that object may convey his estate to trustees, but if he changes his mind he is entitled to revoke the deed and to call on the trustees to denude.

As to the second object, if Mr Bertram had married and had children, that might have rendered the deed irrevocable. But then he did not marry, and there is no person in existence who has acquired an interest or *jus quæsitum* which entitles him to found on this part of the deed. So far as regards the two main objects of the deed, therefore, I am of opinion that Mr Bertram was not debarred from revoking. But then it is said that he cannot revoke because he has given an interest which he cannot take away to his brother David Stanley Bertram and to his step-sister Dorys Jessie Bertram. That contention can only be well founded if it appears from the deed that the granter's intention was to confer a present right on these beneficiaries, although subject, it may be, to contingencies.

Now the way in which this matter comes into the trust deed is as follows:—By the fourth purpose the trustees are directed to hold the capital for the lawful issue of the truster, and by the fifth purpose it is provided that "in the event of there being no lawful issue who shall acquire a vested right to the capital of the said trust estate . . . . my trustees upon the death of the survivor of me and my widow shall assign, dispone, convey, and make over (First) one half of the capital of the said trust estate to my brother the said David Stanley Bertram, and to his heirs and assignees whomsoever; and (Second) the other one-half to Dorys Jessie Bertram, my step-sister, and to her heirs and assignees whomsoever." Now that appears to me to be a provision of a purely testamentary nature intended to prevent the estate falling into intestacy in the event of the truster marrying and being predeceased by all his children. I am therefore of opinion that the first question should be answered in the affirmative, and that being so it is unnecessary to consider the other questions.

LORD ARDWALL and LORD DUNDAS concurred.

The LORD JUSTICE-CLERK was not present.

The Court answered the first question in the affirmative, and that being so found it unnecessary to answer the other questions.

Counsel for the First, Third, and Fourth Parties — Wilton. Agents — Cuthbert & Marchbank, S.S.C.

Counsel for the Second Party — A. R. Brown. Agents—M. J. Brown, Son, & Company, S.S.C.

Thursday, June 24.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

HOULDSWORTH *v.* GORDON CUMMING.

Sale — Sale of Heritage — Subject Sold — Extrinsic Evidence — Competency of Parole Evidence to Explain Written Contract of Sale.

In December 1907 A purchased the "estate of D" from B under agreement constituted by correspondence. The parties thereafter differed as to what precisely was included within the estate which was sold, though they were agreed that a binding contract had been concluded between them. A accordingly raised an action against B for the purpose of obtaining implement of the contract by a valid conveyance of the subjects which he alleged he had purchased. He asked for a conveyance of the lands of D as the same were described in an instrument of disentail, which was the latest infeftment of the estate. The defender on the other hand averred that what he had sold to the pursuer was not the estate of D as described in the title-deeds thereof, but the estate of D as shown in a lithographed plan dated 1887. He further averred that in the course of the negotiations preceding the sale the pursuer's factor was furnished by the defender's factor with a copy of the plan as showing the lands to be sold, and the negotiations for the sale were throughout conducted, and the missives founded on exchanged, on the footing that the estate of D consisted of the lands shown in pink on the said plan. The plan was not referred to in the contract, nor was it signed by the parties as relative thereto. The parties having been allowed a proof of their averments, proof thereof was taken.

Held (*rev.* Lord Mackenzie) that, assuming the evidence with regard to the negotiations to have been competently led, the defender had not, on that evidence, proved that what he had sold to the pursuer was the estate of D as delineated on the plan, and that the pursuer was entitled under the agreement to a conveyance of the estate of D as possessed by the defender and his predecessors under the title-deeds thereof.

Question whether the evidence as to the negotiations of parties should have been admitted.

Opinions (*per* Lords Low and Ardwall) that where lands are sold by name extrinsic evidence is competent, and may be necessary, but only to identify the subject-matter and show what are the exact boundaries or extent of the lands described in and possessed under the title-deeds thereof.

James Hamilton Houldsworth of Coltness, in the County of Lanark, raised an action against Sir William Gordon Gordon Cumming of Altyre and Gordonstown, Baronet, in which he sought that the defender should be ordained to grant him a valid conveyance of the estate of Dallas, in Morayshire, in terms of an agreement of sale and purchase concluded between them with regard to the said property.

The pursuer, *inter alia*, pleaded—"(1) The defender having entered into a valid contract of sale of the estate of Dallas condescended on with the pursuer, should be ordained to implement the same as craved."

The defender, *inter alia*, pleaded—"(4) The subjects purchased by the pursuer being the lands coloured pink on the said plan of 1887, and the defender having tendered to the pursuer a conveyance of these lands, the defender is entitled to absolvitor."

The Lord Ordinary (GUTHRIE) having before answer allowed the parties a proof of their averments, proof was subsequently taken by Lord Mackenzie.

The following narrative of the *facts* established by the proof is taken from the *opinion* of Lord Ardwall: — "In March 1907 the defender Sir William Gordon Gordon Cumming put his estate of Dallas into the hands of Mr James Dowell, London, for sale, and after various correspondence and negotiations as well as meetings upon the ground a sale was finally concluded between the defender and the pursuer Mr Houldsworth on 20th December 1907, in terms of a letter of that date by Mr Logan, the pursuer's factor, to Mr Dowell, who was acting on behalf of the defender.

