

Now, that must depend upon the terms of the bond of caution, which seems to be a curious and in some respects very stringent document. The obligations undertaken are—1st, that the principal obligant shall faithfully discharge his duties as bank agent, and follow out all instructions given to him; 2d, that he will account for all moneys entrusted to him as agent; 3d, liability for losses through fire or robbery; 4th, a liability of one-eighth per cent for all bills discounted; and 5th, a liability for overdrafts. Now, the liability incurred under this 5th head appears to be the only one which comes at all near to the present question, and it is expressed in these terms:—"And that I and the said cautioners, and our respective foresaids, shall be liable, conjunctly and severally, to the said banking company for all loss that may be sustained by forged bills, or by bills not duly protested or negotiated, as also for the regularity of all the vouchers and accounts of my transactions in conducting the said business, and in particular for the regularity of the vouchers of sums drawn out upon cash-credits granted by the directors of the said banking company, and for all sums drawn out upon such credits beyond the sums for which the same have been granted, as well as for all sums drawn out of any current or deposit account beyond the sums which may be at the credit of such accounts, with interest thereof." Now, clearly the kind of risk which was intended to be covered by this clause was that of overdrafts allowed by the agent to customers without the bank's consent. But the present case is very different; it consists of a series of increasing advances by the bank to their agent on his own account as an individual. On that ground it appears to me that the pursuers cannot succeed in the present action, which is laid entirely on the bond of caution. I am therefore for recalling the interlocutor of the Sheriff, and for assailing the defender.

**LORD MURE**—I am entirely of the same opinion. This is an action laid solely on the bond of caution, in which the cautioner undertakes to make good defalcations, and that the agent will faithfully discharge his duties as such. If this had been a bond for a cash-credit, it would have been an entirely different matter. It was clearly the intention of the bank by this bond to prevent the agent allowing customers to overdraw too heavily, to the detriment of the bank; but there is no provision in it that I can see involving the cautioner in liability for overdrafts by the agent himself, and sanctioned by the bank. On these grounds I think the pursuers cannot succeed.

**LORD SHAND**—I am clearly of the opinion expressed by your Lordships. There can be no doubt that this is a bond of caution by a bank agent for the faithful discharge of his duties. The clauses of the bond to which your Lordship has referred make that, I think, sufficiently clear. The cautioners were to be cautioners for faithful acts, but not in any sense for cash-credits involving, as the latter would, the solvency of the principal obligant. If that be clearly kept in view, then no difficulty arises in dealing with the case. The sum sought to be recovered is the balance of the £500 which the cautioners fixed as the limit of their individual liability, and in any event the bank must be a heavy loser. But Alexander

Fleming says that he had the bank's authority to open this account; the officials, indeed, deny this, but there can be no doubt that its existence came to be known to them very soon after its commencement. Bills were drawn and operated upon, and the advances went on increasing. It appears that the officials grumbled a little, but they seem to have taken no active steps to put an end to the transaction. Had Alexander Fleming continued his overdrafts after the bank officials had prohibited him from doing so, then the cautioner would undoubtedly have been made responsible, but so far from their prohibiting, I have come clearly to be of opinion that the bank officials all along sanctioned this account, and that the overdrafts proceeded upon that footing. In these circumstances, taken along with the fact that this is not a bond for a cash-credit, or granted as a guarantee for the solvency of the agent, I consider that this transaction does not fall under the risks undertaken by the cautioners. In saying this I wish it to be understood that the only question which I am considering is whether or not these advances referred to fall under the terms of the bond of caution. There may be many ways in which the pursuers may be able to make good their claim against the defender, but the advances which we are here dealing with being in my opinion advances by a bank to its own agent, cannot, I think, be covered by the terms of a bond for the faithful discharge of duty.

**LORD DEAS** was absent.

The Court recalled the interlocutor of the Sheriff, and assailed the defender from the conclusions of the action, but in respect that the ground of defence on which he had been successful was for the first time stated during the debate on the appeal, found no expenses due.

Counsel for Pursuers (Respondents)—Mackintosh—Darling. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for Defender (Appellant)—Rhind. Agent—Alexander Wardrop, L.A.

Friday, November 24.

FIRST DIVISION.

[Lord M'Laren, Ordinary.]

LEE V. GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY AND ALEXANDER.

