of which the document consisted, equivalent to, though not precisely of the same form with, that which had been, though not by statutory enactment, yet by usage, introduced and in regular use, when instruments were written in what is called the former manner "battered together." I feel obliged, therefore, to concur, although reluctantly, in the judgment, that upon the whole this instrument does not comply with the Statute, and is therefore void.

Interlocutor[1] *affirmed, and appeal dismissed with costs.*

John Cullen, W.S. *Appellants' Agents;* J. F. Elmslie, *London Solicitor.*—Morton, Whitehead, and Greig, W.S. *Respondents' Agents;* Dodds and Greig, *London Solicitors.*

MARCH 28, 1859.

ERNEST GAMMELL and Others, *Appellants*, *v.* THE COMMISSIONERS OF HER MAJESTY'S WOODS AND FORESTS, *Respondents.*

Salmon Fishings—Crown—Property—Fishing on Sea Coast—Limit.

HELD (affirming judgment), *That the salmon fishings around the coast of Scotland form part of the hereditary revenues, and belong exclusively to the Crown, so far as not expressly granted, by charters or otherwise, to subjects or vassals.*[2]

The respondents, as the statutory administrators of the Crown revenue in Scotland, brought this action, (in 1849,) setting forth—"That all the salmon fishings around the coast of Scotland, and in the navigable estuaries, bays, and rivers thereof, so far as the same have not been granted to any of our subjects by charters or otherwise, belong to us *jure coronæ*, and form part of the hereditary revenues of our Crown in Scotland: That, in particular, the salmon fishings *ex adverso* of the estate of Portlethen, in the county of Kincardine foresaid, belong to us *jure coronæ*, and are now under the management of the said Commissioners of Woods, Forests, Land Revenues, Works, and Buildings: That the defender, Ernest Gammell, is proprietor of the estate of Portlethen: That the charters and other titles flowing from us and our royal predecessors, in favour of the said Ernest Gammell or his authors, contain no grant of salmon fishings, and he has no right or title to salmon fishings *ex adverso* of the said estate of Portlethen, or in any part of the sea coast adjoining thereto: That the defender, Ernest Gammell, and his predecessors, never fished, or attempted to fish, for salmon, grilse, or salmon trout, *ex adverso* of the said estate, or in any part of the sea coast adjoining thereto, by net and coble or otherwise, until within the last few years: That the said defender has recently, without any right or title, granted a pretended lease of the salmon fishings, *ex adverso* of the said estate, in favour of the other defenders, Messrs. Gray and Hutcheon, and these parties have illegally and unwarrantably erected or used stake nets, bag nets, or other destructive engines for catching salmon in the sea, opposite, or nearly opposite, to the said estate of Portlethen: That these nets or engines are placed in the sea along the sea coast, and remain stationary in the water, where they are fixed by stakes, anchors, or other moorings, so as to intercept the passage of the salmon, and force or decoy them into courts or enclosures of netting where they are caught: That the said defenders have no right or title to fish for salmon, grilse, or salmon trout, at the place or places above described: That the pursuers intimated their willingness to grant a lease of the foresaid salmon fishings in favour of the defenders, at a moderate rent, but this proposal was declined; and the defenders most illegally and unwarrantably persist in fishing for salmon, grilse, and salmon trout, at the place or places above described, by means of bag or stake nets, and other apparatus, without having any legal right or title so to do: That, in the circumstances above set forth, the pursuers are entitled to insist in and follow forth the conclusions of declarator and others underwritten."

The first declaratory conclusion, upon which the discussion mainly turned, was as follows:—"That the salmon fishings around the sea coast of Scotland belong exclusively to us and our royal successors and form part of the hereditary revenues of the Crown of Scotland, so far as the said salmon fishings have not been expressly granted to any of our subjects or vassals by charters or otherwise." The second declaratory conclusion was as follows:—"That the salmon fishings opposite to the said lands and estate of Portlethen, in the county of Kincardine, belong exclusively to us and our royal successors, and that the defender, Ernest Gammell, the proprietor of

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[1] The exact terms of the order of the House of Lords in this case are set forth in a subsequent appeal of *Whitehead* v. *Galbreath*, *post* (22 July 1861).

[2] See previous reports 13 D. 854; 23 Sc. Jur. 388. S. C. 3 Macq. Ap. 419: 31 Sc. Jur. 431.

the said estate of Portlethen, and the other defenders as tenants, or claiming right under him, have no right or title to fish for salmon, grilse, or salmon trout, *ex adverso* of the said lands and estate of Portlethen, or in any part of the sea coast adjoining, by means of stake nets or bag nets, or by net and coble, or in any other manner of way." Then followed a conclusion for interdict, and for the protection of the Crown in undisturbed and peaceable possession of its alleged right.

