Trustees to make and maintain, in the lines and on the levels shown on the deposited plans, the works thereinafter specified, "and all proper approaches and other works and conveniences in connection therewith respectively;" and authorises them to take and use such of the lands scheduled (including the piece of ground taken from the respondent) as may be required in connection with those works "and for the other purposes of the harbour." The works so referred to are particularly described in the two sub-sections forming part of section 4, and the second of these sub-sections includes "a road of access and wharf along and adjoining the north quay of the harbour and the quay on the eastern side of the entrance to the said wet-dock." The only works shown by the deposited plans upon the respondent's land which has been taken are the said "road of access and wharf;" but neither on the plans nor in the words of the Act is there to be found any indication of what part of that land is to be used as road and what as wharf. That is a matter left to the discretion of the Trustees. "The other purposes of the harbour" for which the land in question was to be used are defined in the 10th section of the Act. It provides that the Trustees "may from time to time" erect sheds, warehouses, offices, workshops, &c., upon the docks, quays, and "other portions of the harbour," and also that they "may from time to time" maintain, remove, and alter the said several works and conveniences. The Lord Advocate ingeniously argued that these enactments are permissive and not imperative, and consequently that the powers which they confer might be waived by the Trustees; but the fallacy of such reasoning is transparent. Section 10 is permissive in this sense only, that the powers which it confers are discretionary, and are not to be put in force unless the Trustees are of opinion that they ought to be exercised in the interest of those members of the public who use the harbour. But it is the plain import of the clause that the Harbour Trustees for the time being shall be vested with and shall avail themselves of these discretionary powers whenever and as often as they may be of opinion that the public interest will be promoted by their exercise.

The case, according to the view which I take of the provisions of the Harbour Act of 1879, stands thus:—The statute expressly says that the Trustees shall in all time coming possess, and may whenever they think fit exercise, the power of altering the condition of the harbour works *ex adverso* of the respondent's land so as to exclude direct access from it to the harbour. The minute lodged in the arbitration by Provost Steele as representing the present body of Trustees explicitly declares that in future the Trustees shall not possess or at least shall not exercise that power. To give effect to the terms of the minute would in my opinion be to affirm that the appellants have power to repeal the provisions of the Act in so far as these apply to the land taken from the respondent; and as I can find no indication of an intention on the part of the Legislature to vest any such power in the appellants, I think the minute is altogether invalid.

Lord Fitzgerald—My Lords, I concur in the judgments of the noble and learned Lords, but do not desire to rest my opinion on the technical though substantial ground that the defenders had no right to create an easement or servitude over the land acquired by them under the powers of The Ayr Harbour Amendment Act of 1879. I prefer adopting the language of the contention of the defenders "That the substance of the proposal by the Harbour Trustees was not to constitute a servitude but to bind themselves to abstain from an apprehended use injurious to Mr Oswald's adjoining land so that they should not be required to pay him compensation on the footing that such use was open to them."

My Lords, when the defenders shall have completed their title to the land in question, they will acquire that land in full ownership for the purposes defined by their Special Act, and cannot lawfully accept it otherwise. My Lords, I am of opinion that having so acquired that land for the purposes expressed in section 4 and amplified in section 10 of their Special Act, they have no power in law to preclude themselves or their successors from the exercise of their statutable powers over it as should be from time to time required for the purposes of the harbour. The minuters are not bound by their own minute.

My Lords, I am further of opinion that even if the minute was not *ultra vires*, yet the minuters had no right at the time and under the circumstances stated to force on the pursuer a minute of doubtful import and effect in lieu of the compensation to which he was otherwise entitled.

Interlocutor appealed from affirmed and appeal dismissed with costs.

Counsel for Pursuer (Respondent)—Solicitor-General (Asher, Q.C.)—Davey, Q.C. Agents—Dundas & Wilson, C.S.—W. A. Loch, Westminster.

Counsel for Defenders (Appellants) — Lord-Advocate (Balfour, Q.C.)—Webster, Q.C. Agents — Gordon, Pringle, Dallas, & Co., W.S. — Grahames, Currey, & Spens.

Friday, August 3.

(Before the Lord Chancellor, Lords Blackburn, Watson, and Fitzgerald.)

LEE *v.* ALEXANDER.

(*Ante*, p. 155, and 10 R. 230.)

