HOUSE OF LORDS.

Friday, June 11.

SCOTT *v.* NAPIER.

(*Ante*, iv, p. 141.)

Loch — Common Property — Riparian Proprietors— Parts and Pertinents—Crown Charter—Express Grant—Feu-Duties—Possession—Negative Prescription. Circumstances in which *held* (reversing judgment of the First Division) on a construction of the titles of two parties, contending as to their rights in two lochs adjoining their lands, and of a proof—(1) that *prima facie* there is a joint-right of property in each riparian proprietor; (2) that the words *una cum*, &c., in the titles of the party alleging an exclusive right was not a grant of the lochs as pertinents of the lands; (3) that the exclusive right of property was cut off by the negative prescription; (4) that neither party having the advantage in the proof of possession, each was a joint-proprietor of the lochs.

This was a question as to the right of property of two lochs, the Loch of the Lowes and St Mary's Loch, adjoining to and connected with each other and situated in the county of Selkirk. The contending parties were Mrs Scott of Rodono and Lord Napier, two riparian proprietors, adjoining the lochs. Mrs Scott of Rodono claimed a joint-right of property with the other riparian proprietor in respect (1) of her titles in which the lands of Rodono were granted *cum silvis lacubus et pertinentiis*, the same description being followed in all the subsequent titles, and (2) of immemorial possession as joint-proprietor. Lord Napier claimed the sole right of property in the lochs, relying upon a Crown charter dated 1607, purporting to grant the lands, *una cum duobus lacubus*, &c., separate feu-duties being payable for the lands and the lakes. After the year 1621 the separate mention of the lakes and relative feu-duties disappeared from Lord Napier's titles. He also relied on exclusive possession. After a lengthened proof the First Division (*diss.* Lord Curriehill, absent the Lord President), decided in favour of Lord Napier.

Mrs Scott appealed.

Lord Advocate (MONCREIFF) and PEARSON, Q.C., for her.

Sir R. PALMER, Q.C., ANDERSON, Q.C., and MARK NAPIER for Respondent.

At advising—

LORD CHANCELLOR—My Lords, in this case the appellant, as representing the late John Scott of Rodono, complains of an interlocutor pronounced by the Lord Ordinary on the 20th March 1866, in an action in which her late husband, Mr John Scott, was the pursuer, and the respondent, Lord Napier, the defender, and further, of an interlocutor of the First Division of the Court of Session pronounced on the 25th of June 1867, whereby their Lordships adhered to the interlocutor of the Lord Ordinary.

The action, which was an action of declarator, sought for a declaration that the pursuer has, together with the other proprietors whose lands lie around and border on the same, a joint right or common property in the loch called St Mary's Loch, and the loch called the Loch of the Lowes, and a joint right of using boats, fowling, fishing, floating timber, and exercising all other rights in or over the said lochs, or either of them, and that he be ordained to desist from molesting and interrupting the pursuer in the exercise of his right.

The defendant insisted on an exclusive right to the property as well as to the use of the lakes. The interlocutor of the Lord Ordinary finds that the defender stands infeft, in terms of an instrument of sasine, under which sasine is given to him, *inter alia*, of "totarum et integrarum terrarum aliarumque postea specificat. videlicit terrarum de Bourhope cum domibus ædificiis hortis partibus pendiculis et pertinen. earund. jacen. in dominio de Ettrick forest, et Balia vestra," etc. The Lord Ordinary also finds that a Crown-charter of resignation and novodamus was granted in 1607 to Robert Scott, by which there is granted to him, his heirs-male, and others therein mentioned, *inter alia*, "totas et integras terras de Bourhope cum domibus ædificiis hortis pomeriis partibus pendiculis et pertinen. earundem quibuscunque jacen. in dominio de Ettrick forest," and so forth, and that this charter contains a clause of novodamus, under which there is, *inter alia*, disponed "totas et integras predictas terras de Bourhoip cum domibus ædificiis hortis pomeriis partibus pendiculis et pertinen. suis quibuscunque ut dictum est jacen. una cum duobus lacubus nuncupat. lie St Maria Lochis de Lowis cum solo terris piscariis et pertinen. earundem lacum cum p'tate. dicto Roberto Scott suisque antedict. dictus lacus aridandi et aliter eisdem utendi et desuper disponendi." After that finding the Lord Ordinary proceeded to find that the defender had the right which he contended for, and was entitled to exclude all others from the use of the lakes, except the ordinary uses and enjoyment of the water.

The Lords of the First Division adhered to this interlocutor, Lord Curriehill differing in opinion from Lords Deas and Ardmillan, who constituted the majority of the Court.

Of the two lochs in question, viz., St Mary's Loch and the Loch of the Lowes, the latter is the smaller loch, and stands at a higher elevation than that of St Mary's. The river Yarrow enters it at the upper end, and issues from it in a shallow stream from 150 to 200 yards in length, which passes on into St Mary's Loch, and from an outlet at the lower end of St Mary's Loch the Yarrow flows on to Selkirk.

The lands held by the pursuer extend round the whole of the Lake of the Lowes, with the exception of a portion of the north-east angle of the lake, which is bordered by land of the defender, called Cross Church. The land of the pursuer extends also along nearly a third part of the western side of St Mary's Loch. To the north of the pursuer's land, and on the same side of the lake, are the lands of the Henderland, belonging originally to the Murray family, and now to the Earl of Wemyss. And next to these, on the same side of the lake (which here bends to the north-east), lie the lands of Kirkstead and Dryhope, the property of the Duke of Buccleuch. The whole of the lands of the opposite (or east and south-east) side of St Mary's Loch, including the lower extremity of the lake, and the bank of the Yarrow, as it issues from it, belong to the defender. The pursuer's title is deduced as follows. By charter under the Great Seal, dated the 18th of April 1599, King James granted to John, the Master of Yester, all the lands of Rodono (that is to say), Langbank, Whitehope,

Littlehope, *alias* Rodono, Chyoll, and Meiklehope, "cum silvis lacubus cum omnibus aliis suis pertinentiis," with other general words of description, including "moris marescis viis semitis acquis stagnis rivolis."

By a Crown-charter of 1683 the same lands, "cum silvis lacubus" and other general words, were erected into a general barony of Rodono in favour of William Hay, the then owner. And these lands afterwards passed by regular progress to one of the same family, and of the same Christian as well as the same surname, who was infeft as heir-male of his father, Robert Hay, deceased, in 1814, in terms of an instrument of sasine containing the same description of the lands of the barony.

This William Hay sold part of the barony to Robert Henderson, who was duly infeft in terms of an instrument of sasine of the 26th of August 1816, and William Hay sold the remaining parts of the barony to George Pott in 1831, and George Pott obtained a Crown-charter of confirmation as to the parts granted to him, dated the 4th of February, and sealed the 5th of March 1839.

The pursuer in 1860 purchased these several portions from those making title under Henderson and Pott respectively, and pursuant to the terms of certain dispositions recorded in each instance in the Register of Sasines. On the 15th May 1860 he became feudal proprietor of all the lands constituting the barony. All the several instruments in the progress of the pursuer's title are in almost identical words, including always the general description "cum silvis lacubus pertinentiis," &c.

The owners of Henderland and of the Duke of Buccleuch's property appear to hold under instruments simply describing those lands with the general words added as to appurtenances, but not including the word "lacus."

The defender's title, as averred by him, is as follows. He does not claim simply equal rights with the pursuers, as a riparian proprietor, but claims to be owner by distinct original grant of the lakes themselves. The principal riparian property of the defender is called Bourhope, stretching along nearly the whole of one side of St Mary's Loch, and he is owner of a smaller property called Crosscleuch, held by a different title, touching, as I have said, on the Loch of the Lowes.

By a grant or disposition dated the 25th February 1607, Robert Lord Roxburgh granted to Robert Scott, the younger of Thirlestane, and the heirs-male of his body, with remainder to Robert Scott his father, and his heirs-male, and other remainders, all his lands of Bourhope, "with the houses, buildings, parts, and pendicles and pertinents of the same."

By a charter *de me* of the same date, a grant in the same words was made, the word "gardens" only being introduced in addition among the general words, the operation of the one grant being to create an immediate holding of the Crown in the same right as the original grantee, the other to create a holding of the disponer himself, as being the immediate superior interposed between the grantee and the Crown.

