands upon you The generality I shewed your Grace in the agreements we made with you I doubt not will plead our cause and as we had no views of dissrving your Grace for you might have made large advantages by what you did with us so I can say we shall be as willing as any of your creditors to do the kind part by you I have been a great many times to wait on your Grace at your own house tho in vain I have therefore sent you this letter with your account with us & beg your Grace's answer in writing and commands when & where I shall wait on you being

Your Grace's very sincere and Humble Servant
George Caswall

To his Grace Henry Duke of Portland present

His Grace Henry Duke of Portland Debit

To Cash on.....5500 S Sea due 24 November.....36300
To ditto.....5500 ditto due 29 Septem….....50000
To ditto.....5500 ditto due 23 Decem.....50000
To ditto.....600 ditto Ballance of his Account Stock

17100 136300

To ditto 10000 ditto Deposit on your Grace's & sundry other account
deduct for Ballance of his Acct cash 943L14s11d
Interest of 1600L E.I. bonds receiv'd 21L11s9d 965L6s8d

135334L13s4d"[66]

A net claim upon Portland's estate in excess of £135,000 was certainly the greatest single liability against which he had to defend himself. From numerous sources it is plain that Caswall took no legal action during the Duke's lifetime, although the same sources allude to frequent attempts to negotiate settlements to the dispute. As a member of the House of Lords and as a serving Royal officer on mission in Jamaica, the Duke's person was inviolable in actions of debt at Common Law, but there is no apparent reason why Caswall could not have followed a strategy similar to that followed by Meres – harassing the Duke for reply and

[66] PL F2/6/313.

evidence in equity and establishing a record of complaint and evidence before useful witnesses and records disappeared. The Duke died in 1726 and thereafter the Duke's creditors' best remedies would be found in equity against his executors and heirs. The second Duke, William, would not reach his majority until 1730 and in the meantime Henry's widow, Elizabeth, was the executrix of his estate, which she would remain until her death in 1736 and William became sole heir.[67]

We have not found one coherent source that describes Caswall's attacks and Portland's defences through the courts. A painstaking comparison of the papers found in the Portland manuscripts with public court records appears now to be the only way to find out conclusively what happened.[68] From the Portland manuscripts perspective only, however, we have the best evidence of the strategy behind the Duke's defences. The bulk of the papers from the late 1720's and well into the 1730's show that the Duke's representatives defended against Caswall and other creditors by tying up vulnerable assets in trust. Prior to his departure to the Governorship of Jamaica, Portland created a new strict settlement of the remainder of the estate trust for his children. This had to be done with care in 1721 because if an executor or an heir later failed to successfully plead the exclusion from creditors of assets from the deceased Duke's estate, the establishment of the estate trust could be construed as an attempt to circumvent the statute against fraudulent devises. Such a failure could potentially further expose the estate to charges from creditors of the deceased ancestor.[69]

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[67] A portion of the estate was created for younger sons in the first Duke's 1704 marriage settlement. After the first Duke's death, Elizabeth petitioned (see Bentinck, 1726) for a Private Bill to remove and manage that portion of the settlement for the benefit of her second son (George, b. 1715) until he should reach his majority. That portion of the estate was thus protected from the actions by the first Duke's creditors. See Private Bill 1Geo. 2, c.5, *An Act to Enable the Guardians of the Lord George Bentinck…*.

[68] The National Archives are making great strides in converting finding aids for courts of law and equity into electronic forms. So far, however, most progress has been made in making equity court pleadings name-searchable by defendant and plaintif. The finding aids for Common Pleas and King's Bench, however, are still quite cumbersome to use. cf. fn. 85. It would seem strange that a trail of public records for such a series of important cases such as the Duke's would be hard to find, but without some foreknowledge of what courts and in what sessions hearings took place and without the names under which the cases were filed, it is a difficult task indeed.

[69] See 3 Will. & Mary, c. 14, 1691, *An Act for Relief of Creditors against Fraudulent Devises*. For discussion of pleas in defence of creditors' bills against estate heirs in equity, see also Langdell's "A brief survey of the equity jurisdiction."

