The Court pronounced the following interlocutor:—

"The Lords, in respect of the minute for pursuer, No. 20 of process, now lodged, Hold the plea of *lis alibi pendens* to be obviated; and having resumed consideration of the reclaiming note, Of new repel the preliminary pleas: Recall the Lord Ordinary's interlocutor of 17th March 1874 reclaimed against, so far as not already recalled; of new, dismiss the action, so far as laid against the defender Mrs Marion Gordon, and decern; and find the said Mrs Marion Gordon entitled to expenses, of which, allow an account to be given in: Remit the said account to the Auditor to tax the same and report; of new assoilzie the other defenders from the reductive conditions of the summons, and decern: Allow these other defenders a proof of the averments contained in the 9th article of their statement of facts, and to the pursuer a conjunct probation, the proof to be taken before Lord Jerviswoode on a day to be fixed by his Lordship: Find the said defenders entitled to expenses since the date of the said interlocutor reclaimed against; and remit to the Auditor to tax the amount thereof and report, reserving all other questions of expenses."

Counsel for Pursuer—J. A. Crichton and D. Crichton. Agent—William Livingstone, S.S.C.

Counsel for Defenders—Asher and Bell. Agents—Morton, Neilson & Smart, W.S.

Friday, June 26.

SECOND DIVISION.

[Sheriff of Perthshire.

CARMICHAEL *v.* PENNY.

Lease—Parole Evidence—Rights of Pasturage.

A tenant under a written lease of a house, garden, and pendicle, claimed certain rights of pasturage in the adjoining woods, which he alleged had been pointed out to him along with the subjects. *Held* that the written lease could not be overruled by parole evidence.

This case came up by appeal against an interlocutor pronounced by the Sheriff of Perthshire (TAIT), on 20th January 1874, in a petition at the instance of the Rev. George Heywood Carmichael and others against James Penny, contractor, Scones, Lethendy. The petitioners set forth that they were proprietors in trust of the estate of Scones, Lethendy, in the parish of Scone and county of Perth, and that the respondent became tenant of the house, garden, and pendicle at Lethendy, now occupied by him, for sixteen and a-half years from Whitsunday 1869, at the yearly rent of £9, conform to lease.

There were certain woods, plantations, and dens on the estate, and the shootings over the estate, including these woods, plantations, and dens, were let under lease, and frequent complaints had been made against the respondent pasturing cattle, &c., in the plantation adjoining his pendicle, whereby the game was disturbed, the trees injured, and damage otherwise sustained, and recently complaints had also been made against the respondent for cutting and carrying away grass from the dens.

The respondent had no right or authority of any kind to enter or pasture cattle, &c., on any part of the estate other than the lands embraced in his lease, yet, notwithstanding frequent remonstrances against his unwarrantable conduct, and written intimations that interdict would be applied for, he threatened to continue the trespass, and accordingly the petitioners prayed for interdict against Penny. In their condescendence the petitioners stated that the respondent became tenant of the house, garden, and pendicle in question conform to lease of date 11th May and 4th June 1869. The original offer for the subjects, dated 23d February 1869, was also produced. This offer was made out after the respondent had been shown the subjects, and it refers only to the house and pendicle.

The woods, plantations, and dens on the estate, and the shootings over the estate, were let under lease prior to the respondent becoming an offerer for the subjects embraced in his lease, and they form no part of the subjects let to the respondent.

The respondent asserted right to the plantation to the west of his pendicle shortly after his entry in 1869, which was resisted by the petitioners, and the access to the plantation built up under the superintendence of Mr Marshall. In consequence of this, the respondent raised an action in June 1870 against the pursuers for loss and damage in consequence of his having been deprived of the use and enjoyment of the plantation, which action was dismissed.

David Gall for a long period of years held the appointment of ground officer on Lethendy, and in addition to the house and pendicle which he possessed rent free, and an annual salary, or money payment, he had some privileges, and among others the pasture of the plantation and dens claimed by the respondent, but these privileges were not let or intended to be let to the respondent, and he was distinctly told before executing the lease that he had only right to the house, garden, and pendicle. Gall had no lease of the pendicle, &c.

