



THE LAW COMMISSION AND THE SCOTTISH LAW COMMISSION

SEA FISHERIES (SHELLFISH) BILL

REPORT ON THE CONSOLIDATION OF CERTAIN
ENACTMENTS RELATING TO SHELLFISH FISHERIES
AND SHELLFISH

*Presented to Parliament by the Lord High Chancellor,
the Secretary of State for Scotland
and the Lord Advocate
by Command of Her Majesty
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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are—

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THE LAW COMMISSION AND THE SCOTTISH
LAW COMMISSION

SEA FISHERIES (SHELLFISH) BILL

REPORT ON THE CONSOLIDATION OF CERTAIN ENACTMENTS
RELATING TO SHELLFISH FISHERIES AND SHELLFISH

*To the Right Honourable the Lord Gardiner, Lord High Chancellor of
Great Britain,*

*the Right Honourable William Ross, M.B.E., M.P., Her Majesty's
Secretary of State for Scotland, and*

the Right Honourable Gordon Stott, Q.C., Her Majesty's Advocate.

In the course of the preparation of the Sea Fisheries (Shellfish) Bill, which is to consolidate certain enactments relating to shellfish fisheries and shellfish, it became apparent that to reproduce exactly all the provisions of the existing Acts would be unsatisfactory. In order to produce a satisfactory consolidation we therefore recommend a number of amendments, which are discussed in detail in the Appendix to this Report.

The amendments which we recommend do not amount to changes substantially greater than could be authorised under the Consolidation of Enactments (Procedure) Act 1949. Indeed most of them would clearly fall within the limits of the definition of "corrections and minor improvements" in section 2 of that Act; but with a few of them this is not so, or at any rate not so clear. It seemed better therefore not to rely on the procedure under that Act but to describe the Bill in its long title as what in fact it is, a Bill to consolidate with amendments to give effect to our recommendations.

We have consulted the Ministry of Agriculture, Fisheries and Food and the Department of Agriculture and Fisheries for Scotland and, through them, the fisheries interests concerned and have taken account of the opinions expressed to us in formulating our recommendations. No comments adverse to those recommendations have been received by us.

We realise that if the Bill is introduced in the form in which it accompanies this Report it will not enjoy the privileges of a Bill introduced under the Act of 1949 and it will be open to both Houses of Parliament, and not only to the Joint Committee, to consider the amendments incorporated in it and, if they think fit, to modify or reject them. But it is our hope that those amendments will be as acceptable to Parliament as they have been to those whom we have consulted and that little time will be needed for their discussion.

LESLIE SCARMAN,
Chairman of the Law Commission.

C. J. D. SHAW,
Chairman of the Scottish Law Commission.

11th April, 1967.

APPENDIX

PRELIMINARY

The provisions of the Bill derive in the main from three Acts—
the Sea Fisheries Act 1868, Parts III and IV,
the Fisheries (Oyster, Crab and Lobster) Act 1877, and
the Sea Fish Industry Act 1962.

Under Part III of the Act of 1868, as originally enacted, the Board of Trade had power to make orders for the establishment or improvement, and for the maintenance and regulation, of fisheries for oysters and mussels. Part III was subsequently extended so as to apply also to cockles, and the powers of the Board are now vested in the Minister of Agriculture, Fisheries and Food, as respects fisheries in England and Wales, and in the Secretary of State, as respects fisheries in Scotland.

The Act of 1877 gave the Board of Trade power to make orders prohibiting or restricting the taking of oysters, crabs and lobsters. This power also is now exercisable by the Minister and the Secretary of State. The Act also fixed the close season for oysters and prohibited the sale of certain crabs and under-sized crabs and lobsters. The Act has to a large extent been repealed or superseded by later Acts.

The provisions of the Act of 1962 dealing with shellfish are sections 19–26. In addition to amendments of Part III of the Act of 1868 those sections contain provisions which have as their object the elimination, or prevention of the spread, of diseases and pests affecting shellfish.

