On the whole, it strikes me that the result is this, that if there be an infringement of the invention as described in the full specification, it is an infringement of a part which is not within the nature of the invention as described in the provisional specification, and if it be a part moreover of the specification, there is a failure to specify the means of doing it, and there is a want of novelty. Upon all these three grounds—and I think any one of them should be sufficient—I think the judgment of the Court below should be affirmed.

Lord Gordon concurred.

Interlocutor of Court of Session affirmed, with variation proposed by the Lord Chancellor (*supra*), and with costs.

Counsel for Appellant—The Attorney-General (Holker, Q.C.)—Webster, Q.C.—Lawson. Agent—J. Henry Johnson, Solicitor.

Counsel for Respondent—Aston, Q.C.—MacClymont. Agent—Andrew Beveridge, Solicitor.

Thursday, June 27.

MACKENZIE *v.* BANKES.

[Before the Lord Chancellor, Lord Selborne, Lord Blackburn, and Lord Gordon.]

[*Ante*, Nov. 30, 1877, p. 173, 5 Rettie 278.]

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* [affirming judgment of Court of Session—*dub.* Lord Blackburn] 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.

Review by Lord Blackburn of the common law regulating the rights of different parties in respect of their occupation of property along the banks of a lake.

This was an action concluding, *inter alia*, for declarator that the pursuer had along with the defender a joint-right or common property in the loch called the Fionn Loch, and particularly in that part of it called the Dubh Loch, and a joint-right of boating, fowling, fishing, and exercising all other rights in or over that loch, and that the defender had no exclusive right thereto. There was also a conclusion for damages. Neither party had any express grant, and the lands of both bordered upon Loch Fionn, of which they were the sole riparian proprietors. The Lord Ordinary [Craighill] had found for the pursuer, but the Second Division [*dub.* Lord Gifford] reversed the Lord Ordinary's interlocutor, and assoilzied the defender [Nov. 30, 1877, *ante* p. 173, 5 Rettie 278.]

The pursuer appealed to the House of Lords.

At delivering judgment—

Lord Hatherley—My Lords, the case submitted to your Lordships' decision in the present appeal is one which depends, as it appears to me, entirely upon a matter of fact. We have had a very able argument both upon the facts and upon the law of this case. Without disparaging the other arguments, we are, I may say, particularly indebted to Mr Mackintosh for the very able argument which he has brought before us when the case was under consideration the other day.

My Lords, the law seems now to be completely settled, and the cases which have been referred to may, I think, be disposed of at once, because the decision must, as I have said, turn upon the facts of the particular case. The case of *Scott* v. *Napier*, 3 Macph., H. of L., 35, and still more the former case of *Cochrane* v. *Lord Minto*, H. of L., July 5, 1815, 6 Pat. Apps. 139, or those two cases put together, will pretty well elucidate all that need be said upon the law; and I assume that if the appellant in the present case had been enabled to prove that the two pieces of water which have acquired by some means or other the names of Loch Fionn and Loch Dubh respectively were within the principle of the Scotch law, by which it appears that the proprietors bordering on a lake have in regard to certain matters, which I shall mention afterwards, a common right in respect of such occupation along the banks of the given lake he would have succeeded. If the appellant could have proved that these two sheets of water formed one lake, so as to bring himself within the decisions which have already been given with respect to lakes of that character, then I apprehend he ought to succeed in this appeal.

I was very much struck by the clear way in which Mr Mackintosh at the outset of his argument said that he proposed to argue the question. Having established from text-writers and from decided cases, that there is a common right on a lake, he said—What is the common right to be, and what is the unity of the lake which gives rise to that common right, and not only gives rise to it but limits its extent? He said—and I confess, my Lords, I followed him and agreed with him in that view—it must be with reference to the character of the right which is said to be exercised. Now, in the present case the right is a common right on the piece of water which the appellant says is only one lake—the common right of boating, fowling, and fishing. One can understand how it is that that common right has grown up. A person proceeding from property of his own to fowl or to fish upon a lake could not be conveniently arrested the moment he arrived at the *medium filum ex adverso* of his land, or the moment he traversed the boundaries which might be drawn on the extreme north and south or on the extreme east and west of his land. The case of *Cochrane* v. *Lord Minto* was cited. I need not dwell long upon that case, for it has no application to the present, but when it was fully looked into, and the papers searched

with reference to the previous opinion of the Lord Ordinary, with which the noble Lords who decided the case in this House said that they agreed, I say, when that was looked into, a rule seems to have been there laid down approaching to some degree of definiteness with reference to the right of a proprietor to the *solum* up to the *medium filum* on the one hand, and on the other hand, what I am now speaking of, the common right of fowling and fishing over the whole lake. I assume, therefore, that Mr Mackenzie has clearly made out his right to fowl and fish, starting from his own grounds, on Loch Fionn until such time as he may be arrested in that right by its termination, owing to the termination of its site—that is to say, the lake upon which he intends to exercise his right in question.

Now, my Lords, I apprehend, if it should be found that there exists between two pieces of water a barrier to the exercise of the right, having regard to the objects of the right—a barrier such as Mr Rodwell a few minutes ago in his argument in reply put thus—Suppose there were a waterfall which a boat could not shoot owing to its quantity of water or the height of the fall, then, although a waterway in one sense exists—that is to say, there is a stream of water—yet it would be idle to say that the right could be carried further up to that waterfall. So again, if you arrive at a distinct and clear river—that was attempted to be made out, not very successfully, I think, in this case by the respondent—but if it should be made out that there was a continuous river flowing for some distance (the exact limits it would be very difficult to define), then the rights would arise of the riparian proprietors along the river, and nobody in his senses would say that because it was a continuous navigable river therefore the two pieces of water were one and the same for the purpose of exercising this right of fowling and fishing. Those would be cases in which it would be very difficult to define the limits.

My Lords, after the difference of opinion in the Court below on the part of the Lord Ordinary, and perhaps to a certain extent, although not to the full extent, on the part of Lord Gifford, as contrasted with the opinions of the Lord Justice-Clerk and Lord Ormidale, it would be idle for any one to contend that the present case was not one of nicety—certainly it is one of great nicety, but I think, when sifted and examined, it will be found to reduce itself to a case in which the right extending over Loch Fionn could not, according to the principles of Scotch law, be rightly and necessarily extended over Loch Dubh—in other words, I do not think the appellant has made out that case which he was bound to make out in order to establish the right which he claims.

