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CLARK, &c. *v.* CALLENDER, &c.

[Fac. Coll., vol. xix., p. 676, *et* Dickson on Evidence, p. 308.]

ALEXANDER CLARK, Writer in St Andrews; JAMES CLARK, Farmer at Alconburry; BETTY CLARK, wife of JOHN WALKER, and him for his interest; and MARGARET CLARK, Tenant in Dron, } *Appellants;*

JOHN CALLENDER of Lady's Miln; ALEXANDER CALLENDER of the Falkirk Bank; JAMES AITKEN, Writer in Falkirk, and JOHN KER, Writer to the Signet, surviving and accepting Trust-Disponees and Executors of the deceased Alexander Callender, late Grazier in Falkirk, } *Respondents.*

House of Lords, 16th June 1819.

CONTRACT OF SALE OF WHEAT—PAROLE EVIDENCE—COMPETENCY OF APPEAL—WAGER.—The original bargain in regard to a sale of wheat was constituted by writing; but Clark transferred and conveyed his interest in this bargain to Alexander Callender, grazier, without any writing. Held (1st) That it was incompetent to prove by witnesses the transfer or conveyance of that party's interest in the contract so constituted. And (2d) That parole testimony was inadmissible to prove the constitution of an obligation of relief, assuming *that* to have been the character of the transaction entered into. (3d) Question, Whether this was a wagering transaction. (4th) Objection to the competency of this appeal, sustained as to two of the interlocutors, but repelled *quoad ultra.*

On the 8th of December 1804, a transaction was entered into between Mr James Gibson, Writer to the Signet, on the one part, and Mr Bayne, then Provost of Cupar, Mr Aitken, writer, there, and Mr Christie of Foodie, on the other, regarding a sale of wheat, the terms of which were reduced to writing, and were as follows: "Provost Bayne, Mr Alex-
"ander Christie, and Mr George Aitken, bind themselves to
"deliver to Mr Gibson 1000 bolls of best Fife wheat, each
"year, for ten years, the first delivery to be in February
"1806, for crop 1805, or to pay the highest Fife fiars there-
"for, in their option, for which Mr Gibson obliges himself
"to pay them 30s. a boll, or pay the difference between that

" and the price of the highest Fife fiars, if the fiars are below " 30s. This is to be extended on stamped paper by Mr " Greenlaw. Cupar, 8th December 1804.

(Signed) " JAS. GIBSON.
" WILL. BAYNE.
" GEO. AITKEN.
" ALEX. CHRISTIE."

This missive was afterwards engrossed on stamped paper in more regular form.

Some time after this, the late Patrick Clark, the father of the appellants, met Mr George Aitken, one of the parties to the above contract, in Cupar, and purchased from him his share of the agreement by exchanging missives, in these terms: " I agree to accept of your share of your bargain with Mr " Gibson for the delivery of 1000 bolls of wheat at 30s., or " paying the Fife fiars, and offer you £40 for your bargain. " Yours, &c.

(Signed) " PATRICK CLARK.

" WM. BAYNE, *witness.*
" JAS. THOMSON, *witness.*
" Cupar, 4th Feby. 1805."

" Mr Clark, I accept of your offer, the £40 payable at " Candlemas 1805. Yours, &c.

(Signed) " GEORGE AITKEN."

Shortly after this latter bargain, Mr Clark had a party with him at dinner in his house at Dron, among whom was the respondents' constituent, the late Alexander Callender, grazier at Falkirk. In the course of conversation Mr Clark happened to mention the bargain he had made, in regard to the wheat, and stating his regret about it, adding that he feared it would not turn out so advantageous as was expected. Upon which Mr Callender stated that he thought he had made a very good bargain, so much so, that he would be happy to take it off his hands. Mr Clark accepted of this offer. No writing passed between them. The only ceremony was the shaking of hands as evidence that it was so agreed on between them.

It was with reference to this last bargain more directly, that the present question was raised, but it resulted out of an action brought by Mr Gibson against Mr Aitken, who resisted implement of the contract on the ground, that it was not a fair agreement but a gambling transaction or bet; Mr Aitken,

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on his part, brought a process against Mr Clark, and Mr Clark brought the present action against Mr Callender (who seems to have died during the action), concluding for payment of the £40 agreed on for the transfer of his interest, and also to implement and fulfil to the said James Gibson, or to the said George Aitken, his said share of George Aitken's part of the said bargain.

Issues were ordered to be framed to be tried by jury. The following issues were sent to trial.

"Whether the defender did, in or about the month of "February 1805, enter into an agreement with the pursuer, "to relieve him from, and take upon himself, the said defender, "a certain bargain set forth in the summons, bearing date "the 8th December 1804, between Mr George Aitken of "Cupar in Fife, and others, and Mr James Gibson, Writer "to the Signet, respecting wheat or the price of wheat; from "which bargain the said pursuer had, before the said month "of February, relieved the said George Aitken?

"Whether the defender did not, at the same time, agree to "pay the sum of £40 sterling, to the said pursuer, or to the "said George Aitken, on condition of the bargain being

July 16, 1818. "made over to him, the defender?"

On the trial, the following verdict was found for the pursuer on both issues: "The jury say, upon their oath, That, "in respect of the matters of the said issues proven before "them, they find for the pursuer on both issues." The Jury Court, in applying the verdict, reserved objection to the competency of parole testimony in this case, as appears by the following entry of the objection and reservation: "Objected "to the competency of parole testimony in this case, that "the contract sought to be established against the defender, "was of such a nature, importance, and duration, that it "could not be constituted without writ; that it was a con- "tract substantially for payment of money, which could not "be proved or constituted by the law of Scotland without "writ; that it was a 'bande or obligation of great impor- "'tance,' under the statute 1579, chap. 80; that it was a "contract originally constituted by writ, transferred to the "pursuer by the same mode, and could, therefore, neither be "extinguished nor farther transferred, except by writing; "and that these objections must be understood as stated to "all the witnesses who might be called to establish the trans- "action in question."

