under the deed 1793 cannot be considered as having title or right, under the former disposition, as if they had been named therein, or otherwise under the effect thereof; and find, likewise, that the heir is not excluded, in this case, from challenging the deed 1793 *ex capite lecti*, and at sametime founding thereon as revoking the former dispositions. And it is therefore ordered and adjudged that the interlocutors complained of, so far as they are inconsistent with these findings, be reversed. And it is further ordered that the cause be remitted to the Court of Session to do therein as shall be meet.

For Appellants, *R. Dundas, Ad. Rolland, Robert Craigie.*
For Respondents, *Wm. Adam, Wm. Robertson.*

(Mor. App. I. "Writ" No. 3.)

JOHN HOWIE, - - - *Appellant;*
JAMES MERRY, - - - *Respondent.*

House of Lords, 17th March 1806.

DEATHBED—DEED—VITIATION IN ESSENTIALIBUS—PAROLE.—(1.) A deed was challenged on the ground of deathbed and incapacity, by a party not the heir-at-law, but by one to whom the same subject had been disponed by a previous deed. Held him entitled to challenge on deathbed. (2.) This deed, in order to get over the objection of deathbed, had been vitiated and altered in its date, and a proof being allowed, held that the deed challenged being vitiated, and its date false, was null and void. (3.) Observed that the want of the date here could not be supplied by parole, and still less the vitiation of a date.

John Howie, proprietor of certain lands, resolving to convey these to the appellant and respondent in two moieties, executed a disposition in 1777 in favour of each: But thereafter, and by a disposition of this date, he conveyed the whole two moieties to the appellant, without revoking or taking any notice of the former disposition. He died two days thereafter, whereupon the appellant took possession of his estate. Jan. 6, 1785.

Action of reduction was brought by the respondent, in so far as concerned the one half of the lands conveyed to him

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by the disposition 1777, to set aside the latter disposition of 6th January 1785, on the ground, 1st, That the disposition which was originally dated 6th Jan. 1785, was null and void, as being vitiated *in essentialibus*, the date of the same having been fraudulently changed after the death of the deceased, from 6th January 1785 to 6th November 1784, in order to exempt it from challenge on the head of deathbed and incapacity; and, 2d, That the deed was executed on deathbed, and while the deceased was incapable of judging of its nature and import.

Feb. 6 and 7, 1801. After a proof, the Lords, of this date, "Sustain the reasons of reduction, and reduce, improve, decern, and declare, in terms of the conclusions of the libel: Find the pursuer (respondent) entitled to expenses,"* &c. On two reclaiming petitions the same were refused.

Feb. 27, and May 15, 1801.

Opinions of the Judges:—

LORD PRESIDENT CAMPBELL said,—"The testator died on the 9th January. The parties are agreed as to this. The deed 1777 required no delivery. The liferent right was reserved. It contained no power to revoke, but, being deposited in the hands of a friend, it might have been called back and destroyed, or defeated during the joint lives of husband and wife, and by their joint act, but not after the death of the husband. The deed 1784 contains no clause of revocation, nor any reference to the former deed. If the first deed is not sustained, it must only be by virtual revocation, and, in consequence of sustaining the last, and holding it as of a posterior date, and executed by a party having right to execute it. The vitiation of the date is, in my opinion, an insuperable objection. But I am not clear that he was in a condition to make a deed on 6th January, for the witnesses clearly refer his capacity to a preceding period.

