COURT OF SESSION.

Thursday, November 8.

SECOND DIVISION.

[Lord Craighill, Ordinary.

MORTON, ETC. (MITCHELL'S TRUSTEES) *v.* SMITH AND OTHERS.

Sale—Essential Error—Refusal to Implement on allegation of Essential Error as to extent of Subject.

A piece of ground was held under two different sets of titles—one set containing 23 falls, the other set 21 falls. By post-nuptial contract the owner conveyed to trustees for behoof of his wife and children the smaller portion, but by mistake of the conveyancer the area was said to be 23 falls, the description being taken from the deeds relating to the larger, but it was sufficiently identified otherwise. Some years after, he conveyed all his estate to trustees for behoof of a second wife and her family. The testamentary trustees having exposed their property to sale by public roup, subject to conditions which, *inter alia*, bound the purchaser to satisfy himself as to the title, extent, and boundaries thereof, represented it as containing not 23 falls, but 28 falls. The purchase having been made by the marriage-contract trustees with the view of consolidating the property, they declined to complete the purchase, on the ground that the variance between the real and advertised area was an error in substance sufficient to annul the sale.—*Held*, in an action for payment of the price (1) that there being a plain mistake on the titles, and the true boundary having in consequence been made matter of dispute before the sale, there was no error established sufficient to void the sale; and (2) that the articles of roup were sufficient to protect the sellers when a doubt existed whether there was such error.

Question (*per* Lord Ormidale) whether the Court would nullify a sale on the ground of essential error, where the loss alleged by the parties pleading it is of merely trifling amount.

This was an action at the instance of David Morton and others, trustees of the late Hugh Mitchell, innkeeper, Auchinleck, acting under his trust-disposition and settlement, dated in 1873, against William Smith and others, trustees acting under a mutual disposition and settlement executed by the said Hugh Mitchell and Jane Baird or Mitchell, his wife, dated in 1864, for payment of the price of a piece of ground and buildings thereon, bought by the second parties from the first.

The circumstances—which are more fully narrated in the opinions of the Judges—were as follows:—Hugh Mitchell died in 1874, leaving various heritable and moveable property. The heritage consisted, *inter alia*, of the following subjects held upon long leases, viz.—"All and whole that piece of ground, with the houses built thereon, lying in the village of Auchinleck, containing 28 falls 8 ells or thereby Scotch measure, ... bounded as follows, viz.— . . . on the west by the Boswell Arms Inn, which belonged to the deceased Hugh Mitchell, ... which subjects are part and portion of all and whole the just and equal one-half of all and whole 42 falls of ground lying on the east side of the road leading from Cumnock to Mauchline, which was let by Alexander Boswell of Auchinleck . . . . to John Kay, and that for the space of 999 years from the term of Martinmas 1765, conform to principal tack right, dated 1st November 1766, as also of all and whole 23 falls of ground or thereby, situated on the south side of the coal road leading from the village of Auchinleck to Barglachan Coalworks, which last piece of ground was let out by James Boswell of Auchinleck to James Lapraick, innkeeper, and that for the space of 999 years from Martinmas 1781, conform to principal tack right, dated the 13th day of September 1786 . . . containing in whole 44 falls."

In 1864 Mitchell had executed along with his wife a trust settlement, in which he had disponed to the present defenders "All and whole the tenants' estate, right, and interest in these 23 falls of ground or thereby," described as above, . . . "and upon which piece of ground the Boswell Arms Inn and stables are now built, as occupied by myself," &c. Nothing seems to have followed upon that conveyance till Hugh Mitchell's death. In 1873 he had executed the trust disposition and settlement above-mentioned, in which he had conveyed the rest of his heritable and moveable estate to the present pursuers in trust for various purposes.

