at the age of sixty was farfetched. The Court would not sanction what was only protracting the operation of the trust without good ground, and against the beneficiary's wish. In *Menzies* v. *Murray*, March 5, 1875, 2 R. 507, the case was on all fours with this, except that there the Court dealt with a marriage-contract and not a trust-deed—*Anderson* v. *Buchanan*, June 2, 1837, 45 S. 1073; *Hope, &c.*, March 15, 1870, 8 Macph. 699; *Smith and Campbell*, May 30, 1873, 11 Macph. 639; *White's Trs.* v. *Whyte*, June 1, 1877, 4 R. 786—were also referred to.

At advising—

LORD YOUNG—I have no difficulty here. When I read the case I came to the conclusion that it was one in which the trustees had no doubt of the propriety of paying this money if they legally could. I have no doubt whatever of the propriety, and none of the law.

LORD CRAIGHILL—But for authority I should have come to a different conclusion. I think that when regard is had to the wishes of the testator, there can be no doubt that he intended that income which he left to his daughter Mary, afterwards Mrs Dickson, should in no case be paid to anyone but herself—it was expressly to be payable exclusive of the *jus mariti* of her present or any future husband. I do not think that this is a case in which anyone will suffer any hardship by the estate not being dealt with differently from what the testator directs. If I had been quite satisfied that a literal compliance with these directions would result in the trust being kept up for a number of years, perhaps for no purpose whatever, and that the testator himself would have made a different arrangement if he had been alive or had contemplated the present position of affairs, then what the second parties here propose might have been sanctioned. But it appears to me that there is still a purpose for which this trust should be kept up. The testator's daughter, Mrs Dickson, is married, but her husband may predecease her and she may marry again, and this, I think, was obviously one of the things which the testator had in view. On this ground accordingly, had it not been for authority, I should not have been a consenting party to that which is here proposed. A distinction—the grounds of which I myself have not been able clearly to discover—has apparently been drawn on this question between testamentary deeds and marriage-contracts. But in respect of these cases, and solely out of respect to them, I concur in the judgment which I understand your Lordships are to pronounce.

LORD RUTHERFURD CLARK—I concur with Lord Young. I think the case very clear in point of propriety, and quite concluded by authority.

LORD JUSTICE-CLERK—I entirely concur with the majority of your Lordships. It appears to me impossible to say that the testator who made his settlement in 1844, when his daughter was only twenty, should have had in his mind the state of affairs which actually exists, now that his daughter has reached the age of sixty. I am clear that we should answer the question put to us in this case in the affirmative.

The Court answered the question in the affirmative.

Counsel for First Parties—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Second Parties—Gardner. Agents—Melville & Lindesay, W.S.

Tuesday, June 22.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

WOOD (LEE'S TRUSTEE) *v.* MAGISTRATES OF EDINBURGH.

Sale—Sale of Heritage—Articles of Roup—Misdescription—Essential Error—Fraud—Actio quanti minoris—*Relevancy.*

The articles of roup at a public sale of heritage, described as part of the lands of Q, provided that purchasers should be held to have satisfied themselves before the roup as to the sufficiency of the exposer's title and the extent of the lots of ground, and all other particulars affecting the same. The purchaser of certain lots brought an action of damages some time after the sale, on the ground that a part of one of the lots he bought was included not in the lands of Q but in the lands of F, and in consequence was subject to certain building restrictions of which he had not known. *Held* that he had undertaken by the conditions of roup to satisfy himself on this point, and had therefore taken the risk of error, and had no action except on the ground of fraud, and *separatim*, that he had made no relevant averment of fraud.

This was an action by J. B. W. Lee, S.S.C., Edinburgh, against the Lord Provost and Magistrates of the City of Edinburgh, as administrators of the Trinity Hospital of Edinburgh, concluding for payment of damages for alleged loss arising from certain heritable subjects which he had purchased from them, and the title to which contained building restrictions which it was alleged by the pursuer were not fully disclosed to him.

The pursuer alleged that the defenders on 21st February 1877 exposed for sale by public roup, *inter alia*, two lots of ground marked respectively 6 and 7 on the plan of their feus in Easter Road, Leith.

The pursuer bought these two lots, which were stated to be "part of the Trinity Hospital lands of Quarryholes, all lying in the parish of South Leith." The entry was at Whitsunday 1877.

The articles of roup required the purchaser to erect within eighteen months of his entry a tenement of the value of £2000 in accordance with plans prepared by the architect of the superiors. The pursuer erected two tenements on the said area, which tenements included several shops. He intended that one or more of these shops should be used as a public-house, but a question arose as to his right so to use the shops.

