therefore no ground has been shown for its being allowed to continue. Then the third finding, that of interdict, necessarily follows the other two.

Lord Neaves—I concur with the result arrived at by the Lord Ordinary; but I think it right to say that I consider many of the grounds of his judgment are liable to question.

The pursuers here are in a privileged position. They are grantees with right of harbour, and also statutory disponees. And if there is any ambiguity in the charters as to their rights, that is all put right by the statutes. Under both these titles they have not only incorporeal rights, but also corporeal rights in this quay. Possession on the defender's part, even though it had been proved, which it has not been, would not be enough. The clauses in the later leases are quite conclusive as to the whole matter.

Lord Ormidale—I am of the same opinion. But I am not prepared to give the same effect to Acts of Parliament as your Lordships. Independently of previous possession, I do not think the mere expressions in the Acts would be enough. But we have ample evidence independently of the Acts altogether. In the first place, we have a grant of harbour in the burgh of Ayr, as contained in the ancient charters. Now, a grant of harbour is not only an incorporeal right, but is also a right to land cargo from incoming ships, and to bring cargo for outgoing ships.

The only question is, what does possession show to have been included in the harbour of Ayr? Why, the old dyke is just the present quay; and the dyke was possessed by the harbour authorities from time immemorial. If Newton ever had right to the ground along the river, then they have lost it, and Ayr has acquired it as part and pertinent of the harbour.

The only difficulty I have had has arisen from the fact that the declaratory conclusions contain no limit of how far backwards from the river the right of the trustees is to extend. But I understand the extent in regard to this particular matter is clearly marked in the plans.

Lord Gifford—I have come to the same conclusion; but I think that some of the many questions of general importance which this case raises are necessary to its decision. For example, though it is true that the burgh of Newton is not here, still the defender has all the rights of Newton. I think, indeed, that the question of who has right to the *solum* lies at the bottom of the whole question.

First, then, I am of opinion that the Harbour Trustees have a good title to the *solum*. I think that the Harbour Trustees have the rights of Ayr in this matter; whether they have the rights of Newton is a more difficult question. Had Ayr, then, right to the *solum*? I observe that it was not a grant referring to extensive limits which Ayr got. Looking to the circumstances of the place, and the terms of the charters, it appears to me that they got a good title on which to prescribe a right of property. I think it is implied in a right of harbour that a grantee is entitled to fence the harbour, except when that is unnecessary, as, for instance, when the harbour is surrounded by a natural fence of precipitous rock.

As to the north dyke, about which we have heard so much, I have a strong impression that it was originally constructed on proper foreshores. The minutes of the Ayr Town Council speak of the dyke falling in, of its confining the river, and of its not being sufficient to keep the river in its course. At all events the dyke may have been built upon foreshore. Undoubtedly at the point where at the very mouth of the river the pier runs out into the sea it is built upon the *solum* of the sea. The old title was certainly quite sufficient to give a title to the *solum* there, and it appears to me it was equally capable of giving a title to the *solum* on which the old dyke opposite the defender's property was built. Therefore I consider that the old dyke must have belonged to Ayr, and that Newton had no right to the *solum* on which it was built. And now of course all that belonged to Ayr being vested in the trustees, the *solum* belongs to them.

As to the breadth to which the trustees have right, I might have seen a difficulty there had not the possession been quite conclusive.

Second, Has Weir a right to a passage through the quay wall? Now, a general title of free port does not entitle the grantee to exclude the proprietors whose lands border on the sea from the sea. It only gives the use of the shore for the purposes of the harbour. But this is not a general grant of free port. If this had been a case of foreshore in connection with a general grant of free port, I might have decided differently; but this is a grant of harbour proper.

Yet I do not say that Weir might not have precribed a right such as he claims. But it appears that every act of possession was in virtue of leave. There was no adverse possession whatever. In fact the case is just the same as if the quays had never been cut through at all.

