an interest in the actions to have the interlocutor of the Lord Ordinary affirmed in so far as it finds him entitled to the expenses therein decerned for, and also to have the defenders' claim for expenses against him disposed of by the Court." He stated that being furth of Scotland he had appointed Mr John Alexander Robertson as his mandatory in the case. He accordingly craved the Court "to sist him as an individual as a pursuer in the action; to sist the said John Alexander Robertson as his mandatory therein; to recal the foresaid sist, and to restore the cause to the roll for discussion."

Answers were lodged by the defenders in both actions, in which they maintained that "upon his removal from the trusteeship" the pursuer "ceased to have any title or interest as a party to the present action, which was carried on by him solely in his capacity as such trustee." They accordingly submitted that the note was incompetent.

They argued that the Court would not allow the merits of a case to be discussed solely for the purpose of getting at the question of expenses, except in the case of a law-agent—*Gordon* v. *Gordon*, December 11, 1823, 2 S. 493.

LORD PRESIDENT—I do not think that this gentleman is entitled to be sisted as a party to carry on the litigation. He has ceased to be a trustee in such circumstances as cannot, at all events, make his position better than it would have been had he resigned office. In the latter case it would have been his right, if he so desired, to make arrangements that he should be relieved of any liability, or possible liability, incurred by him in the interests of the trust-estate. But in the present case we are asked to introduce a novel procedure by bringing back into the process a gentleman who has ceased to be a trustee in order that he may discuss the merits of the case for the purpose of obtaining relief from personal responsibility. I do not think that this is an occasion for introducing new procedure of that kind, and accordingly I am for refusing the note.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court refused the prayer of the note.

Counsel for Pursuer—Dewar. Agents—W. & J. L. Officer, W.S.

Counsel for Defenders—N. J. D. Kennedy—M'Lennan. Agents—Forbes, Dallas, & Company, S.S.C.

Tuesday, July 13.

FIRST DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

GREGSON *v.* ALSOP.

Lease—Extent of Subject Let—"All as some time Occupied by" the Preceding Tenant—Extrinsic Evidence.

A farm was let on a lease to a tenant "all as sometime occupied by" A B, the immediately preceding tenant.

A question having arisen between the landlord and the tenant as to the extent of the subjects let, it was proved that A B had never occupied the piece of ground which was in dispute, but it was stated by the tenant that the ground officer, in showing him over the farm, had pointed out the ground in question as included in the farm.

Held that, even assuming this to be the case, the occupation of A B was the measure of the tenant's right, and that the tenant was consequently not entitled to possess the piece of ground in question.

Opinion reserved—whether, assuming it to be proved that the person authorised to show the farm had said to the tenant that A B occupied up to a certain point, up to which as a matter of fact he had not occupied, the landlord might not be barred from questioning the truth of this representation or from disputing the meaning thus assigned to the terms of the lease.

Lease — Extent of Subjects Let — Letting Clause—Fencing Clause—Repugnancy.

A question as to the right to occupy a certain piece of ground arose between a landlord and a tenant who had a lease of a farm "all as occupied by" A B. It was proved that A B had never occupied the piece of ground, but the tenant founded on a clause in the lease which stipulated that the landlord should not be bound to fence "the rough pasture ground lying towards" a certain hill, and maintained that the ground in dispute was the rough pasture so referred to.

Held that there being a piece of ground within the limits specified in the description of the subjects let which reasonably met the description in the fencing clause, the tenant's claim to the ground in question was unfounded.

Francis Robert Gregson of Tilliefour raised an action in the Sheriff Court of Aberdeen, Kincardine, and Banff to have John Alsop interdicted from interfering with or injuring the boundary fence erected by the pursuer along part of the west side of the farm of Mains of Afforsk.

The pursuer averred that on 30th July 1896 he caused workmen to commence to erect a boundary fence along the west side of the farm; that on the following day the defender, who was the son of the tenant of

the farm, came up to the workmen and threatened to throw down the posts as soon as they put them up; that he repeated this conduct on a subsequent occasion; and that on the 10th August he opened a gate in the fence and let cattle through from the farm of Afforsk into land—being part of the Millstone Hill—"belonging to and occupied by the pursuer on the west side of said fence," and on the 11th he broke down a board erected to protect the gate and again "permitted cattle to stray into the said land belonging to and occupied by the pursuer."