The defences stated were the following:—" 1. The defender Mr. Gammell being the proprietor of lands erected into a barony, the right of salmon fishing in the adjoining water is attached thereto. 2. The right of salmon fishing in the sea does not belong to the Crown, as a part of its hereditary revenue. 3. The right of fishing within the British seas is a privilege belonging to, and which may be exercised by, all British subjects, and cannot be constrained or defeated, or interfered with by the Crown. 4. According to constitutional law, the right to public fishings vested in the Crown, is a right of protection for the benefit of the subject, but is not a right of property. 5. The right of salmon fishings in the sea is not *inter regalia*, and therefore the Crown has no right to grant it, or any other right which will apply to the fishes of the sea, or interfere with the rights and privileges of the public. 6. The defenders being entitled to take fishes in the sea, and the Crown having no right to interfere with the exercise of their constitutional privileges, they are at liberty, and have the legal power of using and erecting such apparatus as they may consider best suited for the purpose of taking and catching fish in the sea."

The defenders were allowed to lodge the following additional pleas:—" 1. The right of fishing in the British seas for salmon or other fish, is not a right vested in the Crown, as part of its *hereditary revenue*, and cannot be appropriated as such by the pursuers. 2. Supposing the right to fishings in the sea to be *inter regalia*, it is merely so vested in the Crown for the purpose of regulation, and of protection to the public or subjects of the realm, who are by law entitled to avail themselves of the public right of fishing; and this right cannot be converted or turned into a royal monopoly, or into part of the hereditary revenue of the Crown. 3. The *regalia* are held by the Crown as trustee for the public, for the use, benefit, and protection of the subjects of the realm in their enjoyment thereof. They form no part of the hereditary revenue, and the terms are neither synonymous nor convertible."

The majority of the Judges in the Court of Session gave judgment for the pursuers.

The defenders appealed, maintaining in their *printed case* that the interlocutor of the Court of Session should be reversed, because—" 1. The right of fishing in the British seas for salmon or other fish, is not a right vested in the Crown as part of its hereditary revenues, and cannot be appropriated as such by the pursuers.—Selden, Mare Clausum, b. ii. c. 1; Craig, lib. i. dieg. 15, § 13, 17; Ersk. b. ii. t. 1, § 6; b. ii. tit. 1, § 5; b. ii. tit. 6, § 17; Peregrinus, De jure et privilegio fisci, lib. i. § 22; Pothier, Traité de Propriété, 40; Stair, b. ii. t. 1, § 5; Bell's Pr. (4th edit.) § 642, &c. 2. The right of fishing in the sea is not *inter regalia;* and there is no authority for classing it among those rights which are so considered.—Craig, lib. i. dieg. 16, § 38; Stair, b. ii. t. 3, § 69; § 76; Erskine, b. ii. t. 6, § 15; Bankton, b. ii. t. 3, § 2; Notes of Hume's Lectures on Scots Law; Ross's Lect. Advert.; 2 Ross's Lectures, p. 173; Bell's Pr. 4th ed. § 671, p. 259; id. 1112, p. 409; Bell's Pr. 4th ed. § 646; Lord Hailes's Rep. vol. ii. p. 722; *Brodie* v. *Burgh of Nairn*, M. 12,830; *Gordon* v. *Duff*, M. 8656; *Straiton* v. *Fullarton*, 5 Br. Sup. 299. 3. The regalia are held by the Crown as trustee for the public for the use, benefit, and protection of the subjects of the realm. They form no part of the hereditary revenue, and if they did, they are not alienable. The terms are neither synonymous nor convertible."—Craig, lib. i. dieg. 16, § 2; §§ 4, 1, 6, 7, 44; Stair, b. ii. t. 3, §§ 35, 60; b. iv. t. 45, § 9; Ersk. b. ii. t. 3, § 14; b. ii. t. 6, §§ 13, 15; Bankton, b. ii. t. 3, § 2, par. 20, p. 540; 20 Geo. II.; 3d and 4th Will. IV. cap. 69; *Brown and Ross* v. *Earl of Morton*, Robertson's App. 254; *M'Kenzie* v. *Gilchrist*, 7 S. 297; *Duke of Hamilton* v. *M'Callum*, M. 7824.

The *respondents*, in their *printed case*, supported the judgment on the following grounds:—" 1. The right of salmon fishings in the sea, around the coast of Scotland, belongs exclusively to the Crown, and forms part of its patrimonial or hereditary property. 2. Such right being *inter regalia*, the Crown alone is entitled to grant a title to it by charters or otherwise; and without a grant from the Crown, neither the appellants nor any other person can lawfully exercise such right. 3. The appellants have no right or title to salmon fishings in the sea opposite the estate of Portlethen, or in any part of the adjoining sea coast, and the pleas maintained by them are inconsistent and untenable."—2 Ross's Lectures, p. 173; Bell's Pr. 4th ed. § 671, p. 259; ib. § 1112, p. 409; Ersk. 2, tit. 6, § 13; 2, tit. 6, § 15.

