THE ABERDEEN ARCTIC COMPANY, APPELLANTS.
SUTTER, ET AL., ... RESPONDENTS (*a*).

1862.
March 17th, 27th, and 28th, April 1st and 3rd.

Whale Fishery Rules—"Fast and loose"—Harpoon and Line Fishing distinguished from Drog Fishing.—By the general custom of the Greenland whale fisheries, a whale does not become appropriated by merely being harpooned; it is necessary that the line should remain attached to the boat. The whale is then a "fast" fish.

If the line gets detached the whale becomes a "loose" fish, and is consequently the lawful prey of any one who captures and secures it.

Held by the House (reversing the decision of the Court of Session), that the general custom of the Greenland whale fisheries was applicable to the case of a whale taken in the special locality of Cumberland Inlet. Held (also reversing the decree of the Court below), that the Scotch law of "occupancy" had no application.

Advantages of a general Rule.—The establishment and acceptance of a general rule prevent disputes and collisions between the fishers of rival nations resorting to the Greenland seas for whales. See remarks by Lord Chelmsford, *infrà*; p. 369.

ON the 13th October 1856, in Cumberland Inlet, an Esquimaux fisher named Bullygar employed by the Respondents, owners of the ship "Clara" of Peterhead, harpooned a whale;—letting go the line with an inflated sealskin attached to it. The wounded animal dived instantly, and reappeared at a distance of some miles; but, before the "Clara" could come up, the men of another vessel, the "Alibi" of Aberdeen, belonging to the Appellants, harpooned and secured it.

Under these circumstances the sole question was one of property, namely, who became entitled to the whale,—the owners of the "Clara," or the owners of the "Alibi?"

(*a*) This case is fully reported, 23 Sec. Ser. 470.

THE ABERDEEN ARCTIC COMPANY v. SUTTER, ET AL.

The owners of the "Clara" brought their action in the Court of Session against the owners of the "Alibi" for payment of 1,200*l.* "in name of compensation and damages," which they attributed to this, as they alleged, illegal seizure and subsequent retention of the whale. Insisting in this action, the owners of the "Clara," by their pleas in law, maintained that the whale had become their property from the moment it was first struck.

The owners of the "Alibi," on the other hand, by their defence and pleas in law, relied on the general laws of whale fishing in the Greenland seas, which give the property not to the first harpooner of the whale, but to the owners of the boat which finally secures it.

The *Lord Ordinary* (*a*) decided in favour of the ultimate captors, in other words in favour of the "Alibi;" but the First Division of the Court of Session, on the 8th February 1861, altered the *Lord Ordinary's* Interlocutor, and gave judgment in favour of the first harpooner, that is to say, in favour of the "Clara."

Against this judgment the owners of the "Alibi" appealed to the House, and were represented at the bar by the *Solicitor-General* (*b*) and Mr. *Monro*, who cited Scoresby's Arctic Regions (*c*), *Addison* v. *Rowe* (*d*), and *Fenning* v. *Grenville* (*e*).

(*a*) Lord Kinloch. (*b*) Sir Roundell Palmer.
(*c*) Edit. 1820, p. 518. (*d*) 3 Paton, 334.
(*e*) 1 Taunton, 241. In this case it was held that by the custom of the Greenland whale fishery, unless he who first strikes a fish continues his dominion until he has reduced it into possession, any other person who kills it acquires the entire property. In the same case it was affirmed that where the general consent of the persons engaged in a trade has established certain rules for the conduct of that trade, it is not competent for any number of individuals to promulgate a contrary regulation; and though they may agree among themselves to adopt new rules, they cannot thereby deprive one who has not assented to their compact of the benefit of the old rules.

Sir *Hugh Cairns* and Mr. *John Skelton* appeared for the Respondents.

On the motion for judgment, the following opinions were expressed by the Law Peers :—

Lord Chancellor's opinion.

The LORD CHANCELLOR (*a*) :

My Lords, 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 considerable period of time, probably ever since the time when these fisheries came into the possession of this country, a rule with regard to the property in whales that are harpooned and captured, which rule has received the technical denomination of "fast and loose" 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 was to prevent disputes and quarrels among persons engaged in the capture of whales. The rule is that the person who first harpoons a fish and retains his hold of that fish 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.

But the rule also involves this condition, that if the fish, after it has been harpooned, breaks away from the person who first harpoons it, or if the fish is subsequently abandoned, that fish, though dying in consequence of the wound originally inflicted by the harpoon, is a "loose" fish, and becomes the property of the person who first finds it and takes possession of

(*a*) Lord Westbury.

THE ABERDEEN ARCTIC COMPANY v. SUTTER, ET AL.

Lord Chancellor's opinion.

