end of the day he was not satisfied. I am unable to regard the evidence as sufficient to make a case of that kind here. During the plating of the yacht there were complaints by the pursuer Mr Nelson, by his naval architect Mr Mylne, and by his representative Mr James. These were made to Mr Gordon Eadie, of the defenders' firm, and the point sought to be made against the pursuer is that Mr James, who saw the plating in progress, did not insist on plates which he as an expert must have known could never be straightened by hammering, being taken out and replaced by others. The defenders' counsel urged that there are certain plates that an expert should have known could never be put right, and others that could be faired out, and that it was the duty of Mr James to see that new plates were put in where necessary, as the defenders' undertaking only extended to fairing out. The answer to this, however, is that Mr Eadie continually promised, during the time the plates were being riveted, including a considerable period after 8th July, that the unevenness could and would be put right by hammering. The result of this was that it was only when the plating was completed in the middle of August that the badness of the work became fully apparent. To turn this point against Mr James now is to say that he should never have given the defenders the opportunity they asked to put their work right. Such a case as that cannot be made upon the evidence here. It was admitted that the defenders had not asked for an opportunity to put matters right after the yacht was rejected on 24th August.

Upon the question of law, therefore, I am against the contention of the defenders. None of the cases cited appear to me to lead necessarily to an opposite conclusion. If a buyer has accepted goods as his own in fulfilment of a contract he will be barred thereafter from rejecting them. The question whether he has accepted them is a question of fact, and it is upon this question of fact that the defenders' contention fails.

In this view of the case the question of who was to blame for the delay after 20th July does not arise. The record as regards the main cause of delay alleged, viz., that Mr Mylne did not furnish the defenders with the line of keelson and height of floors till 12th May, is quite at variance with the point sought to be made on the evidence and the entry in the diary under date 29th May.

No objection was taken to the amount of damages, £75, allowed by the Lord Ordinary.

I am of opinion that the interlocutor reclaimed against should be affirmed.

The Court pronounced this interlocutor—

"Adhere to said interlocutor in so far as it (heads 1 and 3 thereof) decerns against the defenders for payment of the sums of £131, 5s. and £75 respectively, with interest thereon as concluded for in the summons, and to this extent refuse the reclaiming note and decern: Recal the second head of said interlocutor, and in place thereof ordain the defenders to deliver to the pursuer within thirty days from this date the articles specified in said second head, and decern; with certification that if the defenders fail to deliver said articles as aforesaid, decree will be pronounced against them for the value thereof, with interest as concluded for in the summons," &c.

Counsel for Pursuer and Respondent—Blackburn, K.C.—Black. Agents—W. & F. Haldane, W.S.

Counsel for Defenders and Reclaimers—Sandeman, K.C.—Hon. W. Watson. Agents—Carmichael & Miller, W.S.

Tuesday, December 17.

EXTRA DIVISION.

[Lord Guthrie, Ordinary.

MEACHER *v.* BLAIR-OLIPHANT.

Property — Loch—Title — Parts and Pertinents—Marches—Common Proprietors—Evidence—Grant with Parts and Pertinents Opposed to Subsequent Express Grant.

A brought an action against B to have it declared that she was the sole owner of a loch (*a*) in virtue of her titles, or (*b*) in virtue of her titles followed by exclusive possession. The pursuer and defender were respectively proprietors of lands abutting on the loch. Ancient deeds were produced by both sides, with which, however, they were unable to connect themselves. The earliest title produced by the defender with which he connected himself was a charter, dated 1674, granting lands abutting on the loch "with parts and pertinents." The earliest title with which the pursuer connected herself was a charter, dated 1764, granting lands abutting on the loch "*nec non tres lacus.*" One of the said three lochs was the loch in question.

Held that the defender's title gave him a joint right in the loch with the other riparian proprietors; and that the pursuer's title was *a non domino*, and could not prejudice or prevail against the defender's unless she could show continuous, exclusive, and adverse possession of the whole loch for the prescriptive period; that to establish her claims the pursuer must show that she had excluded the defender and his authors from the common uses of the surface of the water, on the ground that they belonged exclusively to herself, or that she had encroached upon what would otherwise have been the defender's separate property in the *solum*, and that she had failed to prove this.

Observed (*per* Lord Kinnear) that the only titles at which the Court are

entitled to look are those with which the parties can connect themselves.

Observations (*per* Lord Kinnear) regarding the value as evidence of Statistical Accounts, Ordnance Survey maps, and plans.

An action was brought by Mrs Emma Mary Brown or Meacher, heiress of entail in possession of the lands and estate of Marlee and Balcairn, in the parish of Kinloch and county of Perth, *pursuer*, against Captain Philip Laurence Kington Blair-Oliphant of Ardblair, in the county of Perth, *defender*, in which the conclusions of the summons were as follows—"Therefore it ought and should be found and declared by decree of the Lords of our Council and Session that the pursuer has, under her titles, the sole and exclusive right to the Fingask Loch, in the county of Perth, including the *solum* thereof, and to the fishings thereof, together with the sole and exclusive right and privilege of using boats, nets, and rods, and fishing in and shooting from the said loch, and generally of exercising all rights of property in connection therewith, and that the defender has no right of property or servitude or other right whatever *except the servitude of watering cattle or other bestial* in the said loch or fishings or shootings, and no privilege of using boats or fishing in or shooting from the said loch in any manner of way; and *separatim*, that the pursuer and her predecessors and authors have for time immemorial, or for forty years, been in the exclusive enjoyment and possession, under their titles, of the said Fingask Loch, and the fishings and shootings thereof, including all the privileges connected therewith: And further, the defender ought and should be interdicted, prohibited, and discharged by decree foresaid from placing or using boats on the said loch, and from entering or trespassing upon the same, or passing on to or over the *solum* thereof, and from fishing in the said loch, either from the banks or from boats or by means of wading or in any other way, and from shooting from the said loch, and from in any way interfering with the pursuer's peaceable possession of the said loch and fishings and shootings in all time coming." [The words in italics were added by amendment at the conclusion of the hearing on evidence.]

The pursuer pleaded—"(1) The pursuer having, in virtue of her titles, the exclusive right to the Fingask Loch, and to the fishings and shootings thereof, and the defender having challenged said right, decree of declarator should be granted as craved. (2) *Separatim*, the pursuer and her authors having for time immemorial, or at least for forty years, enjoyed the exclusive possession of the said loch and fishings and shootings, upon an express grant thereof in their titles, the pursuer is now exclusively in right of the said loch and fishings and shootings, and the defender having challenged said right, decree of declarator should be granted as craved."

The following *narrative* is taken from Lord Mackenzie's opinion—"The question in this action is in regard to Fingask Loch, the size of which is stated to be about 23 acres. The estate of Marlee belonging to the pursuer, and the estate of Ardblair belonging to the defender, both abut upon it. The pursuer claims the sole and exclusive right to the loch under her title, and also under her title and the possession which has followed upon it. The defender claims a joint right to the loch along with the pursuer as the only other riparian proprietor. The earliest title with which the pursuer can connect herself is a Crown charter in 1764 which makes express mention of *tres lacus*. It is admitted that one of these lochs is identified as being Fingask Loch. The pursuer maintains that she has an express title to the loch. The earliest title which the defender can connect himself with is a Crown charter in 1674 of the lands of Ardblair with parts and pertinents. An argument was founded on the fact that this charter contains a conveyance of lands called Shadouhalfe with certain rights in the three lochs. Shadouhalfe however drops out of the progress and no point arises in this case regarding it. The title of the defender is thus a conveyance of land with parts and pertinents earlier in date than the title granted to the pursuer. The lands in question abut, and I do not think there is room for the argument that it has not been shown they abutted at the date of the grant."

On 23rd November 1911 the Lord Ordinary (GUTHRIE) issued an interlocutor finding and declaring in terms of the declaratory conclusions of the summons, and granting interdict as craved.

Opinion.—"*On Merits.*—I have already allowed the amendment proposed by the pursuer, and shall hear counsel on the question of conditions.

