GAMMELL ET AL., ... APPELLANTS.

HER MAJESTY'S COMMISSIONERS OF WOODS AND FORESTS, AND THE LORD ADVOCATE OF SCOTLAND, ... RESPONDENTS (*a*).

1859. *March 3rd, 4th, 7th, 8th, 10th, and 28th.*

Salmon-Fishings around the Sea-Coast of Scotland—Right of the Crown—Its Character, and its Extent.—The Lord Chancellor (*b*), Lord Cranworth, Lord Wensleydale, and Lord Kingsdown, affirming the Decree below, concurred in the following propositions:—

1. The salmon-fishings in the open sea around the coast of Scotland, unless parted with by grant, belong exclusively to the Crown, and form part of its hereditary revenue.
2. This right of the Crown is not merely a right of fishing for salmon, but "a right to the salmon-fishings around the sea-coast of Scotland."
3. It is not to be regarded simply as an attribute of sovereignty, but rather as a patrimonium, a beneficial interest constituting part of the regal hereditary property.
4. Salmon-fishings in the open sea around the coast of Scotland may not only become the subject of a royal grant, but they may be feudalized.
5. The assertion that the sea is common to all, and that there can be no appropriation of it, except where it adjoins the shore, is an erroneous assertion.
6. The Statute 7 & 8 Vict. c. 95. recognizes and proceeds on these principles.

THE pleadings in this important case commenced in the Court below with a summons, dated 5th January 1849, by the Respondents, on behalf of the Crown, stating as follows:—

The salmon-fishings around the coast of Scotland, and in the navigable estuaries, bays, and rivers thereof, so far as the same

(*a*) See Report of this case in the Court below, 13 Sec. Ser. 854.
(*b*) Lord Chelmsford.

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &c.

have not been granted to subjects by charters or otherwise, belong to the Crown *jure coronæ*, and form part of the hereditary revenues of the Crown in Scotland. The salmon-fishings *ex adverso* of the estate of Portlethen, in the county of Kincardine, belong to the Crown *jure coronæ*, and are under the management of the Commissioners. The Defender, Ernest Gammell, is proprietor of the estate of Portlethen. The charters and other titles flowing from the Crown in favour of the said Ernest Gammell, and 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. 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. The said Ernest Gammell 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 (*a*), 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. 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 inclosures of netting, where they are caught. The said Defenders (*a*) have no right or title to fish for salmon, grilse, or salmon-trout at the place or places above described. 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.

Having thus stated the title of the Crown, and the position and acts of the Appellants, the summons submitted and insisted that it ought to be found and declared by a decree of the Court below as follows:—

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, so far as the said salmon-fishings have not been expressly granted to any subject or vassal by charters or otherwise; and that it ought to be further found

(*a*) The Appellants along with Mr Gammell.

and declared, that the salmon-fishings opposite to the said lands and estate of Portlethen belong exclusively to the Crown, and that 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 of way; and that the said Defenders (*a*) ought to be prohibited 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; and that the said Defenders (*a*) ought to be decerned and ordained, by decree foresaid, to desist and cease from disturbing and molesting the Pursuers in the peaceable possession and enjoyment of the said salmon-fishings.

On the 2nd of March 1849 the Appellants put in a defence against the summons of the Crown officers. This defence denied the alleged right of Her Majesty, admitted that the title deeds of Ernest Gammell contained no grant of salmon-fishings *per expressum*, but averred that his lands were held by him under a Crown charter, which described them 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, and whole privileges and pertinents thereof, all lying within the parish of Banchory, and sheriffdom of Kincardine, now erected into a free barony, called the barony of Portlethen." The defence further asserted that the estate of Portlethen, on the shore of the North Sea, was bold, rocky, and precipitous, that the owner and his predecessors had carried on fishings of all kinds for centuries upon the property, and in the sea opposite the shore; that in the year 1827 the fishings were wrought by bag-nets; that a large sum

(*a*) *i.e.* the Appellants.

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &c.

of money had been expended in procuring and placing them; that the Defenders had laid out very considerable capital in their establishment, and especially at the commencement of each fishing-season; that these fisheries not having the shelter of any bay or creek, but being exposed in the open sea, required a stock of strong, heavy, and expensive material and implements; that they had been worked in conformity with usage and the common law, and had been productive of great public benefit, while they had afforded employment to a great number of adventurous and skilled fishermen; and finally, that the Defenders had continued to work their fishings without any complaint until the spring of 1845, when certain rival proprietors attempted to interfere with them, but gave up their attempt.

The defence concluded with the following pleas:—

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 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-fishing 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 record was closed upon the summons and defences; and after hearing Counsel, the *Lord Ordi-*

nary (Murray) pronounced the following Interlocutor :—

Lord Ordinary's Interlocutor.

18*th July* 1849.—The Lord Ordinary, at the desire of both parties, reserves consideration of the first defence, and appoints the parties to give in mutual cases on the other defences; the cases to be interchanged and printed by the 1st November next.

Lord Ordinary's Note.

His Lordship on this occasion issued the following Note:—

The Lord Ordinary conceived that he ought to pronounce a decision on the first defence pleaded for Mr. Gammell, that he had a right to salmon-fishings under his grant of the barony of Portlethen. That defence is altogether inconsistent with his other defences, that the Crown has no right whatever to the salmon-fishings in the sea, which are claimed in this action, and the Lord Ordinary was prepared to pronounce a decision on this defence; but both parties have desired that the consideration of that defence should be reserved until a judgment shall 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 has therefore reserved consideration of the first defence, and ordered cases on a question of very general importance.

The Defenders admit the right of the Crown to make grants of salmon-fishing in all estuaries; but they seem to make a boundary as to what is sea beyond the estuary, and, in that respect, maintain that the rights of the Crown are limited, and that they cease at the limits fixed by Act of Parliament for restraining the erection of stake-nets. The Lord Ordinary is desirous that the supposed limitation or restriction of the Crown's right should be fully stated and argued, as the case seems to turn on that point.

The Counsel for the Defenders have since stated to the Lord Ordinary that they wished the cases ordered to comprehend their first defence, instead of being confined to their five subsequent defences, so that two very different, indeed contradictory, pleas may be argued in the cases as well as in the other proceedings. The Lord Ordinary is, in general, much disposed to accede to such a proposal made by Counsel on either side; but he conceives it of very great importance in this case to keep distinct two sets of pleas, which, though stated as defences to one summons, are altogether inconsistent with each other. On the first defence, at whatever stage of the cause it may be discussed or determined, the Lord Ordinary would not have ordered cases with the view of preparing it for the decision of the Court. The general question, as to the right of the Crown, which is made the subject of five different defences, is of general importance, and it is most desirable that

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &c.

Lord Ordinary's Note.

the decision which may be pronounced should apply to that question alone, branched out as it is into five defences.

Complaints have been often made in the House of Lords, that from decisions being pronounced which were applicable to different and opposite pleas, it was a matter of some difficulty to ascertain on what grounds the Court had decided the case, and, in consequence of that, remits to this Court have sometimes been thought necessary.

The Lord Ordinary does not think it material in what order decisions are pronounced on the defences, but he thinks it essential that the more general and important question should be considered without the admixture of any other matter.

The Case lodged on behalf of Her Majesty's Commissioners and the Lord Advocate (the present Respondents) was in substance as follows :—

Respondents' Case in the Court below.

The question does not relate to fishings generally in the sea, but solely to salmon-fishings around the coast of Scotland.

It must be regulated by the municipal law of Scotland, and cannot be affected by the peculiar laws and usages of other countries. The Defenders have opened a wide discussion by referring to numerous authorities on international law, which have very little bearing on the present case.

There are many doctrines of general law discussed in the Defender's Case which the Pursuers have no occasion to dispute.

All nations being equal, all seem to have an equal right to use the unappropriated parts of the ocean for navigation. But those parts of the sea which adjoin the land *are appropriated as accessory to the coast that commands them.* The doctrine laid down by Heineccius (*a*) is that now generally received by the best writers. He maintains that the ocean is incapable of appropriation, but that *parts of the ocean and narrow seas may be appropriated, subject to the right of navigation.*

The sea within cannon-shot of the shore, or a distance of three miles, is occupied by the occupation of the coast; and sea fisheries are subject to occupancy, and capable of exclusive possession (*b*).

Craig lays it down that the property of the sea belongs to those to whom the nearest continent belongs, and that the right of fishing in the adjoining sea belongs to the same parties to whom the property of the sea, so far as it can be appropriated, belongs (*c*).

(*a*) 2 El. 277.

(*b*) Vattel, i. s. 287 ; Puff. iv. 4. vii. 8 ; Wildman's International Law, 70.

