REPORTS OF SCOTCH APPEALS
IN THE HOUSE OF LORDS.

APRIL 3, 1862.

THE ABERDEEN ARCTIC CO. and Others, Owners of the Ship "Alibi" of Aberdeen, *Appellants*, *v.* JAMES HUTCHISON SUTTER and Others, Owners of the Ship "Clara" of Peterhead, *Respondents*.

Property—Occupancy—Possession—Presumption—Whale Fishing.

HELD (reversing judgment), *That in whale fishing, in Cumberland Inlet, in the Arctic regions, the right of property in a whale harpooned by one party of fishermen, but taken possession of thereafter by another party, is to be decided with reference to the principle of "fast and loose fish," recognized among certain European nations as the law regulating "harpoon and line" fishing of whales, and not according to principles derived from or arising out of the use of "drogs," as practised by the Esquimaux.*[1]

The pursuers, setting themselves forth as "owners of or adventurers in the fishing brig 'Clara' of Peterhead," sued the defenders as the "owners" and "masters of the fishing vessel 'Alibi' of Aberdeen," for £1200 as damages for loss alleged to have been sustained in consequence of the illegal seizure and detention, (on 13th October 1856,) by the defenders or their servants, of a whale alleged to have been captured by the pursuers or those in their service.

In October 1856 the "Clara" and the "Alibi," along with the "Sophia," another vessel belonging to the defenders, were stationed for the purpose of fishing for whales in Cumberland Inlet. The "Clara" had in her employment a boat manned by Esquimaux, who fished by means of harpoons and lines having affixed to them what are called "drogs"—that is, inflated seal skins, of about five feet in length, and three feet in circumference. The drogs, usually two in number, are thrown overboard when the lines are run out by the fish after being harpooned, and serve both to fatigue the animal and to mark its position. Near Niatilick, in Cumberland Inlet, on the morning of the 13th of October, the Esquimaux harpooner, Bullygar, who was in command of the Esquimaux boat employed by the "Clara," harpooned the whale referred to in the present action. After the whale had run out three connected lines of 100 fathoms each, the drogs were attached and thrown overboard. The whale disappeared, and was not seen again till after an interval variously estimated at between three quarters of an hour and two hours. During the interval, Bullygar and his crew were cruising about in search of the fish. When next seen it rose near to some boats belonging to the "Alibi;" and these boats being nearer, intercepted Bullygar's boat, and made towards the whale, (which was found to be in a disabled condition, with Bullygar's lines and drogs still attached,) killed and took it into their possession. Bullygar's boat and another boat belonging to the "Clara" came up and claimed the fish, but the "Alibi" retained possession of it by force.

The pursuers maintained their right to have the value of the fish made good to them upon two grounds:—1. That, according to the custom established in regard to drog fishing, the whale became their property the moment it was struck by the Esquimaux in their employment, and that, as they had never left the fishing ground, they had not lost their right of property. 2. That, by the general law of occupancy, the pursuers were entitled to the whale, as their servants had struck the fish, and were still engaged in the pursuit of it with a reasonable prospect of success, when the defenders interfered.

The defenders maintained their right to retain possession upon these grounds:—1. That, by the special custom applicable to all whale fishing, the property of a whale was that of the first striker only so long as the fish and the boat of the crew which harpooned the animal, were connected by the harpoon and line, and that as soon as the line was detached or thrown overboard

---

[1] See previous reports 23 D. 470: 33 Sc. Jur. 244, 658. S. C. 4 Macq. Ap. 355: 35 Sc. Jur. 470.

(with or without drogs) it became a "loose fish," and the property of the first finder. 2. That, by the general law of occupancy, the pursuers were not entitled to the fish in question, as they were not, at the time the defenders killed it, in the pursuit of it with any prospect of success, and had, on the contrary, abandoned the pursuit.

The Court of Session held, that the rule of fast and loose did not apply to fishing whales by means of drogs, and that the pursuers being in continuance of the pursuit were wrongfully interfered with, and were entitled to the value of the fish.

The defenders (Sutter and Others) appealed against the judgment of the Court of Session, maintaining in their case, that it ought to be reversed, for the following reasons :—1. Because the judgment of the First Division was incompetent, inasmuch as it proceeded upon grounds which were not pleaded in the record. 2. Because, even assuming that the law of occupancy was competently made the ground of judgment, and that, contrary to what is hereinafter contained, the law of occupancy was rightly made the ground of judgment, the respondents, by that law, did not become the proprietors of the fish in dispute. 3. Because the law of general occupancy does not rule the case of a whale killed in the northern seas. Authorities :—Stair ii. 1, 33 ; Ersk. ii. 2, 10 ; Dig. xli. 1, 3 and 5 ; J. Voet, xli. 1. 7 ; Scoresby, ii. 249-253. 4. Because the judgment of the Court of Session would abolish a custom which has obtained the force of law, and would thereby produce endless confusion.

