In the above circumstances the application must be dismissed, and with costs. Had the applicant been unaware of the existence or claims of the caveators and other relations of the husband, or had he brought their existence to the attention of the Court when making his application, it might have been a case for not ordering the applicant to pay the caveators' costs. But he was quite aware of their existence and claims, as they were set up directly after Nathibái's death, and it is the duty of all applicants for administration to bring to the attention of the Court the existence of persons who have any fair ground of adverse claim or opposition to such application.

Application dismissed with costs.

[APPELLATE CIVIL JURISDICTION.]

Before Sir M. R. Westropp, Knt., Chief Justice and Mr. Justice Nánábhái Haridás. October 2.

BA'BAN MAYACHA AND OTHERS (PLAINTIFFS, APPELLANTS) *v.*
NA'GU SHRAVUCHA AND OTHERS (DEFENDANTS, RESPONDENTS.)*

Jurisdiction—Res judicata—Cause of action—Right of fishing in the sea.

The District Court may, when the defendants reside within its local jurisdiction, try a suit for damages for and restrain by injunction an alleged illegal disturbance of the plaintiff's right to fish and use fishing stakes and nets fixed in the sea below low-water-mark and within three miles of it.

The dismissal, on the ground of want of jurisdiction, by the Civil Court of a suit to eject the defendants from the fishing ground of the plaintiffs, situate below low-water-mark, does not operate as a bar to a subsequent suit by the plaintiffs to recover damages from the defendants for fixing their fishing stakes and nets too near to those of the plaintiffs.

Rights of the Crown and of the public in the waters and the subjacent soil of the sea discussed.

The right of the public to fish in the sea, whether it and its subjacent soil be or be not vested in the Crown, is common, and is not the subject of property.

That right may, in certain portions of the sea, be regulated by local custom.

Members of the public, exercising the common right to fish in the sea, are bound to exercise that right in a fair and reasonable manner, and not so as to impede others from doing the same; and conduct which prevents another from a fair exercise of his equal right, if special injury thereby results to him, is actionable.

* Regular Appeal No. 62 of 1873.

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THE parties to this suit were all fishermen owning stakes and nets fixed off the coast of Salsette, at a distance of between two and three miles from the shore. Previously to 1862 the plaintiffs or their predecessors sued the defendants or their predecessors to eject the defendants from a fishing ground claimed by the plaintiffs and valued at Rs. 6,000, and to recover from the defendants, as damages for trespass on the same, the sum of Rs. 1,500. This suit was dismissed by the Principal Sadar Amin of Thána, on the ground (among others) that the Civil Courts had no jurisdiction over that part of the sea which formed the subject of the suit. The Zilla Judge, in appeal, affirmed the decree of the Lower Court on the grounds—1st, that the existence of private property in any portion of the open sea ought not to be recognized without direct evidence (such as was not there forthcoming) of the appropriation, to the claimants, of such exclusive privileges, either by charter or by statute; and, 2nd, that, assuming private property to exist of the kind and at the place to which the action referred, the Zilla Courts had no jurisdiction in regard to such property. The Sadar Diváni Adálut, in special appeal in 1862, affirmed that decree on the ground only of want of jurisdiction. In 1873 the plaintiffs brought the present suit to recover the sum of Rs. 3,000 as damages sustained by the plaintiffs by reason of the defendants having maliciously and wrongfully erected fishing stakes at a distance of only 120 feet from those of the plaintiffs, whereby they wrongfully disturbed the plaintiffs in the enjoyment of their right to fish, and unjustifiably prevented fish from getting into the nets of the plaintiffs, and to obtain a perpetual injunction to restrain the defendants from so erecting their fishing stakes. The District Judge of Thána held the matter to be *res judicata*, and the present suit accordingly, to be barred by the previous one. The plaintiffs thereupon preferred this regular appeal.

Leith (*Ghanasham Nilkant* with him), for the appellants, argued, 1st, that the matter was not *res judicata*; 2nd, that the Civil Courts had jurisdiction to entertain the suit; 3rd, that an action in the nature of an action on the case—would lie. He cited the following authorities:—*Kalia Hasoocha* v. *Sakool Antoocha*,[1] *Young* v. *Hichens*, *Regina* v. *Kástyá Rámá*,[3] *Green* v. *The London General Omnibus*.

(1) 9. Har. S. D. A. Rep. 276. (2) 6 Q. B. 606.
(3) 8 Bom. H. C. Rep. 63 Cr. Ca.

Company.[1] Woolrych on Waters, pp. 166, 167, 204, 236, 237. *Carrington* v. *Taylor,*[2] *Keeble* v. *Hickeringill,*[3] *Wilkes* v. *The Hungerford Market Company,*[4] *Rose* v. *Groves,*[5] *Davis* v. *Mann,*[6] *The Mayor, &c., of Colchester* v. *Brooke,*[7] *The Stockport Waterworks Company* v. *Potter,*[8] Broom Leg. Max. (4th Ed.), pp. 363, 365, 367, 376, 381. Addison on Torts (3rd Ed.), pp. 7, 8, 9, 10, 11, 139, 140, 168. *Deane* v. *Clayton,*[9] *Dobson* v. *Blackmore,*[10] *Anonymous,*[11] *Smith* v. *Kenrick,*[12] *Ashby* v. *White,*[13] *Embrey* v. *Owen.*[14] 3 Kent Comm. 550. *Benett* v. *Costar,*[15] *Seymour* v. *Courtenay.*[16] 2 Bl. Com. 39. *Holford* v. *Bailey.*[17] Com. Dig. Tit. Trespass. *Bell* v. *The Midland Railway Company,*[18] *Rogers* v. *Rajendro Dutt,*[19] *Chapman* v. *Pickersgill.*[20]

Branson (with whom was *Dhirájlal Mathuradás),* for the respondents, submitted, but without relying strongly on the point, that the matter was *res judicata.* He also argued that the Court had no jurisdiction, and, even if it had, no action would lie, citing *Stevenson* v. *Newnham,*[21] *Rogers* v. *Rajendro Dutt,*[22] *Carrington* v. *Taylor,*[23] *Ward* v. *Cresswell.*[24] 16 Vin. Abr. 354. Piscary B. *Warren* v. *Mathews.*[25] 1 Bac. Abr., Actions on the case C, (p. 76, 6th Ed.). *Bejoy Gobind Bural* v. *Watson,*[26] *Bhooyah Okhoy* v. *Rajah Gujendro,*[27] *Green* v. *The London General Omnibus Company,*[28] *Wilkes* v. *The Hungerford Market Company,*[29] *Rose* v. *Groves,*[30] *Ibbotson* v. *Peat,*[31] *Deane* v. *Clayton,*[32] *Dobson* v. *Blackmore,*[33] *Young* v. *Hichens.*[34]

(1) 29 L. J. C. P. 13.
(2) 11 East 571.
(3) 11 East 574.
(4) 2 Bing. N. C. 281.
(5) 12 L. J. C. P. 251.
(6) 12 L. J. Ex. 10.
(7) 15 L. J. Q. B. 173.
(8) 31 L. J. Ex. 9.
(9) 7 Taunt. 489.
(10) 9 Q. B. 991.
(11) 1 Camp. 517 *in notis.*
(12) 7 C. B. 515.
(13) 2 Ld. Raym. 938; S. C. 1 Sm. L. C. 227 (6th Ed.)
(14) 20 L. J. Ex. 212.
(15) 8 Taunt. 183.
(16) 5 Burr. 2815.
(17) 13 Q.B. 426.
(18) 30 L. J. C. P. 273.
(19) 13 Moore P. C. 209.
(20) 2 Wils. 145.
(21) 13 C. B. 285.
(22) 13 Moore P. C. 209.
(23) 11 East 571.
(24) Willes Rep. 265.
(25) 6 Mod. 73.
(26) Calc. S. D. A. Rep. for 1859, p. 629.
(27) 18 Calc. W. R. 142 Civ. Rul.
(28) 29 L. J. C. P. 13.
(29) 2 Bing. N. C. 281.
(30) 12 L. J. C. P. 251; S. C. 5 M. and G. 613.
(31) 34 L. J. Ex. 118.
(32) 7 Taunt. 489.
(33) 9 Q. B. 991.
(34) 6 Q. B. 606.

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Leith in reply cited *Carter* v. *Murcot*,(1) *Webb* v. *Bird*,(2) *Stevenson* v. *Newnham*.(3) Broom Leg. Max. (5th Ed.), p. 325. *Regina* v. *Pratt*,(4) *Ibbotson* v. *Peat*,(5) *Chasemore* v. *Richards*,(6) *Bagram* v. *Moses*,(7) *Penn* v. *Lord Baltimore*,(8) *Chintaman Nárá-yan* v. *Madharav Venkatesh*.(9)

NA'NA'BHA'I HARIDA'S, J.:—This is an appeal against a judgment of the District Judge of Thana. The appellants (plaintiffs below) allege in their plaint that they and the respondents are fishermen; that, in accordance with the custom of their trade, they have been for years erecting their fishing stakes annually opposite to the village of Yerangal, at a distance of between two and three miles from the coast, those of the respondents being to the north of, and about 600 feet distant from, their own; that in the month of March 1872, the respondents, in addition to their customary stakes to the north, *maliciously and wrongfully* erected other fishing stakes to the south, at a distance of only 120 feet from those of the appellants, and that thereby they wrongfully disturbed the latter in the enjoyment of their right to fish, and unjustifiably prevented fish from getting into their nets, thus causing them considerable pecuniary loss. They, therefore, claim from the respondents Rs. 3,000 as damages in respect of such their act, and also pray for a perpetual injunction to restrain the latter from repeating it.

In their written statement the respondents (defendants below) urge that the Court has no jurisdiction to entertain this suit; that the matter complained of is *res judicata*, having already formed the subject of a previous suit that went up to, and was disposed of by, the late Sadr Divani Adalat(10); and also that the suit is barred by the law of limitation. They further deny the custom alleged in the plaint; deny that they have maliciously or wrongfully done the act complained of; aver that they are entitled to fish, and for that purpose to erect their fishing stakes and nets in any part of the sea; deny that the appellants have suffer-

(1) 4 Burr. 2163.
(2) 10 C. B. N. S. 268.
(3) 13 C. B. 285.
(4) 4 El. & Bl. 860.
(5) 34 L. J. Ex. 118.
(6) 26 L. J. Ex. 393.
(7) 1 Hyde 284.
(8) 1 Ves. 444; S. C. 2 Wh. & Tud. (3rd Ed.) 837.
(9) 6 Bom. H. C. Rep. 29, A. C. J.
(10) 9 Harr. S. D. A. Rep. 276.

ed any injury; and, lastly, urge that the appellants, having no exclusive right to fish in any part of the sea, are not entitled to the injunction prayed for.

The District Judge accordingly laid down the following issues :—

1. Whether the Court has jurisdiction to try the suit ?
2. Whether the judgment in the previous suit prevents this suit being heard ?
3. Whether this suit is barred by the law of limitation ?
4. Whether the custom alleged by the plaintiffs exists ? and
5. Whether the defendants have caused any injury to the plaintiffs, and, if so, what damages should be awarded ?

He held that, under Section 5, Act VIII. of 1859, the Court had jurisdiction to try the suit, the defendants dwelling within its jurisdiction; but that the suit itself was barred by the previous one, and he accordingly rejected the claim without deciding the other issues.

The plaintiffs have, therefore, appealed to us on the grounds that the District Judge was wrong in holding this suit barred by the previous one, and that he ought to have taken evidence and decided the case on its merits.

The defendants have, on the other hand, filed an objection, under Section 348, Civil Procedure Code, "that the Civil Court had no jurisdiction to entertain this claim."

We have accordingly to determine in this appeal: 1st, whether the District Judge had jurisdiction to entertain the suit at all; and, 2ndly, if so, whether he was right in holding it barred by the previous suit.