Rolt Q.C., *Anderson* Q.C., and *Hale*, for the appellants.—We say that salmon fishing in the open sea cannot be feudalized by the Crown according to the law of Scotland. *Primâ facie*, the open sea surrounding a country is incapable of appropriation either by the Sovereign or by any of the subjects of that country. Vattel (Law of Nations, 1, 22, 23) speaks only of the rights of one country as against another country, and not of one subject as against another subject. A passage in Craig, 1, 16, 8, is founded on as shewing that rent was paid for fishings, but the term *reditus* there means merely the profit to be made out of fishing, and not rent, strictly so called,

as matter of tenure. The *Regiam Majestatem* and other authorities prior to Stair do not contradict our view. It will be found that Stair, 2, 1, 5; 2, 3, 69; Erskine, 2, 1, 6; 2, 6, 15; Bell, Prin. §§ 671, 754, 1112, all refer only to the mouths of rivers and estuaries, and do not speak distinctly of the open sea. A passage in 2 Ross's Lectures, 173, is founded on; but inasmuch as that author, in an adjoining passage, clearly mistakes the law as to white fishings, it may be inferred that his doctrine is equally erroneous as to salmon fishings. The cases collected in Morrison's Dict. chiefly relate to estuaries, and turn on the often disputed questions of fact as to what is estuary and what is sea. *Leslie* v. *Aytoun*, M. 14,249, as appears from Stair, 2, 3, 69, was about a fishing in a river; and so as to *Gairlies*, M. 14,249. The case of *Ramsay*, 5 Br. Sup. 445; 2 Hailes, 722, does not when examined warrant the proposition laid down by Bell, Prin. § 646, and only shews that great doubts existed on the bench at that period about this question. The cases of *Campbell* v. *Campbell*, M. 14,250; *Kintore* v. *Forbes*, 3 W.S. 261; *Fife* v. *Banff*, 8 S. 137; D. *Portland* v. *Gray*, 11 S. 14, all referred to grants of salmon fishing in rivers. The case of *Smith* v. *Officers of State*, 6 Bell, Ap. 487, related merely to the servitude of the public over the sea shore, and the right of the Crown to protect it against encroachments. *Oswald* v. *M'Whir*, 1 Sh. & M'L. 393, is perhaps the most pertinent authority on this subject, yet did not decide the question.

It is said, the practice of the Crown to make grants of salmon fishing to subjects shews, that the Crown had the right; and many retours of proprietors in the North of Scotland are produced to prove such grants. But on examining these it will be found they all related to estuaries, and there is no instance of a grant of such fishings before the Union. It is true, as Baron Hume says, a practice crept in after that period for the Crown to grant such charters applicable to the open sea, but it was an erroneous practice, and when discovered by competent authorities was put a stop to—Hume's Lect. At the date of the Union the general opinion of Scotch lawyers was, that the right of fishing salmon in the open sea was common to all the subjects of the realm; and the Scotch Commissioners, who were lawyers, and knew well what they were dealing with, urged this as one of the acquisitions which would enure to English subjects from the Union—2 Mack. Works, 659. Moreover, the series of Scotch Statutes beginning *temp.* Alex. II. (1224 to 1685), all refer to salmon in rivers only. The Statutes of Annexation do not shew, that there was any such right in the Crown to grant fishings in the sea.

If such a right as the present exists at all, then it is a *jus regale* and not a *jus patrimonium*, and the Crown cannot turn it to profit. It cannot be supposed that the advisers of Will. IV., if aware of so valuable a right attached to the Crown, would have agreed to abandon it in lieu of the Civil List on the terms then fixed. Moreover, there is no definite limit put to this right of the Crown in the interlocutor of the Court below; it is not stated how far the Crown's right extends from the shore and where the right of the public begins. This defect in the interlocutor must lead to its being varied, even if it ought not to be reversed.

Lord Advocate (Baillie), and *Sir R. Bethell* Q.C., for the respondents.—As regards the limit of the right of the Crown, whatever be its precise extent from the shore, it must at least exclude every use made of the shore for the purpose of salmon fishing. Stake nets are a modern invention, and require to be fixed to the shore as a point of support; and the right of the Crown is inconsistent with such a use of the land by any subject without express grant. All the presumptions are in favour of the Crown's rights to the salmon fishing in the surrounding sea, as the Crown is the original owner and lord paramount, from whom all the titles of subjects take their rise. Craig (1, 16, 38; 2, 8, 15) expressly enumerates salmon fishing as *inter regalia*, and does not qualify it by limiting it to rivers and estuaries. The *Regiam Majestatem* is of no authority in the law of Scotland. Stair (2, 1, 5) does not confine the right of the Crown to fishings in rivers. Erskine (2, 6, 15) and Ross (Lect. ii. 173) corroborate the view, that it extends to the open sea. All the authorities lay down the doctrine that the salmon fishings must have originally belonged to the Crown. Indeed, it is not clear that the Crown could not, before certain Statutes passed, make grants of white fishings in the open sea; for if not, it seems the case of *Ramsay*, 5 Br. Sup. 445, is unintelligible. It is admitted by the appellants, that the Crown can grant salmon fishings in rivers and estuaries; and if so, there is no intelligible reason, why the Right of the Crown should stop there. It is true there is no case exactly in point, but a great many cases assume that as the state of the law. The practice of the Crown has always been to grant these fishings in the open sea; and it is not true that these grants were all grants in estuaries. Hume's Lectures are of no authority, and the author, in his will, prohibited his executors from publishing them. In England, since the great charter, the Crown cannot appropriate to itself the right of fishing in the sea; but in Scotland the right of the Crown was never limited in the same manner, and can still be granted for purposes of revenue, as it could in England formerly. See the *Ban Fishery case*, Davis, 56.