I rest my decision upon the special circumstances of the case—the limited size of the port, the express right to build walls, and the clear way in which the defender's right to cut through the quay walls has been negatived.

The Court adhered.

Counsel for Pursuers—Lord Advocate (Watson) —Asher — Blair. Agents — Hunter, Blair, & Cowan, W.S.

Counsel for Defender —Trayner — Balfour— Guthrie. Agents—Fyfe, Miller, Fyfe, & Ireland, S.S.C.

Wednesday, November 8.

SECOND DIVISION.

SPECIAL CASE—DON AND OTHERS (WEBSTER'S TRUSTEES).

Succession—General Conveyance—Special Destination.

A truster by his settlement conveyed to trustees his whole means for certain purposes. Thereafter he acquired certain heritable property, the disposition whereof he took to himself and "his assignees and disponees," whom failing to his sister and "her heirs and assignees whomsoever in

fee."—*Held* that the subjects in question were carried to the sister by the special destination, and not to the trustees by the general disposition.

This was a Special Case for Mr Don and others, trustees of the deceased James Webster, Trinity Villa, Brechin, of the first part, and Miss Ann Webster, a sister of James Webster, of the second part.

Mr Webster died on 3d January 1875, possessed of considerable personal property, but his only heritable estate consisted of the subjects mentioned in two dispositions referred to below. Mr Webster left a trust-disposition and settlement, dated 11th June 1864, whereby he conveyed to the trustees therein named, or to be assumed under the powers conferred by the said deed, all and sundry lands and other heritable and real estate of every description, and wherever situated, which should belong to him at the time of his death, as also his whole moveable and personal means and estate of whatever kind, and wherever situated, which should belong to him at the time of his death. By the first purpose of the said trust-disposition and settlement the said James Webster provided for payment of his debts, death-bed and funeral expenses, and the expenses of executing the trust. By the second he provided for the delivery of certain specific bequests to the parties therein named. By the third he directed that each of his brothers and sisters was to receive a legacy of £400; but this sum was by the codicil, of date 11th April 1867, reduced to £150. By the fourth purpose of the trust-disposition and settlement the said James Webster directed that, in the event of his said sister Ann Webster surviving him, and remaining single and unmarried, his trustees should, after fulfilment or providing for the fulfilment as far as practicable of the above purposes, but that only while she should remain unmarried, pay to her, as the same should be received by his trustees, the free interest, income, or periodical produce to be derived from the capital or principal of the remainder of his trust-estate and effects, and to allow her the possession and use of his household furniture and plenishing, silver plate, bed and table linen, or what portion thereof his said sister should be pleased to keep in her possession, the remainder to be sold when she should think proper, and the price thereof to form part of the capital of his said trust-estate, and to the interest or profit to be derived therefrom she should be entitled as above provided. In the event of his said sister entering into marriage, he directed his trustees, as soon after that event as should be convenient for them, to pay to his said sister Ann Webster the sum of £500 sterling, and that in addition to the sum of £400 directed to be paid to her on his death, and her just and equal share of the remainder of his estate and effects thereinafter directed to be paid to her. By the fifth purpose the testator directed his trustees in the event of his said sister Ann Webster predeceasing him, or on her decease or being married, to convert his whole trust-estate and effects into money, and to deliver and pay over the proceeds thereof to his sisters and brothers then surviving him, equally among them, share and share alike, the lawful issue of a brother and sister who should have predeceased being entitled to succeed to their parents' share equally among them if more than one. Various codicils were subsequently added, but none of them bearing on the question raised by this Special Case.