RECOMMENDATIONS

1. Two kinds of right may be conferred by orders under Part III of the Act of 1868, viz., a right of several fishery (section 40) and a right of regulating a fishery (section 41). Orders have been made establishing a fishery in a specified area and conferring on the grantees a right of several fishery in part of that area and a right of regulating the remainder of the fishery. This practice, though not expressly provided for by the Act, does not appear to be contrary to it.

We recommend that this practice be expressly recognised. Effect is given to this recommendation in clauses 1(3)(c), 2(1), 3(1) and 4(2) of the Bill.

2. Section 40 of the Act of 1868 lists the rights which are exercisable by the persons entitled to the benefit of an order conferring a right of several fishery. These persons are described in the section as “the persons obtaining the order, in this Act referred to as the grantees”. The description might suggest that they must be the same persons as those who applied for the order; but section 29 of the Act expressly enables the order to provide for the constitution of a body corporate and therefore for the exercise of the rights by a person legally different from those applying for the order.

(See the concluding words of clause 1(1) of the Bill.) Moreover, the right conferred by such an order is a right to property and therefore capable of being disposed of; and the assignment or lease of a right of several fishery is a recognised practice.

We recommend that the provision now in section 40 should be expressed in a way which recognises that the persons entitled to exercise a right of several fishery need not be the same as those who obtained the order. Effect is given to this recommendation in clauses 2(2), 5(8) and 7(6) of the Bill.

3. Under section 24(5) of the Act of 1962 a person who obstructs an inspector or other person "in the exercise of any power or right conferred by the provisions to which this section applies" is guilty of an offence. The provisions to which the section applies are stated in subsection (1) of that section to be certain provisions of section 45 of the Act of 1868. Section 2 of the Sea Fisheries Act 1875 (reproduced in clause 5(3) of the Bill) conferred further powers on a person making inquiries under section 45. Section 33(5) of the Act of 1962 requires references to any enactment to be construed as referring to that enactment as amended by any other enactment but it is doubtful whether this brings section 2 of the 1875 Act within the provisions referred to in section 24(5) of the Act of 1962.

We recommend that the doubt be removed. Effect is given to this recommendation in clause 5(7) of the Bill.

4. Section 43 of the Act of 1868 provides that for the purposes of jurisdiction a fishery shall be deemed to be within the body of the adjoining county or counties. There is a separate commission of the peace not only for each county but also for each county borough and some non-county boroughs. In Scotland, by virtue of section 57 of the Act of 1868, offences under that Act may be tried in any court of summary jurisdiction, which would include a burgh police court. Jurisdiction conferred on a county does not confer jurisdiction on the burgh police court of a burgh within that county.

We recommend that boroughs and burghs should be mentioned as well as counties. Effect is given to this recommendation in clause 10 of the Bill.

5. Section 20 of the Act of 1962 empowers the appropriate Minister by order to prohibit shellfish from being imported into certain areas. Contravention of the order is made an offence by section 21(2). Section 20(3) defines "imported" as meaning imported on board any vessel, whether from a place outside Great Britain or not. The section failed to take account of the fact that shellfish could also be imported by means of an aircraft, and there is also the possibility, more likely now than it was in 1962, that use might be made of a hover vehicle. Provision has recently been made by section 10 of the Finance Act 1966 for the application of the customs and excise Acts to goods and passengers carried in or moved by hover vehicles.

We recommend that the definition of "imported" in section 20(3) be extended to cover both aircraft and hover vehicles. Effect is given to this recommendation in clause 13(4) of the Bill.

6. Section 4 of the Act of 1877 in effect prescribes the close season for oysters. It prescribes one period for oysters known at the passing of that Act in the oyster trade as "deep-sea oysters" and another period, longer by one month, for all other descriptions of oysters. It is understood that deep-sea oysters are no longer obtainable.

We recommend that a separate close season for deep-sea oysters should not be specified. Effect is given to this recommendation in clause 16 of the Bill.

