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terms contained in the contract in the case of contracts entered into by a local authority, I cannot bring myself to hold that s. 174, sub-s. 2, is only directory. I should naturally, in a case like the present, have desired so to hold and defeat this defence.

STIRLING L.J. I feel the difficulty of the case, but I have brought myself to agree with the view of Romer L.J.

Solicitors: *Barton & Pearman, for R. B. Hopkins, Leeds; Jaques & Co., for Scholefield, Taylor & Maggs, Batley.*

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# MERCER v. DENNE.

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[1902 M. 417.]

July 10, 11,  
13, 14, 17, 18,  
20, 21, 22, 24,  
25, 26;  
Aug. 11.

*Custom—Validity—Extent—Custom to dry Fishing Nets—Changes in Mode of User—Recession of Sea—Land added by Accretion—Evidence—Admissibility—"Public Documents"—Official Reports—Reputation—Depositions in former Suit—Maps and Charts.*

An immemorial custom for fishermen inhabitants of a parish to spread their nets to dry on the land of a private owner situate near the sea in the parish, at all times necessary or proper for the purposes of the trade or business of a fisherman:—

*Held*, to be a valid legal custom.

The use of a modern mode of drying the nets will not deprive the fishermen of the benefit of the custom, provided that an unreasonable burden is not thereby cast upon the landowner.

Land added by accretion, in consequence of the gradual and imperceptible recession of the sea, will become subject to the custom.

Decision of Farwell J., [1904] 2 Ch. 534, affirmed.

In an action to establish the existence and validity of the above custom, as affecting land of a private owner at Walmer, called the "beach ground," the defendant sought to prove that within legal memory the land had been covered by the sea, and in proof of this he tendered in evidence (*inter alia*) a survey of Walmer Castle taken in the year 1816 by the direction of the then Lord Warden of the Cinque Ports, and an estimate made by the King's engineer for the reparation of Walmer and other castles. These documents were produced from the Record Office, and they stated that serious damage had been done by the sea to a wall of Walmer Castle:—

*Held*, that these documents were not admissible in evidence as "public

documents," on the ground that they were not, and were not intended to be, records affecting the King's property or revenues, but were to serve temporary purposes only, and in no way affected Crown property, Crown revenues, or Crown grants when the respective purposes were served :

*Held* also, that the documents were not admissible within the doctrine of *Price v. Earl of Torrington*, (1703) 1 Salk. 285, as records made by a deceased official in the discharge of his official duty, there being nothing to shew that they were made contemporaneously with the doing of something which it was the duty of the deceased official to record, and no evidence what his instructions were or of the relation of those instructions to the documents, or of the source of the knowledge or information on which the contents of the documents were based :

*Held* also, that maps and plans prepared by the directions of the Board of Ordnance in 1641, 1644, and 1647, and produced from the War Office, were not admissible as public documents or as evidence of reputation :

*Held* also, that a map or chart published in 1837, and in the possession of the Admiralty, was inadmissible, it not being an Admiralty chart, and not having received in any way the sanction of the Admiralty :

*Held* also, that the depositions taken in an information by the Attorney-General in 1639 against persons who claimed to be entitled to the manor of Walmer for causing or suffering the destruction of a bank between the sea and Walmer Castle were not admissible as evidence of reputation, the depositions being only evidence of particular facts.

Decision of Farwell J., [1904] 2 Ch. 541-546, affirmed.

The definition of "public documents" given by Lord Blackburn in *Sturla v. Freccia*, (1880) 5 App. Cas. 623, 643, discussed and explained.

*Mellor v. Walmesley*, ante, pp. 164, 168, distinguished.

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APPEAL by the defendant from the decision of Farwell J. (1)

The plaintiffs were three inhabitants of the parish of Walmer, Kent, carrying on there the trade or business of fishermen, and they sued on behalf of themselves and all other persons carrying on that trade or business in the parish of Walmer.

By the amended statement of claim the plaintiffs alleged that there was in the parish of Walmer a piece of ground covered with shingle (called the "beach ground"), situate near the sea and lying between the grounds of a messuage known as Walmer Place, on the north side, the grounds of Walmer Castle on the south side, the foreshore on the east side, and a public road called Wellington Road on the west side, and containing about eleven acres; that the "beach ground" had always from time immemorial been unbuilt upon and open and uninclosed; and that from time immemorial, or alternatively

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for the full period of forty years, or alternatively for the full period of twenty years next before the commencement of the action, there had been and still of right ought to be an ancient and laudable custom within the parish that all persons inhabitants of the parish carrying on the trade or business of fishermen might use, have, and exercise, and all such persons had from time immemorial, or alternatively for the said period of forty years, or alternatively for the said period of twenty years, used and of right had and exercised, and still ought to use and of right to have and exercise, the right and privilege, at all times necessary or proper for the purposes of the trade or business of a fisherman, to dry their nets upon the "beach ground," and for that purpose to spread their nets on the surface thereof.

The defendant was the owner of the "beach ground," and the plaintiffs alleged that he intended to erect buildings thereon, and had in fact commenced so doing. The plaintiffs claimed a declaration of their right in the terms of the custom as above alleged, and an injunction to restrain the defendant from building upon or otherwise dealing with any part of the "beach ground" so as in any manner to prevent, disturb, or interfere with the exercise or enjoyment by the plaintiffs, and other persons entitled as alleged, of their alleged right over the "beach ground."

By his amended defence the defendant said that in and prior to the year 1799 and for many years subsequent thereto the "beach ground" was below high-water mark and subject to the flux and reflux of the tide, and until comparatively recent years was wholly unsuitable and in fact incapable of being used for the purposes alleged by the plaintiffs. The defendant denied the existence of the alleged custom, and alleged that no such custom was or could be legal or enforceable; that such user (if any) of the "beach ground" as there had been was occasional and discontinuous; that the custom (if any) was uncertain, and the user (if any) was general and not in any way limited to inhabitants or fishermen of Walmer or to any other class of persons; that the "beach ground" was formed by gradual accretion and the receding of the sea, and was now above high-water mark and did not form any part of the sea-

shore or foreshore ; that the right or privilege claimed was not in any way necessary or proper for the purposes of trade or business ; that the persons on whose behalf the right was claimed were fluctuating, uncertain, and unascertainable ; that the alleged user had always been permissive and not of right ; and that the alleged right was not reasonable, and would prevent the user of the land for any other purpose.

It was, as held by the learned judge, proved by the plaintiffs' witnesses, who were seafaring men, that during the whole of their memory, a period extending over more than seventy years, and by reputation for many years before their birth, the inhabitants of the parish of Walmer, who were fishermen, had used the "beach ground" for the purposes of drying their nets. The practice had varied somewhat during the last seventy years. There were three fisheries now practised at Walmer—the mackerel fishery, for which the season was from May to July and in September and October ; the herring fishery from October to Christmas ; and the sprat fishery from November to March. Down to some thirty or thirty-five years before the commencement of the action the herring and mackerel nets were cutched or tanned at the commencement of and in preparation for the fishery season, and were then spread out to dry on the "beach ground" ; and at the end of the season the boats were brought up close to this piece of ground and the nets were taken directly to it and spread out on it, or, if the weather did not permit of that, the nets were landed nearer the town, and were then brought in carts to the "beach ground" and spread out to dry before being put away for the winter ; and this practice still remained with regard to the mackerel nets. Down to the same period the sprat nets were not spread on the "beach ground" at all. About thirty or thirty-five years before the action the practice of oiling the herring nets instead of cutching them and of oiling the sprat nets came into use, and these nets were also spread on the "beach ground" to dry. The time required for drying after oiling was longer than was required for the earlier process, and sprat nets were now put on the land at a period during which no nets used to be put there so far as living memory went. The fishermen had

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occasionally in former years dried their nets in different places along the beach, but the beach ground was that which had always been used, and to the extent at times of covering its whole area, and it had been known to the fishermen and their forefathers, and spoken of amongst them, as their own ground.

In support of the defendant's allegation that the "beach ground" had at a time since the reign of Richard I. been below high-water mark, and that therefore the custom of drying nets upon it could not have existed from time immemorial, various ancient documents were tendered in evidence. Most of them were rejected by Farwell J., as appears by the former report.

The first class of documents is stated [1904] 2 Ch. 540. They were seven in number, but on the appeal it was conceded that Nos. 4, 5, and 6 were inadmissible.

No. 1 was entitled—

"A Survey taken the 10<sup>th</sup> of May 1616 of the most needfull reparations now presentlie to be done in & upon theise his Ma<sup>ties</sup> castles and fortes called Camber castle Sandgate Castle Archcliff Bullwarke Motes Bullwarke Walmer castle Deale Castle and Sandowne Castle, w<sup>th</sup>in the jurisdicōn and command of the Lord Warden of the Cinqz Portes veiued and surueied at the Commandm<sup>t</sup> of the right Hon<sup>ble</sup> the Lo: Zouch now Lo: Warden of the Cinqz Portes and one of his Ma<sup>ties</sup> most hon<sup>ble</sup> privy Councell."

There followed under the head "Walmer Castle" a number of items of repairs required to be done, among which were the following:—

"Itm p<sup>t</sup> of the Mote Wale to be repaired being fallen downe.

"Item the mote walle of the same castle being in great decaye and danger of the rage of the sea w<sup>ch</sup> yf it should breake in the castle would be utterlie lost w<sup>ch</sup> must be prevented by makeing a Jetty or a head of tymber to staye the foote of the beach upp against the saide walle w<sup>ch</sup> head must bee in length 8 rodd and will cost in estimacōn 30 li the roode."

