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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;

and the respondent afterwards acquired the first and second lots of Seton; and the present question arose between the proprietors of Long Niddry and lot first of Seton, which estates marched with each other, as to what was the boundary between these estates, as set forth and described in their rights, and whether the one had encroached on the property of the other.

In the judicial sale of these estates, the lands in question were divided, with a plan of the boundaries drawn up as to each, and the true measurements of the same prepared. From the description of the subjects published in the advertisements and in the papers distributed at the sale, it was alleged, that the stream or burn called Long Niddry Den-Burn was stated to be the boundary or march between the appellant's lot or estate of Long Niddry, and the respondent's estate of Seton (Lot 1st of Seton).

Formerly there had been a different boundary of the two estates, having different landmarks, and giving to the proprietor of Seton (Lot 1st) some acres or two on the Niddry side of the burn. But the appellant alleged that the proper rights of parties must be regulated by the articles of sale; and founded on these, to show, from the description of both estates, that his property was encroached on by the respondent, and that the proper boundary between them was the Long Niddry Den-Burn, conform to the advertisement of the estate.

By the articles of sale, Long Niddry was described as follows: "The first lot of the barony of Long Niddry, com-"prehending the whole town of Long Niddry, and all be-"low the road from Seton to Haddington, which road "makes the south boundary with the fourth lot; the Water "Gang, and the vestige of an old dyke, upon the west side "of the common, and line northward, till its junction with "Gossford Burn, divides it from the second and third lots. "The sea is the march on the north, from Gossford Burn to "the burn of Long Niddry Den, which is the west boun-"dary." Thus the burn of Long Niddry Den was the boundary on the *west.* All on the *east* of the burn being the respondent's estate of Seton, (Lot 1,) "comprehending Seton "ruins, with the gardens, parks, and village, the mills of "Seton, and mill-lands, together with the East and West "Mains, extending *from the Den, at the march with Long "Niddry to the Fishergate road;* which *den* and *road* form "the *east* and *west* boundaries of this lot; and line from the

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" direction of the said road by Maiden Bridge, through the " Links to the sea, which makes the north boundary. The " great road betwixt Long Niddry and Preston, along the " dykes of St. Germans and parks of Seton, is the march on " the south; and along the said road till its junction with " the road at Milldam, leading by the west end of Seton vil- " lage, and eastward to Fishergate as above."

The respondent claimed several acres on the west side of the burn, as well as all on the *east* side, on the ground that the appellant had caused to be altered the original channel of the burn, which he said was made to run considerably westward of the present course or channel. The appellant, denying this fact, contended that the burn was the natural boundary between the two properties—that though his own tenants, in ignorance of this, had allowed the tenants of the respondent to possess beyond the burn, and on the Niddry side, for several years, yet that he was now entitled to have this declared an infringement on his property.

Mutual declarators having been brought and conjoined, the Lord Ordinary allowed a proof to both parties. Upon considering which, the Lord Ordinary, adopting the ancient march boundary, pronounced this interlocutor:—

July 4, 1800. " Find, that the line shaded red on the plan, which runs along " the bank on the east of the Den-Burn, from the St. Ger- " mans road, north to the letter A, and from thence westward " to another letter A, at the old bridge, is the march between " the respective properties of the said parties in that quar- " ter. Find, That from the old bridge, northward to the " sea, the green line described on the plan, as the vestige of " the old road and burn, and the continuation thereof, " marked with the letter A, is the march in that part; and " decern and declare accordingly; but supersede extract " till the third sederunt day of November next." On reclaiming petition, praying for the examination of Crauford, a land-surveyor, whose evidence was sought, and the transmission of a deposition emitted by Mr. John Home, also land-surveyor, which being allowed, the Court pronounced

June 25, 1801. " this interlocutor:—Find, the march between the respec- " tive properties of the said parties is, as delineated on the " plan of said lands, made out by John Home, land-surveyor, " and described by a line shaded red on said plan along their " boundaries; and decern and declare accordingly. Refuse " the desire of the petition of Mr. Glassell; assoilzie the " Earl of Wemyss from this process of declarator, and de-