*Property—Feu—General Conveyance—Ambiguity in Terms—Competency of Reference to Prior Agreement—Superiority.*

Where a conveyance is ambiguous but contains a distinct reference to a prior agreement between the disponent and disponentee, which has been committed to writing, it is competent to refer to that agreement for the purpose of explaining the ambiguity.

There being in a general conveyance of superiorities an ambiguity as to whether the superiority of the lands of A was intended to be included, *held* competent to read, with the view of explaining the ambiguity, a missive

letter and acceptance constituting the agreement of parties, which agreement was referred to in the narrative of the disposition.

Colonel Alexander was fee-simple proprietor of the estate of Ballochmyle, in the county of Ayr. The estate was held partly of the Crown and partly of subject-superiors, and until the transactions after-mentioned portions of it were held of the Earls of Loudoun. The Glasgow and South-Western Railway passes through the lands, and in 1851, and again in 1873, portions of the estate were parted with to the railway company for the purposes of their line. By feu-disposition, dated 1st April 1878, Colonel Alexander disposed to the railway company one imperial acre of ground in the parish of Mauchline and county of Ayr, with the servitude right of leading pipes from a reservoir to be formed upon the said acre of land to the company's station at Mauchline. The consideration given by the company was an annual feu-duty of £17. Although described in the feu-charter as held of the Crown, this piece of land was in this action averred by Colonel Alexander to be part of the lands of Welton, which were held of Mr Campbell of Catrine, with whom he had entered. In the month of May 1879 the representatives of the Earl of Loudoun exposed for sale the superiorities of certain baronies in the county of Ayr. J. B. W. Lee, S.S.C., Edinburgh, purchased at the roup, and subsequently by private bargain, a large number of these superiorities, and among others the superiority of certain lands which belonged to Colonel Alexander. Negotiations were thereafter entered into between Lee and Alexander for the purchase by the latter of the superiorities which affected his lands (not including the superiority of those portions which had been sold to the Glasgow and South-Western Railway Company), and the price agreed upon was £1750. Some doubt also arose as to whether the superiority of the lands of Mossward and others was included in the purchase, and Lee then offered to sell the superiority of Mossward for £30, provided he was allowed to retain the superiority of the lands sold by Alexander or his predecessors to the railway company. The offer, which was by missive letter dated 13th October 1879, was duly accepted, and is quoted and referred to in the opinion of the Lord President.

By disposition dated 12th, 19th, and 26th Dec. 1879, granted by R. Mackie and A. Dunlop, commissioners for the Loudoun family, in favour of Lee, the superiorities which he had purchased were conveyed to him. Some doubt having arisen as to whether a portion of the lands conveyed to the railway company in 1851 was held of the Earls of Loudoun or of Colonel Alexander, the latter was made a party to the disposition, and the following clause was inserted therein—“And whereas the *dominium directum* or superiority of the lands of Mossgavil, Lochbroom, and others, of which some portions of the subjects hereinafter disposed form or may be held to form parts, belong to and is vested in me the said Claud Alexander.” In this disposition reference was made in the following terms to the agreement which had been entered into between Mr Lee and Colonel Alexander:—“In consideration of the sum of £100 now paid to us . . . as commissioners aforesaid, by the said J. B. W. Lee further on account of the price of said subjects purchased by him from us, as said is, 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.” . . . The subjects conveyed in the fifth place by the said disposition were as follows:—“All other lands and others in the county of Ayr, parts of the said estate of Ballochmyle and others, which belonged to me, the said Claud Alexander, and my predecessors, and have been disposed by me or them to the said Glasgow and South-Western Railway Company.” By the disposition it was declared that it did and should “convey the *dominium directum* only of the said lands and others as disposed to the said Glasgow and South-Western Railway Company, together with the whole right, title, and interest, present and future, of him the said Claud Alexander, in the *dominium directum* of the lands and others above disposed, with entry as at the term of Whitsunday 1878.” A dispute arose between the parties as to whether under this general conveyance was conveyed the superiority of the acre of ground feued by Colonel Alexander on 1st April 1878 to the railway company, Colonel Alexander maintaining that this superiority was not intended to be, and was not, included in the conveyance. The present action of declarator was raised by Lee, on the 18th February 1881, against the Glasgow and South-Western Railway Company and Colonel Alexander, concluding “that it should be found and declared that he had now the only good and undoubted right and title to the superiority or *dominium directum*, and all other rights which belonged to the said Claud Alexander” in that piece of land at the date of the disposition of 1879, when, according to the pursuer's contention, they were sold to him, “which piece of land and others before described are part and portion of all and whole the lands and tenantry of Ballochmyle and others in the county of Ayr.”