Under the head "Deale Castle" was the following:—

"Itm the mote wale of this castle next to the sea being

much decayed and perished by meanes of the beating of the mayne sea uppon it and is likely to be the losse of the whole castle yf it be not speedily prevented for w<sup>ch</sup> there must be made a Jetty or head into the sea in the length 8 rodd & will cost by estima<sup>ti</sup>con 240."

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No. 2 contained the following:—

"Reparations needeful for his Ma<sup>ty</sup> castle of Walmer.

"First two head<sup>es</sup> w<sup>th</sup> stone or timber to be made into the sea (or some other devise) to defend the whole castle from beinge swallowed up by the sea, the w<sup>ch</sup> w<sup>th</sup>in this two yeres last past hath gotten two pikes length of the mayne land, and is now come w<sup>th</sup>in halfe a pikes length of the ditch. To mend the ditch within, two places is likely to fall in."

This document was indorsed "October 1625. The decayes of Wolmer Castle."

No. 3 was a report of a similar kind.

No. 7 was headed—

"Estimates made for the reperation  
of

|           |   |                                  |
|-----------|---|----------------------------------|
| Sanddowne | } | Castles in y <sup>e</sup> Downes |
| Deale &   |   |                                  |
| Walmer    |   |                                  |

&

Archcliff bulwark at Dover made by Lieutenat Colo<sup>ll</sup>  
J. Paprill his Ma<sup>ties</sup> Enginier for the fortification in  
anno do<sup>mi</sup>ni 1634."

Under the head "Deale Castle" was the following:

"A great new-head of tymber, filled with stone, is to be made out of hand, to secure y<sup>e</sup> castle from y<sup>e</sup> violence of y<sup>e</sup> sea: . . . This will cost £650."

And under the head "Walmer Castle" was the following:—

"A great new-heade of tymber filled w<sup>th</sup> stone to secure y<sup>e</sup> castle from y<sup>e</sup> violence of the sea, w<sup>th</sup> three small heades will cost £550."

The beach ground lay between Walmer Castle and Deal Castle, and from the fact that the sea at the dates of those documents came up to both castles it was sought to infer that

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the "beach ground" must also at that time have been covered by the sea.

It was also proposed to use as evidence of reputation the depositions sworn in answer to interrogatories under an information filed in the Court of Exchequer in 1639 by Sir John Bankes, the then Attorney-General, against three persons named James Hugeson, William Hugeson, and Richard Sladen, who, it was alleged, had allowed a bank or cliff between Walmer Castle and the sea to be undermined by conies, and had neglected to repair and amend the same, by reason whereof a wall erected by the King to defend the castle from the sea had "become very ruinous and likely to be quite broken downe and decayed through the violence and rage of the sea, and that if some speedy course be not taken for the repaire and maintenance of the s<sup>d</sup> banke or cliffe the castle itselfe will likewise be subject to the same ruyne to the great damage and p<sup>d</sup>judice of his Ma<sup>ty</sup>." The information prayed that a writ of subpoena might issue directed to the defendants commanding them on a certain day to appear before the Court of Exchequer to answer the premises, and to abide such further order touching the same as to the Court should seem most agreeable to justice and equity.

The defendants put in answers to this information, and the depositions of various witnesses residing in the neighbourhood were taken by commission in answer to interrogatories administered under an order of the Court.

It is not considered necessary to refer in detail to the other documents which were rejected.

During part of the argument upon the appeal the Court were assisted by a nautical assessor, who was at the request of the Court sent by the Admiralty. He was asked by the Court to advise them as to the proper interpretation of a chart, called Spencer's of 1795, which is mentioned in the judgment of Farwell J. (1) The naval assessor differed from the view expressed by Commander Jarrard (one of the plaintiffs' witnesses), and advised the Court that the thick black line in that

(1) [1904] 2 Ch. 555.

chart represented, as the defendant's witnesses asserted, high-water mark.

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As to the admissibility of evidence :—

*Levett, K.C., Jenkins, K.C., and Gatey*, for the defendant. It is submitted that the documents 1, 2, 3, and 7 ought to be admitted, because they are public documents. They relate to a matter of public interest, namely, the defence of the realm against the sea, and they were prepared by public officers : *Sturla v. Freccia*. (1)

The documents are also admissible on the ground that they were made by persons holding an office in the discharge of their duty as such, they being now dead : *Price v. Earl of Torrington* (2) ; *Mellor v. Walmesley*. (3)

Evidence of reputation is also admissible, and these documents prove reputation as to the height of the sea.

[VAUGHAN WILLIAMS L.J. On a question of highway or no highway, would not an order of quarter sessions be admissible as evidence of reputation?—Taylor on Evidence, 9th ed. vol. i. pl. 610, p. 394 ; *Duke of Newcastle v. Hundred of Broxtowe*. (4)]

*Upjohn, K.C., and R. J. Parker*, for the plaintiffs. It is submitted that none of the four documents is admissible. The decision in *Price v. Earl of Torrington* (2) did not depend on the document being a public one, or upon reputation. The principle was explained in *Doe v. Turford*. (5) The principle does not extend to the documents now in question. If it does, every report by a person employed to make a report would after his death be admissible evidence against all the world. No case has yet gone so far. The statement must relate to something done by the deceased person in the discharge of his duty : *Chambers v. Bernasconi*. (6) The report of the surveyor, even if it is admissible, is not admissible to prove the encroachment of the sea. That is mere hearsay evidence—something which the surveyor had been told.

(1) 5 App. Cas. 623, 643.

(2) 1 Salk. 285.

(3) Ante, p. 164.

(4) (1832) 4 B. & Ad. 273.

(5) (1832) 3 B. & Ad. 890 ; 37 R. R. 581.

(6) (1834) 1 C. M. & R. 347 ; 4 Tyrw. 531 ; 40 R. R. 604.



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[VAUGHAN WILLIAMS L.J. referred to the *Dundonald Peerage Case* (1), in which an entry in the books of a deceased solicitor, and in his handwriting, recording an interview with Lord Dundonald on a particular day, was admitted to prove that Lord Dundonald had been in London on that day. The employment of a solicitor is only an occasional one, not permanent like that of a steward or a bailiff.

COZENS-HARDY L.J. referred to *Evans v. Merthyr Tydfil Urban Council* (2), in which it was held that a survey and report of a deceased surveyor, in discharge of his duty under a statute on a sale of Crown lands, was admissible in evidence as a public document to shew that certain land was common land.]

But the report is not evidence of a collateral fact stated in it; there must be a duty to do the very thing to which the entry relates. In *Price v. Earl of Torrington* (3) the duty of the drayman was to do a certain thing, and then to make an entry that he had done it.

[VAUGHAN WILLIAMS L.J. Was it not part of the duty of the surveyor to inspect the property and the condition of the external wall?

COZENS-HARDY L.J. referred to *Phillips v. Hudson* (4), in which it was held that when a manor had formerly belonged to the Crown, a grant and survey recorded in the Augmentation Office was not evidence for the tenants against the lord. Lord Chelmsford L.C. said that the document, though a survey made for the purposes of the Crown, stood in the same position as a survey made by a private owner.]

In *Mellor v. Walmesley* (5) it was the duty of the surveyor to make the entries in question. Here it was a mere matter of opinion whether the castle was in danger from the rage of the sea. An inference drawn from the facts is not admissible.

[COZENS-HARDY L.J. referred to *Smith v. Blakey*. (6)]

Again, in order that documents may be admissible as being public documents, it is not sufficient that they should relate to

(1) 2 Sm. L. C. 11th ed. p. 325.

(2) [1899] 1 Ch. 241.

(3) 1 Salk. 285.

(4) (1867) L. R. 2 Ch. 243.

(5) Ante, p. 164.

(6) (1867) L. R. 2 Q. B. 326.

a matter of public concern. It does not follow that every document relating to the defence of the realm against the sea is, in a suit between private individuals, admissible evidence of any collateral matter mentioned in it: *Sturla v. Freccia*. (1) It is essential, as Lord Blackburn there said, that there should be "a public inquiry." "Public" means made known to the public—accessible to them. These documents are not public documents in the sense in which that term has been used. And indeed the report does not shew the distance of the sea from the east wall of the castle.

[VAUGHAN WILLIAMS L.J. I think that Chitty L.J. was mistaken in saying in *Evans v. Merthyr Tydfil Urban Council* (2) that the survey in *Phillips v. Hudson* (3) "was not made under the requisitions of a public statute." I think it was. But the ground of the decision was that the survey related to property which the King had reserved to himself as private owner—property with which the public had nothing to do. Here the public have an interest in the property.]

As to the admissibility of evidence of reputation, see Taylor on Evidence, 9th ed. vol. i. pl. 607 et seq. pp. 392 et seq. Such evidence is no doubt admissible in matters of public and general interest, but it is not admissible in regard to particular facts. The position of high-water mark is a particular fact: *Reg. v. Bliss*. (4) The object of introducing this evidence is to prove that at a particular date the sea came up to a certain point. That is not a matter of reputation. The point is subsidiary or collateral to the main issue in the case, and evidence of reputation is not admissible.

*Levett, K.C.*, in reply. The plaintiffs have to prove that from the time of Richard I. this land has been used for drying nets; it must be relevant to shew that at a particular date within that period the sea came over the land. At this distance of time it must be assumed that the surveyor was an honest man and that he performed his duty by writing his report at once. There is no reasonable ground for doubting these

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(1) 5 App. Cas. 623, 643.

