conclusion and contained in the bond and disposition in security therein libelled: *Quoad ultra* dismiss the conclusions of the summons, and decern," &c.

Counsel for Pursuers (Reclaimers) — Hunter, K.C. — R. S. Horne. Agents — Mackenzie, Innes, & Logan, W.S.

Counsel for Defenders (Respondents)— Sandeman. Agents — Thomas White & Park, W.S.

Thursday, July 15.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

JOHN C. M'KELLAR, LIMITED *v.* YOUNG.

Sale—Sale of Heritage—Bounding Title—Measurement—Plan.

A property was described in a disposition by reference to a plan, and as containing 383 square yards or thereby, "bounded on the north by D. Road, along which it extends 34 feet 6 inches or thereby; on the north-east by the central line of D. Street, to measure 40 feet in breadth, along which it extends 56 feet 6 inches or thereby; on the south-east-by-south by ground belonging to R, along which it extends 72 feet 3 inches or thereby; and on the west by a steading of ground belonging to M, along which it extends 78 feet 6 inches or thereby."

Held that the disposition could not be regarded as a purely bounding disposition.

Opinion (*per* Lord Low) that the southern boundary was not of the kind which absolutely fixed the limits of the subject since there was in fact nothing on the ground to suggest a boundary there.

Contract — Sale — Sale of Heritage — Disposition — Damages — Articles of Roup — Absolute Warrandice — Reference to Articles after Disposition Completed — Bar.

The articles of roup at a public sale of a heritable property, which was therein described as being of the extent of 383 square yards, provided, *inter alia*, as follows:—"(*Seventh*) The subjects are exposed *tantum et tale* as vested in the exposers, and without reference . . . to the measurements or description thereof . . . as specified in the titles or as appearing from advertisements or otherwise. (*Eighth*) Offerers shall be held to have satisfied themselves with respect to the extent, condition, and description of the subjects. . . . (*Ninth*) The purchaser shall not be entitled, on the ground of any objection to the extent, condition, and description of the subjects . . . or to the exposer's title thereto, or on any other pretext whatever, to withhold the price or any part thereof." The property having been sold to a purchaser under the articles and relative minute of preference, he obtained from the sellers a disposition wherein the same description was given of the property as in the articles of roup. The disposition contained a clause of absolute warrandice. When a building lining was applied for, it appeared that the subjects described in the disposition included an area of 25 square yards which the sellers were not *in titulo* to convey, and that accordingly the purchaser had got 25 yards less than was therein specified. He thereupon brought an action of damages for breach of warrandice against the sellers, in respect that he had not obtained possession of the full area of ground.

Held that it was incompetent to refer to the articles of roup, and, doing so, that the pursuer's claim was barred—*per* Lord Low, on the ground that as the purchaser did not aver that he could not have discovered the discrepancy sooner, and was holding to his purchase, he must be bound by the conditions of the purchase; *per* Lord Ardwall, on the ground that the question between the parties was really, not as to the subject of the sale, but as to the terms of the contract of sale, and these terms were embodied in the articles and minute of preference and not in the disposition.

Wood v. *Magistrates of Edinburgh*, June 22, 1886, 13 R. 1006, 23 S.L.R. 723, *followed.*

On 10th September 1908 John Craig Young, pawnbroker, 11 Merkland Street, Partick, Glasgow, brought an action against John C. M'Kellar, Limited, 45 West Nile Street, Glasgow, in which he claimed £630 damages for breach of the warrandice in a disposition of heritable property granted to him by the defenders.

The pursuer pleaded—"The pursuer having suffered loss and damage through the defenders' breach of warrandice condescended on, is entitled to decree as concluded for."

The defenders, *inter alia*, pleaded—"(1) The averments of the pursuer being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed with expenses. (3) There having been no breach of the obligation of warrandice referred to, the defenders should be assoilzied, with expenses. (4) In respect that the pursuer bound himself by the articles of roup to take the subjects *tantum et tale* as vested in the defenders, and to be satisfied with the title, extent, and description of the said subjects, he is barred from insisting in the present action."

The subjects conveyed were thus *described* in the disposition—"Therefore we do hereby . . . sell and dispone to and in favour of the said John Craig Young and his heirs and assignees whomsoever, heritably and irredeemably, all and whole that steading of ground lying within the parish

of Govan and county of Lanark, marked number VII (seven) upon the plan after mentioned, and containing 383 square yards or thereby imperial standard measure, bounded on the north by Dumbarton Road, along which it extends 34 feet 6 inches or thereby; on the north-east by the central line of Douglas Street, to measure 40 feet in breadth, along which it extends 56 feet 6 inches or thereby; on the south-east-by-south by ground belonging to Charles Arthur Rose and others, as trustees for Hillhead Baptist Church, along which it extends 72 feet 3 inches or thereby; and on the west by a steading of ground belonging to us, the said John C. M'Kellar, Limited, and marked number VI (six) upon the said plan, along which it extends 78 feet 6 inches or thereby, partly on the central line of a wall of a back saloon erected upon the said steading of ground marked number VI (six) upon the said plan, and range thereof, and partly on the central line of a mean gable wall, and range thereof, all as the said steading of ground hereby disponed and three other steadings of ground are delineated upon a plan thereof prepared by Messrs Kyle & Frew, civil engineers and land surveyors in Glasgow, a copy of which is annexed and subscribed as relative to disposition by Robert Gray Ross, writer in Glasgow, and James Paterson, writer there, co-partners carrying on business as writers in Glasgow under the firm of Paterson & Ross, as trustees for behoof of their said firm and their partners thereof, with consent therein mentioned, in favour of us, the said John C. M'Kellar, Limited, dated the 12th, and recorded in the Division of the General Register of Sasines applicable to the county of the barony and regality of Glasgow the 14th, both days of April 1906."

