use of such engines, provided they are of the best construction, and that the proper safeguards are used for minimising the risk of fire-damage."

Having regard to all the circumstances of the case, and the arguments which we have heard, I have myself arrived at a conclusion, as far as I am concerned, without any doubt in favour of the decision of the Court below, and I think that it should be affirmed.

LORD MACNAGHTEN and LORD FIELD concurred.

The Lords affirmed the interlocutor appealed from, and dismissed the appeal with costs.

Counsel for the Appellants — Sir R. Webster, Q.C. — Ure. Agents — Thomas Cooper & Company, for W. B. Rainnie, S.S.C.

Counsel for the Respondents — Lord Advocate Balfour, Q.C. — Finlay, Q.C. — Graham Murray, Q.C. Agents—Grahames, Currey, & Spens, for Hope, Mann, & Kirk, W.S.

Monday, March 20.

(Before the Lord Chancellor (Herschell), and Lords Watson, Ashbourne, Macnaghten, and Field.)

ORR *v.* MITCHELL AND OTHERS (MOIR'S TRUSTEES).

(*Ante*, vol. xxix., p. 543, and 19 R. 700.)

Property — Disposition — Conveyance of "Lands" without Reservation — Construction—Superior and Vassal.

The Duke of Argyle holding the *plenum dominium* of the estate of Castle Campbell of the Crown, in 1796 feued Hillfoot, part of the estate, to Drysdale, reserving coal and coal-heughs. In 1726 Moir acquired Drysdale's feu. In 1808 the Duke conveyed the estate remaining in him to Tait, who in 1811 obtained a Crown charter of resignation and confirmation. Tait's estates were sequestrated in 1828, and in 1837 his trustee, on the narrative that he had exposed for sale "the superiority and feu-duty of the lands of Hillfoot," and that Moir had been preferred to the purchase, disponed to Moir "all and whole the toun and lands of Hillfoot . . . all as at present possessed" by Moir. The warrandice clause excepted the feu-rights or infeftments granted by the disponer's predecessors; there was an assignation of the Crown charter of 1811 with its unexecuted precept of sasine. Moir was infeft on the precept. In 1860 Tait's trustee disponed to Orr the lands of Castle Campbell with a description which included the lands of Hillfoot and the "coals and coalheughs," and in 1890 Orr raised an action against Moir's trustees to have it declared that he possessed the coal in Hillfoot in virtue of the conveyance of 1860. The defenders relied on the conveyance of 1837.

Held (*rev.* the judgment of the Whole Court) that the pursuer was entitled to the declarator sought, on the ground that the deed of 1837 conveyed the superiority of the lands alone, and did not include the coal.

This case is reported *ante*, vol. xxix., p. 543, 19 R. 700.

The pursuer appealed.

At delivering judgment—

LORD WATSON—My Lords, this appeal depends upon the construction of the dispositive clause of a deed of conveyance, dated 28th July 1837, executed in implement of a contract of sale by the trustee on the sequestrated estates of Crawfurd Tait, in favour of John M'Arthur Moir of Hillfoot, the respondents' author. In that clause the principal subject conveyed is described as "all and whole the toun and lands of Hillfoot, with mosses, muirs, and all and singular pertinents used and wont pertaining and belonging thereto, all as at present possessed by the said John M'Arthur Moir and his tenants." Two other subjects, Lochyfaulds and the Bog, are by the same clause disponed in similar terms, with this difference only, that they are described as having been formerly possessed by persons who do not appear to have been proprietors.

It is not matter of dispute that at the date of the conveyance in question the *dominium utile* of Hillfoot, Lochyfaulds, and the Bog was vested in John M'Arthur Moir with the exception of the coal, which was reserved by the Duke of Argyle, then owner of the barony of Campbell, when he feued out these lands to a predecessor of Mr Moir's in the beginning of last century. The superiority of the lands and the reserved estate of coal continued to form part of the barony which was acquired from the Argyle family by Crawfurd Tait and passed to the trustee in his sequestration.

In the year 1860 the lands and barony of Campbell were purchased from the trustee by the late Sir Andrew Orr, and are now feudally vested in the appellant as his testamentary disponee. This action has been brought by the appellant in order to have it found and declared that he has the sole and exclusive right to the coal in the respondents' lands of Hillfoot, Lochyfaulds, and the Bog; and they resist decree on the ground that the coal reserved in the original feu-rights was conveyed to John M'Arthur Moir by the disposition of the 28th July 1837. If that defence cannot be established it was conceded in argument that the appellant must prevail.

