



University of Dundee

Fishing or fish farming

Agnew of Lochnaw, Sir Crispin; Appleby, Thomas; Bean, Emma; Bunwaree, Priyal

Published in:
Environmental Law and Management

Publication date:
2021

Licence:
CC BY-NC-ND

Document Version
Peer reviewed version

[Link to publication in Discovery Research Portal](#)

Citation for published version (APA):
Agnew of Lochnaw, S. C., Appleby, T., Bean, E., & Bunwaree, P. (2021). Fishing or fish farming: the conflict between a Crown grant of salmon fishings in the sea and other Crown rights in the sea in Scotland. *Environmental Law and Management*, 31(5), 193-203.

General rights

Copyright and moral rights for the publications made accessible in Discovery Research Portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Fishing or fish farming: The conflict between a Crown grant of salmon fishings in the sea & other Crown rights in the sea in Scotland.

Sir Crispin Agnew of Lochnaw Bt QC (Scotland - non practising), Honorary Research Fellow, University of Dundee. *

Thomas Appleby, DPhil, Solicitor (non-practising) (qualified in England and Wales), Associate Professor in Property Law, University of the West of England, Bristol.

Emma Bean, PhD, Solicitor (non-practising) (qualified in England and Wales), Senior Lecturer in Property Law, University of the West of England, Bristol.

Priyal Bunwaree, MSc, LLM, Barrister (Non-practising) (qualified in England), Blue Marine Foundation.

Introduction

There is a rising concern over the impact of aquaculture, particularly salmon farming, on the aquatic environment.¹ Two Scottish Parliamentary investigations²³ revealed concerns over the environmental impacts of the industry, particularly with regard to the potential hazard to wild salmonids. Many pointed to regulatory complexity⁴ being a cause of the poor regulation. Representatives of the Crown Estate Scotland stated: “*We have the right bits and pieces, but they have not been put together in the right order...*”⁵ Yet it is the Crown which grants the leases of fish farms to their operators and therefore the Crown is where the ultimate responsibility for their impact sits. If changes to public controls are required, we must first fully understand the roles of the public agencies involved.

* Corresponding author: Sir Crispin Agnew of Lochnaw Bt., QC, CAgnew001@dundee.ac.uk

Ethical statement: No funding was provided for this article. The idea for the article arose from informal advice given by the first and second authors to the owners of salmon fishings in the sea affected by fish farms.

¹ Lucy Adams, ‘Is there a problem with salmon farming?’ (BBC, 20 May 2019) <https://www.bbc.co.uk/news/uk-scotland-48266480> accessed 20 January 2021; L Nippard and C Ciocan, ‘Potential impact of aquaculture effluents in Loch Creran, Scotland’ (2019) 69(1) *Vie et Milieu – Life and Environment* 47. <https://tinyurl.com/lochceran> (accessed 1 February 2021).

² Environment, Climate Change and Land Reform Committee *Report on the Environmental Impacts of Salmon Farming* (Scottish Parliament: 5 March 2018). https://www.parliament.scot/S5_Environment/Inquiries/20180305_GD_to_Rec_salmon_farming.pdf

³ Rural Economy and Connectivity Committee *Salmon Farming in Scotland* SP Paper 432 (Scottish Parliament: 27 November 2018).

⁴ *Ibid*, para 482.

⁵ *Ibid*, para 483.

In Scotland the matter is complicated by private rights to fish for wild salmon, granted historically by the Crown. In order to fully understand the role of the Crown in the rise of salmon farming in Scotland, this article examines the fundamentally important, but little researched, situation where the Crown has granted the right to fish for salmon and fish of a salmon kind to one proprietor, but then retains and uses, or grants out other rights in the sea or seabed to other users, leading to a competition of rights. While the rights which the Crown Estate (and now Crown Estate Scotland) frequently lease out include the right to use the sea bed for mussel farming, permanent moorings for shipping or yachts and for windfarm development, this article focuses on the right to use the sea bed for fish (namely salmon) farming. By investigating the competition between pre-existing salmon fishing rights and leases for salmon fish farms, as well as between those leases and the public rights retained by the Crown (of navigation, white fish fishing and use of the foreshore), the authors consider how the competition between these public and private rights could be reconciled. The benefit of focusing on this competition of rights is that reconciliation of the competition may be able to contribute to addressing the concern over the impact of aquaculture on the marine environment.

Part one examines the legal parameters of private rights of salmon fishing, considering the definition of “salmon”, the usual terms on which salmon fishing rights are granted in the sea and the legal extent of that right. Part two then examines how such rights operate in competition with other public and private rights in the sea or seabed and foreshore derived from the Crown. Part three finishes with a consideration of how to reconcile the competition of rights identified in part two.

Part One: The legal elements of a private salmon fishing right

1.1 The definition of “salmon”

There is no settled definition of salmon at common law, although Lord Johnston in *Lord Advocate v Balfour*⁶ was of the view that “the general practice has been, both by inclusive and exclusive possession, to interpret the Crown's direct and the subject's derivative right of salmon fishing as a right also of sea trout fishing” but said the matter

⁶ 1907 SC 1360 at 1363.

needed proof; proof was not held because the issue was academic in that case. However, “salmon” are defined in the various Salmon Acts for the purposes of those Acts since at least 1828. The Salmon Fisheries (Scotland) Act 1828⁷ applies a Close Time to “salmon, grilse, sea trout ... fish of the salmon kind” and the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003⁸ (“Salmon Act 2003”) now defines salmon as “‘salmon’ means all fish of the species *Salmo salar* and migratory fish of the species *Salmo trutta* and commonly known as salmon and sea trout respectively ...”⁹. However, Lord Johnston commented that “the whole migratory salmonidae¹⁰ are protected by statute (if, as I think, this is the case) is not conclusive, but would be only an element in the proof.”¹¹

In contrast Charles Stewart (1892)¹² questions whether sea trout or bull trout are included with salmon. He says:

“The Crown holds the right of fishing salmon, but it may be questioned whether the right extends to *all fish of the salmon kind*. In recent salmon legislation, the word “salmon” is expressly declared to possess the wider significance, but natural history and common interpretation scarcely warrant the construction. Sea trout and bull trout are perhaps ‘fish of a salmon kind’ and the Salmon Acts expressly declare them to be included in their operation; but in a question of title, can the right to fish for them be held to be *inter regalia*?!”¹³

Accordingly, it is not clear that sea trout are included in a grant of fishings, unless specified, which only occurs in more recent crown grants of salmon fishings, but not in historic titles. In a Freedom of Information request for Crown Estate styles of salmon fishing dispositions from 1945 onwards the Crown Estate Scotland produced a 1949 style that conveyed “All and Whole the Fishing for Salmon and Fish of the salmon kind in the sea from the high water mark ...”¹⁴ Thus, at least from 1949 the Crown Estate was granting salmon including sea trout fishing rights.

⁷ 9 Geo. 4, c. 39. section 1.

⁸ 2003 asp 15.

⁹ Salmon Act 2003 s. 69(1) “salmon”.

¹⁰ “Salmonidae” in context including salmon, sea trout and other migratory fish.