Cur. adv. vult.

LORD CHANCELLOR CHELMSFORD.—My Lords, this is an appeal against certain interlocutors pronounced in an action of declarator raised at the instance of the Commissioners of Woods

and Forests and the Lord Advocate on behalf of Her Majesty, against the appellants, for the purpose of asserting the right of the Crown to the salmon fishings in the sea opposite to the appellant Ernest Gammell's property of Portlethen, in the county of Kincardine.

The summons sets forth that "all the salmon fishings around the coast of Scotland and in the navigable estuaries, bays, and rivers thereof, so far as the same have not been granted to any of our subjects by charters or otherwise, belong to us *jure coronæ* and form part of the hereditary revenues of our Crown in Scotland. That, in particular, the salmon fishings *ex adverso* of the estate of Portlethen, in the county of Kincardine foresaid, belong to us *jure coronæ*, and are now under the management of the said Commissioners of Woods, Forests, Land Revenues, Works, and Buildings. That the defender, Ernest Gammell, is proprietor of the estate of Portlethen. That the charters and other titles flowing from us and our royal predecessors in favour of the said Ernest Gammell or his authors contain no grant of salmon fishings, and he has no right or title to salmon fishings, *ex adverso* of the said estate of Portlethen, or in any part of the sea coast adjoining thereto;" and the summons concludes—"Therefore it ought and should be found and declared, by decree of the Lords of our Council and Session, that the salmon fishings around the sea coast of Scotland belong exclusively to us, and our royal successors, and form part of the hereditary revenues of the Crown in Scotland, so far as the said salmon fishings have not been expressly granted to any of our subjects, or vassals, by charters or otherwise. And it ought and should be found and declared by decree foresaid, that the salmon fishings opposite to the said lands and estate of Portlethen, in the county of Kincardine, belong exclusively to us and our royal successors, and that the defender, Ernest Gammell, the proprietor of the said estate of Portlethen, and the other defenders as tenants or claiming right under him, have no right or title to fish for salmon, grilse, or salmon trout, *ex adverso* of the said lands and estate of Portlethen, or in any part of the sea coast adjoining, by means of stake nets or bag nets, or by net and coble, or in any other manner or way."

The defenders pleaded defences, only two of which it will be necessary to call to your Lordships' attention. The first is—"The defender, Mr. Gammell, being the proprietor of lands erected into a barony, the right of salmon fishing in the adjoining water is attached thereto. Secondly, the right of salmon fishing in the sea does not belong to the Crown as part of its *hereditary revenue*."

The Lord Ordinary was prepared to pronounce a decision on the first defence, which alleged that Mr. Gammell had a right to salmon fishings under his grant of the barony of Portlethen, but both parties having desired that the consideration of that defence should be reserved until a judgment should be pronounced on the other defences, which assert that the Crown has no right whatever to the salmon fishings in question in the sea, *ex adverso* of this barony, he reserved the consideration of the first defence, and ordered cases upon which he afterwards pronounced his interlocutor; and "decerns and declares in terms of the first conclusion of the summons of declarator." That, as your Lordships will perceive, decided that the salmon fishings around the sea coast of Scotland belong exclusively to the Crown, and form part of the *hereditary revenues* of the Crown in Scotland.

Upon this interlocutor the defenders presented a reclaiming note to the Second Division of the Court of Session. Their Lordships, upon the case coming on, considering the question to be one of great importance and difficulty, appointed it to be heard by the whole Court, and they allowed the pursuers to lodge pleas in law, and the defenders to give in additional pleas, which was accordingly done.

The first and second pleas in law for the pursuers are the only ones which need be mentioned. The first is—"The right of salmon fishings in the sea around the coast of Scotland belongs exclusively to the Crown, and forms part of its *hereditary revenues*." The second is—"The right of salmon fishings in the sea around the coast of Scotland being *inter regalia*, the Crown alone is entitled to grant a right to such fishings by charters or otherwise; and without a grant from the Crown no person can lawfully exercise such right."