Shortly stated, the case which was maintained by the respondents in the Courts below and at the bar of the House was this—that the dispositive clause of the deed of 1837 conveys the lands to their author

in terms which must necessarily include the coal, and that these terms cannot be qualified or controlled by any expressions of intention occurring in other parts of the deed. The appellant, on the other hand, maintains that a conveyance of "all and whole the lands" may aptly signify either an estate of fee or an estate of superiority, although the former may be its primary meaning; and that a conveyance in these general terms must be limited to a right of superiority whenever it is clearly apparent from the context of the deed that such was the intention of the parties.

The Lord Ordinary assoilzied the respondents. On a reclaiming-note to the Second Division their Lordships ordered cases to be prepared and laid before the Judges of the Court of Session for their opinion. The Lord Ordinary, who was one of the consulted Judges, adhered, with a slight variation, to the opinion which he had previously expressed in the note appended to the interlocutor under review. The remaining twelve Judges were divided six to six; and the judgment of the Lord Ordinary was affirmed by the Second Division in conformity with the opinion of the majority of the whole of the Court.

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. Again, in ascertaining the subject to which the purchaser has acquired right, the disposition is, according to Scotch law, the governing clause of the conveyance; and if its terms are express and unambiguous they cannot be cut down by evidence of a contrary intention gathered from the context. If, for example, the deed of 1837 had expressly conveyed the lands of Hillfoot, "together with the coal therein," it would have carried the reserved coal to the disponee, although the context showed that the parties meant to sell and buy a right of superiority only. Their Lordships had occasion to notice these principles—which are matter of trite law in Scotland—in deciding the case of *Lee* v. *Alexander*, 8 App. Cas. 853. But that case does not lay down the rule that in arriving at the true meaning of a dispositive clause, all usual and legitimate aid to construction must be excluded. As was explained by Lord Rutherfurd Clark, one of the minority in the Court of Session, it only decides that the context cannot be referred to for the purpose of contradicting the terms of the dispositive clause, or, as Lord Kinnear, one of the majority, observed, "if the intention of the narrative were clearly repugnant to that of the dispositive clause, it is the latter that, according to the established canon of construction, must necessarily receive effect."

I doubt not that in accordance with the canon the reserved coal must be held to have passed to their author under the deed of 1837 if the respondents can show that the expression "the lands of A" occurring in a dispositive clause has in all circumstances and of necessity precisely the same significance as "the lands of A, together with the coal therein." Had Crawfurd Tait's trustee sold the reserved coal to a third party before 1837, and the fact had been apparent on the face of the conveyance, he and the sequestrated estate would nevertheless in that view have been liable for breach of warrandice. If there were nothing else in the deed to expound their meaning, the words "all the lands" would include not only the surface but all the strata below it, *usque ad centrum*. But there is, so far as I am aware, no authority for saying that these general words must always bear that meaning, and are incapable of being otherwise construed in the light of the context.

Fleeming v. *Howden*, 6 Sess. Cas. (3rd series) 752, is a direct authority to the contrary, and its weight is not lessened by the circumstance that Lord President Inglis, Lord Curriehill, and Lord Deas took part in its decision. In that case trustees vested with the superiority of certain lands, and also with the mines and minerals in these lands, which were reserved by the feu-rights conveyed to the feuar by a dispositive clause which contained no words of exception, all and whole the lands, together with all their interest, claim of right, property, and possession. From the narrative of the conveyance it appeared (1) that the intention was to deal with the right of superiority only, and (2) that the trustees had statutory authority to convey the superiority, but had no power to dispone the reserved minerals. In these circumstances the First Division held unanimously that the general words of the dispositive clause must be restricted to the lands of which the *dominium utile* was vested in the disponee, and did not comprehend the mines and minerals, which belonged in fee to the superior.

Counsel for the respondent argued that the decision in *Fleeming* v. *Howden*, 6 Sess. Cas. (3rd series) 782, went mainly on the want of power in the trustees to dispone aught except the right of superiority, an observation which is so far accurate. Their defect of power was regarded as an important element in ascertaining what was the real intention of parties—a question which must vary with the terms of the deed requiring to be construed—but it had no bearing upon the real point of the decision, which consists in its recognition of the principle that evidence, sufficiently cogent, derived from other parts of the deed, of an intention to use them in a more limited sense than they primarily bear will have the effect of restricting to their secondary meaning general words of description in the dispositive clause.