The disposition had this clause of *warrandice*—"And we, the said John C. M'Kellar, Limited, grant warrandice but excepting the tacks or lets of the subjects before disponed, whether current or not yet commenced."

The *facts* and *circumstances* out of which the case arose are given in the opinion (*infra*) of the Lord Ordinary (MACKENZIE), who on 17th March 1909 repelled the first plea-in-law for the defenders, and before answer allowed the parties a proof of their averments.

Opinion.—"This is an action of damages for breach of warrandice.

"On 21st February 1906, the pursuer, through his agents, purchased from the defenders by public roup, at the price of £1320, certain corner premises situated at 309 Dumbarton Road and 2 Douglas Street Partick, with entry at the term of Whitsunday 1906. Following upon the purchase the defenders granted a disposition in favour of the pursuer of the subjects sold to him, dated 9th and 14th and recorded in the Register of Sasines 15th May 1906. The description of the subjects in the disposition is as follows:— . . . (*quotes, v. sup.*) . . . There is a clause which imports absolute warrandice.

"In April 1907 the pursuer presented a petition to the Dean of Guild Court for a lining, when the proprietors to the south objected, on the ground that the plans showed an encroachment on their property. The pursuer avers in the present action that he then ascertained for the first time, as is the fact, that the subjects purchased by him and conveyed to him by the defenders included an area of 25 square yards or thereby which did not belong to them, and which they were not *in titulo* to convey to him, the same having been conveyed to the trustees for the Hillhead Baptist Church by the said Glasgow District Subway Company by a disposition by the said company, dated and recorded prior to the disposition by the said company in favour of the defenders. He further avers that the said 25 square yards or thereby from which he has been evicted forms part of a strip of ground over which the pursuer was bound by the title to afford an access to certain adjoining proprietors, and that it has been necessary in consequence to adjust with these proprietors a new line of access encroaching further on the pursuer's property.

"The defenders maintain that the pursuer is barred by the articles of roup from raising the question he does in regard to the extent of the subject conveyed. The articles which he founds on are in these terms:—' . . . (*quotes articles* 7, 8, *v. sup. in second rubric and inf. Lord Ardwall's opinion*) . . .' I am at a loss to see what part a clause of absolute warrandice is to play if the argument for the defenders is sound. Their counsel declined to maintain that if a half of the subjects were found not to be conveyed he could plead the articles of roup as against the warrandice clause. I understood that ultimately he rested his contention on the fact that the dispute was only about 25 square yards. If the argument were sound, however, I do not think that it can stop short of the larger proposition.

"The argument appears to me to be altogether unsound. The extent of the pursuer's right must be determined by the terms of the pursuer's conveyance, and by nothing else. Any other view would be contrary to what was decided by the House of Lords in *Lee* v. *Alexander*, 10 R. (H.L.) 91, and *Orr* v. *Mitchell*, 20 R. (H.L.) 27.

"In the latter case Lord Watson said, 'When a disposition in implement of sale has been delivered to and accepted by the purchaser, it becomes the sole measure of the contracting parties' rights, and supersedes all previous communings and contracts however formal.' The articles of roup in the present case are not imported into the disposition, which is the 'sole measure' of the rights of the parties. The question at issue must therefore be determined with reference to the terms of the disposition. The true and only question is, what has been conveyed.

"The case of *Wood* v. *Magistrates of Edinburgh*, 13 R. 1006, was founded on by the defenders. There a disponee brought an action of damages against the disponers

for loss ocasioned to him by the non-disclosure of a burden affecting the subjects. In the articles of roup the subjects to be conveyed were described as part of the lands of Quarryholes, which were free from the burden. It turned out that the lands sold had formed part of the lands of Foredrum, which were subject to the burden. 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 held incumbent on the pursuer to search the records for himself, or take the risk of error in any statement as to the title which might have been made to him by the defenders. The point in the present case, however, is not as to any representations in the articles of roup, but as to the construction of the disposition. The warrandice clause must cover whatever it is held is carried by the dispositive clause. The case of *Wood* does not appear to me to help the defenders.

"I am therefore not prepared to hold that the terms of the articles of roup bar the pursuer from insisting in the present claim.

"The defenders criticised the pursuer's averments and maintained that there was not sufficient specification of where the 25 square yards are from which he says he has been evicted, and also that the case made on record was one of misrepresentation, not of eviction. The defender is, however, entitled to the specification he requires, and the pursuer has undertaken to lodge a plan showing the exact position of the 25 square yards in question.

