

This was an action of damages for personal injury brought in the Sheriff Court at Glasgow by John Mooney, labourer, against his employers, William Dixon, Limited, iron and coal masters in Glasgow.

The pursuer appealed to the Court of Session for jury trial. An issue was approved for the trial of the cause on 19th May 1897, and the case was appointed to be tried on 2nd July.

Thereafter the pursuer's law-agents ceased to act for him, and the pursuer failed to pay the dues exigible in terms of the Act of Sederunt of 18th December 1896, I. 23 (5)—which enacts that law-courts' stamps for £2 must be affixed to the precept for citation of the jury before it is transmitted to the Sheriff. In consequence of this failure on his part no jury was cited and the trial did not take place on 2nd July as appointed.

On that day counsel for the defenders moved the Court for decree of absolvitor with expenses in respect of the circumstances above detailed, and referred to the case of *Gilhooly v. M'Hardy*, June 18, 1897, 34 S.L.R. 737.

The Court directed the defenders to make intimation to the pursuer that in the event of his not taking steps to go on with the jury trial they would move for absolvitor upon a certain day in the following week.

The defenders' agents on the same day sent a registered letter to the pursuer giving him notice that upon Saturday 10th they would move the Court to assoilzie the defenders with expenses in respect of the pursuer's failure to provide for citation of a jury and of his failure to appear at the trial.

No answer was received to this letter, a copy of which was lodged.

On July 13th counsel for the defenders appeared and stated that intimation had been duly made and no answer received. He moved for absolvitor with expenses.

The Court pronounced the following interlocutor:—

"The Lords, in respect of the pursuer's failure to cite a jury, and of the intimation made to him, Dismiss the appeal, and assoilzie the defenders from the conclusions of the action, and decern: Find them entitled to expenses in this and in the Inferior Court," &c.

Counsel for the Defenders — Clyde.  
Agent—W. & J. Burness, W.S.

Tuesday, July 13.

FIRST DIVISION.

[Lord Moncreiff, Ordinary.]

MACKENZIE v. FOWLER.

*Title to Sue—Trustee in Sequestration—Right of Divested Trustee to be Sisted as an Individual to Action Raised by him as Trustee.*

A trustee on a sequestrated estate raised an action on behalf of the estate in which he obtained decree. The trustee having left the country, was removed from his office by the creditors, and a new trustee was appointed. The defender in the action reclaimed, and it was sisted in order to enable the new trustee to sist himself as a party. He declined to do so, and the divested trustee moved the Court to sist him individually as a party, in respect that he still had an interest to have the judgment affirmed, so far as he had been found entitled to expenses. The Court refused the motion.

On 18th November 1892 the estates of the late John Clark, farmer, Craiglands, Cromarty, were sequestrated by the Lord Ordinary on the Bills, and on 26th November Mr Hector Rose Mackenzie, Solicitor, Inverness, was appointed trustee on the sequestrated estates.

Mr Mackenzie, as trustee, for the purpose of recovering certain sums due to the estate, raised actions in the Court of Session which were authorised by the majority of a meeting of creditors, against (1st) Mr John A. Fowler, and (2nd) Mrs Louisa Campbell Mackay or Fowler and another.

On 30th January 1896 the Lord Ordinary (MONCREIFF) pronounced interlocutors in both causes, by which he decerned against the defenders for payment of certain sums, and found the pursuer entitled to expenses.

On 23rd May the defenders in both actions reclaimed.

On the 29th May, the pursuer having left the country, a meeting of creditors was held at which it was resolved that he should be removed from the office of trustee, and at a subsequent meeting Mr David Ross, Solicitor, Inverness, was appointed in his place, which appointment was duly confirmed by the Sheriff.

On 20th June 1896 the First Division, on the motion of the defenders, with consent of the pursuer, sisted procedure in the two actions, in order that the new trustee might have an opportunity of sisting himself as a party to the actions. Mr Ross, the new trustee, presented a report to the creditors in which he declined to sist himself in the actions unless the creditors guaranteed him against personal responsibility.

A note was presented to the Court by Mr Mackenzie in both actions, in which, after narrating the above facts, he maintained that "as an individual he still had

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