the Companies Act 1862, and Acts amending and extending the same: Confirm the appointment of James Forsyth designed in the said note as liquidator of the said company, in terms of and with the powers conferred by the said Acts: Further order that all subsequent proceedings in the winding-up be taken before Lord Dundas, one of the permanent Lords Ordinary, and remit the winding-up to him accordingly and decern: Find the petitioners entitled to expenses, and direct that the same shall form part of the expenses in the liquidation: Also find the said liquidator entitled to expenses as between agent and client, and direct that the same shall form part of the expenses in the liquidation," &c.

Counsel for Elsmie & Son—Younger, K.C.—Kemp. Agents—Mustard & Jack, S.S.C.

Counsel for Tomatin Spey District Distillery Company and Liquidator—Constable—Macmillan. Agent—A. B. Fletcher, S.S.C.

Thursday, February 1.

SECOND DIVISION.

[Lord Ardwall, Ordinary.

BROWN *v.* NORTH BRITISH RAILWAY COMPANY.

Title to Heritage—Bounding Title—Measurement — Bounding Title where Lands Defined by Measurement and no other Description.

A disposition in 1819 conveyed to a canal company "all and whole the piece or pieces of ground consisting of four acres and thirty-seven thousandth parts of an acre or thereby Scots measurement being part of my lands . . . which are required for the purposes of the said canal and on which the company have commenced their operations." It contained no further description of the area of ground conveyed. There existed, however, extrinsic evidence by which the area conveyed could be identified. The disposition had been recorded, which under the Canal Company's Act operated to the effect of giving infeftment.

Held that to make the disposition a valid warrant for infeftment the area conveyed at the date of infeftment must have been a definite subject capable of identification; that extrinsic evidence was therefore competent to identify it at the present time; and that the area having been identified the title was a bounding title.

Prescription—Positive Prescription—Possession—Acts of Possession not Attributable to Claim of Ownership—Railway and Canal Company.

Circumstances in which *held* that certain acts of possession on the part of a railway and canal company were not attributable to a claim of ownership, and could not establish a title by prescription.

Railway—Superfluous Lands—Land Taken for a Double Line—Lands Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 19), *sec.* 120.

At the making of a railway, land for a double line of rails was taken, but only a single line was to be at first laid, the second line to be laid if and when necessary. The land which was not immediately required was not fenced off, but was allowed to be used by the farm tenants of the adjoining lands.

Held (*by* Lord Ardwall, Ordinary) (1) that the land acquired for the future doubling of the line could not become "superfluous lands" within the meaning of sec. 120 of the Lands Clauses Consolidation (Scotland) Act 1845, and (2) that if it could, then in that case it would be necessary for the claimant in order to succeed, to prove that at no future date would the railway company require to double the line of rail.

On 21st September 1904 Robert Ainslie Brown of Manuel, S.S.C., Edinburgh, brought an action against the North British Railway Company and others, *inter alia*, (first), to have it found and declared "that all and whole that area of ground extending to one acre and sixteen parts of an acre Scots or thereby . . . lying on the south-west side of the Union Canal, near the village of Causewayend, in the parish of Muiravonside and county of Stirling, is a part and portion of and comprehended within the bounds and marches of the lands and estate of Manuel, lying in the said parish and county, and belongs heritably to the pursuer as proprietor of the said lands and estate of Manuel;" and (fifth) to have it found and declared "that all and whole that piece of ground . . . lying on the north-west side of the viaduct forming part of the said defenders' railway between Manuel Station and Causewayend Station in the said parish and county, and which viaduct bounds the said piece of ground on the south-east, is part and portion of and comprehended within the bounds and marches of the pursuer's said lands and estate of Manuel, and belongs heritably to the pursuer as proprietor of the said lands and estate of Manuel, and which piece of ground is part of the lands which were compulsorily taken by the Slamannan Railway Company or by the Monkland Railways Company for the purposes of their undertaking as set forth in the Slamannan and Borrowstounness Railway Act 1846 (9 and 10 Vict. c. 107), or the Monkland Railways Act 1851 (14 and 15 Vict. c. 62), from the pursuer's . . . author, and not having been required or used by the said defenders the North British Railway Company, or their . . . authors the Slamannan Railway Company, or the Monkland Railways Company, for said purposes, has become 'superfluous lands' within the meaning of the . . . sec. 120 of the Lands Clauses Consoli-

dation (Scotland) Act 1845, and that in terms thereof the same vested in and became the property of the pursuer's said author as from and after the 26th day of June 1859, and that the same has now vested in and become the property of the pursuer in virtue of his rights and titles to the said lands and estate."

The defenders pleaded—"(5) The pursuer not being owner of the land specified in the first conclusion of the summons, the defenders should, with respect thereto, be assoilzied. (6) The pursuer's claim to the said lands is barred by prescription. (9) The defenders are entitled to be assoilzied from the . . . fifth conclusions of the summons, . . . (*b*) in respect the lands described in the . . . fifth conclusions are not superfluous within the meaning of the said Lands Clauses Act. . . ."

The facts of the case are fully given in the opinion (*infra*) of the Lord Ordinary (ARDWALL), who on 27th May 1905 pronounced this interlocutor—"Finds and declares that all and whole that area of ground extending to 1 acre and 16 parts of an acre Scots or thereby, . . . lying on the south-west side of the Union Canal, near the village of Causewayend, in the parish of Muiravonside and county of Stirling, with the exception of that portion of same which is . . . marked by the words 'Lumber Pit,' . . . is a part and portion of and comprehended within the bounds and marches of the lands and estate of Manuel, lying in the said parish and county, and belongs heritably to the pursuer as proprietor of the said lands and estate of Manuel: . . . Assoilzies the defenders from the fifth conclusion of the summons. . . ."