The defender admitted the acts complained of, but denied that the said fence was a boundary fence. "Denied that the cattle passed (through the gate) into land belonging to and occupied by the pursuer on the west side of said fence. Explained and averred that the land in question is part of the farm of Mains of Afforsk, and has been exclusively occupied by defender's father since the commencement of his lease in 1888 as it was by the previous tenant."

The pursuer pleaded—"(1) The pursuer being proprietor of the estate of Tilliefour, on which is the said farm of Mains of Afforsk, is entitled to put up a boundary fence as above. (2) The defender having as libelled, interfered with the fence and gate, which are the property of the pursuer, the pursuer is entitled to be protected against such interference being repeated."

The defender pleaded—"(1) Pursuer having no right to erect the fence in question, and his proceedings in attempting to do so being unwarrantable and illegal, he is not entitled to interdict the defender, the overseer on the farm, from removing it."

After the closing of the record, the Sheriff sisted the defender's father James Alsop, tenant of Mains of Afforsk, as a party defender to the action.

The description of the subjects let in the lease of the farm in question, which was executed in 1888, was as follows:—"All and whole that part and portion of the farm of Mains of Afforsk which belongs to the estate of Tilliefour, being that part and portion thereof lying on the north side of the straight road leading from the Chapel of Garioch Road to the Millstone Hill, which straight road forms the march between the lands hereby let, and that portion of the lands of Mains of Afforsk which belongs to the estate of Monymusk, with the houses and buildings thereon, all as some time occupied by James Brown."

The lease also contained the following clause—"Further, the proprietor undertakes to put the dwelling-house, office houses, and the ring fence into a proper state of repair, but he shall not be bound to fence the rough pasture land lying towards the Millstone Hill, which has no boundary fence, but which the tenant may fence himself at his own expense."

A proof was allowed, of which the import sufficiently appears from the notes of the Sheriff-Substitute and the Sheriff.

On 17th February 1897 the Sheriff-Substitute (ROBERTSON) found that the fence in question was not upon the boundary of the farm, but was erected upon land included in the let to the defender, and if it remained would have interfered with the access of the defender's cattle to pasture included in the let to him; and therefore refused the interdict craved, and assoilzied the defender.

Note.— . . . "The facts, I think, are pretty clear. James Alsop became tenant of the farm at Martinmas 1888. The farm had been advertised as containing a certain number of acres, and that the boundaries would be pointed out by the then landsteward Mr Rule. Mr Rule did point out the boundaries to defender, and I take it as proved that the boundary he pointed out included the pasture in question; the defender says so, and he appeared to be quite a reliable witness, and he is corroborated by the witnesses Fraser and also Watt, who speaks to what Rule said to him just after defender had taken the farm; while as against this evidence there is upon this point really nothing. We may take it, therefore, as proved that Rule, whether rightly or wrongly, pointed out a boundary which includes the disputed portion as in the farm. We may further, I think, take it as clear that ever since defender entered the farm he has regularly pastured this now disputed ground. He and his son speak to it, and also other witnesses, and it is practically admitted in pursuer's letters, though of course the position taken up in the letters is that defender had been *allowed to encroach* over the pasture for a number of years.

"No doubt, whatever was proved as to the boundaries pointed out, or subsequent possession, would be of no avail against clearly defined boundaries if stated in written lease between the parties; the lease must, if clear and unambiguous, be conclusive as to what is let. The first question, therefore, that must be disposed of in the case is, whether the terms of the lease here are so unambiguous as to be conclusive. In my opinion they are not. It will be seen that the farm is said to be let 'all as some time occupied by James Brown,' who was the former tenant.

"But in a subsequent portion of the lease the following clause appears with reference to fencing. Further, the proprietor undertakes to put the ring fence into a proper state of repair, but he shall not be bound to fence the rough pasture land lying towards the Millstone Hill, which has no boundary fence, but which the tenant may fence at his own expense.

"It appears, according to Brown's or rather his son's evidence, that he did not pasture the disputed ground. His march, he stated, was as contended for by pursuer, but it appears from Brown's lease, which is in process, that he occupied 'as lately possessed by George Milton.' Milton possessed under a lease granted to Charles Thom. Thom had desired to give up the farm, and Milton was accepted by the proprietor as instead of him, and he possessed under Thom's lease. Thom is examined as a witness, and states that he pastured this

disputed ground, and considered he had the right to it under his lease.

"If there were nothing further, therefore, it would be a little difficult to say what Brown's rights were, or what 'as possessed by Brown' really meant. But when the subsequent clause I have quoted is taken into consideration, I do not think there can be much doubt of what really was let to defender. Various plans and sketches are produced, but to my mind no intelligible explanation of the phrase 'rough pasture lying towards the Millstone Hill which has no boundary fence' is given, except that it is the pasture here in question, and if so it must have been included in the let, otherwise the tenant could have no reason for fencing it. . . .