(2) [1899] 1 Ch. 253.

(3) L. R. 2 Ch. 243.

(4) (1837) 7 Ad. & E. 550, 555;  
45 R. R. 75".

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documents. If a surveyor who is employed to report about the repairs of a house finds that the house has been injured, he ought to report the cause of the injury as well as state how it should be remedied. The Court will not say that no evidence can be received as to what took place hundreds of years ago. These documents are the only evidence which can be obtained, and the Court will take a reasonable view: *Evans v. Merthyr Tydfil Urban Council* (1); *Phillips v. Hudson* (2); *Reg. v. Bliss* (3); *Duke of Newcastle v. Hundred of Broxtowe*. (4)

*Levett, K.C., Jenkins, K.C., and Gatey*, for the defendant. With regard to the depositions taken upon the information, it is submitted that they are admissible as evidence of reputation.

Any documents of public import or interest are admissible as evidence of reputation. The boundary of a royal fortress at a particular time must be a question of public interest or public right.

In any action whatever, when it becomes relevant to prove a fact, if reputation can prove that fact, then evidence of reputation is admissible: *Thomas v. Jenkins*. (5) Here we have statements made by deceased persons of matters within their own knowledge, and these may be admitted as good hearsay evidence of reputation. Admissible hearsay evidence is not limited to oral evidence: it may be in writing. If a map or plan has been made by a competent person, and he is dead, that map or plan is clearly admissible. For purposes of evidence a statement is just as admissible as a map or plan: the only difference is that the one is oral and the other pictorial. It is submitted, therefore, that the depositions or declarations made in the seventeenth century, though, as being hearsay evidence, not admissible at the time, are admissible now, in the twentieth century, as evidence of reputation. No doubt hearsay evidence of a fact from which to draw a mere inference is not admissible: *Reg. v. Bliss*. (3) But here the object is to prove a direct fact, that is, whether or not in the seventeenth century the sea came up to a particular

(1) [1899] 1 Ch. 241, 250, 252.

(4) 4 B. & Ad. 273.

(2) L. R. 2 Ch. 243.

(5) (1837) 6 Ad. & E. 525, 529;

(3) 7 Ad. & E. 550; 45 R. R. 757. 45 R. R. 560.

point, namely, close up to Walmer Castle. That is a question of what was at that time terra firma of England at that point—whether the sea came up to one of the royal fortresses: that is a question of public interest, and, if so, it may be proved as a matter of direct fact by the declarations of deceased persons. It is submitted, therefore, that these depositions should be admitted, and perhaps also the information itself, though the depositions are more material.

Then it is submitted that the War Office plans and also Labelye's map or chart, a copy of which comes from the custody of the Admiralty, and also the reports, &c., from the Record Office, are all admissible as relating to matters of public or general interest, and therefore relevant: Stephen's Digest of the Law of Evidence, 5th ed. pp. 41–2, art. 30; *Sturla v. Freccia* (1); the reports, &c., being admissible on the further ground that they were prepared by officials in the course of their duty: *Price v. Earl of Torrington*. (2)

*Upjohn, K.C.*, and *R. J. Parker*, for the plaintiffs. It is submitted that the reasons given by the learned judge for disallowing these depositions are sound. The proposition advanced on behalf of the defendant is novel and is not supported by authority. *Thomas v. Jenkins* (3) has no bearing upon the present point. The question there was whether evidence of reputation was admissible. Here the question is, "Aye or No, was the locus in quo under water at or since the time of Richard I., so that this alleged custom must have arisen within the time of legal memory?" Upon that question this evidence is not admissible. No authority can be found to support the proposition either that hearsay evidence, such as these depositions, is admissible in this case, or that the fact sought to be proved is one of such public interest as to make that evidence admissible as evidence of reputation. These depositions were not declarations by the deponents either of what they themselves knew or of what they had heard as to reputation: they were statements of particular facts which were not the direct facts in issue, but merely collateral facts, and therefore they are not admissible. The case thus falls

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(1) 5 App. Cas. 623, 643.

(2) 1 Salk. 285; 2 Ld. Raym. 873.

(3) 6 Ad. &amp; E. 525; 45 R. R. 560.

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within *Ireland v. Powell* (1), cited in *Reg. v. Bliss*. (2) Again, the fact that depositions have been made in a matter of public interest does not make them public to all the world afterwards. Moreover, these depositions are wholly irrelevant to the matters in issue.

[VAUGHAN WILLIAMS L.J. referred to *Barraclough v. Johnson*. (3)]

That case lays down the law in accordance with this argument; it is a case of the same class as *Duke of Newcastle v. Hundred of Broxtowe*. (4) To make a statement evidence of reputation admissible at all, it must be, directly or indirectly, a statement of reputation as to a matter of public or general right, as distinguished from a statement of a fact: that distinction is shewn by both those authorities. On the information of 1639 evidence of reputation was not admissible, nor was it in fact tendered. The fact that the name of the Sovereign appears on the record is not sufficient ground for including evidence by reputation: 2 Roll. Abr. 186, tit. "Prerogative le Roy," pl. 5. Evidence of reputation is admissible only when some public right is in question and the reputation is of that right: *Outram v. Morewood* (5), in which it is pointed out that tradition of a particular fact is not admissible evidence, but evidence of reputation is; see also *Nicholls v. Parker* (6); *Weeks v. Sparke* (7); *Moseley v. Davies* (8); *Cooke v. Bankes* (9); *Crease v. Barrett* (10); and Taylor on Evidence, 9th ed. vol. i. p. 400, § 617, where all the authorities are collected. So again, entries in parish books, recording that perambulations had taken a particular line, and also verdicts, judgments, decrees, and orders, are none of them admissible as evidence of reputation, for they are evidence only of particular facts: *Taylor v. Devey* (11);

(1) (1802) Peake on Evidence, 5th ed. p. 16.

(2) 7 Ad. & E. 555; 45 R. R. 762.

(3) (1838) 8 Ad. & E. 99; 47 R. R. 506.

(4) 4 B. & Ad. 273.

(5) (1793) 5 T. R. 121, 123; 14 East, 330, 331; 12 R. R. 542.

(6) (1805) 14 East, 331, n.; 12 R. R. 542.

(7) (1813) 1 M. & S. 679, 687; 14 R. R. 546.

(8) (1822) 11 Price, 162, 180.

(9) (1826) 2 C. & P. 478; 31 R. R. 680.

(10) (1835) 1 C. M. & R. 919, 929, 930; 40 R. R. 779.

(11) (1837) 7 C. & E. 409, 414; 45 R. R. 741.

*Pim v. Curell*. (1) Accordingly, all these depositions, being evidence only of particular facts, are excluded by the above authorities.

Again, the depositions are not admissible as having been made by the proper persons: *Freeman v. Phillipps*. (2) The competency of the witnesses must be proved before their evidence can be admitted. Moreover, the object of the suit in which the depositions were taken was different from that of the present action, and the depositions are not relevant to the issue in the present case, for it has not been proved that the then conditions were the same as the conditions at the present day. Again, the information itself is not evidence, for statements in pleadings are mere flourishes of the draftsman, or suggestions of counsel: *Taylor on Evidence*, 9th ed. pp. 423-4, 552, 1158, §§ 651, 859, 1753.

As to the War Office plans and Labelye's map or chart, and also the reports, &c., these are not "public documents"—that is, documents made for the public use within *Sturla v. Freccia* (3) and *Price v. Earl of Torrington*. (4) They are merely confidential documents. And, moreover, the plans amount to nothing more than statements in a pictorial form by some one—by whom and on what instructions we do not know—of what he may have found on a particular day; they are thus evidence of "particular facts," and so are excluded by the authorities cited. It would be dangerous to admit mere pictures as evidence against a claim of civil rights.

*Levett, K.C.*, in reply. As to the depositions, it is submitted that parol evidence is admissible to prove facts which negative the alleged custom.

As to the reports, &c., they are public documents prepared on a public inquiry and by public officers, and therefore come within Lord Blackburn's judgment in *Sturla v. Freccia*. (3) As to the copy of Labelye's map or chart, it possesses authority as coming from the custody of the Admiralty.

(1) (1840) 6 M. & W. 234, 266; 16 R. R. 524.

55 R. R. 600.

(3) 5 App. Cas. 623.

(2) (1816) 4 M. & S. 486, 493;

(4) 1 Salk. 285; 2 Ld. Raym. 873.

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[VAUGHAN WILLIAMS L.J. referred to Phipson on Evidence, 3rd ed. pp. 316-7, as to the admissibility of documents which are acts of the Crown, citing *Rowe v. Brenton*. (1)]

*Upjohn, K.C.*, and *R. J. Parker*, for the plaintiffs. With regard to *Rowe v. Brenton* (2), a document called a "caption of seisin" was held in that case to be admissible on the ground that everything which concerned the property of the Duchy of Cornwall concerned also the Crown, to whom, under the Charter of Edward III., the Duchy reverts whenever there is no Duke of Cornwall, and therefore such a document is a public document. The "caption" related to the manor of Tewington, and contained a list of the tenants. It was produced from the Office of the King's Remembrancer. (3) The document was admitted as being a "public document," relating to public matters and taken publicly. It came within

(1) (1828) 8 B. & C. 737; 32 R. R. 524.

(2) 8 B. & C. 743, 744.