"I do not express any opinion on the other questions argued. The pursuer intimated that he was content at this stage if the first plea for the defenders is repelled and a proof before answer on the whole case is allowed. An interlocutor to this effect will be pronounced."

The defenders reclaimed, and argued—1. The title here was a bounding title. The property disponed was a plot of land lying between Dumbarton Road and the property of the Baptist Church trustees. These boundaries were ascertainable, because (1) the pursuer must have ascertained them, or he could not have said that he had got less than was disponed to him, and (2) it was possible by going over the titles to ascertain where the mistake was, as the church boundaries were ascertainable. But if the boundaries were ascertainable, this was a bounding title—*Reid* v. *M'Coll*, October 25, 1879, 7 R. 84 (Lord Justice-Clerk Moncreiff at 90), 17 S.L.R. 56. Accordingly on that footing the boundaries were the determining factor and ruled in competition with measurements and a plan—*Ure* v. *Anderson*, February 26, 1834, 12 S. 494; *North British Railway Co.* v. *Hutton*, February 19, 1896, 23 R. 522, 33 S.L.R. 357; *Currie* v. *Campbell*, December 18, 1888, 16 R. 237, 26 S.L.R. 170. 2. The pursuer was barred by the articles of roup from raising any question as to the extent of the property. This was settled by the case of *Wood* v. *Magistrates of Edinburgh*, June 22, 1886, 13 R. 1006, 23 S.L.R. 723. If the disposition had understated the extent of the property instead of overstating it, that would not have prevented the pursuer from claiming the excess amount.

Argued for the pursuer (respondent)—1. This was not a bounding title. A bounding title was one where the boundaries were clearly fixed by a physical object—Ersk. Inst., ii, 6, 2; Rankine, Landownership (3rd ed.) 95; *Reid* v. *M'Coll*, October 25, 1879, 7 R. 84 (*per* Lord Gifford at p. 95-6), 17 S.L.R. 56. 2. The Lord Ordinary's view was sound. Whatever might have been the case before when matters were entire, once the contract was carried through it was not in the mouth of the defenders to plead anything that was in the articles of roup. The disposition then became the sole measure of the pursuer's right—*Lee* v. *Alexander*, August 3, 1883, 10 R. (H.L.) 91, 20 S.L.R. 877; *Orr* v. *Mitchell*, March 20, 1893, 20 R. (H.L.) 27, 30 S.L.R. 591. *Hamilton* v. *Western Bank of Scotland*, June 12, 1861, 23 D. 1033, was also referred to. The real question was—what did the parties contract—the one to give and the other to get. The pursuer bought this property as measured and shown upon a plan. He was not getting what was shown on the plan. The existence of the clause of warrandice was fatal to the defenders' argument.

At advising—

LORD LOW—On 21st February 1906 the defenders sold to the pursuer by public roup a small property fronting Dumbarton Road and Douglas Street, Partick, at the price of £1320, and on 14th May 1906 the defenders granted a disposition, purporting to be in implement of the sale, to the pursuer.

In the disposition the property is described by boundaries, by measurements, and by reference to a plan, and the area is stated to be 383 square yards or thereby. The boundary of the property on the north is described as the "Dumbarton Road along which it extends 34 feet 6 inches or thereby"; the boundary on the north-east is described as "the central line of Douglas Street, to measure 40 feet in breadth, along which it extends 56 feet 6 inches or thereby"; and the boundary on the south is described as "ground belonging to Charles Arthur Rose and others, as trustees for Hillhead Baptist Church, along which it extends 78 feet 6 inches or thereby."

The pursuer avers (and it is the case) that according to the area and measurements given in the disposition, the defenders have disponed to him 25 square yards of ground which did not belong to them, having already been disponed to the trustees for the Hillhead Baptist Church. The pursuer therefore maintains that the defenders are in breach of the warrandice (which is absolute) contained in the disposition, and he now sues the defenders for the loss and damage which he has sustained by reason of said breach.

The area—383 square yards—given in the disposition is 25 square yards more than

the defenders were *in titulo* to convey, and I am inclined to agree with the pursuer that that is a larger discrepancy than can be held to be covered by the words "or thereby," although a considerable part of the 25 square yards is not ground available for building, but lies between the building line and the centre of Douglas Street. The measurement of the extent of the ground along Douglas Street, which is stated in the disposition to be 56 feet 6 inches or thereby, is also wrong, because a distance of 56 feet 6 inches measuring from Dumbarton Road extends for some feet into the property of the Baptist Church.

The Lord Ordinary has allowed a proof before answer, but the defenders contend that they are entitled to have the action thrown out without any inquiry, on the grounds (1) that the pursuer having accepted a disposition in which the subjects are described by boundaries, and having been given possession of all the land within these boundaries, cannot claim anything more; and (2) that the conditions in the articles of roup under which the pursuer purchased the property bar him from founding upon the discrepancy between the description in the disposition and the property itself.

In support of the first point the defenders contended that the boundary on the south being the "ground belonging to" the trustees for the Baptist Church, was as much a boundary which fixed the limits of the property in that direction as if it had been a wall, or a road, or march stones. The defenders further argued that the pursuer could not say that the northern boundary of the ground belonging to the Baptist Church was not an ascertained and definite boundary, because he had been able to ascertain what that boundary was with such precision that his present claim was founded upon it.