Ex facie therefore at Hugh Mitchell's death the 21 falls held under the deed of 1766 belonged to the present pursuers, and the 23 falls held under the deed of 1786 to the defenders. The defenders, however, stated that this was not the real state of the case; that what was conveyed to them was the ground held under the deed of 1776, upon which the Boswell Arms Inn stood. The pursuers admitted that there was a mistake in the deed of 1864, but said, "all you (the defenders) have is an indefinite title to 16 falls, the ground upon which the inn stands. The two properties were contiguous, and there being doubt about the correct boundaries between them, and disputes between the two parties about fences and other matters, the trustees under the deed of 1873 determined to sell the ground which belonged to them."

They accordingly advertised the ground with the houses thereon for sale as containing 28 falls or thereby. Articles of roup, plans, &c., were prepared, and the titles to the property were accessible to and open to inspection by all intending offerers for some time before the sale.

The articles of roup contained, *inter alia*, the following provision—"And in respect the said title-deeds (*i.e.*, the title-deeds of the said subjects) have been advertised as accessible to intending offerers, it is hereby specially provided and declared as an express condition of any sale to be

effected under these presents that the purchaser of the said piece of ground shall by offering at the roup be held to have satisfied himself with the validity, completeness, and sufficiency of the said title-deeds in every respect, with the right and power of the exposers to sell and convey the said piece of ground, with the regularity in all respects of the sale, and with the amount, nature, and extent of the feu-duties, casualties, ground annuals, rents, burdens, conditions, provisions, declarations, and others, affecting the said piece of ground, and the extent and boundaries thereof, and shall be barred *personali exceptione* from stating any objection to the sale on any ground whatsoever; and it shall not be competent to him to withhold payment of the price, or any part thereof, upon any account or pretext whatever; and in case of payment of the price being for any reason withheld or delayed, it shall be lawful to and in the power of the exposers either to break and be free of the bargain, and declare the sale to be null and void in so far as regards the party objecting or withholding payment . . . or to compel him to fulfil the bargain: Declaring that the said piece of ground is not exposed according to the advertisements thereof, or with reference to any information or documents which may have been communicated to the purchaser before the sale, the particulars of which the exposers shall not be bound to warrant, but *tantum et tale* as they stand vested in the person of the exposers, and that the exposers shall not be bound to warrant the description or measurement specified in the said title-deeds."

At the sale, on 7th December 1876, the property was bought for the defenders as trustees foresaid by William Smith, one of their number, for the price of £345, but when called upon to pay the price they refused to do so, and the present action was raised to recover it. The grounds of the defenders' refusal to pay were thus stated—"The defenders, the said trustees, offered at said sale in the belief that the pursuers were the proprietors in trust of 28 falls in extent; and in reliance on that being the actual extent of the piece of ground exposed for sale, as the articles of roup bear, they offered the said sum. The said defenders did not employ a law agent to represent them before or at the sale, and as matter of fact they did not know the extent of the trust property vested in the pursuers. After the sale they instructed a law agent to obtain a loan on the security of the said subjects, and then it was discovered that of the 28 falls which had been advertised and exposed for sale by the pursuers, 7 falls did not belong to the pursuers at all, but formed a portion of the 23 falls conveyed to and vested in the defenders by the foresaid deed of 1864, and to which the pursuers had no right or title whatever, and this was in the end of December 1876 intimated to the pursuers. The defenders thus entered into the transaction under essential error, induced by the representations of the pursuers; and had they known at the date of the sale that the pursuers were offering a portion of the ground which belonged to the said defenders themselves, they would have taken the necessary steps to prevent the sale going on. The defenders would not have offered the foresaid sum of £345 for the 21 falls, which was all that really could be sold by the pursuers."

The pursuers answered "If there has been an error as to the extent of the ground, the pursuers were unaware of it, and before the sale the defenders, who knew the property perfectly well, had ample opportunity for finding it out. If the 7 falls in dispute actually belonged to them before the sale, they knew that fact, or, at least, ought to have known it. The pursuers were and are of the belief that the defenders under their titles possessed only the Boswell Arms inn and stables and vacant ground immediately behind and square with the same; and of this belief the defenders were well aware, as also that the pursuers were selling the remainder of the late Hugh Mitchell's property. The defenders resolved to offer for the property well knowing what the pursuers proposed to sell, and they authorised the defender Smith to buy it for them before the articles of roup were read, and before they knew that the ground was represented to be of the extent of 28 falls. The pursuers did not by the articles of roup warrant any precise extent of ground, but provided that intending purchasers should satisfy themselves as to this, which the defenders could easily do, they being perfectly familiar with the whole subjects, and the seventh article provides that purchasers should be barred *personali exceptione* from stating any objection of the kind now stated by the defenders."

