

Allen v. New Gas Company, 1876, L.R., 1 Ex. Div. 251. There was no allegation to the effect that the system was defective, all the pursuer's averments amounted to was that the manager had not reported to the defenders certain existing defects. If there had been any failure to observe rule 21, that was due to the fault of the manager, and not to that of the owners.

Argued for appellants—(1) The defenders had a personal duty which they were not entitled to delegate to a servant. There had been a neglect of a statutory duty to make the roofs secure, which the employers should have discharged personally. Failing their doing so they took the risk of their superintendent's neglect of duty, and were liable for it—*Wright v. Dunlop & Company*, February 14, 1893, 20 R. 363. It was not enough for them merely to provide a competent superintendent and good machinery. The case of *Wallace v. Culler Paper Mills Company*, June 23, 1892, 19 R. 915, showed that a company was liable equally with an individual employer for neglect of a duty. In *Henderson v. John Watson, Limited*, July 2, 1892, 19 R. 954, the same principle was followed. (2) In any view, the defenders' objection was premature at this stage. The facts should all be ascertained before this question was considered, as had been done in all the decided cases. The pursuer having averred a neglect of a statutory duty, had a *prima facie* case which could not be repelled by a preliminary objection such as this—*Kelly v. Globe Sugar Refining Company*, June 17, 1893, 20 R. 833. In a case of continuous fault such as was averred here, it was unnecessary to aver specifically the individual liable—*Henderson v. John Watson, Limited, supra*, 19 R., at p. 957. Moreover, a special defence such as this should have been pleaded upon record—*Sneddon v. Mossend Iron Company, supra*, 3 R., at p. 871.

At advising—

LORD PRESIDENT—Before we could throw out this action as laid at common law without ascertaining the facts, we must be sure that the record, when read as a whole, raises any of the questions which Mr Ure has discussed. For my part, I find it sufficient to say that Cond. 8 seems to impute fault to the defenders, as distinguished from their servants, in a matter which may fairly be described as their system of working. I am not prepared to say that it is a legal impossibility that a mining company can be guilty of such fault, and beyond this I am not at present required to go.

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

The Court approved of the proposed issue.

Counsel for the Pursuer—A. S. D. Thomson. Agents—George Inglis & Orr, S.S.C.

Counsel for the Defenders—Ure—Salvesen. Agent—J. Gordon Mason, S.S.C.

Wednesday, February 19.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

HOPE AND OTHERS v. HOPE'S TRUSTEES.

Succession—Testamentary Capacity—Insanity—Relevancy.

When general unsoundness of mind is not alleged against a testator, but merely insane delusion on his part in regard to the objects endowed by his will, the Court will not entertain an action of reduction.

Averments which, taken together with the terms of the deeds sought to be reduced, held, under this rule, irrelevant and insufficient to support an action of reduction of testamentary writings and of a trust-conveyance on the ground that the granter was not of sound disposing mind.

James Hope, W.S., Edinburgh, and others raised an action against David Campbell, S.S.C., Edinburgh, and others, trustees under certain trust-dispositions and settlements of the deceased John Hope, W.S., concluding for reduction of the said trust-dispositions and relative codicils, and for declarator that Mr Hope died intestate.

Mr John Hope died in 1893 at the age of 86, survived by Mr James Hope, his brother and heir-at-law, and by the other pursuers, his next of kin. He left a trust-disposition and settlement dated 2nd August 1879, a trust-conveyance dated 22d April 1890, a trust-disposition and settlement dated 26th July 1890, besides certain codicils of various dates between 1890 and 1893.

By his trust-disposition of 1879 Mr John Hope conveyed his whole means and estate, heritable and moveable, for certain purposes, including the administration of the residue thereof, for assisting the dissemination of a knowledge of the evidences of Christianity, the promotion of Sabbath observance, the carrying on of anti-infidel work, and the advancement of total-abstinence and anti-popery.

