kenzie, December 2, 1864, 3 Macph. 177; *Smith* v. *Smith*, November 4, 1885, 13 R. 126.

Counsel for the respondent were not called upon.

LORD PRESIDENT — The reclaimer Mrs Whyte is the defender in an action at the instance of her son David Whyte for aliment. The pursuer is at present a stockbroker's clerk or clerk apprentice. He received a good education from his mother and about a year and a-half ago he entered the stockbroker's office with her knowledge, and apparently with her approbation, and with the intention of learning that business. His salary was at first £30 a-year, but it was afterwards raised to £40, and this is now his whole income. Up till a few months ago he lived in his mother's house, but shortly before this action was raised she turned him out of the house and refused to take him back. Beyond what is stated in Ans. 5, which is very general, she assigns no reason for this, and there is no allegation made or suggested which could justify her conduct in this matter. Since then the pursuer has lived in lodgings. In this action he sues for an addition to his income on the ground that he is not able to live in his present position on £40 a-year. The Lord Ordinary has found him entitled to £12 a-year from his mother, which will only bring his income up to £1 a-week.

In my opinion we ought not to interfere with what the Lord Ordinary has done. In adhering to his interlocutor we decide nothing as to what the liabilities of the defender will be after the pursuer has completed his professional education. A different question may then arise, but at present the pursuer is only learning his business and the Court has recognised a distinction between permanent liability for aliment after a son has completed his education and professional or business training, and the case where he is still in the course of receiving his education or learning a business. In the former case the Court is unwilling to award aliment, especially where there is, as in *Smith* v. *Smith*, an offer by the parent to maintain the son in his own home. Here the mother has simply barred her son out of doors while he was in the course of learning his profession, without a penny, and without any reason assigned. In these circumstances it appears to me that the Lord Ordinary has acted with proper discrimination in ordering the defender to contribute for the present £12 a-year to her son's income.

LORD ADAM concurred.

LORD M'LAREN — Mr Young has very properly brought before us all the decisions bearing upon this question. These authorities are useful for the principles which should guide the Court, but they do not assist us very much as to the precise circumstances which will raise a case for granting aliment or as regards the amount of such aliment. The pursuer here is neither a mere copying clerk nor a fully qualified clerk. His object is to become a stockbroker after the requisite training and experience. His position in life therefore corresponds to that of an apprentice who in the meantime is earning wages at a lower rate than he may expect to receive when he has learned the business. I agree that the aliment allowed by the Lord Ordinary is reasonable, because it only brings up the income of the pursuer to the sum which he would be able to earn as a qualified clerk in the line of business to which his mother agreed that he should be brought up.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer and Respondent —J. Wilson, K.C.—R. S. Brown. Agent—Henry Wakelin, Solicitor.

Counsel for the Defender and Reclaimer —Guy—J. B. Young. Agent—F. M. H. Young, S.S.C.

Tuesday, June 18.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

MENZIES *v.* WENTWORTH.

Fishings—Trout-Fishing—Loch—Common Right of Fishing—Regulation by Court—Frontage as Measure of Right.

A joint-proprietor of a loch, in which, under previous judgments of the Court, all the riparian proprietors had a common right of trout-fishing, brought an action against the other riparian proprietors, concluding for declarator that the trout-fishing on the said loch was being injured and destroyed, that the injury was caused by excessive fishing by the defenders, or some of them, that the pursuer was entitled to have the right of fishing regulated by the Court, and that it should be regulated on the principle that no more than sixteen boats should be allowed on the loch, and that these should be allocated among the various proprietors in proportion to the extent of frontage held by each. Circumstances in which *held*, after a proof (*aff.* judgment of Lord Stormonth Darling Ordinary, *dub.* Lord M'Laren) that the pursuer had failed to establish such a case of injury to the fishing as would induce the Court to interfere by regulation.

Held by Lord M'Laren that the action was incompetent as laid, in respect that it concluded for allocation of boats according to frontage.

Observations (*per* Lord Kinnear) on the nature of a common right of trout-fishing in a loch.

This was an action at the instance of Sir Robert Menzies, Bart., Menzies, proprietor of the barony of Rannoch, Perthshire, to have the right of trout-fishing in Loch

Rannoch regulated by the Court. He called as defenders all the proprietors having lands fronting on the loch.

The right of fishing on Loch Rannoch had already been the subject of two actions. In the first of these the then proprietor of Menzies and the then proprietor of the barony of Struan, brought cross actions for declarator that each was the proprietor of the whole loch, and had the exclusive right of fishing therein. The actions were conjoined, and by interlocutor pronounced in 1798, and adhered to on 2nd July 1799, the Court found that "both parties in this cause have a joint-right or common property in the loch of Loch Rannoch, and a joint-right of sailing, fishing, floating timber, and exercising all acts of property thereon, and of drawing nets upon the shores thereof adjoining to their respective lands, but not upon the shores of the lands belonging to each other." Stewart of Innerhadden, who was at that date the only other proprietor having a frontage on Loch Rannoch, was not a party to the action.

In 1854, the proprietor of Struan having disponed a portion of his lands with lakes and pertinents, the Court dismissed an action at the instance of the late Sir John Menzies of Menzies, for declarator that the disponee had no right on Loch Rannoch. This judgment was affirmed by the House of Lords on appeal. The case is reported, 16 D. 827, 19 D. (H.L.) 1, and 2 Macq. 463.

The conclusions of the present action were in the following terms:—"Therefore it ought and should be found and declared, by decree of the Lords of our Council and Session—(*First*) That the trout-fishing in Loch Rannoch is being injured and destroyed; (*Second*) That this injury and destruction are being caused by and in consequence of excessive fishing by the defenders, or some of them, or by those authorised by the defenders, or some of them, from boats on the said loch; (*Third*) That the pursuer is entitled to have the fishing in the said loch regulated according to such rules and regulations as the Court may think proper to frame for the preservation of the fishing and the rights of the various riparian proprietors on the said loch; (*Fourth*) That the exercise of the said right of trout-fishing in the said loch by the pursuer and the defenders, and by those duly authorised by the pursuer and the defenders, or by any of them, ought and should be regulated among the various parties concerned rateably as follows, viz.—that no more than sixteen boats should be allowed to fish on the said loch, and that the said sixteen boats should be allocated among the parties having right to fish in said loch in proportion to the extent of frontage along or to the said loch which the land of each person having such right possesses, and which would result as follows:—To the pursuer eight boats; to the defender the said Bruce Canning Vernon Wentworth three boats; to the defender the said James Clark Bunten one boat; to the defender the said Alexander Stewart one boat; to the defender the said John Stewart Odiarne Robertson-Luxford two boats; and to the defender the said Alasdair Stewart Robertson one boat; or otherwise in such way and manner and according to such other system of regulation as shall seem right and proper to our said Lords, and shall by them be determined in the process to follow hereon; And it having been so found and declared, or whether it shall be so found and declared or not, our said Lords ought and should pronounce a decree regulating the said fishing in the specific manner above set forth, or should pronounce a decree for regulating the said fishing in the said loch in such other way and manner, and according to such other regulations as to our said Lords shall seem proper: And further, the defenders, and all others having or pretending right from them, or any of them, ought and should be interdicted and prohibited from exercising the right of trout-fishing in any part of the said loch except in the manner determined by and in conformity with the regulation of the Court."