"Reserved for the consideration of the Court of Session

"in this case." The cause then being returned, the Lords of Session, on motion that the verdict be set aside on the question of law, pronounced a judgment allowing him to show cause "why the verdict in this case should not be set aside, "and a new trial granted." And, after debate, the Court set aside the verdict accordingly, and ordered a new trial. Dec. 2, 1818. Jan. 12, 1819.

The ground on which the verdict was set aside, although not stated in the interlocutor, was the assumed incompetency of parole evidence, to establish the bargain, which forms the subject of the action.

On a second trial, the same evidence was tendered, but rejected, and the jury found a verdict for the defender on both issues; and on bill of exceptions being tendered, and taken, and heard, the Court of Session pronounced this interlocutor: Feb. 1, 1819.

"The Lords having heard counsel, in terms of the former "deliverance, in respect it appears from the bill of exceptions, Mar. 9, 1819.
"that the pursuer merely repeated, on the second trial, his "offers of the same sort of parole evidence, as had been tendered "and received on the first trial, and that it had no reference to "a proof of homologation or *rei interventus* following on the "alleged agreement, they disallow the exceptions, and declare "the verdict final and conclusive, in terms of the statute: "Find the pursuer liable in the expense of the discussion "in this Court on the bill of exceptions: allow an account "thereof to be put in, and remit the same when lodged, to the "auditor of Court to tax and report."

From these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—1st, The objection of the incompetency of parole evidence, however well founded originally, was by implication repelled by the judgment of the Court of Session, remitting the cause to the Jury Court; or at least, the respondents are barred *personali exceptione*, from stating it after such remit. It was, from the first, apparent, that there could be no other evidence but parole proof in support of the conclusions of the present action, which was libelled on a verbal sale to Callender of the interest of Clark, in the original bargain with Mr Gibson. It was further distinctly set forth in the condescendence, that no other proof was to be brought but parole evidence. The Lord Ordinary, in these circumstances, by ordering answers to be lodged, directed to the facts of the case, with a view to a remit to the Jury Court, virtually signified his opinion, that the objection was unfounded; and it was necessarily repelled,

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when, after the pleading *viva voce* on the point, the case was ordered to be prepared in terms of the Act of Parliament for the decision of a jury. The same inference must be drawn from the interlocutor remitting the cause to the Jury Court, after the issues and the relative pleadings were reported by the Lord Ordinary to the judges of the Second Division. The respondents were bound, at this stage of the proceedings, if not before, to object to a jury trial, and they were therefore barred from afterwards insisting upon the objection to the competency of parole proof.

2d, But the objection is unfounded on its merits. By the law of Scotland, every bargain relative to moveables, may be established by parole proof; and, in particular, bargains of sale, may be so established to any extent. The authorities founded upon by the respondents, in support of the distinction between nominate and innominate contracts, do not prove any such distinction; and even, so far as they go, they are unsupported by the decisions of the Court, which exhibit numerous instances of contracts regarding moveables, and having no known prestations, being proved by parole evidence, although beyond the sum of 100 pounds Scots. The general rule of the law of Scotland is, that all relevant averments may be proved by witnesses, unless in transactions regarding land or heritable property, pecuniary obligations beyond the sum of 100 pounds Scots, and certain other special cases, in which, on grounds of expediency, parole proof has been considered dangerous. And there is no authority, in the reported cases, for holding, that even such a transaction as that which was originally concluded by Mr Gibson, cannot be proved by parole evidence.

3d, Besides, there is no authority for holding generally, that a bargain once constituted by writing, cannot be transferred without writing; the fact of its having been put in the form of a written obligation, is an accident which cannot affect the competency of the evidence of after-transactions regarding the same subject. The authorities referred to, apply merely to cases where the original transaction cannot, by law, be otherwise constituted than by written instrument; and even with regard to these, it is nowhere laid down, that they cannot be transferred without writing, the authorities cited being merely applicable to the extinction of such obligations. Even to this effect, parole evidence has been received, when it goes to establish facts which may, by consequence, extinguish the obligation. In the present case, however, the

fact to be proved does not fall under the rule or the exception, however broad it may be, regarding the extinction of written obligations. The fact to be proved here is a sale of moveables, and that can be proved by parole. It is not a question as to the manner, how the extinction of a written obligation may be proved.

4th, The transaction does not fall under the only other rule which has been referred to by the respondents, namely, the incompetency of proving obligations of relief by parole evidence. This is an exception by no means universal, as is proved by the case of Smollet in 1793, where the Court unanimously allowed a cautionary obligation, deducible from facts and circumstances, to be proved by witnesses. But the exception is totally inapplicable here, as the ground of action is a bargain of sale, and not of relief.

Smollet *v.* Bell, &c. Mor. p. 12354.

Pleaded for the Respondents.—1st, This appeal is incompetent, in so far as it complains of the interlocutor of 2d December 1818, directing counsel to be heard against a motion by the respondents for a new trial. The appeal is likewise incompetent, in so far as it complains of the interlocutor of 12th January 1819, setting aside the said verdict, and directing a new trial to take place. Because, by the Statute 55 Geo. III., c. 52, it is explicitly enacted, that "such interlocutor, granting or refusing a new trial, shall not "be subject to review by petition or appeal to the House of "Lords." There is, therefore, no authority or jurisdiction by which these two interlocutors can be reviewed or altered. An appeal against these interlocutors was incompetent at the time of their being pronounced, and the occurrence of a new trial, in obedience to them, cannot alter the statute law with regard to them.