By the conveyance in trust of 22d April 1890 Mr Hope disposed certain lands in Edinburgh to trustees for certain purposes, of which the second and third were as follows:—“(Second) In expending not less than the sum of £1000 sterling, and not more than the sum of £1500 sterling per annum, in the carrying on and advancing the cause of total abstinence at home or abroad, from the giving or partaking of any beer, porter, ale, wine, or cordials containing alcohol, or any whisky, brandy, rum, gin, or other spirits, or any spirituous or fermented or alcoholic liquors, or tobacco or opium, as articles of diet or luxury or beverage, in any form and degree, and from the use of alcoholic or fermented wine, or other intoxicating liquors, in the celebration of the Lord's Supper, and in promoting in the celebration of the Lord's Supper the use of the

juice of the grape unfermented, being the fruit of the vine commonly called unfermented wine, and these by" [various means which need not here be enumerated]; "and (Third) In expending the remainder of the said income and annual proceeds (but subject always during the earlier years of the said trust to the power of accumulation hereinafter conferred upon the said trustees) in the following objects, *videlicet*, in disseminating among the people of Edinburgh, and elsewhere in the United Kingdom, or abroad, a knowledge of the anti-scriptural nature and character of the doctrines and practices of the Church of Rome, otherwise called the Roman Catholic Church, and in arousing the people of Scotland, England, or Ireland, or of the whole United Kingdom, or of other lands, to a sense of the dangerous, pernicious, and evil influences and operations of the Church of Rome upon the people's civil and religious liberties, and in originating and promoting efforts and operations, whether religious, or social, or political, or otherwise, for the conversion of Roman Catholics to Protestantism and to Christ, and the hastening the overthrow of the Church of Rome, and in exposing and opposing all attempts to introduce a liturgy, or prelacy, or sacerdotalism, or ritualism, in any form or degree, into or among any of the Presbyterian Churches of Scotland, and these by means of the following works and operations and enterprises and others, all and every one of which, when entered upon, I hereby provide and declare shall be carried out and effected in accordance with the evangelical Calvinistic principles of the Protestant religion, as at present embodied and set forth in the standards of the Church of Scotland." [Here followed an enumeration of the said works, operations, and enterprises].

By the trust-disposition and settlement dated 26th July 1890, Mr Hope conveyed his whole means and estate, heritable and moveable, to trustees for purposes identical with those set forth in the trust-conveyance of April 1890. He further cancelled the trust-disposition of 1879, in so far as inconsistent with that of 26th July 1890.

The codicils for the most part contained legacies to various persons of both sexes conditional upon their being total abstainers from alcoholic liquor, tobacco, snuff, and opium, upon their not frequenting taverns, balls, theatres, or circuses, upon their continuing to attend Divine service in the Church of Scotland, and the like.

The pursuers averred—" (Cond. 8) The said John Hope was in many respects a man of very eccentric habits, both of mind and body. For many years of his life he was subject to hallucinations, especially in regard to matters connected with temperance and total abstinence and with the Church of Rome. His speech, writings, and actions in regard to these topics were unreasonable and extravagant, and his mind in relation to said subjects was disordered and unhinged. Upon both the said topics he was subject to [insane] delusions. [He believed that he had a special

and imperative duty to further the cause of total abstinence and to oppose the Church of Rome by devoting his pecuniary resources to these objects in consequence of commands which he conceived he had received from the Deity by direct communication upon various occasions. These insane delusions dominated his mind and mastered his judgment] to such an extent as to render him incapable of making a reasonable and proper settlement of his means and estate, or of taking a rational view of the matters to be considered in making a will. The pursuers believe and aver that at the dates of the said deeds and codicils, reduction of which is sought by the leading conclusion of the summons, the said John Hope was not of sound disposing mind. The said deeds and codicils are not the deeds of the said John Hope. Mr Hope therefore died intestate, and the pursuers as his next-of-kin and heir-at-law are entitled to his whole succession, heritable and moveable, according to their respective rights and interests in the same." (*The brackets indicate the amendments made by the pursuers in the Inner House.*)

The pursuers pleaded—" Decree of reduction and declarator ought to be pronounced in terms of the first and second conclusions of the summons, in respect that at the dates of the documents sought to be reduced, the said John Hope was not of sound disposing mind, and that the said documents are not his deeds."