"The subject of the contract of sale as described in the said letter is 'the estate of Dallas in the county of Morayshire, as it now stands, everything complete, including furniture and fixtures.'

"The negotiations relative to the sale had been carried out between Mr Logan as factor for the pursuer and Mr M'Laren as factor for the defender, Mr Dowell acting as broker.

"After the sale, when the matter came into the hands of the law agents for the parties, who were Messrs Hagart & Burn Murdoch, Edinburgh, for the pursuer, and Messrs Grigor & Young, Elgin, for the defender, a difficulty arose regarding the western boundary of the estate sold, and having failed to come to an agreement the pursuer raised this action for the purpose of obtaining implement of the contract of sale by a valid conveyance of the subjects alleged by the pursuer to have been purchased by him. Neither the pursuer nor the defender desire that the contract of sale be set aside on the ground that there was not *consensus in idem placitum;* on the contrary, they both take up the position that there is a valid and binding contract, and ask the Court to determine whether the subject of it was the estate of Dallas according to the titles thereof explained by possession, or the estate of Dallas as shown on a lithographed plan No. 46 of process.

"The pursuer asks for a conveyance of the lands of Dallas as the same are described in an instrument of disentail of the said lands dated 31st December 1886, and registered 18th June 1888, which was said to be the description of 'Dallas' in a letter by Messrs Grigor & Young to Messrs Hagart & Burn Murdoch of 10th January 1908. The titles from which this description is taken are admittedly the titles under which the estate of Dallas has been all along held by the defender and his predecessors, but it seems that there are some crofts and townships mentioned in this description which are outside of what has since 1808 been regarded as the estate of Dallas. The pursuer, however, is willing to have the description qualified to the effect of making the western boundary of the estate of Dallas at the place in dispute to coincide with the march fence bounding the farm of Auchness and the farm of Soccach on the west, though he maintains that strictly the correct boundary of the estate is somewhat to the west of the march fence, and coincides with the boundary of the parish of Dallas. The march fence, however, nearly coincides with the boundary of the parish and also with the boundary of the estate of Dallas as shown on what has been called in this process the three part plans, Nos. 15, 16, and 17 of process, reduced for convenience on the plan No. 29 of process. These plans, it seems, were surveyed in 1808-9, and were adjusted by P. Macbey in 1858. In saying that these three boundaries nearly coincide although there are altogether some 210 acres more enclosed by the parish boundary than by the march fence, I take into account that in erecting a wire fence round an estate on high uncultivated and very rough ground, the persons erecting the fence do so as far as possible in straight lines, so as to shorten the length of the fence by getting rid of angles and turns, and also in order to get the straining posts in line with each other, the land being of trifling value.

"The defender, on the other hand, maintains that what was sold to the pursuer was the estate of Dallas, as shown on a lithographed plan dated 1887, and which forms No. 46 of process. The line of the wire fence is laid down in blue on the Ordnance Survey plan No. 28 of process, and the western boundary of the estate of Dallas, as shown on the lithographed plan, and as contended for by the defender, is laid down in green upon the same plan No. 28. It thus appears that the dispute between the parties is whether the land comprised between these two competing boundaries is or is not to be conveyed to the pursuer."

On 25th February 1909 the Lord Ordinary sustained the fourth plea-in-law for the defender, and assoilzied him from the conclusions of the action.

Opinion.—[*After a narrative of the facts*] —"The class of cases founded upon by the pursuer were those of which the *North British Railway Company* v. *Tod*, 5 Bell's App. 184, is an example. The defender, however, is here founding upon the plan No. 46 for the purpose of identifying the

subject parties were contracting about, and this, in my opinion, it is quite competent to do. There remains no doubt, in my mind, after hearing the evidence that what Sir William Gordon Cumming intended to sell was the estate of Dallas as 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. It is right to say that I do not think the words 'the estate of Dallas as it now stands,' which were founded on by the defender, aid his case. They refer not to the extent of the estate but to what was on it. The pursuer does not define what the extent of his demand is, and Mr Logan does not in his evidence say what more he believed he was buying. I understand the pursuer's claim to be to the land at least up to the boundary of the parish of Dallas, which is shown by the dotted black line on the plan No. 28. This would give an area of 16,838 acres, as against 15,250 in Mr Dowell's particulars, or an excess of 1588 acres, and as against 15,303 acres on the plan No. 46, or an excess of 1535 acres. If the area up to the wire fence which runs north and south to the west of the area tinted pink on No. 46 be taken, that would give an extent of 16,597 acres, or an excess of 1294 acres over the total in the plan No. 46. This wire fence is shown by the blue line on the plan No. 38 of process. It commences at Mill Buie, runs to Loch Dallas, continues thence to the Know of Lochan Iore, and thence on to the Cairn Kitty. It does not correspond with the parish boundary, which is shown on No. 28 of process by a dotted line to the westward of the line of the fence, but substantially it does. The extent of ground between the wire fence and the parish bonndary is 241 acres.