Defences were lodged for Bruce Canning Vernon Wentworth of Dall, and proprietor of the lands of Meall Dubh, James Clark Bunten of Dunalastair, proprietor of the lands of Kinloch, Alexander Stewart of Bunrannoch, proprietor of the lands of Innerhadden, J. S. O. Robertson-Luxford of Croiscraig, and Alasdair Stewart Robertson of Struan, who were all the proprietors having lands fronting on Loch Rannoch. The extent of frontage possessed by each was as follows:—"Menzies (Rannoch), 10¼ miles, Wentworth (Dall) 5½ miles, and (Meall Dubh) ¼ of a mile; Robertson-Luxford (Croiscraig), 3⅜ miles; Stewart (Innerhadden), 1⅛ miles; Bunten (Kinloch), ¼ of a mile; and Robertson (Struan) a few yards."

The pursuer averred that the number of boats on the loch had increased from nineteen in 1853 to 51 in 1898, and that the fishing had thereby been seriously injured, so that the tenants of the shootings, who had a right to fish on the loch, had often complained. He further averred that the proper method of regulation was that concluded for in the summons, and that no scheme of regulation would be accepted by all the proprietors voluntarily. The defenders denied that the loch was being materially injured by over-fishing.

The pursuer pleaded—"(1) The pursuer is one of the riparian proprietors of Loch Rannoch, and as the trout-fishing therein is being destroyed by excessive fishing, he is entitled to have the right of trout-fishing in said loch regulated by the Court. (2) The pursuer has right to at least one-half of the fishing in the said loch, and he and the other proprietors entitled to fish in said loch are only entitled to exercise the right of trout-fishing by themselves, and by others authorised by them, proportionally to the amount of shore owned by each of them respectively. (3) The pursuer under the circumstances condescended on is entitled to prevent the other proprietors whose lands border on Loch Rannoch from fishing in the said loch except to an extent propor-

tional to the amount of shore each is owner of. (4) The pursuer being one of the riparian proprietors of Loch Rannoch is entitled to apply to the Court to have the fishing therein regulated so as to prevent its further injury and destruction by excessive fishing on the part of the other riparian proprietors, and to secure a proper allocation of the said fishing between himself and the other proprietors. (5) The regulations proposed being fair and reasonable, the pursuer is entitled to decree regulating the fishing in said loch according to the mode prescribed in the summons, or otherwise he is entitled to decree regulating said fishing in such way and manner as to our Lords shall seem proper."

All the defenders pleaded that the action was (1) incompetent, and (2) irrelevant. All the defenders except the defender Robertson-Luxford of Croiscraig pleaded that the pursuer's averments were unfounded in fact. The defenders Wentworth of Dall, Stewart of Innerhadden, and Robertson of Struan pleaded that by virtue of their titles and possession they were entitled to free exercise of the right of fishing in the said loch. The defender Bunten of Dunalastair pleaded—"(3) There being no necessity for any judicial regulation of the right of fishing in the loch in question, the present action is uncalled for and unnecessary, and ought to be dismissed. (4) The defender is entitled to absolvitor, in respect (*a*) that under his titles, and in respect of the immemorial possession following thereon, he is entitled to exercise the right of fishing on Loch Rannoch by means of at least six boats — (5) Loch Rannoch being a navigable inland waterway open to the public, and the scheme proposed by the pursuer being inconsistent with the existence of the rights of the public in the said loch, and impracticable having regard to these rights, the present action is untenable, and the defender is entitled to absolvitor." The defender Robertson-Luxford of Croiscraig pleaded that he was entitled to the allocation of a larger number of boats than that proposed in the summons (*a*) in virtue of his prescriptive possession, and (*b*) of the proportionate extent of his frontage to the loch. The defender Robertson of Struan further pleaded as follows—"(2) The action is unnecessary. (6) In the event of regulation of the said fishing being found to be necessary, the defender's interest should be determined on the basis of the valued rent of the said barony of Struan and the several portions into which it has been divided."

Proof was allowed and led, the result of which sufficiently appears from the opinions of the Lord Ordinary and of the Lord President, *infra*.

On 26th July 1900 the Lord Ordinary (STORMONTH DARLING) pronounced the following interlocutor:—"Finds that the pursuer has failed to prove that the exercise of the joint right of trout-fishing in Loch Rannoch by the defenders, or any of them, has been such as to constitute an abuse of the said right or to call for judicial regulation: Therefore dismisses the action, and decerns: Finds the defenders entitled to expenses," &c.

Opinion.—"The purpose of this action is to have the trout-fishing in Loch Rannoch regulated by the Court, and the method of regulation proposed by the pursuer is that the Court should first fix the total number of boats which are to be allowed to fish on the loch, and then should allocate these among the six riparian proprietors in proportion to the extent of frontage possessed by each.

"The water rights in the loch have been the subject of two final judgments, one by this Court in 1799, and the other by the House of Lords in 1856. In 1799 the pursuer's father, as proprietor of the barony of Rannoch, owned, practically speaking, the whole northern shore of the loch, while the southern shore (except a small portion towards the eastern end belonging to Stewart of Innerhadden) was the property of Struan Robertson as proprietor of the barony of Struan. Menzies and Struan were found to have 'a joint right of common property' in the loch. The rights of Innerhadden were not affected by this finding, because he does not seem to have been a party to the process. In 1828 Struan sold the lands of Kinloch forming part of his barony to General Macdonald. These lands had only a small frontage at the east end of the loch, but General Macdonald exercised the right of boating and fishing over the whole loch, and he built an inn upon his lands, the visitors at which were also allowed to fish. In 1853 the present pursuer raised an action against Macdonald to have it declared that he had no right of any kind in the loch, or otherwise that his right was limited to that part of the loch which was situated *ex adverso* of his lands. This case was sent to the Whole Court, and in accordance with the opinions of the majority of the Judges it was held that the pursuer had not set forth any relevant ground in support of the leading conclusion of his summons, and the defender was assoilzied from the alternative conclusion. On appeal to the House of Lords this judgment was affirmed.