(*c*) Craig's Jus Feud. lib. i. dieg. 15. s. 13.

The right of fishing in the sea is totally distinct from the right of maritime dominion. The English have never pretended to have a property in all the seas over which they have claimed maritime dominion by means of their fleets. But all those portions of the sea adjacent to and commanded by the coast, so far as capable of appropriation, are held to form *a part of the national territory*.

Vattel says:—"At present the whole space of the sea within cannon-shot of the coast *is considered as making a part of the territory*, and for that reason, a vessel taken under the cannon of a neutral fortress is not a good prize" (*a*).

It is contended by the Defender that these rights in the sea are national or public rights, which are vested in the Sovereign merely as trustee for the community. Here, however, it is necessary to make a distinction.

The Sovereign of this country is the supreme head of the nation, and as such, vested with the executive power of protecting the interests and vindicating the rights of the people against any outrage or invasion by foreign states. But the rights which belong to the Crown are of two different kinds: 1st, the *jus publicum*, which belongs to the Monarch in jurisdiction and sovereign right, and which may be held as a mere trust for behoof of the public; and 2ndly, the *jus privatum*, under which the Sovereign possesses the land and sea adjoining the coast as a patrimonial property, so far as it is capable of appropriation.

In the case of the *Officers of State* v. *Smith* (*b*), it was observed by the Lord Justice-Clerk, that "anterior to any grant which may be founded on, the right clearly is in the Crown as a right of property. If the proprietor claims the right of property in the shore, it can only be in respect of titles flowing from the Crown. This admits the right of property, in the first instance, to be in the Crown." His Lordship farther observed:—"In such a matter I cannot agree to view the Crown's dominant right and title as the right of the trustee for the public. It is a right of property."

In the same case, Lord Cockburn remarked:—"I agree with those who hold the shore and its natural fruits to be the property of the Crown. Originally and radically, the property is the King's."

All the authorities in the law of England lay down the same general principle (*c*).

The public rights belonging to the Crown are inalienable, while the private ones, being capable of yielding profit, may be retained or alienated to a subject.

(*a*) Vattel, b. i. c. 23. s. 289.
(*b*) March 11, 1846; 8 N. S. 711.
(*c*) See *Rex* v. *Smith*, 2 Doug. 441; Richards, 1796, Ans. 603; *Hull and Selby Railway*, Exchequer of Pleas, 839; 5 M. & W. 327.

GAMMELL
v.
COMMISSIONERS OF WOODS AND FORESTS, &c.

Respondents' Case in the Court below.

Thus it is agreed on all hands, that whales and sturgeons are royal fish, and as such belong to the Queen, at least when they are caught within the precincts of the seas belonging to the Crown. Here then is an exception to the general rule of the common right of fishing in the sea contended for by the Defender; and it is carried so far that the property is held to be vested in the Crown in royal fish, by force of the prerogative, before they have been appropriated by their captors.

By our law, salmon is not regarded as a royal fish, like whales and sturgeons. It belongs to the captor, even although he has fished without a proper title. But Mr. Erskine explains, that although the salmon themselves are not *inter regalia*, but belong to those who catch them, "the fishing of salmon is a royal right" (*a*).

From an early period salmon-fishings have been regarded as of great national importance. This appears from the numerous Acts passed from time to time by the Scottish Parliament, as well as from other historical records. All our institutional writers acknowledge that *salmon-fishings* stand upon a different footing from that of what are called *white-fishings*. The right of the Crown to make grants of salmon-fishings in navigable rivers, or in the sea at their mouths, does not appear to be disputed by the Defender; and the right to make these grants proves that the Crown has, by common law, a right to salmon-fishing in the sea as well as in rivers.

It is not necessary for the Pursuers' argument to show that the right of the Crown extends to white-fishings in the sea, although Crown grants to such fishings, at least when followed by long possession, have been held by high authority to be effectual.

Salmon-fishings are in a very different situation. Not only are they more valuable, and probably for that very reason classed *inter regalia*, but they cannot be profitably carried on at a distance from the sea-coast—the salmon being generally caught in rivers, or in a part of the sea at mouths of rivers, or in the immediate vicinity of the seashore. For these reasons, salmon-fishings are, from their very nature, more easily appropriated or rendered susceptible of private property than white-fishings, in which much greater latitude has always been allowed.

Neither is it necessary for the Pursuers to trace the origin of the Crown's right to salmon-fishings to the Constitution of the Emperor Frederick, or any of the early authorities in the feudal law. In treating of the subjects which are *inter regalia*, that Constitution mentions, among other things, "*piscationum reditus*." The theory of the feudal law was to vest the whole fishings and other territorial rights in the kingdom in the feudal monarch.

Erskine says:—"All the subjects which were by the common law counted *res publicæ* are, since the introduction of feus, held to

(*a*) Ersk. ii. 1. 10.

be *inter regalia* or in *patrimonio principis*, as rivers, free-ports, and highways" (*a*). This applies also to the sea and the seashore, so far as they are capable of yielding profit.

In commenting upon the Constitution of the Emperor Frederick, Craig observes,—"Nam *salmonum piscatio apud nos inter regalia numeratur*, neque cuiquam hodie concessa videtur, nisi specialis ejus in concessione mentio fiat; antiquitus tamen sub nomine piscationis comprehendebatur etiam apud nos, quoties perpetua et ultra hominum memoriam possessio accesserat" (*b*). The same author, in treating of fishings, says:—"Bartolus duplex jus piscationis facit, unum quod a principe impetratur; quo quidem mihi innuere videtur, piscationem jus esse regale quod nisi a principe conferre non possit, nec in privatorum dominio esse; nam quæ antiquitus publica sive juris publici erant, hodie principi, qui Reip. personam repræsentat, ceu propria adjudicantur; alterum quod privati sibi ex diuturni temporis consuetudine cujus inchoatæ memoria non extat præscripserint. 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 piscationum inter regalia numerari*; quæ nisi expressa sit, non censetur concessa, nisi forte terræ in baroniam dentur" (*c*).

Stair draws the distinction between the vast ocean, which is common to all mankind for navigation and fishing, and the sea, where it is enclosed in bays or creeks, or within view of the shores, and where it may become proper for fishing. He says:—"The vast ocean is common to all mankind as to navigation and fishing, which are the only uses thereof, because it is not capable of bounds. But where the sea is enclosed in bays, creeks, or otherwise is capable of any bounds or meiths, as within the points of such lands, *or within the view of such shores*, there it may become proper, but with the reservation of passage for commerce as in the land: so fishing without these bounds is common to all, and within them also, except as to certain kinds of fish, such as herrings," &c. (*d*).

"Salmon-fishing is also *inter regalia*, and therefore passeth not ordinarily as pertinent, and ought to be expressed in the infeftment; yet in some cases salmon-fishing hath been found constituted without special expression, but only by the common clause, *cum piscationibus*, and long possession, June 29, 1593, *Lesley* v. *Ayton*, in which case it was found that salmon-fishing is only *inter*

(*a*) Ersk. 2. 6. 17.
(*b*) Craig's Jus Feudale, b. 1. t. 16. s. 24.
(*c*) Craig's Jus Feudale, b. 2. t. 8. s. 7.
(*d*) Stair, 2. 1. 5.

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &c.

Respondents' Case in the Court below.

regalia, as it is a casualty *fluminis publici*, such as navigable rivers, wherein there is a common use of passage and transportation; see also March 26, 1628, *Maxwell* v. *Portrack*. It is more dubious what the meaning of the clause *cum piscationibus* simply, or of fishing in salt-water, can import, seeing there are common freedoms of every nation to fish in the sea or in brooks or rivers *for common fishes*, and therefore needs no special concession from the King or other superior; but the use thereof may be, first, that it may be the title or foundation of prescription of *salmon-fishing*, not only in fresh-water, but in the sea, at the water-mouth, where they are frequently taken; and also, that in other fishings, if a prescription run of interrupting and hindering others to fish whatsoever sort of fish, it will constitute a property thereof, which could not consist without this clause or the like, as a title; neither could it be comprehended as annexis or connexis of lands, or as a servitude being a distinct right, having so little respect to land." (*a*).

Erskine, after referring to the controversy with the Dutch, in which they asserted that the sea, from its nature, cannot be appropriated, proceeds to observe:—"The British have, on the other hand, maintained that however incapable the ocean may be of property, yet the seas which wash the coast of any state are subjects that may be as fitly appropriated to private uses as rivers, bays, creeks, &c., and that in fact our Sovereigns are lords or *domini* of the British seas which surround this island; in consequence of which only it is that treasures brought up from the bottom of those seas or wreck-goods found floating on their surface, belong to the Crown" (*b*). The same writer says:—"Salmon-fishing is also a *jus regale*, and therefore is not carried by a charter without an express clause. Yet by our uniform practice, the common clause *cum piscationibus* is a sufficient title for constituting a right to salmon-fishings by prescription, so that where the vassal has been in the uninterrupted possession of it for forty years, such possession, joined to the general clause, establishes a right to that '*regale*'" (*c*).