The respondents contended :—1. The whale having been harpooned and "drogged" by parties in the employment of the pursuers, who were continuing the pursuit with a reasonable probability of success, and who would have captured it but for its unlawful seizure by parties in the employment of the appellants, was appropriated by, and became the property of, the respondents. 2. The respondents acquired the property, in respect that, by the law of occupancy in Scotland, the first prosecutor who continues the pursuit with a reasonable probability of success, and not the first possessor, is held to be the lawful occupant. 3. The respondents acquired the property, in respect, that, by the usage which prevails among parties fishing for whales by means of "drogs," the person who fixes the "drogs," and continues the pursuit with a reasonable prospect of success, is held to be the lawful occupant. 4. The appellants are not entitled to plead, that such usage is not binding on them, in respect that they themselves employed drogs when fishing, and in respect that the rule of capture which the said usage has introduced is the only rule that can protect the rights of parties fishing by means of drogs. 5. The usage is in conformity with the principles of the law of occupancy in Scotland. 6. Fishing for whales by means of drogs is a well known and effective system, and ought not to be prohibited. 7. The usage of "fast and loose," which applies to the ordinary system of fishing for whales, cannot apply to, and does not rule, those who fish for whales by a different system ; and if enforced in this case, would lead to the abolition of a valuable and effective system of fishing ; and, if enforced generally, would prevent the introduction of any new or improved system of fishing. Stair's Inst. ii. 1, 33 ; Bankton, ii. 1, 7 ; Mackenzie's Inst. ii. 2, 290 ; Bell's Prin. 1289 ; *Skinner* v. *Chapman*, 1 Moody & Malk. 59 (*n.*) ; *Hogarth* v. *Jackson*, 1 Moody & Malk. 58.

Solicitor General (Palmer), and *Monro*, for the appellants.—The geographical situation of Cumberland Inlet is sufficiently near the northern whaling grounds to justify the assumption, that the same custom applies as to whale fishing, viz. the custom of fast and loose. That custom is well settled, and forms the local law of the northern whale fishery—*Fennings* v. *Lord Grenville*, 1 Taunt. 241 ; *Addison* v. *Row*, 3 Paton's App. 334 ; Bell's Prin. 1289 ; Stair, ii. 1,33 ; Ersk. ii. 1, 10 ; Bank. i. 3, 14 ; *Lord Advocate* v. *Rankin*, M. 11,930. At all events, the presumption is, that that custom applied unless the contrary were proved, which was not the case. There was no evidence of any agreement or understanding among the vessels which frequented Cumberland Straits, that the custom of fast and loose was inapplicable, and that another custom displaced it there. Consequently the appellants were entitled to start with the presumption, that the custom of fast and loose prevailed there. There was nothing in the circumstances of the capture to prevent the application of the custom. The evidence shewed, that the "Clara" never intended to fish with drogs at all, but furnished Bullygar, the Esquimaux, and his boat, with the usual long lines used in the northern whaling grounds. Bullygar, therefore, went out to fish, not with the drog, but with the harpoon and long line which, in fact, he used in the first instance. It was only after the long line failed to hold the whale, that he bethought himself of using the drog. The drog was thus not deliberately adopted, but accidentally; and the accidental use of it, therefore, ought not to be held to imply, that all the parties who did not adopt it, and never intended to adopt it, were bound to abide by the peculiar custom applicable to drog fishing, and renounced the custom of fast and loose with which they started. Even, if the custom of fast and loose were inapplicable, it did not follow, that, by the general law of occupancy, the "Clara" would be entitled to the whale. Stair laid down the rule, that it was the first seizure that fixed the property. Here the whale was not fatally wounded by the "Clara." It was the boat of the Sophia, a third party, that in fact gave the fatal wound afterwards. Therefore, on both grounds, the interlocutor of the Court below was wrong.