¹¹ 1907 SC 1360 at 1363

¹² Charles Stewart *A Treatise On The Law Of Scotland Relating to Rights of Fishing; comprising The Law affecting Sea Fishing, Salmon Fishing, Trout Fishing, Oyster & Mussel Fishing; Etc., Etc.: With An Appendix on Statutes and Byelaws* (2nd Ed by J C Shairp, T & T Clark, Edinburgh: 1892) (Stewart, *Fishing*).

¹³ *Ibid.* p. 88.

¹⁴ Crown Estate Reference SDB 20 page 429, File S.3030. Pre 1945 styles were not sought or recovered.

1.2 The grant of the right to fish for salmon, its extent and statutory control.

Salmon fishings are one of the *regalia minora* of the Crown in Scotland, meaning that all salmon fishings, whether in the sea within territorial waters, rivers or inland waters belong to the Crown but may be granted out to individuals, either as separate tenements or in addition to the grant of land.¹⁵ This is the grant of the right to fish for salmon, but not the grant of the fish themselves, which remain *res nullius* until their capture when the salmon is owned by the capturer.¹⁶

The extent of the salmon fishings held by the Crown was considered in *Gammell v HM Commissioners of Woods and Forests*¹⁷ and the Lord Chancellor¹⁸ said:

“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 (sic) 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.”

This suggests, although it is in the context of the facts of the case, that a grant of salmon fishings in the open sea might be limited to “those modes of fishing in which the use and possession of the coast is essential to the operation” and gives for example stake nets, bag nets, and fishing by net and coble. No doubt rod fishing from boats launched

¹⁵ It should be noted that salmon fishings are not part of the *regalia minora* in Orkney, and therefore probably not also in Shetland, because land law in Orkney and Shetland is based, in part, on udal and not feudal law (*Balfour v Lord Advocate* 1907 SC 136 (Outer House); Stair Memorial Encyclopaedia, Vol 24 (1989), Udal Law paragraph 315. The territorial sea and fishings). However, the sea bed in Orkney and Shetland remains part of the patrimonial property of the Crown (*Shetland Salmon Farmers Assoc v Crown Estate Commissioners* 1991 SLT 166 (Second Division)).

¹⁶ William M Gordon and Stuart Wortley, *Scottish Land Law* (3rd Edition, SULI, W Green 2009), Vol. 1 para 8-43 (“Gordon, Scottish Land Law”).

¹⁷ (1851) 13 D 854: affd (1859) 3 Macqueen 419. The Commissioners for Woods and Forests were the predecessors of the Crown Estates in Scotland.

¹⁸ (1859) 3 Macqueen 419 p. 444/445.

from the shore would be included. However, Lord Wensleydale¹⁹ says 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”. Lord Wensleydale was leaving the matter open per the approach taken by the Lord Chancellor, but indicating a maximum extent of the sea salmon fishings.

The *Gammell* case was considered and analyzed by Lord Cameron in *Joseph Johnston & Sons Ltd v Morrison*²⁰ in a dispute between *Joseph Johnson & Sons*, who held a lease of the salmon fishings in the sea, and *Morrison* who fished for salmon from a fishing boat and argued that salmon fishing from a boat remained a public right. Lord Cameron concluded that on a proper understanding of *Gammell*, and other authorities which he reviewed, that the Crown’s right to salmon fishings in the sea “where a grant of salmon fishing in territorial waters is made by the Crown or a lease given, that is a grant or a lease of an exclusive right to fish by all lawful and legitimate means, unless specifically limited.”²¹ This confirms that the right extends out to the territorial limit of three miles and is by any means, which would include rod and line.

Following the statement by Lord Wensleydale that the salmon fishing rights extended to three miles²² this has been the position until the passing of the Territorial Seas Act 1987²³ extended the territorial sea out to 12 nautical miles. Scottish Land Law considers that whether the salmon fishing right still extends to the common law three miles or has been extended to 12 miles “is debatable”, saying that the 1987 Act “might be read as applying to extend the rights of the Crown but not rights already granted out by the Crown.”²⁴ This question is academic when considering fish farms which are usually within any three-mile limit.

There is an element of statutory control of salmon fishing rights in the sea by section 6(1) of the Salmon Act 2003 which makes it an offence to fish for salmon in the sea

¹⁹ (1859) 3 Macqueen 419, p. 465.

²⁰ 1962 SLT 322.

²¹ *Ibid.* p. 326.

²² *fn.* 19.

²³ c. 49 s. 1(1)(a).

²⁴ Paragraph 8-45.

without legal right or permission within 1.5 kilometers²⁵ of mean low water springs. As the private right extends beyond the 1.5 kilometers it can only be protected under civil law. Similarly, Regulation 2(b)(i) of The Salmon (Definition of Methods of Net Fishing and Construction of Nets) (Scotland) Regulations 1992²⁶ refers to “fishing for or taking salmon by bag net, fly net or other stake net” and states that “no part of the bag net, fly net or other stake net, except mooring warps and anchors, shall extend seawards beyond 1300 metres from the mean low water mark”²⁷. Thus, the law prevents fishing within 1.5 kilometres of low water springs without a legal right or permission and prevents net fishing out beyond 1300 meters from low water springs.

Salmon fishing rights both in the coastal and inland waters have been further constrained by the Conservation of Salmon (Scotland) Regulations 2016²⁸ (“2016 Regulations”). Regulation 3(1) provides, subject to very limited exceptions mainly for scientific or fish farm purposes, that “no person may retain any salmon caught in any coastal waters in a salmon fishery district”. Salmon is defined in Regulation 1(2) to mean “the species *Salmo salar* (commonly known as salmon)” and “excludes the migratory fish of the species *Salmo trutta* (commonly known as sea trout)”. Salmon fishery proprietors who had active salmon fishing netting stations in the sea received compensation for the loss caused by the 2016 Regulations.²⁹ This Regulation follows on from the recommendations in the Report of the Wild Fisheries Review Panel, October 2014³⁰ (Wild Fisheries Review), where Chapter 7 and Recommendations 32 to 35 make clear that the ban on retaining salmon in coastal waters is “until further

²⁵ Originally 1 mile - s. 1 of the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951, 1951 Ch. 26 14 & 15 Geo 6.

²⁶ SI 1992 No. 1974 (S. 201).

²⁷ *Ibid.* Regulation 2(b).

²⁸ SSI 2016/115.

²⁹ Scottish Government, Policy, *Salmon and Recreational fisheries*, Salmon in coastal waters. <https://www.gov.scot/policies/salmon-and-recreational-fisheries/conservation/> (accessed 13 December 2020). See *The Salmon Net Fishing Association of Scotland* [2020] CSOH 11 (judicial review) where the level of compensation was challenged.

³⁰ Andrew Thin, Jane Hope and Michelle Francis, *Report of the Wild Fisheries Review Panel, October 2014*. <https://www.gov.scot/publications/wild-fisheries-review-final-report-and-recommendations/> (accessed 14 January 2021)

notice”³¹. Thus, the ban could be lifted if salmon stock again reaches a sustainable level.³²

As such the proprietor with a right to fish for salmon in the sea, still has the right to fish by any legal means for sea trout and if a salmon is caught it will have to be released, because it is only retaining any salmon that is caught that is prohibited. Further, fishing by rod and line in the sea with a catch and release policy, as exists on salmon rivers, would be a lawful method of salmon fishing in the sea. However, the effect of the 2016 Regulations is to reduce the value of salmon fishings in the sea significantly, particularly where active netting stations have been compensated for the loss.

