

something has followed on the faith of the agreement, then another rule must be applied. Here £40 has been paid to account, and it is a balance of £34 that is now sued for. More than half of the agreement has therefore been performed, and accordingly *res non sunt integra*. In these circumstances, as a mistake has undoubtedly arisen when the contract was made as to the price which was to be paid for the stones, we must just resort to the principle laid down in the case of *Wilson*, and hold that the defender must pay the market price of the coping-stone, while the quantity which has been delivered will limit the amount of his responsibility.

LORDS MURE and SHAND concurred.

LORD ADAM, who was absent on Circuit when the case was argued, delivered no opinion.

The Court affirmed the interlocutor of the Sheriff appealed against except as regarded the finding for expenses, and found no expenses due.

Counsel for Pursuer (Appellant)—J. A. Reid.
Agent—William Duncan, S.S.C.

Counsel for Defender (Respondent)—Scott.
Agents—Begg & Bruce Low, S.S.C.

Friday, November 6.

SECOND DIVISION.

[Lord Trayner, Ordinary.]

WAUGH *v.* WYLIE.

Property—Boundary—Loch—Presumption arising from Natural Configuration of Ground—Possession.

Where the lands of two proprietors met at a loch, their respective rights in which and the boundaries of their estates were not disclosed by their titles, and a dispute arose as to whether one of them had any right in the loch—held that the natural configuration of the ground led to a presumption that the loch formed the boundary, that the *onus* of proof was therefore on the proprietor alleging right to exclude the other from the loch, and that he had not discharged that *onus* either by proof of a definite boundary including the loch in his estate or by proof of exclusive possession.

James Waugh, farmer, South Arnloss, Stirlingshire, was heritable proprietor of the lands of Barns, which come down to the east and south edges of a sheet of water called "The Little Black Loch." The property of Barnsmuir (which did not belong to either pursuer or defender) lies to the south and west of the sheet of water, and the property of Lochhouse, belonging to Alexander Wylie, W.S., Edinburgh, lies on its north side. This action was brought by Waugh against the proprietor of Lochhouse to have it declared that "the march or boundary between the pursuer's said lands of Barns and the defender's said lands of Lochhouse to the north of the loch called 'The Little Black Loch' is the march or boundary laid down and defined on the Ordnance Survey sheet herewith produced by the red line from the point marked X to the point marked Y, and

formed or marked upon the ground by the five march-stones, which are marked on the said Ordnance Survey sheet by the letters A, B, C, D, E: And . . . that the said Little Black Loch shown on the said Ordnance Survey sheet is not comprehended within the marches or boundaries of the defender's said lands of Lochhouse, and that the defenders have no right, title, or interest to or in the said Little Black Loch: And further to have the defenders, and those deriving right from them, interdicted, prohibited, and discharged from troubling or molesting the pursuer in the peaceable possession and enjoyment of his said lands according to the march above referred to, or from invading or encroaching thereon in any manner of way in all time coming."

The pursuer averred—"(Cond. 3) From time immemorial, or at least for forty years and upwards prior to March 1883, the march shown upon the said Ordnance Survey sheet, and formed by the said five march-stones, has always been recognised and acknowledged as the march between the said lands of Barns and the said lands of Lochhouse, and the pursuer and his authors and their tenants, and others deriving right from them, have possessed the said lands of Barns for the said period conform to the said march. There is not, and never within the memory of man has been, any regular fence along the northern boundary of the said Little Black Loch other than the said five march-stones."

The defender denied these averments, and answered as follows—"Explained that the defenders, their authors, and their tenants, have from time immemorial, or at least for forty years and upwards, possessed their lands of Lochhouse as riparian proprietors on the said loch without any fence, obstruction, or hindrance whatever between their lands and the said loch. They have cultivated and grazed to the waters of the said loch, and have used the waters of the said loch for watering cattle, steeping lint, fishing, and other purposes at their pleasure without interruption or interference during the said period. There are valuable minerals under the loch, and the defenders, their tenants, and their authors have also partly wrought the minerals under the loch within their part of the *solum*. The stones mentioned by the pursuer are not march-stones between Lochhouse and Barns; and the effect of the new line of march now for the first time set up by the pursuer would be, as the defenders understand the pursuer's claim, to exclude the defender's lands of Lochhouse from all access to the said loch from which they are called, and which is a part and pertinent of the lands of Lochhouse as regards the shore and *solum* thereof *ex adverso* of the said lands."