"I am disposed, therefore, to think that the lease is at least as favourable to defender's view as to pursuer's, and looking to the evidence I have already referred to as to the march actually pointed out by the man authorised to do it, and the subsequent possession, I am prepared to hold that defender has proved his case. With reference to the question of possession I should probably have referred before to what is unquestionably, in my view, a very strong indication of how matters stood. I mean as to the way in which Mr Alsop jr., seems to have been dealing with and working at fences, which, according to pursuer's contention, were not on the farm. Some of his statements as to these fences are not admitted, but in regard to one of the fences, viz., the one going from the south-west corner of field 763 in plan out to the old dyke, there is no doubt that he both erected this fence and knocked it down, surely indicating pretty clearly the state of possession as regards the ground on which the fence was.

"It is no doubt stated by the witness Troup, and also by Coull, what the recognised boundary of this farm was, and there is no reason to doubt their evidence. I think it likely the mistake arose in consequence of the idea of there being a ring fence round the arable part of the farm, and the disputed part being outside of the ring fence.

"It is also the fact that an acreage is given in the advertisement which corresponds with the acreage of the farm as the boundaries are stated by the landlord. I am prepared to hold, however, that even if this advertisement can be relevantly adduced as evidence when followed by a written lease, which is at least doubtful, the acreage in it is not taxative of the actual farm let to defenders (*v.* Rankine, 'Landownership," pp. 96, 97). In the present case the words of the lease, the boundaries which have been proved to have been pointed out, and the state of possession, constitute a more reliable guide than the acreage advertised.

"I therefore hold that the land upon which this fence was being put up was included in the farm as let to defender, and that pursuer is not entitled to interdict defender from interfering with it."

On 22nd March 1897 the Sheriff (CRAWFORD) affirmed the interlocutor of the Sheriff-Substitute.

Note.—"The form of this action is an interdict to prevent the tenant from interfering with the erection of a fence by the proprietor on a particular line, but the substantial question between the parties is whether a piece of rough pasture, extending to about twenty-seven acres, was or was not let to the defender as a pertinent of the farm. There is a written lease, by which the farm is let as occupied by the previous tenant Brown. The evidence of Brown's son is that his father did not use or occupy the pasture in question (of this there is some corroboration), and that the boundary contended for by the proprietor was treated by Brown as his boundary. It is said, too, that the acreage of the farm, as advertised previous to the lease, corresponds with the acreage within the boundaries claimed by the pursuer. I think the advertisement is admissible evidence in the absence of defined boundaries in the lease, but it is not taxative, and in the view I take of the case it is not of much importance. If the evidence stopped there the pursuer would have a very strong case. But I think it is displaced by the evidence on the other side. I hold it to be proved that Mr Rule, the ground-officer, in pointing out the boundaries to the defender James Alsop, told him that he was to have the rough pasture in question. Any question as to Rule's authority is excluded by the possession which followed with the knowledge and consent of the proprietor, and which included putting up, repairing, and taking down fences. The evidence to which I have referred would be sufficient to get over the reference to Brown's possession, and it is also important that Brown's lease refers to the possession of one Milton, now dead. The witness Thom says that Milton took over and held under his lease, and that he used and occupied the pasturage in question as a right. I am of opinion that, on the evidence, the defender is entitled to the pasturage. If that be so, the pursuer is not in my judgment entitled to put up the fence in question. It is true, and it is necessary for the full understanding of the case, to keep in view that in one sense the rough pasture is not part of the farm. As the tenant himself says, 'He did not tell me that that rough pasture formed part of the farm; it was the outrun from the farm.' The distinction between the two is, in my view, of no great importance in the case, because if the rough pasture was let to the defender, the pursuer has no right to put up a fence which will interfere with his access to it, and the avowed purpose of which is to mark that he has no right to it. . . . I do not think that the clause in the lease as to fencing can possibly refer to the western boundary of 763, which, indeed, as Brown's evidence shows, was sometimes under crop. . . . In my opinion, however, while the clause in the lease relieved the proprietor from any obligation to fence the infield land from the rough pasture on this side of the farm, the proprietor had no right to erect a fence either on the inconvenient and arbitrary line proposed, or on any line to the effect

of shutting off the tenant against his will from the rough pasture which had been let to him."

The pursuer appealed.