The defender Alexander pleaded, *inter alia*:—“(1) The pursuer not being proprietor of the superiority estate in question, has no title to sue the present action. (4) On a sound construction of the disposition libelled, and *separatim* of the said disposition and relative missive letters narrated therein, the pursuer was only entitled to retain or to have conveyed to him the superiority of subjects which had been held of the Earls of Loudoun, and which had been sold to the railway company, and as the subjects in question are not of that character the defender should be assoziized.”

The railway company pleaded—“(1) The pursuer's right to the said feu-duty being in dispute, and the defenders being ready and willing to pay the same to the party who shall be found entitled thereto, the pursuer is not entitled to decree against the defenders.”

By interlocutor of 15th February 1881 the Lord Ordinary of consent sisted further procedure against the defenders the Glasgow and South-Western Railway Company.

By interlocutor of 15th June 1881 the Lord Ordinary (CURRIEHILL), before answer allowed the parties a proof of their averments as to whether the lands in question were part of the lands and tenantry of Ballochmyle. From this proof it appeared that there was considerable difference of opinion as to whether the portion of ground feued to the railway company was part of the lands of Ballochmyle, or whether it was part of the lands of Welton

which were held under Mr Campbell of Catrine. No documents of a conclusive character were produced, and the evidence was chiefly that of aged persons who had resided long in the district, and spoke of what was currently understood in the neighbourhood.

On the 21st March 1882 the Lord Ordinary (M'LAREN) pronounced this interlocutor:—"Finds that the superiority of the subjects described in the summons is within the general conveyance contained in the deed of disposition by Robert Mackie and others and the defender in favour of the pursuer, dated in December 1879, and therefore decerns in favour of the pursuer, in terms of the conclusions of the summons: Finds him entitled to expenses as against the defender Claud Alexander," &c.

*Note.*—"In this case the question in issue is, whether the superiority of the lands described in the summons was conveyed under a general conveyance in the deed referred to, of 'all other lands and others in the county of Ayr, parts of said estate of Ballochmyle and others, which belonged to me, the said Claud Alexander, and my predecessors, and have been disposed by me or them to the said Glasgow and South-Western Railway Company.' A proof on the identification of the lands was allowed by the Lord Ordinary (CURRIE HILL) and in view of the statements on record I do not think that inquiry could have been avoided; but after considering the result of that inquiry, as shown in the proof and documents, I have come to the conclusion that the general words on which the pursuer founds are clearly descriptive of or applicable to any lands disposed by the defender Colonel Alexander to the Glasgow and South-Western Railway Company, and that their generality cannot be controlled by evidence tending to show that the lands in question were not originally part of the estate of Ballochmyle. In order to make my meaning clear, it is necessary to state that before the question arose Mr Lee, the pursuer, had acquired by purchase from Mr Mackie and Mr Dunlop, factors and commissioners for the representatives of the Hastings family, the superiority of various lands in the county of Ayr which belonged to the members of that family, including the superiority of Colonel Alexander's estate. By agreement between the pursuer and Colonel Alexander, the latter acquired, for the sum of £1780, the superiority of his own estate, so far as Mr Lee had acquired right to it, but on the condition, as expressed in the narrative of the disposition of December 1879, 'that the said J. B. W. Lee was to be allowed to retain, or was to have conveyed to him, the superiority of all the subjects and lands which had belonged to me the said Claud Alexander, or my predecessors, and had been sold by them to the Glasgow and South-Western Railway Company.'