1.3 The grant of salmon fishing rights

Express grant

Salmon fishings can be acquired by a direct grant from the Crown of either the salmon fishing alone³³ or a grant of land along with the salmon fishing. The scope and limits of the grant will depend on the wording of the grant. Historically the conveyance of land with salmon fishings was usually with no more than the phrase *cum piscationione (or piscationibus) salmonum*.³⁴ Salmon fishings alone were usually granted as “All and Whole the salmon fishing in the sea” between points A and B on the land.

Salmon fishings could be acquired by prescriptive possession of the salmon fishings on a habile title being a title capable of including the salmon fishings. Prescription against the Crown in respect of the foreshore or salmon fishings was 40 years, but is now 20

³¹ *Ibid.* Recommendation 32. Scottish Government, Policy, *Salmon and Recreational fisheries*, Salmon in coastal waters where the Scottish Government refers to paying compensation for lost fishings in 2016 to 2018 and then to further research from which it was determined that the prohibition on retaining salmon “should remain in place”.

³² Scottish Parliament, Rural Affairs, Climate Change and Environment Committee, Official Report, Session 4, Wednesday 9 March 2016, *Conservation of Salmon (Scotland) Regulations 2016 (SSI 2016/115)*, p. 2, Statement by The Cabinet Secretary for Rural Affairs, Food and Environment (Richard Lochhead). <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=10429&mode=pdf> (accessed 21 January 2021).

³³ *Hogarth v Grant* (1900) 1 SLT 324 – “The pursuer was not proprietor of any lands on the banks of the Findhorn, but only of salmon fishings as a separate tenement.”; *Middletweed Ltd v Murray* 1989 SLT 11.

³⁴ George Joseph Bell, *Principles of the Law of Scotland* (10th edition, W Guthrie, 1899) paragraph 1112. (“Bell’s *Principles*”); Gordon, *Scottish Land Law* paragraphs 8-50 to 8-55.

years under section 1(4) of the Prescription and Limitation (Scotland) Act 1973³⁵. A Barony title³⁶ was a *habile* title and the right to the salmon fishings could be acquired by possession without any mention of fishings in the conveyance of a barony or just the mention of *cum piscariis* or *cum piscationibus*. Likewise, an ordinary conveyance of land *cum piscariis* or *cum piscationibus* could be a *habile* title on which to prescribe a right to the salmon fishings.³⁷

The grant of salmon fishings, including the historic grants, will include a grant of warrandice either expressed or implied unless the warrandice is specifically limited. Warrandice is an obligation in Scottish conveyancing that the person granting the title deed will indemnify the grantee in the event of eviction from the subjects or the discovery of burdens on the subjects such as rights of access and an obligation that the granter will not grant other deeds that prejudice the grant.³⁸ Simple warrandice can be implied or expressed, or it can be expressed as warrandice from fact and deed only or as absolute warrandice.³⁹ The terms of the warrandice will have to be sought in the deed of conveyance. In the Kilbrannan disposition referred to above, the Commissioners granted “warrandice from fact and deed only” which “protects the grantee not only against future deeds of the granter but against his former deeds or actings”⁴⁰.

Such historic titles to salmon fishing, whether by direct grant or acquired by prescription usually included no limitation on the grant beyond that implied by law as discussed above. More recently, the authors have come across grants by the Crown Estate (now Crown Estate Scotland) in which the Crown Estates has tried to preserve their right to grant out other rights in the sea or seabed even if those rights might be in

³⁵ 1973 c. 52.

³⁶ The erection of a landed estate into a Barony (a barony title) carried with it certain rights in the land including the right to prescribe a title to fishings; *cf* Green’s Encyclopaedia of the Laws of Scotland (W Green, Edinburgh 1927) Vol 2 “Barony Title”, paragraphs 316 & 318 re fishings.

³⁷ Bell’s Principles para 1112; Gordon, Scottish Land Law paragraphs 8-50 to 8-55.

³⁸ David M Walker, *The Oxford Companion to Law* (Clarendon Press, Oxford 1980) “Warrandice” & see fn. 39 below.

³⁹ John M Halliday, *Conveyancing Law and Practice in Scotland* (2nd edn by Iain J S Talisman, Scottish Universities Law Institute Ltd, W Green, Edinburgh 1996) paragraphs 4-29 to 4-33 for a description of the nature and effect of the different warrandices.

⁴⁰ *Ibid.* paragraph 4.32.

competition with the grant of the salmon fishings. In one example,⁴¹ the grant of “ALL and WHOLE the whole right title and interest of Her Majesty in and to the fishings for salmon and fish of the salmon kind in Kilbrannan Sound ...” subject to:

“the following conditions and provisions:- (1) the rights of fishing hereby disposed shall not authorise the disponee to interfere with or object to the exercise of any right of fishing nor to interfere with or object to the exercise of any right attaching to or comprised in the dominium utile of any seabed and foreshore within or without the boundaries of the fishings and belonging to Her Majesty or Her Successors or Her or Their disponees or lessees or to other parties; (2) no nets or other engines shall at any time be placed in such a manner as to obstruct the public navigation and, if they are at any time so placed, they may be immediately removed by any person having proper authority so to do and at the expense of the disponee; and ...”.

Having granted out the salmon fishings, condition (1) referring to “the rights of fishing” can only apply to the public right of fishing for white fish in the sea. However, the part of condition (1) “nor to interfere with or object to the exercise of any right attaching to or comprised in the dominium utile of any seabed and foreshore within or without the boundaries of the fishings” is more difficult. It suggests that the proprietor of the salmon fishings granted cannot object to any right attaching to the sea bed such as a Crown lease of a fish farm in the area of the salmon fishings. However, the authors contend, having regard to the obligation not to derogate from one’s grant, and the warrandice obligation not to grant deeds that prejudice the original grant, that the Crown could not grant a lease for a salmon farm, or exercise any other right in the seabed, that had the effect of extinguishing salmon fishing right in whole or in part. If that is wrong then, in any event the courts could regulate the competing rights⁴².

In *Walford v Crown Estate Commissioners*⁴³ Lord Clyde noted that a lease of the sea bed for a salmon farm at Clause 3.b. “expressly accepted and reserved from the lease full and free right for *inter alia* "all members of the public to exercise all rights to which they may be entitled and all privileges which they may enjoy from and over the subjects of let and without prejudice to the foregoing generality such rights of navigation and

⁴¹ Feu Disposition by the Crown Estate Commissioners of salmon fishing in Kilbrannan Sound dated 4th September 1989. (“Kilbrannan disposition”)

⁴² *Fotheringham v Passmore* 1984 S.C. (H.L.) 96, where competing rights of salmon fishings in a river were said to be subject to regulation by the courts.

