

was still alive, the petitioners had no interest in the estate.

Answers were lodged for Messrs Robert Young and William French, in whose favour the deceased's son had, before leaving this country, executed a formal deed of factory and commission. They, and also the widow, opposed the appointment of a judicial factor, on the ground that there was a legal presumption that the deceased's son was still alive, and that, as he had made provision for the management of his property in his absence, there was no ground for the intervention of the Court.

After discussion, the Lord Ordinary pronounced the following interlocutor, which was acquiesced in by the petitioners:—

“*Edinburgh, 12th December 1873.*—The Lord Ordinary having considered the cause, refuses the prayer of the petition, and decerns: Finds the respondents entitled to expenses: Allows an account thereof to be given in, and remits the same when lodged to the auditor to tax and to report.

“*Note.*—The late James Steel died intestate on 30th January last. His only child, James Steel junior, went to sea in 1850, about the age of 17 or 18, and before leaving this country executed a factory and commission in favour of the respondents, Mr Young and Mr French, giving them ample powers to manage his affairs in his absence, and power in particular to make up titles to any property, heritable or moveable, to which he might succeed during his absence. The last communication received from him was a letter dated in July 1857, addressed to his mother, in which he spoke of deserting the whaling ship in which he was engaged, having a great distaste for the employment, and from the letter, No. 15 of process, it appears that he did desert the ship in March of that year. Mr Young and Mr French, as factors and commissioners for James Steel junior, propose to enter on the administration of the estate of his father, but the petitioners—a brother and three nephews, and a niece of the deceased—have applied, by the present petition, to have the estate put under judicial management.

“Although upwards of 16 years have elapsed since any communication was received from James Steel junior, the legal presumption is that he is still in life. This being so, the respondents are entitled, by virtue of the factory and commission which they hold, to make up titles in his person to the estate, heritable and moveable, which belonged to his father, and it appears to the Lord Ordinary that more distant relations of the deceased, who can succeed to him only if it shall be shown that his son is dead, are not entitled in the existing circumstances, and in the face of the legal presumption that he is in life, to have the management taken out of the hands of those whom he has appointed his commissioners. These parties will take up the estate for preservation and administration only, and it is not said that there is anything in their peculiar circumstances or position which renders it advisable or expedient that the management of the deceased's estates should not be in their hands. It appears to the Lord Ordinary that, if there had not been any factory and commission in existence, a factor *loco absentis* to James Steel junior would have been the appointment which should be made in the circumstances, and that the estate of the deceased should, in that view, have been adminis-

tered by such an officer until at least the legal presumption of James Steel junior being still in life was in some way removed.

“At the close of the discussion the Lord Ordinary was disposed to think he might sist proceedings in this application for a time, in order that it might be seen whether the respondents, Mr Young and Mr French, would succeed in making up a title to the estate and enter on its administration, but having formed the opinion that they are entitled to do so, he has come to the conclusion that they are also entitled to have this application refused.”

Counsel for Petitioners—Mr Jameson. Agent
—D. J. Macbrair, S.S.C.

Counsel for Respondents—Mr Burnet. Agents
—Campbell & Smith, S.S.C.

Tuesday, January 6.

SECOND DIVISION.

STEWART'S TRUSTEES, &C., v. ROBERTSON
AND HEPBURN.

Property—Pertinents—Loch—Riparian Proprietor.

Circumstances in which held that the pursuers had failed to establish an exclusive right of property in a loch by reference to their titles, or by exclusive possession for upwards of forty years.

This was an action at the instance of Mrs Williamina Wilson Robertson or Stewart, widow of the late Stewart Robertson Stewart, Esquire of Derculich, and William Shaw Soutar, writer in Blairgowrie, sole accepting and surviving trustees of Stewart Robertson Stewart, and Alexander Robertson Stewart of Derculich, son of Stewart Robertson Stewart, against James Stewart Robertson, Esquire of Edradynate, and Mrs Helen Stewart Hepburn of Clunie and Blackhill, all in the parish of Logierait and county of Perth.

The pursuers sought to have it found that they “have under their titles the sole and exclusive right to the loch of Derculich, including the *solum*, and to the fishings thereof, together with the sole and exclusive right and privilege of using boats, nets, rods, and fishing in the said loch, and generally of exercising all rights of property in connection therewith, and that the defenders have no right of property or servitude, or other right whatever, in the said loch or fishings, and no privilege of using boats, or fishing in the said loch in any manner of way: and further, that they and their predecessors and authors have for time immemorial, or for forty years, been in the exclusive enjoyment and possession, under their titles, of the said loch of Derculich and the fishings thereof, including all the privileges connected therewith.” The summons further sought interdict against the defenders placing or using boats upon the loch, and entering or trespassing upon the same, or passing on to or over the *solum* thereof, and fishing in the loch either from the banks or from boats. Finally, the pursuers sought to have the defenders ordained forthwith to remove from the loch a boat placed thereon by them, or by their authority or permission.

The circumstances of the case were as follows:—The pursuers, Mrs Stewart and Mr Soutar, as trustees, and Alexander Robertson Stewart, are proprietors of the estate of Derculich, lying in the parish of Dull and county of Perth, conform to trust-disposition and settlement and codicil thereto annexed, executed by the late Stewart Robertson Stewart, Esquire of Derculich, dated 13th April 1858 and 26th September 1860, and recorded in the General Register of Sasines for the county of Perth 28th October 1871. The estate of Derculich includes the mill lands of Derculich, according to the pursuer's statement, "with the loch of Derculich, and fishings thereof." This the defenders denied. The loch is an inland lake, about two or three miles back from the river Tay. Salmon are not found in it, but there are trout and pike. On the east the loch is bounded by the pursuers' lands. James Stewart Robertson is proprietor of the estate of Edradynate, abutting on the west side of the loch, and immediately to the west of the pursuers' property, divided from it by the Derculich burn, which flows between the loch of Derculich and the Tay. The pursuers averred that theirs was the only property besides Edradynate which adjoined the loch; but the other defender, Mrs Helen Stewart Hepburn, who is heir of entail in possession of the estate of Blackhill, immediately adjoining the estate of Edradynate, asserted that the lands of Blackhill also abut upon the loch. Mr James Stewart Robertson is heir of entail next entitled to succeed to Blackhill.