He averred that he called upon the defenders as superiors to produce their title in support of

his, but that they had refused to do so. He also alleged that he had ascertained from other sources that the building areas feued to him were in or about the year 1853 the subject of an excambion. They were prior to that date a part of the lands of Drum or Foredrum belonging to Mr Sligo of Drum, and were at that time excambed for a portion of the lands of Quarryholes belonging to the defenders or their predecessors. In the contract of excambion it was specially provided that the portions of ground thereby conveyed by Mr Sligo to the defenders or their predecessors were conveyed with and under the condition and real burden that "no public-houses, small workshops, piggeries, or any other erections to create a nuisance shall ever be erected or placed thereon without consent of the said John Sligo or his successors in the said lands of Foredrum." The pursuer averred that this contract of excambion did not appear on any of the records, but this was admitted in the argument before the Lord Ordinary to be erroneous.

He further in his record (as amended in the Inner House) stated that no such servitude right or real burden was referred to in the articles of roup or in the feu-charter granted to him, the only title which the defenders produced as superiors being an extract contract between Messrs Duff, Trotter, and Nicolson, and the Provost and Council of Edinburgh, dated September 1642, and registered in their own Court books (the same year) of the lands of Quarryholes; that the defenders never revealed the existence of any servitude right or real burden, but concealed it from him, and that there was nothing in the records to show that any of the ground feued to him was part of Foredrum and not of Quarryholes, and that he had only discovered the existence of any such burden from a demand made on him (under threat of an action) on behalf of the owner of Drum to admit the existence of it.

The defenders averred that by article 12 of the articles of roup it was provided that "the feuars shall be held to have satisfied themselves before the roup as to the sufficiency of the exposer's title, and as to the extent of their respective lots of ground, and as to all other particulars affecting and regarding the same." . . . and that the pursuer was offered the fullest access to the Burgh Court books, and to the title-deeds in the City Clerk's office.

They admitted that a portion of the two lots sold to the pursuer formed part of what had at one time been the lands of Foredrum, extending to 1 acre 16 poles, and that this subject was in 1853 acquired by the governors of Trinity Hospital under a contract of excambion between them and John Sligo of Carmyle, and that the contract contained the prohibitions alleged by the pursuer, but they alleged that the remaining portion of the two lots sold formed part of the lands of Quarryholes.

The pursuer pleaded, *inter alia*—"The defenders having concealed from the pursuer the existence of and the restrictions contained in the contract of excambion of 1853, and having thereby caused loss and injury to the pursuer, are liable in damages."

By interlocutor of 12th January 1886 intimation of the dependence of the cause was ordered to be made to W. A. Wood, C.A., trustee under a voluntary trust-deed executed by J. B. W. Lee. The trustee, subject to a minute of restriction which he placed on the summons, appeared to insist in the action.

The Lord Ordinary on 26th March 1886 pronounced the following interlocutor:—"Having heard counsel and considered the cause, Finds that the pursuer's averments of loss and damage arising from the state of the titles to the subjects in question, and from the representations and actings of the defenders with reference to the same, are not relevant to be remitted to proof: *Quoad ultra* allows the parties a proof of their respective averments on record: Grants leave to reclaim."

"*Note.*—The pursuer avers that he has been prevented from making a profitable use of his property by reason of a servitude in favour of a neighbouring proprietor, constituted by a contract of excambion, which forms part of his title, and the existence of which was concealed from him by the defenders. But the title complained of was on record, for the statement to the contrary in the condescendence was admitted at the bar to be incorrect; and by the conditions of roup the pursuer had undertaken the duty of inquiring and satisfying himself as to the 'sufficiency of the titles and the extent of the ground, and as to all other particulars affecting the same.' It was incumbent on him therefore to search the records for himself, or to take the risk of error in any statements as to the title which may have been made to him by the defenders.

"It is true that notwithstanding the stipulation in the articles of roup the contract of sale and the conveyance which followed might be set aside on the ground of fraud. But there is no averment of fraud, and the pursuer does not attempt to reduce the contract. Holding as he does by the contract, and the right which he has acquired under it, he can have no remedy on the principle of the *actio quanti minoris.*"

[The matters upon which the Lord Ordinary allowed the parties a proof related to an alleged undertaking by the defenders to construct a main drain into which the houses to be built by the pursuer's tenants were to drain, and to the alleged failure of the defenders to implement their arrangement. The point has no bearing upon the present question.]

The trustee (pursuer) reclaimed.

Argued for the reclaimer—This was really a serious case of misrepresentation, made both verbally and on the face of the titles. The ground was sold as part of the lands of Quarryholes, while in reality it was part of the lands of Foredrum, which were burdened with a prohibition. The pursuer was led to understand there were no restrictions, while the defenders had full means of knowledge, it being their own property. This amounted to a case of legal fraud. *Restitutio in integrum* was in the circumstances impossible, because the purchaser had built on the ground and disposed of some of the buildings. Damages was the only remedy. A proof ought to be allowed.

Authorities—*Gilmour* v. *Hart*, Dec. 2, 1875, 3 R. 192; *Spenser & Co.* v. *Dobie & Co.*, Dec. 17, 1879, 7 R. 396; *Critchley* v. *Campbell*, Feb. 1, 1884, 11 R. 475; *Blair* v. *Murray*, 1790, reported only in 2 Bell's Com., 7th ed., p. 263.