⁴³ 1988 SLT 377 at page 379.

fishing as exist,"" which has similarities to the Kilbrannan disposition of salmon fishings.

It is not clear when the Crown Estate started introducing such conditions and provisions, because the early grants of salmon fishings do not have such conditions. A Freedom of Information request was served on the Crown Estate Scotland to obtain past copies of style dispositions and leases of salmon fishing to ascertain when those conditions and provisions were first introduced. A redacted 1949 disposition of the Auchmeddan Salmon Fishings in the sea⁴⁴ had the following conditions:

(FIRST) that it is provided and declared that the right of fishing hereby disposed shall not authorise or entitle the vassals or their tenants to interfere with any right of fishing belonging to His Majesty, His Heirs or Successors or His or Their disponees or lessees or other persons ex adverso other lands, (SECOND) that no nets or other engines shall at any time be placed or allowed to remain in the sea between the said boundaries so as to obstruct or hinder or be a source of danger to public navigation and that in the event of their being so placed or allowed to remain it shall be in the power of the Lords of the Admiralty, the Board of Trade or the Ministry of Transport or their respective officers forthwith to remove the same at the expense of the vassals and without any notice given to them, ...”.

The (First) is similar to, but has differences from, the Kilbrannan disposition conditions, and it is argued applies only to the public right to fish for white fish in the sea and (Second) is effectively the same restriction on obstructions of navigation.

Part Two: Competition between Rights

2.1 Public rights - The competition between salmon fishing rights and public rights in the sea and in the foreshore.

The Crown holds the public rights to fish for white fish in the sea and to navigate as inalienable public rights and, further it holds certain rights in the foreshore, being the area of the shore between the high and low water marks of ordinary spring tides,⁴⁵ for the benefit of the public. The precise nature of the public right to fish for white fish in

⁴⁴ Annotated File S.D.B 20 page 429. File S.3030 dated 28 May 1949.

⁴⁵ *Fisherrow Harbour Commissioners v Musselburgh Real Estate Co Ltd* (1903) 5F 387 per Lord Low at p 393-4.

the territorial sea is unclear, but it is summarised by Stewart⁴⁶ in a manner that is sufficient for the purposes of this article, as:

“The right of white fishing in the territorial seas of Scotland may be considered, in one sense, as vested in the Crown, but it is held, not as patrimonial property, but, like the right of navigation, for behoof of the public.”⁴⁷

Therefore, there is a potential competition between these public rights and any grant of the salmon fishings to an individual. This competition is recognised by Stewart, citing *Brodie v Cadel*,⁴⁸ who states that:

“All rights of fishing, including salmon fishing both in the sea and in rivers must yield to the more important rights of navigation and commerce; but these supereminent rights must be exercised *sine aemulatione vicini*”.⁴⁹

In that case, *Brodie* was infest⁵⁰ under a barony title with “with five stell⁵¹ salmon fishings in the river of Findhorn” and complained that *Cadel*:

“by many acts of encroachment, such as the floating, sailing, anchoring, and mooring of his boats, ships, and cibles, just upon the place of these stells, the keels and anchors making such furrows in the strand and alveus of the river, as wholly chases away the salmon from their former haunts. 2do, By casting in their ballast and fish-guts into these stells, which not only fills them up, but likewise so corrupts and poisons the water that the salmon desert that place ...”.

The court found that *Brodie* could not object to ships coming up and down the river, but that *Cadell's* ships could not anchor in the stells nor cast their ships ballast or fish guts into the stells because they might do these deeds conveniently elsewhere.

⁴⁶ Stewart *Fishing*, p. 20.

⁴⁷ For a fuller discussion of the extent of the right to fish for white fish see , Agnew, S. C., Appleby, T., & Bean, E. (2018). The ownership of inshore fisheries in Scotland: An opportunity for community ownership? *Journal of Water Law*, 26(2).

⁴⁸ [1707] 4 Brown 660.

⁴⁹ Stewart, *Fishing* page 129, *sine aemulatione vicini* – Merriam-Webster on line Dictionary “aemulatio vicini” civil & Scots law, “the exercise of a legal right only to cause annoyance, harm, or injury to another”. <https://www.merriam-webster.com/dictionary/aemulatio%20vicini> (accessed 14 January 2021); David M Walker, *The Oxford Companion to Law* (Clarendon Press, Oxford 1980) “ameliatio vicini. In Scots law ...mainly for pure spite or other oblique motives”.

⁵⁰ Under Scots Law a person is “infest” in the title to their property when it is recorded in the Register of Sasine (now the Land Register) Prior to recording, a person only has a personal right to the property and not a real right.

⁵¹ Stells “are deep ponds, pools, and ditches in the river, where the salmon haunting are taken in nets spread beneath them” per *Brodie v Cadel* p. 660 line 4.

Similarly, the public right of navigation has to be exercised having regard to the rights of others in the sea or sea bed, such as salmon fishing rights. In *Crown Estate Commissioners v Fairlie Yacht Slip Ltd*⁵² the Lord President said:

“The true view appears to me to be that the right of navigation is not to be regarded as a right to sail in every square inch of the surface of the sea or to use for casting anchor every square inch of the sea bed. The public right is undoubtedly wide but it should not be regarded as having been infringed save in circumstances in which what is done by or with the consent of the Crown constitutes or is likely to constitute a material interference with its exercise by members of the public exercising their right reasonably.”⁵³

In *Walford v David*⁵⁴ the court had to consider whether a fish farm operated under a lease from the Crown Estates constituted a material interference with the public right of navigation. The court held “that what amounted to material interference was a question of degree dependent on the circumstances of each case, but that mere inconvenience or nuisance was not enough to satisfy the test of material interference”. The authors consider that this test would be applied to the exercise of salmon fishings rights, particularly by the use of nets strung out from the shore for some 1300 meters from the low water mark and in relation to any interference with public rights on the foreshore.

With regard to the foreshore, the common law rights of the public on the foreshore (i.e., the area between the high and low water marks of ordinary spring tides) are recreation, fishing therefrom, the right to gather shellfish and the right to shoot wildfowl.⁵⁵ There are now, also, public rights of access and recreation on the foreshore and on the sea given by Part 1 of the Land Reform (Scotland) Act 2003⁵⁶.

⁵² 1979 SC 156.

⁵³ *Ibid.* p. 178.

⁵⁴ 1989 SLT 876 – see *Walford v Crown Estates Commissioners* 1988 SLT 377 the precursor where there was a challenge to the lawfulness of the lease as it was said to constitute an interference of the right of navigation. the court said this was a matter for evidence.

⁵⁵ Scottish Law Commission, *Discussion Paper No 113; Discussion Paper on Law of the Foreshore and Seabed* (April 2001), para 3.12. Note that the position in England and Wales is slightly different, where only the public right of fishing is recognised on the foreshore (*Blundell v Catterall* (1821) [1814-23] All ER Rep 39 (King’s Bench)).

⁵⁶ 2003 asp 2.

