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OBSERVATIONS

ON THE

PUBLIC RIGHT OF FISHING

BY ANGLE OR NETS,

IN

PUBLIC NAVIGABLE RIVERS IN GENERAL,

AND

The River Thames

IN PARTICULAR.

WITH NOTES, HISTORICAL AND EXPLANATORY,

BY PISCATOR.

Suum cuique tribuito.

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PREFACE.

It has long been a disputed point, as well amongst theologians as others, "whether it be justifiable to do wrong, that good may arise out of it;" and I confess the question has frequently arose in my own mind previous to the publication of the following sheets. It has, however, as frequently occurred to me, that I had only the choice of two evils; namely, that of submitting in common with a large portion of my fellow-subjects to being deprived of, or at least much restricted in, the exercise of a right which appeared to me secured by the laws of the country; and witnessing a continuation of a system for the destruction of

fish and fishing, by parties illegally claiming an exclusive privilege of doing so, in the manner described in a subsequent page; or by publishing the present work, run the chance of admitting, what is generally called, the common poacher, to the right of fishing with nets.

The *first* appeared to me a *certain* evil, and was frequently attended with numberless vexatious proceedings on the part of the persons claiming an exclusive privilege against *those* who caught a few fish merely for amusement, and whose legal right to do so was equal to their own; while the supposed privileged persons were by illegal means destroying fish by cart and waggon loads for no earthly good whatever; and thus, not only doing a great public injury, but depriving a large portion of society of a pleasing and legal amusement.

The *other* appeared merely a *possible* evil, and at worst, only let in the *poor* poacher with *small* means of destruction, against the *rich* one

with *unlimited* ones, and might lead to the prevention of *both*, by the public enforcing the existing laws against all offenders, whether rich or poor.

The publication, therefore, appeared to me to be the lesser evil of the two; yet it must be admitted, both are evils, particularly as against the angler; and it is exceedingly probable, that from this "halting between two opinions," (that is to publish, or not to publish,) the following Observations would never have been intruded on the public attention, had not a recent circumstance occurred, in which a gentleman (who has held a high military command in a foreign service,) while *angling* from a boat in the Thames, was, upon two different occasions, disturbed in his amusement by a clergyman and his servant, in a manner the most offensive and insulting, and which was followed up by conduct replete with acrimony and hostility, very generally considered, not only impolite, but widely different from what

is usually expected in the conduct and character of an ecclesiastic and a gentleman.*

On these two occasions, which of course soon became public, a strong sensation was naturally created in the minds of persons residing in the neighbourhood of the transaction, as their own rights and the enjoyment of a highly prized recreation were involved in the question; and it being known that I had devoted much time and attention to the subject, I was so strongly pressed to publish the Observations on the general right that I felt myself bound to attend to their wishes.

My object has been to bring into one point of view, both the history and the law of the subject; I have aimed at nothing more; whether I have succeeded or not, the public must determine. That the work may have errors is exceedingly probable, but of that also the public will judge; but I submit that the autho-

* Since writing the above I have been informed that *a lady*, the wife of an equally respectable gentleman, has been annoyed, while angling from a boat, in the same manner and by the same person.

rities produced are conclusive in favour of the public right contended for, and till its opponents "can rail those authorities from off the public records, they 'll but offend their lungs."

But whatever may be the result of this publication, as to the increase or diminution of the recreation of fishing, it must be attributed (to say the least of it) to the intemperate zeal of those who have hitherto called themselves "Proprietors of private Fisheries in the River Thames." If an *increase* of amusement should take place, a good will arise out of an evil: if, on the contrary, a diminution of it, they must blame their own conduct in pushing matters to such an extremity as to compel individuals to ascertain their legal rights, and when ascertained, must not be surprised if they are determined to exercise them.

I flatter myself it will clearly appear, that the public at large are by law entitled to fish both

with angle and lawful nets; and at the same time it will be equally clear, that the present system of destroying fish by cart and waggon loads, by means of drag and flew nets, is altogether unlawful, and ought for the future to be prevented.

For my own part, as an angler, I sincerely wish that a hint suggested to me a short time since by a worthy and enlightened friend, and a magistrate, (that of preventing fishing with nets, or indeed any other mode than that of rod and line) could be adopted: by which means the River Thames would be full of fish, and the inhabitants of the towns and villages on the banks be essentially benefited by an influx of company from different parts of the country, who would visit them purposely to enjoy the amusement on the first and most beautiful river in the kingdom.

OBSERVATIONS

ON THE

Public Right of Fishing in Public Navigable Rivers in general, and the River Thames in particular.

Several Informations having within these few years past been laid against persons for Fishing in the River Thames, by others calling themselves Proprietors of fisheries in that river, have occasioned an enquiry into the rights or claims of each party: and the object of the following sheets, is to submit the different authorities extant on the subject to the judgment of the reader, previously premising, that those authorities are intended principally to apply to that part of the River Thames *not* within the jurisdiction of the City of London.

Before, however, we enter on these authorities, it may not be amiss to examine what each party claims as a right.

1st.—The gentlemen, or proprietors, claim a *private* and *exclusive* right of fishery in certain parts of the river, as a free fishery, a several fishery, or a common of fishery,* acquired by them either by purchase or descent. Under one or the other of these titles, they say, they are entitled, not only to fish what they term their respective parts of the river, as they may think proper, but to exclude all other persons from a participation in the amusement of fishing, or at least an equal enjoyment of it.

2ndly.—The public on the other hand contend, that the gentlemen possess no such exclusive rights, that the fishing in the River Thames, as well as every other navigable river, is common to all the King's subjects; and that unless the party claiming such exclusive right, can *produce* a Grant from the Crown, or can *prove* a Prescription, and such grant is antecedent to the first year of the reign of Richard I., or such prescription be legally proved, the presumptive right is in favour of the public claim.

* For the distinction of these several sorts of fishery, vid. 2d. Black. Com. 39., and Schultes on Aquatic Rights, p. 62, et seq.

Such I believe are the claims of each party, and we shall hereafter endeavour to show how each is supported.

It appears, that prior to the reign of King John, the appropriation of various parts, both of the Thames, and other navigable rivers in the kingdom, by the King and some of his subjects, (who at the time they wished to monopolize the game, coveted also the amusements and profits of fishing,) was one of the grievances at that time complained of, and that the fisheries, as well as the navigation of the rivers, was much injured and impeded by such appropriation: for we find, that in the 16th chapter of Magna Charta, it is provided, that "no owners on the banks of the rivers, shall so appropriate or keep the rivers several in him, to defend or bar others, either to have passage, or *fish* there, otherwise than they were used in the reign of Henry II."

And the Mirror on this chapter states, "that many rivers were so inclosed in which formerly was common of fishing." And by chapter 39 of the great Charter, it is directed that "All wears and kiddles shall be demolished on the Thames and Medway."

Lord Coke, in his Institutes, observes, that "a kiddle is a proper word for open wears, whereby fish are caught: that the erecting such was a *pour presture*, or encroachment; making *that* several, or separate to *one*, which ought to be common to *many;* that this was forbidden by the common law on public rivers, for that every public river or stream is a King's highway."

Such then appears to have been the common law right of the subject, which seems to have been invaded by the King and others, but which was restored to the public by the Great Charter.

Like many other rights, however, of a similar description, which being beneficial to all, is by all neglected, and as is too frequently found by experience, no individual would defend his right, because he knew others would be benefited as well as himself; the owners of large estates on the banks of the rivers appear to have profited by this neglect, and have endeavoured to convert this public right into a private one,* and they apply the doctrine (which

* From very similar causes the common law right of the subject in game was invaded.

is certainly correct as to rivers *not* navigable) to those which are, viz. that the waters and fishings are the property of those persons whose lands adjoin such rivers.