Although the question of jurisdiction was thus expressly raised in the objection filed by the respondents, as stated above, they did not appear to us seriously to rely upon it when the appeal was argued before us; and it is impossible to hold that the District Judge had not jurisdiction to entertain this suit. It is not a suit "for land or other immoveable property," but for damages for an

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alleged illegal act; and we have it expressly found here upon their own admission that "the defendants at the time of the commencement of the suit dwelt within the jurisdiction of the Court"—a fact not controverted before us. We must, therefore, regard their objection as deserving of no further notice, and proceed to consider the plaintiffs' appeal.

To determine whether this suit is barred by the previous one or not, it is necessary to see what that suit was about, and what the contention and ultimate decision in it were, assuming the parties in both to be substantially the same. In the former suit, which terminated in S. A. No. 4311,[1] the present plaintiffs, or those whom they represent, sued the present defendants, or those whom they represent, to eject them from a fishing ground, whose identity with the site of the present fishing stakes is not disputed, and to recover damages from them for an alleged trespass upon it, the plaintiffs claiming it as exclusively their own under an alleged grant from the villagers of Yerangal.

The defendants denied that the ground was plaintiffs', and asserted that they themselves had been fishing there from time immemorial.

The Principal Sadr Amin of Thana, as also the Zillah Judge in appeal, dismissed the claim on the ground *(inter alia)* that the Civil Court had no jurisdiction; the immoveable property, the subject of the suit, being situated below low-water-mark and, therefore, as they held, beyond the limits of their jurisdiction.

This decision was in special appeal upheld, upon the same ground, by the late Sadr Divani Adalat on the 26th March 1862.

It is not necessary for us to express any opinion in this case as to the correctness of that decision; but it is clear to our minds that it cannot be taken to have disposed of any question except that of the Civil Court's jurisdiction to entertain the suit. The Sadr Adalat did not proceed to decide the suit upon the merits at all; and, although the Principal Sadr Amin and the Zillah Judge had both expressed their views upon the merits adversely to the plaintiffs, still, as they held that they had no jurisdiction to entertain the suit, and as the suit was ultimately disposed of in special

(1) 9 Harr. S. D. A. Rep. 276.

appeal on that ground alone, the cause of action in it cannot be regarded as having been "heard and determined by a Court of competent jurisdiction." Besides, in the present suit, the thing complained of is different from that in the former. The present cause of action, as alleged, is that in March 1872 the defendants fixed their fishing stakes and nets too near the plaintiffs', whereby the plaintiffs have been deprived of the fish they would otherwise have caught. This cause of action then, if it be one, was certainly not, and could not possibly have been, "heard and determined" by the late Sadr Court in 1862; and Section 2 of the Civil Procedure Code accordingly does not seem to us to preclude the District Judge from taking cognizance of the present suit in respect of an alleged illegal act of the defendants subsequent in point of time to the decision in the previous one.

Such being the case, we have no alternative but to remand the suit, unless it be clear that the facts alleged in the plaint constitute no cause of action at all. It has been strongly urged in argument here that they do not, because, if true, they only showed that the defendants had done what they had a perfect right to do, namely, to follow their own trade; and that the sea being a *res publica*, no one could lay claim to an exclusive right to or property in any portion of it. As regards this latter branch of the contention, however, it is scarcely necessary for us to do more than observe that, whatever the plaintiffs may have claimed in the previous suit, they have not in the present one claimed any exclusive right to or property in the sea itself; and that hence whether such right or property can, under any circumstances, be claimed or not, is a question upon which we are not called upon to express any opinion. The plaintiffs distinctly disclaim here any exclusive right through their counsel Mr. Leith. He says: "We only complain here of the too great proximity of the defendants' nets.....We complain of the new stakes, 120 feet to the south of ours, placed in March 1872, and not of those to the north, which are 600 feet distant from ours. *We claim no exclusive right. We only claim to enjoy the right which is common to all the public.*" The only question, therefore, which remains for us to decide is whether, taking all the facts as stated in the plaint, they constitute any cause of action, or whether, as urged

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on behalf of the defendants, they only show that what is complained of is what the defendants are entitled to do, and that, therefore, though this may be a case of damage, it is not one in which any injury or legal wrong has been caused.

After alleging in paragraph 2 of their plaint a 'custom' in accordance with which the defendants, as they allege, have hitherto planted their stakes at a distance of 600 feet from their own, the plaintiffs in paragraph 3 state that "in the month of March last" the defendants "*wrongfully and maliciously*, and with intent to damnify the plaintiffs," erected the fishing stakes and nets complained of at a distance from their own of "not more than 120 feet or thereabouts," whereby "the defendants have wilfully disturbed and caused an *unreasonable and unnecessary* obstruction to the plaintiffs' right of fishing in the said waters, and *wrongfully and unjustifiably* prevented fish from coming into the power of the plaintiffs, as they would otherwise have done; and whereby the defendants also have materially interfered with and injured the said trade of the plaintiffs, and caused the plaintiffs considerable pecuniary loss and damage."

The plaintiffs may not be able to prove all that they have thus alleged; but we are not prepared to say that no cause of action whatever is disclosed in the plaint itself. Our reasons for this opinion will be dealt with by the Chief Justice in the judgment he will presently deliver.

The decree of the District Judge must, therefore, be reversed, and the case remanded for decision on the merits.

WESTROPP, C.J.:—At the other side of India several cases relating to private fisheries, most frequently described as Jalkars (Julkurs), appear in the reports.(1) Excepting, however, the information derivable from the previous litigation between the inhabitants of the villages of Malavni and Manori,(2) who once again encounter each other in the present suit, there is an absolute dearth of authority in our Indian law books with respect to fisheries in the open sea.

(1) 1 Calc. S. D. A. Rep. 221; 2 Id. 51; 1 Calc. W. R. 79, 88, 116; 5 Id. 115; 6 Id. 17, 41, 99; 7 Id. 405; 11 Id. 374; 18 Id. 460; 20 Id. 95, 117; 24 Id. 200, 265; Calc. W. R. (1864) 63, 243, 267, 275; Marshall 334; 12. Beng. L. R. 210 (P. C.).

(2) *Kalia* v. *Hasoocha*, 9 Harrington S. D. A. Rep. 276; *Regina* v. *Kástyá Rámá*, 8 Bom. H. C. R. 63 Cr. Ca.

The Roman Law may be gathered from the following passages:— Ulpian.—"Et quidem mare *commune* omnium est, et litora, sicuti aer: et est sæpissume rescriptum non posse quem piscari prohibere * * * * * * In lacu tamen qui mei dominii est, utique piscari aliquem prohibere possum." (1) Celsus.—"Litora in quæ populus Romanus imperium habet, populi Romani esse arbitror. Maris *communem* usum omnibus hominibus ut aeris: jactasque in id pilas, ejus esse qui jecerit: sed id concedendum non esse, is deterior litoris marisve usus eo modo futurus sit." (2) With reference to what Celsus has here said as to the 'litora', the Commentator, probably Gothofredus, observes:—"Ideoque gentes in illa litora descendentes populus Romanus prohibere potest: suos cives non potest." On the same portion of the passage Mr. Sandars aptly remarks that "if we are to bring this opinion of Celsus into harmony with the opinions of other jurists, we must understand 'populi Romani esse' to mean 'are subject to the guardianship of the Roman people'." In the Institutes (3) it is said:— "Quædam enim naturali jure *communia* sunt omnium, quædam publica, quædam universitatis, quædam nullius, pleraque singulorum, quæ ex variis causis cuique adquiruntur, sicut ex subjectis apparebit. 1, Et quidem naturali jure *communia* sunt omnium hæc: aer, aqua profluens, et mare, et per litora maris. Nemo igitur ad litus maris accedere prohibetur; (4) dum tamen a villis et monumentis et ædificiis abstineat, quia non sunt juris gentium sicut est mare. 2, Flumina autem omnia et portus *publica* sunt. Ideoque jus piscandi omnibus *commune* est in portu fluminibusque. 3, Est autem litus maris quatenus hybernus fluctus maximus excurrit. 4, Riparum quoque usus *publicus* est jure gentium, sicut ipsius fluminis. Itaque navem ad eas adplicare, funes arboribus ibi natis religare, onus aliquod in his reponere, cuilibet liberum est, sicut per ipsum flumen navigare. Sed proprietas earum illorum est quorum prædiis hærent. Qua de causa arbores quoque in iisdem natæ eorundem sunt. 5, Litorum quoque usus *publicus* est, et juris gentium, sicut et ipsius maris. Et ob id cuilibet liberum est casam ibi ponere, in quam se recipiat: sicut retia siccare, et ex mari deducere. Proprietas autem eorum potest intelligi

(1) Dig. Lib. XLVII, Tit. X *l.* 13; see also by Ulpian Dig. L. VIII., Tit. IV., *l.* 13, and the Commentary thereon.

(2) Dig. L. XLIII., Tit. VIII. *l.* 3.

(3) Inst. Lib. II., Tit. 1.

(4) Some here add "piscandi causa."

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nullius esse: sed ejusdem juris esse, cujus et mare, et quæ subjacet mari, terra vel arena. 6. Universitatis sunt, non singulorum, veluti quæ in civitatibus sunt, theatra, stadia, et si quæ alia sunt communia civitatum."

Amongst several passages quoted by Grotius[1] from the classic poets to show how deeply imbued the Roman mind was with the doctrine of the civilians contained in the above extracts, is the following from Ovid, Met. 6:—

> "Quid prohibetis aquis? Usus communis aquarum est.
> Nec solem proprium Natura, nec aëra fecit,
> Nec tenues undas. In publica munera veni."

Grotius addressed his 'Mare Liberum' 'ad principes populosque liberos orbis Christiani' against the Portuguese claim to a monopoly of the Indian Seas, and denied that alleged primary discovery, the grant of the Pope (Alexander VI.), or any other pretence could confer upon the Portuguese a good title against that of the world at large, resting upon the Law of Nature and of Nations and the Civil Law, to a common enjoyment of the high seas for purposes of navigation and fishing[2]. He denied that, generally speaking,[3] the sea or its subjacent soil could be the subject of property or dominion. He also noticed the distinction taken in the passage above quoted from the Institutes between what is common and what is public—a distinction repudiated by Noodt[4] and by the Commentator in the London translation of Grotius' De Jure Belli et Pacis, published A. D. 1738, Bk. II, Ch. III, p. 162, note 5. Bracton[5] takes the distinction, but differently: "Nota hic differentiam inter publicum et commune. *Publica* autem ita accipiuntur *quæ sunt omnium populorum—quæ spectant* ad usum hominum tantum—communia vero dici poterunt aliquando quæ sunt omnium animantium," but I shall not pursue those distinctions. It will be sufficient for present purposes if we arrive at the conclusion that the right of fishing off Yerangal[6]

(1) Mare Liberum C. 5; see also Selden's Mare Clausum, Bk. I., ch. II., p. 6., transl. by J. H.; London, 1663.

(2) See especially his 5th chapter of the Marc Liberum, and his treatise De Jure Belli et Pacis, Bk. II., ch. III., pl. 9.

(3) As to exceptions, *vide* De Jure Belli et Pacis, Bk. II., ch. III, pl. 10, Ulpian Dig. XLIII., Tit. 8, *l.* 3.

(4) Probabilia Juris. Lib. I., ch. VII., VIII.

(5) Lib. I., ch. XII., pl. 6.

(6) Called 'Yergheel' in 9 Harrington S. D. A. Rep. 278, *et seq.*

is open to the public of British India; hence it is not essential to consider either the claims of the human race at large or of all animated beings.