Now, my Lords, in order to trace this matter to the commencement with reference to the information we have before us, it will be necessary to refer to the old witnesses upon the subject. But before I refer to the evidence of the old witnesses I will state generally the conclusion at which I have arrived. I will not read the whole mass of evidence, which it took your Lordships a considerable time to hear expounded and a considerable time also to follow, but it is upon that evidence that your conclusions must be based. Upon that evidence my mind comes to this conclusion, that anterior to 1828 (since which more than forty-eight years have elapsed), when a solid sort of causeway or path was constructed at this narrow part which separates and divides the two sheets of water—anterior to that time there was, whatever it may be called, whether it be called a phait, or whether it be called a hump, or whatever name may be used to describe it, there was a considerable rise in the ground or bed of that piece of water, which rise, beginning in Loch Fionn, may be traced to a considerable extent in Loch Dubh, and this occurred at a narrow point (you see it at a glance on the map) where the sheet of water is wonderfully nipped and narrowed—nipped into a space so small that had it continued so it might well perhaps have been called a river. At that very point there was always a remarkable shallow, and I think I may state how shallow it was according to the evidence of the oldest witnesses. At the lowest time you could not, perhaps, have traversed the shallow entirely dry footed to its full extent, but a portion of it was dry in the middle, and there was more or less a space of very low water on one side and on the other of that ridge. At the lowest times, when there was not a large amount of flood-water in the lakes, the depth at that place was, I think, one witness says, a foot, not more. In the ordinary average times throughout the year you would have it as high as the small of the leg. There were times, one witness says, when it came up to his middle, and one of the witnesses who resided for a great many years on the spot says that at least twenty times he had to go round the lake—(he was a person who probably did not much care for wasting his time or his labour)—still we have the evidence of a man residing there that there were about twenty times when he could not venture to cross at all. This rising phait or hump is proved (Mr Buchanan expressly speaks to this) to have on the one side, namely, the Loch Dubh side, what the witness calls a "pot," a deep descent, the ground descending fifty or sixty feet from this shallow very rapidly to this deep pot or bowl, and there is something of the same kind on the other side—that is to say, on the Loch Fionn side of this shallow. It therefore represents in itself a considerable division between the two pieces of water.

But, my Lords, as I said before, this must be considered in reference to the exercise of this right of fowling and fishing, and the question is, Whether any of those reasons which occasion such a common right exist in this case? Undoubtedly, we are left with very slender evidence indeed as to anything done or attempted to be done by boats previous to the erection of the causeway forty-eight years ago, but even anterior to the erection of the causeway, which made things more difficult—that is to say, at a time when it was not intended that persons should not cross this barrier,—the case was very rare that any boat could pass or did pass by means of the water. I think that there were one or two instances perhaps of a boat having passed through the water.

LORD BLACKBURN—No, not even one.

LORD HATHERLEY—There was one witness who spoke of a boat being used, generally as a ferry I think, but it passed up to Loch Dubh. Well, that being so, there being no instance of any boat having got over this obstacle except by the process of the persons in the boat getting out of it and hauling it over at the most convenient spot for such a hauling process, it appears to me, my Lords,

that that is in itself enough to conclude the case, coupled with the configuration of the spot in question, the obstacle occurring in the midst of this narrow part which has undoubtedly given rise to the two names being applied to the two pieces of water by all the countryside. It has been well urged at the bar that you might meet with cases where two names are given to different parts of an entire open piece of water, but when you find the two things combined—when you find that the two sheets of water are called by two different names, and that that is a very reasonable thing to happen when the only mode of communication from the one to the other before this causeway was constructed was by the process of hauling a boat in the way I have described—these two things taken together go a long way to show that there was no legal necessity for the extension of the right of fowling and fishing over the sheet of water which could not be reached by the ordinary process which a fowler or fisher would use, but could only be reached by hauling the boat over the ridge in question. Not only is that argument as to the absence of legal necessity for the right very strong in itself, but as a matter of fact the non-user of Loch Dubh by the persons dwelling on Loch Fionn alone for any other purposes is a very strong adjunct as helping us to arrive at a conclusion. Tried, as Mr Mackintosh suggested, by the nature of the right to be exercised, when that right seems to be arrested and stopped by means of that shallow portion of the loch, it goes a long way to show that the law of Scotland with reference to a common right of fowling and fishing would not have applied where a proprietor could not conveniently have used his boat for the purpose.

Now, my Lords, if that was so before the erection of this barrier, then let us see how the erection of the barrier acted. I quite agree that Mr Mackenzie's right, if he had any, was not lost by the erection of that barrier forty-eight years ago under the circumstance and by the person who performed that act, who seems to have been the author of both these proprietors who are now contending before you. He erected it for the convenience apparently of bringing his sheep over dry-footed at certain seasons. He thought it desirable to augment this natural barrier and to raise this artificial barrier in order to make such a causeway as could be traversed by the sheep at certain seasons when most required, and generally dry-footed, or nearly so. The object was to suit his pastoral business. Now, let us see how that bears upon the question which is raised by Mr Mackenzie. I do not say that it proves an acquiescence on his part to submit to an exclusion of his right, supposing the right to have existed. Considering all the evidence we have before us as to the object for which the causeway was made, and all that took place afterwards in the way of pulling down the barrier occasionally, though not for the purpose of asserting on the one hand, or denying on the other, any right, I do not think that all that would in itself have amounted to a legal conclusion against the pursuer—that is to say, the appellant—but it does show that all those who might have raised the same litigation as he has raised upon the present occasion did not care in the least degree about the erection of this sheep-path—in fact probably preferred that it should be erected for the accommodation which it rendered to their tenants. Be that as it may, no question was ever raised, and can it be believed that if the authors of Mr Mackenzie had thought or dreamt of exercising any right of pursuing their fowling or fishing up to the upper loch they would have quietly sanctioned the erection, for a totally different purpose, of a barrier which would totally frustrate their object—that seeing the obstacle which existed already they would have allowed a still greater obstacle to be placed in their way? But that was not the case; this erection interfered with nothing that they ever thought of doing, and it being no interference with any rights which they wished to enjoy, they did not object to it. It is only in that way that it can be used, but I think the observation has considerable force—that if such a right is to be assumed as is laid down in the authorities, the text-writers, and so on, with reference to these lochs, the authors of Mr Mackenzie, possessing property on Loch Fionn which would undoubtedly have entitled them, if the facts were as stated in the case, to similar rights on Loch Dubh, would have made earlier interference with those who were making it still more difficult to exercise such rights— those who were altering this separation, which in my judgment really existed *in rerum natura*, but only at certain times and certain seasons, into a separation existing at all times and at all seasons.

My Lords, I am not going to read through the whole of the evidence of course, but there are two or three of the oldest witnesses who tell us what the exact state of things was at the time when this barrier was put up, and what was the position of matters as between those exercising any rights on Loch Fionn and the proprietors on Loch Dubh. I ought to have mentioned, perhaps earlier in the case, that the same proprietor, Mr Bankes, the respondent in the present case, is at this moment the owner of the whole of the land surrounding Loch Dubh, so that if, as one of the learned Judges observed, any regulation were required for the purpose of settling the rights as between the one party and the other, he is in the natural position which would determine almost any Court to assign to him the entirety of that loch. But I do not base my opinion upon such a view as that. It is quite enough to say that from all time these lochs have had a barrier which interposed a reasonable separation between the rights in common on Loch Fionn and those on the other portion of water which, flowing past the barrier, formed what is called Loch Dubh.

