

[30th July 1840.]

Mrs. SOPHIA HOGGAN or SMITH, Relict of Alexander (No. 10.)
Smith, Esquire, of Land, Appellant.¹

[*Lord Advocate (Murray) — P. Shaw.*]

THOMAS RANKEN, S. S. C., Respondent.

[*Sir W. Follett — Forbes.*]

Sasine — Writ — Vitiatio.—Held (affirming the judgment of the Court of Session), that an instrument of sasine was null and void, the word “three” in the year of the Christian era (one thousand eight hundred and three), denoting the date of the sasine, being written upon an erasure.

Observed by Lord Brougham, in reference to the judgment of the Court of Session in *Gordon v. Earl of Fife*², (not appealed,) “I must fairly add that I do not go very willingly or indeed very easily along with that decision, and that the judgment delivered by the Lord President Hope, and in which Lords Gillies, Alloway, Eldin, and Corehouse concurred, would have satisfied my mind.”—
See page 207, *infra*.

ALEXANDER SMITH of Land, now deceased, the husband of the appellant, purchased the lands of Monygryle and Pointfoot in the year 1801. The disposition in his favour was executed on 26th August 1801; and in virtue of the precept of sasine which it contained Mr. Smith was infest in the lands on 2d of September 1803. The instrument of sasine was duly registered in

2D DIVISION.
—
Lord Ordinary
Mackenzie.
—
Statement.
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¹ 13 S., D., & B., 461; Fac. Coll., 13th Feb. 1835.

² 9th March 1827, Fac. Coll.; 5 S. & D. 517.

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the particular register of sasines at Dumfries, on the 14th September 1803.

The appellant was married to Mr. Smith in the year 1807; there was no contract entered into; but he was then proprietor of and stood infest in considerable landed property. Mr. Smith died intestate in July 1827. He left merely a bond of provision in favour of his children, containing a nomination of tutors and curators to them.

At Mr. Smith's death his affairs were involved, but it was supposed that after paying his debts there would remain a considerable reversion to his children, all of whom were then in minority; and the eldest son and his curators continued in possession of the landed estates. Instead, however, of having left a reversion to his children after paying his debts, it turned out that Mr. Smith was bankrupt; and a process of ranking and sale was brought by the creditors.

As there had been no contract of marriage betwixt the appellant and her husband, she was entitled to her terce of all the lands in which he died infest, in so far as any of them or their proceeds remained over after satisfying the claims of heritable creditors, and she therefore preferred a claim in the process, inter alia, for terce out of the lands of Monygryle and Pointfoot. The instrument of sasine in her husband's favour was in its invocation expressed thus:—"In the name of God, Amen.
" Be it known to all men by this present public instru-
" ment, that, upon the second day of September in the
" year of our Lord one thousand eight hundred and
" three, and of the reign of our sovereign Lord George
" the third, by the grace of God, king of the United
" Kingdom of Great Britain and Ireland, defender of

“ the faith, the forty-third year, in presence of me,
 “ notary public, and the witnesses subscribing, appeared
 “ personally,” &c.

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In the principal instrument the word “ three ” in the year of our Lord, and also the connecting word “ and ” which follows, were written or superinduced upon erasures. The record of the instrument was free from erasure.

The respondent, Mr. Ranken, who had been appointed common agent for the creditors, objected to the claim of the appellant on the ground that the instrument of sasine was vitiated and erased in the date.

The Lord Ordinary, by an interlocutor dated the 18th January 1834, found, “ that the appellant was not
 “ barred from claiming terce out of the estate of her
 “ late husband, but that the said Alexander Smith was
 “ not validly seised in the lands of Monygryle and
 “ Pointfoot.”

The appellant having reclaimed to the Second Division, minutes of debate were ordered, and the Court being divided the opinions of the other judges were taken¹, when their Lordships (13th July 1835) adhered to the interlocutor of the Lord Ordinary.

Judgment of
 Court.
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 13th July 1835.
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¹ Opinions of the Lord President, and Lords Balgray, Gillies, Mackenzie, and Corehouse.

“ We are of opinion that the objection to the seisin in question, that
 “ the word three in the date of the year of our Lord is written on
 “ an erasure, is a good objection.