7. Section 8(2) of the Act of 1877 (reproduced in clause 17(1) of the Bill) prohibits the sale of crabs carrying spawn. A similar provision about lobsters is contained in section 4(2) of the Sea-Fishing Industry Act 1933, and the present consolidation provides an opportunity for bringing the two provisions together. The advantage of doing so would, however, be outweighed by the resulting complication if all the ancillary provisions of the Act of 1933 had to be reproduced, whether or not they had any practical application to section 4(2).

Section 4 was one of the sections for which new provisions were substituted by section 38 of the Sea Fish Industry Act 1938 in order to give effect to a convention for regulating the meshes of fishing nets and the size limits of fish. The provision about lobsters carrying spawn is quite foreign to the convention and the rest of section 4. It was not at first in the Bill for the Act of 1938 but was inserted by an amendment at the Report Stage in the House of Commons. Its position as subsection (2) of section 4 appears to be due to accident rather than design and attracts to it ancillary matters designed for other provisions, some of them as inappropriate to the subsection as the subsection itself is to the rest of the section.

Section 4(2) does not itself impose a prohibition but merely enables a prohibition to be imposed by an order. No order under the section has been in force since the Sea-Fishing Industry (Crabs and Lobsters) Order 1951 (S.I. 1951/638) was replaced by the Sea-Fishing Industry (Crabs and Lobsters) Order 1966 (S.I. 1966/737) and we understand that there is no present intention to make a further order under the section. Nevertheless we think that it would be undesirable to perpetuate the existing anomalies.

The greatest of these is the discrepancy between the penalties for contraventions of section 4(2) of the Act of 1933 and section 8(2) of the Act of 1877. The fine for an offence under section 8(2) has remained unchanged at £2 for a first offence and £10 for a second offence, but the fine for an offence under section 4(2), originally £50, was increased (together with fines for other offences) by section 9 of the Sea Fish Industry Act 1959 and is now £100 for a first offence and £200 for a subsequent offence. It seems to us unlikely that a difference of that order can be due to anything other than the accident of the two offences forming part of different bodies of law.

We recommend that the provision now in section 4(2) of the Sea-Fishing Industry Act 1933 should be treated as if it were contained in the Fisheries (Oyster, Crab and Lobster) Act 1877 and we further recommend that the penalties for the two offences should be assimilated. The Bill gives effect to the first of these recommendations by the inclusion of clause 17(3) and the repeal of section 4(2). The second recommendation is not yet given effect

to but would have to be implemented during the passage of the Bill through Parliament. Although we feel no hesitation in expressing the view that the existing discrepancy between the fines for two similar offences is an accidental anomaly we do not think that Parliament would look to us for advice on the proper level of a fine applicable to both offences alike.

8. Section 33(1) of the Act of 1962 defines "shellfish bed" as "any bed or ground used for the propagation or cultivation of shellfish". The definition is not quite apt for such provisions as that reproduced in clause 12 of the Bill, where it ought to cover "natural" shellfish beds.

We recommend that the definition of "shellfish bed" in section 33(1) be amended. Effect is given to this recommendation in clause 22 of the Bill.

9. Sections 11 and 12 of the Act of 1877 contain provisions intended to adapt the Act to the laws of the Isle of Man and the Channel Islands. Changes in those laws have made those provisions obsolete. The modern practice is to allow for such changes by enabling the necessary adaptations and modifications to be made from time to time by Order in Council.

We recommend that the modern practice be followed. Effect is given to this recommendation in clause 23 of, and Schedule 3 to, the Bill.

10. Where an order under Part III of the Act of 1868 is made, section 35 requires the applicants for the order to cause it to be published and circulated in such manner as the appropriate Minister thinks sufficient for giving information to all parties interested. By virtue of section 34(3) of the Act of 1962 the order is now made by statutory instrument and is printed and published by the Stationery Office and section 35 is in practice construed as requiring the applicants to publish only notice of the making of the order.

We recommend that section 35 be amended to conform with modern practice. Effect is given to this recommendation in paragraph 7 of Schedule 1 to the Bill.