Now, my Lords, I will refer your Lordships to the oldest witnesses who were examined. You will find Duncan Darroch's evidence, but I will refer to it subsequently for a different purpose; he only speaks of a particular instance. The first witness I will refer to is William M'Intyre. He is eighty years of age, and lived in the neighbourhood till he was twenty; therefore he lived there before this artificial barrier was added to the natural barrier which previously existed. He says —"My father was managing partner to the firm of Messrs Birtwhistle, who had the farm of Letterewe and some other farms in that neighbourhood. He was so at the time I was born, and continued to be so until his death in 1827. I was born at Letterewe. I lived there till I was twenty years of age, when I went into the navy as a midshipman. I remained in the navy till 1822. I then returned to Letterewe, where I spent two

years. I next went to Liverpool, where I was for thirty-three years. I came back to Poolewe in 1860, and have been living there ever since. The first time I visited the Fionn Loch was in 1813. There were some smugglers then on an island in the loch, and they had a boat and took me across with them. I first saw the phait in 1816. There was no artificial causeway across it in these days, so far as I observed. A medical student was along with me, and when we came to the phait he carried me across the water. (Q) How high up did the water come?—(A) I recollect there was plenty water to float a boat at all events, and it was very dry weather at the time. I recollect that perfectly well. It was about the end of June. The next time I crossed the phait was in October the same year. I was on a shooting excursion." He speaks of floating a boat—probably it was that which misled me into supposing that a boat had once passed; but I see he only speaks of the amount of water which he thinks was enough to float a boat—speaking from his own recollection of that remote time, 1813. Then he says—"I do not recollect how deep the water was, but I had to take off my shoes and stockings." That just agrees with what the other witnesses say about it coming up to the small of the leg. Before, when he was speaking of his general impression, he says he thinks there was water enough to float a boat; but when he made the actual experiment of it he found that the depth was such that it came to the small of the leg, or at least that he had to take off his shoes and stockings, and nothing more. Some of the witnesses say that they were obliged to take off their higher garments also, but that was at a different time of year. He does not define the height to which the water reached when he was wading on that occasion. He says—"I do not recollect how deep the water was, but I had to take off my shoes and stockings. There was plenty water to float a boat that day. My next visit to the phait was in August 1817; I had again to wade; and there was plenty of water to float a boat. I next visited the place in 1824, when I went to have a day's fishing on Loch Dubh. I crossed the phait again by wading. There was no artificial erection up at that time." Then he goes on to say—"There was just one sheet of water from end to end, and quite smooth, as I recollect it. The water was just the same in appearance at that place as at other parts of the loch. There was nothing that I would suppose a current." As to that point I take this as useful evidence of the exact state of things at the phait at that time. Then he says—"My father had a coble at the phait at one time. I recollect that from the circumstance that one day a cattle-dealer named Peter Morrison was crossing the phait in the boat. I don't know how it happened, but the boat drifted out with him, and he got so much alarmed that he was shouting out to us how his property was to be disposed of." A coble, I believe, does not draw very much water, and he speaks of crossing the phait, but he does not say here what part of this particular natural obstruction he was passing over. He says nothing more definite. That is in his examination-in-chief. Then in his cross-examination he is asked—"Do you mean it paid to keep a boat for ferrying people, or that they got the advantage of it?—(A) They took the advantage of it. My father at one time kept a shepherd who kept a pair of stilts to go through the water." That is not a bad criterion again. His statement tallies as nearly as possible with the evidence that the water went to the small of the leg or the knee. He says that people kept pairs of stilts to get over by this natural barrier anterior to the formation of the artificial barrier. Then he says—"I was a fisher in my time. I fished only once on Loch Dubh. The part of the loch in question which is dark was called Loch Dubh in my time." Then he is asked—"What was the part called which is not Loch Dubh?" and he answers, "I don't recollect." There is a good deal more evidence given by that witness, but I will not trouble your Lordships by reading it through in detail. Then he says—"When I spoke of the water at the phait being deep enough for a boat, I meant a boat with a light draught of water. I do not say that a loaded boat or a keeled boat would pass there." Then he is asked—"Do you mean a flat-bottomed boat such as was used for soldiers landing?" and he answers, "There was plenty of water to float that. (Q) Because it drew two or three inches of water?—(A) More than that; when empty it would draw eight or nine inches." That is the most he gets to. That, I think, bears me out in saying that I take this witness as agreeing with the other witnesses who spoke of the water being up to the small of the leg. He says that although a boat might get over the obstruction, a keeled boat could not do it, but a flat-bottomed boat drawing eight or nine inches of water might do so.

The next witness, my Lords, is John Mackenzie, who made this artificial structure, and he says that he is seventy-four years old, and that he was twenty-two years old when he went to live in the neighbourhood. He is asked—"Were the Fionn Loch and the Dubh Loch one sheet of water, or were they two sheets of water?" and he answers, "I was making it out to be one till it was spoiled." I think that means I was thinking it to be one till it was spoiled. He adds—"I spoiled it myself forty-eight years ago with stones at the place called phait." Now, Mr Mackintosh says that that phrase "I spoiled it" is somewhat significant, because it might be interpreted as meaning that it could be used as one loch until Mackenzie spoiled it. But whether he spoiled it as one loch, or whether he spoiled it with reference to natural beauty, or whether he spoiled it with reference to navigation, I do not know. I cannot see anything more definite than that—that is to say, he divided it, as he thinks. Then when he is cross-examined he is asked—"In the ordinary state of the water was there a run of water from the Dubh Loch to the Fionn Loch?—(A) No; I could make no distinction between them. (Q) Did the water run from Loch Fionn to Loch Dubh?—(A) Whatever the wind was. When the wind blew from the Fionn Loch there was a current from that direction." I may say at once that I do not lay any weight at all upon the evidence of some of the witnesses who speak to a current and endeavour to bring this division to something more in the nature of a river. I do not consider that it can be treated as a river in any sense or way. I treat it merely as a natural barrier which up to a certain time had impeded the passage of boats to a certain extent, and then was augmented and made more formidable as a barrier and became more difficult to pass by reason of the obstruction which was erected upon it.

