

Littoral and the Liminal: Openings for Change in the Coastal Commons

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Introduction: Collecting Kelp on the Littoral

A short while ago (August 26 2017), a friend and I waded out into the tidal zone of a village in Newfoundland, Canada, where I spend the summer, and we gathered as much kelp and other seaweeds as we could. We dragged heavy totes of the seaweeds up the lane to my little kitchen garden, where we dumped and raked it in, hoping for a good crop next year. Before we raked it, we found ourselves forced to photograph the beauty and diversity of the marine plants we’d so cavalierly pulled from the rocky tide zone. We also wondered how they would taste. And I thought, how wonderful that we could so easily harvest these wonders of the sea, even at the front of my neighbor’s property, what Newfoundlanders call the “landwash” but is also known as the “foreshore.”

How special is it? What difference does that make? Ownership and property rights at the edges of the sea are unusual, ambiguous, often contested—and thus qualify as “liminal,” not quite fitting into well-known categories and roles, and, as Alon Schwabe & Daniel Fernandez Pascual of “Cooking Sections” argue, pose both obstacles and opportunities to rethink and change our relationships with the world. I will discuss this with reference to my brief (and naïve) look at a book about law and the testimony of crofters and fishermen on the Isle of Skye in 1883-1884, and my longer-term research into the fisheries (both “floating” and “non-floating” in Scottish legal terms) of North America and Mexico. The “liminal” is a psychological and anthropological construct, and in anthropology it is viewed as important to the creation of “communitas,” moments or events when people put aside their differences to come together, in celebration of the past or to create a new future.

Late 19th Century Rights to Sea-ware and Floating and Non-Floating Fish on the coast of the Isle of Skye

In the English-speaking world and beyond—often traced back to ancient Rome and even the Bible—is the notion and practice of public rights for navigation, fishing, and other activities on the coasts, the “public trust doctrine.” Like the coasts themselves, notorious for the dynamics of erosion, storms, tides, the PTD’s location in law is liminal or at the very least ambiguous and dubious. The reigning case in English common law is Blundell v Catterall (1821) on public rights to the foreshore for bathing—and where the majority ruled against it! (Schorr 2015). The authority of that case is acknowledged in some common law jurisdictions but there is little evidence of it being given practical application in the UK; It is present today in the Crown Estate and sometimes problematic in the estate’s leases in Scotland and elsewhere. Ironically, more has been done in the states of

California and New Jersey in the U.S. to create a legal argument and some precedent for the strong version of the public trust doctrine.

Historically, in Scotland, including the Isle of Skye, the notion of a public trust, or general rights of the public to the shore and adjacent tidelands—the coastal “commons”—has been evident but imbued with uncertainty and subject to dispute. It may or may not be an accident that the leading treatise on this topic, John Rankine’s volume, “The Law of Land-Ownership in Scotland” (1884; 2010),¹ was published in 1884, the same year that the “Napier Commission” published its evidentiary hearings of meetings in the Highlands over land rights “and other heritage”² including shore and sea rights. Rankine said it was “settled law” that the Crown had the role of guardian of “inextinguishable and inalienable” public rights to the foreshore (p.222-223). Any extension of private property is subject to those rights, “in a way to which nothing on terra firma, except perhaps public roads, affords any parallel....In this sense the sea-shore is common to all...” (Rankine 1884:223).³

So much so good, but what of it? The Napier Commission meetings around the Isle of Skye in 1883 shows the importance—perhaps the growing importance—of seaweeds and the fish and shellfish of the tidal zone, and how the question of rights to them was caught up in the struggles of the times.

John Rankine (1884) discussed the dispute over the right to take “wreck or sea-ware,” as well as the right to take sand (“shell-sand”), in terms of the public trust versus title landowners had and whether they extended into the sea. A lot was at stake, because seaweed had come to be valued as a commodity attached to the land. An important case on the matter (“Macalister”) lend weight to those who claimed the right to exclude or charge the public by saying that the great value of the seaweed, “amounting on the coast of the Forth to 15s. or 20s. per acre for land next to the coast” made it “a very serious matter to cast doubt” on landowners’ claims (p. 221). Public trust gave way, as it often has, to private business.

