flicting decisions which had been pronounced under the common law. It adopts the principle of the corresponding German custom, which declares that the incumbent is the person in whose interest and in gratitude for whose services the provision called ann is made. If the incumbent dies, as has happened in this case, after Whitsunday, he is to have the first half year's stipend for his incumbency, the second half year's stipend for his ann. The principle of the enactment is that he is to have half-a-year's stipend, in addition to what he has earned, for behoof of his wife and children; that is given to him on such conditions that it can never form part of his executry estate, for it is never *in bonis* of the defunct; but that only enhances the value of the gift, for his widow and children will always have a claim to it preferable to the claims of his creditors. It is none the less a gift to him.

As I understand the matter, then, Mr Fraser is entitled to the whole year's stipend—to the first half-year's stipend for his incumbency, to the second for his ann. What is the effect of the Apportionment Act on his rights? If the minister is to receive only as much of the second half-year's stipend as corresponds to the number of days he lives beyond Whitsunday, he gets less than he is entitled to get under the Statute of 1672. The Lord Ordinary and the pursuer endeavour to surmount this difficulty by saying—"Let the ann stand as it does at present, but it must not run from Whitsunday, but must run for half-a-year from the date of the minister's death; that is directly contrary to the provisions of the Statute 1672; those who are in right of the ann have no claim to the fruits of the benefice except that portion to which the Act of 1672 gives them right. These two Acts therefore cannot stand together.

Then we come back to the contention that the Apportionment Acts are reformatory of the common law only, and do not interfere with statutory enactments about the division of profits, rents, or income, or with cases where there has been any special contract upon such questions. Section 7 may not perhaps be directly applicable, because it refers to cases in which it is "expressly stipulated" that no apportionment shall take place; but it illustrates the meaning of the statute, for it shows that it was merely intended to provide for cases where no other provision was made, and where the regulation of such payments was left to the common law. Here the matter of minister's stipend in the year in which the minister dies is made matter of regulation by a statute which established a rule in 1672 for the first time with reference to a custom which up to that time had acquired no uniform shape. By that statute we must be guided, and must hold that the Apportionment Act has no application.

LORDS DEAS, MURE, and SHAND concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for the defenders against Lord Curriehill's interlocutor, dated 28th March 1877, Recal the said interlocutor: Sustain the third and fifth and the first part of the fourth pleas stated for the defenders, and in respect thereof assoilzie the defenders, and decern: Find the pursuer liable in expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuer (Respondent)—Kinnear—Blair. Agents—J. A. Campbell & Lamond, C.S.

Counsel for Defenders (Reclaimers)—Lord Advocate (Watson)—Pearson. Agent—James Macknight, W.S.

Friday, November 30.

SECOND DIVISION.

[Lord Craighill, Ordinary.

MACKENZIE *v.* BANKES.

Property—Loch—Riparian Owner—Joint Property in Two Pieces of Water separated by Narrow Channel.

In an action of declarator of joint right or common property in a piece of water alleged to be part of an inland loch, in which the pursuer and defender had equal rights, the latter asserted that he was the sole owner and the only riparian proprietor of the water, which bore a different name, and was separated from the loch by a causeway erected upwards of forty years previously, and not since taken exception to.—*Held* (*rev.* judgment of Lord Ordinary Craighill — *dub.* Lord Gifford) that the two pieces of water must be held to be separate lochs, judging, *inter alia*—(1) from their difference of name; (2) from the configuration of the ground; and (3) from the existence of the causeway for the period of prescription.

Observations (*per* Lords Justice-Clerk and Ormidale) on the cases of *Menzies* v. *Macdonald*, March 10, 1854, 16 D. 827, 2 Macq. 463, and of *Scott* v. *Napier*, June 11, 1869, 7 Macph. H.L. 35.

This was an action raised by Mr Osgood Mackenzie of Davoch of Inverewe and other lands, in the parish of Gairloch and county of Ross, against Mr Meyrick Bankes of Letterewe, in the same parish and county, concluding, *inter alia*, for declarator that "the pursuer (who and the defender are the only proprietors whose lands lie around and border on the loch after mentioned) has, along with the defender, a joint right or common property in the loch called Fionn Loch, lying in the said parish, and particularly in that part of the same sometimes called the Dubh Loch, and a joint right of boating, fowling, fishing, and exercising all other rights in or over the said loch, and particularly in or over the said part thereof: And it ought and should be found and declared, by decree foresaid, that the defender has no exclusive right either of property or of use in or over the said loch or the said part thereof: And further, the defender ought and should be decerned and ordained, by decree foresaid, to desist and cease from molesting and interrupting the pursuer in the exercise of any of his rights aforesaid." There was also a conclusion for damages.