"In the opinions delivered both here and in the House of Lords a good deal was said about judicial regulation as a possible remedy for abuse in the exercise of the joint right. It undoubtedly formed part of the reasoning by which the result was reached, that while either of the co-owners might alienate any portion of his interest, and thereby transmit a right similar in quality to his own, the effect of the alienation could not give him and his disponee together a greater interest in the loch than he alone enjoyed before. Thus Lord Chancellor Cranworth said (I quote from 1 Paterson App. 626)—'If indeed the effect of alienation by one of two co-owners should be to deprive the other owner of the full right as to his moiety, then that would give a right of action for regulation of the enjoyment.' Then coming more directly to the matter now in hand his Lordship said—'Suppose it were not possible for more than any given number of boats, say 1000,

to be simultaneously engaged in fishing upon the lake, Menzies would be entitled to have 500 so employed, and Struan would be entitled to the other 500. Struan could not by alienating to others give a right to more than his due share. But if he keeps within that limit Menzies has no right to complain. It is the same thing to him whether the right is exercised by Struan himself or by others deriving title under him. In either case Struan or his disponees might be restrained from any excessive exercise of the right enjoyed in common with another, but Struan could not be prevented from exercising, subject to the liability to be thus regulated, the right incident to property in general of alienating it as he may think fit.'

"Beyond expressions like these, to the effect that judicial regulation of some kind would be competent and might be necessary, and that it must aim at preserving equality of rights between the two baronies notwithstanding the division of one of them into several parts, there is unfortunately no indication of the principle upon which such regulation should proceed. In the Court of Session indeed it was conceded both by the majority and the minority that it might be difficult to find one. Lord Rutherfurd, who was the chief exponent of the views of the majority, said (at p. 847 of 16 D.)—'In like manner here, the right and interest of Sir John Menzies, if it extended to one-half, will not necessarily be reduced to a third, or a fourth, or a sixth, by the subdivision of the right and interest of his original co-proprietor. It may indeed be difficult for the pursuer in such a case as the present to establish encroachment or abuse or to show injury.' Similarly Lord Deas, who was in the minority, said (at p. 855)—'No means have been suggested, and none such appear to be practicable, whereby effect can be given to the right of property which will accrue to each additional common proprietor and yet leave Menzies in the same favourable position he was in before. For example, after the joint proprietors have been multiplied—it may be by studding the whole bank or the whole of Struan's estate with villas—can Menzies have the same means of fishing and fowling which he previously had? If so, the fish and fowls must be infinite.' Again (p. 856), 'It is said the possession may be regulated. But what kind of regulation would be practicable and consistent at once with the right of property vested in each new proprietor, and with the rights of Menzies, has not been pointed out.' Then, after showing how much simpler is the case of a grazing commonty, his Lordship adds—'But nobody has even suggested any analogous principle which would be applicable here, so as to fix the number of boats which each joint proprietor may put upon the lake, the number of persons and sojourners from each inn and villa who may embark in each boat, the hours or days of the week they are respectively to sail, shoot, and fish, and the corresponding restrictions which are to be placed on one or both of Struan and Menzies.' It may be that Lord Deas magnified a little the difficulties of regulation in order to enforce the view that Struan could not subdivide his rights at all. But being now face to face with the difficulties which he anticipated, I confess that I strongly sympathise with these observations.

"As matters now stand, there are four proprietors standing in the original right of Struan; there is Innerhadden, whose right is independent of both the baronies; and there is the pursuer, whose barony remains undivided. The right of each one of these six proprietors is to boat and fish over the whole loch, and to do so by himself and others as much as he pleases, so long as he does not abuse his right by encroaching unduly on the rights of his neighbours. A court of law must always be very chary of interfering with the free choice which is inherent in every right of property; and in a question of this kind it is extremely difficult to find the criterion by which it is to be held that legitimate use has passed into abuse. Plainly the use which one of the community chooses to make of his right cannot be made the measure for all the others. It is not enough for the complaining owner to say, as the pursuer in effect says here, 'I have only eight boats on the loch, therefore you, the others, must not have more than eight amongst you.' There must first be a determination as to the total number of boats which the loch is capable of carrying before the question of allocation can even be considered. And how is this determination to be reached?

"The answer would be greatly simplified if the case for the pursuer were that the loch is being depleted of trout, by which of course I mean that, one year with another, a fair breeding stock is not being left. But that is not his case. There is no attempt to show that the total yield of trout is not as large as it ever was, and the skilled evidence for the defenders establishes that the food supply is abundant, and the spawning ground sufficient. The real case for the pursuer is that, although as many trout may be taken now as formerly (and probably there are more), the average take per rod is not nearly so good, either in number or weight, and that this arises from the trout, and particularly the larger trout, being made shy by over-fishing. Now, I concede that the right of trout-fishing being a sporting right, its value depends on the probabilities of success for an angler of average skill going out on a fairly good day. But then the test of what he may reasonably expect is not to be found in the great baskets of sixty years ago, to which the pursuer himself and Mr Fletcher Menzies speak, when the trout very seldom saw an artificial fly, and when there were probably not more than half-a-dozen boats on the loch all told. That, I suppose, is the reason why preserved lochs are as a rule better than lochs which are practically open to the public. Indeed, the danger to preserved lochs arises from their being under-fished, and probably in the pursuer's early days the fishing would not have been

so good as it was if the balance had not been redressed by practices such as netting, spearing, and the use of set-lines and the otter, which are proved to have been common in Loch Rannoch and its feeders at that time, but are now either illegal, or, at all events, not in use. Mr Gregor Macgregor, who is much the most important witness for the pursuer, admits that even in his young days, *i.e.*, throughout the sixties, the loch was under-fished. Therefore the baskets which he was in the habit of getting, often weighing 20 lbs., and averaging 15 lbs., cannot be taken as a test of what the average angler might reasonably expect, now that the loch is no longer under-fished. I do not think that Mr Macgregor has much to say against the fishing down to 1878, when he had 'two very good days.' In this way the pursuer's case comes to be that the fishing has fallen off during the last twenty-two years. Probably that is true; and I think the same might be said (Mr Malloch allows it) of every loch in Scotland which is practically open to the public. It is of course notorious that the taste for every form of sport and the means of gratifying that taste have enormously increased during the last quarter of a century. But it is open to everyone of the six joint proprietors of this loch, just as it would have been open to Struan if he had retained the whole of his estate, to invite as many persons as he pleases to fish all over the loch; and the difficulty lies in saying at what point (there being no depletion of the breeding stock) the number of anglers plying the rod makes the sport of each so bad that it amounts to an abuse of the right.

"One can figure cases of joint right where the task of regulation would be comparatively simple. Take the case of a stretch of moor held in common—and there are such cases. If one of two joint owners were, by himself or his tenant, to monopolise the first fortnight after the 12th of August, with the result, not of shooting all the birds, but of making them so wild that the other man could not get near them, it would be easy enough to say that the shooting of each must take place on alternate days, or on specified days in each week. But here what is asked is not of that nature. It is that the Court should define the number of boats which the loch may fairly carry throughout the season.