"The title is made up on one half of the subject, under the former deed, by sasine 5th September 1785. Sasine expede by William Dunn, notary public. Sasine taken upon the challenged deed not till 11th Jan. 1790, William Nimmo, notary public. The widow was still alive. If there was only one settlement, the date would be less material. But if there be two, it is essential. Besides, it is a check against forgery and *false evidence*. All the witnesses here, except Dunn, are swearing upon a wrong hypothesis, and Dunn is a stranger to the testator. Besides, he would naturally incline to support the deed. I think the want of the date here cannot be supported by parole evidence, and still less the vitiation of a date. The legatees in former deeds are also interested parties; and our *nobili officium* cannot be exerted to restore this party against his own fraud in vitiating the date. No doubt, the word eighty is not vitiated, and this

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

Pleaded for the Appellant.—The deed in question could only be reduced on the head of deathbed by the heir-at-law; but as all right of succession in the heir-at-law was previously excluded by a special deed of conveyance of the lands in question to strangers, he could not interfere; and those strangers cannot avail themselves of a challenge on deathbed, which is peculiar alone to the heir. The respondent has no title, therefore, to maintain the present action. The deed under challenge was deliberately executed, and having specially conveyed to the appellant what was conveyed formerly to the respondent, this must be held as an implied revocation of the former deed. And as the heir-at-law has confirmed the last deed, the respondent cannot be heard to challenge. Besides, if the deed was vitiated, it was done by the respondent and not the appellant; and there is no evidence to show that the deed does not bear its true date, viz. 6th Nov. 1784; nor that the granter was under any incapacity, at that time, far less that the deed is reducible on the head of deathbed.

Pleaded for the Respondent.—The respondent's title and interest to sue this action is placed beyond all doubt by the disposition of 1777 conveying to him the one half of the property. This deed was irrevocable in its nature, as it contained warranty against all subsequent deeds of the granter. The deed was actually delivered, and infeftment taken upon it. But even supposing the deed merely testamentary, and revocable in its nature, it must stand good until revoked;

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is material; but still a partial manufacture must have been for a fraudulent purpose, and if we cannot restore the date fully, it must be held as a null date altogether, especially where the time is material in the question of deathbed; or it is made a question whether the maker at that time was of good health, or of sound mind. A holograph deed is held to be executed at the last moment of life. This cannot be in a better situation. Holograph deeds could not, by parole evidence, be brought back to a former date, *e.g.* in a question of deathbed."

LORD HERMAND.—"The pursuer has made out his case, 1. Because the first deed was delivered; and, 2. Because the second deed was vitiated in the testing clause, and the date clearly false."

LORD JUSTICE CLERK.—"I am of the same opinion."

LORD MEADOWBANK.—"I am of the same opinion."

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and this can only be by express revocation, or by implied revocation, neither of which applies to the present case. The proof adduced shows that the deed sought to be reduced had at one time a different date from that which it bears. *Ex facie* it appears manifestly crazed, and not to be the true date, and the true question is, Whether a deed vitiated or altered with a fraudulent intent, after execution, and after the death of the granter, can be set up as the deed of that person? or can be used by the perpetrator of the fraud? The respondent maintains that, in the face of the proof adduced, this deed has been vitiated, and altered in its date, to serve a fraudulent purpose, as it clearly appears from the evidence of Dunn, the writer of the deed, and from the law charges in his books, that it was executed on 6th Jan. 1785, two days before the granter's death.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellant, *John Hagart, M. Nolan.*
For Respondent, *Ar. Campbell, James Grahame, Fra. Horner.*

JOHN GLASSELL of Long Niddry, . . *Appellant;*
EARL OF WEMYSS, ... *Respondent.*

House of Lords, 22d March 1806.

SALE OF LAND—BOUNDARIES—PLAN—PAROLE.—In a judicial sale of land by lots, the articles of roup gave a different description of the boundaries from that contained in the plan prepared for the sale, and which marked out the boundaries. It was stated, that the judicial proceedings in the sale specially referred to the plans of the estates. Parole proof was allowed, in which the surveyors were examined, though it was contended that the description of the boundaries, as contained in the articles of roup, could not be affected by those plans and such proof: Held that the old boundary, as contained in the title deeds, and these plans, was the march between the parties.

The baronies of Long Niddry and of Seton, along with other extensive estates, belonging to the York Buildings Company, were sold by judicial sale in lots, particularly described in the articles of sale, in the year 1779.

The appellant purchased the first lot of Long Niddry;