Neither the pursuer nor the defender's titles conferred an express grant of Loch Fionn or of Loch Dubh. The lands of both (of the former to a less extent than the latter) bordered upon Loch Fionn, of which they were the sole riparian proprietors. Towards its eastern extremity it was contracted by a promontory projecting from each side, when it again expanded, forming a sheet of water called the Dubh Loch. There was a dyke or causeway 4 feet high from one side to the other at that part, which was shallow, upon which sheep were driven across. This was generally passable dryshod. The defender's lands alone surrounded this Dubh Loch, the application of the name of which was a matter in dispute between the parties. It was contested whether it imported a distinct name to a distinct sheet of water, or was a second name given to a distinct part of Loch Fionn. The record contained averments by the pursuer that he or his authors had fished and exercised all other acts of ownership on the Dubh Loch, which the defender denied. On 28th October 1876 the pursuer had been fishing on the Dubh Loch, when on his return across the causeway his boat was seized and carried off by the defender's men under his orders. Hence this action, the further particulars of which, as averred by the parties and brought out in evidence, appear from the subjoined opinions.

The pursuer, *inter alia*, pleaded—"(2) At least the pursuer's title, and the possession, use, and enjoyment of the said loch by him and his predecessors and authors from time immemorial, or for forty years and upwards, confer upon him the said rights. (3) The said sheet of water, sometimes called the Dubh Loch, being a part of the said Fionn Loch, the pursuer has the same rights of common property in the same as in the rest of the said loch. (4) The pursuer having been molested by the defender in the exercise of his rights, he is entitled to decree of declarator and interdict, as concluded for in the summons."

The defender, *inter alia*, pleaded—"(5) In virtue of his titles and the facts alleged by him regarding the possession of the said loch, the defender has sole and exclusive right to the said loch, and is therefore entitled to be assoilzied."

The Lord Ordinary (CRAIGHILL) pronounced the following interlocutor and note:—

"*Edinburgh, 4th June* 1877.— . . . In the second place, and with reference to the other conclusions, Finds, as matters of fact—(1) That the lands of Inverewe and Kernsary, belonging to the pursuer, and the lands of Letterewe, belonging to the defender, border upon and surround the natural sheet of water known as the Fionn Loch, in the parish of Gairloch and county of Ross; (2) that neither the titles of the pursuer nor those of the defender contain an express grant of that loch, or of any part thereof, or of any right therein, but in the case of each lochs are specified as pertinents which are conveyed along with the lands; (3) that there has not, on the part of the pursuer or of the defender, and their respective predecessors, been exclusive possession of said loch, or of any part of it, or of any right therein, for forty years, or for time immemorial; (4) that the said loch is between seven and eight miles long; that the pursuer's lands of Inverewe and Kernsary stretch along the south shore for a distance of between three and four miles; and that the portion of these lands farthest up the loch, which is that nearest to the piece of water in dispute, represented by the pursuer to be the head of said loch, and by the defender to be a separate loch known by the name of the Dubh Loch, is more than three miles distant from that locality; (5) that the said piece of water which is in dispute is not a separate loch, but is a part of the said Fionn Loch; and (6) that the pursuer has since the end of October 1876 been forcibly prevented by the defender from sailing on, fishing in, or otherwise using the said piece of water in dispute; but that special damage from this exclusion has not been proved, and nominal damages are, in the circumstances, all which the pursuer now seeks to recover from the defender. In the third place, finds, as matters of law, the facts being as above set forth—(1) that the pursuer has, along with the defender, a joint right or common property in the said Fionn Loch, including that part thereof sometimes called the Dubh Loch, and a joint right of boating, fowling, fishing, and exercising all other rights on, in, or over the said loch, including as aforesaid; and (2) that the defender is liable in damages to the pursuer for excluding the latter as aforesaid from the said part of the Fionn Loch: Therefore repels the defences, &c.

"*Note.*—Three pleas in defence are maintained by the defender. The first is, that as the pursuer has no land bordering on the piece of water in dispute he has no right in it, even assuming it to be a part of Loch Fionn; the second, that the erection of the causeway referred to on the record and in the proof, at the Narrows, immediately below the water in dispute, is a barrier by which the pursuer is excluded; and the third, that the water in dispute is not a part of the Fionn Loch, but a separate loch.