The Crown and the law were doing little to guard public rights to “sea-ware” (most often referring to seaweed) against the claims of owners of private land. As the clearances moved people closer to the coasts and as the crofters loss access to grazing commons when they were converted to sheep-folds or deer parks, seaweed may have become even more important than before for successful farming. One Donald Buchanan, who fished off Ireland, but not Skye, and lived in Olach, underscored the importance of seaweed. “The land was rocky, and was yielding no crop without manure in the way of sea-weed....” Animal manure was scarce for the crofters who could no longer keep animals, a frequent complaint in the testimonies.

¹ The Law of Land-Ownership in Scotland: A Treatise on the Rights and Burdens Incident to the Ownership of Lands and Other Heritages in Scotland. 1884 [John Rankine](#) ISBN 10: [1240072120](#) / ISBN 13: 9781240072125 Published by Gale, Making of Modern Law, United States, 2010

² Parliamentary Papers Volume 33. Great Britain. Parliament. House of Commons. Minutes of Evidence. Highlands and Islands Commission. Skye. Published 1884. Hearings 1883

³ “It is settled law that, whether the Crown has or has not a patrimonial right in the foreshore, it holds a certain guardianship over it in trust for certain public uses. This guardianship is, as to certain of these purposes at least, inextinguishable and inalienable; and many therefore be classed among the *regalia majora*. Any claims of the Crown itself or of its grantee to extend to the foreshore the ordinary uses of private property, must be exercised subject to the rights of the public, which are deemed to be of paramount importance” 222/223 “, in a way to which nothing on terra firma, except perhaps public roads, affords any parallel. The Crown may have lost its original right of property, *jure coronae*, in part of the whole of the coasts of Scotland, yet this fiduciary relation remains untouched. In this sense the sea-shore is common to all, or public...” Rankine 1884 223

In earlier times crofters seem to have held rights to gather seaweeds and had developed ways to equitably share it, but it became a marketable commodity John Bethune of Seaboast (74 years old at the time), said, "Speaking about the sea-ware here, when we had the sea-ware before, it was divided into shares. It was the best sea-ware, and they would cast lots for it, and that was very good for the people to manure their ground." However, all that had changed, according to those who testified, and people had to pay for seaweed. At the time of the hearings people on Skye had trouble getting any seaweed at all, unless they curried favors: "To-day we will not get a dust of it unless I am a favourite with the ground officer of the proprietor."⁴

Rights to Floating Fish and the Yairs

The public right "of white-fishing in the sea" or "floating white-fish" was recognized in 1884 (Rankine 1884:224). "Floating fish," that is, fish that could swim and move about, had limited potential for privatization given their mobility and the fluidity of their habitats. However, by the 19th century Atlantic salmon were partially privatized because of their high value, both commercially and as "game" for sportsmen; this was feasible due to a life history that brings them up into the rivers for spawning and early growth, in well-defined seasons and in places easily fenced off. No public trust for salmon.

Public trust rights to "floating white-fish"—that is, fish other than salmon—remained but the issue of access to fish set up obstacles to many fishers. Judging from the Napier Commission hearings, piers, boats, and other aspects of the infrastructure of fishing were very scarce and had been severely damaged around the coasts of Skye; those who fished, including those who were forced to fish because of the small and miserable crofts left for them to farm, typically went away to fish with crews working the east coast of Scotland and the coasts of Ireland.

An alternative and ancient mode of fishing involves using large stone or wood fish traps, that used tides and seasonal migrations of fish to corral them close to shore where they could be taken up by nets or other means. Remnants of very large weirs or fish traps, known as *yairs*, are found around the coasts of the islands of Scotland, including Skye (Hale 2005).⁵ Judging from the 1883 hearings, they were used mainly for herring runs and other "white-fish."—that is, floating fish other than salmon. Local towns once controlled the yairs and the rights to use them on behalf of their citizens, but by the early 19th century the towns had by and large lost those rights to upstream landowners (Hale 2005).

Access to fish through use of the yairs was important to the poor, according to testimony. John Nicolson, a pensioner and crofter from Tote, said that when potatoes failed in 1845 and 1846, cottars were "given patches of grounds to be near the yairs." "Frequently at that time families would have nothing in the house at nights; they would go to the yair, and have plenty for their families in the morning." The poor also got employed to repair the yair by the Fishery Board, getting one pound of Indian meal per day. But the yair was broken down by order of the big landowner, Lord Macdonald. The big issue was taking salmon in the yairs. There had been an Act of Parliament forbidding the taking of salmon in the yairs (see also Hale 2005), but local people

⁴ Another sign of the separation of seaweeds from the tidal commons and into markets was the fact that, according to the Napier testimonies, those who claimed ownership of the right to take seaweeds need not be owners of adjacent lands; they could simply own that right.