The next of the old witnesses I refer to is Malcolm M'Lean. He was examined also for the appellant, and he says—"I know the phait at Loch Fionn. Mr M'Intyre had ground on both sides of the phait. I used to cross the phait frequently—perhaps three times in one week—and that throughout the whole year. I never saw the phait dry. In the driest summer I saw I never went over dry. Sometimes the water came up to my knee when I was crossing, and sometimes I would have to put off my trousers. When the water was at its lowest it came up to about the small of the leg. It was many times too deep for me to wade it; and then I had to go round the head of the loch, which gave me at least two miles of extra walking. There would be no current at the phait when I was wading. I know Loch Maree." And then he speaks of two names by which different parts of the loch are known. Then he is cross-examined, and he says—"I have often crossed" at the phait "when it reached up to my breast;" and a little lower down he says—"I did not see the causeway built, but I knew when it was being built." That evidence agrees exactly with what I have said—that is to say, that at what I take to be the shallow time the water came to near the knee—to the small of the leg—and sometimes it was so high after falls of rain that persons having regard to their safety did not like to cross at the phait at all, but went round the lake.

Murdoch M'Lean was eighty-eight years of age, and he lives in Poolewe parish. He says—"When I was a young man I had often to cross the phait, and at all times of the year. The water was at different heights on these occasions. I never waded it that it did not reach near the knee. There was no stone causeway across the phait in my time. I was in my father's service at the time I used to wade across." Then he is asked in cross-examination—"Have you always heard the loch on the one side of the phait called the Dubh Loch when you were a boy?" and he answers "Yes." And then comes in a question which is put as part of the answer. I think it must be a misprint; the words are—"Was it not the same water?" However, he goes on to say—"I have seen a boat on the Fionn Loch a good bit from the phait. The man who lived in Kernsary owned it. It was kept to bring wood from the islands. (Q) At the time when you were in the habit of crossing the phait did you often see anybody?—(A) Yes; it was in fact the path. (Q) From where to where?—(A) From Letterewe to the other side. (Q) Except the people who belonged to the place, did you ever see anybody there?—(A) No." Then he speaks again about the current, and says that he never saw it. I think, my Lords, after referring to these witnesses, I need read no more to show what was the exact nature of this natural barrier anterior to the erection of the artificial barrier for the purpose of making a path across it by John Mackenzie. It appears to have been this—People crossed by wading, or they crossed by stilts; at the lowest times one could cross by taking off one's shoes and stockings, and sometimes the water went up to the knee, but not often. No boat ever went across it. I made a mistake about that at first, but it appears that at this time no boat crossed it by the mere process of having her sails set up or of being propelled by oars.

My Lords, I will not go into matters upon which there is no dispute between the parties. I should only be wearying your Lordships by going into them; but there is abundant evidence to show that after the time of the formation of this artificial barrier nobody ever crossed it by means of a boat except by the process of getting out of the boat, lifting her up, and drawing her at the place where it was most convenient to cross the artificial barrier. I do not say that there was no water there; there might be about three or four inches—sometimes more or sometimes less—of water underneath her, but there was not enough to float her into the upper sheet of water.

That being so, my Lords, I do not consider it necessary to go into more detail upon the whole nature of the case. I have carefully read the Lord Ordinary's judgment, and I have carefully read the judgment of Lord Gifford, and Lord Gifford, although he uses rather a remarkable expression as to what it would have given him pleasure to find, nevertheless does not on the whole dissent from the judgment of the Lord Justice-Clerk and Lord Ormidale.

I think, my Lords, that the broad view of the case is that upon which our decision may be rested beyond a possibility of cavil or dispute. Taking the broad view of the case, you have here two sheets of water which undoubtedly occupy two different "pots" or deep hollows. Between these two different deep hollows a ridge has been formed, either originally at the time when the hollows were formed, or by process of denudation and detrition, bringing down the gravel and stones from the mountains, and the like. At all events there is this high ridge or barrier shelving off on the one side and on the other into the deeper parts of Loch Fionn on the one hand and Loch Dubh on the other. This ridge or barrier could not be crossed, and never was crossed, by any person for the purpose of exercising the rights of fowling or fishing, which are said to belong in common to the proprietors of land on the shores of the lake, and those rights were never exercised up to the time of the artificial barrier being placed there. That artificial barrier was raised without any kind of dissent or murmur on the part of any human being, and it is almost incredible that persons who were entitled to exercise rights, and who desired to exercise those rights of fowling and fishing on the upper sheet of water, which would be interfered with by that artificial barrier, should not have objected to it. It may be that they never thought it was worth their while to do so then, and it may be that the increased number of travellers in that locality has made it more desirable to a proprietor upon the one sheet of water to see how far he can extend his rights; but at all events, there being that nip of the land, there being this natural conformation of the bed of the water underneath the surface, there being these two large hollows or chasms on the one side and on the other, there being this natural barrier between the two lakes (for so I must call them) in the centre, unpassed by boats up to the time when the artificial barrier was erected—the artificial barrier having been erected which made it still more impassable, and that having been done without objection by anybody—I must confess that if I were considering this matter as a juryman I should come to the conclusion that the Dubh Loch was a separate loch, and that the barrier between it and Loch Fionn was never passed by sailors or

by sportsmen or by fishermen without lifting the boat across the barrier in question. Loch Dubh is by its natural configuration and conformation underneath separated from Loch Fionn, and that being the case it follows of course that the decision which extends the right in common claimed by the appellant over Loch Dubh cannot be sustained.

Therefore, my Lords, I advise your Lordships that the interlocutor complained of be affirmed, and this appeal dismissed with costs.

Lord Selborne—My Lords, in the view which I take of this case it is not one of any serious difficulty.

In one of the wildest parts of Ross-shire there are two basins of water closely connected together, as to which the question is, Whether for the purpose of determining the rights of the riparian proprietors they ought to be regarded as two lakes or as one?

So far as reputation or the testimony of the common sense and understanding of the people of the district goes, it is in favour of the proposition that they are two lakes, for the upper of them is, and always has been, commonly and popularly called "Loch Dubh" (or "The Black Lake") and the lower "Loch Fionn" (or "The White Lake"). The natural formation of the two basins appears to me to justify this common and popular understanding. Loch Dubh, the upper and smaller basin, receiving in proportion to its size a considerably larger rainfall than the lower, is surrounded except on one side by precipitous mountains falling steeply to the water, and is very deep. But on one side, that towards Loch Fionn, the two sheets of water are divided by a low lying spit or ridge of land, from which the bed of each basin slopes down gradually. Over the neck or middle of this ridge the surplus waters of Loch Dubh flow into Loch Fionn, and at the narrowest point of the outlet, which is about fifty feet long and ninety-four yards wide, the water of overflow in its natural state, when neither swollen by excessive rains nor reduced by excessive drought, is stated in the appellant's evidence to have been usually about knee-deep. From this point on the other side the bed of Loch Fionn also sinks gradually until it likewise attains a great depth. Across this narrowest part of the outlet there appears always to have been a ford or passage for men and animals, passable except in times of spate or flood, and I see no reason to doubt the correctness of a statement made by one of the respondent's witnesses, that this ford or passage has long been, as it is now, used by the country people as part of a driftway between Loch Broom and Gairloch.

