SIR ROBERT MENZIES, BARONET, . . APPELLANT.
LIEUTENANT-GENERAL MACDONALD, RESPONDENT (*a*).

1856, *April* 17*th*, 18*th*, 20*th*, *and June* 10*th*.

Common property in a loch—Right of alienation.—Where there are two or more co-owners of a loch, any one of them may effectually alienate a portion of his property, provided that the alienation do not infringe on the rights and enjoyments of the other co-owners.

The Respondent, General Macdonald, is proprietor of the estate of Kinloch, which originally formed part of the ancient barony of Strowan, in the highlands of Perthshire, with the fishings, lakes, and pertinents of the same, under a disposition in his favour, granted in 1828, by the trustees of the late Colonel Alexander Robertson, of Strowan, and infeftment following thereon.

These lands of Kinloch border on Loch Rannoch, which stretches about eleven miles from east to west, averaging about two miles in breadth. It is bounded on the south almost entirely by the barony of Strowan, and upon the north it is bounded by the barony of Menzies, with the exception of the land belonging to the Respondent.

The respondent alleged that as owner of Kinloch he had exercised all the rights of a common proprietor in Loch Rannoch at large by boating, fishing, floating timber, and every other use of which the lake was susceptible, on a footing of perfect equality with the barons of Strowan and Menzies, although according to a plan produced his share of the banks extended only to about 1,200 yards.

(*a*) Very fully reported in the Second Series of Court of Session Cases, vol. 16. p. 827.

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The question was whether the ownership of a narrow corner on the south-west corner of the lake entitled the respondent to the enjoyment of the entire surface of the lake.

The appellant contended that the respondent had no right of property or servitude in the lake; but, at all events, he insisted that his right was confined to his own frontage.

The Appellant further averred, that in 1848 the Respondent had erected a tavern at Kinloch; that it became a resort for sportsmen "from the South" (*a*); that these were permitted by the Respondent or his tenant to "sail and fish" in and over the whole of the said loch jointly and equally with the two barons aforesaid and their friends, who were alleged by the Appellant to be exclusively entitled to these privileges; that, by reason of the Respondent's proceedings, "great annoyance" had been occasioned to the Appellant; his sport had been invaded; his rights had been injured; and the amenity and silence of the lake had been disturbed.

The Appellant, in November 1850, commenced the present action of declarator, to establish his own rights and ascertain those of his opponent.

A defence was put in by the Respondent, and cases were prepared, containing copious and learned arguments on both sides; the result of which was that the Judges were divided in opinion, nine being for the Respondent and three for the Appellant.

In no way can justice be so effectually done to the discussion as by here introducing some extracts from the judgment of Lord *Rutherford*, who was in the majority; and some from that of Lord *Deas*, who was in the minority.

(*a*) Termed "Cockneys" by the learned Solicitor-General.

The opinion of Lord *Rutherford* was as follows:—

Lord *Rutherford*,—Loch Rannoch, with its islands, which is almost entirely surrounded by the baronies of Menzies and Strowan, was the subject of mutual actions of declarator between the late Sir John Menzies and Colonel Robertson. The titles of Menzies contained a grant *per expressum* of Loch Rannoch, and the islands of Loch Rannoch; the Strowan titles contained a grant of barony, with a general grant of lakes and fishings, and parts and pertinents. The question turned upon the effect of the special grant to the one proprietor, in competition with the general grant to the other proprietor, and the possession had under it. The result was a judgment on 14th December 1798, adhered to on the 2d of July 1799, finding "that Sir John Menzies and his trustees have an exclusive right to the two islands in Loch Rannoch; that both parties 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.*" It is not disputed that this judgment definitively ascertained the rights of these parties respectively in the loch.

The ground upon which the Pursuer maintains his leading conclusion is, that Strowan *could not convey*, and *de facto, did not convey* to the defender any portion of the *pro indiviso* joint right or common property in the loch, that right being, as he terms it, an indivisible subject. He maintains further, that *de facto* it was not conveyed to the Defender; lastly, he maintains, that if the joint right or common property could be partially conveyed to the Defender, and was so conveyed,it was only to the extent of the loch *ex adverso* of his own lands, and covering the *solum*, as the boundary might be ascertained.