The defenders averred—" (Stat. 1) The late Mr John Hope was a man of great business capacity. He was admitted to the Society of Writers to the Signet in 1829. Down to 1864 he was in partnership with the pursuer Mr James Hope, and took the leading share in the conduct of the firm's business. After the firm was dissolved, the late Mr John Hope continued to carry on business on his own account, and down to the date of his death he acted as agent for several important landed proprietors and other clients, all of whom placed the most implicit confidence in his professional ability and soundness of judgment. The deceased was also a man of great public spirit, and, besides attending to his professional business as a Writer to the Signet, he devoted much of his time to public affairs, and to the promotion of various schemes for the social and religious wellbeing of the people. In 1857, when he was fifty years of age, he entered the Town Council of the city of Edinburgh as representing St George's ward, and he remained in the Town Council, with the exception of a single year (1866 to 1867), for the long period of thirty-two years, retiring in November 1889 in his eighty-third year. In all matters connected with the city administration he proved himself a man of great shrewdness and sound business capacity. He took a special interest in the volunteer movement. In 1860 he was appointed a captain in the 2nd Edinburgh Rifle Volunteers, now the Queen's Brigade, having by his own efforts raised a company of 100 men. He held the post for six years,

during which time he brought his company to the very highest state of efficiency, and was specially congratulated by the officer commanding the regiment. Latterly the members of his company far exceeded the maximum strength, and he promoted a corps into which among others his older cadets might be drafted. At the end of 1866 he started the 3rd City of Edinburgh Rifle Volunteers, now known as the 4th Volunteer Battalion, The Royal Scots. Beginning with one company the corps grew year by year until it was a fully equipped battalion of six companies. Mr Hope's connection with the volunteers lasted until 1884, when he resigned. Mr Hope's views on social matters were broad and liberal; and in many cases he was far in advance of the times. He advocated free education as long ago as 1852. In 1848 he established a number of apprentice evening school for males, and separate schools for females, where the ordinary branches of elementary education were taught by experienced teachers paid by himself. Reading books, copy books, slates, ink, pens, and pencils were supplied gratis, and the only charge made was a nominal entrance fee, imposed solely with a view of preventing those from coming who did not mean to learn. These schools were continued by him till 1873, when the Governors of George Heriot's Hospital made arrangements for having evening schools for young people. One of his female evening schools, attended by both Protestant and Roman Catholic girls, was continued by Mr Hope until his death, and is now carried on by his trustees. Prizes in the form of useful articles of apparel were given to the girls for regular attendance. Mr Hope's British League Cadet Corps, formed in 1860, one of the earliest, if not the first, in the kingdom, was the pioneer of the modern Boys' Brigade which was begun in 1883. For twenty-eight years, from 1860 to 1888, Mr Hope's Cadet Corps was a well-known institution in Edinburgh, and upwards of 6000 boys passed through the ranks. Prior to 1851 children attending the day schools in Edinburgh received no instruction in music or singing, and Mr Hope, recognising the advantage of brightening school life by the introduction of these subjects, proposed to several of the teachers in Edinburgh that at his own expense he should send to the schools music masters who would give the children lessons in music and singing while in the schools. The offer was accepted, and for thirty years, from 1851 down till 1881, Mr Hope employed music masters to visit and to teach music in forty of the Edinburgh day schools. The arrangement was only brought to an end in 1881 in consequence of ample provision for teaching music and singing having been by that time made by the School Board. In 1854 Mr Hope endeavoured to secure the co-operation of the Town Council in instituting a series of popular concerts in the Corn Exchange. The Town Council did not see their way to allow the use of the Corn Exchange for the purpose, and Mr Hope secured the Music