"The subject in controversy, namely, the right of the defender to joint ownership of the Fingask Loch with the pursuer, while it seems, from the possibility of future feuing, and the advantage the defender's water-side feus would have for that purpose if they carried a right of boating, bathing, fishing and shooting on the lake, to be of some conceivable future importance to the defender, is of only nominal value to the pursuer. Her concession of the defender's servitude of watering deprives her right of property of its most important incidents, and her project for killing out the pike and perch, and stocking with trout, would not have been objected to by the defender. The pursuer's position seems to be that of the Captain in *Hamlet*—'Truly to speak, and with no addition, we go to gain a little patch of ground, that hath in it no profit but the name.' And before this case is ended it may turn out that Hamlet's reply will be also applicable—'Twenty thousand ducats will not debate the question of this straw.'

"Fingask Loch is bounded, as near as may be, to the extent of half by the pursuer's property of Marlee on the west

side, and on the other half by the defender's property of Ardblair on the east. In these circumstances the presumption is that both pursuer and defender have a joint right of property in the loch—*Cochrane* v. *Earl of Minto*, 6 Pat. App. 139; *Napier* v. *Scott*, 7 Macph. (H.L.) 35; *Stewart* v. *Robertson*, 1 R. 334. The defender has never claimed more; the pursuer claims under her titles, and her titles with possession, an exclusive right.

"The pursuer founds, as her earliest title, on a Crown charter dated 14th July 1541, in which, among the lands described in the dispositive clause, are the following —'Easter Kinloch with the mill thereof, and with the three lochs and their fishings.' I hold it sufficiently proved that one of these three lochs was the Fingask Loch now in question, the other two being the Marlee Loch and the Rae Loch. (The defender argues that because the pursuer does not claim exclusive possession of the Marlee Loch, that she cannot claim exclusive possession of Fingask Loch. This is a *non sequitur*.) The title granted in 1604, naming the lochs, although only a security writ, is legitimate evidence of this, and is confirmed by the universal understanding, and by the absence of any other lochs on the lands in question. The pursuer's previous title, in 1499, refers to lochs in the tenendas clause only, and does not mention any number. The subsequent titles all refer to three lochs, with the exception of a title in 1657, where the number is omitted. From 1700 onwards the three lochs are conveyed, not '*unacum*,' but as separate subjects, and they are described as lying within the parish of Kinloch. There is a gap in the pursuer's titles between 1700, when they were in the ownership of Gall, and 1757, when Farquharson of Invercauld conveyed the lands of Kinloch as proprietor. The Crown charter of 1764 is the first writ with which the pursuer connects herself without a break. The pursuer's father, Mr Brown, acquired the lands in 1844 from the Farquharsons of Invercauld, under the Act of Parliament of 1828.

"An express title like the pursuer's, if granted subsequent to a Crown grant to another waterside proprietor of lands adjacent to the loch with parts and pertinents, can only prevail to prevent the proprietor under the earlier title having a joint right of property in the loch, by evidence of exclusive possession for the prescriptive period—*Scott* v. *Napier*, 7 Macph. (H.L.) 36; *Stewart* v. *Robertson*, 1 R. 334. In the ordinary case of parts and pertinents possession is necessary to show what the parts and pertinents cover, but in the case of lands bordering a loch, if these lands are held with a clause of parts and pertinents, a joint right of property in the loch will be presumed, and this presumption can only be overcome, in the case of a subsequent express grant, by proof of exclusive possession by the holder of that express grant.

"The defender's earliest title is in 1423 —a grant by a subject superior, confirmed by the Crown, which contains a clause of parts and pertinents connected with the lands of Muirton and Ardblair, one or other of which includes the defender's lands bordering on the loch of Fingask. The defender's earliest title is thus earlier than the pursuer's earliest title.

"Neither the pursuer nor the defender can connect themselves by an unbroken progress with the earliest title of their lands, namely, the pursuer's of 1541 and the defender's of 1423. The defender's progress of titles is continuous after 1674.

"Thus whether the earliest title of the defender's lands be taken, namely, the title in 1423, or the earliest with which he can connect himself without a break, namely, the title of 1674, in either case his title, with parts and pertinents, is earlier than the pursuer's express title, for her earliest title is in 1541, and the earliest title with which she can connect herself is in 1764.

"The sole question is—Has the pursuer, who has an express but subsequent title to the loch, possessed so as to involve an exclusive right of proprietorship? or has the defender, who has in an earlier title a right to parts and pertinents, which may include a joint-right in the loch, not possessed sufficiently to prevent a claim of exclusive possession by the pursuer?

"So stated, the *onus* is on the pursuer.

"The evidence of general repute does not go far back, and is to some extent discounted by the defender's admission that the pursuer is entitled to the rights of a part proprietor. But so far as it goes, it may be said to be entirely in favour of the pursuer.

"Had the question been that of the pursuer's rights to part proprietorship her claim would have been clear, from her title and the possession following on it. It is not so clear that she has ousted the defender from claiming that his title includes a right of part proprietorship in the loch.

"The pursuer has possessed the loch in every possible way, and has done so continuously and from time immemorial. It is unnecessary to go into details on this point. If she has not had exclusive possession, it must be on account of possession by the defender. The use of the loch by the public of Blairgowrie for boating and fishing was not an assertion of any right, and it is accounted for by the valuelessness of the subject.

"It therefore becomes necessary to consider what possession the defender has had of the loch and to determine its nature and extent. That question may be looked at in two ways:—First, what, if anything, did he do in assertion of his alleged right? Second, what, if anything, did the defender do inconsistent with his alleged right?

"*First*, what, if anything, did the defender do in assertion of his alleged right of part proprietorship of Fingask Loch?

"1. Watering animals. — That the cattle and other animals in the defender's fields adjoining the loch drank the water in the loch, without objection by the pursuer, is admitted. But this use involved no assertion of a right of property on the

defender's part. Its effect as establishing a servitude in favour of the defender has been conceded by the pursuer, with the result probably that the pursuer will be debarred from fencing, polluting, or draining the loch. It is true that not only did the cattle water, but fences were run into the area of the loch to keep the cattle in their respective fields. But this was a mere innocuous accessory of a servitude, which, as such, I am not satisfied that the pursuer could have prevented.

"2. Boating, fishing, and shooting. — There is no evidence that the Laird of Ardblair ever had a boat of his own on Fingask Loch down to 1903, when the defender took his Norwegian skiff there from the Rae Loch, at which date he had a sporting lease from the pursuer covering the whole loch. But he used boats belonging to other people, and, in particular, the boat of Menzies, pursuer's tenant. The effect of the evidence of boating, fishing, and shooting is discounted on both sides, when it is found that, owing apparently to the proximity of Blairgowrie and the valuelessness of the fishing and shooting, Fingask Loch was free to all.

"3. Taking marl from the bed of the loch. — The defender tried to prove the taking of marl. In my opinion he has not done so. In view of the convenient situation of Fingask Loch and of the value of marl, and of the defender having taken it from adjoining places but never from Fingask, there is a strong presumption against his right of proprietorship in the loch.

"4. Taking reeds and sand. — It is not proved that the reeds were taken in the loch. Sand has only been taken within the last twenty years, and only on two or three occasions, in insignificant quantities.

"5. Preparation of plans showing part of the loch within his property. — The defender founds on plans prepared by Stobie and a copy in the Advocates' Library, and some evidence was led about the different versions of these plans. This point seems to me unimportant. Any proceeding by the defender which could constitute an interference with the pursuer's exclusive possession must have been one of which the pursuer knew or was bound to know—*Place* v. *Breadalbane*, 1 R. 1202; *Reid* v. *Haldane's Trustees*, 18 R. 744.

"*Second*, what, if anything, did the defender do inconsistent with his alleged right?

"1. Inserting a statement in his titles on and after 1721 that his estate is all within the parish of Blairgowrie, whereas the loch is entirely within the parish of Kinloch. — I do not found on this point. The proof is not clear that the Ordnance Survey map is right in taking the boundary of Blairgowrie parish outside the area of the loch—*Gibson* v. *Bonnington Company*, 7 Macph. 394. The two Statistical Accounts of 1796 and 1845 do not agree. Besides, the title of 1721 and subsequent charters by progress could not affect the defender's feudal estate if once duly constituted—*Boyd*, 11 Macph. 243, 246.

"2. Failing to challenge the action of the pursuer's authors in applying to Parliament and obtaining the Act of 1828, and selling under the Act, on the basis that the whole loch belonged to Marlee. — The pursuer is entitled to make this point; but I do not attach much importance to it. The defender was not directly concerned with the Parliamentary application.