Sir H. Cairns Q.C., and *Skelton*, for the respondents.—The Court below was right. This

was a new locality, altogether separated from the northern whaling grounds, to which latter alone the custom of fast and loose applied. Instead, therefore, of starting here with the presumption, that the same custom of fast and loose applied, the presumption was the other way. A custom is something which creates an innovation on the general law, and requires to be proved. It is never assumed. Now there is no proof that the custom of fast and loose ever prevailed in this new locality. It is true, that, if the custom be assumed to exist, then a mere colourable evasion of it would not be permitted; but here there was no evasion. The natives were accustomed to fish with the drog at this place, and they were employed by these vessels. Therefore it was reasonable to assume they thereby adopted also the native custom as to drog fishing. The very principle on which drog fishing is founded is to throw overboard the line with the drog attached to it, so that it is the reverse of the principle on which the harpoon and line fishing is carried on. In the one case the fishermen keep the end of the line in the boat; in the other they throw it overboard. Here Bullygar went out with his drog, and used it in the usual way; and, as he first wounded the fish, and followed up pursuit with reasonable promptitude, he was entitled to the property. Not only was he entitled by the custom of drog fishing; but he was equally entitled by the general law of occupancy. The general law of capturing wild animals is this, that whoever goes out to hunt a wild animal, and first wounds it, and then follows up pursuit with reasonable promptitude, is entitled to the property, though another intervene, and first take possession. Such a rule extends to all wild animals. If, in course of hot pursuit, a third party interfere and give a deadly wound, or first seize the animal, he is held to do so in aid of the hunter. If this were not the law, there would be an end to all hunting, and anybody could come in at the last moment, and carry off the prey. It is universally agreed, and it is so laid down by Stair (ii. 1, 33), that if the hunter wounds the animal, and follows up pursuit with reasonable promptitude, it is enough to give him an inchoate right to the animal killed—Mackenzie Inst. ii. 1; Bell's Prin. 1289; M. 11,930.

LORD CHANCELLOR WESTBURY.—In this appeal a question has been raised and argued, both in the Court below and in this House, at a degree of length very disproportionate either to the value of the subject, or to the difficulty of the question. There has prevailed in the northern whale fishery for a very considerable period of time, probably ever since these fisheries came into the possession of this country, a rule with regard to the property in whales which are harpooned and captured, which rule has received the technical designation of "fast and loose." It has been known by that designation among the parties engaged in the fishery, and has become the subject of various decisions in English courts of justice. The object of the rule, undoubtedly, has been to prevent disputes and quarrels among persons engaged in the capture of whales. The rule is intended to denote, that the person who first harpoons a fish and retains his hold of it until it is finally captured, is to be regarded as the proprietor of the fish, although the actual capture and killing of the whale may be accomplished by the assistance of other persons. The rule, however, also involves this consideration, that if the fish, after it has been harpooned, breaks away from the person who first harpoons it, or if it is subsequently abandoned, that fish, though dying in consequence of the wound originally inflicted by the harpoon, is regarded as a "loose fish," and becomes the property of the person who first finds it and takes possession of it. Nay, to such an extent has the rule been carried, that supposing a whale, or any number of whales, to be killed, and the captors are driven by stress of weather to abandon them, mooring them to the ice, or, so far as the evidence here goes, even to the land, if another ship, which has had no part in the capture, comes up and finds the whales in that position, that other ship's party may take possession of them, and appropriate them as the captors. This rule, as I have said, has prevailed for a very considerable period of time.

My Lords, the area of the fishing grounds in the northern seas has, of course, varied from time to time with the progress of the Arctic discoveries, and according to the circumstance, that whales disturbed by being pursued in one particular part of the sea may have abandoned that portion of the sea or coast and taken refuge in other parts, whither, of course, the ships pursue them. Now it appears that, a little to the south of Davis Straits, there is an inlet (or large space of water) sometimes called Cumberland Inlet, sometimes Cumberland Sound; and the first question that arises in this cause is, whether that portion of the sea called Cumberland Inlet is or is not included within the area of the northern whale fishery. I see, however, no reason whatever for arriving at the conclusion, that that portion of the northern sea is not comprehended within the area of the northern whale fishery. It seems to me, that it would be incumbent on the pursuers in the Court below to have proved that as a fact; but I find nothing leading to the conclusion, that it ought not to be considered as part of the northern fishing ground, to which, of course, the rule that I have mentioned of fast and loose would *primâ facie* be applicable.

