As regards the law there laid down, I entirely concur in the judgment of the Lord Ordinary, and of the Inner House afterwards. But upon looking attentively to the case, I cannot discover the least trace that Mr. Gray acted in any respect whatever as the law agent of Miss Cunningham. The proceedings here are in the nature of what we should call in this country a demurrer. There is no evidence gone into except some letters which I shall allude to presently. Miss Cunningham says that Mr. Gray acted as her agent. He denies that. He states that he never saw Miss Cunningham in his life. Miss Cunningham says that he acted as her agent, communicating with her through a nephew, a son of Mr. Cunningham's. That is entirely denied. The transaction looks to me very much more like that which the appellant represents it, than that which Miss Cunningham's advisers represent it. Because this was no loan of money. Miss Cunningham was the creditor of her brother upon a bill or a note, or some transaction of that sort, (I suppose some family arrangement,) and Mr. Cunningham had, whether at her instance or not is immaterial, agreed that he would give her a real security for the amount he owed—£500 due to herself, and £200 to some person for whom she was trustee, making in all £700.

The *printed case* now before your Lordships does not disclose the fact, but we have had handed to us the print as it was before the Court of Session in Scotland, and by that print it appears that a correspondence took place, in which Mr. Cunningham always treated this as a transaction in which he and he alone was concerned. I say he alone, because there is no allusion to anybody else. The bill of costs was brought in to him. He complained of delay and neglect on the part of the agent, Mr. Gray, who managed this business. Mr. Gray takes offence at that, and writes to say that Mr. Cunningham is charging him very unfairly; that he had done exactly what Mr. Cunningham had told him to do. And he points out how he had strictly complied with his commands.

That being so, the facts on which the law applied by the Court of Session rested, entirely fails in this case. There is no evidence that Mr. Gray ever undertook to act as agent for Miss Cunningham, and consequently the application of the law is not warranted by the facts of this case.

The result therefore is, that I shall move your Lordships, as to the two first findings, to dismiss the appeal, and declare that the appellant's right of retention of the title deeds of Kinninghouse and Regent Street, Glasgow, was not affected by reason of his having parted with all right in the title deeds of Stonelaw in consideration of a sum of £455; and declare further, that the appellant was not barred by any personal exception from insisting on his right of retention against Miss Cunningham's claim on her bond for £700; and with this declaration remit the case to the Court of Session.

Mr. Anderson.—May I ask how your Lordships dispose of the costs below—the costs in the Court of Session? The Inner House gave the costs against Mr. Gray. I apprehend that order will be reversed with the other finding; but I apprehend that he ought to have his costs. He has succeeded in the main points.

LORD CHANCELLOR.—He has succeeded upon two of his points, and upon two he has failed.

Mr. Anderson.—He has succeeded entirely against Miss Cunningham.

LORD CHANCELLOR.—He has succeeded entirely against Miss Cunningham, and as against her he must have his costs below. With regard to the others he can have no costs, because he has succeeded only in part.

Cause remitted with a declaration.

Appellant's Agents, Wotherspoon and Mack, W.S.—*Respondents' Agents* (for Wardrop's Trustees), Patrick Graham, W.S.; (for Miss Cunningham) William Fraser, W.S.

JUNE 9, 1856.

SIR ROBERT MENZIES, BART., *Appellant, v.* Major-General JOHN MACDONALD, *Respondent.*

Common Property—Loch—Part and Pertinent—Right of Riparian Owner in Loch—*A and B, two proprietors* ex adverso *of the shores of Loch Rannoch, had, by decree of the Court of Session, been found to have a joint right or common property in the loch. Thereafter A sold part of his lands adjacent to the loch to C, the title being taken in the same terms as in his own Crown charter, where lakes were merely mentioned as amongst other pertinents.*

HELD (affirming judgment), *in a declarator at B's instance, that C had also a right of common property in Loch Rannoch.*

Where a lake is common property, each proprietor can restrain the other from an excessive exercise of his right; and he can alienate his share to as many others as he pleases, so long as these subdivided shares do not together exceed the original share in a manner prejudicial to the others.[1]

This action was brought by the pursuer, (the appellant,) who is proprietor of the barony of Rannoch, against the defender, who is proprietor of the estate of Dalchosnie, to determine the extent of the rights of the parties to Loch Rannoch.