"The first of these pleas, the Lord Ordinary thinks, is overruled by *Menzies* v. *Macdonald*, 16 D. 827 and 2 Macq. 463, and *Scott* v. *Napier*, 7 Macph. 36 (H. of L.). The law is understood to have been settled by these cases; and the defender's argument was neither more nor less than an attempt to re-open a question which has, as the Lord Ordinary thinks, been finally determined.

"The second plea of the defender must, in the opinion of the Lord Ordinary, likewise be overruled. No doubt the causeway referred to has been erected for forty-eight years, but the argument rested upon this is met by several considerations. In the first place, the causeway was erected upon common account—that is to say, for the benefit both of Kernsary and Letterewe—and has so been used. The defender therefore cannot, on the strength of its existence, exclude the pursuer from the enjoyment of a right which, had it not been constructed, the pursuer might have exercised. In the second place, the causeway has not been an impediment to the enjoyment of the right claimed. The pursuer and his friends and tenants have for the last thirty years taken their boats over the causeway from the lower to the upper part of the loch, which of itself shows that this plea is rested on an after thought suggested by the necessities of the present litigation. In the third place, there appears to the Lord Ordinary to be a fallacy in this contention of the defender. He assumes that the solum upon which the causeway is laid is to be

regarded to all intents and purposes as his exclusive property, because at this point he has the land upon both sides of the loch. But the water is still there; and, to say the least, the solum cannot be regarded as the defender's to any effect inconsistent with the continued existence of the pursuer's right in the loch. In the fourth place, the causeway, while it rests on the solum, is in the water; and the water being a thing in which the right of both is common, both are interested in it, and neither can use it so as to destroy the right of the other. The Lord Ordinary therefore thinks that the controversy between the parties must be determined as it would have been had the causeway never been constructed.

"The third defence simply presents this question—Is the piece of water known as the Dubh Loch a separate loch, or is it a part of one natural sheet of water, the lower and by much the larger part of which is known as the Fionn Loch? A great deal of evidence has been led on both sides; but the Lord Ordinary has, without much difficulty, come to the conclusion that the latter is the true view of its character. The defender's theory is, that these two pieces of water are separated by a river, and so are as distinct as if they were miles apart. But this river is really a thing of the imagination. Its bank on the south side is only 50 feet, and that on the north only 150 feet long. This is the statement of Mr Buchanan, the defender's scientific witness, who certainly would have made them longer if they could have been enlarged. But when was it heard of that a river was broader than it was long? and yet this is the result to which in this case we would be brought should we adopt the view presented by the defender. Of course there are several other circumstances, to some of which the defender calls attention; but upon these the Lord Ordinary thinks it unnecessary to comment, and he refrains the rather that several, if not all, of these are things as to which there is a conflict in the proof. It seems enough to say, in addition to what has been already said, that on the whole matter the Lord Ordinary is of opinion that there is in fact one loch, and that consequently in law the pursuer as a riparian proprietor has, from end to end, the right which he seeks to have declared."

Authorities—*Menzies* v. *Macdonald*, March 10, 1854, 16 D. 827, 2 Macq. 463; *Scott* v. *Napier*, June 11, 1869, 7 Macq. (H. of L.) 35; Erskine, ii. 6, 3; Bell's Prin., sec 648.

At advising—

Lord Justice-Clerk—It has been settled by a series of decisions that the proprietors of the banks of a lake or loch have a right of common property in the loch itself, and a right of common interest in the ordinary uses of the loch. That arises not from the fact that they are common proprietors equally of the solum of the loch; nor does it necessarily follow that they may not be subject to adjustment and limitation in regard to their uses of it; but in the case of *Menzies* v. *Macdonald*, and the more recent St Mary's Loch case, viz., *Scott* v. *Napier*, the general doctrine was clearly established that a right to the bank gives a common right of property in the loch. But this principle arises in the present case in a rather unusual and perplexing way. The facts out of which it arises are these. In a wild district of Ross-shire (the Gairloch district) the pursuer and defender are proprietors of a considerable stretch of country. There is a water-covered piece of ground extending apparently to some 8 or 9 miles, in regard to which the dispute arises. The north-western part of this territory is situate in a kind of basin covering 200 acres, at the foot of precipitous mountains rising to above 1000 feet. At its south-eastern extremity the land becomes more level, and trends to a narrow point; but excepting at that point, apparently, the mountains are so precipitous, going sheer down into the water, that the loch is nearly inaccessible from the land. The loch narrows at that portion to about 80 yards in width, and for a distance of 150 feet on one side, and 50 feet on the other, there is a narrow neck, covered with water, opening out ultimately into a very large sheet of water about 7 miles in length. The north-western part of this territory goes by the name of the Dubh Loch or Black Loch; the south-eastern part is called the Fionn Loch: and the question has arisen whether these basins covered with water are or are not one loch, to the effect that property in the bank of one shall give a common right of property in the whole. The Dubh Loch is surrounded entirely by the lands of the defender, with the exception of the small orifice at the end, consisting of about 80 yards. The titles give us no assistance, as both parties hold their lands *cum lacubus* merely, without any more specific conveyance. In regard to the Fionn Loch, Mr Bankes' ground extends for 2 or 3 miles along the margin, but Mr Mackenzie has the land at the other end of it, and in these circumstances Mr Mackenzie claims a right of common property not only in the Fionn Loch, to which he is clearly entitled, but also in the Dubh Loch, as being part of the same loch.