The mill lands of Derculich, now belonging to the pursuers, and the lands of Lurgan and others, now belonging to the defender Mr Stewart Robertson, belonged at and prior to 1730 to one proprietor, Adam Reid of Edradynate. By disposition, dated 29th December 1730, Adam Reid disposed to his son John Reid both these sets of lands; and he again resigned the same into the hands of the Duke of Athole as superior, who granted a charter of resignation in his favour, dated 19th July 1738. In this charter the lands are thus described, "All and whole the lands of Lurgan, Ballinauld, and Shennavale, extending to merkland, with the shealing called Ryechois and Rhynalettrich, with all other houses, biggings, yards, commonities, pasturages, shealings, feull, feal and divott, in the common bounds used and wont, with fishings as well salmon as other fishings upon the water of Tay, woods as well oak as other woods growing and to grow thereupon, and all other parts, pendicles, and pertinents thereto belonging, used and wont, lying within the paroch of Logyrate, regality of Athole, and shire of Perth, and sicklike all and hail the miln of Derculich, with the miln lands thereof, not only the old croft called Croftorich pertaining yreto but also the new croft called Rearnamein, and with the outfield lately added thereto by James Robertson, younger of Balnacree—to be reckoned in all time coming a merk of Easter Derculich, and to pay public dues conform, together with the oak woods and other woods growing or to grow on the ground of the said miln lands. And with houses, biggings, grassings, shealings, commonities, and common pasturages above head dykes, and other pertinents belonging to the said miln lands, and with the astricted multures, sequels, and services of the said miln, used and wont particularly, but prejudice to the said generality, the multures, sequels, and services of the ten pound land of

Wester and Easter Derculichs, with the loch of Derculich and fishings thereof, and other mill-dams and water gangs belonging to the said miln of Derculich lying within the parish of Dull and Logyrate, regality of Athole, and shire of Perth."

The defenders explained that the charter quoted did not convey, and was not intended to convey, to John Reid, an exclusive right of property in the loch, and farther, that the loch then belonged in common to the Duke of Athole, the proprietor of Blackhill, Robert Stewart, the proprietor of Easter Derculich, except the mill lands thereof, and Adam Reid, the proprietor of Edradynate, and did not, and never had, belonged exclusively to the mill lands of Derculich. John Reid, and his spouse, by disposition, dated 2d August 1738, disposed to George Robertson the lands of Lurgan and others, retaining the mill lands of Derculich. The description of the lands of Lurgan and others contained in the last-mentioned disposition is the same as that quoted in the immediately preceding article, and no mention is made therein of the loch of Derculich and the fishings thereof. On the death of John Reid, his son and heir, also named John Reid, made up a title by service and infeftment following thereon, dated 7th November and registered 1st December 1763, to the mill lands of Derculich, including, according to the pursuer, the loch of Derculich and fishings thereof, both of which are specified *nominatim* in the infeftment. In the titles, intervening between that last mentioned and the disposition under which the pursuers hold the mill lands of Derculich, the description of the lands is the same as that above quoted, and expressly mentions "the loch of Derculich and fishings thereof." Under their titles the pursuers claimed to have the sole and exclusive right to and in the said loch of Derculich, including the *solium*, and to the fishings thereof of every description; and also the sole right and privilege of using boats on the said loch, and of fishing therein by all lawful means. In virtue of their titles the pursuers, their predecessors, and authors, claimed to have for time immemorial, or at least for forty years, enjoyed exclusive possession of the loch and fishings, and uninterruptedly exercised the privileges connected therewith. In particular, alone to have for the above period kept a boat upon the loch, and used the same without interruption for sailing and fishing over the whole of the loch, including those portions of it lying *ex adverso* of the defender's lands. On 29th June 1872, Messrs Adam, Kirk & Robertson, W.S., Edinburgh, agents for both defenders, wrote to the pursuers' agents to the effect that Mr Stewart Robertson had satisfied himself that under his titles he had the ordinary rights of a riparian proprietor in the loch of Derculich, and these rights he meant without delay to vindicate by declarator. They further stated that Mr Robertson was unwilling to commence proceedings without giving the pursuers an opportunity of satisfying themselves of the justice of his claims by an examination of his titles, and that he would delay proceedings for one month in order to enable them to do so. The pursuers' agents did examine the titles, and seeing no ground to alter their views of the rights of parties, intimated this to Messrs Adam, Kirk & Robertson. The defender Mr Robertson did not raise the threatened action of declarator. But on the 11th day of January 1873 a boat was placed upon the west side of the loch, and fastened by a chain and pad-

lock to a post driven into the shore. There it still remains. The complainers were informed that the boat had been placed there by the servants or tenants of the defender Mrs Hepburn; but as they were under the impression that the part of the shore where the boat was moored was in the estate of Edradynate, and as Mrs Hepburn had never before attempted or asserted right to place a boat upon the loch, the pursuers' agents, on 17th January 1873, wrote to Messrs Adam, Kirk & Robertson to inquire whether the defender Mr Robertson was responsible for what had been done. They received in answer a letter, dated 18th January 1873, stating "that the boat was put on Loch Derculich by our orders and on behalf of Mrs Hepburn, to protect her rights in the loch, which your clients indicated their intention of disregarding."

The state of the titles is fully set forth by the Lord Ordinary (SHAND) in his note.

The pursuers pleaded—" (1) In virtue of their titles, the pursuers have the sole and exclusive right to the loch of Derculich, including the solum, and to the fishings thereof, and are entitled to declarator to that effect. (2) *Separatim*. The pursuers and their predecessors and authors having for time immemorial, or at least for forty years, enjoyed the exclusive possession of the said loch and fishings, are entitled to declarator to that effect as concluded for. (3) The defenders having without right or title disturbed, or threatened to disturb, the pursuers in their peaceable possession of the said loch and fishings, should be interdicted as craved. (4) The defenders having without right or title placed the said boat upon the loch, should be ordained to remove it forthwith."