It appears that Caswall bided his time before he launched his legal attack on the Portland interests. His path would have certainly been eased by the Duke's death in 1726 in Jamaica, for it would have widened his options for action in equity, but we see no evidence that he immediately began an attack on either the Portland estate's executrix, Elizabeth, or the estate trustees. Not until 1735 and 1736 was he purchasing writs of *distringas* in Buckinghamshire (as the Edwin brothers did in 1725) to accompany his pleadings in Exchequer. One object of his actions was to force Elizabeth to produce an inventory of the Portland estate as it would pass to the ultimate heir, the second Duke. When this inventory was eventually produced, it was quite small (less than £7,000) because it clearly excluded all lands and land-derived incomes – as if such assets were not going to pass to the second Duke by descent.[70] This was a clear premonition of one defensive device the second Duke was to subsequently use; he would plead that the bulk of the estate did not come to him by descent (the plea, *riens per descent*) and thus was not assets available to his father's creditors. We have already described the dangers of making a false plea of *riens per descent* and this is the setback that William eventually suffered in Exchequer. To see why this might have happened, we have to go back to the 1720 and the first Duke's relationship with the Portland settled estate.

We have already visited the issue of Portland's relations with his estate's trustees.[71] There are papers dating from 1722 in which the idea is tested of shifting the blame of estate losses towards the trustees and away from Portland.[72] This argument was still alive and was raised, as if it were of some possible use, even in 1739. Portland's paid legal advisors were disdainful of its merits and later we find evidence that the estate's trustees were indemnified by the second Duke for any losses to the estate that their actions may have led to. The apparent reason for doing this was so the trustees could be better used as witnesses in the

[70] Details of writs, pleadings and the inventory referred to are found in PL F2/6/225,226. Elizabeth died March 1736.
[71] cf. fn. 31, section V and related discussion on page 16.

Duke's defence. The second Duke greatly needed such witnesses because he faced several problems in defending the 1721 settlement of the estate; his legal advisors were quite divided as to whether it was a good settlement or not. The crux of the issue was whether the first Duke in 1720 had a) acted in concert with the trustees in applying the trust's cash for allowed uses or b) whether the Duke had merely borrowed money from the trust. In the latter case, the money would be treated as personal estate and would be available to creditors. In the former case, the money would be simply the Duke's debt to the estate. Several advisors were looking at the same hypothetical case document reproduced in Appendix 3. In the opinion of John Browne (KC and MP for Dorchester) if the Duke was not actually a borrower from the original estate, the resettlement of the estate upon his son would be fraudulent and void as it would appear that it was done merely to avoid the claims of creditors. "…the principall Difficulty & defect in the Case seems to be the Slight Evidence of John Strongs having really borrowed the 10000L..."[73] In another opinion "…it seems to be an agreement between the X and the Trustees to layout the 10000 in the Purchase of Stock…& if this should come out to be the case it may be of very ill consequence to the family…"[74] Finally, in the opinion of no less than Sir Dudley Ryder, the Attorney General,

> "I think on the whole of this transaction the placing out the trust money in the purchase of SS Stock at 500 p cent cannot be considered as a Loan on governmt. securitys according to the trust & therefore was a breach of trust & as Jo Strong was not only a party to it but procured it to ease himself he would be bound in Equity to make it good the consequence of which is that the settlement made by him of his own estate to repair the Loss was on valueable consideration not void as to creditors & therefore that Robert the Son did not take that estate by Descent from his father. but How far he may safely plead riens per descent will I think depend on the Evidence he is capable of giving of the nature of the transaction. As to the Remainder in Fee it being after an Estate Tail which he barred it has no assets
>
> As to the estate purchas't with the 10000L if that appears to be the fact I am of opinion it was well settled & therefore no assetts of Jo Strong.
>
> As to the trustees being Evidence I rather think they cannot because it is to discharge themselves of the trust money by the purchase of the Stock, to gett themselves

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[72] cf. fn. 32.
[73] PL F2/6/220.
[74] PL F2/6/219.