"3. Accepting a lease from the pursuer on the footing that the pursuer was sole proprietor of the loch. — In 1904 the defender took a sporting lease from the pursuer, the terms of which and plan attached shows the whole loch as part of the pursuer's estate. This strongly suggests that the defender did not at the time maintain his present contention.

"4. Framing estate plans on the footing that Fingask Loch excluded. — This involves a comparison between Nos. 168 and 183 of process, and depends on points which the evidence leaves obscure.

"5. Allowing pursuer's authors to make a road on the east side of the loch. — The evidence about this road is too vague to be of any value. The point is not made on record.

"6. Allowing pursuer to take marl from the eastern side of the loch. — This is not proved.

"7. Granting lease on the footing that the defender had no interest in the loch. — See the lease of 1897 by the defender to Thomas Henry Smith. On the whole, with some reluctance, I hold that the pursuer has proved possession of all kinds in the loch for time immemorial, and has sufficiently shown that there was no possession of the loch by any other person, and, in particular, by the defender or his predecessors, to exclude her claim founded on exclusive possession."

The defender reclaimed, and argued—The defender's title was prior to that of the pursuer. By his title he got the lands, with parts and pertinents, and this gave him a right to a share of the loch—*Scott* v. *Napier*, June 11, 1869, 7 Macph. (H.L.) 35, 6 S.L.R. 716; *Stewart's Trustees* v. *Robertson*, January 6, 1874, 1 R. 334, 11 S.L.R. 161. In other words the defender got the lands of Ardblair, parts of which were covered with water. This grant gave him an indefeasible right to a share of the loch, and consequently the subsequent grant of the whole loch was *a non domino*—*Menzies* v. *Wentworth*, June 18, 1901, 3 F. 941, 38 S.L.R. 672. "Part" and "pertinent" have sufficiently distinct meanings, and the right to the loch is a "part"—*Mackenzie* v. *Bankes*, June 27, 1878, 5 R. (H.L.) 192 (C. of S. 279), 15 S.L.R. 755 (C. of S. 173); Stair, ii, 3, 73. The lands could be identified by the fact that they abutted on the loch, which the pursuer admitted in his pleadings, and the share of the loch appertaining to those lands was settled by a series of decisions—*Menzies* v. *Macdonald*, March 10, 1854, 16 D. 827; *Macdonell* v. *Caledonian Canal Commissioners*, June 5, 1830, 8 S. 881; Erskine, ii, 6, 4; Bell's Principles 648 and 651; Duff Section 47 (2); Rankine's Law of Landownership (4th ed.), p. 195.

The defender had therefore a good title to start with, and so threw the whole burden of proof on the pursuer. In any case the defender's title was made good by prescription. Prescription dates from the original grant, and as the defender had proved possession for more than forty years after his grant by 1714, *i.e.*, 50 years before the pursuer's express grant, the latter was clearly *a non domino*—*Lord Advocate* v. *M'Culloch*, October 20, 1874, 2 R. 27, 12 S.L.R. 1. In regard to the pursuer's title the sound view was that it carried the lochs "so far as they appertain to the lands of Marlee." This was consistent with the pursuer's possession both of this loch and of the two others and consistent with the defender's possession. To cut out the defender's title the pursuer must show an express grant followed by exclusive possession—*Lord Advocate* v. *Wemyss*, July 31, 1899, 2 F. (H.L.) 1, 36 S.L.R. 977; *Baird* v. *Robertson*, February 2, 1836, 14 S. 396; *Dick* v. *Earl of Abercorn*, 1769, M. 12,813; Bell's Lectures on Conveyancing, p. 596. The pursuer's concession of the right of servitude at once negatived exclusive possession on his part. In regard to the bounding charter it was only in the event of the pursuer proving that the Blairgowrie march went round the loch that the question would arise, and this he had failed to do. In any event the defender had acquired by title and prescription a right which the subsequent introduction of these bounding words could not cut down. The evidence of plans could not be given much weight—*Place* v. *Breadalbane*, July 17, 1874, 1 R. 1202, 11 S.L.R. 704.

Argued for the pursuer—The pursuer was entitled upon her titles with her possession to exclusive right in the loch. She had an express grant of the lochs, and even if an express grant required to be fortified by possession to give a good title, such possession need not be exclusive but could be something short of the possession required to fortify a mere grant *cum pertinentibus*. It might not be necessary for the defender to prove exclusive possession to establish his right, for he had a prescription in his favour, but his right was not so high as to require exclusive possession to be proved against him. The grant to the pursuer, accompanied by possession, not necessarily exclusive, was sufficient to overcome the prescription in his favour. A grant *cum pertinentibus* followed by exclusive possession would have given the pursuer the whole loch, and an express grant must be stronger than a grant *cum pertinentibus*, and so could not require equal possession to support it. On the authorities the pursuer was bound to prove some degree of possession, but only explicative possession, not the possession necessary to establish an adverse right—*Scott* v. *Napier* (*cit.*), *per* the Lord Chancellor at p. 74, and Lord Chelmsford at pp. 81 and 83; *Scot* v. *Lindsay*, 1635, M. 12,771; *Menzies* v. *Macdonald*, 1856, 2 Macq. 463, at p. 474; *Earl of Fife's Trustees* v. *Cuming*, January 16, 1830, 8 S. 326; *Agnew* v. *Lord Advocate*, January 21, 1873, 11 Macph. 309, 10 S.L.R. 229; *Young* v. *North British Railway Company and Lord Advocate*, August 1, 1887, 14 R. (H.L.) 53, 24 S.L.R. 763; *Macdonald* v. *Farquharson*, 1836, 15 S. 259. [LORD DUNDAS referred to *Auld* v. *Hay*, March 5, 1880, 7 R. 663, 17 S.L.R. 465.] In any event the defender's own title excluded him from the loch, for it described his property as lying within the parish of Blairgowrie, and it was proved that the loch was outside the parish. It was true that this limitation was only introduced in the middle of the progress of titles, but where a limitation appeared in a progress it was valid although an earlier charter existed without the limitation—*Gordon* v. *Grant*, November 12, 1850, 13 D. 1. If the defender could legitimately go back to an earlier charter to get rid of this limitation it could only be to the original grant, and neither side could produce this—*Lord Advocate* v. *Wemyss* (*cit.*) *per* Lord Watson, p. 10; *Threipland* v. *Rutherford*, May 30, 1848, 10 D. 1079; *Boyd* v. *Bruce and Others*, December 20, 1872, 11 Macph. 243, 10 S.L.R. 157. [LORD KINNEAR referred to *Durie's Trustees* v. *Earl of Elgin*, July 11, 1889, 16 R. 1004, 26 S.L.R. 664.] On the question of the admissibility of plans, &c., as evidence counsel referred to the Ordnance Survey Act (4 and 5 Vict. c. 30), sec. 17; *Reid* v. *Haldane's Trustees*, March 19, 1891, 18 R. 744, 28 S.L.R. 511; *Gibson* v. *Bonnington Sugar Refining Company*, January 20, 1869, 7 Macph. 394.

At advising—

LORD DUNDAS—The pursuer of this action, Mrs Meacher, is heiress of entail in possession of the estate of Marlee in Perthshire. The defender is proprietor of the estate of Ardblair, which lies immediately to the east of and marches with Marlee. The dispute is as to the parties' rights of ownership respectively in Loch Fingask, which is twenty three acres in extent, and is bounded in about equal proportions by lands admittedly belonging to the parties. The pursuer claims to be sole proprietrix of the loch. The defender says that he is owner of its *solum* to an extent corresponding with his riparian ownership, and has joint rights with the pursuer in and over its waters. The summons concludes for declarator of Mrs Meacher's sole and exclusive right in virtue of her titles, *et separatim*, of these titles followed by exclusive possession. The Lord Ordinary has granted decree "in terms of the declaratory conclusions of the summons." It is admitted that the interlocutor as framed cannot stand.