The defender James Stewart Robertson pleaded—" (1) The defender's lands being bounded by Loch Derculich, he has a joint right thereto with the pursuers and the other defender, who are the other riparian proprietors. (2) Under and in virtue of his titles and the possession following thereon, the defender is entitled to possess, use, and enjoy the said loch. (3) The pursuers have no title, either by express grant or otherwise, to an exclusive right to the said loch. (4) The pursuers not having had exclusive possession of the said loch, have not exclusive right thereto. (5) The pursuers have no right under their titles, and can acquire no right by prescription or otherwise, to any subjects not lying in the parish of Dull, and as a part of the said loch lies in the parish of Logierait, the pursuers have no right or title to the exclusive property of the said loch."

The defender Mrs Helen Stewart Hepburn pleaded—" (1) This defender should be assoilzied from the whole conclusions of the action, with expenses, in respect 1st, that the titles of the pursuers do not confer upon them an exclusive right to the loch of Derculich and to the fishing thereof; and 2d, that they have not acquired by possession any such exclusive right. (2) This defender is entitled to absolvitor, in respect that under her titles to the estate of Blackhill she has a right to the loch of Derculich and to the fishing thereof, and to place a boat thereon, and exercise all other rights of property therein, in common with the pursuers and the proprietors of the other lands adjacent to the loch. (3) *Separately*. This defender should be assoilzied, in respect that she and her predecessors and authors have from time

immemorial, at least for upwards of forty years, possessed the loch and fishing."

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 21st August 1873.*—The Lord Ordinary having considered the cause, finds that the pursuers have failed to instruct a title to the sole and exclusive right to the loch of Derculich, including the solum, and to the fishings thereof; *Separatim*, finds that the pursuers have failed to prove that under their titles, and possession following thereon, they have the sole and exclusive right to the said loch, including the solum, and to the fishings thereof; and that, on the contrary, it is proved that the pursuers, as proprietors of the lands of Easter Derculich, and the defenders, as proprietors of the lands of Edradynate and Blackhill respectively, have under their titles a joint right of property in the said loch, and the solum and fishings thereof: Therefore sustains the defences, and assoilzies the defenders from the conclusions of the action as founded on an alleged exclusive right belonging to the pursuers, and decerns: Finds the defenders entitled to expenses," &c.

"*Note.*—The object of the present action, instituted by the trustees of the late Stewart Robertson Stewart, Esq. of Derculich, is to have it declared that the loch of Derculich, including the solum and the fishings, is their exclusive property, and the pursuers' claim is rested (1) upon their title as of itself conferring an exclusive right, and (2) on the title, combined with alleged exclusive possession.

"The loch of Derculich is an inland lake, about two miles in length, surrounded by hills used for pasture. The burn of Derculich flows out of it, and runs into the river Tay after a course of from two to three miles.

"The pursuers are proprietors of two different properties, which, in the consideration of the case, it is necessary should be distinguished from each other, for they have been kept distinct in the titles, and have only been united in the same proprietor since the year 1770, a comparatively recent date, looking to the period for which the titles of the parties which have been produced run back. The first of these is the property or lands of Derculich, or more properly Easter Derculich, which begin above the loch and extend along the whole eastern side of it, and for some distance down the east side of the burn of Derculich. The second, which lies at a considerable distance below the loch of Derculich, consists of the mill of Derculich, with the mill lands and pertinents, and along with this property, and included in the title to it, the exclusive right of property of the loch is said to have been held by the pursuers and their predecessors. The defender Mr James Stewart Robertson is proprietor of Edradynate, and the defender Mrs Hepburn, of Blackhill. These lands lie on the west side of Derculich Burn, and these march with each other; and the whole land lying above what is called the head dyke, opposite the pursuers' property, and on the west side of the burn up to the loch, and all along the western side of the loch, consisting of pasture ground, is the joint property of the proprietors of Edradynate and Blackhill, and has been in time past possessed in common by the tenants of these properties. The pursuers are thus the proprietors of the land on the east side of the loch and of the burn. The defenders have

joint right to the whole property on the west side of the loch, and for some distance below it on the west side of the burn, down to the march which divides Edradynate from Blackhill.

"The pursuers, in the statement of their title, (condescendence 2), begin by founding on a disposition in 1730 by Adam Reid to his son John Reid, and charter of resignation in 1738 by the Duke of Athole following on that deed. But, for reasons which will be obvious immediately, it appears to the Lord Ordinary to be necessary to trace the titles from an earlier date, which there is no real difficulty in doing, as there is a pretty distinct progress extant for upwards of a century before 1730. The defenders maintain that the earlier titles are of much value as explaining the origin of the pursuers' alleged title to the loch, and as assisting to reach the true construction of the descriptions contained in the title deeds of all the parties, and particularly the title relied on by the pursuers, and the Lord Ordinary is of opinion that this contention is sound.

"For upwards of a century, prior to 1637, the whole lands surrounding Loch Derculich, and extending down the burn of Derculich, and now belonging to the pursuers and defenders, belonged to a family of Fergusson, in whose titles they were described as, All and whole the lands of Derculich, with the islands and lake of the same, mill and mill lands and pertinents, and the lands of 'Ed-dragwynyt' (Edradynate), with the pertinents. In 1837 portions of the lands were given off by Robert Fergusson of Derculich, and they have never again been all united. The particular lands now forming the property of the parties respectively, as these are specially named in the older titles of 1637 and subsequently, are the following, viz. :—(First), The pursuers' lands, now called Derculich, being Easter Derculich, consist of Easter Derculich, being the lands of Laigh of Derculich, Balmeanoch, afterwards apparently called Middletown, Toberindonich, Balnasuim, and the mill lands of Derculich; (Second) Dowerokan, or Druchrockan, now called Blackhill, the property of the defender, Mrs Stewart Hepburn; and (Third) the lands of Lurgan, Ballinauld, and Shinnavale, together constituting the lands and estate of Edradynate, the property of the defender, Mr Stewart Robertson.