That argument does, I think, receive some support from the judgment in the case of *Reid* v. *M'Coll* (7 R. 84), but that was a very special case, and cannot, I think, looking to the division of judicial opinion which occurred, be regarded as laying down a rule of general application.

In my opinion the disposition in this case cannot be regarded as a purely bounding disposition, but must be dealt with as being, what it in fact is, a disposition which while describing the subjects in a general way by boundaries, also describes them by area and measurement and by reference to a plan. Further, I do not think that the southern boundary was in fact the kind of boundary which absolutely fixes the limits of the subject, because there was nothing upon the ground to show what the northern boundary of the Baptist Church property was. If 56 feet 6 inches were measured along Douglas Street from Dumbarton Road, a point would be reached where the ground was vacant, with nothing upon it to suggest a boundary of a property. Accordingly anyone visiting the ground and measuring the distance given in the disposition would see nothing to suggest that the defenders were not in a position to give possession of the whole of the ground included in the measurement. I am therefore against the defenders upon the first ground of defence.

The question raised upon the articles of roup presents much more difficulty, especially as the Lord Ordinary has considered that question—the first does not seem to have been argued before him—and expresses the opinion that it is not well founded.

The articles of roup are in the usual form. They commence with a description of the subjects, consisting of three lots, which were exposed for sale. The subjects purchased by the pursuer were described as being the steading of ground marked No. 7 upon a certain plan, containing 383 square yards or thereby, and "being the subjects particularly described" in a draft disposition. It was that particular description which was subsequently inserted in the disposition to the pursuer. I may add that the practice is to give the description of the subjects in the articles of roup which will be inserted in the disposition to the purchaser. The pursuer was therefore aware when he purchased the subjects what the terms of the disposition to be granted to him would be.

The seventh, eighth, and ninth articles specify the conditions of the sale. The subjects are declared to be exposed *tantum et tale* as invested in the exposers; offerers are to be held to have satisfied themselves with respect to the extent, condition, and description of the subjects; and it is declared that the purchaser shall "not be entitled, on the ground of any objection to the extent, condition, or description of the subjects . . . or to the exposer's title thereto, or on any other pretext whatever, to withhold the price or any part thereof."

The defenders' contention is that the purchaser having been bound prior to offering at the roup to satisfy himself as to the extent and description of the subjects, is barred from now founding upon the fact that the area of the subjects is 25 square yards less than it was represented to be in the articles of roup.

In considering that argument it is necessary to bear in mind that this is not an action to have the sale set aside on the ground of misrepresentation or essential error, nor is it a claim for an abatement of the price on the principle of the *actio quanti minoris*. On the contrary, the pursuer is holding to his purchase, and is claiming damages for breach of warrandice in respect that he has been evicted from a portion of the subjects described in the disposition, or rather that he has not been given possession of part of the subjects. The question is whether that claim is not barred by the obligation which the pursuer undertook to satisfy himself as to the extent and description of the subjects before he became an offerer for them at the roup?

I rather think that the Lord Ordinary would have answered that question in the affirmative if he had not thought it was incompetent to take any account of the

conditions in the articles of roup, these being, in his opinion, entirely superseded by the disposition. It is, of course, well settled that when a contract for the sale and purchase of a property has been concluded, that contract is the measure of the rights of parties and it is incompetent in any way to modify or control the contract by referring to what passed between the parties during the negotiations which preceded it. In like manner, if a contract of sale of a property has been concluded and a disposition is granted and accepted in implement of the contract, the disposition entirely supersedes the contract. The reason for the rule, however, seems to me to be that it gives effect to the intention of the transaction.

A contract of sale is intended to supersede all prior negotiations by stating precisely what the agreement at which the parties have ultimately arrived is, and a disposition granted in implement of a contract of sale is intended to supersede that contract by giving the purchaser a complete title to the subjects. Therefore neither party can, while holding to his bargain, be allowed to modify or interpret the contract, or the disposition as the case may be, by reference to that which the contract or the disposition was intended to supersede. If, however, the parties choose to make a special agreement which renders the ordinary rule inapplicable, it is quite lawful for them to do so. And that, in my judgment, is what was done in this case.

There was no doubt what the property which the defenders offered for sale was. It was the piece of ground lying between Dumbarton Road on the north and the property of the Baptist Church on the south. That was the only ground which the defenders were *in titulo* to sell, and the only ground (whatever its extent might be) which they offered for sale. The articles of roup made that quite clear. Now the defenders by the articles of roup in effect said to the pursuer—"We believe that the subjects which we offer for sale are correctly described in the draft disposition which we produce, and are correctly shown on the relative plan; and further, that the area and measurements given in the draft disposition are correct. We will not, however, guarantee that that is the case, and therefore before you purchase you must satisfy yourself in regard to these matters, and if you make the purchase you shall not be entitled to refuse payment of the price on the ground that the description or measurements are not correct, and you shall accept a disposition in terms of the draft as due implement of our obligation to convey the subjects to you."

