it ought not to allow the mere letter of the particular clause to prevail over that intention. Now by the intention of the testator is meant an intention expressed in the will itself, and accordingly the learned Judge goes on to explain the ground of his construction of the particular will which he was considering. By that will the testator had directed an equal division of certain portions of his estate among his daughters for their separate use. Well, then, when the Vice-Chancellor found that one particular bequest appeared, when construed literally, to be repugnant to that plain intention, he had no difficulty in saying that that intention must prevail against the letter of that particular clause. The principle was explained in exactly the same way in the case of *Mellor* v. *Daintree*, and I do not think it can be stated more clearly than in the passage which was quoted from the opinion of Mr Pemberton Leigh, afterwards Lord Kingsdown, where he says that "when the main purpose and intention of the testator are ascertained to the satisfaction of the Court, if particular expressions are found in the will which are inconsistent with such intention, though not sufficient to control it, or which indicate an intention which the law will not permit to take effect, such expressions must be discarded or modified; and on the other hand, if the will shows that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to devise, the Court has to supply the defect by implication, and thus to mould the language of the testator so as to carry into effect as far as possible the intention which it is of opinion that the testator has on the whole will sufficiently declared."

Now I look in vain in this will for any declarator of intention whatsoever, except that which is to be inferred from a comparison of four separate and independent bequests. I think no inference can reasonably be drawn from such a comparison. It may very well be that when the effect of these bequests is considered one of them may appear somewhat capriciously to deny to certain persons a benefit which is given to persons in a similar position in the other bequests; but that is not a sufficient ground for inferring that the testatrix did not intend her plain words in that respect to receive effect. A testator is entitled to be arbitrary and capricious if he pleases; and the capriciousness is merely *apparent* capriciousness, for the Court does not know the reasons which may induce a testator to give a benefit to one part of a family and not to another. I do not find in the will an expression of general intention to which the bequest, literally construed, is found to be repugnant. It is impossible to infer uniformity of intention from a series of independent bequests when the only thing that creates the difficulty is that the bequests are not uniform. The assumption of a general intention to make an equal division appears to me to be without basis in fact, since all we know is that the testatrix gives three bequests in one way and a fourth in another way.

I therefere come to the same conclusion as Lord Dundas, that there is no sufficient reason for overruling the clear expression of the testatrix. I assent to the view expressed by both Lord Johnston and Lord Dundas that there is some apparent hardship to the parties immediately concerned, but I do not think that is a matter which can be considered by the Court in construing the settlement; it is a consideration for the testator, but not for us.

The result therefore will be that we shall answer the first question in the affirmative, and that being so, I do not think the other questions arise, unless in form, and they are not pressed.

The Lord President and Lord Salvesen were not present.

The Court answered the first question of law in the affirmative and found it unnecessary to answer the other questions.

Counsel for the First Parties—Macfarlane, K.C.—Spens. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for the Second Parties—Blackburn, K.C.—Macmillan. Agents—R. Addison Smith & Company, W.S.

Counsel for the Third, Fourth, Fifth, and Sixth Parties—C. D. Murray, K.C.—Hon. Wm. Watson. Agents—Webster, Will, & Company, W.S.

HOUSE OF LORDS.

Thursday, July 21.

(Before the Lord Chancellor (Loreburn), Earl of Halsbury, Lord Kinnear, and Lord Shaw.)

HOULDSWORTH *v.* GORDON CUMMING.

Sale—Sale of Heritage—Subject—Extrinsic Evidence—Titles — Estate-Name — Proof —Admissibility of Parole and Other Extrinsic Evidence to Explain the Subject of a Completed Sale of Heritage.

All that passed, either oral or in writing, in the negotiations leading up to a completed contract of sale of heritable property is admissible in evidence to prove what was the subject of the sale, not to alter the contract, but to identify the subject.

Per Lord Kinnear—"The meaning of a descriptive name in a particular contract cannot be determined by a fixed rule of law without regard to the facts of the case. . . . I agree that a contract to sell the lands contained in a certain title is perfectly possible, and would give the purchaser right to everything which the seller and his predecessors had in fact possessed under that title. I would be disposed to concede further that if an estate is sold under a general

name, without reservation or restriction expressed in the contract, or capable of being proved by competent evidence, the reasonable inference is that what is intended is the estate so named which the seller holds under a valid title. And if it be assumed that the contract covers the whole estate, the buyer would be entitled to a disposition according to the description contained in the existing titles, because *ex hypothesi* the intention of the contract is to transfer to the disponee everything to which the disponer had right. But if there be any question whether the subject sold is less or more than the whole estate possessed, that cannot be solved by the title unless the contract has been made with express reference to the title. The mere coincidence of names proves nothing, because names are not used in the ordinary transactions of business with exact reference to title-deeds, and the local use of estate names may vary indefinitely as boundaries may shift from time to time."

This case is reported *ante ut supra.*

The defender (respondent in the Inner House) appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—This is a dispute as to how much land was bought by Mr Houldsworth on a contract of sale in December 1907.