2d, The interlocutor of the Court of Session, of the 9th March 1819, disallowing the exceptions, and declaring the verdict final and conclusive, is founded upon a judgment of the Court of Session previously pronounced, *namely*, upon that of the 12th January 1819, setting aside the verdict and directing a new trial. It has already been shown, that this last judgment cannot be reviewed nor altered, even by the eminent jurisdiction of this most Honourable House. It is, therefore, *res hactenus judicata* between the parties, that parole proof was incompetent to establish the allegations preferred by the appellants.

Unless, therefore, it is to be held, that the *exceptio rei judicatæ* is struck out of the law in all cases which come

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under the cognizance of the Jury Court, it must apply in the present instance.

3d, By the law of Scotland, the allegations contained in the summons and issues of the pursuer, cannot competently be established by parole testimony. *First*, Parole testimony is not admitted to prove the constitution of any innominate contract, of which the value exceeds £100 Scots. *Second*, Parole testimony is not admitted to prove the assignation or discharge of a contract which is constituted by writ. *Third*, Parole testimony is not admitted to prove the constitution of an obligation of relief of a written obligation.

After hearing counsel,

The LORD CHANCELLOR (ELDON) said,*

"My Lords,

"Whatever may be ultimately the nature of your Lordships' judgment upon this case, if it should be, as I apprehend it is very likely to be, a judgment of affirmance, it is impossible, attending to the circumstances of this case, not to feel, that it is proper to depart from the usual course of affirming without giving reasons upon the subject. *That* having been the practice of this House, it ought not very hastily to be departed from; but, when one looks at the nature of this appeal, it is evident that the House must be extremely careful as to the terms in which it gives its judgment, let the nature of that judgment be what it may. If this had been an appeal from certain interlocutors which are contended not to be subject to appeal; and if those who contend that these interlocutors are not subject to appeal, are right in so contending, I take it, our course would have been, to have considered whether we would enter upon the appeal at all, and probably, by referring the appeal to the Appeal Committee, that Committee would have advised the House, that the appeal ought not to be entertained; but it happens to be an appeal which cannot be so treated; because if there be any of the interlocutors which are the legitimate subject of appeal, the appeal embracing also the other species of interlocutors, the Court would be bound to hear it, and our judgment, supposing it to be a mere judgment of affirmance, would be a judgment the effect of which would be mistaken, if we find nothing with respect to the appeal, as it is an appeal against some interlocutors which can be fairly contended to be unappealable: the judgment, therefore, must be a judgment pronouncing that these latter are not the subject of appeal; and with respect to the other interlocutors, dealing with them as justice may require them to be dealt with.

* From Mr Gurney's short-hand notes.

"My Lords, this case has certainly been very well argued on the part of the appellants, both originally, and in the reply, and there were many points put by Mr Stephen with great ability. There is one view of the case in which, I think, none of your Lordships can differ, and that is, that this argument must have satisfied us that there has been, in this case, a monstrous waste both of time and expense, and it becomes necessary to look a little through this proceeding, to see what the nature of the case really is.

Describes the nature of the bargain.

"My Lords, an agreement was made between a Mr James Gibson, who, I think, is a writer to the signet; and it affects to be a bargain in respect to a dealing in grain, for I cannot think it was in the contemplation of any one of the parties, that one single grain of wheat should ever be delivered,—it is between Mr James Gibson, writer to the signet, on the one part, and Mr Bayne, the Provost of Cupar, and Mr Aitken, writer, there, and Mr Christie of Foodie, on the other—they were dining together—all these bargains are made soon after dinner—both the original bargain and the sub-contracts, as they are called—they enter into this agreement,—having speculated first upon the probable price of land and of grain: 'Provost Bayne, Mr Alex. Christie, and Mr George 'Aitken, bind themselves to deliver to Mr Gibson 1000 bolls of 'best Fife wheat each year for ten years, the first delivery to be 'February 1806, for crop 1805, or to pay the highest Fife fiars 'therefor, in their option'—that is, the average market price—'for which Mr Gibson obliges himself to pay them 30s. a boll, or 'pay the difference between that and the price of the highest Fife 'fiars, if the fiars are below 30s. This to be extended on stamped 'paper, by Mr Greenlaw.' Now, my Lords, that there was an option here, in one circumstance, nobody can doubt: for that Mr Bayne, Mr Christie, and Mr Aitken, were not bound to deliver one single grain of wheat in the ten years, it is impossible to doubt, they having the option either to do that, or to pay the highest fiar prices; on the other hand, it has been contended that there is certainly more doubt with respect to Mr Gibson having had an option; but, I think it manifest and clear that, whether he had an option or not, there never would be a grain of wheat delivered between them, for the meaning of the agreement is neither more nor less than this: If the wheat be above 30s., we will deliver you the wheat, or pay you the difference; on the other hand, if it is below 30s., we will deliver you the wheat and have the 30s., or, we will not deliver you the wheat, and you shall pay us the difference between 30s. and the lower price. Now, I ask, Whether any wheat would be delivered under these circumstances, where the parties could deliver themselves from the bargain by paying the difference between the 30s. and the price, whether the price was above or below 30s.? and Whether this is to be called, in any sense whatever, a sale of goods? or Whether it is anything

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more or less than a wager, and that for a value, according as the price of wheat should be in the course of that year?