Opinion.—" . . . The only really important questions, however, are those raised by the first and fifth conclusions. Under the first conclusion the pursuer seeks to have his right of property declared to 1 acre and 16 parts of an acre Scots or thereby marked A B C on the plan. It was, however, conceded in the course of the proof that he was not entitled to that portion of the land A B C, which is coloured yellow and marked with the words 'lumber pit' on the plan.

"Before the construction of the Union Canal, in or about 1819, the whole of the land at or near the piece in question belonged to the estate of Manuel of which the pursuer is now the proprietor. The situation and character of the piece of land in question may be adverted to. The Union Canal crosses the river Avon from east to west upon an aqueduct. From the west end of the aqueduct the canal is carried westward for some distance on an embankment, but as the ground slopes upwards from the bed of the river Avon towards the west, the embankment becomes less and less till the canal reaches the level of the natural surface of the ground, and almost immediately after enters a cutting made through the pursuer's lands and increasing in depth as it goes westward.

"In the course of making the canal it is evident that the engineers constructing it utilised the earth, stones, rock, and other materials taken out of the cutting for the formation of the embankment which is required to support the canal from the time it leaves the aqueduct till it reaches the natural surface level of the ground. The piece of ground now in dispute consists of a bank for about two-thirds of its length beginning at its eastmost point, while for the remaining third of its length the ground practically retains its natural configuration, while to the west of the ground in question there is a clay hill or clay pit from which clay has been taken from time to time in considerable quantities for the purpose of manufacturing puddle clay for the formation and repair of the bed of the canal. The piece of ground in dispute has for many years been covered with trees and scrub. Some of the wood and cover possibly may have been self-sown, but there seem also to have been a considerable number of larch trees which presumably have been planted, but there is no evidence in the case to show when or by whom they have been planted.

"In 1819 the estate of Manuel belonged to Mr John Baird, for whom Messrs MacRitchie, Bayley, & Henderson, W.S. Edinburgh, acted as agents. Mr Baird died on the 21st of November 1831. His affairs seem to have been in some confusion at the time of his death, and on 8th February 1838 an inventory of his personal estate was given up in the Commissary Court at Stirling by Henry George Watson, C.A., Edinburgh, factor *loco absentis* to James Hay junior, who apparently had been decerned executor *qua* creditor of the said John Baird. In that inventory the whole claim at the instance of the deceased John Baird against the Canal Company is set forth, and is the same as the claim on which the settlement I shall hereafter refer to took place; but it seems that in the meantime Isaac Bayley, S.S.C., Edinburgh, who married a daughter of the Rev. Dr Baird, a brother of Mr John Baird, purchased the estate of Manuel in 1832. Mr Isaac Bayley possessed the estate till his death in 1873. It then passed to his son Mr George Bayley, W.S., who held it till his death in 1902, and it was sold to the present pursuer, Mr Brown, in 1903 by Mr George Bayley's heirs

"The title of the defenders, the North British Railway Company, who in virtue of several Acts of Parliament now represent to all effects and purposes the Edinburgh and Glasgow Union Canal Company, consists of a disposition by John Baird, then proprietor of Manuel, to the said Canal Company, dated 12th February 1819. Under the Canal Company's Act, section 60, this disposition when recorded, which was done, is declared to have the same effect as if a 'formal disposition had been executed and followed by charter and seisin.' By the said disposition the land conveyed to the Canal Company is thus described—'All and whole the piece or pieces of ground consisting of four acres and thirty-seven thousandth parts of an acre or thereby Scots measurement, being part of my said lands and estate of Manuelmiln, situated

within the parish of Muiravonside and county of Stirling, which are required for the purposes of the said canal, and on which the company have commenced their operations.'

"The said disposition contains the further clause, 'and in respect it is impossible to ascertain the precise quantity of land to be occupied by the company until the canal and works connected therewith are completed, it is hereby declared that after the said works are completed a measurement of the ground occupied thereby shall take place, and in case it turn out that the said ground extends to more than is herein specified, the company shall pay to me for the excess at the rate of £75 sterling per acre Scots measurement, and should it turn out that the quantity is less than is herein specified, I oblige myself and my foresaids to repay to the said company such part of the price as shall correspond at the foresaid rate per acre to such difference.'