The next step in the title of the defender is one of great importance. On the 13th August 1607, a grant was made by a charter under the Great Seal called a charter of resignation and novodamus, or new grant, which charter recited the grant to the Scotts of Bourhope, and its pertinents, in exactly the same language as was used in the grants made by Lord Roxburgh, and then the charter contained a grant by confirmation and novodamus to the Scotts, in the following words: "All the said lands of Bourhope, with the houses, buildings, gardens, orchards, parts, pendicles, and pertinents whatsoever aforesaid," and then following these words (in page 261): "Una cum duobus lacubus nuncupat. lie St Marie Lochis de Lowis cum solo terris piscariis et pertinen. earundem lacum cum potestate dicto Roberto Scott suisque antedict, dictos lacus aridandi et aliter eisdem utendi et de super disponendi tanquam ipsorum propriam heriditatem ad ipsorum arbitrium in futurum." And then in the tenendas it runs thus:—"Totas et intregras predictas terras de Bourhoip cum domibus edificiis hortis pomeriis partibus pendiculis et pertinen. earundem quibuscunque ut dictum est jacen. Una cum dictis duobus lacubus nuncupat. lie St Marie Lochis de Lowes cum solo terris piscariis et pertinen. earundem lacum cum potestate dicto Roberto Scott suisque antedict, dictos lacus aridandi et aliter eisdem utendi et de super disponendi," and so on. And then there is the reddendo in this form: "Reddendo annuatim dictus Robertus Scott junior, heredes sui mascult talliæ et assignati predict nobis et successoribus nostris nostrisque computorum rotulatoribus factoribus et camerariis presentibus et futuris pro totis et integris predictis terris de Boerhoip cum petinen. summam viginti librarum usualis monetæ regni nostri Scotie," and so forth. "Et pro lacubus suprascript. et piscariis terris et pertinen. ad easdem spectan. summam viginti solidorum monete predict.," and so forth. The observation I make upon that is, that there were two distinct reservations, the one rent being reserved in respect of the grant of lands, which corresponded exactly with the grant which had been previously made by Lord Roxburgh, and the other reservation of 20s. being in respect of the lakes.

The defender asserts that he can deduce a regular title to the lakes by special grant under the charter of novodamus; and before proceeding further with the deduction of title on his part, it may be well here to consider what the position of the parties is, and upon whom the burden of proof is thrown as regards their respective claims, upon which much appears to me to depend.

In the first place, the pursuer was bound to make out a *prima facie* right. But the first question is, whether he has not made out such a right when he produces a grant made in 1599 of land nearly enclosing one lake and running for nearly a mile along the margin of the other to the extent which alone he asserts, namely, the common right of a riparian proprietor? I do not find the authorities cited by Lord Curriehill in pages 151 and 152 of the respondent's case upon the point in any way controverted by the other learned Judges. What is said by Lord Curriehill is this: "The presumption of the common law itself is in favour of the pursuer's demand. The principle, as stated by Lord Stair, is:—'Albeit woods and lochs use oft to be expressed, yet they are comprehended under parts and pertinents; and therefore the master of the ground hath not only right to the water in lochs, but to the ground thereof, and may drain the same, unless servitudes be fixed to water-gangs of mills, or other works; and the ground of the loch, and all that is upon it, or under it, is a part of the fee; but if the loch be not wholly within the fee, but partly within or adjacent to the fee of another, then unless the loch be expressed, it will be divided among the fiars whose lands front thereupon.' Lord Bankton,

under the head 'parts and pertinents of the fee,' states that 'if the loch is between two contiguous heritors, it belongs to them equally, unless it be provided otherways by the rights.' Professor Bell states this principle thus: 'Navigable lakes do not, generally speaking, appear to be *inter regalia*, as rivers are. If wholly within the lands of one proprietor, the lake goes as a pertinent of the land. If not so, but touching the estates of various proprietors, the lake and its solum rateably belongs to them all.' And he elsewhere states that 'lakes, which give a permanent source to rivers, are not to be drained by the owner of the ground in which they are situated.'" Indeed Lord Ardmillan seems to recognise the law as laid down by the authorities cited by Lord Curriehill, though in another part of Lord Ardmillan's judgment there seems to be more hesitation as to whether the grant with pertinents would carry a *prima facie* title without possession, by which, I presume, must be meant distinct possession of the water rights. Lord Deas does not appear to contest the general principle, but appears to hold that, as against the Crown, no right in the solum of the lake arises by a grant of land adjoining *cum pertinentiis* or *cum lacubus et pertinentiis*, unless, as to the water opposite the soil granted, possession (I presume of the water rights) be taken. Perhaps the mode of reconciling the views of the Judges on this head may be that the presumption of law arises only when there is no other deduction of title originating in the express grant. But in that point of view the presumption will exist until a contrary title is shown, and this would be sufficient to show that the burden of proof is then thrown on those who impugn the *prima facie* title to the adjacent soil of the lake derivable from a grant of the riparian property "cum lacubus." If so, the pursuer is *in petitorio* till he made out his title to the land under the grant of 1599; but when that is made out, I conceive that, upon the authorities he will be entitled to the benefit of the grant "cum lacubus," as possessing an interest in the soil of the lake, though he had never placed a boat on the lake, nor fished, nor done any other possessory act, until a better title is shown by one who tries to exclude him. He has thrown the burden of proof on him who disputes his right.

I have made no remark on any special force of the words "cum lacubus," but have considered them as merely words of the same effect as "pertinentiis." It has not been contended before us that they amount to a grant of the whole of the lakes themselves, or any more than the equal right of the uses with the other riparian owners. In that lower sense, however, I confess I think (with great deference) they may be set in opposition to the suggestion of Lord Deas as to the improbability of the Crown granting any such riparian right in a part only of the loch; for I cannot bring myself to hold that the words refer to the marshy pools called chapel lakes, which would be sufficiently indicated by the words "marescis" and "aquis stagnis" in the charter of 1599. But the pursuer having clearly made out his progress of title under that charter, the defender then has to prove his exclusive right.

I will therefore proceed to consider the title alleged by the defender to have been transmitted to him from the charter of novodamus of 13th August 1607. Now, this title is very complicated, but it is stated with clearness by Lord Curriehill, and I will take it from his judgment, and will consider his observation as to the effect of the successive instrument before I notice the reply made to those observations. They will be found clearly stated by Lord Curriehill thus: "The lands of Bourhope, prior to 1607, belonged to Robert Lord Roxburgh." Then he mentions the charter 1607 to which I before referred, and then he proceeds to say, "By the clause of *reddendo*, the yearly feu-duty payable for Bourhope and its pertinents is, as formerly, £20 Scots, and 6s. 8d. Scots in augmentation of the rental. But there is an additional stipulation of a separate *reddendo* for the lakes in these terms:—'Et pro lacubus suprascript. et piscariis, terris, et pertinen. ad easdem spectan. summam 20s. monetæ prædict. ad terminis prescript. nomine feudifirmæ.'" Then he makes these observations:—"Infeftment was not expede on that charter for more than four years thereafter. Some peculiarities regarding that grant require attention. That grant of the lochs was not a mere constitution or a servitude over them, such as a privilege of shooting or fishing, but was a conveyance of the full *dominium* or right of property, including the *solum* itself." Then he says, "Although this grant was included in the same deed with a renewal of the investiture of the lands of Bourhope, which previously belonged to the grantee, they were distinguished as two different tenements not only by each of them being conveyed separately with its own proper pertinents, but still more emphatically by an additional *reddendo* being made payable separately for the subjects contained in the new grant." Then he observes upon the significance of that, and he then goes on to say:—"This new grant was made, as is expressly stated in its own preamble, in the exercise of the power conferred upon the Crown by the Act of Dissolution, which had been passed on his Majesty attaining majority, *i.e.*, by the statute 1857, cap. 30." Then he makes some observations upon that statute, and then he proceeds with the dedication of the title:—"Robert Scott was infeft in 1612 on the charter of 1607, both in the lands of Bourhope and in the lochs. He having died in 1619 without issue, his father, Sir Robert Scott, obtained a renewal of the investiture in his person as heir of provision to his son, and in 1621 he was also infeft both in the lands and in the lochs. In that renewal of the investiture, these different subjects, with their respective pertinents, and with their separate *reddendos*, were described separately, and at full length, as they were in the prior investiture in favour of Robert Scott junior." Then he observes that, "since that date the lochs have never again been included in any renewal of the investiture, and they have ever since entirely disappeared from the titles. Hence the right of Sir Robert to these lochs,—even supposing that right to have originally been valid, and not to have been long ago excluded by prescription" (which he afterwards adverts to), "would still be in his *hereditas jacens*. But" (he says) "while the right to these subjects would now be in that predicament, the right to Bourhope and its pertinents would have been separate from it, as the right to them was taken out of his *hereditas jacens* by proceedings of his creditors, and has been transmitted through them to the defender."