"The history of the fence is given by Mr Walker. He says that everything to the west of the pink area on No. 46 has been regarded as Altyre all his time. He became factor in 1860. The tenants of Auchness and Soccach get grazing ground to the west, there being no fixed line. It was in 1879 that a definite arrangement was made with them. The fence was then erected between Mill Buie and Lochan Iore. Between Lochan Iore and Cairn Kitty it was erected in 1880 or 1881. (Mr Doig must be in error in saying the fence between Lochan Iore and Cairn Kitty was not up when he made his survey in 1887.) This fence was not the march of the estate of Dallas. The pursuer in his present case does not maintain that it is or ever was.

"In asking a disposition which would convey more than the pink area on No. 46 I think the pursuer asks for what the defender never meant to sell. On the other hand, the defender is tendering to the pursuer a conveyance which will give him less than the area producing the agricultural rent shown in the rental No. 12, which was handed by Mr M'Laren to Mr Logan, and less than the adjusted figure of £3585, 6s. 6d. Amount of agricultural rent applicable to the portions of Auchness and Soccach west of the pink up to the fence is estimated at £45 to £60. This rent the pursuer will not be entitled to receive if he has purchased the area shown in pink on plan No. 46. If this were material it might lead to the conclusion that there was not *consensus in idem* as regards the subject sold, in which case the pursuer might be entitled to be quit of his bargain. This is not, however, the view presented by either of the parties. They are agreed that a binding contract was entered into, and they desire a judgment in regard to what that contract means. I should have thought in this state of matters that the case was eminently one for a reasonable settlement. This unfortunately the parties have been unable to arrive at, and it is necessary to decide the question raised.

"In considering what weight is to be attached to the possession by the Auchness and Soccach tenants up to the wire fence it has to be kept in view that the pursuer is not claiming the property up to the wire fence, but beyond it. In support of his demand the pursuer refers to the entries in the valuation roll as carrying the Dallas lands up to the parish boundary; to the fact that stipend is paid to the minister of Dallas in respect of the lands and estate of Dallas, and that he pays no other stipend to the minister in respect of Dallas parish; that the whole poor and school rates, registration, and county assessments are levied on Auchness and Soccach up to the wire fence; that a widow who lived in Clashninian, which is west of the wire fence, between it and the parish boundary, got parochial relief from Dallas up to her death in 1906; and that the extent unfenced as given by Mr M'Laren of four or five miles will not correspond with the fact if the pink area is taken. The pursuer also founds on the description in the leases of the shootings of Loch Dallas, Trevay, and Lochan Iore, as being all on the estate of Altyre and Dallas; to the obligation in the lease, No. 25 of process, in 1901 on the tenant of Soccach to perform the necessary carriages of materials effeiring to the estate of Dallas for the erection of the march fence between his farm and the estate of Elchies, extending from Cairn Kitty in a north-easterly direction, thus bounding the southern portion of the land in dispute. It is, however, to be observed that Mr Walker, after it was arranged in 1887 to sell the estate, put on the back of the lease of Soccach, No. 67 of process, a marking 'less for part of estate of Altyre, 490 acres, £20,' and on the lease of Auchness, No. 65 of process, 'less for part of estate of Altyre, 755 acres, £30.' These make up the bulk of the lands now in dispute. The amounts were not credited in the ledgers of the Altyre estate, as the notes were put on to provide for the case of a sale being then effected. The shooting rent of £40 apparently was, and in the valuation roll appears as, shootings of Altyre in the parish of Dallas.

"No reference was made at the proof or in argument to the averment that

a sum of £30,000 is secured over the estate of Dallas, nor was any explanation given of what lands are covered by the bond. If the bond covers the land described in the summons the price of £75,000 would in part go to disencumber lands which are not, according to my view, included in the contract of sale. Even on this hypothesis, which is the one most favourable to the pursuers, I should reach the same conclusion.

"After giving all due weight to the considerations urged on behalf of the pursuer, I am of opinion what was sold and bought was the estate of Dallas as shown on the plan No. 46. Parties are agreed that this is a sporting estate (which is really what was wanted) of a size greater than the acreage specified in Mr Dowell's particulars; that it is capable of yielding the bags of game represented in those particulars; and that it has a rental of £3585 (Mr Logan says he attached importance to the purchase as an investment). I think the fact that in the rental exhibited to Mr Logan are entered the whole rents paid by the Auchness and Soccach tenants, including what effeirs to their grazings over the march, does not entitle the pursuer to a conveyance of more than is shown on No. 46. If it affords ground for a claim by the pursuer against the defender, that question can only be raised in another action.

"The result, in my opinion, is that the pursuer fails in the demand he now makes. The defenders' fourth plea-in-law will be sustained. The result is absolvitor, and with expenses."

