

Opinion of Counsel
for
The Crown Estate Commissioners
relating to
Ownership of the Cuillins

Introduction

Mr MacLeod's claim to the Cuillins is based on the disposition in his favour recorded on 2nd May 1966. The description in that deed refers to "the Lands and Barony of Dunvegan and Others, commonly called the MacLeod Estate", as described in the decree of special service in favour of Sir Reginald MacLeod recorded on 20th January 1931. That description is subject to certain exceptions, but none of those is relevant.

The decree of special service recorded on 20th January 1931 relates to a number of areas of land, all of which are referred to by general names. These include "the lands of Bracadale", which comprehend certain specific areas referred to by general name only, and "the lands of Miginish", again consisting of certain specific areas referred to by general name only. In each case the lands are said to lie within the Parish of Dynart and Bracadale. Those descriptions go back to the Crown charter of 4th April 1611 in favour of Roderick MacLeod of Dunvegan. It is reasonably clear that the Cuillins lie within the Parish of Bracadale and within the areas generally known as Bracadale and Miginish (now Minginish). It follows that the three deeds in question, those of 1611, 1931 and 1966, are all capable of including the Cuillins among the subjects conveyed.

None of those deeds contains a bounding description of the lands conveyed. Consequently the extent of the subjects conveyed depends upon the extent of the possession enjoyed by Mr MacLeod and his predecessors as proprietors of the MacLeod Estate. Moreover, for Mr MacLeod to have an unchallengeable right as against the Crown to any area of ground that may be comprised in the disposition in his favour, he must rely on the positive prescription. In any question with the Crown, the period of the positive prescription is 20 years. That means that Mr MacLeod must be able to demonstrate that, for period in excess of 20 years, he and his predecessors have possessed the land in question, openly, peaceably and without judicial interruption.

The law of positive prescription

The relevant principles of law are set out in the opinion of LJC Ross in *Hamilton v. McIntosh Donald*

Limited, 1994 SLT 793, at 796-797, and it may be useful to set out the relevant passage in that opinion.
It is as follows:

"(1) For the operation of the positive prescription, there must be a *habile* title followed by prescriptive possession.... It is of course no objection that the title relied upon flows a *non domino*....

(2) As is clear from s 1(1) of the Prescription and Limitation (Scotland) Act 1973, there must in any case where prescriptive possession is being asserted be possession, for a continuous period, openly, peaceably and without judicial interruption. The importance of the possession being open is so that anyone with a competing title has an opportunity to challenge the possession. As already noted, possession must be founded on a *habile* title which has been recorded.

(3) So far as possession is concerned it is clearly established that possession may be natural or civil. Thus there may be acts of possession exercised by the claimants personally, or the acts may have been carried out on the claimant's behalf by servants, employees or persons licensed by him. [It is well established that tenants and their employees fall into this category: *Lord Advocate v. Hall*, 1873, 11 M 967; Rankine, *Landownership*, 41]. Possession must be by or on behalf of the person in whose favour the title to the *dominium utile* has been recorded.

(4) Whether particular acts constitute possession for the purposes of prescription depends upon the nature of the subjects claimed.... in *Aitken's Trustees v. The Caledonian Railway and the Lord Advocate* (1904) 6 F 470, Lord Moncreiff stated: 'in judging of the sufficiency of the possession, regard will be had to the nature of the subject and the uses to which it can be put'.

(5) It is also well established that before possession can instruct a right of property its must be unequivocally referable to an assertion of ownership of the land....

(6) It is of the essence of prescription that the possession has taken place over a continuous period. 'The possession held must be continuous in the sense that its must extend over the whole prescriptive period'.... Of course, there may be interruptions during the prescriptive period, and yet it may still be possible to conclude that the possession has extended over the whole prescriptive period. It must, however, be possible to identify the beginning and the end of the period, and if that is done possession may be regarded as continuous even though there have been intervals when it cannot be shown the possession was in fact exercised.... On the other hand, if during the prescriptive period possession appears to have been given up, then even if there is a resumption of possession, it may not be possible to claim that possession was continuous over the whole prescriptive period.... I am satisfied that in every case it is a question of degree. The critical question must always be whether the alleged possession was spasmodic or sporadic or whether it was truly continuous. Even when possession has been intermittent, it may amount to continuous possession; and much may depend upon the extent of the periods during which possession was not actually

exercised..... 'What must be shown, with the aid of presumptions if need be, is a continuous series of acts, in which gaps are explicable as normal or natural...'