Then he says, "I shall now advert to these proceedings, in order to show that no right to the lochs was ever included in them. These proceedings consisted of (1) a wadset granted by Robert Scott junior, and his father to Walter Scott of Burnfoot on 8th and 13th June 1610; (2) a decree of adju-

dication *contra hereditatem jacentem*, dated in 1637, against John Scott, the son and heir-apparent of Sir Robert, at the instance of Robert Scott of Whiteslaid; (3) a decree of appraising, dated in 1642, at the instance of Patrick Scott of Tanlawhill against that John Scott; (4) another decree of appraising against him, dated 7th August 1643, at the instance of Robert Scott of Whiteslaid. To avoid confusion arising from all these creditors having the same surname, I shall distinguish them by the names of their estates. The first of these proceedings, namely, the wadset to Burnfoot, was granted in 1610, about three years after the date of the charter of 1607. It is the first link in the progress of the defender's titles. But what the subjects thereby disponed consisted of were only as set forth in the wadset right itself, 'all and haill the said Robert's lands of Bourhope,' with their pertinents, and of the contiguous tenement called Corsecleuch and its pertinents, being again *verbatim* the same subjects only as those which, in the disposition of Bourhope alone, had been disponed three years before by Lord Roxburgh; and that that conveyance purposely excluded the lochs appears from the *reddendo* in the corresponding charter, which (according to what was then the practice in Scottish conveyancing) was granted simultaneously with the disposition to enable the disponee to obtain himself infeft; for that *reddendo* not only did not include the feu-duty of 20s. Scots which was payable for the lochs, but is exlusive of it. That *reddendo* is expressly stated to be 'pro prescriptis terris et predio de Bourhope cum domibus, edificiis hortis et suis prtinen. antescript, summam viginti librarum monetæ antedict. une cum sex solidorum et octo denariorum summa in augmentationem rentalis earundem terraru. de Bourhop cum pertinen.;' and declaring that feu-duty to be 'tantum pro omni alio onere, exactione questione, demanda seu servitio seculari. quæ de predictis terris et prediis per quoscunque juste exigi poterint quodamlibet vel requiri.' This declaration is very significant, as indicating that the lochs were not included in that conveyance; because, if they had been included in the conveyance, this clause would have operated as a gratuitous discharge of the 20s. of feu-duty for them, which had been stipulated as a part of the Crown rental, and consequently would have contravened the statutory condition under which the Crown had any power to feu this part of the annexed property. So also as to the other three proceedings above-mentioned,—the subjects which Whitslaid adjudged in 1637, and appraised in 1643, and which were apprised by Tanlawhill in 1642, included Bourhope and its pertinents, but did not include nor mention in any way the lochs or their *solum*. These and other proceedings by the creditors were followed in 1647 by a voluntary division among themselves of the only subjects which had been acquired by these creditors. That transaction was embodied in a deed called a contract of communication, whereby the lands of Bourhope with its pertinents, but without any mention or reference to the lochs, were allocated to the proprietor of Tanlawhill. And here it may be mentioned that that gentleman had then likewise acquired the lands of Thirlestane, and thenceforth took that title." "The result of all these proceedings" (the learned Lord observes) "was, that the feudal investiture of all the subjects which were so acquired by Tanlawhill (Thirlestane) was renewed by the Crown in 1673 in favour of his heir, Sir Francis Scott. That investiture was again renewed in favour of the heir of the latter, Sir William Scott;" and so it proceeds in regular course down to the present defender.

In all this course of proceeding, the only instance in which the 20s. at all appears is in the retour in favour of Margaret Scott, as heir of her father, Scott of Whitslaid, which is dated 26th August 1647. That inquest found that "the feu-duty payable for Bourhope and its pertinents was £20, 6s. 8d. and 20s." There is no description either there or in the preceding instruments, *nominatim* of the lakes, but those words are found there. The learned Lord conceives that to be a mistake of the inquest, and he thinks it is established to be so by the other titles. He goes on to say, "In the first place, that document itself states that it was for Bourhope (not the lochs, which are never mentioned in it) the 20s. is payable. And, secondly, that error was corrected by the Crown-charter itself, which followed on the contract of communication, and by which all the rights in the subject held under the wadset, the adjudication, and the apprising were united and vested in Tanlawhill (then Thirlestane). That was the charter of resignation which was expede in favour of his heir, Sir Francis Scott, in 1673. Not only did that charter expressly declare that £20, 6s. 8d. was the amount of the feu-duty payable for Bourhope and its pertinents; but, further, the relative precept of sasine for infefting the grantee of that charter states expressly that that feu-duty had then been six and a-half years in arrear, and, accordingy, the direction therein contained to the Sheriff is to take *securitatem de* £132, 3s. 4d. Now, as the amount of £20, 6s. 8d., multiplied by 6½, is precisely £132, 3s. 4d., this entry in the investiture which followed on the contract of communication, conclusively establishes, not only the amount of the annual feu-duty which was exigible by that feudal title for Bourhope and its pertinents, which continued to be £20, 6s. 8d. as it had been prior to 1607, but likewise that *de facto* that was the whole amount of the feu-duty which was then levied by the Crown."

The fact deducible from all these documents is, that when the grantee under the charter of 1607 was infeft (which was not till 1612, two years after the wadset of Burnfoot), the separate rent of 20s. was specified, and separate sasines given. Such, again, was the case with Sir Robert, his father, in 1621, but in no instance since that period had the saparate sasine occurred, and in no case has the rent of 20s. been specified, with the single exception of the retour of Margaret Scott as heir of Whitslaid, where it is said that the feu-duty for Bourhope and its pertinents is £20, 6s. 8d. and 20s. But that is on the 26th August 1647, and not only is no mention made of lochs, but in the next grant of 1673 and every subsequent grant, £20, 6s. 8d. only is mentioned, and not only that, but £20, 6s. 8d. is stated to be in satisfaction of all rents. In the renewed grant in 1673 to Sir Francis Scott, not only is the £20, 6s. 8d. alone referred to, but the precept of sasine directed the Sheriff to see to six and a half years' arrears, which was carefully calculated at £132, 3s. 4d., the exact amount of the aggregate at £20, 6s. 8d. of the annual rent for Bourhope exclusive of the lochs.

It has scarcely been argued at all events, not very stenuously argued, before us under these circumstances, that the two subject-matters of the charter of 1607 were, by the expression "una

cum," so attached to Bourhope as to amount to a clause of union by which Bourhope would stand as the representative designation of the whole subject-matter of the grant; but it has been contended that the learned Judges who formed the majority of the Court were correct in holding that these words (*una cum*) in reality were intended to attach the lakes permanently as pertinents to Bourhope.

It is not without great diffidence that I venture to express my dissatisfaction at this view of the case, but I do not see that an adequate reply is made to the difficulties raised by Lord Curriehill as opposed to it.

The subjects are admitted to be distinct in their origin, the one, viz., Bourhope and its proper pertinents, being the subject of the grant of February 1607 and of the re-grant of August 1607, and the lochs with their pertinents separately enumerated, being the direct subject of an original grant by the same charter of re-grant and *novodamus* of August 1607. Each grant is made with its special pertinents; a special duty is reserved; on each separate sasine is given; and when the objects of the new grant cease to appear *nominatim*, the rent reserved in respect of them ceases to appear also. Not only that, but the rent reserved on the original object of the grant is stated to be the entire rent, and the title is transferred free of all other reservation. If the granters and transferers had intended to omit the subject of the new grant, what other way could they have taken for showing such intention?

I confess myself less capable of coming to a clear conclusion on what the precise feudal effect of Robert Scott's double holding under the two charters *a me* and *de me*, and the consequent infeftment as to Bourhope, may be; but what I rely upon is the manifest intent, as far as all the instruments in the progress of title appear, not to include the lochs.

It is true that in 1656 Scott of Tanlawhill (afterwards of Thirlestane), who had acquired all the rights vested in the creditors of the old Scots of Thirlestane in 1647, and a renunciation of right in 1657 on the part of the heir of the debtor, seems to have paid a sum at the rate of 20s. per annum as and for feu-duties for three years preceding, and it was expressed to be paid for the lochs and fishing-lands of Bourhope, conform to the *reddendo* of his charter and infeftment under the Great Seal produced. But at that date no Crown-charter had been expede, and when the charter was expede in favour of his son and heir, Sir Francis, in 1673, the 20s. is not reserved or mentioned, which appears to make the case stronger as to omission.