Mr. Ross, in treating of the original charter, makes the following remarks (*d*):—"Common fishings in public rivers and the sea were preserved in a manner by nature to mankind in general; but the pleasure of killing deer, and the profit afforded by salmon, attracted the notice of princes, and were placed *inter regalia*. Salmon always was an article of great moment in Scotland, and therefore practice distinguished between them and the white fish. *Salmon-fishings in the sea are not comprehended under the general word piscationibus. It behoved them to be specially granted.* The rule in white-fishing was, that they belonged to the proprietor of the coast. If he had been in the immemorial use not only of fishing himself,

(*a*) Stair, 2. 3. 69.
(*b*) Ersk. 2. 1. 6.
(*c*) Ersk. 2. 6. 15.
(*d*) 2 Ross's Lectures, 173.

but of preventing others, then the general term *piscationibus* was held as a title sufficient to continue such possession."

Mr. Bell, our latest institutional writer, in treating of salmon-fishing, says:—"The right to fish salmon otherwise than by angling within sea-mark, or where the sea ebbs and flows, or in rivers, is *inter regalia*. This right is communicable by grant" (*a*). "The right of fishing for salmon otherwise than by rod in rivers or within sea-mark, where the sea ebbs and flows, belongs to the Crown, and is communicable to subjects only by grant. The right may be given either with the land or separately. The royal grant is, 1st, *cum piscatione salmonum*, which vests the right directly, the extent depending on the limits expressed, and the constitution of the grant; or, 2nd, *cum piscariis* or *cum piscationibus*, which grounds a title for prescribing a right of salmon-fishing, provided the possession is by the exercise of fishing salmon by net and coble, not merely by rod and spear" (*b*).

It has sometimes been made a question whether the Crown can confer, or a subject acquire, a right to white-fishings in the sea.

In the *Duke of Portland* v. *Gray* (*c*), Lord Corehouse said:—"It is settled law that a right to fish oysters and muscles in the sea from the scalp or bed to which they are attached may be appropriated. There are many grants in Scotch charters of a right of fishing white or floating fish in the sea, the legality of which, though not expressly recognized, seems to have been taken for granted repeatedly in the proceedings of the Court. Lobsters hold an intermediate place between oysters and muscles on the one hand, and floating fish on the other." The Crown charter in favour of the Defender, Mr. Gammell, contains an express grant of a right of white-fishings in the sea.

In *Leslie* v. *Ayton* (*d*), "salmon fishings were found to be *inter regalia* within the sea-mark, or where the sea ebbs and flows, or where salt-water comes, or where the fishing is with a coble or trail net, in all which cases it was found to require express disposition, otherwise than it passes under the clause *cum piscationibus*." Again, in the case of *Gairlies* (*e*), "the Lords found that salmon-fishing was *regale* where the sea filled or salt-water came, or where the fishing was with a coble or a trail-net. But where the sea came not, or the fishing was not with a coble, they found that the clause *cum piscatione in verbis dispositivis* might comprehend it.

There are numerous reported cases, both of an ancient and modern date, where charters contain a general grant of lands *cum piscationibus tam in mari quam aquis dulcibus;* and this has been

(*a*) Bell's Prin. 4th ed. s. 671. p. 259.
(*b*) Bell's Prin. 4th ed. s. 1112. p. 409.
(*c*) Nov. 15, 1832; 11 S. & D. 14.
(*d*) June 29, 1593; Mor. 14249.
(*e*) July 30, 1605; Mor. 14249.

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &c.

Respondents' Case in the Court below.

held to give right to salmon-fishings, at least where the title has been fortified by possession of forty years (*a*). There are also many examples of express grants of salmon-fishings in the sea in Crown charters, clearly showing that, according to the usage and understanding of the country, such fishings are *inter regalia*, and can only be claimed by a subject under a title flowing from the Sovereign.

In the case of *Kelly* v. *Ramsay* (*b*), a question was raised whether a clause *cum piscationibus*, in a Crown charter, conferred an exclusive privilege of oyster-fishing in the sea; and from the report it will be seen that the Court expressed a clear opinion upon the question now under discussion. It proceeds thus:—*Salmon fishing is the only species of fishing in the sea which is universally allowed to be capable of a grant from the Sovereign.* White-fishings in the sea are said to be common to all the subjects. The same view was taken by Lord Chancellor Eldon in the *Earl of Kintore* v. *Forbes* (*c*). There a complaint was made by the Earl of Kintore and other proprietors against the use of stake-nets by Mr. Forbes and others, who held grants of salmon-fishings from the Crown *ex adverso* of their estates, which were situated for several miles along the sea-shore northward of Aberdeen. It was decided that the Pursuers of that action had no title to challenge the use of stake-nets on the proper shore of the sea by parties holding grants from the Crown. Lord Eldon observed:—"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 in the river Don have a right to complain of it, and on that ground to sustain this 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, namely, by the use of stake-nets, that is a question between them and the Crown; the Crown may have a right to complain that the exercise of the right conveyed by the Crown has, in that instance, been exceeded; and possibly, under such circumstances, the Crown might, by its public officer, institute some proceeding against them; upon which, however, I wish carefully to abstain from expressing any opinion; but the proprietors of the fisheries on the Don have nothing to do with that."

(*a*) See Campbell, Feb. 16, 1610; Mor. 14250.
(*b*) Nov. 22, 1776; 5 Brown's Sup. 445.
(*c*) May 31, 1826; 4 S. & D. 641; affirmed, 3 W. & S. 267.

In the case of the *Earl of Fife* v. *Magistrates of Banff* (*a*), the town of Banff held a charter from James VI., containing a grant of salmon-fishings in the sea, extending along the coast about a distance of two miles. They granted a conveyance to the Earl of Fife of certain salmon-fishings in the sea, including those called Middle Shot, under a restriction that he should not fish within a space of 200 feet from the mouth of the river Dovern. The Earl of Fife had exercised the salmon-fishings in the sea, in the eastern bay between Banff and M'Duff, but had never fished in the western bay between Banff and the Burn of Boyndie. A dispute arose between the Town and the Earl as to the extent of his right; and the case is important as showing that the town of Banff had under their royal charters a grant of the salmon-fishings, not only in the river Dovern, but also in the sea, *ex adverso* of the whole liberties of the burgh, originally extending to about two miles along the coast, while the Earl of Fife had also under his title certain salmon-fishings in the sea, at some distance from the point where the Dovern falls into the ocean.

The Defender has no general title to fishings, either in the sea or elsewhere. His right is limited by his charter to "the white-fishings on the sea adjacent to the said lands."

The Pursuers have put into process printed abstracts from the Records of Retours to Chancery, and Crown charters, containing specimens of numerous grants of salmon-fishings in the sea or salt-water on the coast of Aberdeen, Banff, Ross-shire, and other maritime counties in Scotland, both before and since the Union.

By the first section of the 7 & 8 Vict. c. 95. it is enacted, that if any person, *not having a legal right or permission from the proprietor of the salmon-fishery*, shall, from and after the passing of this Act, wilfully take fish from, or attempt to take, or aid or assist in taking, fishing for, or attempting to take in or from any river, stream, lake, water, estuary, frith, sea-loch, creek, bay, or shore of the sea, *or in or upon any part of the sea, within one mile of low-water mark in Scotland*, any salmon, grilse, sea-trout, whitling, or other fish of the salmon kind, such person shall forfeit and pay a sum not less than 10*s.* and not exceeding 5*l.* for each and every such offences, and shall, if the Sheriff or Justices shall think proper, over and above forfeit each and every fish so taken, and each and every boat, boat-tackle, net, or other engine used in taking, fishing for, or attempting to take fish as aforesaid; and it shall be lawful for any person employed in the execution of this Act to seize and detain all fish so taken, and all boats, tackle, nets and other engines so used, and to give information thereof to the Sheriff or any Justice of the Peace, and such Sheriff or Justice may give such orders concerning the immediate disposal of the same as may be necessary.

(*a*) Nov. 27, 1829; 8 Sh. 137.

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &C.

Respondents' Case in the Court below.

This Statute demonstrates that salmon-fishings in the sea belong exclusively to those proprietors who have a legal right to them, and that there is no foundation for the theory that the right of fishing for salmon in the sea is a privilege belonging to, and which may be exercised by all British subjects without distinction.