The pursuer reclaimed, and argued—It was incompetent to vary a written contract by parole evidence—1 Bell Comm. (M'Laren's Edit.) 457; *Steuart's Trustees* v. *Hart*, December 2, 1875, 3 R. 192 (L.-P. Inglis at 201), 13 S.L.R. 105. Even if the parole evidence which the defender had led were competent to vary the bargain, it was wholly insufficient to prove a contract based on plan No. 46 of process. The defender was endeavouring to substitute for a sale of the estate of Dallas as shown in the titles, a sale of the estate as shown in a plan which was not part of the bargain between the parties. This he was not entitled to do—*North British Railway Company* v. *Tod*, July 23, 1846, 5 Bell's App. 184 (Lord Chancellor Cottenham at 200, and Lord Campbell at 207); *Feoffees of Heriot's Hospital* v. *Gibson*, May 4, 1814, 2 Dow 301 (Lord Chancellor Eldon at 307, Lord Redesdale at 313); *Macfarlane* v. *Watt*, February 15, 1828, 6 S. 556 (Lord Pitmilly at 560); *Squire* v. *Campbell*, July 27, 1836, 1 Mylne & Craig, 459. The pursuer was entitled to a disposition of the lands in which the defender was infeft, though he was not asking for so much. It did not matter what the defender intended to sell. What he sold was the estate of Dallas.

Argued for the defender—The defender did not challenge the authorities quoted by the pursuer on the matter of the variation of a contract by a plan not signed as relative thereto. Both parties maintained that there was a valid contract of sale, but they were not agreed as to the subject-matter thereof. Extrinsic evidence was competent to identify the subject-matter of the sale—*Macdonald* v. *Newall*, November 16, 1898, 1 F. 68, 36 S.L.R. 77. The pursuer identified the estate by a reference to a deed; the defender identified it as delineated on the plan. The pursuer maintained that the subject-matter of the contract was the lands and barony of Dallas, but it was an unsound proposition to say that the estate of Dallas meant the barony of Dallas—*Lord Advocate* v. *Sir Andrew Cathcart*, May 19, 1871, 9 Macph. 744 (Lord President Inglis at 749), 8 S.L.R. 503. Moreover, there was no averment on record that the estate of Dallas was identical with the lands and barony of Dallas. *Esto* that there was a relevant averment to that effect, the pursuer had not proved it. On the contrary, the barony had been shown to embrace lands outside the estate. But the defender must prove, as pursuer in the issue, that the estate of Dallas put up for sale was the estate as shown on the said plan. This he had done. The plan was what the pursuer had to indicate the limits of what he was going to buy. If an intending purchaser of a property was shown a plan thereof, and subsequently bought the property, it could be identified by means of the plan. Finally, if the defender's factor had made a material misrepresentation as to the rental of the property, the pursuer was entitled to have the contract set aside and claim damages. But that matter was not before the Court in the present process. No misrepresentation as to the area of the estate had been made to the pursuer.

At advising—

LORD ARDWALL—. . . [*After narrative of facts, supra*] . . . I propose first to consider which of these two boundaries is to be regarded as the true western boundary of the estate of Dallas, and I shall thereafter proceed to inquire whether the pursuer is bound to accept anything less than the lands contained in that boundary in respect, as the defender alleges, of his having bought the estate shown in pink on the lithographed plan No. 46 of process, and nothing more.

It must be observed in entering on this inquiry that the estate of Dallas and the estate of Altyre, which immediately adjoins it on the west, up to and at the date of the contract of sale in question both belonged to the defender. It is further to be observed that it is proved alike by the evidence of the titles, and of Robert Walker, who is a witness for the defender and was long the factor on both estates, that the Altyre property is in Edenkillie parish, and that there is no part of Altyre in Dallas parish at or near the land in dispute, whereas the whole of the estate of Dallas, including the whole of the farms of Auchness and Soccach, are in Dallas parish.

I am of opinion that the boundary claimed by the pursuer is to be preferred to that claimed by the defender.

[*His Lordship here reviewed the evidence.*]

It appears to be clearly proved (1) that what I have called the wire fence boundary is practically the old boundary of the estate as shown on the plan of 1808; (2) that it coincides practically with the parish boundary; (3) that all the land to the east of that boundary has been all along possessed by the tenants of Auchness and Soccach respectively; (4) that these farms have all along been regarded as farms on the Dallas estate; (5) that the whole land comprised in these farms up to the wire fence has all along been treated for all valuation and parish purposes as being in Dallas estate and in Dallas parish; (6) that no part of either of these farms has ever been held to be in the estate of Altyre or the parish of Edenkillie. I therefore cannot doubt that unless there can be clearly proved to have been a special agreement to the contrary, the pursuer is entitled to have conveyed to him by the defender the whole of the land to the east of the wire fence.

A word must now be said as to the other boundary which is shown in green on the Ordnance Survey plan. That boundary is not shown by anything upon the ground, though it appears that the gamekeepers are able to point out where the alleged boundary line runs by certain butts and other marks, not placed there, however, for the purpose of marking a boundary. This boundary was laid down entirely for the purposes of grouse shooting, and apparently in consequence of a dispute of some bitterness between the defender's predecessor Sir Alexander Gordon Cumming and the then shooting tenant of Dallas, and I suppose the boundary was laid down when the division of the shootings was made, either for the purpose of marking off conveniently-sized beats or for convenience in the sportsmen walking, or to suit the flight of grouse when driven over butts. But apart from this the boundary never had any existence. The occupation of the farms was not interfered with by it in any way, nor the rental of the estate of Dallas, nor the incidence of parochial or other burdens. The first shooting lease which refers to the boundary is apparently that dated April 1870, and the language of that lease appears to confirm the view that the ground in dispute lying between the boundary of the Dallas shootings as then let and the wire fence is truly part of the estate of Dallas.

