

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 march-stones 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-implementation 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-implementation 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

therefore to consider whether the pursuer can recover more than that sum. But for the decision in *Johnstone's Trustees v. Johnstone*, January 19, 1819, F.C., I should have been disposed to hold that in such a case the party willing to perform the contract might at his election either sue for the penalty, in which case the amount of the penalty would be the limit of the damages which he could recover, or, ignoring the penalty, he might sue for the actual amount of damage sustained, whether more or less than the sum contained in the penalty. But the decision in *Johnstone's Trustees v. Johnstone* decided that in circumstances similar to those in the present case damages incurred for non-implementation of an offer to purchase made at a public sale could in no event exceed the penalty named. In that case the clause in the articles of roup was as follows—'That the last and highest offerer for each lot shall be obliged, within thirty days of the date of roup, to grant bond for the price offered by him to the satisfaction of the expositors, payable within the City of Edinburgh at the terms above specified, with a fifth part more than the price of liquidated penalty in case of failure and annual rent as aforesaid; and if any purchaser shall fail in granting the said bond, he shall, besides incurring a penalty of a fifth part more than the price, forfeit his interest in the purchase.'

"The defender Dr Johnstone bought part of the lands at the price of £15,646, 11s. 1d.; but having resiled from the purchase, the pursuers brought an action against him, concluding first for £3129, 6s. 2d., a fifth part of the price, and in addition for £5000, or such sum, less or more, as should be found to be the amount of further damage sustained. The Lord Ordinary at first found generally that the defender was liable in damages, and found the footing on which they were to be estimated. But afterwards he found 'that the sum exigible from the defender can in no event exceed the penalty.' Against this interlocutor the pursuers petitioned, and pleaded that as, according to later practice, a penalty for non-performance fell to be modified if it exceeded the actual amount of damage, so it was reasonable that where the actual damage sustained exceeded the sum named, the injured party should not be restricted to the penalty, but be entitled to recover full damages for breach of contract. Otherwise the adjection of a penalty would be a disadvantage instead of an advantage to the party willing to perform the contract.

"But this representation did not prevail, and the Court, without calling for an answer, adhered.

"In practice that judgment has been held as establishing that in articles of roup such a penalty, when stated, is the maximum of damages which can be recovered for non-implementation of an offer at a public sale. This is so stated by Professor Montgomerie Bell in his Lectures, vol. ii. p. 728, 3rd ed., and by Professor Menzies in almost the same terms at p. 390 of the 3rd ed. of his Lectures. This statement of the understanding and practice in the profession made by two

writers of so great practical experience is entitled to weight. The pursuers maintain that as the penalty is stipulated to be over and above performance, they are not restricted to the amount in the penalty, but are entitled also to recover further damages for breach of contract. But all penalties are in a sense 'over and above performance,' even although these words should be omitted. As Erskine says, iii. 3, 86—'By our customs also such penalties are not unfrequent. But they have no tendency to weaken the obligation itself, being adjoined purely for quickening the performance of the debtor, who therefore cannot get free by offering payment of the penalty, though the words of style, "by and attour performance," should be omitted.'—See also *Frost and Barr v. Henderson, Coulborn, & Co.*, 8 Macph. 187; *Gold v. Houldsworth*, 8 Macph. 1006; and 2 Bell's Comm. p. 699, 7th ed. The party seeking to enforce the contract is not prevented from suing for implement by the other tendering payment of the penalty. This does not necessarily imply, and it has not in practice been held to imply, that if the party chooses not to enforce implement of the contract, he can both claim the penalty and such further damages as he is able to instruct. In the case of *Johnstone's Trustees* the expositors had the option of compelling the purchaser to implement his bargain. But as they did not choose to do so, they were held not entitled to damages in respect of non-performance beyond the amount of the penalty.

"I am therefore of opinion that the pursuers are entitled to recover damages, but that those damages must be limited to the sum of £100. But before decree for that sum is given, the abortive decree for implement, which the pursuers obtained against the defender, must be departed from."

Counsel for the Pursuers—Baxter. Agent—W. Kinniburgh Morton, S.S.C.

Counsel for the Defender—M'Lennan. Agents—Miller & Murray, S.S.C.

Tuesday, December 10.

OUTER HOUSE.

[Lord Moncreiff.]

DICK v. MANSON.

Poor—Lunatic—Aliment—Claim of Parish for Arrears Against Relative.

A parochial board has no claim against the relative of a pauper lunatic for reimbursement of sums expended on the aliment or maintenance of the lunatic, except for those years during which the relative was himself in a position to have maintained the lunatic.

Mrs Margaret Gilbert or Corstorphine, residing at Kirknewton, died on 1st May 1894, predeceased by her husband but survived by her daughter Elizabeth Corstor-