The *first* of these points, namely, whether either proprietor could partially communicate his right to a disponee, is the most important. The Pursuer must begin by admitting, that the right is in itself alienable. He cannot deny that the proprietor of the barony of Strowan might convey the whole barony, with his joint right of property in the loch. But further, he cannot deny that the right or property of a loch may be held by two parties in joint right, or common property. That is found by the judgment of 1799, which in that respect is conclusive. We have nothing to do here, therefore, with a *feudum* or franchise, which is in its nature *indivisible*, or to be enjoyed by one party only; but we have a property in which it was held that these two proprietors have a joint interest or common property; and not only so in general language, but emphatically a joint right of sailing, fishing, floating timber, and exercising all rights of property of which the subject is susceptible; under this limitation only, that neither shall draw nets upon the shores belonging to the other.

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But if a loch can be a subject of joint right or common property in two parties, why not in three or four, or any number of parties? If two parties can exercise jointly and in common the rights of fishing, and sailing, and floating timber, and other acts of property, why not three, four, or six?

I am unable to take a solid distinction between this case and any other right of common property. Here the property is of a peculiar nature, and the modes of possession and enjoyment are also peculiar, being adapted to the nature of the subject. But the rights of sailing, and of fishing, and of floating timber, are not personal privileges in the several proprietors. They are rights flowing from, and incident to, the right of *property* in the loch; and constitute the manner in which that property is enjoyed, and are, as is well expressed in the judgment of 1799, "acts of property." The right of fishing over the whole loch, or sailing over the whole loch, is just like the right of grazing over the whole commonty. With the exception that no party can draw nets but on his own shore, the whole loch is the subject of joint interest and common property; and every part may be fished upon, as in the case of a land commonty every; part may be grazed upon by the co-proprietors.

An ordinary right of commonty may require regulation in the case of two proprietors, where one draws more feal and divot than he ought, or puts a greater number of sheep or cattle on the common than he is entitled to. The same may be said of commonty in a loch. If the right of one party, by voluntary disposition, or by succession, be conferred on several, that will not affect the right of the other. He will make good his own right and interest against the several proprietors as against the one. 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 a 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. If in a patronage belonging jointly to two parties, one patron was succeeded by heirs-portioners, or disponed his right to two parties jointly, that would not affect the rights of the other patron, who would be entitled to present in his own turn, leaving the others to adjust their interests as they might. So in any other commonty the right of one proprietor may be given to several, but the rights of the other will remain as before. And in the same manner here, if the pursuer can show a case of injury, he will have his remedy by regulation and by interdict. His right to such a remedy, however, does not depend upon, but is in truth adverse to the principle he now contends for, that there never can be in Loch Rannoch more than two proprietors. I think the plea cannot be maintained.

The proprietor of Strowan has conveyed a part of the barony,

the lands of Kinloch, with all right, title, and interest, which he had, and in the same general terms of conveyance, including lakes, fishings, parts, and pertinents, *which were found, with his possession, sufficient to give him joint interest and common property.* Such a conveyance, I think, carries the benefit of the author's possession, as well as the benefit of his title. Holding, therefore, that the proprietor of Strowan could communicate to a disponee a share of this joint interest and property in the loch, I think the defence good against the first conclusions of the declarator.

If it were necessary to consider the alternative conclusions of the libel, my present impression is, that there are no grounds for limiting, in the manner proposed, the rights of the Defender as Strowan's disponee. He cannot draw nets except upon his own shore; but his joint interest in fishing, and sailing, and floating timber, and other acts of property, extends over the whole lake in its present condition, subject only to such regulation and remedy, in the case of proved abuse, as the Pursuer or any other co-proprietor may establish with reference to the proper extent of their interests in the joint right or common property in the loch. To restrict the Defender's exercise of his right to a particular portion of the water, while the whole is held in common property would be much the same as the restriction of a joint proprietor in a land commonty to a particular portion of the undivided commonty for his grazing.