It was not maintained for the defender that the plan could be imported into the contract directly, as it was neither referred to therein nor signed as relative thereto, but the defender does maintain that he is entitled to identify the subject sold by a proof going to show what was the subject which both parties had in view when they respectively sold and bought the estate of Dallas; and he further maintains that the subjects so identified must be taken to be "the estate of Dallas" mentioned in the missives of sale. It becomes necessary, therefore, to examine the evidence bearing on this matter.

I have already alluded to the origin of the division of the shootings of Dallas and Altyre shown by the green line upon the plans No. 28 and 29 of process. The origin of the lithographed plan (No. 46 of process) was this. In 1887 the defender resolved to expose the estate of Dallas for sale, and gave instructions for a plan of the estate defined by the shooting boundaries on the west to be drawn up. The property was put into the hands of Messrs Watson, Lyall, & Co. for sale, but it was not sold at that time, nor was it again exposed for sale till 1907. Mr Doig, civil engineer, Elgin, prepared the original of the plan No. 46 according to instructions received from Mr Walker, the then factor on Dallas estate. The boundaries which he was instructed to lay down were pointed out by Mr Walker and by Irving, the head keeper at Altyre, and were laid down accordingly. The area of the estate was also surveyed by Mr Doig, he tells us, and found to amount, according to him, to 15,303·688 acres, while according to Mr Robertson, the pursuer's engineer, the area of the estate to the west of the wire fence is 16,587 acres, being 1284 acres additional of rough high-lying moorland. A lithographed copy of the plan thus made by Mr Doig was executed and attached to the particulars of the sale, and it was one of these lithographed plans, namely, No. 46 of process, which it is said was agreed on as showing the boundaries of the estate for the purposes of the sale to the pursuer.

As the whole dispute really hinges on this question, which is one of fact, I shall refer to some portions of the evidence on the matter. I think it is extremely doubtful whether the greater part of this evidence should have been admitted; but as neither party objected to it, and as it is now before the Court, it is not necessary to determine the question of its competency.

[*His Lordship here considered the evidence.*]

In this state of matters I am unable to hold that the defender has succeeded in his contention that the estate of Dallas as sold to the pursuer was confined to the portions of the original estate shown on the lithographed plan No. 46 of process.

The difference that it would make to the purchaser if only the portion of the estate of Dallas shown on the lithographed plan were to be conveyed to him would be considerable. In the first place, according to the estimate of the pursuer's factor, £50 a-year would be knocked off the agricultural or pastoral rent of the estate, and also a considerable amount of shooting. It would involve the trouble and annoyance of splitting up of the rental of two farms, and probably when they came to be re-let the diminution in the acreage of both farms would render them less desirable subjects for letting. Further, it would involve the erection of a new march fence on the site of the line marked green on plan so as to prevent difficulties arising between the farm tenants on Altyre and Dallas estates respectively. Now I am of opinion that to effect a change on the original boundaries of the estate of Dallas having

these results would require a very definite agreement in a sale of "the estate of Dallas," whereas all that the defender has shown is that without any special reservation or explanation the lithographed plan No. 46 of process was put into the hands of the pursuer's factor when he was inspecting the estate, not for the purpose of informing him as to the boundaries of the estate or the extent of it, but simply for the purpose of enabling him to make a general inspection of it more intelligently than he would have been able to do had he not a plan with him.

But any importance that might have otherwise attached to these facts is, I think, entirely removed by there having been submitted to Mr Logan a rental of the estate which included the whole of the ground now in dispute, and on the faith of which rental the bargain was concluded.

I shall now make a few observations on the sales of estates by an estate name on the one hand and by a plan on the other.

Where an estate is sold under a general name, as was the case here with regard to the estate of Dallas, that name is held to designate the estate as described in the recorded title-deeds thereof, all land in Scotland being held under titles recorded in the Register of Sasines, which is open to the public. It may sometimes happen that more lands are included in the title-deeds than have recently been possessed as part of the estate under these deeds. In such a case it may be a proper subject of proof what were the exact boundaries or extent of the lands possessed under the titles, and in such a case the buyer will be entitled only to a conveyance of such lands as have been known and possessed by the estate name under the recorded title-deeds. In the present case, as already pointed out, the title to which the defender's agent referred the pursuer's agent as containing the description of Dallas estate seems to contain some lands forming part of the barony of Gordonstown, and which have apparently never formed part of the estate of Dallas proper. There is, however, no doubt whatever on the titles that the extract registered instrument of disentail and the deeds on which it follows are the titles and the only titles under which the estate of Dallas has been possessed, and it is equally clear that the piece of land presently in dispute is included in these titles and is not included in the titles of the estate of Altyre. In other words, if the ground in dispute does not form part of the estate of Dallas it must be held to have been possessed by Sir William Gordon Cumming and his predecessors under no title at all, which is not suggested.