The pursuer produced the following titles—(1) A charter of alienation granted by the Earl of Linlithgow and Callander, dated 21st February 1709, in favour of John Bowie, in which the lands conveyed were described as the lands of Holehouse and pertinents, and were further described as "meithed and marched conform to a decret of division betwixt us and our other feuars of Holehouse." The lands were conveyed with the "haill fishing upon the Black Loch and Little Loch belonging to us." (2) A disposition by Charles Tinker and Cornelius Bryce, the successors of John Bowie, dated 26th May 1819, in favour of Thomas Johnston, of the lands of

Barnsmuir, in which the lands were conveyed as "All and whole the lands called Barnsmuir, being a part of that part and portion of the wester part of the lands of Holehouse now known by the name of Barns." The lands of Barnsmuir were described as bounded as follows—"On the north partly by the highway leading from Linlithgow to Airdrie, and partly by the lands of Lochhouse; on the east, partly by the Little Loch and partly by the remaining lands of Barns, and divided therefrom by a straight line drawn from two march-stones placed at the north-west corner of the said loch straight to the bottom of the hedge on the lands of Stoneridge, which is the easter boundary of the park immediately on the east side of Stoneridge Planting, and which hedge is called Meikle Hedge; on the south," &c. The grantor reserved right to himself and his successors to build a mill and to dam up the water in the Little Loch for the supply of the mill to a height not exceeding $3\frac{1}{2}$ feet above the channel of the outlet therefrom, without being liable in damages.

The defender produced, *inter alia*, a disposition dated 13th October 1873, in which the lands were described as "All and whole that part and portion of the lands of Slamannan commonly called Lochhouse, with parts, pendicles, and pertinents thereof."

The pursuer pleaded—"(1) The northern march between the pursuer's lands of Barns and the defender's lands of Lochhouse being the march referred to in the libel, the pursuer is entitled to declarator as concluded for. (2) The pursuer and his authors having from time immemorial had exclusive possession to the south of the said march, is entitled to decree. (3) The Little Black Loch being entirely to the south of the said march, and the defenders and their authors having had no possession of the said loch, the pursuer is entitled to declarator as concluded for. (4) The defenders having encroached upon the pursuer's property, the pursuer is entitled to interdict as concluded for, with expenses."

The defender pleaded—"(3) The pursuer's material averments being unfounded in fact, and the prescriptive possession being with the defenders, the defenders are entitled to absolvitor with expenses."

A proof was led, the import of which very fully appears in the Lord Ordinary's note to his interlocutor and in the opinions of the Lord Justice-Clerk and Lord Craighill.

The Lord Ordinary (FRAYNER) pronounced this interlocutor—"Decerns in terms of the first declaratory conclusions of the summons, and further interdicts the defenders, and those deriving right from them, from troubling and molesting the pursuer in the peaceable enjoyment and possession of his said lands, according to the march referred to in the said declaratory conclusion, and decerns, &c.

"*Note*.—The leading question in this case is whether the pursuer has established that the boundary between the lands of Barns and the defender's lands of Lochhouse is a series of march-stones alleged to have been placed round the northern end of the Little Black Loch.

"The earliest title produced of the pursuer's lands is a charter of alienation granted by the

Earl of Linlithgow and Callander, dated 21st February 1709, in favour of John Bowie—[*His Lordship here quoted the terms of the charter as above*].

"The decree of division referred to has been lost and is not forthcoming. The clause as to the fishing is somewhat ambiguous. It may be read as containing an assertion that the whole fishing in the Little Black Loch belonged to the grantor, and was conveyed to the grantee, or it may be that the hail fishing so far as it belonged to the grantor was conveyed. The fishing seems to be of little or no value, and the matter is not cleared by any proof of exclusive possession of the fishings. If, as the pursuer contends, the whole of the Little Black Loch was included in the lands of Holehouse, it does not appear why there should have been any separate mention of the fishings, which would have passed as a pertinent. It does not appear to me that the mention of the fishings throws much or any light on the respective contentions of the parties.

"The next title which may be referred to is a disposition by Charles Tinker and Cornelius Bryce, the successors of John Bowie, dated 26th May 1819, in favour of Thomas Johnston, of the lands of Barnsmuir.—[*His Lordship here quoted as above the terms of the disposition.*]

"From this description it is to be inferred that the lands of Barnsmuir, from the road from Linlithgow to Airdrie eastwards, are bounded on the north by the lands of Lochhouse, and that no part of Barns lies between Barnsmuir and Lochhouse; also that two march-stones, whether they exist there now or not, had been placed at the north-west corner of the loch. It appears to me that it may be reasonably presumed that the most northerly of these two march-stones had been placed at the march between Lochhouse on the one side and Barns and Barnsmuir on the other, and further, that the reservation of a right to dam up the water of the loch indicates a belief on the part of the proprietor of Barns at the time that he was entitled to deal with the water of the loch without reference to other adjoining proprietors.