"These clauses show that while it was at the time supposed that the extent of land therein mentioned was all that would be required for the purposes of the canal, yet there was to be a future measurement and settlement fixing definitely what land was to be permanently acquired by the company, it was doubtless contemplated that there should thereafter be a plan made out and a supplementary deed executed. A plan of the ground, evidently founded on careful measurement, was made by Mr Horne, a surveyor in the employment of the Canal Company, in 1822, which, with its table of contents, shows very distinctly, as it was first drawn out, the ground permanently acquired by the Canal Company, being 4·218 acres; this consisted of the 4·037 acres mentioned in the disposition and a small quantity ·181 acre which is referred to in the correspondence as having consisted of a space of ten feet on each side of the acqueduct. But apparently, shortly after the plan had been drawn, the canal company altered the plan and table of contents so as to transfer from the table of contents of the spoil banks to the table of land retained by the company, the area in dispute consisting of 1·016 acres. The settlement following on the measurement was very long delayed; the first letter on the subject which is produced is dated 9th August 1830, in which the agents for the proprietor of Manuel called the attention of the canal surveyor to the 'still unsettled claim of Mr Baird of Manuel.' A state of claim for Mr Baird as at Martinmas 1831 has been produced, and a discharge by Mr Watson, accountant in Edinburgh, who, after Mr Baird's death, had come to represent Mr Baird's executor-creditor, was granted to the Canal Company on 6th September 1838, and has been recovered from the defenders. This discharge proceeds on the narrative 'that the Canal Company were indebted to John Baird at the time of his death on 21st November 1831 in certain sums of money on account of said company's portions of his estate of Manuel Mill, and for ground taken by them from the said estate, amounting with interest to that date to the sum of £466, 14s. 4d., conform to detailed state thereof as adjusted by Messrs MacRitchie, Bayley & Henderson, writers in Edinburgh.'

"The above sum with additional interest on part thereof brought up the sum due to Mr Watson to £586, 0s. 2d. sterling, and by the said deed he discharges the Canal Company of that sum. This state refers to the numbers and figures on the plan of 1822, No. 93B. According to the state 4·037 acres, which is the quantity mentioned in the disposition, are represented as having been paid for by the £302, 15s. 6d. also mentioned in the disposition, but there is added the ·181 acre, which, at the rate of £75 an acre, made a difference of £13, 11s. 6d. This then is declared in the state to be the ground 'occupied by the canal.' The result of reading the discharge, claim, and plan along with the disposition is to identify exactly by measurements and boundaries the ground acquired by the Canal Company. The difference between the figures in the disposition and in the final settlement was so small that probably neither party thought there was any need for a supplementary deed. But the matter does not stop there, for the second portion of the state deals with what are there termed 'spoil banks,' and it is plain by a reference to the plan that these include the whole of the land now in dispute. . . . The claim in respect of the spoil banks consists of (*First*) a claim for an agreed-on rent for the years 1820 to 1825, both inclusive, and then a claim 'for deterioration of ground by spoil banks, 4·292 acres at £40 per acre.' According to this state of claim, on which the settlement between the parties took place and the discharge already referred to was granted, it is made clear that, beyond the 4·218 acres above referred to no land was purchased or paid for, and in particular that the spoil banks, which by reference to the plan are found to embrace the whole of the ground now in dispute, were treated as still parts of Manuel property, for the deterioration of which by the Canal Company having used them as spoil banks, they paid damages at the rate of £40 per acre.

"It seems from superinduced markings on the plan No. 93B of process and the remarks upon these additions made upon the rough copy of No. 93B, that a dispute had arisen as far back as 1822 as to the land in question. The Canal Company wished to retain the said piece of land, and from evidence in the case it appears that they had marked it out as their own by march stones, without any permission from the proprietor of Manuel. The correspondence brings this out very clearly, but all disputes which had then arisen were settled by the subsequent discharge which, taken along with the claim and plan referred to therein, shows that the whole land conveyed under the disposition was the 4·037 acres there mentioned, and this, with the ·181 acre additional, is all that was paid for by the Canal Company as land taken by purchase. I am therefore of opinion that the defenders have not a title entitling them to prescribe a right to any land beyond the boundaries of the land thereby

conveyed, which, in my opinion, are quite definitely fixed by the documents and plans above referred to.

"It was strongly argued for the defenders that the disposition must be looked at by itself, and that extrinsic evidence is inadmissible. In this case, however, the evidence of the plan and settlement can hardly be called extrinsic, for *in gremio* of the disposition there is a reference to a future measurement and settlement under which the precise ground required for the purposes of the canal was to be ascertained, and this is probably the reason why no plan was annexed to the disposition showing the situation of the 4·037 acres thereby conveyed. It appears to me therefore that I am entitled to read the disposition by the light of the final measurement and settlement to which the disposition itself refers me, and without which the description in the disposition of the land conveyed is defective and unsatisfactory. I, accordingly, have arrived at the conclusion that the defenders' title is a bounding title under which they cannot acquire by prescription any land in excess of the subjects actually conveyed. The decision in *Auld* v. *Hay*, 5th March 1880, 7 R. 663, and other decisions to a similar effect, accordingly do not apply to the present case.

"The defenders, however, require not only to produce such a title as will admit of their acquiring the land by prescriptive possession, but also to prove possession for twenty years attributable to their title as proprietors, and not to any inferior right. I do not think they have made out such a case. The first fact founded on by them is the existence and position of the march stones. Now, a reference to the correspondence shows that these march stones were put down before the settlement was arrived at which determined what land was to be permanently retained by the Canal Company and what land was to be regarded as damaged land left in the hands of the proprietors as spoil banks. Whatever may be said as to the competency of extrinsic evidence to explain the title, I think when we come to the question of possession, and the existence of march stones is founded on, it is competent to inquire when and under what circumstances these march stones were placed there, and the result of such inquiry is to show that these march stones were put down there without the consent of the proprietor of Manuel, and at a time when it was undetermined what land the Canal Company were to take. And there is no doubt that their presence at the points they were placed at led all along and down to the present time to constant misapprehensions on the part of persons who naturally believed that they correctly marked the boundary of the defenders' ground. It seems to me that such possession otherwise as the Canal Company (and afterwards the Railway Company) had was attributable to the rights of tenancy the company acquired from the proprietors of Manuel.

