

“ said land surveyor, under the commissioner’s direction,  
 “ according to the testimony of the most creditable of the  
 “ witnesses, and particularly of such of them as the General  
 “ has no right to object to; of which engraved plan three  
 “ copies are now subscribed by the Lord Ordinary as relative  
 “ hereto; one to be given to the Duke of Atholl, another to  
 “ General Robertson of Lude, and a third to be kept among  
 “ the warrants of the decree: Finds, that the several allot-  
 “ ments and shares of said commonty as above specified, are  
 “ to belong to the parties in whose favours such allotments  
 “ are respectively made, heritably and irredeemably, and to  
 “ be held by them, and their heirs and successors, as parts  
 “ and pertinents of their several property lands of consent:  
 “ Reserves to General Robertson his proportional share of  
 “ the marle that may be found in the mosses, until the same  
 “ is exhausted, and finds, decrees, and declares accordingly.”  
 On several reclaiming petitions by General Robertson, the  
 Court adhered.

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Nov. 18, 1810.  
 Dec. 5, 1810.  
 Nov. 29, 1811.  
 May 22, 1812.  
 Mar. 9, 1813.

Against these interlocutors the present appeal was brought to the House of Lords, but their Lordships affirmed the judgment of the Court below.

For the Appellant, *Sir Saml. Romilly, John Haggart, D. M'Farlane.*

For the Respondent, *Wm. Adam, Ar. Fletcher.*

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ARCHIBALD COCHRANE of Askirk, . . . . . *Appellant;*  
 The Right Honourable GILBERT, EARL OF  
 MINTO, . . . . . *Respondent.*

House of Lords, 5th July 1815.

PROPERTY IN WATER.—Held that the respondent was entitled to the entire property or *solum* of a loch in which the appellant claimed also a proprietary right opposite to his lands. Reversed in the House of Lords, and held that each party’s interest in the loch extended *ex adverso* of his lands from the shore to the middle of the loch, and that each party might dig marle within his own division.

The appellant stood infest in “ All and whole the six-hus-  
 “ band lands and mill of Askirk, with the astricted multures  
 “ of the whole barony of Askirk, the five merk land of Kirk-

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“ house of Askirk, the twenty shilling land of Salineside  
“ called Wreathlongshot and Broomshaugh, the lands of  
“ Broadlee, Castleside, Leaphill, Rhymer’s Croft, Rye Croft,  
“ Roundhaugh, and Lawhope meadow, being all parts and  
“ portions of the ancient barony of Askirk lying in the shire  
“ of Roxburgh.” The appellant purchased these lands, which  
all lie contiguous, in 1795.

Dec. 10, 1778. The predecessor of the respondent acquired right to one  
farm called Easter Essenside, part of the same barony of  
Askirk, and was infeft in 1778.

Intersected between the lands belonging to the appellant,  
and the farm of Easter Essenside, belonging to the respondent,  
is a loch or lake, about the property to which, and the marle  
it contains, the present dispute arose.

The respondent had laid claim to the exclusive right to the  
loch, stating that his lands of Easter Essenside almost sur-  
rounded the whole loch, except at the point L marked on  
the plan, where the appellant’s lands of Castleside were, and  
where, perhaps, the proprietors of these lands had acquired,  
most probably by sufferance, a right of watering their cattle.  
He also founded on an excambion to show that the pieces of  
land extending along the north east side of the lake, had been  
disjoined from Essenside, and annexed to Castleside, in con-  
sideration of another piece of land lying more conveniently  
to the lands of Essenside, and he concluded, that this trans-  
action limited the right acquired by the appellant, to the  
specified extent of land.

Neither in the title-deeds of the appellant, nor the title-  
deeds of the respondent, was any right expressly given as to  
the loch ; and the Court, therefore, pronounced interlocutors  
holding the loch common to both ; but at this juncture of the  
procedure, the excambion, together with the decree-arbitral  
entered into on that occasion, was discovered and produced ;  
and from these the Court changed their opinion, holding that  
the appellant’s right was limited, by the terms of the excambion,  
to the land so given by it, as ascertained by measurement,  
while the property of the lake remained as before, attached  
to the lands of Essenside.

May 17, 1810. The Court, therefore, found “ that the defender (respondent)  
“ is sole proprietor of the *solum* of the loch, in so far as the  
“ water now extends ; and, in so far, sustain the defences  
“ and remove the interdict. Find the pursuer (appellant)  
“ liable in the full expense of extracting the decree, and  
“ decern ; reserving to the pursuer his claim to fish in the

“loch, and to have the water thereof as the boundary of his property, and to the defender his objection as accords.”

Other procedure followed, but the Court ultimately adhered to the above interlocutors.

Against these interlocutors the present appeal was brought to the House of Lords.

