line thereof; the word 'Find' on the eighteenth line, and all the words following the said word to the word 'thereof' on the twenty-seventh line; as also the words 'and moveable effects' on the twenty-ninth line thereof: *Quoad ultra* adhere to the said interlocutor, refuse the reclaiming-note, and decern."

Counsel for Mrs Gardiner and Others—Gloag—Dickson. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for Trustees—D.-F. Mackintosh, Q.C.—Low. Agents—D. Mackenzie, W.S.—Webster, Will, & Ritchie, S.S.C.

Saturday, June 19.

SECOND DIVISION.

LOUSON'S TRUSTEES *v.* DICKSONS.

Husband and Wife—Succession—Exclusion of Jus mariti—*Payment.*

A truster directed his trustees to invest one-half of the residue of his estate for behoof of one of his daughters, who was at the date of his will married and aged twenty, in liferent only, and her children in fee, exclusive of the *jus mariti* of her present or of any future husband. After she had reached the age of sixty she and her husband and whole surviving children called upon the trustees to pay over her share of residue. The Court (*dub.* Lord Craighill) *authorised* payment.

David Louson of Springfield, town-clerk of Arbroath, died on 11th December 1858, survived by two children, Mary Ann Louson and Mary Duncan Louson. He left a trust-disposition and settlement executed shortly after the marriage of his daughter Mary Duncan in 1844, as after stated, in the fifth purpose of which he directed his trustees to invest on good security a sum of £4000 for behoof of his daughter Mary Duncan, and for which he had become bound in his marriage-contract—"Taking the rights and securities therefor payable to themselves, in trust for behoof of the said Mary Duncan Louson in liferent, but for her liferent use allenarly, and to the child or children to be lawfully procreated of her body, equally among such children, if more than one, share and share alike, in fee, but failing of such child or children lawfully to be procreated of her body, then to her own heirs or assignees whomsoever; but under this express condition and declaration, that the interest or annual produce of the said sum of £4000 so to be invested as aforesaid shall be payable to herself, the said Mary Duncan Louson alone, exclusive of the *jus mariti* of her present or any future husband: and that no part of the said sum of £4000, nor the interest nor annual produce thereof, shall on any account be affectable by the debts or deeds, legal or voluntary, of the present husband or of any future husband of the said Mary Duncan Louson, nor by the diligence of his creditors, his right of administration in respect of the said sum of £4000, and the interest or produce thereof, being hereby expressly excluded and debarred." By the eighth purpose he directed them—"If any balance or residue of my means and estate, after being realised, shall remain after the sums above mentioned are invested, then I hereby order and direct such balance or residue to be invested for behoof of my said daughters, equally in liferent, and their children in fee, exclusive of their husbands' *jus mariti*, in the terms and under the conditions particularly above expressed."

Mary Ann Louson married a Mr Macdougall, and died on 3d June 1885. Mary Duncan Louson married James Anderson Dickson on 24th December 1844. At the date of this Special Case she was over sixty years of age, and her surviving children, one daughter and four sons, were all over twenty-one years of age, the only other children having died unmarried and intestate.

Mr and Mrs Dickson and their children maintained that they were entitled, as being the whole parties interested therein, to immediate payment of the one-half of the residue of the means and estate of the deceased David Louson provided to Mrs Dickson and her children in liferent and fee respectively, in terms of the testamentary writings, and they called on the trustees to pay over the amount to them (other than Mr Dickson), or to their nominees. The trustees maintained that they were bound to retain the amount until the death of Mrs Dickson.

In order to settle that question this Special Case was presented to the Court by the trustees of the first part, and by Mr and Mrs Anderson Dickson and their whole surviving children of the second part.

The question for the opinion of the Court was—"Are the parties of the first part bound, upon the demand of the parties of the second part, forthwith to pay over the said half of residue to the parties of the second part, or to their nominees?"

Argued for first parties—The truster had most carefully provided that his daughter's share of residue should be exclusive of the *jus mariti* of any husband she might marry. Mrs Dickson was only sixty years old. Her husband might die, and if she married again then the exclusion of her husband's *jus mariti* would have to be given effect. The truster evidently had this contingency in view. The following authorities—*Kippen* v. *Kippen's Trs.*, Nov. 24, 1871, 10 Macph. 134; *Dow* v. *Kilgour's Trs.*, Jan. 31, 1877, 4 R. 403; *M'Lean's Trs.* v. *M'Lean*, Feb. 23, 1878, 5 R. 679—were no doubt cases in which a wife in similar circumstances, as being the only person interested in the fund, had been held entitled to get it. But the principle had never been carried further than the case of a marriage-contract. They must then retain the fund till Mrs Dickson's death. Reference was also made to *Martin* v. *Bannatyne, &c.*, March 8, 1861, 23 D. 705; *Massey* v. *Scott's Trs.*, Dec. 5, 1872, 11 Macph. 173; *Allan's Trs.* v. *Allan and Others*, Dec. 12, 1872, 11 Macph. 216.

Argued for second parties—They were entitled to get the funds now, inasmuch as they were the only persons interested. The contingency of Mr Dickson dying and Mrs Dickson marrying again

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