Although I have found the case attended with great difficulty, and there seems to be no authority of any kind which affords us any great help on this question of fact whether the territory constitutes one loch or two lochs, I have come to be of opinion that there are substantially two lochs, that they are not identical, and that consequently the defender is entitled to prevail in this contention. I shall state very shortly the grounds on which I have come to that conclusion. In the first place, the two lochs have different names, and I think that is an important matter. Unquestionably if there had been one name for both, it would have been very nearly conclusive in favour of the pursuer's contention, and against that of the defender; but the names given by the countryside, and apparently attached to these places from time immemorial, at least *prima facie* indicate a distinction, as the reason for giving two portions of ground different names is of course to distinguish one from the other, and if they were identical there would be no reason for their being distinguished. If there had been in the titles a grant of one or other of these sheets of water by name, each would have been limited by the narrow strip at their extremity, and the grant of it would not have entitled the grantee to come further than the junction of the two sheets of water. It is said that there are instances or illustrations of different names being attached to the same sheet of water. We have no means of judging of these instances, nor do we see what

the origin of the difference of names may have been. But there must have been some origin for it; and in the general case where we find that two places go under different names, we may assume that there is a distinction between them which from time immemorial has been recognised by the two names; and therefore I should not desire to go much further, provided there was nothing in the natural features of the territory to indicate that the two names were not intended to denote different subjects or properties.

But then the natural features, so far from being inconsistent with the distinction denoted by the names, are entirely consistent with it, and in fact would have led to that conclusion even without the separate denomination. In the first place, the very configuration of the ground indicates a natural boundary—the means of telling where the Dubh Loch ends and the Fionn Loch begins; and that is material, because, taken in connection with the different names, it shows very clearly whence the difference arose. The whole loch is surrounded, as I have already said, by land to within 80 yards, and at the point of outlet the waters of the Dubh Loch are appreciably higher than those of the Fionn Loch. At that end the land, which is precipitous all round the other parts of the loch, trends to triangular points which approach each other to within 80 yards, and between these the water—instead of being, as it is in the greater part of the Dubh Loch, and as it immediately becomes in the Fionn Loch, of considerable depth—varies from 6 or 8 or 13 inches up to a couple of feet. In short, there is a spit of land, submerged by the water no doubt, and covered apparently in all seasons and at all times, but still very considerably higher than the bottom of the loch on either side. This points at a natural barrier—which in point of fact it is—a natural barrier of land between the waters of the one loch and the waters of the other. There is also a perceptible current in that short space of connecting stream between the two lochs. The Lord Ordinary seems to think that that can hardly be called a river, because it is as broad as it is long. It is not in the least necessary to call it a river. The question is, if it is a physical demarcation or division of these two sheets of water? and whether it be called river or lake is really of no moment. What it is is plain enough. It is a bit of ground covered with water connecting these two lochs, but in reality being lower at the south-eastern end than it is at the north-western end. The result is, that the waters of the Dubh Loch constitute a perceptible current flowing downwards to the Fionn Loch, and at the other end of the Fionn Loch there is an outlet in the shape of a stream. That is of some moment; and Mr Manners, the engineer for the pursuer, is quite as clear about it as Mr Buchanan, the engineer for the defender. It is said that all the waters of Loch Fionn must tend towards the orifice at the south-eastern end, and that is quite true; but the tending of a large body of water which has an outlet at one end is a totally different thing from a current. The waters of the loch retain substantially the same level, but a current means that the water in the course of its flow is higher at one point than it is at the other; and this fact seems to me to indicate that there is a natural division between them