Loch Rannoch is an inland lake, of about eleven miles in length and two in breadth, almost entirely surrounded by the pursuer's lands on the one side, and the barony of Strowan on the other. In the pursuer's titles, commencing with a charter granted by King James IV. in 1502, the loch is conveyed *per expressum.* In the titles of Robertson of Strowan, dating from 1636, there is merely the general words *piscationes lacus aliaque*, &c., and *cum piscariis lacubus*, &c.

About the end of last century a dispute arose between the families of Menzies and Robertson as to their rights to the loch, and mutual actions of declarator were raised, which resulted in an interlocutor which became final in 1799. By it the Court found that Sir John Menzies and his trustees had an exclusive right to two islands in the loch, and that both parties had a joint right or common property in it,—a joint right of boating, fishing, floating timber, and of drawing nets on the shores adjoining to their respective lands, but not upon the shores of the lands belonging to the other.

In 1828 the defender purchased from the trustees of the late Colonel Robertson of Strowan the lands of Kinloch, being part of the barony. These lands extend along the eastern margin of the loch for about two miles, and they were conveyed to him, with "fishings, lakes, forests, annexis, connexis, pendicles and outsets of the foresaid lands, and universal pertinents of the same, all lying within the parish of Fortingall and sheriffdom of Perth, and parts of the united, annexed, and incorporated free barony of Strowan; together with all right, title, and interest which we, as trustees foresaid, or the said deceased Colonel Alexander Robertson of Strowan, or his predecessors or authors, had, have, or can anyways claim or pretend thereto, or to any part or portion thereof."

The pursuer raised the present action to have it found that the defender "has no right of property or of servitude, or other right whatever, in Loch Rannoch, and that he is not entitled, by himself or his tenants, or any other person claiming under his permission, to exercise the rights and privileges of sailing, fishing, and floating timber on the said loch, or to exercise any other rights and privileges connected therewith; but that the pursuer is entitled to possess and enjoy, in his own right, and in common with the proprietors of the barony of Strowan, the said loch and the whole privileges connected therewith, exclusive of all right of property or servitude therein or thereto in the defender."

The summons, after concluding that the defender should be interdicted from troubling or molesting the pursuer in the peaceable possession and exercise of his rights and privileges in the loch, contained an alternative conclusion, that "it should be found that the defender's right of property or of servitude, or other right (if any), is limited and restricted to that part only of Loch Rannoch which is situated *ex adverso* of the lands acquired by him from the trustees of the late Alexander Robertson of Strowan, and does not extend to any other part of said loch; and that he can only exercise the right of sailing and fishing in the said loch, so far, and no farther, as his said lands from the shores thereof, and within such line or boundary as shall be determined in course of the proceedings to follow hereon."

The defender contended that he was entitled to the full use of the whole loch, in common with the other proprietors, and that the disposition in his favour of part of the barony was sufficient to confer such a right.

The Court of Session held that the defender had also a right of common property in Loch Rannoch.

The pursuer having appealed, he maintained that the interlocutor of the Court of Session should be reversed—1. Because one of two joint proprietors of a subject cannot introduce a third party into the enjoyment of it, without the consent of the other. Interlocutor of Court in former action, 14th Dec. 1798. 2. Because the right in the lake possessed by the family of Strowan, was a right of common property, and not a right of commonty. Bell's Principles, §§ 1072, 1087, 1088; Ersk. ii. 9, 15; Hailes, ii. 897-8. 3. Because the right in the lake possessed by the family of Strowan, was not a pertinent of their lands, and attached to each particular portion of the lands, so as to be carried along with the conveyance of a part. 4. Because a lake, being an indivisible subject, cannot be apportioned; and one of two joint proprietors of a lake cannot convey his right to a lake in part, but must convey it in whole. *Milligan* v. *Barnhill*, M. 2486; Hailes, ii. 897. 5. Because the introduction of a new joint proprietor of the lake, materially interferes with the rights of the appellant as one of the two original joint proprietors of it. *Anderson* v. *Dalrymple*, 20th June 1799, F.C.; *Campbell* v. *Stewart*, 24th Jan. 1809, F.C. 6. Because

[1] See previous report 16 D. 827; 26 Sc. Jur. 385. S. C. 2 Macq. Ap. 463: 28 Sc. Jur. 453.

the conveyance founded on by the respondent, conveys to him no right of property in the loch. 7. Because, although the respondent has no right of property in the loch, his right to make such use of the loch as may belong at common law to a proprietor on the banks of a loch, is not interfered with by the claim of the appellant, and his right to have such uses declared may be reserved. 8. Because, under the alternative conclusion of the summons, the extent of the respondent's right, if he any has, ought to be limited and restricted to that part of the lake which is situated *ex adverso* of the lands acquired by him from the Strowan family.

