fortune to be applied to their furtherance after he is dead, it cannot be said that the testamentary purpose is of itself presumptive of mental unsoundness, unless the sum bequeathed be so large, and the object to be advanced so small, that the application of the one to the other is impossible or preposterous. If Mr Hope's fortune had been a tenth or a fifth of what it was, I hardly think that his settlement would have caused surprise. But if regard be had to the far-reaching influences which he desired to counteract, to the unquestioned power of propagandism, and to the equally certain cost of such operations, there is no such palpable disproportion between the means and the ends as to presume unsoundness in a mind which desired to apply the one to the other. Accordingly, I do not think that *res ipsa loquitur* so as to dispense with the need for particularising the kind of insanity which is said to invalidate the will of a man about whom the pursuers concur with the defenders in stating so much that is presumptive of sanity. As I have already pointed out, the pursuers have met the challenge for particulars by their amendment of the record, and for the reason already stated, I think that it shows they have no case.

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

The Court adhered.

Counsel for the Pursuers — Sol.-Gen. Murray, Q.C. — Ure — Dundas. Agents—Dundas & Wilson, C.S.

Counsel for the Defenders—J. C. Thomson — Guthrie—Dickson—Wilson Agents —Macpherson & Mackay, S.S.C.

Wednesday, February 19.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* HUTTON.

Prescription—Bounding Title—Exception of Lands Previously Disponed.

A purchaser acquired a piece of ground under a title which excepted from the land conveyed "those parts and portions thereof sold and disponed by me to A B, all as specified and described in the disposition thereof by me in their favour." The disposition in question referred to an annexed plan as delineating the ground conveyed.

Held that the purchaser's title was a bounding one, and that he could not acquire by prescription any of the subjects thus excepted from the grant.

The North British Railway Company, under powers conferred upon them by their Galashiels and Peebles Railway Act of 1861, acquired a piece of land from Mr Robert Symington Grieve, for the purpose of building a bridge over the river Tweed. The land was conveyed to them in a disposition executed by Grieve, dated 11th July 1864, and is therein described as "All and whole these seven hundred and twelve decimals or one-thousandth part of an acre imperial measure or thereby, being the portions of ground taken and used by the said North British Railway Company from the lands belonging to me hereinafter described, as the said portions of ground are delineated and coloured red on a plan thereof signed by me as relative hereto; and which portions of ground lie in the parish of Peebles, and form part of all and whole these 4 acres of land of the Bridgelands now called Walkershaugh, lying on the north side of the river Tweed, near the burgh and within the sheriffdom of Peebles." The land consisted of a strip about 550 feet long by 50 wide.

On 11th October 1864 Mr Grieve disponed the remainder of the 4 acres contained in Walkershaugh to Mr Archibald Marshall. The disposition, after describing the land conveyed in the same terms as in the disposition to the North British Railway Company, proceeded—"but excepting and reserving from the subjects before disponed those parts and portions thereof sold and disponed by me to the North British Railway Company for their line of railway from Peebles to Innerleithen, all as specified and described in the disposition thereof by me in their favour, dated the 11th day of July 1864."

After Mr Marshall's death his trustees, in 1894, sold to Mr Andrew Hutton, printer, Edinburgh, part of the lands conveyed to Mr Marshall by the disposition of 11th October 1864, adjoining those previously conveyed to the North British Railway Company. The disposition to Mr Hutton described the subjects conveyed as "that piece of ground lying to the West of the North British Railway extending to $^{651}/_{1000}$ of an acre." Mr Hutton proceeded to build a house on this land, and while it was in the course of construction the North British Railway Company intimated to him that he was encroaching upon land included in the conveyance to the company, and expressly excepted from his authors' titles. Accordingly on 2nd August 1895 the company raised an action against him, in which they craved the Court to ordain the defender to remove the building so far as erected upon their lands. It was proved that the area in dispute was delineated on the plan as part of the land conveyed to the company, that it was within the alignment of the company's fences, that it had not been fenced off by the company, and that for 30 years it had been used by the defender's authors as part of a garden surrounded by a wall. The defender pleaded that he had acquired a prescriptive title.

On 5th December the Lord Ordinary (KYLLACHY) granted decree in terms of the conclusion of the summons, and ordained the defender to implement the decree before Whitsunday 1896.