But before this exclusive claim can be allowed, we ought to be informed by what *legal* means the public have *lost* their right, thus shown to have been legally vested in them; and we shall presently see, that if those persons who call themselves proprietors, mean to claim such an exclusive right, it must be proved, and supported by the production of a Grant from the Crown, or by Prescription, which implies a grant.

We have already seen, that the chapter of Magna Charta, before referred to, establishes the public right of passage and fishing in all navigable rivers.

The next authority I shall refer to, is in the 2nd Blackstone's Commentaries, page 39, where it is stated, that "a free fishery, or exclusive right of fishing in a public river, is a royal franchise; though the making of such grants, and by that means appropriating what seems to be unnatural to restrain, (the use of

running water,) was prohibited for the future by King John's Great Charter, and the rivers that were fenced in his time, were directed to be laid open, as the forests to be disafforested. This opening was extended by Henry III. to those also that were fenced under Richard I., so that a franchise of free fishing ought to be at least as old as Henry II."

The next authority is the case of Warren against Matthews, 6 Modern Reports 73, where it is decided "that *every subject* of common right, may fish with *lawful nets* in a navigable river, as well as in the sea, and the King's grant cannot bar them thereof, but the Crown only has a right to royal fish, and that, the King only may grant."*

In Lord Fitzwalter's case it is declared, that "in the Severn, the soil belongs to *the owners* of the land on each side. The soil of the River Thames is in the King, but the fishing is common to all." 1 Mod. Rep. 105.

"A person claiming a free fishery, or several fishery, or a common of fishery, must show

* Vide also Burrow's Reports 2164.

the foundation of his claim, for the right is *prima facie* in all the King's subjects." *Id.*

"One claiming solam Piscariam in the River Ex by a grant from the Crown. Et per Holt C. J. The subject has a right to fish in all navigable rivers, as he has to fish in the sea, and a *quo warranto* ought to be brought to try the title of his grantee, and the validity of his grant." Salkeld Rep. 357.

In Carter against Murcot, which was an action for fishing in the River *Severn*,* the defendant pleaded that "it was a navigable river, and also that it is an arm of the sea wherein every subject has a right to fish." The plaintiff replied (without traversing these allegations) that "this was part of the Manor of Arlingham, and that Mrs. Yates was seized of that manor, and prescribes for a several fishery there; issue being joined, a verdict was found for the plaintiff.

It is observable in this case, that in the Severn the soil of the river is not in the King,

* In the Severn the soil of the river belongs to the lords, and a special sort of fishing belongs to them likewise; but the common sort of fishing is common to all. 1 Mod. Rep. 105.

and that here a prescription was proved, and therefore a verdict very properly found for the plaintiff; which, on a subsequent application for a new trial, the court refused to disturb.

But Lord Mansfield in delivering his judgment in that case states,

"In rivers *not* navigable, the proprietors of land have the right of fishery on their respective sides, and it generally extends, "ad filum medium aquæ."

"But in navigable rivers, the proprietors of land on each side *have it not;* the fishery is common; it is *prima facie* in the King, and is public."

"If any one claim it *exclusively,* he must show a *right.* If he can show a right by prescription, he may then exercise an exclusive right, though the *presumption is against him,* unless he can prove such a prescriptive right."

"Here it is claimed, and found: it is therefore consistent with all the cases, that he may have an exclusive privilege of fishing, although

it be an arm of the sea; such a right shall not be *presumed,* but the *contrary prima facie;* but it is capable of being proved, and must have been so, in the present case."

Mr. Justice Yates, in the same case, says "I was concerned in a case of this kind; such a claim was made, but the claim failed, because it there happened, that such a right could not be proved; therefore it was in that case determined, that the right of fishing was common." 4 Burrows Rep. 2162.

The next authority I shall offer, is an Act of Parliament, in which not only the Common Law right of the subject is recognized, but his interest in fee simple declared.

The statute I allude to, is that of the 2d Hen. 6. c. 15. Anno Dom. 1423, which is entitled "An Act to prevent persons fastening nets athwart the River Thames and other rivers." After reciting that "it had been the practice to fasten trinks or nets by day and night to large posts, boats and *ancres* across the River Thames and other Rivers of the Realm, which was the cause of great destruction of fish," it prohibits

such practice in future, and has this important proviso :

" Provided always, that it shall be lawful for the possessors of such trinks or nets, if they be of assize, to fish with them at all seasonable times, drawing and pulling them by hand as other fishers do, with other nets, and not *fastening* or *tacking* the said nets to posts, boats, and ancres, continually to stand as aforesaid."

" *Saving always to every the King's Liege People, their Right, Title, and Inheritance in their fishings in the said Waters.*"

This is certainly a most important statute ; for it not only confirms the Common Law right of the public, to fish in the River Thames (whatever may be the right as to other navigable rivers,) but it prohibits (if not in the strict letter, at all events in spirit) that disgraceful practice but too frequently resorted to, by those who call themselves proprietors of fisheries, in dragging the river with nets in the manner now pursued :—A practice at once disgraceful to gentlemen and sportsmen, and seldom or ever resorted to even by the professed poacher; and there can be no doubt, that if it is not an offence under the strict letter of this statute, it would be so at Common Law.

Such are a few (among many other authorities) advanced in support of the *Public* claim ; and they should be well considered by those persons who claim an exclusive, or peculiar right, before they attempt to enforce such right, as it is presumed they would find it difficult (if not impossible) to find authorities to contravene them.

From these authorities then we find, that there are two modes by which the person who claims such peculiar and exclusive proprietorship can support his claim.

The first is by Grant from the Crown.
The second by Prescription.

We will take each in their order :—
First then, he can claim by the production of a Grant from the Crown, and that grant will particularize the extent of the liberty or privilege granted.

But it must be remembered that such grant

must not only be antecedent to the reign of Richard I., but it must be *produced* and *proved*, for it cannot (as in ordinary cases) be presumed, but the contrary, *prima facie*.

The evidence then, with respect to a grant, is extremely short, and if it possesses these requisites, as to dates, &c., it appears from the authorities I have before quoted, on its production and proof it may succeed.

His next claim is by Prescription, which implies a former grant.

Now, what is Prescription, and what are the requisites necessary to support it? and can it *in this* case be implied?

1st. What is Prescription? We are told that "Prescription or custom presupposes an original grant, which being lost by length of time, immemorial usage is admitted as evidence to show that it once did exist, and that from thence such usage was derived." 2 Black. Com. 30.

Such appears to be Prescription or custom.

2nd. What are its requisites?

We are told by another authority, that

"every custom has two essential points, viz. time out of mind, and *continual* usage, without interruption." 1 Institutes, 110.

"Now time out of mind has been long ago ascertained by the law to commence from the beginning of the reign of Richard I., and any custom may be destroyed by evidence of its non-existence in any part of that long period from that time to the present." 2 Black. 30.

Again. "To make a particular custom good, the following are necessary requisites. First, that it has been used so long, that the memory of man runneth not to the contrary; so that if any one can show the beginning of it, it is no good custom. *For which reason no custom can prevail against an Act of Parliament since the statute itself is a proof of a time when such custom did not exist.*" 1 Black. Com. Introduction 76.

"If any one can show the beginning of a custom within legal memory, that is, within any time since the first year of Richard I., it is not a good custom." Christian's Notes on Blackstone.