The pursuers pleaded, *inter alia*—"(2) All purchasers being required by the article of roup to satisfy themselves as to the extent of the property and other particulars, the defenders are barred from pleading an erroneous statement as to extent to the effect of enabling them to avoid fulfilment of the contract. (3) The defenders not having been under essential error, and having resolved to buy the property exposed from a knowledge of the property itself, and altogether irrespective of any representation as to the extent of the ground embraced in it, the defences ought to be repelled."

The defenders pleaded, *inter alia*—"(2) The said transaction having been entered into by the defenders under essential error, they are entitled to absolvitor. (3) The pursuers having exposed for sale 28 falls of ground, of which 7 falls were not their property, and the price of £345 having been offered by the defenders on the faith that the whole ground exposed was the property of the pursuers, the defenders are entitled to absolvitor from the whole conclusions of the action, with expenses."

The Lord Ordinary (CRAIGHILL), after proof, pronounced, on 20th June 1877, an interlocutor finding as matter of fact "(1) That the subjects in question as exposed to sale by the pursuers were represented to contain 28 falls or thereby of ground; (2) That to the extent of at least 5 falls or thereby the said ground was not the property of the defenders; (3) That the defenders, through the defender William Smith, offered for and became purchasers of the said subjects so exposed; (4) That the defenders when they so purchased did not know that the subjects to which the pursuers could give a title were less in extent than 28 falls; and (5) That in offering and purchasing as aforesaid they acted in error as to this particular, and that this error was an essential or material particular of the transaction: In the second place, Finds as matter of law, the facts being as above set forth, that the pursuers are

not entitled to insist for implement of the said sale. Therefore sustains the defences; Assoilzies the defenders, and decerns," &c.

The pursuers reclaimed.

Authorities—*Hamilton* v. *Western Bank*, June 12, 1861, 23 D. 1033; *Bingham*, October 27, 1748, 1 Vesey Sen. 126; *Jones* v. *Clifford*, June 26, 1876, 3 Law Rep. Chan. 779; Justice Fry on Specific Performance of Contracts, 1858, p. 221; *Aberaman Iron Works*, November 6, 1868, Law Rep. 4 Chan. Ap. 101; *Young* v. *Grierson*, 11 D. 1482, July 19, 1849; *Hain* v. *Laing & Son*, 15 D. 667, May 21, 1853; Sugden on Vendors and Purchasers, p. 16, Ed. 1864; *Smith* v. *Watts*, 28 L. J., Chan. 220, Dec. 15, 1859; *Wilson & M'Lennan* v. *Sinclair*, Dec. 7, 1830, 4 Wilson and Shaw, p. 398 and p. 409; Smith's Leading Cases, vol. 2, p. 424; *Clason* v. *Steuart*, 6 D. 1201, June 25, 1844.

At advising—

Lord Justice-Clerk—In this case many important questions of law have been argued, but it seems to me that these do not arise, as the defenders have not laid any foundation in fact for their argument. The facts are as follows—[*narrates facts as above stated*]. It seems that in 1864 Hugh Mitchell executed a deed in favour of trustees, by which he conveyed a certain portion of the 44 falls, that part of it upon which the inn and other buildings stood. Although this was a *de presenti* deed, it does not appear that anything followed upon it till after Hugh Mitchell's death. He left a trust-settlement in favour of the present pursuers, leaving them his whole means and estate in trust for various purposes.