Replied for respondents—The question really was, whether the pursuer was entitled to damages because the property which he purchased in 1877 had not turned out so profitable as he expected. Fraud or essential error were the only two grounds upon which a purchaser could void his bargain, and there was no relevant averment of either here. The duty of making a search was by the articles of roup laid on the pursuer.

Authorities—*Hamilton* v. *Western Bank of Scotland*, June 12, 1863, 23 D. 1033; *Ferguson* v. *Mossman*, 3 Pat. App. 531; *Brownlie* v. *Miller*, July 16, 1878, 5 R. 1076, and 7 R. (H. of L.) 66.

At advising—

Lord President—The bankrupt, who is now represented by his trustee, bought two lots of ground which were exposed for sale by public roup by the Governors of Trinity Hospital, and which were described as being "part of the Trinity Hospital lands of Quarryholes, all lying in the parish of South Leith and sheriffdom of Edinburgh," and it is correctly set out in the condescendence that the articles of roup did not mention any servitude right or any real burden affecting the feu.

Now, it appears that there was a misdescription of the subjects in the articles of roup, and instead of these two lots being entirely part of the lands of Quarryholes we now know that a portion of one of these lots, extending to 1 acre and 16 poles, belonged to what was originally the lands of Foredrum, and which piece of ground was acquired by the Governors of Trinity Hospital in 1853 by deed of excambion. It is thus described in the deed as "All and whole that oblong slip or stripe of ground, part of the lands of Foredrum, lying on the west side of the Easter Road . . . and measuring 1 acre and 16 poles imperial measure."

It was upon this disposition that the Governors of Trinity Hospital were infeft, and one cannot therefore resist the conclusion that there was a misdescription of the subjects in the articles of roup.

The question which we have to determine is, whether or not that description was material?

Now, that of course must depend entirely upon circumstances. The two lots sold are said to be marked 7 and 8 on the feuing plan of Easter Road, and that being so the site of these two plots of ground could easily be seen and identified. The misdescription therefore in the articles of roup would have been a matter of no importance had it not been for the burdens which had been imposed on the lands of Foredrum.

The Magistrates as Governors of Trinity Hospital had granted a feu-charter to the pursuer Lee, and he in terms of it had proceeded to erect tenements on the ground, and it was not until 1884 that the pursuer discovered that the lands were under certain prohibitions. He now says that if the lands which were sold had been the lands of Quarryholes, as described, they would have been free from the restrictions he now complains of.

But the pursuer bought these subjects under articles of roup, article 12 of which provides as follows:—"The feuars shall be held to have satisfied themselves before the roup as to the sufficiency of the exposer's title, and as to the extent of their respective lots of ground, and as to all other particulars affecting and regarding the same, and shall not be entitled to raise any objection on account thereof, or on any account whatever." Now, the important words are, that the purchasers are "to satisfy themselves as to the sufficiency of the exposer's title," and "to satisfy themselves as to all other particulars affecting and regarding the same." Such a condition necessarily sends intending purchasers to the records, and there can be no doubt that if Mr Lee had gone there he would have found this contract of excambion, and had he attached the same importance to the restriction then that he seems to do now probably he would not have purchased this ground.

In these circumstances the question comes to be, whether a purchaser coming to know sometime after his purchase has been made of restrictions which he might have become aware of at the time of the sale, can after a lapse of time set up a claim of damages? Upon that matter I think the Lord Ordinary's ground of judgment is irresistible, and agreeing with his Lordship as I do, I consider it unnecessary to go into the very nice questions which were raised in the course of the discussion before us. I adopt the first ground of judgment of the Lord Ordinary, and affirm his finding that there is no relevant averment of fraud.

Lords Mure and Shand concurred.

Lord Adam was absent.

The Court adhered.

Counsel for Pursuer — Jameson — Gardner. Agents—W. & J. Burness, W.S.

Counsel for Defenders — Mackay — Darling. Agents—Millar, Robson, & Innes, S.S.C.

Tuesday, June 22.

SECOND DIVISION.

[Sheriff of Lanarkshire.

SINNERTON *v.* MERRY & CUNNINGHAME.

Reparation — Coal-Pit — Fence — Contributory Negligence—Mines Regulation Act 1872 (35 *and* 36 *Vict. c.* 76), *sec.* 51.

A pit about 66 yards from a pathway used by the public was fenced, but the fence was left off on one occasion for a short time, during part of which those in charge of it were engaged in seeing a stranger, who when under the influence of drink had come to the pit, towards a place of safety. Before the fence was replaced the stranger returned, and fell down the pit and was killed. *Held* that the mine-owner was not liable for his death to his representatives either under the Mines Regulation Act 1872 or at common law.

This was an action by Joseph Sinnerton to recover damages for the death of his son John Sinnerton, who lost his life on 13th May 1885 by falling down a coal-pit near Saltcoats, belonging to Merry & Cunninghame, the defenders.

The defenders' pit was situated in a field near the shore, and some distance from a public road, but about 66 yards from a path along a line