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

of railway, along which path and railway members of the public were in use to pass.

John Sinnerton was a stranger to the district. He came to it on the day of the accident, and after coming to the pit to ask for a relative there, went to the neighbouring village of Stevenston to call for him. In Stevenston he took a considerable amount of drink with some companions, and became the worse of drink. In the evening about 9 o'clock he appeared in the engine-house at the pit still the worse of drink, and told the engineman he wished work there, and also wished to stop all night, which the engineman refused to allow. Shortly after that he was found the worse of drink in the bothy at the pit, and after he had been there some time the pitmen removed him and conducted him about 150 or 160 yards away from the pit on the way to Stevenston, and directed him to the station there and to the manager's house. They then returned. A very short time afterwards he returned, and before he was seen fell down the pit. The fence at that part of the pit had been left open for about twenty minutes by a miner who came up; but part of this time was accounted for by the absence of the engineman and others when engaged in putting Sinnerton away off the ground. At the place also there was a quantity of sleepers lying piled up to a height of one and a-half to three and a-half feet, and Sinnerton ere getting into the pit must not only have got over them, but before that have gone back to the bothy round an outlying part of the engine-seat and past a large water-tank. The night was clear, and evidence was led to show that a sober man might safely have walked at the spot without falling down the pit.

The Coal Mines Regulation Act 1872 (35 and 36 Vict. cap. 76) provides by section 51, subsection 14—"The top and all entrances between the top and bottom of every working or pumping shaft shall be properly fenced, but this shall not be taken to forbid the temporary removal of the fence for the purpose of repairs or other operations if proper precautions are used."

The pursuer relied on this Act and on the common law, and maintained that the defenders had failed to take proper precautions against such an accident.

The defenders denied liability, and pleaded that Sinnerton was a trespasser, and had contributed to the accident.

The Sheriff-Substitute (GUTHRIE) pronounced this interlocutor—"Finds that on the night of the 13th May last the pursuer's son John Sinnerton fell into the shaft of defenders' No. 5 Pit at Auchinharvie Colliery, near Stevenston in Ayrshire, and was killed: Finds that the gate or fence on the south side of the pit mouth was not closed, having been left open by some one of the defenders' servants a few minutes before, and not having been immediately closed by the engineman (Wilson), whose duty it was at night to take charge of the pithead: Finds that the deceased John Sinnerton was the worse of liquor, and had gone to the pit with the intention of staying all night there, but was put away by Wilson, the engineman, and two other servants of defenders', and on account of the state he was in was conducted by them to a safe distance from the pithead, and that the deceased must have returned to the pithead without any lawful reason, but probably for the purpose of spending the night there: Finds that the pithead was sufficiently protected on the south side by a heap of prop wood, over which the deceased must have climbed: Finds, in these circumstances, that the deceased fell into the shaft and was killed while unlawfully trespassing on the defenders' premises and through his own recklessness: Therefore assoilzies the defenders and decerns.

"*Note.*—I think that the unfortunate lad, for whose death his father here seeks to recover damages, must be held to have been a reckless trespasser. Even, therefore, if there were more serious fault on the part of the defenders than has been proved, I am of opinion that the pursuer could not recover damages, and that on the authority of a series of cases from *Black* v. *Caddell*, in 1804, downwards. I was strongly pressed with Lord Penzance's *dicta* on the subject of contributory negligence in the case of *Radley* v. *L. and N.-W. Railway Co.* But these words must not be pressed beyond their fair meaning, which is not very clear. They must be construed with reference to the case in which they were used, and they do not apply to a case such as this where recklessness is combined with trespass. For it seems to me more than clear that whatever the law might have said if the lad had met with his death when he first came to the pit on at least a plausible errand, he was a trespasser when he returned there in the dark, after being carefully warned away and removed to a safe distance, and directed on his way to Stevenston, by those who were the proper guardians of the pit.

"But apart from the special elements of trespass and recklessness, I hardly think that there was fault on the defenders' side, either under the statute, if it is applicable to a case of this kind, or at common law. It must be observed that the fence had been removed in the necessary working of the pit not more than twenty minutes before the accident happened. It ought certainly to have been replaced at once by the man who came up the shaft, or by Wilson, the engineer, or his assistant. But there are two considerations which either make the fault a very trivial one or none at all. In the first place, the open part of the pit was protected by the prop-wood placed there for the convenience of the mine. In the second place, the delay in replacing the fence, so far as Wilson and Miller were concerned, was caused by their anxiety to get the deceased himself removed from a place where he had no right to be, and where he was in danger. It would be very hard if they or their employers should be held liable for a small omission of theirs, which the deceased by his foolish conduct really occasioned. It must be remembered in a case of this kind that if the defenders are liable, the men whom they employed are also primarily liable, and that the case must be judged precisely as if the claim were made against the workmen who left the gate open, or against Wilson and Miller; and it is not perhaps unfair to remark that the extraordinary increase in late years of actions of reparation for personal injuries might possibly be somewhat checked if employers, when found liable, would insist on getting relief, so far as possible, from the men actually in fault."