The opinion of Lord *Deas*, in opposition to Lord *Rutherford*, was in these terms:—

Lord *Deas*.—The real question in dispute relates to the Defender's alleged right of common property, which is virtually affirmed by the interlocutor of the Lord Ordinary.

Such a right is, I apprehend, as distinct from *commonty* as it is from *servitude and common interest*.—(Bell's Principles, sec. 1071.) Commonty "is a right neither of common property nor of common interest, but of joint perpetual use, conferred, or presumed to be conferred, by the proprietor of land for the common use of many." —(*Ib.* sec. 1087.) Accordingly, the Statute 1695, cap. 38, applicable to commonties, is not applicable to common property.

Indeed, that statute was passed just because the common law right to compel a division of common property, so far as in its own nature divisible, was not applicable to commonties.—(Bell's Principles, sec. 1087.)

The nature of commonty cannot be better described than in the words of Mr. Bell in his Principles. After distinguishing it (in sec. 1071) from common property, he says (sec. 1088), "The right is distinguishable from usufruct, as not being personal, but an accessory of the real property of the commoner, from liferent, as

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being perpetual, and without any reversionary right of fee in another; and from servitude, as being not a burden, but of the nature of limited property."

The fact that a right of commonty is "*of the nature of limited property*" accounts for the phraseology used in many of the reported decisions, when the question was not between common property and commonty, but between commonty and servitude. From a similar looseness of expression the distinction is sometimes lost sight of between common property and common interest. As Mr. Bell observes, "These distinctions are not sufficiently marked by our institutional writers, *but they are very important.*" —(Principles, sec. 1071.)

A grant of commonty, as Mr. Bell says, has reference to *land*, and has mainly a view to pasturage. There is no instance of such a grant applicable to a lake. A grant of commonty is "an accessory of the real property of the commoner," and inseparable from it. A grant of common property is not so. That common property and commonty are different is indeed evident from the single fact that the common law alone provides for the division of the one, and the statute law alone for the division of the other. Accordingly, Lord Braxfield takes the distinction in the case of *Milligan*, when he observes, "It is said that by the common law of Scotland *commonties* could not be divided; but it does not follow that *common property* could not be divided."

It is true there must be, at least, one commoner deriving right from the original proprietor, otherwise there can be no division under the Statute 1695, however many rights of mere servitude there may be. But the right of the commoner, although a qualified, or, as it is sometimes called, a partial right of property, is not a right of common property in the correct and legal sense of these words, *and certainly not in the sense in which Strowan and Menzies are common proprietors of Loch Rannoch.*

I know of no principle or authority for holding that, in such a case, if the lake should become dry, the *solum* would fall to be divided, like a commonty, according to the valued rent of the respective baronies. The division would, I conceive, be between the two joint proprietors equally. The right of the one is as good and as extensive as the right of the other.

The property of a lake may, no doubt, belong to the adjacent proprietors, although not mentioned in the titles of either. But, even then, the lake can, with no legal accuracy, be called a commonty. "Lakes surrounded by the ground of various proprietors are common property; but they are not under the Act 1695, nor divisible otherwise than by consent or Act of Parliament."—(Bell's Principles, sec. 1111.)

Each proprietor is entitled to the *solum ex adverso* of his frontage, forward to the middle of the lake, either angularly or otherwise,

according to its shape (or to an equivalent portion), but without reference to his valued rent, or to the extent of his lands, except as regards their frontage, just as the proprietor of a narrow stripe of ground along the banks of a stream is entitled to half the *alveus ex adverso* of his ground, however great the breadth and value may be of the estate of the heritor on the opposite bank.

The principle applicable to such cases would obviously, however, not apply here. For Strowan and Menzies are *not proprietors of the whole banks*, and yet they are clearly joint proprietors *of the whole lake*.