One must consider, in the first place, the respective titles of the parties. Ancient deeds are produced upon both sides, with which it is admitted they cannot connect themselves by an unbroken progress of title. These may be dismissed from consideration; they are not the title-deeds of the parties to the case. The earliest title produced by the defender with which he can validly connect himself is a Crown charter of novodamus dated in 1674, in favour of John Blair of Ardblair and his

son, of the lands of Ardblair with parts and pertinents. It is admitted that the defender's estate now abuts on Loch Fingask, as already stated. The pursuer's counsel suggested rather than argued that it is not proved that it did so in 1674. There is, I think, no substance in the suggestion. No notice of any such point is given by the pursuer on record; she avers that the defender's lands "abut on the east side of the Fingask Loch"; and the present description of the defender's lands in his title has been substantially the same for a very long period of time. The defender's charter of 1674, therefore, must be taken to be a grant by the Crown of lands *de facto* abutting on this loch. I think that such a grant, with parts and pertinents, is sufficient, apart from possession, to carry a joint right of property in the *solum* of the loch, and that a subsequent grant by the Crown to another, expressly conveying the entire loch, would be *pro tanto ultra vires* of the Crown, as proceeding *a non domino*, and inept, unless followed by exclusive possession of the whole loch for the prescriptive period. This is, in my opinion, the correct result of the authorities to which we were referred, particularly of *Scott* v. *Napier* (1869, 7 Macph. (H.L.) 35), and *Stewart's Trustees* v. *Robertson* (1874, 1 R. 334).

The earliest title upon which the pursuer can found is a Crown charter in favour of her author in 1764,—ninety years later than the defender's title already referred to —of, *inter alia*, the lands of Kinloch Easter and others, *nec non tres lacus et piscationes dictarum terrarum de Kinloch*. It is admitted that one of the *tres lacus* here referred to is Loch Fingask. It is unnecessary, in the view I take of the case, to consider or decide whether this grant of lands *nec non tres lacus*, &c., conferred any better or higher right on the grantee than one of the lands with parts and pertinents; but there seems to be authority in support of a negative answer to that question. It is, I think, clear that the pursuer's title cannot prejudice or prevail against the defender's earlier grant, unless it has been fortified by exclusive possession of the whole loch in question for the prescriptive period.

One must next consider whether or not the pursuer has proved such exclusive possession. Her counsel, as I understand them, suggested that possession might in this case be sufficient for their purpose, though falling short of the exclusive possession which has been held necessary in the ordinary cases with which one is familiar. They were not, however, able to explain what amount of possession might be considered sufficient, and I confess I find it difficult to understand the legal basis of their contention. We were referred especially to a *dictum* by Lord Watson in *Lord Advocate* v. *Wemyss* (1899, 2 F. (H.L. 1), where a distinction is recognised between "the prescriptive possession which establishes a new and adverse right in the possessor, and the prescriptive possession which the law admits for the purpose of construing or explaining, in a question with its author, the limits of an antecedent grant or conveyance." The pursuer cannot, in my opinion, derive the smallest aid from the distinction thus recognised. She is not here in a question with her author —I suppose the Crown—but is endeavouring to fortify, in a question with an earlier grantee from that author, a title which, according to my view, proceeded *a non domino* in so far as it purported to carry right to the whole *solum* of the loch, by prescriptive possession, which must, I apprehend, be of a character and quality sufficient to establish, as against the prior grantee, a better right to the portion of the *solum* which he claims. If, then, as I think, the possession had by the pursuer must, in order to establish the right she asserts, be continuous, exclusive, and adverse possession of the whole loch for the prescriptive period, I am of opinion, upon the evidence, that she has entirely failed to prove her case. The Lord Ordinary has held "with some reluctance . . . . that the pursuer has proved possession of all kinds in the loch, for time immemorial, and has sufficiently shown that there was no possession of the loch by any other person, and, in particular, by the defender or his predecessors, to exclude her claim founded on exclusive possession." I am unable to agree with this conclusion, or with the views expressed by the Lord Ordinary in support of it. It seems to me that, upon his Lordship's own showing, the pursuer's possession has not been exclusive.

I do not propose to deal in detail with the voluminous evidence in the case, but I shall endeavour to summarise such points in it as are sufficient, in my judgment, to negative the Lord Ordinary's conclusion. The most important acts of possession averred by the pursuer relate to the digging or "fishing" of marl from the loch. It is, I think, proved by the evidence, documentary and oral, that the pursuer's authors at one time dug marl to a considerable extent, and used or sold it as manure; they had a boat, or boats, for the purpose; the remains of an old pier used in connection with the "fishing" are spoken to; and the estate accounts produced, though they relate only to a comparatively recent period (1847-1856), show that marl was being dug, though not to a very remunerative extent, at that time. It also appears that several marl-pits have been dug in that part of the *solum* of the loch which the defender claims as his property; and the traces of at least one marl "midden" on the defender's land near the loch are deponed to. The pursuer's counsel urged that, as no positive evidence is forthcoming to the effect that the Ardblair proprietors or their tenants ever dug marl in the loch, the Court must infer that the operations just described were done by Marlee, in the exercise or assertion of a proprietory right, and with the knowledge and acquiescence of Ardblair. I do not think such an inference can, upon the evidence, be justifiably drawn. We know nothing of the time at which, or the cir-

cumstances under which, or the persons by whom, the pits were dug in the part of the loch claimed by the defender, and there is no proof that the digging in it was not done, as, for all we know, it may have been, by the proprietors of Ardblair or their tenants. Next, the pursuer avers that a tenant of Ardblair named Falconer having put a boat on the loch, she ordered him to take it off, and he accordingly did so. But this averment is, I think, not only not proved, but is disproved by the parole evidence. And apart from Falconer's boat it seems clear that the Ardblair tenants (the Scotts) have had boats on the loch from time to time, apparently without remonstrance on the part of Marlee. I refrain from commenting on such acts of possession as the cutting of reeds or taking of sand from the loch further than to say that the evidence is scanty and inconclusive on either side. Fishing (such as it is) stands in a similar position; but in so far as the proof shows that almost any one who chose to do so fished in the loch unchecked and unheeded, it militates *pro tanto* against the pursuer's theory of exclusive possession. I next notice two points (of slight importance) which the Lord Ordinary thinks adverse to the defender's case. In 1904 the defender leased from the pursuer the shooting on some of the Marlee farms, "together with the sporting rights of the proprietrix in the adjoining loch of Fingask," for five years, at a rent of £15. The map annexed to the lease shows the farm lands coloured pink, and a pink line enclosing the whole of the loch. The Lord Ordinary observes that "this strongly suggests that the defender did not at the time maintain his present contention." The Lord Ordinary's view is, I think, unfair to the defender. It was, to my mind, quite right that the entire loch should be so shown on the plan, as the sporting rights which the pursuer admittedly has over the whole of it, even upon the defender's theory of joint proprietorship, were included in the subject of the lease. Then in 1907 the defender granted a lease to a Mr Smith of "the exclusive right of sporting and shooting over the estate of Ardblair (including the Whiteloch)"—this express inclusion was, as the correspondence shows, specially desired by Mr Smith—and also over the portion of Marlee let by the pursuer to the defender by the lease before mentioned, "and the sporting and shooting rights of the said proprietrix of Marlee in the adjoining loch of Fingask, all as presently possessed by the" defender. The Lord Ordinary says that this lease was granted "on the footing that the defender had no interest in the loch." But I do not think the terms of the lease, though perhaps unhappily expressed, are inconsistent with the defender's present contention that he is joint owner of the loch along with the pursuer. I next advert to a point which I consider to be of real importance on the question of possession, and as to which the Lord Ordinary has, in my judgment, gone materially astray. It is proved, and indeed I think admitted by the pursuer, that the cattle and other animals in the defender's fields adjoining Loch Fingask have always watered in the loch, and that fences have been run by the Ardblair tenants into the area of the loch to keep the beasts in their respective fields. The pursuer's counsel, very adroitly I think, sought to negative the effect of these *prima facie* formidable and adverse facts by tendering (at the conclusion of his speech upon the evidence) an amendment of the summons to the effect of admitting the existence of a "servitude of watering cattle or other bestial" in favour of the defender. The Lord Ordinary allowed the amendment, and in his opinion merely observes that the watering of cattle "involved no assertion of a right of property on the defender's part," and that the extension of the fences upon the *solum* of the loch "was a mere innocuous accessory of a servitude which, as such, I am not satisfied that the pursuer could have prevented." This method of dealing with the matter is, to my thinking, fallacious. If the pursuer's right to the whole *solum* of the loch was otherwise established, the watering of the defender's cattle might well be ascribed to a servitude acquired by him by way of burden on the pursuer's right. But the pursuer's right is not so established; it was, upon the assumption of the whole case, in the course of making so to speak, by possession upon a title habile as a basis for prescription but not in itself a complete or sufficient title of ownership. The actings, therefore, of the defender's authors by way of watering and fencing cannot, in my opinion, be ascribed to servitude, but constitute evidence of an assertion by them of a proprietory right, sufficient probably by itself to negative the pursuer's claim to exclusive possession of the entire loch. Upon a consideration of the whole evidence it appears to me that the defender and his authors have throughout acted in a manner quite consistent with his present claim, and that the pursuer has entirely failed to prove exclusive possession of the loch for the prescriptive period.