The pursuer appealed to the Court of Session, and argued—It was necessary for the protection

of the public that the pit should be properly fenced, and it was not properly fenced, as the gate was open for a long time, so that both at common law and under the Mines Regulation Act 1872 the defenders were liable in damages. The negligent act of leaving the gate open had been done by their servants, and the principle of *qui facit per alium facit per se* consequently applied. All the cases went to show the common law liability of proprietors to fence openings in the ground near public pathways—*Black* v. *Caddell*, Feb. 9, 1804, M. 13,905; *Hislop* v. *Sir P. Durham*, March 14, 1842, 4 D. 1168; *M'Feat* v. *Rankine's Trustees*, June 17, 1879, 6 R. 1043. The defenders were bound also by the Mines Regulation Act to have their pit properly fenced, but they had not done this; they were therefore liable—*Gibb* v. *Crombie*, July 6, 1875, 2 R. 886. Supposing a person meeting with an accident to have been negligent, if the defenders have rendered the accident possible by their negligence, the person injured or his representatives were not barred from getting damages—*Grier* v. *Stirlingshire Road Trustees*, July 7, 1812, 9 R. 1069; *Radley* v. *L. and N. W. Railway Company*, Dec. 1, 1876, 1 App. Ca. 754. Sinnerton was at the place with a perfectly legitimate purpose; he went there to endeavour to get work—*Whitelaw* v. *Moffat*, Dec. 27, 1849, 12 D. 434; *Reid* v. *Bartonshill Coal Company*, June 17, 1858, 3 Macq. 266; *M'Guire* v. *Bartonshill Coal Company*, June 17, 1858, 3 Macq. 300.

The defenders argued—There was here no breach of duty on the part of the defenders. The pit was properly fenced within the meaning of the Mines Regulation Act, and the mere temporary removal of the gate could not be held to be a breach of the statute. Even supposing there had been some negligence on the part of the men who ought to have seen that the gate was closed and who did not, it was not every negligence of their workmen that would subject coalmasters to a vicarious responsibility, and so make them liable for a penalty. The gate would have been shut by the workmen if their attention had not been taken up by the deceased. At common law there was no necessity for Merry & Cunninghame to fence their pit, unless it could be shown that the pit was so near a public path that anybody accidentally straying off the path was liable to fall down it. There was no such public path here. Sinnerton had caused or at least contributed to his death by his own negligence—see *Balfour* v. *Baird & Brown*, Dec. 5, 1657, 20 D. 238; *Lumsden* v. *Russel*, Feb. 1, 1856, 18 D. 468.

At advising—

Lord Justice-Clerk—The event which has been the cause of this case being presented to us was a very lamentable one. The young man Sinnerton who lost his life on this occasion, and whose representatives are now suing for damages, was evidently the worse of drink, but he seems to have made his way to the margin of this coal-pit belonging to Merry & Cunninghame. When challenged as to his business there he said he was looking for work. The men who were at the work seem to have looked after him, and even kindly taken him down to the path and pointed out the manager's house to him. It seems that during the interval they were away from the work the man Scott had come up from the pit, the gate in the fence round which was left open. Probably if this young man Sinnerton had not come up at this time and so attracted the notice of the men the gate would have been shut. There is no doubt there must been a certain amount of negligence; the men were so taken up with looking after Sinnerton that they had not looked to see if the gate was properly shut. A few minutes afterwards Sinnerton wandered back, and going through the open gate fell into the pit—the question is, whether it was by the fault of the men who left the gate open that the accident happened?

I do not think the statute gives us any assistance. The owners of the mine, Messrs Merry & Cunninghame, were bound under the statute to fence the pit for the protection of their workmen, and the pit was quite properly fenced. There is no doubt the pit is only secure when the gate of the fence is shut, and it was the duty of the attendants to shut the gates, but I do not think that that matter is dealt with by the statute at all. The proprietors of the pit are not liable in damages because in the circumstances of this colliery the workmen had left the gate in the fence open. I think the case is a peculiar one. If this pit had not been fenced at all, I do not know that Messrs Merry & Cunninghame would have been liable in damages because they had not complied with the conditions of the statute, but I am of opinion that this young man Sinnerton brought on his fate by his own conduct in going where he had no right to go, and in a state in which his faculties were much confused, and that the accident happened from his unauthorised intrusion into the defenders' works. I am of opinion that there is no ground for finding the defenders liable in damages, and that very much on the grounds expressed by the Sheriff-Substitute in his note.

Lord Craighill—I have arrived at the same conclusion. It is sought to make the defender liable to the pursuer in damages on various grounds.

The first and most obvious of these is under the Mines Regulation Act of 1872, but after consideration I have come to agree with your Lordship that the provisions in that Act have no applicability to cases such as this. On the evidence there is no doubt that this pit was fenced round notwithstanding the fact that there was a gate in the fence, and that that gate was from time to time left open. I think all that the statute requires to be done by the coal-masters was done here, even although the gate may been left open longer than was necessary.