"cern." In another reclaiming petition, the appellant argued, that the interlocutors proceeded upon a new and imaginary line laid down in a plan, and not on the boundary described in the articles of sale, as being the only boundary between these two properties, namely, the Long Niddry Den-Burn; and this being a competition for two or three acres of land lying upon the east of the Den-Burn, and betwixt that burn and the imaginary line shaded red on the plan, the question ought to be decided by the title-deeds of the parties. By the articles of sale, the appellant's property is described to be bounded *on the west by the Den-Burn*, as it is declared that the "sea is the march on the "north, from Gossford burn to the burn of Long Niddry-"Den, *which is the western boundary.*" If then, Long-Niddry Den-Burn be the boundary to his estate on the west, it is obvious that he is proprietor of the whole lands lying on the east side of the said burn. To this the respondent answered, that the plans of the different baronies, and of the different lots under sale, had been prepared, and were repeatedly referred to, in the judicial proceedings of this sale; and maintained, from these plans, it appeared that a certain red line, a considerable way to the east of the Den-burn, was the boundary betwixt these lots, and which never at any one point touched that burn; and, therefore, contended that the description in the articles of sale was altogether in mistake, and that the question must be regulated by these plans, since the language made use of in the articles of sale was a mere translation of these boundaries from the plans of the different lots prepared by the surveyor. The Court, reverting to their former judgment, finding that the red line was the march to the old bridge, and that the old course of the burn and the Long Niddry road was the march from the old bridge to the sea, of this date, pro- Feb. 4. 1802.
nounced this interlocutor:—"Find that, from the site of the "old bridge to the sea, the green line described on the "plan made out by John Ainslie in May 1800, as the ves-"tige of the old road and burn, and the continuations "thereof, marked with the letter A, are the march in that "part; and decern and declare accordingly, and, in so far, "alter the interlocutor complained of; but, *quoad ultra*, "adhere, and remit to the Lord Ordinary to proceed ac-"cordingly, and do farther in the cause as he shall see "proper."

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

Pleaded for the Appellant.—This being a question relating to the property of land, must be regulated solely by the title-deeds of the parties, which show that the Den-Burn is the western boundary of the Long Niddry estate, purchased by the appellant. The plans cannot alter or remove the effect of the precise words made use of in the articles of sale, declaring the Den-Burn to be the march, and in virtue of which, and of the decree of the Court of Session, the appellant stands infeft in the lands so described. Independently of this title, there is also the positive evidence of Mr. Hepburn, to whom the fixing of the boundaries of the different allotments was solely committed, that the Den-Burn was to be the march betwixt these two lots, and that no part of the lot of Long Niddry should be upon the west side of that burn, nor any part of the Seton lot on the east side of the burn. This was the understanding of all the surveyors, of Mr. Home and of Mr. Crauford, by the latter of whom, the Den-Burn on the plan was shaded red as the march between them. And the very principle upon which the Den-Burn is declared to be the march from the sea to the old bridge, necessarily leads to the conclusion that the burn must be the march the whole way between these two properties. The measurements too lead to the same conclusion.

Pleaded for the Respondent.—It is clear, from the evidence, that the present course of the Den-Burn, from the old bridge *down to the sea,* or northwards, is different from what it had been in the year 1779, when the properties were divided and sold to the appellant and the respondent; and the alteration of the course was occasioned partly by accident, but chiefly by operations executed by the appellant himself, and unauthorized. The estates of both parties were purchased at the same time, *according to certain plans,* upon which the boundary was distinctly laid down by a line to the eastward of the Den, from the old bridge over the burn at the bottom of the Den, southward to the St. Germans road. There were different plans; one of the barony of Seton, another of the barony of Long Niddry, a third of the Seton lot, now the respondent's; and a fourth, of the first lot of Long Niddry, which lot forms the appellant's estate; and the line of boundary appears in all of them precisely as the respondent concludes, and as the Court has