The only subsequent payments in 1823 and the following years of the 20s. by the late Lord Napier and the defender would not make the title irrespective of the charters, muniments, or titles.

But still it may be important to inquire whether any continued user of an exclusive right, as claimed by the defender, has been made out which would in any way tend to support his construction of the instruments of title? For such a continued user might be held to raise a title by prescription against the defender. Now, certainly, as to exclusive possession, it appears to me that no evidence whatever has been produced by Lord Napier sufficient to establish that right as against the *prima facie* right of the pursuer and of the other riparian proprietors. It is stated expressly by the respondent's case that no question arises as to the ordinary use of the water of the lochs for all domestic purposes by any of the riparian proprietors. Such usage has been common to all. It does not appear that any of the riparian proprietors other than Lord Napier and his immediate predecessors before the time of this dispute resided personally near the lochs. The late Lord Napier does not appear to have resided there till about 1816.

Now the first appearance of a boat on either loch of which we have any account is that of a boat belonging to Mr Robert Ballantyne, which was brought to and used in St Mary's Loch about the year 1805. His brother-in-law, Mr James Ballantyne, says it was about the time of Robert's marriage in that year. James Cowan (defendant's witness) remembers this boat in 1811, when he was seven years old. The boat was brought from Leith and used by the family for shooting, fishing, and pleasure. Mr Robert Ballantyne was a tenant of Dryhope, the Duke of Buccleuch's riparian property. The boat was kept in a boat-house excavated on the margin of the lake at Kirkstead farm (other part of the Buccleuch property), and constructed of stone and lime, with a wooden roof. The witness, James Ballantyne, speaks positively to David Ballantyne, the brother of Robert, using this boat for shooting and fishing. Robert ceased to hold the riparian farm about 1811 or 1812, and the witness became owner of the boat, but he was not an occupier of riparian land, for his farm was eight miles off.

The late Lord Napier seems to have first put a boat on the lake in 1816. Soon afterwards some accident occurred at a time when his boat and that of James Ballantyne were moored together in the boat-house at Kirkstead. Ballantyne was ordered to remove his boat and the boat-house, and ultimately Lord Napier destroyed the boat-house, and the boat perished by neglect. But it must be remembered that James Ballantyne was not in any way entitled to use either boat or boat-house, not being a riparian proprietor, nor having any interest in the lake. As to such right, if any, as is acquired by establishing a boat on the lake, it appears that the Duke of Buccleuch's tenant was the first so to do; that he used it without question for all purposes of pleasure, including fishing and shooting, during five or six years, and left it to another who was not entitled to use it; sometime after which the defender prevented its being used. Grieve, a tenant of Henderland, the riparian property of Mr Murray, put a boat on St Mary's lake about 1821, retained it there till 1824, shot swans out of it in 1822, and removed it at last when he left. M'Call, another tenant of Henderland, kept a boat there, given to him by Mr Jardine in 1844, and kept it for several years. He says he occasionally went to Tibbie Shiells in it, and that he was never interfered with; and Mrs Shiells does not contradict this evidence.

Now these facts completely disprove that which is stated in defender's revised statement, where he says:—"The possession as proprietors of the said two lakes of St Mary's and the Lowes, pertinents of the said lands of Bourhope as held by this line of Scotts of Thirlestane, latterly merging in the female peerage of Napier, has been no less distinct, exclusive, and uninterrupted than the feudalized possession to the relative lands. For a period exceeding the memory of man or at least for more than forty years prior to the date of this process, there has been but one boat upon the lakes, namely, that belonging to the successive Lord Napiers, and

carefully protected from use by all others except such as were specially permitted to use it by the said proprietors, and also, with the exception of an express permission granted to his Grace the Duke of Buccleuch as hereinafter mentioned, and the use of a boat for crossing the lake given by the defender to his own tenant of Bourhope." Then he says, neither his Grace of Buccleuch, nor Murray of Henderland, nor any neighbouring proprietors, have hitherto put forth any claim whatever to be proprietors in common with the defender of these lakes, or to have a right to place a boat thereon, to exercise any right of fishing or fowling or otherwise over those waters, without the permission of the Lords Napier. Then he alleges also permission expressly given by Lord Napier to the Duke of Buccleuch.

The Tibbie Shiells named above appears to have been a person employed to watch over the defender's boat, and otherwise to look after his interests in a cottage on the loch, but she does not speak of any instructions given to her to interfere with the uses of the lake by the boats of other persons. She produces a written order given to her by the late Lord Napier, not to allow any one to take his boat without a written order from him.

Now, as this witness occupied her post from 1823 to the time when she was examined in 1865, viz., forty-two years, it is very remarkable that she does not offer evidence on this head, but says expressly, "I don't remember hearing any general instructions from the late Lord about keeping the loch free from poachers and other people. She says, indeed, that she once let a Mr Campbell know that she had no authority to let him put a boat on the loch, but if he would give his name she would give it to Lord Napier;" and again, "I was very particular in letting it be known that Lord Napier allowed no boats on the loch but his own." But then she says (a little after that) "Mr Campbell was a stranger to the neighbourhood, and brought the boat on wheels, using it as a gig." She says as to Grieve, who was a tenant of Henderland, that she heard of his bringing a boat over once when some swans were on the loch, but she did not see it, and she does not deny seeing M'Call in his boat.

Now I have gone through this case of boats because the destruction of Ballantyne's boat-house at first seemed an act of exclusive ownership, but it wholly fails, as does Campbell's case, when we find neither of them to be riparian proprietors. The like may be said of permission asked and given as to the use of a boat by one of the Duke of Buccleuch's relations; whatever right the Duke had would not be vested in his brothers.

There, however, it is said that the late Lord Napier and the defender have prohibited fishing without their leave, and especially the use of the otter. Now, as to this, it is instructive to compare the evidence of Mr Richardson, the son of Isabella Shiells, with the paper that he produces. He depones that his mother got a written order to the effect that no person was to fish in the loch with the lath or otter. He produces it, and it runs thus: "Lady Napier requests that gentlemen fishing in St Mary's and the Loch of the Lowes will have the goodness to abstain from the use of the lath. September 1st, 1835." There is some evidence given by Richardson Copland (the factor) of their having forbidden M'Call, the tenant of Henderland, to use the otter, and of his desisting from so doing, but this is denied by M'Call.

There appears, I have said, to be no dispute as to the user, by the pursuer and his predecessors in title of the lochs for ordinary purposes, such as ordinary fishing with the rod, cutting reeds and rushes, washing sheep, and the like. There is no instance of their being interfered with in any way by the defender or his predecessors till the recent disputes. The other riparian proprietors have used boats before and after the defender's predecessors commenced such user at all. I am at a loss to see anything approaching to evidence of exclusive user asserted by the defender, and acquiesced in by the other proprietors.

Much evidence was given by the opinion of the neighbourhood on the title. I can hardly appreciate the value of such evidence in Scotland, but one of the defender's witnesses, M'Blyth I think, explains how such a rumour would arise. He says he first heard it publicly asserted in 1816. It was generally understood before that, but at that time made quite notorious. "What I mean is, that it was in 1816 I first heard it publicly asserted that his Lordship held a charter from Government for the lochs." The existence of the charter as giving the right to Lord Napier has been believed in ever since. But I apprehend that the constant verbal assertion of the right to the exclusive user by one proprietor on his coming to reside in the neighbourhood, whilst the other proprietors do not there reside, is of very little avail, if unaccompanied by some act asserting that right.

I do not dwell upon the transactions with the owners of the Selkirk Mills in 1844. They required a license to lay down a syphon on his Lordship's lands. We know not if any damage was done to any of the other riparian owners. No use of the water seems to have been interfered with. If any soil was laid here, it does not seem to have been claimed by Lord Napier.

On the whole, therefore, my Lords, without entering into all the details of the evidence, I do not think that Lord Napier has proved (that which for reasons I have alleged I think him bound to prove) any right to exclude the pursuer from the benefit of his grant as deduced from that made to the Master of Yester in 1599.

I shall therefore propose to your Lordships that the interlocutors complained of be reversed, and that the right of the late pursuer, who is now represented by the appellant, should be declared, in the terms of the pursuer's summons. And that the appellant should be held entitled to the pursuer's and her own expenses in the Court below, but that there should be no costs of this appeal.