(3) A translation of the document is to be found in Concanen's full report of the trial of *Rowe v. Brenton* (in Lincoln's Inn Library and in the Bar Library), App. pp. 48 et seq. The original document was at the request of the Court produced from the Record Office in the course of the argument on the appeal in *Mercer v. Denne*. The document is headed

"TEWYNTON.

"Caption of seizin of the manor of Tewinton, to the use of the Lord Edward, Duke of Cornwall, first-born son of the Lord, the illustrious King of England, by James de Wodestoke and William de Monden, assigned by the letters-patent of the Duke, to do the same, on Monday, the 12th day of the month of May, in the year of the reign of King Edward III. after the Conquest of the eleventh."

Then follows a list of the "Free Tenants," "Free Conventioneers," and

"Native Conventioneers," stating in each case the rent and the fine subject to which the tenement is held.

In the same Appendix, at p. 36, the Charter of Edward III., creating the Duchy of Cornwall, is set forth.

In *Rowe v. Brenton* the question was whether copper ore under the plaintiff's tenement, held of the Duchy of Cornwall, belonged to the plaintiff or to the defendant, who claimed to be entitled to the ore under a lease from the Duchy, and the "caption of seisin" was tendered in evidence by the defendant.

The defendant also tendered in evidence an extent of the manor of Tewington taken in the year 1 Edw. 3. This document also was produced from the King's Remembrancer's Office. A copy of this document is given in Concanen's report of *Rowe v. Brenton*, App. pp. 56 et seq. The extent was admitted in evidence on the ground that it must be presumed to have been duly taken under the provisions of 4 Edw. 1, Stat 1.

the definition of a "public document" given by Lord Blackburn in *Sturla v. Freccia*. (1) On the same ground an enrolment of a lease granted by the Duke of Cornwall was admitted in *Rowe v. Brenton*. (2) That case does not authorize the admission in evidence of a document merely because it relates to Crown property. The only question there was whether the Duke of Cornwall was to be treated as a private person, and it was held that as regarded the property of the Duchy he stood in the same position as the Crown. *Rowe v. Brenton* (3) was considered in *Evans v. Taylor*. (4) In that case it was held that a survey of a manor, formerly, but no longer, part of the Duchy of Lancaster, which was produced from the Duchy Office, was not admissible as evidence upon a question as to the boundary of the manor, because the statute *Extenta Manerii*, 4 Edw. 1, Stat. 1, gave no power to define boundaries of manors, and also that the document was not admissible as furnishing evidence of reputation. The mere fact that the document was found among the archives of the Duchy was held to be not sufficient to justify its admission in evidence even on the question of reputation. The argument for admitting the documents in the present case cannot be put even as high as that.

As regards the "Mapp of the Downes," which Farwell J. refused to admit, there is no evidence that it was made by a public officer in the discharge of a public duty. As to the maps and plans produced from the War Office, all that can be said in favour of their admissibility is that they are found in a Government office. They are mere departmental documents, and are not of record.

*Levett, K.C.*, in reply. A "public document" does not mean a document which is open to every one. Lord Blackburn in his definition in *Sturla v. Freccia* (1) did not intend to exclude any document relating to Crown property merely because it was not open to the inspection of the public; that point was not then before him. It was as a record of the

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(1) 5 App. Cas. 623, 643.

(2) 8 B. &amp; C. 756.

(3) 8 B. &amp; C. 737; 32 R. R. 524.

(4) (1838) 7 Ad. &amp; E. 617; 45 R. R. 775.



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property of the Crown that the caption of seisin was admitted in *Rowe v. Brenton* (1)

[VAUGHAN WILLIAMS L.J. Crown property can be transferred only by matter of record: Chitty on the Prerogative of the Crown, p. 389.]

*Evans v. Taylor* (2) is distinguishable from the present case, for no authority for taking the survey was proved, and the statute 4 Edw. 1, Stat. 1, did not apply.

If the alleged custom extends to the accreted land as well as the original land, it is too wide; if it shifts with the alteration of the high-water mark, it may be that the accretion only is subject to the custom and the rest of the land is free from it.

[VAUGHAN WILLIAMS L.J. Is an interlocutory judgment evidence?

*Upjohn, K.C.* Mere interlocutory orders, not involving any judgment upon the rights of the parties, cannot be received: Taylor on Evidence, 9th ed. vol. i. p. 406; *Pim v. Curell* (3); *Rowe v. Brenton*. (4)

VAUGHAN WILLIAMS L.J. Had not the whole of the public an interest in the information?

*Upjohn, K.C.* "Interest" does not mean a merely sentimental interest.

VAUGHAN WILLIAMS L.J. referred to *Thomas v. Jenkins* (5), in which evidence of reputation was admitted to prove the boundary between two estates, it being proved that that boundary was the same as that between two hamlets.]

July 18. VAUGHAN WILLIAMS L.J. This case turns largely upon the admissibility in evidence of certain documents, either as public documents or as evidence of reputation.

In addition to the questions as to the admissibility of these documents, there is the question whether land added by accretion where the sea has gradually receded takes the character of and becomes subject to the same custom as the land to which it has been added.

- (1) 8 B. & C. 737; 32 R. R. 524. (3) 6 M. & W. 234, 265; 55 R. R. 600.  
(2) 7 Ad. & E. 617, 626; 45 R. R. 775. (4) 8 B. & C. 765.  
(5) 6 Ad. & E. 525; 45 R. R. 560.

The documents in respect of which the questions of admissibility were raised were tendered in evidence as proof that the land as to which the custom of the fishermen of Walmer to dry their nets was alleged had been within legal memory covered by the flux and reflux of the tide, a fact which would be inconsistent with the existence of the custom from time immemorial.

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Now the first documents with which Farwell J. dealt, as appears in the report of his judgment, [1904] 2 Ch. at p. 541, were ancient documents all produced from the Record Office. The nature of the documents is stated [1904] 2 Ch. at p. 540. [His Lordship read the statement, and continued :—]

Farwell J. commenced his judgment by reading the following passage from the speech of Lord Blackburn in *Sturla v. Freccia* (1): "I understand a public document there" (i.e., in the judgment of Parke B. in *Irish Society v. Bishop of Derry*) (2) "to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or quasi-judicial, duty to inquire, as might be said to be the case with the bishop acting under the writs issued by the Crown. That may be said to be quasi-judicial. He is acting for the public when that is done; but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards."

It is to be observed that the document the admissibility of which, either as a public document or as coming within the doctrine of *Higham v. Ridgway* (3), was negatived by the House of Lords in *Sturla v. Freccia* (1) was a report made by a committee to the Genoese Government with reference to the qualifications of one Mangini, a candidate for the appointment as agent for that Government, and the object of tendering that report in evidence was to prove the age and birthplace of Mangini. This report did not in any way affect the property or the revenue of the Crown. It was not intended in any sense to be a public record; it was intended to serve only a

(1) 5 App. Cas. 643.

(2) (1846) 12 Cl. & F. 641; 69 R. R. 150.

(3) (1808) 10 East, 109; 10 R. R. 235.

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temporary purpose, namely, to enable the Government to judge of the qualifications of Mangini; it certainly was not intended that the public should make use of it or should be able to refer to it. And, although it may be that the ruling of Lord Blackburn covers the case of a record relating to the alienation of Crown property or a conveyance of property to the Crown, or other records directly affecting the revenue of the Crown, I do not think that Lord Blackburn had such cases present to his mind.

The case of *Rowe v. Brenton* (1) deals to some extent with this point. In that case there was admitted in evidence a "caption of seisin" which was tendered in support of the case of the defendant, who claimed the ore in question in the action "as lessee under the Crown in right of the Duchy of Cornwall." This "caption of seisin" was produced from the King's Remembrancer's Office, which was proved to be the proper depository for the Minister's accounts of the King and the Duke of Cornwall. The document purported to be a "caption of seizin to the use of the Duke of Cornwall by James de Wodestoke and William de Monden, assigned by the letters patent of the Duke to do the same, on Monday the 12th day of May (1338), 11 Edw. 3." It was objected that it was not a public document executed under any public authority, but a mere account of something done under a letter of attorney from the Duke of Cornwall, who was merely a subject, although the highest subject in the kingdom, and that the public had no interest in his acts or in the revenues of the Dukedom, and that consequently this document could not be used for the purpose of affecting the rights of third persons. Lord Tenterden C.J., accepting the proposition that this document could not have been put in evidence if it had been a mere private document, said (2): "In general, that is true. But with regard to the Duchy of Cornwall, the case is very different; for when there is no Duke of Cornwall, the possessions granted to him revert to the Crown. The Crown representing the public, has an interest in everything relating to the Duchy of Cornwall and its revenues; and it is immaterial whether any

(1) 8 B. & C. 737, 755; 32 R. R. 524.