declared by the parts of the interlocutors complained of. The plan of the appellant's estate, containing that line, was delivered to him at the time of the purchase in 1779, and remained in his hands till produced by himself in the course of the present action. He cannot therefore be heard to set up a different boundary, because the description in the articles of sale, by mistake, set up a different boundary. The real boundary is that indicated by the plan; and if there was no less evidence of this than exists, the possession had would be sufficient of itself to decide the question, for the respondent has possessed, without interruption, the Den on both sides, and on the east side, up to the red line, on the plans 1779. And in regard to the measurement of the contents of the plans of Seton in 1779, and the different measurement of the same estate, made by Mr. Ainslie in 1796, showing that the former was less by fifteen acres than the latter, it was sufficient to say, that by the articles of sale, all deficiencies and errors in the mensuration of the lots and parcels were to be solely upon the risk and hazard of the purchasers.

After hearing counsel,

LORD CHANCELLOR ERSKINE said,

"My Lords,

"If there is not any reason, seen or apparent, to disturb this judgment of the Court of Session, (and as yet I have seen none), there is no ground to hear this case further. It frequently happens to courts of justice that their decisions may be wrong, from not being able to investigate facts at a remote distance of time. Therefore, they are obliged to have recourse to general rules and maxims of evidence.

"Hence the possession, after a lapse of time, is a material feature here; for the sale of both estates to the contending parties took place in 1779 at the same time.

"If the judgment below had tended to bring into doubt any rule with regard to the rights of real property in Scotland, or rights standing on infeftments, I would have heard the other side, and sifted the matter to the bottom, but that is not the case here.

"It happens every day, that estates are sold in lots; and it thence often becomes a difficulty to prepare the necessary deeds. It is difficult to give a different description of property in a deed. If you take highways or rivulets for boundaries, these change, and the boundaries are thus effaced. But nothing is so common as a reference to a plan, and to look to that plan in all such disputes. There every man has plain notice of his enjoyment.

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"I can conceive, that such precise words may be used in a deed, that it would be impossible to mistake them, and thus such evidence of a plan be excluded, but it is quite impossible to come to such a conclusion in this case.

"This is the case of a judicial sale, and depends now, on the appellant's part, on the parole evidence, or the oath of the surveyor as to drawing the plan. Mr. B. Hepburn says, that when the plan is completed, it is usual to burn the protraction. Would you go back to the protraction after such a lapse of time?

"Mr. Home says, all the protractions are gone. (Reads Mr. Glassell's deposition). In treating with his tenant, he has recourse to the plan. Then he sees the alteration of boundaries, taking place partly by accident, and partly by his own operations.

"I go on the whole evidence adduced; and before we can do our duty, we must see if the judges below have done right.

"I think they have; and that it is our duty to affirm."

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

For Appellants, *Wm. Adam*, *John Clerk*.
For Respondents, *W. Alexander*, *Fra. Horner*.

NOTE.—Unreported in the Court of Session.

WILLIAM ALLAN, Merchant in Leith, - *Appellant;*
CORNELIUS DE VOZ, Merchant in Hamburgh, }
Messrs. RAMSAY, WILLIAMSON & Co., Mer- } *Respondents.*
chants in Leith, his Attorneys, - }

House of Lords, 24th March 1806.

AGREEMENT—PERSONAL PROTECTION—SUSPENSION OF DECREE OF LORDS OF SESSION IN FORO CONTRADICTORIO—CAUTION DE JUDICIO SISTI.—All the creditors of a bankrupt, except one, agreed to grant a personal protection. In a suspension of a charge of the Court of Session, given upon a decree *in foro contradictorio*, Held, (1.) That a letter written by the respondent's attorney, did not, in its import, infer an agreement to grant a protection,—the conditions thereof not having been complied with; and, (2.) That a suspension of a charge on such a decree could only be on consignation or caution,—and execution sisted upon condition of the defender's finding caution *de judicio sisti*, during the dependence of the action. On appeal, interlocutors affirmed.

The appellant having been indebted to the respondent, Mr. de Voz, in a large amount, the latter raised action in the Court of