(7) It is a cardinal rule that there is only prescription insofar as there has been possession tantum prescriptum tantum possessum. In this connection it is important to distinguish between cases where prescription is relied upon to enable a new right to be acquired, and cases where prescription is relied on for the purposes of establishing the extent of a right which the claimant already has. In *Lord Advocate v. Wemyss* (1899) 2 F (HL) 9, Lord Watson said: 'There is, in my apprehension, or ought to be, a practical distinction recognised between the prescriptive possession which establishes a new and adverse right in the possessor, and the prescriptive possession which the law admits, for the purpose of construing or explaining, in a question with its author, the limits of an antecedent grant or conveyance. In the first case the rule obtains tantum prescriptum quantum possessum. In the second, it appears to me that a much more liberal effect has been given to partial acts of possession as evidencing proprietary possession of the whole, in cases where the subject of controversy has been in itself a distinct and definite tenement'.

(8) ... The matters raised..., are capable of being established by circumstantial evidence provided always that it is understood that [the person claiming prescriptive possession] must establish what is the fact in issue, namely, whether there was the requisite possession to instruct the right of ownership which they claim.

(9) ... Although the onus is on the party alleging prescriptive possession, it is always a material consideration whether has been any adverse possession.."

Of these principles, numbers (1), (2), (4), (5), (6), (7) and (9), call for comment.

in relation to the first and second principles, Mr MacLeod's title, as contained in the deeds of 1611, 1931 and 1966, is in my opinion clearly capable of including the Cuillins. Thus the requirement of a habile title is satisfied, and the crucial question is accordingly whether there has been sufficient possession, exercised openly, peaceably and without judicial interruption, to establish the boundaries of the land granted to Mr MacLeod's predecessors and to fortify Mr MacLeod's title to that land by prescription. For the reasons discussed at length below, I am clearly of opinion that there has been sufficient possession of that nature to establish that the land granted to Mr MacLeod's predecessors includes the Cuillins and to fortify Mr MacLeod's title to the area of the Cuillins.

In relation to the fourth and fifth principles, it is highly relevant that the Cuillins are marginal land. Consequently the acts of possession that will be required to establish prescription will be relatively slight, and will be much less than, for example, prime agricultural land in the Lothians or Fife. Land such as the Cuillins is generally capable of three economic uses, namely grazing, shooting and fishing. It follows that there will be a clear assertion of ownership of such land if it is put to those three uses. The Cuillins have obviously been the subject of very extensive recreational use, principally by members of the public rather than

persons specifically authorised by the MacLeod Estate. Nevertheless, use by the public cannot constitute adverse possession in any question relating to ownership, because no adverse claim of ownership is made. (There may be a claim to a public right of way, but that is not relevant for present purposes, as it is a right less than ownership). In any event, it would be unfortunate if a landowner who allowed the public wide rights of access to land were placed in a worse position as against the Crown than a landowner who substantially restricted public rights of access.

In relation to the sixth principle, that possession must be continuous, it is clear that the economic acts that can be performed in areas such as the Cuillins are essentially seasonal in nature. Thus grazing in the high Cuillins is likely to be confined to the summer, and shooting and fishing will likewise be confined to the appropriate seasons. Nevertheless, in such cases it will be presumed that possession continues during the other months of the year because the land is being put to the best use that it can be, having regard to its marginal nature.