"My Lords, we cannot, however, take upon ourselves to apply any principles of the law of Scotland to this, as a wagering bargain, because the Court of Session have, in this complicated proceeding, the nature of which I shall state to your Lordships presently, held this to be a good bargain; but I take upon myself, at least, to say, that I am so stupid that I cannot look upon this as a sale of goods—it is not at all like a sale of goods, nor does it fall under that species of known denomination as a contract, distinguished by the designation of nominate, in contradistinction to innominate.

"My Lords, this notable bargain, called a sale of goods, which took place after a good dinner, at Mr Bayne's, on the 8th of December 1804, was so soon repented of by Mr Aitken, or at least, he wished to get out of the matter so early as the 4th Feb. 1805, and he assigned in favour of the present appellant, Mr Clark, his interest concerning this transaction. That assignation was reduced to writing in a letter, in the following tenor:—Mr Aitken, 'I agree to accept of your share of your bargain with Mr 'Gibson, for the delivery of 1000 bolls of wheat at 30s., or paying 'the Fife fiars, and offer you £40 for your bargain.' If it had rested there, the £40, in point of law, would, upon that undertaking, have been payable immediately; but, the acceptance of Mr Aitken addressed to Mr Clark varied from this: 'I accept of your 'offer, the £40 payable at Candlemas 1805,' which, your Lordships know, would be very soon after the 4th February 1805, so that this is taken to be (and that cannot be disputed, for the Court of Session have decided that) a good assignation of Aitken's share of the bargain. Your Lordships will observe those words, 'share of the bargain'—when you come to look at the summons you will see whether this summons treats Callender's transaction as a transaction of relief, by looking to see how it treats Clark's transaction in respect to Aitken. The £40, which is rather more than £100 Scots—a sum which gives value to a contract with respect to the testimony by which it is to be proved, according to some of the writers—the £40 is to be paid at Candlemas 1805, and he agrees to accept this offer, the £40 being payable at Candlemas 1805.

"Now, I do not enter into the question at all, whether, supposing the original transaction to be a good transaction, this would be a good transfer of Aitken's share of the bargain; whether it contains enough upon the face of it, and in the terms of it, to instruct that Clark understood what he was bargaining for. The expressions in this transfer are mighty short, they do not refer in terms to the bargain, the assignment to which is intended to be made; but this must be taken, in consequence of the judgment of the Court of Session, which I shall have occasion to mention pre-

sently to your Lordships, to have placed Mr Clark (to use an expression which I see has great weight) *in the shoes* of Mr Aitken; but still it must be admitted, that throughout the whole of these bargains, though Mr Clark had got into Mr Aitken's shoes, Mr Aitken had not got out of his own shoes.

"My Lords, after this, Mr Clark seems to have grown very sick of the contract he had made with Mr Aitken; and, as the appellants state it, 'soon after this bargain, Mr Clark had a party 'at dinner at his house at Dron, among whom was the late Alex- 'ander Callender, whom the present respondents represent, and in 'the course of conversation, Mr Clark happened to mention that 'he had purchased Mr Aitken's third of Mr Gibson's wheat-con- 'tract, adding his regret at having done so, as he conceived the 'transaction would not be so advantageous to him as it had been 'represented by Mr Aitken. Upon this Mr Callender observed 'that he thought Mr Clark had made a very good bargain, and 'that he would be happy to take it off his hands, as he knew he 'could get a contract in Stirlingshire for a permanent sale of the 'same quantity of wheat, at two or three shillings a boll less.' Now, I see it is in evidence, that they were all extremely sober at the time—it is thought very material that that should be given in evidence, and yet I cannot help doubting whether Clark was sober enough to exercise his own judgment, to the extent of knowing what this bargain meant, because, if the prices of corn were so much below 30s. as 2s. or 3s. a boll, Mr Clark would not have made so very good a thing of this as it is supposed he might have made. Mr Clark, it is said, 'immediately accepted of this offer, 'and the agreement was made in nearly the following terms:— 'That Mr Callender should step into Mr Clark's shoes, and relieve 'him of the bargain he had made with Mr Aitken. Upon this 'the parties shook hands, in evidence that the bargain was con- 'cluded, and it was fully considered to be so by both, as well as 'by all the company present.' There then follows a statement, that 'it was farther settled, that Mr Clark should furnish Mr 'Callender with a copy of the original agreement made with Mr 'Gibson, and also of his own agreement with Mr Aitken; and as 'Mr Clark had no copies by him at the time, he engaged to pro- 'cure and transmit them next day, which was accordingly done, 'and they were received by Mr Callender, who, on innumerable 'occasions afterwards, admitted and represented himself to others, 'as completely bound by the transaction.'

Opinion as to the effect of a bargain so completed.

Now, here the transaction is stated in a way in which, I think, I may venture to say, in an English court, it would be very soon shown that nothing could be made of it, because, at the time this bargain is stated to have been concluded, that is, immediately after dinner, it is admitted, that neither the original agreement, nor Clark's agreement with Aitken was produced; but it is said

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the terms of the bargain were clearly explained. Now, the condescendence proves clearly that they were not; for, with respect to £40, which was to be paid by Clark to Aitken at Candlemas 1805, the appellant himself admits, in his condescendence, that he did not recollect at the time whether it was to be paid at the beginning or the end of the agreement, the fact being, that it was to be paid neither at the end nor at the beginning of the agreement, but at Candlemas 1805. It appears, therefore, clear, that the bargain would not have been considered concluded in an English court until after these papers had been sent next day, and something had been done, either on the one part or on the other part, and perhaps on both parts after these papers had been sent.