As might have been expected, counsel for the respondents did not admit that *Fleeming* v. *Howden*, 6 Sess. Cas. (3rd series) 782, was well decided. Even if I had entertained any doubts as to its soundness, I would have hesitated to advise your Lordships, after the lapse of twenty-four years from its date, to disturb the only

precedent which is to be found in our reports upon this conveyancing question. But the decision appears to me to be in strict conformity with legal principle.

In the case submitted by them to the learned Judges of the Court of Session, and also in their argument upon this appeal, the respondents relied upon an unreported decision of the Court in the year 1785 in a case of *Erskine* v. *Schaw*. That case resembled the present, inasmuch as the question arose upon a dispositive clause, which conveyed "all and haill the said lands of Gogar and Gartenclair," the disponee being feuar of the lands under exception of the coal, whilst the disponer was feudal owner both of the superiority and of the reserved mineral. It was held that the terms of the dispositive clause gave the disponee right not only to the superiority but to the coal also. The opinions expressed by the Judges at final advising are only to be found in brief notes made by Islay Campbell, the future Lord President, who was one of the counsel in the cause. According to his notes, four Judges were for and two against the judgment. None of the Judges of the majority rested their decision upon the ground that the general description in the dispositive clause was conclusive, with the exception of Lord Monboddo, who appears to have taken the untenable view that the superiority included not only the vassal's feu but the estate of coal reserved to the superior. The rest of the majority were of opinion that it was the intention of the parties that the whole interest the disponer had in the lands, whether of superiority or of fee, was to be conveyed. The minority were of opinion that such was not their intention—that it was (to use the language attributed to one of them) "clear that not in view to dispose of the coal."

In so far as concerns the competency of limiting the meaning of general words of description in a dispositive clause, which is a matter of law, the principle recognised by the learned Judges in *Erskine* v. *Schaw* appears to me to differ in no respect from that which was followed by the First Division in *Fleeming* v. *Howden*, 10 Sess. Cas. (3rd series) 782. In cases to which the principle applies, it does not occur to me that the question whether the context affords evidence of intention sufficiently clear to restrict, and if so, to what extent the language of the dispositive clause can be usefully solved by reference to precedents. Each case must in that respect be decided upon its own merits. One limitation must always be observed, which is, that evidence of intention, however clear, cannot be permitted to impose upon the words of the dispositive clause a meaning of which they are not susceptible.

Applying what I conceive to be the principle of *Fleeming* v. *Howden* to the deed of the 28th July 1837, I cannot say that I entertain any doubt as to the true meaning of the dispositive clause. The narrative expressly bears that John M'Arthur Moir purchased the superiority and feuduty of his subaltern estate and nothing else, and that the deed was executed for the sole purpose of giving him a feudal title to these subjects. There is no special mention of the reserved coal. It is not included in the lands described as Hillfoot and others, but is comprehended in the general description of "the lands and estate of Campbell," which are stated to belong to the disponer. The only lands referred to in the narrative as "the lands of Hillfoot and others" (a description which comprehends Lochyfaulds and the Bog) are specially described as "belonging in property to John M'Arthur Moir of Hillfoot," the disponee. These statements occurring on the face of the deed itself afford, to my mind, irresistible evidence that the words of the dispositive clause were only meant to apply to the vassal's estate, which had previously been described as the lands of Hillfoot and others, and were not meant to comprehend land or minerals belonging in fee to the superior which had been previously included in the general description of the lands and estate of Campbell.

Being of opinion, for these reasons, that the interlocutors appealed from ought to be reversed, I do not find it necessary to consider at length the limitation of the general words of the dispositive clause which may be implied in the expression "all as at present possessed by the said John M'Arthur Moir and his tenants." The limitation does not apply either to Lochyfaulds or to the Bog; but, in my opinion, it is in itself sufficient to exempt from the operation of the clause the coal in Hillfoot, which had never been worked by the disponee or his predecessors in the feu, and could not be constructively possessed by them in the absence of title.

I have thought it necessary to explain my own views of this case because of its importance to the law, and the difference of opinion which it elicited in the Court of Session. But I desire to express my concurrence in the opinions delivered by the Judges of the minority, and particularly in the exhaustive judgment of Lord Rutherfurd Clark.

LORD CHANCELLOR—My Lords, I have had an opportunity of reading the opinion expressed by my noble and learned friend Lord Watson, and entirely agree with it. I desire to add only a few words.