In relation to the seventh principle, the present case falls in my opinion into the second of the two categories described; prescription is relied on to establish the extent of a right which Mr MacLeod already has. There is no doubt that a substantial area of land was conferred on Roderick MacLeod and his successors by the Crown in 1611, and that area has, subject to certain exceptions, been passed on to the successors of Roderick MacLeod, and ultimately to Mr John MacLeod. That area of land included subjects in Bracadale and Miginish. The question is whether that area includes the Cuillins. In these circumstances, partial acts of possession may be sufficient, especially in view of the marginal nature of the land in question. That would obviously make any challenge by the Crown to Mr MacLeod's title very difficult. I should add, however, that in reaching the conclusion stated in answer 7.3 below, I do not think it necessary to rely on this rule; the acts of possession referred to in the Private Information are sufficient even to demonstrate a new and adverse right to the Cuillins on the part of the MacLeod Estate.

In relation to the ninth principle, so far as I am aware there is no evidence anywhere of any adverse claim to the Cuillins except in relation to an area to the south-east of Loch Coruisk; that area does not form part of the subjects that Mr MacLeod is presently offering for sale. Nor, so far as I am aware, has there been any adverse claim by the Crown.

The Cuillins

The area comprising the Cuillins and their immediate vicinity has been dealt with by the MacLeod Estate in three parts:

1. Glenbrittle Farm;
2. the Allt Dearg; and
3. the lands around Loch Coruisk and Harta Corrie.

Glenbrittle Farm is the area lying to the west of the main range of the Cuillins, extending generally from the River Brittle and Loch Brittle to the west to the main

range of the Cuillins; to the south it extends to Soay Sound. The Allt Dearg takes in the northern extremity of the main range of the Cuillins and extends north to the vicinity of Sligachan Hotel and the A863 road. The lands around Loch Coruisk and Harta Corrie lie in the south-east and part of the area that Mr Macleod proposes to sell.

The third of those areas is in my opinion of particular importance, for two reasons. First, it is the area furthest to the south east, and hence furthest from the main part of the MacLeod Estate, which lies generally to the west and somewhat to the north of the Cuillins. The western boundaries of Glenbrittle Farm and the Allt Dearg were formerly with land included within the MacLeod Estate. Consequently, if clear possession of the area around Loch Coruisk and Harta Corrie can be demonstrated, I am of opinion that the Court would be strongly disposed to hold that sufficient possession existed in relation to the area is lying to the north and west, namely Glenbrittle Farm and the Allt Dearg. Second, the area around Loch Coruisk and the Harta Come is separated from the rest of the MacLeod Estate by the main range of the Cuillins. In relation to Glenbrittle Farm and the Allt Dearg, the Court is likely to draw the inference that any substantial acts of possession, as by grazing or shooting, extended up to the main range of the Cuillins, as that is the natural boundary to the east and south; authority exists for having regard to natural boundaries in cases where the boundary of land is doubtful: *Whitsun v. Ramsay*, 1813, 5 Pat. 664; *Lumsden v. Gordon*, 1870, 42 Sc. Jur, 538; Gordon, Scottish Land Law, paragraph 4-10. If the claims of MacLeod Estate are to extend beyond the main range, however, separate and distinct acts of possession would have to be shown, and those are the acts of possession in relation to Loch Coruisk and Harta Corrie.

Leases by MacLeod Estate

1. Glenbrittle Farm.

Glenbrittle Farm has been leased by the MacLeod Estate since at least the late eighteenth century. The most recent lease is that between Flora MacLeod of MacLeod and Hugh McRae and Others dated 9th and 23rd May 1946. Previously, a lease between Sir Reginald MacLeod of MacLeod and Hugh McRae had been concluded on 4th and 7th July and 2nd August 1932. Rent was paid under those leases; I have seen the rent books for the period between Whitsunday 1947 and Martinmas 1956, and payment has apparently continued since then.