2.2 Private rights - The competition between salmon fishing rights and private rights in the sea and in the foreshore granted by the Crown Estates Scotland

An example where such competition arises is that between a party with the salmon fishing rights which extend along the shore and at least out to 3 miles, with netting rights (but for the suspension discussed at section 1.2⁵⁷) that can extend out to 1300 meters + anchor ropes from the mean low water mark and the grant of a salmon farm lease by the crown where the salmon farm cages are to be anchored nearer than 1300 meters from the shore.

Where the Crown Estates has granted out the salmon fishing rights there will be warrandice granted as well. All warrandices include an obligation that the disponent will not do anything voluntarily that will derogate from the grant, which includes granting future deeds⁵⁸. It is therefore arguable that if the Crown Estates has granted out the sea salmon fishing rights over a specific area of the sea that the grant of a right to anchor a fish farm within the same area is a derogation of the original grant. In *Joseph Johnston & Sons Ltd v Morrison* the court referred to the grant of an “exclusive right to fish by all lawful and legitimate means”⁵⁹ in the territorial waters. The authors suggest that this must mean an exclusive right to fish for salmon over the whole area of the grant and that if the salmon fishing owner is excluded for part of the area by a subsequent deed or lease, that is a breach of warrandice as a derogation from the grant.

However, the problem under a warrandice clause where there has been a partial eviction, is that the claim is for damages occasioned by the breach of warrandice.⁶⁰ If a fish farm only excludes a party from part of his fishing area, the question is what loss have they sustained where the keeping of salmon is prohibited and the salmon fishing right is now limited to sea trout or a catch and release policy fishing in the sea with rod and line.

⁵⁷ Conservation of Salmon (Scotland) Regulations 2016 (SSI 2016/115).

⁵⁸ John M Halliday, *Conveyancing Law and Practice in Scotland* (2nd edn by Iain J S Talisman, Scottish Universities Law Institute Ltd, W Green, Edinburgh 1996) paragraphs 4-29 to 4-33.

⁵⁹ 1962 SLT 322 p. 326.

⁶⁰ *Welsh v Russell* 1894 21 R 769.

Separately, there is a principle of Scots Law that a person cannot derogate from grant. Gloag on Contract⁶¹ states under the heading “(3) Rule that Man must not Derogate from his Own Grant” that “the general rule that when a man has conveyed property, or made a grant in any form, for onerous causes, he comes under an implied obligation not to do anything to diminish the advantage which the grantee might reasonably expect to acquire ... The rule is expressed in the maxim that a man must not derogate from his own grant.”. Gloag goes on to qualify this statement by saying “But the rule is one to be applied with great limitation, and in cases on its applications to leases and to contracts for the sale of goodwill of a business shew that the reasonable expectations of the lessee or purchaser are very narrowly construed.”

The rule is explained in *Huber v Ross*⁶², with reference to some English authorities, but caution is advised in referring to English authorities because Scotland does not recognise the doctrine of “quiet enjoyment”. However, the case accepts that there is a common approach to the derogation from grant rule. The *Huber* case concerned the lease of a flat for a photographic business. The landlord carried out renovations to the building which caused physical damage to the tenant’s property and also the dust and noise caused damage to his photographic business. There was discussion on the basis on which damages could be claimed and it was accepted that the tenant could claim for the physical damage to the property and to the business. The court discussed quiet enjoyment, which it rejected as not part of the law of Scotland, and derogation from grant. The Lord President said “... the principle of no derogation from the grant is quite good Scots law, ...” and goes on to cite a passage from *Browne v. Flower*⁶³ with approval:

“Thus, if the grant or demise be made for a particular purpose, the grantor or lessor comes under an obligation not to use the land retained by him in such a way as to render the land granted or demised unfit or materially less fit for the particular purpose for which the grant or demise was made”.⁶⁴

That covers the situation where the Crown grants the salmon fishing rights and then allows a fish farm lease in the same area of water. That subsequent grant of a lease will

⁶¹ (1929) 2nd Ed p. 296 (“Gloag”).

⁶² 1912 SC 898 (First Division).

⁶³ [1911] 1 Ch. 219.

⁶⁴ *Huber v Ross*, p. 912

make the salmon fishing area “materially less fit for the particular purpose for which the grant or demise was made”. In *Huber v Ross* the Lord President said of the obligation not to derogate from the grant that “the obligation of warrandice is in some senses analogous”⁶⁵

If the rule is that a person must not derogate from their grant, then it must be competent to seek interdict of the disponer from executing a deed or lease that will have the effect of derogating from the grant. However, a possible difficulty is that a court has a discretion to refuse interdict and grant damages in lieu, where in the current situation owners of salmon fishings in the sea are effectively not entitled to retain salmon that have been caught, apart from sea trout, and where they were actually fishing at the time of the Order were granted compensation. A court might well say in those circumstances that there is no significant damage to the proprietor of the salmon fishings and so authorise a claim for damages rather than grant interdict.

Part Three: Reconciliation of the competition

3.1 Rights of the salmon fishings proprietor under Article 1 of the 1st Protocol

A public authority is bound by section 6 of the Human Rights Act 1998 (the HRA), which provides that “(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right”. If the Crown Estate Commissioners and Crown Estate Scotland are public authorities for the purposes of the HRA, then it is possible that the grant by them of a fish farming lease in an area where a right to the salmon fishings in the sea has already been granted would prevent the peaceful enjoyment of that right and amount to a deprivation of, or part deprivation of, that right.

*R (on app of Mott) v Environment Agency*⁶⁶ established that salmon fishing rights are possessions for the purposes of the HRA and thus Article 1 of the First Protocol applies to them. This was accepted in *The Salmon Net Fishing Association of Scotland*⁶⁷. This Article provides that “Every natural or legal person is entitled to the peaceful enjoyment

⁶⁵ *Ibid.* p. 909.

⁶⁶ [2018] UKSC 10; [2018] 1 WLR 1022.

⁶⁷ [2020] CSOH 11.

of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.” Thus, a salmon fishings proprietor is entitled to the peaceful enjoyment of his possessions and should not be deprived of them unless it is in the public interest. The imposition of a fish farm lease on an area where the salmon fishing proprietor has the rights to fish for salmon amounts to an interference with the peaceful enjoyment of that right and a deprivation of part of the salmon fishings.

The court in the *Mott* case had to determine whether action taken by the Environment Agency, in the public interest to protect salmon, which imposed an annual catch of salmon limit on Mott, was a violation of his Article 1 rights. Despite the Agency’s action being motivated by the public interest, the Supreme Court still took the view that the action taken by the Agency was not proportionate as it had not considered whether the action struck a fair balance between protecting M’s fishing rights and protecting the public interest in environmental protection.

In the present circumstances, a grant by the Crown Estate or Crown Estate Scotland of a lease for a salmon fish farm is not an act in the public interest, such as an act for the conservation of salmon, but is the grant of a private right by the Crown Estate to the fish farm developer in the circumstances where the Crown Estate has already granted out the private right of fishing for salmon in the sea. Thus, it seems clear that, subject to the discussion below, such a grant of a fish farm lease may be susceptible to a claim under the HRA by owners of salmon fishings who are adversely affected by the lease.