The next point which it is desirable to consider in this case is this: whether ships resorting to Cumberland Inlet for the purpose of whale fishing, have not, by any kind of common consent among themselves, abandoned the rule of fast and loose, in order to adopt some other different rule. It was contended on the part of the respondents, that the rule of fast and loose was applicable to that peculiar mode of fishing which is adopted in the other portions of the northern

whale fishery, namely, the practice of fishing by what I should denominate "harpoon and line;" and it was asserted that, in Cumberland Inlet, another and a different mode of fishing has prevailed by common consent, which has been adopted from the habits of the native Esquimaux either dwelling there, or resorting to that district; that this different mode of fishing has superseded the fishing by harpoon and line; and that, as a necessary consequence, the rule of fast and loose, introduced to govern the practice of harpoon and line fishing is not applicable to the different mode of fishing which, it is asserted, has prevailed in Cumberland Inlet.

This peculiar mode of fishing has been commonly called drog fishing. It appears to be a mode of fishing which was suggested by the habits of the Esquimaux in their mode of capturing seals. It consists in this, that after they have harpooned a seal, they attach to the end of a short line, which is fastened to the harpoon sticking in the animal, an inflated seal skin of the nature of a large bladder, which is called a drog. This is intended to weary the animal in its flight, and, consequently, to facilitate its being afterwards killed and captured. It is asserted, that a similar practice has prevailed among the natives with regard to whale fishing; and the case of the respondent depends upon the allegation, that this peculiar mode of native fishing has been adopted and used by the English ships resorting, for the purpose of whale fishing, to the Cumberland Inlet.

I have examined with great care the great mass of evidence which has been taken in this case with reference to these several allegations; and I am unable to find any satisfactory proof, that whale fishing, as a general pursuit, prevailed among the native Esquimaux in this locality through the medium of drog fishing. It is, I think, abundantly shewn, that the weapons, the implements, and the boats of the natives were utterly inadequate for the purposes of whale fishing previously to the arrival of European ships in Cumberland Inlet. I have also examined the evidence for the purpose of testing the accuracy of the allegation, that English ships resorting to Cumberland Inlet, by express or tacit agreement or understanding among themselves, abandoned the practice of harpoon and line fishing, in order to adopt this mode of drog fishing in capturing whales.

The present action arose out of the taking of a whale at a time when there were three English ships in Cumberland Inlet. The three ships were the "Clara," which is the ship of the respondents; the "Alibi," which is the ship of the appellants; and another ship called "Sophia." I do not find it anywhere alleged, much less do I find it proved, that there was anything like an agreement between those three ships when they entered Cumberland Inlet, or that there was any such agreement among other ships that preceded them in Cumberland Inlet, to abandon the mode of harpoon and line fishing, in order to adopt this other and different mode of fishing. If there was not, then I think it follows of necessity, that ships going to the Cumberland Inlet for the purpose of engaging in the northern whale fishery were bound by the other custom of fast and loose.

Upon the subject of the mode of fishing adopted in Cumberland Inlet, it is further alleged, on the part of the respondents, that if the ships themselves did not, by their own crew, practise this new and different mode of fishing, yet that they practised it through the medium of the native Esquimaux, who were engaged by the ships for that work. If that allegation were supported by the evidence, it would still be very difficult to say, that, because they employed native fishermen to fish in that manner, they thereby intended, by that employment, to abandon the rule which bound themselves as to their own mode of fishing, and to adopt or establish *inter se* any rule or custom that might prevail among the native Esquimaux in fishing, which they themselves, for their own benefit, might carry on. Upon an examination of the evidence I find, that these things are put, I think, beyond the possibility of doubt, as I find it established that the "Clara" was the only ship which, according to the evidence, appears to have engaged a boat's crew of native Esquimaux. The "Clara" appears to have employed a boat's crew of five or six natives, and the principal man among them, the harpooner, was a man of the name of Bullygar.

The first question that arises upon the evidence is, whether Bullygar and his crew were employed by the "Clara" for the purpose of drog fishing. The decision of that question depends first upon the inquiry, what is the distinctive characteristic of drog fishing? Upon that point I will confine myself entirely to the evidence adduced on behalf of the "Clara." It appears upon that evidence, that the peculiar characteristic of drog fishing was to attach a short line with the drog to the harpoon line, and the moment a fish was struck the line was thrown overboard with the drog attached to it; but, so far from it being proved, that that mode of fishing was the mode which Bullygar and his crew were engaged to employ, it is distinctly stated in his testimony, and by the captain of the "Clara" himself, that Bullygar had a boat which he had obtained from some American whalers, and that this boat was altogether provided with the fishing tackle according to the European practice of whale fishing, viz. with harpoon and line. I find, that Bullygar was provided with three lines, each of which is described as being 100 fathoms long; whereas, according to the testimony of Captain Penny and other witnesses for the respondent, the ordinary line used by the Esquimaux in drog fishing was about 35 feet or about six fathoms long. I find it also clearly established by the evidence, that Bullygar went out with the other boats of the "Clara" for the purpose of fishing in the ordinary European manner, and that

Bullygar, having struck the whale in question, ran out the whole of his three lines, and held fast to the fish, expecting the assistance of the other boats, until (in the language of the log book) the "Clara" was obliged to cut away his line.