There remains, however, for consideration one matter which is not wholly free from difficulty. In the defender's titles from 1721 onwards his lands are described as lying within the parish of Blairgowrie. The pursuer says that Loch Fingask lies wholly outside that parish, and that the defender's title being a bounding one, he can have no right to any part of the *solum*. The Lord Ordinary is in the defender's favour on this point; he passes over the matter rather lightly in his opinion, but I think his conclusion is right. The pursuer's strongest point is the Ordnance Survey map of 1859, which shows the boundary of Blairgowrie parish as going along the east shore of Loch Fingask, and her witness Mr Bennett exhibited the "Boundary Remark Book," with the original sketches and notes from which the survey of this part of Perthshire was made. It contains a certificate by two inhabitants of the district, who had apparently been appointed by the Sheriff as "meersmen" to assist the

surveyors, in terms of the Act 4 and 5 Vict. c. 30, and the certificate bears that "the boundary as described in this book from p. 49 to p. 62 between the parishes of Blairgowrie and Kinloch was pointed out by us this day and is strictly correct." This evidence is admissible, but it is not conclusive. One notices that the certificate applies generally to the whole line of the boundary between the parishes. It is not easy to conjecture how the "meersmen" can have known, or thought they knew, the parish boundary as regards this loch, —a subject in itself of no importance for parochial purposes. But the Ordnance Survey map does not stand uncontradicted. Stobie's revised plan of 1905, which I gather from Mr Walker's evidence may be regarded as of considerable authority, is in the defender's favour; while each party claims to derive advantage from the production of a copy of the same author's earlier map of 1783. The Statistical Accounts of 1796 and 1845 (which are not, strictly, evidence at all) differ from one another. The pursuer founds strongly upon two plans—especially on No. 171 of process—produced by the defender under diligence, as showing that no part of Loch Fingask was considered by the defender's authors to be their property. But we know nothing about the plan No. 171, as to its date, its authorship, or the purpose for which it was made. I do not think it is of material weight in the case (see Lord Neaves' observations in *Place*, 1874, 1 R. 1202). Upon this point, therefore, I hold with the Lord Ordinary, that the pursuer has failed to prove that Loch Fingask lies outwith the parish of Blairgowrie. In this view it is unnecessary to consider or determine whether the defender is entitled to found upon the fact that his earliest title-deed—the Crown charter of 1674—contains no limitation by way of parochial boundary.

On the whole matter, I am of opinion that we ought to recall the Lord Ordinary's interlocutor; find that the defender in virtue of his titles has a joint right of property along with the pursuer in Loch Fingask, and that the pursuer has failed to prove her alleged exclusive right to the same; and assoilzie the defender from the whole conclusions of the summons with expenses.

LORD MACKENZIE—. . . [*After narrative*] . . .—Before considering the law applicable to titles in such a position it is necessary to advert to a speciality in the case. In the defender's progress there is introduced for the first time in a Crown charter of adjudication in 1721, as part of the description of the lands, that they lie within the parish of Blairgowrie. Two questions arise upon this—(1) whether the defender can go back to the charter of 1674, which contains no boundary, and (2) if he cannot, whether the pursuer has succeeded in proving that the whole of Fingask Loch lies outside the boundary of the parish of Blairgowrie. If she has, then under the authority of *Gordon* v. *Grant*, 13 D. 1, the defender holds under a bounding charter which excludes Fingask Loch. I take the second point first, because if it is answered in the negative the first point does not arise. Upon the first question I will only say that as the defender's charter of 1674 contains a novodamus there seems to me strong ground for saying that he may as competently go back to it as he might to an original charter. I refer to what Lord Adam said upon this point in the case of *Durie's Trustees* v. *Earl of Elgin* (16 R. 1104 at p. 1117). I do not think it necessary to decide this, because in my opinion the pursuer has failed to prove that the parish boundary runs along the eastern margin of Fingask Loch. I think the parish boundary is not distinctly defined as regards the loch. There is a difference between the two copies of Stobie's plan of 1783 which have been referred to. Stobie's revised plan of 1805, as Mr Meacher admits in his evidence, shows that the loch was divided between the parish of Blairgowrie and the parish of Kinloch. No doubt the Ordnance Survey map which was prepared in 1859 does show a dotted line intended to indicate the parish boundary running round the eastern margin of the loch, and the docquet of the meersmen on the plan was founded upon by the pursuer. This, however, would not be evidence sufficient to prove the fact, nor can the statements in the Statistical Accounts be regarded as evidence in the case. It was argued that the defender's estate plans which do not indicate Fingask Loch as forming part of the estate of Ardblair were conclusive against him. But the point which the pursuer has to establish is that the dotted line on the Ordnance Survey was truly the parish boundary, and this I do not think the estate plans, whether pursuer's or defender's, enable him to do. It is not, in my opinion, proved that the defender is excluded from Fingask Loch by the line of the parish boundary.

The next question is as to the law applicable to the case. As already stated, the pursuer maintains that she has an express title to the loch, and I take the case on that assumption. The pursuer holds an earlier title to lands abutting on the loch with parts and pertinents. The law as decided in *Scott* v. *Napier*, 7 Macph. (H.L.) 35, and *Steuart* v. *Robertson*, 1 R. 532, I take to be this, that in the case of a grant of lands abutting on an inland loch with parts and pertinents there is a presumption that the grantee has a joint right of property in the loch which will not be prejudiced by a subsequent express grant of the loch unless the latter is followed by exclusive possession. The joint right, as is pointed out by Lord Selborne in the case of *Mackenzie* v. *Bankes*, 5 R. (H.L.) 192, at p. 202, carries with it the share of the *solum* pertaining to the lands *ex adverso* and a right in common with the other riparian proprietors over the whole of the water. It was argued that the possession which the holder of the express title requires to have in order to rebut the presumption in favour of the holder of a title to lands

abutting with parts and pertinents was something less than the exclusive and adverse possession which is required to establish a right, and it was maintained that the opinion of Lord Watson in the case of the *Lord Advocate* v. *Wemyss*, 2 F. (H.L.) 1, supported this view. There it was pointed out that what was termed explicative possession might be sufficient. I am unable to take the view that this applies to the present case. That was a dispute between granter and grantee, which this is not. Further, the quality and extent of the possession necessary in each case largely depends upon the nature of the subject possessed. Whatever application the observations made in the case of *Wemyss* may have to the case of coal, they do not seem to me to apply to a case where both pursuer and defender have had possession of a loch, and the pursuer maintains that her possession is exclusive.

The pursuer therefore requires to prove exclusive and adverse possession in the ordinary sense.

As regards possession, that of the marl is most important. If the pursuer could have shown that she or her predecessors had worked marl in that portion of the *solum* of the loch which is *ex adverso* of Ardblair, this would have been very material in instructing an exclusive right. But there is an entire absence of this evidence. Mr Meacher no doubt proves that there are holes from which marl has been evidently taken in the eastern portion of the *solum* of the loch, but there is no evidence as to when these were made or who worked them. The evidence in regard to the working of marl is not inconsistent with a joint right on the part of the defender. There are traces of a marl midden on Ardblair, although where the marl came from is not established. There is nothing in the lease between Farquharson of Invercauld, the pursuer's predecessor, and William Anderson in 1797, nor in the lease by the laird in Ardblair to James Baxter of Whiteloch farm in 1759, as I read them, to exclude the idea that the proprietor of Ardblair could have worked marl in the loch had he wished to do so. The terms of the deed of entail by Farquharson of Invercauld of 1788, and the accounts and receipts for marl worked by Marlee proprietors from 1847 to 1859, do not instruct that the pursuer's predecessors had possession of the whole *solum* of the loch. The reference to marl in the Statistical Accounts does not in my opinion prove as a fact that Farquharson of Invercauld was the sole proprietor.