LORD CHELMSFORD—My Lords, this is an appeal from an interlocutor of the First Division of the Court of Session adhering to an interlocutor of the Lord Ordinary in an action of declarator brought by the late Mr John Scott against the respondent, assoilzieing the defender from the conclusions of the action, and also an appeal from the Lord Ordinary's interlocutor.

The pursuer, by his summons in the action, sought to have it found and declared that he, in virtue of his titles and possession, has, along with the other proprietors whose lands lie around and border on the same, a joint right or common property in the loch called St Mary's Loch, lying in the counties of Peebles and Selkirk, and the loch called the Loch of the Lowes, lying in the county of Selkirk, and a joint right of using boats, fowling, fishing, and floating timber, and exercising all other rights in and over the said lochs; and that

the defender, Lord Napier, had no exclusive right either of property or of use in or over these lochs, or either of them. The appellant derives her title from a Crown-charter of the 15th April 1599, by which the barony and lands of Rodono (of which she is now feudal proprietor) were granted to the Master of Yester "cum lacubus partibus pendiculis et omnibus allis earundem pertinentis." These lands lie partly around the Loch of the Lowes, and partly on one side of a portion of St Mary's Loch, and one upon the margin of both lochs. The appellant contends that her title derived from this charter is one of common property in the lochs, and confers a joint right to use the same along with the other proprietors, whose lands lie along the shores or margin of the lochs.

If there were no competing title in this case, it would probably have been admitted that the lochs in question would have passed as pertinents under the general words in the charter of 1599. The passages cited in the argument from Stair ii. 3. 73, Bankton, ii. 3. 12, and Bell's Principles, 651 (5th edition), are authorities for this position. Bell puts the point shortly and clearly. "If," he says, "navigable lakes are wholly within the lands of one proprietor, the lakes go as a pertinent to the land. If not so, but touching the estates of various proprietors, the lake and its solum naturally belong to them all."

But the respondent asserts an exclusive title to the lochs, under an express grant of them by a Crown-charter of 13th August 1607. By this charter the respondent's lands at Bourhope or Bowerhope, with parts, pendicles, and pertinents, were granted to his predecessor, Robert Scott, and the heirs-male of his body, together with (*una cum*) two lakes, called St Mary's Lochs of the Lowes, with the soil, fisheries, and pertinents of the said lakes, with power for the said Robert Scott and his heirs to drain the said lakes, and otherwise to use them and dispose of them at their pleasure, as their proper inheritance. Reddendo, for the lands of Bourhope and their pertinents the sum of £20, together with 6s. 8d. in augmentation of the rent of the said lands, and for the lakes, and the fisheries, lands, and pertinents belonging to the same, the sum of 20s.

The pursuer, in his pleas in law contended that after the Crown-charter of 1599, granting to his predecessor the lands of Rodono "cum lacubus," it was *ultra vires* and incompetent to the Crown to make a special and exclusive grant of the lochs in question in favour of any other person.

But the learned Lord Advocate admitted, not that a special grant of the lochs as exclusive property, after a grant of lands with the lochs as pertinents, would as of course be good, but that as the grant to the appellant's predecessor gave him a *pro indiviso* title merely of presumption, the subsequent grant of an exclusive right to the lochs might prevail, provided it was followed by such a possession as would have the effect of removing such presumption.

In considering the case, then, it must be taken that the grant to the appellant's predecessor gave him a good *prima facie* right of common property in the lochs with the other proprietors, and that this title must stand unless the respondent can establish that it was displaced by the charter of 1607, followed by the enjoyment of the exclusive possession of the lochs, which was thereby expressly granted.

The charter, therefore, must be very carefully examined, to ascertain whether the lochs were granted by it as a separate and independent tenement distinct from the lands, or whether they were annexed as pertinents to the lands to pass with them in future, under the description of Bourhope and its pertinents.

It was argued on behalf of the respondent that the charter of 1607 united the lands and the lochs into one subject, by the words "una cum duobus lacubus," which followed the grant of the lands of Bowerhope, and that from thenceforth the lochs would go with the lands by the description of lands of Bowerhope, even without the words "and pertinents," but that at all events the lochs would be carried by the word "pertinents" in all subsequent dispositions of the property. The Lord Advocate insisted that the charter 1607 could not be a charter of union, because a separate feu-duty was reserved for the lands, and for the lochs. But there seems to be no reason why subjects may not be united for the purpose of sasine, and yet a distinct and separate feu-duty be reserved for each of them. But in fact not only is there no provision in the deed that one sasine should serve for both subjects but sasine was given to Robert Scott separately, first of the lands of Bourhope with their parts, pendicles, and pertinents, and secondly, of the two lochs with the soil, fisheries, and pertinents of the same, and the delivery of the different symbols.

Upon the question whether the lochs became pertinents to the land by the charter of 1607 it was observed that, although the lands of Bourhope run along one side of the margin of St Mary's Loch for nearly its whole distance, yet they are discontiguous from the Loch of the Lowes. But as was said in the case of the *Lord Advocate* v. *Hunt*, 1 Law Reports, Scotch Appeals, 89, "discontiguity is no objection to a subject becoming part and pertinent even where it is included in the titles of another party." There will always be a sort of presumption against one of two discontiguous subjects standing in the relation of pertinent to another; but this relation may be established by express words in a grant, or by long enjoyment in connexion with the principal subject. Again, there is nothing against this construction of the charter of 1607 arising from the circumstance of the grant being of the lands and their pertinents and the lochs and their pertinents; for, as lands in Scotland may be pertinent to land, and land may have its pertinents, there may of course be a pertinent of a pertinent, and no great stress can be laid upon the addition of the words pertinents and lochs in favour of its being a substantive and not a relative grant of them.

But the reservation of a specific feu-duty in respect of the lochs, and the mode of dealing with it in the subsequent dispositions of the property, appear to me to be strong indications that the grant of the lochs was intended to be a substantive grant, entirely independent of the grant of the lands. It may not be unusual, upon the original annexation of a pertinent to a subject to which it was not before related, to reserve a feu-duty for the subject, and an additional one for the increased value so given to it. But the relation being thus forced between the principal subject and its relative subordinate, it might be expected that in the subsequent disposition of the property the separate feu-duties would be blended and described as an entire duty applicable to the united subjects of the grant.

Lord Curriehill considered the circumstance of an additional *reddendo* being made payable separate-

ly for the subjects contained in the new grant to be very significant, inasmuch as the legal remedies competent to the superior in the event of the non-payment of the feu-duty of either of the estates could not have been enforced against the other estate.

In the progress of titles to the lands of Bourhope, there is no indication that the lochs had been annexed to them as pertinents, except in the single instance of a special retour of the service of Margaret Scott as heir of line to her father, Robert Scott of Whitslaid, dated the 26th August 1647, in which the sums of £20, 6s. 8d. and 20s. are stated as the feu-duty payable for the lands of Bourhope with their pertinents. But this feu-duty of 20s. disappears till the subsequent dispositions of the lands of Bourhope. Thus, in the Crown charter in favour of Sir Francis Scott of 22d April 1673, in the Crown charter of resignation in favour of William Scott of the 22d June 1710, and in the charter of resignation in favour of Francis Lord Napier of the 27th July 1730, the feu-duties in respect of the lands of Bourhope and their pertinents are stated to be £20, together with 6s. 8d. in augmentation of the rent, being the amount reserved in the charter of 1607 for the lands and their pertinents above, exclusive of the lochs.

From the consideration of the above circumstances, I am led to the conclusion that the charter of 1607 did not annex the lochs as a pertinent to the lands of Bowerhope, so as to create an exclusive right to them in that relative character and render them transmissible by the general description of "pertinents" through the subsequent disposition of the property.

The respondent can only therefore found his claim to an exclusive right to the lochs and their *solum* upon the express grant of them as an independent tenement by the charter of 1607. But as this charter (as already observed) is posterior to the charter of 1599, which gave the appellant's predecessors a *prima facie* title to a common property in the lochs with the other riparian proprietors, the mere grant of the lochs to the respondent would be of no avail unless it was followed by exclusive possession; and proof of this possession, from the peculiarity of the case, ought to be of the clearest and most unequivocal character. For although the lochs were distinctly granted as a specific subject of grant by the charter of 1607, yet they are expressly named for the last time in a specific retour of the service of Sir Robert Scott of Thirlestane on the 10th February 1621; and in the long progress of titles, the feu-duty of 20s. for the lochs is only mentioned in the retour of the service of Margaret Scott in 1647, to which I have before adverted.