With unfeigned respect to the learned Judges of the Second Division, I think the Lord Ordinary was right in his conclusion.

Both the parties come before your Lordships saying that they made a valid contract, and differ only as to the boundary of what was sold. Sir William Gordon Cumming claims that he sold according to a plan. Mr Houldsworth contends that he bought according to an instrument of disentail of 31st December 1886, which is a disentail of the "lands and barony of Dallas."

Now I am not in the least satisfied that the "estate of Dallas" is the same thing as the "lands and barony." On the contrary, there is no title specifically of the "estate," and the effect of treating it as equivalent to the lands and barony would be to substitute in the contract of sale a different description of the subject for that which the parties used. The proprietor owned not only Dallas but the contiguous property of Altyre; and in 1887 he cut out an area which he then designed to sell, denominated it the "estate of Dallas," and had it delineated on a plan, No. 46 of process. I cannot see ground for assuming that a sale by name of the one subject is a sale by name of the other. This, however, does not affect the case from my point of view, for I hold that the sale was in fact on the plan. As I have the misfortune to differ from the Second Division, I must state the material facts on which my opinion proceeds.

For the purpose of selling in 1887, a small plan, 30 inches or thereabouts in length, had been prepared. There is no question that it exhibited intelligibly and quite accurately the boundaries and the area. It also contained a clear statement of the acreage, and confessedly states with sufficient precision the dimensions of what Sir William wished to sell. It purports, on the face of it, to be a plan of the estate of Dallas, and in the negotiations throughout, the area to be sold was called "the Dallas estate."

Not succeeding in 1887, Sir William again put this "Dallas estate" on the market in 1907, and Mr Houldsworth proceeded to negotiate for it. Ultimately, in December 1907, both parties agree in maintaining that a contract of sale was effected, though they differ as to what was the subject sold.

In my view these negotiations are crucial, and all that passed, either orally or in writing, is admissible in evidence to prove what was in fact the subject of sale, not to alter the contract but to identify its subject.

These negotiations began in March and were suspended in the summer. At the end of the year they were renewed, and ended with a written offer of an option, and an acceptance thereof in December 1907. All through, only one subject was the subject of negotiation, viz., the Dallas estate. Accordingly, anything which will identify that estate is equally important, whether it occurred at the commencement or at any other stage of the negotiations.

The material passages in this dealing are shortly as follows:—Seller's agent furnishes a statement of the acreage of the Dallas estate as 15,303 acres, describing the kinds of land and the acreage of each kind, which agree with the plan. Buyer's agent says he will go to inspect and asks for a plan. He goes to inspect and is furnished with the plan, No. 46 of process, which I have already mentioned. Armed with this he goes over the ground and views it, only in a general way. He is also offered an examination of larger plans. If they had been examined they would have showed some matter to provoke inquiry on the south-west boundary, but they also showed a green line fixing the south-west boundary the same as plan 46. Buyer's agent did not, however, examine them and worked upon plan 46 and on nothing else in the way of plans. He took plan 46 away with him, and subsequently wrote alluding to it as "the plan of the estate." How he could have thought that he was negotiating for anything but the estate delineated on plan, 46 I do not understand, under the foregoing circumstances which represent his own evidence. If the evidence of the seller's agent is to be accepted, the identification is even more explicit. I regret that the Lord Ordinary has not told us which of the two accounts he believed. But I take the buyer's evidence, and on that I am convinced that the plan 46 represents the only estate which was the subject of negotiation from beginning to end.

One other circumstance must be mentioned, and was strongly relied upon by

the Dean of Faculty on behalf of the buyer.

In addition to plan 46 the buyer was furnished with the particulars of the estate, showing acreage, names of tenants, and rentals. In these particulars there appear two distinct farms of Auchness and Soccath, with their acreage. These two farms lie partly within the area delineated in plan 46; but as to some 1200 or 1300 acres they lie outside that area. The error of including their entire acreage, I think, arose from the extension of these farms, some thirty years ago, by taking in certain pieces of land formerly held in commonty. It is certain, however, that if they are to be included in the sale, their inclusion is absolutely inconsistent with the delineation of boundaries in plan 46, not in any small degree, but to a degree which would destroy the authority of that plan. It is also certain that if they were so included the inclusion would involve a complete departure from the area of 15,303 acres which appeared on that plan and would substitute a much larger area. Buyer's agent nowhere says that he bought on these particulars or noticed the discrepancy.

In the dealings between these parties I think the sale was on the plan; and the particulars in question were given and taken as being particulars of what the plan comprised, and erroneously contained particulars of what the plan did not comprise. Seller's agent says he pointed this out in substance to buyer's agent. Buyer's agent denies it, and I will assume he is right. In these circumstances the buyer might perhaps have renounced the contract on the ground of misrepresentation. As he does not renounce he cannot now found upon the discrepancy. He might be entitled to an allowance, but we were told that he did not desire to make any such point.