"Now, that being the nature of the pursuer's demand, I must say that he has supported it by evidence of the vaguest kind. He admits that ever since 1856 he has had in view the possibility of having to come to the Court for regulation. Yet he has taken no means to keep any record either of the baskets got by his tenants and keepers, or of the number of boats on the loch at any given period. Indeed, he closed his case without proving how many boats there are now; and I have had to glean, chiefly from the evidence led for the defenders, what I think may be taken as approximately accurate, that the number is from forty-five to fifty, consisting of eight belonging to the pursuer, sixteen belonging to the three hotels, three belonging to the defender Struan Robertson, ten belonging to the defender Luxford, eight or ten belonging to sundry houses near the east end of the loch, including Innerhadden, and one or two at Dall. Probably this number is rather larger than it ever was, but I should have thought it vital to the pursuer's case to compare it with the number, say twenty years ago, when it was admitted that the fishing was still fairly good. There again everything is vague; but it is tolerably certain that the addition of a third hotel last year, which the pursuer assigns as his reason for thinking it time to complain, has not materially added to the number. There are now six at the Dunalastair Hotel, five at the Bunrannoch Hotel, and five at the new hotel. Oddly enough the pursuer's own keeper gives fifteen or sixteen as the number at the two hotels when he first came to the district nineteen years ago. I think this must be an over-statement, for the other evidence seems to show that between 1880 and 1899 the number kept at the two hotels was thirteen. Taking it so, the addition of three boats is not a very large one out of forty-five or fifty, and there is positively nothing to suggest that in the last twenty years there has been any increase in the number except at the hotels.

"When I turn to the baskets got, once more I find a want of reliable data. The reputation of anglers for severe accuracy about their takes is not perhaps of the highest, but that is an observation which applies all round. Discounting the pursuer's own evidence and that of his brother (as applying to a state of things which can never return), what remains? He says that his tenants do not now think the loch worth fishing, and that for the last five or six years he has had to give all of them leave to fish the private lochs on the estate, whether these are included in their shooting grounds or not. One may conjecture that a shooting tenant, on the off-days when he wants to fish, might well prefer a preserved loch at some distance from his lodge to an open loch at his door. But not a single shooting tenant has come to give evidence; and there is no suggestion that the rents which they pay have gone down. Mr Malloch, a well-known sporting agent in Perth, says that, though he never fished Loch Rannoch, he has known it in connection with his business for twenty-five years; that when he began business it was a very good fishing loch, but that now he does not recommend it to first-rate anglers, because, judging from what he hears, the fishing has fallen off. Then there is Mr Gregor Macgregor. I have already indicated that I attach great importance to his evidence, both on account of his long and intimate acquaintance with the loch and his perfect independence as a witness. He has no doubt that since 1878 the fishing has fallen off very much—so much that when he visits Rannoch now he very seldom cares to fish. But then I think that the recollection of the good baskets of his youth makes him a little fastidious, and that he is hardly a fair

representative of the average angler. The only recent basket which he mentions is one of twenty-one trout, weighing 7 lbs., got on 22nd June this season. It happens that on that very day another angler, of I am sure not greater skill, but with better luck, caught, along with his wife, sixty trout weighing nearly 15 lbs. Other baskets of recent years are spoken to which are about as good. Thus the witness Crawshay on his best day last year got fifty-eight fish weighing 15 lbs.; and the witness Chamberlain, on six consecutive days in 1894, got 146 fish weighing 57 lbs., which is equal to an average of nearly 10 lbs. a day of trout, rather better than three to the pound. Perhaps the testimony of boatmen is not to be relied on too implicitly as regards accuracy, and I discount a good deal from their general evidence about the sport being as good as ever. But Macpherson speaks to a basket of forty-one trout, about four to the pound, being got within two hours in July 1898; Lamont was at the getting of twenty-four trout weighing 19 lbs. in 1894, and 25 lbs. (number not stated) in July 1896; M'Dougall speaks to fifty-two fish weighing 15 lbs. to one rod in July 1898, and Macfarlane to 32 lbs. for two rods some six or seven years ago. Now, of course, these are picked baskets, and do not represent what may ordinarily be expected; but when such things are still possible, I find it very difficult to say that there is abuse of the joint right of that manifest and palpable kind which alone would entitle the Court to interfere. It may be (and I rather think it is the case) that the amount of fishing has reached a point beyond which it cannot be carried with safety to the sport. But such things tend to right themselves because it is not in the interest of any of the joint proprietors to spoil the sport; and I do not think that this Court should ever be resorted to for compulsory regulation until at least an effort has been made to secure agreement within the community of owners. But the pursuer admits that he launched this action against his neighbours without making any attempt of that kind, because he thought it would be useless.

"There are several topics discussed in the proof which have not influenced my mind in the least. The experience of Loch Leven was referred to by both sides, but I do not think that any assistance is to be derived from the case of a loch so entirely different from Loch Rannoch, both in its natural features and its mode of treatment. Suggestions were made that the fishing might be artificially improved, but, although that may be a fair enough subject for consideration by the proprietors themselves, it can have no bearing upon the present question, which relates solely to the loch in its natural state. For the same reason I have nothing to do with suggestions about the destruction of trout by cormorants and gulls. Even the scientific evidence, although interesting in itself, is relevant only as establishing that there is ample feeding for trout in the loch, because all the speculations about trout being found in the deep waters of the loch will never get over the fact that in practice the fishable area during the best months of the year is confined to about 500 acres at the west end and a strip of about 100 yards all round the margin. Probably Mr Mitchell is fairly accurate when he calculates this marginal area at about 500 acres more. These two areas represent all the water that is worth fishing with the fly during the summer, and any trout that are caught in the deep waters are caught only by trolling with small trout or the phantom minnow. I cannot help thinking that the pursuer's grievance arises largely from the fact that the hotel boats congregate over the shallow water at the Rannoch Lodge end of the loch; but that is the necessary result of the judgment of the House of Lords in 1856, which gave all the joint proprietors the right to fish over the whole loch. Their right to do so is one which the Court cannot disturb unless, as I have said, there is manifest and palpable abuse. The pursuer by the structure of his summons recognises that. His first declaratory conclusion is that the trout-fishing in Loch Rannoch is being 'injured and destroyed'; and his second is, that this injury and destruction are being caused by excessive fishing from boats on the loch. That is equivalent to an assertion of abuse leading to the substantial destruction of the joint right. The onus of proving such a case is a heavy one, and I am of opinion that the pursuer has failed to discharge it."