"Prescription, or custom, must be *conti-*

nued, it must be *peaceable* and *acquiesced* in, not subject to *contention* and *dispute;* for, as customs owe their original to common consent, their being immemorially disputed either at law or *otherwise,* is a proof that such consent was wanting. 1 Black. Com. 77.

Such appear to be the requisites necessary to support a Prescription or a custom.

Let us now see how far Prescription can in this case be implied, or ever proved.

We have before seen that the right of fishing in all navigable rivers is *prima facie* in the public; that the King's Grant cannot bar them thereof; that a person claiming an exclusive right must prove it, for it shall not be presumed, but the contrary *prima facie;* that no custom shall prevail against an Act of Parliament; and that there are several Acts of Parliament besides the great Charter in which the public right is acknowledged. Therefore no custom or prescription can be offered or given in evidence against these acts.*

* In the case of Carter and Mercot these Acts were not pleaded in bar, and therefore could not perhaps have been made available: *sed quere,* had they been pleaded, would the result have been the same?

The gentlemen, therefore, claiming these exclusive privileges would do well to consider, whether their prescriptive rights possess all the qualities here required; for if they fail in *one* point, they fail in *all:* for the presumption is in favour of the public.

Have they from the 1st year of Richard I. exercised the right they claim *peaceably?* Has such claim been acquiesced in? Has it been without *contention* and *dispute?* Are the charters of King John and Henry III., or the statute of Henry VI. still in force? (nay, even were they repealed, I should contend, that, as they once had been in force, it would be sufficient to destroy such prescription.) Or is there a single Act of Parliament which recognizes or protects a private or exclusive right of fishery in the River Thames, or in any other public navigable river?

In the year 1787 this right was the subject of a law-suit, and perhaps it is to be regretted that the question had not been put at rest; but after incurring all the expenses of a

suit, an arrangement was made between the parties, that the public right of angling should be admitted, and the action dropped.

Having considered the subject as affected by Grant, Prescription, the Statutes, and decisions of the Courts,

We come now shortly to examine in what way it is affected by the Common Law of the land, and endeavour to prove that by that law the public have had, used, and exercised, time out of mind, to take fish, (or attempt to take fish,) in all public navigable rivers.

In doing this I shall avail myself of the assistance afforded me by a small pamphlet published in 1787, while the above suit was pending.

"The Common Law is the unwritten law of the land, and consists of *general* customs, and usage, declared and established by the judgments of Courts, and authentic records, or proved by other sufficient evidence to have been used, time out of mind, without legal impediment or obstruction."

Our great law writers say hereon:

"The law of England is divided into three parts: the Common Law, Statute Law, and *particular* Customs; for if it be the *general* custom of the realm, it is part of the Common Law." Coke's 1. Institutes.

"The Common Law is the ancient usage and custom of the realm, before any statutes were made." Shepherd's Epitome of the Laws.

"The Common Law is grounded on the general customs of the realm." Terms de la Ley, 147.

"General customs, which are the universal rule of the whole kingdom, form the unwritten or Common Law." Black. Com. Introd. p. 67.

"The Common Law of England is a law used time out of mind by prescription. That custom which is common throughout the realm, is Common Law." Sir Henry Finch's Discourse on Law, p. 77.

If, therefore, it can be proved, that this public right hath been used and practised, time out of mind, continually, without legal interruption, it proves it to be the Common Law

right, or privilege, and of course common to all. And, although these authorities have been applied on a former occasion to the right of *angling* only, yet their general application to all other fishings will hereafter appear.

I will not go into history, either on the subject of fishing with nets or angling, which I might easily do, but I will presume my readers are fully as well, or perhaps better acquainted with these authorities than myself. I will only observe, that it was allowed to the clergy when the more sanguinary sports, and athletic exercises were forbidden; and most historians and travellers record it as the universal practice of all nations. But to come more near to the time it is intended to establish the usage and practice of it, viz. at and before the beginning of the reign of Queen Elizabeth, being the time the first statute now extant was made on the subject of fishing.

There is a book, (one of the most ancient printed in this kingdom)* called "The Boke of

* Printing was brought into England by William Caxton, a mercer, in 1471; who, it is said, had a press in Westminster Abbey till 1494.

St. Albans, emprynted at Westmystre, by Wynkyn de Word," in small folio, and contains, among other curious matter, "A Treatyse of Fyshynge with an Angle."* It was written by Dame Juliana Barnes, Prioress of the Nunnery of Sopwell, near St. Alban's.

It clearly proves that the art of angling was then used, well known, and practised throughout the kingdom, without any legal impediment, in all public rivers; and particularly the reason she gives for publishing this book confirms the right of angling being then held and esteemed common to all; for she says, "And for by cause that this present treatyse sholde not come to the handys of eche ydle persone whych wolde desire it, yf it were emprynted alone by itself, and put in a lytyll plamflet," she has therefore compiled it together with divers books interesting to gentlemen and noblemen.

So that, though the good lady was desirous of keeping the exercise of this diversion to "gentlemen and noblemen," yet she fairly ac-

* Some account of this book may be seen in the Biographia Britannica. Article, Caxton. Note L.

knowledges that the commonalty had a full right to the enjoyment of it; and her wish to prevent the common people from this diversion, by means of making the purchase of her book too high priced for them, plainly indicates there were no other, or other legal prohibitions or means to prevent them.*

Again, she says, "The reason of her so publishing the Treatise on Angling was, lest those common persons should, if they had the assistance of the book, utterly destroy 'this dysporte of fyshynge,'" by which we may fairly infer, that the custom of taking fish by angling was very frequent, and commonly used by such as she calls common persons.

Another book was printed on this subject in 1590, by Leonard Mascall, entitled "A Book of Fishing, with Hook and Line, and all other Instruments thereunto belonging."

* It is presumed the old lady conceived this "a pious fraud," a term very generally used, and a conduct as generally practised at that period; but like most other frauds, it was well calculated to defeat the end proposed, by affording evidence of the public right in the attempt to conceal it.

Another book, by John Taverner, in 1600, entitled "Approved Experiments in Angling."

And another in 1613, entitled "The Secrets of Angling, by J. D. A Poem."

And in 1653, Walton's "Complete Angler" was also published, which has been called "a pleasing and instructive treatise on the subject."

Now by all these books it is proved indisputably, that the usage, custom, and practice of angling, was well known, commonly used and practised, and was a general custom throughout the realm.

Walton says, in an account he gives relative to the laws of angling, that "The statute of 1st. Eliz. c. 17. had so much respect to anglers, as to leave them to catch as big as they could, or as little as they would; and, that though this recreation be lawful, yet no man can go on another's private ground to angle without licence; but in case of a river, the taking fish with an angle is not trespass."*

* Nor poaching, *vide* next note.

Should it be observed, that all this doctrine applies to *angling* only, and not to the use of nets or other accustomed modes of fishing; I answer, that when these observations were originally made, it was at a time when the general right was in dispute, and it was then thought, that if the action then pending was persevered in, that the establishment of such general right might be perverted to bad purposes, and productive of bad consequences, by encouraging what were termed poachers.* This was one of the reasons that induced the parties claiming the general right, to consent to the accommodation which then took place. But at that time it never could have been contemplated, that those persons who then claimed an exclusive proprietorship in the fisheries, would resort to a practice equally (if not more) destructive than the poachers, that of dragging the rivers with nets, and thus collecting waggon and cart loads,† which they frequently do,

* Query—If poachers can exist, where a general right to take fish exists? "Angling with a rod only could not be called poaching, nor was it ever so esteemed." By the Lord Chancellor, in Rex v. D. of Beaufort. 2nd Chitty, 1034.