Hall instead. The project, however, fell through from want of support, although it has had its outcome in the modern popular Waverley Market Concerts of to-day. In 1854 Mr Hope, being struck with the fact that while there were public parks for the east, south, and west districts of the city, there was no provision of that kind for the northern district, himself rented a large field behind Raeburn Place for the use of the public in the northern district. The park was opened on 20th May 1854, after a procession to it of thousands of children and others. The park which had been secured by Mr Hope was available to him for a single year, but owing to the movement which he had made in the matter, so much public interest and attention had been aroused that the Town Council shortly afterwards rented an adjoining park on the Dean estate, and for thirty years, until it became built upon, the new park was available to the public, and was known as 'John Hope's Park.' Mr Hope's great benevolence and generosity, as well as his large-hearted interest in the well-being of the working classes of the community, were shown in many ways. He assisted many young men in their University course, several of them becoming ministers of the Church. He was the pioneer of the present day annual excursions to the country for children. As far back as 1847, when such an event was unknown in any other association, Mr Hope inaugurated his first British League excursion, when more than 3000 people, mostly young, took advantage of it, and went with him to Dalkeith Park. Year by year thereafter for forty-five years, up till and including the year before his death, the British League Excursions were the means of taking hundreds of young people and many of their parents to the country. For very many years also Mr Hope was in the habit of sending a number of lads and young men, and later the wives and children of those who had married, to the country for holidays—some getting a week, and others longer, and Mr Hope defrayed all the expenses, including the railway fares."

The defenders also made averments setting forth the peculiar interest taken by Mr Hope during his lifetime in the total abstinence and Protestant movements of the last fifty years. They further averred that Mr Hope had had little intercourse or intimacy with his relations, and denied the allegations as to his incapacity and unsoundness of mind.

The pursuers answered with regard to Statement 1, quoted above—"The dates mentioned and the averments relative to matters of fact are believed to be substantially correct. *Quoad ultra* not known and not admitted."

The defenders pleaded—" (1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons. (2) The defenders ought to be assoilzied in respect (a) that the deeds sought to be reduced are valid and effectual and were executed by the deceased when he was of sound mind, and (b) that the

avermments of the pursuers so far as material are unfounded in fact."

On 18th June 1895 the Lord Ordinary (KINCAIRNEY), in respect that counsel for the pursuers stated that he did not move for leave to amend the record, sustained the first plea-in-law for the defenders and dismissed the action.

Opinion.— . . . "The point which has been debated is the relevancy of the pursuers' averments, and I have on consideration come to the conclusion that they are irrelevant, and not such as can be sent to proof.

"The pursuers' only plea is that the deeds should be reduced because at their dates Mr Hope was not of sound disposing mind, and because they are not his deeds. The averments on which that plea is founded are contained in condescence 8, the rest of the record consisting merely of a narrative of the deeds. In condescence 8 it is averred that Mr Hope was not of sound disposing mind, and that the deeds were not his deeds. Now, no doubt, in a sense these averments, with the corresponding plea, are perfectly relevant, and if they were proved the deeds would be of course reduced. But they are entirely wanting in specification and detail. I consider that it is not sufficient merely to lay a deed before the Court and aver that it was not the deed of its apparent granter. It is necessary, I conceive, to aver special facts from which the inability of the granter can be inferred, and which will inform the defender of the kind of case which he requires to meet. Accordingly the pursuers add to this general statement the averments that Mr Hope was for many years of his life subject to hallucinations, especially in regard to matters connected with temperance and total abstinence, and with the Church of Rome, that his mind was in relation to these subjects disordered and unhinged, and that he was subject to delusions in regard to them to such an extent as to render him incapable of making a reasonable and proper settlement of his estates. I think that these averments are still insufficient, and so defective in specification and definiteness as to be irrelevant. They probably indicate the nature of Mr Hope's mental defects intended to be averred, at least to the extent of showing what kinds of mental defect are not intended. It is clearly not intended to be averred that Mr Hope was not of sound disposing mind either because of mental imbecility or of any failure of intellect incident to his great age. What is averred are hallucinations and delusions, and seeing that delusions and even hallucinations are not necessarily the product of insanity, I think it essential to relevancy that it should be averred that they were so in this case, or otherwise—in perhaps less exact language—that they were insane hallucinations and delusions. Counsel for the pursuers held that the addition of the word 'insane' added nothing to the meaning, but they stated that nevertheless they were willing to add this word. I think, however, that the record as so amended

would still fall short of relevancy, and would not give the defenders the information as to the grounds on which it was intended to attack the deeds to which they are entitled.