The respondent supported the interlocutor on the following grounds:—1. Because it was competent for Strowan, by the disposition granted by him in 1828 in favour of the respondent, to convey to him a right and interest as common proprietor in Loch Rannoch, in respect of the lands of Kinloch, to which, along with others, that right of common property attached. 2. Because the grant contained in the said disposition was made in terms apt and habile to convey such right of common property. 3. Because, on the assumption that a right of common property was conveyed to the respondent, neither of the conclusions of the appellant's action of declarator can be maintained.

Solicitor-General (Bethell), *Sir F. Kelly* Q.C., and *Anderson* Q.C., for the appellant.—We contend that it was not competent for Strowan to convey the right of enjoying the lake to Macdonald, and even if it was competent, that he has not in fact conveyed it. The substantial question resolves itself into what was the meaning of the interlocutor of 1798. The right declared by that interlocutor was a right of joint ownership or common property in the lake, *i. e.* a substantive right, and not merely one that was a pertinent to the adjacent property. The grounds on which the Court came to that conclusion were, that the charter of Menzies contained a specific grant of the lake to his ancestor. On the other hand, there was no specific grant of the lake to Strowan, but the terms of his charter were such, that, if possession had followed, a prescriptive title might be founded on it, and accordingly the Court held, that such prescription had taken effect. Such continued to be the state of things down to the conveyance to Macdonald. That conveyance contained no words conveying Loch Rannoch or any interest therein; it conveyed merely what was a pertinent of the lands of Kinloch. If it conveyed any interest in the lake at all, it conveyed all the interest of Strowan; but this is not admitted by the respondent. The right of property was declared, in 1798, to be joint in Menzies and Strowan, and each therefore held it *pro indiviso*. Though one might sell his whole right, he could not sell a part, so as to communicate the right of enjoyment of the lake to other proprietors, without the consent of Menzies. The other side contend, however, that Strowan parted with his right, and yet retained it—that he gave as large a right to Macdonald as he himself possessed, and yet his own right remained unimpaired—which is absurd. The permission of the co-owner is necessary in such cases, for the obvious reason that his right is necessarily deteriorated by communicating it to third parties. Each owner is entitled, by himself, his family, his friends and servants, to use the loch, and suppose the average number of the individuals so availing themselves of his privilege to be 40, then, if a third party is introduced as co-owner, it is tantamount to adding 40 persons. And if, as the respondent must contend, every foot of ground could be disponed to different individuals, each taking with it the right to use the loch, the number of persons thereby using the loch would entirely destroy and fritter away any right of Menzies, which so long as two only used the lake, might be valuable. The respondent contended that the lake passed as a pertinent of each portion of the adjacent land.

[LORD CHANCELLOR.—One may have a servitude as a pertinent to land, but I cannot understand how you can have a property in the lake itself, which is a separate and independent thing, as annexed to something else. The question in 1798 seems to have been, whether Strowan's right was a servitude, or a separate and independent right of property; and the Court held it was the latter.]

Quite so. The lake was a substantive property, and Strowan might have sold his right to it next day without selling his lands.

[LORD CHANCELLOR.—Suppose, by a convulsion of nature, the water in the lake should be dried up, to whom would the soil belong?]

It would clearly belong to the two owners declared by the interlocutor of 1798, and no part would belong to Macdonald. The Court below had considered the right to the lake as analogous to a right of commonty, but it was not so. A right of commonty merely represented say 20 cattle which were entitled to pasture there, and if the owner of the land to which the right of commonty was a pertinent, sold his land in four equal portions, then each of the disponees would be entitled to pasture only five cattle. Thus the disponees could in the aggregate enjoy only the right which originally belonged to their author. But here the respondent claims to have the same measure of right which Strowan had, and yet that Strowan retains that right undiminished. It was stated by Bell (Prin. §§ 1072, 1087-8, 1071-90, and 1111), that a lake was not divisible, except by consent of the owners, or by act of parliament. And a thing in itself indivisible, could not be a part and pertinent of that which was divisible. If it is a part and pertinent of anything, it is so of the barony of Strowan, and it is not contended that the barony has passed to Macdonald. In *Scott*