A considerable extent[1] was claimed by Selden in his Mare Clausum (which controverted certain of the doctrines of Grotius) for the British Seas (or as they are usually called the Four Seas),[2] and an imperious dominion over them, on behalf of the King of Great Britain and Ireland. His arguments have been impugned by Bynkershoek and other foreign jurists, and have received only a qualified support from Sir Philip Meadows in his observations concerning the Dominion and Sovereignty of the Seas published in 1689.[3] Selden's contention was that the seas which washed the shores of Great Britain and Ireland were subject to the sovereignty of that kingdom even so far as the Norwegian coast. This pretension Mr. Reddie[4] and Sir R. Phillimore[5] pronounce to be extravagant, and since Selden's time it does not appear to have been insisted upon. Grotius, while denying the right of any nation to monopolize a sea, admitted that, over parts of a sea adjacent to a State, it might acquire a certain "imperium," which acquisition, he said, might be effected like that of other "imperia" as he had previously stated, "ratione personarum et ratione territorii." He proceeded—"Ratione personarum ut si classis, qui maritimus est exercitus, aliquo in loco maris se habeat: ratione territorii quatenus ex terra cogi possunt, qui in proxima maris parte versantur, nec minus, quam si in ipsa terra reperirentur."[6] This territorial "imperium" or jurisdiction was by Bynkershoek[7] asserted to terminate "ubi finitur armorum vis" or "quousque tormenta exploduntur." Some authors (not many) have assigned to it a wider scope; but the great majority of writers on International Law, from his time down to the present day, adopting his view, have maintained that the territorial jurisdiction extends over the sea adjacent to the land so far as a cannon shot fired from low-water-mark would reach—a distance which most of

(1) Mare Clausum Bk. II., ch. I., p. 181 *et seq.* of Eng., trans. by J. H.; London, 1663.

(2) As to the Four Seas, *vide* Hargrave's Note to Co. Lit. 107a, 107b.

(3) See Butler's Note to Co. Lit. 261a, and Thomas' Co. Lit., Vol. I., pp. 46, 47, *in notis.*

(4) 1 International Law, ch. VI., pp. 218, 220, *et seq.* (2nd Ed.)

(5) Marit. Int. Law, Vol. I., p. 215.

(6) De Jure Belli et Pacis Lib. II.' c. 3., s. 13., pl. 2.

(7) De Dom. Mar. ch. II., p. 127 (Ed. of 1767).

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them concur in fixing at three geographical miles (*i. e.*, a marine league).[1] What the nature of the authority over that maritime territory is, and whether such territory can be regarded as the property of the State to which it is adjacent, are questions upon which internationalists are not unanimous.[2] In the recent edition by Mr. Amos of the treatise of Mr. Manning, p. 119, the subject is treated thus :—" For some limited purposes a special right of jurisdiction, and even (for a few definite purposes) of dominion, is conceded to a State in respect of the part of the ocean immediately adjoining its own coast line. The purposes for which this jurisdiction and dominion have been recognized are—1, *The regulation of fisheries;* 2, the prevention of frauds on customs laws ; 3, the exaction of harbour and light-house dues; and 4, the protection of the territory from violation in time of war between other States. The distance from the coast line to which this qualified privilege extends, has been variously measured—the most prevalent distance being that of a cannon shot or of a marine league from the shore." Vattel[3] admits that " the various uses of the sea near the coast render it very susceptible of property. It furnishes fish, shells, &c. &c. Now in all these respects its use is not inexhaustible; wherefore the nation, to whom the coasts belong, may appropriate to themselves, and convert to their own profit, an advantage which nature has so placed within their reach as to enable them conveniently to take possession of it, in the same manner as they possessed themselves of the dominion of the land they inhabit." Hautefeuille[4] treats the sovereignty of the riparian state over this maritime territory to be as complete as over the land, and that it is necessary for the welfare of its subjects that the fisheries should be protected and regulated; and contends that the ships of other nations may be excluded from this littoral sea. Ortolan denies that the riparian state has any right of property in that sea, or, at least, any such right of property as would imply authority to prohibit

(1) 1 Kent Com. pp. 31, 32, Ed. of 1860; Wheaton Int. Law 320, *et seq.*, of Lawrence's Ed. of 1864 ; Vattel Bk. I, ch. XXIII., pl. 289; Bonfils., p. 319, Paris—Ed. of 1865 ; 1 Reddie Mar. Int. L. 16 ; Ortolan Diplomatie de la Mer. Liv. II., ch. VIII., p. 158 of the Paris Ed. of 1864 ; Manning, 1st Ed., ch. XIII., p. 385 ; 1 Phillimore Int. L., page 235, pl. CXCVIII., 2nd Ed., and many others.—See 7 Bombay H. C. Rep. Cr. Ca. 104.

(2) See *Reg.* v. *Keyn*, L. R. 2 Ex. D. 63 (*Reporter's Note*).

(3) Bk. I., ch. XXIII., pl. 287.

(4) Des Droits, &c., des nations neutres, pp. 82, 287, *et seq.* 297 ; Hist. de Droit Marit, 197.

the ships of other States from navigating it.(1) He admits, however, that one of the main objects of the *mer territoriale* is "pour protéger la pêche côtiére qui, á moins de conventions spéciales, doit être reservée aux seuls nationaux."(2) The right of free navigation appears to have been recognized by English Courts—*Gann* v. *The Free Fishers of Whitstable*,(3) *The Twee Gebroeders*,(4) *The Saxonia*.(5) There would not, however, seem to be any impossiblity in the existence of a right of property in such a sea being vested in the riparian state subject to a right of free navigation by the ships of other states for commercial purposes. Mr. Wheaton,(6) speaking of this belt of littoral sea "within the distance of a marine league, or as far as a cannon shot will reach from the shore," says :—"The physical power of exercising an exclusive property and jurisdiction, and of excluding the action of other nations within these limits, exists to a certain degree; but the moral power may, perhaps, seem to extend no further than to exclude the action of other nations to the injury of the State by which this right is claimed. It is upon this ground that is founded the acknowledged immunity of a neutral State from the exercise of acts of hostility by one belligerent power against another, within those limits. This claim has, however, been sometimes extended to exclude other nations from the innocent use of the waters washing the shores of a particular State in peace and in war; as, for example, for the purpose of participating in the fishery, which is generally appropriated to the subjects of the State within that distance of the coasts. This exclusive claim is sanctioned both by usage and convention, and must be considered as forming a part of the positive law of nations." In a treaty between Great Britain and the United States, with respect to the fishery off Newfoundland,(7) and in a treaty between France and Great Britain,(8) the exclusive right of the contracting riparian states to fish within the territorial zone of three miles from their respective shores, has been recognized. Massé, in his Droit Commercial en rapport avec le Droit des Gens, admits the existence of a property in that zone burdened

(1) Dipl. de la Mer. Vol. I., Liv. 2, c. 8, pp. 156, 159 (Ed. of 1864).

(2) Id. p. 160.

(3) 11 H. of Lds. 192.

(4) 3 C. Rob. 336.

(5) 15 Moore P. C. 262.

(6) Int. Law, Ed. by Lawrence; 1864, p. 343.

(7) Phil. 1 Int. Law., p. 232, pl. CXCV. (2nd Ed.)

(8) 1 Ort. Dipl. de la Mer., Liv. II., ch. VIII, p. 160, note (Ed. of 1864).

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(grévée), however, with "une servitude naturelle au profit de tous les peuples navigateurs." He adds this important qualification of that remark—"cependant il en est autrement pour la pêche, qui ne peut être faite que par les habitants du littoral." And Sir John Nicholl, in *Rex* v. *Forty-Nine Casks of Brandy*,(1) said: "As between nation and nation, the territorial right may, by a sort of tacit understanding, be extended to three miles, but that rests upon different principles, viz., that their own subjects shall not be disturbed in their fishing, and particularly in their coasting trade and communications between place and place during war," &c. To much the same effect are the observations of Bynkershoek in the 4th chapter of his treatise De Dominio Maris. The territorial maritime belt has been adopted by Lord Stowell in *The Twee Gebroeders*,(2) a prize case, and by Wood, V. C., in *General Iron Screw Co.* v. *Schurmanns*.(3) In *The Leda*,(4) and *The Annapolis*,(5) Dr. Lushington recognized the right of Parliament to legislate for that territory.(6) For instances in which that right has been exercised, I may refer to 59 Geo. III. c. 38, s. 2, affirming the right of British subjects to fish and dry fish within three miles of the coast of British America; to Acts relating to the customs 3 and 4 W. IV., c. 53, s. 2; 16 and 17 Vic. c. 107, s. 212; and the Foreign Enlistment Act, 33 and 34 Vic., c. 90, ss. 2, 14; and The Merchant Shipping Act, 17 and 18 Vic., c. 104, s. 527. Speaking of the three-mile belt, with reference to the right of fishing, Lord Wensleydale in *Gammel* v. *The Commissioners of Woods and Forests*(7) said that it, "by the acknowledged law of nations, belongs to the coast of the country—that which is under the dominion by being within cannon range and so capable of being kept in perpetual possession." In *Rolet* v. *The Queen*(8) the right of a colony to legislate for its marine territory to that extent was admitted.

British authorities have laid it down that the British seas, to their geographical extent, whatsoever it may be, both as regards the land or soil beneath them, and the water, are vested in the Sovereign. It has been said that 'the sea is the King's proper

(1) 3 Hag. Adm. Rep. 289, 290.

(2) 3 C. Rob. 162.

(3) J. and H. 180.

(4) Sw. Adm. Rep. 40.

(5) Lush. Adm. Rep. 295, 306.

(6) See also the opinions of the Law Officers mentioned in *Reg.* v. *Elmstone*, 7 Bom. H. C. Rep. 104.

(7) 3 Macq. 465.

(8) L. R. 1 P. C. 198.

inheritance',(1) and he is lord 'of the Great Waste',(2) *tam aquae quam soli*. This includes not only the open sea, but all creeks, arms of the sea, havens, ports, and tide rivers so far as the reach of the tide, around the coast of the United Kingdom. Lord Chief Justice Hale, in his treatise(3) De Jure Maris, divides the King's right into two branches, viz. :—1, "His right of jurisdiction which he ordinarily exerciseth by his admiral," and, 2, "His right of propriety or ownership," and deals with the latter thus :—"The King's right of propriety or ownership in the sea and soil thereof is evidenced principally in these things that follow. 1st—The right of fishing in this sea and the creeks and arms thereof is originally lodged in the Crown, as the right of depasturing is originally lodged in the owner of the waste, whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river." Although theoretically this may be so, what follows shows that the British Law was as little forgetful of the interests of the public as the Roman Law. Lord Chief Justice Hale, after making references in support of what he had said, proceeds thus:—"But though the king is the owner of this Great Waste, and, as a consequent of his propriety, hath the primary right of fishing in the sea and the creeks and arms thereof; yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places or creeks or navigable rivers where either the king or some particular subject hath gained a propriety exclusive of that common liberty."(4)

Speaking of this right of the public to fish in the sea and its arms, Schultes(5) says:—"As a public right belonging to the people, it *primâ facie* vests in the Crown, but such legal investment does not diminish the right or counteract its exertion."

(1) The case of the Royal Fishery of the Bann, Sir John Davis, Rep. 56.

(2) Sir M. Hale's De Jure Maris, ch. IV., Hargrave's Law Tracts, pp. 10 and 11; Hall's Sea Shore (Ed. of 1875), pp. 2, 3, and App. pp. VII., VIII.

(3) Sir M. Hale's authorship of this work has been disputed by Serjeant Merewether in his speech in *Att. Gen.* v. *The City of London* (Hall's Sea Shore, App. p. LXXV). See Jerwood's Dissertation, pp. 32, 45; Phear, p. 47, note (m); Hall's Sea Shore, p. 5, note (g), Ed. of 1875.

(4) De Jure Maris, ch. IV., Hargrave's Law Tracts, pp. 10, 11; Hall's Sea Shore, App. pp. VII., VIII.

(5) Aquatic Rights, p. 15.

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As to exceptional cases of private rights in the sea and its soil, Lord Chief Justice Hale further observes[1] that, "although the king hath *primâ facie* this right in the arms and creeks of the sea *communi jure*, and in common presumption, yet a subject may have such a right" either by grant or prescription[2] (which latter, "in the eye of the law, always presupposes a grant,"[3] although in fact none such may have been made). Lord Chief Justice Hale continues:—"The king may grant fishing within a creek of the sea, *or in some known precinct that hath known bounds though within the main sea.*[4] He may also grant that very interest itself, viz., a navigable river, that is an arm of the sea, the water and soil thereof. He may also grant a manor *cum litore maris eidem adjacente;* and the shore itself will pass, though in gross and not parcel of the manor.—He may also grant a manor or land contiguous to the sea, *unâ cum maritimis incrementis*, and that will pass that *jus alluvionis* whereof before."[5] As to fishing he observes:—"A subject may, by prescription, have the interest of fishing in an arm of the sea, in a creek or port of the sea, or in a certain precinct or extent lying within the sea: and these not only free fishing but several fishing."[6] The burden of proof lies on the subject asserting that right.[7]

It should here be observed that, although Lord Chief Justice Hale used the expression "may grant," he must be understood as meaning that the King might, previously to Magna Charta (temp. Henry II), have granted a several fishery in a part or branch of the sea, or in tidal navigable rivers. Since Magna Charta he cannot in England or Ireland by grant thus abridge the public right. In *Blundell* v. *Caterall*,[8] Bayley, J., said:—"Many of the King's rights are, to a certain extent, for the benefit of his subjects, and that is the case as to the sea, in which all his subjects

(1) De Jure Maris, Hargrave L. T. 17; Hall's Sea Shore, App. XIV.