However, in these circumstances, three questions arise. First, is the Crown Estate or Crown Estate Scotland acting as public authority for the purposes of section 6(1) of the HRA which defines a public authority as “any person certain of whose functions are functions of a public nature”⁶⁸? Secondly, is the grant of a fish farm lease a private act so that, even if Crown Estate Scotland is a public authority, it is not a public authority “(i)n relation to a particular act ... if the nature of the act is private”⁶⁹? Thirdly, even if the grant of the lease is a private act, whether it remains a private act in relation to the

⁶⁸ HRA s. 6(3)(b).

⁶⁹ *Ibid.* s. 6(5).

salmon fishings proprietor who was not part of the “private act”, being the grant of the lease to the fish farm developer?

The authors contend that when granting out the fish farm lease that the Crown Estate is a public authority, particularly in so far as their actions affect the Convention rights of the proprietor of the salmon fishing rights. It is contended that *Aston Cantlow PCC v Wallbank*⁷⁰ (“*Aston Cantlow*”) confirms that the Crown Estate is “a core public authority which [exercises] functions which [are] broadly governmental so that they [are] all functions of a public nature”⁷¹ for the purposes of section 6 of the HRA. Lord Nicholls of Birkenhead refers to:

“the phrase ‘a public authority’ in section 6(1) is essentially a reference to a body whose nature is governmental in a broad sense of that expression ... Behind the instinctive classification of these organisations as bodies whose nature is governmental lie factors such as the possession of special powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest, and a statutory constitution”⁷².

First, under the Crown Estate Act 1961⁷³ section 1(1) and (3) the Crown Estate Commissioners manage the property, rights and interests of the Crown on behalf of the Crown “to maintain and enhance its value and the return obtained from it”; under section 1(4) these functions are carried out under the directions of the Chancellor of the Exchequer or the Secretary of State and under section 2(1) and (6) an annual report has to be made to Her Majesty and laid before Parliament and the annual accounts are certified by the Comptroller and Auditor-General and laid before both Houses of Parliament. The surplus revenue from the estate is paid each year to the treasury for the benefit of the state’s finances.⁷⁴ These functions are therefore being carried out for and on behalf of the state.

Further, the Crown Estate has a statutory constitution and is democratically accountable in that it acts under the directions of the Chancellor of the Exchequer, the Secretary of

⁷⁰ [2003] UKHL 37; [2004] 1 AC 546.

⁷¹ *Ibid.* p. 546, held (1).

⁷² *Ibid.* para. 7. See Oliver, D. (2000). The frontiers of the state: public authorities and public functions under the Human Rights Act. *Public law*, (3), 476-493 referred to by Lord Nicolls at *ibid.* para. 7

⁷³ 1961 c. 55 (Regnal. 9 and 10 Eliz 2).

⁷⁴ <https://www.thecrownestate.co.uk/en-gb/resources/faqs/> (accessed 11 January 2021).

State or the Scottish Ministers who are all accountable to parliament. In addition, its funding comes from the state, in that it takes its expenses from the income from the property it is managing for the benefit of the state or the purposes of the state.

While the Crown Estate in Scotland has now been devolved under section 90B of the Scotland Act 1998,⁷⁵ it is only a transfer of “all the existing Scottish functions of the Crown Estate Commissioners ... to the Scottish Ministers or a person nominated by the Scottish Ministers”. This does not, therefore, affect the fact that the functions are being carried out for and on behalf of the state and now on behalf of the Scottish Ministers or a person nominated by them. The Scottish Crown Estate Act 2019⁷⁶ requires the Scottish Ministers or any manager to keep proper accounts and these must be audited by the Auditor General for Scotland (section 35(2)). The revenue profits are passed to the Scottish Government for public spending⁷⁷. The Scottish Ministers can give directions (section 37) or guidance (section 38) to managers. The Scottish assets were transferred to the management of the Scottish Ministers, or the appointed manager, by the Crown Estate Transfer Scheme 2017⁷⁸ which under Schedule 1, paragraph 12 included “the seabed of Scottish coastal waters” and paragraph 15 the foreshore.

In addition, the Crown Estate has confirmed, in response to a Freedom of Information request, that “The Crown Estate is not a government department but is subject to the Human Rights Act.” Although it went on to add that “[w]e are a real estate business, do not exercise any regulatory or government functions and therefore the actual application is very limited. As a statutory body we are mindful of our duties under this legislation.”⁷⁹ In evidence from the Crown Estate to the Scottish Affairs Committee, the Crown Estate stated that “being a public authority” it was subject to “the Human Rights Act 1998, which impose obligations specific to public authorities, although these in general are unlikely to impact on the granting of leases.”⁸⁰

⁷⁵ S. 90B and cross-heading inserted (23.3.2016) by Scotland Act 2016 (c. 11), ss. 36(1), 72(1)(b).

⁷⁶ 2019 asp 1.

⁷⁷ Crown Estate Scotland, What is Crown Estate Scotland. <https://www.crownestatescotland.com/about-us/frequently-asked-questions> (Accessed 11 January 2021)

⁷⁸ SI 2017 No. 524.

⁷⁹ <https://www.whatdotheyknow.com/request/the-universal-declaration-of-hum-18?unfold=1> (accessed 10 January 2021)

⁸⁰ Scottish Affairs Committee, Additional written evidence submitted by The Crown Estate, June 2011. <https://publications.parliament.uk/pa/cm201012/cmselect/cmsscota/1117/1117we19.htm> (accessed 11 January 2021)

However, while it is agreed that the HRA obligations are unlikely to impact the granting of leases in much of the Crown Estate portfolio, in the present circumstances it is contended that the Crown Estate Scotland are a public authority as they are managing the seabed on behalf of the state. This means that when exercising their powers in relation to the seabed or foreshore, which includes granting leases for fish farms, they owe a duty to the proprietor of any salmon fishings in the sea, not to interfere with the peaceful enjoyment of the salmon fishing proprietor's possessions and not to deprive them of their possessions in whole or in part.

Alternatively, it is submitted that if the Crown Estate and Crown Estate Scotland are not a core public authority,⁸¹ then when acting in the management of the seabed they are a public authority in relation to third parties affected by their actions and decisions as this management is a "[function] of a public nature" (section 6(3)(b) HRA). It should be noted that section 6(5) of the HRA provides: "In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private." However, while the grant of a lease to a fish farm developer might be a private act and so raise no Convention right issues between the Crown Estate Scotland and the developer, it is contended that as between the owner of the salmon fishing rights in the sea and the Crown Estate Scotland, that the act of the Crown Estate Scotland in granting the lease is not in the nature of a private act given that the Crown Estate Scotland is managing the seabed on behalf of the state.

Thus, either as a core public authority, or as a body exercising functions of a public nature, it is contended that the Crown Estate Scotland, when exercising their powers in relation to the seabed or foreshore (including granting leases for fish farms), owes a duty to the proprietor of any salmon fishings in the sea not to interfere with the peaceful enjoyment of the salmon fishing proprietor's possessions and not to deprive them of their possessions in whole or in part.

3.2 Private remedies against installing a fish farm in a salmon fishing area granted by the Crown.

⁸¹ *Aston Cantlow*, Lord Hope of Craighead at 35.