“ A seisin is an actus legitimus; and in all such, therefore, the
 “ solemnities and forms fixed by statute or by immemorial usage must
 “ be strictly adhered to. In the case of a seisin, it has been the
 “ form from time immemorial, that it shall mention the date both of
 “ the christian era and of the king’s reign; and it is remarkable that
 “ this requisite is not necessary even in the disposition or heritable bond
 “ on which the seisin proceeds. We must hold, therefore, that this
 “ double date has been required in a seisin, that the one may be a check

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Appellant's
Argument.

The appellant appealed.

Appellant.—Whether an erasure is material or not, and such as to infer a nullity in a deed or instrument, must always depend on the circumstances of the parti-

“ on the other ; so that by means of this precaution the true date may
 “ be more certainly ascertained. And it is the more necessary that
 “ great precision should be required in the date of the seisin with refer-
 “ ence to the registration, which, to be effectual against third parties,
 “ must be done within a given period.

“ In this case the word three being written on an erasure, it must be
 “ held that some other word had been originally written, but afterwards
 “ rubbed out, in order that the word three might be substituted in its
 “ place:—e. g. that the date was originally 1801 or 1802, or 1804 or
 “ 1805, which, as neither of these corresponded with the 43d of the
 “ king, would have rendered the true date quite uncertain. Therefore
 “ it must be held that there was originally no date at all, by which the
 “ time allowed for registration could be regulated. But if the date was
 “ originally wrong as being uncertain, it could not be remedied by the
 “ summary mode of inserting what is said to be the proper date, by
 “ means of an erasure of the wrong one. There are legitimate modes of
 “ rectifying such mistakes which are well known in practice, and none of
 “ these having been adopted in this case, the erasure must be held to be
 “ fatal to the deed.

“ The nullity cannot be rectified by the mere fact of registration,
 “ because the clerks at the register office must record every deed that is
 “ presented to them for that purpose exactly as it stands, for they are
 “ not entitled to judge whether it is valid or not.

“ It is also proper to remark, that when an estate is to be purchased,
 “ or money lent on the security of an estate, the agent of the purchaser
 “ or lender never contents himself with the production to him of extracts
 “ of seisins or other deeds, but always calls for and examines the seisins
 “ themselves, and other principal deeds; because, besides erasures, there
 “ are other fatal objections which cannot be discovered from the records;
 “ such as forgery,—the existence of a nearer heir,—objections on the
 “ ground of death-bed. Against such objections he must satisfy himself
 “ aliunde, or rely on the clause of warrandice; for the records, however
 “ valuable in other respects, neither do nor by possibility can afford pro-
 “ tection to purchasers or creditors in all cases.

“ But against an objection arising from an erasure the party can
 “ easily guard by examining the principal seisin, which every agent who
 “ knows any thing of his duty always does.

“ This is no doubt a hard case, but there is no help for it; and in this
 “ case the objection, however late in point of time, was stated as
 “ soon as the interests of the party made it competent to do so.

cular case. A deed is not necessarily to be annulled because a word is written on an erasure, provided what

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Appellant's
Argument.

Opinion of Lord Moncreiff, concurred in by Lords Fullerton and Jeffrey.

“ I concur entirely in the substance and conclusion of the Lord President’s opinion. I conceive it to be a very clear matter of law, that the registers were never intended to supersede the original instruments as the essential grounds and evidence of the title when called for, or to relieve such title deeds from any fundamental defects or nullities. When therefore such an instrument is produced, the question whether it is liable to any objection of nullity must altogether depend on the nature and condition of the deed itself.

“ It is essential to the validity of every instrument of seisin, that it should bear the date both of the Christian era and of the king’s reign. This fixed rule is, I conceive, independent of the system of registration, and it has not been altered by any of the statutes on that subject, though the importance of it may be increased by them. These dates, therefore, are inter essentialia of the instrument.

“ It is an established principle of the law of Scotland, that in all writs of importance, and especially in instruments of seisin, erasures in substantialibus are to be held as vitiations of the writ inferring nullity. I think it unnecessary to inquire into the presumptions on which this doctrine of the law is founded, the rule itself being settled and indisputable.

