

OPINION OF COUNSEL

for

THE CLERK TO
THE ARGYLL DISTRICT
SALMON FISHERY BOARD

Issues arising out of
the sale of fishing permits
on Loch Awe

Ref.: Robert Younger

1. I refer to the letter of instruction of 5 December 2023, and apologise for my delay in replying. I am asked seven questions which with my answers are set out below.

2. It may assist to begin with the following general remarks.

3. I am not asked whether Mr. Hamilton's title is good. A registered title can be challenged by an application for its rectification, but also in principle in any court action which relevantly takes issue with whether it is warranted by a prescriptive succession of prior titles. Mr. Hamilton's author may or may not have had a good title to the third of the salmon fishings that was ostensibly conveyed to him. It might be worthwhile to try to answer that question. However, it is not a question which I am asked, so for present purposes I assume his title is good.

4. As my instructions helpfully point out, Mr. Hamilton's assumed right of salmon fishing is thought to carry an implied right to trout fishing.¹ It is said to carry an implied right to take "other fish",² so pike may be included; it does not apparently matter whether other species are.

5. Where a man has a right to fish for trout in a loch, he may do so in any part of the loch. Taking Mr. Hamilton to be entitled to fish for trout in Loch Awe, it does not appear to be possible to deny his right in respect of parts of the loch which are controlled by the Association (apart from the north-west arm of the loch; see para. 7 below). That is consistent with the rule which applies between riparian proprietors.³ A 'riparian proprietor' does not include he who owns only salmon fishings; it means a understood as an owner of all or part of the alveus⁴ or banks of a river or stream.⁵ The root is the Latin ripa, meaning the bank or shore of a body of

¹ Scott Robinson, The Law of Game, Salmon and Freshwater Fishing in Scotland, at p. 230

² Reid, 'Property', The Laws of Scotland: the Stair Memorial Encyclopaedia, vol. 18, para. 326; Barry states that:-

"The right of salmon fishing includes the right to fish for brown trout and other freshwater fish in the same waters. As is discussed below, the right to fish for brown trout is not a separate heritable right like salmon fishing, but pertains to the ownership of the lands which border, and are adverso, the water. The result may therefore be that one proprietor owns the salmon fishings and a separate proprietor of the lands adjoining the water will have the right to fish for freshwater fish such as trout and eels in the same water." - 'Fisheries', The Laws of Scotland: the Stair Memorial Encyclopaedia, vol. 11, para. 5

³ Mackenzie v. Bankes, (1878) 5 R. (H.L.) 192; see Lord Hatherley at p. 193, Lord Blackburn at pp. 204 & 208, and Lord Selborne who said at p. 201:-

"the law of Scotland, with respect to the rights of riparian proprietors in inland lakes, has now to be applied. Under titles such as those by which both the competitors in the present case hold (and when nothing turns upon any evidence of exclusive possession) the entire lake, if surrounded by the land of a single proprietor, belongs to that proprietor as a 'pertinent' of his land. If there are more riparian proprietors than one it belongs, 'rateably', to them all. ... rights (such as boating, fishing, and fowling) which are exercised in or upon the surface of lake waters ... are to be enjoyed over the whole water's face by all the riparian proprietors in common"

See also Reid, op. cit., para. 306

⁴ i.e., the bed

⁵ Reid, op. cit., paras. 209 & 278; Lyall, 'Water and Water Rights', The Laws of Scotland: the Stair Memorial Encyclopaedia, vol. 25, para. 303

water. A 'riparian proprietor' includes the owner of part of the alveus or banks of not only a stream but also a loch.

6. But what might be thought to matter here is that Mr. Hamilton is not a riparian proprietor. The words published on his website which agents quote in my instructions could be taken to acknowledge that. However, his assumed right to salmon is to a third of the fishings in the whole loch, so presumably the Court would hold that his ancillary right to trout or pike extends likewise. And as I say, that would be consistent with the law which regulates riparian proprietors; even in the absence of express authority, it seems sufficient to conclude that there is no reason why the law should hold that the ancillary right of the owner of salmon fishings in the whole loch is not also a right in common to take trout and pike anywhere in the loch.

7. That reasoning does not apply to the north-west arm of the loch to which Mr. Hamilton's registered title does not extend. I assume that he does not affect to be entitled to authorise fishing there. If he does then I can give further consideration to the question his rights in that part of the loch.

8. I turn to the Clerk's specific questions.

1. Could the principles of 'common interest' in fishing be applied in this case and if so what limitations might the application of this principle place on the freedom of an owner such as Mr. Hamilton, for example, to sell unlimited tickets designed to undercut the Loch Awe Improvement Association.