Then, thirdly, I think that the state of possession is very material—I mean the artificial boundary which without objection or remonstrance has remained there for upwards of the prescriptive period. It seems that at one time there was a ford across the water at this place—a fact which of itself denotes a shallow bottom. In the Dubh Loch at a distance of 120 feet the water goes sheer down 9 or 10 and even 17 feet; and the same thing may be said as to the Fionn Loch, although not to the same extent. Now, at this particular place the submerged land rises so high that there is a ford over which in ordinary periods of the water a person could go without materially wetting himself. But it seems that there was a tenant who had the lands of Letterewe taken from Mr Bankes or his predecessor on one side of the loch, while he was at the same time tenant of Mr Mackenzie a good way up the Fionn Loch; in short, he had a large and extensive sheep-farm extending along both sides of the sheet of water, and he constructed a gangway across the water at this place—a gangway of stone, from 2 to 3 feet high, both ends of course resting upon ground belonging to Mr Bankes, the proprietor of the Dubh Loch; and that has remained from that day to this. I do not say that of itself, if there had been nothing else in the case, this erection would have been conclusive. But it does form, and has formed for forty years, a complete obstruction to the use of the common property, or the exercise of the common interest which Mr Mackenzie claims, as no boat could sail up unless the gangway was altered, or a stone taken out of it. It implies that the proprietor of the Dubh Loch, and no one else, had a right to put across the stream there, resting each end on his own ground, that which is destructive of the use of the alleged common property, and which is in itself an assertion of the strongest kind, not only of the right of property in both the banks, but of a right to place this obstruction in the bed of the stream.

And that leads me to say, as my last ground, that it is clear that the loch is not capable of being used as if it were one loch, with the full enjoyment of the common interest which Mr Mackenzie claims. If the loch were one, it must be available from end to end, but it is not. Both the natural obstruction and the artificial construction make that impossible, and such has been the state of possession from time immemorial as far as we see. In this very remote district there has not been a great deal of possession at any end, but where the proprietor has the whole lands around a loch he does not require much proof of possession. On the contrary, so far as possession goes, the proof would rather require to be on the part of the other proprietor claiming the right. But in this case what is proved is this—that the proprietors of Loch Fionn have sometimes come up to this narrow isthmus of water, when there dragged their boat across the barrier which was put up for the convenience of the farmer, taking a stone out sometimes, then launched it on the other side. I think this was done by mere tolerance. It happened seldom until recently, and seems to have been permitted out of good neighbourhood, and not as the assertion of a right. Nothing can prove more clearly that the lakes were not capable of being used as a single sheet of water; and even without the artificial barrier

the water is so shallow, and there are so many boulders, that the natural barrier of itself would have prevented the full enjoyment of the right claimed.

I have thus shortly gone over the grounds on which it appears to me that the Lord Ordinary is wrong in his view, and that these two sheets of water are as separate in their nature as they are in their names—that the Dubh Loch is one loch and the Fionn Loch another; and that therefore a riparian proprietor on the latter is not entitled to claim a common property or common interest in both. That is the best result which, giving full attention to the evidence, I have been able to arrive at. I do not deny that it is a case of perplexity, but I rather think the popular view is likely to be the true view in a case of this kind, which really turns on identity in ordinary language; and taking it altogether, I think that anyone looking to the ground would say that the Dubh Loch is one loch and the Fionn Loch another.

Lord Ormidale—I must hold it to be settled by the judicial opinions which appear to have been delivered, both in this Court and in the House of Lords, in the cases of *Menzies* v. *Macdonald* and *Scott* v. *Napier*, referred to by the Lord Ordinary in the note to his interlocutor, that an inland lake or loch, with its *solum*, belongs, in the general case, jointly or in common to the riparian proprietors rateably—that is to say, in proportion to the extent of their properties. Or, in the words of Professor Bell in his Principles (sect. 648, subdivision 2)—"Navigable lakes do not, generally speaking, appear to be *inter regalia*, as rivers are. If wholly within the lands of one proprietor, the lake goes as a pertinent of the lands. If not so, but touching the estates of various proprietors, the lake and its *solum* rateably belongs to them all." And in support of this doctrine the Professor refers to the institutional writers Stair and Erskine.