I think that these were perfectly lawful conditions for the defenders to make, and that the pursuer having agreed to them must be bound thereby.

I do not understand the Lord Ordinary to say that the conditions were not perfectly lawful and binding. His sole ground of judgment is that they were superseded and became ineffectual when, and only when, the disposition was granted. It seems to me that the result of that view would be that if a person in the position of the pursuer took an objection to the description or extent of the subjects after he had purchased them but before obtaining a disposition he would be met by the conditions in the articles of roup, but if he held his peace until he had obtained a disposition the conditions could not be pleaded against him. I do not think that that would be a just result, or in accordance with the conditions of sale to which the purchaser had agreed.

Then the Lord Ordinary says—"I am at a loss to see what part a clause of absolute warrandice would play if the argument for the defenders is sound." Now, it is true that if effect were given to the conditions in the articles of roup the warrandice clause would not receive full effect, in so far as it would not warrant to the pursuer the 25 square yards by which the ground of which he has obtained possession falls short of the measurements given in the disposition, but it would be fully effectual as regards the ground described in the disposition (apart from measurements), namely, the ground bounded on the north by Dumbarton Road, and on the south by the property of the Baptist Church, which, as I have pointed out, was all that the defenders had to sell, and all that they offered for sale.

It was said that the object of such conditions in articles of roup was merely to prevent the purchaser throwing up his bargain on account of immaterial inaccuracies of description or measurement. I think that that is the case to this extent, that if the measurements are not material the purchaser will be barred from founding upon them to any effect; but the conditions here (and they are very much in the usual form) are quite general in their terms, and make no distinction between inaccuracies which are material and those which are not so. It seems to me that it really comes to be a question of remedy. If the inaccuracy were small and immaterial, I think that the conditions would bar the purchaser from taking objection in any form; but if the inaccuracy were material, and if there was anything of the nature of deliberate misrepresentation on the seller's part; or if the inaccuracy was of a kind which the purchaser could not reasonably be expected to discover; or if the parties had been under mutual error in regard to the subjects, the conditions in the articles of roup would not prevent the purchaser from reducing the sale, and, it may be, also claiming damages. But if the purchaser elects to abide by his purchase I think that he must also be held to the conditions upon which that purchase was made.

I should not, however, like to go so far as to say that in no circumstances could the purchaser of a property at a public roup in which the articles contained conditions such as those in the present case sue the seller upon the warrandice in the disposition, on the ground that what he had given possession of was less than the ground described in the articles and in the disposition.

Suppose that it had been impossible for him to discover by the investigations usually made by a proposed purchaser—such as consulting the records and examining the ground—that the property which the seller was *in titulo* to sell was less than that described, and that he did not become aware of the shortage until after he had received the disposition and had proceeded to build upon the ground, there would be a good deal to be said for the view that the seller, who ought to have known the extent of his property, and who was responsible for the misdescription, should bear the consequences, and should be held liable upon the warrandice which he had given. But that is not the case which the pursuer avers. He says, indeed, that he only discovered the shortage when, in the Dean of Guild Court, the trustees of the Baptist Church opposed the lining which he craved, but he does not say that prior to that he had made investigations but had been unable to discover the mistake; nor does he even aver that if he had made investigations the mistake could not or might not have been disclosed. For anything, therefore, that is averred to the contrary, the pursuer did nothing whatever to satisfy himself that the extent of the property was correctly described in the articles of roup. That being so, I am of opinion, for the reasons which I have stated, that he is barred from making the present claim.

The Lord Ordinary refers to the case of *Wood* v. *Magistrates of Edinburgh* (13 R. 1006), where it was held that conditions in articles of roup similar to those in this case barred the purchaser, who had obtained a feu-disposition of the subjects, from claiming damages in respect that the subjects were burdened with certain restrictions which prevented the free use of them, the restrictions not having been disclosed either in the articles of roup or in the disposition. If the Lord Ordinary's view that the conditions in the articles of roup are altogether superseded by the disposition, *Wood's* case was wrongly decided, or, at all events, was decided on the wrong grounds. No doubt, as the Lord Ordinary points out, the circumstances in *Wood's* case were different from those with which we are now dealing, but so far as regards the competency of referring to the conditions in the articles of roup I do not think there is any distinction. Here the disposition describes the ground as being of a certain extent, and the pursuer has found that in fact the extent is somewhat less; in *Wood's* case *ex facie* of the disposition the ground was not subject to any burden, but it turned out that in fact it was burdened with restrictions which prevented the purchaser (at least so he averred) making full use of it. Wood, however, was held to have no claim against the seller, because he was taken bound by the articles of roup to satisfy himself before the roup as to the "sufficiency of the title, and as to all other particulars affecting and regarding the ground." Here the purchaser was taken bound to satisfy himself "with respect to the extent, condition, and description of the subjects." Now it seems to me that if Wood was barred from founding upon the fact that a restriction affecting the ground had not been disclosed, the pursuer must be also barred from founding on the fact that there was an error in the alleged extent of the ground.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be recalled, and that the first plea-in-law for the defenders should be sustained and the action dismissed.