"On 16th June 1637 Robert Fergusson, proprietor of the whole lands, including the exclusive right to the loch in question, by feu-charter conveyed to Adam Reid and Christian Stewart, his spouse, the lands of Lurgan, Balnalt, Schennwell (that is Edradynate), with the pertinents; and on the same day, as appears from an extract instrument of Sasine, he conveyed Dowchaochan or Blackhill, with the pertinents, and with a half of the fishing upon the loch of Derculich, to Francis Reid, the eldest son and heir apparent of Adam Reid above mentioned. It is of importance to observe that these conveyances were granted nearly a century before the title on which the pursuers found as giving them an exclusive right to the loch; that they were granted by one who was the proprietor of the loch at the time; that the properties conveyed were situated on the side of the loch; and that these properties were conveyed with their pertinents and without any special reservation of the loch or its fishings.

"After granting these feu-charters, Robert Fergusson, so far as regards the lands, remained pro-

prietor of the lands of Easter Derculich only adjoining the loch, and the mill and mill lands of Derculich on the burn. In 1865 John Fergusson, notwithstanding these conveyances, obtained a precept of clare constat from the Duke of Athole as superior, in which he was infet in 1667, in which the general description of the whole lands as contained in his ancestor's titles and above noticed was contained. The effect of this deed was, however, to complete his title to the property of the lands only which he had not conveyed away, and to the superiority of Edradynate and Blackhill. In or before 1687 the lands which continued to belong to the family of Fergusson seem to have been appraised by Thomas Fleming of Moness, as appears from an instrument of sasine following upon charter of apprising by the Marquis of Athole. And in 1723 Thomas and Robert Fleming, in right of the appraised lands, conveyed the lands of Easter Derculich, and mill of Derculich, and mill lands, to Alexander Robertson of Balnacree by disposition in which the description is in the following terms:—'All and Hail the five pound land of Easter Derculich, comprehending the particular towus and lands following—viz., the town and lands of Laigh of Derculich, the town and lands of Balmeanoch, the town and lands of Toberindonich, and the town and lands of Balnasuim, with the houses, biggings, yards, grassings, shealings, mosses, muirs, meadows, oak woods, and other woods, fishings, and other parts, pendicles, and pertinents yrof whatsomr; and all right that I have to the teinds, both great and small of the same; and sicklike All and Hail the mill of Derculich, miln lands, multure, sequels, and services yrto belonging, all lying wln the parochine of Dull and sheriffdom of Perth.' The terms of the description contained in this deed, and now quoted, are founded on by the defenders, and appear to be of much importance in the case, for the pursuers derive the right on which they found from Alexander Robertson, the dispoonee in this deed; and although he, as will immediately be seen, granted a conveyance of the loch of Derculich specially, there is no mention whatever of that loch as a subject conveyed to him in his own title.

"On 11th May 1725 Alexander Robertson, just mentioned, conveyed to Adam Reid, above mentioned, who had already acquired the lands of Edradynate, part of the lands acquired by him under the disposition of 1723—viz., the mill of Derculich, and the mill lands thereof, and the pertinents—and here occurs for the first time in the title with which the pursuers connect themselves since the whole properties belonging to the parties were held by the Fergussons, a special description and conveyance of the loch, after conveyance of pertinents of the lands generally. The description runs as follows:—'And with astricted multure, sequels, and services of ye sd. milln, used and wont, particularly but prejudice of ye sd. generality, the multure, sequels, and services of ye ten pound land of Easter and Wester Derculich, with ye loch of Derculich and fishing yrof, and oyr milln dams and water gangs belonging to the said milln of Derculich, lying within the parishes of Dull and Logirath, regality of Athole, and shire of Perth.' Thereafter, Adam Reid having resigned the subjects in the hands of the superior, the Duke of Athole, obtained a charter of resignation in his favour on 10th October 1728.

"It is of importance here to observe that such

right to the Loch of Derculich and fishings thereof as were conveyed to Adam Reid of Edradynate, the pursuers' author, was so conveyed, not by a proprietor of lands adjoining the loch as such proprietor, but by the proprietor of the mill of Derculich and the mill lands thereof, along with the mill and mill lands. The other lands which then belonged to Alexander Robertson were Laigh of Derculich, Balmeanoch, Toberindonich, and Balnasuim—being Easter Derculich—all lying on the east side of the loch, and adjoining it. Part of these lands—viz., Laigh, Balmeanoch, and Balnasuim—he conveyed also in 1725 to Patrick Bissat; the remainder—viz., Toberindonich—he retained for a number of years, viz., till 1738, when he conveyed them to Robert Stewart. A note of the titles of Middletown, Laigh, and Balnasuim, and Toberindonich is printed on pages 14, 15, and 16 of print A. From 1725, when Alexander Robertson conveyed the mill of Derculich, with the mill lands and pertinents and right to the loch in the terms above quoted to Adam Reid, until 1738, the mill lands and pertinents, and the lands of Edradynate, were the property of the family of Reid, but on 2d August 1738 Edradynate was conveyed by John Reid to George Robertson, and from that time till 1770, a period of thirty-two years, the mill and mill lands appear to have been held by a proprietor who had no lands adjoining the loch at all, and it was not until 1770, when James Reid conveyed these subjects to James Stewart of Derculich, who by this time had acquired right to the lands of Middletown, Laigh, Balnasuim, and Toberindonich (Easter Derculich), that the properties now belonging to the pursuers were united in one person, and the alleged exclusive right to the loch under the titles came to be held by the proprietor of Easter Derculich, lying on the eastern side of the loch. The late Stewart Robertson Stewart, the truster, now represented by the pursuers, acquired the property now held by them under the trust-disposition and settlement of his uncle, Alexander Stewart of Madras, and he (Alexander Stewart) acquired the property in 1805 by disposition granted by James Stewart above mentioned, in whom the lands of Easter Derculich, and the mill and mill lands of Derculich, had been united in 1770. It is clear that no exclusive right to the loch can be maintained in respect of the title to the lands of Easter Derculich for the description of these lands in the titles to them, and as contained in the instrument of sasine in 1757, in favour of James Stewart, proceeding on the conveyance by his father in 1755, merely enumerates the lands making up Easter Derculich, with their pertinents, and makes no special mention of the loch. It follows that the pursuers' claim to an exclusive right to the loch on the ground of express title rests entirely on the conveyance of 1725 from Robertson to Adam Reid, and the conveyance of 1770 by James Reid in favour of James Stewart. From 1770 till the present time no change has occurred in the terms of the pursuers' title.