"A memorandum as to the Canal Company's matters, drawn up by Mr Isaac Bayley, who purchased the property from Mr Baird's representatives, dated 15th July 1841, propounds as one of the questions the following:—'To state what portions of the spoil banks . . . the company are to have right to in absolute property.' These spoil banks together make up the area now in question.

"Following on this, the memorandum proposes that the company are to fence and enclose whatever they are to get in absolute property with a stone fence of a certain description. The answer to this is to be found in a letter dated 6th July 1841 by Mr Ellis, on behalf of the Canal Company, to Mr Bayley, in which he says that the Canal Committee will take a twenty years' lease of the spoil bank at £5 a year, but will not purchase any part of the ground as the cost of enclosing it would be too great.

"It appears that the company duly entered into possession of the land under this arrangement, but so little was the estate of Manuel looked after that no claim was made for rent till 9th April 1852, when £55 was claimed, being eleven years' rent, and that sum was afterwards paid as is shown by the correspondence. The ground which was leased is indifferently called the spoil bank and the clay bank. Strictly speaking, the spoil bank only consisted of the eastmost two-thirds of the area in dispute, while the clay hill was situated wholly on what is marked No. 3 upon the plan of 1822. In the correspondence, however, these terms are applied indifferently to the whole ground. . . .

"The matter came up again in 1873, and after some correspondence a lease, dated 3rd and 4th February 1874, was entered into, granting a lease for six years from Martinmas 1873. The lease confers the privilege of taking clay from that bank or enclosure, 'part of the estate of Manuel, which is situated immediately to the west of the aqueduct on the Union Canal over the river Avon, and is bounded on the eastern side by the said canal, and on the western side by a road from Causewayend Bridge to a ford on the river Avon.' In my opinion this description covers not only the clay hill proper, but the area in question. In point of fact these subjects all formed part of the same enclosure, and although it is true that the provision as to taking clay and restoring to natural level applies strictly only to the clay hill, it seems to me that the lease includes the area in question. It is further proved that all along the Canal Company's servants were accustomed to tip dredgings from the canal on to the place in question with the two objects of getting rid of the dredgings and strengthening the bank of the canal at that place. With their doing this nobody seems to have interfered. It did no one any harm; on the contrary, it tended to strengthen the bank and obviate the danger of leaks and landslips which were to be feared alike by the proprietor of Manuel and the Canal Company.

"There is also some evidence that now and again the employees of the Canal Com-

pany cut trees on the ground in question for the purpose of forming jetties or arms for jetties along the canal, and it is certainly a remark rather in favour of the defenders that while Mr Bayley wrote objecting to the cutting of these trees he afterwards allowed the matter to drop. Probably he did not think it worth while insisting on being paid for them. The most important act of possession, however, which has been exercised by and on behalf of the defenders was exercised by their tenants the Logans, who built a cottage on the area in dispute. This they did in virtue of a lease which they got from the defenders on 27th July 1894. But it may be said that even if the proprietor of Manuel ever had any notice of what was being done, there was no reason why he should object to a cottage of some value being built on ground belonging to him, but which was of practically no value to him.

"On the whole of this part of the case, I am of opinion that the facts founded on by the defenders as tending to prove possession may fairly be attributed either to the false position of the march stones marked A B C, or to the leases granted to the defenders and their predecessors by the proprietors of Manuel or to the valueless character of the spoil bank itself, or to the combination of one or more of these causes.

". . . [*His Lordship here dealt with another conclusion of the summons*]. . . .

"In the fifth conclusion of the summons the pursuer seeks to have it found and declared that the piece of ground there described vested in and became the property of the pursuer's author as from and after the 26th day of June 1863, and that the same has vested in and become the property of the pursuer in virtue of his titles to the estate.

"When the Slamannan and Bo'ness Railway was constructed the defenders' predecessors considered it a prudent act while laying down only a single line of rails at first, yet so to construct their railway works as that should it at any time become advisable to double their line that could be done without new works being executed beyond the laying down of another line of rails; and to enable this to be done they acquired under their Acts and within their limits of deviation enough land to double their line all along its length. The cuttings and embankments were so constructed as to permit of a double line of rails being laid, but when it came to building the viaduct, while they took enough of ground to enable them to construct a viaduct for a double line of rails, the viaduct actually constructed by them was only constructed for a single line. At the place in question the defenders' predecessors acquired a strip of land 36 feet in breadth. It is undisputed that in constructing all viaducts railway companies acquire at least enough land to provide for a space of 3 feet on each side of the viaduct by which they may have access to all parts of it for repairs and the like without trespassing on ground belonging to others. Accordingly the present viaduct was constructed with its eastern elevation three feet from the eastern boundary of the said strip. The viaduct itself occupies 15 feet more. It is admitted that the Railway Company require 3 feet on the west to repair the present viaduct, and the present claim accordingly is for the strip 15 feet wide which forms the westmost part of the ground acquired by the defenders' authors at that place, and the pursuer maintains that this 15 feet has become superfluous land within the meaning of section 120 of the Lands Clauses Consolidation (Scotland) Act 1845, and that it vested in the pursuer's authors on the expiry of ten years from 26th June 1853, being the expiration of the time limited by the special Act for the completion of the railway works.