Lord Ardwall—This is an action of damages for breach of the warrandice contained in a disposition by the defenders to the pursuer of a steading of ground situated at 309 Dumbarton Road and 2 Douglas Street, Partick, dated 9th, 16th and 15th May 1906. In the disposition the steading of ground is described by reference to a plan, and as containing 383 square yards or thereby imperial standard measure, bounded on the north by the turnpike road leading from Dumbarton to Glasgow and on the south by the lands now belonging to Charles Arthur Rose and others as trustees for the Hillhead Baptist Church. I do not think that this southern boundary constitutes a proper bounding title so as to exclude all reference to measurements, and, on the other hand, it is quite clear, indeed it is admitted, that the pursuer has got 25 square yards less than the number of yards specified in the disposition. I may remark in passing that this seems to have been caused by a mistake in laying off the ground disponed to the Baptist Church trustees and squaring the south and north boundaries instead of angling them to the south at their east end, the result being to leave some 25 yards of ground belonging neither to the Baptist Church trustees nor to the pursuer, but forcing up the north boundary of the Baptist trustees so as to encroach by 25 yards on the ground intended to be disponed to the pursuer.

The pursuer complains that he has been evicted from these 25 yards of ground, and claims damages against the defenders for breach of warrandice.

It is to be noted that he does not take the remedy which was sought and obtained in the case of *Hamilton* v. *Western Bank of Scotland* (23 D. 1033), where it was held that there was such essential error as to the identity of the subject of sale as to entitle the purchaser to be restored against the sale, and it was there held that he was not barred by the terms of the articles of roup providing that the purchaser should be understood to have satisfied himself as to the title-deeds and extent of the subjects, and that it should not be competent for him after the sale to object to the title or withhold payment of the price on any pretext whatever. In that case the whole transaction was reduced. In the present case, however, the pursuer only concludes for damages for breach of warrandice in respect that he has not got and cannot get

the whole of the 383 yards of ground mentioned in the articles of roup and the disposition granted in terms thereof.

The defenders, *inter alia*, make answer to this claim by putting forward in defence to it the articles of roup under which the subjects were sold, and particularly the seventh, eighth, and ninth articles thereof, which are in these terms:—"*Seventh.*—The subjects are exposed *tantum et tale* as vested in the exposers, and without reference to any feu-duties or other ground burdens affecting the same, or to the measurements or description or rental thereof as specified in the titles, or as appearing from advertisements or otherwise. *Eighth.*—Offerers shall be held to have satisfied themselves with respect to the extent, condition and description of the subjects, and to the whole burdens, conditions and others of every kind affecting same, and also with respect to the sufficiency of the writs: Declaring that the purchaser shall be bound to accept the writs specified in said inventory as a good and sufficient title, and that the exposers shall not be bound to produce or make forthcoming any other writs, nor shall they be bound to continue the searches. *Ninth.* — The purchaser shall not be entitled on the ground of any objection to the extent, condition, or description of the subjects, or to the feu-duties, ground annuals, burdens, servitudes or others affecting the same, or to the writs thereof, or to the exposers' title thereto, or on any other pretext whatever to withhold the price or any part thereof, nor shall he be entitled to require the exposers to pay any casualty or composition or sums in lieu thereof which may be due to or exigible by the superiors prior to the delivery of the disposition to be granted in terms hereof, the purchaser himself being bound to pay such casualty and composition and sums in lieu thereof (if any), and to free and relieve the exposers thereof."

The effect of those articles, I think, if they are given effect to, is to exclude altogether the present claim, because, in the first place, the pursuer was bound by them to have satisfied himself with respect to the extent, condition and description of the subjects, and, in the next place, he is precluded from raising any difficulties in the way of the sale being concluded on the ground of any objection to the extent, condition and description of the subjects. Now the pursuer's present claim practically includes a claim for repetition of a part of the price of the subjects, and that on the ground of an objection to the extent of the subjects. But the pursuer contends, and his contention has been sustained by the Lord Ordinary, that these conditions in the articles of roup cannot be founded on, in respect that the whole articles of roup are superseded by the disposition of the subjects granted in May 1906 by the defenders to the pursuer, and he founds on the cases of *Lee* v. *Alexander* (10 R. (H.L.) 91), and *Orr* v. *Mitchell* (20 R. (H.L.) 27), and on the dictum of Lord Watson in the latter case, which he quotes.

In my opinion these cases and the dicta therein pronounced do not apply to the present question. In the case of *Lee* v. *Alexander* the question in dispute was whether a party was entitled to the mid-superiority of certain ground, and while the First Division allowed a reference to previous correspondence to be looked at for the purpose of ascertaining the intention of the parties, the House of Lords held that it was incompetent to do so inasmuch as that correspondence was superseded by the formal conveyance.