(2) Mr. Hall (Sea Shore, 2nd Ed., pp. 16 to 40) argues against the acquisition of title by prescription to the sea-shore or bottom of the sea. That it may be so gained is, however, established law.—Vide *Benest* v. *Pipon*, 1 Knapp P. C. C. 60; De Jure Maris, ch. V., Hargrave L. T., p. 18, *et seq;* Hall's Sea Shore, App. p. XV., *et seq.;* Butler's note to Co. Lit. 261a.

(3) Butler's note to Co. Lit. 261a.

(4) See 4 B. & C. 485, 6 C. B. 881, and Hall's Sea Shore 89, 2nd Ed.; *Carter* v. *Murcott* 4 Burr. 2162.

(5) De Jure Maris, Hargrave L. T. 17, 18, 19; Hall's Sea Shore, App. XIV., XV., XVII.

(6) De Jure Maris, Hargrave L. T. 18; Hall's Sea Shore, App. XV., 2nd Ed.

(7) Lord Fitz Walter's case 1 Mod. 105, 106.

(8) 5 B. and Ald. 304.

have the right of navigation, and of fishing, and it is so in highways, along which all his subjects have the right of passage, and the King can make no modern grants in derogation of those rights." And in *Dickens* v. *Shaw*,(1) the same learned Judge, speaking of the sea-shore between high and low-water-mark, said :—"The right of the Crown is not, in general, for any beneficial interest to itself, but for securing to the public certain privileges in the spot between high and low-water-mark." And Willes, J., in giving to the House of Lords in *Malcomson* v. *O'Dea* (2) the unanimous opinion of the Judges, said:—"The soil of navigable rivers like the Shannon, so far as the tide flows and reflows, is *primâ facie* in the Crown, and the right of fishery *primâ facie* in the public. But for Magna Charta, the Crown could by its prerogative exclude the public from such *primâ facie* right, and grant the exclusive right of fishery to a private individual, either together with or distinct from the soil. And the Great Charter left untouched all fisheries which were made several, to the exclusion of the public, by act of the Crown not later than the reign of Henry II."

Such "a certain precinct," in which a subject may acquire a right of property or of fishing or of both, Lord Chief Justice Hale describes as "a *districtus maris*, a place in the sea between such points or a particular part contiguous to the shore, or of a port or creek or arm of the sea."(3) "These may be possessed by a subject, and prescribed in point of interest both of the water and the soil itself covered with the water within such a precinct; for these are manoriable, and may be entirely possessed by a subject."(4) Such portions of the sea as may thus become private property, or in which there may be a private right of fishery, *generally* no doubt, are situated *inter fauces terræ*, but it is not to be inferred from the observations of Lord Chief Justice Hale that this must *necessarily* be so.

(1) Hall's Sea Shore, App., p. LXIV. (2nd Ed.)

(2) 10 Ho. of Lds. 593, 618. See also *Duke of Devonshire* v. *Hodnett*, 1 Hud. and Br. 322, and the remarks of Lord St. Leonards in the *Lord Advocate* v. *Hamilton*, 1 Macqueen (H. L.) 46, quoted *infra*.

(3) De Jure Maris, ch. VI. Hargrave L. T., p. 31, and see p. 36; Hall's Sea Shore, App., pp. XXIX, XXX, and see p. XXXV.

(4) Ibid.

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Whether the locality, the proper mode of fishing in which is now in dispute between the villagers of Malavni and Manori, is such a *districtus maris* as might be the site of a private fishery, was a question entertained by Mr. C. Erskine as Zillah Judge of Thana in the former civil suit between these villagers, and he seemed to be of opinion in the negative.(1) This suit is so differently framed from the suit before him that, as will presently be seen, it is unnecessary for us to give any opinion upon that question.

Erle, C. J., in the *Whitstable Fishers* v. *Gann*(2) said:—"The soil of the sea-shore to the extent of three miles from the beach is vested in the Crown." Lord Chelmsford said that it was so vested subject to the right of navigation.(3) The Stat. 21 and 22 Vic. c. 109, passed in 1858 and founded upon an award of Sir John Patteson upon questions between the Crown and the Prince of Wales as to the right to mines and minerals "between high and low-water-marks within the County of Cornwall, and under the estuaries and tidal rivers within the same county, and under the open sea below low-water-mark, adjacent to, but not in or part of the same county," is deserving of consideration. Sir John Patteson decided, as appears from the preamble of the Statute, "first, that the right to all mines and minerals lying under the sea-shore between high and low-water-marks within the said County of Cornwall, and under the estuaries and tidal rivers and other places even below low-water-mark, being in and part of the said county, is vested in His Royal Highness as part of the soil and territorial possessions of the Duchy of Cornwall," and, "secondly," which is to be especially noted, "that the right to all minerals lying below low-water-mark under the open sea, adjacent to, but not being part of the County of Cornwall, is vested in Her Majesty the Queen in right of her Crown, although such minerals may or might be won by workings commenced above low-water-mark and extended below it." The second section of the statute accordingly enacted and declared that "all mines and minerals lying below low-water-mark under the open sea, adjacent to, but not being part of the County of

(1) 9 Harrington S. D. A., Rep. p. 281.

(2) 11 C. B. N. S. 387, 413; S. C. 13 C. B. N. S. 853.

(3) 11 Ho. of Lds. 192, 217, 218.

Cornwall, are, as between the Queen's Majesty in right of her Crown on the one hand, and H. R. H. Albert Edward, Prince of Wales and Duke of Cornwall in right of his Duchy of Cornwall on the other hand, vested in Her Majesty the Queen in right of her Crown as part of the soil and territorial possessions of the Crown."

Whether the Sovereign is entitled to dominion over or ownership in the seas surrounding British India and their subjacent soil, to any extent *beyond* the territorial jurisdiction of three geographical miles from low-water-mark, is a question which we need not consider. The tort, of which the present plaintiffs complain, is, in the plaint, alleged to have been perpetrated at a distance of more than two and less than three miles from the shore, and is, therefore, within the territorial limit of jurisdiction assigned to States by internationalists. Howsoever great or small may be the value of the analogy, it may, perhaps, be well to observe that as in Great Britain the Sovereign, as Lord of the Waste, is said to be Lord also of the British territorial waters and the soil beneath them, so in India we find that, as a general rule, its waste lands are vested in the Ruling Power. The principal authorities for that proposition have been quoted or mentioned in the Kanara Land Case.(1) In Bombay Regulations I. of 1808, Section 59, and XVII. of 1827, Section 7, the *primâ facie* title of Government to deal with waste and uncultivated lands is recognized. A more ambitious assertion of the proprietary right of the State in lands is to be found in the preamble of Bombay Regulation III. of 1814, if it be read in the sense which primarily it would seem to bear. That preamble alleges that "the Ruling Power of the provinces now subject to the Government of Bombay has, in conformity to the ancient usages of the country, reserved to itself, and has exercised the actual proprietary right of *lands of every description*, and that, consistently with that principle, all alienations of land, except by the consent and authority of the Ruling Power, are violations of that right"—a statement directly at variance with a despatch of the Court of

(1) *Vyakunta Bapuji* v. *The Government of Bombay*, 12 Bom. H. C. Rep., App. at pp. 57, 58, 59, 60; and see *Doe d. Hirabai* v. *The East India Company*, Perry's Or. Ca. 480, and 1 Mad. H. C. Rep., 12, 407.

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Directors of the East India Company written in 1822 to the Government of Bombay,[1] where, speaking of a draft regulation prepared for the purpose of giving greater validity to the result of surveys yet to be undertaken, the Directors said:—"The preamble, as it originally stood in the draft prepared by Captain Williams, is much more correct than the preamble as altered at the suggestion of Mr. Prendergast (a member of Council), which asserts the proprietary right in the land to be vested in the Ruling Power, whereas, in the draft of Captain Williams, it is stated that the Ruling Power is entitled to a certain share of the produce of the land." That preamble, in its *primâ facie* sense, is also negatived by the authorities collected in *Vyakunta Bapuji* v. *The Government of Bombay*.[2] But, even were it to be regarded as portion of the enacting part of the Regulation III. of 1814, it should be restrained in construction in the same manner as a similarly ample recital, couched in the same words, in Madras Regulation XXXI. of 1802 was controlled by the Privy Council in *The Collector of Trichinopoly* v. *Lekkamani*[3], where it was decided that the object of that Regulation was only the protection of the revenue from invalid *lakhiraj* grants, and to provide for the mode of trying the validity of the titles of persons claiming to hold their lands exempt from the payment of revenue, and that it was not intended to confer upon Government any title which did not then exist.[4] Bombay Regulation III. of 1814 was precisely in *pari materiâ*, and would necessarily receive the same construction. But such a recital, taken in its full apparent breadth, is as valueless legally as it is historically. The preamble is no part of the enactment, and "a mere recital in an Act of Parliament" (and, therefore, in Acts of the local legislatures) "either of fact or law is not conclusive, and we are at liberty to consider the fact or the law to be different from the statement in the recital."[5] The more moderate proposition (that the proprietary right to *waste* land is *primâ facie* vested in Government), contained

(1) Rev. Sel., Vol. IV., p. 646.

(2) 12 Bom. H. C. Rep., App., pp. 30 to 56.

(3) L. R. 1 Ind. App., 282, 304, 308

(4) See 12 Bom. H. C. Rep., App. 75 to 77.

(5) Per Lord Campbell, C.J., in *Reg.* v. *Haughton*, 1 El. and Bl. 501. For another recital inconsistent with fact, see the first sentence in the preamble to Bom. Act VI. of 1862 (The Talukdari Act); and compare it with Mr. Peile's Report No. CVI. of the New Series of Bombay Govt. Records, p. 13, *et seq.*

or implied in Bombay Regulations I. of 1808, Section 59, and XVII. of 1827, Section 7, is reasonable and founded upon truth.

In *Gureeb Hossein Chowdry* v. *Lamb*,(1) the Calcutta Sadr Divani Adalut in 1859 substantially held that the bed of a navigable river, where the tide flows and ebbs, must be *primâ facie* regarded as vested in the State, and the fishery in it as open to the public, and refused to recognize either of the riparian proprietors as lords of the soil of the river, or as entitled to any exclusive or special right of fishing in it. The Court said that it appeared, "from the pleadings, that the *julkurs* sued for, extend over a large area in the bed of a navigable river, the Megna—that is, a river in which the tide ebbs and flows; and by our Regulation Laws—Regulation XI. of 1825 (Bengal), which is declaratory of the common law of this country—as well as by the common law of England, the bed of a navigable river is not the property of any individual, and consequently the right of fishery in such rivers is not private property, but that right is a right common to every person; and if any individual claims an exclusive right in navigable waters, he must show that it has been acquired by grant or prescription, which is evidence of a grant, and, until that be shown, the presumption is strong against his claim"(2) and, again, after terming the Government "a trustee for the public,"(3) the Court said:—

"Had the present claims, advanced on either side, been for the exclusive right of fishing in a river *above* the ebbing and flowing of the tide, as well as for their right to the property in the stream opposite to their respective lands, in that case the claims of the parties would have been limited" (I presume the Court meant *primâ facie* limited) "by the extent of their riparian ownership, and we should, even then, have required clear proof on either side; but in a case like the present, in which the claim is apparently bounded by nothing but the desires of the parties before the Court to possess, and in which what may be termed an arm of the sea is in litigation, to prove the right set up, the evidence of a grant, or prescription evidencing a grant, must be of the very strongest

(1) Calc. S. D. A. Rep. 1859, p. 1357. (2) Calc. S. D. A. Rep., p. 1361.