"I do not think that there is anything in the pursuer's subsequent titles calling for particular remark.

"There is nothing calling for particular observation in the titles of the defenders' lands, except that they are not described by boundaries. In the disposition in their favour, which is dated 13th February 1873, they are described as 'All and whole that part and portion of the lands of Slamannan commonly called Lochhouse,' with parts, pendicles, and pertinents thereof.

"As I have stated, the disposition of 1819 suggests that two march-stones were placed at the north-west corner of the loch, and I think it probable that the stone marked A on the plan is one of these. But these stones were placed as march-stones between Barns and Barnsmuir, and not between Barns and Lochhouse, and therefore the fact that they were so placed goes no way to prove the existence of similar march-stones between Barns and Lochhouse round the end of the loch, as alleged by the pursuer.

"With reference to the question whether the march-stones exist, and whether they are those specified by the pursuer and delineated on his plan, it does not appear to me to be proved

that there is anything in the character of those stones to indicate that they are march-stones. They are the ordinary boulder stones found in the neighbourhood. They are not marked in any way as march-stones. They are, however, perhaps somewhat larger than other stones in the immediate vicinity, and they are situated, or have been placed with a certain amount of regularity, round the northern margin of the loch, or nearly so. If, however, the evidence of the pursuer's witnesses, and particularly of James Johnston, Thomas Johnston, and George Pettigrew, is to be relied on, there is no doubt that they are march-stones. It is somewhat singular, however, that if they were march-stones, that fact should not have been more generally known than it appears to have been. I see no reason, however, to disbelieve these witnesses, and I think that their evidence is corroborated by the possession which the proprietors and tenants of Barns have had of the subjects. Here, again, however, it must be remarked that the value of the subjects, above ground at least, is inconsiderable, and therefore some of the acts of possession founded are not very decisive.

"There is no doubt that the proprietors and tenants of Barns have possessed and enjoyed for time immemorial—at least from 1819—a road from the Barns steading and offices to the Lintlithgow and Airdrie public road. From Barns this road proceeds westwards till it reaches nearly to the outlet of the loch, at or near the point Y on plan No. 6; it then proceeds round the northern margin of the loch, immediately to the south of the alleged march-stones, to the north-west corner, until it reaches what is now recognised as the boundary between Lochhouse and Barnsmuir, at or near the point marked X on the plan, whence it proceeds along that boundary through the lands of Lochhouse to the public road.

"It is maintained by the pursuer that the whole of this road was on the lands of Barns before Barnsmuir was separated from it, and that accordingly that part of it lying between the points X and Y is not a servitude road, but was then, and is now, wholly within their own lands.

"It is true that that part of the road from the west side of the loch to the public road can now only be regarded as a servitude road over Lochhouse, but I do not think that that was its original character.

"The titles are silent on the subject of the road. It is clear, however, that when Barnsmuir was part of Barns, the tenants of Barns would have access to the public road through their own fields, and it seems to me most improbable that they should at the same time have had a servitude road over Lochhouse running parallel with their own march. I think the evidence shows that the original march between Barnsmuir and Lochhouse ran from the stone at the doghillock on the Airdrie road westwards till it met the march running north and south between Barns and Barnsmuir.

"It appears from the evidence of Hodge, who went to Barns just at the time of the sale in 1819, and of other witnesses, that there was a 'sheugh' along the north as well as the south side of the strip of ground along which the road now passes, and that there was then no hedge along the south side of the road. Mrs Shanks, who was born in 1818, remembers the 'sheugh' and she

says the hedge was a little hedge when she first remembers it. The tenants of Barns may have been mistaken in supposing that the property of the strip of ground had been reserved to Barns, but in these early days they exercised rights over it—such as cutting the grass which grew on it—which would not have been permitted had it belonged to Lochhouse.

"The truth appears to me to be that the proprietors of Lochhouse have now acquired by prescription a right to this strip of ground, and that the road from the road westwards can only now be regarded as a servitude road. The direction in which that part of it runs between X and Y, passing round the head of the loch, can only be explained as being the best road the tenants of Barns could get through their own ground. If this be the true character of the road, it goes to support the pursuer's contention that the stones in question are march-stones, seeing that the road passed immediately to the south of these stones.