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 of those whales are driven by stress of weather to abandon them, and to moor them to the ice, or (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.

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 as the whales disturbed by being pursued in one particular part of the sea have abandoned that portion of the sea or coast, and taken refuge in other parts, whither, of course, the ships pursue them.

A little to the south of Davis's Straits there is an inlet, a large piece of water, sometimes called Cumberland Inlet, sometimes Cumberland Sound, lying on the south side of Cumberland Island. 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 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 was incumbent on the Plaintiffs in the Court below to prove that it was not; but I find nothing leading to the conclusion that that 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 be *primâ facie* applicable.

The next point is, whether ships resorting for the purpose of whale fishing to Cumberland Inlet have or have not by any kind of common consent among

themselves abandoned the rule of "fast and loose" in order to adopt some different rule.

Now it was contended on the part of the Respondent that the rule of "fast and loose" was applicable only to that peculiar mode of fishing which is adopted in the other portions of the northern whale fishery, namely, the practice of fishing by the harpoon and line. And it is asserted that in Cumberland Inlet another and a different mode of fishing has prevailed by common consent, which has been adopted from 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.

That mode of fishing is commonly called "drog" fishing. Your Lordships have had it described to you several times in the course of the argument. It appears to be a mode of fishing used in capturing seals by the Esquimaux, who, after they have harpooned a seal, attach to the end of a short line which is fastened to the harpoon an inflated seal skin which is called a "drog," in the nature of a large bladder. This is intended to weary the fish, and consequently to facilitate its being afterwards 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

THE ABERDEEN ARCTIC COMPANY *v.* SUTTER, ET AL.

Lord Chancellor's opinion.

reference to these several allegations, and I am unable to find any satisfactory proof that whale fishing prevailed among the native Esquimaux in this locality through the medium of this drog fishing. It is, I think, abundantly shown 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 the European ships in Cumberland Inlet. I have also examined the evidence for the purpose of testing the accuracy of the allegation that the 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 drog mode of 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 the "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 the ships going to the Cumberland Inlet for the purpose of engaging in the northern whale fishery are bound by this custom of "fast and loose."

But 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.

But upon an examination of the evidence, I find that these things are put, I think, beyond the possibility of doubt. I find it established that the "Clara" is the only ship which, according to the evidence now before us, 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 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, and the moment the fish was struck the line was thrown overboard with the drog attached to it. But so far from its being proved that that mode of fishing was the mode which Bullygar and his crew were engaged to use, I find it distinctly stated in his testimony by the captain of the "Clara"

THE ABERDEEN ARCTIC COMPANY v. SUTTER, ET AL.

Lord Chancellor's opinion.

himself, that Bullygar had a boat which he had obtained from some American whalers, and that this boat was wholly provided with fishing tackle according to the European practice of whale fishing 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 six fathoms long. I find it 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 of the "Clara") he was obliged to cut away his lines.

Now it is established by the evidence that when the European fishers became acquainted with the use of the drogs, it occurred to them that the drog might be employed for another purpose, peculiar to the harpoon and line fishing, and which might obviate one of the inconveniences that sometimes occurred in that 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. It frequently, therefore, happened, when fishing in that bay, that the whale, in descending or sinking down almost perpendicularly to very near the bottom, ran out the whole line, and that the fishermen were compelled, either to cut the line, or to submit to the boat being dragged under water. It seems therefore to have occurred to Captain Penny, and to other persons engaged in the fishing, that whenever they were reduced to that extremity, and compelled to cut

the line, it would be a good thing to attach one of the drogs to the end of the line, which would facilitate the observation of the place where the fish afterwards appeared. The use of the drog by Bullygar and his crew appears to have been in conformity with that suggestion, and the drog does not appear to have been used by Bullygar at all for the primary and original purpose of drog fishing, as it is described by the Respondents.

I am therefore obliged to answer the several inquiries in the negative. I mean by inquiries the following questions:—Did the vessels, in resorting to Cumberland Inlet, arrive at an understanding among themselves that the rule of "fast and loose" should not be applicable? I answer that question, upon the 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 alleged native custom, that is, the usage of drog fishing? And I answer that question by observing that the "Clara" alone, in the present case, appears to have employed an Esquimaux boat's crew, but to have furnished that crew with English implements for the purpose of pursuing the general mode of fishing by harpoon and line which had been commonly practised.

THE ABERDEEN ARCTIC COMPANY v. SUTTER, ET AL.

Lord Chancellor's opinion.

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, a 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 was entertained in the Court below, either that in the whale fishing practised in the Cumberland Inlet the English and Scotch ships have 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 with the conclusion of the *Lord Ordinary*, and with the reasoning of the *Lord Ordinary*, rather than with the reasoning of the majority of the Judges of the Inner House.