(3) p. 1362.

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nature."[1] That decision is conformable to English Law, and is, I think, sound as Indian Law; but whether it derived quite so much support from Bengal Regulation XI. of 1825, as the Sadr Adalut seemed to think, is not very certain. That Regulation relates to lands gained by alluvion or dereliction of a river or the sea.[2] Its 2nd section and the 5th clause of its 4th section recognized immemorial usage in such localities as it might be found to prevail. In other cases, its 3rd section and 4th section (clauses 1, 3, and 4) pointed out who should be regarded as the holder of lands so gained, and that the increment should be liable to Government land assessment in his hands. The 3rd clause of that section, which treats of the formation of islands in large navigable rivers and in the sea, expressly contemplates the possibility of the bed of such a river being the property of a private individual, but is silent as to such a possibility in the case of the soil under the sea, and leads to the inference that the Legislature did not suppose that the soil beneath the sea was to any important extent vested in private persons. I should also be inclined to infer from that clause, taken together with the 5th section to which I shall presently refer, that the case of the bed of a navigable river being the property of a subject was the exception and not the rule. The inference is not very strong. It is clear, however, from the same clause that, except where the channel between an island in such a river *or the sea* and the land of the adjacent riparian proprietor is "fordable,"[3] the island is State property. The inference, though not conclusive, from the 4th clause of the same section appears to be that the beds of non-navigable rivers are generally private property. The 5th section declares that nothing in this Regulation shall be construed to justify encroachments by individuals on the beds or channels of navigable rivers, or to prevent the officers

(1) Calc. S. D. A. Rep., p. 1366.

(2) Upon that subject see Beng. Reg. II. of 1819 (s. 3, cl. 2), Acts IX. of 1847, XXXI. of 1858, and Act XIX. of 1873, ss. 77, 104, 257. See also the Hedaya, Vol. IV., pp. 136, 143, as to rivers, and 1 Calc. S. D. A. Rep., 221, 319; 2 Id. 269; 3 Id. 316; 4 Moo. I. App. 403; 12 Id. 136; 13 Id. 1, 467; 14 Id. 595; 3 Beng. L. R. App. 116; 10 Id. 406; 14 Id. 268; Beng. L. R. F. B. 353; 1 Calc. W. R., 124, 713; 2 Id. 10, 284, 295, 324; 4 Id. 65; 5 Id. 55; 6 Id. 40, 76, 249; 7 Id. 42, 67, 203 231; 8 Id. 164, 287, 427; 9 Id. 379; 10 Id. 67; 11 Id. 116; 12 Id., 204, 252, 272; 18 Id. 64; 19 Id. 127, 114; 20 Id. 117, 276, 427; 21 Id. 115, 446; 22 Id. 238, 324; 23 Id. 38, 443; 24 Id. 435; 25 Id. 129, 242, 390; Calc. W. R. (1864) 64, 302, 306; Calc. W. R. F. B. 22; 3 Agra, 1.

(3) As to the meaning of this word see 6 Beng. L. R. 343; Calc. W. R. (1864) 302; 2 Calc. W. R. 34, 127; 6 Id. 123; 7 Id. 574; 10 Id. 272.

of Government from removing obstacles to the safe and customary navigation of those rivers by tracking or otherwise. It will from this brief summary of the Regulation be seen that, although it does not, in such distinct terms as might, from the language of the Sadr Adalut, be expected, support the above-mentioned decision of that Court, yet it is not in any respect inconsistent with that decision, and leans more in favour of, than against, it. In *Chunder Jalleah* v. *Ramchurn Mookerjee*,(1) decided by the High Court of Calcutta in 1871 (Kemp and Glover, JJ.), it was held that the bed of a river which was navigable for boats, but where the tide did not ebb or flow, might be the property of a subject. Glover, J., there drew attention to the circumstance that there is not in India, as in England and Ireland, a Magna Charta or legislative prohibition of grants by the Crown of a several fishery in a navigable river. Expressing his opinion that the governing power might, in India, make such a grant, he specified instances in which it had done so, within the last century, in navigable but not tidal rivers.(2) The creeks in Salsette (which are all tidal) appear, from Bombay Regulation I. of 1808, Section XIII, to have been, to some extent, let out at rents (*rend kharee*, or creek-rent) by Government. There is nothing before us to show that the *rend-doly* spoken of in Section VI. (Clause 2) of the same Regulation as "a due," payable to Government on fishing stakes "set up in the Salsette waters," applied to any stakes, except those in creeks, in which Salsette abounds. It appears to have been leviable in 1808 (Section XXX, Clause 5), but it has not been contended before us that it is, or ever was, enforced with respect to fishing stakes in the open sea. The Angdena or poll-tax levied on the Koli (corruptly cooly) caste, to which many of the parties in this suit belong,(3) and which, in 1798, yielded Rs. 16,405,(4) being of the nature of Muhtarafa (corruptly Mohturfa), or tax upon trades, arts, or professions,(5) was abo-

(1) 15. Calc. W. R. 212 Civ. Rul.

(2) 15 Calc. W. R. 215 Civ. Rul. See as to the conflict of decisions in America on the question whether navigability in fact is navigability in law, *i.e.*, whether tides are necessary to make a river navigable in law, the note (f) at pp. 3, 4 and 5 of Hall's Sea Shore.

(3) Bom. Reg. 1 of 1808, ss. VI. (cl. 2), and XXXVIII.

(4) Bom. Reg. 1 of 1808, Sec. L, and see Sec. LXXV.

(5) Bom. Reg. 1 of 1808, ss. VII. (cl. 3), and XXXVIII. The tax on sellers of dry fish and the tax called bombil are of the same character, SS. VI. [cl. 2] and XIII.

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lished by Act XIX. of 1844. Mr. Erskine in his judgment already referred to (and who certainly had the means of obtaining correct information, and would not fail to use his opportunities), made some valuable observations upon it.(1) He said: "It appears that the old taxes on fishermen (of which notice is taken in Reg. I. of 1808) were levies on all Kolis over 16 years of age, whether they fished or not, and whether they lived in a sea-board village or not. The principal cess was capitation, or body-tax (angdene). It seems to have been in no respect an optional payment required only from those who actually wished to practise fishing, but a compulsory impost exacted from all full-grown men of the common fishing caste, in the belief apparently that if any adult males of that caste did not engage in sea-fisheries, they were rare exceptions to the general rule, and also that the number of persons of other castes who did engage in that trade was inconsiderable, and not such as to require that special rules for their taxation should be adopted.(2) There is nothing, in short, to show that this tax was in any way analagous to a sporting licence (giving liberty to catch fish where they could be caught without trespassing upon the property of others). It does not seem that the not being a payer of this cess, disabled a man of another caste from trading as a sea-fisher, or that a Koli, who paid the cess might exercise his calling only within a limited space opposite to his own village." We have no reason to suppose that there has been by Government anything in the nature of a grant or demise of the right of fishing in the sea of Yerangal, or of any other part of Salsette, to any of the parties in this cause, or any other persons, or that the fishery of those seas can in any respect be viewed as a private fishery. It is unnecessary for us to express an opinion whether Government could in India create such a fishery in the sea. From *Doe d. Seebristko* v. *The East India Company*(3) it would appear that Her Majesty's Privy Council were of opinion that the beds of navigable tidal rivers in British India, are vested in the State. The similar rule of law as to beds of such rivers in Great Britain and Ireland, already mentioned, was thus laid down by Lord St. Leonards in *The Lord Advocate* v. *Hamilton*.(4)

(1) 9 Harrington S. D. A. Rep. 286.

(2) *Vide* Bom. Reg. I. of 1808, Sec. XXXVI.

(3) 6 Moore's I. A. 26.

(4) 1 Macqueen [H. L.] 46.

"With respect to the question which has been mooted as to the rights of the Crown to the *alveus* or the bed of a river, it really admits of no dispute; beyond all doubt the soil and bed of a river (we are now speaking of navigable rivers only) belongs to the Crown." In *Bagram* v. *The Collector of Bullooa*,[1] although the plaintiff established his right to a private fishery in certain tidal and navigable rivers, the principles laid down in *Chunder Jalleeah* v. *Ramchander Mookerjee*[2] and *Doe d. Seebristko* v. *The East India Company*,[3] were adopted and approved.

Assuming, as I think we may, that the proposition—that the beds of tidal rivers in British India are, like those of such rivers in Great Britain, *primâ facie*, to be regarded as vested in the Crown—is established, the transition thence to the proposition—that the subjacent soil of the British Indian Seas, within the territorial limit of three geographical miles from low-water-mark, is also vested in the Crown—is (if the like proposition as to the territorial waters of Great Britain be true) not difficult, for a navigable river, in such part of it as the tide flows and ebbs, is an arm of the sea. We gather from the elaborate judgments in *Reg.* v. *Kastya Rámá*[4] that the learned Judges who gave them, regarded the sea and its subjacent soil, within the ordinary territorial limit at least around British India, as vested in the Sovereign, but held that the use of it for the purposes of navigation and fishing belonged *communis juris* to her subjects, at least so far as it had not been otherwise appropriated by the Sovereign; and West, J., in speaking of the prerogatives of the Crown in India in this respect, said: "I am not aware that in any case they have been so used as to exclude any subject in this country from fishing in any part of the sea. No grant of a fishery in the present case has been set up either as directly proved or as to be inferred from prescriptive enjoyment. The complainants and the applicants alike must rest on their common right of fishing in the sea; and a permission in favour of one or other of the parties by the villagers of Yerangal, as given without title, could confer none

(1) Calc. W. R. for 1864, p. 243 Civ. Rul.

(2) 15 Calc. W. R. 212 Civ. Rul.

(3) 6 Moore's I. A. 26.

(4) 8 Bom. H. C. Rep 67, 68, 69, 70, 86, 87, 88, Cr. Ca.

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upon either."[1] Whether or not the sea and its subjacent soil be vested in the Sovereign as her property, would not seem to be a vital question, if there has not been by the Sovereign, as appears to be the fact in the present case, any appropriation or attempted appropriation of the sea or its soil or the right of fishing in the former to any particular individuals, for where there is no such appropriation, even if the sea and its soil be vested in the Sovereign, the right of fishing in the territorial waters of British India would be common to all her subjects in that country; and if the sea and its soil be not so vested, the right of fishing in those waters would still, as well according to the Roman law, as the law of nations, be common to the inhabitants of British India.

It was argued on behalf of the defendants that the plaintiffs' alleged right to fish off Yerangal, if it existed at all, was immoveable property not situated within the district of Thana, and, therefore, under Act VIII. of 1859, Section 5, (9 Harr. S. D. A. Rep. 277) the District Court had no jurisdiction. But, neither the plaint in this suit, nor the learned counsel for the plaintiffs, claimed any private or exclusive right of fishing off Yerangal. The latter rested his clients' case upon the fact that they were subjects of Her Majesty in British India, and, as such, had a right, common to themselves and all other members of the public in that country, to fish in its adjacent seas. It is necessary to distinguish between a common of fishery and a common fishery, as to which, as well as to free fishery, and several fishery, there is some confusion in English Law Books and Reports.[2] A common fishery is a public fishery, *i. e.*, a fishery open to the public. A common of fishery is one of the species of private fisheries. The distinction was clearly brought out in *Benett* v. *Costar*[3] where Dallas, C.J., said:—"A common of fishery is a right in common with *certain* other persons in a particular stream;" to which I would add "or other water." Dallas, C.J., continued:—"Though text writers have used the terms *communem piscariam* and *communiam piscariæ* indifferently, a common fishery extends to all mankind. The defendant should have leave to amend by

(1) 8 Bom. H. C. Rep. 88, Cr. Ca.

(2) As to this confusion see Hargrave's note 7 to Co. Lit. 122*b*.