The additional pleas in law for the defenders were—"First, the right of fishing in the British seas for salmon or other fish is not a right vested in the Crown as part of its *hereditary revenue*, and cannot be appropriated as such by the pursuers. Secondly, supposing the right of fishings in the sea to be *inter regalia*, it is merely so vested in the Crown for the purpose of regulation and of protection to the public or subjects of the realm, who are by law entitled to avail themselves of the public right of fishing, and this right cannot be converted or turned into a royal monopoly or into part of the *hereditary revenue* of the Crown. Thirdly, the *regalia* are held by the Crown as trustee for the public, for the use, benefit, and protection of the subjects of the realm in their enjoyment thereof. They form no part of the *hereditary revenue*, and the terms are neither synonymous nor convertible."

The case having been argued before the whole Court, all the consulted Judges, with the exception of the Lord Justice Clerk, were of opinion to adhere to the interlocutors of the Lord Ordinary; and the Second Division pronounced this interlocutor:—"The Lords having resumed consideration of the reclaiming note for Ernest Gammell and others against Lord Murray's

interlocutor, with additional pleas for the parties: In respect of the opinions of the majority of the whole Judges, adhere to the said interlocutor reclaimed against, and repel the additional pleas for the defenders given in since the date of that interlocutor, and remit to the Lord Ordinary to proceed further in the cause."

The case had been brought by appeal from these interlocutors to your Lordships' House, and you are called upon to decide the important question, whether the salmon fishings around the sea coast of Scotland belong exclusively to the Crown, and form part of its *hereditary revenues*.

Before entering upon the consideration of this question, it may be necessary, in consequence of a part of the argument of the counsel for the appellant, to endeavour to ascertain as accurately as possible the limits within which this right of the Crown is alleged to exist; because it was strongly urged that, the sea being common to all, there could be no appropriation of it except in that limited portion which adjoins the shore, and that the right claimed was unreasonable, as it would embrace any fishing whatever in the deep sea at an indefinite distance from the coast. But it appears to me that this is a misapprehension of the claim made by the Crown, and that the limits are not so undefined as alleged, although the right, from its nature, must be to a certain extent indefinite. Your Lordships will observe that the right which the Crown asserts in the second conclusion of the declarator, is to the exclusive salmon fishings opposite to the lands of Portlethen, and that the defenders "have no right or title to fish for salmon, grilse, or salmon trout, *ex adverso* of the said lands and estate of Portlethen, or in any part of the sea coast adjoining, by means of stake nets, or bag nets, or by net and coble, or in any other manner or way;" and the conclusion for interdict is, that the defenders shall "be prohibited, interdicted, and discharged from fishing for salmon, grilse, or salmon trout, *ex adverso* of the said lands and estate, or in any part of the sea coast adjoining thereto, and from erecting or using stake nets, bag nets, net and coble, or any other engines or apparatus for catching salmon, grilse, or salmon trout, within any part of the said lands."

It is unnecessary for the purposes of this case to say more than that I agree with the consulted Judges in their opinion—"That the right of fishing in dispute, the right which is asserted on the part of the Crown, and denied to the defenders in the summons, is the right of fishing in the open sea, when by that term is meant the sea on an open coast, as distinguished from estuaries and inlets; but still by stake nets, bag nets, and by net and coble, and other similar modes, all of which, it is a matter of notoriety, imply either the connexion of the apparatus with the coast, as in the case of stake nets and bag nets, or the use and possession of the coast, as in the case of net and coble. In short, the modes of fishing on the coast which it is the object of the summons to deny to the defenders, and to claim for the Crown, are those modes of fishing in which the use and possession of the coast is essential to the operation."

To these observations it may be added that the right which is asserted is not a right of fishing for salmon, but a right to "the salmon fishings around the sea coast of Scotland," which appears to be a common and well understood description of the subject of claim.

The question, then, is to be determined upon the right thus limited and explained, and it must be decided entirely by reference to the law of Scotland. The right of the Crown is rested solely upon that law, and it cannot be met by arguments derived from the works of foreign jurists, or from the municipal laws of other countries.

There can be little doubt that salmon fishings at an early period of the history of Scotland were regarded as possessing a peculiar value over other fishings, and were distinguished from them in a remarkable manner. They were classed *inter regalia*. They were only capable of belonging to a subject by an express grant from the Crown, or by a grant of fishings generally, followed by such an user of salmon fishing as proved that it was intended to be comprehended within the general terms of the grant.

It will be necessary only to cite one or two of the best institutional writers on the subject. Craig, in his Jus Feudale, book 1, dieg. 16, § 38, says—"Salmonum piscatio apud nos inter regalia numeratur, neque cuiquam hodie concessa videtur nisi specialis ejus in concessione mentio fiat." And in another passage of the same work, book 2, dieg. 8, § 15, after stating that Bartolus distinguished rights of fishing into two kinds, the one derived from the Prince or Sovereign, the other acquired by an individual by prescription, he proceeds thus—"Nos etiam duplicem piscationem facimus sed alio modo distinctam, unam salmonum, alteram communium sive alborum (ut loqui solemus) piscium. Salmonum piscatio in feudi dispositione generali non venit nisi exprimatur, neque sufficit generalis illa dispositio (cum piscationibus) nam salmones non comprehendit. Et hæc est communis opinio salmonum piscationem inter regalia numerari."