Again, in the case of *Orr* v. *Mitchell* the question was whether the *dominium utile* or only the superiority of a certain estate was conveyed to the vassal. In both these cases it will be noticed that the question was, what did the one party contract to convey to the other? and therefore it was held that that question must be settled by a reference to the disposition, which was the final and complete embodiment of the contract between the parties on all questions of that kind. But in the present case, where a general question is raised as to what were the terms of the contract of sale between the parties, the final and complete deeds embodying these terms are, not the disposition founded on by the pursuer, but the articles of roup and the minute of enactment and preference. In these formal and solemn deeds, duly signed by the parties, the whole rights of the parties to the contract of sale *hinc inde* are defined, and in my opinion it is by these deeds and not by the subsequent disposition that they must be measured. It appears to me that to hold anything else would lead to most anomalous results, as I shall presently show,

The articles of roup are declared to be the articles of roup of "In the third place, all and whole that steading of ground lying within the parish and county foresaid, marked number VII (seven) upon the plan first after mentioned, and containing 383 square yards or thereby imperial standard measure, all as the said steading of ground last mentioned is delineated upon a plan thereof prepared by the said Kyle & Frew, a copy of which is annexed to, and being the subjects particularly described in, a draft of a disposition to be granted by the said Robert Gray Ross and James Paterson, as trustees foresaid, with consents therein mentioned in favour of the said John C. M'Kellar, Limited, having their registered office now at number 45 West Nile Street, Glasgow, docquetted and signed as relative to these presents, together with the servitudes of light and air space in favour of the said steadings of ground and proprietors thereof specified and contained in the said two contracts of ground annual and the said draft disposition respectively, together also with the whole buildings erected on the said three steadings of ground and the whole parts, privileges, and pertinents thereof, which subjects are to be exposed for sale, &c. . . ."

It will be noticed that the description of the subjects here mentioned is the same as that contained in the disposition founded

on by the pursuer both as to the extent, 383 yards, and other matters.

By the sixth article of the articles of roup it is provided as follows:—"*Sixth.*—In exchange for the price the exposers shall grant to each purchaser and his heirs and assignees whomsoever an absolute disposition of the subjects purchased by him, containing all usual and necessary clauses, including a clause of absolute warrandice under the exception of the current tacks or sets, but without prejudice to the purchaser challenging the same on any ground not inferring warrandice against the exposers, and also under exception of the two bonds and dispositions in security for two thousand five hundred and sixty-five pounds and two thousand pounds after mentioned and interests and consequents thereof in the event of the purchaser being required to take same over as hereinafter provided. The said disposition shall also contain the following declaration and servitude, videlicet. . . ." Thereafter there follow a number of anxiously framed declarations and servitudes; in short, the articles of roup leave nothing to be done except to grant and accept dispositions in precisely the terms set forth in these articles themselves.

It will be noticed that in the passage above quoted the articles of roup provide for the seller including in the disposition to be given "a clause of absolute warrandice." But after all this there come the very important conditions, seventh, eighth and ninth, above quoted, which in my opinion control what has gone before, excluding and barring the purchasers from making any objections to the extent, condition, and description of the subjects, with which it is declared that they shall be held to have satisfied themselves, and which, therefore, are to be held as correct so far as they are concerned. The articles of roup therefore, while they oblige the seller to grant warrandice, at the same time prohibit the purchaser from raising any such claim as the pursuer seeks to do here. The provisions must be read together, and so reading them there can, I think, be no doubt that the later provisions limit the rights which the pursuer might otherwise have had under the warrandice clause.

The contention, however, is put forward by the pursuer that the defenders by granting the disposition exactly in the terms prescribed in the articles of roup, supersede and blot out the seventh, eighth, and ninth articles which are just as much a part of the contract between the parties as the obligation to grant a disposition with a clause of warrandice in the terms specified in the articles. In my opinion such a contention is out of the question. *Inter alia*, it would lead to this, that after the minute of enactment had been executed and signed the pursuer could not for a time successfully raise any objection to the extent or description of the subjects conveyed; but if he waited till a disposition was granted in terms of the articles of roup that then he could turn round and say that all the other conditions of the contract had flown off to the effect of entitling him to object to the extent and description of the subjects, and to make a claim for damages in respect of the diminished "extent" of the ground actually handed over to him after he had declared himself satisfied with the description and extent thereof and barred himself from taking any objections on such grounds.

As I have already indicated, my opinion is that it is the articles of roup coupled by the minute of enactment and preference which constitute the final and completed deed regarding the contract of sale carried out under the same, and that it is out of the question to hold that the fulfilling by the defenders of one provision in these articles by granting a disposition in the precise terms set forth in the articles of roup has the effect of entitling the pursuer to be free of other and quite as important stipulations of the contract. If I am right in this, the cases I have referred to have no application.

In my opinion the case which most nearly resembles the present is the case of *The Duke of Fife* v. *The Great North of Scotland Railway*, 3 F. (H.L.) 2, which is subsequent, it will be noticed, to both the cases quoted by the Lord Ordinary. In that case it was held, reversing the judgment of the First Division of this Court and reverting to the judgment of Lord Low, that a disposition executed by a proprietor in pursuance of a decreet-arbitral and proceeding thereon fell to be construed in conformity with that decreet-arbitral, the conveyance being viewed simply as a deed executed in pursuance of the decreet-arbitral. In that case the Lord Chancellor (Halsbury) said—"It is manifest that what was intended was to draw a deed in pursuance of the directions of the decreet-arbitral, and I entirely agree with the Lord Ordinary that, reading the two instruments together, it is impossible to doubt what is the meaning and intention of the deed itself."