Opinion.—"In this case the first point to be decided is, whether the defender has acquired by prescription a right to the ground in question. He and his authors have had *de facto* possession for more than thirty years; that is to say, it has been occupied by their tenants along with the adjacent ground. But the pursuers dispute that the possession has been of the requisite character, and they maintain further that the title of the defender's author excluded the ground in controversy, being in fact a bounding title, and that therefore prescription cannot apply.

"I think that the proof sufficiently instructs the possession on which the defender founds, and if it had followed upon a title to which it could lawfully be ascribed, I see nothing in its character to deprive it of effect. But I am of opinion that as regards the matter of title the pursuers are right. The defender's title is deduced from a disposition by Robert Symington Grieve in favour of Archibald Marshall, dated 11th October 1864, and by that disposition there is expressly excepted from the conveyance the ground conveyed by Grieve to the Railway Company by disposition dated 11th July 1864. Now, turning to that last disposition, it is not, I think, doubtful that it includes a conveyance of the ground in dispute. That ground is required to meet the measurement of the area disponed. The disposition is with reference to an annexed plan, which shows the ground in question as within the conveyance. And it does not appear to me that because the disposition is of ground 'taken and used' by the Railway Company, that expression can reasonably be held to limit the disposition to such ground as might *de facto* be fenced off from the adjacent ground by a railway fence. That being so, I am compelled to hold that the area in question is within the pursuers' title, and is excluded from that of the defender, and that the defender has therefore no title upon which he can plead prescription."

Against this judgment the defender reclaimed.

Argued for reclaimer—The exception in the defender's title only applied to the land actually used by the Railway Company, and not to that possessed by the defender and his authors. This appeared from the terms of the exception and of the disposition to the company in which the land is described as "taken and used by them." That description would not apply to the piece of land in question which they had not even fenced as they were bound to do under section 60 of the Railway Clauses Consolidation Act 1845 (8 and 9 Vict. cap. 33). Accordingly, the defender's title was not a bounding title excluding prescription. The title was ambiguous, and in construing it the defender's possession ought to be given effect to—*Auld* v. *Hay*, March 5, 1880, 7 R. 663. The case of *Reid, &c.* v. *M'Coll*, October 25, 1879, 7 R. 84, was inconsistent with the above case and must be held to have been overruled by it. Even if the defender had gone to the pursuers' title he would have found nothing to help him, there being no plan on record. The case of a small piece of ground like this was precisely the kind of case which the principle of prescriptive possession was intended to meet.

Argued for respondents—The pursuers' title was most unequivocally a bounding one. The typical case of such a title was one where march stones were referred to as defining the boundaries. In such a case it was necessary to go outside the title itself. In modern conveyancing it was usual to refer to a plan as was done here, and that was held to constitute a bounding title just as much as a reference to march stones—*North British Railway Company* v. *Magistrates of Hawick*, December 19, 1862, 1 Macph. 200. The defender's title gave him a part of the property, less that disponed to the pursuers; accordingly he had an unequivocal reference to an unambiguous title, so his was also bounding. The cases of *Reid* and *Auld* were not inconsistent, the circumstances in the two being different. *Reid* was directly in point in the present case, while in *Auld* the title founded on might be construed to include the whole lands afterwards possessed, and it was not disputed that prescription might apply in such cases.

At advising—

LORD M'LAREN—In this action the North British Railway Company conclude that the defender should be decerned and ordained to remove a house or building erected by him upon land belonging to the company near their station at Peebles, or at least to take down and remove such portion thereof as has been erected on any part of the lands belonging to the pursuers.

The title of the Railway Company is a disposition by Robert Symington Grieve dated 11th July 1864 of land acquired by agreement under the powers of one of the Railway Company's special Acts, and for the purposes of the undertaking. The land is described by measurement, being $\frac{712}{1000}$ parts of an acre, and also by a relative plan, and it is stated to be a part of these 4 acres of land known as Walkershaugh.

Mr Grieve, a few months later, disponed the remainder of the 4 acres to Archibald Marshall. The disposition is in form a conveyance of the 4 acres, "but excepting and reserving from the subjects before disponed those parts and portions thereof sold and disponed by me to the North British Railway Company for their line of railway from Peebles to Innerleithen, all as specified and described in the disposition thereof by me in their favour dated the 11th day of July 1864."