Now, it is established by the evidence, that when the European fishers became acquainted with the use of the "drog," it occurred to them, that the drog might be employed for another purpose, which was wholly peculiar to the harpoon and line fishing, and which might obviate one of the inconveniences which sometimes occurred in their mode of fishing. It appears, that in the bay in Cumberland Inlet the water is very deep. It is said, that in some places the water exceeds 400 fathoms in depth, but the exact depth does not appear to have been ascertained. It frequently, therefore, happened when fishing in that bay, that a whale, on being struck, in descending or sinking down trying to escape does so almost perpendicularly to a very great depth, and so it runs out the whole line, and the fishermen are therefore compelled to cut the line in order to avoid the danger of the boat being dragged under water. It seems accordingly to have occurred to Captain Penny and to other persons engaged in the fishing, that whenever the fishermen are reduced to that extremity, and compelled to cut the line, it would be a good thing to attach a drog to the end of the line, in order to facilitate the discovery of the place where the fish should appear on afterwards coming to the surface to breathe.

The use of the drog by Bullygar and his crew appears to have been applied in conformity with this idea, for the drog does not appear to have been used by Bullygar at all for the primary and original purpose of drog fishing as described by the respondents.

I am therefore obliged to answer these several inquiries in the negative. I mean by inquiries the following questions: Have the vessels, in resorting to Cumberland Inlet, arrived at an understanding among themselves, that the rule of fast and loose should not be applicable? My Lords, I answer that question upon evidence in the cause decidedly in the negative. Next I inquire whether the ships resorting to Cumberland Inlet have been in the habit of adopting a different mode of fishing to which the rule of fast and loose was never applicable. I am obliged to answer that question also in the negative. There appears to be no indication, that, so far as Europeans were concerned, any other mode of fishing was practised by them in Cumberland Inlet than the old mode of harpoon and line fishing. I ask, in the third place, whether there is any evidence, that the English and Scotch ships resorting to Cumberland Inlet were in the habit of employing native Esquimaux to fish for them according to the native custom, and according to the alleged usage of drog fishing? As to that I am obliged to answer that question by observing, that the "Clara" alone, in the present case, appears to have employed an Esquimaux boat's crew, but then it appears, that the "Clara" furnished the Esquimaux crew with English implements, for the purpose of engaging in the general mode of fishing by "harpoon and line," as commonly practised. I answer it further by observing, that it does not appear from the evidence, that either the "Alibi" or the "Sophia" had any native boat's crew in the employment of either vessel. One Esquimaux man of the name of Tessuin appears to have been in the employment of the "Alibi," but he seems to have been employed in his character of harpooner, as the Esquimaux are more expert in the practice of harpooning than the English fishermen generally are considered to be. I find, therefore, that the answers to these questions entirely exclude the possibility of this action being maintained. There is nothing at all to warrant the notion which has been come to in the Court below, either that in the whale fishing as practised in Cumberland Inlet, the English and Scotch ships had adopted a different mode of fishing from that which is practised in other parts of the northern whale fishery, or that these particular ships were in the practice of another mode of fishing, or that this whale was killed by the operation of a mode of fishing subject to a different rule from that which regulates the mode of fishing adopted in other portions of the northern whale fishery. Upon these grounds, therefore, I must advise your Lordships to concur in the conclusion and reasoning of the Lord Ordinary rather than in the reasoning of the majority of the Judges.