9. In summary my advice is that in principle the principles of common interest do indeed apply, and those principles may apply so as to limit such freedom. That would depend on evidence that otherwise the trout and pike fishings would probably suffer material injury. The detailed terms of what order the Court would make would depend on what is necessary to avoid such injury, and how to impose that necessity fairly on all those having relevant rights.

10. Subject to such evidence, it seems reasonable to presume that if a case for judicial regulation were made out, then there would be a reasonable case for it to require (i) limits on

the numbers of persons permitted to fish; (ii) the employment of wardens; (iii) for all persons having rights in the fishings to fairly share the burden of the wardens' costs; and (iv) the means of securing these ends being practicably enforceable.

11. There may be more than one way of achieving that. Any application to the Court might seek alternative remedies. But if the Court found favour with the general principles of what I have outlined at para. 10, then it should follow that regulation would fairly require costs to be borne by the owners of rights, in proportion to any income raised by them or in their names. Subject to the presumed needs for a limit on the number of anglers and for regulation to be practically enforceable, any one individual might be left at liberty to charge any price he liked for a permit, so long as he fairly contributed to the costs of enforcing the scheme. But without a central point of sale and hence revenue, it would seem to be difficult to be assured about the numbers of permits issued and the proper allocation of income. The primary form of regulation to be sought could therefore logically amount to compelling Mr. Hamilton to sell permits only through, if not the Association's scheme, then a judicially-imposed successor in similar terms.

12. If those points are granted, there remains the question of fair allocation of costs and income. Extents of frontage have been judicially discussed as a measure for allocating rights in this context. However, if Mr. Hamilton has no frontage but only the separate tenement of salmon fishing, some other measure would be needed. I would defer to those with greater knowledge of fishing in general and Loch Awe in particular to propose a fair measure of allocation, but would of course be willing to consider what might find favour with the Court.

13. As a more modest fall-back to what I have outlined above, the Court might instead be asked only to interdict Mr. Hamilton from issuing more permits than a given limit, defined as one beyond which the fishings are likely to be materially injured, while having regard to a fair allocation of permits to be issued by the Association. That would eschew the option of seeking a contribution from him towards the wardens' costs. Again, however, both the argument in principle, and the identification of what that limit should be, would depend on evidence along the lines outlined above.

14. Accordingly, these remarks all proceed on the premise that there is or would be evidence that, if it continues, the existing state of affairs will probably cause material injury to the trout and pike fishings in the foreseeable future.

Detail

15. The common right of fishing in a loch⁶ is an example of common interest.⁷ Reid treats the recognised judicial power to regulate such fishings in the de-facto common interests of the proprietors (if not also the public interest) as an aspect of common interest as a legal concept. In my opinion that must be right; otherwise that judicial power would have to be characterised as something sui generis to common fishings, which has nonetheless to be enforced or exercised alongside a separate body of rules deriving from the doctrine of common interest. That would be conceptually redundant and practically confusing.

16. Lyall writes that:-

*“the right to the water is shared with the other proprietors, each having the right to sail on the loch, to fish, shoot or use the water for primary purposes. But if proprietors exercise these rights unreasonably, having regard to the rights of others, the court may restrain them, for example by regulating the number of boats each proprietor puts on a loch.”*⁸

17. In Mackenzie v. Bankes,⁹ Lord Selborne referred to:

*“these rights (such as boating, fishing, and fowling) which are exercised in or upon the surface of lake waters. These are to be enjoyed over the whole water’s face by all the riparian proprietors in common, subject (if need be) to judicial regulation.”*¹⁰

18. While that was a discussion of the rights of riparian proprietors inter se, it is difficult to discern any logical reason why the same principles do not apply to relations between a riparian proprietor and the owner of salmon-fishing rights. Insofar as Mr. Hamilton’s right is to fish

⁶ other than for salmon

⁷ Reid, op. cit., paras. 305-7 and 359

⁸ op. cit., par. 339, citing Mackenzie v. Bankes and Menzies v. Wentworth

⁹ (1878) 5 R. (H.L.) 192

¹⁰ p. 202

for salmon, as opposed to other species, it subject to the rules of common interest as between him and other owner or owners of the salmon fishings in the loch,¹¹ so that must also be true in a question between his non-salmon-fishing rights and those of others, including both the owner of the remainder of the salmon-fishing rights and the riparian proprietors.