My views, then, on both branches of the argument, may be summed up thus :—

1. In the language of Scotch conveyancing, there is a recognized distinction between commonty and common property.

2. One established difference is that, while rights of *commonty* attach inseparably to certain lands, and imply, *inter alia*, pasturage for the bestial which these lands can winter, and a share, in case of division, in proportion to valued rent, rights of *common property*, on the other hand are rights in fixed and specific, although undivided shares to a separable and distinct subject, which may or may not be held along with the individual estates of the common proprietors.

3. Whatever analogy, if any, may be drawn between a commonty and a lake belonging to the adjacent proprietors merely in respect of frontage, there can be none here, where, by final judgment, the general grant (with possession), and the express grant, have been held to vest in the two parties the common property of the lake, whereby each is a proprietor of a *pro indiviso* half, without reference either to frontage or valued rent.

4. This being so, a disposition by one of them, which makes no mention of any share of the *pro indiviso* half of the lake, cannot be read as a disposition of any such share, simply because it conveys a part of his individual lands, "with lakes and pertinents."

5. Even if the disposition could be so read, it would be ineffectual without the consent of Menzies; for this reason amongst others, that multiplication of the joint proprietors must necessarily alter and prejudice his position, contrary to the implied condition of the *pro indiviso* right.

6. If either party be dissatisfied with the restrictions he is thus under, his course is to dissolve the communion in one or other of the ways already pointed out.

The judgment appealed from was pronounced by the Second Division of the Court, on the 10th March 1854. It proceeded "in respect of the opinions of the majority of the whole Judges," and assoilzied the Defender (General Macdonald), from the conclusions of

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the action. The Pursuer (Sir R. Menzies) thereupon tendered the present Appeal.

The *Solicitor-General* (*a*), Sir *Fitzroy Kelly*, Mr. *Rolt*, and Mr. *Anderson* for the Appellant. The question is whether the alienation of the *ripa* carries the lake. If it does, an owner may divide his land infinitesimally, and on every distinct alienation the question will arise which is the subject of this litigation. We contend that the right here is *pro indiviso*, and incapable of alienation. The Respondent builds an inn; the landlord attracts guests, and the result is, that the Menzies' enjoyment is deteriorated. If this alleged right was pertinent to the Barony of Strowan, it still remains with Robertson.

The true rule of Scotch law, and the true distinctions recognized by it, are clearly stated in Mr. Bell's Principles (*b*). *Scott* v. *Lindsay* (*c*) is an authority in our favour; so likewise is *Anderson* v. *Dalrymple* (*d*).

The *Lord Advocate* and Mr. *Roundell Palmer* for the Respondent. Woods and lochs pass as "pertinents." This Lord *Stair* affirms (*e*) in a part of his great work, which contains all the law on the subject. *Craig* (*f*) is to the same effect. And no less strong is *Erskine* in his Institute (*g*); commonty and common property are one and the same, and Mr. Bell is wrong where he lays down the contrary. This question has very lately been considered by the Court of Session in a cause argued for nineteen days, that of *Gordon* v. *Grant* (*h*), where the doctrines we contend for were deliberately recognized and established. The decision below, we submit, must be affirmed.

The *Solicitor-General* replied.

(*a*) Sir R. Bethell. (*b*) See Lord Deas' opinion, *suprà*, p. 468.
(*c*) 22 July 1635; 12 Morr. 771. (*d*) 20 June 1799.
(*e*) B. 2. t. 3. s. 73. (*f*) B. 2. t. 8. s. 35.
(*g*) B. 3. t. 3. s. 56. (*h*) 22 Scottish Jurist, Nov. 1849.

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The LORD CHANCELLOR (*a*):

The object of the present action was "to prevent Lieutenant-General Macdonald, his family, friends, and tenants, from exercising the privilege of boating, fishing, and floating timber, and otherwise using the lake" called Loch Rannoch. The title of the Appellant dates from a very early period, viz., from the year 1502, when King James the Fourth of Scotland, by charter under the Great Seal, gave and granted to Robert Menzies, and his heirs and successors, the lands of Downan, and other lands and heritages therein mentioned, which were thereby erected into a Barony, to be called the Barony of Rannoch, upon which charter the said Robert Menzies was infeft on 17th March 1510.