“ The question whether a particular erasure is in substantialibus or not sometimes may depend on circumstances in the position and connexion of the word or term which is written on it, but in other cases is at once determined by the nature of the word or term itself as essential to the deed.

“ In the present case, the word admitted to be written on an erasure is that which denotes the year of the christian era; and that being so essential to the validity of the instrument that it cannot be read without it, it must in my opinion be a case of erasure in substantialibus.

“ Having this view of the law applicable to the case, I humbly conceive that such an objection cannot be obviated by any reasoning of presumptions or probabilities, derived either from the year of the king’s reign being fairly written (that being equally essential by itself), or from the state of the copy engrossed in the register, or from extraneous circumstances; and further, that all arguments against the application of the rule of law to such a case, founded on the idea that the register ought to overrule or supersede the principal instrument, or relieve it from nullities of this description—or on supposed danger to parties who may look at the register alone,—are inconsistent with the established law on the subject, and altogether irrelevant to the present question.”

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precedes and what follows the erased word show, as in the case of an instrument of sasine, what the true word really is; here every presumption or notion that the word "three" has been falsified is excluded by the fact that the year of the king's reign is not disputed to be correctly stated in the instrument. No verba solemnia are required in an instrument of sasine; it is sufficient that on the face of the instrument it shall appear that on a particular day, in a particular month, and in a particular year that took place which it is the object of the instrument to certify. Even if the word "three" had been left blank, there would have been still sufficient legal evidence of its date. There is no statute which requires, under pain of nullity, that a notarial instrument shall prove its date in two ways, though, as a check against fraud and falsehood, the usage is to state the year in two ways. Nothing appears, from inspection of the instrument, to show that the dates according to the Christian era and the king's reign were originally different, and an assumption that the correction was made after the instrument was signed by the notary cannot be admitted. The correction was evidently made at the same time the instrument was extended, and before the solemnity of giving sasine to Mr. Alexander Smith by the notary took place, and it is manifest, from an inspection of the instrument, that the correction was made by the same hand and with the same pen and ink as had been used in extending the instrument. Clearly there was no fraud intended, and none is imputed. The effect of the interlocutor appealed from then is, that, in the absence of fraud, the mere correction of a blot or mistake in an instrument of

sasine renders that instrument null and void to all intents and purposes.¹

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Respondent's
Argument.

Respondent.—It is an established rule of law in Scotland that deeds vitiated in substantialibus are invalid, and it being the object of law to preserve those deeds which have been truly executed pure and unaltered, a deed must show ex facie that it has not been altered or vitiated since it was executed; but if it be erased and vitiated, no reasonable confidence can be entertained that it remains in the state in which it was produced. The vitiation is not proved by the deed to have been part of the writing at the time of the execution, and the jealousy of the law goes so far as even to presume against it that the vitiation has been afterwards made and is fraudulent if it is in an important part of the writing, and more especially where the vitiation is not mentioned in the notary's docquet. It is not denied that vitiations to be fatal must be in substantialibus, and

¹ *Appellant's Authorities.*—Ersk. b. ii. tit. 9. s. 44. and 46; 1 Bell's Com. 59; Rose v. Fraser, 26th Jan. 1790; Mor. App., voce "Terce," No. 1.; Ersk. (Ivory), p. 428, note 223; Hamilton v. Boswell, 15th June 1716, Mor. 3117; Mitchell and Co. v. Stevenson and Co., in House of Lords, 4th April 1831; Lockhart v. Hamilton, 5th March 1706; Mor. 16939; Adam v. Drummond, 12th June 1810, Fac. Coll. xv. 691, No. 233; Hamilton, 4th Jan. 1824; 2 S. & D., p. 640; Gordon v. Earl of Fife, 9th March 1827, 5 S. & D. p. 517, (but as to authority of that case, see post, p. 207); Gaywood v. M'Eand, 19th June 1828, 6 S. & D., p. 991; Morton v. Hunters and Co., 10th Dec. 1828, 7 S. & D., p. 172; affirmed 26th Nov. 1830, 4 W. & S. p. 379; Earl of Cassilis v. Kennedy, 3d June 1831, 9 S. & D. p. 663; see also Stair, b. ii. tit. 3, s. 17. 18., and b. iv. tit. 12. s. 19; 2 Ross, 181; Henderson v. Dalrymple, 6th March 1776, Fac. Coll., vii. 201, No. 225, Ap. 1, Mem. of Par., No. 2.; Lord Hailes's Decis., p. 695; Livingston v. Napier, 3d March 1762, Fol. Dic. iv. 335; Mor. 15418; Gordon v. Brodie, 20th July 1773, Bell's Election Laws, p. 258; Tait's Coll. Brown's Supp., vol. v. p. 587; Douglas v. Chalmers, 3d March 1762; Brown's Supp., vol. v. p. 587; Morrison v. Ramsay, 16th Dec. 1826; 5 S. & D. 150.