19. In Menzies v. Wentworth,¹² Lord President Kinross proceeded on the premise that the Court has power:-

“to regulate the exercise of the right of fishing for trout in [a loch] by the riparian proprietors, or persons having their authority”.¹³

20. He continued:-

*“I did not understand it to be disputed by the counsel for the defenders that the Court would, upon sufficient cause shewn, have power to regulate the right of trout-fishing in a loch as between or among different proprietors interested in it, and the existence of this right of regulation was fully recognised in the previous cases already mentioned. The defenders, however, maintained that there has not been any abuse, or any excessive or undue exercise, of the right by any of them, and that consequently no case for interference by the Court has been established.”*¹⁴

21. Again, the reference to *“power to regulate the right of trout-fishing in a loch as between or among different proprietors interested in it”* does not suggest that in this regard any arbitrary distinction is made between, on the one hand, a case involving only riparian proprietors or, on the other, a case also involving the owner of salmon-fishing rights.

¹¹ Reid, op. cit., paras. 326; cf. para. 330

¹² (1901) 3 F. 941

¹³ p. 952; cf. Alex Pirie & Sons Ltd. v. Earl of Kintore, (1906) 8 F. (H.L.)

¹⁴ p. 954; see also Lord Kinnear at pp. 958-9

22. The Lord President considered it to be a necessary and sufficient condition for the exercise of the Court's power that "*the fishing is being materially injured or destroyed*";¹⁵

*"The Court should not, in my judgment, interfere unless the fishing is carried on in such a manner, or to such excess, as either to destroy or materially injure the reasonable enjoyment of the right."*¹⁶

23. Lord M'Laren said that:-¹⁷

"The Lord Ordinary concludes his analysis of the evidence with this observation: - 'It may be (and I rather think it is the case) that the amount of fishing has reached a point beyond which it cannot be carried with safety to the sport.' I agree; but then my inference is, that in such a state of the facts regulation is necessary. I think that a proprietor of fishing is not bound to wait until he can prove actual injury before coming to the Court with an action which is in substance an appeal to the Court's equitable jurisdiction to restrain apprehended injury." [emphasis added]

24. There is a reasonable prospect that today the Court would adopt Lord M'Laren's approach in preference to that of the Lord President. It is a first premise of the whole law of interdict that the common law does not require actual injury as a necessary condition of judicial remedy, and that a reasonable apprehension of injury suffices. Leaving aside the question of the penalties for breach, judicial regulation of fishings has an equivalence with an interdict, so may logically be held to depend on similar principles. It may also be that the Lord President's approach in 1901 was informed by more confidence about the numbers of wild fish in freshwaters than is now justified.

¹⁵ pp. 955-6

¹⁶ p. 956; see also Lord Kinneir at pp. 959 and at p. 960-1, who at p. 960 also said that:-

"The trout-fishing may be injured either by the destruction or the great diminution of the total number of fish in the loch, or by the destruction of the enjoyment of trout-fishing as a sport. In either of these ways it appears to me that the common right might be encroached upon and destroyed, or at all events materially diminished by the action of particular proprietors."

¹⁷ p. 958

25. Nonetheless, an application to the Court would require evidence justifying a reasonable apprehension that the present state of affairs will at least materially injure the trout and pike fishings in the loch, within the foreseeable future. That would require to be based on factual evidence of what has happened both over a reasonable tract of time before Mr. Hamilton began to issue permits and what has happened since then, presumably based inter alia on records of catches.

26. It would also require evidence from an independent man of skill about whether, and if so to what extent, the present state of affairs is causing any injury to the fishings; what is likely to happen in the future if matters continue as they are; and what difference an identified new form of regulation would be likely to make over the foreseeable future.

2. If Counsel is of the view that the principles of common interest are applicable in this case then what steps could the Association take to utilise this to protect their position. Would any such action require the co-operation of the Duke of Argyll as the apparent owner of the remaining pro indiviso salmon fishings on Loch Awe ?

27. The further steps which I recommend are the in-gathering of evidence and proposals described at paras. 9-14 and 25-26 above.

28. The co-operation of the Duke would be advantageous but not essential. Plainly if he is the owner of the remaining salmon-fishing rights, then any proceedings would have to be served on him for his interest. However, whatever the Duke's attitude to a new scheme of regulation, the Court would probably be swayed principally by the factual and expert evidence.

3. Should an angler holding a permit from Mr. Hamilton fall under the definition of an "Angler" in bye-law II of the Association, and thus be bound by the Association's bye-laws when exercising their rights to fish on Loch Awe ?

29. On the assumption that Mr. Hamilton's title to the salmon fishings is valid, and given that his rights includes the rights to fish for trout and for pike and to permit others to exercise those rights, and that he has not apparently agreed to be bound by the bye-laws, in my opinion such an angler is not bound by the bye-laws.