The defender made it matter of objection to the pursuer obtaining decree in this action that the latter is not entitled to obtain a disposition in terms of the conclusions of the summons, as that would include some lands not forming part of the estate of Dallas. But it is perfectly competent for the Court to give him decree for a conveyance of a less amount of land than is concluded for in the summons, and he is willing to accept a decree giving him a title to the estate of Dallas, bounded on the west by the wire fence presently on the ground. This I think is clearly within his rights, because, as I have already pointed out, it involves his practically giving up some 210 acres of land.

On the other hand, the sale of an estate with reference to a plan is of frequent occurrence, but in every such case the plan according to which the estate is being sold is either expressly referred to in the missives or other documents containing the contract of sale, or is itself signed or initialled by the parties as relative to such contract. Nothing of that kind was done in the present case.

But the defender maintained, and offered to prove, that the estate of Dallas as mentioned in the missives of sale meant, according to the agreement of both parties, not the estate described in the title-deeds and possessed under them, but a portion only of that estate shown on the lithographed plan which has been so often referred to. I have already pointed out that it would require very clear and distinct evidence indeed to show that a plan was thus practically made a part of the contract between the parties, for that is what it amounts to; and on the evidence, for the reasons above indicated when examining it, I am of opinion that the defender has entirely failed to discharge the very heavy *onus* which, in view of the terms of the missives, lay upon him.

The careful but, as I think, erroneous judgment of the Lord Ordinary seems to proceed upon his having attached undue weight to two points in the case, the first being that in 1887 the defender exposed for sale only the estate of Dallas as shown on the lithographed plan, and that in 1907 he never intended to sell anything more; and the second, that the estate was a sporting estate, and that the shooting boundary must therefore be regarded as the important boundary in deciding the present case.

For the reasons I have already indicated, I think it is of little consequence what the defender wished or intended to sell, the question being what under the contract entered into with the pursuer he did sell; while with regard to the shooting boundary, I think it would be a strange proceeding to adopt a shooting boundary on an estate plan as its true boundary, when for all other purposes—agricultural, valuation, and rating—its recognised boundary was quite different.

I am accordingly of opinion that the Lord Ordinary's interlocutor ought to be recalled, and that the Court should find that the pursuer is entitled to a disposition of the lands mentioned in the conclusions of the summons so far as these lie to the east of the wire fence delineated and coloured blue on the plan No. 28 of process; and appoint him to lodge in process a draft of a description of the lands and estate of Dallas in terms of this finding.

LORD LOW—In December 1907 a contract was concluded for the sale by the defenders to the pursuer of "the estate of Dallas as it now stands, everything complete, including furniture and fixtures."

The parties agree that a binding contract was concluded between them, but they differ as to what precisely was included within the estate which was sold. There is an area of some 1500 acres upon the west side of the property, which the pursuer maintains forms part of the "estate of Dallas," while the defender contends that it does not do so.

It seems to me to be plain, and indeed was in the end conceded by the defender's counsel, that the words "as it now stands everything complete," do not refer in any way to the extent of the estate, but to what was on the estate, such as fixtures, which in the absence of agreement to the contrary the seller would have been entitled, in a question with the purchaser, to remove.

The question therefore is, What is "the estate of Dallas" which the defender agreed to sell and the pursuer agreed to purchase? In order to answer that question extrinsic evidence is no doubt necessary, but I have grave doubts of the competency of a great part of the evidence which was led, and which related to conversations and communings prior to the contract between Mr Logan and Mr M'Laren, who acted for the pursuer and the defender respectively. The reason why such evidence was admitted was that the defender alleges in his defences that the estate was sold as shown upon a plan (No. 46 of process) which had been prepared in 1887. The defender's statements upon the subject are to the following effect. It is stated that when Logan inspected the estate in March 1907 M'Laren informed him "that the lands to be sold were correctly shown on the 1887 plan, and the boundaries were pointed out in accordance therewith"; and again, that Logan was furnished by M'Laren with "a copy of said plan as showing the lands to be sold, and the negotiations for the sale were throughout conducted, and the missives founded or exchanged, on the footing that the estate of Dallas consisted of the lands shown in pink on said plan."

Now, considering that this is not an action for reduction of the contract, I doubt whether these averments ought to have been remitted to probation. The parties admit that a contract was concluded between them, and they are willing to carry out that contract according to its true meaning and effect. The difference is as to the scope of the general description "the estate of Dallas"; they are not agreed as to what that description includes. It is necessary, in order to determine that question, to inquire into facts outside of the contract, but I think that these must be facts relating to the estate as distinguished from negotiations or communings between the parties prior to the completion of the contract. I think that the first step in such a case would naturally be to ascertain what were the titles under which the estate was held, and what was the description given therein of the estate. If, as in this case, the titles gave no boundaries but merely enumerate a number of holdings as comprehended within the estate, the inquiry is what has been possessed under the titles, and in that inquiry various kinds of evidence, such as leases, estate plans, entries in the valuation roll, rentals, and the like, are admissible. But I have difficulty in assenting to the view that it is competent to have evidence of what passed between the parties during the negotiations which led up to the contract. The question is not what prior to the contract was represented by this party or by that, or what the one party intended to sell and the other party intended to buy. The only question is, What, upon a fair construction of the language used, is the meaning and effect of the contract which the parties ultimately made, and which superseded all previous communings and negotiations.