The only other proof that the lochs were an independent subject of grant, and that the title to them in that character was still subsisting, is to be found in the account of the feu-duties rendered to the Exchequer by Patrick Scott for the years 1653 and 1654, according and conform to the *reddendo* of his charter and infeftment under the Great Seal produced, in which he is charged for the lands of Bowerhope a sum of £20, augmentation 6s. 8d., and for the lochs and fishing lands of Bourhope £1. It is impossible to explain this re-appearance of the lochs as a specific subject of grant with their own appropriate feu-duty. But from the year 1656, down to 1823, there is no proof of any payment being made in respect of the lochs, and, as before observed, the feu-duty applicable to them is dropped altogether out of the subsequent titles. It can hardly be supposed that this omission of the feu-duty for the lochs arose from mistake or forgetfulness; because, between the year 1647, when it is specifically mentioned, and the year 1673, when it is omitted from the Crown charter of that date, the payment in respect of it for the years 1653 and 1656 had been made. In the year 1823 William John Lord Napier paid to the deputy receiver of the Crown £23, 6s. 8d., as one year's feu-duty due to his Majesty, in which sum was included £20, 6s. 8d. for Bourhope, and £1 for St Mary's Loch of the Lowes. It was said on behalf of the respondent that this payment being for one year only, it must be assumed that there were no arrears, and therefore, that the interest for the lochs had been paid regularly from 1656 downwards. But if this had been the case, it would probably have been easily capable of proof; and, in the absence of such proof, the presumption is at least as strong that there had been no payment for the lochs in the long interval between 1656 and 1823, more especially when no mention of the feu-duty for the lochs is found in the charters during the intervening period.

It is impossible to form any satisfactory judgment as to the reason for allowing the grant of the lochs by the charter of 1607 to drop altogether out of the subsequent dispositions of the property. But whatever may have been the cause of this peculiar, and in some respects inexplicable state of the titles, it certainly places the respondent under a more than ordinary necessity of proving by clear and distinct acts of ownership his right to enjoy the lochs as his own property to the exclusion of all other persons.

Now I do not find in the evidence for the respondent proof of the exercise of rights over the lochs by him and his predecessors, or his interference with other riparian proprietors or their tenants which unequivocally establish his title to the sole and separate use and possession of the lochs, or which are not consistent with his having merely a common property in them with the other proprietors.

On the other hand, the other proprietors of the adjoining lands and their tenants are shown to have had occasionally the same kind of use and enjoyment of the lochs as the respondent, not by mere sufferance and permission, but in the exercise of what they considered their proprietary rights. The respondent can only successfully meet this evidence by proof of acts done which can be referred to nothing else but an exclusive ownership of the lochs. It is not sufficient to prove permission given by him to fish in or use a boat upon the lochs to persons who claim no interest in them. But he must show that his title was acknowledged by those who might be supposed to have a common property in the lochs with him, either by a request on their part to be permitted to use them, or by submitting to his prohibition against the use of them.

It must be remembered that for many years the Lords Napier were the only resident proprietors in the neighbourhood of the lochs, and that any permission that they might give to strangers to use them would not be likely to be questioned. I do not find any instance of such leave having been granted to any one connected with a riparian proprietor except in the case of Lord John Scott, the brother of the Duke of Buccleuch. The conversations on which this admission of exclusive ownership is supposed to have taken place is stated in the evidence of the respondent himself, and the whole it amounts to is to this, that Lord *John ex-*

pressed his desire to keep a boat on the lochs for the purpose of duck shooting, and the respondent said it would give him the greatest pleasure that he should keep a boat there for that purpose.

It is to my mind extremely doubtful whether one of several owners of a lake could license a stranger to keep a boat permanently upon it; and although Lord John had obtained the permission of the Duke of Buccleuch, he might still consider it necessary to ask the consent of the respondent; and, under any circumstances, as a matter of courtesy, would probably think it right to do so. But it does not appear that Lord John ever availed himself of the permission granted, and therefore there was no occasion offered to the other proprietors to challenge it. And I cannot see how a private conversation between the respondent and a person who had no sort of interest in the lochs, even if he had made the most unqualified admission of the exclusive property of the respondent in them, which Lord John certainly did not, could affect the right of other riparian proprietors, or even be admissible in evidence against them. With respect to the permission granted by the respondent to the proprietor of mills at Selkirk to draw an additional supply of water from St Mary's Loch, it is only necessary to observe that the respondent himself lays no stress on this supposed act of ownership.

The respondent, in support of his title, relies upon proof of prohibitions against the use of lochs upon several occasions, and if he had shown instances of persons whose lands adjoin the lochs, and who would from this contiguity have a presumptive property in them, having been prohibited to use them, and acquiescing in the prohibition, it would be evidence in his favour of the strongest description. But his case appears to me to be destitute of this proof that he or his predecessors ever excluded the other riparian proprietors from such use of the lochs as they were desirous of having. The respondent himself specifies the particular right of property exercised by him in the Loch of the Lowes in these words:—"The exclusive use of a boat and of fishing with the net in the loch, and the prohibition issued by me and my representatives of the use of the machine called the otter in the loch as well as in St Mary's Loch."

With respect to the exclusive use of the bank of the respondent, and his prohibiting the use of it by any person except those to whom he gave permission, it is no more than any person having a common property in the loch would be entitled to do. And the same observation may be made with respect to the prohibition to fish with the machine called an otter, which is an unsportsmanlike though not an unlawful mode of fishing. It does not appear that the respondent ever prevented any of the tenants of the riparian proprietors from fishing even with the otter; but there is evidence of one of these tenants, James M'Call, disregarding the information that Lord Napier did not permit otter fishing, and afterwards fishing once or twice in this manner without the interference of any one, and this witness, who was tenant of Henderland for 19 years from 1844, stated that this "was the only attempt during the whole course of his tenancy, made by any one to interfere with the use of the lochs."

Great stress was laid, as a strong proof of the respondent's exclusive ownership of the lochs, upon the fact that a boat that had belonged to a tenant of Dryhope, part of the riparian lands of the Duke of Buccleuch, had been ordered by the respondent to be removed, and that a boat-house built for this tenant's use had been pulled down by the respondent's orders. But a short examination of the circumstances under which this exercise of authority took place will show that it affords no proof at all of the exclusive property of the respondent in the lochs.

The tenant of Dryhope, Robert Ballantyne, built the boat-house in question, and had a boat upon the loch from the year 1805 or 1806 down to the year 1811 or 1812. It may be remarked in passing that during his tenancy it does not appear that any one ever questioned his right to use a boat on the loch, or to have a boat-house to keep it in.

In 1811 or 1812, Robert Ballantyne quitted Dryhope, and gave the boat to his brother James Ballantyne, who rented a farm eight miles distant from the lochs. Robert Ballantyne had, of course, no right any longer to the use of the loch, and James Ballantyne never acquired any such right, and therefore, when the respondent ordered James Ballantyne to remove the boat, he was treating him as he was entitled to do, as a mere stranger who had not a shadow of right in the lochs, and which he would have been justified in doing if he had only been a proprietor of the lochs in common with others. With respect to the removal of the boat-house, if it took place by the respondent's orders, it does not appear that it was of sufficient value to make it likely that the tenant of the farm to which it belonged would question the legality of the act.

Upon the whole case, I am of opinion that, as the respondent can only found his title to the lochs as a separate and independent tenement under the charter of 1607, and could establish this title only by clear and unequivocal proof of exclusive ownership, and as there is not a single act proved which is not consistent with the respondent being entitled merely in common with other proprietors, his answer to the appellant's case entirely failed; and therefore differing, as I am compelled to do, with the majority of the Judges of the First Division, I think the interlocutors appealed from ought to be reversed.

Lord Colonsay—My Lords, this is a declaratory action at the instance of Mrs Scott of Rodono, in which she seeks to have it found in substance that she is entitled to a right of common property with other riparian proprietors of these lochs; that Lord Napier is not entitled to any exclusive right; and that Lord Napier should be prohibited and interdicted from interfering with the exercise of right by Mrs Scott; and the defences against the action are twofold. In the first place, the defender contends that he has right, by an express grant of these lochs; and, in the next place, he contends that he has had exclusive prescriptive possession from which such grant is to be deduced or inferred.