4. What limitations or restrictions do anglers holding angling permits from Mr. Hamilton have when using land belonging to Loch Awe riparian proprietors, if any ?

30. In summary, in my opinion such persons are entitled to take access over such land, insofar as it is reasonable necessary to do so in order to fish for trout or pike.

31. There is a stateable, contrary argument, that if such persons are not fishing for salmon, then they have no right to take access to fish for other species. However, the Court cannot prudently be relied on to agree.

Detail

32. A right to take from a loch fish other than salmon carries no right to access to adjoining land on its banks or shores without permission of the owner of that land.¹⁸ So a person with a right to take only trout or pike has, as such, no right to be on such land without such permission. On the other hand, the right of salmon fishing in a river or a loch also carries with it qualified rights to use the banks or shores. Reid says that:-

“Where the right of salmon fishings is separately owned from the dry land immediately adjacent to the waters, the proprietor of the former has certain rights of use in respect of the latter. These rights are distinct from, and in addition to, the right in the general public to use the foreshore for the purposes of fishing. In general, a proprietor of salmon fishings is entitled to make all uses of the banks or foreshore adjacent to the waters as are reasonably required for the conduct of his fishing. Thus he may use the land for necessary access to the waters on foot, or even by car or other vehicle if this is required either by the type of fishings or by the distance to the waters.¹⁹ On arrival he may continue the use as a base for fishing, for example for casting his line, for drawing his nets, and for carrying out repairs to his tackle. The uses must, however, meet the criterion of reasonableness, a

¹⁸ Menzies v. Macdonald, (1854) 16 D. 827, at p. 828; Lyall, op. cit., par. 339

¹⁹ Miller v. Blair, (1825) 4 S 214 (NE 217); Middletweed Ltd. v. Murray, 1989 S.L.T. 11

principle which has been held to exclude the construction of a hut²⁰ and of a towing path;²¹ and they must be exercised in a manner as little detrimental to the proprietor of the ground as is consistent with a full beneficial use of the right of salmon fishing.²² The rights implied by law may be extended by servitude, whether created by grant or by possession for the twenty years of positive prescription.”²³

33. Barry puts matters similarly:-

“A right to salmon fishing implies a right to such accessories as are necessary for the beneficial enjoyment of the principal right. The most important of these ancillary rights is clearly that of access to the water, as otherwise it would be impossible to exercise the right. This will become particularly important where the salmon fishing rights and the land adjoining the water are in different ownerships. The general principle is that the proprietor of salmon fishings may make all uses of the adjacent banks, or the foreshore where fishing in the sea is concerned, which are reasonably required for the proper exercise of his right. This includes the use of the foreshore, beach and waste land adjoining for drawing and drying salmon nets. He may therefore have access across land to reach the waters. The authorities concerning access to salmon fishings were reviewed by Lord Davidson in the Middletweed case, where he concluded:

‘... these passages tend to reinforce the view that the necessary right of access which attaches to property in salmon fishings is restricted not merely to access which is least prejudicial to the riparian owner, but also to access which is necessary for the beneficial enjoyment of the fishings.’

“On arrival at the fishing the salmon proprietor is entitled to use the bank for casting and other such necessary purposes but, as specified by Lord Davidson, the use must be such as is least prejudicial to the riparian owner. Doubt has been expressed as to the legal basis

²⁰ Mackinnon v. Ellis, (1878) 5 R 832

²¹ Forbes v. Smith, (1824) 2 S 721 (NE 602).

²² Miller v. Blair, supra; cf. Tummel Valley Leisure Ltd. v. Sudjic, 2010 S.L.T. (Sh. Ct.) 170

²³ para. 328

*of such accessory rights. Certain judicial statements would appear to support the view that such rights are rights in property and not servitudes.”*²⁴

34. What is reasonably necessary for access is to be judged by the needs of a person of average strength and agility.²⁵ Plainly there can be no unqualified right to take a vehicle to any part of the shore, but at most only so far as is reasonably necessary to proceed to fish on foot or from a boat.

35. The right of access is entailed by the right to fish for salmon. The right to fish for salmon is understood to include the right to take other fish. It can be asked whether a man who has a right to fish for salmon can use the ancillary right of access for a purpose other than salmon fishing.

36. Given the terms in which Mr. Hamilton advertises the sale of permits, all but an annual permit are expressly stated to be permits to take fish other than salmon, namely trout and pike. An annual permit may or may not be expressed as including salmon; more information is needed. Leaving aside holders of annual permits, holders of other permits granted by Mr. Hamilton are not (or at least not lawfully) engaged in salmon fishing.