“It appears to be unnecessary to trace particularly the history of the defenders' titles. It is enough to observe that on the 18th of June 1637 Edradynate and its pertinents, and Blackhill and its pertinents, were respectively disposed by the feu-charters already mentioned, granted by Robert Fergusson, proprietor of the whole of the old estate, and that these properties of Edradynate and Blackhill respectively have continued under

separate titles with substantially the same description to the present date. In the original charter of Blackhill the description contained among the pertinents of the lands the half of the fishing of the loch of Derculich. These lands were resigned and conveyed to the superior, John Marquis of Athole, in 1677; and when afterwards given out by the Duke of Athole to Duncan Stewart in 1730 by contract of feu, the description merely conveyed the lands with the pertinents, without any special mention of the fishing in the loch of Derculich.

“Having so far examined the titles of the parties, the Lord Ordinary is now in a position to deal with the question, whether the pursuers hold an exclusive title to the loch and its fishings? He is of opinion that the pursuers have failed to establish the existence of such a title, and farther, having regard to the proof which has been led, even assuming that the pursuers' title, if followed by exclusive possession, would warrant decree in their favour in terms of the conclusions of the summons, he is farther of opinion that they are not entitled to such decree, in respect they have not had such exclusive possession, but that the defenders under their titles have had joint possession of the loch with the pursuers and their authors.

“On the question of the title only, apart from the detailed proof of possession, it has been shown that the pursuers claim their right in virtue of the titles to the mill and mill lands. To begin with, this is not a favourable position. It no doubt happens that in 1770 these lands came to belong to the proprietor of Easter Derculich, whose lands extended along one side of the loch—that this must be regarded as an accidental circumstance, and does not affect the observation that the exclusive right of property in the loch, including the right to the solum of the loch, and the fishings thereof, is claimed as against the proprietors of all the lands abutting on the loch by the proprietor of lands at a considerable distance from it, under his titles to these lands. This is certainly an unusual and extraordinary state of matters. It may no doubt be the true position of the rights of parties, but where the right claimed is challenged, the pursuers must be in a position to show an unambiguous title, and clear exclusive possession, in a question with the proprietors on the shores of the loch who hold their lands under titles which give them right to the pertinents. In this view of the case, the pursuers, as proprietors of Easter Derculich, have themselves no right to the loch. The presumption will be, till the contrary is clearly shown, that the proprietors *ex adverso* of the loch have right to the loch also—*Cochrane v. Earl of Minto*, 1815, 6 Paton, 142.

“The pursuers' title to the loch is to be found for the first time in the disposition by Alexander Robertson to Adam Reid, of 11th May 1725, and with reference to this deed the first question which arises is, whether Robertson had a title which enabled him to give an exclusive right of property in the loch. A separate question is, whether the title granted by him according to its sound construction gave such a right of property. On both of these points the Lord Ordinary has formed an opinion against the contention of the pursuers.

“In regard to the first of them, it is to be observed that in 1725 the lands of Edradynate were held as a separate subject by Adam Reid. These lands had been conveyed with their pertinents in 1637, without any reservation or exclusion of the loch; and it appears to the Lord Ordinary that

there is no good ground for maintaining that a right to the loch *ex adverso* of the lands, and as a natural pertinent of them, had not been carried by that conveyance. The authorities on this subject were fully considered in the recent case regarding St Mary's Loch, of *Scott v. Napier*; and it is sufficient to refer to the opinions of the Lord Chancellor and the other learned Judges in the House of Lords as showing, in accordance with the views expressed by the institutional writers, that a title to lands on the banks of an inland loch, with the pertinents, carries a right to the loch *ex adverso* of the property, which will receive effect unless the title be overcome by an express title combined with exclusive possession—7 Macph., House of Lords Reports, p. 86. In the titles of the parties in the case of *Menzies*, 2 Macq., House of Lords Reports, 471, and in the St Mary's Loch case, lakes were enumerated among the pertinents, but no force or effect was given to this beyond what the Court stated would be given to the general term 'pertinents.' The opinion of the Lord Chancellor in the last of these cases may be specially referred to on this subject.

"From 1637 down to 1725 there was no separate and exclusive title to the loch in question held by any one. The lands of Edradynate and Blackhill and their pertinents were respectively held under separate titles. It is true that in the old titles of the estate the loch and island or islands were mentioned separately in the general description; but this circumstance did not derogate from the force of a grant of lands on the side of the loch with their pertinents, or render it necessary that the loch should be specially mentioned. The disponees under the conveyances of Edradynate and Blackhill were entitled to appeal to the older titles, for the purpose of shewing that the loch was clearly part of the property of their author, which, not having been reserved, was conveyed to them, so far as *ex adverso* of their properties, as a pertinent of their lands. In this view of the title, which the Lord Ordinary holds to be sound, Alexander Robertson had no right or title to convey an exclusive right to the loch of Derculich and fishings, for at the date of his conveyance the other proprietors on the shore of the loch had a joint right in it.

"But apart from this right in the proprietors of Edradynate and Blackhill, the Lord Ordinary is of opinion that Robertson's own title was limited, and did not give him an exclusive right to the loch. Its terms have been already quoted. The conveyance by Thomas and Robert Fleming in his favour contained (1) the lands of Easter Derculich and the pertinents, and (2) the mill and mill lands of Derculich, but no special right to the loch, and, indeed, no mention of it; and any disposition of the loch by him was a conveyance by one who had no power to grant it. A title of such a nature might, if followed by exclusive prescriptive possession, create a right of property; but in that case the possession would truly create the right, and must be unequivocal in its nature.