(3) 8 Taunt. 183, 187.

introducing the word *of*."[1] Blackstone[2] and others have treated a free fishery as identical with an exclusive right of fishing in a public river, and as differing from a several fishery, of which Blackstone says that the owner must also be, or derive his title from the owner of the soil. But in *Malcolmson* v. *O'Dea*[3] Willes, J., in giving the opinion of the Judges said :—"Some discussion took place during the argument as to the proper name of such a fishery, whether it ought not to have been called in the pleading (following Blackstone) a 'free' instead of a 'several' fishery. This is more of the confusion which the ambiguous use of the word 'free' has occasioned from a period as early as that of the Year Book of 7 H, 7. P, fo. 13, down to the case of *Holford* v. *Bailey*,[4] where it was clearly shown that the only substantial distinction is between an exclusive right of fishery, usually called 'several,' sometimes 'free,' used as in 'free warren,' and a right in common with others, usually called 'common of fishery' sometimes 'free' (used as in free port). The fishery in this case is sufficiently described as a several fishery, which means an exclusive right to fish in a given place, either with or without the property in the soil." Mr. Justice Phear in his treatise describes the various kinds of fisheries thus :—"It is a *several fishery* when one has the exclusive right, to whatever extent, of fishing in waters covering land which does not belong to himself; and this right is not the less exclusive because other persons have also rights of fishing in the same waters,[5] provided that the latter rights do not conflict with the former :—for instance, the exclusive right to take all fish, except oysters, is a several fishery, although another person has a right to take the oysters. A several fishery is so far unlike most other easements as to be capable of being trespassed upon;[6] this quality is probably common to all exclusive *profits à prendre*.[7] The natural right of the

(1) In *Blundell* v. *Caterall*, 5 B. and Ald. 294. Holroyd, J., usually a most accurate speaker, appears, *per incuriam*, to have used the phrase "a common of fishery" for "a common fishery." L. C. J. Hale, in his treatise, used the phrase "public common of fishery." The employment of the word "public" shows that what he meant was a common fishery.

(2) 2 Blackstone's Com. p. 39.

(3) 10 Ho. of Lds. 618.

(4) 13 Q. B. 426.

(5) *Seymour* v. *Lord Courtenay*, 5 Burr. 2814.

(6) Trespass on a several fishery lies even for disturbing the fish, though none be taken. *Holford* v. *Bailey*, 13 Q. B. 426.

(7) Selwyn's N. P. Tit (Trespass).

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owner of the land to the exclusive fishing in the waters which are upon it, is also termed a several fishery; and therefore[1] where a several fishery is in question, in the absence of evidence as to its origin, it will probably, except against the public right to sea-fishing, be presumed to arise by virtue of ownership of the land and water, rather than to exist as an easement. If the original grant can be produced, and its terms are such as to convey an incorporeal hereditament only, then the several fishery passed by it is simply an easement."[2]

This latter kind of several fishery, *i.e.*, where the ownership of the soil and the right of fishery are associated in the same person, is, for distinction, appropriately styled by Serjeant Woolrych, in his treatise on waters, "a territorial fishery."[3] Mr. Justice Phear continues:—"It is a free fishery when several *specified* persons have equal rights of fishing in the same waters.[4] It is a *common of fishery* when all the persons of a certain class, as all the tenants of a manor, or all the dwellers in a parish, have equal rights of fishing in the same waters. And it is a *common fishery* when all the subjects of the realm have equal rights, as is the case in the sea and navigable rivers." All of these fisheries except the last are private fisheries, and, with that exception, would, in England, when the owner enjoyed a free-hold interest in them, be real property.

Sir Thomas Strange, in his treatise on Hindu Law,[5] divides Hindu property into moveable and immoveable, and classes the former with personal and the latter with real estate—terms known to the English Law; noticing, however, that, differently from that law, both species of property are descendible amongst Hindus to the same persons. Without affirming that, in every instance, what is moveable by Hindu Law is personal by English Law, or that what is immoveable according to the former is real according to the latter,[6] (and admitting the very special exception of what in

(1) 5 B. & C. 886; *D. of Somerset* v. *Fogwell*, Co. Lit. 122*a*; Hargrave's note 7.

(2) 5 B. & C. 886; Co. Lit. 46, Shep. Touch 97.

(3) Pages 110, 111, 113.

(4) *Seymour* v. *Lord Courtenay*, 5 Burr. 2814.

(5) Vol. 1, pp. 1, 16 and 17.

(6) See 9 Bom. H. C. Rep. 99, 111; 10 Bom. H. C. Rep. 281; L. R. I. Ind. App. 34 as to the meaning of the phrase "immoveable property" in the Limitation Acts.

England are termed chattels real,) it is sufficient to say that, generally speaking, that coincidence is found to exist, and there does not seem to be any reason for presuming that private fisheries constitute an exception. The Hindu Law books, so far as I can discover, are silent as to fisheries public or private—and in that silence the general rule may be assumed to prevail with respect to private fisheries. The Muhammadan Law does not make any distinction similar to that between moveable and immoveable, personal and real property.(1) We now revert to public fisheries.

Real property consists of lands (which would comprise waters actually covering those lands(2)) and hereditaments, which last phrase includes lands and tenements. Hereditaments are divided into corporeal and incorporeal.(3) It has not been and could not be contended that the common right of the people of British India to fish in its territorial waters, (part of which we must regard the sea off Yerangal to be,) is a corporeal hereditament. It is suggested, however, that such a right may be regarded as an incorporeal hereditament, but I cannot perceive how it can be regarded as an hereditament of either sort. Whether we assume the property in that sea and its subjacent soil to be vested in the Sovereign, or assume this not to be so, but that the right of fishing in that sea, as part of the maritime territory of the country, is open to its inhabitants at large, a subject of Her Majesty in this country, although his father may have been an alien and never owed allegiance to the Crown of England, nor ever came within this country or its marine territory, would be entitled to this right on becoming a denizen thereof. Again, if his father had been one of Her Majesty's subjects here, the son would, as a member of the public in British India, enjoy that right quite

(1) Macn. M. L., p. 1, and Preliminary Remarks, p. LXXII., note.

(2) Co. Lit. 4*a*; 1 Stephen Com. 169, 4th Ed.; Calc. W. R. (1864) 62.

(3) Bracton, after dividing things into those which are within and those which are beyond our patrimony, and subdividing the former into moveables and immoveables, says: "Fit et alia et secunda divisio rerum, quia aliæsunt corporales, aliæ incorporales—corporales vero sunt quæ tangi possunt, sicut terra, fundus, res immobiles vel res mobiles quæ se movere possunt, sicut animalia vel hujus modi, vel moveri. Incorporales vero sunt, sicut sunt jura, quæ videri non possunt, nec tangi, ut jus eundi, agendi, aquamve ducendi, et hujus modi, quæ non possidentur sed quasi." Lib. I., c. 12., pl. 3. *Vide* 2 Bl. Com. 16, 17, 34, 417; 1 Stephen Com. 168, 171.

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independently of his father, and as fully in his father's life-time as after his decease.

Lord Chief Justice Willes and his colleagues in the Court of Common Pleas in *Ward* v. *Cresswell*,(1) allowed a general demurrer to pleas in replevin alleging a prescriptive right annexed to certain tenements to fish in the sea, saying :—"We are all clearly of opinion on the second objection, which equally applies to both pleas, that the prescription is void, because the right claimed, as annexed to certain tenements, is a general right for all the subjects of the kingdom. In *Pell* v. *Towers* (2) it was agreed 'that a man shall not prescribe in that which the law of common right gives.' Now 'every man may fish in the sea of common right,' 8 Edward IV 19*a*. (3) In *Warren* v. *Matthew* (4) it was holden that 'every subject of common right may fish with lawful nets in a navigable river, as well as in the sea.' So in 1 Mod. 105. And this is not merely the law of this country, but is also the law of nations. (5) And Bracton (6) says, 'Publica vero sunt omnia flumina et portus. Ideoque jus piscandi omnibus commune est in mari et in fluminibus.' (7) This prescription, therefore, for a right common to all of the subjects of the realm cannot be supported. A man might as well prescribe that he, and all whose estate he has, have a right to travel on the King's highway as appurtenant to his estate."

An inference from that case is that the right of the public to fish in the sea or a tidal river is not an easement, inasmuch as for an easement you may prescribe, whereas that case decides that for a right to fish in the sea, you cannot prescribe, because it is a right common to all of the subjects of the realm. The circumstance that it is not an easement is more favourable to the theory of the Roman Law, that the sea and the right of fishing

(1) Willes' Rep. 265, 268, Ed. of 1800, Dublin ; 16 Vin. Ab. Tit. Piscary B.

(2) Noy 20. Bro. Abr. Tit. Prescription, pl. 71.

(3) Per Choke, J.

(4) 6 Mod. 63 ; Salk 357.

(5) Grot. de Jur. Belli. et Pac., B. II., C. 3 ; F. 9.

(6) Lib. I., c. 12, s. 6.

(7) See Selden's Mare Clausum, Bk. II., ch. XXIV., pp. 383, 384, 392 of the Eng. translation by J. H., published in 1663. The word "fluminibus" must here be limited to navigable rivers which are tidal. The word 'tide' includes the fresh water forced back by the sea water, 3 Douglas R. 441 ; 6 Cl. and F. 628.

therein are *communia jure* than to the proposition that they are vested in the Sovereign. The passage from Bracton, of which Willes, C. J., quoted only a portion relating to ports and rivers, is almost, though not quite, a transcript of what has been above quoted from the Institutes, and contains (inter alia) the following :—" Naturali vero jure communia sunt omnia haec : aqua profluens, aer, et mare, et litora maris quasi maris accessoria." (1) I refer to that remark of Bracton, so far as it relates to the sea only, and not in relation to the sea-shore. How far his doctrines as to the sea-shore, or as to the banks of rivers, are now law in England, it would be irrelevant here to inquire. (2)

In *Lloyd* v. *Jones*(3), which was an action of trespass for having entered on the plaintiff's land and fished there in his waters, the defendant pleaded that he did so in exercise of a right conferred upon him as an inhabitant of the town of Bala under an immemorial custom. The Court of Common Pleas held that the custom set up was, in effect, a custom for the inhabitants of Bala to have a *profit à prendre* in the soil of another, and that no such custom could exist in point of law. (And that point was subsequently similarly decided in *Bland* v. *Lipscombe* by the Queen's Bench.(4)) It had been contended for the defendant Jones that the claim, which he put forward, was for an incorporeal hereditament, and, therefore, that the County Court (in which the action had been brought) was, by Section 58 of Act 9 and 10 Vic. c. 95, deprived of jurisdiction to entertain the action, but the Court said :—" 'Hereditament' is defined in the text books to signify 'all such things whether corporeal or incorporeal, which a man may have to him and his heirs, by way of inheritance, and which, if they be not otherwise bequeathed, come to him which is next of blood, and not to the executors or administrators, as chattels do.'(5) It is obvious that the right claimed under the custom alleged, is not a claim to a hereditament, and, therefore, not such as to exclude the jurisdiction of the County Court." The claim of the defendant, on behalf of himself and the other inhabitants of

(1) Bracton, Lib. 1, cap. 12., pl. 5.

(2) See *Ball* v. *Herbert* 3 T. R. 253 263, per Buller J.; *Blundell* v. *Caterall* 5 B. and Ald. 268; Hall's Sea Shore 156 *et seq.* 161 to 186, 2d. Ed.; Woolrych on Waters 9, 164.

(3) 6 C. B. 81, 90.

(4) 24 L. J. N. S. Q. B. 155, note 4.

(5) Termes de la Ley 388; Co. Lit. 6*a* 16.

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Bala, amounted to an alleged common of fishery with the plaintiff in the river Treweryn under an immemorial custom. The Court, as I have observed, held: 1. That no such right could exist by custom; and, 2ndly, that if it could so exist, it would not be a hereditament. That case being a claim for a common of fishery, which is one of the species of private fisheries in the soil of another, differs from the claim here, which is for a common (or public) fishery, in respect of which the plaintiffs, as members of the public, claim to fish in the sea off Yerangal. But the reasoning, by which the Common Pleas arrived at the conclusion that the alleged common of fishery was not a hereditament—viz.: that the alleged right was not descendible to the heirs of the defendant and of the other inhabitants of the town of Bala—applies equally here; the plaintiffs' right appertaining to them as members of the public, and not, as already explained, being descendible to their heirs whether they be inhabitants of Malavni or not.