By disposition of 26th and 27th January and 3d and 9th February 1874, the trustees of the late John Mitchell, in consideration of £500 paid them by Mr Webster, sold and disponed "to the said James Webster and his assignees and disponees, whom failing to Ann Webster, also residing at Trinity village, sister of the said James Webster, and her heirs and assignees whomsoever in fee, heritably and irredeemably," certain lands and houses at Trinity Muir market-stance, at Brechin, By disposition dated 14th May and 13th June 1876, James Guthrie, agent for the Royal Bank of Scotland, Brechin, in consideration of £10 paid him by Mr Webster, sold and disponed "to the said James Webster and his assignees and disponees, whom failing to Ann Webster, also residing at Trinity village, sister of the said James Webster, and her heirs and assignees whomsoever in fee, heritably and irredeemably," two other small plots of land at the same place. Mr Webster and his sister had lived together for thirty years prior to his death at various places, and latterly on these properties at Trinity village purchased by him.

By minute of admissions the following facts were further added to the case. The following members of the testator's family were at the date of the trust-deed, 11th June 1864, the whole living brothers and sisters—Alexander Webster, born 28th April 1801; David Webster, born July 1803, died 8th July 1872; Jean Webster or Don, born July 1805; Mary Webster or Taylor, born October 1811; Ann Webster, born 17th December 1813; and Isabella Webster or Fairweather, born October 1819. The testator himself was born 3d September 1799, and, except David, all his brothers and sisters survived him. Miss Ann Webster presented to the Sheriff of Forfarshire a petition for service as heir of provision in general to the said James Webster, under the disposition by Mitchell's trustees in his favour, and also as heir of provision in general to the said James Webster under the disposition by James Guthrie in his favour. The parties of the first part, however, maintained that the subjects contained in the said dispositions belonged to them in trust for the purposes mentioned in the said trust-disposition and settlement and codicils of the said deceased James Webster by virtue of the general conveyance contained in the said trust-disposition and settlement.

The opinion and judgment of the Court was asked upon the following questions—'(1) Whether, in virtue of the general conveyance by the said James Webster in his trust-disposition and settlement, the subjects contained in the dispositions referred to belong to the parties of the first part, in trust for the purposes mentioned in the said trust-disposition and settlement and codicils? Or (2) Whether the said subjects contained in the two dispositions before mentioned now belong to the said Miss Ann Webster, as heir of provision of the said James Webster in virtue of the destinations therein contained.

Authorities quoted—*Glendonwyn* v. *Gordon*, May 19, 1873, 2 L. R. Sc. App. 317; *Thoms* v. *Thoms*, March 30, 1868, 6 Macph. 704; *Catton* v. *Mackenzie*, July 19, 1870, 8 Macph. 1049; *Connell's Trs.* February 23, 1866, 4 Macph. 465; *Farquharson*, March 2, 1756, M. 2290; *Campbell*, 1 Paton App. 343, M. 14,855; *Fleming* v. *Fleming*, M. "Implied Will," App. No. 1.

At advising—

Lord Justice-Clerk — There are two principles, or rather legal presumptions, applicable to the construction of separate deeds, when each is conceived in terms capable of conveying the same property. One is that a special conveyance derogates from a general conveyance. The other is that the deed last in date derogates from that which is earlier in date. In the cases of *Glendonwyn, Thoms*, and others of that category, these two principles came into conflict; and it was contended that a general conveyance, although later in date than a special conveyance, must yet give way, on the ground that the other presumption in favour of a special conveyance was the stronger. But the present case reverses the conditions of all these authorities, for the special deed is the latest in date; and the two presumptions do not conflict but concur. They can only be overcome by the clearest indication of contrary intention.

But the indication of intention is all the other way. The words "his assignees and disponees" may no doubt embrace the assignees and disponees under the general settlement. But to give them this construction is to render the destination to his sister nugatory. The simple way to have effected that purpose was to take the title to himself in ordinary form. The special request to the trustees, the signature to the disposition, and the destination to his sister, would have no meaning on that assumption; or at least could only have received effect on a contingency which the testator could hardly have anticipated, namely, that he should have cancelled his general settlement and executed no other. The simple signification of the words evinces the true meaning. It means that if the disponee did not assign or dispone the property afterwards, it should go to his sister; and this is the result at which I arrive.