v. *Lindsay*, Mor. 12,771, an express grant was held to exclude the right of one who had a general grant coupled with possession, though the latter was anterior in time. In *Anderson* v. *Dalrymple*, 20th June 1792, F.C., one joint owner was held incapable of introducing new proprietors without the consent of the other. So in *Campbell* v. *Stewart*, 24th Jan. 1809, F.C., as to the right of shooting on a moor which was joint property; and in *Bruce* v. *Hunter*, 16th Nov. 1808, F.C., it was held one joint owner could not remove a tenant without the consent of the other owner.

Lord Advocate (Moncreift), and *R. Palmer* Q.C., for the respondent.—The other side say, that a lake cannot be held as a pertinent of the lands adjacent. This is quite a mistake. The right to the adjacent land carries with it (in the absence of words to the contrary) the soil of the lake, subject to any servitude possessed by other parties over the waters.—Stair, ii. 2, 73; Bell's Prin. §§ 648, 1100, 1101, 1110, 1111. If the lake passed as a pertinent of the lands before they were erected into a barony, it can make no difference that they now form part of the barony.—See *Officers of State* v. *Smith*, 6 Bell's Ap. C. 487. The Court, in 1798, held, that the charter to Menzies did not convey the right to the loch more than the charter to Strowan. The fact was, neither charter conveyed it, except as a pertinent to the lands. It was said a lake was a thing in itself indivisible; but the best answer to that was, that here we have it already divided between two parties, and if so, it may be divided still further. A lake may perhaps be incapable of actual partition, but it was quite possible for several persons to have separate interests in it. The lake being a pertinent of lands which are divisible, must itself be divisible—the accessory must follow the principal. It is said the multiplication of persons interested in the lake necessarily tends to prejudice the right of Menzies. What we contend, however, is, not that Strowan could enlarge the right, but merely that the number of alienees could in the aggregate enjoy the same measure of right which Strowan held originally. If, owing to the number of alienees, Menzies should be unable fully to exercise his right, then the law of Scotland provides a remedy, for he may have an action to regulate the exercise of right on the part of these alienees. But it was not contended that Menzies was here impeded in the enjoyment of the lake from the number of the other persons using it by right of the respondent. Each owner of the adjacent land was entitled, by himself, and family and friends, to fish and boat, and it could not be said that because a man may be an innkeeper, his right was to be different from that of other persons. The case of a common, though not in all respects identical with a lake, was yet analogous. The right of commonty was a pertinent of the land. It required a statute to enable a common to be divided, and there is perhaps no instance of a lake having been so divided. There was nothing, however, in the laws of Scotland to prevent any number of the adjacent owners being entitled to the common use of the lake, subject only to the regulation of their mutual rights. They might among themselves divide the common property.—Craig, ii. 8, 35; Ersk. iii. 3, 56. It was said in the Court below, that the right of commonty is different from the right of common property, and Bell's Prin. § 1086, was said to be an authority. But Bell is evidently inaccurate, and confounds the right of servitude with that of commonty, the two often co-existing. Commonty is nothing else than common property,—(see *Gordon* v. *Grant*, 22 Sc. Jur. 192,)—and there is no intermediate right in the law of Scotland between servitude and common property. As to the cases cited on the other side, *Campbell* v. *Stewart* was quite consistent with the doctrine, that the tenement belonging to the joint owners there could be divided into shares, and the common right would pass to each holder of a share. *Bruce* v. *Hunter* merely shews that two joint owners must concur in granting a lease. In *Anderson* v. *Dalrymple*, one of the joint owners attempted to alter the substance of the joint property, which the respondent does not do here. There is a case in our favour of *Macdonald* v. *Farquharson*, 15 S. 259, where it was held, that one joint owner could not prevent his co-owner from granting a right to fish. Lastly, it being competent for Strowan to convey the right in question, the conveyance to Macdonald actually conveyed it, the terms used being the same as those in Strowan's charter.

Sir R. Bethell replied.—We deny that a lake in Scotland can pass as a part and pertinent of the lands adjacent, where there has been an express conveyance, and Stair says nothing to the contrary. The doctrine of part and pertinent can only apply, where there is no such express conveyance. In 1798, Strowan did not claim the lake as a part and pertinent, but he claimed the exclusive right to the lake by virtue of an express grant of later date than that of Menzies. The judgment of 1798 does not find that the lake was a part and pertinent, but that it was the substantive property of the two owners, each having claimed it by express grant.