11. We recommend that the enactments briefly described below should not be reproduced in the Bill but should be repealed, with the exception of those which are needed for provisions not affected by the Bill. Effect is given to this recommendation in Schedule 3 to the Bill.

The following are the enactments concerned:—

The Sea Fisheries Act 1868, sections 47, 49, 55, 57, 63 and 68.

The Fisheries (Oyster, Crab and Lobster) Act 1877, sections 5, 6 and 10.

The Sea Fisheries Regulation (Scotland) Act 1895, sections 11 to 17.

Section 47 of the Act of 1868 provides that in certain cases an order under Part III of the Act of 1868 shall incorporate the Lands Clauses Consolidation Act 1845 or the Lands Clauses Consolidation (Scotland) Act 1845, as the case requires, and shall apply the provisions thereof to the purchase or taking of the relevant portion of the sea shore. It is believed that the power of compulsory purchase conferred by section 47 has never been exercised and it is said to be unnecessary.

Section 49 requires the persons who obtain an order under Part III to keep at some convenient place near the part of the sea shore to which

the order relates copies of the order and of Part III of the Act and to sell them to anyone wishing to buy them at a price not exceeding 6d. for one copy of each. This section is out of date. Notice of the making of the order has to be published and circulated to persons likely to be directly affected by it. There is no difficulty now, as there may have been in 1868, for any of those persons to obtain a copy of the order from the Stationery Office. Furthermore, the requirement made by the section does not apply to Acts which amend Part III, and a number of later Acts have amended that Part.

Section 55 is concerned with the allegation and proof of property and possession in proceedings for stealing oysters or mussels where the oyster or mussel beds or fisheries are contiguous and belong to different persons. In the draft Bill annexed to the Eighth Report of the Criminal Law Revision Committee on Theft and Related Offences (Cmnd. 2977) section 55 is one of the enactments scheduled for repeal as obsolete or redundant. In Scotland so far as can be traced this provision has never been used and the situation which it is designed to cover seems unlikely to arise.

Section 57 in effect provides that offenders under the Act shall be punishable on summary conviction before a single justice. By virtue of section 98(5) of the Magistrates' Courts Act 1952 the maximum fine which a magistrates' court composed of a single justice may impose is £1. The nature of the offences created by Part III, and the fines to which offenders are liable, are such as to make it unnecessary and inappropriate to re-enact so much of section 57 as authorises trial in England or Wales before a single justice.

Section 63 provides that any penalty under the Act, with one exception not relevant, may be recovered in the ordinary way or, if the court thinks fit so to order, by distress or poinding and sale of the sea fishing boat to which the offender belongs and her tackle, apparel and furniture and any property on board or belonging thereto, or any part thereof. Prosecutions for offences under Part III are very rare and it is believed that little, if any, use has been made of section 63. Moreover, none of the Sea Fish Industry Acts of this century, some of which create more serious offences with far higher fines, contains a similar provision.

Section 68 contains provisions for the protection of seine fishing on the coast of Cornwall. We understand that the method of fishing the section was designed to protect is no longer used there.

Sections 5 and 10 of the Act of 1877, as amended, empower the Minister and the Secretary of State to make orders, local in effect, restricting or prohibiting the taking of oysters, crabs or lobsters. Section 6 is ancillary to section 5. Orders are no longer made under these sections since by-laws to the same effect can be made by local fisheries committees under section 5 of the Sea Fisheries Regulation Act 1966, which was a consolidation Act, and by the Secretary of State under the Sea Fisheries Regulation (Scotland) Act 1895. In addition, the Minister and the Secretary of State have power under section 7 of the Sea Fish Industry Act 1959, as amended, to make orders prohibiting the fishing for sea fish (including shellfish) in waters adjacent to Great Britain and within the fishery limits of the British Islands.

Sections 11 to 17 of the Act of 1895, as amended, confer certain powers on the Secretary of State with respect to mussel and clam fisheries. These powers have been little used, if at all, and certainly not in recent years. There is no likelihood of their being required in the future.