There is a further question in this case which this view of the subject would render it unnecessary to consider, namely, Supposing the rule of fast and loose to be superseded by the peculiar practice prevailing in Cumberland Inlet, the question then would be, whether the right of property in the whale would not be governed by the ordinary rule of law, namely, the law of occupancy. It would then become a matter of inquiry whether, in truth, according to the expression of that doctrine as set forth in the best Scotch institutional writers, the fish should be considered to have been so far captured by what Bullygar had done in wounding and entangling it, as to give a right to Bullygar's employers to pursue and claim the fish, seeing that the actual death was attributable to the harpoons from the boats of the "Alibi." If it were necessary to decide that question, I should be of opinion, that there is not sufficient evidence in the cause to shew, by the law of occupancy as interpreted in the law of Scotland, that this fish belonged to the "Clara." I think it unnecessary to decide or enter into that, because I have arrived at the conclusion which I submit to your Lordships as the proper one, that there is nothing to exempt these ships fishing in the Cumberland Inlet from the application of the ordinary rule of fast and loose, and if that be so, that, as it is hardly attempted to be disputed, that this was a

loose fish at the time when it was taken possession of by the boats of the "Alibi," I must, therefore, advise your Lordships to reverse the judgment of the Inner House, and to affirm the interlocutor which was pronounced by the Lord Ordinary.

LORD CHELMSFORD.—My Lords, a majority of the Judges of the First Division of the Court of Session agreed upon three points in this case—(1.) that the custom in whale fishing commonly called the law of fast and loose must be excluded; (2.) that there is no settled usage prevailing in Cumberland Inlet which can take the place of this custom; and therefore, (3.) that the only law applicable to the dispute which has arisen is the law of occupancy prevailing in Scotland.

The importance of having a settled rule, and of adhering to it in all cases where it can be properly applied, is obvious. It governs the rights, not of whalers from one country only, but of rival nations, upon fishing ground common to them all; and it prevents the violent collisions and contests which would inevitably arise out of conflicting claims to the possession of the same object of pursuit. Perhaps a better illustration of the danger of permitting a doubt to break upon this general rule of the northern whale fisheries could not be afforded than by the present case, in which the question, whether it had not been superseded by a usage peculiar to a limited part of the seas in which it prevailed, produced imminent danger of a fierce struggle between the crews of the two vessels claiming the prize, and led, though to a slight extent, to bloodshed.

The custom which regulates the rights of parties engaged in whale fishing in the north seas, is one which has long been established, and which has been recognized in decisions of the highest authority. A majority of the Judges of the First Division of the Court of Session, however, whilst admitting the existence of the custom throughout the North Sea generally, held, that it was inapplicable to the present case; because, in Cumberland Inlet, where the dispute arose, a new and peculiar kind of fishing is carried on, which was employed in the capture of the whale in question. This mode of fishing, which is shortly described as drog fishing, was derived by the whalers from the Esquimaux, who, when the intercourse between them and Europeans commenced, appear to have applied it almost entirely to seal fishing. This they carried on in their light boats, capable of holding only one man, using lines of about 35 feet long with drogs at the end, consisting of inflated seal skins of about five or six feet in length, and about three feet in circumference. The object of using drogs is to impede the way of the fish after it has been struck, and probably also to indicate its position when it rises to the surface during the pursuit. It is obvious, that the Esquimaux could not, with the boats and gear which they employed even in fishing for seals, keep their lines attached to the boat. The small extent of their lines would be insufficient to give scope to the fish to exhaust itself before the whole length was run out, and their light boats would have been instantly upset if the lines had been retained on board. The species of fishing by the natives was, therefore, almost a matter of necessity, and there is no reason to suppose (to use the words of one of the witnesses) that they were ever in the habit of fishing with long lines, and keeping the lines attached to the boat.

The Esquimaux were first employed by whalers in 1844. Captain Penney, who has longer experience in these seas than any of the other witnesses, says, that, originally, he did not engage them as seamen, but merely put them on board the boats to instruct his seamen in the habits of the whale. He first employed them as seamen in 1853, but never anywhere else than in Cumberland Inlet. From that time the practice of making use of the services of the natives became so well established, that the whaling vessels proceeded on their outward voyages short-handed, reckoning upon being able to fill up the complement of their crews from the natives, in the event of fishing in Cumberland Inlet. In consequence, drog fishing was first introduced amongst the whalers resorting to this inlet.

The usage of the Esquimaux, with regard to the property in a captured fish, appears to have been, that the first person whose harpoon struck and remained in the fish, with the lines and drogs attached, was entitled to it, although it might be afterwards killed and taken possession of by another. I do not find any proof that this native rule was ever accepted by the whalers visiting Cumberland Inlet. The time during which drog fishing has been practised was, of course, much too short to admit of any new usage tacitly growing up, and supplanting the old established one; but there was nothing to prevent the adoption of the native rule or of any other, by a general agreement amongst the persons engaged in fishing in this part of the north seas. An agreement of this kind might have been expressly entered into, or it might be implied from circumstances. That no agreement can be implied is evident from the fact, that the witnesses differ amongst themselves as to the period during which the use of drogs secured the right to the first harpooner. One witness thinks, that the fish would continue a fast fish so long as there was a pursuit of it; but that it would be a loose fish after the crew had lost sight of it for two hours. Another, that it would remain a fast fish for any length of time, so long as the drogs were attached to it, although the pursuit had been abandoned; and a third, that even if the drogs had been detached from the coil of the lines, the fish would belong to the party who first drogged it.