The case of *Macdonald* v. *Newall* (1 F. 68) was cited as an authority for saying that when there is a dispute as to the extent of a property which has been sold it is competent to prove that certain boundaries were pointed out to the purchaser prior to the sale. There were perhaps dicta in that case which may be regarded as supporting that view, but the circumstances were very special, and it is to be remembered that one of the cross actions (which were conjoined) concluded for reduction of the contract.

But while I have thought it right to express these doubts I think that we must consider the whole evidence in disposing of the case, because no objection to its competency appears to have been taken at the proof, and although the point was raised in the opening speech, the Dean of Faculty, when he came to address the Court for the pursuer, dealt with the case as it had been presented in the Outer House, and did not impugn the competency of any part of the evidence.

Turning, therefore, to the evidence, my opinion is that the defender has entirely failed to prove that the plan was given to Logan and accepted by him as showing the precise extent and boundaries of the estate which was offered for sale. Lord Ardwall has gone fully into the evidence, and it is unnecessary to repeat what he has said. I would only add that I am satisfied that the sole purpose for which Logan asked for a plan of the estate, and for which M'Laren handed him the plan No. 46, was to enable him to form a better estimate of the estate when driving through it than he would otherwise have been able to do. That is a very intelligible purpose, because there can be no doubt that a person will get a much more accurate knowledge of a large estate such as Dallas if he drives through it with a plan in his hand, than he could do by driving through it without a plan, or by studying a plan before seeing the estate. By driving through the estate Logan saw what its general character was, while the plan showed him the general lie of the land, and the relative positions of farms or

holdings and of natural features such as hills, woods, and streams. For such a purpose a plan which was generally correct was sufficient, and Logan had no reason to concern himself about the boundaries shown upon the plan, because it was never suggested that any question could arise as to what the boundaries were.

I therefore think that the evidence in regard to the circumstances in which the plan was given to Logan is altogether insufficient to establish the defender's averments as to the purpose for which it was given to and accepted by him. Further, if it is competent to consider what passed between Logan and M'Laren in regard to the plan, it is also, in my opinion, competent to take into consideration what passed between them in regard to another matter. M'Laren furnished Logan with what is called a "rental" of the estate—that is, a statement containing in separate columns the names of the holdings on the estate, the names of the tenants, the extent of each holding, the amount of the rents, and the duration of the leases. That statement was gone over very carefully by Logan and M'Laren, some small mistakes were corrected, and Logan obtained from M'Laren a good deal of additional information of which he made notes.

Now two of the farms contained in the statement are Soccach and Auchness, and the full acreage of these farms is given in the statement, and the full rents; but according to the defender's contention only a portion of each of these farms was included in the sale to the pursuer. Not one word, however, was said by M'Laren to Logan suggesting that that was the case. On the contrary, M'Laren furnished the statement as showing the farms which, and the whole of which, were included in the estate which was offered for sale. I think that that was in effect as distinct a representation by the accredited agent of the defender that the farms of Soccach and Auchness formed part of the estate as could be imagined, and the pursuer claims no more than was there represented to him to form part of the estate.

The Lord Advocate, however, argued that although the evidence in regard to the "rental" might have been competent if the pursuer had been seeking to reduce the contract on the ground of misrepresentation, it was not competent when the only question was what was the subject-matter of the contract. I confess that I am unable to see any difference, so far as the question of the competency of the evidence is concerned, between the case of the defender on the plan and the case of the pursuer on the rental. The defender's case is that a plan was handed to the pursuer showing the precise boundaries of the estate which was offered for sale, while the pursuer's case is that the statement in question was supplied to him as showing what were the holdings, with their acreage and rentals, of which the estate was composed. The two cases seem to me to be *in pari casu*, and if it was competent to lead evidence in support of the one, it was also competent to do so in support of the other. I am therefore of opinion that the Lord Advocate's argument that the evidence in regard to the plan is competent, but that the evidence in regard to the rental is incompetent, cannot be sustained. But if the latter evidence can be considered, it seems to me in itself to be conclusive of the question at issue.

If, however, all the evidence of what passed between the parties prior to the completion of the contract were left out of view, the result will be the same. The immediate title under which the defender held the estate was an instrument of disentail of "All and Whole the lands and barony of Dallas." No boundaries are given, but the lands and barony are described in a general way as comprehending a number of holdings which are named. In these circumstances the question comes to be, what, as matter of fact, have the defender and his predecessors possessed under that description? I do not think that the answer to that question is in doubt. I think that it is perfectly clear from the facts, which Lord Ardwall has stated in detail and which I need not repeat, that at all events the whole of the farms of Soccach and Auchness, up to the wire fence which divides them from the estate of Altyre, is included within the estate of Dallas. Strictly speaking, I think that the boundary of the estate coincides with the boundary of the parish of Dallas, which lies somewhat to the west of the wire fence, but there is no great difference between the two boundaries, and the pursuer is willing to accept a conveyance of the lands up to the wire fence. To that I am clearly of opinion that he is entitled, and I think that the interlocutor proposed by Lord Ardwall will put the matter in proper shape.