Property—Conveyance—Dispositive Clause.

The terms of the dispositive clause in a disposition conveyed the superiority of the "whole lands and others . . . which belonged to me [the disponer] and my predecessors, and have been disponed by me or them to the Glasgow and South-Western Railway Company." *Held* that these words of conveyance were sufficient to carry to the disponee the superiority of all lands disponed to the railway company by the disponer without exception, and could not be controlled or modified by a reference made in another clause of the disposition to the antecedent agreement of parties.

Superior and Vassal—Mid-Superiority—Construction of Conveyance.

A disponed to B the superiority of "all the

lands and others, part of the estate of X," and which had belonged to A, and been conveyed to a purchaser, "being the lands and others particularly described in a writ of *clare constat*" granted by A, as immediate lawful superior, in his own favour as heir of his predecessor in the property. The estates of property and superiority were never consolidated. Part of the lands conveyed to the purchaser was to be held by him of A, and a split therefore took place in respect of it, A holding the superiority of the lands conveyed, and also a mid-superiority between that superiority and the purchaser's estate of fee. *Held*, on a construction of the conveyance, that the disposition to B of the superiority of the lands did not embrace this mid-superiority.

This case is reported in Court of Session, November 24, 1882, *ante*, p. 155, and 10 R. 230.

The pursuer appealed to the House of Lords.

At delivering judgment—

LORD WATSON—My Lords, this action relates to a subaltern right of superiority which was created by the respondent on the 1st April 1878. Upon that day the respondent disponed to the Glasgow and South-Western Railway Company a piece of land, extending to an acre or thereby imperial measure, for the purpose of forming a reservoir, together with the servitude and right of conveying water from it by means of leaden pipes through his intervening lands to their railway station at Mauchline. The deed declares that the said piece of land and servitude are to be holden of and under the disponer and his successors in feu-farm, fee, and heritage for ever, for payment therefor of the sum of £17 sterling in name of feu-duty at the term of Whitsunday yearly. The piece of land thus feued to the railway company, as well as the lands thus affected by the servitude, are in the same deed described as parts of all and whole the lands and tenandry of Ballochmyle and others, being the lands and others particularly described in a writ of *clare constat* granted by the respondent in favour of himself, dated the 28th and recorded in the General Register of Sasines on the 31st days of May 1864.

It appears that the respondent succeeded to the estate of Ballochmyle in 1861, and that in 1863 he completed his title as superior under the Crown of "all and whole the lands and tenandry of Ballochmyle." Then in 1864 he made up a feudal title to the *dominium utile* of the lands and tenandry of Ballochmyle, of which he is also the proprietor, by obtaining from himself, as his own immediate superior, the writ of *clare* referred to in the feu-disposition in favour of the railway company. These several estates of superiority and fee remain vested in the respondent under separate titles, and have never been consolidated. Accordingly, on the assumption that the land feued is therein correctly described, the effect of the feu-disposition of the 1st April 1878 was to split the *dominium utile* of the imperial acre and its accompanying servitude rights, as vested in the respondent by the writ of 1864, into two estates, the one an estate of fee belonging to the railway company, and the other a subordinate yet independent estate of superiority belonging to the respondent, interposed betwixt his vassal's estate of fee and his own estate of superiority under the Crown.

The respondent in his record averred that the land included in the feu-disposition of 1878 was therein misdescribed; that in point of fact it did not form part of the lands and tenandry of Ballochmyle vested in him by the writ of *clare* of 1864, but is part and parcel of the lands of East Welton, which are held by him in fee under the proprietor of the estate of Catrine as his immediate feudal superior. That allegation was denied by the appellant, and upon this point proof was adduced by both parties, in which the respondent led, by appointment of the Lord Ordinary. The proof so taken does not appear to me to be either clear or conclusive. Taking it *per se*, and irrespective of any question of *onus*, I am inclined to think the preponderance of the evidence is in favour of the land in question being part of East Welton. But the appellant is entitled to take his stand upon the terms of the feu-disposition, which are clear and unambiguous, and the burden of showing that the description which so recently as the year 1878 he inserted in the title which he gave to his vassals is erroneous, rests upon the respondent. In that aspect of the case I am of opinion that the evidence is not sufficient to discredit the description of the land which occurs in the feu-disposition by the respondent to the railway company.