*Pleaded for the Appellant.*—1st, The appellant has a right of property in the loch to a certain extent at least, even according to the respondent's own statements. The respondent has uniformly acknowledged, in every stage of the proceedings, that, before the excambion, and independently of that transaction, the appellant's lands of Castleside reached the water of the loch in that quarter, which lies to the north of Lochgreen, that is to say, northward of the letter C marked on the plan annexed to appellant's petition of 6th June 1810. In proof of this it is sufficient to refer to the respondent's first condescence (annexed to the petition for Admiral Elliot of date 15th September 1808), given in by appointment of the Lord Ordinary; and to his last statement made, in presence of the sheriff, in both of which, this fact of the appellant's lands of Castleside being conterminous with the loch, is admitted in explicit terms. In this situation, the appellant cannot, consistently with law, be excluded entirely from the loch, but must be allowed to have a right therein, less or more, as being a conterminous heritor.

2d, But he has not only a right and interest in the loch, in respect of the ground between C and D, part of the property of Castleside having originally extended to the loch, but also on account of the excambion founded on by the respondent, the legal effect of which was to confer upon the appellant's authors, and him, as now become *proprietor* of *Lochgreen*, a right and interest in the loch, of the same nature and extent which the proprietors of *Essenside* formerly had as proprietors of *Lochgreen*, as well as that part of the appellant's lands which bordered on the loch originally.

3d, Upon the supposition of the proprietor of Castleside having acquired, by the excambion, a right to have the water as his natural boundary, and, of course, a right to follow the water as it recedes towards the centre, it is submitted that there can be no just ground for the finding, “That the defender is sole proprietor of the *solum* of the loch, in so far as the water now extends.” This finding is declaratory of an exclusive right to the respondent, so that it never could be allowable to the appellant to follow the water as his

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boundary a single inch within the margin of the loch as it presently stands.

*Pleaded for the Respondent.*—1st, The lands of Essenside having, prior to the excambion in 1760, completely encircled the lake in question (except in one very small spot, where there appears to have been a way to an *aquahaustus*), the possession of those lands necessarily conferred upon the proprietor the exclusive property of the lake; and that exclusive property could not be impaired by the excambion, which merely disjoined from Essenside a small portion of the land precisely ascertained by measurement, without containing any grant, either express or implied, of any interest in the lake itself.

2. The manner in which the respondent, the present proprietor, has exercised that exclusive right, is not such as to require any legal interference by suspension, as the gradual, and almost imperceptible deepening of the lake by digging for marle, cannot possibly diminish the supply of water for the appellant's mill, which is besides, from its situation on a very considerable stream, totally independent of any supply which the very small rivulet from the lake can afford.

After hearing counsel,  
LORD REDESDALE, said,\*

“ My Lords,

“ Mr Cochrane, the appellant in this cause, has a property of considerable extent, with the mill of Askirk, part of the barony of Askirk in the county of Roxburgh, which he purchased in 1795.

“ Admiral Elliot, the predecessor of the respondent, in 1778, purchased the farm of Essenside, situated in the same barony.

“ It was said that the proportional values of these properties were considerably different. That the appellant's property was valued in the cess-books of the county at £1048, 10s. Scots, and that the property of the respondent was valued in these cess-books at £365, 10s. Scots, but this difference of valuation appears to me to be of no weight in the present question. The present question respects a lake or loch, situated between the lands belonging respectively to these parties.

“ It now comes to be decided, whether either has a right to this loch, and in what proportions, on account of their rights to the lands next adjoining to the lake. Where the contrary does not appear, if a person's land extend round an entire lake, the law will presume that he has right to the whole; and if they extend round half of the lake, it will presume that he has right to the half, and so on.

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\* Taken by Mr Spottiswoode.

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“ It certainly appears that originally a very small part of the lands now belonging to the appellant bordered on the lake. There was a right of taking water from it to the mill, and probably a right of watering cattle. On the other hand, the property of Essenside certainly did originally surround the lake, and the present question depends upon the effect of an exchange made between the property of Essenside and Askirk.

“ In 1759, one James Shortreed appears to have been proprietor of the lands belonging to the respondent. The appellant’s property then belonged to a person of the name of Wilkinson, who, in 1795, sold the same to the appellant.

“ In 1807 the late Admiral Elliot set up a claim of exclusive right to the lake, and put a drag boat on it to obtain marle. The appellant applied for a suspension to the Court of Session, and also raised an action of declarator before that Court, concluding to have it declared that the lake belonged to the parties as their common property, in other words, that it was common to both.

“ This suspension and declarator were conjoined. Admiral Elliot alleged that there had been a verbal excambion in regard to this lake, and on the 29th of January 1808, the Lord Ordinary appointed him to give in a condescendence upon this allegation.

“ Admiral Elliot accordingly gave in such condescendence founded upon this verbal excambion, and the Lord Ordinary, on the 11th March 1808, pronounced an interlocutor, finding the lake common to both.

“ The appellant then craved an interdict, which was accordingly granted by the Lord Ordinary, on 24th June 1808.