Now, there is no doubt that there had been a dispute about the boundaries of these two portions of ground so conveyed to different sets of trustees, and seeing also, as is proved, that between the death of Hugh Mitchell and the date of this action there had been many disputes between the two parties about fences and other matters—under these circumstances, the pursuers resolved to sell the whole subjects. With a view to this, they prepared articles of roup, a plan of the ground, &c. The titles to both properties remained in the hands of the agent of the families, and were open to inspection by all up to the time of the sale. The sale took place upon the articles of roup, the plan was at the sale, and was examined by the defenders there. After competition the pursuers had an offer which they thought it right to accept, and the present action has been brought by them to have the sale implemented. An objection has been brought by the defenders, which is this—"you were not proprietors of all the ground you have sold us; you were not proprietor of 28 falls, but only of 21; and therefore we have paid you for 7 falls which were our own already."

The clause of the articles of roup which has been founded on is as follows—[*reads as above*].

I am of opinion that we are relieved from the necessity of here deciding upon the question of law. First, because the defenders have failed to shew that there was any error on their part at all. Second, because, assuming there was error, they have failed to shew what the extent of it was. Third, because the defenders, in the circumstances, were not in a position to allege error at all, being in the full knowledge of all the facts. And fourth, because the articles of roup are sufficient to protect the sellers where a doubt exists whether there was error at all.

It is essential for their case that the defenders should shew a clear title to the five falls which they say belonged to them, but they have not produced any title to it at all. The words of the dispositive clause of the disposition give them no right whatsoever to the ground they say is theirs. The only result of their contention is, that they have an indefinite title to the ground upon which the Boswell Arms Inn is, but there is no evidence of occupation of the whole ground they claim; and I cannot see any ground on which we can hold that this disposition conveys the whole 21 falls. I am not in a position to say that they had any right to them, and I think it is very doubtful if they had, and this is enough for judgment.

But further, the error has not been proved. The parties have long been disputing about the extent of the ground. It was a notorious dispute; the defenders here knew of it well; and in that knowledge they go to the sale and give an unlimited order to purchase the ground. They say that they thought they were buying only what was eastwards of the fence, but in fact they were willing to buy the ground advertised at any price without seeing the fence or knowing the ground, for the express purpose of uniting it to the ground in their own possession. What they really wanted was to unite the two titles. In these circumstances, the plea of essential error is out of the question.

I am not going into the question how far a fact within the means of knowledge of a man, which he did not find out, may invalidate his actions where there was an undoubted mistake; but I take it the general rule is, that, while provisions such as we have here are to receive reasonable and fair effect as between man and man, they will not control a clear case of injustice and iniquity. But here no such injustice was suffered, and on the whole matter I am of opinion that the pursuers must prevail. What the defenders complain of did not enhance the price a farthing. The title given is absolute, and there is no ground for saying it is defective. The question should never have been raised, but it is not the pursuers fault that it was, and they must succeed.

Lord Ormidale—I agree with your Lordship that the pursuer must prevail. It is satisfactory, however, that whatever happens the defenders will have a good title. I think it is a pity that this question ever arose, but as it is before us we must decide it—whether there was here a mistake sufficient to invalidate the sale.

In 1864, before Hugh Mitchell granted the trust-deed under which the defenders act, the whole ground referred to was in his possession, and so at the time he could have granted a title to any extent of it to any person.

The first question is, What was it Mitchell disponed in 1864? The defenders say, according to the deed that he disponed "All and whole the tenant's estate, right, and interest in these 23 falls of ground or thereby." This is admitted to be a mistake, and it is said only 21 falls were disponed, but where are we to find that, looking to the deed alone, and I deprecate getting assistance from any other quarter; it is just as consistent with fact that Mitchell intended to con-

vey, and did convey, only 16 falls. It is stated to be the piece of ground upon which the "Boswell Arms Inn and Stable" are now built. These are built upon the ground now conveyed, but the extent of the ground is nowhere specified.