⁵ Hale, Alex G.C. 2005. Fish-traps in Scotland: Construction, Supply, Demand and Destruction. [Památky Archeologické- Supplementum 17, Ruralia V](http://www.ruralia.cz/sites/default/files/doc/pdf/16_Hale.pdf): Pp 119-126. www.ruralia.cz/sites/default/files/doc/pdf/16_Hale.pdf

seemed not to know about this. Some did try to justify their use of the yairs by saying that once the herring run was over, their practice was to take down much of the yair structure so that the salmon could run free.⁶ But the commissioners, clearly sympathetic with the landowners who controlled rights to salmon, pushed on the question of the fate of the salmon, while crofters admitted that if they did catch salmon, they 'd be likely to take them home to eat because they needed them.⁷

Rights to Non-Floating Fish

“Non-floating fish,” or shellfish, opened the door to privatization in a more direct way than did “floating fish” because of the potential for expanding fixed boundaries and even a limited form of cultivation. According to John Rankine, the public had rights to shellfish on the foreshore but oysters and mussels were reserved for the Crown, which apparently could grant them away to individuals. Their value as bait and human food “and the importance of preserving them from indiscriminate fishing” were justifications (1884: 222).⁸ A long exchange on this topic during the Napier Commission hearings included mention of a crippled man taken to jail for collecting some oysters to eat. The commissioner got some resistance to the explanation that people had overharvested.⁹

⁶ “...would the crofters or the fishermen allow the salmon to go free, and be contented to take the herrings and other fish?—During the summer season there were very seldom any herring got in the yair and the people would allow the wall to be broken down in some places so as to let the salmon out, and then, when the salmon season was over, to rebuild it, and it would catch the herring then....”.....“I do not know whether they would have the honesty of going to the proprietor with the salmon or not” if they caught salmon. 864.

⁷“It was placed on Lord Macdonald’s estate on the other side of the loch, just opposite this church. 839. What was it like?—It was a stone dyke, but one end of it was on dry land, and going out with a semi-circle into the sea, and at ebb tide, if the herring went in there, they were caught by the dyke.””841. Why did they destroy it?—For fear the people would be catching salmon. 82. Did they ever catch salmon in the place? —Yes, very often. 843. Then, did they bring the salmon to the proprietor, or did they keep the salmon to themselves?—they kept the salmon for themselves for they had more need for them. 844. If such a yair were re-established here, do you think they would still catching herring in it?—I do; for the herring would stand the same chance of being there as in former times.

⁸ “Non-floating fish”: “Concerning non-floating fish, it may be regarded as settled that the right to take limpets cockles, and other small shell-fish, either on the foreshore or beyond it, is open to all the lieges, and cannot be appropriated, always assuming that the public can reach them in a legal manner. Oysters and mussels are in a different position. If the scalps on which they lie are situated within the three mile limit, the Crown has an exclusive right, ...[comparable to salmon-fishing.]” “The reasons for originally distinguishing...seem to have been their adaptability not for bait only, but for human food, and the importance of preserving them from indiscriminate fishing.” Basically, Crown can grant these away, or people with title that mentions ‘fishings’ can claim the exclusive rights.

⁹ 893. Sheriff Nicolson. Can you tell us anything about the taking away of the right to the shell-fish?—Yes, I saw a poor crippled man that gathered a few oysters on the shore here, and the put him in jail—a poor crippled man, with one leg, put in jail for a score of oysters!

894. Mr Fraser-Mackintosh. Is the sea-shore not open to anybody then?—No, I do not think it. Arrested on order of the proprietor.

896. Was the shore formerly a good place for oysters? —Yes, but they are all gone now.

897. Did the people use all to lift them? —yes, they lifted them from all quarters here.

898. And the laird put a stop to that?—Yes.

...

900. Are there any oysters now at all? —Very few.

901. What has become of them? —I do not know.

902. Do not the people take them all away? —No, they don’t; but the went away themselves someway or another I do not know what is the reason of that.

903. Don’t you know that an oyster bed will be destroyed if the oysters—young and old—are taken away?—surely.

904. Was not that the case? —I do not think it.

905. If people from all directions were taking the oysters, there would not be many left? —No , they would take them all; but there are a few left. I was there about a month ago and I saw a few oysters but there, but there are not many.