> indemnify'd so far as the value of the Estate against their breach of trust but this is not quite clear.
>
> D Ryder
> 18 Sept 1739"[75]

After the controversial settlement, the first Duke departed for his well-remunerated Governorship of Jamaica. It was not a very successful sojourn, nor in the end did the Duke live long enough to much benefit from the salary.[76] The portion of the estate strictly settled on his son may have remained safe, but the portion that the Duke managed to expose to the deterioration in the South Sea appeared, in his lawyers' eyes, to have remained "assets" available to creditors.

Caswall's direct attacks upon William, as sole heir to the estate, started in late 1737. From this point forward, we have more than just the Portland manuscripts to guide us. We have also the record of rules and orders coming out of Exchequer.[77] In November 1737 the Buckinghamshire sheriff summoned the second Duke to answer one of Caswall's bills in Exchequer.[78] We have not yet discovered Caswall's pleadings in Exchequer, but we have the Portland manuscripts copies of them and they claim the penal sums for non-performance on the three contracts described in his original letter (reproduced above) of 1722 to the first

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[75] PL F2/6/218. There is a note on the verso of this document that the Mr Attorney General was due 2 guineas for this opinion. For Ryder's career see, Lemmings, 'Ryder, Sir Dudley (1691–1756)'.

[76] He was appointed in September 1721, but did not arrive in Jamaica until December 1722. At the Crown's request, the Jamaican Assembly reluctantly granted him an expenses/salary budget of £5,000 p.a., twice the usual £2,500 p.a., received by Governors of Jamaica. He unsuccessfully negotiated with the Assembly on revenue bills. He had poor relations with the Royal Navy establishment in Jamaica and had even tried to alleviate the problems of piracy with direct offers of grants and pardons to pirates. In short, he had all the usual problems of Jamaican governors in this period. He also experienced the usual death of Jamaican governors; fatal disease was rarely a lingering disease and he was quickly carried off by a fever on 4 July 1726. Neither was his sojourn in Jamaica financially successful. Although the Jamaican Assembly, upon his wife's petition, made good the remnants of the Duke's salary, her requests for relief from the Duke's accumulated debts met with rebuff. See Cundall, *The Governors of Jamaica…*, Chapter 7. An official sojourn in the Caribbean to escape creditors and to make money was common. It was a ploy nearly undertaken by Thomas Pitt the elder in 1717 and undertaken by Lord Londonderry in 1727. See Larry Neal's "The Money Pitt".

[77] This is series NA, E12.

[78] PL F2/6/225 in the Portland manuscripts. Corroborating evidence comes from the 1738 entries in the Exchequer series NA, E12/40.

Duke.[79] In June 1739 we know that the court was moved that Portland be allowed to plead that "the deed was not the Duke's and the plaintif did not tender stock." There follow several notices of trial and motions for delay until it appears that 14 May 1741 was to be the day of reckoning. For that day there are notices to the South Sea Company to prepare to deliver transfer ledgers for 1720, cash books and the register of contracts to be at the court's disposal. Paperwork was also ordered to trace the accounts of not only Caswall, but also those of the Portland trustees (Eyles, Eyles and de Gols).[80]

What happened? By this time Sir George's son was contesting the action alone. Perhaps Sir George was too ill to attend to his legal affairs, although he was not to die until the autumn of 1742. In a memorandum of 16 July 1741 of a meeting between the Duke's counsel and the younger Caswall, Caswall apparently tried to come to some salvaging arrangement with the Duke. "That if it had been in his power he would deliver up that contract {referring here to PL F2/6/133} as well as the other two which he did deliver to the Duke and that he was ever ready if the Duke desir'd to make an assignment of said two contracts…. That Sir George does not know of his giving up the Contracts to his Grace…That the mony he has expended in the suit has been more than he ever had from his father in his Life since 16 years old." These passages are the only existing evidence of an attempted settlement between the antagonists. Perhaps the younger Caswall was proposing to accept payment for the contracts, or perhaps such a payment had already changed hands.