The sole object of the action in which the present appeal is taken is to have it judicially found and declared that the mid-superiority so created by the respondent upon the 1st April 1878 has been conveyed and now belongs to the appellant by virtue of a deed of disposition in his favour executed by the trustees of the Loudon estates, in Ayrshire, and also by the respondent in the month of December 1879. That deed conveys to the respondent the *dominium directum* of five separate lots or parcels of land. As to the first, second, third, and fourth parcels no controversy arises. The *dominium utile* of these four parcels as it stood vested in them was conveyed by the respondent and his predecessor, the late William Maxwell Alexander, to the Glasgow and South-Western Railway Company at various dates in and prior to the year 1873. None of these conveyances was of the nature of a feu-right, no mid-superiority was thereby created, and consequently the railway company held the lands thereby disponed to them (subject to the provisions of section 126 of the Lands Clauses (Scotland) Act 1845) under those who were the immediate superiors at the dates of the several conveyances in their favour; accordingly, it does not admit of dispute that in the case of each of those four parcels of land the superiority right, in so far as conveyed by the respondent, and not by the Loudon trustees, to the appellant under the disposition of December 1879, was part of the respondent's estate of superiority of the lands and tenandry of Ballochmyle held by him immediately under the Crown.

The fifth lot or parcel included in the disposition of December 1879 is described in these terms:—"All other lands and others in the county of Ayr, parts of the said estates of Ballochmyle and others, which belonged to me the said Claud Alexander" (the respondent) "and my predecessors, and have been disponed by me or them to the said Glasgow and South-Western Railway

Company, but declaring that these presents do and shall convey the *dominium directum* only of the said lands and others as disponed to the said Glasgow and South-Western Railway Company." It is upon these words of description, occurring in the dispositive clause of the deed, that the right which the appellant asserts to the mid-superiority in question is rested, because the other clauses of the deed are not favourable to his claim. The appellant contends (and in my opinion his contention is well founded) that if the terms of the dispositive clause are *per se* sufficient to give him the right which he asserts, they cannot be displaced or controlled by a reference to the other clauses of the disposition. The language in which these subsidiary clauses are expressed cannot be permitted to override plain words of disposition, although it may be legitimately referred to for the purpose of solving any ambiguity which is raised by the terms of the dispositive clause.

I do not find in the dispositive clause upon which the present case depends any such ambiguity of expression as to necessitate or justify a reference to the other clauses of the deed for aid in its interpretation, but I am of opinion that the terms of that clause do not, according to their just construction, sustain the claim made by the appellant.

The fifth head or parcel of the conveyance is expressed in general terms, "All other lands and others in the county of Ayr," and it follows and concludes a specific enumeration and description of four separate heads or subjects. *Prima facie*, therefore (and unless the contrary appear) it must be presumed that the fifth head of the disposition was merely intended to carry rights *ejusdem generis* with those previously described and disponed, and was not intended to convey a superiority right of a totally different character.

Then, in the fifth head, the expression "all other lands and others in the county of Ayr" does not stand alone, but is qualified by the addition of these words "part of said estates of Ballochmyle and others."

There can be no doubt that the reference back implied in the words "said estates" is to the previous description of these estates as "All and whole the lands and tenandry of Ballochmyle and others in the county of Ayr, being the lands and others particularly described in the writ of *clare constat* granted by me the said Claud Alexander, as immediate lawful superior of the said lands in favour of myself as eldest son and nearest and lawful heir of the deceased Boyd Alexander of Ballochmyle and Southbar, dated the 8th, and with warrant of registration thereon recorded in the General Register of Sasines on the 31st days of May in the year 1864."

Had the respondent been successful in establishing his allegation that the land feued by him to the railway company in 1878 was part of East Welton, that would have been fatal to the appellant's case, because the respondent was not at and prior to the 1st of April 1878 the immediate lawful superior of the lands of East Welton, nor are these lands comprehended in the writ of *clare constat* thus referred to. But, as I have already stated, it is my opinion that for the purposes of this case the land feued to the company must be held to be part of the lands and tenandry of Ballochmyle, which belonged both in fee and superiority to the respondent in 1864. I say "for the purposes of this case," because nothing that your Lordships may determine now, as between the appellant and the respondent, can prejudice the owner of the Catrine superiority, or prevent his establishing that he and not the respondent is the immediate over-lord of that estate, which comprehends both the fee feued to the railway company and the mid-superiority which is the subject-matter of the present action.