"Mr Hope's opinions about total abstinence and Roman Catholicism may have been erroneous, extreme, and extravagant, and the importance which he attached to them may have been exaggerated out of reason. Many people doubtless think so, while there are, I have no doubt, not a few who consider them reasonable, wholesome, and beneficent, but unless he reached his opinions under the influence of some insane hallucination, the mere fact that his opinions were extreme, and were held with more than ordinary earnestness and tenacity, cannot, I apprehend, indicate insanity. If the pursuers knew enough to be able to aver that he laboured under delusions and hallucinations on these subjects, they must necessarily be able to say what these hallucinations and delusions were. They say—and perhaps are entitled to say—that if a man labours under certain insane delusions, it is not unlikely that other similar delusions may be discovered in the course of inquiry, and that that they do not wish to tie themselves down to those delusions only which they have at present discovered, and it is possible that they might be entitled to add to a statement of specific delusions some general words which may meet such a case. Had they condescended on special insane delusions they might have made a case for inquiry, although it might not necessarily follow that the deeds would be reduced even if the hallucinations were proved. But I hold that they are not entitled to get into a proof while they withhold information, which *ex hypothesi* they possess, about the truster's insane hallucinations.

"The pursuers' counsel mentioned at the debate no special hallucinations, and seemed rather to put forward that the view that Mr Hope's mind was so dominated and monopolised by the two ideas which possessed him, whether they were right ideas or wrong, as to be thrown clean off its balance and rendered unable to take any rational view of other interests to which in making his settlements he ought to have had regard. That is hardly the case averred on record, and I am not prepared to say that an averment of that kind would be relevant.

"No authorities were quoted to me in regard to the amount of specification, and the definiteness of averment necessary for relevancy in an action of reduction of trust-deeds. Various important cases were referred to, and in particular the cases of *Morrison v. Maclean's Trustees*, 24 D. 625; *Nisbet's Trustees v. Nisbet*, June 30, 1871, 9 Macph. 937; *Ballantyne v. Evans*, March 3, 1886, 13 R. 652; *Boughton & Marston v. Knight, &c.*, 1873, 3 Pro. and Div. 64; *Jenkins v. Morris*, 1880, 14 Ch. Div. 674; and the highly important case of *Banks v. Goodfellow*, 1870, L.R., 5 Q.B. 549. These cases, however, do not bear on the question of relevancy of averment, but

on the effect of insane delusion on contractual or testamentary power.

"I proceed on the view that the defenders are entitled to more specific information than the record affords, and am of opinion that I cannot send the pursuers' averments to proof, but must, unless they propose to amend their record, sustain the first plea in defence and dismiss the action."

The pursuers reclaimed, and moved for leave to amend their record to the effect indicated above. Leave to amend was granted, and the pursuer answered the amendment by averring that the additional statement was "not indicative of insanity."

Argued for the pursuers and reclaimers—The Lord Ordinary was wrong. The real question here was—Was there mental disease—for insane delusion was only an indication of mental disease. The terms of the documents challenged, when read together with the averments of the pursuer, emphatically suggested the necessity of an inquiry into the question whether there was mental disease. Insanity was a matter of fact, and the rationality of the deeds themselves was a most important element, and one which a jury was entitled to take into account—*Morrison v. Maclean's Trustees*, February 27, 1862, 24 D. 625; *Nisbet's Trustees v. Nisbet*, June 30, 1871, 9 Macph. 937; *Ballantyne, &c. v. Evans*, March 3, 1886, 13 R. 652. The settlements were saturated with the insane delusion alleged.