If your Lordships take this view it concludes the case in favour of the appellant. In any other view I should have felt great difficulty in holding that there was a consensus *ad idem*. It is not enough for the parties to agree in saying there was a concluded contract if there was none, and then to ask a judicial decision as to what the contract in fact was. That would be the same thing as asking us to make the bargain, whereas our sole function is to interpret it. My own view, however, is that there was a consensus, and that the interlocutor of the Lord Ordinary ought to be restored. I move your Lordships accordingly, and to award to the appellant his expenses here and below.

EARL OF HALSBURY—I am entirely of the same opinion as the Lord Chancellor.

I have been very much puzzled to know what the dispute has been, since the account given by the defender is practically admitted by the pursuer and the witnesses he has called to support his case. Both parties have insisted on there being a concluded contract between them. This is what is said by Sir William Gordon Cumming—"In 1907 I again determined to sell the estate. By this time Mr M'Laren was my factor. I gave him instructions to place the estate in the hands of an agent. I gave him No. 46 as the plan of the estate. He had authority to sell upon no other plan. The estate of Dallas as shown on No. 46 is the estate which I was prepared and am prepared to convey to Mr Houldsworth." And there really is very little room for doubt when one reads the account given on the other side. Mr Logan says—"He" (Mr M'Laren) "handed me No. 46 or a copy of it. (Q) Was this very plan recovered from you after the present litigation commenced?—(A) I know that this plan or a copy of it was got from me after the litigation began. I observe that that plan bears to be a plan of the estate of Dallas. I noticed that at the time. (Q) Do you observe that the plan you have in your hand has the boundaries of the estate clearly defined?—(A) No, I would not say clearly defined boundaries. (Q) Does it not show clearly defined boundaries of the estate coloured pink?—(A) Yes, in so far as clearly defined boundaries can be shown on such a plan as this—on a small scale. So far as a plan can show it, apparently the boundaries are clearly defined on that plan. I daresay I observed that the estate of Dallas as shown upon this plan is said to have a total extent of 15,303 acres. I observed therefore that it corresponded substantially with the description given in Mr Dowell's letter of 7th March, which said it was about 15,000."

The fallacy which prevailed in the Courts to upset the extremely plain and accurate judgment of the Lord Ordinary is completely answered by my noble and learned friend Lord Kinnear, whose judgment, about to be delivered, I have had an opportunity of reading, and who points out that the argument which prevailed in the Second Division appears to rest upon some supposed doctrine of law, that "when an estate is sold under a general name, that name is held to designate the estate as described in the title-deeds, all land in Scotland being held under titles recorded in the Register of Sasines, which is open to the public." But I entirely agree with my noble and learned friend that the meaning of a descriptive name in a particular contract cannot be determined by a fixed rule of law without regard to the facts of the case. No authority is quoted for any such rule, while my noble and learned friend gives his own high authority for saying that he knows of no authority either in principle or practice for the supposed rule.

It seems to me that the reasoning fails because it assumes the question in debate that the estate was sold under the general name, whereas the Lord Ordinary finds in terms—"The estate as shown in this plan was what was being sold; that the plan was handed to Mr Logan at the first interview, was referred to by him throughout the negotiations, and was recovered from him in the course of the present proceedings. The remarkable thing is that apparently Mr Logan never informed Mr

Dowell, or Messrs Hagart & Burn Murdoch, the pursuer's agents, that this plan had been given him."

I certainly understand that in this passage the Lord Ordinary intends to find and does find as a fact that the estate was sold on this plan, and if so the definite thing was by this plan sufficiently ascertained. I could have understood a question arising if there had been a dispute as to whether the two parties were ever at one, but both parties insist on a concluded bargain and what it was, I think, is not in doubt.

I agree with the motion the Lord Chancellor has proposed.

LORD KINNEAR—I agree with the motion proposed by the Lord Chancellor. There is no question before us as to the validity of the contract nor as to the identity of the greater part of the estate of over 15,000 acres to which the contract relates. The only point in dispute is whether a certain parcel of land, extending I think to about 1300 acres, is part of the estate so bought and sold. This appears to me to be a question as to the identification of the subject-matter of an admitted contract, or in other words it is a question of fact to be determined by evidence. But I have found it necessary to consider in the first place the respondent's argument that any appeal to extraneous evidence for the purpose of identification is excluded by the legal effect of the contract itself. His contention is that inasmuch as the parties had agreed, the one to purchase and the other to sell lands described generally and without specification of boundaries as "the estate of Dallas," the seller is bound in law to perform his part of the contract by delivering a conveyance of all the land called Dallas belonging to him, and so described in the feudal title by which he held it at the date of the sale; and, with a certain qualification which is not material to the question in hand, the Court below has given effect to this contention by the judgment under appeal.