I assume, then, that the subjects feued in 1878 lie within the proper lands and tenandry of Ballochmyle. As I have already pointed out, it is the necessary consequence of that assumption that the respondent became vested in two distinct rights or estates of superiority affecting the railway company's feu—the one held under the Crown, and the other held under himself as the vassal of the Crown. Now, the respondent does not profess to convey to the appellant, by the descriptive language above quoted, all rights of superiority which might be vested in his person affecting the lands in question. He only conveys the *dominium directum* of the lands and others particularly described in the writ of *clare constat* of May 1864. I do not think that the description of the superiority conveyed can be reasonably held to embrace the mid-superiority of 1878. That mid-superiority is part and parcel of the lands, or, in other words, of the estate of fee described and vested in the respondent by the writ of *clare constat.* The only superiority which can with any propriety be described as the *dominium directum* of the lands particularly described in that writ of *clare constat* is the respondent's Crown superiority, in virtue of which he gave himself warrant of infeftment as his own vassal in the *dominium utile* of those lands. If at any time after the 1st April 1878 the respondent had been so rash as to enter into a contract of sale binding himself to dispone the *dominium utile* of the whole lands described in the writ of *clare constat*, without an exception, express or implied, of the railway company's feu-right, or of his own mid-superiority, I can see no reason to doubt that he would thereby have incurred an obligation to convey both rights to the purchaser, because the mid-superiority is just as much as the railway feu an integral part of the lands themselves—of the *dominium utile* as distinguished from the *dominium directum* according to the description given in the writ. And seeing that the appellant has only got a conveyance to the *dominium directum* of the lands as these are particularly described in the writ of *clare constat*, it appears to me to follow *ex paritate rationis* that he cannot successfully claim under his conveyance that which is described in the writ as an integral part of the *dominium utile.*

Hitherto I have only noticed the language employed in the dispositive clause to describe the subjects conveyed. The subjects so described are not conveyed by the respondent in terms absolute, and without qualification. On the contrary, the respondent dispones to the appellant, his heirs and assignees, or disponees whomsoever, the subjects thereinafter described, subject to the qualification expressed in the words "so far as regards the subjects the superiority of which is vested in me as before mentioned." The reference implied in these last words is a link in the narrative part of

the deed, which runs thus—"And whereas the *dominium directum* or superiority of the lands of Mossgavil, Loch Broom, and others, of which some portions of the subjects hereinafter disponed form or may be held to form parts belongs to and is vested in me the said Claud Alexander" (the respondent). The effect of the qualification, as explained by the reference, shortly stated, is this—That the respondent does not dispone, or profess to dispone, the whole superiorities described in the dispositive clause, but only such portions of them as formed, or might be held to form, parts of his own *dominium directum* or superiority of the lands of "Mossgavil, Loch Broom, and others."

In construing the dispositive clause of a deed of conveyance proper words of disposition are of greater significance than mere words of description, and expressions used for the purpose of limiting the scope of dispositive words lose none of their force because the language subsequently employed to describe the subjects conveyed goes beyond that scope. In the present case the qualification of the word "dispone," as used by the respondent, was obviously introduced for the very purpose of limiting the general descriptions which followed descriptions which were framed so as to include not only what the respondent intended to convey, but what was meant to be conveyed by the Loudon trustees.

I am accordingly of opinion that the dispositive clause gives the appellant no right to the mid-superiority of the railway company's feu unless he can establish that such mid-superiority forms, or may be held to form, part of the respondent's *dominium directum* or superiority of "the lands of Mossgavil, Loch Broom, and others." It appears from the writ of *clare constat* of May 1864 that the lands of South Mossgavil, as well as the lands of East and West Mossgavil, and the lands of Loch Hill (which include the respondent's share of the *solum* of Loch Broom, now drained by the operations of the railway company), with the parts, pendicles, and pertinents of the same, are all proper parts and portions of the six-merk and forty-penny land of old extent of Mossgavil, and that the respondent is the immediate superior of these lands of Mossgavil and Loch Broom in virtue of the estate of superiority which he holds directly under the Crown. The appellant did not venture to assert that the land included in the feu of 1878 is part of the lands of Mossgavil or Loch Broom, and it is in vain for him to contend that the mid-superiority of the feu forms part of the Crown superiority, the only *dominium directum* embracing these lands which is vested in the respondent. Even if the appellant had shown (what he has entirely failed to establish) that the railway company's feu does, in point of fact, form part of the lands of Mossgavil, he would still have failed to show that the mid-superiority which he claims either forms, or could in any reasonable sense be held to form, any portion of that *dominium directum*, some parts or portions of which are all that the respondent dispones to him.