“ The effect of these interlocutors was to give Admiral Elliot and the appellant a mutual right to the lake, opposite to their respective lands. Admiral Elliot to possess or to have a proportion of 36 out of 55. Admiral Elliot reclaimed to the Lords of the second division, who, on the 2d of February 1809, adhered to the Lord Ordinary’s interlocutor with an explanation, that the respective rights of the parties were to be regulated by a line drawn from two centres or *foci* of the north-western and south-eastern ends of the lake.

“ Admiral Elliot having died, Lord Minto was then sisted as a party to this cause ; and he gave in a new condescendence, stating that after the excambion took place, there was still a small stripe of land which remained part of the estate of Essenside, lying between the appellant’s land and the lake, and that there was also a road which separated the ground exchanged from the lake, which had been made without interruption, and ever since used by the tenants of Essenside.

“ In the condescendence which Admiral Elliot had given in, these particularities were not mentioned. It was then stated in a minute on the part of Lord Minto, that he had recovered written

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evidence of the excambion, and on the 15th November 1809, the Lords of the second division pronounced the first interlocutor appealed from, remitting to the Sheriff of Roxburghshire to visit and inspect the subjects in question, and if necessary to take proof therein, and make his report.

“The sheriff having made his report, the Court, on the 16th May 1810, pronounced an interlocutor altering the interlocutors of the Lord Ordinary, and finding that Lord Minto was the sole proprietor of the *solum* of the loch.

“The appellant reclaimed; and on the 8th June 1810, the Court pronounced an interlocutor appointing the petition to be answered, and directing the sheriff to report the exact extent of that part of Castleside that originally touched the lake.

“On the 22d June 1810, the Court superseded consideration of a petition for the appellant to examine further witnesses, till the sheriff’s report was received.

“On the 10th July 1810, the Court interdicted both parties from digging up or carrying away the marle from the lake, till the appellant’s reclaiming petition and answers were disposed of, and on the 29th November 1810, the cause was finally decided in favour of the respondent.

“From these interlocutors the present appeal was brought, and the question now is, Whether the interlocutors of the Lord Ordinary or the interlocutor of the Court appealed from, have decided this matter rightly. This depends upon the effect of the exchange or excambion.

“At first it was said that it was a verbal exchange, but the writings were afterwards recovered and printed.” (Here his Lordship read the submission and decree-arbitral).

“Your Lordships find that, by the terms of this submission, Mr Shortreed, the proprietor of Essenside, agreed to exchange some corn land from a march stone at the foot of Castleside hill, in a straight line *to the loch* of Essenside, and another piece of ground against a point of land on the north west of the farm of Broadlee belonging to Mr Wilkinson, quantity for quality.

As I understand the submission, the consequence must have been, that the loch of Essenside was to be the boundary in so far as the ground came to the lake. It was said that there was still a way at the bottom of this field, and along the lake, reserved, but I find nothing to counteract the terms of the submission which carry the bounds of the property to be exchanged to the lake itself.

“The evidence on both sides on the subject, seems very little to be relied on. It appears that the cattle on both sides went to the water. This does not in any degree alter the instrument which carries the bounds of the property to the lake itself. By the plan which was produced to us, the stripe of land was carried

on to the edge of the lake. As the water receded, there would, of course, be a slip of land between the lake and what was its former margin; the water has now receded farther, and that piece of land is larger than before.

“It is impossible to consider it as the meaning of the parties to the excambion, that the boundary of the appellant’s property was to be continually changing as the lake receded or otherwise. The consequence of the lake being the boundary, was, that the property must have extended to the lake, and as the rights to the lake belong to the parties only as pertinents to their adjacent lands, it does appear to me, upon the whole, that the original interlocutors of the Lord Ordinary in this case were right, and that the subsequent interlocutors of the Court were wrong. But I move the further adjournment of the cause, in order to consider of the terms of the judgment.”

(On 5th July 1815, his Lordship recapitulated some of his former observations, and then moved the reversal of the interlocutors complained of as below).

It was ordered and adjudged that the several interlocutors complained of in the said appeal be, and the same are hereby reversed. And the Lords find and declare that each party’s interest in the loch does extend *ex adverso* of his own lands from the shore to the middle of the loch, and that each party may dig marle within his own division; and that the appellant’s land on the shore of the loch extends from *Essenside Burn*, the march of *Castleside* and *Essenside*, to a line drawn from the march stone at the foot of *Castleside Hill* to the loch, including the lands acquired by *Thomas Wilkinson* by the excambion with *James Shortreed*, referred to in the pleadings. And it is ordered that the cause be remitted back to the Court of Session to proceed accordingly.

For the Appellant, *Mat. Ross, Thos. W. Baird.*

For the Respondent, *Sir Saml. Romilly, John Clerk, George Cranstoun, John Fullerton.*

NOTE.—Unreported in the Court of Session.

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DR THOMAS HAY, Edinburgh,	. . .	Appellant;
JAMES SCOTT and JOHN REID, Merchants, Leith, and ROBERT BURN, Architect, Trustees of ROBERT INGLIS, Builder,	}	Respondents.

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