The argument which prevailed with the Second Division appears to rest upon a supposed doctrine of law, which is stated thus by one of the learned Judges—"When an estate is sold under a general name, that name is held to designate the estate as described in the title-deeds, all land in Scotland being held under titles recorded in the Register of Sasines, which is open to the public." But with great respect the meaning of a descriptive name in a particular contract cannot be determined by a fixed rule of law without regard to the facts of the case, and I know of no authority in principle or practice for the rule which has been so laid down. The Register of Sasines enables a purchaser to assure himself, if so be, that his seller is in a position to give him a valid title to an unencumbered estate. But there is no presumption of fact or of law that the purchaser has examined the records for the purpose of ascertaining boundaries, and if he did so, he would in general obtain but little information. The title-deeds of an estate like that with which we are dealing do not as a rule define the subject in such a way that it can be identified without the help of extrinsic evidence. A grant or conveyance of the lands, or of the lands and barony of a certain name, or of so many merk lands of a certain name, is a perfectly valid title without any detailed description whatever. This creates no practical difficulty in determining rights of property, for the right depends not on the title alone but on possession following upon and by virtue of the title. But the facts of possession do not appear on the records. The buyer, therefore, in this case followed a very natural and usual course when he made his bargain upon such information as he thought sufficient, reserving his consultation of the Register of Sasines until he should have acquired right to call upon the seller to exhibit the title and "the usual searches" in performance of a completed contract.

I agree with the respondent's counsel that a contract to sell the lands contained in a certain title is perfectly possible, and would give the purchaser right to everything which the seller and his predecessors had in fact possessed under that title. I should be disposed to concede further that if an estate is sold under a general name, without reservation or restriction expressed in the contract, or capable of being proved by competent evidence, the reasonable inference is that what is intended is the estate so named which the seller holds under a valid title. And if it be assumed that the contract covers the whole estate, the buyer would be entitled to a disposition according to the description contained in the existing titles, because *ex hypothesi* the intention of the contract is to transfer to the disponee everything to which the disponer had right. But if there be any question whether the subject sold is less or more than the whole estate possessed, that cannot be solved by the title unless the contract has been made with express reference to the title. The mere coincidence of names proves nothing, because names are not used in the ordinary transactions of business with exact reference to title-deeds, and the local use of estate names may vary indefinitely as boundaries may shift from time to time.

When lands have been held for any considerable period under the same title (and the lands in question have been so held since 1781) it will frequently be found that boundaries have been changed for convenience of management, or for the accommodation of neighbours, without any corresponding change being made in the titles; and the altered estate may still, for all ordinary purposes, pass under the old name. It is evident that this is all the more likely to happen when two contiguous properties are held under different titles by the same owner, who may observe the boundaries or disregard them as he finds most convenient for the management of his estates. Accordingly it is pointed out in the treatises which are recognised as the best guides to modern conveyancing — the Lectures of

Professor Menzies and of Professor Montgomerie Bell—that it is the duty of the conveyancer in framing a disposition upon a sale not to take for granted that he is to follow the exact terms of the description of the existing title, but to make full inquiry into the facts in order that he may be enabled to describe correctly the subject intended to be disponed; and as an illustration of the necessity for caution which he inculcates, the learned professor (Bell, Lectures, vol. i, 594) refers to the case of *Inglis and Others (Walker's Trustees)* v. *Mansfield*, April 10, 1835, 1 Sh. & M'L. 203, which was decided in this House—a very important case on a different branch of law, but in which the admitted purpose of a contract was entirely defeated by the negligent assumption of a conveyancer that the lands of Hillside mentioned in the contract must be identical with the lands of Hillside as described in the titles of the owner. There are many other cases in the books which go to illustrate the same point, but one is enough.

It is manifest, therefore, that if a question arises as to the description to be inserted in a disposition the first thing to be settled is what is the exact subject sold, and that is to be determined, not by the existing titles, but by the contract of sale, interpreted, as every document whatsoever must more or less be interpreted, by reference to the surrounding circumstances.

The evidence which has been adduced for this purpose is said to be inadmissible; but, for the reasons which have been given by the Lord Chancellor and by the noble and learned Earl, I am very clearly of opinion that it was perfectly relevant and was rightly admitted by the Lord Ordinary. I concede that the letters specified in the summons make a complete and final contract, and it follows that in accordance with the well-known rule of law the terms therein expressed cannot be contradicted, altered, or added to by oral evidence. But it is just as well-settled law that evidence may be given not to modify but to apply the contract by identifying any person or thing mentioned in it which requires identification; and I see no difference in this respect between the admissibility of a map or plan of the estate and that of any other item of evidence, so long as the plan is not used for the purpose of importing additional or different terms, but only to prove the external facts to which the contract relates.