"I am of opinion that this claim is not well founded. In the first place, it appears to me that land taken for the future doubling of a line of railway is not the kind of land which falls under the section relating to superfluous land at all. It certainly does not seem to fall within any of the categories laid down by Lord Chancellor Cairns in the case of the *Directors of the Great Western Railway Company* v. *May* (L.R., 7 E. & I. App. 283, see particularly foot of page 292), and it seems to me to be not within the policy of the said section, which is to prevent railway companies becoming landowners, which is a character foreign to the enterprise for furthering which alone they obtain compulsory powers to take land (see the case last cited at page 293, and also Lord Hatherley's opinion in the case of *Hooper* v. *Bourne*, L.R., 5 App. Cas. 13). But assuming that the Act does apply to any extent to land taken at the original construction of a railway for the purpose of at any time, if necessary, doubling the line, the next observation is that, as laid down in the case of *Hooper* above referred to, the burden of proving a title to superfluous land lies upon the claimants; and I am of opinion that in the present case the pursuer has not discharged that burden, In order to do so I think he would require to show that at no future time will the defenders require to double their railway, and the evidence in this case shows that far from that being the case the time for doubling it may arrive at any moment. The pursuer laid great stress upon what he alleged to be the abandonment by the Railway Company of the land in question, and at the hearing on the evidence his counsel founded strongly on the fact that the land belonging to the defenders at the viaduct was not fenced in, and had been regularly ploughed and cropped as part of the adjoining fields. It appears to me that the suggestion that the land should have been fenced is a most ridiculous one. To begin with, I think it is certain that the severance damage originally paid by the Railway Company was calculated on the footing that there should be free ingress and egress under the arches of the viaduct. At least that is the footing on which every case I have known of relating to a viaduct has been settled. In particular, I may mention the Glenfinnan viaduct, regarding which there was an interesting discussion on

evidence as to whether red deer would use the passages under the arches of the viaduct for travelling between one part of the forest and another. But even supposing the Railway Company were entitled to put up such a fence, they had very good reasons for not doing so, because, on the one hand, it would cause needless expense to themselves, and on the other hand it would prevent the pursuer's tenants from using the ground as part of their cropping land, which would obviously be a most unneighbourly act. I therefore cannot hold that the omission to fence the land in question implies abandonment thereof by the Railway Company to the effect of rendering it superfluous land. For these reasons I have no hesitation in assoilzieing the defenders from the fifth conclusion of the summons.

"Of course the judgment now given does not affect any possible questions which the Messrs Logan may raise regarding the ground in question, or the cottage built by them thereon.

"With regard to expenses, while it may be said that the success has been so far divided, yet the pursuer has been successful upon the first conclusion of the summons, with which the greater part of the evidence, oral and written, was concerned. I accordingly find the pursuer entitled to one-half of his expenses from the 23rd of February 1905, as the same may be taxed by the Auditor."

The defenders, the North British Railway, reclaimed, and argued—(1) It had not been shown (and the onus was on the pursuer) that the defenders were in possession of more than the acreage "or thereby" specified in the disposition. The defenders had got ·181 acres more than the 4·037, why not an additional 1·016? After forty years' possession of the defenders, *e.g.*, 1820–1860, it was incompetent for the pursuer to go back and seek to show by extrinsic evidence that the defenders or their authors had taken more than the title of 1819 gave them—*Auld* v. *Hay*, March 5, 1880, 7 R. 663, 17 S.L.R. 465; Rankine on Land Ownership, p. 30; *Buccleugh* v. *Cunynghame*, November 30, 1826, 5 S. 57; *Forbes* v. *Livingstone*, November 29, 1827, 6 S. 167 at 173; *Wallace* v. *University Court of St Andrews*, July 20, 1904, 6 F. 1093, 41 S.L.R. 812. (2) Even if the pursuer had shown that the ground in question was not part of the 4·037 acres, there was nothing in the title to prevent the North British Railway proving that they had acquired the extra acre by prescription. There was no plan appended to or incorporated in the disposition. The plan, discharge, and claim referred to by the Lord Ordinary as contributing to make up a bounding title were extrinsic evidence, and such evidence was not competent to withstand the evidence of possession, nor could a bounding title be so constituted—*Auld* v. *Hay*, and other cases *cit. supra*; also *Fraser* v. *Lovat*, February 18, 1898, 25 R. 603, 35 S.L.R. 471; *Cooper's Trustees* v. *Stark's Trustees*, July 14, 1898, 25 R. 1160, 35 S.L.R. 897, opinions of Lord Justice-Clerk and Lord M'Laren. The pursuer said that here there was no clause of parts and pertinents as in *Cooper;* the absence of a clause of parts and pertinents did not in any way prevent prescription—*Beaumont* v. *Lord Glenlyon*, July 11, 1843, 5 D. 1337; Lord Mackenzie at 1342. The title was not a bounding title; the mere statement of acreage or dimensions could not *per se* constitute a bounding title—*Ure* v. *Anderson and Others*, February 26, 1834, 12 S. 494; Bell's Principles, sec. 738; Rankine on Land Ownership, 96, 97, and *Duff* therein cited; *Cooper's Trustees* v. *Stark's Trustees*, *supra*, and Erskine Inst. ii, 6, 2, and Stair ii, 3, 26, therein referred to; *Douglas* v. *Lyme*, February 2, 1630, M. 2262. This last case was *a fortiori* of the present, and never apparently had been challenged. There was nothing accordingly in the disposition preventing possession (if they proved it) being referable to their title, or being reconcilable with it, which was sufficient—*Education Trust Governors* v. *Macalister*, July 6, 1893, 30 S.L.R. 818. Possession does not merely explain the title, but if there is a habile title and possession has followed, the possession then constitutes the title. They had proved possession, possession of so full a character that it was only compatible with ownership, and must be ascribed to the title of 1819. They must succeed if they showed possession either from 1820–1860, or from 1884–1904. They had succeeded in showing possession for both of these periods. [The pursuer not challenging the Lord Ordinary's judgment on the fifth conclusion of the summons, no argument on it was necessary. The following authorities on that point in the case had been quoted—*Directors, &c. of Great Western Railway Company* v. *May*, [1874] L.R. 7 E. & I. App. 283; *Hooper* v. *Bourne* [1877], 3 Q.B.D. 258 and (1880) 5 App. Cas. 1; *North British Railway* v. *Moon's Trustees*, February 8, 1879, 6 R. 640, 16 S.L.R. 329; *Emsley* v. *North-Eastern Railway Company*, [1896] 1 Ch. 418; *Stewart* v. *Highland Railway Company*, March 8, 1889, 16 R. 580, 26 S.L.R. 438; *Norton* v. *London and North-Western Railway Company* (1879), L.R. 13 Ch. D. 268; *Betts* v. *The Great Eastern Railway Company*, [1878] L.R., 3 Ex. D. 182; *Macfie* v. *Callander and Oban Railway*, February 25, 1898, 25 R. (H.L.) 19, 35 S.L.R. 413; *Hobbs* v. *Midland Railway Company*, L.R. [1882] 20 Ch. D. 418].