† However improbable this circumstance may appear, it is nevertheless literally true, and has been practised to this extent.

for no one good purpose, and with which they know not what to do after they are caught, and after such unfair and illegal practices endeavour to prevent in others the fair and legal use of the net.

If the public rivers are to have a poacher, it must be obvious they had much better have a poor than a rich one; as the poor poacher's means of destruction are much more limited than the rich one, and whatever the poor one obtains may be of some service to his family, and by sale is distributed amongst the public; while, on the contrary, what the rich one gets is neither necessary for himself, nor beneficial in the slightest degree to the public, but extremely detrimental to the fair sportsman.

But, now to apply these general observations on angling to the general right of taking fish by lawful nets, and other accustomed modes of fishing.

First, then, in all these observations there does not appear a single restriction or exception to the other general modes of taking fish; while the Statute of Hen. VI. recognizes the right of using nets, "as the right, title and

inheritance of *all* his Majesty's liege people," but prohibits the system above noticed.

2ndly. All the cases determined by the Courts concur in acknowledging this right; particularly the case of Warren and Matthews before noticed, where it is expressly stated, that " every subject of common right may fish with lawful nets in a navigable river."

3rdly. That not a single Act of Parliament, either directly or indirectly, recognizes a private or exclusive right of fishing in a navigable river: but, on the contrary, acknowledges that right to be in the public, particularly the Statute of 1st Eliz. c. 17. entitled " An Act for the Preservation of the Spawn and Fry of Fish;" and the preamble states, " that for the preservation hereafter of spawn and young breed of eels, salmon, pikes, and of all other fish which heretofore have been much destroyed in rivers and streams, salt and fresh, within this realm, insomuch that in divers places, they feed swine and dogs with the fry and spawn of fish, and otherwise *(lamentable and horrible to be reported)* destroy the same to the great hinderance and *decay of the Commonwealth.*"

Here is no injury complained of, as violating the right of an individual, but of the Commonwealth or the public. Besides, the Act applies, not only to *all persons*, but to *all rivers*, and only restrains the shameful destruction of fish in the manner described by the Act.*

4thly. There are other Acts of Parliament for punishing offenders who steal fish in *private* rivers, pools, ponds, or inclosed places, but not a word is said of using *nets* in public rivers, provided those nets be of proper assize, and used at proper times.

5thly. That at all events here is a *prima facie* case made out on the part of the public, which, till it is rebutted by stronger evidence by the opposite party, must stand; as neither Grant nor Prescription shall be implied, but must be proved.

Thus I submit, that both by the Common Law, the two great Charters, the subsequent Statute Law, and the decision of the Courts,

* In some editions of the Statutes the penalty under this Act is 20*l.*, in others 20*s.*; in the record it is not distinguishable whether it be pounds or shillings. The latter seems more adequate to the offence.—Vid. 2 Burn, 369.

the public right of fishing, both with nets and by angling, in navigable rivers in general, but in the River Thames in particular, is completely and indisputably established.

But it has been argued, that the River Thames is not, 1st, a public river; 2ndly, a navigable river; 3rdly, a river constantly navigable; or 4thly, a river naturally navigable; for all these grounds have been taken, and all these distinctions have been made, in consequence of an expression of Bracton's, "*fluminibus perennibus*," which in fact means no other than constant rivers, or perpetual by running, as distinguishable from those, sometimes dry, and conveys no idea whatever of navigable.

These objections are evidently taken with a view to mislead, and are endeavours to prove that the River Thames is a private river, not naturally navigable; for even the persons who urge these objections are obliged to admit, and do admit, that the fishing is common, if the Thames be naturally navigable, or navigable time out of mind.

We will here again take each in their order,

first observing upon the four preceding objections:—

1st. If the River Thames be not "a public river," a navigable river, a river constantly navigable, and a river naturally navigable, what other river in the kingdom is so?

2nd. With respect to "a navigable river," it is a vague term; it may mean for ships, for barges, or for small boats, and such is at places and times every river in the kingdom.

3rd. "Constantly navigable," is still more uncertain; no river is strictly speaking so; nor even the sea.

4th. "Naturally navigable," is more loose and uncertain still, and if it has any legal meaning, it is the having *been navigable time out of mind.*

In these points of view I shall now proceed to consider the question; and if I establish the fact, that the River Thames now is, and time out of mind has been, a public navigable river, in such case I presume I give an indisputable answer to all these objections.

I would previously remark, that it appears the true ground of distinction of the fishing

being public or private is, *whether the river be public or not*; for although Lord Mansfield, and several others, use the term *navigable*, it seems only to be applied as evidence of the river being public.

It is in effect said by Blackstone, vol. ii. p. 8. that originally, all land and water was public and common to all; and private property arose merely from inclosing, fencing, or separating a part from the general mass, and holding or occupying it separately by the public acquiescence.

All such rivers, brooks, or streams, as are *not* navigable, and run through private, separate, or inclosed grounds, and which the public cannot have free access to without trespassing, I apprehend to be private: and these I conceive are the only descriptions of property intended to be protected by the 5 Geo. III. c. 14. and the different other Acts of Parliament for the preservation of fish and fisheries, unless otherwise particularly mentioned.

But all such rivers and streams as have time out of mind been navigable, or which the public have a right to navigate, or have a free access

to, cannot be said to have been inclosed, separated, or appropriated, to the use of any individual; but still are, and remain public, and common to all the King's subjects. This is confirmed by Sir M. Hale, Bracton, and by Magna Charta before noticed.

All such rivers as now are, and time out of mind have been navigable, as run by the King's highway, or by a common, and to which the subjects now have, and constantly have had, or might have had, free access, it is conceived are public rivers, and common to all.

With this doctrine agrees the observation of Walton, that "if the angler offends not with his feet, there is no great danger with his hands;" that is, the trespass must be committed by going on private property to make the party responsible.

This distinction is strong, and marked, and perhaps enough has been stated to prove, that the River Thames is, and for time out of mind has been, a public river, which would be sufficient to establish the public right of fishing in it.

But I shall now proceed to prove it to have been time out of mind a *navigable*, as well as a *public* river.

The River Thames, properly speaking, extends from the junction of the river with the Isis at Dorchester bridge, in the county of Oxford, to the Sea, separating the counties of Oxford, Bucks, Middlesex, and Essex, on the north side, from those of Berks, Surrey, and Kent, on the south side of the said river.

There are many persons who apprehend, that the River Thames includes the river sometimes called the Thames, and sometimes the Isis, running from Leachlade, in Gloucestershire, to Dorchester; but as it is contended that the right of fishing is in all public rivers, it is of no great consequence on the present occasion, whether that part of the river be denominated Thames or Isis.*

* There are also many persons who claim as private property the Lock Pools, and certain waters partially separated from the main stream, by a Eyott, or island, but I apprehend no such claim can be supported; for if the River Thames is public, it must be so *e ripa ad ripeur*, from bank to bank, its natural boundaries.

To prove that the River Thames (at least from its junction at Dorchester with the river now known as the Isis) for several years past has been both public and navigable, I shall offer the following authorities.

To prove that it is so *now* would be to waste the time, and insult the understanding of the reader.

To do this, it will only be necessary to produce the Statute of the 11 Geo. III. (1771.) for improving the said navigation, by which it is acknowledged then to exist, and is directed to be improved and completed. And the books of the Navigation Company will be further evidence, that, for many years before the passing of that Act, and ever since, more than 100,000 tons of goods have been annually conveyed by barges on the said river, to and from London.