"It is further maintained that the proprietors and occupants of Barns have had possession of the whole loch, and that the defenders or their predecessors have exercised no similar acts of possession.

"It appears that the tenants of Barns cut pipes and grass over the whole loch wherever they grew; and, in particular, that they constantly cut grass on the north-west side as far north as the stone marked A.

"As regards the matter of steeping lint, the neighbours who wished to steep lint in the loch applied to the tenants of Barns for leave to do so, and never to the tenants of Lochhouse. It is true that the best place for steeping lint was at the eastern side opposite Barns, and persons wishing to steep lint could not do so without having access through the Barns fields, and obtaining the use of turf, &c.

"But, on the other hand, the tenants of Barns seem to have claimed and exercised the exclusive right to dam the loch for the purpose. There is also evidence that the tenants of Lochhouse obtained permission to steep lint in the loch in exchange for the privilege of allowing the tenants of Barns to take their carts to the public road through the Lochhouse fields. There is also evidence that in one dry season the tenant of Barns received a small sum of money, £5, from the millers on the stream leading out of the loch, for allowing the water of the loch to pass down the stream. There is also evidence that the tenant of Barns cut a sleugh or ditch into the loch in order to let the water of the loch more freely away. These acts may not perhaps be of much consequence, but they seem to be just such acts of possession as such a subject was capable of.

"I do not see that there were any similar acts of possession on the part of the tenants of Lochhouse. No doubt their cattle did pasture down to the loch and drink from it, and the tenants occasionally took water from it, but that is easily explained by the fact of the good terms on which the respective tenants were, and it may be that the proprietors of Lochhouse have thereby acquired certain rights of servitude which it is unnecessary to determine in this process.

"On the whole matter, therefore, I think the pursuer has made out his case.

"Commencing at the west, I think that the boun-

dary starts from the point where the boundary between Barns and Barnsmuir—as described in the Barnsmuir disposition—meets the southern boundary of the road leading from the loch westwards—that is, the point marked X on plan No. 6—thence in a straight line to the stone A, thence round the loch by the march-stones marked on the said plan to the stone E, and thence to the point Y, where the road from Barns crossed the outlet of the loch. If this be so, it follows that the defenders have no right to the *solum* of the loch within these boundaries; but I do not think that it can be determined in this process that the defenders have no right or interest in the Little Black Loch. Should they assert any right, the pursuer can then meet their claim.

“The preceding interlocutor and note have been prepared by Lord Adam, who took the proof and heard the case.”

The defender reclaimed, and argued—His lands were *de facto* bounded by the loch. He was, then, a riparian proprietor, and the legal presumption arising from such contiguity of position was that he was entitled to as much of the loch as effeired to the extent of his lands as compared in extent with those of the pursuer on the margin of the loch. This presumption the pursuer had utterly failed to displace by proof of exclusive possession.

Authorities—*Cochrane v. Minto*, 6 Pat. App. 139; *Scott v. Napier*, 7 Macph. (H. of L.) 35; *Stewart's Trustees v. Robertson*, January 6, 1874, 1 R. 334.

The pursuer replied—Even assuming that the defender was entitled to the benefit of the legal presumption of contiguity of position, that presumption did not apply to the case of what was really no more than a marshy piece of water, and what was in no sense a loch. A consideration of the evidence, however, showed that the march-stones formed the true boundary of the defender's property, and that the pursuer had for the prescriptive period exercised in the loch every act of exclusive possession of which the subject was capable.

At advising—

LORD JUSTICE-CLERK—In this case the question relates to an alleged line of march between two contemrinous proprietors.

The pursuer is proprietor of the property of Barns in the county of Stirling. There is a sheet of water at one end of that property called the Little Black Loch. His property of Barns comes down to the water on the east and south sides of the loch. There is a second property of the name of Barnsmuir, which lies to the south and west of the loch, and the property of Lochhouse would be, but for the alleged boundary in this case, the boundary on the north. But the pursuer alleges that on the north side he has a strip of ground of no great extent—only a few feet in width, varying with the water in the loch—which pertains to the estate of Barns. He has brought this action for the purpose of asserting his right to that piece of ground, the result being manifest from what I have said, that the lands of Lochhouse, although even by their name connected with the sheet of water in question, will yet be debarred, should the pursuer succeed, from coming to the margin of the loch by this strip which is alleged to belong to the pursuer. The

