

March 30,
1814.

(Cited, *Leman v. Newnham*, 1 Ves. 51.—*Task v. White*, 3 Bro. C. C. 289.)

MORTGAGE.

Hart and Courtney for Appellant; *Romilly and Blake* for Respondent.

Judgment.

Judgment *affirmed*.

Agents for Appellant, RASHLEIGH and LEE.

Agents for Respondent, LIGHTFOOT and ROBSON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

GEORGE and PATRICK WALKER—*Appellants*.

GIBSON—*Respondent*.

April 20, 1814.

WRIT.—EX
FACIE VITIA-
TION.

NAME of one of the attesting witnesses in a deed appears to be written on an erasure, and the word *witness* subjoined is in a different hand-writing. This is an *ex facie* vitiation *in substantialibus*, though the witness deponed to the name being his writing, but recollecting nothing farther about the circumstances.

Deed.

THIS was an action of reduction to set aside a commission or deputation granted Dec. 23, 1791, by Lord Ballenden, then heretable usher and door-keeper of the Treasury and Exchequer, to the Appellants, of the office of deputy usher and door-keeper of the Exchequer Court, on the ground

(among others) that the commission was *ex facie* vitiated *in substantialibus*. April 20, 1814.

The alleged vitiation consisted in this,—1st, That the name *Charles Cummins*, one of the witnesses, was written upon an erasure so complete that it was impossible to discover what had stood in the place before. 2d, That the name *Charles Cummins* was written in a different ink from the subscription of Lord Ballenden and William Downs, the other witness. 3d, That the name *Charles Cummins* was written in a different hand, and with a different ink, from the word *witness* subjoined to the name.

WRIT.—EX
FACIE VITIA-
TION.

Alleged vitia-
tion.

After the cause had been stated in mutual memorials, the Ordinary, (*Cullen*), by interlocutor, July 11, 1807, at the suggestion of Defenders, and with consent of Pursuers, allowed Defenders, “before farther answer, to take the oath and deposition of Charles Cummins as to his having witnessed the deed in question, and adhibited his subscription to the same.” Charles Cummins was accordingly examined by the Ordinary himself, and deponed that he was perfectly certain the name *Charles Cummins* was in his hand-writing, though satisfied, from inspection of the deed, that there must have been an erasure in the place; that he did not recollect the deed itself, nor the circumstance of subscribing it; that deponent, from his official situation, (Clerk in the Exchequer in London,) was frequently called upon to witness various deeds; that, as a man of business, he certainly would not subscribe a deed which he did not see properly executed by the principal party; and that, though de-

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WRIT.—EX
FACIE VITIA-
TION.

Deed adjudged
to be vitiated
*in substan-
tialibus.*

Sea Box of
Queensferry,
Jan. 7, 1732.
—Ersk. b. 3.
t. 2. s. 23.

Dict. voce
Writ.

ponent did not recollect the circumstance, he was confident he must have seen Lord Bellenden subscribe this deed; that he rather inclined to suppose the word *witness* subjoined to be the hand-writing of G. Walker, one of the Appellants.

The Court, (Second Division,) on report of the Ordinary, Jan. 26, 1809, sustained the reasons of reduction founded on the *ex facie* vitiation *in substantialibus* of the commission, and adhered, June 17, 1809. From these interlocutors an appeal was lodged.

Argued for Appellants,—1st, Every alteration was not a vitiation, and here every thing essential was in the deed. Case turned on appearance of erasure and evidence of Cummins. The appearance suspicious, but evidence of Cummins did away the suspicion, (Stair, b. 4. t. 4. s. 19.—2 Dict. 152, and cases there collected.) 2d, Nothing in statute of 1681, cap. 5, to show that witness must subjoin word *witness* to his name in his own hand-writing. (*Lord Eldon* (Chancellor.) They say that another person subscribed as witness before erasure, that Cummins afterwards signed, and found word *witness* ready to his hand.) That was no objection. (*Lord Eldon* (Chancellor.) Whether the subscription of principal party must not be executed, or acknowledged, before both witnesses at the same time?) That was not necessary; but here there was no evidence that it had not. 3d, The evidence of Cummins was sufficient to prove that he had seen the principal party subscribe, or acknowledge his subscription. (*Young v. Glen*, August 2, 1770.—*Sibbald*, Jan. 18, 1776.—*Frank*, March 3, 1795.)

Argued for Respondents,—1st, Clear that the deed was vitiated in material part. Attestation there equal to a deposition on oath, and as essential as execution by principal party. Forgery not imputed; only an attempt to remedy a blunder, but this fatal to the deed. No case cited on the other side of erasure of a witness's name, and another written in the place,—no case bearing upon the present. 2d, Proper that word *witness* should be subjoined in witness's own hand-writing, to show that he subscribed as such, and not in any other character. That was peculiarly requisite, where attestation was equivalent to deposition on oath, (Bankton, b. 1. t. 2. s. 41.) 3d, Cummins's testimony taken before answer, and therefore without prejudice to any legal question. A deed *ex facie* vitiated *in substantialibus* is void, and evidence of Cummins could not help it. Cummins was examined merely to show that the subscription was not a forgery, to preserve his evidence in case of a criminal charge. 4th, Evidence, if to be received, rather proved Respondent's case. Witness only said that the name on the erasure was his writing, but he did not at all account for the erasure; he knew nothing about it, and the presumption still remained. 5th, Witnesses must together see party subscribe, or own subscription, otherwise they do not attest same date of subscription or acknowledgment, and there is no legal execution of deed before two witnesses. Presumption here was, that this deed was not so executed, and evidence of Cummins did not rebut that presumption.

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WRIT.—EX
FACIE VITIATION.

Bell's Lect.
p. 228, referred to as evidence of the general understanding and practice.
Patullo v. Forrester, Nov. 22, 1671.
Morr. Dict.
voce Proof.

April 20, 1814.

Leach and *A. Murray* for Appellants; *Adam*
and *Romilly* for Respondents.WRIT—EX
FACIE VITIA-
TION.

Judgment.

Judgment *affirmed*.

Agent for Appellant, RICHARDSON.

Agent for Respondent, CAMPBELL.

 ENGLAND.

APPEAL FROM THE COURT OF CHANCERY.

WILLAN—*Appellant*.WILLAN—*Respondent*.April 22, 25,
May 13, 1814.

AGREEMENT.

AGREEMENT between uncle and nephew for a sub-lease to the latter at a fixed rent, with covenant for perpetual renewal, of premises held by the uncle under a church lease, renewable on fines at will of lessors, set aside on the ground of surprise and misapprehension of its effect in one or both of the parties; the facts being, that the agreement was entered into a few days before the uncle's death, when he was confined to bed by the illness of which he died, and was in such a state of bodily and mental imbecility as rendered him incapable of transacting business which required deliberation and reflection, the agreement being at the same time one for val. con. and in that view of it unreasonable.

Lord Redesdale doubting whether, even if there had been no evidence of imbecility, such an agreement, made under such circumstances, would not be set aside on the ground of surprise and misapprehension.

And since it was unfit that such an agreement should be acted upon in equity, it was held unfit to be acted upon at law, and it was ordered to be delivered up.