The implied right of a riparian proprietor, with a clause of pertinents, is matter of general law, which I apprehend is not seriously contested in this case—the right, I mean, of interest in the lake adjacent to which the property lies. The doctrine is laid down by Lord Stair and by subsequent writers, and I do not think that it is contested or questioned by any of the learned counsel on either side, or by the learned Judges who have delivered opinions adverse to the appellant.

In the present case, the title of the appellant contains words which have been founded on by her as words having express reference to a right in St Mary's Loch and the Loch of the Lowes. It may

be that those words had some reference to those lochs, and I think that too much has been attempted to be made of them, and I think they might be explained irrespectively of that. But seeing that the lands are adjacent to these lochs, I cannot say that the appellant is excluded from referring to that expression in her title, assuming other things that are of a pertinential nature to them. I am not, however, disposed to put the weight upon it which the appellant has endeavoured to put.

In this case there are four riparian proprietors. I need not enumerate them. They are described, and their properties laid down upon the plan which is before your Lordships, and the titles of each of those riparian proprietors are titles with pertinents. I have stated what I understood to be the general law in reference to such titles, but still, if the defender has shown that, by express title or otherwise, he is in possession of an exclusive right, he ought to prevail.

Now the title founded on by the defender is, in the first place, the charter of 1607. Before that date, in 1607, in the month of February, there had been a disposition by Lord Roxburgh to Robert Scott, son of Sir Robert Scott of Thirlestane, of the lands of Bourhope and pertinents, the lands to which this right is contended to belong. That disposition by Lord Roxburgh did not give any rights to the lakes other than that which a riparian proprietor would have. It was not alleged that Lord Roxburgh had a sole right to the lakes. There is no mention of it in the conveyance, and the title to the lands of Bourhope, even though it was a title with pertinents, was not a title which comprehended the whole or exclusive right in those lakes. The lakes, then, were not at that time pertinent of the lands of Bourhope, and the lake (I need not repeat the words of the charter, they have been read already by my noble and learned friend on the Woolsack)—undoubtedly the words are such as may give rise to a contention as to their meaning; the right to the lakes is introduced by the words "una cum," which apply to mere pertinents, but are not necessarily so applied. We must look to the whole deed to see whether these lakes are granted by that deed as pertinents of the lands of Bourhope, or are granted as a separate subject.

Now the tests of that are, I think, apparent. In the first place, while the lands of Bourhope are described as they had always been before with their pertinents, there comes a description of these lakes with various rights connected with them and with their pertinents, indicating that they are a substantial subject which has pertinents of its own. Then it is a peculiar grant giving a right to deal with the lakes in a special manner, and to convert them from their present condition into land to be used for other purposes. This has reference to a very extensive subject, comprehending a very large area absolutely as well as relatively to the other property contained in the deed of which it is now said to be pertinent. Then there is a separate feu-duty prescribed for this subject, and then there is a warrant of infeftment specially in the subject. Then that is followed in 1612 by an infeftment which gives special and separate infeftment in the lakes by symbols, which are described in the instrument. In short, it is treated as a separate subject up to that time.

The next thing that we see is that the original granter of these subjects, Mr Scott, having died without issue, his father succeeded him in 1621. His father was named in the grant as heir of provision in the event of the son having no issue, and he makes up a title. He gets a renewal of investiture, and that renewal of investiture, as far as regards the description of the subjects, is in similar terms to the original grant. There is also the separate feu-duty. There is a variation in the mode in which that is expressed, but still it is stated as consisting of two separate sums, *videlicet*, £20 and £1.

Nothing was done in the way of draining or other operations in the lake, and since 1621 the lochs are not mentioned in any title, neither in the feu-duty effeiring to the lochs, nor included in any deed or title, with the single exception (if such it be) of a retour in 1647, which I shall presently notice. But while that was the case, the lands of Bourhope and their pertinents are clearly traced down to the present time, running through all the titles by the same description as was contained in the original disposition of Lord Roxburgh, which confessedly did not comprehend the lochs, and also with only the feu-duty of the lands of Bourhope, without the lochs.

When, then, was the progress of the titles by which the lands of Bourhope came into the possession of the defenders? The defender is not the descendant and heir of the Scotts of Thirlestane, who, in 1621, possessed both Thirlestane and Bourhope. The connexion of that family with these estates ceased not long after 1621. It appears that in 1610 they had granted a wadset over Bourhope in favour of Mr Scott of Burnfoot, and the family seemed to be in involved circumstances. For in 1637, 1642, and 1643, there appear to have been adjudications and apprisings at the instance of Mr Scott of Whitslaid, and Mr Scott of Tanlawhill; and those proceedings by the creditors, whereby they adjudged and apprised certain property belonging to the proprietors of Thirlestane and Bourhope, make no mention of the lochs, nor the 20s. feu-duty effeiring to the lochs. In 1647 it appears that some arrangement was made among the creditors who had taken those steps—an arrangement by what is called a contract of communication. By that arrangement, the different rights of the creditors were settled by an allocation of the lands, and Bourhope was allocated to Mr Scott of Tanlawhill, who had, in the meantime, acquired by some other title the lands of Thirlestane, and in 1648 the representatives of the wadsetter, and the other apprising creditor, made a resignation in his favour, but no charter followed on that resignation till 1673, and the lochs are not mentioned in the instrument of resignation.

In 1657 the representative of the original debtor executed a renunciation of his reversionary right, and in 1673 a Crown-charter was granted to Sir Francis Scott, then of Thirlestane, and the investment was renewed in favour of his heir, Sir William, and in 1730 Sir William made an entail which was completed by another renewal, and so continued to the defender.

Now, neither in that charter of 1673, nor in the renewal of the investiture in favour of Sir William Scott, nor in the entail, nor in any subsequent investiture, is there any mention of the lochs, nor of the 20s.

I mentioned that a certain retour in 1647 was founded on as an exception to the omission, from 1621 downwards, of any notice of the lochs or of the 20s. That retour does not make any mention of the lochs. The retour referred to is that of Margaret Scott, the daughter and heiress of Whits-

laid, who was one of the adjudging and apprising creditors. She, of course, could take up no rights beyond what had been comprehended in her father's diligence. But it appears that in the retour, which makes no mention of the lochs, the feu-duty of the lands of Bourhope and pertinents is stated as £21, 6s. 8d. instead of £20, 6s. 8d. as in all the other writs from first to last. I think this was plainly an error of the inquest, for in the Crown-charter of 1673, which followed upon the contract of communication to which that lady and her tutor were parties, the feu-duty is correctly stated as £20, 6s. 8d., and there is no mention of the lochs, or of the 20s., nor is there any mention of the lochs in the instrument of resignation on which the charter proceeded. It is easily conceivable how the error might have occured. Because the Crown officers, looking back to the last charter in their possession, the last investiture, might have seen the total sum of £21, 6s. 8d. there mentioned, and have taken that to be the feu-duty of the lands.

How then does the defender make out that the right and title to the lochs, said to have been conferred on the Scotts of Thirlestane by the charter of 1607, has been transmitted to him?

The lochs and their pertinents are not mentioned in the titles of transmission, neither is the feu-duty appertaining to them. But the defender says that the lochs given in 1607 were given as a pertinent of Bourhope, and ever after treated and transmitted as a pertinent. I have already noticed the terms in which those lochs are mentioned in the deed of 1607, separately described with their own pertinents, having a separate feu-duty and infeftment taken in them separately from the infeftment in the lands. And the same substantially in regard to the renewal in 1621.

The defender says that the charter of 1607 is to be regarded as a charter of union. I cannot understand that. There it no union, no clause of union, in it. It is not acted upon as a charter of union. The infeftments are taken separately, and I observe that in the charter of 1673 there is a clause of union for the first time introduced and subsequently acted upon. But the charter does not comprehend the lochs or the feu-duty effeiring to the lochs.

Then if it was not a union, and if it was not a pertinent in 1607, when did it become a pertinent? The defender says that it has been transmitted to him as a pertinent. If it was not a pertinent originally, when did it become a pertinent? Was it rendered a pertinent by dropping it out of the title, and dropping the feu-duty effeiring to it? I think not. I think there was no point to which they can direct us at which it became a pertinent it was not so orginally, and I think clearly it was not so originally.

But still there are certain circumstances in the case which are peculiar, and I cannot help thinking that in the progress of these titles, blended with the proceeding by creditors, there has been more or less inaccuracy and confusion in conveyancing, and that we are now asked to give more effect to inference and conjecture than is usual in such cases. I do not think it necessary to go through all those matters.