The earliest extant lease of Glenbrittle Farm is an agreement between Norman MacLeod of MacLeod on one part and Norman MacLeod and Kenneth MacCaskill dated 17th August 1791. That lease is of "Glenbrittle and the Forest of Cullen". The document indicates that Glenbrittle was considered at that time as extending to the burn known as the Allt Dearg, and that the Forest of Cullen was the area beyond that MacLeod's tenants were to be excluded from the latter area. Both Glenbrittle and the Forest of Cullen were to be held in tack from Whitsunday 1792 until Whitsunday 1811, at a rent of £50 per annum. A rent of £50 at that time indicates that the subjects were considered to have a substantial value; that was far from a nominal rent.

In 1951, the salmon fishings on Skye ex adverso the island of Soay were leased by Flora MacLeod of MacLeod to Major Gavin Maxwell for 21 years from the 1952 season. Those fishings extended from An-dubh Sgeir at the mouth of Loch Eynort to Geo-na-Muie at the entrance to Loch Scavaig. Those fishings clearly related to the southern sea boundary of Glenbrittle. In 1945 Flora MacLeod of MacLeod had leased the shootings of Glenbrittle to Major Maxwell. In 1952 she leased the shootings and fishings of Glenbrittle Farm to Hugh McRae and others, the agricultural tenants of the farm. The fact that it was considered worth while leasing shootings and fishings in this way indicates that sporting activity was taking part on Glenbrittle Farm and its adjacent waters.

2. The Allt Dearg.

The shootings in the Allt Dearg was the subject of a lease between Flora MacLeod of MacLeod and Lord Malcolm Avondale Douglas-Hamilton 6th and 12th May 1948, for a term of 25 years from Whitsunday 1945. The rent was £10 per annum. Leases of the shootings in the Allt Dearg have continued since then; since 1987 the tenant has been Commander Peppe. The grazings in the Allt Dearg have been let, on an annual basis, to the holders of the grazings in Satran Township since at least 1947; I have seen evidence of rent being paid from Whitsunday 1947 to Martinmas 1956, and I understand that payments of rent have continued since then.

3. Loch Coruisk and Harta Corrie.

In 1902 Norman MacLeod of MacLeod granted a lease of the sporting and fishing rights in the basin of Coruisk and in the vicinity of the Cuillin Hills to Robert Lawrie Thomson of Strathaird. The lease related specifically to the fishings in Loch Coruisk and the right of fishing for salmon and sea trout in the estuary of the River Coruisk. It also covered the sporting rights "in and around the basin of Loch Coruisk and The Coolins". At the same time a minute of agreement was concluded between the same parties letting the grazing rights in the same subjects. The original lease of the basin of Coruisk extended for 19 years from Whitsunday 1902, but it is clear that subsequent leases have been concluded in respect of exactly the same subjects.

The successive leases of those subjects, and the possession of the tenants under those leases, are of the greatest importance, because the basin of Loch Coruisk goes right into the heart of the Cuillins on the south east side, its boundary to the west being the main range of the Cuillins. The 1902 lease and minute of agreement were preceded by correspondence extending over several years in relation to the boundary between the MacLeod Estate and the Strathaird Estate in the vicinity of Loch Coruisk; essentially the MacLeod Estate asserted that the boundary ran well to the east of Loch Coruisk, up the Corrie Riach, whereas the Strathaird Estate asserted that it ran up the middle of Loch Coruisk. The dispute was settled by the granting of the lease and minute of agreement, which conferred rights on the proprietors of the Strathaird Estate that extended over the whole of Loch Coruisk and its basin, those being areas that were much easier to approach

from Strathaird than from the rest of the MacLeod Estate. It is clear from the correspondence preceding the 1902 deeds that the proprietors of both estates considered that they had a common boundary; the dispute was where that boundary lay.

That is important, because it involves acceptance by the neighbouring proprietor to the east of the Cuillins that the MacLeod Estate was the proprietor of the main range of the mountains and the large basin and its attendant comes that lie immediately to the south-east of that range. Thus the person who had, apart from the Crown, the best title to challenge MacLeod ownership of the east side of the Cuillins declined to do so. Rent under the 1902 lease and minute of agreement and its successors has been paid regularly from that date.