Cur. adv. vult.

LORD CHANCELLOR CRANWORTH.—In this case the question was as to the right of using a loch or lake in Scotland called Loch Rannoch, for the purpose of sailing, fishing, floating timber, and other like purposes, upon the lake. It appears that Loch Rannoch is a loch about 11 miles long, running from west to east, and about 2 miles broad. The appellant Sir R. Menzies is the owner of the whole of the north bank, except about 1200 yards at the lower or east end, known by the name of Kinloch. A gentleman of the name of Robertson is the owner of the land on the south side, except about 2 miles of the lower end, which has always been held as a separate

property, called Innerhadden, and he was also, up to 1828, the owner of that small portion of the north bank at the east end, called Kinloch. Robertson's land to the south of the loch, together with that piece called Kinloch, and which had formerly belonged to the same owner, Robertson, constituted, with other lands, a barony called the barony of Strowan. In the year 1828, the then owner of Strowan sold this portion of the land called Kinloch, to the respondent Major-General Macdonald. The facts appear on the pleadings, and I need not state them more in detail. There is no question upon these points which I have stated.

From this time, that is, in 1828, the respondent Macdonald, with his family, friends, and tenants, exercised the right of boating and fishing, and using the lake as they thought fit. The allegation is, that when he acquired the five merk lands of Kinloch, being part of the barony of Strowan bordering on Loch Rannoch, with fishings, lakes, and pertinents of the same, he exercised the right of boating and fishing upon the loch by himself and his family, and friends and visitors, and he has ever since continued to do so. During the defender's absence on his military duties, the tenants of his mansion house, shootings, and fishings, exercised the same right of boating and fishing on the loch. That is the allegation of Major-General Macdonald. The other side say, "that the defender exercised the privileges here mentioned, and his family, friends, visitors, and tenants, have occasionally attempted to exercise the privileges here mentioned," but the appellant denies "that they had any right to do so." He admits, however, that the respondent himself did exercise this privilege, and that his family and friends did the same.

The object of the present action was "to prevent Major-General Macdonald, his family, and friends and tenants, from exercising the privilege of boating, fishing, and floating timber, and otherwise using the lake."

The title of Menzies, the appellant, dates from a very early period, viz., from the year 1502, when King James IV. of Scotland, by charter, granted to Robert Menzies the lands of Downan, and other lands therein mentioned, and erected the same into a barony. The statement of the appellant is in these terms:—"By charter under the Great Seal, granted by King James the IV. to Robert Menzies of that ilk, dated 1st September 1502, His Majesty gave and granted to the said 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 completed by the pursuer, as before mentioned, connects with the said charter and infeftment."

The title of Strowan, that is, the title to the south side, which is in the possession of Robertson, was not carried further back than the year 1636. And by a Crown charter of resignation, dated 27th 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 in Latin:—"Totas et integras terras, et baroniam de Strowan, comprehendentem omnes et singulas terras molendina, silvas, piscationes, lacus, aliaque, particulariter subscripta," and then it gives a description of the manor, and, amongst other things, "piscariis, lacubus," and others.

This property, that is, the barony of Strowan, afterwards came to the Crown on the attainder of its then possessor, 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, comprehending 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, whereby it was determined that the two parties were joint owners of the lake. The interlocutor of the 14th December 1798, which was afterwards confirmed on the 2d July 1799, states this:—"The Lords having advised the foregoing state of the conjoined processes of declarator, depositions of the witnesses adduced, writs produced, and heard counsel thereupon yesterday and this day—Find that Sir John Menzies and his trustees have an exclusive right to the two islands in Loch Rannoch: Find that both parties in this case, (that is, Menzies, as the owner of the barony of Rannoch, and the north side of the lake; and Robertson, as the owner of the barony of Strowan, including the chief part of the south side,) 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 the respective lands, but not upon the shores of the lands belonging to each other; and decern and declare accordingly."