While such is the general rule, I am not to be understood as meaning that there may not be exceptions to it arising from peculiarities of title, the state of possession, and rights of public communication. But into these exceptions it does not appear to me to be necessary to enter in dealing with the present case, which raises and substantially turns upon the question, whether what are called Loch Dubh and the Fionn Loch are to be treated, for the purposes of the present action, as one and the same, or as two separate and distinct lochs? The pursuer contends that they must be treated as one loch; and that accordingly he, in respect his property of Kernsary to some extent abuts on Loch Fionn at a point three miles distant from Loch Dubh, is entitled to be held a riparian proprietor on the latter loch. The defender denies that there is any good foundation for this contention, and maintains that Loch Dubh, which, with the exception of a narrow opening or passage betwixt it and Loch Fionn, is surrounded and enclosed by his lands, must be held in the present action to belong to him, to the exclusion of the pursuer.

It was conceded at the debate that the second finding in the Lord Ordinary's interlocutor, to the effect that neither the titles of the pursuer nor those of the defender contain an express grant of Loch Fionn or of Loch Dubh, is correct. And the pursuer must be also taken as conceding that the defender, who is a riparian proprietor on both lochs, is entitled to be dealt with as having right along with himself in these lochs, for the conclusions of his summons proceed upon that footing. But the question—and the only one in the case of any importance—is, whether the pursuer has a joint or common right along with the defender in Loch Dubh?—and this he cannot have unless he establishes that it and Loch Fionn are one and the same. The Lord Ordinary has found that they are, but, for the reasons now to be stated, I am, with much deference, unable to concur with his Lordship.

In the first place, according to the appearance and configuration of the lochs with the surrounding lands, as exhibited on the Ordnance map, No. 65 of process, it is difficult, if not impossible, I think, to avoid the conclusion that they are separate and distinct lochs. It is true that they are linked together, so to speak, by a narrow passage, or "phait," as it is called by some of the Highland witnesses, but, for all substantial purposes, and in a fair and reasonable sense, they are marked out and divided by nature itself into two separate and distinct sheets of water.

As to the passage or "phait," it is of importance, especially in reference to a view of the case which will be afterwards adverted to, that its character should be clearly understood. At present there is, and has been for about the last fifty years, over its whole length a causeway or erection of stones, both ends of which are on the defender's property, by means of which persons, as well as sheep and cattle, can easily pass without getting into the water at all. It is described by John Mackenzie, a witness for the pursuer, the man who made it. He says—"I put the stones there by orders of Duncan Macrae, tenant of Inveran, which was part of Kernsary. Macrae was also tenant of Carnmore and Strathnashellag, on the north side of the loch. He told me to make a causeway or stepping-stones across the phait. I got £5 for doing so. I used no lime or clay in making the causeway. I made it just of loose stones, not dressed in any way. Macrae ordered the causeway to be made to get sheep across the phait from his one farm to his other farm. I cannot say very well what was the height of the causeway above the ground; I believe it was between 2 and 3 feet. The breadth, I believe, was between 6 and 7 feet." And it is proved by other witnesses that its length from one bank to the other is about 80 yards. It is obvious therefore that, to have admitted of such an erection, the opening between the two lochs must, besides being narrow, have been little more than a natural bank or ridge dividing the two lakes. Accordingly, several witnesses—some of whom were called by the pursuer, and some by the defender—speak to having been in the practice of wading across at the phait before the causeway was made—one of them even stating that he did so in his boots without getting wet.

It is only therefore what in the circumstances might have been expected that the lochs are, as they appear from the proof always to have been, called by different names—the one Loch Fionn, or the Fionn Loch; and the other Loch Dubh, or the Dubh Loch. This appears to me to be a most important feature of the case. That different names are used for the very purpose of denoting

different objects and distinguishing them from each other, just because they are distinct and separate, is unquestionable; and that, I feel entitled by the proof to say, was and is the reason why the two lochs in question are and have been always known and called by different names.

But then it was argued for the pursuer that the waters in question, although naturally separated and divided into two lochs, and called and known in the locality in which they are situated by different names, and although the one is all but surrounded and enclosed by the property of the defender, while the property of the pursuer does not abut upon it at all, must, for the purposes of the present action, be treated as one, because they are united by a very narrow channel or passage, over which the water of the upper loch runs into the water of the lower. I am unable to appreciate the force of this reasoning. If, indeed, it were sound, there would be very few, if any, separate lakes or lochs, seeing that there are few, if any, sheets of water, which do not communicate with others, either inland lakes or the sea, by rivers or runs of water, of greater or less extent.