A new lease of the same subjects was concluded in 1927/28, between the MacLeod Estate and Mr W. L. Johnson. In that lease the march was said to be "the skyline of the Cuillins as at present". In the correspondence that led to that lease, it was suggested that Mr Johnson, who had become the proprietor of the Strathaird Estate, might want a lease right across the Cuillins, as there was good woodcock and snipe fishing in the vicinity of the Eagle's Nest (presumably Nead na-h-lolaire, which lies to the north of the Cuillins) and Corrie-na-Creiche. The significance of that correspondence is that it amounted to a clear assertion of ownership by MacLeod Estate of areas to the west and north of the Cuillins, such assertion being made in correspondence with the proprietor of Strathaird, the neighbouring estate to the east.

It is clear from the rent books of the MacLeod Estate for the period from Whitsunday 1947 to Martinmas 1956 that Mr Johnson paid rent for what were described as the Cuchullin Grazings during that period, although it is possible that he did not make use of the grazings as such.

A fresh lease dated 1st and 12th November 1974 of the Cuillin sporting rights was granted in favour of the Johnsons. This referred specifically to rights in respect of deer, and salmon and trout in Loch Coruisk and the River Scavaig. In about 1981 Strathaird was sold by the Johnsons to Mr Ian Anderson, and he paid rent under the 1974 lease after that date. In 1983 there was further discussion between the MacLeod Estate and Mr Anderson relating to the boundary between the MacLeod Estate and the Strathaird Estate; once again it is clear that both parties considered that there was a common boundary on the east side of the Cuillins.

Possession by MacLeod Estate and its tenants

The leases referred to in the preceding section give rise to an inference that the tenants of the MacLeod Estate took possession of the various grazing, shooting and fishing rights referred to in the leases. That is the normal inference from the grant of a lease; it is not to be presumed that a formal legal agreement served no useful purpose. In addition, however, a large amount of written information has been made available by the MacLeod Estate; this is the Private Information referred to in Messrs Anderson Strathern's Advice Memorandum to the Crown Estate Commissioners. I have been given an opportunity by the agents acting for

the MacLeod Estate to consider the Private Information, and in my opinion it clearly supports the inference that the MacLeod Estate and its tenants enjoyed continuous possession of the Cuillins, through the activities of grazing, shooting and fishing.

1. Glenbrittle Farm.

It is clear from the documents in the possession of the MacLeod Estate that from at least the first half of the nineteenth century extensive sheep stock were kept on Glenbrittle Farm, and that such sheep were in the habit of grazing right into the heart of the Cuillins, and beyond the main range into the eastern corries and the area of Loch Coruisk and its basin.

Evidence as to the extent of such grazings is available from a letter of 10th March 1902 from John T. Mackenzie, the factor on the MacLeod Estate, to MacLeod of MacLeod. In that letter Mr Mackenzie indicated that grazing on the Cuillins themselves, including the eastern corries, by sheep kept on the Glenbrittle side of the hills could not be stopped unless a fence were erected from Loch Brittle to the foot of Sgurr-na-Gobhar, to the foot of Sgurr Thuilm, and from there to the Sligachan estuary. In that letter it was further indicated that 5000 sheep from Glenbrittle wintered in the Rhuendunan peninsula, which lies to the south west of the Cuillins, on the southern part of Glenbrittle Farm. That suggests an extensive sheep stock on the farm.

Further evidence of such grazing from Glenbrittle is found in a letter dated 17th November 1930 from Mr Mackenzie to MacLeod of MacLeod. The letter concerned a possible lease of Glenbrittle to a Mr John Macdonald, and it was suggested that fences should be erected at certain points in the Cuillins to prevent sheep from straying into the Strathaird and Sconser Forests; the letter makes it clear that the sheep were in the habit of grazing across the main range of the hills. There is obviously no reason to suppose that sheep kept today on Glenbrittle Farm will have habits any different from their predecessors.