The Defender refers to various English cases, and also to Blackstone and Chitty, for the purpose of showing that, "in navigable rivers, and in the sea, the right of fishing is common to the lieges, without restriction." These authorities, however, plainly prove too much, because they imply that in England no Crown grant to salmon-fishings will be effectual even in navigable rivers,—a position which the Defender admits is quite untenable in Scotland, as he does not contest the right of the Crown to make such grants in navigable rivers in this country.

According to all the best authorities, the right of fishing for salmon is, by the law of Scotland, a *jus regale*, and belongs only to the Crown or its grantees; and this holds both in salt-water and in fresh, in rivers and on the sea-coast. It is well known that this fish is unfitted to remain for a length of time either in fresh water or in salt, and that it passes alternately from the one to the other. It ascends to the sources of rivers, and enters the smallest stream, in order to deposit its spawn, and to get rid of the animalculæ which infest it, if it remains too long in the sea; but if it be detained in the fresh water, the body wastes away, and the animal becomes unfit for food, and perishes of disease.

In addition to the preceding Case, the Respondents lodged the following pleas in law:—

I. 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.

II. 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.

III. The Defender, Mr. Gammell, by pleading under his alleged title of barony, and by having acted or attempted to act thereon, and to grant the alleged lease of the fishings in question, is barred from challenging the right of the Crown to such fishings; and in any view, his pleas on this head are inconsistent with, and exclusive of, the pleas maintained against the title of the Pursuers.

IV. The Defender has no right or title to salmon-fishings in the sea opposite the estate of Portlethen, or in any part of the sea-coast adjoining thereto, either under his pretended title of barony or otherwise.

V. In the circumstances of this case, the pleas maintained by the Defenders are groundless and untenable; and the Pursuers are entitled to decree, in terms of the conclusions of the Summons.

The Case lodged on behalf of the Appellants in the Court below was substantially as follows:—

Appellants' Case in the Court below.

By the law of nature the sea is *inter res communes*, and all mankind have a common right to the enjoyment and use of it. This is the doctrine of the Roman law, as delivered in the Pandects (*a*): —"Et quidem naturali jure omnium communia sunt illa: aër, aqua profluens, et mare; et per hoc litora maris." "Item, Nemo igitur ad litus maris accedere prohibetur piscandi causâ; dum tamen villis, et ædificiis, et monumentis abstineatur; quia non juris gentium, sicut et mare, idque et Divus Pius piscatoribus Formianis et Capenatis rescripsit."

"Mare commune omnium est, et litora, sicut aër. Et est sæpissime rescriptum, non posse quem piscari prohiberi" (*b*).

Maritime nations have from the earliest periods appropriated parts of the ocean along their coasts, and subjected them to the general laws and regulations of the state; but *no right of property was ever maintained.*

In the great dispute which arose in the time of Charles I., between England and Holland, as to the dominion of the narrow seas, Selden, in his treatise, entitled "*Mare Clausum,*" written in answer to the work of Grotius, called "*Mare Liberum,*" maintains the doctrine that a nation may appropriate the sea, and may vindicate its right to the dominion thereof, in the same manner as it may appropriate a newly-discovered island.

Vattel and other great writers of the same period likewise maintained the doctrine of *national* appropriation.

The whole doctrine to which the observations now made apply is summed up by Craig in the following passage:—"Juris autem humani res rursus subdividuntur, ut quædam sunt publicæ res, quædam universales, quædam nullius, quædam privatæ, sive singulorum. De his singulis dicendum. Publicæ, quæ vel omnium hominum vel gentium communes sunt, ut aër, mare, litus, flumen, viæ, itinera publica. Quod ad aërem pertinet, is ita omnium communis est, ut nemo ab ejus usu prohiberi possit, neque enim alteri vendi potest, denique omnino in commercio non est. Quod ad mare attinet, licet adhuc ita omnium commune sit, ut in eo navigari possit, proprietas tamen ejus ad eos pertinere hodie creditur, ad quos proximus continens; adeo ut mare Gallicum id dicatur, quod litus Galliæ alluit, aut ei propius est quam ulli alii con-

(*a*) Corpus Juris, lib. 1. tit. 8. s. 4.
(*b*) Lib. 13. ff Tit.

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &c.

Appellants' Case in the Court below.

tinenti. Sic Anglicum, Scoticum, et Hibernicum, quod propius Angliæ, Scotiæ, et Hiberniæ est. Ita ut reges inter se quasi maria omnia diviserint, et quasi ex mutua partitione alterius id mare censeatur, quod alteri propinquius et commodius est; in quo si delictum aliquod commissum fuerit, ejus sit jurisdictio qui proximum continentem possideat; isque suum illud mare vocat." Craig then proceeds:—"Piscationes vero, quæ in proximo mari fiunt, procul dubio eorum sunt qui proximum continentem possident. Itaque non sine summa injuria nostra Belgæ circa nostras insulas piscantur" (*a*).

Craig is talking here of national, not of private rights,—not of those individuals who may possess the feudal right of the adjacent soil, but of nations. This is clear from the sentence which immediately follows, where he distinguishes and particularizes the Gallic or French sea as being nearer to France than any other country. "Sic Anglicum, Scoticum, et Hibernicum, quod propius Angliæ, Scotiæ, et Hiberniæ est."

The right of fishing in the adjoining sea is given by Craig to those who possess the nearest continent; that is, to the same parties to whom the property of the sea, so far as it can be appropriated, has been attributed.

These rights are *nominally* vested in the Crown, because the Crown protects the property of the nation. The Crown possesses the land in sovereignty, and so also it possesses the British seas.

The doctrine of Erskine is precisely the same:—"If our kings have that right of sovereignty in the narrow seas which is affirmed by all our writers, and, consequently, in the shore as an accessory of the sea, *it must differ much in its effects from private property*, which may be disposed or sold at the owner's pleasure; *for the King holds both the sea and its shores as a trustee for the public.* Both, therefore, are to be ranked in the same class with several other subjects which by the Roman law were public, but are by our feudal plan deemed *regalia*, or rights belonging to the Crown" (*b*).

The claim of the Crown in the present case is based upon the assumed principle, that the public, and the Defenders as forming part of the public, have no right to fish for salmon in the sea, and that all such fishings in the sea belong exclusively to the Crown or its grantees.

The Pursuers (*c*) rely on the feudal law, as vesting in the Monarch certain *regalia*, unknown to the civilians, and among these, the right of fisheries; in particular the Respondents cite the Constitution of the Emperor Frederick, given in the *Lex Feu-*

(*a*) Craig, lib. 1. dieg. 15. s. 13.
(*b*) Ersk. book ii. tit. 1. s. 6.
(*c*) *i.e.* the Respondents.

dorum, defining and enumerating the *regalia*. That Constitution is given at length by Craig (*a*), who investigates and comments upon each separate head. The words are "*piscationum reditus et salinarum.*"

The most approved commentators on the Books of the Feus, explain that the *reditus* are not exacted in virtue of the Sovereign's right to fishings, but in recognition of his authority.

Reygerus, in his Thesaurus (*b*), treating of "Reditus vel vectigal piscationum," says:—"In quibus tamen piscationibus attendi consuetudinem dicit Alvaro, et licet flumina publica sunt communia, tamen protectiones et jurisdictiones eorum spectant ad Principem."

In commenting upon that portion of the Books of the Feus wherein *regalia* are treated of, *Vulteius* (*c*) says:—"Annotavit hoc loco Cujacius *usurpatione* tantum defendi posse fiscum, *qui sibi vindicavit piscarias contra jus gentium.* Hinc *feudi dominum non posse subditis prohibere piscationes* tradunt Jacobinus et alii, quod magis commune asserit Menochius (Consil. 298, No. 20-1) sed egregie declarat Sixt. 2, de Regal. 18." The passage of Menochius here cited is in these terms:—

"Ea autem quæ juris naturalis vel gentium sunt, *Princeps tollere non potest.* Non licere uni ex commitibus, prohibere alios comites et convassalos piscari quovis in loco ipsius comitatus tum quia singuli censentur domini ex quo non dominium feudi sed jurisdictionis exercitium tantummodo fuit divisum, et ideo par in parem non habet imperium tum etiam quia *princeps et feudi dominus non potest subditis* (*quod majus est*), *prohibere piscationes quæ juris naturæ et gentium censentur;*" and Vulteius, p. 71, thus expresses himself:—"Et sicut viarum publicarum usus communis est, ita etiam fluminum publicorum usus jure gentium manet communis, atque adeo etiam jus piscandi et navigandi et similia, nisi forte imperator id prohibuisset per doctrinum Bartolini, quam sententiam pluribus probat Rauchbertus—aut uni jus piscationis vendidisset aut ex certa scientia concessisset, *tametsi hæc limitatio videatur satis esse dura, usui et juri gentium repugnans, et legibus ac constitutionibus Imperatorum contraria,* ut scribit Peregrinus." So likewise the learned Peregrinus:—"Notandum est, quod maria Principum sunt, respectu jurisdictionis, et protectionis, *usus verum eorum est publicus, proprietas autem est in nullius bonis*" (*d*). Peregrinus adds:—"Quibus expresse cavetur usum viæ publicæ et fluminis publici, publicum esse jure gentium, *ac ideo interdici non posse, liberumque esse uni cuique, per publica flumina navigare, et omnibus jus piscandi, commune esse* in flumenibus publicis et porti-

(*a*) Craig, lib. 1. dieg. 16. s. 8.
(*b*) Voce Regalia, p. 418. s. 25.
(*c*) Lib. 1. p. 75. s. 18. *Piscationum reditus.*
(*d*) De jure et privilegii fisci, lib. 1. s. 17. p. 3.