The pursuer reclaimed, and argued—It was not seriously disputed that the authorities—*Menzies* v. *Macdonald*, March 10, 1854, 16 D. 827, *aff.* June 10, 1856, 19 D. (H.L.) 1, 2 Macq. 463; *Scott* v. *Napier*, June 11, 1869, 7 Macph. (H.L.) 35; *Mackenzie* v. *Bankes*, November 30, 1877, 5 R. 278, *aff.* June 27, 1878, 5 R. (H.L.) 192—established the right of the Court to regulate a common right of trout-fishing in the event of that right being abused. The question what amounted to abuse must depend on the nature of the right under consideration. The right to fish for trout was a sporting right, and the limits of its exercise must be determined by considerations applicable to such a right, and not by the rule established in rights of property or servitude—*Earl of Aboyne* v. *Innes*, June 22, 1813, F.C., *aff.* July 10, 1819, 1 Paton 444, explained in *Patrick* v. *Napier*, March 28, 1867, 5 Macph. 683, at p. 693; *Governors of George Watson's Hospital* v. *Cormack*, December 14, 1883, 11 R. 320, *per* Lord M'Laren, Ordinary, at p. 323. A right of fishing was abused whenever it was so exercised as to be seriously deteriorated. It might be so deteriorated by injury to the stock of fish, or by so overcrowding the loch that angling was impossible, but these were not the only ways in which abuse might take place. The argument to the contrary was really the argument of the minority of the Court in *Menzies* v. *Macdonald* (*cit. supra*), and had been rejected there. Such overfishing as made the angling materially worse as a sport was abuse, justified regulation, and had been established here. A right of trout-fishing was a right to the enjoyment of angling, not a right to catch

so many fish. Therefore even although the loch swarmed with trout, if they were rendered so shy that it was impossible to catch them, the right of fishing was abused. *Separatim*, the regulation according to frontage was a reasonable method. Any opinions in *Menzies* v. *Macdonald* disapproving of it were *obiter*. Prescription could not apply, because there was not, until regulation, any adverse right to prescribe against—*Fergusson* v. *Sheriff*, July 18, 1844, 6 D. 1363, opinion of Lord Cockburn at p. 1374.

Argued for the defenders—On the evidence the pursuer had failed to establish that the fishing in Loch Rannoch had deteriorated. But even if it were proved that the trout were more difficult to catch, that was not a sufficient ground for the interference of the Court. It was not disputed that a right to have the fishing regulated was recognised by the law. But the remedy was very exceptional; the proprietor who proposed to call in the intervention of the Court was bound to show that his rights had been seriously interfered with—*Earl of Aboyne* v. *Innes*, *cit. supra*; *Somerville* v. *Smith*, December 22, 1859, 22 D. 279. Now, in the case of trout-fishing, that right might be interfered with so as to call for regulation in two ways, and in two only. First, the stock of fish might be injured, and secondly, the loch might be so crowded with boats as to make it impossible to fish the water properly. On the facts there was no proof that either of these cases had arisen in Loch Rannoch—the evidence was all the other way. On that assumption no case for regulation had been made out, even if it were proved (which it was submitted had not been done) that the fishing was not so good as a sporting right as it formerly was, because the fish were more difficult to catch. In cases of common property the use of one common proprietor could only be interfered with by regulation when there was an abuse which was injuring the subject—*Menzies* v. *Macdonald*, March 10, 1854, 16 D. 827, *aff.* 19 D. (H.L.) 1, 2 Macq. 263. If regulation were admitted, on the ground that the sport derivable from the fishing was inferior to what it was formerly, the defenders might on similar grounds be compelled to fish so many days in the week, because there was no doubt that enjoyment of angling in a loch might be as much interfered with by under as by over fishing. Secondly, whether the pursuer had or had not made out a case for regulation, his action as laid was incompetent. Decree would result in allocation of boats according to frontage. Such an allocation would be contrary to the principle laid down in *Menzies* v. *Macdonald*, *cit. supra*.

At advising—

LORD PRESIDENT — The question presented for decision in this case is whether sufficient grounds have been established for the Court interfering to regulate the exercise of the right of fishing for trout in Loch Rannoch by the riparian proprietors, or persons having their authority.

A century ago the property surrounding the loch belonged to the family of Menzies of Rannoch, now represented by the pursuer and the family of Robertson of Struan, with the exception of a small portion at the south-east corner of the loch which belonged to Stewart of Innerhadden. Speaking generally, the lands on the north side belonged, as they still belong, to Rannoch, and the lands on the south side belonged to Struan. The lands of Struan have since been sub-divided into four parts, and the present proprietors of these are defenders in this action, as is also Stewart of Innerhadden.

The respective rights of the proprietors of Rannoch and Struan in Loch Rannoch have been determined by two important judicial decisions, one on 14th December 1798, adhered to on 2nd July 1799, and the other a judgment of the whole Court on 10th March 1854, affirmed by the House of Lords on 10th June 1856. By the former judgment, which was pronounced in conjoined actions between Sir John Menzies of Rannoch and Colonel Robertson of Struan, the Court found that "both parties in this cause have a joint right or common property in the loch of Loch Rannoch, and a joint right of sailing, fishing, floating timber, and exercising all acts of property thereupon, and of drawing nets upon the shores thereof adjoining to their respective lands, but not upon the shores of the lands belonging to each other;" and decerned and declared accordingly. In the action second mentioned, which was at the instance of the present pursuer against Major-General John Macdonald, who had acquired a portion of the barony of Struan, the Court, by a majority of the whole Judges, held that Struan was entitled to convey a share of the joint interest and property in the loch belonging to him, and that a disposition by him was a valid conveyance to his disponee of this joint interest, and this judgment was affirmed by the House of Lords on 10th June 1856. The Lord Chancellor (Lord Cranworth) in giving judgment said, that a disposition of a specific part of the lands constituting the barony, with the general words added, must be taken to give to the disponee of parts of the lands of the barony, as pertinent thereto, the same rights in the lake in respect of the parts so conveyed as he had himself taken on obtaining a conveyance of the whole, "subject of course to the observation that as between Menzies on the one hand, and Struan and his disponee on the other, no greater or more extended rights could be enjoyed by the latter than if the whole of the barony had remained entire and unsevered." Although the proprietor of Innerhadden was not a party to either of these actions, the present case is presented upon the assumption that Innerhadden has rights in the loch similar to those pertaining to the baronies of Rannoch and Struan, and it appears that these rights have been exercised by the proprietors of Innerhadden from time immemorial. The discussion has been taken upon the footing that each of the six riparian proprietors has a right of fishing

for trout by rod and line over the whole loch, and the object of the present action is to obtain judicial regulation of that right.

I did not understand it to be disputed by the counsel for the defenders that the Court would, upon sufficient cause shown, have power to regulate the right of trout-fishing in a loch as between or among different proprietors interested in it, and the existence of this right of regulation was fully recognised in the previous cases already mentioned. The defenders, however, maintained that there has not been any abuse, or any excessive or undue exercise, of the right by any of them, and that consequently no case for interference by the Court has been established.

The pursuer in his summons seeks to have it affirmed as the ground for claiming judicial regulation (1) "that the trout-fishing in Loch Rannoch is being injured and destroyed;" and (2) "that this injury and destruction are being caused by and in consequence of excessive fishing by the defenders, or some of them, or by those authorised by the defenders, or some of them, from boats on the said loch;" and the Court is asked to regulate the fishing by finding that no more than sixteen boats should be allowed to fish on the loch, and that these sixteen boats should be allocated among the parties having right to fish in the loch in proportion to the extent of the frontage of the land of each of them along or to the loch.

The first question therefore is, whether it has been established that the trout-fishing in the loch is in fact being injured and destroyed in consequence of excessive fishing by the defenders, or any of them, or by persons in their right, and much evidence has been adduced both by the pursuer and by the defenders upon this question. If it was established that the fishing was being materially injured or destroyed by excessive fishing, I think that it would be the duty of the Court to interfere by way of regulation, because, although trout-fishing is not, like salmon-fishing, a separate feudal estate, it is an incident of property having a distinct commercial value, and it is therefore entitled to the protection of the law as well as any other valuable incident of property.