I cannot therefore hold that the narrow and shallow "phait" which connects Loch Dubh with Loch Fionn is sufficient to make them one loch or lake for the purposes of the present action—that is to say, sufficient to entitle the pursuer to decree to the effect, as concluded for by him, that he has, along with the defender, a joint right or common property in Loch Dubh, and a joint right with the defender of boating, fowling, fishing, and exercising all other rights on or over the same. He may have such a right in the Fionn Loch, in respect his lands abut upon it, although even as regards the Fionn Loch his and the defender's rights are only rateable according to the extent of their respective properties. But as it would be impossible to line or mark off these rateable proportions on a sheet of water such as Loch Fionn, not divided by natural banks or boundaries, both proprietors must be allowed to exercise their rights over the whole, subject to regulation when necessary, as was settled and explained in the cases of *Menzies* v. *Macdonald* and *Scott* v. *Napier*. But in the present case there is no necessity, and therefore no reason, for adopting such a course, for the two lochs are sufficiently separated and divided from each other as to make it quite practicable and convenient to limit the pursuer's right in common with the defender to the Fionn Loch, on which alone his property abuts; while the defender, whose property all but surrounds and encloses the Dubh Loch, is left to the exclusive use and enjoyment thereof. It cannot, I think, be doubted that any regulation which might become necessary in the event of the pursuer obtaining decree in the terms he concludes for would have the effect of excluding him from Loch Dubh; and if so, why, it may be asked, ought he not now and at once to be excluded from participating with the defender in the use of that loch? Even as regards the Fionn Loch, it is clear, having regard to the extent to which their respective properties abut upon it, that, were regulation to become necessary, the pursuer's right would be found to be greatly less than the defender's.

For these reasons, I am of opinion that the interlocutor of the Lord Ordinary ought to be recalled, and the defender assoilzied from the pursuer's action.

Lord Gifford—I have found this case to be attended with very great difficulty, and my opinion has more than once wavered towards the view which your Lordship and Lord Ormidale have taken, and against the view taken by the Lord Ordinary. Even yet I feel hardly in a position to say very decidedly on which side I feel the preponderance; but my leaning is rather with the Lord Ordinary than with the judgment which your Lordship proposes, although I scarcely feel my doubts and difficulties strong enough to lead me to dissent from the judgment now proposed. I do not attach quite so great importance as your Lordship does to the fact that the two lochs—for I call them so, and in one sense they are undoubtedly two lochs—have different names. That may arise from the natural features of the scenery or of the sheets of water, and from the convenience which leads people to name pieces of water at all; and if there were nothing but that, or rather if the two names were accompanied by a somewhat different state of natural feature, I do not think there would be much in the mere name. To take a very familiar instance on a much larger scale, the Mediterranean Sea has a great many names at different places—the Levant, the Ægean Sea, the Adriatic; but it would hardly do to say that these were two seas, in the sense that one could belong to one party and another to another. They are all an open sea. I do not attach very great importance to the fact that the natural features lead one to speak, and lead residents in the neighbourhood to speak, of two sheets of water. The point which I think is most important in a case like this is this, whether there is between the two sheets of water—or what may be called in common language the two sheets of water—whether there is or has always been a free, open, and continuous water communication? I think that is the most material point, and it is there that the great difficulty in this case arises in the view which I am inclined to take of the question. Suppose that this opening or communication between the lakes, instead of being shallow, as your Lordship has described it, with a subaqueous ridge—suppose that, instead of that, the strait between the two lakes had been somewhat larger, or even supposing that without being wider it had been deep—as deep as the lakes themselves—I think it would hardly have done to say that they were two lochs merely because they were called by different names—two lochs I mean for the purposes of this action, so that the party who has a right to sail on one of them has no right to sail on the other. I think it would be very difficult to hold, merely because the shore at a particular point of one loch stretched across the loch to within comparatively narrow limits, that that prevented those who had a right to sail on the one loch from going on the other. Therefore it is not only the narrowness of the opening that is to be looked to, but the other circumstances.