Next, as to the watering of cattle by Ardblair tenants—the evidence of this is complete and seems to me destructive of the pursuer's position unless she is successful in relegating it to the exercise of a servitude right. The pursuer endeavoured to turn the defender's position by tendering a minute of amendment, excepting from the conclusions of the summons the servitude of watering cattle or other bestial. If the watering of cattle had been the only competing act of possession on the part of the defender, it might have been possible to deal with it in this way. The pursuer, however, cannot in my opinion strike out the evidence upon this head when the whole evidence is being weighed. Acts of possession of this nature do tend to weaken the case for exclusive possession, and must be taken into account along with the other evidence in the case. Not only were the cattle watered but fences were run down between the defender's fields into the *solum* of the loch, which, according to the pursuer's contention, was her exclusive property. There were no fences along the margin of Ardblair estate where it abutted on the loch.

The proprietor and tenants of Ardblair exercised the right of boating on the loch over a long period. The Scotts—grandfather, father, and son—tenants of Whiteloch farm on the Ardblair estate, had a connection with the place stretching back for 56 years. All had boats on Fingask Loch. Major Chalmers, whose recollection goes back to 1850, speaks of getting a boat on Fingask Loch from the farm of Whiteloch in that year. The evidence of any interruption is quite inconclusive. Daniel Scott speaks of Mr Anderson, who was factor both on Ardblair and Marlee, writing to ask him to take off his boat because he could not thole to see the boys amusing themselves. Scott says he took it off, not in consequence of this letter, but because he was afraid the boys would drown themselves. In any case it cannot be said that Mr Anderson was asserting a right on the part of Marlee as against Ardblair. An attempt was made to prove that William Falconer, who was at one time tenant of Whiteloch Sawmill, had been told to take his boat off Fingask Loch. Falconer denies this, and it is not proved. There is also evidence of other tenants on Ardblair having boats on the loch. In the same way Thomas Menzies, tenant of the farms of Newbigging and Leys, on Marlee, gives evidence of his having a boat on Fingask Loch. He says that he never heard of any of the Ardblair people being interfered with at all. It cannot be said that the successive proprietors of Marlee had exclusive possession of the loch as regards boating. Still less can it be said that they had exclusive possession as regards fishing. It is sought to discount such evidence as that given by the Blairgowrie sheriff officer, who has fished the loch for thirty years and has been in the habit of applying to Captain Blair-Oliphant for permission to fish and use his boat, by the fact that all and sundry seem to have come from Blairgowrie to fish when they pleased, No doubt the care and attention bestowed on the loch, which holds only pike and perch, is not such as is given to water which has been netted of these and stocked with trout. The fact, however, remains, and it tells against the exclusive possession of the pursuer, that not only did people fish who had no right, but the Ardblair proprietor, who could claim under his title that he was exercising a right did so, and so did his tenants.

As regards shooting, the pursuer here relies upon the terms of the lease granted by her to Captain Blair-Oliphant, and the plan annexed thereto, and the sub-leases granted by him. I do not consider it necessary to go into them in detail. The plan annexed to No. 22 shows the whole subject over which the pursuer was letting her sporting rights, whatever those rights might be. There is not, in my opinion, sufficient to establish acquiescence on the part of the defender in the position which the pursuer is now maintaining. The evidence as to taking sand and cutting reeds does not come to much. There is evidence that defender's tenants took sand from the loch. As regards reeds, the pursuer lays no stress on this, as they were only cut on her own side.

Upon the whole matter, I am of opinion that the pursuer has failed to discharge the *onus* there is upon her to prove exclusive possession. The possession by the defender and his predecessors is of the nature, quality, and extent which might be expected in the case of one who had a joint right.

I am accordingly of opinion that the defender is entitled to a judgment that he has a joint right in the loch.

LORD KINNEAR—I agree entirely with the opinions which have been delivered by Lord Dundas and by Lord Mackenzie. I do not think it necessary to repeat what has been said or to go into any further detail, in expressing my own views, than is unavoidable in order that I should state the opinion I entertain upon the main points of the case.

I think, in the first place, with your Lordships, that if this question stood upon a competition of titles alone the defender must certainly prevail; the defender has a title which according to all the authorities gives him a joint right in the lake with the other riparian proprietors or proprietor. I do not think it is now disputed that a title to lands surrounding a lake of this kind is a sufficient title to the lake itself; and in like manner when the adjacent lands belong to different proprietors, so that the lake cannot be said to be surrounded by one estate, each has a common joint right with the others in the lake, although it is not expressly mentioned in his titles, unless it can be shown that he is excluded by a prior express title, or by a later title, which is in its terms exclusive, and which has been followed by prescriptive possession. I understand that to be the law, and it is entirely in accordance with what has been said by your Lordships.

The first question, therefore, as between the competing titles is whether the defender's is not preferable in respect of his prior infeftment, and upon that point I think it right to make one observation in passing, and with great respect to the Lord Ordinary, because I think his Lordship has fallen into an error, which although in the particular circumstances of this case it may not be of practical importance, is nevertheless so serious in point of law that it is necessary to take notice of it, lest the Court should be supposed to have sanctioned a line of argument which is altogether inconsistent with settled law. The parties are, I think, agreed; at all events, it is quite clear to my mind, upon the titles adduced, that the earliest title under which the pursuer holds her lands is a Crown charter of 1764. The earliest title upon which the defender holds his lands is a title of 1674, and therefore in the competition between these two titles there is no question at all that the defender's is the prior infeftment. But the Lord Ordinary examines a great variety of title-deeds, which he describes as the pursuer's and the defender's titles respectively. He goes back in the case of the pursuer to 1541, and to a description contained in a Crown charter of that date; and then he refers specifically to subsequent titles prior to the title of 1764. But the pursuer is unable to trace her right, or to connect herself in any way with one of these titles. Now I apprehend that is altogether incompetent. These earlier documents are not the pursuer's titles at all, nor are the earlier titles which the defender adduces the defender's titles. The question is what is the title under which the parties respectively hold their lands? They hold only upon titles with which they can connect themselves—that is to say, titles which they have a right to found upon as creating their rights. The earlier titles are mere pieces of antiquarian history. It is out of the question to assume that because there was a grant in the 16th century, which contained a certain right, therefore the proprietor of lands called by the same general name, who begins with the establishment of his own right in the 18th century, is entitled to refer to earlier documents with which he has no connection.

This is especially material in a question of prescription. I apprehend that nothing can be better settled than that you cannot go back at all for any purpose to inquire what was the condition of the right prior to the date of the charter or of the series of sasines standing together which form the basis of the prescriptive possession. The point is put very clearly and forcibly by Lord Moncreiff in the case of the *Duke of Montrose* v. *Bontine* (1840), 2 D. 1186, at p. 1197, where he says "that to go back to previous titles to explain away or alter or qualify the investiture secured by prescription, is contrary to the very principle of the statute, which, as I have always understood it, was intended and was effectual to shut out all such inquiries." I do not refer to the decision as an authority, for it is not in point. But I cite Lord Moncreiff's language as expressing the established rule of law better than I can put it in my own words. Therefore we start with the titles of the two dates I have mentioned. The defender's title gives him an express right in riparian lands, and that by construction of law carries with it a joint right along with the other riparian proprietors in the loch. But this is the

earlier infeftment, and if the pursuer is to exclude him by a later express grant, it is necessary for her to show that the express grant has been followed by exclusive possession for the prescriptive time.

But then it is necessary to consider a point, with which your Lordships have already dealt, and on which the pursuer maintains that the defender cannot have the benefit of this doctrine, because it is said his estate is bounded by the boundaries of the parish, being described as an estate lying within the parish of Blairgowrie, and that the loch in dispute lies outside the parish. I agree with Lord Mackenzie that if it were necessary to decide whether that was in law a good objection, having regard to the position of the title in which the limitation by the parish boundary first found its way into a grant to the defender's author it would require some serious consideration; but I agree with him also that the question is altogether excluded, because the fact upon which the plea is founded has not been proved. There is to my mind no evidence requiring serious consideration that the parish of Blairgowrie is bounded by the loch, and, indeed, I am not surprised that there should be none, because it is very difficult to understand how any such evidence could ever come into existence.

