

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.

“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.*

1819.

 CLARK, &C.
 v.
 CALLENDER,
 &C.
 The opinion as to the incompetency of parole in this case.

1819.

 WALKER, &C.
 v.
 GIBSON.

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

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by an erasure in the signature of one of the testamentary witnesses, was reducible, and reduced accordingly. (2) The respondent had purchased the heritable right to the office at a judicial sale; and the decree of sale in his favour reserved the deputies right, "so far as they had right by the commission." Held that this clause did not save their right from the exceptions pleadable against it.

This is the sequel of the case reported in Dow, vol. ii. p. 270.

It was an action of reduction raised at the instance of the respondent against the appellants, to reduce a commission appointing them to the office of heritable usher and door-keeper of the Court of Exchequer in Scotland, upon the ground that the commission was *ex facie* vitiated *in substantialibus*, in consequence of the name of one of the subscribing witnesses to the commission having been written on an erasure.

May 11, 1814. The Court of Session sustained the reasons of reduction; but on appeal to the House of Lords, that right Honourable House was pleased to "Find that the Commission, 23d December 1791, is reducible as vitiated *in substantialibus*; "and it is, therefore, ordered and adjudged, that with this "finding, the cause be remitted back to the Court of Session "in Scotland, to apply such finding, and to hear parties "further on all the other points of the cause."

June 3, 1814. When the cause came back from the House of Lords, a petition was presented to the Court to apply this judgment, and to remit to the Ordinary to hear parties further on the other points of the cause.

The Court found "in terms of the said judgment, that the "commission, 23d December 1791, is reducible, as vitiated "in *substantialibus*, and *quoad ultra*, remit to the next "Ordinary of this Division in the Outer House, instead of "the late Lord Cullen, to hear parties, and to do as his "Lordship shall see cause."

The respondent had purchased the heritable right held by Lord Bellenden in this office at a judicial sale of his Lordship's estate, and held it in virtue of the decree of sale pronounced by the Court, of which no reduction was brought.

The appellants founded on a prior deputation which had been resigned by them. A new one was then granted to George and Patrick Walker, and it was this commission which was the subject of reduction.

To give fuller effect to the discussion, the appellants brought an action of declarator, which was conjoined.

After hearing parties fully upon all the points of the case, the Lord Ordinary (Pitmilley) pronounced this interlocutor: —“The Lord Ordinary having heard parties’ procurators on the grounds of the conjoined actions, in the reduction at the instance of James Gibson against George and Patrick Walker: Reduces, decerns and declares, conform to the reductive conclusions of the libel; and, in the action of declarator at the instance of William and George Walker against James and Archibald Gibson, sustains the defences, assoilzies the defenders, and decerns. And on the other points of the action at James Gibson’s instance, appoints parties’ procurators to be ready to debate at next calling.” On representation his Lordship adhered.

1819.

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Feb. 21, 1815.

In a reclaiming petition, he pleaded that though the judgment of the House of Lords, had found that the commission 1791, was reducible, yet that the question still remained, Whether it could be reduced at the instance of Mr Gibson, as he had purchased the office *minus* the rights of the deputies; in other words, as the decree of sale set forth, “under the reservation always to George and Patrick Walker, and the survivor of them, of all right, title and interest they and each of them have in the said office, salary, fees, and perquisites thereof, as deputies therein, during all the days of their respective lives, *so far as they have right thereto by the commission granted in their favour.*”

In answer, the respondent founded his argument on the latter part of the above clause, stating that the rights reserved to them, were only so far as these were good *by the commission*, but this last being vitiated, was good for nothing.

The Court (Second Division) refused this petition and adhered. June 17, 1816.

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

After hearing counsel,

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

For the Appellants, *John Dickson, Tho. Thomson, John A. Murray, Pat. Walker, Jas. Campbell.*

For the Respondent, *Sir Saml. Romilly, John Clerk, Jas. Moncreiff.*