906. Were the people prohibited from lifting any other shell-fish except oysters? —I do not think it. They were not prohibited from collecting shell-fish except the oysters.”

Mussels were very important to fishermen as bait, and the hearings showed that some people were prevented from fishing because they could not get mussels, even though the mussels were close by.¹⁰ Hugh M’Nab, of Kildonan, Lyndendale, explained that his son got a summons for taking mussels for bait. Apparently, a Mr. Robertson had an oyster bed in that spot, and the claim was that taking mussels would destroy oysters as well. A Kildonan crofter and fisherman, Donald Steele, claimed that the proprietors would not allow anyone to take mussels upon the shore even when they were found higher up on the shore than oysters rather than mixed in. Hugh M’Nab simply said that the proprietor should have put up public notices “that we might know his marks.” The main issue had nothing to do with mussels and oysters, rather it was land: “It is plenty of land that we want, on which we can rear a crop and sheep...” (1315).

Discussion

This brief sojourn into the files of the Napier Commission’s hearings shows that here as elsewhere public rights were diminished and extinguished by private property claims, to the detriment, even suffering, of the common folk, the crofters, the cottars, the fishermen of Skye. Ordinary people were dispossessed of their rights to the marine and coastal commons.

However, claims of public rights to the tidal zone, to the seaweeds, shellfish, fish, of the seashore were important and alive then as now, and the essential tension, the liminality of coastal domains, is heightened by the lucrative development of commercial mariculture, especially salmon farming, dependent on private property (or leaseholds from stewards of the public trust, the Crown Estate). In historical context these issues on the Isle of Skye, were peripheral to the main issue of the loss of access to land, but they had become more important by the last quarter of the 19th century because of that loss. The coasts and seas are hard places to make a living but they will and must do when other things have failed.

The tensions, ambiguities, contests about rights that emerged are similar to what has happened on the tidal margins of the sea abound around the globe. “Sea tenure” is perhaps analogous to “land tenure” but it is indeed, as John Rankine wrote in 1884, different. Any extension of private property is subject to public rights, whereby “the sea-shore is common to all...” “in a way to which nothing on terra firma, except perhaps public roads, affords any parallel (Rankine 1884:223). But in so many ways it was NOT common to all.

My research into the shellfisheries of New Jersey, in the United States, documented two centuries of competition, even violent skirmishes, over rights to harvest oysters and clams, in the context of industrialization of the more urban waterfronts close to New York City, and the development of

¹⁰ Hugh M’Nab, Kildonan, Lyndedale, was forced by landlord to cut peats, for nothing. “We have no shore, and the proprietor takes payment from us for the sea-weed....My son and another young lad were getting plenty of fish in Loch Grishornish with the hand line. They went to get mussels, and Mr Robertson summoned them to Portree, I cannot get fishing because of Mr Robertson of Grishornish...prevented from gathering mussels on the shore for bait. 1307-8
1310. How far are you from the shore? –the shore is below me.
13212. How far from mussel gathering –Ten minutes’ sail by boat. The beach is two and a half miles from me.
1313. But there is an oyster bed upon that shore? –yes
1314. And Mr Robertson has got the right to those oysters? –I do not know.
1315. That is why he prohibits people from getting mussels? –I did not know that. Mr Robertson has got oyster beds there, but if he has a right to the shore, he ought to put up public notices that we might know his marks. It is plenty of land that we want, on which we can rear a crop and sheep as the Gaelic proverb says –‘It is time about that the bellows are worked.’

oyster culture.¹¹ This happened to be where and how the American notion of “public trust doctrine” was created and settled in American law (which, ironically, now serves as impetus for brushing off the doctrine in UK law!). Indeed, in some of the court conflicts over oystering rights in New Jersey, the Scottish Highlands “clearances” were invoked as a tragedy that should be a lesson for those who wished to privatize oystering. Nonetheless, in the northeastern section of the U.S., as in 19th century Isle of Skye, the “public trust” idea has been ambiguous and poorly supported in law and practice.