Lord Neaves—I regard this case as one not free entirely from difficulty, but I have come to the same conclusion. The general rule is established that the deed posterior in date must govern unless there is absolutely a conflict of presumptions. On the whole, I consider that Mr Webster's special object was to make this extra provision for his sister, and also I am of opinion that the clause of institution and substitution of Miss Ann Webster would have been quite unnecessary had his intention been that the older deed should take effect. This conclusion appears to me to be at once the safest and the most natural.

Lord Ormidale—All questions depending for their solution upon presumptions to be gathered from very indefinite expressions must necessarily cause great difficulty before a safe conclusion can be attained, but in this case I quite concur in the views expressed by your Lordships, and that chiefly on account of the very peculiar way in which Mr Webster worked the conveyance in 1874. I think, however, that by the expression "disponees and assignees" a reference was intended to any persons whom he might make such by any subsequent deed as to those special subjects. No such deed was ever executed, and I therefore think Miss Ann Webster must be found entitled to the house.

Lord Gifford—This is entirely a question as to the intention of the late James Webster. What did the late Mr Webster mean by the terms of his trust-deed and codicils of 1864 and 1865, and by the terms and destination in which he expressly took the two special dispositions of 1874, which special dispositions in testimony of his will and wish are subscribed by himself?

Even although Mr Webster had not subscribed these two special deeds, the question would not have been materially altered, because a purchaser who takes the disposition to himself in special terms, and with substitutions or destinations over, is held by acceptance of the deed to make it his own settlement of the subjects purchased.

In such cases the mode in which the question generally arises is, whether a substitution or special destination in the settlement of a particular subject is evacuated, destroyed, or altered by a subsequent general disposition and settlement of the testator's whole estate. In the present case the question arises differently, and in a somewhat unusual form, for it is whether Mr Webster's general trust-deed and settlement of 1864 is innovated upon, or whether an exception thereto is created by the special conveyances which he took in 1874. In both cases, however, and indeed in all such cases, the true question is, *Quid sit voluntas testatoris?*

Looking to the whole circumstances of the present case as disclosed in the deeds and in the Special Case for the parties as amended, I am of opinion that the subjects contained in the two dispositions of 1874 belong to Miss Ann Webster, and not to the trustees under the general settlement, and I think the questions put should be answered, the first in the negative, and the second in the affirmative.

In getting at the intention of the late Mr Webster from the deeds and circumstances before us, I begin by supposing, contrary to the fact, that the two special dispositions had been taken by Mr Webster first, and that then some years afterwards, at a greater or at a lesser interval, he had executed his general trust-disposition and settlement and codicils in the terms which are now before us. If this had been the case, would the general trust-disposition and settlement have evacuated the destinations in the special deeds, and carried the subjects to Mr Webster's testamentary trustees for the general purposes of his settlement.

Now, I think this would not be the effect of such a general settlement. I think the special settlement and destination effected by the dispositions to the villa at Trinity village and small piece of ground adjoining would not have been held to be superseded and destroyed by the mere general words in Mr Webster's universal settlement. General words in such a deed are always open to construction, if the intention of the testator can be gleaned, and I think the

general rule is that a special subject precisely and definitively settled in a particular way, or in favour of a particular heir or substitute, is not affected by mere general words used by a testator in settling his whole means and estate. The subject specially settled is held not to have been in the testator's view unless the contrary can be shown, and in general a special provision should be specially revoked. There are very numerous instances of the application of this rule, the latest and most authoritative of which, trenching to some extent upon cases which preceded it, is the case of *Glendonwyn* v. *Gordon*, as decided in the House of Lords, 19th May 1873 (Law Rep. ii., Scotch Appeals 320). I do not think there is anything in the present case which, supposing the general trust-deed to have been lost, in date would have indicated the testator's intention thereby of cutting down the previous special destinations.

Now, I think the case actually before us is more favourable for Miss Webster, the special disponee or substitute, than it would have been had the general disposition been latest in date. *Posteriora derogant prioribus* applies emphatically in such cases as the present. The latest expression of the testator's will receives effect even though it be contrary to preceding indications, and the latest will in the present case is expressed in the special dispositions.