But what makes the present question quite clear is, that while the defenders state that there was a dispute upon that point, they attended the sale and authorised a person to bid for them. They knew that the pursuers said that the piece of ground for sale amounted to 28 falls, but in his evidence Smith further says—"I knew the ground but not the measurement; both of us were claiming it." As long as it was uncertain what the defenders had got by the deed of 1864, it was impossible for the pursuers to say what they were doing at the sale.

The object of the defenders was to put an end to this dispute by uniting the titles; they knew the whole circumstances, and I cannot see any grounds why they should not pay the price. They must prove that what they got by the deed of 1864 amounted to 21 falls. They have failed in this, and this is enough to dispose of the case.

But supposing I am wrong, the next question is, Have the defenders established that there was a materiality in the error they allege? Was it essential? This always depends upon the circumstances of the case. The value of the ground here in dispute is of very small amount, only about £5, and, even if the defenders were successful in their contention that there was essential error on their part, the amount in which they would be the losers on account of this alleged error is so trifling that I doubt whether they would succeed to getting the sale nullified. On the whole matter, I think the pursuers must prevail.

LORD GIFFORD concurred.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming note for Mitchell's Trustees against Lord Curriehill's interlocutor of 20th June 1877, Alter said interlocutor: Decern in terms of the first alternative conclusion of the summons against the trustees of the late Hugh Mitchell, under his disposition and settlement of 25th July 1864, to the effect of ordaining them to implement the contract of sale libelled: *Quoad ultra* assoilzie the defenders from the conclusions of the summons: Find the defenders, the said trustees, liable in expenses, and remit to the Auditor to tax the same, and to report; and decern."

Counsel for Pursuers — Campbell Smith — Moncrieff. Agent—John M'Millan, S.S.C.

Counsel for Defenders—Guthrie Smith—J. A. Reid. Agents—Philip, Laing, & Monro, W.S.

Friday, November 9.

FIRST DIVISION.

[Lord Young, Ordinary.

SMITHS *v.* CHAMBERS' TRUSTEES.

Writ — Testing-Clause — Where it contained the Granter's Will.

The testing-clause of a probative deed, cannot competently contain anything except what is directly connected with the subscription and authentication of the deed.

Held that the insertion in the testing-clause of a trust-disposition and settlement, after the writer's designation, of an express provision and declaration that the "whole of the legacies, annuity, and provisions made and provided by this disposition and deed of settlement shall be strictly alimentary, and shall not be arrestable or attachable for the debts or deeds of the persons in whose favour the same are conceived, or any of them, nor be subject or liable to the diligence of their creditors"—the whole clause being fairly written, and in the same handwriting as the rest of the deed—was incompetent, and that the provision could not be read as part of the deed.

Review of the law regarding the functions of the testing-clause.

Trust—Powers of Trustees—Postponement of Term of Payment—Fee and Liferent—Arrestment—Litigiosity—Effect of an Arrestment by Creditors in barring the exercise by Trustees of powers conferred on them to limit the rights of Beneficiaries under a Trust-Disposition and Settlement.

A truster had directed his trustees to hold his estate for behoof of his children, declaring that their shares should vest at his death, and be payable six months thereafter, but powers were given the trustees to postpone the payment of the shares so long as they should see fit, and to create a new trust, so that his children should receive the income only during their lives. The trustees having paid certain portions of the capital and the whole income to the beneficiaries, the share of residue accruing to one of the children was arrested in their hands by creditors five years after the truster's death, and thereupon the trustees executed a deed restricting the right of that child to a liferent.—*Held* (*revg.* the Lord Ordinary Young, *diss.* Lord Shand) that the execution of the arrestment fixed the rights of parties as they stood at its date, and produced litigiosity, and that no innovation could be effected by the subsequent execution of such a deed of limitation.

Opinion (*per* Lord Shand) that the arresting creditors took the right *tantum et tale* as it stood in the debtor, in whose person, although it had vested, it remained undetermined and suspended, and subject therefore to the exercise of the powers conferred on the trustees.

This was an action of furthcoming raised by Charles Edward Smith, Charles George Smith, and Edward Smith, creditors of James Chambers,