"My Lords, these three short contracts having been made in order to have it determined whether Mr Callender was bound by this verbal agreement he had made with Mr Clark, it becomes necessary, as your Lordships observe, to see whether Mr Gibson's original contract with Bayne, Aitken, and Christie, was a binding contract; secondly, to see whether Clark's contract with Aitken was a binding contract between these two; if the first contract did not bind the four who were parties to it, and the second contract did not bind the two who were parties to it, of course the third contract could not bind the parties to it, if Clark had nothing he could assign to Callender by the contract.—The first proceeding of the Court of Session was a proceeding on the part of Gibson to have the contract declared good as against Bayne, Aitken, and Christie; and then, secondly, there is a proceeding by Aitken against Clark, to have the second contract declared good; and then, thirdly, there is a proceeding by Clark against Callender. *Who* the parties were that fought the two first, I cannot represent to your Lordships; it is enough to say to your Lordships that the Court held the first contract to be one, to which there was no good objection in law, and that it should be carried into execution; and that they held that the second was a good assignment of Aitken's share in the contract; and then Clark was put *rectus in curia* to fight with Callender; but before he could enter the lists with him, he had been obliged to go through this previous proceeding. It becomes necessary next to see what is the proceeding which takes place, but before that, I will say (which I utter with great deference to the Court of Session), I am not sure that in giving them this trial by jury, which, if rightly used, will be a great blessing to that country,—I am not sure it will be such, if this House does not (with respect to the pleadings in Scotland, and more especially with respect to the pleadings so taken out of the Court of Session, in matters of fact to be tried by the Jury Court), endeavour, if possible, to introduce into the transaction of pleadings, both in the Court of Session and in the Jury Court, that nicety which has

long distinguished, and which, I believe in my conscience, is the best security for the administration of justice in this country; and this observation I will apply both to the transaction by which the party enters into the Court of Session, I mean his summons, and likewise to the trial by jury, arising out of that summons, for it is impossible, I think, for any one who has had the experience, many gentlemen now at the bar have, and it is impossible for me, after having spent so large a period of life in hearing arguments at your Lordships' bar in Scotch cases, and having to decide upon them here, not to see to what an enormous waste, both of time and expense, these matters may proceed by not holding men in their *summons*, to say, what it is that they demand, and upon what grounds they demand it, and do not confine themselves to saying, what it is they demand. If they confine themselves to what they demand, they ought, in the proceedings arising out of their demand, to be confined to that which they do demand, and if they state the grounds upon which they demand it, they must take care to state precisely and accurately those grounds, and the Court must confine them to those grounds.

" My Lords, the summons begins with stating, that the pursuer, that is Clark—for this is the *third* action—that the pursuer has been convened in an action before the Lords of Council and Session, at the instance of George Aitken, setting forth, that upon the 8th December 1804, they entered, with these other parties, that is the first parties, into an agreement, the terms of which I have first mentioned; that some time after the date of the said agreement, the pursuer, it is stated, offered to take the said George Aitken's share of the bargain off his hands, and gave him £40 sterling of profit thereon; and that this offer was accepted of by the said George Aitken, not stating when the £40 was to be paid according to the acceptance; 'but that, although 'the said George Aitken had often desired and required the pur-'suer to make payment to him of the foresaid principal sum and 'interest thereof, yet he refused,' &c., and then you are told there is the usual prayer for a sum to be given in damages. Now, the prayer of Aitken against Clark is a prayer that has not that alternative; the Solicitor-General has observed and has commented upon the prayer of the summons of Clark against Callender, which it will be necessary to attend to by and by.

" Then it states, 'That Alexander Callender having been in the 'pursuer's company in the month of February 1805, along with 'William Haig, Robert Meldrum, and others, the above bargain, 'which had excited some discussion in that part of the country, 'being the topic of conversation, and the pursuer having stated 'to the said Alexander Callender the nature and terms of the 'original bargain betwixt the said James Gibson and one other 'gentleman, and also the nature and terms of the paction betwixt

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'the said George Aitken and the pursuer, the said Alexander 'Callender conceiving it to be so extremely good a concern on 'the part of the pursuer, offered instantly to the pursuer to take 'the bargain off his hands, and to make payment to the said 'George Aitken, of the said sum of £40 for his, the said George 'Aitken's share or interest in the said concern as aforesaid.' Now, as this offer is here stated, the meaning of it in law, I take to be, that he offered to take the bargain off his hands, and to make payment of £40 for his share of interest, and that, that £40 was to be paid with interest according to what is stated in a former part of the summons, that is, at Candlemas 1805, that must be taken to be the allegation of the summons.

"Then, he says, 'The pursuer immediately accepted of this offer, 'and the said Alexander Callender and the pursuer did there- 'upon join hands across the table, in presence of the company, 'in token of its being a concluded bargain, whereby the said 'Alexander Callender placed himself in the vice and stead of 'the pursuer in the said concern, and became bound to free 'and relieve him of the whole obligations and consequences 'thereof.' It does not appear whether this Mr Clark ever opened his lips at all upon the subject at this time; what might have been proved against him in order to show that he was bound by the bargain, I think it appears very difficult, indeed, to collect from the papers before us.