conclusion of the summons is—“That the march or boundary between the pursuer's said lands of Barns and the defender's said lands of Lochhouse to the north of the loch called the Little Black Loch is the march or boundary laid down and defined on the Ordnance Survey sheet, herewith produced, by the red line from the point marked X to the point marked Y, and formed or marked upon the ground by the five march-stones which are marked on the said Ordnance Survey sheet by the letters A, B, C, D, E.” These letters indicate a line of march on the north side of the loch in the line of certain stones that are said to be march-stones, which are also marked by letters on the plan. That substantially is the only conclusion in the summons, the second being to this effect—“And the defenders, and those deriving right from them, ought and should be interdicted, prohibited, and discharged by decree foresaid from troubling and molesting the pursuer in the peaceable possession and enjoyment of his said lands according to the march above referred to, or from invading or encroaching thereon in any manner of way in all time coming.”

Now, the whole of this matter is left in a very indistinct and obscure state as far as the details are concerned. In short, there is no written evidence of any kind or description. That there is no light one way or the other on the question thus brought before us it is impossible to deny. It is impossible not to see that the natural boundary of the property in question would certainly never have been supposed to be that concluded for in the summons. Lochhouse lies to the north of the loch. It lies in the immediate vicinity. The lands come down to within a few feet of the margin of the highest point to which the water rises. Naturally one would suppose the loch to be the boundary of the property immediately to the north. But the pursuer has undertaken to show, and has led a large amount of evidence for the purpose of showing, that the true line of march lies above the water-line in the direction of those march-stones which he says were intended to mark off the boundary. He also says there was a road which was used by the tenant of Barns or the proprietor of Barns along the north side of the loch, and along the line of the alleged bit of property, in order to unite or to enable those occupying Barns to communicate with the Airdrie road, which lies to the westward.

The Lord Ordinary has bestowed great pains on the case, and has given an opinion that, on the whole, the pursuer has made out his case. His Lordship points out very powerfully the difficulties arising on the face of the evidence. I shall consider very shortly the grounds on which the Lord Ordinary has proceeded, and also the grounds of his doubts. But upon the statement of the case by the Lord Ordinary I should be inclined to come to the conclusion opposite to that at which he has arrived. I think the pursuer has not made out his case. In regard to titles, all that we have in the way of boundaries is a charter by the Earl of Linlithgow in favour of John Bowie, being part of the Barns title, and there it does appear that there was a decree of division between the proprietor of Barns and the other feuars of Holehouse—it is not called Lochhouse, but that is of no moment. There is also a conveyance to Barns of the fishing on the

Black Loch, but that does not appear to be in question. The other title, which I think is of some importance in one view, is a title by Charles Tinker and Cornelius Bryce, dated on 26th May 1819, in favour of Thomas Johnston, of the lands of Barnsmuir. These are the lands that lie to west and south of the loch, but no one representing Barnsmuir is a party to this action at all. The important part of that disposition is, that the title bears that his property is bounded on the north partly by the highway leading from Linlithgow to Airdrie, and partly by the lands of Lochhouse; on the east, partly by the Little Black Loch, and partly by the remaining lands of Barns, and divided therefrom by a straight line drawn from the march-stones placed at the north-west corner of the loch straight to the bottom of a hedge.

Now, these two march-stones are material in a matter which I shall immediately explain. It turns out that there are on the north side of the loch four or five boulder stones more or less in such a line, but not absolutely in such a line, as to show that they might have been introduced with the intention of indicating a line of march. It seems quite clear that two of these stones were march-stones that divided Barnsmuir from Lochhouse, namely, the two stones mentioned in the title of Barnsmuir, dividing, as they were intended to divide, Barnsmuir from Lochhouse.

Now, the question comes to be, Has the pursuer in the first place proved that these were march-stones, or were intended to denote any boundary between his own lands of Barnhouse and the lands of Lochhouse? He alleges that they were, and in the second place he alleges that to a certain extent the possession has been in conformity with this view—that is to say, has been exclusive as far as the proprietor of Lochhouse is concerned. I think that here the pursuer has a very heavy *onus* laid upon him, because to intercept a communication between the lands of Lochhouse and the water by a line of this kind—a fanciful line—requires a very clear demonstration indeed, both in the way of title and of possession, before we can give effect to it.