Why should Caswall have attempted a settlement? Not everything had gone against the Caswall suit. In a fortuitous reminiscence more than thirty years after the events, Lord Chief Justice Mansfield recalled that, when he was but a junior member of the Duke's defence team, the Duke had suffered a ruling that his plea of *riens per descent* was a false plea and this opened the way for Caswall to enter a claim for the £200,000 penal sums attached to the two

[79] PL F2/6/230, dated 1738.
[80] These are all in the series PL F2/6/261-272. All these orders and actions are corroborated in NA, E12/41.

contracts referred to in the passage above.[81] By making an analogy between the Caswall case and the case on which he was ruling in 1773, Mansfield revealed something about the course of the suit in 1741. First, he stated that the basis of the false plea ruling was trifling matter; there had been some small error in the accounting of the assets the second Duke had received by descent, but it was not the intent of the statute against fraudulent devises that such small errors should open the heir's estate to the whole debt. With these remarks Mansfield also revealed that Caswall had some success in establishing that debt and that it was not a small debt. The proceedings in May 1741 were either postponed or incomplete because there were fresh rulings for the formation of a new jury in June.[82] This was probably the jury, which Caswall complained, was not allowed to judge his suit. He "had heard the Judg had sent for the Record the night before the tryall to his chamber…{and}…That if it had been left to the Jury he was sure he should have had a verdict."[83] Apparently some settlement between the antagonists along the lines suggested in the July memorandum was arranged, although we cannot find the details of it in the Portland manuscripts, since the last mention of the case is a November 1741 order to enter the judgement that the plaintiff was nonsuit.[84]

VII. Conclusions and Directions for Further Research

The primary goal of this paper was to begin an examination of the mechanics by which private financial contracts were settled in the wake of the South Sea Bubble. There is a natural and unavoidable bias, however, in the historical sources that we must use since disputed financial contracts tend to leave behind a richer historical record than amicably settled contracts would tend to do. In Banner's seminal work on early security regulation we

[81] Lofft, *Reports of cases adjudged in the Court of King's Bench,* page 263.
[82] NA, E12/41. Perhaps there were problems in jury selection. In an early June ruling Caswall was ordered to show cause as to why he should object to presence of nonjurors in his jury.
[83] PL F2/6/312.
[84] NA, E12/41.

find a description of the legal principles that were in existence and developed afterwards, but what we really wish to know is how well these principles worked in practice in the settlement of disputes. The South Sea Bubble period should be a particularly fruitful in producing examples of legal proceedings arising from financial disagreements, but we admittedly start here with an examination of cases that were probably not typical of the cases produced in this period. The Duke of Portland's disputes were numerous and involved huge sums of money. In monetary terms the cases may have well been amongst the largest generated by the South Sea Bubble. The historical record of his disputes is unusual in that it pertains to a number of disputed contracts with a variety of people. It also contains expert opinion upon the proper legal strategies for Portland to follow. A broader survey of financial disputes arising from the South Sea Bubble will have to depend, however, upon sources very different from the Portland sources.

We believe that most South Sea cases would probably have been actions on debt in Common Law courts, not Equity. The debts in dispute would probably have been of considerable size and thus it would be more likely they were actioned in the Court of King's Bench, rather than Common Pleas. A survey of disputes that came into the Court of King's Bench, just before and after the South Sea Bubble, will probably reveal more about the common run of disputes than will a study of large disputes such as Portland's, but the challenges presented to such a study will be formidable. The records of the Common Law courts for the 1720's are much less accessible than are the records for the courts in Equity in the same period.[85] The search also may not uncover a huge number of cases because the 1720's sit very close to a period of a great decline in civil litigation near the middle of the

[85] Court of King's Bench judgements and their finding aids from this period, such as the Entry Books for judgements (NA, KB 168) or the Rule Books (NA, KB 125) are all written in a legal Latin and typically recorded (with numerous specialised abbreviations) in a very small legal hand, a descendant of the court hand of medieval scriptography.

eighteenth century.[86] In contrast to the period right after the collapse of the Railway Mania, the South Sea Bubble may not have caused a "hurricane of litigation".[87] Nevertheless, hidden in the relatively smaller amount of private litigation there might actually be a high proportion of cases that stem from the South Sea Bubble. Until the results of a broader survey can temper our conclusions, we here attempt what conclusions we can as regards the state of law in its attitudes towards financial litigants.