Let me also notice that, in regard to these lakes, or rather in regard to lakes similarly placed, there is often a question of interior communication as between different parts of the country. We often hear the expression used "a chain of lakes." And if you can sail a boat or

convey boats or barges from one to another, that may be an exceedingly important matter for the inhabitants along the shores of the chain of lakes, that they should have a right to use that chain of lakes as a means of communication. Supposing that the lie of these two lochs was reversed, and that Loch Dubh was next the sea, with a navigable opening to the sea, I think it would be a very strong thing to hold that the proprietors on Loch Fionn, who undoubtedly had a right to sail on it, were to be kept from the sea merely because there was the narrow opening between Loch Fionn and Loch Dubh. It is quite true that the matter of communication does not very strongly arise in this case, because there seems to be no public place, and perhaps very few inhabitants, along Loch Dubh, which is said to be one of the centres of a deer forest; but it might be otherwise; and I hesitate to lay down any proposition which might lead to this—that where two natural sheets of water are united by a strait like this, passable, although it may be attended by some difficulty, that those who have a right to use the one as a means of communication are not to have a right to use the other. The question might also arise on arms of the sea, and there are many such in Scotland, into which the tide ebbs and flows; and I hesitate to affirm the right to exclude the public from a tidal or sea loch merely because there is a shallow at some particular point of it. These are the difficulties that I feel. No doubt the case is exceedingly peculiar, because the passage between the two lochs or sheets of water is not a deep passage, but a very shallow one. But I think it is in evidence that at certain states of the water, apart from the artificial bank which was made by the tenant, boats could pass from the one to the other; and it is very difficult to hold that if that had continued to be the case—and there is some evidence that it can be passed yet—the mere difficulty or occasional difficulty of passing the shore is to separate so completely the two pieces of water as to make those who have a right to the one not have a right to sail over the other. For I can easily conceive that the case might have been that Mr Bankes might have no property abutting on Loch Fionn properly so called, and it would be very hard to shut him out from Loch Fionn merely because it was difficult to push a heavy boat or any other than a flat-bottomed boat across the isthmus.

Your Lordships have come to a different conclusion from that of the Lord Ordinary. I cannot help saying that I should have assented with much more pleasure to the view of the Lord Ordinary than I can to the view of your Lordships. Still the circumstances are exceedingly singular, and there is such a marked distinction between these two lochs in natural feature that I do not dissent from the proposed judgment. I think that on this part of the case the artificial barrier is really a very material element, for it has subsisted without objection for more than forty years. The altered state of matters has become the natural state, so to speak, and the two lochs are now so completely separated that I do not dissent from a judgment which gives the Dubh Loch exclusively to the proprietor whose lands wholly surround it. I was a little moved at one time by the photograph which is in process, and which shows that a person sailing to the top of Loch Fionn would see nothing to prevent him sailing on; but I understand that photograph only shows the state of matters in a very peculiar position, and a very favourable point of view has been taken; while the evidence goes to this, that there is great difficulty in going from one loch to the other, and that persons must get out and shove or haul the boat over. Altogether, I think we are entitled to say that this is a private loch, and not one to which any party who has no ground abutting on it may come and go at pleasure.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming note for Meyrick Bankes against Lord Craighill's interlocutor of 4th June 1877, Alter the said interlocutor: Find that the pursuer is not proprietor of any land abutting on the Dubh Loch, and has no right of common property or common interest therein: Find that the Dubh Loch is not part of the Fionn Loch, but is a distinct and separate loch: Therefore assoilzie the defender from the conclusions of the summons: Find the defender entitled to expenses, and remit to the Auditor to tax the same and to report; and decern."

Counsel for Pursuer (Respondent)—Asher—Mackintosh. Agents—Adam & Sang, W.S.

Counsel for Defender (Reclaimer)—Solicitor-General (Macdonald)—J. P. B. Robertson. Agents—Murray, Beith, & Murray, W.S.

Saturday, December 1.*

SECOND DIVISION.

[Lord Shand, Ordinary.

FRASER'S TRUSTEES *v.* CRAN.

Nuisance — Interdict — Interim Interdict against Works being carried on so as to create Nuisance.

In an action of declarator and interdict brought against a manure manufacturer by a proprietor in the neighbourhood, the Court after proof made a remit to a man of skill, who reported favourably on the mode in which improvements which he had recommended for the removal of the nuisance were carried out, and that a great diminution of it had consequently taken place. The Court made another remit that at a certain date the reporter should state "whether the nuisance complained of is then abated," and meantime *granted* interim interdict against the "carrying on the manufacture complained of so as to create a nuisance."

Nuisance — Interim Interdict — Time to Remove Nuisance.

Interim interdict was granted against the carrying on of a manufacture so as to create a nuisance. On a petition and complaint being brought averring breaches of the interdict on certain specified dates, which were de-

* Decided partly on 31st May.