The title of Strowan was not carried farther back than the year 1636. By a crown charter of resignation, dated the 27th of June 1636, in favour of Alexander Robertson, the Barony of Strowan, which includes the piece of land on the north side called Kinloch, is described. The description is—"Totas et integras terras et baroniam de Strowan, comprehendentem omnes et singulas terras, molendina, silvas, piscationes, lacus, aliaque particulariter subscripta;" and then it adds "cum piscariis lacubus," and others.

This property, that is, the Barony of Strowan, afterwards came to the Crown on the attainder of its then owner, about the middle of the last century, I think in the troubles of 1745. But afterwards, in 1785, it was restored to Alexander Robertson by the same description as that contained in the original charter of 1636.

Disputes arose soon after 1785 between Menzies, who was the owner of the Barony of Rannoch com-

(*a*) Lord Cranworth.

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prehending the north side of the lake, except that small piece at the bottom, and Robertson, as the owner of the Barony of Strowan, as to their respective rights in and over the lake, which led to cross actions between them. The two actions were afterwards conjoined, and a final interlocutor was made in the conjoined actions on the 2d July 1799.

That decision conclusively establishes the rights respectively of Menzies and Strowan to this lake as joint property.

The Appellant, however, contends that Strowan could not alienate a portion of the Barony, so as to give to his disponee the right to use the loch for fishing, boating, and so on, for that by such alienation he would be making the interests of Menzies less than it in fact is; that he would be thus making him an owner to the extent of one third of the lake, instead of one half. The Appellant insists that the ownership of a lake is a *jus individuum*, incapable of severance; and that where there are two joint proprietors of such a right, one of them cannot, without the consent of the other, introduce a third. That such is the law in reference to some property there is no doubt. For instance, in the case of a castle for defence, you cannot grant a portion of it; the nature of the property prevents a subdivision.

There is also a further point raised by the Appellant here, namely, that even if Strowan had the power of giving a right of using the loch for all the purposes for which he can use it himself, yet that, in fact, no such right was conferred by the conveyance which he made in 1828. This is a question depending on the construction of the particular deed, and is of inferior importance to the other, which involves principles affecting the general rights of two or more co-owners of a loch.

Both parties, it is to be observed, start from the interlocutor of 1799, which established the joint ownership. The *Lord Ordinary* was of opinion, that treating Rannoch and Strowan as joint owners of the loch, there was nothing in the nature of the property to prevent either of the co-owners from alienating any portion of his interest, provided only that he and his alienee could not together take a greater interest in the loch, and the use of it, than he alone enjoyed before his alienation.

The argument of the Appellant proceeds upon the assumption that the right to a loch is a right incapable of division. But upon what does this rest? The proposition comes strangely in a case which is founded upon the joint ownership of the two. There is nothing in the law of Scotland, so far as I have been able to discover, to prevent the owner of a loch from alienating any portion of it as he may think fit. So also, when the right to a loch is held as a mere pertinent to land. If, indeed, the effect of alienation by one or 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. But a similar right would exist independently of alienation, if one of two co-owners should use his right in excess, so as to interfere with the right of the other. To illustrate this, suppose it were not possible for more than any given number of boats, say a thousand, to be simultaneously engaged in fishing upon the lake, Sir Robert Menzies would be entitled to have five hundred so employed, and Strowan would be entitled to the other five hundred. Strowan could not, by alienating to others, give a right to more than his due share. But if he keeps within that limit, Sir Robert Menzies has no right to complain. It is the same thing to him whether the right is exercised by Strowan himself, or

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by others deriving title under him. In either case, Strowan or his disponees might be restrained from any excessive exercise of the right enjoyed in common with another; but Strowan 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.