Argued for the defenders and respondents—The Lord Ordinary was right. The pursuers practically admitted the sanity of the testator, for they admitted that he had managed his own complicated private affairs and had transacted much important public business. There was nothing outrageous in the belief in a direct command from the Deity, which had been held by many great men. The very most that was averred here was an insane delusion, a partial unsoundness of mind; but that was not sufficient to render a person incapable of disposing of his property by will—*Banks v. Goodfellow*, L.R., 5 Q.B. 549; *Jenkins v. Morris*, L.R., 14 Ch. D. 674. No doubt *Morrison*, *Nisbet*, and *Ballantyne* had all been sent to proof, but in these cases the averments were far more specific than here. In any event, the pursuers had averred nothing relevant to overturn the deed of 1879, where a number of other interests had been cared for besides total abstinence and anti-popery.

At advising—

LORD PRESIDENT—My opinion is that the pursuers' case as stated on record does not entitle them to go to trial.

It may be that a bald averment that a testator was of unsound mind when he made his will, and that the will is therefore not his will, might be sustained as relevant, without any more circumstantiated statement. I do not pronounce upon this question of pleading, for it is not before me. The present pursuers have, with becoming frankness, done two things. They have substantially admitted the whole of what

is a pretty full biographical account of the testator and of his relations during his life to the two public objects to which by his testamentary writings he has devoted his fortune after his death. They have also, by an amendment of the record, which can only be ascribed to a sincere desire to inform the Court, disclosed their reason for calling the testator insane.

It appears, then, on the face of the pursuers' record that this gentleman, during his life, not merely managed his own affairs but was entrusted with the affairs of other people and of the public. Concurrently with the performance of these professional and public duties he was devoting a great deal of energy and money to exactly the schemes which he has endowed by his will. All this went on for a period exceeding an ordinary lifetime.

I do not go into detail about all this; for it would never do to decide a case on relevancy by what are inferences from facts which might strike different minds differently and are therefore appropriate to a jury, even although the true result might be easy of prognostication. But the point is, whether this admission by the pursuers of this very detailed account of the testator does not dislodge them from the position of being entitled to bid the Court take their word for it that the testator was of unsound mind and that the will is not his will. I think that it does; and the pursuers seem to have thought so, for they have quitted the abstract, and have specified the kind of insanity which they allege.

Now, I do not think that the amendment of the record contains any good averment of unsoundness of mind. The crudeness of the language used cannot be permitted to enhance its significance; and it amounts to no more than this, that Mr Hope believed that in promoting the two objects in question he was obeying God's will as made manifest by God to his conscience. The amendment of the record seems to me therefore to weaken and not to strengthen it. But taking the record of the pursuers as a whole, including the admissions, the general statement of unsoundness of mind is to be read as relative to the will which it is said to invalidate. Now, let it be assumed as true that the intense interest which Mr Hope is said to have taken in abstinence from alcohol and in Protestantism, made those causes the absorbing subjects of his thoughts, to the exclusion or to the prejudice of other matters which are regarded by most men as of equal or greater importance. Some men devote their time and their means to what, on a fair view of life, will be regarded as matters of minor concern, and they exaggerate the importance of what, conversationally, are called their hobbies. But even one who does not sympathise with the peculiar views expressed in Mr Hope's will, is constrained to allow that both his favourite causes touch large human interests, and are both susceptible of being advanced by such methods as he indicates. Now, if a man who has taken a lifelong interest in some specific subjects, even of minor importance, desires his

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 Disposed.

A purchaser acquired a piece of ground under a title which excepted from the land conveyed "those parts and portions thereof sold and disposed 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 Bridge-lands 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 disposed 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 disposed those parts and portions thereof sold and disposed 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 $\frac{651}{1000}$ 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 (KYLACHY) granted decree in terms of the conclusion of the summons, and ordained the defender to implement the decree before Whitsunday 1896.