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &c.

Appellants' Case in the Court below.

bus, quo circa principum prohibitiones adversum licentiam hanc communem, jure, et usu gentium universali probatam et deinde per leges principum confirmatam, non videntur *juris auctoritate subnixa, sed de facto, et contra jura, idcirco* temperandæ ex causa veluti ut prohibere possint, non solventibus vectigal indictum vel ex aliqua alia honesta causa" (*a*).

The general right of the subjects of a state to fish in the sea in the exercise of that freedom which cannot be abridged for the advantage of any particular individual, is declared by Pothier, in words not less sound in principle than universal in their application:—"*La mer étant du nombre des choses communes, dont la propriété n'appartient à personne et dont l'usage est permis à tout le monde, il a toujours été, et il est encore permis à tout le monde d'y pécher*" (*b*).

The same view of the subject is taken by Craig in his gloss upon this part of the Emperor's Constitution:—De piscationibus et eorum reditibus, quomodo inter Regalia connumerari possint, inter gravissimos auctores controvertitur *cum jus piscandi tam in mari quam in fluminibus sit publicum, et a jure gentium introductum.* Nos non tam hujus quæstionis solutionem, quam quid apud nos in usu servetur requirentes, per piscationum reditus, non quascunque piscium commoditates, *sed tantummodo salmonum, qui in fluminibus capiuntur, intelligendas putamus*" (*c*). The exception stated by Craig as to salmon-fishings in rivers will be afterwards considered, but the text lays down the law broadly and clearly, that the right of fishing in the sea is a right belonging to the public, and given them by the law of nations,—that is, by the law of nature.

Craig negatives the idea that any duty or custom could be levied by the monarch upon fishings in the sea of any kind whatsoever.

The right of the Crown, therefore, cannot stand upon principles of general law. Nor can it be supported upon that text in the constitution of the Emperor Frederick, founded upon by the Pursuers, as the origin of the feudal right claimed.

It is not only useful, but necessary, to ascertain whether such a claim is permitted or known in England.

The *regiam majestatem*, copied as it was from the *regiam potestatem* of Glanville, proves that the royal authority in both countries was founded upon similar principles, and must have been liable to the same restrictions.

Mr. Chitty, treating of the regal prerogative, lays it down that the King possesses sovereign power in all seas adjoining his dominions. This prerogative power is vested in the King, as the protector of his people and guardian of their rights. It is sub-

(*a*) De jure et privilegii fisci, lib. 1. s. 22.
(*b*) Traité de Propriété, 40.
(*c*) Craig, lib. 1. dieg. 16. s. 38.

servient, however, to those *jura communia* which nature and the principles of the constitution reserve for His Majesty's subjects. It can neither prevent them from trading *nor fishing* (*a*). The same writer further affirms:—"By implication of law, the property in the soil under these public waters is also in the King. But in this, as in most other instances, the prerogative does not counteract or interfere *with the natural right of the public to fish in the sea*, in arms of the sea, and in creeks and navigable rivers, and to take fish found on the shore between high and low water mark. This is one of the *jura publica or communia*, which never was vested exclusively in the crown, and of course, is not to be considered as a regal franchise" (*b*). Again, he says:—"*In the sea the right of fishing is common to the lieges without restriction*" (*b*).

The right of the public to fish in the sea is clearly stated:—"But notwithstanding the King's prerogative in seas and navigable rivers, yet it hath been always held, *that a subject may fish in the sea; for this being a matter of common right, and the means of livelihood, and for the good of the commonwealth*, cannot be restrained by grant or prescription" (*c*).

In *Warren* v. *Mathews* (*d*), *per Curiam*, every subject of common right may fish with lawful nets, &c., in a navigable river as well as in the sea, and the *King's grant cannot bar them thereof;* but the Crown only has a right to royal fish, and that the King only may grant.

In *Carter* v. *Murcot* (*e*), it was maintained that "Every subject of common right may fish with lawful nets, and in a navigable river as well as in the sea, and the King's right cannot bar them thereof." The subject has a right to fish in all navigable rivers, as he has to fish in the sea. In a case of a river that flows and reflows, and is an arm of the sea, the right of fishing is *primâ facie* common to all.

In *Ward* v. *Cresswell* (*f*), Chief Justice Willis said:—We are clearly of opinion that THE PRESCRIPTION IS VOID, because the right claimed, as annexed to certain tenements, is a general right for all the subjects of the kingdom."

The Defenders will now proceed to show that the invasion of the public right has been, according to the authorities, confined to the salmon-fishings in rivers, and has not been extended to those in the sea.

Neither Stair nor Erskine afford the slightest support to the present claim. Their *dicta* are entirely confined to salmon-fishings in rivers, and their general doctrines are opposed to any inter-

(*a*) Chitty on the Prerogative of the Crown, 173.
(*b*) Chitty, 142.
(*c*) 5 Bacon's Abridg. 498, "Prerogative."
(*d*) 6 Mod. 73.
(*e*) 4 Burrows' Rep. 2163.
(*f*) Willis' Reports, 265.

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &c.

Appellants' Case in the Court below.

ference with the right of the public to fish in the sea for salmon or any other species of fish found therein.

Such is the doctrine of the institutional writers upon the law of Scotland. The Defenders, in a case of this importance, must be permitted to quote the doctrine taught by the late Baron Hume in his Lectures upon Scots' Law (*a*), which is perfectly consistent not only with the principles above stated, but also with those more learned constitutional lawyers who have treated more largely of monarchical prerogative. Treating of that branch of the *regalia*, which, by the Roman law, comprehended *res publicæ*, he taught "That the King by no means holds these things in absolute property; on the contrary he holds them as *trustee and guardian* only. In this view he holds them not as an individual, but as supreme magistrate, and he does so, that by *the awe of his name*, they may be the *better protected for public use*."

The King, however, cannot make any grant which will apply farther than the shore, and *so he cannot make any grant which will apply to the fishes of the sea*. Upon this principle, the Court reduced a feu, granted by the Magistrates of Edinburgh, over part of the sands of Leith, in the case of the *Magistrates of Edinburgh v. Tod and Stoddart*, 3rd July 1793, N.R. Where, however, the King has given a grant of sea-fishing, it will be effectual to the granter, if it has been followed by long and immemorial possession. —This is Stair's opinion. The public, by permitting such grants to have so long effect, are presumed to have waived any right of challenge. Hence the numerous grants of oyster-fishing, lobster-fishing, salmon-fishing, at the mouths of rivers, which are enjoyed by different persons, and which rest on no other ground than that of a royal grant *followed by a very long and undisturbed possession*. As to fish in a public river, the contiguous heritors, as such, have not the exclusive right of fishing for them; but this right is equally enjoyed by all the lieges indiscriminately. As to small fishes, such as trouts and the like, all the lieges are entitled to resort to, and take them from *any public river*, in any fashion or way which they incline, but the same cannot be said to any material extent at least with regard to salmon-fishing. This forms one of the *regalia*, and this fish cannot be taken in a particular way, at least but by those who possess a royal grant for the purpose. This fish, however, is not accounted a royal fish, in any proper sense of the word, for every heritor is entitled to angle for it *ex adverso* of his own property. It is the particular wholesale way of fishing by net and coble, or by curracks or cruives, or standing nets, which is the subject of the royal grant. In a public river, any person whatever is entitled to angle for, or take by rod or spear, such quantities of salmon as he may be able to catch. It

(*a*) Notes of Hume's Lectures.

is, therefore, only to the profitable way of fishing by net and coble, or by cruives (this can only be understood of a river) that any royal grant is requisite.

The Defenders will now offer a few remarks upon the authorities referred to by the Pursuers.