(2) 8 B. & C. 744.

act affecting them is done by the King when there is no Duke of Cornwall, or by the Duke of Cornwall when there is one. The instrument in question is, therefore, a document affecting the interests of the public, and must be received." A much fuller report of this case was published by Mr. Concanen, a barrister, and from his report it appears that, although De Wodestoke and De Monden were Commissioners acting on behalf of the Duke assigned to make the "caption" in question, and the "caption" must have been made in the presence of the conventional or assessional tenants, because they are stated to have made delivery, yet there does not appear to have been anything in the nature of an inquisition in the presence of the tenants, or that anything happened which could justify the conclusion that the commissioners were performing a judicial or quasi-judicial duty. It would seem from Concanen's report that the document was admitted in evidence because it was a register in the King's Exchequer accounts affecting the King's title as against the free tenants, and affecting the King's title by stating the services and privileges of the free tenants, and that the King can only make or give title by matter of record: see Chitty on the Prerogative of the Crown, p. 389, where the learned author says: "It is a clear rule, that, as well for the protection of the King as the security of the subject, and on account of the high consideration entertained by the law towards His Majesty, no freehold interest, franchise, or liberty, &c., can be transferred from the Crown but by matter of record," and he goes on to explain how this is effected. In *Evans v. Taylor* (1) *Rowe v. Brenton* (2) was much discussed, especially that part of it which related to the admissibility of a survey made on an extent taken conformably with the statute *Extenta Manerii*, 4 Edw. 1, Stat. 1, and the Court held that the survey which was tendered in *Evans v. Taylor* (1) was not admissible, because, being made for the purpose of defining the boundaries of a manor, the authority to make it could not be based on the statute, which gives no power to define such boundaries, and no authority to make the survey was proved except under the statute.

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(1) 7 Ad. &amp; E. 617; 45 R. R. 775.

(2) 8 B. &amp; C. 737; 32 R. R. 524.

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I have thought it right to make these observations upon the scope of the judgment of Lord Blackburn in *Sturla v. Freccia* (1), because I think Farwell J. in his judgment carried the ruling of Lord Blackburn rather further than Lord Blackburn himself intended. But, even on the assumption, which I am inclined to think is the right one, that records in the Exchequer of acts done by officers of the Crown in assertion or derogation of the King's title are admissible as against all the world whenever there comes in question in any action a matter directly affected by such a record, I do not think that any of the documents 1 to 7 dealt with in the judgment of Farwell J. are admissible in evidence in the present case. None of those documents is a record affecting the King's property or revenues. The documents were not intended as such. Each of them was to serve only a temporary purpose, and in no way affected Crown property, Crown revenues, or Crown grants when the respective temporary purposes were served.

I agree, therefore, with Farwell J. that none of these documents is admissible as a public document. I also agree with him that none of them is admissible as coming within the doctrine of *Price v. Earl of Torrington* (2), as explained in *Doe v. Turford* (3) and *Smith v. Blakey* (4), which makes it a necessary condition of the admissibility in evidence of the entry made by a deceased agent that it should be an entry of a transaction effected or done by the person making the entry, and that it should be made contemporaneously with the transaction thus effected or done, which, I suppose, means that the entry must be proved to be the last step in a continuous chain of duty, and that it was made in the usual course and routine of that duty.

These conditions are not present with regard to any of these documents. There is nothing to shew that any of them was made contemporaneously with the doing or effecting of a transaction which it was the duty of the deceased person to record. There is no evidence of what his instructions were or of the relation of those instructions to the document tendered in

(1) 5 App. Cas. 643.

(2) 1 Salk. 285.

(3) 3 B. & Ad. 890; 37 R. R. 581.

(4) L. R. 2 Q. B. 326.

evidence, or of the source of the knowledge or information on which the contents of the report or estimate were based. All this may have been mere hearsay as regards the person who made the report.

These reports in no way resemble the field-book entries made by a deceased surveyor for the purpose of a survey on which he was professionally employed, which this Court held to be admissible in *Mellor v. Walmesley*. (1)

The next question dealt with by Farwell J. was that of the admissibility of depositions made in the course of the prosecution of an information by the Attorney-General in 1639 against certain persons who claimed to be entitled to the manor of Walmer for causing, or suffering, the destruction of a bank between the sea and Walmer Castle, whereby the King had been put to great expense in protecting the castle from the sea. These depositions shewed that the sea then came up close to the castle. I observe that in that information a question was also raised as to the title of the Crown, and, if that matter had been dealt with by the interlocutory order which was made on this information, reasons might have been urged for admitting that document in evidence which cannot now be urged, because that order omits all reference to any question of title. The question is whether these depositions are admissible. The parties to the present action are in no sense the successors of any party to that information, and, therefore, if these depositions are admissible as against strangers to that proceeding, it can only be, as Farwell J. said, if they relate to some subject-matter as to which evidence of reputation would be admissible. Speaking for myself, I do not think the admissibility of these depositions can be determined by the subject-matter of the present action. In my judgment, both *Duke of Newcastle v. Hundred of Broxtowe* (2) and *Thomas v. Jenkins* (3) go far to shew that as regards evidence of reputation it is sufficient, when a question arises which is directly affected by the document tendered, if the subject-matter of the reputation is one in which the public are interested. Sometimes

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(1) Ante, pp. 164, 168.

(2) 4 B. &amp; Ad. 273.

(3) 6 Ad. &amp; E. 525; 45 R. R. 560.

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the word "public" means the public at large; sometimes it means a section of the public, such as the tenants of a manor, or the conventional free tenants in the district of Cornwall mentioned in *Rowe v. Brenton*. (1) Therefore, if it had been shewn that these depositions were made by persons to whom it was right to impute knowledge of these matters without any special proof, I should have thought that they might have been admitted in evidence, not quâ depositions, but as something written by the deponents in reference to a subject-matter of public interest. Therefore, in my view, what we have to ask is, first, Was the subject-matter dealt with by that information one of public interest? Otherwise, in my judgment, these depositions could not be admitted as evidence of reputation against strangers to the information. And the second question is, Were the deponents persons to whom we ought to impute such knowledge of the subject-matter as would render their statements evidence of reputation? In *Duke of Newcastle v. Hundred of Broxtowe* (2) the documents which were admitted shewed, it was said, that Nottingham Castle was within the hundred of Broxtowe. The documents were orders of the magistrates with regard to matters over which it was said they had no judicial jurisdiction, but the orders were made by the justices assembled in session, who, although they were not proved to be residents in the county or hundred, must, it was held, "from the nature and character of their offices alone be presumed to have sufficient acquaintance with the subject to which their declarations related." Were then these deponents persons to whom knowledge ought to be thus imputed so as to make their statements in their depositions admissible evidence in the present action? In my opinion they were not; and, this being so, I think their depositions were not admissible. As I take that view, I need not deal with any other question affecting the admissibility of the depositions.

The next documents with which Farwell J. dealt were War Office plans, as to which he said (3): "The War Office plans are clearly within my previous decision—they are not public

(1) 8 B. & C. 737; 32 R. R. 524.

(2) 4 B. & Ad. 273.

(3) [1904] 2 Ch. 544.

documents. So far as they can be treated as evidence at all, they are evidence of particular facts and not of reputation." I agree, although not, perhaps, exactly on the same grounds. These plans were not intended as permanent records affecting the property or revenue of the Crown, or any grant by the Crown. Farwell J. thought that, so far as these plans are evidence at all, they are evidence of particular facts, and not of reputation. I agree, and I think they are not admissible in evidence.

The next matter with which Farwell J. dealt (1) was a map or chart, which, it was ultimately conceded, was on a very small scale and of very little importance. Therefore, I need not trouble myself about that. That being so, I have now dealt with all the questions of admissibility of documents, and in my opinion the judgment of Farwell J. on this point ought to be affirmed.

STIRLING L.J. I am of the same opinion, and have really very little to add, agreeing as I do in substance with Farwell J. Having regard, however, to the very elaborate argument which we have heard, I will say a few words with reference to each class of documents which it has been sought to put in evidence. I begin with the group of documents consisting of reports and letters and other documents made in reference to repairs at Walmer Castle.

[His Lordship read the heading of the survey of May, 1616, as above stated, and continued :—]

It does not appear by whom that survey was made, nor is there any evidence of the instructions given for it, beyond what appears from the document itself. It is said that it ought to be admitted as a "public document." Farwell J. held that it could not be so admitted, because it did not fall within the definition of a "public document" given by Lord Blackburn in *Sturla v. Freccia*. (2) To that it was answered that that definition is not exhaustive, and that in other cases documents have been admitted as "public documents" which did not fall within that definition, and in particular we were

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(1) [1904] 2 Ch. 545.

(2) 5 App. Cas. 643.



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referred to *Rowe v. Brenton* (1), in which a document called a "caption of seisin" was held to be admissible. From the report of that case it appears that King Edward III. in the eleventh year of his reign by charter created his son Edward Duke of Cornwall, and granted to him seventeen manors therein specified. There was produced from the King's Remembrancer's Office an account of the revenues of the Crown property, and that account contained no entries with reference to the manors so granted after May in the eleventh year of Edward III. because, as the account stated, Edward, Duke of Cornwall, had then taken seisin of those manors pursuant to the charter. The document, the admissibility of which was in question, purported to be a "caption of seisin to the use of the Duke of Cornwall by James de Wodestoke and William de Monden, assigned by the letters patent of the Duke to do the same, on Monday, May 12th, 11 Edward III." In my view that was a document of great importance. At the time when those transactions took place, and in the then state of the law, one subject could not, by a mere document in writing, transfer real estate to another subject, but it was necessary that the transaction should be completed by livery of seisin—that is, that there should be a public transfer of the possession of the real estate which was the subject of the conveyance. That being the state of the law between subjects, the Crown was guarded by still greater precautions, and it was laid down in that very case by Bayley J. (2) that "the King cannot alienate the possessions of the Crown but by matter of record." That is in accordance with all the older authorities. Now what was this document? It seems to me that it was the official record of what took place when seisin was taken on behalf of the Duke of Cornwall by James de Wodestoke and William de Monden, and in that sense it was the proper record of the completion of the conveyance to the Duke which was required by the law at that time. It was shewn that it came from the proper office, and was the official record of the completion of the transaction between the King and the Duke. If the persons who were appointed to receive the seisin had been appointed by the King,

(1) 8 B. & C. 737; 32 R. R. 524.