"Then, he says, that he had 'frequently desired and required 'him to make payment to him;' this is upon the 18th of October 1806, 'that he has frequently desired and required,' (here his Lordship read the conclusion of the summons). Now, if Aitken placed Clark in his shoes, and if Clark placed Callender in his shoes, Aitken having been united with two other persons in the first contract, being concerned jointly with them, they having the liberty of choosing whether they would deliver the wheat, or whether they would pay the money; the option of Callender to pay Clark a sum of money, or to give to Clark so much grain, is not an option that would necessarily enable Clark to make good his contract with the other two in the delivery to Gibson; and it is upon that I entertain a doubt from beginning to end, whether those assignments ever could have been made available, unless Provost Bayne and Mr Christie were parties to the suit; for it is an agreement, which that person, substituted in the room of another person, is, when joined with two other persons, to make good as the act of the three; and, therefore, I think it impossible to say, that if this is a proceeding, seeking the benefit of an assignation in relief, that the other party can make it other than an assignation in relief; for whether either of them can make it an *obligation* in relief, is the principal question in this cause, on which I shall not touch at this moment.

"My Lords, to this summons an answer was put in, and here I shall take the liberty to say, that if this matter had been tried before me in England, I am extremely afraid I should either have fallen into a very great mistake, or I should have relieved the cause of all further proceeding in it, almost immediately; because, if a count in a declaration had been of the same nature as this summons is, the very moment it was admitted by Mr Clark, 'that 'at the time the pursuer mentioned, he did not recollect whether 'the above sum was payable at the beginning or end of the 'agreement, but that he said to Mr Callender, at all events, this 'should make no difference, for he (Callender) should not be 'called upon to pay the £40 till the end of the ten years,' the moment he had stated in his summons an agreement that this condescendence did not *state* as the agreement, I should have said, that he must state the agreement as it is, and not as it is not; but, however, that point is not taken; the defences are not put in; and among others, it is said, 'that although he recollects, that at a 'convivial meeting, at which the pursuer, he, and various others 'were present, the subject of this agreement was talked over, and 'some conversation ensued betwixt the pursuer and defender, 'about the defender taking his share of the bargain, yet, it is 'certain, there was no concluded agreement betwixt them on the 'subject.' Now, here also is another observation, I think, which would have been applied to this case in our courts in England; if you had declared that the bargain was completed on that day after dinner; if it was a bargain made at any other time, and not only if it was a bargain made at any other time, but if it was a bargain in terms different from those stated in your declaration; you must begin again, and you cannot recover upon that declaration; and the time of payment of money is a very material article in any bargain that can be made between parties. Then it is further said, 'that the transaction is of such a nature, that even if 'parties had been at one upon it, writing was not only in every 'sense proper, but essentially necessary for its constitution, and 'without which it could not be binding upon either party.'

"A condescendence is afterwards called for, and that before the direction for a trial by jury; and there are in this condescendence ten articles upon which the pursuer condescends. I have before stated the sixth article, with respect to the time at which the £40 was to be paid; but it concludes thus: 'That such per-'sons as Mr Callender.' (Here his Lordship read the ninth article of the condescendence.) Now, I do not apprehend that a person, who puts in a condescendence is at liberty to say, that what he states in his condescendence is wholly immaterial; here are allegations in the *ninth* and *tenth* articles, that bargains of this kind were usual between Mr Callender and the pursuer, which would not, I apprehend, alter the law, 'and that it is not unusual

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'to transfer verbally the subject of a bargain, which from accidental circumstances may have been reduced to writing; that is, I suppose, may have been reduced into writing originally.

"When the case comes before the Lord Ordinary, he directs the issues. I will read to your Lordships, *first*, the issue whether an agreement was made. Now, I have no doubt at all, that when an issue is directed, as to whether an agreement was made, if that agreement was made, only, if I may use that expression in a manner in which the law says, an agreement is not validly made, that the conclusion of the law is, though it is so stated to the jury, for them to try the fact that the agreement is not made. It may be said that my Lord Ordinary must have been of opinion, when he directed this issue, that if they could prove the agreement by parole, that was sufficient; supposing that to be my Lord Ordinary's opinion, is it possible to say that his directing that issue, in order that *that* which was matter of fact might be tried by a jury, if the parties chose to send it to a jury, but which, I admit, as matter of fact, the Court of Session were competent to try without a jury, is it possible to say, because these issues were so directed by the Lord Ordinary, that, therefore, the Lord Ordinary had given a judgment that parole evidence was sufficient? I speak of parole evidence without a *rei interventus*. At any rate, all you can say is, that you *imply* that my Lord Ordinary must have had that opinion; but an opinion, in the mind of a judge, unless it is *declared* in *judgment*, is just nothing at all; it must appear in *judgment*, and not appearing in judgment, it may be a mistake and a miscarriage in proceeding to have directed the issue; but to say that the direction of the issue is a judgment, that parole evidence was sufficient to show there was an agreement when it was sent to a jury, to say, whether there was an agreement or not, appears to me to be altogether untenable; and I will take the liberty of saying, that I do not know that the Lord Ordinary can be looked at as having directed an unnecessary proceeding, even if that was the idea; for when one looks at the books, and sees what is said about a nominate contract, and an innominate contract, and what is thought about an *usual* contract, or an *unusual* contract. I do not know but the Lord Ordinary might say, looking at the *ninth* and *tenth* articles of your condescendence, I will not shut you out—prove these facts before a jury—if you can prove that this is a usual contract among merchants, I will not shut you out, and you have in your condescendence alleged it is so; I say, therefore, without going further into it, my Lord Ordinary, whatever be his opinion upon mere parole, cannot, as it appears to me, be represented as having thought that this case was to go upon nothing but parole evidence when it went before the jury.