The existence of an express agreement on the subject is distinctly negatived; for it is stated by one of the witnesses, that an attempt was made by the masters of some vessels, other than British, to have the Esquimaux custom agreed to by the British whalers as the law or usage for fishing

in those seas; that Captain Stewart of the "Alibi" was the only person who opposed it, and no agreement of the kind was ever entered into. The law of fast and loose must, therefore, prevail in Cumberland Inlet as in the rest of the north seas, unless the fishing carried on there is so peculiar, and so essentially different from the mode of fishing previously practised, as to render the custom altogether inapplicable.

This is the opinion of the majority of the Judges of the First Division; and holding, as they do, that no other usage had been substituted, they consider (to use the words of the Lord President) that the question ought to be solved by the principles of their own laws of occupancy. I cannot forbear the remark, that although the application of the Scotch law of occupancy created no difficulty in this case, as both the contending parties belonged to Scotland, yet, if the fishing in Cumberland Inlet is governed by no usage, but is left to the general law, many perplexing questions might hereafter arise between the natives of different countries, in which different principles as to rights acquired by occupancy may prevail. I think, however, that it may be fairly questioned, whether the drog fishing carried on in Cumberland Inlet is so essentially different from the former method of fishing, as necessarily to exclude the established custom. The respondents not only assert this to be the case, but also endeavour to distinguish Cumberland Inlet from the rest of the north seas as an entirely separate and distinct fishing ground. To a certain extent, they have succeeded in giving it something of a distinctive character from the rest of the fishings. It appears from the evidence, that when it first became known to the whalers it was not resorted to, except at the end of the season, when they had failed to make a good fishing in the north; and that it "is so distinct, that some regular whaling vessels have written orders not to go there, and others, with a smaller crew, go to that fishing alone to obtain the assistance of the natives." The drog fishing carried on in Cumberland Inlet, and apparently not in other parts of the north seas, is also alleged to be a totally different mode of fishing from that previously employed; because the object of the old method is, if possible, to keep the whale fast, and the essence of drog fishing is to part with the lines and drogs, leaving the fish, after being struck, to carry them off for the purpose of retarding its flight.

Had the whalers resorting to this fishing ground, which is nominally, at least, distinguished from Davis Straits and the rest of the north seas, and confined themselves exclusively to the peculiar mode of fishing which they learnt from the natives, there might have been some opening for a presumption, that a new usage was to prevail amongst them; but this is not the case, for it clearly appears that drog fishing has not excluded the old method of fishing in Cumberland Inlet, as both are carried on together at the same time. It is, therefore, hardly possible to conceive anything more inconvenient, or more likely to lead to endless disputes, than in a comparatively narrow range of fishing ground to have two modes of fishing going on simultaneously, and subject to two different rules which must be continually conflicting with each other. But happily the two methods of fishing are not separate and independent of each other; but the drog fishing carried on in Cumberland Inlet only forms part of the general fishing operations there. The ordinary method is employed, but drog fishing, with the assistance of the natives, is added to it. The natives appear to be retained not merely for drog fishing, but for whale fishing generally, and no distinction can be made between them and the other seamen engaged in the service.

The evidence in this case clearly shews the general employment of the natives, and that their services were not confined to their own peculiar mode of fishing. The boat used by Bullygar, the native employed by the captain of the "Clara," was supplied with long lines similar to those in the other boats—lines of a length never used by Esquimaux in their fishing, nor capable of being used together with their boats. The whale in question having been harpooned by Bullygar, the lines were paid out for about ten minutes before they were parted with. The entry in the log book of the "Clara" gives in a few words the description of Bullygar's proceedings. This log book, it must be remembered, was made up on the very day on which the whale was killed, and no doubt after the dispute had arisen as to the property in it. It is in these words: "Bullygar was obliged to drog his lines according to native custom." Now I collect from this entry and from the evidence, that Bullygar intended, if possible, to keep the whale fast, and paid off his lines with that intention; but, when they were entirely run out, he could no longer safely retain them in the boat, and he was therefore compelled to part with the drogs at the end. If Bullygar's boat was engaged solely in drog fishing, there would have been no more occasion to mention the necessity of using his drogs than to state that he struck the whale with his harpoon. These circumstances appear to me to conclude the question, and to render any further observations unnecessary; but I must add, that, assuming drog fishing to be essentially different from the former method of fishing, (upon which a doubt may be fairly entertained,) it must be remembered, that when the whalers, a very few years ago, adopted it from the natives and introduced it as part of their operations, they were governed by the established custom of whale fishing in the north seas. They knew that, according to that custom, a drogged fish would be a loose fish, and the prize of any one who could afterwards secure it. They carried with them into Cumberland Inlet their old method of fishing, and with it the custom which attached upon it. They