It is hard to imagine that the first Duke of Portland, if he were alive today, could have possibly remained solvent after having undertaken such a series of large and uniformly ill-advised financial contracts as he undertook in 1720.[88] The Bentinck/Portland house has only recently expired with the 9th Duke of Portland (d. 1981), but we have to conclude that the Bentinck direct line was able to continue its march towards ultimate extinction only on the backs of the eighteenth-century claimants to the Bentinck estate. There was an extensive uniformity in the basic structure of all the Portland contracts in Table 1 and elsewhere in the Portland Manuscripts. The Duke and his successor were nevertheless able to discriminate between claimants' demands and strategically decide whose demands could be ignored, whose demands must be satisfied and whose demands must be legally resisted. So far I have found no one who obtained large satisfaction from the Duke except Sir John Meres. Caswall's claims appear to have been harmed by his reluctance to move quickly and aggressively against the Duke. Instead of appreciating Caswall's hesitance, the Duke's defence used Caswall's delay to his own advantage. It is difficult therefore not to have wished the Edwin brothers well in their pursuit of the Duke – their brutal and

[86] If there was a general rise in numbers of cases started and reaching advanced stages as a result of the Bubble, it would have to have been quite short-lived since it escaped notice in the survey performed by Brooks, The 1720's and 1730's were characterised by very low levels of litigation. See Brooks, 'Interpersonal conflict,' pp. 360-364.

[87] Kostal, *Law and English Railway Capitalism*, Chapter 2 (The Hurricane of Litigation), describes the litigation aftermath of the Railway Mania of 1844-5 and shows that the Railway Mania was directly responsible in a very large increase in civil litigation.

[88] It is also highly unlikely that the heirs of the late Lord Lovat could have suffered a worse financial fate in 1720 than they suffered in 1995 when (mere) debt and the weight of modern death duties forced the sale of one of the oldest (13th century) estates in the British Isles.

uncompromising approach was seemingly more fitting to the true dignity[89] of Henry Bentinck than the equally threatening, but more honeyed approach taken by Meres.

In the hands of as a resourceful antagonist as the Duke of Portland, the provisions of 7 Geo. 1, stat. 2 were weapons that could be effectively deployed to deny justice to claimants. The intent of the statute clearly was to draw a line under the South Sea Bubble by hastening an end to vexatious suits, but in the hands of the Portland legal team it could be used, and was used, to make financial lawsuits vexatious. To modern minds it is somewhat incredible that two cornerstones of Portland's defence were the arguments that his creditors a) could not manage properly to ask the Duke to perform on his contracts and simultaneously b) could not manage to properly register their contracts as required under 7 Geo. 1, stat. 2. Yet these were the two arguments that were raised and refined repeatedly in the Portland papers in which legal strategies were rehearsed. But perhaps nothing more could have been expected of a duke in the early eighteenth century. Caswall's struggles against Portland are reminiscent of the struggles Richard Cantillon had at the same time with the Lady Mary Herbert, another member of the aristocracy who would not honour her contracts apparently only because it would have been too expensive for her to do so.[90]

For private property rights in capital markets, 1720-1 was 'the best of times, it was the worst of times.' In three Acts, Parliament had radically intermeddled with public finance, company law and the security of contract. The public's ultimate negative reaction to the first of these Acts[91] finally forced Walpole's administration to put public finance on a footing that was stable and secure for more than a century afterwards. The second Act[92] forced the development of company law onto paths in which change could take place only very slowly. This may ultimately have had its benefits and certainly in many contemporary minds the

[89] We must remember that Henry Bentinck, or at least some of his advisors, were willing to try the argument that long-term family servants (Eyles) and not the Duke were responsible for the misapplication of estate trust funds – an argument that not one of the Duke's paid legal counsel was willing to countenance.
[90] Murphy, *Richard Cantillon*, Chapter 11.
[91] 6 Geo 1, c. 4.

joint-stock form of incorporation was itself seen as a nuisance which needed to be restricted. On the other hand, joint-stock incorporation had previously been a popular way of organising business and so it is likely that the Bubble Act did reduce the ability and rights of certain persons to organise businesses into the forms they preferred. In the third Act,[93] Parliament sought to reduce the proliferation of lawsuits resulting from the South Sea Bubble, but this was clearly achieved at the cost of a reduction in the rights of creditors.