And to the same effect precisely are the passages which were cited in argument from Stair, from Erskine, and from Bell.

Indeed this hardly seems to be denied on the part of the appellants, for in their case, at page 25, after adverting to the assertion that the right of the Crown to make grants of salmon fishings in navigable rivers or in the sea at their mouths, is admitted, they say—"The defenders are not here to contest the right of the Crown to make such grants in navigable rivers. These

are founded on immemorial usage, and are supported by authority and decision." And in their printed reasons for reversing the interlocutors submitted to the House, they say, at page 54, "The appellants do not dispute that the power of making grants of salmon fishings in rivers, and in those estuaries of the sea which are at the mouths of rivers, are *inter regalia*," but they deny the right to exist in the sea adjoining an open coast.

It seems rather difficult to understand the principle upon which this distinction is supposed to rest. If it could have been shown that the right has invariably been exercised in this restricted manner, it might have amounted to evidence which would have prevented its being further extended; but it will presently be seen that the grants which have been made from time to time by the Crown are not of this limited character.

If I have rightly apprehended the argument of the counsel for the appellants, it is this:—They say the law, as to the right to the sea shore, is different in Scotland from that of England; that in Scotland "the shore is not, as in England, held to be the property reserved to the Sovereign, but presumed to be granted as part and pertinent of the adjacent land under the burden of the Crown's rights as trustee for the public uses." (Bell's Principles, § 642.) That the right to the salmon fishings, therefore, cannot be connected with any right in the shore, and that in the open sea they are incapable of becoming the subject of feudal property.

I do not think it very important in this case to ascertain what right the Crown possesses in the sea shore in Scotland. It may be observed, however, that Lord Campbell, in the case of *Smith* v. *The Earl of Stair* and others, 6 Bell's App. 500, says—"Notwithstanding some loose *dicta* to the contrary, there can be no doubt that, by the law of Scotland, as by the law of England, the soil of the sea shore is presumed to belong to the Crown by virtue of the prerogative, although it may have been alienated subject to any easements which the public may have over it." But assuming that the sea shore, which originally belonged to the King, like all the other property in the kingdom, though not granted expressly, yet, if not excepted, passed to the owner of the adjoining land, or, in the absence of proof to the contrary, must be presumed to belong to him, this would determine nothing as to the right of the salmon fishings upon the coast; because the right is not at all connected with property in lands, as appears from Erskine, book 2, title 6, § 15, where he says—"As this right, in consequence of its being *inter regalia*, remains with the Sovereign after he is divested of the property of the lands on both sides of the river, the Crown may make a grant of the salmon fishing in a river or any part thereof, in favour of one who has no lands on either side. The whole estate of such grantee consists in the fishing, and this right entitles him to draw his nets on the banks of the adjacent grounds without the proprietor's consent, as a pertinent of the fishing." And even admitting that the sea shore must be presumed to belong to the appellant, there is the strongest proof that the grant to him was not intended to include the salmon-fishings opposite his land, because in the charter from the Crown of the lands and barony of Portlethen, they are described as, "All and whole, &c., with the seaport, haven, and harbour of Portlethen, and whole tolls, duties, customs, and anchorages pertaining and belonging thereto, with the white fishings in the sea adjacent to the said lands;" the expression of "white fishings," according to the well known rule, being an exclusion of all others.

As little ground is there for the appellants' assertion that "fishings in the open sea cannot be feudalized or become the subject of a feudal grant." This is directly contrary to the authority of Craig, who, in his Jus Feudale, book 1, dieg. 15, § 15, says—"Itaque piscationes maris proximi et insulæ et portus ut locari sic in feudum dari possunt." And § 17—"Nam pisces in mari aut in flumine publico licet nullius in bonis sint, piscationum tamen feudum recte fit."

But the appellants endeavour to get over the difficulty of distinguishing between rivers and estuaries and the sea upon an open shore, by attributing the origin of the right acquired by the Crown in salmon fishings to usurpation, which they say has never extended to the open sea, but has been confined to rivers and estuaries. And the respondents having produced a great number of retours shewing grants of salmon fishings prior to the Union, the appellants try to disable them by alleging that they are all of them in terms applicable to rivers and estuaries, being either grants of fishings, "tam in dulcibus quam in salsis aquis," which they say necessarily imports a tidal river or an estuary, or in waters by a specific name, as "Aqua de Done," or "Aqua de Doverane," which cannot apply to the undefined open sea.