LORD JUSTICE-CLERK—I concur in the opinions which have been expressed by your Lordships. In these opinions the evidence has been so fully considered that it is quite unnecessary to go into a further criticism of it. I think that the Lord Ordinary has been misled into arriving at the decision given in his interlocutor, by his having taken up the impression that this case is to be looked upon as relating to a shooting estate, distinguishing between such an estate and an ordinary landed estate. Accordingly, he does not give effect to the fact that according to the titles the estate to be sold embraces the land in dispute, as they undoubtedly do. He holds this to be overruled by the lines shown on a plan which was prepared to show a readjustment of boundaries for the better division of one shooting from another, in the intention, probably, if a sale was to be made, of excluding a portion of the lands in the titles from the sale. This, indeed, is what the respondent maintains was done. The whole case for the seller depends upon whether the purchaser is bound to accept the lands as limited by the colourings upon that plan. I am unable, as your Lordships are, to see that

he ever placed himself in that position—that he ever in any way barred himself from insisting on the sale covering the whole of Dallas estate. The plan, which is a small scale lithographed plan, was, according to my view of the evidence, handed to his representative as an aid to understanding the general lie of the ground when making a general inspection of the estate, not including a visit to and examination of the marches, and I am satisfied that nothing took place to indicate that a large part of the estate of Dallas as described in the titles was to be excluded from the purchase. Any intention the seller may have had to limit the sale to less than the estate as described in the titles was not brought home to the purchaser. The plan, such as it was, showed on the side in question that the lands to be sold were bounded by the Altyre estate, and so they are according to the titles. The boundary between the two estates is a parish boundary, whereas the line to which it is proposed to restrict the reclaimer is a long way within the parish boundary, and cuts through farms reaching to that parish boundary. If there were evidence that the purchase had been made according to a plan, it would be in accordance with ordinary practice that the plan should be signed as relative to the bargain. In this case no such thing was ever proposed. Had it been, it is impossible to doubt that before signing any plan the representatives of the reclaimer would have made sure that the line and direction of the boundaries shown upon the plan to be signed corresponded with the line and boundaries described in the titles. It was the estate named in these titles that it was intended to purchase, not a mere shooting but an estate, though containing a great deal of hill ground, also a large quantity of arable land. That the estate had its boundary at the boundary of the parish, and at the boundary of the tenancies of the lands, is certain. Further, the rental exhibited included the rental of all the land in dispute. The question truly is whether the respondent's representative made it plain to the reclaimer that a part of Dallas estate was to be excluded from the sale, so as to bar him from maintaining that he is entitled to a conveyance of the whole estate included in the titles. No such thing has been made out, in my opinion. A great deal of the proof which was led in the case seems to me to have been inadmissible. But assuming it to have been admissible, it entirely fails to show that the reclaimer who demands a title according to the boundaries in the existing title has done anything as regards the plan, on which alone the respondent founds, to justify the Court in holding that if the plan and the existing titles are inconsistent, the plan and not the titles must rule.

I therefore agree with your Lordships in holding that the Lord Ordinary's judgment should be recalled, and the reclaiming note sustained.

LORD DUNDAS was absent.

The Court recalled the interlocutor reclaimed against, and found that under the agreement of sale and purchase the pursuer was entitled to a valid and sufficient conveyance of the estate of Dallas as possessed by the defender and his predecessors under the title-deeds thereof, that the western boundary of the estate of Dallas coincided with the western boundary of the parish of Dallas, that a wire fence, shown by a blue line on the ordnance map, No. 28 of process, had been treated as the march fence upon the west of the estate of Dallas, that its position approximated to the parish boundary, but cut off a portion lying to the left of the fence, and that, as the pursuer did not insist on that portion, in the disposition the estate should be declared to be bounded on the west by the wire fence, and appointed the pursuer to lodge the draft of such disposition.

Counsel for the Pursuer (Reclaimer)—D.-F. Dickson, K.C.—M'Clure, K.C.—Burn Murdoch. Agents—Hagart & Burn Murdoch, W.S.

Counsel for the Defender (Respondent)—Lord Advocate (Ure, K.C.)—Spens. Agents—John C. Brodie & Sons, W.S.

HIGH COURT OF JUSTICIARY.

Wednesday, June 23.

(Before the Lord Justice-General, Lord Kinnear, and Lord Pearson.)

MORRISON *v.* PETERS.

Justiciary Cases—Review—Suspension—Competency—Licensing Act 1903 (3 *Edw. VII, c.* 25) *secs.* 102 *and* 103—*Sentence Containing Fundamental Nullity.*

The Licensing (Scotland) Act 1903, sec. 102, enacts that it shall be competent for a person conceiving himself aggrieved by any warrant, sentence &c., given by any Sheriff, &c., in a cause, prosecution, or complaint raised under the Act for any offence punishable by fine or imprisonment, "to bring the case by appeal" before the High Court of Justiciary, provided always that such appeal is only competent on the ground of corruption or malice and oppression on the part of the Sheriff, &c., or on such deviations in point of form from the statutory enactments as have prevented substantial justice from being done. Sec. 103 enacts that no warrant, sentence, &c., shall be subject to reduction, suspension, appeal, or any other form of review or stay of execution, on any ground or for any reason whatever other than provided by the Act.

Held that where a conviction and sentence contained a fundamental nullity a suspension was, notwithstanding the terms of the Act, competent.