In 1829 a causeway of rough stones rising a little above the level of the water in its ordinary state, and constituting a visible separation between the upper and lower basin, was erected partly on the low bank on each side (then belonging to predecessors in title of the respondent), and from thence across the waterway in the line of the accustomed passage or ford. This was done by a person who was the tenant of the land immediately adjacent on the north side of the ford, and who was at the same time tenant of other land a few miles distant on the south bank of Loch Fionn under a predecessor in title of the appellant. It was argued by the appellant's counsel that the motive for this erection was to enable sheep to be more safely and conveniently moved from this tenant's land on the one side to his land on the other by means of the driftway crossing the ford, and that both landlords ought to be presumed to have known and to have acquiesced in what was so done. Taking this to be so, it would appear to follow that all the landowners under whom the appellant and the respondent now claim concurred or acquiesced in 1829 in an act by which any passage of boats from the lower to the upper waters if practicable before would become permanently obstructed, although they might still be drawn or lifted over the obstruction or forced through any gap which might exist or be made in it by the use of proper means, and this state of things has existed ever since 1829, and still continues to exist.

In point of fact it does not appear that any boat ever did pass from the lower to the upper basin, or that any use was ever made of the waters of the upper basin for fowling or fishing from their surface before this causeway was erected. A coble is said to have been kept at or near the passage at one particular time before 1827, and persons are said to have been sometimes ferried across in it, but if this had been done above the outlet or in the narrowest part where the ford was, the witness (who was called for the appellant) would doubtless have said so, and I therefore think myself bound to infer the contrary. That witness (M'Intyre), an educated man, and a seaman by profession, said that on three several occasions, in summer and autumn, when he waded over the passage, there "was plenty of water to float a boat;" but he explained that he meant an empty flat-bottomed boat with a light draught of water of about eight or nine inches, and that he "did not say that a loaded boat or a keeled boat would pass there." Other witnesses for the appellant also spoke of the possibility of taking a boat through at the ordinary height of the water in the ford, but they do not appear to me to have added anything of importance to this testimony of M'Intyre, and I think it is better to lay no stress upon anything less favourable to the appellant's case which was said by any witness for the respondent.

There always was and must have been some current downwards through this passage from the upper to the lower basin, but the witnesses for the appellant, who speak of the state of things before 1829, say that neither that current nor any difference of level between the two sheets of water was then ordinarily perceptible to the eye, although since the erection of the causeway it appears generally to have been so.

It is to these facts that the law of Scotland with respect to the rights of riparian proprietors in inland lakes has now to be applied. Under titles such as those by which both the competitors in the present case hold (and where nothing turns upon any evidence of exclusive possession), the entire lake if surrounded by the land of a single proprietor belongs to that proprietor as a "pertinent" of his land. If there are more riparian proprietors than one, it belongs "rateably" to them all. So far as relates to the *solum* or *fundus* of the lake, it is considered to belong in severalty to the several riparian proprietors if more than one, the space enclosed by lines drawn from the boundaries of each property

usque ad medium filum aquæ being deemed appurtenant to the land of that proprietor exactly as in the common case of a river. But, for reasons which may be pronounced to be founded in part if not wholly, on the irregularity of configuration frequent in lakes, this *ex adverso* rule is not extended by the law of Scotland to these rights (such as boating, fishing, and fowling) which are exercised in or upon the surface of lake waters. These are to be enjoyed over the whole water's face by all the riparian proprietors in common, subject (if need be) to judicial regulation.

In this case it follows necessarily from these principles that the whole *fundus* or *solum* of Loch Dubh and of the outlet from that piece of water, including the site of the causeway, belongs to the respondent alone, by whose land it is entirely surrounded; and I am of opinion that the Court of Session was also right in holding that to the respondent, and to him alone, belong all other rights of a sole riparian proprietor in and over the same piece of water.

These two bodies of water are naturally distinct, no part of the waters of Loch Fionn mixing with those of Loch Dubh, while those of Loch Dubh overflow into Loch Fionn, though with little apparent current or difference of level. "There is" (in the words of the appellant's witness Rogerson) "a considerable barrier to the mass of the water passing from the one loch to the other." The fact that the channel of overflow is too short and immediate to be called a river, and the possibility of drawing or working some kinds of boats over or through it are not, in my mind, of any material importance; nor am I sure that they would be so even if I were satisfied (which upon the evidence I am not) that the transit of ordinary boats from the lower to the upper loch would before the causeway was made have been practicable in the usual state of the water at all seasons of the year without the use of any extraordinary means for that purpose. No imaginary line of partition has in this case to be drawn upon any water surface; the demarcation has been made by nature in a manner at once scientifically and practically intelligible. It has been practically and popularly understood and acted upon as a natural and real boundary between two lakes, as is evident both from the local nomenclature and from the history and use of the "phait" or ford and of the causeway. To infer from the authorities as to the right of several riparian proprietors to use the same lake in common that such a common right is to be extended to every upper sheet of water accessible by any continuous water communication from a lake, unless such water communication has the proper character of a river, appears to me to be an arbitrary corollary from a reasonable rule founded on the peculiar natural conditions of lakes which the reasons of that rule do not at all require or justify.

I agree therefore with my noble and learned friend now on the woolsack that this appeal should be dismissed.

Lord Blackburn—My Lords, after the argument—particularly the very able and clear exposition given by Mr Mackintosh on the one side and the Lord Advocate on the other—I think I may say that there is no dispute now as to the law of Scotland so far as it comes in question in the present case. Where there is a lake with different proprietors on each side the titles may be such as to show that one has the exclusive possession, and even where the titles do not show it there may in the civilised parts of the country be evidence of possession for such a long time as to show either that there has been "promiscuous possession," to adopt the phrase which has been used, and which appears to be an expressive one, or that there has been exclusive possession by one proprietor; in either case that possession would explain and supplement a title which was not in itself enough to determine it. But in the rare cases which occur of its being shown, for instance, that there had been unity of possession within the last forty years, and that the then proprietors had acquired different portions of the lake or of its margin from the same person without their titles having anything to define or bind their rights, the law of Scotland seems to be established thus far, that as regards the rights which from their nature can only be enjoyed in severalty, such as dredging for marl, where marl exists, in the bed of a lake, or taking coals, where coals exist underneath a lake (I do not know any lake in Scotland which has coals underneath it; if there are any they must be very few), those rights are to be enjoyed in severalty. The question how far the Courts in Scotland exercise a power of severing and dividing the rights so as to take away the right of taking marl, and so on, under certain parts of the lake, does not arise in this case, and I only mention it to say so.