The institutional writers are quoted and relied upon in support of the claim made in the summons. The Defenders have already referred to these passages, and it is unnecessary to add further argument. The doctrine laid down and the statements made are relied upon by the Defenders in support of their argument.

A passage is quoted from the Lectures of Mr. Ross, to prove the right of the Crown to the salmon-fishings of the sea. But he is not an authority upon questions of general law.

The next authority quoted on the other side is that of the late Professor Bell, who, in his Principles, gives a different version of the law to that of Baron Hume. Professor Bell refers to the case of *Ramsay*, November 22, 1766 (*a*), which is reported by Tait. The question was one as to a right of oyster-fishing in the Frith of Forth, and it does not appear that salmon were ever mentioned through the whole of the discussion. In reporting the case, however, the reporter introduces it with a dictum of his own, in these words :—"Salmon-fishing is the only species of fishing in the sea which is universally allowed to be capable of a grant from the sovereign."

It appears from the opinions of the Bench in this case, as reported by Hailes (*b*), that much doubt was thrown upon the power of the Crown to make any grant of fishings *in alto mare*, and there is no pretence for saying that the other point was ever spoken to.

The Pursuers rely upon the cases *Leslie* v. *Ayrtoun*, June 20, 1593; and *Gairlies* v. *Torhouse*, July 13, 1605 (*c*).

Both these cases have reference to fishings in rivers or waters where "salt-water comes;" and the judgment appears to be that, in such cases, the right of salmon-fishing required express disposition, otherwise it passed under the clause *cum piscationibus*.

Mackenzie, May 20, 1830, was also quoted. Here interim interdict was granted against a party fishing by any other mode than the ordinary one of net and coble. This also was a case as to fishing in a river, and is not applicable.

The Pursuers quote the note of Lord Corehouse, in the case of the *Duke of Portland* v. *Gray* (*d*). This was a question as to the right of lobster-fishing along the coast of Ayrshire, *ex adverso* of

(*a*) 5 Brown, Supplement, 445.
(*b*) Vol. ii. 722.
(*c*) Morrison, 14249.
(*d*) Nov. 15, 1832; 11 S. & D. 14.

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &c.

his Grace's estate; he was in possession of a barony, with the right of fishing salmon *et aliorum piscium*. His Grace averred exclusive right to the lobster-fishing.

Appellants' Case in the Court below.

The general question as to the right of the Crown was not determined, and was considered one of difficulty, both by the Lord Ordinary and the Court.

The next case referred to is that of the *Earl of Kintore* v. *Forbes*, where the Lord Justice Clerk delivered the following opinion:—Such, then, being the state of the authorities in regard to these statutory enactments, in none of which is there to be found any indication of their being held to apply to the proper coasts of the ocean, and as it is manifest that no decision has been pronounced tending to establish the illegality of stake-nets, when used not in rivers, or estuaries, or water mouths, but on the shores of the sea itself, it appears to me that the action at the Pursuer's instance cannot be maintained, although I reserve my opinion as to nets placed so as to intercept the entrance of salmon into the river according to the principle of the ancient case mentioned by Balfour (*The Queen* v. *Lady Innes*, April 12, 1559), but which is totally independent of the legality or illegality of the nets themselves.

The Defenders are not bound to say what may be the effect of a grant of salmon-fishings followed by exclusive possession for forty years, or from time immemorial.

The statute 7th and 8th Victoria, referred to by the Pursuers, confers no right.

In the second place, your Lordships cannot grant the interdict demanded without interfering with the rights of the Defenders as British subjects, and preventing and depriving them of the exercise of rights and privileges which are common to the public, and for which, as they are now challenged, the public have a right to demand your protection.

Lord Ordinary's Judgment.

Upon considering these cases, the *Lord Ordinary* on the 15th of January 1850, decerned and declared in terms of the first conclusion of the summons of declarator.

On the 2nd February 1850 a reclaiming note was presented to the Second Division against the Interlocutor of the *Lord Ordinary*; and afterwards their Lordships of the Second Division suggested that the Respondents should put in specific pleas in law; and they also gave liberty to the Appellants to give in additional pleas in law if they thought fit.

In pursuance of this suggestion, the Respondents lodged the following pleas in law :—

Respondents' Pleas in Law.

I. The right of salmon-fishing in the sea around the coast of Scotland belongs exclusively to the Crown, and forms part of its hereditary revenues.

II. 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.

III. The Defender, Mr. Gammell, by pleading under his alleged title of barony, and by having acted, or attempted to act, thereon, and to grant the alleged lease of the fishings in question, is barred from challenging the right of the Crown to such fishings; and in any view, his pleas on this head are inconsistent with, and exclusive of, the pleas maintained against the title of the Pursuers.

IV. The Defender has no right or title to salmon-fishings in the sea opposite the estate of Portlethen, or in any part of the sea-coast adjoining thereto, either under his pretended title of barony or otherwise.

V. In the circumstances of this case, the pleas maintained by the Defenders are groundless and untenable; and the Pursuers are entitled to decree, in terms of the conclusions of the summons.

On the other hand, in pursuance of the allowance of the Court, the Appellants put in the following additional pleas in law :—

Appellants' Pleas in Law.

I. 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.

II. 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.

III. 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 thus matured was then argued before the Second Division, who, abstaining from decision, and availing themselves of the Act of Parliament in that behalf, requested the opinions of the other Judges

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &c.

upon the several questions raised. Accordingly, in due time the following opinion was returned by the consulted Judges:—

Opinion of the consulted Judges below.

There can be no question here regarding the public right to *the sea* in all its uses, including that of fishing. Such question might have arisen if the Crown had sought to prohibit Mr. Gammell, or his tenants, from fishing in the high seas from shipboard, at any distance from the coast, or to deprive them of any other rights which would have been common to foreigners on the principles of international law. But how can it be said, with any show of reason, that those principles, within whatever distance from the coast they may be held to operate, could ever warrant foreigners to plant bag-nets or stake-nets, or fish with net and coble, on the coast of Aberdeenshire? or even that such interference with that part of the coast would be competent to any British subject without a Crown grant either expressly conferring it, or a grant of lands understood in law to imply it? The very nature of the fishing shows that it is essentially connected with the shore. It is a territorial right attached to the land, and of course subject to all the regulations by which such rights are limited, or conferred, or withheld, by the law of this country. There surely cannot be a doubt that the British Legislature might effectually regulate those modes of fishing without infringing any of the rules of international law; and accordingly, such regulations have been lately made by the Act of 7th and 8th Victoria, quoted in the pleadings. It is equally clear that the same authority might have put an end to them altogether. But while they remain in force, the question as to the parties in whom those rights legally reside is one which manifestly must be determined by the municipal law of Scotland, and that law alone.

According to the concurring testimony of all our law authorities, salmon-fishing is considered as a beneficial right of property, and is held to be vested in the Crown; or perhaps, speaking more properly, to remain with the Crown, unless it has been made the subject of special grant to a private party. It is needless to speculate on the circumstances from which this susceptibility of appropriation took its rise,—very probably from the value of the fish, combined with that peculiarity of its habits which rendered the operation of catching it in a great measure dependent on, or connected with, the possession of the adjacent shore. But certain it is, that by the law of Scotland it is a right of property; and, whether granted by or remaining in the Crown, a beneficial right. It is sometimes described, indeed, as being *inter regalia;* but the term, as so applied, is expressly laid down by the authorities as differing in meaning from its more general employment—as denoting the rights and duties of superintendence or control lodged

in the executive part of the Government. Mr. Erskine, in noticing the subject of *regalia*, 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 is expressed "(*a*). And after explaining the meaning of *regalia* in the larger sense, as comprehending all rights over the persons or estates of the subjects, he concludes the paragraph as follows :—" 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 "(*b*). And under the enumeration of the rights following under this description, he specifies salmon-fishing as a *jus regale ;* which is, therefore, not carried by a charter without an express clause. Indeed, there is one admitted quality of the Crown's right, which seems to us to be conclusive. If that right were confined to the mere sanction by the Crown of the taking of salmon by the proprietor of the adjacent lands, there might be some colour at least for the statement, that the sanction was granted *jure coronæ* in the exercise of its general powers of superintendence. But it is confessedly not so limited. In the very paragraph just referred to it is laid down :—" 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*." And it would be difficult indeed to see how, but for the assumption that the Crown has a patrimonial interest in salmon-fishings, the Crown could confer the right to turn them to account on a party who has no conceivable interest in, or connexion with, the matter, except through the medium of the Crown grant.

The only question, then, which can be said to raise any doubt, is the second, viz., whether there is such peculiarity in the local situation of these fishings on the open coast as to demand the application of a different principle. And here we consider the strict definition of the sense in which the terms are employed by the parties to be of importance.