Finally, in a letter of 9th August 1888 from Mr Mackenzie to Mr H. E. Laidlaw, the manager at Glenbrittle, it is recorded that Glenbrittle had been tenanted by several generations of McAskills, obviously including the tenant under the lease of 17th August 1791. The writer adds that the McAskill tenants went back before any written records; thus it seems that leases of Glenbrittle Farm went back even before 1791. The letter goes on to discuss the march between Glenbrittle and Strathaird, and indicates that it started at a green knoll on the east side of the river at Coruisk and continued northwards to Loch Corry-reach (Loch a'Choire Riabhaich) and to Clach-a-ghurra in Harta Corrie. That makes it clear that, prior to 1902, Glenbrittle extended east of the Cuillins; that is consistent with the reference in the 1791 lease to the "Forest of Cullen". Thus the tenants of Glenbrittle in the eighteenth and nineteenth centuries appear to have regarded themselves as possessing the land to the east of the Cuillins, as far as the march with Strathaird.

Glenbrittle Farm continues to be tenanted, and it is obviously likely that the sheep on the farm will continue to graze the western side of the Cuillins. That is in my opinion quite sufficient evidence of possession of that side of the Cuillins by persons deriving title from the MacLeod Estate.

2. The Allt Dearg.

This area is the least important of the three into which the Cuillins and their surroundings have been divided. It is clear, however, that leases of the shootings and grazings have been granted, and rights under those leases exercised, since at least the 1940s. That in my opinion is quite sufficient evidence of possession of that area by persons deriving their right from the MacLeod Estate.

3. Loch Coruisk and Harta Corrie.

As indicated above, this area was part of Glenbrittle farm until 1902. Strong evidence exists of possession by the tenants of Glenbrittle. This is found in two precognitions taken from shepherds on Glenbrittle. One of these was taken from Norman Chisholm, residing at Bolantour, on 8th April 1876; Mr Chisholm was then eighty years old, and indicated that he had spent his adult life as shepherd to the MacAskills. He indicated that, about 60 years previously, he had been shown the march between Glenbrittle and Strathaird by Kenneth MacAskill, and his description of the march is exactly as in Mr Mackenzie's letter of 9th August 1888. He added, and the story is repeated by Mr Mackenzie in his letter, that a boy (who is elsewhere identified by name and by relationship to a living person) was thrashed on the green knoll marking the boundary to make him remember the march. This somewhat barbaric practice is referred to in Stair's Institutions, and there is accordingly no reason to believe that this story is untrue. Mr Chisholm states that at the same time as the boy was thrashed a lump of willow charcoal was placed on the green knoll. Mr Chisholm further indicated that, approximately 20 years after he was shown the march, he was at Coruisk with MacLeod of MacLeod, Kenneth MacAskill and Norman MacLeod of Drynoch, and the boundary was pointed out. On that occasion, some men were seen catching fish on the River Coruisk, and Mr MacLeod of MacLeod sent for them to challenge their right to do so. (On learning that they were from Mull, rather than the Strathaird Estate, he decided to do nothing further). In his precognition Mr Chisholm indicates that, in his work as a shepherd on Glenbrittle, he kept the march as it had been pointed out to him by Kenneth MacAskill, apart from a minor concession made in the area to the east of the River Coruisk. Apart from that area, Mr Chisholm was not aware of any other claim made by Strathaird.

A further precognition was taken at about the same time from Mr Peter MacRae, another shepherd on Glenbrittle. He indicated that the marches of the MacLeod Estate were the same as those stated in Mr Mackenzie's letter of 9th August 1888. He confirmed much of what Mr Chisholm said, and indicated that a Glenbrittle shepherd looked after sheep in the whole of Harta Corrie and Lota Corrie. That clearly indicates grazing in the high Cuillins, on their eastern side. Mr MacRae further indicated that the marches as he understood them were respected by the Strathaird shepherds.