(2) 8 B. & C. 757.

it seems to me that the document would fall almost within the very terms of Lord Blackburn's definition, where he said (1): "The principle upon which it" (i.e., *Irish Society v. Bishop of Derry*) (2) "goes is that it should be a public inquiry, a public document, and made by a public officer. I do not think that 'public' there is to be taken in the sense of meaning the whole world. I think an entry in the books of a manor is public in the sense that it concerns all the people interested in the manor. And an entry probably in a corporation book concerning a corporate matter, or something in which all the corporation is concerned, would be 'public' within that sense. But it must be a public document, and it must be made by a public officer." What the Court decided in *Rowe v. Brenton* (3) seems to me to have been really this—that the fact that these Commissioners, who were appointed for the purpose of taking the seisin, were appointed by letters patent of the Duke, and not by letters patent of the Crown, made no substantial difference as to the nature of the document. But, however this may be, that authority is not in point in the present case, for it is clear that not every document which comes from the possession of the Crown, or from a public office, is admissible in evidence as a "public document." This is shewn by *Evans v. Taylor* (4), in which a document produced from the office of the Duchy of Lancaster was of the time of Queen Elizabeth, "and purported to be a survey of the manor, taken by J. W., deputy of the Surveyor-General of the Duchy, by authority of letters of deputation to J. W., by the oaths and presentment of such of the tenants of the manor whose names were subscribed." It was tendered as evidence of the boundary of a particular manor, and it was said to be admissible both on the ground that it was a "public document," and also that it furnished evidence of reputation. The Court held that it could not be admitted as a "public document," because, assuming that it was made in discharge of a duty imposed by the statute 4 Edw. 1, Stat. 1, that statute gave no power to define the boundaries of manors, and, therefore, the document

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(1) 5 App. Cas. 643.

(3) 8 B. &amp; C. 737; 32 R. R. 524.

(2) 12 Cl. &amp; F. 641; 69 R. R. 150.

(4) 7 Ad. &amp; E. 617; 45 R. R. 775.

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was not admissible with reference to a matter outside the statute. It was also held that the document was not admissible as evidence of reputation in the absence of evidence as to the authority by which the survey was made. In the present case also there is no such evidence. The only statement is that which appears at the head of the survey. On that ground it seems to me that it is not admissible as a "public document."

The next ground on which it was sought to have it admitted was as evidence of reputation. Now the action relates to the existence of a custom for the fishermen of Walmer to dry their nets on a particular plot of land, and the nature of the action is certainly such that evidence of reputation would be admissible. But what is the purpose for which it is sought to have this evidence admitted? The evidence does not in any way relate to the alleged custom, nor even to the plot of land over which the custom is said to be exercisable. It relates to the state of the foreshore adjoining the Castle of Walmer and the Castle of Deal in the early part of the seventeenth century. The object is to establish that at that period the sea flowed twice a day over the locus in quo, the plot over which the custom is said to be exercisable, and it is said that by establishing where the sea flowed at that time at Walmer Castle and at Deal Castle, between which castles the locus in quo lies, it will be shewn that that plot of land was at that time subject to the flux and reflux of the sea, and, therefore, the custom must have arisen at a subsequent date, and consequently does not satisfy the requirements of the law as to the period of time at which it began. In my opinion that is not a matter of reputation. It is laid down in all the cases that when reputation is admissible, evidence of particular acts ought not to be allowed. That is laid down in *Reg. v. Bliss*. (1) There the question was whether a particular road, which was admitted to exist, was public or private, and "evidence was offered that a person, since deceased, had planted a willow on a spot adjoining the road, on ground of which he was a tenant, saying, at the same time, that he planted it to shew where the boundary

(1) 7 Ad. & E. 550; 45 R. R. 757.

of the road was when he was a boy." It was held "that such declaration was not evidence, either as shewing reputation, as a statement accompanying an act, or as the admission of an occupier against his own interest." All the learned judges there said that evidence of particular acts cannot be admitted under reputation. Patteson J. said (1): "It was agreed here that the alleged road was a road of some sort; the evidence was not necessary as to that; and the reputation which it was attempted to introduce was of a particular fact." And Coleridge J. said (2): "Then it stands that Ramplin" (the person whose acts and sayings it was sought to introduce) "said he planted the tree for a certain purpose; namely, to shew the boundary. That is a particular fact; and evidence given of it is like proof of old persons having been heard to say that a stone was put down at a certain spot, or that boys were whipped, or cakes distributed, at a particular place, as the boundary; which statements would not be admissible." In my opinion the evidence which it is sought to introduce here falls under the same class, and is not admissible under the head of reputation.

Lastly, it was said that the document was admissible on the ground on which entries in books were admitted in *Price v. Earl of Torrington*. (3) That doctrine has very considerable limitations, as was pointed out by Blackburn J. in *Smith v. Blakey*. (4) There the question arose as to the admissibility of a letter. The head-note is as follows (5): "It was the duty of a confidential clerk, who managed a branch business of the plaintiffs, as general merchants, to keep them duly advised of all business transacted; in discharge of this duty, he wrote them a letter, stating that the defendant had sent three cases to the office, and giving details of the transaction under which they were sent:—*Held*, that this letter was not admissible in evidence against the defendant after the clerk's death, as it was neither a declaration against direct pecuniary interest, nor an entry made in the discharge of a duty to do a particular act

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(1) 7 Ad. &amp; E. 554.

(3) 1 Salk. 285.

(2) Ibid. 556.

(4) L. R. 2 Q. B. 322.

(5) L. R. 2 Q. B. 326.

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and make a record of it.” And Blackburn J. said (1): “Then it is said, if not a statement against interest, the letter is admissible as a memorandum made in the course of business and in the discharge of a duty to Barker’s principals. But the rule as to the admission of such evidence is confined strictly to the entry of the particular thing which it is the duty of the person to do, and, unlike a statement against interest, does not extend to collateral matters, however closely connected with that thing. A strong instance of the distinction is the case of *Chambers v. Bernasconi* (2) in the Exchequer Chamber. The reason of the distinction is not at first sight very obvious; but I think all the cases shew that it is an essential fact to render such an entry admissible, that not only it should have been made in the due discharge of the business about which the person is employed, but the duty must be to do the very thing to which the entry relates, and then to make a report or record of it.” Then, after referring to several cases amongst which was *Doe v. Turford* (3), the learned judge said (4): “In the last case” (that is *Doe v. Turford*) (3) “Parke J. points out that an entry in the course of business to be admissible must be made at the very time of the transaction, whereas an entry against interest may be made at any time; and this explains the distinction: if the nature of the duty must be to do a particular act and make a record of it at once, the time at which the entry is made is of great consequence, and goes to the essence of the admissibility, which is confined to the matters which it is the duty to record. It at once follows that the present statement was not admissible, and ought not to have been received.” Then Lush J. said (5): “When an entry is said to be admissible, as made in the course of duty, it is not meant that every entry or statement which it is the duty of the deceased to make can be used in evidence against third persons; but the exception is limited to the case in which it was the duty of the deceased to do a particular thing and to record the fact of having done it.” This survey does not appear to me to fall within the rule as thus

(1) L. R. 2 Q. B. 332.

(2) 1 C. M. & R. 347; 4 Tyrw. 531;  
 40 R. R. 604.

(3) 3 B. & Ad. 890; 37 R. R. 581.

(4) L. R. 2 Q. B. 333.

(5) Ibid. 335.

laid down, and in this respect the case is entirely distinguishable from *Mellor v. Walmsley* (1), in which this Court admitted the entries made by a surveyor at the time in his field-book in reference to a survey which he was employed to make. I have confined my remarks to the specific document which stands first in the class of documents of this kind, but they apply equally to the other documents in that class.

Besides this class of documents, there are some other documents of a different kind. The second class consisted of depositions in the suit *Attorney-General v. Hugeson*, which related to acts said to have been done by the defendants between the Castle of Walmer and the sea, by reason of which the sea had encroached on the property of the Crown. That action was never brought to a final hearing. The only thing, so far as we know, was that an interlocutory order was made, not disposing of the action, but giving the Attorney-General liberty to file a further information if he should think fit. That does not appear to have been done; but what would be most material for the purpose of the present action, if they be admissible, are the statements of the witnesses, in their sworn depositions in answer to interrogatories, with reference to the flux and reflux of the sea in the neighbourhood of Walmer Castle at the time when that suit was going on. In my judgment (and I need not repeat what I have already said) these statements could only be admitted as evidence of reputation, and the matters to which they relate are, for the reasons which I have already given with reference to the survey, not matters of reputation, but are evidence with regard to particular facts which it is intended to use, not for the purpose of establishing the custom, or of destroying it, but from which, by way of inference, the custom is to be negatived. I think, therefore, that on that ground these depositions are inadmissible.

Lastly, there are some plans, which come from the War Office, of Walmer Castle and Deal Castle. Again, it is sought to introduce these plans on the ground that they are "public documents," and also as evidence of reputation. In my opinion, they are not admissible as "public documents"

(1) *Ante*, pp. 164, 168.

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because we do not know how they came to be prepared. And, for the reasons which I have already given with reference to the other documents, I think these plans are not admissible as evidence of reputation. I think, therefore, that the decision of Farwell J. on this part of the case ought to be affirmed.