The learned counsel for the appellant did no doubt maintain before your Lordships the somewhat desperate argument that "the lands of Mossgavil, Loch Broom, and others" must be held to include not only the lands of Mossgavil and Loch Broom, but also to include, if not the whole other lands wherever situated belonging in superiority to the respondent, at least his whole other lands forming parts of the estate of Ballochmyle, and comprehended in the writ of *clare* of 1864. All I can say is this, that to put such a construction upon these words "and others," as they occur in connection with the lands of Mossgavil and Loch Broom, would be to give them for the first time a meaning which has never been attributed to them in Scotch conveyancing, and which in my opinion they do not naturally bear. The words are constantly used with great propriety by conveyancers as a short substitute for the detailed clause of parts, pendicles, and pertinents, which is inserted in a full and particular description of lands such as is to be found in the writ of *clare constat*.

Although I have come to the same conclusion as the learned Judges of the First Division of the Court in regard to the merits of the appellant's case, I have thought it necessary to explain fully the considerations which have led me to that conclusion, because I am unable to concur in all the reasons which have been assigned for their judgment in the Court below.

I do not think there is any ambiguity in the language of the disposition of December 1879 which can justify a reference, for the purpose of controlling that language, to an antecedent agreement between the appellant and the respondent. Nor do I think that such a reference is warranted either by the fact that the subjects conveyed are described in general terms in the dispositive clause of the deed, or by the fact that in the narrative of the deed the parties are represented as having agreed upon certain points which were presumably matter of stipulation in any written agreement which preceded its execution. In the present case the deed narrates that the appellant and respondent had previously arranged certain terms and conditions, but it makes no mention of any document in which these are to be found. Even if the narrative had borne that these terms and conditions had, *inter alia*, been agreed to by missive letters of the 13th October 1879, that would not in my opinion have made these letters admissible evidence for the purpose of controlling or qualifying the language of the deed. According to the law of Scotland, the execution of a formal conveyance, even when it expressly bears to be in implement of a previous contract, supersedes that contract *in toto*, and the conveyance thenceforth becomes the sole measure of the rights and liabilities of the contracting parties. To admit the letters of October 1879, for the purpose and for the reasons explained in the opinions of the Lord President and Lord Mure, would, in my humble opinion, be inconsistent with the principles which ought to govern the construction of a probative deed of conveyance.

I move that the interlocutors appealed from be affirmed, and that the appeal be dismissed with costs.

Lord Chancellor—My Lords, at the conclu- of the argument in this case I made a note of the view of it which I at that time took, and finding as I do that the reasons which I was prepared to assign for my conclusions are entirely the same with those which have been stated to your Lordships by my noble and learned friend who has just moved the judgment of the House, I abstain from repeating them.

The only point on which I wish to add a single word as far as the construction of the deed goes is this. The argument for the appellant was mainly rested upon the ground that under the fifth head, according to the construction which is placed upon the deed by the respondent, nothing would pass. Of course that is an argument always entitled to some weight, but not by any means of a conclusive character. There are two purposes for which a clause of this kind expressed in general words may be introduced into a deed—one is of course to pass some particular property not comprehended in the previous parcels, but another is to pass anything not exactly in the view of the parties at the time, or specifically identified, but which would come within the general intention expressed in the previous part of the deed, and which might possibly not be sufficiently described or comprehended in the particular parcels. Now, on the face of this deed it appears to me that the latter and not the former is the object of this clause, because if it had been intended to pass this particular parcel of land—the reservoir in question (and it is not alleged that there was anything else which it could possibly pass not comprehended in the previous parcels),—why in the world was not the reservoir expressly mentioned and described as the other four parcels were? That is to my mind conclusive against the notion that it was the particular purpose of this clause to pass the reservoir expressly as such, and that being so, I look upon the clause entirely as introduced *ex cautela* for the purpose of including and sweeping in anything which might possibly have been omitted in the previous description.