"When it does come before a jury, my Lord Chief Commis-

sioner's report of the trial upon these issues: 'Whether the defender did, in the month of February 1805, enter into an agreement with the pursuer,' &c. (Here his Lordship read the issues.) Now, my Lords, I observe in the proceedings (I am afraid I am getting to great length here, but this is a case of importance with respect to the Jury Court) if this is not to be considered as what is known in the law of Scotland as a contract of relief, it is a little unfortunate that the terms in which this issue is taken were adopted, because the terms are, whether he entered into a contract to *relieve* him of that bargain, and not only a contract to relieve him of that bargain, but the issue contains an assertion, in fact, that the pursuer had, before the month of February 1805, relieved Mr George Aitken of that bargain; and, I am sure, if it was not considered as a contract *of relief*, those are not the terms which would have been used in this country, but whether it was a contract of relief, it is not a question whether he talked with the party aye or no, but whether, talking with the party, he made a lawful agreement.

"The next question is, 'Whether the defender did not, at 'the same time, agree to pay the sum of £40 sterling to the 'said pursuer, or to the said George Aitken, on condition of the 'bargain being made over to him, the said defender?' Now, when one looks at the condescendence, one cannot help again entertaining some degree of doubt, whether that issue should have been so framed, because if the *time of payment* be an essential in the term of an agreement, and the time of payment was here essential for more reasons than one,—*first*, it was essential considered in itself; *secondly*, it was essential, because it varied the agreement of Callender with Clark, from the agreement which Clark had made with Aitken.

"Then, my Lords, the Lord Chief Commissioner and Lord Gillies report, and 'they call witnesses to prove the bargain be-'tween Clark and Callender. This was objected to by the 'defender's counsel, who contended that the bargain could only be 'legally established by writing, and could not be proved by parole; 'the judges, however, were of opinion, that if the evidence of the 'bargain between Clark and Callender could only rest upon a 'written instrument, the Court of Session would not have sent 'the case to be tried by a jury, but would have decided it them-'selves, either upon the view of the instrument, if there was one, 'or if none, upon the sufficiency of the bargain in point of law, 'for want of writing.' Here it is said, my Lord Chief Commissioner and Lord Gillies miscarried; but really I cannot come to that conclusion myself, because what the judges have finally held, is, *not* that a bargain, where there is a *rei interventus*, or a part *performance* of it, cannot be carried into effect without writing, but that where there was *nothing* but a parole agreement without a

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rei interventus or *part execution*, *that* cannot serve; and much may depend upon what actually passed in the court at the time this transaction took place, whether there was any matter for a reference or not; but take it as you please, either the opinion in the mind of the Lord Ordinary, or in the minds of the judges who tried this issue, and when I recollect who Lord Gillies is, and who the Lord Chief Commissioner is, and Lord Meadowbank, and Lord Reston; speaking of these four persons, I hope none of them who may be now living, will find any fault with me, if I take leave to say, that in common with the greatest and most eminent of judges in England, they may have fallen into a mistake. Then the Lord Chief Commissioner reports the evidence; now, I have looked with great attention to that evidence, and if your Lordships shall come to the conclusion that this judgment shall be affirmed, it does appear to me satisfactory to say, that taking that evidence, and the summons, and the terms of the issues together, I do not think it would have been at all against the evidence if there had been a verdict, not for the pursuer, but for the *defender*; and I think there would have been a verdict for the defender in this country, upon that evidence.

"My Lords, the case goes back to the Court of Session, and there is a motion made for a new trial, and two interlocutors one of the 2d December 1818, and the other of the 12th January 1819, the first directing counsel to be heard against the motion by the respondent for a new trial, and the other of the 12th January 1819, setting aside the verdict, and directing a new trial to take place, and against these interlocutors there is an appeal to your Lordships. The Court of Session, in directing the trial, must be understood to say, that the evidence in point of law, upon which the verdict had been given for the pursuer, in the first instance, was not such as would maintain that verdict; and it has been argued, I think principally by Mr Stephen, that upon the whole construction of the Acts introducing trial by jury into Scotland, an appeal may be competent against such interlocutor, if the decision of the Court, at the conclusion of the case, affords appealable matter. I speak with deference, when I say, that I do not think there could be an appeal against such interlocutors. Certainly the impression upon my mind from the beginning to the end of our proceedings in legislation here, in reference to matter of trial, leads me to say, that I think there is no right of appeal, and that I think I am not wrong when I recollect how much I have had to do with legislation upon this subject.

"My Lords, there was a new trial, and upon that new trial the parties proposed to give parole evidence, the nature of which is not distinctly stated, certainly, in the bill of exceptions; and here, too, I recollect, Mr Stephen, in his argument for the appellant, gave us some observations which deserved considerable at-

tention upon what the legislature must be understood to mean by this bill of exceptions, when it sent it into Scotland. Without entering into remarks upon these observations, I think I may go the length of saying, that the proceeding upon a bill of exceptions, must, at least in Scotland, so far resemble the proceeding upon a bill of exceptions in England, as that those who are afterwards called upon to determine whether the evidence was properly received, if such be the point of the bill of exceptions, may be able, upon a bill of exceptions, to say, that it is clear upon the bill of exceptions, the judge has done right.