"In pursuance of this agreement Mr Mackie and Mr Dunlop were to convey to Colonel Alexander, with Mr Lee's consent, the *dominium directum* of the lands of Ballochmyle so far as held of the Hastings family; and Mr Mackie and Mr Dunlop, along with Colonel Alexander, were to convey to Mr Lee, for their respective rights and interests, the *dominium directum* of so much of the lands of Ballochmyle and others as were vested in property in the Glasgow and South-Western Railway Company. Apparently the principle or scheme

of division was that Colonel Alexander wished to hold his own lands direct of the Crown, but did not wish to be the proprietor of mere superiorities, and therefore was willing that Mr Lee should be the superior of lands conveyed to the railway company. Such, I think, is the conclusion to be drawn from the narrative of the deed. In the dispositive clause Mr Mackie and Mr Dunlop, together with Colonel Alexander, are made joint disponers, the reason being apparently that there were certain subjects of which it was not quite certain whether the superiority belonged to the Hastings family or to Colonel Alexander. As the right certainly belonged to one or other of them, a conveyance by both for their respective rights and interests was obviously the best way of giving a title to Mr Lee. The dispositive clause enumerates the four subjects, which are described by locality and measurement, and also conveys (Fifth) 'All other lands or others in the county of Ayr, parts of said estates of Ballochmyle and others, which belonged to me, the said Claud Alexander, and my predecessors, and have been disposed 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,' &c. The subjects in dispute consist of a piece of land feued by Colonel Alexander to the railway company for the purpose of forming a reservoir, with a servitude of aqueduct thence to the railway line. It is contended by the defender that the site of the reservoir, although his property, does not form part of the old Ballochmyle estate, but is within the boundaries of the property of Welton, acquired by his family in the latter part of last century from Professor Dugald Stewart. He contends that, according to the tenor of his agreement with Mr Lee nothing was to be retained by or conveyed to Mr Lee except portions of the Ballochmyle superiorities which Mr Lee had acquired from the Hastings family. According to the evidence, I am disposed to think that the reservoir is part of the Welton property, held formerly of the Stewart family, and now of Mr Campbell of Catrine. But I do not consider it necessary to express a final opinion on that question, because I am unable to find in the disposition of December 1879 any such ambiguity or any such evidence of intention to restrict the generality of the words of conveyance as would justify the letting in of extrinsic evidence to explain or limit the grant. I am not satisfied that the disposition to Mr Lee was to be confined absolutely to superiorities acquired from the Hastings family. There are various considerations adverse to this reading of the contract—(1) If the Hastings superiorities only were in view, it was not necessary that Colonel Alexander should be a party to the disposition. The Hastings superiorities were not vested in him, and it was only necessary to recite the agreement between him and Mr Lee, or at most to make Colonel Alexander a consenting party in respect of the antecedent agreement. (2) But further, it clearly appears from the narrative clause of the deed that there were certain superiorities pertaining to Colonel Alexander himself which did or might be held to extend to the railway subjects. These are referred to as the superiority of the lands of Mossgavil, Lochbroom, and others. The words 'and others' occurring in a contract relating to superiorities of undefined

tenure and extent are so vague and general as really to justify the inclusion of any small superiority which the granter has power to dispose, and which fulfils the limiting condition of being the superiority of subjects sold to the railway company. Further, it does not appear that Colonel Alexander meant that his part of the conveyance should be limited to the superiorities described as Mossgavil and Lochbroom, if, as I understand, these superiorities are intermixed with those of the Hastings family. It rather appears that the limit he had in view was that the superiorities conveyed should be co-extensive with the *dominium utile* of lands conveyed to the Glasgow and South-Western Railway Company. (3) In this connection the words 'which have been disposed by me or them' are important. It is in evidence that there are no other superiorities to which the general conveyance can apply except the reservoir; all the other lands conveyed by Colonel Alexander and his predecessors to the company being enumerated under heads 1, 2, 3, and 4. If, therefore, it was not intended that Mr Lee should become superior of the reservoir, it is unfortunate that the parties should have introduced into their deed a general conveyance which can have no other meaning or effect than that of the inclusion of the superiority of the reservoir. Even if there had been other subjects not specially described, but answering to the description of lands conveyed by the defender to the railway company, I should have difficulty in giving effect to evidence intended to exclude the reservoir. But as there are no other subjects, or at least none have been pointed out to which the general conveyance can apply, I have come to a clear opinion on the case.

"The defender desired" that his right to challenge this construction of the deed on the ground of essential error should be reserved. I do not think that the question of essential error can be dealt with in this action, and I have therefore given decree without qualification. But it will be open to the defender to raise the question of essential error by action of reduction, if so advised."

The defender reclaimed.

Authorities—Bell's Princ., sec. 676; *Buttery*, 3 L.R., App. Ca. 554.