37. There is a reasonable argument that the rights ancillary to salmon fishing do not pertain to someone to whom no right to fish for salmon has been given. The argument is that the right of access to another’s land is a right granted for the purpose of salmon fishing, so may not be exercised by a person to whom the benefit of the salmon-fishing right has not been conveyed. On that view, taking access in order to take other fish is only lawful in the course of taking access to take salmon, and is not lawful where salmon are not the lawful object.

38. That is a stateable argument. However, it depends on the rights of fishing for salmon and other fish being inseparable. It should therefore logically entail that Mr. Hamilton can only grant permits to take salmon and other fish in the loch, and cannot grant permits to take, say, only trout or pike. In other words, if a licensee of the holder of the salmon-fishing right cannot

²⁴ op.cit., para. 8

²⁵ Middletweed Ltd. v. Murray, supra

be permitted to take access on land that he does not own purely to take other fish, then by parity of reasoning neither is he permitted to take access by boat on a loch that he does not own in order to take such other fish. The argument entails that Mr. Hamilton cannot divorce his rights in terms of the permission that he gives, so that if he does not permit the greater right of salmon fishing, he cannot permit the lesser right to take other fish.

39. In my opinion that would only attract the Court if the right of the owner of the salmon fishings to take other species was envisaged to be exercisable only while engaged in salmon fishing; other species might then be regarded as a lawful 'by-catch'. That seems doubtful. I may be corrected by the expert fisherman, but on the face of things there seems no reason why the owner of the owner of the salmon fishings might not on occasion purposefully eschew salmon fishing, in favour of angling only for other freshwater species. On that view, he would not need to have the accoutrements of salmon fishing with him, in order to be lawfully exercising the lesser right. But once that is admitted, then there appears to be no logical reason why he could not also permit third parties to exercise his right, on the condition that they may seek only other species and not salmon. And if he may do that, then there appears to be no logical reason why he could not permit them to exercise his ancillary right of access also for that lesser purpose only.

40. In the result, the argument that Mr. Hamilton cannot devolve on licensees his ancillary right to take reasonably necessary access to the shores of the loch, when they are permitted to take fish other than salmon, could be tested in court, but reliance on it cannot be recommended. Nonetheless, if proceedings were to be raised for other purposes which had better prospects, a ruling on this issue could be sought at the same time.

5. Is there any limit on the number of fishing permits that any fishing owner may issue at any one time ?

41. I refer to para. 13 above. In principle the answer is 'Yes'; in practice it depends on the Court's assessment of evidence that issuing more than an identified maximum number of permits is likely to lead to material injury to the trout and pike fishings.

6. Could an application be made to the court for judicial regulation of the loch, and, if so, would the scope of such an order be ? Might it include a limit on the number of permits any owner might issue and if so, how might that be fairly calculated ?

42. I refer to my advice at para. 9-14 and 25-26 above.

7. Are there any other material issues which Counsel would wish to draw to the Board's attention to clarify the nature of the rights of the fishery owners on Loch Awe or to assist in resolving this issue ?

43. If the value of what is at stake exceeds £100,000, then the Court of Session would have jurisdiction. I would recommend considering how the interests at stake might be valued financially, in terms of both capital and revenue, in order that the prospects for invoking that Court's jurisdiction could be explored. An advantage of proceedings in the Outer House would be a more ready means of reclaiming to the Inner House, should the Outer House consider that it is bound by the more restrictive approach of the Lord President in Menzies v. Wentworth, by which the Inner House would not be bound.

44. However, identification of the prospects for court action should proceed in the context that primarily an agreed compromise with Mr. Hamilton (and possibly also the Duke of Argyll) would be preferable to litigation. If there appeared to be good prospects for court action, then it would be prudent to communicate them to Mr. Hamilton and invite him to discuss possible agreement on how the fishings should be regulated. Generally litigation is of course advisable only if reasonable attempts at finding common ground have proved to be fruitless.

45. As well as ascertaining whether there is evidence to warrant an application to the Court, the question of whether the Scottish Ministers could validly exercise any statutory powers to innovate upon the limited effects of the 1992 Order could be explored in parallel.

If/

If any questions arise or discussion might assist agents need not hesitate to contact me.

The Opinion of

Michael Upton

Advocates' Library,
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6 April 2024

OPINION OF COUNSEL

for

THE CLERK TO
THE ARGYLL DISTRICT
SALMON FISHERY BOARD

Issues arising out of
the sale of fishing permits
on Loch Awe

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