Forward markets today usually work on principles that make parties to contracts as faceless as is possible, with no contract being more or less subject to settlement risk than any other. Such was not the case in 1720, however, when parties to forward contracts had to be very careful of whom they contracted with. The shocks delivered by the South Sea Bubble revealed a number of fault lines in law into which the rights of financial contractors could founder. If unilateral Acts of Parliament did not upset some of those rights, then others could be frustrated by financial defendants, especially if they were members of the aristocracy, who could find refuge in the complexities of the land law. The legal process itself was so slow or could be slowed to the point where the lives of litigants and witnesses alike could not outlast the length of the suits. A long time was to pass after 1720 before property rights in capital markets could be more fully achieved for people who wished to write speculative financial contracts.

[92] 6 Geo 1, c. 18, the Bubble Act.
[93] 7 Geo. 1, stat. 2.

Appendix 1 **Pw B 164**

1st Duke of Portland Misc. 9 South Sea Transactions

[pages 1-2]

His Grace the D of Portland	debit	per Contra Credit
To Sr Jn Eyles, M Jos Eyles & Mr Comrade de Gols as Trustees	83575L7s6.5d	By 16000 South Sea Stock Transferr'd to them as a for Mony advanc'd
	Security for the 83575L7s6.5d	

[pages 3-4]

His Grace the D of Portland	debit	per Contra Credit
To the South Sea Compy a Loan at 4 p.c.	8000	By 2000 South Sea Stock transferr'd to R Surman
To Interest thereof at 4 p.c.		By the Mid Srm Divid: on the 2000 Stock
To the Loan of.....	70000	By 14000 South Sea Stock Transferr to Shaw by
To the Int thereof at 5 p.c		Mr Knights order as Deposit

[pages 5-6]

His Grace the D of Portland to Mr Jn Edwin	debit	per Contra Credit
22 Sep 1720 To Mony Lent	16000	By 3000 South Sea Stock
To Int agd: to be paid to him Dec 22 1720	1600	Transferr'd to him as a Security

[pages 7-8]

His Grace the D of Portland to Mr Wm Bowles	debit	per Contra Credit
1720 To Mony Lent	20000	By 3500 South Sea Stock
To Int: agreed to be paid him the {blank} 1720	2000	Transferr'd to him as Security

[pages 9-10]

His Grace the D of Portland to Sr Jn Meers	debit	per Contra Credit
To Mony Lent	20000	By 3500 South Sea Stock
To Int: agd to be paid him the {blank} 1720	2000	Transferr to Mr Tho: Martin by Sr Jn Meers order as a Security

[pages 11-12]

His Grace the D of Portland to Isaac Nunez	debit	per Contra Credit

To Mony Lent	6000	By 1000 South Sea Stock Transferr'd to him as security
In Int: till the openg: after Midsmr 1720	650	
To ditto to the {blank} of Nov	650	By 100 Stock for the Divd: at Midr: on the sd 1000 Stock

[pages 13-14]

His Grace the D of Portland to Phest: Crisp	debit	per Contra Credit
To Mony Lent	5900	By 1000 South Sea Stock Transferr'd to him as a security
To In: thereof to the openg: after Midsr: 1720	650	
To Int: thereof to the {blank} on	650	By 100 Stock for the Div:d at Midsmr sd 1000 Stock

[pages 15-16]

His Grace the D of Portland to Sr George Caswall	debit	per Contra Credit
To Mony lent	30000	By 5000 South Sea Stock Transferr'd to him as security for the sd 30000
To Int to the openg: after Midsmr	3000	
To Int: to the 24 Nov: 1720 for the sd 33000	3000	By 500 Stock for the Mid smr Divd on the sd 5000 stock
additional		By 500 S Sea Stock deposd as Security

[pages 17-18]