There are two kinds of evidence of parish boundaries. In many cases there are authentic documents, either before or after the Reformation, establishing by ecclesiastical authority what are the respective limits of adjoining parishes, or else defining such limitations by decrees of the Commission. But in other cases the only possible evidence depends upon immemorial usage. It must be remembered that until very recently the parish was a purely ecclesiastical area. It is only of comparatively recent date that other public interests came to be regulated by parish boundaries, and therefore in all the questions in which boundaries of parishes have had to be considered it has been found necessary to see what was the ecclesiastical division prior to the institution of any civil rights which might be regulated by a parish boundary. Now if there were any such authentic documents as I have figured which might establish the boundaries of parishes applicable to the case of Blairgowrie we do not know what they are; they are not produced. I think it is extremely probable that there were none, but at all events their existence is not to be assumed. The other kind of evidence is evidence of long-continued parochial uses which must be, from the nature of the case, ecclesiastical uses, because there was no other interest until recently in the division of parishes. Now it does not appear to me at all probable that in the present case there should ever have been any evidence of such uses worthy of consideration, for this simple reason that there is no parochial interest in such a piece of water as this loch. One cannot imagine any ground upon which a question between the ministers of two neighbouring parishes could possibly arise with reference to such a subject. It is not teindable. It is not the residence of any parishioner. There is no reason why persons interested in the limits of the parochial area should ever have considered whether the true parish boundary was an imaginary line drawn through the loch, or the verge of the loch itself. The probability to my mind is that it was absolutely disregarded by both parishes, and that no one ever dreamed of raising such a question.

It is, of course, good law to say that in Scotland there is no extra-parochial land, and I daresay if this loch had been drained and made available for some agricultural purpose a question might have arisen as to which parish was entitled to have the benefit of it. But that would involve an allocation of recovered land, and would depend upon different considerations, both legal and practical, from any that are before us now.

As to the evidence which has been actually produced, I agree with what both your Lordships have said. I think the Statistical Accounts, besides being of very doubtful effect, are merè hearsay and must be thrown aside altogether. As to the evidence of plans, I think the two cases of *Place* v. *Earl of Breadalbane*, 1874, 1 R. 202, and *Gibson* v. *Bonnington Sugar Refinery*, 1869, 7 Macph. 39, are conclusive. We do not know enough of the mode in which the plans were drawn, or the reasons for drawing them, to attach any importance to them. So far as regards the Ordnance Survey map, which is in a somewhat different position from the other plan, I think the case to which I have referred—*Gibson* v. *Bonnington Sugar Refinery*—is quite conclusive. The question there had reference to a piece of ground which was described as running along the Water of Leith. The grant of the piece of ground contained a river boundary, and accordingly by a well-known rule of law gave the proprietor one-half of the *alveus* of the stream *ex adverso* of his land, but it was maintained that in the particular instance he could not be the proprietor of any part of the *alveus*, because the lands were described as lying in the parish of St Cuthbert, and the Ordnance Survey map showed that the boundaries of St Cuthbert's and North Leith lay upon his side of the river. That is exactly the question that has to be considered now. The Court held that the Ordnance Survey map must be disregarded altogether. The Lord Ordinary (Lord Mure) treats it as of no weight in itself irrespective of other evidence, and he found no such evidence. Lord Neaves, at p. 400, put it more strongly no doubt, with the concurrence of the other Judges—"I am glad," he says, "that no doubt has been expressed by any of your Lordships with regard to the question of the parish boundaries, for I think it would be highly dangerous if we held that a man could be deprived of his property on such evidence as an Ordnance Survey map." That is a

perfectly reasonable view, because we know nothing of the evidence upon which the engineer officer laid down the parish boundaries. His object was not to decide legal questions of boundaries either between parishes or between estates, but to lay down a correct plan of the country, and the value of his note of the boundaries depends entirely upon the evidence upon which he laid them down. It is said that in the present case we are entitled to hold that he proceeded upon the statements of meresmen. I do not think that makes the matter any better. It shows that the evidence of the map as to parish boundaries rests upon nothing but hearsay and inference, and we know nothing of the grounds upon which the meresmen went, if indeed they made any statement about the matter. I think for the same reasons which were held sufficient in the *Bonnington Sugar Refining Company* case we should disregard this evidence altogether. Therefore I think we may take the title upon the ordinary construction which would be applied to its words as if there were no such limitation as the parish boundaries of Blairgowrie. In that view I think it is a perfectly good title to convey a joint-right in the loch just as effectually as if that were expressed in words.

If that be so, then the only question is whether the pursuer has proved exclusive possession of the whole loch. There was some question raised in the case as to whether it was necessary that there should be proof of exclusive possession. I confess I do not see how that question can be raised with due regard to the conclusion in the pursuer's summons. What she seeks to have declared is that she has "the sole and exclusive right to Fingask Loch, including the *solum* thereof." That is the right she has got to prove. How she can prove that right without showing that she has the sole and exclusive possession, if it depends on possession at all, for the prescriptive period I am unable to understand. It is necessary, then, that the pursuer's enjoyment of the right should be shown to be exclusive of any use and enjoyment by the defender or by anybody else.

For this reason you have to consider the nature of the right which she possesses. It is very clearly stated in Lord Selborne's opinion in the case of *Mackenzie* v. *Bankes* (1878), 5 R. 278, (H.L.) 192. I think it is of great importance to keep in view what the nature of the right really is. His Lordship says (at p. 202) this—"Under titles such as those by which both the competitors in the present case hold (and when nothing turns upon any evidence of exclusive possession) the entire lake, if surrounded by the land of a single proprietor, belongs to that proprietor as a 'pertinent' of his land. If there are more riparian proprietors than one it belongs 'rateably' to them all." Then he comes to the point to which I am referring—"So far as relates to the *solum* or *fundus* of the lake it is considered to belong in severalty to the several riparian proprietors if more than one. . . . But for reasons which may be pronounced to be founded in part, if not wholly, on the irregularity of configuration frequent in lakes, this *ex adverso* rule is not extended by the law of Scotland to these rights (such as boating, fishing, and fowling) which are exercised in or upon the surface of lake waters. These are to be enjoyed over the whole water's face by all the riparian proprietors in common, subject (if need be) to judicial regulation." Now that being the nature of the right it appears to me that the pursuer proves nothing of the character of exclusive right by proving merely that she and her predecessors had exercised upon the surface of the waters those rights which are common to all the proprietors. The question is not whether she has a right to use the surface of the water of this lake for boating, fishing, and fowling—nobody disputes that—but the question is whether she has a right to the whole loch or the whole *solum*. Therefore she has not advanced a single step in her case by merely showing that she has enjoyed those rights in the loch which belong to all riparian proprietors. She cannot establish her right, therefore, without showing one of two things—either that she has effectively excluded the defender and his authors from the common uses and enjoyments of the surface of the water, and this on the ground that they belonged exclusively to herself, or that she has encroached upon what would otherwise have been the defender's separate property in the *solum*. If she had so encroached, it would be a very strong piece of evidence to show that her right extends beyond her natural share of the loch. If she has not done that, she can only show that she has exercised an exclusive right in the whole loch, and not a joint-right with others in the surface of the loch, by proving that she has not only used the surface herself but has excluded everybody else. It is for her to prove exclusion. Her own use, which excludes nobody, proves nothing. Therefore I am unable to agree with the Lord Ordinary. The Lord Ordinary says she has proved that she used the loch, that nobody else has used the loch, and that therefore she is exclusive proprietor. That appears to me to be altogether unsound. There is not a scintilla of evidence tending to establish exclusive right, because she did nothing which could not be supported by the common right which was admittedly vested in her and her neighbours.

In all cases of prescription, exclusive possession has only been held to exist where the person alleging a prescriptive right has done something which the person against whom prescription is supposed to be running could have prevented if it were an infringement of his rights. That is the test. The pursuer must say—"I, in the exercise of my sole right, encroached upon what you allege to be your joint right and you did not prevent me." I ask how could the defender in this case and his predecessors have interfered to prevent the pursuer from doing any single one of

the things she alleges that she did. He was bound to submit to them, not because she had a sole and exclusive right to the loch, but because she had a joint right along with him, which would have been in itself sufficient to maintain her possession.

The only point, in this view of the case, is that which is made by the pursuer, where she claims to have worked marl on the defender's side of the loch. If that were proved, I should, with your Lordships, have thought that to be a very material consideration. I do not say that it would be conclusive. One cannot lay down any general rule with reference to a hypothetical fact, which if it were proved must be taken into account along with the whole other facts of the case. But I think it is not proved. All that is proved is that there is a hole on the defender's side of the loch, which might have been caused by people working marl, but whether it was the defender or whether it was the pursuer who made it, there is no evidence. Therefore I think that point completely fails.