At advising—

LORD PRESIDENT—This is a declarator of property by which the pursuer seeks to establish his right to the mid-superiority of a portion of the estate of Ballochmyle belonging to the defender, and which the defender feued to the Glasgow and South-Western Railway Company on 1st April 1878. The defender and his predecessors had some years previously sold portions of the estate of Ballochmyle to the said railway company for the purposes of their line, and it was understood at the time by all parties that the lands thus parted with were held of the Earls of Loudoun. When the disposition, however, came to be prepared, doubts seem to have arisen whether a portion of the lands thus conveyed was held of the Earls of Loudoun, and expression was given to that doubt by declaring that the "superiority of the subjects, of which the portions hereinafter disposed form parts, belongs to and is vested in me the said Claud Alexander."

The pursuer's case is that the mid-superiority

of this feu, which would give him a right to the feu-duty of £17 per annum payable by the railway company for the portion of the Ballochmyle estate feued on 1st April 1878, is embraced in a conveyance to him by the defender in December 1879. The words of that disposition are—"All other lands and others in the county of Ayr, parts of said estate of Ballochmyle and others, which belonged to me the said Claud Alexander and my predecessors and have been disposed by me or them to the said Glasgow and South-Western Railway Company." Now, these words are so general as to admit of construction, and for the purposes of construction it is necessary to attend to the narrative and to the circumstances under which this deed was originally granted.

It appears that the superiority of the estate of Ballochmyle was vested in the Earls of Loudoun, who in turn held of the Crown. In 1878 the representatives of the Earl of Loudoun exposed for sale the superiorities of certain baronies in the county of Ayr, and these were purchased by the pursuer for a *cumulo* price of £5290. Thereafter negotiations were entered into by the pursuer and defender for the sale to the defender of the superiorities of the estate of Ballochmyle, in so far as these had been conveyed to the pursuer by the Loudoun family, and the price agreed upon was £1750. A question arose as to how much was intended to be conveyed by this arrangement, and especially whether the superiority of the lands of Mossgavil was included, and the matter was arranged by the pursuer offering to sell the superiority of these lands for an additional sum of £30, provided he was allowed to retain the superiority of the lands sold by the defender or his predecessors to the railway company. The defender did not care to hold the superiority of lands of which the *dominium utile* had passed to others, but he was anxious to secure his own superiorities. In the disposition to the pursuer of December 1879 the portions of land sold to the railway company by William Maxwell Alexander, the defender's predecessor, are described as the first and second, and those by the defender as third and fourth, the *dominium utile* of which was thus parted with; and then the following passage occurs—"and whereas the *dominium directum* or superiority of the lands of Mossgavil, Loch Broom, and others of which some portions of the subjects hereinafter disposed form, or may be held to form parts, belongs to and is vested in me the said Claud Alexander," this accounting for Colonel Alexander being made a disposer along with the commissioners of the Loudoun family to Lee the pursuer; and then the deed goes on to say—"therefore in consideration of the sum of £100 now paid to us, the said Robert Mackie and Alexander Milne Dunlop, as factors and commissioners foresaid, by the said J. B. W. Lee further on account of the price of said subjects purchased by him from us as said is, 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, and I, the said Claud Alexander, so far as regards the subjects the superiority of which is vested in me as before mentioned, do hereby dispose to the said J. B.