I do not think it necessary to recapitulate the evidence, because it is very fully and correctly stated by the Lord Ordinary, and I agree with everything that has been said about it by the two noble and learned Lords who have preceded me. The material fact is that beyond all question Sir William Gordon Cumming intended to sell the estate of Dallas as delineated on the plan No. 46 of process, and that that intention was made clear to the buyer. It was indispensable to take some such method for defining the subject of sale, because the recent possession, however it may have been cleared by the evidence in this case, was ambiguous. Sir William himself believed that the line laid down on the plan was the true line of boundary between Dallas and Altyre. I am not satisfied, to say the least, that he was right in this. But the possibility of his being mistaken made it all the more necessary that he should define with precision the line of boundary between the land he offered for sale and the land he intended to retain. He could not do so better than by delineating the area and boundaries of the estate to be sold upon a plan. He accordingly authorised his agent to sell Dallas as laid down upon the plan No. 46. This was the only estate which his agent Mr M'Laren had authority to sell, and the agent carried out his instructions with exactness. This estate, therefore, and no other definite property, was offered for sale to the buyer, and the buyer's agent had no other description put before him and no other materials for defining the estate he was buying except the plan which had been furnished to him for that purpose. If the letters of December 1907 are read with reference to the facts and circumstances which were or ought to have been present at the time to the minds of the agents who wrote them, they constitute to my mind a perfectly distinct and unqualified offer and acceptance of the estate of Dallas as delineated on the plan No. 46. But there are two points in the argument of the respondent's counsel which may require consideration. In the first place, it is said that the rental furnished to the buyers includes the farms of Auchness and Soccath, which to a great extent lie outside the area shown on the plan. This was a mistake which I think has not been very satisfactorily cleared up. But the rental was not put before the buyer's agent for the purpose of identifying the subject sold, and he does not allege that he relied upon it as evidence that ground outside the area of the plan was included in the sale; the rental, therefore, is not relevant to the point in issue. When the subject of sale has been made specific by measurement and boundaries it may invalidate the contract, but it cannot enlarge its scope, to show that a rental was exhibited to the purchaser in excess of what could be in fact obtained.

I agree with the Lord Ordinary that it is unnecessary to inquire what remedy would have been open to the purchaser if he had desired to rescind the contract on the ground of a misrepresentation. He affirms the contract and brings this action to enforce it, and it must be affirmed, if at all, according to its actual terms.

The second point is that the buyer relied upon the title and not upon the plan. If it had been proved that he believed he was buying according to a certain description in a title-deed, while the seller believed he was selling according to the plan, there would have been very strong ground for maintaining that there had been no *consensus in idem*, and therefore no contract. But the buyer's agent never saw the titles till after the contract was completed, and had

no kind of description before him except that contained in the plan. His evidence shows only that he took for granted, contrary to the fact, that there must be a description in the title, and assumed that this would be the governing description if any question should arise as to extent of boundaries. But this was a mere mistake, which since it was not due to any representation by the other party has no effect in law. On consideration of the whole evidence I am therefore of opinion that there was a valid and binding contract between the parties, and as regards its effect I think the Lord Ordinary's conclusion is perfectly right when he says—"There remains no doubt in my mind that what Sir William Gordon Cumming intended to sell was the estate of Dallas shown on the plan No. 46, and nothing else. I am unable to see how Mr Logan could have been under the belief that he was purchasing for his constituent anything else."

If this be the meaning of the contract, the next question is, whether the respondent is entitled to a conveyance of the estate or lands of Dallas in terms of the conclusions of his summons, and it follows from what I have already said that he is not so entitled if Dallas includes, or if there be reasonable ground for holding that it may include, any part of the disputed land outside the boundary laid down on the plan. The appellant does not take quite so simple a view of the matter. But I am by no means able to accept the Lord Advocate's argument on this part of the case. It must be remembered that the title which the learned counsel criticised in such detail is the appellant's own title to his estate of Dallas, and that it is put forward by him in performance of his contract for the sale of that estate. The first obligation which a contract for the sale of land lays upon the seller is to exhibit a valid title or progress of titles in his own person to the subject sold, and if he fails to do so he is in breach of contract. But the only title which the appellant has to exhibit is a deed of entail of 1781, along with which he produces an instrument of disentail, not as his title to land (for an instrument of disentail is not a title to land), but in order to show that he has acquired power to sell the entailed estate. Being thus relieved of the fetters he puts forward the deed of entail to prove his own right in the estate which he has sold, and so to establish his title to give a valid disposition to his purchaser. It is out of the question therefore that he should be allowed to contradict his own case by denying that the estate of Dallas described in the deed of entail corresponds in the main with the estate of Dallas mentioned in the contract.

The difference between the phraseology of the deed and the phraseology of the contract is to my mind of no significance whatever. "Estate" is a word of common language, and may very naturally be used with its ordinary meaning in an informal writing. But it is not the usual or appropriate term for a feudal conveyance, and to find that what is called an estate of a certain name in a correspondence between men of business is called "the lands" or "the lands and barony" of the same name in the title-deeds is exactly what anyone would expect who is familiar with the practice of conveyancers. The addition of the word barony makes no difference, because that only expresses a legal fact which carries with it certain conveyancing advantages but adds nothing to the area of the physical subject. Nor is it of importance to say that certain of the holdings which are asserted in the title to be included in the barony have not been identified. It is of no consequence whether they are identified or not, because a conveyance of the barony as such without any enumeration of particulars will carry all the particular lands within it. But the conclusive answer to all criticism of the two documents taken apart from the evidence is that the deed of entail is put forward by the seller and accepted by the buyer as a sufficient title to support a valid conveyance of the subject sold. It is nevertheless open to the appellant to show that while the deed of entail is a valid title to all the land possessed by himself and his predecessors under the name of Dallas, he has kept back from the sale a certain portion of the land so possessed. That point is perfectly open to him, and in my judgment is the only point open to him upon the title. If that be so, he is clearly entitled to frame a new description in order to convey to his purchaser the subject sold and nothing more. On the other hand, if the subject sold coincides at all points with the subjects carried by the deed of entail, the respondent will be entitled according to the ordinary rule of practice to a conveyance in terms of the existing title.