His Grace the D of Portland to Sr George Caswall	debit	per Contra Credit
To Mony agreed to be pd on the 29th of Sepr 1720 for the purchase of 5000 South Sea Stock with the Divd: thereon at Midsmr 1720 being 500 Stock at the rate of 1000 p. ct.	50000	By 5500 Stock to be delivr'd the {blank}
To Mony agreed to be paid on the 24th of Decr: for the like Stock and at the like Price	50000	By 5500 South Sea Stock to be delivr'd the {blank}

[pages 19-20]

His Grace the D of Portland	debit	per Contra Credit

to Sr Tho: Sebright

To Mony agreed to be pd for 2000 SS Stock to be Delivr'd his Grace on or before the Openg: after Xmas 1720 at 410 p Cent. delivr'd	8200	By 2000 SS Stock to be delivr'd By 200 Stock for the Divd: at Midsmr 1720 also to be

[pages 21-22]

His Grace the D of Portland to Mr Ed Eure	debit	per Contra Credit
To Mony agreed to be paid for 5000 South Sea Stock to be delivr'd on or before the 25th of March 1721 at the rate of 1000 p cent	50000	By 5000 SS Stock to be Delivr'd By 500 Stock for the Midsmr: Divd: also to be delivr'd By The Divid: at Xmas on the 5500 Stock

[pages 23-24]

Sword Blade Comp To His Grace the Dk: of Portland	debit	per Contra Credit
	Stock	
To South Sea Stock deposd: by		By {blank}
his Grace the Ld Morpeth	4000	
By his Grace the Coll Darcey	2000	
By his Grace the Coll Cope	1000	
By His Grace the Cl Campbell	1000	
By His Grace the Gen Wade	2000	
By His Grace to Sr George Caswall	500	
To Stock undeposited	100	

[pages 25-26]

His Grace the D of Portland to Mr Robt: Surman	debit	per Contra Credit
To Mony Lent To Int: thereof	10000	By 2000 of the 1st Sub receipt deposited with him

[pages 27-28]

His Grace the D of Portland	debit	per Contra Credit
To Tho: Wynn Esq	6100	
To Alexd: Gordon	4000	
To Mr Owen	{blank}	

The Fictitious Case of Ellis vs. Davis: Similar to Edwin vs. Portland with Sergeant Chesshyre's opinions

Facts:

22 Aug 1720 Davis having purchased several large quantitys of SS stock applys (by his broker) to Ellis for 16000L on 3000L stock.

Ellis agrees to lend the money on having 1600L for the Loan for three Months which is after the rate of 40L p.c. And which 1600L was agreed to be added to the Sums lent.

Accordingly Ellis pays the 16000L to the persons of whom Davis had purchased/the residue of the purchase money being paid by Davis/and Ellis has the stock transferred to himself.

In order the evade the Statute of usury the form of the agreement is varied and Indentures of Agreement are reciprocally Executed a Copy where of is Annexed.

Which agreement please to observe is for Stock as bought by Davis of Ellis for a future day and the 1600L for the Loan is added to the 16000L lent and Davis thereby Covenants to accept the Stock on the 23rd Nov 1720 and pay for the same 17,600L.

Stock continuing to rise Considerably Ellis makes use of Davis's Stock and sells the same as we supposed at a considerable advance for it appears by the SS Books that 9 days after viz.t 31st Aug Ellis had in his name no more than 600L but some few days before the expiration of the Contract he bought in Stock/it being then very considerably fallen/so that on the 23rd Nov 1720 he had 3500L South Sea Stock.

23 Nov 1720 - The contract expired & no notice was taken by either of the partys or the other Ellis did not tender transfer or sell out the stock or did he require Davis's acceptance or payment for it Or on the other side did Davis require the Transfer or offer the money.

(And we doubt not but Ellis has gained very considerably by trading with Davis's stock.)