The pursuer (respondent), who did not challenge the judgment on the fifth conclusion, argued—In all the cases referred to by defender there was a title capable of carrying what was claimed, or a title which required to be interpreted. In *Cooper* v. *Stark* the possession was under the clause of parts and pertinents; there was none here. Here there was a definite amount of ground conveyed, unaccompanied by any description applying to a larger amount. The plan, claim, and discharge identified the ground conveyed, and the extra ·181 had been shown to be a strip of ground along the aqueduct given for purposes of repair. They were not claiming this; possibly the "or thereby" might be wide enough to cover this, but it was

not wide enough to cover the ground claimed. The title was a bounding title, or at any rate a limitation *in gremio* of defenders' title, such as figured by Lord Glenlee and Lord Meadowbank in *Ure* v. *Anderson*, *supra*. Prescription might secure a progress of titles, as in *Fraser* v. *Lovat*, *supra*, or interpret a grant, as in *Cooper* v. *Stark*, *supra*, it was not itself the title. *Douglas* v. *Lyme* was very shortly reported. It might well have been that there were no means of identifying which four acres out of the six were those disponed. In any event such possession as the defenders had had was not referable to their title.

At advising—

LORD JUSTICE-CLERK—I have formed in this case a very decided opinion in favour of the view expressed by the Lord Ordinary. It appears to me that it is established that the disposition to the defenders' predecessors was a disposition of a fixed and defined area of 4·037 acres, sufficiently defined at the time to give a basis for infeftment as of a subject distinguishable and certain.

The next question is, can the subject so conveyed be identified? It is maintained that extrinsic evidence could not be received to identify the specific piece of ground. I cannot assent to that. The ground must have been marked out in some way at the time, or the specific and minute measurement could not have been ascertained. If the markings no longer exists, but there are means extrinsically of locating where they must have been, I can see no incompetency in considering and, if they are satisfactory, in giving effect to them. Now, the plan which was made in 1822, and the letters passing at the time, are in my opinion conclusive as to what the boundaries of the 4·037 acres were, and that the 1·015 acres which form the subject of the litigation were not part of what was conveyed.

I fully accept the view that a description by measurement may not be sufficient to exclude a disponee from prescribing to a greater extent than the measurement in the description, such a measurement being not taxative necessarily. But here there is nothing in the title in the way of description which seems capable of being read as covering any larger area than that contained in the measurement given. There is nothing in the title here to which any larger extent of ground than is contained in the measurement can be ascribed. It is by measurement alone that any description is given.

But, further, I find no ground for holding that the defenders have had such possession as would have sufficed to establish their right by prescription to a larger area than that stated in their title, even upon a title habile to enable a prescriptive right to be obtained by possession. On the contrary, I find at one time rent negotiated for and paid, and at another proposals to buy, which fell through because it was thought it would be too expensive to erect a fence which was stipulated for. To pay rent for ground, or to negotiate for its purchase, is scarcely consistent with the running of a possession capable of giving ground for maintaining a right proved by prescriptive possession.

Concurring as I do in the decision on fact and the reasoning in law so clearly stated by the Lord Ordinary, I do not think it necessary to go into the case more fully, and would move your Lordships to adhere to his judgment.

LORD KYLLACHY—In this case I agree with the Lord Ordinary and upon both his grounds. The defenders' case is laid on the positive prescription, and I am of opinion —(1) that they have no habile title—that is to say, no clear and distinct title duly constituted by infeftment—which upon any reasonable construction covers the ground in dispute; (2) that even assuming such habile title they have not had for the requisite period continued and unequivocal possession—possession clearly and unequivocally referable to the title alleged.