The evidence adduced by the pursuer consists, —First, of the alleged march-stones and proof of the repute in regard to them; secondly, of various acts of exclusive possession; and thirdly, of instances in which the servants of Lochhouse were prevented from exercising acts of ownership on the disputed ground. I shall shortly refer to these in their order.

First, as to the march-stones. I attach little importance to one view, elaborated with wearisome prolixity, in the evidence that the stones in question are of the same formation and even in some respects present the same appearance as other boulders on the opposite side of the loch. I do so because if march-stones were to be set there it was probable that they would be procured in the neighbourhood, and secondly, because the title to Barnsmuir proves that in 1819 there were two march-stones at the north-west corner of the loch. It is certain, I think, that these were the two stones A and B, and it is proved by the parole testimony, which extends back to 1819, that the stones remain now as they were then substantially—one of them, I think, is said to have been removed—but there has been

no material alteration upon them. But this fact supplies one of the most material grounds of my demurs. These two stones, as appears from the title of 1819, were march-stones, not between Barns and Lochhouse, but between Barnsmuir and Lochhouse—a very different matter. It was in the highest degree natural that the boundaries between Barnsmuir and Lochhouse should be defined at this point, that is, the north-west angle of the loch. But it was in the highest degree improbable that these two stones should indicate the starting point of a line which should run between Lochhouse and the sheet of water from which it takes its name—all the more that this is proved not to have been the object with which they were placed there. In the obscurity which hangs over this subject it has occurred to me that the idea of these being indicative of a march between Lochhouse and Barns may have arisen entirely from the fact that the two west-most stones were indeed march-stones, but only between Barnsmuir and Lochhouse, but that those to the east were not march-stones at all.

This seems all the more likely that the evidence of the three witnesses to whom the Lord Ordinary very rightly refers as being the strongest in support of the pursuer, all depends on the hearsay of a former owner of Barns of the name of Bryce. But Cornelius Bryce is one of the granters of the disposition of 1819, and it is again referred to by those witnesses in their testimony, in which two of these very stones are mentioned as marking the boundary between Barnsmuir and Lochhouse, and at this distance of time the witnesses' memory might easily confound the two. As to the alleged road, I draw a different conclusion from the Lord Ordinary. I think it was and must have been a servitude road from the first through the Lochhouse lands to enable the owner of Barns to reach the Airdrie road, and had no such improbable intention as to cut off Lochhouse from the water. It does appear that of late the proprietor of Lochhouse has given the owner of Barns a more commodious route to reach the highway through his own grounds. It seems very certain that in former years the water of the loch stood at a higher level than it does now, and the alleged strip of ground between the boundary and the loch must have been under water for the most part. I therefore distrust the evidence in support of the march-stones.

The alleged exclusive possession may be very shortly dealt with. The possession of which the loch was capable was of the slenderest kind. I do not think that the cutting of the wretched amount of grass that grew, or of the reeds which formed the chief growth—indeed which almost exclusively flourished on the south and east sides—could by possibility be possession of that kind necessary to establish exclusive possession. There is a certain amount of evidence no doubt to the effect that Lochhouse was prevented from cutting, or at all events did not cut, the grass at one period, and that because they were thought to be trespassing. I do not in the least deny, as the Lord Ordinary says, there is a good deal of evidence of one kind or another in this direction. But I should say on the whole that the absence of exclusive possession for the greater part of the period is demonstrated by the evidence we have before us. Therefore, upon

the whole matter, and very much on the views that the Lord Ordinary has himself expressed, I have come to be of opinion that this pursuer has not made out his case, the object manifestly being to obtain the property under the surface. But on this aspect of the case I say nothing. It is enough to say that the pursuer has not succeeded in proving the line of march where he seeks to place it.

LORD YOUNG—I am of the same opinion.

LORD CRAIGHILL—The pursuer of this action is proprietor of the lands of Barns, and the defender is proprietor of the lands of Lochhouse, both in the parish of Slamannan, the subject of dispute between them being the boundary of their properties and their rights in a small sheet of water which is and long has been known as the Little Black Loch. The pursuer contends that the loch is his exclusively, while the defender, claiming to be a riparian proprietor, asserts rights to as much of the loch as, according to the rules by which such a subject is divided, effeirs to the extent of his lands as compared in extent with those of the pursuer on the margin of the loch.

The question between the parties might have been settled by their titles, but both are agreed that there is nothing in the titles of either by which this question is determined.