It is impossible to form a correct judgment of these retours without a map or plan of the properties to which they relate, but without this assistance there are some of them which clearly appear not to be as confined as the appellants contend. For instance, the first of the returns in Aberdeen, "Villa et terris de Carnbulge cum piscatione super mare salsum infra baroniam de Phillorthe;" the one in Kincardine, to Mr. Arthur Straiton—"Salmon fishing and teynd thereof in the sea within the parochin of Eglesgreig," which we know from a case which came to this House, means the open sea; and one in Nairn, to Simon Fraissiser—"Salmon fishing and uther fisching of the yair of Aleak Callit Corrynagold and uther fischings as well in the sea as in the Water of Cruan lying of auld within the thayndome of Calder and now united into the barronie of Kinkell Froyser."

But the grants since the union are many of them not capable of being referred to rivers or

estuaries, because they are grants of fishings in the sea adjacent to lands "upon the sea coast," or "upon the sea shore," or "along the sea coast," or "lying along the sea coast;" and with respect to the modern Crown charters, on page 13 of the respondents' appendix, some of them (as was pointed out in the course of the argument) can only be understood as applying to the sea shore upon an open coast, such as the one to Mr. Anderson, dated 21st December 1840, at page 18—"Totas et integras terras et baroniam de Kinnaber et cum Salmonum piscariis aliisque piscariis super aqua de Northesk, &c., ac etiam cum salmonum piscariis aliisque piscariis in littore maris inter dictam aquam de Northesk et aquam de Southesk." Now these were either original charters or charters by progress, and either way they shew the exercise of the right to grant these salmon fishings in the sea, either as charters of *novodamus*, or as repetitions of grants in former charters.

In addition to these grants, several authorities were cited on behalf of the Crown to shew that the right now claimed had been repeatedly recognized. All of these are disposed of by the Lord Justice Clerk in a summary manner. He says—"None of the cases seem to me to afford any direct authority for the pleas of the Crown. In most of the cases the interest of both parties was to admit that there might be a right of salmon fishings in what is called in these cases the sea, but in almost all, the fishings were in estuaries, or in sands stretching from the mouths of estuaries." I think the learned Judge has put this a little too strongly. But admitting that in most of the cases the question of the Crown's right was not contested, yet there is not one of them in which the slightest hint was given that the right did not exist.

Nor is the absence of any denial of the right to be accounted for in the manner suggested by the Lord Justice Clerk, in the case of the *Earl of Kintore* v. *Forbes* for instance, where it was clearly the interest of the pursuers to dispute the right of the Crown to grant fishings in the sea properly so called. There Forbes and others were proprietors of estates, with rights of salmon fishings on the shores of the German Ocean to the north of the river Don. Lord Kintore and others were proprietors of salmon fishings in the river, and they raised an action, founded on various statutes, to have it declared that Forbes and the others were not entitled to use stake nets or similar machinery within the salt water that ebbs and flows and upon the sand and the schaulds adjacent. The Court of Session assoilzied the defenders, and their judgment was affirmed by this House—on the ground that the stake-nets and machinery were erected and placed in the sea, and not in any river or estuary. Lord Lyndhurst, in advising the House, said —"It is said that the proprietors of these fisheries on the sea coast have no right by the terms of their grant to fish in this manner; that they are entitled only to fish with what is called a net and coble; and that having taken upon themselves to fish in a different mode, the proprietors of the fisheries on the river Don have a right to complain of it, and on that ground to sustain the suit. My Lords, I apprehend that is quite a mistake. These persons became proprietors of fisheries on the coast originally by grant from the Crown, and if their grants are so limited that in point of law (upon which I do not wish at present to pronounce any opinion) they are not entitled to fish in the manner described, viz., by the use of stake nets, that is a question between them and the Crown.'

Now in this case it would clearly have been the interest of the pursuers to have disputed the Crown's right to grant the fishings to the defenders, as that grant was the protection to their acts. If they had possessed no grant at all they would have been mere wrong doers, and by intercepting the entrance of the salmon into the river Don, they would have been committing an injury to the fishings there, without any justification for which an action might have been raised against them.

But in *Straiton's case* the Crown grant was brought directly into question, and I agree with the consulted Judges, that this case appears to be perfectly conclusive upon the point of the Crown's right to grant fishings in the sea. The case is very clearly explained in their opinion, and they expressly say that the only ground of Straiton of Kirkside's right was a grant of fishing from the Crown *in mari*, which *there* was open sea, there being no estuary. The case was confessedly a difficult one. In the altered course of the river it became necessary to adjust the respective rights of Fullerton of Kinnaber, who was entitled to the river fishery, and Straiton of Kirkside, who was entitled to the sea: but if Straiton of Kirkside's grant of fishing in the sea could not be sustained, it was an easy way of solving the whole difficulty, as Fullerton would have been entitled to his river fishing whatever was the state of the tide, and Straiton would have had no right at all which required to be provided for.

It seems to me, therefore, to be clear that the right of the Crown is established to the full extent claimed in the conclusion of the summons of declarator.