The respondent in answer set forth that before he entered into the lease the subjects to be embraced in the lease were pointed out to him on the ground by James Marshall, road surveyor, Dovecotland, himself one of the Lethendy trustees, and authorised to act for the others, and the pasture in the woods and dens were then specially pointed out to him as forming part thereof, and James Marshall at the same time told him that he was to have the same privileges in reference thereto as David Gall had.

The petitioners denied these statements, and averred that any possession had by the respondent was contrary to the terms of his lease.

The pursuers pleaded—"(1) The said plantation or dens never having been let to the respondent, but, on the contrary, it having been expressly understood and explained to the respondent, before offering for the pendicle, that no right to any of the subjects claimed were granted, his alleged right is unfounded. (2) In the circumstances condescended on, the petitioners are entitled to have the interdict declared perpetual, and to decree against the respondent for expenses."

"The defender pleaded—The pasture in the said dens and wood or plantation being a part of the subjects which were let to the defender by the pursuers, he is entitled to occupy and possess the same, and the interim interdict ought therefore to

be recalled, and decree of absolvitor in favour of the defender pronounced, with expenses."

The Sheriff-Substitute (BARCLAY), on 22d December 1873 pronounced the following interlocutor with note appended:—"Having heard parties' procurators, and made avizandum with the process, proofs, and debates,—Finds, as matter of fact—*First*, That by contract of lease between the parties (No. 6 of process), the pursuers let to the defender James Penny, 'All and Whole the house, garden, and pendicle at Lethendy, formerly occupied by David Gall, ground officer, lying in the parish of Scone and shire of Perth, as pointed out on the ground to the said James Penny.' *Second*, It is not proved that the subjects leased, and especially the pastures in the woods and dens, were pointed out to the defender on the ground. But it is proved the previous occupant David Gall, as set forth in the lease, was ground-officer to the pursuers, and as such, and not as a tenant or rentaller, enjoyed certain privileges of pasturage in the woods on the estate adjoining the pendicle; but it is not proved that he did possess the dens remote from the pendicle. *Third*, It is proved that the defender claimed and took possession of the plantations around the pendicle immediately on his entry, but which possession the pursuers disputed and often interrupted. *Fourth*, It is proved that he did not take the use or possession of the remote dens until the present year. Therefore, applying the law to these facts, Finds that the defender, with whom the burden of proof rested, has failed to prove that the pasturage in the woods or dens were pointed out and so let to him, and therefore continues the interim interdict. Finds the defender liable in expenses: Allows an account thereof to be lodged, and remits the same to the Auditor to tax, and decerns.

"*Note.*—Had the subject lease been simply the 'house, garden, and pendicle,' there could have been no room for doubt. A pendicle is a Scotch law word, and when attached to *an estate* is tantamount to the ancient parts and pertinents and *annexis et connexis* of olden charters, and so of an expansive nature, embracing more or less according to possession; but here the pendicle being let *separately*, surrounded by stone walls, there can be no doubt as a bounding description it comprehended no more than what was within the limits of the surrounding walls. The reference to the former occupation of David Gall is merely *descriptive* and not *taxative*. The words are not *as* formerly occupied, in which case (and many such the Sheriff-Substitute has decided) the former possession is the key to the discovery of what was let and the measure of possession. But here the only guide to discovery is the clause, '*as* pointed out on the ground.' The particle *as* omitted as to the previous possession, but introduced in the pointing clause, is the *only guide* as to the possession let. This pointing-out clause, as the Sheriff-Substitute has also painfully experienced, is a most unfortunate one, and should be anxiously avoided. There may be a question (as he has seen) who was really the authorised pointsman? for there may have been more than one claiming that distinguished office. Then the pointsman may have died, and with him the fact has gone into oblivion, and still more (as was illustrated in a recent case in this Court), the pointer may, after a duration of time, have become wholly oblivious of the boundaries pointed out, and other persons who were present at his perambulation may give contradictory evidence as to his locomotion at the time of the process of demarcation. Besides, the fact that the previous possession of Gall is not set down *as* the measure of the possession of his successor, there is the important fact that Gall was not a tenant or rentaller, but an official with certain privileges, which might at any time have been extended or limited at the pleasures of his masters. Besides, the possession of Gall is by no means very clearly shown, and he himself was not called as a witness, and the Sheriff-Substitute does not recollect any reason for this omission.