But there are some rights which, owing to the nature of a lake, cannot conveniently be enjoyed in severalty. Those who are proprietors upon the shores of a lake may boat upon it, and may catch fish or shoot wild fowl upon it. No doubt if you were to apply the same rule as would be applied in a river you could say that a man who had a few yards of land upon the edge of a lake should have attached to it a right to have what I may call a long projecting promontory of water—perhaps some seven or eight miles long in the case of some of the larger lakes—tacked on to his land, and he would of course have a right to say—I myself will sail up and down this long narrow strip of land covered with water; I will take care not to go over the boundary on either side; and nobody shall come into my long narrow strip. Such a thing is conceivable in law, but it would be very inconvenient in fact. Now, I think I may say that the law of Scotland has established this.—In the absence of anything in a title to show the contrary—for there may be many things in a title to show the contrary—and in the absence of exclusive possession, where there may be exclusive possession, of the whole or part—in the absence of those things, the common *prima facie* right of those who are riparian proprietors is to enjoy such rights in common. The cases which have been cited seem to show that, but, with the one exception which I will mention presently, the point was not absolutely necessary to be decided.

The earliest case seems to have been that between the *Earl of Wemyss* and *Robertson of Strowan*. Upon what principle that was decided, or why it was decided, one does not know—at least I have not been able to see; but in 1797 they did divide Loch Rannoch between them, the Court of Session declaring that Robertson of Strowan and the ancestor of Sir Neil Menzies had the right of boating and fishing on the whole loch in common. How they got it does not appear, but that was the fact undoubtedly.

The next case was the case of *Cochrane* v. *The Earl of Minto.* In that case there was a small lake in Roxburghshire which had been entirely the property of one person, his barony surrounded the whole, and unquestionably and undoubtedly he had the whole lake. He sold a part of it to Admiral Elliot, the uncle of the Earl of Minto; he seems to have sold part of it also to Mr Cochrane. Then there came a quarrel. The real quarrel that arose between them was as to the right of dredging for marl. It was found that the marl at the bottom of the lake was of great value. Admiral Elliot claimed to take marl under the whole of the lake. The other rights which were claimed as to fishing and fowling and so forth were not of any great consequence, and the question as to them did not really arise. But, as I understand the history of the case, the parties seem to have had first a declarator as to the nature of their rights, and afterwards an interdict to prevent the dredging of marl, and then the two processes were united. On referring to the papers which have been laid before us it appears that the Lord Justice-Clerk made this interlocutor. I could have wished that I had the book to read the very words, but as well as I remember what he said was—"So far as regards the taking of marl from the bottom we must regulate that, and Admiral Elliot shall take marl (drawing a line to mark it off) over five-sixths of the lake, and Mr Cochrane shall take marl over one-sixth of the lake, for such are their relative proportions of the lake. And as regards the rights of sport, fishing, shooting, and fowling, I say they shall enjoy them jointly over the whole surface of the lake." It seems to me, my Lords, that the Lord Justice-Clerk must have had in his mind the decision which was come to in the case of *Robertson of Strowan* as to Loch Rannoch, and must have applied it in that case, and said—The surface rights which are not practically enjoyable unless you enjoy them jointly are to be enjoyed jointly. That is what I understand the Lord Justice-Clerk to say. The two conjoint processes came before the Court of Session, and then there was a question as to whether the effect of an excambion had not been such as to exclude Cochrane from the lake altogether. Admiral Elliot said that the effect of the excambion was that he got the whole, and that Cochrane was not a riparian proprietor at all. The Court thought that Admiral Elliot should have everything, Cochrane not being a riparian proprietor. The case came up to this House upon that, and Lord Redesdale in advising the House says—I think the Lord Justice-Clerk was originally right. I think the excambion has not that effect. I think that Cochrane is a riparian proprietor, although a small one. Now, it happens that in drawing up what of the interlocutor was to be altered he says nothing about the fishing, fowling, shooting, and boating; that is unmentioned. As regards the marl, that is mentioned in the order of the House of Lords. It is said that it should be taken by metes and bounds, and the rest is left untouched. But I think that the effect of that judgment is to say in the year 1815 that as to these surface rights, which from their nature could not conveniently be exercised except jointly over the whole loch, the *prima facie* and natural presumption was that they were to be exercised over the whole lake.

Then, my Lords, came the two cases which have been so much mentioned, the first of which was the case of *Menzies* v. *Macdonald.* I agree with what the Lord Advocate said, that there having been a basis settled as long ago as 1797 when Robertson of Strowan was declared to have his right as regards the shore of the loch, and a joint-right of boating over the whole loch, that was a fixed matter for the Court to start with in this case, and consequently they did not decide upon the common right. Lord Curriehill evidently thought that it was a common right to be exercised by each of the proprietors, as the Lord Justice-Clerk had previously held, but I do not think that that was decided.

In the case of *Scott* v. *Napier*, which followed, Lord Curriehill laid down the law, which was very much adopted by this House. The Lord Advocate was justified in pointing out that Lord Curriehill proceeds to show that there had been promiscuous possession for the last forty years, and that the case might have been decided on the ground that there was promiscuous possession, but I do not think it was decided upon that ground. I think it was decided upon the ground that what the Lord Justice-Clerk actually laid down in 1815 was the law, and obviously it is a very convenient law. Supposing there was an unquestionable bay extending from the loch entirely within a gentleman's policy, and that gentleman and his ancestors had had the park for forty or fifty years with that bay projecting into it, it might be a most reasonable thing that that gentleman should be held to have had exclusive possession there, and be entitled to prevent others coming into it. At present I do not say anything about how it would be, but I should be very sorry to say that in such a case as that, if exclusive possession for forty years was proved, a proof of promiscuous possession in other parts of the main loch would have the effect of undoing it. I think I am not saying too much, after having heard the exceedingly able argument, in stating that such is the established rule since 1815, now more than sixty years, and it is a sensible and convenient rule, and one that ought not to be disturbed rashly.

Taking that to be so, my Lords, I think I am right in saying that if the Lord Ordinary was right in his facts he was right in his judgment. He finds that the lands of the pursuer and 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; 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"—that is not, I think, disputed to be the state of the title—"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." Now, as to that I think I may say that that is borne out by the facts which appear on the evidence. The nature of the lochs was such, they being in a very wild part of the hills, far from any gentleman's house, that until very recently nobody cared about either boating or fishing on the lochs. There is evidence that some smugglers from some of the islands once had a boat there, and it appears that a shepherd at one

time kept a coble which he used for the purpose of crossing from side to side. But neither the proprietors nor anybody else ever boated for pleasure, nor did either of them care about the fishing at that time. I daresay the smugglers caught a trout for themselves now and then, and I daresay the shepherd caught a trout for himself now and then, but neither of the proprietors cared about it at all, and consequently there was no occasion for either of them to trouble themselves about such exercise of their rights. The rights were left as the law gave them to them, without anything being done to affect them.