"The Lord Ordinary is, however, of opinion that the questions which he has now dealt with on the titles need not necessarily form the ground of decision in the case, because he thinks the deed of 1725, according to its sound construction, was not a conveyance of the property of the loch. The state of the title of the parties, and their apparent rights at that date, make it extremely improbable,

to say the least of it, that the exclusive property of the loch should be united with the mill and mill lands, so as to deprive all of the proprietors on its banks from any right to use it. It is much more reasonable to suppose that any right to the loch in connection with the mill, lying far below it, should be of the nature of a servitude in connection with the use of the mill, and that this was the right which Robertson would convey with the mill. It is difficult to suppose that he, continuing to be the proprietor of Toberindonich, on the eastern shore of the loch, should divest himself of all right to the solum, and to the use of the water of the loch, for the purposes either of benefit or of pleasure, including fishing, in favour of the disponee of Derculich mill. Accordingly, everything favours the construction of his grant as being one of servitude, and not of property, if that can reasonably be gathered from the language of the conveyance; and the Lord Ordinary is of opinion that that is its true construction. For after the words of conveyance the description first mentions the mill and the mill lands, including an old croft, and a new croft specially mentioned, with outfields lately added thereto, 'to be reckoned in all time coming a merk of the five pound land of Easter Derculich, and to pay publick dues conforme,'—showing how small the value of the subjects conveyed were compared with Easter Derculich, which the disponent retained. The description then proceeds to enumerate the pertinents, 'together with the houses, biggings, oak woods, . . . and oyr pertinents belonging to ye said mill lands, and with astricted miltures,' &c., . . . 'with ye loch of Derculich and fishing yrof, and oyr miln dams and watter gangs, belonging to the said milln of Derculich, lying within the parishes of Dull and Iogierait, regality of Athole, and shire of Perth.' These words appear to the Lord Ordinary to be intended to give, and do give, not a right of property in the loch and the solum thereof, but a right to use the loch as a pertinent of the mill. The loch is introduced among the pertinents conveyed, and it is referred to as a feeder of the mill, because it is classed with the mill dams and watter gangs, and indeed is mentioned as one of those, being given along with 'the other mill gangs and watter gangs belonging to the said milln.' Against this view it was observed that the right of fishing in the loch was given. But it appears to the Lord Ordinary that it is more reasonable to suppose that the grant of a right of fishing was given and taken *quantum valeat* to the proprietor of the mill, to be enjoyed along with the proprietors on the loch side, or it may be for the purpose of giving the proprietor of the mill as much control as possible over the use of the water, than that an exclusive right to the solum of the loch and the loch, and the loch itself and the fishings on it, was given, to the deprivation of the disponent himself, and the other proprietors whose lands were washed by it, of all right whatever in the loch, and he thinks that this is the true construction of the title. The terms of the title contrast very strikingly with the language used in the conveyance of the Duddingstone Loch—see *Dick v. Earl of Abercorn*, 1769, M. 12,813—where such a right as the pursuers claim was really given, and it appears to the Lord Ordinary that some such language as was there used would have been here employed if it had been intended to give more than a servitude in favour of the mill. This view is confirmed not

merely by the direct interest which the proprietors on the shore of the loch must necessarily have had in it for the use and enjoyment of their properties, and by the terms of the titles of Edradynate and Blackhill already alluded to, but also by the circumstance that Robertson himself held no exclusive grant of the loch which could warrant him in conveying it away in property, although he might be entitled, under the titles and the known state of possession at the time, to give a servitude in the terms contained in the deed.

"The counsel for the pursuers founded strongly on the reference in the titles to separate symbols of infeftment for the loch and fishings, as showing that a separate tenement was created, and a right of property given. The Lord Ordinary understands that such symbols are not mentioned in the older titles of 1539 and 1630, so that the loch, though there referred to, was a pertinent of the lands, and not a separate tenement, and was so held when Edradynate and Blackhill were given off. A net, and sometimes net and coble, for said fishings, appears in the later deeds down to 1767, after which 'a little water' for the loch appears in some of the deeds. The Lord Ordinary cannot attach any real weight to this circumstance. A net or net and coble as a symbol for trout fishing can have no real force or meaning, and the introduction by a conveyance in certain of the deeds, in and after 1767, of the symbol of water for the loch, cannot aid in the construction of the title of 1725, or make the loch from 1767 a separate tenement. It may be, and probably is the truth, that the somewhat loose language used in giving the servitude in 1725 led those into whose hands the titles afterwards came to regard the right given as one of property, and the same circumstance may account for the view which it appears Mr Stewart, who bought the lands of Easter Derulich and the mill lands in 1805, entertained as to his right in the loch. But the mention of symbols in this way cannot, in the view of the Lord Ordinary, be of any real importance in the decision of the case.

"In the view which the Lord Ordinary takes of the title as now explained, the possession on which both parties found is not of material consequence. That possession has certainly not been exclusive on the part of the pursuers or their predecessors. The character of the possession which has followed on a title may be legitimately referred to for the purpose of explaining the title itself and aiding in its construction, and if the pursuers had been able to show that in connection with the possession of the mill and mill lands there had been an assertion, by acts of possession or otherwise, from time to time, of exclusive right to the loch, that acquiescence had occurred on the part of the proprietors on its banks, this would have raised a strong argument against the construction of the title which the Lord Ordinary has adopted, and might possibly have been sufficient to lead to a different construction, and to rear up the title into one which conferred a right of property, and not a servitude merely. On this subject the Lord Ordinary can only say that he does not think the proof at all comes up to what would be necessary for this purpose.

"Assuming, however, contrary to the view of the Lord Ordinary, that the title is to be construed as a conveyance of a right of property, the question remains, what effect is to be given to it, and to the competing title held by the defenders, and the

proof of possession which has been adduced by the parties? In this aspect of the case, as the Lord Ordinary has already said, the pursuers have a serious difficulty to surmount in the fact that Robertson, from whom they acquired their title, had himself no right or power to grant it. Their title is one *a non habente potestatem*, and could only be made effectual by very clear proof of exclusive possession, creating a right which the deed alone could never give. The proof, in the opinion of the Lord Ordinary, does not establish any such possession.

"But, even assuming this difficulty to be overcome, the state of the title in 1725, and from that time onwards, has been such as to leave it open to the defenders, as well as to the pursuers, to hold and maintain a right to the loch, provided the possession of the pursuers' predecessors has not excluded them, for in 1725, when Robertson granted the conveyance to Reid, the properties of Edradynate and Blackhill were held with their pertinents, including the loch; and seeing that the titles to these properties and their pertinents are of earlier date than the exclusive title founded on, unless the proprietors of these lands have been excluded from possession, a joint right in the loch as a natural pertinent of these lands belongs to them. The Lord Ordinary is of opinion that there has not been exclusive possession on the part of the pursuers. He thinks the proof shows to some extent a preponderance of possession in their favour, if the evidence as a whole on the one side be weighed against the proof as a whole on the other. This preponderance, however, is not great, and certainly not such as could, in the opinion of the Lord Ordinary, deprive the defenders of that right to the loch which he thinks, under their titles and the acts of possession proved, they have established. In some respects the defenders and their predecessors have exercised rights in the bed of the loch more extensively than the pursuers, and that acting as proprietors, and not by favour of the pursuers, and no single act whatever of exclusive possession by the pursuers, or interruption of the acts of the defenders, has been proved.