No authority has been cited which establishes that according to the law of Scotland where a provision contained in a deed has to be construed, it is not legitimate to look at the whole deed in order to determine what is the true construction of the provision in question. In the absence of such an authority I am of opinion that light may properly be sought from every part of the deed, though I do not, of course, say that every part of it is of equal weight. Where by a dispositive provision a subject is conveyed in terms clear and unambiguous, and which admit of but one meaning, it would not be right to hold that something less was conveyed because either the recitals or other parts of the deed appear to indicate that this was the

intention of the parties. But where language is employed which may appropriately be used for different purposes or which has a wider or more restricted sense, I think it is perfectly legitimate to look to other parts of the deed to see how it was intended to be used in the dispositive clause, or whether it has there such wider or more restricted sense. These are the principles which I have applied to the solution of the question which has to be determined by your Lordships. My noble and learned friend's opinion sufficiently indicates the course of reasoning which has led me to agree with the conclusion arrived at by the six learned Judges who formed the minority in the Court below.

My noble and learned frend Lord Hannen, whose public duties prevent his being present to-day, has asked me to say that he concurs in the conclusion at which the rest of your Lordships have arrived.

I therefore move your Lordships that the interlocutors appealed from be reversed; that it be declared that the appellant is entitled to a decree of declarator; that he has the sole and exclusive right to the coals within the lands mentioned in the terms of the summons; that the case be remitted to the Court below with that declaration; and that the respondents do pay the costs of this appeal, and the costs in the Court below.

LORD ASHBOURNE—My Lords, I have had an opportunity of reading and considering the judgment which has just been delivered by my noble and learned friend on my right (Lord Watson), and I entirely concur in it.

LORD MACNAGHTEN—My Lords, I should not have troubled your Lordships with any observations if it had not been that in the arguments before the Court of Session, and in one at least of the opinions delivered there, the case of *Lee* v. *Alexander* was treated as laying down a canon of construction favourable to the respondents' contention. It does not appear to me that the respondents' contention can derive any support from anything that was said in *Lee* v. *Alexander*, or that any exception can be taken to the way in which a well-known canon of construction is stated in that case. As regards the question before your Lordships, the canon of construction applicable to deeds of conveyance must be the same whether the question arises in Scotland or in England. When the words in the dispositive or operative part of a deed of conveyance are clear and unambiguous, they cannot be controlled or corrected by reference to the other parts of the instrument. When those words are susceptible of two constructions, the context may properly be referred to for the purpose of determining which of the two constructions is the true meaning. In order to justify a reference to the context for this purpose, it is not necessary that the language of the dispositive or operative clause should be ambiguous in the sense that without some help you cannot tell which of the two meanings should be taken. The rule applies though one of the two meanings is the more obvious one, and would necessarily be preferred if no light could be derived from the rest of the deed. For the purpose of construing the dispositive or operative clause, the whole of the instrument may be referred to, though the introductory narrative or recitals leading up to that clause are perhaps more likely to furnish the key to its true construction than the subsidiary clauses of the deed.

In the deed of the 28th of July 1837 the dispositive clause (omitting the qualifying words "all as at present possessed by the said John M'Arthur Moir and his tenants") is susceptible of two meanings. It is the usual and proper clause for conveying an estate of superiority, and it is also framed in the proper way for conveying the lands and all within them. If there were nothing to throw light upon the meaning of the parties the latter construction would undoubtedly be preferred. But the words "all as at present possessed by the said J. M. Moir and his tenants" qualify the sentence which precedes them. Those words are, I think, clear and unambiguous—that is to say, that when you have ascertained what lands answering the description of "the town and lands of Hillfoot" were immediately before the disposition possessed by Moir and his tenants, the subjects to which the disposition applies are clearly defined. The word "possessed" is not a word of technical meaning. It must be taken in its ordinary signification. But one thing is clear—There is no sense in which it can be said that Moir or any tenant of his was possessed of the reserved coal within the lands in question. That is not suggested on behalf of the respondents. What they say is that the words are merely demonstrative, and simply denote the boundaries of the property or the extent of the surface in the visible possession of Moir and his tenants. That seems to me, with all deference, to be a very forced and unnatural meaning to attribute to the words in question. And it is, perhaps, a little inconsistent to say that the language of the dispositive clause must be construed so strictly that you are to shut your eyes to any light that the rest of the deed may afford, and at the same time you are to treat an integral part of that clause as conveying only a faint and imperfect impression of its full and proper meaning.