There is a further question in this case which this view of the subject renders it unnecessary to consider, namely, supposing the rule of fast and loose to be superseded by the peculiar practice prevailing in Cumberland Inlet, 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

become a matter of inquiry whether, according to the expression of that law as found 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, although the actual death was attributable to the harpoons from the boats of the "Alibi."

Lord Chancellor's opinion.

If it were necessary to decide that question, I should be of opinion that there is not enough to show that by the law of occupancy, as interpreted in the law of Scotland, this fish belonged to the "Clara;" but 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, there is hardly an attempt to dispute 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's opinion.

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. First, that the custom in whale fishing, commonly called the law of "fast and loose," must be excluded. Secondly, that there is no settled usage prevailing in Cumberland Inlet which can take the place of this custom. And, therefore, thirdly, 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

THE ABERDEEN ARCTIC COMPANY *v.* SUTTER, ET AL.

Lord Chelmsford's opinion.

adhering to it in all cases where it can properly be 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 in 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 an 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 been long established, and which has been recognized in decisions of the highest authority. A majority of the Judges of the First Division, however, whilst admitting the existence of the custom throughout the North Seas 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 in fishing even 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. This 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 the whalers in 1844. Captain Penny, 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 crew from the natives in the event of their fishing in Cumberland Inlet. In this manner 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

THE ABERDEEN ARCTIC COMPANY *v.* SUTTER, ET AL.

Lord Chelmsford's opinion.

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 secures 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.

THE ABERDEEN ARCTIC COMPANY v. SUTTER, ET AL.

Lord Chelmsford's opinion.

This is the opinion of the majority of the Judges of the First Division, and holding, as they do, that no other usage has been substituted, they consider (to use the words of the *Lord President*) "that the question must 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 fishery in Cumberland Inlet is governed by no usage, but is left to the general law, many perplexing questions may hereafter arise between the natives of different countries, in which different principles as to rights acquired by occupancy may prevail.

But I think 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

THE ABERDEEN ARCTIC COMPANY v. SUTTER, ET AL.

Lord Chelmsford's opinion.

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's Straits and the rest of the North Seas, 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, but that both are carried on together at the same time. Now it is hardly possible to conceive anything much 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 shows the general employments 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 the 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 them and throw them overboard 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 a part of their operations, they were

THE ABERDEEN ARCTIC COMPANY v. SUTTER, ET AL.

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 anyone who could afterwards secure it. They carried with them into Cumberland Inlet their old method of fisbing, 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 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.

Lord Chelmsford's opinion.

For these reasons I agree in the opinions of the *Lord Ordinary* (*a*) and Lord *Curriehill* (*b*), and differ with the Interlocutor of the First Division of the Court of Session, which I think ought to be reversed.

Lord Kingsdown's opinion.

Lord KINGSDOWN:

My Lords, 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

(*a*) 23 Sec. Ser. 470. (*b*) Ib.

decision are stated by him with perfect clearness and accuracy in his very able Note appended to the Interlocutor which he pronounced.

The LORD CHANCELLOR: I shall move your Lordships to reverse the Interlocutor of the Inner House, and to affirm the Interlocutor 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.

JUDGMENT.

Ordered and *Adjudged*, That the Interlocutor of the Lords of Session in Scotland, of the First Division, of the 8th of February 1861 be, and the same is hereby reversed; and that the cause be remitted back to the Court of Session in Scotland, with directions to that Court to adhere to the Interlocutor of the Lord Ordinary of the 10th of January 1860, and to decern in terms thereof, and to find the Respondents liable to the Appellants in the additional expenses incurred by them in the Court of Session since the date of the said Interlocutor of the Lord Ordinary. And it is further *Ordered*, That the said Pursuers (Respondents) do repay to the Defenders (Appellants) the expenses to which the said Defenders (Appellants) were found liable by the said Interlocutor of the 8th of February 1861, appealed from, if paid by the said Defenders (Appellants) to the said Pursuers (Respondents), with such interest as may be due thereon to the date of repayment; and that the Court of Session do proceed otherwise in the cause as may be just and consistent with this Judgment (*a*).

(*a*) Quæsitum est, an si fera bestia ita vulnerata sit, ut capi possit, statim tua esse intelligatur? Et quibusdam placuit, statim esse tuam; donec eam persequaris: quod si desieris persequi, desinere esse tuam, et rursus fieri occupantis. Alii vero putaverunt, non aliter tuam esse, quam si eam ceperis. Sed posteriorem sententiam nos confirmamus, quod multa accidere soleant, ut eam non capias.—Inst. 2. 1. 13.

DEANS & STEIN—JOHNSTON, FARQUHAR, & LEECH.