3.2.1 Artificial structures

In rivers, the erection of artificial structures in the river to the prejudice of the salmon fishings may be objected to by proprietors of these fishings, whether the obstructions be above or below the fishings.⁸² By analogy, the authors suggest that the proprietor of salmon fishings in the sea should be able to object to structures in the sea area over which there is the exclusive right to fish for salmon.

In *Lord Forbes v Leys, Masson & Co*,⁸³ Lord Forbes and others, proprietors of the salmon-fishings, were held entitled to pursue an action for removing one of several dam-dikes across the river, as an obstruction to the passage of fish. The issue was whether there was interest to raise the action as there were other dam-dikes across the river below that of the defenders and therefore there was no interest to pursue the defenders alone, about their dam-dike, because the damage was done by the lower dam-dikes. This technical defence was dismissed. In *Mackenzie v Magistrates of Dingwall*⁸⁴ M, as proprietor of the salmon fishings in the river Conon, sought interdict against the Magistrates of Dingwall who were carrying out operations on the river bed. The Magistrates alleged that the operations were harmless to M, but the interdict was continued until it was determined whether or not there was likely to be damage.

3.2.2 Pollution

A salmon fishings proprietor can interdict the discharge of pollution for which there is a reasonable apprehension that it might affect the salmon fishings. It is commonly accepted that fish farms cause an environmental impact including pollution of the sea and sea bed,⁸⁵ notwithstanding that SEPA try to regulate discharges from fish farms⁸⁶ under the Water Environment (Controlled Activities) (Scotland) Regulations 2011.⁸⁷ The scientific evidence for pollution from salmon farms is limited, but there is evidence

⁸² Gordon, Scottish Land Law paragraph 8-79.

⁸³ (1831) 5 W & S 384 & (1831) 9 S 933.

⁸⁴ (1834) 13 S 218.

⁸⁵ Whitmarsh, D., & Wattage, P. (2006). Public attitudes towards the environmental impact of salmon aquaculture in Scotland. *European Environment*, 16(2), 108-121.

⁸⁶ <https://www.sepa.org.uk/regulations/water/aquaculture/> (accessed 14 December 2020)

⁸⁷ SSI, 2011 No. 2009.

of both significant risk to wild salmonids from farmed salmon,⁸⁸ and of risks to other marine species.⁸⁹

In *Moncrieff v. Police Commissioners of Perth*⁹⁰ the court held that whether or not M could seek interdict to prevent sewerage polluting the river Tay, a tidal and publicly navigable river, he had title to sue as owner of the salmon fishings. The court held that the current pollution had existed for over 40 years and so was protected by prescription, but held that M was entitled to a remedy to prevent an extension of the sewerage works where the extra discharge would be “to the probable if not certain injury of the rights of that proprietor.”⁹¹

Further, in *Duke of Richmond v Burgh of Lossiemouth*⁹² the Duke owned the salmon fishings in the estuary of the river Lossie and along the foreshore and so this case concerns pollution from the land to affect salmon fishings in the sea. The Burgh intended to discharge sewage into the estuary. There were issues of whether or not the burgh was entitled to do this at common law or under statute contrary to private rights, but these defences were dismissed. The issue for the court, after proof, was whether the Duke had “such reasonable grounds for apprehending injury as to justify his bringing the present action.”⁹³ It held that the Duke did have such reasonable grounds, but rather than granting interdict, like in the *Moncrieffe* case, the court gave the burgh time to modify their scheme so as to meet the Dukes objections.

*Mull Shellfish Ltd v Golden Sea Produce Ltd*⁹⁴ is a case where Mull Shellfish had a Crown lease to farm mussels by hanging ropes in the sea to which mussel larvae attached themselves. Golden Sea Produce had a neighbouring fish farm and used TBT

⁸⁸ Geir Lasse Taranger, Ørjan Karlsen, Raymond Bannister, Kevin Glover, Vivian Husa, Egil Karlsbakk, Bjørn Kvamme, Karin Bixaspen, Pål Bjørn, Bengt Finstad, Abdullah Madhun, H. Craig Morton and Terje Svåsand, ‘Risk assessment of the environmental impact of Norwegian Atlantic salmon farming’ (2015) 72(3) ICES Journal of Marine Science 997; see also Environment, Climate Change and Land Reform Committee, *Report on the environmental impacts of salmon farming* (2018) <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/107588.aspx> (accessed 20 January 2021).

⁸⁹ L Nippard and C Ciocan, ‘Potential Impact of Aquaculture Effluents in Loch Ceran, Scotland’ (2019) 69(1) *Vie et Milieu – Life and Environment* 47

⁹⁰ (1886) 13 R 921.

⁹¹ *Ibid.* p. 926.

⁹² (1905) 12 SLT 166.

⁹³ *Ibid.* p. 169.

⁹⁴ 1992 SLT 703 (Second Division).

antifouling (now banned) on their nets, which Mull Shellfish alleged damaged the larvae preventing them settling on the ropes and so causing loss and damage. The issue was whether Mull Shellfish had title to sue, but the court held that the lease, by implication, included the right to have the larvae settle on the ropes and so they had title to sue for the nuisance caused by the fish farm releasing the chemicals. Assuming chemicals currently released by fish farms can be shown to damage the salmon fishings, the authors contend that this might found a case in nuisance by the proprietor of the salmon fishings in the sea against a fish farm.

Taking these three cases together it is clear that a salmon fishery owner can protect their fishery when it is in a river and a fishery owner can protect their fishery in the sea from salmon farm pollution, thus a salmon fishery owner in the sea should be able to protect their fishery from pollution from a salmon farm.

*Gay v Malloch*⁹⁵ is a case where one proprietor of the lands on a river bank with the ownership of the salmon fishings to the *medium filium*, removed boulders and other material from the river bed to improve the sweep and drawing of his nets over the alveus of the river. The Lord President started with the general proposition, under reference to *Bicket v Morris*⁹⁶ that:

“In general, it may be stated that a riparian proprietor can prevent anyone erecting a building or any other encroachment on the bed of a river *ex adverso* of his bank which may injure his property, unless it can be shown to be something trivial which could have no sensible effect on the flow of the river. The party seeking to prevent such operations need not prove that they will damage his property.”⁹⁷

and he went on to say that the same principles applied not only to “the construction of something on the bed of the river, but the removal of something from the bed”⁹⁸.

The rule in *Gay* is founded upon riparian rights and the risk arising from any works as it might impact on the river. Lord Russell referred to “any operation on the *alveus* of a stream which affects the natural flow of the water and which may possibly result in

⁹⁵ 1959 SC 110.

⁹⁶ (1866) 4 M (HL) 44.

⁹⁷ *Ibid.* p. 123.

⁹⁸ *Ibid.* p. 124.

injury or damage (by erosion) to the bank of the opposite proprietor's lands.”⁹⁹ The authors contend that, by analogy, the same rule should apply to salmon fishings in the sea, where the erection of any structure, such as a fish farm, could affect the natural flow of the sea and the tides, or it might displace the route of the salmon migration so that instead of being inshore within the 1300 meters for nets to outside the 1300 meters, which may possibly result in injury or damage to the salmon fishings. It is already applied to possible pollution of the sea, where the test is “such reasonable grounds for apprehending injury”, which transfers the onus onto the fish farm owner to show that any injury to the salmon fishing will be minimal as in the *Duke of Richmond* case¹⁰⁰.