My Lords, I entirely agree with my noble and learned friend that for the purpose of this question we are obliged to discharge from our minds the previous letters or missives which contained the terms of agreement between the parties. I doubt whether, even if we could have looked at them, it would have been very satisfactory to have to rely only upon some of them without seeing all that passed leading up to the contract, but to me it is clear that although missives of that description might be material for the purpose of reduction on the ground of essential error, they are not material or admissible for the purpose of the construction of a deed. To me, my Lords, it is of the less importance, because when I look at the missives in this case, the principal ones do not appear to me to be at all more clear than the deed itself. I agree that there is an explanatory note interjected afterwards by Mr Lee which perhaps may be somewhat more clear; at the same time, even that is, after all, but an imperfect description of the whole agreement. Therefore I do not think that we lose very much by not looking at those missives, and it is not at all clear to me that the Lord President and Lord Shand (I do not speak of Lord Mure) really proceeded upon the ground of those missives, although undoubtedly they thought themselves at liberty to refer to them, and perhaps there is a great temptation to refer to that which satisfies you that the construction which you put upon an instrument is in accordance with the previous contract and intention of the parties. That temptation it is, however, not well to yield to, except when the documents can be legitimately referred to for the purpose of construction. But I find in the Lord President's opinion, and Lord Shand's in the last sentence, what is to my mind clear evidence that upon the pure question of construction those two learned Lords took exactly the same view which your Lordships take, and would have come to the same conclusion even if they had not referred to the missives at all. Therefore we do not really differ from these Judges, and the grounds which we take are grounds which were also taken by the Court below.

And, my Lords, it is the more satisfactory to me to come to this conclusion, because the real truth is, that the judgment of the Lord Ordinary, which was the other way, could not, I think, have stood upon the ground which the Lord Ordinary himself took. He was of opinion that it was a conclusion which might properly be drawn from the evidence that the reservoir in question was part of the Welton lands held by Mr Campbell of Catrine. If it had been so, it would have been to my mind perfectly clear upon the construction of this deed that it did not pass by the deed. But I agree with my noble and learned friend who has just addressed your Lordships, that if the case had depended upon that, the *onus probandi* would have been upon the respondent, and that the evidence of his title produced by him in the face of his own declarations in the instruments of title would not have been enough for that purpose. Still the fact remains that the judgment of the Lord Ordinary would hardly have been capable of being supported even in the view of the case which the Lord Ordinary himself took.

Upon the whole, I entirely concur in the motion which has been made by my noble and learned friend.

Lord Blackburn—My Lords, at the conclusion of the argument for the appellant in this case, I, in common with, I believe, every one of the noble and learned Lords present, thought that the interlocutor appealed against should be affirmed, though not on the ground assigned by the Lord President and Lord Mure—for I do not think that there is any ground for incorporating the letters of 13th October 1879, or any of the present communings between the parties, in the subsequent disposition of December 1879, so as to affect its construction. If the now respondent had sought to set aside the disposition he might have used those communings for the purpose of making out a case for so doing—whether he could have succeeded or not I do not say. I have not before me the whole materials for solving that question. But I concur in the view, very briefly expressed by Lord Shand, that "on the question as one of construction of the conveyance" the interlocutor is right.

I take the canon of construction to be that where the description of the premises assigned is clear and unambiguous, effect must be given to it by the Court even though convinced from other parts of the deed that it was not what the parties meant to say. But general words following a specific description rarely, if ever, clearly and unambiguously express that everything which may come within that general description is to pass. They may, and more commonly do, mean that if there is anything which virtually and in substance is part of the things described, though it may be not perfectly described, that shall pass, and consequently I think it is legitimate to look

at the narrative in the deed, and still more at the dispositive words used, in order to see whether there appears on the face of the conveyance a sufficient indication that it was intended to restrict those general words *secundum subjectam materiam.* I think that there is a sufficient indication of such an intention on the face of this conveyance.

I have had the advantage of perusing in print the opinion of Lord Watson, in which I quite concur, and I do not think it necessary to go over it in order to point out the parts of it which chiefly weigh with me.