On an examination of the plan it appears that the estate sold does in fact coincide with the estate possessed by the appellant under his titles at all points except just where the estate of Dallas is said to be bounded by other property belonging to the appellant himself, because at every other part of the boundary the estate of Dallas as shown upon the plan is represented as being bounded by other properties belonging to different owners, and therefore it is only at a point towards the south-western boundary that the question arises that the appellant is in a position to say—"I have reserved from the sale property belonging to myself which I did not intend to sell at all." The respondent accordingly states his objection to the plan as being that it contains only part of the estate of Dallas. The answer to my mind is conclusive. That is exactly the reason why you cannot have a conveyance of the whole estate of Dallas, because you have bought on the plan and must take the estate so defined.

But then the question is complicated by the argument for the appellant that the parcels of land in dispute are not part of the estate or of the lands and barony of Dallas, but are in fact part of his other estate of Altyre. I think this point difficult to maintain (to put it no higher) in face of the very forcible reasoning of the

learned Judges, but if it were clearly made out the appellant would have no defence to this action. The summons concludes for a disposition of the lands and barony of Dallas, and nothing else, and if the disputed farms are outside the limits of Dallas they will not be carried by a conveyance in those terms. It is only because they would or might be carried by a conveyance of the lands of Dallas without restriction that the appellant has an interest to vary the description. The true answer to the pursuer's demand, therefore, is not that the disputed ground is not a part of Dallas, but that whether it is part of Dallas or not it is effectually excluded from the contract of sale. I think this is a sufficient answer, because when the appellant offered his estate of Dallas for sale he defined exactly what he meant by production of the plan No. 46, and whether the area so defined coincides or not with the possession he and his predecessors have had under their existing titles makes no difference to the contract. If the land sold falls short of that so possessed, it is obvious that he cannot be required to convey the whole; and if there be any reasonable ground for question as to the fact, he is not bound to concede a title to his purchaser which is avowedly demanded on the ground that it will cover parcels of land which he did not sell. On the whole matter, therefore, I think that the Lord Ordinary's judgment is right, and ought to be restored.

I only add that I express no opinion as to the sufficiency of the title actually offered by the appellant. If any question arises as to its terms it is not one to be settled in this House. But when the question of right has been determined by the judgment proposed by the noble and learned Lord on the Woolsack the parties will have no difficulty in adjusting the proper terms of conveyance.

LORD SHAW — Before I come to the crucial question in this case, which is whether a contract of sale of the estate of Dallas was under the letters produced made according to a particular plan or was not so made, I think it important and indeed necessary to deal with certain other portions of the argument presented at your Lordships' Bar by the learned Lord Advocate.

It is not disputed that the title of Sir William Gordon Cumming to the estate of Dallas is an instrument of disentail by Sir William Gordon Cumming, Baronet, of the lands and barony of Dallas, dated 31st December 1886, and registered 18th June 1888. This is a deed in which the granter is described "as Sir William Gordon Gordon Cumming of Altyre and Gordonstown, Baronet, heir of entail in possession of the lands and others after mentioned." These lands are "All and whole the lands and barony of Dallas, comprehending," and then follows the naming of particular towns, hills, loans, lochs, cairns, &c. Language, verbose and not unusual, descriptive of pertinents follows. And the "lands, barony, and others above written" are stated to lie "within the parish of Dallas and sheriffdom of Elgin and Forres." An analysis of a somewhat detailed character was made of the description contained in this deed in order to show (which was not indeed disputed) that it did not contain any description intelligible at the present day from which boundaries might be made up. And a conclusion was apparently desired that a sale under these titles would have been to something so indeterminate that one was consequently driven to the plan without which no definite contract could be said to have been made.

I can only say with reference to that argument, but I do so as clearly and emphatically as I can, that I see no ground or reason whatever for supposing or suggesting that a sale of the lands and barony of Dallas, although no plan thereof had been referred to or been in existence, would not have been a perfectly good sale according to the law of Scotland, on the well-known principle that when a man stands infeft as owner of certain subjects he sells the same, there being nothing said to the contrary, as they stand in him, and, to use the familiar and appropriate expression, on the faith of the records. The situation of Scotch landed property as subject of transfer would indeed be perilous if it were allowed to a seller holding under a recorded title to analyse it for the purpose of showing that from it it was impossible to ascertain what was the subject which he had sold. Accordingly I do not doubt that in the present case, suppose no plan had been seen by the parties or referred to in the transaction, the transaction itself would have been perfectly good, and could have been worked out upon the elementary principles applicable to Scotch land. These are (1) that the transaction proceeds upon the faith of the records; (2) that in the case of indefiniteness in boundary, that indefiniteness is cleared up by the state of possession of the property; and (3) where such clearing up requires to be judicially made, disputed marches are settled by the judge ordinary of the bounds.