The above will, for the present, be sufficient to prove that the river has been *for several years past* navigable.

I shall now endeavour to prove, that the said River Thames hath been a public river

time out of mind, which term hath been before explained; and if my observations and authorities may be a little tedious to some of my readers, yet to the antiquarian they may afford amusement; and although some of those authorities may not be considered as *legal* proofs, yet they may carry conviction to the mind of every one, except those who are predetermined not to be convinced.

Cæsar in his Commentaries (book v. cap. xi.) says "the territories of Cassibellanus, were divided from the maritime states by a river called the Thames," and tells us "that he forded it at the only place it was fordable in his (Cassibellanus's) kingdom;" (book v. c. xiv.) which the author of the pamphlet before alluded to, supposes to have been at Harleyford, because it is the *lowest* place on the Thames with the termination of "ford."*

The Thames is well known to have been the division in the Saxon heptarchy, between

* Did the author mean that in a geographical point of view it was the lowest on the river; or to allude to the small depth of water at Harleyford, and fordable on that account? If the latter, I should rather think he was mistaken; for whatever

the kingdoms of Mercia and Wessex; hence in those times, the river must have been public and common to the people of both nations. *Vide* History of England.

In an antient book called Dunthorne, it is said that "the River Thames was the cause of the first erecting and building the city of London."

Heylin in his Geography says, "in England there are 325 rivers, though some say 450, of which the chief is the Thames."

In Doctor Campbell's history, the Thames is mentioned as the first, and principal of the three public navigable rivers in the kingdom.

"The Thames is the most famous river of England." Sir Henry Chauncey's History of Hertfordshire.

In Seymour's history of London, it is said

it might have been in Cassibellanus's time, it is now as deep as most places on the river, and appears to have been always naturally so. It was, however, a little excusable in him, in wishing to fix "the point of honour" near his own residence, and create an additional interest in a spot perhaps the most beautiful on the whole line of navigation.

"the Thames is the longest of the three famous rivers of this isle, and no way inferior in abundance of fish."

There are numberless other authors on the same subject, such as Camden, Drayton, Sir John Denham, &c, all proving it to be the first public river in point of consequence in the kingdom.

But to proceed to *more particular* and *legal* proofs of it.

Richard I. by his Charter to the citizens of London in 1197 "grants and commands that all wears that are on the Thames, be removed, wheresoever they shall be within the Thames, and that no wears be put up any where within the Thames."

It has already been shown, that King John by his Charter, as well as Henry IIId by his confirmation of it, directs, "that all wears and kiddles shall be utterly put down by Thames and Medway."*

By the statute of Westminster 2d the 13

* And that the *passage* and fishery should be open and free.

Edward. I c. 47. it is provided "that the Rivers Humber, Ouse, Trent, (and several others there named) and all other waters in which salmon are taken, shall be put in defence, from the Nativity of St. Mary to the day of St Martin."

Upon this statute Sir Edward Coke remarks, "that the noble River Thames is not named, and it was held, that the general words extended to *inferior* rivers only," and therefore the River Thames is added in another place, viz.

In the 25th Edward III. it was prayed by the Commons, and in the same year it was enacted that "the statute of Westminster made against *the destruction of salmon* may be kept, and that all mills set on the aforesaid rivers be thrown down, and shall take effect as well on the River Thames as elsewhere." See the Statutes, and Cotton's Abridgement of the Records in the Tower of London, by Prynne, 1657. pp. 75-80.

In the 50th of Edward III. it was petitioned by the Commons "that no *salmons* be taken between Gravesend and Henely-upon-Thames in kipper time."

Answered, "that the Statutes shall be kept." Vid. id. 124.

In the 8th Richard II. it was petitioned by the Commons "that no man *take any fry or fish in the River Thames* unless the mesh *of the net be according to the statute.*" Vid. id. 305.

Here is a recognition of the public right of taking fish with nets, provided they be of proper assize.

In the 14th of Richard II. by petition from the Commons, it was prayed "that a remedy may be had against mills, stanks, kiddles, and such like engines and devices on the *Thames.*" Answered, that the statutes shall be observed. Id. 339.

By Statutes of Richard II. c. 19. and 17 Richard II. c. 9, reciting the statute of Westminster 2d. it is directed that "young *salmons* shall not be taken from the midst of April, 'till the Nativity of Saint John Baptist, in the waters of the *Thames*, Humber, Ouse, Trent, or any other waters."

In the 2d Henry V. the Mayor and Com-

monalty prayed "that all kiddles, wears, and other engines, on the Thames, Medway, and Ley, should be laid down." Id. 539.

And it must be remembered that it has been before shown, that it has been said by Hale, that "the soil of the Thames is in the King, and the fishing is common to all."

By this it must plainly and evidently appear, that the River Thames has always been considered as a *public* river; the charters, which are confirmations of the public rights, confirm it. Sir Edward Coke instances it as public, and the King's highway.—Hale says, the soil is the King's; and the Commons of England taking the cognizance to remove encroachments and obstructions, and to prevent the illegal destruction of fish, is proof of its being public; for if the river had been a private one, neither the legislature, the charters, nor the Commons, could have interfered; for instead of a confirmation of liberty, it would have been an infringement of private property. If the encroachments had been made on *private* property, the remedy would have been private; but that being public, proves the river and grievance thereon to have been public.

I shall now endeavour to prove, that this river is not only a public river, but has, time out of mind, been a *navigable* one. And here I shall adopt the plan of the author of the Pamphlet before noticed, beginning with the most modern authorities, and proceed up to Magna Charta, observing that these proofs are not only legal ones (being taken from Acts of Parliament), but it is submitted are ample, strong, and unanswerable.

By the Statute of 24th Geo. II. c. 8, for the better carrying on the navigation of the Thames and Isis, it is recited "that the Rivers Thames and Isis have *time out of mind* been navigable from the City of London, to the village of Bercott, in the county of Oxford, and from the City of Oxford, westward, beyond Letchlade."

By the Statute of 6 and 7th of William and Mary, c. 16. to prevent exactions of occupiers of locks and wears on the Thames, it recites "that the Rivers Thames and Isis have *time out of mind* been *navigable* from the *City of London to Bercott*, in the County of Oxon, and *for divers years last past* from thence to somewhat farther than Letchlade."

By the Statute of 21st Jac. I. c. 32. s. 3. for making the Thames navigable from Bercott to Oxford, it is said, "the River Thames for many miles beyond the City of Oxford, westward, is already navigable, and from London to the village of Bercott."

The Statute of 1st Jac. I. c. 16. entitled "an Act concerning wherrymen and watermen," recites that "persons passing by water between Windsor and Gravesend, had been put to hazard and danger;" and declares "that no watermen shall take apprentices, but he that hath served a time to it, (except western barges, mill-boats, and other vessels, serving for other uses than carrying passengers."

M. was fined 200l. for diverting part of the River Thames, by which means he weakened the current to carry barges towards London. *That river is a highway*. Noy's Reports, 103.

In 1579, John Bishop complained to the Lord Treasurer (Burleigh) of the locks, weirs, and flood-gates, on the Thames between Maidenhead and Oxford, and showed that by these stoppages several persons have been drowned, who all belonged to barges that used the river.

And in 1585 said Bishop petitioned the Queen (Elizabeth) against the same locks, weirs, &c.

The persons complained of showed cause for maintaining them, that they were as of great antiquity as the towns and villages whereto they joined; that they were of necessity for the passage of barges.

That the mills, locks, and weirs, were for the most part the Queen's inheritance. (Records of Star Chamber Proceedings.)