Now, in 1828, more than forty-eight years before the present time, a causeway was made across at the narrow strait to enable the sheep to cross from one side of the loch to the other, and no doubt that causeway would be an impediment —I do not say that it would absolutely hinder, but it would be an impediment—to any person boating up the Fionn Loch—when I say "the Fionn Loch" I use the words to signify both Loch Fionn and Loch Dubh. If it had been allowed to continue an impediment without anybody exercising the right for forty years from that time I should say that that was strong evidence to show that whether such was the intention or not everybody had been in fact kept out of Loch Dubh for forty years, and a prescription would have run in favour of Mr Bankes. But the wind and waves very soon made breaches in it, and I think it is shown very clearly that in 1845, sixteen years after this erection had been put up, the then tenants of Mr Mackenzie did interfere with it. They seem to have purchased a boat for the purpose, and to have had the boat carried overland to the spot. It is very likely that in old times some of the lairds may have gone fishing there, but as far as the evidence shows that occasion in 1845 seems really to have been the first occasion of the exercise of boating or fishing on the loch on the part of either proprietor. I think the evidence is clear that they did not then go up into Loch Dubh without passing through a gap in the causeway or over it, but it had so little effect upon the mind that the tenant—Blackburn—who was there, and who says he is positively certain that he fished up to the bottom of the steep hill at the end of the Black Loch, did not remember until he looked at the photograph there were particular projecting points at all, nor does he remember any erection nor any difficulty in passing the boat from one end of the loch to the other. I think that shows that he must have gone over at that time without much difficulty. If he had been obliged to get out of the boat and wade he would have remembered it well enough. But then I do not know what the state of the water was at that time, and it is proved that there is a rise and fall, and that there is a difference of several feet between high and low water; consequently if at the time he went the water was a few inches higher than usual his going over without getting out of the boat would not prove much. However, this evidence shows that at that time they did go there and exercise the right on the part of Mr Mackenzie, and from that time there has been an exercise of right on the part of Mr Mackenzie and his tenants coming down to the present day. Now, my Lords, assuming what is the main question in the present case, that they had a right, then this exercise of it was quite enough to prevent any prescription on the part of Mr Bankes or his authors running against them. On the other hand, if they had not got the right, the user is not enough to give them a title.

Therefore, my Lords, we come back, in my view, to see what the state of things was in 1828, before the formation of this artificial causeway. I do not attribute the same degree of weight that my noble and learned friend who spoke just before me has done to the putting of the causeway there as showing what was the right before the causeway was constructed. I think it shows that neither Mr Mackenzie's author nor Mr Bankes' author cared much for boating then. It was not until fourteen or fifteen years afterwards that boating for sporting purposes seems to have been used at all. I do not, for my own part, feel that I would attribute much weight therefore to that circumstance.

Then comes the controverted part of the Lord Ordinary's finding. He finds "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 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." And then he finds "that the pursuer has along with the defender, a joint-right or common property in the said Fionn Loch" (what the effect of that would be in the extraordinary and improbable event of the discovery of there being marl at the bottom of Loch Fionn I do not know—he does not say), "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." I think if his fact is a fact, that the Dubh Loch is not a separate loch, but a part of the Fionn Loch, his conclusion in law is perfectly right.

Now, my Lords, comes the real question of fact —Is the Dubh Loch a separate loch or not, and what should be the guide of those who are to decide that question of fact? A good deal has been said about its being called by a separate name. That, I think, is not a matter to be despised at all or thrown out of view, because calling a place by a separate name indicates that those people who are about in the country and see it see that it looks like a separate place, and therefore call it by a separate name, because it has a marked natural boundary such as would lead people to call it by a separate name. If that stood alone, that would be the inference which I should draw from the fact of it being called by a separate name. I think it is quite unnecessary to draw such an inference here, because, taking the Ordnance Survey, I look at it on that map, and I see there is such a natural boundary round it that it may well have been called by a separate name. I look at the photograph, and I see that the Dubh Loch is surrounded by high cliffs, which go all round it, whereas the Fionn Loch is much less surrounded by cliffs, consequently there is a well marked boundary round the Dubh Loch. But then there is the element of width at the strait in question. Now the phait, as it is called, seems to be eighty yards broad; that is consistent with Loch Dubh

being a narrow piece of loch and not a separate one of itself. Then it is very shallow; that is certain from the evidence that has been called, and I think we must look at it according to its ordinary state. The loch, like most Highland lochs, is liable, according as there has been wet weather or not, to considerable differences of level. I will not trouble your Lordships by going through the evidence again. I will merely say that the conclusion in my mind is—that in its ordinary state it is, or was before 1828, nearly knee-deep. I think the man who makes it the shallowest of all says that it came to the small of the leg. I do not know what the size of the man was, but probably that might mean eight or nine inches. However, I think that would, according to the rest of the evidence, be exceptionally low. Most of the witnesses say that it was ordinarily about knee-deep, which would be about a foot or thirteen inches deep, or something like that.

Shallowness is one of the elements to be considered when we are considering whether or no this was part of the same loch. It was first thrown out by Mr Mackintosh in his argument, and I quite agree that, as a rule, what you have to look to is the purpose of using the common rights on the surface—boating, fowling, fishing, and so on. Then, is this space between the sheets of water one which would prevent the use of those rights in common? If so, they are clearly not one loch. The shallowness has a great deal to do with it, but looking at the evidence I should have said myself that you could go from the one to the other with a boat in the ordinary state of things. It seems to have been done without much difficulty after the causeway was there, and Mr M'Intyre, who was a midshipman, and therefore would have a trained eye to see whether the water was deep enough for boats, seems to have entertained no doubt that he passed it in a boat, and therefore a boat could go across it. Not a keeled boat, he says, but a flat boat—a boat such as soldiers are landed in was suggested by the counsel. From his nautical experience he seems to have thought that such a boat, drawing eight or nine inches of water, could go across. That, my Lords, is strong evidence, and I should have said that it could have been crossed in a boat. I quite agree, however, that it is not conclusive at all.

It is a common thing to have a loch and then a bit of river joining it to another loch, sometimes shorter and sometimes longer. In some districts I have known two lochs very close to each other, and when it comes to the uniting of the two there is a lead or lane from the one to the other, and according to its depth you may force a boat through it or not. I cannot help thinking that if there be a river between the two, however short the river may be, that would be enough to make one say they were separate lochs. Take the case of Loch Katrine at the Trossachs—there is a very short reach of the Teith between Loch Vennachar and Loch Katrine. I do not remember enough to say whether it is too shallow or whether it is too rapid to let a boat through or not; still it is obvious that Loch Vennachar would not be a part of Loch Katrine.