I should be sorry to think that any doubt whatever was thrown upon these principles. The system of registration of title in Scotland, which was substantially perfected in the seventeenth century, beginning particularly with the Act 1617, cap. 16, was the recognition of the principle that the transfer of land in Scotland was not a private transaction merely but a matter of public concern. For nearly 300 years the system of registration of titles has prevailed, and has been found of value not only for national purposes but for the purposes of the publication of all transactions in and in regard to land. Registration, the faith of the records, and the use and adaptation of these to all the purposes of the transmission, burdening, &c., of heritable property in Scotland, all these things are not only at the basis of Scottish conveyancing, but they are not usually, to say the least, accompanied by the indefiniteness argued for, but, on the

contrary, by practical certainty. As already stated, a sale on the faith of the records is a regular and ordinary matter of course in regard to transactions affecting land in Scotland. I am constrained, therefore, to reject the whole of the argument founded upon the criticism of the pursuer's counsel of the pursuer's own title.

As to the use in this transaction of the term "estate of Dallas," I think that that term and the term "lands and barony of Dallas" were substantially convertible. I am not surprised that when the agents for the seller were asked to forward the titles to what had been sold, viz., the estate of Dallas, they forwarded the titles, and particularly the instrument of disentail of the lands and barony. It is fairly plain that the lands of Dallas and the estate of Dallas were the same, and to denominate the latter a barony effects, and in Scotland would suggest, no alteration of their boundaries or limitation or increase of their extent. And again, premising that the correspondence and negotiations had been without reference to a plan, I do not doubt that by the sale of the estate of Dallas by its proprietor no court of law in Scotland could have come to a conclusion that it was not simply identical with the lands and barony.

Finally, I attach no importance, nor do I think any of your Lordships do, to the estate being called a sporting estate. This merely meant that the estate of Dallas had the attraction of sport, perhaps in a particular degree, but it is quite consistent with that, as is the case here, that there should on the same estate be a large agricultural rental, much larger indeed than the revenue in the shape of sporting rent.

I hold, accordingly, for the reasons given, that the contract to sell the estate of Dallas with no reference to a plan or plans, and with no reservation or restriction expressed in the contract, would have been, according to well-established principles, a sale on the faith of the records, and although these should not have disclosed definite boundaries, yet notwithstanding the sale would have been of what under familiar practice was a perfectly ascertainable *unum quid*.

It is in the fullest recognition of these principles which have proved in Scotland of so great convenience and utility that I reach the correspondence in this case. And with regard to it I may say with your Lordships that it must be treated as a whole. So treated, it is, I have come to think, pretty clear that this particular transaction was not a sale merely on the faith of the records. Rentals containing statements of tenancies with exact measurements were furnished. A plan was asked for on behalf of the intending purchaser, and I think it proved that at one interview between the representatives of the parties a large plan was exhibited and was not fully examined, whereas a small plan was taken by Mr Logan, who acted for the buyer, and was kept in his possession for many months. I cannot say, however, that it is proved that Mr Logan, although he had the plan upon the ground during his inspection, ever went the length of the boundaries or indeed within a mile or two of this particular boundary, or used the plan in the sense of checking those boundaries on the ground.

The rentals have been the subject to my mind of very considerable difficulty in this case. They were undoubtedly inspected by the representatives of the parties, and they were checked in some minor details. They contain the names of two farms—Auchness and Soccath—and the acreage of these farms extends beyond the boundaries as delineated on the plan, and do so to the extent of many hundreds of acres. But the peculiarity of this case is that while they extent beyond the boundaries on the plan, they do not, it is admitted on behalf of the respondent, extend to the limits of the barony. The learned Dean of Faculty conceded that this was so, but treated the concession as *ex gratia* in the sense that he was willing to go to the bounds of these farms and no further. No doubt that was a wise attitude, but it largely destroys the value of the rentals as indicating boundaries, when it is found that they do not fortify, but, on the contrary, contradict, the boundaries of the barony as these would have been adjudicated had the transaction been on the faith of the records. On the whole, therefore, I fear that the argument for the latter view is not strengthened but rather weakened by the production of the rentals.