Further, I think there is no liability under the rules of the common-law. No doubt the cases from *Black* v. *Cadell* and the others following upon it lead to the conclusion that if there is some such opening as a pit or a quarry, and it lies open in ground contiguous to a footpath or public way, those persons to whom this opening,—or the ground in which it exists—belongs must take every precaution that there be no accidents, and if such should happen from want of such precaution they must take the liability for its happening even if the persons who may meet with the accident by straying from the public way should be committing trespass. But there does not appear to be any such evidence here as

in the case of *Black* that the pithead was near any path or public way whence persons could by wandering easily fall into danger. This is not to say that the same rule would be followed in regard to all open pits, but I do not wish to carry the case of *Black* any further than the case itself goes. So with regard to liability under the common-law I do not think that there has been shown negligence on the part of the defenders either as regards the fencing of the pit or as regards the opening of the gate. I should be disposed to say that negligence has not been established, and that in consequence of the attention paid by the men to Sinnerton an omission took place in not closing the gate, so that that accident happened which would not otherwise have occurred.

I was greatly struck with one incident in the case. The accident was said to have taken place in May, not far from the longest day, and before eleven o'clock in the evening, but the pursuer has not made any statement to the effect that the night was too dark to allow Sinnerton to see that the gate was open. I think it must have been light enough for anyone who was taking care of himself to see his way about and notice that the gate was open. I think that the judgment of the Sheriff-Substitute ought to be affirmed.

Lord Rutherfurd Clark—I am of the same opinion.

The Court affirmed the Sheriff-Substitute's interlocutor.

Counsel for Pursuer — Gardner. Agents — Sturrock & Graham, W.S.

Counsel for Defenders—Graham Murray—C. N. Johnstone. Agents—J. & F. Anderson, W.S.

HOUSE OF LORDS.

Tuesday, June 22.

(Before Lords Blackburn, Fitzgerald, and Halsbury.)

MACKINNON (GILMOUR'S TRUSTEE) *v.* THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

(*Ante*, vol. xxii. p. 875, and 12 R. 1309.)

Carrier—Railway—Agreement—Unequal Rates. A railway company agreed with certain coalmasters to carry their coal at so much per ton per mile when carried a distance exceeding six miles, and further, that if they should charge any other trader for distances above six miles for the same description of traffic "lower rates" than those stipulated in the agreement, they should give the coalmasters who were parties to the agreement a corresponding reduction in the rates payable by them. *Held* (*aff.* judgment of Second Division) that "lower rates" meant lower rates per ton per mile, and *therefore* the company having charged another trader lower rates per ton per mile, *held* that the coalmasters were entitled to a corresponding reduction, though owing to the distance for which this trader's coal was carried the lump sum payable by him was greater than that paid by the coalmasters who were parties to the agreement.

This case is reported in Court of Session, July 15, 1885, *ante*, vol. xxii. p. 875, and 12 R. 1309.

The defenders, the Glasgow and South-Western Railway Company, appealed to the House of Lords.

At delivering judgment—

Lord Blackburn—My Lords, this is an appeal against an interlocutor of the Lords of the Second Division of the Court of Session in Scotland dated 15th July 1885, affirming an interlocutor of the Sheriff-Substitute, and ordaining the defenders to make payment to the pursuers of the sum of £148, 16s. 1½d. with interest.

The question turns upon the construction of an agreement which is set out, and of which I think only the second, ninth, and eleventh articles are in any way important. The pursuers, who are coal-owners in Ayrshire, made an agreement with the Glasgow and South-Western Railway Company, the second article of which was—"The second party respectively shall, subject to article eleventh hereof, as from the said date, pay to the first party, for and in respect of the traffic of the second party before mentioned, the charges following." It refers to the charges which are in the schedule, which I need not at present read to your Lordships. I need only state that there are such charges, and that those charges are made to depend upon the distance for which the coals have been carried along the railway.

The first eight articles are not important to read. The ninth is this—"It is hereby provided and agreed that in the event of the first party," that is to say, the railway company, "charging to any other trader for distances above six miles, for the said description of traffic, to any station or place, lower rates than those stipulated in this agreement to be paid by the second party," that is, the traders, "then and in that event the first party shall give to the second party a corresponding reduction in the rates payable by them for their traffic of a similar description to such station or place while and so long as such lower rates are charged against such other trader." It is admitted that the railway company do charge to Troon (taking one place for instance) from Lanemark Colliery, New Cumnock, a rate which is considerably lower than the rate in the schedule, and that they do continue to charge against the pursuers the scheduled rate, which is higher consequently than that which they actually do charge to the Eglinton Company. An attempt has been made unsuccessfully both before the Sheriff-Substitute and before the Court below (and I think rightly unsuccessfully) to argue that the ninth article which I have just read has the effect of saying that so long as they do not charge to anyone else a lower sum to Troon than the sum which they charge to the pursuers to Troon, it does not matter how much further they may carry gratis, throwing the extra distance into the bargain. I do not think that that can be the true construction of the agreement. It does not seem to be the meaning of the words, and certainly according to my view of it, it is not what the parties would be likely to intend. That being the unanimous opinion of the Sheriff-Substitute and of all the Judges of the Second Division, I