If those qualifying words had applied to all the subjects disponed, it would not, I think, have been necessary to have referred to the context at all. They do not, however, apply to the lands of Lochyfaulds and some other small pieces of ground, all of which at one time belonged to Hillfoot, and were at the date of the disposition in the possession of Moir. It becomes, therefore, necessary to turn to the narrative for the purpose of seeing whether a distinction was intended to be made between the lands of Hillfoot and the other lands contained in the disposition. It seems, to me, clear that there was no such intention. On the

narrative taken by itself it is plain that the subject sold and the subject intended to be disposed was an estate of superiority only, and that all the lands referred to and intended to be dealt with were lands belonging in property to Moir. It seems, therefore, to be the fair and necessary inference that the words "all as possessed by J. M. Moir and his tenants" were not introduced for the purpose of drawing a distinction between the reserved coal within the lands to which those qualifying words apply, and the coal within the other lands specified in the dispositive clause. But being introduced as a definition of the lands of Hillfoot without any such special object, they do show, I think, very clearly that the intention of the parties in the dispositive clause was the same as the intention apparent on the face of the narrative, and the weight and effect of their introduction is not, I think, to be limited to the lands of Hillfoot only.

LORD FIELD—My Lords, the great conflict of opinion between the learned Judges of the Court of Session would seem to show that the case is not unattended with difficulty. But the very clear and complete exposition of the arguments and reasoning upon which the differing judgments of their Lordships rest has enabled me to estimate them and follow them, and I have come to the conclusion that the reasoning of the minority ought to prevail, and that the judgment of the Court of Session cannot therefore be supported.

The question is, as your Lordships are already aware, whether the coals in the lands comprised in the disposition of the 28th of July 1837 passed by that deed to the respondents' author. There is no doubt that at the date of it, and before its execution, these coals were vested in the disponer Scott, the trustee of the estates of Crawfurd Tait, as a separate tenement and as part of the barony and estate of Campbell, or that he was also entitled to the superiority and feu-duty of those lands which, except the coals, belonged in property to the respondents' author. It is equally clear that the superiority and feu-duty had been purchased by the latter either by public roup or private bargain, and that the disposition of 1837 was executed for the purpose of implementing those purchases, and I think those purchases only. But it is also, I think, clear that the language of the dispositive clause is sufficiently large in itself and taken by itself to have included the coals; and therefore if I had been compelled to have regard to that clause alone I should have been obliged to hold that the coals did pass, whatever might have been my view as to the real intention of the parties apart from the deed. Certainly I should have also done so, and willingly, if the dispositive clause in the deed, or the deed in any other part, had contained language expressly or by necessary implication referring to the coals as part of the disponed property. I agree that clear and unambiguous language of the dispositive clause cannot be cut down by other language leading to a contrary intention. But then (and this is where I differ from the majority of the Court of Session) it seems to me that the language of the clause, although habile to pass the whole tenement from the sky to the centre of the earth, is equally habile, having regard to the practice of conveyancing and to what I understand to be the legal theory as to lands which have been feued remaining within the title of the superior, to pass the mere superiority and feu-duty, of which the excepted coals form no part, for they are part of the original proprietorship of the whole barony.

I need not trouble your Lordships with a further expression of my views, for they have been clearly and fully expressed to your Lordships by my noble and learned friends who have preceded me, but the result is that of the two possible interpretations of the language of the dispositive clause the narrower one is the true one; and this view has the great advantage of carrying out what I am quite satisfied was the real intention of the parties.

The House found that the appellant is entitled to a decree of declarator that he has the sole and exclusive right to the coals within the lands mentioned in the terms of the summons; and that the case be remitted with that declaration to the Court below.

Counsel for the Appellant—Solicitor-General for Scotland (Asher, Q.C.)—Graham Murray, Q.C.—Morison. Agents—Grahames, Currey, & Spens, for Alexander Morison, S.S.C.

Counsel for the Respondent—Lord Advocate (J. B. Balfour, Q.C.)—MacWatt. Agent—A. Beveridge, for Carmichael & Miller, W.S.

COURT OF SESSION.

Tuesday, March 14.

FIRST DIVISION.

[Sheriff of Lanarkshire.

HIGGIN *v.* PUMPHERSTON OIL COMPANY, LIMITED.

Sale — Delivery by Instalment—Condition that each Delivery shall Constitute a Separate Contract—Measure of Damages.

By contract-note dated 26th March 1890, an oil company sold to a candle-maker 20 tons paraffin wax, "to be delivered free . . . during the next twelve months, in about equal monthly quantities, . . . to be taken delivery of when tendered, and paid for by cash within fourteen days."

The contract-note contained this clause—"Each delivery shall constitute a separate contract."

The only deliveries during the twelve months were 1 ton in September 1890