The whole argument of the defender rests on the proposition, that fishings in the "*open sea*" are not vested in the Crown patrimonially or otherwise, and in truth are not a fit subject of appropriation at all. But the proposition is irrelevant to the matter now in dispute, when we attend to the sense in which the term "open sea" is there used. The authorities will all be found to bear reference to sea-fishings in the wide sense of the term—fishings which may be carried on from shipboard—and which, though in

(*a*) Lib. 2. tit. 6. s. 13.

(*b*) Lib. 2. tit. 6. s. 16.

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &c.

Opinion of the consulted Judges below.

one sense said to be on the coast of a nation, are conducted without touching or interfering with its territory.

But the question here relates to the right of fishing for salmon, in the sea indeed, but by operations implying connexion with the land. The supposition, that this is a public right open to all nations, is too outrageous to require any serious refutation.

Salmon-fishings within rivers and estuaries have been more frequently the subject of discussion and regulation, because those are the situations in which such fishings are generally carried on with the greatest ease and the greatest advantage. But there is no authority for the statement that the Crown's right has been limited to rivers and estuaries with the exception, perhaps, of a passage from a version of Hume's Lectures, which we must consider as apocryphal, as it contains various propositions in regard to salmon-fishing which are manifestly unfounded. Not only has the right to grant fishings in the sea been asserted by the Crown in the form of special grant, but such grants, when brought under the notice of our Courts, have been always tacitly admitted, and sometimes expressly recognized as good.

On this point, the documents printed for the Pursuer, are conclusive. Those grant the right of fishing, *tam in mari quam aqua dulci;* and in many of the cases there cannot be a doubt that the fishings so granted were beyond the limits of estuaries and inlets, and as much in the open sea as those *ex adverso* of the Defender's lands of Portlethen. Neither can it be said with any justice, that these grants are mere assertions of right, which never have been recognized by our Courts. So far from that, it would seem that, in the earlier cases, a grant from the Crown of the salmon-fishings in the sea, or *aquis salsis,* was held to be a more effectual transference of the *regale* from the Crown to the grantee, than the mere general grant of fishings; for instance, in the case of *Campbell* v. *Campbell* (*a*), "it was found, in an action of removing pursued by Sir Duncan Campbell of Glenurchy *contra* Alexander Campbell, prior of Ardchatton, that a sasine of a barony, or third part of a barony or lordship, disponed to Glenurchy, to be holden of the Earl of Argyle, did comprehend salmon-fishings, albeit the barony was not holden of the King; *speciall in respect the sasine bears him to be infeft in the haill fishings, as well upon the sea* as fresh waters, which was found to include salmon-fishings"—or as it is expressed in the other report—"an infeftment of lands, *cum piscationibus tam in mari quam aquis dulcibus,* found to be a sufficient right to salmon-fishing, albeit it made no mention of salmon-fishing, and the land was holden of the Earl of Argyle."

When the law had became more matured, in the case of *Straiton* v. *Scott and Fullerton* (*b*), Straiton of Kirkside had a grant of lands "*cum piscariis salmonum in mari infra limites et bondas dictarum*

(*a*) Morr. 14250. (*b*) 5 Brown's Sup. 299.

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &C.

Opinion of the consulted Judges below.

terrarum;" another party, Fullerton of Kinnaber, had a right of salmon-fishing "*in aqua de Northesk tam intra fluxum maris tam extra eundem in quavis parte dictæ aquæ, ex adverso dictarum terrarum, in baronia de Kinnaber;*" a third party, Colonel Scott, had originally had a fishing on the river, which, however, was not brought into question.

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; and if it could have been held that the Crown had no power to make such a grant with effect, there must have been an end to the question. But the Court having, by their Interlocutor, found that Straiton of Kirkside had the sole and exclusive right of salmon-fishing within the bounds and limits of the lands of Kirkside, but the judgment of the House of Lords ordered that in the Interlocutor, after the words (sole and exclusive right of salmon fishing) these words (*in the sea*) be inserted. One thing is fixed by this judgment, that Straiton of Kirkside had no right of fishing but "*in the sea,*" and that a grant of such fishing was effectual and exclusive. Accordingly (*a*) that was held to be the law in a subsequent case of the same kind, between the holder of a grant of a sea-fishing and the grantee of a river-fishing which had changed its course. "As to the fishing in the river, it was thought that at low water the Defenders had an exclusive right to it, notwithstanding the change in the course of the river, agreeably to the decision December 1752, *Straiton* v. *Fullerton*, as varied by the judgment of the House of Lords, and that at high water the fishing in the river so far as covered by the sea opposite to the Pursuer's property was included under the sea-fishing."

In the Earl of Fife against the Magistrates of Banff, 27th November 1829 (*b*), the rights of salmon-fishing *in the sea* were brought under the notice of the Court; and though in that case both parties founded upon their right to sea-fishing, and, consequently, neither had an interest to challenge the general title of another, the case is sufficiently good evidence of the practice and understanding of our Courts, in holding a grant of sea-fishing by the Crown to be effectual in constituting rights of property. The same remark may be made on the case of the Earl of Kintore against Forbes. There, it is true, the only question was, whether the statutes preventing the use of stake-nets applied to fishings in the sea held by grant from the Crown. But it seemed to be admitted on all hands that the Crown grant was in itself good; though the Pursuers raised one point, whether, independently of the statutes, the grantees of the fishing were, in virtue of the Crown grant, entitled to employ stake-nets. The Lord Chancellor, in noticing that point, laid it down that it was a question

(*a*) *Brodie* v. *Magistrates of Nairn*, 1796, June 4; Morr. 12830.
(*b*) *Earl of Fife*, Nov. 27, 1829; 8 S. 137.

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &c.

Opinion of the consulted Judges below.

entirely between the Crown and the grantees:—"*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, namely, by the use of stake-nets,—that is a question between them and the Crown;*— the Crown may have a right to complain that the exercise of the right conveyed by the Crown has, in that instance, been exceeded."

It appears to us, then, utterly desperate to maintain, in defiance of these various cases, that a right of salmon-fishing in the sea is not capable of being appropriated at all; and that it is essentially different in this particular from the right of fishing in rivers and estuaries; and upon this matter we cannot help thinking that the statute of the 7th and 8th Victoria (*a*), which has been so lightly treated by the Defenders in argument, is of the greatest importance.

We think nobody can read the statute without being satisfied that the Legislature understood that, by the law and practice of Scotland, salmon-fishing in the sea was a beneficial right, and a fit subject of proprietorship.

On all these grounds, it appears to us that the original defences, from the second to the sixth, both inclusive, as well as the three additional pleas in law, ought to be repelled.

(Signed) D. BOYLE.
J. H. MACKENZIE.
JOHN FULLERTON.
J. CUNINGHAME.
JOHN A. MURRAY.
JAMES IVORY.
A. WOOD.
P. ROBERTSON.
THOMAS MAITLAND.

With the preceding opinion Lords *Medwyn* (*b*), *Moncreiff*, and *Cockburn* concurred; but the Lord Justice Clerk *Hope* dissented from them all, as appears by the following opinion from his Lordship:—

Opinion of Lord Justice Clerk Hope.

The salmon-fishings are not here claimed as a *jus regale*, but as part of the *hereditary revenues* of the Crown. The Lord Ordinary and the consulted Judges put the right on the same footing as in regard to salmon-fishings in rivers, and the mouths of rivers.

(*a*) 7 & 8 Vict. c. 95.

(*b*) Lord Medwyn gave a very full and learned opinion (see 13 Sec. Ser. 854), concluding in these terms: "Upon the whole I concur with the Lord Ordinary, that a right of salmon-fishing in the sea is the property of the Crown, to be exercised by a subject only in right of a special grant."

And if that is so, the salmon-fishings in all the rivers in Scotland, so far as not directly the subject of grant, form part of the hereditary revenues of the Crown, may be caught and sold or farmed out by the Crown.

From the commencement of the argument it has appeared to me that two things have been confounded which are distinct. I mean *jura regalia* and the hereditary revenues of the Crown. In the Lord Ordinary's note I observe that he says, "he sees no room for making a distinction between the rights of the Crown to *make grants* of salmon-fishings in rivers, at the mouths of rivers, and along the coast of the sea."