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what points are de substantialibus must be determined by the nature of the writ; all which occur in the description or specification of the subjects conveyed, or in the sum, or in the term of years, or in other similar clauses of a deed are vitiations in substantialibus. The date of an instrument of sasine is of the utmost importance, as affording the only means of ascertaining whether it has been recorded within the sixty days, and being thus absolutely essential to its validity.

Immemorial practice, as stated by the text writers, has required two dates in the case of instruments of sasine, viz. the date of the Christian era and of the reign of the king; the two dates must therefore be consistent, or the instrument has no date. The vitiati^on which occurs in the date of the present instrument proves that the year of the Christian era originally inserted must have been different from the one now inserted in the instrument, and it follows, as a legal presumption, that it was different when the deed was executed. It is said by the appellant, that the effect of the vitiati^on in the year of the Christian era is only to cause that part of the date to be held pro non scripto, and that there still remains the year of the king's reign to supply the date of the instrument, and to show that it has been properly recorded; but the answer is, that there is no authority, either in principle or practice, for dispensing with the invariable style of pointing out the date of the instrument both by the year of the Christian era and of the king's reign; neither is this a case in which one date only has been ab initio employed, for the use of two dates has been resorted to, and as the instrument originally stood it is obvious that these date must have been disconform to each other, and it must

have been to remedy that discrepancy that the vitiation was effected subsequently to execution, such discrepancy being fatal to the deed. A vitiation in one or other of the dates of an instrument in which two have been employed is in principle as objectionable as if both had been written on erasures, and the whole authority of a deed depends upon its being entire and without a vitiation. In the present instance, and supposing that the only effect of an erasure in law is that the letters or word erased must be held *pro non scripto*, by striking out 3 the date is left 180, and thus creates the same defect as if an inconsistent date or no date whatever were specified. There is no hardship in the rule of law as contended for by the respondents, because, even although an erasure is in *substantialibus*, the effect of it may be removed if, in the testing clause of a deed, or the notary's docquet in the case of a *sasine*, the erasure is noticed and the words written upon it specified. The rule of law now contended for applies especially to an instrument of *sasine*, not only because it is *actus legitimus*, but because the notarial instrument is the only admissible evidence that *sasine* had been taken.¹

Judgment in this and the two succeeding causes was given at the same time. The opinion delivered by Lord Brougham in moving the judgment of affirmance, concurred in by the Earl of Devon, will be found in the report of Lord Strathmore's case, No. 12. *post*, p. 189.

¹ *Respondent's Authorities*. — Balfour, p. 368; Spottiswood, p. 164; Ersk., b. iii. tit. 2. s. 20; Ross's Lectures, i. 145; Stair, b. iv. tit. 12. s. 19., and b. ii. tit. 3. s. 17; A. v. B., 22d July 1625, Mor. 16925; Laurie v. Reid, 9th July 1712; Fount. i. 731; Mor. 12284; Innes v. Earl of Fife, 10th March 1827; 5 S. & D., p. 559; Stewart, 20th Feb. 1827, 5 S. & D., p. 383; Dennistoun v. Speirs, 16th Nov. 1824, 3 S. & D., p. 285; M'Queen v. Nairne, 23d Jan. 1824, 2 S. & D., p. 637.

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The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed.

DEANS and DUNLOP — RICHARDSON and CONNELL,
Solicitors.