"The main point, and it is not an unimportant one, on which the pursuers have founded, is, that they alone have kept a boat for time immemorial on the loch, and which has been regularly used from time to time for fishing; but this fact loses much of its weight from the circumstance that the use of the boat was had by the proprietors of Edradynate at any time when it was wanted. The property of Blackhill has been possessed by persons who had no liking for fishing, and indeed the same thing may be said of Edradynate, for the present proprietor's father apparently cared only for salmon fishing, which he had in the Tay, and his son, the defender, fished from time to time in the loch on the footing that he was exercising a legal right. He had no difficulty in getting the boat when it was wanted, and so far as the extent of use was concerned, there appears to have been no reason for having two boats on the loch. One was sufficient for the use of all the parties who desired to sail or fish on the loch. Mr Alexander Stewart, already mentioned, who acquired the property in the beginning of the present century, appears to have enjoyed having the loch occasionally swept by the net, perhaps once or twice a-year, and for a number of years had a net for the purpose, but on most of these occasions Mr Robert-

son of Edradynate was present, and on one of them he took a boat and net with him. The other matters of evidence mainly founded on by the pursuers were the interdict proceedings adopted in 1864 against Mr Robertson in the Sheriff-court, in which interdict was granted, and the advertisements of Easter Derculich, with the exclusive right of fishing. It is explained by Mr Robertson, the defender, that from the date of the interdict, the question being one of heritable title, he had avowed his intention of raising an action of declarator in the Court of Session, which he would have done if the present proceedings had not been adopted, and that he had not adverted to the terms of the advertisements. On the whole, the Lord Ordinary does not attach great importance to these comparatively recent proceedings. For the defenders it has been proved that in addition to the exercise of a right of fishing on the part of the proprietor of Edradynate, and the fishing by tenants on that property and Blackhill, and to the use of the boat by Mr Robertson when it was wanted, and his presence at the fishing excursions already referred to, which may be attributed either to friendly feeling between the proprietors, or to his right of property, sand and gravel were taken when required from the loch for the use of Blackhill and Edradynate houses and grounds, and for making a filtering pond on the latter of these properties, and that limestone was quarried by the tenants of both properties from part of the bed of the loch when the water was low, and that the cattle of these tenants pastured exclusively on the island at the foot of the loch. All of these acts are just such acts of use as the loch as a subject of property admitted of, and as were founded on in the St Mary's Loch case above mentioned. There will generally be a preponderance of use by one or more proprietors where several have a joint right in a loch, varying according to the circumstances and tastes of the parties. In the present case the Lord Ordinary can only say that, on the whole, and particularly with reference to the use of the boat, he thinks there was rather a preponderance of such use or possession on the part of the pursuers' authors, although in some respects, and more particularly in the working of limestone and the pasturing of the island, the use was greater, and indeed solely, on the part of the defender's predecessors. In this state of matters, having regard to the titles, the Lord Ordinary is of opinion that the possession was such that the defenders, holding their properties with the pertinents, must be held to have possessed the loch as proprietors, and was not such as the pursuers must establish in order to give them the exclusive right which they claim."

The pursuers reclaimed.

Authorities—*Dick v. Earl of Abercorn*, 1769, M. 12,813; *Cochrane v. Earl of Minto*, 1815, 6 Paton 142; *Menzies*, 2 Macq. H.L. 471; *Scott v. Napier*, 7 Macph. H.L. 36.

At advising—

LORD JUSTICE-CLERK—My Lords, we have heard in this case a very able and exhaustive argument addressed to us from both sides of the bar, and upon some points I might possibly have had some reasons for doubt had it not been for the ground upon which I have come to a conclusion. That ground is, that Fergusson, who was in 1637 the proprietor of the whole of the lands, those alike now be-

longing to the pursuer and those belonging to the defenders, did actually divest himself of the *solum* of the loch by the two conveyances which he executed. Were it a question in my mind whether Fergusson, who was undoubtedly in 1637 proprietor of all the lands, had so divested himself, and if I could have thought that he did not, but retained the right to the *solum* of the loch, then it would be necessary to search in order to find whether the proprietorship of the *solum* had subsequently passed, and it would seem perhaps that the conterminous proprietor might have acquired that right. But, my Lords, I have been quite satisfied that these two feu-charters to Adam Reid and to Francis Reid conveyed the lake itself *pro indiviso* to the riparian proprietors. The general principle is clearly apparent from the authorities, that the title to land adjoining and abutting on a lake is a sufficient title to the *solum* of the lake, unless some express title giving this *solum* to another than this riparian proprietor can be shown. This doctrine is so clearly established in the case of *Lord Napier* as to leave no room for doubt. If this be so, it is quite unnecessary to go at all into the argument maintained before us upon these titles of Mr Stewart, for the original conveyance by Fergusson not having given him the *solum*, the clauses in any subsequent titles and conveyances are rendered of no avail. I have some doubts as to whether the conveyance of these mill lands of Derculich did not convey along with them a right of frontage to the lands of Easter Derculich, which passed to other parties, but this does not affect our judgment. On the question of possession for the prescriptive period, it can only be observed that while the *balance* of evidence is on the pursuers' side, it is very far from showing an *exclusive* possession such as would be enough to exclude the defenders' right as created by these conveyances

LORD BENHOLME—This case has been considered very deliberately by the Lord Ordinary, and, with the exception of one observation, I substantially agree with what he has said in the note to the interlocutor reclaimed against. That observation is to be found in the following sentence: "The terms of the description contained in this deed, and now quoted, are founded on by the defenders, and appear to be of much importance in the case, for the pursuers derive the right on which they found from Alex. Robertson, the donee in this deed; and although he, as will immediately be seen, granted a conveyance of the loch of Derculich specially, there is no mention whatever of that loch as a subject conveyed to him in his own title." I think this is a mistake. We are not in possession of full titles, but, looking at the charter of resignation (p. 23, letter B), the superior distinctly sets forth the special conveyance on which the case now turns. With the exception of that observation, which does not bear much on the question, I think the analysis of the titles given by the Lord Ordinary is very accurate. We cannot do anything but assolve the defenders in this action. The only substantial title to the loch in the pursuer is that connected with the mill and mill lands. I confess I see no evidence that these lands ever abutted on the loch so as to constitute them contiguous, and render their owners riparian proprietors. Now, if these lands were entirely discontinuous, it does appear to me to be extremely hard to suppose that the right in the loch should be an out and out right,

not merely to the waters of the loch, but even to the very *solum* itself.