As indicated above, the lease of 1902 was preceded by correspondence between the MacLeod Estate and the Strathaird Estate. In that correspondence the proprietors of Strathaird made no attempt to claim the land to the west of Loch Coruisk. In the letter of 10th March 1902 referred to previously from Mr Mackenzie to Mr MacLeod of MacLeod, it is pointed out that approximately 150 sheep grazed the Harta and Lota Corries; that indicates that the practice referred to in Mr MacRae's precognition continued.

When the new lease of the Loch Coruisk area was concluded in 1927/28, correspondence passed between Mr Mackenzie, the MacLeod factor, and Mr W. L. Johnson, who acquired Strathaird, and it is clear from that correspondence that sheep were grazed by tenants of the MacLeod Estate on the Cuillins above Loch Coruisk. It seems that the Johnsons did not graze sheep on the area tenanted by them, but it is clear that they used that area for sporting purposes, in particular fishing on Loch Coruisk. Records of the sea trout caught in that Loch are available.

Evidence is available of the entries for Coruisk Shootings and Fishings on the valuation roll. It is clear that Mr MacLeod and his predecessors as owners of the MacLeod Estate have been treated as the proprietors of those subjects, with the Johnsons and their successors as tenants.

The foregoing evidence indicates that from the early nineteenth century until about 1927 sheep were regularly grazed on the east side of the Cuillins above Loch Coruisk and in the Harta Corrie by the tenants of the MacLeod Estate. That is very clear evidence of possession of this area, as grazing is clearly the greatest form of possession that can be exercised in such a district. Both before and after 1927 it is clear that the shooting and fishing rights in the area have been regularly exercised. The exercise of those rights is the other major way in which a person can take possession of such a marginal area of land. In all of these circumstances I am of opinion that there is ample evidence of possession of this area by the MacLeod Estate.

4. Recognition of ownership by Crown and other public bodies.

The ownership of the Cuillins by the MacLeod estate has been recognised by a number of public bodies, and indeed by the Crown itself in certain limited respects. The most important matters have been as follows.

First, it is clear from correspondence in 1945 that at that time the National Trust inquired about purchasing the Cuillins from Flora MacLeod of MacLeod. It is clear that the National Trust considered her to be the owner. In that correspondence the Johnsons indicated that they did not want to lose the sporting rights in the area around Loch Coruisk. In the event Flora MacLeod of MacLeod refused to sell.

Second, in 1957 correspondence took place with the Assessor in relation to the changes in the rating system that were made at that time; owner's rates in respect of sporting and grazing subjects were abolished from Whitsunday 1957. In that

correspondence, it is clear that the MacLeod Estate was subject to the following assessments as owners:

Grazings in Cuchullins (the Coruisk grazings)	£70 per annum
Sporting rights: Strathaird (the Coruisk sporting rights)	£80 per annum
Sporting rights: Allt Dearg	£10 per annum
Sporting Rights: Glenbrittle	£10 per annum.

Earlier correspondence with the District Valuer in relation to the Coruisk Grazings and Allt Dearg shootings had taken place in 1936; in that it was made clear that the MacLeod Estate was recognised as the owner of those areas.

Third, at various times during the last thirty years various units of the Army and the RAF and various OTC units have corresponded with the MacLeod Estate in relation to training exercises on the Cuillins; it is clear from that correspondence that the MacLeod Estate was recognised as the proprietor from whom permission had to be sought. Moreover, in 1972 the Defence Lands Office corresponded with the MacLeod Estate over a proposal to build a joint services mountain training centre at Glenbrittle.

Fourth, footpaths have been built on the west side of the Cuillins by Highland Council and Scottish Natural Heritage. The latter body built a footpath into Coire Lagan in 1995, and Highland Council built a footpath into Corrie-na-Creiche in 1999. That work was done by agreement with the MacLeod Estate, which was clearly recognised as the proprietors of the western slopes of the Cuillins.

None of these matters is in itself conclusive; the first, third and fourth can be regarded as essentially sporadic in nature, and the second is not a factor that is likely to be in any way decisive by itself. Nevertheless, when taken with the clear evidence of possession referred to previously, these matters provide substantial support for the view that the MacLeod Estate has exercised rights of possession over the Cuillins for considerably longer than the prescriptive period.