The argument of the pursuer sufficiently appears from the opinion of the Lord President, that of the defenders from the Sheriffs' notes.

At advising—

LORD PRESIDENT — The Sheriffs have pointed out that the question upon which the parties have joined issue is as to the boundaries of the land let to the defender James Alsop. The lease is a probative writing, and in my opinion it affords a definite and conclusive criterion of this dispute.

One naturally turns first to the description of the subjects let in the clause of actual lease just as in a disposition the dispositive clause is the primary and authoritative place for ascertaining the subject of the grant. Well, this lease purports to let a certain part of a former and larger farm called Mains of Affordsk, and then states certain boundaries of the subjects let, none of which touch the part of the farm which we are concerned with, or afford any help in the solution of the present question. But then the lease adds the words "All as sometime occupied by James Brown."

Now, in my opinion this description prescribes a standard and criterion of the boundaries of the farm, which can only be got over by some clear and unequivocal addition or subtraction contained within the lease itself, or by some independent and subsequent grant. On the face of the clause which I have quoted, the tenant has right to what James Brown occupied, and to no more. Anything that passed before the lease was executed is superseded by this contractually accepted standard of boundaries, the possession by James Brown. Accordingly, I hold that even supposing that the ground officer had said, in showing the tenant over the farm, that the boundary was here or was there, this does not avail, as the parties afterwards set down in writing that the farm is let (not as pointed out by the ground officer, but) as occupied by James Brown. Of course if it had been proved that the person authorised to show the farm had said that James Brown occupied up to a certain point, another question might arise, viz., whether the landlord was not barred from questioning the truth of this statement. But nothing of that kind occurs in this case. And I am unable to admit into consideration the various circumstances to which both Sheriffs give weight, as entering into competition with the criterion set up by the lease, viz., what was in fact occupied by James Brown.

Now, the peculiarity of the case is that on this question of fact there is no dispute whatever. James Brown did not occupy the ground now claimed by the tenant.

The only remaining question would therefore seem to be—does any other clause in the lease extend the area of possession? And the defenders point to the fencing clause. The proprietor undertakes to put the ring fence into a proper state of repair, but he shall not be bound to fence the rough pasture land lying towards the Millstone Hill, which has no boundary fence, but which the tenant may fence himself at his own expense. The defenders' argument is that the rough pasture land here referred to is the ground in dispute, and that the clause implies that it is part of the farm.

Now, a fencing clause is necessarily subordinate to the letting clause in this sense, that it naturally is confined to the fencing of the subjects already described as let. It would, to say the least, be a very unusual and unexpected thing in a formal lease for the parties to use the fencing clause for the purpose of incidentally and by implication granting a lease of something outside the boundaries already laid down in the part of the lease which professes to do this. It is only if the facts compelled such a construction that it could be adopted. Now, I do not think that any such necessity arises. We have to see whether there is not within the limits of the farm as possessed by James Brown something which reasonably meets the description of rough pasture land lying towards the Millstone Hill which has no boundary fence, and I think that the field 763 is in this position. It lies towards Millstone Hill, and on that side it was unfenced. Historically it was once under tillage, but it has not been so for years, and at the date of the lease there was nothing but its history to distinguish it from rough pasture land.

Accordingly, I do not find any repugnancy between the fencing clause and the letting clause. What the effect of such a repugnancy might have been is therefore a question which does not arise.

The defenders have no case for any extension of the farm by agreement subsequent to the lease. Mr John Alsop's own evidence as to what passed when Mr Rule visited the ground, and the absence of any averment on record, show that this theory cannot be maintained.

I am for recalling the interlocutor appealed against and granting the interdict craved.

LORD ADAM concurred.

LORD M'LAREN—I also concur. In your Lordships' opinion there is a reservation of a question which may hereafter arise for our consideration, where there is a discrepancy between the terms of the description given in the lease and the lands pointed out by the agent of the landlord as falling within that description. In such a case the question might arise whether the landlord was not barred by the representations of his authorised agent. Another point might perhaps arise in the case of a farm defined by boundaries and also by reference to past possession. If there was a discrepancy between the boundaries and the possession as proved, the question might arise whether effect was to be given to the description by boundaries or by possession. In all such cases the question of the identity of the subjects is a question of fact, and I do not think that

any absolute rule can be laid down for their decision.

LORD KINNEAR concurred.