COZENS-HARDY L.J. I agree with Farwell J. on all the points decided by him as to the admissibility of documents, and I should not be justified in taking up any more time. But I wish to make two remarks. There has been a great deal of discussion about *Rowe v. Brenton* (1) and a "caption of seisin," and the reasons for which that document was admitted in evidence. The matter, as it seems to me, is made reasonably clear by the full report of the case by Mr. Concanen: see pp. 109, 110. That report, I think, shews that the "caption of seisin" was in the nature of, if it was not actually, a record, and within the principle applicable to that class of documents. It follows, I think, that *Rowe v. Brenton* (1) is not a decision which justifies the admissibility of any kind of survey or document which may be found in the War Office or which belonged at some former time to some Government department.

As regards the depositions in *Attorney-General v. Hugeson*, I think the judgment of Lord Abinger C.B. in *Pim v. Curell* (2) supplies clear and ample authority for the view which has been taken by my learned brethren on this point.

The argument then proceeded on the merits.

*Levett, K.C., Jenkins, K.C., and Gatey*, for the defendant. A custom is established by usage, but to be a good custom it must be certain: 7 Viner's Abr., Customs, pp. 165, 183; Year Book, 8 Edw. IV. pp. 18, 19; the case of *Tanistry* (3); 2 Bacon's Abr., Customs, pp. 564, 566, 573, 575, 576. Here, the custom is void for uncertainty and has been enlarged beyond the usage. A custom is a local law, as fully explained by Jessel M.R. in *Hammerton v. Honey* (4); and there is no authority that a local law affecting certain land can be altered

(1) 8 B. & C. 737; 32 R. R. 524.

(3) (1608) Davies Rep. 78, 82.

(2) 6 M. & W. 234, 266; 55 R. R. 600.

(4) (1876) 24 W. R. 603.

by an accretion to that land, especially by such gradual and imperceptible accretion as has taken place here. This accretion has occurred within comparatively recent years, and therefore it is impossible to say that there has been a custom of spreading nets affecting the accreted land from time immemorial. Moreover, the present user is far in excess of the old user or custom simply to dry nets, for until thirty years ago there was no user at all for sprat nets; and, further, oiling nets is quite a recent practice, the oiling being done in the course of manufacturing the nets, not of fishing, and the time required for drying these oiled nets, some seven or eight weeks, throws an excessive and unreasonable burden on the land. Such a user, it is submitted, is bad, for there can be no prescriptive right so large as practically to exclude the owner of the land from any enjoyment of his land: *Dyce v. Hay*. (1) The learned judge seems to have overlooked the White Herring Fisheries Act, 1771 (11 Geo. 3, c. 31), which recognised only the white herring and mackerel fisheries, so that the user or custom was in respect of those fisheries only. Again, the custom is not a right to use the land "at all times," but to use it intermittently at a restricted period before and after each fishing season: *Scrutton v. Brown*. (2)

The doctrine of accretion applies as much to local law as to rights of property. The question, then, here is, Does the accretion become part of the old land? The law of accretion comes down from the old Roman law, and is a question of property: Justin. Inst. book ii. tit. 1, ss. 20, 21. The doctrine of accretion should be disregarded, for custom cannot attach to land formed by accretion, which does not affect the relative rights of the parties: *Attorney-General v. Chambers* (3); *Foster v. Wright*. (4) It is therefore submitted (1.) that the existence of the custom claimed has not been sufficiently proved; (2.) that the only custom proved is that over one particular piece of ground; and (3.) that the plaintiffs cannot acquire any right over the land added by accretion.

(1) (1852) 1 Macq. 305.

(3) (1859) 4 De G. &amp; J. 55, 67-8.

(2) (1825) 4 B. &amp; C. 485; 28 R. R.

(4) (1878) 4 C. P. D. 438.



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*Upjohn, K.C.*, and *R. J. Parker*, for the plaintiffs. It is submitted that the White Herring Fisheries Act (11 Geo. 3, c. 31), does not limit the plaintiffs' rights in any way.

[VAUGHAN WILLIAMS L.J. You need not discuss that point. It is obvious that the user by the fishermen extended to all kinds of fishing.]

Then as to the oiling of the nets. The evidence shews that the practice of oiling the nets came into use about thirty-five years ago.

This comparatively recent practice cannot destroy the custom previously in force. That custom extends to any reasonable mode of drying nets, and is not necessarily confined to the one mode originally in use. For instance, a custom of playing "all lawful games" on a close has been held to be a good custom, and to justify all games coming into vogue from time to time: *Fitch v. Rawling*. (1) So a custom to ferry the inhabitants of a vill free of toll is not destroyed by an increase of traffic resulting from an increase of population: *Pain v. Patrick*. (2) The objection that there will be an increase of the burden on the servient tenement, which may apply to an easement by grant or prescription, as in *Dyce v. Hay* (3), does not apply to a right arising by custom: *Pain v. Patrick*. (4)

[VAUGHAN WILLIAMS L.J. referred to *Millechamp v. Johnson*. (5)]

That case was dealt with in *Hall v. Nottingham* (6), which followed *Fitch v. Rawling*. (1) In *Blundell v. Catterall* (7) it was assumed that a custom to spread nets for drying was good.

The mere fact that the sea has occasionally flowed over a strip of land does not constitute an "interruption" of the customary right of user of that land; there would be merely a temporary physical inability to make use of the land for the purpose: *Hammerton v. Honey*. (8) The nature of "custom" or "local common law" was fully explained by Jessel M.R. in that case.

(1) (1795) 2 H. Bl. 393; 3 R. R. 425.

(2) (1690) 3 Mod. 289.

(3) 1 Macq. 305.

(4) 3 Mod. 293.

(5) (1746) Willes, 205, n.

(6) (1875) 1 Ex. D. 1.

(7) (1821) 5 B. & Al. 268, 295-6; 24 R. R. 353.

(8) 24 W. R. 603.

[VAUGHAN WILLIAMS L.J. The interruption of a right is a distinct thing from the failure to prove the necessary continuity of user.]

“The title, being once gained by prescription or custome, cannot be lost by interruption of the possession for ten or twenty yeares, but by interruption in the right”: Co. Litt. 114 b. The mode of the exercise of a customary right may vary from time to time: *Fitch v. Rawling*. (1) There is no evidence of the sea coming over the land prior to 1795. Suppose the custom had been established in an action in 1790, would the right have been lost because the sea had afterwards flowed over the margin of the land and had then receded again? The custom must apply to land adjoining the sea, and the margin of the sea varies from time to time. What length of interruption would destroy the right? It would be destroyed altogether, if at all. If the right by custom once existed, it would, as Jessel M.R. said in *Hammerton v. Honey* (2), require an Act of Parliament to take it away. Suppose there was a war, and all the Walmer fishermen were drafted into the King’s naval service, so that they could not exercise the customary right, would this destroy it? It is submitted that in such a case the right would continue, though there would be a discontinuance of the possession or exercise of the right. Suppose there were a custom for the inhabitants of a vill to water their cattle at a particular stream, and the stream were to dry up and disappear, would the right be lost if the stream should afterwards reappear?

[VAUGHAN WILLIAMS L.J. I am inclined to think there may be an intermittent customary right.

COZENS-HARDY L.J. Interruptions of the exercise of the supposed right would make it more difficult to prove the existence of the custom.]

It should, it is submitted, be presumed that this custom extended over the land lying between Wellington Road and the high-water mark for the time being.

If this be so, it is not necessary to rely upon the law of accretion. But under that law an accretion to land, resulting

(1) 2 H. Bl. 393, 398; 3 R. R. 425.

(2) 24 W. R. 603, 604.

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from the gradual recession of the sea, is treated as never having taken place; in other words, the land is treated as having been in substance always the same land, and subject to the same customary rights and easements: *In re Hull and Selby Ry. Co.* (1); *Foster v. Wright* (2); *Attorney-General v. Chambers* (3); *Hindson v. Ashby*. (4) If the land were in Kent the custom of gavelkind would apply to the accretion. Otherwise, the accretion would be outside the county of Kent and free from the custom of gavelkind. So also, if the accretion were an addition to the waste of a manor. The freehold tenants of a manor have a prescriptive right over the waste, and the copyhold tenants might have a right by custom: *Gateward's Case*. (5) How could a distinction be made for this purpose between the freehold tenants and the copyhold tenants? Would they not both have the right over an accretion to the waste? *Attorney-General v. Chambers* (3) and *In re Hull and Selby Ry. Co.* (1) shew that both must stand in the same position.

Suppose there were a customary right to cross the foreshore for the purpose of bathing in the sea: would the right be lost by the receding of the sea for a distance of one foot, because the strip of land added could not be crossed without committing a trespass? An accretion to land which is copyhold of a manor would be subject to the custom of the manor: *Rex v. Lord Yarborough*. (6)

It is said that this would render the custom unreasonable, because land a mile in width might be in time added by accretion. The answer is that that event has not happened, and the mere possibility of its happening will not invalidate the custom: *Tyson v. Smith*. (7) If the rate of accretion was one foot in a year, it would take more than 5000 years to add a mile. Moreover, in that time there might be an alteration and the sea might gain upon the land. Those who

(1) (1839) 5 M. & W. 327, 333; (6) (1824) 3 B. & C. 91; (1828) 52 R. R. 733. 2 Bligh. (N.S.) 147, 158; 27 R. R.

(2) 4 C. P. D. 438, 448.

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(3) 4 De G. & J. 55, 68.

(7) (1838) 9 Ad. & E. 406, 421;

(4) [1896] 2 Ch. 1, 12.