The right to make grants of salmon-fishings in rivers is not equivalent to the proposition that all the salmon in the rivers of Scotland, if not granted out, form part of the hereditary revenues of the Crown. The right is derived from this, that a salmon-fishing being a *jus regale*, that is, one of the higher rights of property, supposed by fiction to be peculiar to the Monarch *personally*, for his own sport or pleasure, and so reserved from ordinary grants, must be specially given, in order to be devolved over to a subject. The common grant, *cum piscationibus*, followed by possession of salmon-fishing, which possession was, *ex hypotheci*, not intended or competent, is yet held to be equivalent to a special grant by the Crown. But no one has ever said the salmon in all the rivers in Scotland formed part of the hereditary revenues, that is, of the proper patrimony of the Crown. If so, no grant whatever would be competent, for then they would be struck at as alienations contrary to the statutes of the patrimony of the Crown. This, then, at the outset, brings out the distinction between the two separate matters, *jus regale* and the hereditary revenues or patrimony of the Crown. In the opinion returned to us, and which, as their united judgment, must carry such authority, I cannot discover whether, and to what extent, the views of their Lordships were directed to the distinction between, or the supposed identity of, *jura regalia* and the hereditary revenues of the Crown, although the practical result of the Interlocutor to be affirmed is to hold them to be identical.

But the character and history of the hereditary revenues of the Crown are well known.

In no statute or book of the Crown, and there are various as to the hereditary revenues of the Crown, is there one word which comprehends *jura regalia* as forming any portion of the hereditary revenues of the Crown, much less any mention of salmon-fishings in the sea. Neither among the grants rescinded as illegal and improvident is any grant of *jura regalia* ever noticed, although, most unquestionably, if the *jura regalia* were part of the patrimony of the Crown, and so inalienable under the Acts passed against alienation, and illegal at common law, there were most numerous grants of *jura regalia* which ought and would, on that supposition, have been set aside. I know not, on that supposition, how any of

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &C.

Opinion of Lord Justice Clerk Hope.

the extensive grants of heritable jurisdiction came to be effectual and recognized. But, again, if *jura regalia* form part of the hereditary revenues of the Crown, and if the salmon-fishings in the sea, along the sea-coast of Scotland, are part of the hereditary revenues of the Crown, and also salmon-fishings in rivers and mouths of rivers, then the whole grants of salmon-fishings in rivers, and those founded on as made in the sea, were all illegal and incompetent, being alienations of the proper patrimony of the Crown.

1. I apprehend that there is no authority whatever for holding salmon-fishings to be any part of the hereditary revenues of the Crown.

2. There is no authority for holding a *jus regale* to be a portion of the hereditary revenues of the Crown.

3. None of the *jura regalia* include, or were intended to include, salmon-fishings in the proper sea.

4. None of the cases afford any direct authority for the pleas of the Crown.

5. The right of the Crown to give such a grant will in no degree establish the proposition that the whole salmon-fishings along the sea-coast of Scotland form part of the hereditary revenues of the Crown.

6. The argument founded on the fact that grants have actually been made by the Crown of salmon-fishings, which are said to be in the sea, is inconclusive in point of principle, and weak as a matter of practice.

Most of the grants are really in friths, estuaries, or the mouths of rivers, or at the turn where the coast begins to trend off, and where it is difficult to say where the proper sands of the tidal river cease. This I believe to be the explanation of the expressions, of fishings as well in salt as in fresh water, or *in aquis dulcibus quam salsis*, or *in salsis aquis de Findhorn*, or as well in fresh water as in the sea.

That there are grants, however, which have been made of salmon-fishings in the sea proper, is undoubted. But considering the manner in which grants were obtained from the Scotch Exchequer, one is not surprised that proprietors asking for grants *ex adverso* of their own lands of salmon-fishings in the sea, to which the Crown never advanced any claim, should have got them whenever asked. The practice was stopped when Baron Hume went to the Exchequer; and I know, as a Crown lawyer, that the practice was stopped on the ground that such did not fall within the *jura regalia* of the Crown.

I see that a distinction is attempted to be taken between fishings *in alto mare*, as something different from the fishings along the sea-coast. That distinction seems to me wholly to fail, and in the authorities, "*in alto mare*" is used as contradistinguished from the sea in estuaries, but directly as applicable to the sea along the open coast of the island.

The pretension now advanced on the part of the Crown was matter of great surprise to me, and also to the individual (now the oldest member of the profession) who was the principal adviser of the Crown half a century ago (*a*).

Opinion of Lord Justice Clerk Hope.

The following judgment was pronounced :—

Judgment of the Full Court below.

6th March 1851.—The Lords, in respect of the opinions of the majority of the whole Judges, adhere to the Interlocutor reclaimed against, and repel the additional Pleas for the Defender given in since the date of that Interlocutor.

The Interlocutor of Lord *Murray* of the 15th of January 1850, and the judgment of the Inner House of the 6th of March 1850, formed the subject of the Appeal to the House.

The case was argued in the session of 1853, but no judgment was pronounced.

In the present session (1859) it was again argued, Mr. *Rolt*, Mr. *Anderson*, and Mr. *Hale* appearing for the Appellants; and the *Lord Advocate* (*b*), Sir *Richard Bethell*, and Mr. *W. M. James*, Q.C., for the Respondents.

Of the argument, a portion was derived from English law, and a still larger portion from foreign jurists. It will be found that the judgment of the House proceeds exclusively and avowedly on the law of Scotland, which (so far as relates to the regal right to salmon in the open sea, as distinguished from rivers and estuaries, and the regal right of fishing for salmon around the coast of Scotland,) is sufficiently discussed in the cases prepared for the parties respectively below, and more especially in the

(*a*) The Right Hon. Charles Hope (father of the Lord Justice Clerk), Lord Advocate early in the present century, and for many years the much venerated Lord President of the Court of Session, from which high office he retired in 1841.

(*b*) Mr. Baillie.

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &c.

profound opinions of the thirteen learned Judges whose views have already been set forth.

The following were the opinions delivered by the Law Peers :—

Lord Chancellor's opinion.

The LORD CHANCELLOR (*a*) :

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

(*a*) Lord Chelmsford.

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

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &c.

Lord Chancellor's opinion.

ordered cases, upon which he afterwards pronounced his Interlocutor, "decerning and declaring 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 Interlocutor 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 has 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

GAMMELL *v.* COMMISSIONERS OF WOODS AND FORESTS, &c.

Lord Chancellor's opinion.

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 similiar 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 says, "*Salmonum piscatio apud nos inter regalia numeratur, neque cuiquam hodie concessa videtur nisi*

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &c.

Lord Chancellor's opinion.

specialis ejus in concessione mentio fiat" (*a*). And in another passage of the same work (*b*), 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, 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,—"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.

(*a*) Jus Feudale, book 1. dieg. 16. sect. 38.
(*b*) Ibid. book 2. dieg. 8. sect. 15.

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &c. — *Lord Chancellor's opinion.*

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" (*a*). 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* (*b*), 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

(*a*) Bell's Principles, sect. 642. (*b*) 6 Bell's App. Ca. 500.

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &c.

Lord Chancellor's opinion.

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 to the salmon-fishings upon the coast, because the right is not at all connected with property in lands, as appears from Erskine, who 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" (*a*). 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 says (*b*):—

(*a*) Institutes, book 2. title 6. sect. 15.
(*b*) Jus Feudale, book 1. dieg. 15. sect. 15.

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &c.

Lord Chancellor's opinion.

'*Itaque piscationes mares proximi et insulæ et portus ut locari sic in feudum dari possunt.*' And sect. 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 showing grants of salmon-fishings prior to the Union, the Appellants try to get over 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 retours 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 Fraissisor,—"Salmon fishing and uther fischings of the yair of Aleak Callit Corrynagold and uther fischings

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &c.

Lord Chancellor opinion.

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 coasts," or "lying along the sea coast;" and with respect to the modern Crown Charters, 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, "*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 show the exercise of the right to grant these salmon-fishings in the sea, either as charters of *novo damus*, or as repetitions of grants in former charters.

In addition to these grants, several authorities were cited on behalf of the Crown to show 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 on 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 similiar 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

GAMMELL *v.* COMMISSIONERS OF WOODS AND FORESTS, &c.

Lord Chancellor's opinion.

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 dispute 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 here wrongdoers, 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 fishery; 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.

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &c.

Lord Chancellor's opinion.

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 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" (*a*). 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 & 8 Victoria, chapter 95, recognizes the legality of an individual right in a salmon-fishing in the sea by prohibiting any

(*a*) Institutes, book 2, title 6, sect. 13.

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &c.

Lord Chancellor's opinion.

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 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's opinion.

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, con-

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &c.

Lord Cranworth's opinion.

sidering 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 dare say 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 drying 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's opinion.

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

GAMMELL v. COMMISSIONERS OF WOODS AND FORESTS, &c.

Lord Wensleydale's opinion.

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's opinion.

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.

Interlocutors affirmed.

HOLMES, ANTON, AND TURNBULL—THE SOLICITORS FOR THE WOODS AND FORESTS.