It only remains to be considered, whether this right belongs to the Crown merely as an attribute of its sovereignty and as a trustee for the public, or whether it is to be regarded as a *patrimonium*, and therefore as a part of its *hereditary revenues*. I do not think that your Lordships will entertain much doubt upon this point; Erskine, in book 2, title 6, § 13, says:—"No right in lands which is by our feudal customs appropriated to the sovereign, and therefore goes by the name of *regale*, is presumed to be conveyed by the charter unless it be expressed." He then

explains the *regalia*, which he divides into *majora et minora*, and then proceeds,—"But the *regalia* now to be explained are truly parts or pertinents of land, and, as such, would naturally go to the vassal by his charter, if they had not been by our feudal customs appropriated to the sovereign, and so understood to be excepted from the grant." He then enumerates these *regalia*, and amongst them includes salmon fishings, which he says is also a "*jus regale*," and therefore is not carried by a charter without an express clause. Now, as the Crown may either retain this subject itself or grant it to individuals, it cannot possibly be regarded as amongst the *regalia* which are held for the benefit of the public. All the passages from the writers already quoted as to the effect of grants of salmon fishing, or of grants *cum piscationibus*, support the right of property in the Crown. If the right were common to all, it could not be appropriated, and if the Crown held it for the public, the public could not be excluded by a grant to any of them. But the Statute of 7 and 8 Victoria, chapter 95, recognizes the legality of an individual right in a salmon fishing in the sea, by prohibiting any person not having a legal right or permission from the proprietors of the salmon fishings to take, amongst other places, from any shore of the sea, or in or upon any part of the sea, within one mile of low water mark in Scotland, any salmon under a penalty. No person could have become the proprietor of a salmon fishing in Scotland except by a grant from the Crown, and, therefore, the legislature has expressly recognized the validity of these grants. But, as the Crown may grant these fishings for the benefit of individuals, so it may retain them in its own hands, and it seems difficult to understand how they should become property when granted away, but possess a totally different character while belonging to the Crown.

It is clear, therefore, that the salmon fishings in Scotland are the property of the Crown, and that the Commissioners of Woods and Forests are the proper parties to pursue on behalf of Her Majesty. Upon the whole case the claim of the Crown appears to be satisfactorily established, and I advise your Lordships to affirm the interlocutors, and I submit, my Lords, without costs.

LORD CRANWORTH.—My Lords, my noble and learned friend has gone so fully into this case that, concurring as I do with him in the result, I do not think it necessary, and I do not think it would be proper for me, to trouble your Lordships with any detailed observations upon the case. I confess that, both upon the recent argument and upon that which took place some years ago, I have entertained some considerable doubt, arising from the indefinite nature of the claim, and the great difficulty, if not impossibility, of defining to what extent the claim would go with respect to sea fishings. But, upon the whole, considering particularly the almost unanimous opinion of the Court below, and finding that the doubts which I have entertained are not participated in by others of your Lordships who have heard this case, I daresay those doubts are unfounded; and I think an observation that was made is not unentitled to considerable weight, namely, that if this doubt were well founded, an exactly similar doubt might be raised as to the prerogative right of the Crown—in England at least—to the bed of the sea, because that is undefined; yet nobody doubts that such a right exists. Then, taking into account what has been pointed out by my noble and learned friend, that what is here claimed is the fishings around the coast, and that it is matter of notoriety that the fishings require for some purpose the use of the coast, at least according to modern science, either by stake nets or by drawing the nets to the shore, or by drawing the nets upon the shore, or in some other way; I think it is very likely that that may be a sufficient answer to that doubt. At all events, I concur with my noble and learned friend in thinking that these interlocutors ought to be affirmed.

LORD WENSLEYDALE.—My Lords, my noble and learned friend communicated to me the opinion that he was about to give to the House, and I entirely concur in every part of it, and I think it unnecessary to add anything to it, except that, perhaps, besides the limits he has stated of the fishing being connected with the coast, it may be worth while to observe that it would be hardly possible to extend it seaward beyond the distance of three miles, which, by the acknowledged law of nations, belongs to the coast of the country—that which is under the dominion of the country by being within cannon range, and so capable of being kept in perpetual possession. It is very true that Lord Coke says, that the right to jetson and flotson, which is part of the prerogative of the Crown, extends over all the narrow seas. But I apprehend it is not necessary to go so far as that, but that it is sufficient to say that, subject to the qualification which my noble and learned friend has explained, it may be perfectly true that the right is possessed within the three miles of sea over which the jurisdiction both in Scotland and in England extends.

LORD KINGSDOWN.—My Lords, I have also had an opportunity of seeing the opinion which has been delivered by the LORD CHANCELLOR, before it was pronounced, and I entirely concur in it.

LORD BROUGHAM, who had heard the argument, was not present at the judgment.

Interlocutors affirmed.[1]

Inglis and Burns, W.S. *Appellants' Agents.*—Donald Horne, W.S. *Respondents' Agent.*

[1] This case was commented on by some of the English Judges in the recent case as to criminal jurisdiction of the Courts over offences committed on the sea coast within three miles.—*R.* v. *Keyn*, 46 L. J. M. C. 17.