W. Lee, and his heirs and assignees or disponees whomsoever," &c. Now, so far as Colonel Alexander is concerned, this agreement here referred to was the consideration upon which the disposition proceeds, and it is of value in helping to construe the dispositive clause in the deed itself, and in so making use of it I wish carefully to guard against it being supposed that I am in any way violating the well-known rule of law that in construing a written deed no regard can be paid to informal missives which preceded it; but where as in the present case the conveyance is ambiguous, and where there is a direct reference made to the preceding agreement, then I think we are entitled to look into that agreement and to discover if possible what its terms exactly are. Now, this agreement is contained in a long correspondence, which is referred to in the defender's statement of facts, from which it appears that negotiations had been entered into between the pursuer and defender for the purchase by the latter of the superiorities of certain of his lands (including the superiority of those portions which had been sold to the Glasgow and South-Western Railway Company), and the price agreed upon was £1750. A doubt, however, arose whether this agreement included certain superiorities of Mossward and others, and accordingly a letter was written by the pursuer to the defender's agents on the 13th October 1879 in the following terms:—"Dear Sirs,—In addition to what I have already sold to Col. Alexander, I hereby offer to sell to him for the sum of thirty pounds additional—(1) Thirteen acres called Mossward; (2) Andrew Allan's house and yard; (4) three acres two roods and thirty-one falls called Newlands; and (5) 3½ acres called Rodding or Redding, being parts of sub-branch two of lot 2 of particulars of sale of Mauchline, &c. And in respect that I am to be allowed to retain, or am to have conveyed to me, the superiority of all the subjects and lands which belonged to Col. Alexander or his predecessors, and sold to the Glasgow and South-Western Railway Company, I hereby offer further to convey to the Colonel all other right and interest which I have or may have in and to the superiorities and feu-duties and casualties of and pertaining to the estate of Ballochmyle, as presently held and possessed by Col. Alexander,—the Colonel consenting to the disposition in my favour of the superiority of the parts sold to the railway company as aforesaid. The conveyance to be granted by the heirs of the Loudoun family with my consent, and to have warrantice from fact and deed only," &c. Here then we have the true arrangement between the parties—first, the Mossward superiorities are to be given to Colonel Alexander at the price of £30, and then follows the further offer on Mr Lee's part to convey to Colonel Alexander all other right that he may have to the Ballochmyle superiorities on condition that he is to retain the superiority of all the subjects Colonel Alexander sold to the Glasgow and South-Western Railway Company—that is to say, Mr Lee is to retain or have conveyed to him the superiority of the lands made over to the railway company. There was to be a conveyance to Colonel Alexander with Mr Lee's consent, and also a conveyance to Mr Lee with Colonel Alexander's consent. Now, the subjects here dealt with are subjects the superiorities of which are vested in the Loudoun family, and the conveyance

is to be granted by the heirs of the Loudoun family. As to the subjects sold by Colonel Alexander to the railway company, the title stands thus. In 1851 certain portions of land were sold to the railway company by Colonel Alexander's predecessor, and in 1873 a further portion was disposed by Colonel Alexander himself, and in both cases the Alexander family were divested entirely. But more recently, on 1st April 1878, a feu was granted to the railway company of a piece of ground near Mauchline station for the purpose of providing a reservoir for the said station, with an annual feu-duty of £17. Now, the mid-superiority of this piece of ground remained in Colonel Alexander. In the following month of May Mr Lee bought the feu-duties already referred to, and the question comes to be, was it intended that this sub-feu should be embraced in the agreement then entered into between Mr Lee and Colonel Alexander? Now, it appears to me that there are great difficulties in the way of holding that this sub-feu was so embraced. Colonel Alexander would not have been a disponent at all but for the circumstance I have previously referred to, and which was that it was discovered that he was superior of the lands of Mossgiel. But if we turn to the first and second heads of the conveyance to the pursuer of December 1879 we find that in neither of them is the conveyance to the railway company included. Now, all that Mr Lee acquired from the Loudoun family and the defenders was superiorities in this sense, viz., the *dominium directum* holding of the Crown. I can find no words that can be read as meaning that Mr Lee was to have any other superiority but that holding of the Crown, and that was the character which pertained to all the subjects sold by Colonel Alexander and his predecessors to the railway company. But the superiority of those lands which were feued to the railway company on April 1st 1878 did not belong to the defender at all. If it is in the Loudoun family, then Mr Lee may obtain it from them, and so make himself the defender's superior, but no such process as this will ever make him the superior of the railway company, to the effect of giving to him any right to the feu-duty of £17 per annum claimed in this action. In these circumstances it seems to me that the pursuer cannot prevail. The case is complicated, but whenever the substance of the agreement is reached, it is made perfectly clear that the pursuer can get nothing from the defender, any more than he can from the commissioners of the Loudoun family. All that he possibly can get is a bare superiority holding of the Crown. I am therefore for recalling the interlocutor reclaimed against, and for assailing the defender from the conclusion of the action.