The title founded on is the recorded disposition of 1819, which if capable of forming a good warrant for infeftment, admittedly operated, by virtue of the Canal Company's Act, to the same effect as if it had contained a procuratory and precept and had been followed by sasine as required by the existing law. And I quite recognise that in construing such a disposition for the purposes of the positive prescription that construction must be adopted which is the widest of which the language admits. That is the principle—if it be a principle—of the case of *Auld* v. *Hay*, 7 R. 667, of which so much has been said; but which, so far as I know, decided nothing specially new or doubtful.

But so recognising, two questions arise. The first question is whether this disposition can be construed so as to be a disposition of "a particular and certain subject," a subject so defined as to be "distinguished from all others," and thus to escape the operation of the rule laid down by Erskine (ii., 3, 23) that for purposes of infeftment "the conveyance of an uncertain subject is inept and ineffectual." That is the first question. And then the second question is this, whether assuming the subject to be so described as to be sufficiently definite, the definition expressed is not, upon any reasonable construction, such as to exclude the ground now in dispute, and to confine the defenders' title to a certain adjoining area, which it is admitted the defenders have bought and paid for, and as to which there is no dispute.

Now, I am by no means sure that either of those questions can be answered favourably to the defenders, but I am at least certain that they cannot both be so answered.

It seems to be clear upon the terms of the disposition that unless it applies to a specific area of about 4·037 acres, originally at least marked out by visible landmarks so as to be identifiable by those landmarks while they remained, or afterwards by extrinsic evidence as to their position, the whole disposition was as a warrant for infeftment

entirely inept. In other words, if the attempt of the disposition was not to convey a particular and specific area of 4·037 acres, but to convey by anticipation all the ground or pieces of ground within the estate of Manuel which should be ultimately required for the purposes of the canal (the 4·037 acres being merely mentioned as an assumed quantity which might be afterwards increased or diminished)—if that was the attempt of the disposition, it seems to me to be hardly doubtful that following on such a conveyance there could be no valid infeftment. It would, I apprehend, at least have been necessary to postpone the infeftment until the canal was completed, and then to have a second deed between the parties defining the conveyed area, which deed might under the old form be handed to the notary and set forth in his instrument, or might under the statutory form be recorded along with the disposition.

Accordingly it seems to me that the defenders are shut up to accepting the perhaps less violent proposition that the conveyance was on its just construction confined to a definite area staked out and measured, and consisting, as expressed, of 4·037 acres or thereby. That, I think, is the most favourable view which the defenders can present.

But then, so taking it, what is the result? I apprehend it is only this, that the area disponed being specific, it may even now be identified by extrinsic evidence; and being so, that the defenders' title becomes simply an ordinary and indeed typical bounding title. The defenders maintain no doubt that extrinsic evidence is not competent. But I cannot, I confess, find any ground for that argument. At least I cannot do so except upon a view which would, for the reasons already expressed, be fatal to the validity of the title. For *ex hypothesi* of the argument, the conveyance here is not a conveyance simply of a certain number of acres lying somewhere within the lands of Manuel. It is *ex hypothesi* a conveyance which implies—if it does not express—meiths and bounds—meiths and bounds which must have been at least temporarily visible on the ground, and as to the position of which—if they are no longer visible—there seems no objection to the admission of extrinsic evidence. Neither can I assent to the defenders' further argument that the extrinsic evidence still available is unsatisfactory. As to that, it is enough to say that in my opinion the defenders' plan of 1822, read along with the letters and documents which passed between the parties in 1838 at the settlement of the compensation money payable by the Canal Company to the estate of Manuel, make it perfectly clear what the bounds of the 4·037 acres were; and also quite certain that the same did not include, but excluded, the area of about 1·016 acres which is now in dispute.

Moreover, it appears to me that, assuming extrinsic evidence to be either incompetent or unreliable, the result would not at all improve the defenders' position. We should then, I am afraid, have in substance a case such as I have previously figured—the case namely of a conveyance simply of 4·037 acres somewhere within the estate of Manuel—a conveyance which, as I have already said, could form no warrant for a valid infeftment. It did, no doubt, seem to be argued that even with such a title, if prescriptive possession followed—possession of any number of acres, however large—such possession might not only cure the original indefiniteness, but might, on the principle that measurements are not as a rule taxative, bring the whole area possessed—whatever its extent—within the operation of the Prescription Statute. But apart from other difficulties, I need hardly, I think, point out that the distinction between measurements taxative and non-taxative applies only where there is, combined with the measurements, some sufficient description covering or capable of covering some larger area. It can have no application where, as in the case supposed, *only* measurements are expressed. In such cases (subject always to the latitude covered by the usually adjected words "or thereby") the measurement is, I apprehend, always taxative. And by consequence, while such measurement may not in strictness constitute what is called a Bounding Charter, it necessarily at least constitutes a limitation *in gremio* of the title—a limitation *per se* sufficient to exclude any ascription to the title of a possession substantially in excess of the measurement.