In considering whether the pursuer has established material injury or destruction by excessive fishing, it is necessary in the first instance to form an opinion as to the standard by reference to which the question what constitutes excessive fishing should be tried. The recollection of the pursuer and his brother Mr Fletcher Menzies goes back for seventy years, when there were very few boats and very little fishing on the loch, or in other words, when the loch was not fished to anything like the extent to which it could have been without injury to it as a sporting subject. Indeed there is evidence of weight to the effect that in these early days, and until between thirty and forty years ago, the loch was rather under than over fished. Very little value was at that time attached to the right of trout-fishing, and it was not exercised to such an extent as it might well have been in the fair and advantageous administration of the riparian properties. I therefore think that the amount of fishing practised sixty or even thirty years ago cannot be taken as affording a standard any fishing beyond which must be held to be excessive. The number of boats on the loch in these early days was relatively small, probably five or six, and it has since increased to from forty-five to fifty, the principal increase being at the hotels — there are now six at the Dunalastair Hotel, five at the Bunrannoch Hotel, and five at the New Hotel. It does not, however, appear to be established that except at the hotels there has been any material increase during the last twenty years, and even at the hotels the increase during that time does not seem to have been very great. No allegation is made that the number of boats is so great that they incommode or crowd each other on the fishing-ground, and it would appear that it rarely happens that a third of the boats on the loch are engaged in fishing at the same time.

But in the question whether the fishing is being materially injured or destroyed, the best, or at all events the most obvious, test would be a comparison of the number of fish caught at a time when the fishing is not alleged to have been excessive, with the number caught now, and I do not think it is proved that the aggregate number taken is smaller now than it was when it is not alleged that there was excessive fishing, although the average weight of the individual fish was probably greater then than it is now. The evidence on this question has been very fully and carefully dealt with by the Lord Ordinary, and it does not appear to me to be necessary to go through the details of it again. I may, however, remark that in regard to this matter, as well as with respect to the number of boats on the loch twenty or thirty years ago as compared with the number now, the evidence is conflicting. Some anglers who have known the loch for many years say that since 1878 the fishing in it has fallen off so greatly that they do not now care to fish, but about the same time of which they complain other anglers were obtaining good baskets. Probably the loch is now being as fully fished as it should be in the permanent interests of the riparian proprietors, but I cannot say that it appears to me to be proved that the fishing has been or is being destroyed, or even materially injured, in the sense of being brought below what might be regarded as a fair standard of sport under the conditions now existing throughout the country.

I think that a different question would arise if it were established that the fishing was carried to such an extent as to destroy or materially injure what may be termed the breeding stock of fish, but the evidence does not appear to prove this to have been the case down to the present time. It is said that the fish are now much smaller than they were, and that this is proved,

not only by the size of those caught but by observation of those running up the streams for the purpose of spawning. The fact, however, that the majority of fish now caught are smaller than in former times may be partly at least accounted for by the fact that owing to the number of boats moving about on the loch, and the amount of angling from them, the larger fish are made shy and more difficult to catch. This view is confirmed by the fact that good baskets, including fish of fairly heavy weight, are still not infrequently obtained by skilful anglers. The increasing shyness of the fish is no doubt unfortunate for the unskilled angler or the angler of only average skill, but so long as the number or crop of the fish is not seriously diminished, I do not think that a case of material injury calling for the interference of the Court is made out.

It appears to me that the law does not require a community of proprietors, having interest in a common right of fishing, to observe the same standard of preservation of fish, or even of moderation in fishing, as the owner of a private loch might think fit to practise in his own interest. The Court should not in my judgment interfere unless the fishing is carried on in such a manner or to such excess as either to destroy or materially injure the reasonable enjoyment of the right. I was at first disposed to think that a *prima facie* case for regulation had been established by the pursuer, but upon a careful consideration of the evidence it appears to me to fall short of what would be required to warrant our interference.

One of the peculiarities of the case arises from the fact that while the total area of the loch is about 4611 acres, not above 1000 acres of that area can be described as reasonably fishable ground, and the best part during the summer and autumn months is an area of between 400 and 500 acres at the west end, opposite to the pursuer's property. The result is that this portion—about a tenth of the entire area—becomes the usual fishing ground, with the consequence that the fish become shy from being so frequently cast over. It is not wonderful that the pursuer should dislike so much fishing on the part of the loch opposite the residence of Rannoch Lodge, but the right of the other proprietors to fish there results from the decision that Rannoch and Struan, and now apparently each of the riparian proprietors, has a joint and equal right of fishing over the entire loch, so that each can fish at any part of it which he may prefer.

Upon the whole matter it does not appear to me that there is sufficient proof either of destruction of or material injury to the fishing to require or warrant the interference of the Court, and I am therefore of opinion that the judgment of the Lord Ordinary should be adhered to.

LORD ADAM—I concur.

LORD M'LAREN—In this case I concur in the proposed affirmance of the Lord Ordinary's interlocutor dismissing the action, but my opinion is based upon a different ground. The pursuer's demand, and, as I shall presently show, his only demand, is that the rights of the proprietors of the fishing shall be allocated in proportion to the extent of "frontage" which each of the present proprietors possesses. But according to the judgment of the House of Lords in the previous case of *Menzies* v. *Macdonald*, 2 Macq. 463, all the owners of original baronies have equal rights, and each is entitled to communicate a share of his right to a feuar or disponee, but not so as to diminish the right of other tenants under the Crown. This, I think, is very clearly expressed in Lord Cranworth's speech in moving the affirmance of the judgment of the Court of Session, and it is also consistent with Lord Rutherfurd's opinion, which was concurred in by other Judges, who supported the judgment of the Court of Session. Now, it appears to me that we could not make an order allocating the use of the loch in proportion to "frontage" consistently with the rights of the parties as already determined in the case of *Menzies* v. *Macdonald*, and that no allocation on a different basis could be awarded under this action. This is, as I think, very clear on the face of the summons. Passing over the first and second conclusions, which relate only to the facts of the case, it is concluded, third, that the pursuer is entitled to have the fishing in the said loch regulated according to such rules and regulations as the Court may think proper to frame for the preservation of the fishing, &c. As I read this conclusion, the reference to the discretion of the Court is only for the purpose of ascertaining the kind of regulation which is desirable, not for the ascertainment of the measure of the rights of the proprietors. This is made clear by the terms of the fourth conclusion, where it is affirmed that no more than sixteen boats should be allowed to fish on the said loch, and that the said sixteen boats should be allocated amongst the parties having right to fish in said loch in proportion to the extent of frontage along or to the said loch which the land of each person having such right possesses, &c. The conclusion goes on to say, "or otherwise in such way and manner, and according to such other system of regulation as shall seem right and proper," &c., but these general words appear to me to relate only to the mode of enjoyment, and it would not in my view be possible under this conclusion to frame regulations founded on the principle that each of the baronies had equal rights of fishing.