"The lease certainly is evidence that something more than the enclosed pendicle was intended to be let, otherwise there existed no necessity for further description or pointing out. The defender swears to Marshall having pointed out 'all the ground, but not *every bit of it*; but he pointed out the wood's grass as formerly occupied by David Gall.' But this is not corroborated; whilst Marshall, though under some qualifications, at length swears decidedly that he did not point 'out the plantations as to be possessed by the defender.' The defender soon after his entry took possession of the wood grass adjoining the pendicle, and a series of counter-movements quickly followed to claim and reclaim the possession. The dispute, however, was rather as to the right of watering, than of pasturing the cattle in the plantations. This balances the view of both parties, showing that whilst the defender did seem to consider and claim the wood pasture as let to him, the pursuers did not, but uniformly disputed that possession. But the defender took no possession of the remote dens until this year, though annually yielding grass, clearly indicating that these were not let to him, and which from their distance, there was every presumption that they were not so let. Both parties referred to certain clauses in the lease as to cultivation and possession, with the view to show that the grassing was and was not let to the defender. But the ruling clause is the leasing one, and that being clearly expressed, there remains no ambiguity to be cleared away by subsequent clauses, and which may be read to support both views.

"On the whole, the defender was in the terms of the lease bound to prove that the wood pastures were all let to him. Seeing that the lease did imply that something beyond the walls of the pendicle was to be let, and required to be pointed out, and indeed at the date of the lease had been actually so pointed out, a very little additional evidence as to Marshall having pointed out the wood near the pendicle would have satisfied the Sheriff-Substitute to give to the defender *that* possession, the more especially that it was possessed by Gall, though only as a privilege, and it is not now let to Easson or any one else, and might very reasonably be expected to go with the pendicle, and to be of more value to the pendicler than to any one else. So far, however, as regards the remote dens, the defender has not shown the slightest evidence of right to possess them, but the facts all tend to the opposite direction."

The Sheriff-Depute (TAIT), on appeal, affirmed this judgment, and the defender appealed to the Court of Session.

At advising—

LORD NEAVES—The parties here entered into a lease for a period exceeding a year, and accordingly we must have written evidence as to its

terms. The examination of the lease, as produced, leads to the inevitable conclusion that it embraced only a house, garden, and pendicle. The appellant says that the pasturage rights were pointed out to him, and that he was told he was to have them; that is the whole statement made, and to give effect to it would be to allow parole evidence to overrule this written lease. I am clearly for dismissing the appeal.

LORD BENHOLME—I concur.

LORD ORMIDALE—The defender proposes to drag in a parole gossiping proof of what was talked of over whisky in public houses. Such a kind of thing would be most hazardous, and the Court could not listen to it.

LORD JUSTICE-CLERK—I concur in the result arrived at by your Lordships, though I am not quite prepared to put it upon the ground adopted by Lord Ormidale. If there was an averment that certain things were pointed out, it appears to me impossible to know what was pointed out except by parole testimony, and had this clearly sustained the statements of the defender, I am not quite prepared to say how far it might have affected the position of matters; but there is no need for any consideration of this point, as the case has failed entirely to prove the defenders' averments.

Appeal dismissed, with expenses.

Counsel for Petitioner (Respondents)—Dean of Faculty (Clark), Q.C., and Keir. Agents—Dundas & Wilson, C.S.