The case of the pursuer as disclosed on the record is, that the south boundary of the lands of Lochhouse are the march stones referred to in the conclusions of the summons, the position of which is delineated in red on the Ordnance sheet. If this view is adopted, the pursuer must prevail. If not, the pursuer claims the loch on the ground of exclusive possession. There are thus two questions for decision—(first) Is the boundary of Lochhouse the march stones? (second) if not, Has exclusive possession of the loch on the part of the pursuer been proved?

Before treating of these questions, however, it is proper, as preliminary, to say a word on a point regarding which there was some discussion offered at the debate upon the reclaiming-note. That point is the character of this piece of water. Is it a loch, or is it only a marsh to which the presumption of right resulting from contiguity, and the rules for division recognised in the case of a loch properly so-called, do not apply? On this question I have no doubt. The water in question has for generations been known as a loch, and it is so described by the pursuer on the record. It may not be as large, or as free from reeds or other vegetable growths, as at one time it was, though on this subject there is little evidence one way or the other. But it has not ceased to be a loch. The pursuer claims it all, and the defender a part of it as such, and in determining their rights, so far as these are rested on the ownership of riparian property, it must be so regarded.

What, then, are the rights of parties as disclosed in the record and proof in the present action? The Lord Ordinary has given judgment for the pursuer, and decerns in terms of the first declaratory conclusion of the summons. In other words, using the language of the summons, he declares "that the march or boundary between the pursuer's said lands of Barns and the defen-

der's said lands of Lochhouse, to the north of the loch called 'Little Black Loch,' is the march or boundary laid down and defined in the Ordnance Survey sheet, herewith produced, by the red line from the point marked X to the point marked Y, and formed or marked upon the ground by the five march-stones, which are marked on the said Ordnance Survey sheet by the letters A, B, C, D, E." What, in the opinion of the Lord Ordinary, is the warrant for this finding can hardly be discovered from the note to his interlocutor, for although he says that he sees no reason to disbelieve James Johnston, Thomas Johnston, and George Pettigrew, witnesses who say that the stones referred to are march-stones, and that their evidence is corroborated by the possession which the proprietors and tenants of Barns have had of the subjects, yet it cannot be inferred that in the Lord Ordinary's opinion these stones were march-stones between Lochhouse on the north and Barns on the south, because further on he says—"The truth appears to me to be that the proprietors of Lochhouse have now acquired by prescription a right to this strip of ground, and that the road from the road westwards can only now be regarded as a servitude road." This strip of ground elsewhere spoken of as a road is all that is between the stones and the loch, from which of course it follows that these stones, for the period of prescription at any rate, did not regulate the possession of the ground, a consideration by which their pretensions to the character of march-stones is materially discredited. Looking at the proof on both sides, and bearing in mind all that was said upon it, the conclusion to which I have come is that this part of the pursuer's case has not been proved, and consequently that so far there is no ground upon which decree in terms of the first conclusion of the summons can be pronounced.

There is, however, another declaratory conclusion which must be considered. The pursuer seeks to have it declared "that the said Little Black Loch shown on the said Ordnance Survey sheet is not comprehended within the marches or boundaries of the defender's said lands of Lochhouse, and that the defenders have no right, title, or interest to or in the said Little Black Loch."

The claim to decree in these terms rests on the allegation of exclusive possession, and necessarily must, because if the march-stones are not the boundary, Lochhouse at the north of the loch is a riparian property, and the defender has such right to or on it as, according to the ordinary legal presumption, belongs to a riparian proprietor, unless that be excluded by exclusive possession on the part of the pursuer. Has this exclusive possession been established? The result to which I have been brought is, that the pursuer and his predecessors had a wider and more varied, but not an exclusive possession of the loch. The proprietors and tenants of Lochhouse shared in the possession. They put their cattle down to the water to drink. They cut and carried away reeds and other vegetable products. They steeped their lint, and they exercised and availed themselves of other uses which the loch afforded. Those things having been done, it cannot be held that the pursuer had exclusive possession, and thus there is a failure in the second, as there was in the first ground of action.

The interlocutor reclaimed against therefore ought to be recalled and the defenders to be assoilzied from the conclusions of the action.

LORD RUTHERFURD CLARK—I am of the same opinion.

The Court pronounced this interlocutor :—

“Find that the pursuer has failed to establish the conclusions of the summons: Therefore recal the interlocutors reclaimed against: Assolzie the defenders from the conclusions of the action.”

Counsel for Pursuer—Mackintosh—Low. Agent—David Turnbull, W.S.

Counsel for Defender—R. V. Campbell—Rankine. Agents—M. Macgregor & Company, S.S.C.

Wednesday, November 25.