In the course of the argument the attention of counsel was directed to the discrepancy between the extent of the right claimed by Sir Robert Menzies and the extent of the right which he appears to enjoy according to the judgment in *Menzies* v. *Macdonald*, but it was not proposed to amend the summons, and we are left to decide the question as it is submitted to us in the summons. Having formed this opinion, it may not be necessary that I should enter on the question whether the facts as proved establish a case for regulation ac-

cording to the true measure of the rights of the parties. But I may say that I have not been able to satisfy myself that the existing state of possession is satisfactory. The Lord Ordinary concludes his analysis of the evidence with this observation—"It may be (and I rather think it is the case) that the amount of fishing has reached a point beyond which it cannot be carried with safety to the sport." I agree, but then my inference is that in such a state of the facts regulation is necessary. I think that a proprietor of fishing is not bound to wait until he can prove actual injury before coming to the Court with an action which is in substance an appeal to the Court's equitable jurisdiction to restrain apprehended injury. But for the reasons stated I am of opinion that relief cannot be given in the manner concluded for in this action.

LORD KINNEAR—I agree with your Lordship in the chair, and for the same reasons which you have explained, and which have been also explained very clearly by the Lord Ordinary. The first question we have to consider when we are asked to make regulations is, what is the precise legal character of the right which we are to regulate, and in this case we are not left to define it for ourselves, because it has been already defined for us by two previous judgments of this Court and of the House of Lords. The effect of the right as so defined is, I think, entirely in accordance with the general rule of the law of Scotland with reference to fishing rights in lochs, as that is very clearly explained by Lord Selborne in the case of *Bankes* v. *Mackenzie* —"If there are more riparian proprietors than one, the entire lake belongs rateably to them all. So far as relates to the *solum* of the loch, it is considered to belong in severalty to the several proprietors, the space enclosed by lines drawn from the boundaries of each property *usque ad medium filum* being deemed appurtenant to the land of the proprietor, exactly as in the common case of a river." But then, from the very nature of the circumstances, rights of boating, fowling, and fishing, which are to be exercised on the surface of a loch, cannot be conveniently enjoyed—indeed they cannot be practically enjoyed at all—in severalty, and therefore they must be enjoyed "over the whole face of the water by all the riparian proprietors in common." That is the right that the pursuer and defenders say they are entitled to enjoy—the right of fishing all over the whole face of the loch. But then it is laid down by the judgment of the House of Lords, and it is, I think, an obvious corallary of the proposition I have cited from Lord Selborne, that this common right must be subject, in case of abuse, to judicial regulation. The question therefore comes to be, what will amount to abuse—such abuse as to require the interference of the Court? In the first place, it is evident from the very nature of the right that no one proprietor can complain that others do not confine themselves to their own part of the loch, but come upon water which he thinks ought to be exclusively his, because no part of the water is his or theirs. They have all a right to be everywhere, and if one part of the loch affords better fishing than another, every proprietor alike is entitled to have the benefit of that advantage, whether his riparian property is in the immediate vicinity of this better water or at a distance from it. One can quite understand, as your Lordship has observed, that it may be very vexatious to a proprietor whose property is situated in relation to a loch in such a position as the pursuer's lodge of Rannoch is situated with reference to the loch, to find that whereas the water in the immediate proximity of his residence affords the best fishing-ground of the whole loch, it is generally occupied by boats that are always coming up from the other end, miles away, and I daresay this invasion of the best water may be especially annoying when such a proprietor has been accustomed at an earlier period to something very like exclusive enjoyment of one part of the loch. But then it is a condition of his right; it must be subject to the concurrent exercise of the same right by other people, whatever vexation and annoyance that may bring with it. Each proprietor has access to and right to fish in any part of the loch, and therefore the mere complaint of a proprietor that others are frequenting one part of the loch appears to me to form no ground for regulation at all. A regulation is a restriction of the enjoyment of a legal right, and where there can be no encroachment by one party enjoying such a right against the adverse or separate right of another party, it seems to me that the only excess which can afford ground for regulation or restriction of legal right must be such a use as amounts to abuse, either by destroying or materially diminishing the subject-matter of the right, or by destroying or materially diminishing the sporting enjoyment of the right. I do not quite follow the case which was suggested in argument, though there is certainly very high authority in support of it, that one of the common proprietors may be restrained if he takes more than his due share of the common right to the exclusion of others, because there are no shares. The right is not enjoyed in shares, but it is a right which from its very nature can only be enjoyed in common, and therefore one proprietor cannot exercise his right in excess so as either to injure the stock of fish or to injure the sport of fishing to the prejudice of another proprietor without equally injuring himself and all the proprietors in common. There is no room, so far as I can see, for a case of abuse by encroachment upon any right vested in the pursuer in severalty, and accordingly I think the pursuer has framed his summons with perfect logical accuracy, when he asks it to be found as the first and, I think, indispensable step towards the regulation which he wishes us to make, that the trout-fishing in Loch Rannoch is being injured and destroyed; and, in the second place, that this injury and destruction are being caused by excessive fishing by the defen-