LORD NEAVES—I have no difficulty in concurring with the views expressed by the Court. I think the Lord Ordinary is right. The rule fixed by the authorities is that without a special grant the property of the *solum* of a loch is presumed to be in the riparian proprietors *pro indiviso*. Now the only speciality founded on here is the clause in the titles of the mill and mill lands, "with the loch of Derculich, and the fishings thereof." I cannot think it clear that this is a substantive and special conveyance of the whole loch. It was merely an accessory to the enjoyment of the mill. There is no contiguity of mill and loch, and this being so, there is a presumption against the loch being given, but a very obvious ground for the grant that was made—the loch being in fact a mill-dam—one of the water-dams to supply the mill. The possession of the pursuers is not at all consistent with the views they have maintained on that point.

The Court adhered to the judgment of the Lord Ordinary, with expenses.

Counsel for Pursuers—Dean of Faculty (Gordon), Q.C., Guthrie Smith, and H. J. Moncreiff. Agents—Mitchell & Baxter, W.S.

Counsel for Defender, Mr Stewart Robertson—Lord Advocate (Young), Q.C., and Marshall. Agents—Adam, Kirk & Robertson, W.S.

Counsel for Defender, Mrs Stewart Hepburn—Solicitor-General (Clark), Q.C., and Adam. Agents—Adam, Kirk & Robertson, W.S.

Tuesday, January 6.

FIRST DIVISION.

[Lord Gifford, Ordinary.]

DUNCAN AND OTHERS v. SALMOND AND OTHERS.

Counsel—Client—Mandate—Effect of Acts of Counsel to bind Client—Reclaiming—Action of Reduction—Competency.

Where a minute of abandonment of a claim in a multiplepounding, signed by counsel, was lodged for certain parties, in consequence of which decree was pronounced against them; in an action at their instance for reduction of said decree on the ground that they had not authorised said minute, *Held* (1) that a client is bound, in a question with the opposite party, by every judicial or forensic act of his counsel or agent in the conduct of the cause—and this includes even the abandonment or withdrawal of the action or defence; (2) that the present action, being in reality an attempt to reclaim against the previous judgment, was incompetent.

On 1st March 1871 an action of multiplepounding was brought in name of the trustees of the late Miss Ann Duncan of Balchrystie, for the purpose of distributing her estate. The real object was to determine who were the heirs and next of kin of Miss Duncan, for although she left a trust deed, and intended to have executed a relative deed of directions, she executed no such deed, and consequently, in effect died intestate. A great variety

of claims were lodged by parties claiming to be next of kin, or among the next of kin, of Miss Duncan, and among others the four pursuers in the present case appeared and lodged a claim, and the record was closed on 6th February 1872, and a proof allowed, the diet for which was afterwards adjourned. The present pursuers were parties to the closed record and to the proof allowed thereon. At the adjourned diet of proof, on 19th March 1872, a joint minute was lodged for a number of the claimants, and among others, for the four pursuers of the present action, stating that "they did not now insist in the claims lodged for" them, and craving the diet of proof to be discharged. This minute is duly signed by the counsel for all the parties, and among others by the counsel for the present pursuers. On this minute being lodged, the Lord Ordinary the same day discharged the order for proof, as regarded the claimants who had not withdrawn, till 14th May 1872. On 14th May 1872 the proof proceeded, the question being between Mrs Thomas and the Crown, who claimed as *ultima hæres*; commissions were granted to examine infirm witnesses who were unable to attend, and the proof was adjourned till 29th May. At the adjourned diet new claimants appeared, who on certain conditions as to expenses were allowed to lodge claims. The record was closed of new and proof ordered to proceed. On 31st May 1872 additional claimants appeared again, and the same course was followed, the record being again closed of new on 31st May 1872. The proof proceeded on 20th and 21st June, and after additional depositions were got in, the whole parties were heard, and, on 30th July 1872, the Lord Ordinary disposed of the whole case on the proof and on the merits by ranking and preferring certain of the claimants to the whole moveable succession of Miss Duncan, and repelling the claim of the Crown. This is the leading judgment which the pursuers now seek to reduce. A great deal of procedure followed, having for its object the carrying out of this judgment. The judgment was not reclaimed against, but was understood to be acquiesced in by all parties interested. Certain of the claimants were found entitled to expenses, and as the whole fund was to be divided among the various claimants, it was arranged that these expenses should be taken out of the fund, which was done accordingly. There is a long series of interlocutors after judgment of 30th July 1872, about twenty in number, having for their object the carrying out of the judgment of 30th July 1872, disposing of the interest of the claimants preferred *inter se*, sisting a judicial factor in room of the trustees, and similar procedure. On 29th November 1872 the present pursuers tendered a new claim in the multiplepounding, which the Lord Ordinary, reserving all questions of competency, allowed to be seen: At the date of the Lord Ordinary's judgment in the present case nothing further had been done in reference to this claim. In these circumstances, the present pursuers, on 7th February 1873, brought the present action of reduction, to reduce and set aside the decrees of preference of 30th July 1872 and the whole procedure following thereon, and concluding for a decree against the judicial factor ordaining him to pay Miss Duncan's whole moveable estate to the present pursuers.

With reference to the minute of abandonment above mentioned, the pursuers averred that after the diet of proof of 7th March 1872 (in the former