By Statute of 23d Eliz. c. 5. touching iron mills near London and the River Thames, "no person shall convert to coal for making iron, any wood growing within 22 miles of the River Thames from Dorchester downwards."

See also the Statute of 1st Eliz. c. 15. to nearly the same effect, only extending its provisions to timber growing within 14 miles of the sea, or any part of the *Rivers Thames*, Severn, Wye, Humber, &c. &c. or *any other river by which carriage is commonly used by boat*, or other vessel, to any part of the sea.

The Statute of 27th. Henry VIII. c. 18. recites, that "Whereas before this time, the River *Thames* among all other rivers within this realm hath been accepted and taken, and is indeed the most commodious and profitable to all the King's liege people, *and chiefly of all others frequented and used*, as well by the King's Highness, his estates, and nobles, merchants, and others, repairing to the city of London and other places, shires, and counties adjoining the same, which River of Thames is, and hath been, most meet and convenient of all others, for the safeguard and ordering of the King's navy, *conveyance of merchandises* and other necessaries, to and for the King's household, *and otherwise*, to the great relief and comfort *of all persons within the realm*, 'till now of late years divers evil minded persons create *obstructions*." The above statute directs that no such obstructions shall be made in future.

The Statute of 1st. Hen. IV. The Commons prayed "that no barge on the River Thames should be forfeited as a deodand;" and it was answered "to be as heretofore." Records in the Tower. Cotton's Abridg. 398.

In the 50th. Edward III, the Commons represented that "the watermen of London complained of leaving locks, stanks, and wears, upon the River Thames; and namely a lock called Hambledow lock, and for that, there is a custom demanded of them passing the bridges of Staines, Windsor, and Maidenhead, and other locks, against their custom." To which it was answered, "that for the locks and kiddles the statute made in the 37th. Edward III. shall be executed, and for exacting money of them for the bridges, they shall make suit in Chancery." Id. 132.

In the 37th. Edward III, it was petitioned "that a remedy might be found against wears, and such other engines, on the River Thames, to the annoyance of boats. Id. 97.*

Here then it is submitted are abundant proofs that the River Thames has been a navigable river time out of mind; and it is

* In the 21st Ed. III., it is recorded that the four great rivers of England, viz. the Thames, Tese, Ouse, and Trent, *were wont from antiquity to be open and free for every ship to pass.* Id. 57.

The Queen of King Hen. III. 1263, was insulted, as she was going by water from the Tower of London to Windsor. Rap. vol I. p. 336.

to be remarked, *that in not one of these statutes is there the slightest recognition of a private right* of any sort; and, surely had any such existed in law, some notice of it (either as a reservation of such right, or in some other manner) would have been taken, particularly in some of the late Navigation Acts relative to the River Thames; *in which many of those who now claim such exclusive rights are named as commissioners for carrying those Acts into execution, yet have never ventured to obtain a legislative sanction for them.* And it is again asked, if the River Thames is not naturally navigable, what river in the kingdom is?

It is true, that that part of the river extending from Bercott to Oxford appears to have been made navigable by the Statute of Jac. I., but that statute, as well as those of William and Mary, and Geo. II, expressly state, that the *other* part of the river has "time out of mind been navigable from Bercott to London." We are also warranted in concluding from these authorities, that it has not been made navigable by art, but that it was naturally so.

In contradiction, however, to this, it has

been asserted, and endeavoured to be proved, "that the River Thames is not, nor ever was, *naturally* navigable, but has been made so by the *locks and wears* upon it."

To this it is answered, that all the authorities already produced, prove the direct contrary of this; for, from Magna Charta, to Edward IV, it is declared, that those locks and wears *impeded and hindered* the navigation. The fact seems to be, that these locks and wears appear to have been built for the purpose of penning a head of water to the mill contiguous, there being a mill to every one of them; and it has been justly observed, that admitting the fact, that they were erected for the navigation, the argument is in favour of the public right, and will lead to, and indeed affords, a more *ancient* proof of navigation on the River Thames; for some of them are mentioned in Doomsday-book, and are said to be as old as the adjacent villages, and of course the River Thames was then navigable.

But in order still more satisfactorily to prove this fact, we will notice the different statutes on the subject from Magna Charta downwards.

It has already been shown, that the wears and kiddles on the Thames and Medway were directed by the charters of King John and Hen. III., to be removed and demolished.

By the 25th of Edward III. st. 4. c. 6, it is said, that "the common passage of boats and ships in the great rivers of England, is *annoyed* by wears, &c.," and directs that they shall be pulled down.

The Statute of 45th Edward III., c. 2, recites the last statute, and that "such wears, &c. were to the *great damage of the people*," and directs them to be pulled down.

The Statutes of Richard II., c. 19, and 1st Henry IV. c. 12, recite and confirm the said statutes of the 25th and 45th Edward III, for pulling down wears, &c. on the petition and request of the Commons, "that the common passage of ships and boats in the great rivers of England be thereby greatly *disturbed*, so that they *cannot pass* as they were wont."

The Statute of 4th Henry IV., c. 11, recites that "wears, stanks, and kiddles, being in the water of Thames, and of other great rivers

through the realm, the common passage of ships and boats is *disturbed*, and much people perished, and the young fry of fish destroyed and given to swine to eat,* contrary to the pleasure of God, and to the great damage of the King *and his people*;" and enacts that the statutes be kept, and commissions awarded to certain justices in every county of the realm, where need be, to enquire and punish offenders.†

This statute is of great importance to the general question. Here is no private right protected or even recognized, which no doubt would have been the case had any such right existed. On the contrary, the injury is said to be to the King *and his people*; viz. to the King, as owner of the *soil*, and to the people, in the destruction or injury in their right of fishing. Here is also prohibited a practice, too often indulged in, even now, by those who claim an exclusive right of fishing; viz. that of destroying and wasting fish in the manner I have before alluded to,† and which this Act evidently

* Vid. statute of Elizabeth.

† Who were allowed 4*s*. a-day for every day they travelled.

‡ As proofs of this destructive practice, it is a fact well known, that in one instance, between thirty and forty bushels of roach, a jack of 35lbs., besides other fish, have been taken at a draught. Another instance has occurred equally notorious, of between forty and fifty bushels being in like manner taken; and I have lately been informed by a person who was present at the time, that between sixty and seventy bushels were taken at another time; and that a less quantity than this is not thought a good draught. Yet the persons who practice this destructive and illegal system, are those who complain of the poacher and angler.

designed to prevent and punish; and although those proprietors may not give them to swine, yet that they thus illegally take and waste them cannot be denied, and the injury is the same to the public after they are once taken, whether they are applied to swine, or wasted in any other way. Coupling this statute with that of the 2nd of Henry VI., and 1st of Elizabeth, before noticed, it is difficult to comprehend how an exclusive right in any one can be pretended, or how a doubt of the public right can be for a moment entertained.

The next statute in point of time is that of the 2nd Henry VI., but as I have before noticed it rather at large, I must beg leave to refer the reader to its provisions, which appear to me most important, as recognizing the public right by a legislative enactment.

The next statute, in point of importance as well as time, is that of the 12th Edward IV. c. 7, which is entitled "The penalty of them that do not perform the award and order of the commissioners authorized to pull down wears." After reciting "that by the laudable statute of Magna Charta, among other things it is contained, that all kiddles by Thames and Medway, and throughout the realm, should be taken away, (saving by the sea banks,) which statute was made for the great wealth of this land, in avoiding the straightness of all rivers, so that ships and boats might have in them their free passage, and also in safeguard of all the fry of fish spawned within the same; upon which Magna Charta, the great sentence and apostolic curse by a great number of bishops was denounced against the breakers of the same;" and reciting the statutes of Edward and Henry before mentioned, it expressly declares, "that all wears, &c. were to be pulled down, that boats might have free passage," and particularly mentions the Thames.