The question is, whether under the fifth subject the appellant is entitled to have the superiority, carrying with it a feu-duty of £17 per annum, of a reservoir and pipes granted in feu on 1st April 1878 by the respondent to the Glasgow and South-Western Railway Company? It is a matter of dispute whether that superiority was "part of the estates of Ballochmyle." I assume without deciding that it was. It is not asserted that it was part either of Mossgavil or Loch Broom, nor that there was any pretence for saying that it could be held to be part of any of the fair subjects specifically described which, as we must take it for the construction of the instrument, formed or might be held to form parts of Mossgavil or Loch Broom, but it was said that it was "other lands" which had been disponed to the Glasgow and South-Western Railway Company, and that the respondent's agents ought to have objected to this general description, and required it to be confined to "other lands, if any, which may form or be held to form parts of the four subjects specially described," or some similar form of words. It would have been better if they had done so, for it might have saved a lawsuit, but I cannot come to any other conclusion than that the whole of the conveyance, more especially the form of the dispositive clause referring to the narrative that the subjects formed or might be held to form part of Mossgavil and Loch Broom, sufficiently indicates an intention to restrict the general words in that manner. If the appellant really thought that the respondent had sold to him the superiority of this reservoir (which I can hardly suppose), he ought to have taken care that the intention to convey it was expressed in the disposition by less ambiguous words.

Lord Fitzgerald—My Lords, the question before us is, whether the dispositive clause contained in the disposition of 26th December 1879 gave the pursuer a right to the mid-superiority of the railway company's feu arising under the feu disposition of the 1st April 1878? My Lords, I have listened to the clear and very able judgment of the noble and learned Lord opposite (Lord Watson), in which I entirely concur, and to which I can add nothing with advantage.

My Lords, the noble and learned Lord has shewn us that there is no such ambiguity in the language of the instrument of 26th December 1879, or in the description of its subject-matter, as would render it necessary to resort to the previous correspondence if it was open to us to do so, and that a clear construction of that instrument can be arrived at on the terms of the instrument itself without resort to any extraneous or antecedent matters. But, my Lords, in affirming the interlocutor of the First Division in favour of the defender on the merits, I desire also to guard myself against any apparent adoption of the ground on which that interlocutor seems, at least in the opinion of two of the Judges, partly to rest.

My Lords, from the judgment of the Lord President it would appear that the Court considered that on the face of the instrument there was ambiguity as to the intentions of the parties, and that to clear away that ambiguity it was necessary and open to the Court to resort to the missive letters constituting a prior preliminary agreement. His Lordship is represented to have said—"That agreement is not set out *in extenso*, but as it is the consideration on which the disposition proceeds, it appears to me that in construing the disposition we are entitled to resort to the agreement itself for light on its meaning. In saying this I wish carefully to guard against it being supposed that I am in any way violating the well-known general rule of law as to the construction of written instruments, viz., that no recourse can be had to previous informal missives which preceded it. I desire to respect that rule, but where, as in the present case, the conveyance is ambiguous, and direct reference is made to the preceding agreement as the conditions of granting the disposition, then I do not doubt that the Court may take any light they can get from it." Now, that agreement is contained in a long correspondence, the result of which is stated in the third article of the defender's statement on record. This preliminary agreement is referred to in the instrument of disposition once only, and in these terms—"And of the agreement made by me the said Claud Alexander with the said J. B. W. Lee for the purchase of the said superiorities, we the said Robert Mackie and Alexander Milne Dunlop, as factors and commissioners foresaid, so far as regards the lands the superiority of which was vested in our constituents as before mentioned." It is observable that it does not refer to or ear-mark any particular documents as constituting the agreement.

My Lords, on this subject my noble and learned friend states what is the law of Scotland to the effect that the formal conveyance when executed supersedes the previous contract and becomes the measure of the rights of the parties. But, my Lords, it is not only the law of Scotland but of the United Kingdom, that if a previous treaty or correspondence results in a final and distinct written agreement, the prior correspondence cannot, as a general rule, be resorted to in order to construe the agreement by which it has been superseded and discharged.

My Lords, on this question I adopt the opinion expressed by the Lord Chancellor and the noble and learned Lords who have preceded me, that it was not open to the Court to resort to the prior correspondence constituting, as alleged, the preliminary agreement, for the purpose of explaining or of aiding in the construction of the final disposition of December 1879.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

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