In relation to the other passages above quoted from the judgment of Bayley, J., in *Blundell* v. *Caterall* (1) to the effect that the right of the Crown to the sea is not, in general, for any beneficial interest to the Crown itself, but for securing to the public the privileges of navigation and fishing, I may refer to the treatise of Mr. Justice Phear, in p. 44, where he says that "the Crown simply represents the public," and "is in fact its subjects' trustee." (2) This remark, however, may be due to the fact that, in England and Ireland, the Royal power is limited by Magna Charta, as already mentioned. Subsequently at p. 52 he observes:—"When, as is generally the case, the soil of the shore is in the Crown, the rights of the public in the sea or tidal waters, such as rights of fishing and navigation, &c., are natural rights accruing to them as *cestuis que trustent* in possession; but, when a private individual holds the shore, such of these rights as remain to the public have become, strictly speaking 'easements.'"(3) The natural rights, here spoken of, are by Mr. Austin denominated *res publicæ*.(4) Mr. Phear's distinction of

(1) 5 B. and Ald. 294.

(2) See also note *l.* to p. 45, and note *m.* to p. 47, of Mr. Justice Phear's Treatise.

(3) Mr. Justice Phear's Treatise, p. 52.

(4) 3 Austin Jur. 56.

these rights, which he calls natural, from easements, is supported by *Ward* v. *Cresswell*,(1) above cited, which decided that the right to fish in the sea is not the subject of prescription, whereas easements may be prescribed for. Hence, independently of other reasons for the same conclusion, it follows that the right of the public to fish in the sea is not an easement. Nor again is it a *profit à prendre in alieno solo*. A private right of fishery over the soil of another is a *profit à prendre*—*Wickham* v. *Hawker*,(2) but a right to take water from a spring in the soil of another is not a *profit à prendre*. In deciding this to be so in *Race* v. *Ward*,(3) Lord Campbell, C.J., said:—"The water which they (the defendants) claim a right to take, is not the produce of the plaintiff's close; it is not his property; it is not the subject of property." In support of this proposition Lord Campbell referred to Blackstone, who, in Vol. II., Comm. p. 14, says:—"But, after all, there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had; and, therefore, they still belong to the first occupant, during the time he holds possession, of them and no longer. Such *(among others)* are the elements of light, air, and water, &c." Afterwards,(4) having stated that a man cannot bring an action to recover possession of a pool, pond, water-course, rivulet, or other piece of water (*quære* whether he is right as to a pond or other stagnant water, and see *Challenor* v. *Thomas*), either calculating its capacity, as for so many cubical yards or by superficial measure for twenty acres of water,(5) Blackstone gives the reason: 'For water is a moveable wandering thing, and must of necessity continue common by the law of nature,' Ibid. p. 18. It was in *Challenor* v. *Thomas*(6) held that 'ejectment would not lie for 'a certain rivulet and water-course,' for a rivulet or water-course neither lies in demand, nor does a præcipe lie for it, nor can livery of seisin be made of it, for it does not stay *(non moratur)*, but is always flowing, nor

(1) 5 Willes Rep. 265.

(2) 7 M. & W. 63.

(3) 4 El. and Bl. 702, 709.

(4) Vol. II., Bl. Com. pp. 17, 18.

(5) For this, Blackstone refers to Brownlow 142, which is the case of *Challenor* v. *Thomas*, better reported, however, in Yelverton 143. See Co. Lit. 4b.

(6) Ibid.

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can it be given in execution, nor can seisin be had of it, for it cannot be given into the possession of any one, and is like to (a Writ of) protection *quia moratur super mare*, which is not allowable by 35 Hen. 6, for *mare non moratur*, but as it is in 12 Hen. 7 4, the action ought to be for so many acres of land covered with water. And ejectment lies for a gors[1] or stagne,[2] for a præcipe lies for them, and a woman will be endowed of the third part of a gors, as in 11 Ed. 3 is stated. But if the land under the river or under the water does not belong to the plaintiff, but the river only, then on disturbance his remedy is only by action on the case for any diversion of it and not otherwise." The decision in *Race* v. *Ward*[3] would seem to be applicable here, because it rested on the circumstance that running water *(aqua profluens)* is common, like air and light, and not the subject of property. The right of the public to fish in the sea is common, and not, as I think, the subject of property, and may be enumerated amongst the natural rights other than light, air, and water referred to, but not specified in detail by Blackstone. In *Race* v. *Ward* the Court, it is true, while holding the right to go upon the plaintiff's soil to take water not to be a *profit à prendre*, also held that it was an easement; but that was because, in order to take it, it was necessary to go upon the land of a private individual. Here the plaintiffs may fish in the sea as of common right, whether it and its subjacent soil be or be not vested in the Crown.

The fisheries mentioned in Act XVI. of 1838, Section 1, Clause 2, as to which the Revenue Courts, and the fisheries mentioned in Act X. of 1872 (Criminal Procedure Code) ss. 530 and 531, as to which the Magistrates are respectively empowered summarily but temporarily to decide questions of possession, would seem to be private fisheries,[4] and so also the fisheries which, for the purposes of the Registration Acts XX. of 1866[5] and VIII. of 1871,[6] are in the glossarial clauses of these Acts included amongst

(1) As to this word, see 10 Ho. of Lords 619, 620. In *Challenor* v. *Thomas* it would seem to mean a fish pond.

(2) Rendered by Brownlow *étang*, a pond, derived from the Latin *stagnum*.

(3) 4 El. and Bl. 702.

(4) *Vide* per West, J., 8 Bom. H. C. R. 84 Cr. Ca.

(5) Sec. 2.

(6) Sec. 2.

"immoveable property." It would be impossible to hold the Registration Acts to be applicable to the right which every member of the public, whether he be a fisherman or not, has to fish in the sea. Such a right could neither pass by livery, grant, descent, or devise.

It follows from what has already been said, that, even if this suit had been brought in the Court of the Principal Sadr Amin, where the former suit was instituted, in its present form while Act IX. of 1844 was in force, the Court within whose jurisdiction the parties reside would, I think, have had jurisdiction, because, for the reasons already given, it does not "relate" to "landed or other real property" within the 3rd Section of that Act, and the objection made successfully in the former suit, that the sea off Yerangal is not within the local jurisdiction, must have failed in this suit, constituted as it is. Act VIII. of 1859 (Civil Procedure Code), Section 5—the enactment applicable to this suit—is more favourable to the jurisdiction than Act IX. of 1844; for, even assuming that this suit "relates" to immoveable property, there would be some difficulty in saying that, within the terms of the 5th Section of Act VIII. of 1859, it is a suit brought "*for* land or other immoveable property" being merely in the nature of an action on the case for preventing the plaintiffs from fishing. It is not, however, my desire to lay much stress on the difference in language of those enactments, inasmuch as I am satisfied to rest my opinion on the question of jurisdiction upon the ground that the right of the public to fish in the sea does not come within the description of property of any kind. Nobody, I may here observe, has ever heard in England of such a right being, as property, subjected to probate or succession duty. Jurisdiction being given by Act VIII. of 1859, Section 5, in actions not brought for land or other immoveable property, to the Courts within whose jurisdiction defendants reside, there is not any necessity for resorting to the system of fictitious venues which grew up in England.

Next as to the defence of *res judicata*.

The plaintiffs in the former suit, reported in 9 Harrington S D. A. Rep. 276, (where that suit is denominated, by the reporter, an action of ejectment,) alleged that they were entitled to an

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ancestral fishing ground where they and their ancestors had for a long period of time planted fishing stakes and caught fish. They set it out by boundaries, stating that Yerangal village lies on the east of it. They aver that the defendants forcibly entered it, and planted their own fishing stakes there, and obstructed the plaintiffs in their fishing. The plaintiffs denied the right of the defendants to enter upon that fishing ground, and alleged that they (the plaintiffs) were entitled to exclude the defendants from it, and prayed the Court to effect that exclusion, and that the defendants should be enjoined against obstructing the plaintiffs in the fishing. Strictly speaking, the various forms of action known in England, were never in force in the Mofussil. It was not, however, unusual to describe suits here according as their objects would have caused them to be classified had they been instituted in England. A perusal of the plaint in the former suit leads to the conclusion that it sounded in ejectment and trespass. Serjeant Adams, in his treatise on ejectment, p. 20, referring to Cro. Jac. 144, Cro. Car. 492—8 Mod. 275-277, says: "In the old cases it is holden that an ejectment will not lie for a fishery, because it is only a *profit à prendre*, but it is said by Ashurst, J., in the case of *The King* v. *The Inhabitants of Old Alresford* (1) :— "There is no doubt but that a fishery is a tenement; trespass will lie for an injury to it, and it may be recovered in ejectment." Trespass will lie for breaking and entering the "several" or, what is equivalent to it, "sole and exclusive" fishery of one person over the soil of another, and disturbing the fish—*Holford* v. *Bailey* (2)—or for a free fishery. Ashurst, J., in saying that a fishery might be recovered in ejectment, most probably had in his view only an action of ejectment for a territorial fishery, that is to say, brought by a person in whom a several fishery is united with the ownership of the soil over which the right of fishery is claimed, as was the fact in *The King* v. *Alresford*. The old cases referred to by Serjeant Adams, show that ejectment will not lie where the right of fishery is dissociated from the ownership of the soil, *i. e.*, where the right is a mere *profit à prendre in alieno solo*. The allegations in the plaint in the former suit account for that suit assuming, to some extent at least, the character of an

(1) 1 T. R. 358, 361, and see Woolrych on Waters, pp. 239, 246.

(2) 13 Q. B. 426; 18 L. J. Q. B. 109, Exch.

action of ejectment. That suit was brought in September 1856 in respect of occurrences previous to that time, and proceeded on the hypothesis that the plaintiffs had an exclusive proprietary title to fish off Yerangal. In short, they claimed a private several fishery, and seemed to treat that fishing ground as solely their own. The present suit is brought by the plaintiffs in respect of occurrences in March 1872 and sounds in case, not in trespass or ejectment. The plaint does not allege the fishing ground to be that of the plaintiffs. It has been argued throughout on both sides as merely claiming for the plaintiffs the ordinary right of all Her Majesty's subjects to fish in the sea, and the plaint alleges that such right was exercised off Yerangal by the plaintiffs and defendants in a manner regulated by custom. It complained of the defendants having, in breach of that custom, planted a row of stakes parallel to those of the plaintiffs at a distance of 120 feet from the latter, "whereby the defendants had wilfully disturbed and caused an unnecessary obstruction to the plaintiffs' right of fishing in the said waters, and wrongfully and unjustifiably prevented fish from coming into the power of the plaintiffs, as they would otherwise have done, and whereby the defendants also have materially interfered with and injured the said trade of the plaintiffs, and caused the plaintiffs considerable pecuniary loss and damage." I fully concur on this point also with my learned colleague in thinking that the cause of action in this suit differs considerably from that in the former action. Here a common fishery, regulated by custom, is asserted—there a several fishery was claimed. The defence of *res judicata*, therefore, would, upon this ground alone, fail. But, further, the previous suit was, by the Sadr Divani Adalut, decided, not upon the merits, but solely upon the incompetency of the Lower Courts in respect of jurisdiction. It is for these reasons impossible, under Section 2, Civil Procedure Code, to hold the decree in that suit any bar to the present suit.