At the beginning, I mentioned the anthropological idea of liminality generating “communitas,” and the potential for creating new social and ecological relationships. Tensions about ownership of tidal resources have, in some times and places, led to novel solutions, even more communal ones. One example from New Jersey history is worth recounting (McCay 1987). Early in English settlement, in the 1700s, rights to the tidal zone and its resources in a region known as Cape May were privatized—rights to clams and oysters, to hunt for birds, to put cows on the salt marshes. This was very rare in the American colonies but made possible in the great real estate venture led by William Penn and other speculators based in London. Privatization of tidal resources was not acceptable, though; the notion and spirit of public rights was very much alive in colonial culture, sharpened by strong sense of the injustices left behind. In this instance, settlers who objected to enclosure by landowners cooperated to purchase these rights, placing them into legal associations or corporations that allowed all citizens of the county to hunt, fish, gather seaweed, and clam on the coastal margins.

This case also shows how state trusteeship can diminish local control. The Cape May associations functioned to regulate coastal activities until the latter 19th century, when the state government claimed that its power as trustee of the public trust doctrine should replace local control, and the Cape May systems ended. Eventually, the state did exercise some care in managing the shellfisheries and wildlife harvests of Cape May, as part of its general mandate. Eventually, also, local control re-emerged. With the rise of beach-based tourism in the early 20th century, local municipalities gained regulatory control over beaches and beach access, challenging the public trust right, acknowledged in NJ law, of access to the beaches. The tension between local and state control continues to rankle, one way and the other, complicated further by claims of private ownership rights.

There are strong parallels to the larger notion of “common rights” on land, as historian E.P. Thompson pointed out, documenting the loss of rights to trap, hunt, fish, gather firewood, and more on the once common lands of rural England, capped by the Enclosure Acts of Parliament. However, as he also argued, the idea and whatever remains of its legal underpinnings have not disappeared and can and have been taken up, adapted, and used to support claims of the poor and the dispossessed.¹²

One can argue as well that the ambiguities and conflicts embedded in relationships between public rights and private privilege can allow for creativity in ways of thinking about and managing the coastal commons. Important examples are found in the development of small-scale fisheries

¹¹ McCay, Bonnie J. 1998. Oyster Wars and the Public Trust: Property, Law and Ecology in New Jersey History. Tucson, AZ: University of Arizona Press.

¹² Thompson, E.P. 1975. Whigs and Hunters; The Origins of the Black Act. Pantheon Books. 1991. Customs in Common: Studies in Traditional Popular Culture.

systems of “community-based management,” where full privatization is held at bay by the laws protecting public rights, but local associations of fishers or shellfishers exercise special positions in decision-making, resource use, and even enforcement. An example comes from the Pacific coast of Baja California, Mexico, where coastal abalone and spiny lobster are harvested by local residents, who belong to cooperatives.¹³ The Mexican revolution of the 1920s not only secured public fishing rights to all citizens but also required membership in cooperatives for people engaged in the more valuable fisheries. The contradiction inherent in that is one story, but the other one is how some of the cooperatives have emerged as powerful stewards of the tidal zones and adjacent waters, engaged in co-management with government agencies, and able to gain certification with the Marine Stewardship Council for sustainable fisheries (for lobster). They were able to get exclusive rights to fishing territories, a major part of their subsequent success, but these are owned by the cooperatives, not by individuals, and they cannot be sold off or given to private companies. This case has become a powerful lesson of the possibility of subverting privatization of coastal resources, in a way, by converting it to community ownership, with limitations on what can be done with it.

Cooperatives are themselves strange institutions, chimaera if not liminal in their efforts to compete within capitalist-dominated economies but retain their footing and distribute their benefits to the producers and workers who own them. “Worker-owned,” operated on the basis of “one member, one vote,” they are very hard to sustain in competitive economies. In any case, they have emerged in many coastal settings as ways to exercise some community-based access to and control over the riches and risks of the tidal zone and coastal sea, ways to place some limits on public rights and practices while protecting the interests of those most dependent on those resources. They can also serve as the basis for investment in enterprise for economic development, if they can prove themselves worthy of support from banks and other institutions. Short of full-fledged cooperatives are more loosely designed organizations of people with similar interests and concerns, such as “Friends of the Kelp” (?), environmental NGOs, even municipal councils. The door is wide open.

¹³ McCay, Bonnie J., Fiorenza Micheli, German Ponce-Díaz, Grant Murray, Geoff Shester, Saudiel Ramirez-Sanchez, and Wendy Weisman. 2013. Cooperatives, concessions, and co-management on the Pacific coast of Mexico. *Marine Policy* 44: 49-59. <http://dx.doi.org/10.1016/j.marpol.2013.08.001>