Against the foregoing background, I now deal with the questions in Messrs Anderson Strathern's Memorial.

Answer 7.1

In my opinion the Public Information and the Private Information is sufficient for the Commissioners to draw a conclusion as to whether or not they have a basis to challenge Mr MacLeod's claim of ownership of the Cuillins. It is true, as Mr Menzies points out in his Advice Memorandum to the Commissioners, that the information available has been determined by the MacLeod Estate, and that there has been no independent check on what other evidence they may have. Nor has there been any attempt to obtain information from neighbouring properties such as the Strathaird Estate. Nevertheless, it is significant that the present question arises as between the MacLeod Estate and the Crown, and not between the MacLeod Estate and its neighbours. Consequently acts of neighbouring proprietors are not relevant except the extent that they show that the MacLeod

Estate has not adequately possessed the land in question. Moreover, in the extensive papers that I have seen, there is no indication that neighbouring proprietors have claimed any part of the Cuillins or exercised acts of possession over any part of the Cuillins apart from a small area in the south-east, to the south-east of Loch Coruisk. That area is not included in the proposed sale of the Cuillins. Otherwise, the neighbouring proprietors have clearly acquiesced in the ownership of the Cuillins by the MacLeod Estate. This is not merely an inference from the failure of neighbouring proprietors to act; I have seen documents relating to the crucial south eastern and eastern boundary with the Strathaird Estate that clearly indicate positive acknowledgement by Strathaird that the MacLeod Estate owns the eastern part of the Cuillins. I am accordingly of opinion that it is not necessary to go to the neighbouring proprietors in an attempt to investigate their estate records.

So far as claims by the Crown are concerned, I am not informed that there has ever been a dispute between the Commissioners and the MacLeod Estate in relation to the ownership of the Cuillins. On that basis, I assume that the Crown has never claimed, at least in the last century or so, that it owns the Cuillins. On that basis, the documents in the possession of the MacLeod Estate will be sufficient to indicate the necessary acts of possession on their part.

The documents that are available are extensive, and, for the reasons discussed above, I am of opinion that they are more than sufficient to demonstrate open and peaceable possession of the Cuillins by the MacLeod Estate for a period well in excess of a century.

Answer 7.2

Superseded.

Answer 7.3

In my opinion the Crown Estate could not properly challenge Mr MacLeod's claim of ownership of the Cuillins, with the intent of securing an order that the Cuillin Mountains are the property of the Crown.

If such proceedings were raised, I am of opinion that the Crown would have little prospect of success.

For the reasons set out above, I am of opinion that Mr MacLeod has a title that is habile to include the whole of the Cuillins, to the extent that it is now proposed to sell them. I am further of opinion that Mr MacLeod has demonstrated quite sufficient possession, over a period much longer than the statutory 20 years, to demonstrate that the boundaries of the land granted to him include the Cuillins, and that his title to the Cuillins has been fortified by prescriptive possession. The acts of possession that appear on the documentary evidence are of exactly the sort that would be expected in relation to a marginal area of the Highlands or Islands.

Answer 7.4

This question is superseded. Nevertheless, I should indicate that any challenge to Mr MacLeod's title would best be carried out by means of an action of declarator. Nothing more would be required, because the legal basis for any challenge to Mr MacLeod's ownership would be that title to the Cuillins had never left the Crown. If such proceedings were raised, however, I would rate the Crown's prospects of success as very low. The expenses of any such challenge would clearly be considerable, and in the event of an unsuccessful challenge the Crown would be compelled to pay Mr MacLeod's judicial expenses.

Answer 7.5

In my opinion the legal position is already clear, and I do not consider that there are other steps that the Commissioners should take as part of that investigation into the ownership of the Cuillins.

Answer 7.6

I should add that I am in complete agreement with the views expressed in Mr Menzies' Advice Memorandum to the Commissioners.

J.E. Drummond Young

14 Ainslie Place,
Edinburgh
2nd July 2000