Summary of rights against the fish farm developer

From the above cases the authors contend that the owner of salmon fishings in the sea has a right of action to proceed against the fish farmer developer on three main grounds:

- 1 – Reduction of the area that may be fished over, because of the space taken up by the fish farm, where the right to fish for salmon is over the whole area: *Joseph Johnston & Sons Ltd v Morrison*¹⁰¹.
- 2 – The right to prevent the construction and erection of fish farm in the salmon fishing area, and perhaps either side of it; *Gay v Malloch*¹⁰².
- 3 – The right to prevent pollution of sea in the area of the salmon fishings, if fish farms are considered to pollute the sea; *Duke of Richmond v Burgh of Lossiemouth*¹⁰³; *Mull Shellfish Ltd v Golden Sea Produce Ltd*. This, and any action of nuisance, would require scientific evidence from an expert that there were “reasonable grounds for apprehending injury” from the pollution or that in an action of nuisance, damage was actually caused.

Liability of Crown Estates Scotland for acting of their tenant the fish farm developer

⁹⁹ *Ibid.* p. 129.

¹⁰⁰ (1905) 12 SLT 166.

¹⁰¹ 1962 SLT 322.

¹⁰² 1959 SC 110.

¹⁰³ (1905) 12 SLT 166.

In the scenario being considered, Crown Estate Scotland has granted a fish farm lease within an area where there is a pre-existing Crown grant of salmon fishing rights. In law, the landlord can be liable for the actions of the tenant, where those actions are a consequence of the terms of the lease. It is clear that a consequence of a fish farm lease is that the tenant will appropriate an area of the sea for the fish farm and will construct the fish farm in that area. It is therefore considered that the landlord, Crown Estate Scotland, would be liable, along with the tenant, for those actions which affect the salmon fishing right.

It is more difficult to say that Crown Estate Scotland will be liable for any pollution or nuisance emanating from the fish farm, unless there is evidence to show that such pollution and nuisance are an inevitable consequence of the lease of an area for the development and operation of a fish farm. Having regard to the style for a Crown Estate Lease¹⁰⁴ Clauses 7.8 (Environmental Care), 7.16 (Concurrent rights) are arguably limiting the rights of the fish farm to cause damage to others, but it may be that evidence is required to confirm that those clauses are not sufficient to mean that pollution or damage to the salmon fishing are not an inevitable consequence of the lease.

*Fleming v Gemmill*¹⁰⁵ confirmed that where a landlord leased property from which pollution was discharged, that the landlord was liable because the pollution was the probable result of the lease. The Lord President, approving *Caledonian Railway Co. v William Baird & Co*¹⁰⁶ said:

“the law was pretty clearly laid down that if a landlord erects his premises in such a way that what may be called the natural result will be pollution, he will be liable, although in one sense he is not the person who personally contributes to the pollution. ... On the other hand, it is quite clear that where the pollution is due to the ultraneous act of the tenant and is not a thing which the landlord could foresee, then the landlord cannot be liable.”¹⁰⁷

¹⁰⁴ Crown Estate Scotland (2021) REF: 129 - Copy of Fin Fish standard Lease <https://www.crownestatescotland.com/freedom-of-information/ref-129-copy-of-fin-fish-standard-lease> (accessed 31 January 2021)

¹⁰⁵ 1908 SC 340 (First Division).

¹⁰⁶ (1876) 3 R 839 (Second Division).

¹⁰⁷ 1908 SC 340 (First Division), p. 349.

In the *Caledonian Railway* case, Lord Ormidale summarised the defence open to a landlord thus:

“Messrs Baird do not identify themselves with their tenants. They deny, no doubt, that there is any nuisance, but alternatively (and I think they are entitled so to put it) they say if a nuisance has been created they did not authorise it, and it was not the necessary consequence of anything they did.”¹⁰⁸

The “necessary consequence of anything they did” can be applied to Crown Estate Scotland’s lease. Was it a necessary consequence of the fish farm lease, that the salmon fishings would be damaged?

Summary

Having regard to the foregoing cases, it is contended that where Crown Estate Scotland grant a fish farming lease to a developer in an area where the Crown has already granted the salmon fishing rights to a proprietor, that the salmon fishing proprietor may be able to challenge that grant on the following grounds:

- 1 – As a breach of warrandice, being the grant of a right in breach of the grant of the salmon fishing rights.
- 2 – That the grant of a fish farm lease would amount to a breach of the obligation not to derogate from the grant.
- 3- That the grant by the Crown Estate Scotland, as a public authority, is contrary to the salmon fishings proprietor’s rights under Article 1 of the 1st Protocol and so a breach of the Crown Estate Scotland’s obligations under section 6(1) of the HRA.
- 4 – That the developer could be prevented from erecting structures on the sea bed in the area of the salmon fishing rights and could be prevented from polluting the sea in that area if there are reasonable grounds for apprehending injury.

¹⁰⁸ (1876) 3 R 839 (Second Division), p. 846.

5 – The Crown Estate Scotland, as landlord, may be held liable for the actions of their tenant, as the terms of the lease would inevitably lead to the wrongs against the salmon fishing right.

The problem for the owner of the salmon fishing rights in the sea is that they have been emasculated by the 2016 Regulations which prevent the keeping of any salmon caught in the sea. However, it is submitted that the existence of the 2016 Regulations should not prevent the proprietor from challenging Crown grants, since at some point in the future stocks may recover, at which point the purpose of the 2016 Regulations (being to restore stocks) would be fulfilled and as such the 2016 Regulations should be lifted. Indeed, the continued development of salmon farms makes such restoration of wild salmon stocks significantly more difficult and so it is arguable that now is the time to make the challenges set out above, before the negative impacts of fish farming on wild salmonids and the wider marine environment grow yet further.

In terms of the Crown Estate Scotland's position, this study demonstrates that its role is more than a passive, absentee landowner. In exercising its functions, it must take account of the rights of other proprietors before it permits an activity on its property with such a wide and acknowledged environmental impact. Indeed, the environmental impact of salmon fish farms is not limited to Scotland alone. For example, increased pressure on wrasse fish stocks (a 'cleaner' fish used to deal with salmon lice infestations), arising in part from salmon farms in Scotland, has been felt as far away as the south coast of Devon.¹⁰⁹ The Crown Estate Scotland is already aware of the consequences of its tenants' actions on other proprietors, the remainder of its marine owned estate and the environment itself before it enters into salmon farm leases. As those in charge of salmon farming in Scotland struggle to put the bits of public administration in the right order, the authors submit that the place to start is for Crown Estate Scotland to take proper responsibility for those consequences and take a more active role in the management of salmon farming and its impacts.

Words: 8984

¹⁰⁹ Devon and Severn Inshore Fisheries and Conservation Authority, *Live Wrasse Fishery* (18 August 2020) <https://www.devonandsevernifca.gov.uk/Environment-and-Research/Research/Finfish-Research/Wrasse> (accessed 20 January 2021)