LOED MURE—I concur. I think that it is absolutely necessary to keep in view the position of the pursuer and defender at the time when this disposition was granted. This we gather partly from the narrative and also from the minute of October 13, 1879, which appears to me to be one of the most important parts of this agreement. I agree with your Lordship that in construing the disposition we are entitled to look at this agreement without interfering thereby with any of the well-established rules applicable by written deeds, because this agreement is by

reference made part of the bargain between the parties. It appears that the Loudoun family about 1878 were anxious to dispose of certain superiorities which they held under the Crown, and these were purchased by the pursuer of the present action for about £5000, and amongst these superiorities was one lot which applied to the estate of Ballochmyle. Now, it appears that Colonel Alexander held principally of the Loudoun family, but to some extent also under the Crown, and he thought that he would like to purchase a portion of these superiorities, and hence the arrangement with Mr Lee, the pursuer. The object of the purchase was to enable Colonel Alexander to hold the whole of his estate of the Crown. Portions of the estate had however been parted with to the Glasgow and South-Western Railway Company, and it was arranged between the parties that the superiority of these portions should remain with or be made over to the pursuer; but throughout the whole transaction it was superiorities *ejusdem generis* that were being dealt with, and were all to be held under the Crown. This appears from the deed itself, and removes all doubt. The feu-duty of £17 per annum is a matter with which the Loudoun family had nothing whatever to do, for the words of the deed are, "declaring that these presents do and shall convey the *dominium directum* only of the said lands and others as disposed to the Glasgow and South-Western Railway Company, together with the whole right, title, and interest, present and future, of the said constituents of us the said Robert Mackie and Alexander Milne Dunlop, and of me the said Claud Alexander."

Now, it appears to me to be quite foreign to the whole transaction that Lee should have got this feu-duty in question; therefore I concur with your Lordship in holding that what the pursuer really secured was superiorities to be held under the Loudoun family.

LORD SHAND—I am of the same opinion, and have no doubt that what was intended to be sold under the agreement was the superiority of lands belonging to the Earls of Loudoun, sold to the Glasgow and South-Western Railway Company by Colonel Alexander. That being so, it is clear that the superiority of the subject of this action was not sold or intended to be sold under that agreement. If the question had arisen in the adjustment of a conveyance the pursuer would not have prevailed, but it was a matter for consideration whether this deed was not so loosely framed as to carry this superiority also; but holding as I do that we can look at this agreement and read the deed in the light of it, I am clearly of opinion that the feu-duty of £17 is not carried by it, and that the pursuer therefore cannot prevail.

The Court recalled the interlocutor of the Lord Ordinary, and assolized the defender from the conclusions of the summons.

Counsel for Pursuer—Campbell Smith—Rhind.  
Agent—J. B. W. Lee, S.S.C.

Counsel for Defender—Mackintosh—Rankine.  
Agents—A. & A. Campbell, W.S.

Friday, November 24.

OUTER HOUSE.

[Lord Fraser.

NIXON v. THE NORTH BRITISH RAILWAY COMPANY.

*Process—Expenses—Fees to Counsel.*

An action of damages for bodily injury was settled after the closing of the record by the pursuer's acceptance of a tender of a sum in full of his claims. Under the tender he was also entitled to expenses of process. Held (by Lord Fraser, Ordinary) (1) that he was entitled to include in his account of expenses as against the defenders a fee to senior counsel for advising as to the acceptance of the tender; but (2) that the pleadings being of a simple and ordinary nature, he was not entitled to include a fee to senior counsel for assistance at adjusting and closing the record.

William Nixon brought this action against the North British Railway Company concluding for £2000 as damages for bodily injury. The action was compromised after the record was closed by the pursuer's acceptance of a tender of £500 and expenses. In taxing the pursuer's account of expenses the Auditor disallowed (1) a fee of £3, 3s. to senior counsel (with agency charges relating thereto) for assistance in adjusting and closing the record; (2) a fee of £1, 1s. to senior counsel for advice as to acceptance of the defenders' tender.

The pursuer lodged a note of objections to the Auditor's report with regard to these two items, and argued that the Auditor ought to have allowed both against the defenders.

The Lord Ordinary having heard counsel, repelled the objections to the Auditor's report as regarded the fee to senior counsel for adjusting the record, on the ground that there had been no special difficulty requiring the assistance of senior counsel connected therewith, but sustained the objection as regarded the fee for advising as to a settlement, on the ground that the question of the acceptance or rejection of a tender required the experience and advice of senior counsel.

Authorities—*Stott v. M'William*, March 1, 1856, 18 D. 716; *M'Dougall v. Caledonian Railway Company*, June 28, 1878, 5 R. 1011.

Counsel for Pursuer—Kennedy. Agent—John Macpherson, W.S.

Counsel for Defender—Dickson. Agents—Millar, Robson, & Innes, S.S.C.