ders, or some of them, from boats upon the loch. These are the two propositions which lie at the foundation of the pursuer's case, and I think that in tabling them for consideration in the first place, he has acted on a perfectly accurate and logical conception of the nature of the right which is really vested in him. The question then comes to be whether either of these propositions is proved. I think the terms of the first declaratory finding that it is proposed we should make are sufficiently comprehensive to cover the two cases which I have suggested might be made of abuse or excessive fishing. The trout-fishing may be injured either by the destruction or the great diminution of the total number of fish in the loch, or by the destruction of the enjoyment of trout-fishing as a sport. In either of these ways it appears to me that the common right might be encroached upon and destroyed, or at all events materially diminished, by the action of particular proprietors. But then I agree with your Lordship and with the Lord Ordinary that as to the first of these two propositions there is no sufficient evidence to enable us to affirm it. There is conflicting evidence, and if the question were to be treated as one depending upon a balance of testimony, I confess I should say that the evidence of the defenders in my opinion prevails, because I think, not only in numbers and quantity, but also in precision and in carefulness of investigation, it appears to me to be weightier than any evidence that has been adduced by the pursuer. But apart altogether from any conflict of testimony, if the pursuer's evidence were taken alone, I should think it much too loose and indefinite to justify the Court in founding upon it any such conclusion as we are asked to found. The evidence of the pursuer and his witnesses taken alone probably comes to this, that there is some diminution in the baskets taken by particular fishermen on particular days—that on an average the fish taken are smaller than they used to be, and they are taken in small numbers. Now, I think that upon such a question as this the evidence of the pursuer himself and of Mr Fletcher Menzies is entitled to the greatest possible respect and weight, and I have no doubt that the same thing should be said as to the evidence of Mr M'Gregor. But then it is really nothing but a general opinion, and we must consider the point of view from which it is given. When witnesses, who have been accustomed to fish in a particular loch for so many years as these gentlemen have, say that they do not now find the fishing is so good as it was thirty, forty, sixty, or seventy years ago, I confess it seems to me very certain that the same kind of evidence might have been brought with regard to the same sport in any other loch, or with regard to any sport anywhere. But it really comes to no more than this, that the fishing is not so good as it once was, and if that is to be connected, as the pursuer's case requires it should be, with the condition that a greater number of people are fishing on the loch than used to be at the somewhat distant periods to which these witnesses speak, then it seems to me that it is a condition of the right which has been established as being in the pursuer and the other proprietors. It is a right which from its very nature can be exercised by a great number of people, and if the consequence of its being exercised by a great number of people is that it is not quite so good or so enjoyable as it would have been if it had been vested in one person alone, who should have the entire control of the water, then I am afraid that is simply a consequence of the nature of the right of which no proprietor can be relieved. But then, if the evidence went a great deal further—if it were conclusive as to the fact that the number of fish in the loch has been materially diminished—that is only one step towards the pursuer's conclusion; and I must say I can really find no evidence—I do not say insufficient evidence, but I find no evidence in the pursuer's case to enable me to take the further step and to say that that is owing to excessive fishing from too many boats. What strikes me most on considering the evidence of the pursuer as to the specific cause of any decrease of numbers which may be supposed to have taken place, is the entire absence of any attempt at either theoretical or experimental investigation of the problem. If the fact is as is maintained by him it is, there is no evidence whatever as to the cause of it. What is relied upon is merely that there is a considerable amount of fishing now—a greater amount of fishing now than there used to be. Now I cannot at all assent to the proposition that that is in itself conclusive evidence that over-fishing is the cause of the diminution of fish in the loch, if it were proved there was such a diminution. There may be many causes to account for the failure of anglers to have a successful day upon the loch. If the fish do not take readily, or if the smaller fish take more readily than the larger ones, I suppose every angler will have his own way of accounting for that phenomenon, and the probability is that many of their hypotheses may be wrong. But if we are invited to hold it proved that a particular cause has produced these effects, then I must say I should look for much more definite and explicit evidence than I find in the pursuer's case. If it be true that the larger fish are less eager to take the fly, and that a greater number of the small fish escape the voracity of the larger than used to be the case, it is very possible that that might be accounted for in various ways; and there is really no evidence at all to show that it can only be accounted for by overfishing. Again, I think it a fatal defect, that if we take the pursuer's case alone, we should not be able to say either how many boats there are upon the loch or how many boats may generally be sent out to fish at the same time, and certainly we have no evidence to enable us to say how many boats there ought to be. Then I think the evidence as to the question of the diminution of enjoyment of sport stands

exactly in the same position. I do not at all assent to the argument which was maintained by one of the defenders' counsel that that is a matter which the Court ought not to take into account, either because of its being merely a pastime or because the facts are too obscure for investigation. The enjoyment of trout-fishing as a sport is an incident of property, and therefore the Court is bound to recognise it, and I do not see that there should be any greater difficulty in ascertaining the determining facts than there is in ascertaining the facts in a great many other questions which are not within the range of common knowledge. But then the complaint which is made appears to me to be a great deal too vague for the Court to proceed upon. For the pursuer to make out that the enjoyment of sport has been destroyed or materially diminished it would in my opinion be necessary to show some definite case of interference with his own enjoyment. It was suggested in the course of the argument by one of the defenders' counsel that if it could be said that the pursuer could not fish without being exposed to the imminent risk of another boat crossing his drift, that would be very good ground for complaint. I think it would, and I daresay—though I do not know—that some other illustrations of the same kind might be given. But whatever the complaint is, there must, in my opinion, be some definite ground upon which the pursuer can say—"The enjoyment of the sport is interfered with in this or that particular," and there is no attempt to make such a case in evidence. It appears to me, therefore, that upon both points the evidence fails. I should add that I entirely sympathise with Lord M'Laren in the difficulty which he feels in reconciling the specific manner in which it is proposed to regulate the right with the terms upon which the right has been fixed by the judgment of the House of Lords, because we are asked to measure the rights of the proprietors by reference to their frontage to the loch. I agree that there is very great difficulty in measuring the right in that way, because it is established, as I have already said, that in its exercise it has no relation to frontage at all. But then I should have great difficulty in seeing how it is to be regulated in any other way, and therefore I do not desire to express any decided opinion that if a case for interference had been made out, and if we had ascertained the exact number of boats which ought to be allowed to fish at one time on Loch Rannoch, we might not have been compelled to distribute that number amongst the various proprietors with reference to frontage. I agree it is not very logical, but I do not at present see any other very satisfactory means of making a distribution. The principle suggested in Lord Cranworth's judgment in the House of Lords seemed to be that Rannoch would be entitled to the same proportion of boats in competition with the other proprietors on the loch as it would have been entitled to before the subdivision of Struan into different properties. But what number of boats Rannoch would have been entitled to, and what number the other property of Struan would have been entitled to, in these circumstances, we do not know. The great difficulty I should have in making any regulation arises at an earlier stage of the process of reasoning, and that is, to find any sound basis for determining any definite number of boats which may be allowed to all the proprietors together, and it is only when that has been done that we should be in a position to consider what proportion of the whole should be allowed to each. I do not think there is any evidence to enable the Court to define the numbers of boats that ought to be used on Loch Rannoch, and indeed I do not think there is any evidence to enable us to say that the number used is excessive; but if it is excessive—if it is more or less than the proper number—there is nothing, so far as I can see, to enable us to say what the proper number is. On the whole matter, therefore, I agree with your Lordship that the Lord Ordinary's interlocutor should be adhered to, but I do not think we have reached the stage at which we can usefully consider what the precise method of regulation should be in a case where a case for regulation had been made out.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Sol.-Gen. Dickson, K.C.—E. H. Robertson. Agents—W. & J. Cook, W.S.

Counsel for the Defenders and Respondents—Shaw, K.C.—Wilson, K.C.—Clyde—J. H. Millar—Sandeman—Chree—R. S. Brown. Agents—A. P. Purves & Aitken, W.S.—Davidson & Syme, W.S.—Charles P. Finlay, W.S.—Skene, Edwards, & Garson, W.S.—Mackenzie & Black, W.S.

Tuesday, June 4.

FIRST DIVISION.

SCOTTISH PROVIDENT INSTITUTION *v.* ALLAN.

Revenue—Income-Tax—Interest from Securities Abroad—Remittances of Interest or Repayment of Capital—Income-Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *sec.* 100, *Sched. D, Case* 4.

A mutual insurance society in Scotland were assessed for income-tax under the fourth case of Schedule D of the Income-Tax Act 1842, upon sums remitted to them from Australia in 1898. They maintained that they were not liable to be so assessed, upon the ground that the sum so remitted was not in payment of interest but in repayment of capital. Between 1885 and 1890 the society had sent various sums to Australia for investment. The interest on these investments was received by the Society's representatives in Australia, and paid into a bank account there; and prior to 1893 it was not brought to this country but invested in