The Court pronounced an interlocutor in the following terms:—

"Find in fact (1) that the only title of possession proposed by the defender is the probative lease; (2) that the ground now in dispute was not occupied by James Brown mentioned in the lease; (3) that within the farm as occupied by James Brown, the field No. 763 was at the date of the lease rough pasture land lying towards the Millstone Hill, and had no boundary fence; (4) that the fence which has been interfered with does not encroach on the farm as occupied by James Brown: Find in law that the defenders have no right to interfere with or injure the said fence: Sustain the appeal: Recal the interlocutors of the Sheriff-Substitute and of the Sheriff dated 17th February and 22nd March 1897 respectively: Interdict the defenders in terms of the prayer of the petition," &c.

Counsel for the Pursuer — Guthrie — Wilson. Agents—Somerville & Watson, S.S.C.

Counsel for the Defenders—Watt—A. S. D. Thomson. Agent—Andrew Urquhart, S.S.C.

Wednesday, July 14.

SECOND DIVISION.

[Sheriff of Perthshire.

WOOD *v.* TODD.

Stamp—Promissory-Note—Receipt—Agreement—Stamp Act 1891 (54 *and* 55 *Vict. cap.* 39), *secs.* 33 (1), 101 (1), *and First Schedule voce Agreement.*

In support of a claim lodged in a sequestration, the claimant produced the following document, which was stated to be holograph, and was signed by the bankrupt:—"Borrowed from [here followed the name of the claimant] £67 Pounds, July 1878. Paid back £5 Pounds, May 1885. Leaving a balance of £62 Pounds to pay still." It was neither dated nor stamped. *Held*, without pronouncing any opinion as to the validity of the document in establishing a claim of debt, that it was neither a promissory-note, a receipt, nor an agreement within the meaning of the Stamp Act 1891, sections 33 (1), or 101 (1), or first schedule *voce* agreement, and that it did not require any stamp.

Mrs Ann Caird or Todd, widow, Cowhill, Rickarton, lodged a claim in the sequestration of John Douglas, builder, Perth. The claim was for the sum of £96, 2s., of which sum £62 was stated to be the balance of a sum lent to the bankrupt in May 1885, and the balance was interest on that sum to 23rd October 1896. In support of her claim Mrs Todd produced the following document, which was stated to be holograph, and was written in pencil:—

"Borrowed from Mrs Todd £67 Pounds, July 1878.
Paid back £5 Pounds, May 1885.
Leaving a balance of £62 Pounds to pay still.
"JOHN DOUGLAS."

The Bills of Exchange Act 1882 (45 and 46 Vict. cap 61) enacts as follows:—Section 3 (4) "A bill is not invalid by reason (*a*) That it is not dated." Section 10 (1) "A bill is payable on demand. . . . (*b*) In which no term for payment is expressed." Section 83 (1) "A promissory-note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future term, a sum certain in money, to or to the order of a specified person or to bearer." Section 89 (1) "Subject to the provisions in this part, and except as by this section provided, the provisions of this Act relating to bills of exchange, apply, with the necessary modifications, to promissory-notes."

The Stamp Act 1891 (54 and 55 Vict. cap. 39) enacts as follows:—Section 33 (1) "For the purposes of this Act, the expression 'promissory-note' includes any document or writing (except a bank note) containing a promise to pay any sum of money." Section 101 (1) "For the purposes of this Act, the expression 'receipt' includes any note, memorandum, or writing whereby any money amounting to two pounds or upwards, or any bill of exchange or promissory-note for money amounting to two pounds or upwards, is acknowledged or expressed to have been received or deposited or paid." . . . First schedule—"Agreement, or any memorandum of an agreement, made in England or Ireland under hand only, or made in Scotland without any clause of registration, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract or obligatory upon the parties from its being a written instrument—6d."

On 6th May 1897 the trustee in the sequestration, Mr Wood, accountant, Perth, issued the following deliverance on Mrs Todd's claim:—"In respect that the acknowledgement of the loan is neither dated nor stamped, and that no information is supplied as to the alleged loan by the claimant, who is, the trustee understands, related to the bankrupt, the trustee rejects the same."

Against the deliverance the claimant appealed to the Sheriff of Perthshire.

On 28th May 1897 the Sheriff-Substitute (GRAHAM) issued the following interlocutor:—"The Sheriff-Substitute having heard parties' procurators upon the appeal of Mrs Ann Caird or Todd against the deliverance of date 6th May 1897, pronounced by William James Wood, trustee on the sequestrated estates of John Douglas, rejecting the claim of the appellant to be ranked as a creditor on said estate for the sum of £92, 2s. (which she alleges to be due