These several statutes then must evidently and indisputably rebut the assertion, that the River Thames was made navigable by means of these wears, &c.; but they prove the direct

reverse, and that it was navigable prior to their erection, which obstructed and hindered the free navigation of it; as well as that the river must have been naturally so, as no other means of art appears at any time to have been made use of to render it so. They prove also, that not only the *navigation* belonged to the public, but that the *fishing* also was preserved for their use; as the injury is said to be done, not to a private individual, not even to the King himself, but to the injury of the King *and his people*, and not in *one* of them is there a saving clause of any private right of fishing or otherwise.

But we come now to consider the Act relied upon by those persons who claim the exclusive right of fishing in the Thames, which, I believe, is the statute of 4 and 5 William and Mary, c. 23,* and is the one upon which every attempt has yet been made to found a conviction for fishing in the River Thames;† for there is no other statute upon which they have ventured to proceed to defeat the public right, or that a private right can be pretended to be supported by.

* Or the 22nd and 23rd of Car. II. c. 25.

† It is difficult to know which, for both are equally irrelevant to the present question.

I would first observe, that this statute has been stigmatized, and its provisions condemned by more legal authorities than one. Amongst other provisions, it authorizes a gamekeeper to *kill his fellow-creature* if found *trespassing* in the night: it creates pigeons and fowl game. In an act professedly made for the preservation of *game* is introduced clauses for the preservation of *fish;* and thus insidiously holding forth one matter, viz. *game*, and relating to another, *fish*, which are not game; for the latter of which no one would ever suspect from the title of the Act any provisions would be included or penalties created.

Mr. Christian with great reason asks, "could any one have supposed these enactments possible in a land of learning and liberty?" and adds, "that no magistrate ought to enforce an Act so pregnant with *ignorance* and *absurdity*." And with respect to the Clauses relating to fishing, he stigmatizes them as being "miserably composed."

This Act however is evidently intended to apply to all disorderly and mean persons, taking fish out of *ponds, waters, rivers, and other fisheries*, to the damage of the *owners* thereof, and is confined to several or private ponds,

waters, rivers, and fisheries, in inclosed grounds. In an Act of Parliament penned "in so loose, uncertain, and ungrammatical a manner," little is to be relied on, and less understood. But should it be argued that by the word "river" being used in it, a private fishery in the River Thames, or any other navigable river, is thereby included, I must deny the position, or the inference.

It has been already shown, and it is admitted, that persons may have a right to a fishery *in a river not navigable*, (such as the Ock, the Lambourn, and the Lodden,) and it is to fisheries in such *rivers* that the Act applies, as well as to fish in ponds, &c. *in inclosed grounds*.

Besides, this Act is designed for the protection of *the owners*, of such rivers, ponds, &c. Now it has already been clearly shown that the soil of the River Thames is in the King, but the fishing is common to all his subjects, and that it is an *alta regia via*. Who then has ever heard of the owner of the River Thames otherwise than as an *alta regia via?* We may as well talk of the owner of a turnpike road.

In the construction of Acts of Parliament we are told, that "a statute which treats of things

or persons of an *inferior* rank, cannot by any general words be extended to a *superior*. So a statute treating of deans, prebendaries, parsons, vicars, and *others, having spiritual promotions,* is held not to extend to *bishops,* though they have spiritual promotion. Deans being the highest persons named, and bishops being of a still higher order." 1 Black. 87.

And we have before seen that Sir Edward Coke in his remarks on the Stat. of Westminster 2., 13 Edward I. c. 47, distinctly states "that this statute, providing for the protection of the Rivers Humber, Ouse, &c. did not include the River Thames, *that not being named in it,* and that the general words extending only to *inferior* rivers, it did not include a *superior* one." And as ponds, waters, rivers (without name) are here only mentioned, by the same mode of reasoning as well as by the general construction of the statutes, no waters of a superior nature than those described in this Act would be included in its operations.

In addition to these observations it must also be remembered, that there is not a single conviction for fishing *in the Thames* to be found in any of our law books. Where the offence

(if it be such) is so common; it is a little singular that such should be the fact.

The only ground then on which it is conceived the parties who call themselves proprietors can possibly pretend to or claim an exclusive right to fisheries in a public navigable river, such as the Thames, must be by Grant from the Crown, or by Prescription; and it has been before shown that such grant must be *produced,* for it shall not be presumed, and even if produced it may be necessary for the grantee, or those claiming under him, to consider how far such grant may be affected by the many statutes of resumption made from before Magna Charta down to the time of Charles II., by which Grants from the Crown of lands, *fishings,* &c. are declared to be null and void, unless the full annual value be reserved and paid by way of annual rent,* or the matter excepted by those statutes. Also, if the grant shall appear to have been made since the 1st year of the reign of Richard I., if so, the charters before-mentioned render it entirely void.

If they claim by Prescription, which is usage

* Vide Case of Duke of Portland and Lord Lowther.

time out of mind, on a presumed grant, it has already been shown, that independent of numberless other requisites, almost impossible in this case to be produced, that prescription or custom cannot be pleaded against an Act of Parliament; and the statute of Henry VI. as well as several other statutes, recognise the public right of fishing, both by *nets* and angling. And, although it is said such prescription may by possibility be proved,* the probability is much doubted, should these statutes be pleaded in bar.

It, however, may be urged in this case, (as under the Game Laws) that many persons have *purchased* their fisheries at large sums of money, and for valuable considerations; but that does not mend their claim, any more than it would do had they purchased any other property under a bad or defective title. If such title be bad or defective in one case, it must be so in the other; or if there was any difference, it ought to operate with more force where the *public at large* would be prejudiced, than where an individual would.

* It must be remembered this was said of a river where the soil of it was in the subject, and not in the King.

I have thus endeavoured to prove that by the Common Law, the public have had, used, and exercised, time out of mind, a right to take fish, or attempt to take fish, either by angling, or nets, of a legal description, in all public navigable rivers, but particularly in the River Thames. That such right is proved by ancient books on the subject, confirmed by the opinions of our most learned judges, and the determination of the courts of law.

That the River Thames now is, and time out of mind has been, a public navigable river.

That the several statutes made, instead of restraining such fishing, acknowledge and allow the Common Law right, nor do they directly, or indirectly, recognize in the slightest manner the private right claimed by many, which, if such right had ever existed, would in the course of so many years have appeared.

The conclusion I infer from all these authorities is, that the public have legally the right or privilege of taking fish, or attempting to take fish, by angling, or legal nets, (except in the fence months) in the River Thames, and in all other navigable rivers, where the soil is in the King.

Supposing then the public right to be, such as I conceive it to be, and that the gentlemen who claim to be proprietors, should persist in prosecuting their present claims, it may naturally be asked, in what manner has the public a power of establishing their claims to the right in question?

The usual mode has been, that when a supposed offence has been committed, for the magistrates to issue a summons for the appearance of the party offending.

The defence in such case should be, a *justification*, and *a right* so to fish: if this defence is properly made, a much more than a *colourable* right would appear, and hence arises a question of *title*, and from that moment the jurisdiction of the magistrate ceases.

For in the case of Ashbrittle and Wyley, it is distinctly laid down, (and I have frequently known it acted upon at the Quarter Sessions,) that in cases of title, the magistrates at those Sessions have no jurisdiction. *Vide* 4 Burn. 428.