Counsel for Respondent (Appellant)—M'Kechnie. Agent—W. S. Stuart, S.S.C.

I., Clerk.

Saturday, June 27.

SECOND DIVISION.

SPECIAL CASE—HEARN AND OTHERS (CONGREVE'S TRS.).

Succession—Heritable and Moveable—Direction to Entail—Intention—Implied Revocation.

A testator by codicil directed his trustees to sell a highland property and purchase with the proceeds an agricultural estate to be by them entailed on his son and a certain series of heirs. Subsequently he sold the property himself, and thereafter died without revoking the codicil, leaving only moveable property, and not having set apart the proceeds of the sale, but mixing it with his other funds. *Held* that the trustees were not entitled to purchase and entail an estate as directed by the codicil, no heritage having come to them and the direction having been revoked by the act of the testator in selling the property during his lifetime without setting the proceeds apart from his other funds.

Testament — Codicil — Partial Revocation—Specific Legacy.

A testator by a codicil directed his trustees to pay to his daughter a sum of £10,000 to be reduced proportionably if the sale of an estate by them should realize less than a certain sum. Having sold the estate himself at a lower price during his lifetime—*held* that the legacy did not fall, but that the daughter was entitled to the whole £10,000.

This was a Special Case for opinion and judgment of the Court, the parties being as follows:—(1) The trustees of the late John Congreve, Esq., sometime of Flichity, of the *first part;* (2) Mrs Congreve, the widow, of the *second part;* (3) William John Congreve Mackintosh Congreve, the son, and his tutors, of the *third part;* (4) Francis Dora Congreve, the daughter, and her tutors, of the *fourth part.*

John Congreve, Esq., sometime of Flichity, died on the 16th November 1873, survived by his widow, and by two children, William Congreve Mackintosh Congreve, his only son, and Frances Dora Congreve, his only daughter. William C. M. Congreve was born on 19th September 1860, and Frances Dora Congreve on 10th June 1865. By antenuptial marriage settlement, dated 28th April 1859, drawn up and executed in English form, a sum of £6000 was settled by Mr Congreve in trust for payment of the income to himself during his life, and after his death for payment of £100 per annum to Mrs Congreve during her widowhood; and, subject to such payment, said £6000 was to be for behoof of the children of the marriage in such proportions as Mr Congreve should direct, failing which, equally among them, the share of each to be payable on his or her attaining 21 years of age, or in the case of daughters on marriage, and failing children of the marriage, ultimately to Mr Congreve's assignees or next of kin; with power to the trustees, with the consent of the spouses or the survivor, to raise a sum not exceeding one-half of each child's expectancy for its advancement in life; and lastly, the unapplied income is to be accumulated for the children. This sum of £6000 was duly paid to and continues to be held by the separate trustees appointed to carry out the purposes of the marriage settlement. The legal rights of the widow and children are not discharged or renounced in the settlement. In addition to the annuity of £100, Mr Congreve, by bond of annuity, of even date with the antenuptial settlement, bound himself, his heirs, executors, and representatives whomsoever, to pay to Mrs Congreve a further annuity of £200 per annum, in case she should survive him, and while she should remain unmarried; and disponed a portion of the estate of Flichity in security. On the sale of Flichity after mentioned, the security over that estate was discharged, but the personal obligation against Mr Congreve and his representatives continues to subsist. By his trust disposition and settlement, dated 12th November 1864, with codicil thereto, dated 10th February 1870, Mr Congreve conveyed his whole heritable and moveable estate to trustees, in trust for the purposes therein mentioned. He also appointed his trustees executors and tutors and guardians to his children. The purposes of the trust-disposition are (1) For payment of just and lawful debts, &c.: (2) For payment of two specified legacies of £100 each; (3) For payment of any other legacies he might instruct by any codicils or writings under his hand; (4) That the trustees should immediately after the testator's death give to his widow possession of the mansion-house of Flichity and furniture therein belonging to him at the time of his death, free of any rent whatever, until his son should marry or