I therefore agree with the Lord Ordinary's first ground of judgment, which is of course sufficient for the decision of the cause. But I think it right to say that, even on the opposite assumption, I also agree with the Lord Ordinary that the defenders have never in fact had any possession of the ground now in dispute—any possession unequivocal in itself and unequivocally referable to the title on which they found. On this point it is perhaps unnecessary to add anything to the Lord Ordinary's reasoned opinion. I may, however, say this, that it seems to me to be really demonstrated by the documents—(1) That from 1819 to 1838 the ground in question was possessed simply as part of certain spoil banks for which the defenders' authors paid rent at so much per acre, plus an allowance for deterioration; (2) that after 1838, and after a proposal on their part to purchase a small strip of the ground in question along the canal (a proposal which only fell through by reason of the defenders' authors being unwilling to incur the expense of a certain fence)—the ground in question was (part of it expressly and the rest, if not expressly, impliedly) let to the Canal Company for a period of years, along with the rest of the spoil banks, at a specified rent; (3) that having possessed under that lease until 1873, the defenders in that year took a new lease of the ground in question, or of the right to use it for certain purposes at an increased rent; and (4) under this lease of 1873 the defenders have possessed and paid rent down to the present time. When to all this it is added that the defenders do not profess that

either they or their authors ever paid any price for the ground in question, and further, that the whole of the said ground has been since 1852 included in the estate plan of the estate of Manuel—I do not, I confess, see how it is possible for any person reading carefully the print of documents to conclude otherwise than that the idea of the defenders' proprietorship or possession *quâ* proprietors of the ground in question is a comparatively recent afterthought for which there is no good foundation either in fact or law.

LORD STORMONTH DARLING—I concur.

LORD LOW—I have had the advantage of reading the opinion prepared by Lord Kyllachy, and I concur so entirely with what he has said that I do not think I can usefully add anything.

The Court refused the reclaiming note and adhered to the interlocutor of 27th May 1905, with expenses to the pursuer since its date.

Counsel for Pursuer (Respondent)—Cooper, K.C.—Welsh. Agent—Party (R. Ainslie Brown, S.S.C.).

Counsel for Defenders (Reclaimers)—Dickson, K.C.—Guthrie, K.C.—Grierson. Agent—James Watson, S.S.C.

Friday, February 2.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

ADDISON *v.* BROWN.

Process—Citation—Registered Letter—Enrolled Law-Agent—Service by Registered Letter by Party Himself being Enrolled Law-Agent—Citation Amendment (Scotland) Act 1882 (45 *and* 46 *Vict. c.* 77), *sec.* 3.

A party to an action who is an enrolled law-agent may himself execute service by registered letter.

Process—Citation—Service by Registered Letter—Statement of Inducíæ—Citation Amendment (Scotland) Act 1882 (45 *and* 46 *Vict. c.* 77), *sec.* 4, *sub-secs.* (1) *and* (2).

The Citation Amendment (Scotland) Act 1882, section 4, enacts—"The following provisions shall apply to service by registered letter:—(1) The citation or notice subjoined to the copy or other citation or notice required in the circumstances shall specify the date of posting, and in cases where the party is not cited to a fixed diet but to appear or lodge answers or other pleadings within a certain period, shall also state that the *inducíæ* or period for appearance or lodging answers or other pleadings is reckoned from that date; (2) the *inducíæ* or period of notice shall be reckoned from twenty-four hours after the time of posting." . . .

An interlocutor granting decree was served upon the defender by registered letter. The notice continued, after stating the date of posting, "from which the *inducíæ* or period for appearance is reckoned."

A suspension and interdict having been brought on the ground that the notice was wrong inasmuch as the *inducíæ* ran from twenty-four hours after the date of posting, *held* that the notice, following as it did explicitly the words of section 4, sub-section 1, was right, and the suspension and interdict *refused*.

The Citation Amendment (Scotland) Act 1882, section 3, enacts—"In any civil action or proceeding in any court or before any person or body of persons having by law power to cite parties or witnesses, any summons or warrant of citation of any person, whether as a party or witness, or warrant of service or judicial intimation, may be executed in Scotland . . . by an enrolled law-agent, by sending to the known residence or place of business of the person upon whom such summons, warrant, or judicial intimation is to be served . . . a registered letter by post, containing the copy of the summons or petition, or other document required by law in the particular case to be served, with the proper citation or notice subjoined thereto, or containing such other citation or notice as may be required in the circumstances, and such posting shall constitute a legal and valid citation, unless the person cited shall prove that such letter was not left or tendered at his known residence or place of business." . . .

Robert Ainslie Brown of Manuel, Stirlingshire, Solicitor before the Supreme Courts, Edinburgh, having raised a note of suspension and interdict against Abram Addison, tenant of the mill and farm of Manuel Mill, Stirlingshire, to have him interdicted, *inter alia*, from entering upon a certain field, on presentation obtained interim interdict from the Lord Ordinary (JOHNSTON), and served the note and interdict upon Addison by posting to him in a registered letter a copy of the note, to which was annexed the following citation:—"I, Robert Ainslie Brown, law-agent, by virtue of an interlocutor dated the ninth day of June Nineteen hundred and five years, pronounced by Lord Johnston, Ordinary, officiating on the Bills, upon the note of suspension and interdict given in and presented for and in name of *Robert Ainslie Brown, of Manuel, Stirlingshire, Solicitor before the Supreme Courts of Scotland, Edinburgh*, complainer, do hereby, in His Majesty's name and authority, and in name and authority of the said Lord Ordinary, lawfully intimate the said note and interlocutor thereon to you *the therein designed Abram Addison*, respondent, by serving you with the foregoing copy thereof, that you may not pretend ignorance of the same, and desire and require you to conform yourself to said interlocutor, *within eight days*, with certification as effeirs. This I do upon the *ninth* day of *June* Nineteen hundred and five years, being the date of the posting of this intimation, and from