Mr Webster made his general settlement in 1864 containing various provisions in favour of his sister Miss Ann Webster, who was the only one of his sisters who resided with him. In 1874, having occasion to buy the villa in question for the occupation of himself and sister, he took the titles both of the villa and of the adjoining ground to himself and his assignees and disponees, whom failing to his sister Ann Webster, in the terms of the deeds before us, both of which he specially subscribes in token of the destination being the expression of his will. Now, I cannot help holding that by these deeds Mr Webster intended to give his sister Miss Ann Webster an additional benefit in his succession. He surely meant something by inserting her name as the disponee or substitute; and although undoubtedly he reserved full power of himself disposing of the subjects, I think he intended that failing any subsequent disposal thereof by himself it should go to his sister.

The contention for the trustees makes the special insertion of Miss Webster's name in the dispositions of 1874 absolutely meaningless, unless the testator be supposed to have intended to destroy his general settlement and die intestate; and this seems to me to be a most unlikely supposition. Miss Webster is only to take, the trustees' say, failing them the general testamentary trustees. I cannot think that this was Mr Webster's intention. I feel certain that had he so intended he would have expressed himself very differently. No doubt a difficulty arises from the expression in the special deeds after Mr Webster's own name, "and his assignees and disponees," for undoubtedly in one sense his testamentary trustees are his assignees and disponees; but I think this is not the true meaning of the words. His "assignees and disponees" mean, I think, special assignees or special disponees in the special subject conveyed by the deed, and not mere general assignees in his general settlement. The intention was, that notwithstanding the destination of the villa to his sister, Mr Webster might sell or convey to whom he pleased, but that failing such special sale or conveyance Miss Webster should inherit it. Mr Webster never altered this special destination, and he never sold and disposed of the villa and ground, and I think we should now give effect to his will and purpose by finding that Miss Webster is entitled to the villa and pertinents in addition to her provisions under the general settlements.

The Court answered the first question in the negative and the second in the affirmative.

Counsel for First Parties—Crichton. Agents—Duncan & Black, W.S.

Counsel for Second Party—Mackay. Agents—G. & H. Cairns, W.S.

Wednesday, November 8.

SECOND DIVISION.

[Sheriff of Forfar.

DOUGLAS *v.* DOUGLAS.

Parent and Child—Legitim—Collatio inter liberos. A father died leaving two sons and a will whereby he disponed and assigned to his younger son his whole means and estate. It was shewn by holograph entries in the father's ledger that he had made three large advances to this younger son during his life, marked respectively "By gift," "By allotted for his business, free gift," and "By given over as free gift." The elder son claimed the whole legitim fund, or (there being no widow) one-half of the personal estate.—*Held* that these advances to the younger son were to be regarded as advances to account of legitim, and that they fell to be imputed in a claim by the elder son for legitim.

This was an appeal against an interlocutor pronounced by the Sheriff of Forfar (HERIOT) in an action at the instance of Andrew Douglas, merchant, Dundee, eldest son of the late Thomas Douglas, Rock Villa, Broughty Ferry, against his younger brother James Earl Douglas, the sole executor and universal disponee and assignee of his father under his will of 4th August 1869. The summons concluded for payment of legitim and production of all vouchers, &c., necessary to the determining thereof. Mr Thomas Douglas was twice married, the pursuer and defender respectively being the only issue of the first and second marriages. The father died on 13th March 1875, predeceased by both his wives, and leaving considerable personal estate besides the villa and heritable property in Dundee.

In the case of the first marriage there was a post-nuptial contract of marriage, dated 31st December 1834, by which, *inter alia*, the spouses assigned and disponed their whole estates and effects to the husband, should he survive his wife, and to the pursuer, provided he was twenty-one years of age at the predecease of his mother, in the proportion of two-third parts to