This decision, which was pronounced above 50 years ago, conclusively establishes the rights of Menzies and Strowan to this lake as joint property. But Menzies, the present appellant, the owner of Rannoch, contends that Strowan (I use the names which I believe are commonly used, Rannoch and Strowan) could not alienate a portion of the barony so as to give Macdonald, his

disponee, the right to use the loch for fishing, boating, and so on, for that by such a course he would be making the interest 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. He contends that the ownership of a lake is what is called a *jus individuum*, incapable of division, and that when there are two joint proprietors of such a right, one of them cannot, without the consent of the other, introduce a third. That that is the state of the law in reference to some property, there is no doubt. You cannot, in the case of a peerage, for instance, split that, so as to make two peerages —you cannot grant a part of a peerage. So, again, in the case of a castle for defence, you cannot grant a portion of it. The nature of the property prevents such subdivision.

There is also a further point raised by the appellant here, viz., that even if Strowan had the power of giving the lake to the defender Macdonald for 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 1748. This is a question of inferior importance to the other, depending merely on the construction of the particular deed. The former question is one of general importance, depending on what are in general the rights of two or more co-owners of a loch.

Both parties, it is to be observed, start from the interlocutor of 1798, which established the joint ownership. The Lord Ordinary upon the present action was of opinion, that, treating the pursuer Menzies 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 decision of the Lord Ordinary was brought before the Second Division of the Court of Session. The Judges there were equally divided upon it. The Lord Justice Clerk and Lord Wood took a different view from the Lord Ordinary, and Lords Cockburn and Murray thought with him. That being the state of the case, the question was brought before the other Division of the Court of Session. The Lord President, Lords Robertson, Rutherfurd, Handyside, Curriehill, Benholme, and Ivory, concurred with the Lord Ordinary. Lord Deas was of the contrary opinion. The case has now been brought, by way of appeal, before your Lordships' House.

The argument of the appellant Menzies rests 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 on 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 a 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 1000, to be simultaneously engaged in fishing upon the lake, Menzies would be entitled to have 500 so employed, and Strowan would be entitled to the other 500. Strowan 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 Strowan himself, or 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 as heirs portioners, 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 on the subject; but I confess that 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 rights of fishing and other rights on the loch. And so the Court held. This case might have been relied on 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, was then relied on, but that case also is 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 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 shew, that he could not do so; but it is no

authority to shew, 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 party the right of sporting over it. Those cases, however, proceeded upon the special nature of the right attempted to be severed. 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 respondent 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 defender by the terms of 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 June 1636, when Alexander Robertson became the owner of the barony of Strowan. The description in that charter is as follows (I have already referred to it):—"Totas et integras terras, et baroniam de Strowan, comprehendentem omnes et singulas terras, molendina, silvas, piscationes, lacus, (and so on,) cum castris, turribus, fortaliciis, maneriebus, pomariis, hortis, toftis, croftis, molendinis, multuris, silvis, piscariis, lacubus," &c. In the disposition and sasine whereby the lands of Kinloch were conveyed to the defender, the description is substantially exactly the same, except that it is in English, "all and whole the five merk lands of Kinloch or Kinlochie, of old extent, with castles, towers, fishings, lakes, forests, 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 pertinentibus," 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 part 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 be enjoyed by the latter than if the whole barony had remained entire and unsevered. For these reasons, I entirely concur in the judgment of the Court of Session.

Interlocutors affirmed, with costs.

Appellant's Solicitors, Hope, Oliphant, and Mackay.—*Respondent's Solicitor*, Charles Bruce.

JUNE 12, 1856.

THE MAGISTRATES OF RENFREW, *Appellants*, *v.* JAMES HOBY, and Others, *Respondents.*

Appeal to House of Lords—Competency—Withdrawing case from Jury—Process—*Issues having been sent to a jury to try a question as to a right of free port and harbour, four witnesses were examined by the pursuer, when the parties, on the suggestion of the presiding Judge, agreed that there was no proper question of fact for the jury, and the Judge thereon discharged them, and it was arranged, in order to the disposal of the case by the Court on the notes of the presiding Judge, that each party should be entitled to raise any question of law before the Court, which the notes and record might suggest. The Court of Session having disposed of the case after hearing parties, an appeal was presented against the judgment of the Court.*

HELD—*That the case had, by the consent of parties, been referred to the Court for decision as arbitrators, and that it was therefore no longer subject to the review of the House of Lords by appeal, as an ordinary case.*[1]

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[1] See previous report 16 D. 348; 26 Sc. Jur. 165. S. C. 2 Macq. Ap. 478: 28 Sc. Jur. 470.