It was, indeed, argued that the right to a loch is a *jus individuum*, incapable of division, at all events incapable of division by the act of the party. That was a necessary restriction of the argument, because it is clear that the right to a loch might descend to two heirs, who might take in coparcenery, and in that case it is not contended that the right might not be divided.

I have searched through all the books that would throw light upon the subject; but I can find no ground whatever for such contention. The cases relied upon do not sustain it.

The old case of *Scott* v. *Lindsay* merely decided that a party claiming under a special infeftment of a lake might set up a valid title to exclusive possession, even against a party who had been previously infeft in certain lands *cum lacu piscationibus, &c.*, and who claimed under that infeftment to have continually exercised the right of fishing, and other rights on the loch: and so the Court held.

That case might have been relied upon, as affording a cogent argument in the contest raised by Menzies in 1798, but it is inapplicable to the present case.

The case of *Anderson* v. *Dalrymple*, decided in 1799, is also inapplicable to the question now under discussion. It was there decided, that where two or more persons are entitled to the common use of a passage leading to their respective apartments in a house, no one of the persons interested can alter, even

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by improving, the passage in which there is this common interest, without the consent of all. I have no doubt of the correctness of that decision, and if here Strowan had without the consent of Menzies attempted to drain the lake, the case cited would have been an authority to show that he could not do so; but it is no authority to show that the owner of one of the rooms in the supposed house to which the passage led could not alienate that room or any portion of it to another, and that such disponee would not have a right to use the passage.

Reliance was then had upon two cases, in which it was held that where there are two joint owners of a muir, one of them cannot, without the consent of the other, let to a third person the right of sporting over it. Those cases, however, proceeded upon the special nature of the right attempted to be raised. It certainly was not meant to be decided that one of two joint owners of a muir may not sell his interest, or any share of it, to as many joint purchasers as he may choose. With respect to the correctness of the decision itself, I am not called upon now to express an opinion.

The same principle must govern the ownership by two or more owners in common of a loch, which is the case here. And I, therefore, concur with the great majority of the Judges below, in the conclusion that it was competent to Strowan, in 1828, to sell and convey to the Respondents a right to the use of the loch as pertinent to the lands of Kinloch.

With reference to the other question, namely, whether any right to the loch was, in fact, conveyed to the Respondent by the conveyance of 1828, it is to be observed that the conveyance is, so far as relates to the lands conveyed, in the same language as occurs in the crown charter of resignation of the 27th of June

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1636, when Christopher Robertson became the owner of the Barony of Strowan. The description in that charter is as follows:—"Totas et integras terras et baroniam de Strowan, comprehendentem omnes et singulas terras, molendina, silvas, piscationes, lacus," and so on, "cum castris, turribus, fortaliciis, locis, pomariis, hortis, toftis, croftis, molendinis, multuris, silvis, piscariis, lacubus," &c. In the disposition and sasine whereby the lands of Kinloch were conveyed to the Respondent, the description is substantially the same, except that it is in English:—"All and whole the five-merk lands of Kinloch, of old extent, with castles, towers, fishings, lakes, forests, and pertinents of the same."

Now the description in the charter of 1636, of the whole of the lands therein described as making up the Barony of Strowan, coupled with the general words, "cum piscariis, lacubus, et omnibus earundem terrarum pertinentes," was held, in 1798, to include a right to the use of the loch for the purposes of fishing, boating, and floating timber; or, at least, it was held that with the usage it might be so interpreted. And that being so, I think it follows as a necessary consequence, that a subsequent disposition of a specific part of the lands constituting the barony, together with the same general words added, must be taken to have the same effect; that is, to give to the disponee of part 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 Strowan and his disponee on the other, no greater or more extended rights could he enjoyed by the latter than if the whole barony had remained entire and unsevered.

For these reasons, my Lords, I entirely concur in the judgment of the Court of Session.

Interlocutors affirmed, and Appeal dismissed with costs.

GRAHAME, WEEMS, AND GRAHAME—RICHARDSON, LOCH, AND M'LAURIN.