Applying that to the present case, I think it may be said with at least equal force that the disposition founded on by the pursuer was executed in pursuance of the articles of roup, that the two deeds must be read together, and so reading them I can have no doubt that the pursuer's present claim is excluded. Further, I entirely agree with what has been said by my brother Lord Low as to the case of *Wood* v. *The Magistrates of Edinburgh*, 13 R. 1006, and I cannot concur in the Lord Ordinary's view that that case does not apply to the present.

In the view I take it is unnecessary for me to go into the other points in the case, but I may say that so far as these have been dealt with in Lord Low's opinion I concur in that opinion.

I accordingly think that the Lord Ordinary's interlocutor ought to be recalled and the action dismissed with expenses.

The LORD JUSTICE-CLERK concurred.

LORD DUNDAS was absent.

The Court recalled the interlocutor reclaimed against and dismissed the action.

Counsel for Defenders (Reclaimers) — Cullen, K.C. — A. Crawford. Agents — Campbell & Smith, S.S.C.

Counsel for Pursuer (Respondent) — Hunter, K.C.—Christie. Agents—Simpson & Marwick, W.S.

Friday, July 16.

FIRST DIVISION.

[Sheriff Court at Kirkcaldy.

ELLIS *v.* THE LOCHGELLY IRON AND COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *sec.* 1 (3) — *Arbiter — Sheriff — Jurisdiction — Discharge—"Any Question as to the Liability to Pay Compensation."*

In an appeal from an arbitration under the Workmen's Compensation Act 1906, the defenders founded on a discharge purporting to have been granted by the workman, and pleaded that the Sheriff, sitting as arbiter, was bound to apply it as such unless and until it was reduced by competent legal process.

Held that the question as to the validity of the discharge was a question "as to the liability to pay compensation" under section 1 (3) of the Act, and that the Sheriff sitting as arbiter could competently dispose of the same.

Contract — Discharge — Essential Error—Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58).

A workman entitled to compensation under the Workmen's Compensation Act 1906, signed a discharge which purported to be in full satisfaction of all claims past and future, in the belief that he was merely signing a receipt for compensation past due. His employers' cashier took the discharge in the belief that the workman had fully recovered, whereas he was still totally incapacitated. The Sheriff-Substitute awarded compensation, being of opinion that the workman was not barred from recovering compensation by the discharge. A case for appeal having been stated at the instance of the employers, *held* that there was no such clear error of law as to entitle the Court to interfere with the judgment of the Sheriff-Substitute.

Observations (*per* Lord President) on essential error not induced by the representations of the other parties.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), section 1 (3), enacts: -"If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the person injured is a workman to whom this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration, in accordance with the Second Schedule to this Act."

In an arbitration under the Workmen's Compensation Act 1906, in the Sheriff Court at Kirkcaldy, between Robert Ellis, miner, Lochgelly, and The Lochgelly Iron and Coal Company, Limited, the Sheriff-Substitute (SHENNAN) awarded Ellis compensation at the rate of 19s. per week from 29th May to 11th July 1908, under deduction of £2, 1s. 2d. paid, and at the rate of 6s. 6d. per week from 11th July 1908. The Lochgelly Iron and Coal Company, Limited, took a stated case for appeal.

The case gave the following *facts* as proved: — "(1) The respondent, while working in appellant's employment in their Newton Pit, Lochgelly, on 29th May 1908, sustained injuries from accident arising out of and in the course of his employment, in consequence of which he was totally incapacitated for work down to 11th July 1908. (2) Since 11th July 1908 the respondent has been partially incapacitated, owing chiefly to stiffness and pains in his back, but his condition is improving. His hearing was somewhat imperfect before the accident, and there are no objective signs of injury to his ears. (3) On Friday, 12th June 1908, the respondent went to the appellant's colliery office to receive his compensation, and was told to return on the Monday following. The respondent returned to the office on Monday, 15th June 1908, and received payment of £2, 1s. 2d., granting a discharge over a penny stamp which purported to be in full satisfaction of his claims past and future. A copy of the discharge, which was partly printed and partly written, is appended hereto in full, and forms part of this case. (4) The appellants' cashier, George Erskine, read over the receipt to the respondent, who also had the opportunity of reading it over for himself. The cashier took the receipt in the belief that the respondent had fully recovered. At that date the respondent was still totally incapacitated. (5) The respondent signed this discharge in the belief that it was merely a receipt for compensation past due. He did not intend to sign any document by which he was agreeing to claim no further compensation. He was not aware that this was the effect of the discharge until, about ten days later, he asked the cashier when his next payment of compensation was due. (6) The discharge was not registered in the Sheriff Court books at Kirkcaldy under section 10 of the Second Schedule of the Workmen's Compensation Act 1906. (7) The respondent's average weekly earnings prior to the accident are of consent taken to be 38s. Since 11th July 1908 the respondent's earning capacity may be fairly stated at 25s. per week."

On these facts the Sheriff-Substitute found in law—"(1) That respondent is entitled to recover compensation from the appellants; and (2) that he is not barred