might, if they pleased, have excluded, by common consent, this custom from the novel mode of fishing which they introduced, or have substituted some other rule for it within the Inlet; and an endeavour seems to have been made to regulate their rights by an agreement confined to that part of the seas. This having failed, and it being admitted, that there is no local usage to take the place of the general custom, there seems to me to be nothing in the character of the Cumberland Inlet, or in the peculiar nature of drog fishing, which is necessarily incompatible with the prevalence of the custom within those limits, and that it must therefore attach upon the fishery operations carried on there in the same manner as throughout the whole fisheries in the rest of the north seas. For these reasons I think, that the interlocutor ought to be reversed.

LORD KINGSDOWN.—I agree with the noble and learned Lords who have addressed your Lordships, that the interlocutor complained of should be reversed. I think it due to the Lord Ordinary to state, that the real question to be decided, and the true grounds of the decision, are stated by him with perfect clearness and accuracy in his very able note appended to the interlocutor which he pronounced.

LORD CHANCELLOR.—I shall move your Lordships to reverse the interlocutor of the Inner House, and to affirm that of the Lord Ordinary, and to remit the case back to the Court of Session with a direction to dismiss the reclaiming note of the pursuer, with expenses.

Interlocutor reversed.

Appellants' Agents, Deans and Stein, Solicitors, Westminster. — *Respondents' Agents*, Johnston, Farquhar, and Leech, Solicitors, London.

FEBRUARY 14, 1862.

MRS. ISABELLA YOUNG or RICHARDSON and MRS. YOUNG or THOMSON (and Husbands), *Appellants, v.* LAURENCE ROBERTSON and Others (Donaldson's Trustees), Lieut. Colonel JOHN MACDOUGALL, MRS. MARY ANN TRONSON or YOUNG, and JOHN LAWFORD YOUNG (and Tutor), *Respondents.*

JOHN LAWFORD YOUNG (and Tutor), *Appellant, v.* MRS. YOUNG or RICHARDSON and MRS. YOUNG or THOMSON (and Husbands), Lieut. Colonel JOHN MACDOUGALL, and THOMAS TRONSON YOUNG, *Respondents.*

Legacy—Vesting—Conditional Institution—Trust Settlement—Clause of Survivorship—Construction—*A testator who, by his trust settlement, provided his wife in a liferent of the whole of his estate, heritable, and moveable, directed his trustees, as to the residue, " to divide, or convey" " the whole residue," " after the death of the last liver of me and my said wife, equally, to and among" several grandnephews and grandnieces, " equally, or share and share alike, and to their respective heirs or assignees, declaring that, if any of the said residuary legatees shall die without leaving lawful issue before his or her share vest in the party or parties so deceasing, the same shall belong to, and be divided equally, or share and share alike, among the survivors of my said grandnephews and grandnieces, equally." The wife and all the residuary legatees survived the testator except two of the legatees, A and B, who predeceased the wife, A leaving no issue, while B left a son.*

HELD (reversing judgment), (1.) *That the period of vesting was the period of distribution on the death of the wife, and that a legatee dying during the lifetime of the wife without leaving lawful issue, as A did, could take no part or share of the residue;* (2.) *That B's son was a conditional institute, and so took the share that would have belonged to his father B, had he survived the period of vesting;* and (3.) *That the share of A was divisible among such of the residuary legatees as were alive at the death of the liferentrix or period of distribution, and that B's son was excluded from participating in that share.*

Where there is a clause of survivorship, then primâ facie *survivorship means the time at which the property to be divided comes into enjoyment, that is to say, if there be no previous life estate, then at the death of the testator; but, if there be a previous life estate, then at the termination of that life estate:* Per LORD CRANWORTH.

---

[1] See previous reports 22 D. 1527 : 32 Sc. Jur. 684. S. C. 4 Macq. Ap. 314, 337 : 34 Sc. Jur. 270.