Mr Marshall's representatives sold the property in lots, one of which was purchased by the defender, being the lot adjoining the railway line. Now, it appears from the evidence that a small part of the Railway Company's land was left unfenced, and the defender finding this land within his enclosure and apparently identified with his subject, has treated it as his own, and has built his house in such a position

that it partly covers the unfenced portion of the company's land. The question is whether the defender can maintain his possession against the heritable right of the pursuers. I assume, in accordance with the fair import of the evidence, that the defender and his author Mr Marshall have had since 1864 all the possession of the land in dispute of which it is susceptible, but mere possession will not suffice to establish a right of property in the defender, unless the possession is referable to charters and dispositions followed by sasine. Where an estate is described in the title-deeds by a general name or in general terms so that its extent and boundaries cannot be ascertained from the title-deeds themselves, then anything that has been possessed under the general name or general descriptive words for the prescriptive period is deemed to be part of the estate, and it is not of much consequence whether we consider the subject possessed as having been acquired by prescription under the Scottish statute, or whether we consider the long possession as connected with a rule or principle of the common law for defining and ascertaining the original extent of the estate. In either view the person in possession has a prescriptive title to the land. There is also a principle of the law of property which is correlative and complimentary to the principle I have stated, viz., that a proprietor cannot acquire by prescription a subject which is excluded by the terms of his title, because this would not be possession under charter and sasine, but would be possession contrary to the written title. The case of what is termed a bounding charter is an example, but not the only example, of a title which so defines the estate as to exclude the possibility of acquiring land by prescription in excess of the subjects actually conveyed. In the present case the prescriptive title of the defender begins with the conveyance by Grieve to Marshall. In it the subjects previously conveyed to the North British Railway Company are expressly excepted, and the conveyance to the Railway Company is referred to by its date, so that the extent of the land conveyed to the Railway Company is just as clearly defined as if the description had been *verbatim* inserted in the disposition to Marshall.

Now, when the granter of a conveyance says, "I except from this conveyance so many fractional parts of an acre previously conveyed and delineated in a plan annexed to that conveyance," I think that, so far as relates to the bounding line which separates the areas first and second conveyed, he has just as clearly defined the boundary as if he had defined it by reference to marchstones or natural land-marks. I see no distinction between the cases; the principle is one and the same, that you cannot by long possession acquire a subject which your title-deed in terms excludes or declares to be the property of a conterminous proprietor. It follows, in my opinion, that the Lord Ordinary has rightly held that the defender is not in a position to plead prescription in answer to the pursuers' demand for the restoration of their property.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court adhered.

Counsel for Pursuers—Balfour, Q.C.—Cooper. Agent—James Watson, S.S.C.

Counsel for Defender—C. S. Dickson—Cook. Agents—W. & J. Cook, W.S.

Thursday, November 21, 1895.

OUTER HOUSE.

[Lord Moncreiff.

HYNDMAN'S TRUSTEES *v.* MILLER.

Contract—Penalty—Sale by Auction.

By articles of roup it was stipulated that the parties should be bound to implement the articles under a penalty of £100, "over and above performance." *Held* (following *Johnstone's Trustees*, January 19, 1819, F.C.) that the damages recoverable for non-implement were limited to the amount named.

The trustees of the deceased James Hyndman exposed certain heritable subjects for sale under powers contained in a bond and disposition in security for £500 held by them. The articles of roup contained the following provision—"The exposers, as trustees foresaid, by subscribing these presents, and the offerers by subscribing their respective offers, oblige themselves mutually to implement the foresaid articles to each other, under the penalty of £100 sterling, to be paid by the party failing to the party performing or willing to perform, over and above performance."

At the sale the subjects were purchased by the defender John Miller at the price of £1050.

John Miller refused to implement his bargain, whereupon the present action of damages was raised against him by Hyndman's trustees.

The defender admitted that he had agreed to purchase the subjects, and that he now refused to do so, but maintained that the pursuers had suffered no damage by his refusal.

He pleaded—"(4) The action, so far as concluding for a sum in excess of £100, is excluded by the terms of the articles of roup, under which the maximum sum recoverable in respect of non-implement of the said articles is restricted to £100."

A proof was held, from which it appeared that the pursuers had suffered damages to an extent exceeding £100.

On 21st November the Lord Ordinary found it proved that the pursuers had sustained damage to an amount exceeding £100, but that their claim was limited to the said sum of £100, being the sum named in the penalty clause in the articles of roup.

Opinion.— . . . "On the proof led it is sufficient to say that damage considerably beyond £100 has been proved; and I have