"Persons aggrieved may appeal to the next

Sessions, whose determination therein shall be final, *if no title to any land, royalty, or fishery, be therein concerned.*" 2 Burn 259. 22 & 23 Charles II. c. 25. s. q.

Again, "If the defendant, when put on his defence, set up a *claim* to the thing he is accused of taking, or destroying, and there is any *pretence* or *colour* for such right, the justices ought to acquit. 1 Burn 572. Rex. *v.* Speed. Lord Raymond's Reports, Vol. i. 583.

The justices, therefore, even at their Quarter Sessions cannot *try* a Prescription, or any other case where a question of title arises. Nay, even if a *grant* was produced, it would be equally incompetent for them to decide the question, as the validity, or resumption of that grant may be disputed, and be the issue between the parties. If, therefore, they cannot *try* such a right at their *Quarter Sessions*, it is absurd to suppose they could legally *decide* it, in a summary manner, at their *Petty Sessions*.

It has lately been the practice of *some* of the country magistrates, (for in London and Middlesex, no such practice prevails) of excluding professional gentlemen from attending on any

occasion, on behalf of the accused, particularly on questions relating to these, and the Game Laws.

This practice certainly exposes them to the accusation of wishing to decide on cases, in which they are more particularly and personally interested than any other, with an arbitrary and tyrannical hand. In cases of *felony*, and where the parties are only to be committed for *trial*, there may be some reason for this arrangement; yet even in this case, the magistrates of London and Middlesex, not only allow the attendance of a professional adviser, but will even adjourn the examination if the accused wishes for such assistance; but where a *summary* conviction is to follow the magistrates' decision, both as to the law, and facts—where the question is, guilty or not guilty, and where the punishment immediately follows the conviction, both reason and justice must condemn such a rule. But it is now decided in the case of Cox and Coleridge, that in cases of *summary* conviction, the defendant is *entitled* to such assistance; and should this be refused in any case arising under these laws, the best and safest way for the party accused would be, to set up his *legal claim*, and offer to pro-

duce his attorney, or legal adviser, to urge the point of law, (which few defendants can be supposed capable of doing, and ought not to be expected to do, and to refuse which, would perhaps be dangerous to a magistrate;) and if this is refused, leave it to the magistrates' discretion to act as they may think proper and most prudent. And if a conviction ensues, remove it into the Court of King's Bench, and try the right.

But a much better (because it would not only be a more liberal and gentlemanly, but a more effective) mode of trying this right would be, either on a private understanding between the parties, or by some individual giving notice to any gentleman who imagines himself entitled to a fishery of this description, of his intention to fish, at a time and place specified, merely with the intention of trying the right. Sufficient should be done for that purpose, *and no more*, and thus the matter would come fairly and properly before a tribunal competent to decide this important question.*

* From the facts stated in the preface, it is more than probable the question will shortly come before a legal tribunal.

The author will here take the liberty of introducing a curious circumstance falling within his own knowledge, a few years ago, at a petty sessions of some neighbouring magistrates.

An information * had been laid by a person in the neighbourhood of the Thames, against some respectable tradesmen for fishing with nets, " in the water of the *private fishery* † the property of A. B.—*in the River Thames*, for the purpose of stealing, taking, and killing fish out of the said *private* fishery, without the consent of the said A. B. the *Lord* or owner thereof."

The defendants on being summoned attended, and by their solicitor urged many of the arguments here enumerated. After hearing which, the defendants and their solicitor were

* This information is a curious document and a unique of its kind. It purports to be the information of A. B. and states that " he has been *informed*, and believes, and doubts not but that he shall be able to prove" the parties guilty of the offence. Thus it is an information on an information.

† There is no such thing as a *private* fishery in a river, recognized by the law: there are only a *several* fishery, a *free* fishery, and a *common* of fishery.

directed to withdraw, while the magistrates considered their judgment, the gentleman, however, claiming this private fishery, remaining in the room the whole of the time.

At length the parties were recalled, and informed that the magistrates admitted that the authorities offered by their solicitor had considerable weight in their opinion, but that they felt it their duty to convict them in the penalty, *on the ground that the defendants had not proved the* locus in quo *was in the River Thames!!*

It was in vain for the solicitor to urge that such proof was unnecessary, as the *information stated the offence to have been committed in the private fishery of A. B. in the River Thames.* Or that if such evidence was necessary, and did not appear, the defendants were entitled to an acquittal, as the information was not supported by any evidence of that fact, which was on the part of the informer indispensably necessary. That every magistrate there was a commissioner of that river, and knew the *locus in quo* as well as his own fish-pond, and that many of them claimed a similar right with the said A. B. The conviction was persisted in, and the defendants were told, they might ap-

peal, if they were dissatisfied with it. This, however, as tradesmen, they thought it not prudent to do, and therefore paid the penalty. But had the conviction been removed into the King's Bench, there cannot, I think, be the slightest doubt of its being quashed.*

It is, however, much to be regretted that this question (like the Game Laws) has been pushed so far as it has lately been done, by some persons claiming this exclusive right, as it must necessarily tend to an examination of the law on the subject. It must also be obvious, that much injury might be done to

* A paragraph in Sir John Hawkins' edition of Walton's Complete Angler deserves notice. "But there are (says he) some covetous rigid persons whose souls hold no sympathy with those of the innocent angler, having neither got to be lords of royalties or owners of land adjoining to rivers, and these do by some apted clownish nature and education, for the purpose, insult and domineer over the innocent angler, beating him, breaking his rod, or at least taking it from him, and sometimes imprisoning his person, as if he were a felon. Whereas a true-bred gentleman scorns those spider-like attempts, and will rather refresh a civil stranger at his table than warn him from coming on his ground upon so innocent an occasion. It should therefore be considered how far such furious drivers are warranted by the law, and what the angler may (in case of such violence) do in defence of himself;" which he proceeds to state.

the fair sportsmen (particularly to the angler), should the public right be carried to its utmost extent, or rather should that right be abused. An equal injury may be sustained by the parties now calling themselves proprietors of these private fisheries, but for which they will only have to blame themselves, by their endeavours to monopolize a privilege they appear to me not entitled to, and beyond what the public may feel inclined to allow, but which by a little prudence and less arbitrary measures they might have retained.

The writer has here to acknowledge the assistance he has received from the author of the Pamphlet so frequently alluded to. He has not only adopted nearly the course he has so judiciously pursued in the arrangement of his work, but has been greatly assisted by it, and by the reference to the authorities he has quoted. Whenever he has had occasion to refer to other authorities, and to quote from them, to use the words of the author of the Pamphlet, he trusts, "those quotations are so plain, that every man may apply them, and on this state of facts it is now left to the consideration and determination of every impartial person, whether he has succeeded in

proving the public right of fishing in the Thames to be just and legal; and that, if the authorities quoted shall be found to be faithful and authentic, the inferences to be fairly drawn and the conclusion just and convincing: it is the *Duty* and *Interest* of every independent *individual* to lend his assistance in *support of this last best right and privilege of the public* in its amusements, *and to transmit it as pure and as inviolate to his posterity*, as he received it from his ancestors," whether he be an inhabitant of the banks of the Thames, the Isis, the Ouse, the Trent, or any other navigable river, where such privilege may appear to exist; for to all of these is the question equally important, and to all of them ought it to be equally interesting.

In the Press, and shortly will be published,

BY THE SAME AUTHOR,

OBSERVATIONS

ON THE

GAME LAWS;

WITH NOTES HISTORICAL, CRITICAL, AND EXPLANATORY.

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