My Lords, that brings me to another important element, and that is to see whether the section of this division is so small that in the ordinary state of things there would be a perceptible current in the loch. There must be some motion of the water from the one to the other, but where the section of the loch is large that would not be perceptible. I cannot help thinking that if the division between the two was such that the level of the upper sheet was raised above that of the lower, so that there would be a perceptible flow from the one to the other, that would be a strong ground for saying they were separate lochs. Upon that matter the evidence is difficult to reconcile, except by remembering that the loch rises and falls. When there has been much rain upon the upper part—upon Loch Dubh—I should expect that there would be a perceptible current there; but when there has not been much rain I should not expect to find much current—I should expect that the water would sometimes flow from Loch Fionn to Loch Dubh—that when the wind blows in that direction it would force the water to Loch Dubh. On the other hand, when the wind blows from Loch Dubh it would send a current into Loch Fionn; that is what I should expect. I will not trouble the House by going through the evidence on the subject, but I think the witnesses say, upon the whole, that in the ordinary state of the loch that is what really would happen.

Now, my Lords, taking all these things together, and putting it in an English way, if I were trying the case before a jury, and explaining the law to them, and giving them directions, I should say what I have said now; and I should say that if they came to the conclusion that they were separate lochs I could not blame them; on the other hand, if they came to the conclusion that they were one and the same loch I could not blame them either. I should not disguise from them, nor do I disguise from your Lordships, that I think they are one and the same loch—that the connection between the two is sufficiently large and sufficiently deep to make them one and the same loch. The Lord Ordinary came to that conclusion, and two of the Judges of the Inner House came to a different conclusion. I think it may fairly be said that Lord Gifford intimates plainly that he would have come to the same conclusion as the Lord Ordinary, so that we may take it that they were pretty equally divided; consequently the decision does not come to us with any great prestige or weight. But whichever way the verdict was found, I should not have been able to say that I dissented from it. Now, unfortunately, your Lordships are here obliged to perform two tasks. You have to perform the task of jurymen as well as that of Judges. I can only say that if a jury had come into Court and said to me,—We cannot agree; we perfectly understand what you have said, but still we cannot agree; there is a majority of us one way, and a minority, perhaps of only one, the other, I should have said—indeed I have constantly said,—Go and consider it again, and try to agree if you can, and I should strongly advise the gentleman in the minority (I will not inquire on which side he is) that if there is a majority against him he ought to consider his opinion as being open to very considerable doubt and hesitation—if he still disagrees with the majority, I suppose there can be no verdict,—but he should try to agree—he should remember that he may possibly be wrong, and that his brother jurors are, individually at least, as likely to be right as he is. Therefore I advise him to diffidently reconsider his opinion. Now, my Lords, I must

take my own words home to myself. If it rested with me alone I should find upon the facts as the Lord Ordinary has, and as the Court of Session has not. I find, however, that the two noble and learned Lords who have addressed your Lordships before me have come to a decided conclusion the other way, and I believe the noble and learned Lord who is to follow me, if not quite so decided in opinion, inclines the same way. Under these circumstances I can only take my own lesson home to myself. I should have found a verdict the other way, but I do not dissent from the decision which is arrived at by your Lordships.

Lord Gordon—My Lords, certainly it is with some hesitation that I have felt myself obliged to concur in the opinion of the majority of your Lordships with reference to the disposal of this case. I felt the force of the lecture which was addressed by my noble and learned friend to a juryman. There is, undoubtedly, a certain amount of responsibility which rests upon any one who forms an opinion upon a case of this kind, where there has been such a difference of opinion in the Court below, but I took up the case and addressed myself to the consideration of it with some degree of interest, because I saw that the question involved a good deal of anxiety to the parties who are appearing before us as litigants. I have come to the conclusion that really one must defer to the opinions of my two noble and learned friends who first expressed their opinion upon the facts of the case.

I feel, my Lords, in the present case that a considerable amount of *onus* rests upon the pursuer. The pursuer has brought his action for the purpose of having it "found and declared that he has, along with the defender, a joint-right of common property in the loch called Fionn Loch," "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." I think that the *onus* lies upon him of establishing his case; and I think that when we come to consider the evidence we find that he has not established it, and he has not shown that he has such exclusive possession as would justify him in asserting the right which he attempts to assert in the conclusions of the summons.

I find that Lord Gifford, who may be held to be in a divided position so far as regards the substance of the opinion which he expressed, deals with the matter with reference to the obstruction which was caused by the artificial erection in the loch. He says in his opinion—"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 judgment which your Lordship proposes; and 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 completely separated, and I do not dissent from the judgment to which your Lordships have come, and which gives the Dubh Loch exclusively to the proprietor whose lands wholly surround it." Now, there is no doubt that there was a natural barrier, to some extent, before the artificial barrier was constructed. I think the artificial barrier cannot be thrown out of view in the case, and one is glad to get some firm footing in a case of this kind where the elements are so few. I think the artificial barrier did constitute an obstruction to the passage of boats, and that there has not been such an exclusive possession by boats after the artificial barrier was constructed as would interfere with the presumption against the passage of boats both before that barrier was erected and since that barrier was erected.

I feel, therefore, my Lords, that I am very much in the position of the juryman who would very properly be lectured by my noble and learned friend if he was addressing a jury, and that I ought in this case to defer to the opinions of the majority of your Lordships. I would only say, that after the very clear and exhaustive opinion which has been given by my noble and learned friend Lord Selborne, which I cannot attempt to improve upon in any way, I think the best course I can follow is to say that I adopt the conclusion which my noble and learned friend now on the woolsack has proposed that the House should adopt; and further, that I adopt the opinion which Lord Selborne has so clearly expressed.

With reference to the question of law, I think my noble and learned friend opposite, who spoke last (Lord Blackburn), has very fully gone into that, and I do not think I can add anything to the very clear exposition of the law as derived from previous decisions which he has given.

Interlocutor complained of affirmed, and appeal dismissed, with costs.

Counsel for Appellant — Rodwell Q.C. — Mackintosh. Agents—Tippetts & Co., Solicitors.

Counsel for the Respondent — Lord Advocate (Watson) — Benjamin Q.C. Agents—J. & J. Graham, Solicitors.

Monday, July 8.

[Before Lord O'Hagan, Lord Selborne, Lord Blackburn, and Lord Gordon.]

POLICE COMMISSIONERS OF FORT-WILLIAM *v.* KENNEDY.

[*Ante*, Jan. 9, 1877, 4 Rettie 266.]

General Police and Improvement (Scotland) Act 1862 (25 *and* 26 *Vict. cap.* 101), *sec.* 162—*Projection of a House beyond the Line of a Street—"House" and "Building."*

An owner of a house in a burgh which stood back some feet from the street line, but had a plot of ground in front separated from the street by a railing fixed on a wall, removed the latter and took down the front of the house, intending to rebuild it in advance. The Police Commissioners thereupon served him with a notice, under the 162d section of the General Police and Improvement (Scotland) Act 1862, to the effect that he must keep the new front wall of his house "in a line with that of the adjoining house." *Held* (affirming the judgment of the Court of Session) that that section of the Act did not