The final question—and it does not appear so easy to me as to some of your Lordships—is, accordingly, Was this a special transaction upon plan or a transaction, very ordinary in the case of large landed estates in Scotland, of a sale under a common name and under the recorded title? Taking it that the boundaries of the estate, in the sense of the barony, were one thing, and that the boundaries per the plan were another, I hold it to be fairly clear that the seller by himself and his agent meant to sell by the plan referred to in the correspondence and used on the ground. Had the case of the purchaser been that, although this was so, he meant to buy on the faith of the records, and that accordingly there was no *consensus ad idem*, I should have had upon the whole little difficulty in agreeing with him. But that is not the position taken up. The position taken up is that there was *consensus ad idem*, and, in short, he is as plain that not only did he, but his opponent, conclude the transaction upon the faith of the records and not on the plan, as his opponent is in maintaining that the transaction was concluded upon the plan and not upon the records. Possession of the property has been taken over, and the Court is confronted with allegations mutually destructive and only agreeing in this, that a bargain was made. This being so, the question of the extent and boundaries of the subject sold falls to be ascertained from a perusal of the correspondence and the evidence, and is a question of fact. It is carrying matters too far when a plan has been

one of the documents exchanged between the parties to say that it shall be excluded from the bargain by what it is argued is a superior doctrine as to the extent of the estate per the titles. For the plan which is produced is undoubtedly a plan which, although containing the bulk of the estate per the titles, does, at or near the disputed boundary, exclude therefrom a considerable tract of land.

In *Keith* v. *Smyth* (November 7, 1884, 12 R. 66, 22 S.L.R. 50) a reference to a plan was made in the titles of certain heritable subjects. On that Lord President Inglis (at p. 74, p. 54) observes—"There being no boundaries expressed in the dispositions, I apprehend it is clear that the plans are referred to for the purpose of showing the boundaries, and, in the second place, for the purpose of showing the extent or measurement of the ground."

This, which is true with regard to executed deeds of conveyance, is also similarly true with regard to a contract of sale of heritable property. The parties, as I have said, each maintain that they were both agreed, and the question is whether they agreed upon a sale per plan or per titles. We have had the advantage of a most careful treatment of that subject by Lord Mackenzie, who heard the witnesses. He has come to the conclusion that the subject of sale was per plan. Notwithstanding the opinion of the learned Judges of the Second Division, which I have perused with much respect and care, I cannot see my way to differ from the conclusion arrived at by the Lord Ordinary. I therefore agree with your Lordships, but I think it right, in view of the arguments to which I have alluded, to make it clear that I do so without derogating from those familiar principles and practice which accord with and tend to make up the highly prized system of registration of titles in Scotland.

Their Lordship sustained the appeal, with expenses.

Counsel for the Appellant (Defender)—Lord Advocate (Alex. Ure, K.C.)—Spens. Agents—J. C. Brodie & Sons, W.S., Edinburgh—Grahames, Currey, & Spens, Westminster.

Counsel for the Respondents (Pursuer)—D.-F. Scott Dickson, K.C.—Burn Murdoch. Agents—Hagart & Burn Murdoch, W.S., Edinburgh—Trinder, Capron, & Company, London.

HIGH COURT OF JUSTICIARY.

Friday, June 10.

(Before Lord Low, Lord Ardwall, and Lord Dundas.)

RENTON *v.* RAMAGE.

Justiciary Cases—Complaint—Children Act 1908 (8 *Edw. VII, cap.* 67), *sec.* 15—*Summary Jurisdiction (Scotland) Act* 1908 (8 *Edw. VII, cap.* 65), *sec.* 19 (1)—*Specification — Modus — Relevancy — Allowing Child to be in Room with Fire Grate Insufficiently Protected.*

The Children Act 1908, section 15, enacts—"If any person over the age of 16 years, who has the custody, charge, or care of any child under the age of 7 years, allows that child to be in any room containing an open fire grate not sufficiently protected to guard against the risk of the child being burnt or scalded, without taking reasonable precautions against that risk, and by reason thereof the child is killed or suffers serious injury," he shall be liable to a penalty.

The Summary Jurisdiction (Scotland) Act 1908, section 18 (1), enacts—"The description of any offence in the words of the statute or order contravened, or in similar words, shall be sufficient."

Held that a complaint charging a contravention of section 15 of the Children Act 1908, which was stated as nearly as possible in the words of the section, and which consequently did not set forth the *modus*, was relevant, and that it was unnecessary to insert therein any further specification of the offence charged.

Observed that a case might occur where an offence was described in a statute in such general terms that it would be necessary to set out further particulars in the libel in order to give the accused fair notice of the nature of the charge against him.

Agnes Ramage was charged, on 11th April 1910, in the Sheriff Court in Edinburgh, at the instance of Robert Wemyss Renton, Procurator-Fiscal of Mid-Lothian, on a complaint in the following terms:—"Agnes Ramage, 34 Arthur Street, Leith, being a person over 16 years of age, you are charged, at the instance of the complainer, that on 4th April 1910, in the house at 34 Arthur Street, Leith, occupied by John Ramage, your husband, you did allow Elizabeth Macfarlane Ramage, your daughter, then between 4 and 5 years of age, and under the age of seven years, and under your custody, charge, or care, to be in a room of said house containing an open fire grate not sufficiently protected to guard against the risk; of the said Elizabeth Macfarlane Ramage being burnt or scalded, without taking reasonable precautions against that risk; whereby the said Elizabeth Macfarlane Ramage was burnt and died from the injuries so received; contrary