I must, however, notice two things—two things which do not appear in the title-deeds, but have been alluded to already, and are peculiar. In 1654 it appears that the proprietor at that time made payment of his feu-duty for the three previous years, and the certificate of his having made that payment refers to a comparison of his charter, with an account said to have been settled in 1653. And at the bottom of the certificate there is a summing up of the amounts applicable to the different portions of land, and there the lochs are mentioned, but mentioned in a very peculiar manner, which I do not find in any of the titles. The sums are mentioned as applying to the different lands, and then at the end we have the lochs and fishing grounds of Bourhope. Now, what the fishing grounds of Bourhope means I do not know. The certificate bears that the payment was conformable to his charter. But he had not obtained any charter. It must have been the charter of 1607 which contained the 20s. for the lochs, that was referred to, but he had obtained no right to the lochs; there was no mention of them or of the 20s. in his title or in the Crown-charter which his son did obtain in 1673.

Then again in 1823, and from that time downwards, Lord Napier has been paying to the recipient of Crown duties the sum of 20s., taking receipts as for the lochs, but he was under no obligation to do so. In the first place, there was no mention of the lochs in his title, and in the second place there was no condition in his title for the payment of this 20s. It was a merely voluntary proceeding on his part. And why was it adopted without being in the title? I think the plain inference is, that, having conceived the idea of connecting himself in some way with the grant of 1607, this proceeding was taken voluntarily in order to aid the title by a continuous payment for a certain length of time, but I do not think that that can avail the defender in this case.

It was a mere spontaneous payment for a purpose, it was not a thing that the Crown could exact as against Lord Napier, and therefore I attach very little weight, if any at all, to the payment.

But how is it that this grant of the lochs has dropped out altogether from the titles? On the face of it, it is a very peculiar kind of grant, and very doubtful, as regards the legal effect of it, or the power of the Crown to grant it, especially as against the rights which may be presumed to have been in the riparian proprietors. It seems to have been dropped as altogether unavailing, and never to have been acted upon.

Then as to possession. Has the possession which is set up established a separate and independent right, or does it amount to exclusive possession? I shall not add anything upon that subject to the observations which have been made already by my noble and learned friends. It appears to me that there has been nothing in the possession of Lord Napier which may not be ascribed to his right as a riparian proprietor. Every part of the evidence, I think, is consistent with that position. Then there have been exercises of right or exercises of use by other riparians which have not been stopped or prevented by him. He certainly was not bound to prevent them. In courtesy he might have allowed them although he had a separate right. That is a possible supposition, but when we are inquiring whether what he did was done in his character of riparian proprietor, and whether what others did was done in their character of riparian proprietors, the fact that there was no obstruction on his part to such apparent exercise of rights by them is indicative of their possessing the rights which they apparently exercised. I therefore think, my Lords, that the right by possession alleged has not been established, and I think that the interlocutor appealed from must be reversed. I am not surprised

that there has been a difference of opinion in this case, seeing the way in which the matter has been dealt with since 1607 in the titles and otherwise; but upon the whole, with all deference to the learned Judges composing the majority in the Court below, and for whose opinion I entertain every possible respect, I cannot arrive at the conclusion that the right of Lord Napier has been established. In this case it was necessary for him to make out his right. He set up an exclusive title and right as against what would be the ordinary construction of the titles of other parties, and he having failed in that, I see no alternative but to reverse the judgment of the Court of Session.

Lord Cairns—My Lords, I entirely agree with the opinions expressed by your Lordships; and, inasmuch as the reasons I proposed to offer you in support of that view have been entirely exhausted by what has been already said, and more especially by my noble and learned friend who has just sat down, I do not think I should be justified in going over the same grounds again. I simply, therefore, wish to give my adhesion to the motion proposed to be made.

Interlocutors appealed from reversed, with declaration, and directions as to expenses in the Court below.

Agents for Appellant—Scott, Moncreiff, & Dalgety, W.S.; Connell Hope, Westminister.
Agents for Respondent—Hunter, Blair, & Cowan, W.S.; Preston Karslake, Regent Street, London.

COURT OF SESSION.

Tuesday, July 20.

SECOND DIVISION.

JOHNSTON *v.* MACKENZIE AND OTHERS.

Salmon Fishings—Stake-Nets—Estuary—Old Scotch Statutes. Held that the Solway Firth was exempt from the restrictions of the old statutes which made fishing for salmon by stake-nets in the estuary of a river illegal.

In this action Lieutenant-General Johnston of Carnsalloch, heritable proprietor of the salmon fishings in the River Nith, seeks to have it declared that Mr Mackenzie of Newby, and the tenant of the fishings on the estate of Newby, have no right or title to use stake-nets or other fixed engines for catching salmon in the rivers Annan and Nith, or either of them, or in the estuary thereof, and asks for interdict against their so doing. The pursuer, founding on the Act 25 and 26 Victoria, cap. 97, sec. 6, "The Salmon Fisheries (Scotland) Act 1862," and subsequent relative statutes (26 and 27 Vic., cap. 50, and 27 and 28 Vic., cap. 118), under which the Commissioners defined the estuary of the rivers Esk, Annan, and Nith, alleges that the defenders have been in use, especially in the years 1865 and 1866, to place stake-nets in the rivers Nith and Annan, or in the estuary thereof, where the tide ebbs and flows, being localities where the use of stake-nets is illegal under the old Scotch statutes relating to salmon fishings, and the foresaid Acts.

The pursuer pleaded:—"(1) The stake-nets or fixed engines in question having been placed and used by the defenders in the said rivers or estuary, and in a locality falling within the prohibitions of the statutes, the same are illegal. (2) The said stake-nets or other fixed engines having been placed and used by the defenders within the limits of the said rivers Annan and Nith, or one or other of them, or in the estuary thereof, as fixed by the statutory Commissioners, and in violation of the statutory prohibitions, are illegal. (3) The stake-nets and other fixed engines placed and used by the defenders as aforesaid having been illegal, they have not acquired, and cannot acquire, a right or title to use the same by prescription or immemorial usage. (4) The said stake-nets or other fixed engines placed and used by the defenders as aforesaid being illegal, the same ought to be removed, and the pursuer is entitled to decree of declarator and interdict at his instance against the defenders, in terms of the conclusions of the summons."

The defenders contended that their fishings of Newbie had always been fished by means of stake-nets; and, owing to the strength of the current of the Solway, were not capable of being fished otherwise. Having been in use for time immemorial, their right was within the exception of the statute, and was not affected either by the Scotch or English Acts. The use of stake-nets in those fishings had been recognised in *M'Whir* v. *Oswald*, H. L., April 13, 1835, 1 Shaw and Maclean, 393.

And they pleaded:—"(3) The provisions of the Acts 24 and 25 Victoria, cap. 109, and 25 and 26 Victoria, cap. 97, and of the subsequent Acts, do not apply to or affect in any way the fishings belonging to and enjoyed by the defenders, and this in respect of the terms of these Acts taken in connection with the bye-laws issued by the Commissioners. (4) Under the provisions of the Acts 24 and 25 Victoria, cap. 109, and 25 and 26 Victoria, cap. 97, section 33, the prohibition against fixed engines does not affect the defender's fishings, which have been enjoyed by means of stake-nets in virtue of ancient rights and immemorial usage. (5) The defender and his authors having, for far more than the prescriptive period, fished by means of stake-nets without interruption, and this mode having been judicially recognised, and being the only mode practicable, the prohibitions in the statutes do not apply. (6) The bye-laws founded on by the pursuer being unintelligible and impracticable, and disconform to the provisions of the statute, they cannot be enforced. (7) The bye-laws founded on by the pursuer not having been framed, communicated, enacted, published, or approved in terms of the statute, the same are null, and cannot be enforced against the defenders."

The Lord Ordinary (Jerviswoode) pronounced the following interlocutor:—

"*Edinburgh, 25th March* 1869.—The Lord Ordinary having heard counsel on the proof and whole cause—finds, as matter of fact, 1*st*, that the defender Mackenzie, his predecessors and authors, have themselves, and by and through their tenants and others acting on their behalf, or under their authority, used and exercised the right of fishing for salmon by means of stake-nets, and other the like fixed engines, on and along the northern shore or coast of the Solway Firth, from a point at or near Annan Waterfoot on the east, to a point at or near the junction of the river or water of Lochar with the Solway Firth on the west; and 2*d*, That the Firth of Solway, including the portion thereof within which the right of fishing on the shore or coast to which the preceding finding relates is situated, does not in its true character form a river, or estuary of a river, but is an arm or other like