The last objection made on behalf of the defendants is that this suit will not lie on the merits, as alleged in the plaint. We, however, think that it will lie, if the facts stated be proved, and we are not disposed to view in a very critical spirit the plaint as framed. If the plaintiffs have, as we hold to be the case, a right to fish in the sea off Yerangal as members of the public, and the defendants have a similar right, we think that each were bound

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to exercise that right in a fair and reasonable manner, and not so as to impede the others from doing the same.(1) There being a right, there must be a remedy, and we think that this suit, which sounds in case, is a proper mode of seeking that remedy. It is manifest that a suit, in the nature of ejectment, would not be applicable where the plaintiffs have not a several fishery of the territorial kind, nor would trespass lie for a mere disturbance of a common fishery; although it or trover might lie, if the fish were actually caught and in the possession of the plaintiffs and taken out of that possession by the defendants. In *Young* v. *Hichens* (2) the possession was not complete, and, therefore, the Court (Q. B.) held that trespass would not lie; but Lord Denman, C.J., in ruling that to be so, added: "It may be that the defendant acted unjustifiably in preventing the plaintiff from obtaining such power; but that would only show a wrongful act, for which he might be liable in a proper form of action." Here his Lordship was evidently pointing to an action on the case, for the maintenance of which, possession of the fish would not be necessary, and an improper disturbance of the right would be sufficient. We agree in what Holt, C.J., said in *Keeble* v. *Hickeringill* (3) in illustrating his proposition that "he that hinders another in his trade or livelihood is liable to an action for so hindering him." After instancing that "scandalous words spoken of a man in his profession" are actionable, but when spoken of him without *(dehors)* his profession are not so, he proceeds to observe how much more the defendant ought to be so liable if he do "an actual or real damage to another, when he is in the very act of receiving profit by his employment. Now there are two sorts of acts for doing damage to a man's employment, for which an action lies: the one is in respect of a man's privilege; the other is in respect of his property. In that of a man's franchise or privilege whereby he hath a fair, market, or ferry, if another shall use the like liberty, though out of his limits, he shall be liable to an action, though by grant from the king. But therein is the difference to

(1) West, J., in 8 Bom. H. C. Rep. Cr. Ca. at p. 89, says:—"Thus the accused finding a particular space in the sea occupied by the Malavni fishermen, were bound so to pursue their own calling, if they could, as to leave their rivals without molestation."

(2) 6 Q. B. 606, 611; S. C. Davison and Mer. 592, 598, 599.

(3) 11 East *in notis*, pp. 574. 576.

be taken between a liberty in which the public hath a benefit, and that wherein the public is not concerned—22 H. 6. 14, 15. The other is where a violent and malicious act is done to a man's occupation, profession, or way of getting a livelihood: there an action lies in all cases. But if a man doth him damage by using the same employment: as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff, no action would lie, because he had as much liberty to make and use a decoy as the plaintiff. This is like the case of 11 Hen. IV. 47. One schoolmaster sets up a new school to the damage of an ancient school, and thereby the scholars are allured from the old school to come to his new. (The action there was held not to lie.) But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars—29 E. III. c. 18. A man hath a market, to which he hath toll for horses sold: a man is bringing his horse to market to sell: a stranger hinders and obstructs him from going thither to the market: an action lies, because it imports damage. Action upon the case lies against one that shall by threats fright away his (plaintiff's) tenants-at-will—9 H. VII. 8; 21 H. VI. 31; 9 H. VII. 7; 14 Edw. IV. 7: *vide* Rastal 662; 2 Cro. 423." The ruling in *Keeble* v. *Hickeringill*[1] was that an action on the case lies for discharging guns near the decoy pond of another with design to damnify the owner by frightening away the wild fowl resorting thereto, by which the wild fowl were frightened away and the owner damnified. *Carrington* v. *Taylor*[2] is to the same effect, the question put to the jury by the Judge on the trial and approved in Banc by the Court being whether the evidence showed a wilful disturbance of the plaintiff's decoy by the defendant. No doubt these cases, relating to decoys, involved a disturbance of the plaintiff's rights connected with their private property in the decoy, but still they are to a certain extent applicable here as relating to the capture of animals *ferœ naturœ*, which fish as well as wild fowl are. The observations of Holt, C. J., as to the case of the school in the Year Book 11 H. IV. 47 touch this case more nearly. It is quite true that where there are rival schools, or (as was observed by the Judges in the school case,) rival mills, the mere circumstance of competition, although it may be inju-

(1) 11 East. 574. (2) 11 East. 571.

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rious to the original school or original mill, confers no cause of action; but, as was remarked by Holt, C. J., a wilful prevention by the new schoolmaster of the exercise of his calling by the ancient schoolmaster would be actionable. Both are entitled to set up their schools and to use all fair means to attract scholars to them, but neither would be entitled to slander the other in his mode of carrying on his school, or wilfully to obstruct his pupils in attending it. For instance, if the new schoolmaster placed obstructions to the access of the old schoolmaster's pupils to the school of the latter, such conduct would be actionable. It would not be competition but prevention, partial or complete as the case might be, and such a molestation as the law would not permit. I asked the learned counsel for the defendants whether, if the defendants had placed one row of stakes immediately in front, and another row of stakes immediately behind those of the plaintiffs, such conduct, which would completely prevent them from exercising their equal right with that of the defendants to fish in the sea, would not be actionable, and he did not venture to deny that it would. There undoubtedly was room enough for both parties to fish off Yerangal, and they should exercise their right in such a manner as not to impede each other in so doing. What is a reasonable distance at which one party should fix their stakes from those of the other, so as not to impede the latter from fishing, may depend on many circumstances, *ex. gr.*, the strength with which the tide runs, the direction in which the fish usually run on the ebb or flood tide, the variety of the currents occasioned by the conformation of the shore or upon other circumstances, which should be the subject of careful inquiry. Independently of custom, if there be any conduct of one party towards the other which prevents the latter from a fair exercise of his equal right, and special injury thereby results to him (1), such conduct is actionable. There appears to be no good reason why the principle, *sic utere tuo ut alienum non lædas*, should not be applied to rights as well as to property. There is a very great difference between fair competition and wilful prevention. We do not, and cannot, in the absence of evidence, attempt to form an opinion

(1). *Maynell* v. *Saltmarsh* 1 Keble. 847; *Hart* v. *Bagsett*. Sir T. Jones 156. *Chichester* v. *Lethbridge*, Willes' Rep 71. *Iveson* v. *Moore* 1 Ld Raym 486. S. C. 12 Mod. 262; *Greasly* v. *Codling* 2 Bing. 263; *Rose* v. *Miles* 4 M. & S. 101; *vide* per Kelly C. B. L. R. 2 Ex. 322. 1 H & N 369 *et vide Satku* v *Ibrahim*, Infra pp. 457-460· 467 *et seq* and *Gehanaji* v. *Ganpati*, infra p. 469.

whether the distance of 120 feet, at which the defendants have set up their second row of stakes, is, having regard to such circumstances as above indicated, an unfair obstruction of the plaintiffs' right of common fishery. That is a matter of evidence. The defendants had already one row of stakes to the northward of those of the plaintiffs, and the setting up of another row to the southward of the plaintiffs' stakes, so nearly as 120 feet from them, wears the aspect of an intention on the defendants' part not to give fair play to the plaintiffs. Further, the plaintiffs have alleged a custom of not placing rival stakes at a less distance than 600 feet from each other. If this custom be established, and a breach of it by the defendants, and injury from that breach, this action would be sustainable. In the whale fisheries, in the northern and southern seas, customs prevail, and the Courts have gladly recognized those customs,(1) and for good reasons. Some of these may be gathered from the remarks of Chambre, J., in *Fennings* v. *Lord Grenville*.(2) The point on which the case (which arose in the southern whale fishery) turned, is not material here; but Chambre, J., said: "I should have been very unwilling to grant a new trial, if the only question had been on the custom. There must of necessity be a custom in these things to govern the subjects of *England* as well amongst themselves, as in their intercourse with the subjects of other countries. The usage of *Greenland* is held to be obligatory not only as between British subjects but as between them and all other nations. I remember the first case upon that usage which was tried before Lord *Mansfield*, who was clear that every person was bound by it, and said *that were it not for such a custom, there must be a sort of warfare perpetually subsisting between the adventurers;* and he held it strongly binding, from the circumstance of its extending to different nations. The same necessity must prevail in the *South Seas*, although the fishery has not been so long in use, in order to regulate our intercourse with the *French, Americans,* and others who resort thither."

The customs of the whale fisheries would not afford much or any assistance in such a case as the present, where the mode of

(1) *Hogarth* v. *Jackson*, Moo. and Mal. 58; 2 C. and P. 595; *Skinner* v. *Chapman*, Moo. and Mal. 59, note; *Littledale* v. *Scaith*, 1 Taunt. 243, note *Aberdeen Arctic & Co.* v. *Sutter*, 4 Macq. H. L. 355.

(2) 1 Taunt. 241, 248.

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fishing and the fish are so different. But the principle of the recognition of custom as regulating sea fishing is valuable. The remarks of Lord Mansfield quoted by Chambre, J., are especially so, and very applicable here. If there be not some usage, we are at a loss to conceive how difficulties in conducting the system of stake fishing, which prevails along the Malabar Coast, are not of much more frequent occurrence then they are, for it is very clear that too great proximity of the stakes to each other would be disastrous to the trade, costing much money, as those stakes (which are often of very considerable length) and the fixing of them do. It can scarcely be that the fishermen along the coast have not some understanding amongst themselves as to what is a fair and proper distance at which the rows of stakes should be fixed from each other. The expense and trouble of frequently raising the stakes, and refixing them elsewhere, whenever any person chooses to lay down a new row near existing stakes, would be too intolerable to be long submitted to. The system of stake-fishing along this coast is very ancient. In the map of Bombay attached to Fryer's Travels, published A.D. 1698, fishing stakes are marked as existing in the same locality in which some are still planted. It has not been contended that the plaintiffs' stakes interfere with navigation, and the system is too long established, and permitted as one of the most ordinary modes of sea-fishing, to be regarded with the jealousy with which stake-fishing is viewed by the English Law, which deems stake-fishing a private mode of fishing inconsistent with a common fishery.(1) Moreover, the stakes are alleged to be shifted at particular seasons, and cannot be regarded as giving a title to the parts of the soil in which they are from time to time planted, as Lord Hale seemed to think was the case in England,(2) from which opinion Mr. Hall expresses his dissent.(3)

For these reasons we think that this suit will lie. We reverse the decree of the District Judge and remand the cause for a new trial on the merits. Costs of suit and of this appeal must abide the final result of the cause.

(1) Hall's Sea Shore, pp. 50, 51 2nd Ed.
(2) De Jure Maris, Harg. L. T. ; Hall's Sea Shore, Appx. pp. XV., XVI., 2nd Ed.
(3) Hall's Sea Shore, p. 55, 2nd Ed.

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It will be desirable that, if it be necessary, and the plaintiffs be so advised, they should be permitted to amend their plaint by stating therein the general custom of the coast, if any, as to the distance at which rows of fishing stakes are usually placed from each other. The custom, if any, may possibly vary in different places according to local circumstances.

The District Judge should permit the parties to give such evidence as to local or coast customs as they can procure or as may in other respects be necessary or may elucidate the case.

It is our strong recommendation to the parties, and we desire that the same may be conveyed to them respectively, that, if they cannot, as they ought, come to a fair settlement between themselves, they should refer the matter in dispute to the arbitration of some gentlemen of experience, who are cognizant of the mode of stake-fishing along the coast, and should not harass and exhaust each other by further litigation. If, however, they do not take this reasonable course, they should recollect that it is certain that the law is capable of compelling them to exercise their common right fairly towards each other, and not in a spirit of malice or rapacity.

Decree reversed and case remanded.

[CROWN SIDE.]

Before Sir M. R. Westropp, Knt., Chief Justice, Sir Charles Sargent, Knt., Justice, and Mr. Justice Atkinson.

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IMPERATRIX *v.* PITA'MBER JINA.

Evidence—Confession—Indian Evidence Act (I. of 1872), Sections 25 and 167—High Court's Criminal Procedure Act (X. of 1875), Sections 23 and 101—Letters Patent, 1865, Clause 25—Power of the High Court on a point of law reserved to consider the merits of the case.

Section 25 of the Indian Evidence Act (I. of 1872) does not preclude one accused person from proving a confession made to a police officer by another accused person tried jointly with him.

Such a confession is not to be received or treated as evidence against the person making it, but simply as evidence on behalf of the other.

The High Court, on a point of law, as to the admissibility of rejected evidence, reserved under Clause 25 of the Letters Patent, 1865, and Section 101 of the High Court's Criminal Procedure Act (X. of 1875), has power to review the whole case,