"My Lords, it is stated that 'the counsel learned in the law 'for the pursuers, tendered several witnesses to give parole evi- 'dence in proof of said issues; whereupon the counsel for the 'defender, did then and there pray the said Lord Chief Commis- 'sioner to reject the parole testimony offered to be adduced in 'proof of the bargain in the said issues mentioned, and did main- 'tain that such a bargain could only be legally established by 'writing, and could not be proved by parole; that to this the 'counsel learned in the law for the pursuer, did then and there 'insist that the objection taken to the admissibility of the evidence 'offered, was not well founded in law, and that the parole testi- 'mony offered to be adduced, ought not to be rejected, but that the 'same ought, according to law, to be admitted, to prove the said 'bargain.' Now, with respect to the testimony which it was here prayed the Lord Chief Commissioner that he should reject, the testimony is stated to be 'in proof of the bargain in said issues 'mentioned,' and that it was maintained by the counsel, 'that 'such bargain could only be legally established by writing, and 'could not be proved by parole.' If the matter stopped there, one has to observe upon it, true it is (provided, I mean the law as laid down last in the Court of Session is right), that bargain might have been legally established without writing, provided not only the terms of the bargain were proved by parole, but something further were proved by parole, namely, the *rei interventus*, supposing that which is found in the interlocutor is rightly found; and then in order to guess at what is meant by this bill of exceptions, you must go on, in order to make a fair construction of it, to see what is said on the other side. Now, it is said, 'that the parole testimony offered to be adduced, ought 'not to be rejected, but that the same, according to law, ought 'to be admitted.' Now, if this be taken on the one side, to be an offer of evidence to prove by parole, only where there is *rei interventus*, and upon the other, insisting, that the evidence should not be rejected, though it was a transaction consisting only of a bargain without *rei interventus* or part performance, it is intelligible on both sides; but there appears to be a considerable confusion, if either of them contended that where there was a *rei inter-*

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ventus or part performance, the testimony ought still to be rejected; and if the other contended that if there was a *rei interventus* or part performance, the testimony ought to be received; and it has been determined that when a Court is called upon to determine upon a bill of exceptions that a judge has done wrong, you must see upon the face of the bill of exceptions, that he *has* done wrong before you say so; the reasons which he had given, would lead one to consider him as having had tendered to him, parole evidence of the agreement without anything more, and as having rejected that evidence so tendered to him; and I cannot conceive that this bill of exceptions would have been drawn in the way in which it has been drawn, if we cannot do that better in writing which we often do loosely at the bar. My Lord, we will not only tender you that evidence, but will state what we mean to prove besides that; and if it was properly drawn, there would have been that matter in it, or if improperly drawn, it is a thousand to one but the judge would have directed it to be put in, or have inserted it. Then the judge left it, as his direction to the jury, that as the pursuer had no evidence to produce which was admissible in law, according to the judgment of the Court of Session, in granting the new trial, they should find a verdict for the defender. The jury accordingly gave their verdict for the defender.

"That bill of exceptions goes, according to the statute, before the Court of Session, and that Court of Session gives its judgment upon the point of law, that is to say, the Court of Session decides this, and so far they act very usefully in stating the grounds of their decision (reads their judgment). Then there is a finding about the bill of exceptions. Now, my Lords, on the one hand, it has been contended, that the party cannot appeal from this interlocutor of the 9th March 1819, because of its connection with the trial by jury; on the other hand, it is contended that he *may* appeal from this judgment of the Court of Session; and, speaking again from that impression upon my memory to which I have alluded, I have not any doubt he may appeal from this; and, notwithstanding all we have heard on this case, I do apprehend that the single question before us now to be decided is this, Whether the Court of Session have decided rightly, when they say that there was no reference to homologation (they not only say there is no proof of homologation, but no reference to a proof of homologation), they disallow the exceptions, or in other words, whether their judgment in law that this agreement, which was made not between Gibson, Bayne, and Aitken, but between Callender and Clark, for, from the judgment upon these two agreements we have no appeal, they are all contained together, it seems a little harsh, but so it is, whether this agreement alleged to be made between Callender and Clark, is capable of being denomi-

nated an agreement, by which I mean a lawful binding agreement, and whether the Court of Session are right or wrong in stating that there being no attempt at a proof of homologation, or a proof of *rei interventus*, it is not proveable by parole.

The opinion as to the incompetency of parole in this case.

"My Lords, upon that point I have very little difficulty in stating at this moment, that looking at what is the original nature of this agreement, my opinion is conformable to that which the Court of Session has stated. I am not now entering into the reasons of it, and I am the better satisfied with that opinion, because I do most sincerely think that if this agreement between Callender and Clark had been tried in a court in this country, it would have been impossible that Clark could have maintained an action in order to carry that agreement into execution. The result of the whole, therefore, is, if it shall turn out, in considering the terms of the judgment, that your Lordships shall concur in that which I have felt it my duty to advise your Lordships to adopt, the result of the whole is, that this judgment must be affirmed. If, on considering these points, anything should occur to me that has not yet occurred to me, attending to what has been stated at the bar, and reading all the papers in the cause, I shall be very ready to state any alteration of opinion, if there should be any; but my present opinion is, that the two interlocutors, in respect of the motion for a new trial, and the directing a new trial *cannot* be appealed from; that the judgment of the Court of Session can be appealed from, and that being appealed from, and the question being, whether that judgment is right or wrong, my present opinion and persuasion is, that that judgment is right. I will propose to your Lordships to give judgment in this to-morrow.

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed, with £80 costs.

For the Appellants, *John Clerk, Andrew Skene, Henry J. Stephen.*

For the Respondents, *Jas. Wedderburn, Geo Cranstoun.*

WM. and GEORGE WALKER, Esqs., and Sir PATRICK WALKER, . . . *Appellants;*
JAMES GIBSON, Esq., W.S., . . *Respondent.*

House of Lords, 22d February 1819.

VITIATION IN SUBSTANTIALIBUS—DECREE OF SALE.—(1) Held that the commission in which the appellants founded their claim as deputy ushers in the Court of Exchequer, having been vitiated