Then the question comes to be, whether the pursuer has shown that she has prevented the defender from making any such use of the loch as he would be entitled to make if he had the ordinary right of a riparian proprietor. If she had, that again would have been a very strong point in favour of her claim to an exclusive right. There again I think she has completely failed. The defender and his predecessors have exercised exactly the same kind of right, although, no doubt to a very inconsiderable extent—that is to say, they have used the surface of the loch by their tenants for boating, fishing, and fowling. They have also made an exceptional use of the loch, which involves a direct encroachment upon the right of the pursuer to the entire *solum* if she has such a right. They have for more than the prescriptive period watered their cattle, and for the purpose of enabling them to water their cattle have driven piles into the *solum*. Now if they had no right in the loch, it was for the pursuer and her predecessors to interfere to prevent that encroachment if they were to maintain afterwards that they themselves had an exclusive right. It is said that use for watering cattle is to be referred to a right of servitude. I apprehend that is an altogether untenable position. There is nothing in the process to show any right of servitude. The only known right to which the defender's use and possession of the loch can be referred is the undoubted right of property which the defender holds by virtue of his titles. He has a perfectly good property title—and I think that is not disputed—which would support this use of the loch in like manner as it would support his use of the loch in other ways. Why is his use of it not to be referred to that undoubted title rather than to an entirely imaginary or, to say the least, a purely hypothetical right of servitude? There is evidence of property; there is no evidence of servitude right apart from property. The vital importance of the point becomes evident when it is considered for what purpose this practice of watering cattle is employed by the defender. He does not require to show a use of the loch; he has a perfectly good title without possession at all. The value of his use of the loch is that he can show that he was not interfered with by the pursuer. That is the point to be explained. If the pursuer could have shown that she did not object to the defender's practice of watering cattle, because he had established or alleged a servitude right, there might have been something in the point, but otherwise it appears to me untenable. Now there is nothing to suggest that the practice was ever challenged, or that the defender ever maintained it on the ground of a servitude over property, which he admitted to be the pursuer's. If the right were allowed only because it was a servitude, the pursuer would, I think, be required to show that she and her predecessors knew of the servitude and did not interfere because there was a servitude known to exist, and upon no other ground. The whole theory of the pursuer is that she was excluding the defender, and therefore it lies upon her to establish that the encroachment upon her alleged exclusive possession can be accounted for by showing that she allowed it upon a ground in law consistent with the existence of her exclusive right. It appears to me, therefore, upon the whole case, without going into a further examination of the actual facts which have already been explained, that there is no evidence of such possession as would establish a prescriptive right.

The pursuer's counsel founded upon a passage in Lord Watson's opinion in the case of *Lord Advocate* v. *Wemyss*, (1899) 2 F. (H.L.) 1, at p. 9, for the purpose of showing that she might succeed upon some more slender evidence of possession than is ordinarily necessary to establish an adverse right. But Lord Watson makes it perfectly plain that this is exactly the kind of case to which his observation does not apply. What his Lordship says is that in the case of a grant of a particular kind of right the grantee's right, as against the granter, may be explained by a possession falling short of that which would be necessary to establish a prescriptive right against an adverse claim. The particular right which he was considering was a right of foreshore; and for a fuller exposition of what his Lordship means he refers to Lord Blackburn's judgment in the case of *Lord Advocate and Clyde Trustees* v. *Lord Blantyre*, (1879) 6 R. (H.L.) 72, at p. 85. In that case what was found was that if the holder of a property under a barony title had had such uses as the nature of the subject permitted in parts of the foreshore where his land adjoined the river, he might be held to have established, as against the Crown, a right to the entire foreshore. The only question was whether partial possession would do, and whether possession of such limited nature as possession of the foreshore must necessarily be would be effectual. I think all that Lord

Watson means is that such partial possession is good as against the granter, but his own statement clearly shows that he did not mean to say that it was of any avail for the purpose of establishing an adverse right against a stranger to the grant, founding upon a competing title.

On the whole matter, therefore, I agree with your Lordships that the interlocutor of the Lord Ordinary must be recalled and the defender assoilzied.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defender from the conclusions of the summons.

Counsel for Pursuer and Respondent—M'Lennan, K.C.—T. E. Robertson. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defender and Reclaimer—Macphail, K.C.—A. M. Hamilton. Agents—Lindsay, Howe, & Company, W.S.

Wednesday, January 15.

SECOND DIVISION.

HANNAY'S TRUSTEES *v.* KEITH.

Succession—Testamentary Writings—Revocation—Extrinsic Evidence.

A testatrix left a trust-disposition and settlement by which she revoked all previous testamentary writings and, *inter alia*, directed her trustees to pay £1500 "in the manner to be afterwards directed by me in any writing or writings to be hereafter executed by me." She left no writing subsequent to the date of the settlement, but in her repositories after her death a holograph document was found dated prior to the settlement and disposing of the sum of £1500. *Held* that extrinsic evidence was incompetent to prove that she intended the holograph document to receive effect.

Tait's Trustees v. *Chiene*, 1911 S.C. 743, 48 S.L.R. 609, *explained* and *distinguished*.

Succession — Testament — Re-execution of Prior Testament—Intervening Codicil.

A testatrix left a trust-disposition and settlement which in its main terms was a re-execution of an earlier settlement, but which, along with certain other alterations, directed her trustees to pay a sum of £1500 "in the manner to be afterwards directed by me in any writing or writings to be hereafter executed by me." She also left a holograph document dated subsequent to the earlier but prior to the later settlement, disposing of the sum of £1500. Both settlements contained a clause of revocation of previous testamentary writings. *Held* that the later settlement was not a re-attestation of the earlier, and that therefore it revoked the intervening holograph document.

Dalglish's Trustees v. *Crum*, November 25, 1891, 19 R. 170, 29 S.L.R. 149, *distinguished*.

A Special Case was presented for the opinion and judgment of the Court by David M. M. Milligan, advocate, Aberdeen, and another, the trustees acting under the trust-disposition and settlement, dated 13th January 1904, of the deceased Mrs Eliza Farquharson Milne or Hannay, Southville, Dollar, who died on 26th October 1904, *first parties;* Mrs Laura Esther Parker or Keith, Christchurch, New Zealand, widow of William Keith, formerly of Ceylon, and his children, *second parties;* Miss Jemima Graham, 15 Alva Street, Edinburgh, the executrix acting under the settlement of Miss Elizabeth Harriet Caroline Hannay, the testatrix' only daughter, who died unmarried on 12th January 1911, *third party;* Peter Hannay, the only son of the testatrix, *fourth party;* John H. P. Hannay, Bayup Brook, Bridgtown, West Australia, and others, the whole children of Peter Hannay, *fifth parties*.

By the fourth purpose of her settlement the testatrix provided as follows—"(*Fourth*) I direct my trustees, as soon as convenient after my death, to set aside and invest in their own names the sum of five thousand pounds sterling, and to pay to my daughter, the said Elizabeth Harriet Caroline Hannay, during her lifetime, the free annual income thereof for her alimentary support, declaring, however, that my daughter shall have no vested right in the fee of said five thousand pounds . . . and in the event of my daughter dying unmarried . . . then I direct my trustees on my daughter's death, and out of said sum of five thousand pounds, to pay a sum of five hundred pounds thereof, as representing the amount of a legacy which I received from my great-grandfather, the Reverend Robert Farquharson of Allargue, to my granddaughter Millicent Isabel Bruce Hannay absolutely, and to pay a further sum of one thousand five hundred pounds thereof, in the manner to be afterwards directed by me in any writing or writings to be hereafter executed by me, and that too, however informal said writings may be, so long as they are admittedly under my hand, and the remainder of said sum of five thousand pounds, *videlicet*, three thousand pounds, I direct my trustees to pay to the children of my son Peter equally among them if on my daughter's death they have attained the age of twenty-one years complete, or if females have attained that age or been married, and if not, then on their respectively attaining that age, or if females, being married before they attain that age."

The settlement further contained the following clause—"And I revoke all previous testamentary writings."

Mrs Hannay did not leave any writing dated after the date of execution of her settlement dealing with the above-mentioned sum of £1500. She left, however, a holograph writing in pencil, dated 21st December 1903, in the following terms—"In the event of my daughter's leaving no