Q Can Ellis maintain an action against Davis for the 16000L lent notwithstanding this Deed of Agreement if so can Davis plead the Statute of Usury and thereby avoid the payment

Paroll proofs of the Loan of the money will not be allowed to maintain an action for money lent against this contract of the party reduced into writing under hand and seal But I do not see But the borrower may plead the Statute of usury against any action which the lender can bring to recover the money. In case he can prove the contract or Loan to be or having an usurious sums for forbearance not withstanding the contrivance of the security to blind or avoid the statute

Q Or must Ellis ground his action for breach of the Covenant by Davis for not accepting the stock and paying the money If so can Davis avoid the payment by the Statute of usury & is it not essentially necessary that Ellis proves the tender of the stock on the day or will a subsequent tender be sufficient

I think Ellis his remedy must be on the covenant and it will be incumbent in order to assigne a good breach that a tender be avirrd either on the day or before with notice and a tender after will not be sufficient But if he could assigne a good breach I cannot apprehend but Davis may avoid the charge by pleading the usurious contract (this money lent) and (??) writing made in execution of it. In case he carefully prove it but it will be expected that in such a case the proofs be clear and manifest.

Q Can Ellis be relieved on this Agreement in Equity should Davis insist on the statute of usury there

I conceive that a Court of Equity will not give relief against a statute made to suppress usury in case the party can avoid the contract at law as usurious.

Q In case Ellis shall not Register this Contract pursuant to the Late Act 7 Geo for restoring publick Creditt shall Davis be discharged from this demand of Ellis

I conceive he will be discharged from soe much as remaynes unperformed.

Q Shall Ellis be accountable for such advantages as he may have made by trading with this stock

I do not see but he ought and may be made accountable for them In case he did by sale make any & he must by answer admit them or they can be proved upon him.

Q Is it advisable for Davis to Exhibit a Bill in the Court of Equity in order to preserve the testimony of his Witnesses who are now Living and could prove the usurious agreement or for any purpose in order for his relief

I do not think that a bill can be proper to preserve the testimony of individuals in such a case. But in case Ellis did really make such advantage by the sale of the stock, a bill will be proper to discover it(or that) but then Davis should be sure on the account of those advantages there will come out a balance on his side against Ellis on demand on the contract which Davis will by such bill affirm as legal.

23 Sept 1721 Chesshyre

Appendix 3 **PL F2/6/220**

The Fictitious Case of John Strong and Mary Best

1689....John Strong and Mary Best upon Intermarriage vested in Trustees 20,000L to be laid out in Purchases of Land to be Settled in Strict Settlement with Power to Trustees to lend the Money on Government Securities till purchases could be had

1691....A Purchase was made of Lands & the Consideration being 10,000L was laid out of Said Trust Money but the Conveyances taken to John Strong & his Heirs

1720....The said Trustees lent the remaining 10,000L to said John Strong upon 2000L South Sea Stock but no Contract or Defeazance is found between the said Trustees & John Strong nor was the Stock transferred to them from John Strong but by his Direction from other Persons of whom he had bought it at much greater Prices

The said 2000 South Sea Stock being from various Causes reduced in Value to 3000L Money whereby a loss was Sustained of 7000L of said Trust Money & the Purchases directed to be made by the Marriage Articles of Lands to be settled for the Benefit of the Issue of said Marriage could not be made and John Strong being greatly indebted by Bonds & other Specialtys did

1721....By Deed reciting said Articles & also reciting the Loss of 7000L part of said Trust Money & that thereby the Issue of that Marriage would be so far deprived of the Benefit intended them by the said Marriage Articles the said John Strong at the Pressing Instances of said Trustees for & towards making Satisfaction for said Loss & in Discharge of so much of said Trust Money as the Value of Lands therein mentioned would extend settled the Lands purchased with the 10,000L Trust Money in 1691 & also several other Lands of which he was seized in Fee in such manner as the Lands to be purchased by the Articles were to be settled & soon after dyed leaving several Sons & Daughters

N.B. The Lands of Inheritance so settled were not of Value sufficient to make good the loss of the 7000L Trust Money

Queare Will the Deed of Settlement made by John Strong in 1721 (for the Considerations aforesaid) both of the Lands purchased with the Trust Money & also of his own lands of Inheritance be either in Law or Equity looked upon as made for a valuable Consideration or will all or any of said Lands be Assetts by Descent in the Hands of Robert Strong the Eldest Son with Respect to the Creditors of his Father?

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