FIRST DIVISION.

[Lord Lee, Ordinary.]

WADDELL'S TRUSTEES *v.* THE MONKLAND IRON COMPANY (LIMITED).

Lease—Mineral Lease—Abandonment—Arbiter.

A mineral lease provided that the lessees should “be entitled to put an end to the lease” in case it should be found by arbitration that the minerals could not be wrought to profit, and that this arose from no fault of the lessees. They intimated their intention to abandon, on the ground that the minerals could not be wrought to profit, but on the landlord disputing that any necessity for arbitration had arisen they took no steps to have arbiters appointed. *Held* that as they had not taken the steps necessary to entitle them to be free of the lease, they remained liable for the rent.

By lease dated 28th and 29th March 1877, James Arthur Crichton, advocate, and George M'Intosh, S.S.C., surviving trustees under a disposition and conveyance in trust executed by the deceased William Waddell, of Easter Moffat, let to the Monkland Iron and Coal Company (Limited) the whole ironstone in the lands of Easter Moffat, in the county of Lanark, for a period of nineteen years from Whitsunday 1877. The rent was £500 per annum. There were to be breaks in the lease in favour of the lessees at the end of every fifth year on giving six months' notice. The lessees bound themselves to make all practicable exertions for working and putting out the ironstone.

The lease further provided :—“And it is hereby agreed that if at any time before the natural expiry of this lease the said lessees or their foresaids shall work out and exhaust the ironstone hereby let, or in case it be proved by a mining engineer to be fixed by the parties, or by two mining engineers to be mutually chosen, or by an oversman to be named by them at the time they accept their appointment, or in case of their disagreeing, by a person to be appointed by the judge ordinary in the event of the parties not naming an arbiter or arbiters, or of their differing in opinion and not appointing an oversman, that

the ironstone hereby let cannot be wrought to profit, and that this result has arisen from no fault on the part of the tenants, then the lessees or their foresaids shall be entitled to put an end to this lease, just as if it had terminated by the lapse of time.”

The Monkland Iron and Coal Company (Limited) worked the ironstone from 1877 to 1881. The company then assigned the tack to the Monkland Iron Company (Limited), the defenders in the present action, who worked the ironstone and paid the rents under the lease until Martinmas 1884.

On 7th August 1884 the lessees wrote to the Easter Moffat trustees in these terms—“Dear Sirs—We beg to give you notice, in terms of our lease of Easter Moffat, that owing to the unprofitable nature of our workings we intend to cease mining operations at Martinmas first, and as this matter comes within the scope of an arbiter, we shall be glad to have this matter arranged as soon as may be convenient. Kindly own receipt of this intimation.” On 12th August 1884 the trustees' agent replied—“Gentlemen,—We received your Mr Ferguson's letter of the 7th. You some time ago applied for a modification of the terms of your lease of the ironstone in this property, when our clients instructed us to request Mr Geddes, M.E., to inspect the workings and report for their information. We at once did this, but, as you will see from the annexed copy of Mr Geddes' letter to us of the 31st July, he has been unable, owing to an accident to your manager Mr M'Culloch, to examine the workings and report. In these circumstances we cannot admit your right to discontinue the workings as you propose to do, nor is there at present any occasion for entering into a reference such as you propose. So soon as Mr Geddes makes his report the matter will be considered by the Easter Moffat trustees, and we will then write you further.”

The lessees abandoned the workings at Martinmas, and in December they began to dismantle the works. They took up the position that they were entitled in consequence of the unprofitable nature of the undertaking to take advantage of the clause of the lease quoted above, and that their letter of 7th August was a notice to abandon at Martinmas 1884, while the trustees maintained that the workings had not been satisfactorily conducted nor the ground properly explored for minerals, and that they were entitled to rent till the next break at Whitsunday 1887, or till the lease should be found by competent authority to be at an end.

This action was raised by the trustees for £250, the rent for the half-year from Martinmas 1884 to Whitsunday 1885.

The pursuers pleaded, *inter alia*—“(3) The alleged notice of abandonment by the defenders not being sufficient in itself, or in accordance with the provisions of the lease, the defenders are liable for the rents from Martinmas 1884 to Whitsunday 1885. (4) It not having been proved by a mining engineer or otherwise, as provided by the lease, that the ironstone let has become unworkable to profit, and the defenders not having fairly and fully worked out and explored the minerals so as to ascertain that it is unworkable to profit, the pursuers are entitled to decree in terms of the conclusions of the summons.”