48 R. R. 539.

(5) (1606) 6 Rep. 59 b.

have the risk of losing in that event ought also to have the chance of gaining in the opposite event. Moreover, the class of fishermen may increase in number.

[VAUGHAN WILLIAMS L.J. Ought a custom to be measured by the needs of those who benefit by it? Ought the landowner to be hampered in the use of his land?]

A custom extending over a fixed distance from high-water mark would be bad. It might carry the right into another parish. On the other hand, it might be futile; it might carry the exercise of the right away from the upper part of the beach, which is the most suitable for drying nets because it is composed of shingle, and limit it to the lower part, which is sand and more likely to be wet.

There is a difference between an entire discontinuance of the user and a continuance of the user, though for a time it is exercised over a more limited extent of land. Suppose a part of the waste of a manor were at one time covered with thick gorse, or a quarry were opened on part of the waste, that would not exempt such a part of the waste from the customary right of the tenants, but if the gorse was removed or the quarry ceased to be worked and grass grew there again, the right of the tenants would still continue on that part of the waste.

It is not disputed that during the last fifty or sixty years the sea has on the whole receded at the "beach ground." But, even if the defendant can prove that 100 years ago the high-water mark was much further inland than it is now, there is no presumption that it was so in the reign of Richard I. There may have been changes backward and forward since then. From the state of things at the date of a map of 1795 no inference can be drawn as to the state of things in the time of Richard I.

The cases which have been decided with regard to excessive user of an easement have no application in the present case, in which there are not a dominant tenement and a servient tenement. There is no analogy between the alteration of the dominant tenement, so as to increase the burden upon the servient tenement, and an alteration in the manner of carrying

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on the trade or business of the fishermen. The only question is whether the drying of oiled nets is within the custom—does the custom include this particular mode of drying nets? This might no doubt bear upon the question of reasonableness. It may be reasonable that the custom should enlarge so as to admit a modern method of drying. All customs are an infraction of the common law, and they must be justified by public utility. By this test “reasonableness” must be judged. That is the object which renders the custom lawful. If the custom is to be limited to the material of which nets were made in the time of Richard I. all modern improvements would be prevented. If there were a right of way over land for church purposes, the user would not be excessive if the vicar were to have daily service in the church when there had been services on Sundays only. The question is whether the particular user is within the reason or object of the custom; if it is, the user is reasonable. To render the user unreasonable it must be destructive of the inheritance, or such as in effect to deprive the owner of his inheritance.

An accretion to land should enure to the benefit of each person who is interested in the land according to his interest whatever it may be, even if his interest is an easement in gross. The question of accretion is a question of common law, and has nothing to do with the reasonableness of the custom. A close of land to which there has been a gradual accretion is considered by the law as having been always the same close. A custom will not be void for uncertainty because it extends to accrued land. Of course, every customary right must be exercised reasonably—there must be a *bonâ fide* exercise of the right.

As to the alternative claim under the Prescription Act. Both a profit à prendre and an easement are parts of the right of ownership of the property. It is submitted that for this purpose there is no distinction between the property at large and a separated portion of it. Either may be acquired by prescription, though the period of prescription is not the same. It is contended that s. 2 of the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), applies to an easement in gross. The word

“custom” occurs in this section. No doubt the decisions in *Mounsey v. Ismay* (1) and *Shuttleworth v. Le Fleming* (2) are contrary to this view. In the latter case it was expressly decided that s. 2 does not apply to easements or profits à prendre in gross, but that there must be a dominant and a servient tenement. Those decisions are not binding on this Court, and it is contended that the ratio decidendi of them is inconsistent with the decision of the House of Lords in *Dalton v. Angus* (3), and also with *Simpson v. Godmanchester Corporation* (4) and *Lemaitre v. Davis*. (5)

*Levett, K.C.*, in reply. Neither *Mounsey v. Ismay* (6) nor *Shuttleworth v. Le Fleming* (7) was cited in *Dalton v. Angus* (8), and indeed the point was not even mentioned there. The ground of that decision is shewn by Lord Selborne’s observations. (9) He says that the doctrine of ejusdem generis cannot be applied to s. 2 of the Prescription Act so as to confine its operation to rights of way and rights of water. Those two cases have never been doubted, and they are ample authority for holding that no easement is within s. 2 unless there is a dominant tenement. It was so in Roman law: Institutes of Justinian, lib. ii. tit. iii. s. 3. The statement in the note at p. 11 of Gale on Easements, 7th ed., that Lord St. Leonards in *Dyce v. Hay* (10) expressly laid down “that a dominant tenement is not necessary for the existence of an easement according to the English law,” is not justified by what Lord St. Leonards there said. “An easement must be connected with a dominant tenement”: per Lord Cairns L.J. in *Rangeley v. Midland Ry. Co.* (11) There cannot be an easement by local custom; the word must have its common law meaning: see Carson’s Real Property Statutes, p. 5.

It is not disputed that the plaintiffs are entitled to dry their nets on the “beach ground” at the end of the season—namely, after they have been used and wetted in the sea. They, however,

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| (1) (1865) 3 H. & C. 486.        | C. 486, 498.                      |
| (2) (1865) 19 C. B. (N.S.) 687.  | (7) 19 C. B. (N.S.) 710, 711.     |
| (3) (1881) 6 App. Cas. 740, 798. | (8) 6 App. Cas. 740.              |
| (4) [1897] A. C. 696, 709.       | (9) Ibid. 798, 799.               |
| (5) (1881) 19 Ch. D. 281.        | (10) 1 Macq. 312.                 |
| (6) (1863) 1 H. & C. 729; 3 H. & | (11) (1868) L. R. 3 Ch. 306, 311. |

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claim a right to spread and dry their nets also after oiling and cutting. That would be an unreasonable custom, and it would prevent all other use of the land. There cannot be a right in any one to make nets for sale and oil or cutch them and then spread them to dry before they have been actually used for fishing. The only custom of this sort known to the law is a custom to dry nets after fishing: Viner's Abridgment, 2nd ed. vol. vii. p. 183; Bacon's Abridgment, 7th ed. vol. ii. p. 566. The plaintiffs have pleaded and endeavoured to prove too large a custom. They cannot take advantage of the small part which has been proved and drop the rest: *Hammerton v. Honey*. (1) It is said to be only a development of the custom; but there is no authority to shew that a burden imposed on land in the time of Richard I. can be increased. The plaintiffs cannot saddle the defendant's part of the shore with so large a custom.

[VAUGHAN WILLIAMS L.J. I think the custom applies to the whole of the coast of Kent: *Fitch v. Rawling* (2); *Rex v. Lord Yarborough*. (3)]

The beach is much larger now than it was at the date of the commencement of the custom. There can be no right to dry nets on the accretions to land. There is no law which can extend the custom to the accreted land. By common law the accretions belong to the adjoining land. That does not interfere with local customs. If a church path is bounded on one side by the foreshore and the sea recedes 100 yards, there is not a right of way over the whole width. Whether a custom is reasonable depends upon the peculiar circumstances of the case: Co. Litt. sec. 165 (110 b).

If the plaintiffs had alleged a custom to dry their nets on a reasonable extent of beach near the sea it might have been upheld, but they do not suggest that. To prove an easement over a shifting area would involve great legal difficulties. If they had proved their right, it might have followed that they had a right of access to the spot from the sea.

*Cur. adv. vult.*

(1) 24 W. R. 603, 604.

(2) 2 H. Bl. 393, 398; 3 R. R. 425.

(3) (1828) 5 Bing. 163; 27 R. R. 305.

Aug. 11. The following judgments were read :--

VAUGHAN WILLIAMS L.J. This is a difficult case. Most cases with regard to validity of custom are difficult of decision. The fact is that reason recoils from the proposition that legal memory goes back to an arbitrary date at the beginning of the reign of Richard I., A.D. 1189, and, if one finds proof of uninterrupted modern usage, there is a natural inclination to presume the previous existence of the custom right back to 1189, even though the facts may be such as to force upon reason the conclusion that the modern usage could not in fact have been adopted for more than a few generations. Judges, therefore, presume everything possible which would give a custom a legal origin, and find in favour of a manifestly modern custom as being an extension which falls within the reason of so much of the modern usage as may well have existed throughout legal memory. I think that in the present case it is very difficult in reason to arrive at the conclusion at which Farwell J. seems to have arrived, namely, that the drying of nets after cutting or oiling can be treated as a mere expansion, with the changes which take place in the circumstances of mankind, of the ancient custom of drying nets wet with sea water when taken out of the fishing boats on their return to the shore after fishing. Nor do I think that the validity of the latter custom, established by so many dicta in the books and old cases, is in any sense conclusive of the reasonableness or validity of a custom to dry nets after cutting or oiling them in preparation for their use in sea fishing. It may be perfectly reasonable in favour of commerce and navigation to invade private property forming part of the beach, because it is so convenient to dry the nets wet and heavy with sea water on the nearest part of the beach suitable for such a purpose, since it is difficult to see how in many parts of the coast, where cliffs or other causes make the inland difficult of access, sea fishing by nets could be carried on otherwise. But it by no means follows that it is reasonable in favour of commerce and navigation to bring from the land behind the beach nets which have been cutched or oiled at some inland spot and dry them on a part of the beach which

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is private property. The drying, at all events after oiling, burdens the land with the nets for a much longer period than does the drying of the nets after being wetted with sea fishing. But this difficulty arises: If the Court treats the drying of the nets after oiling as a usage or custom to be tested as to reasonableness or unreasonableness, or whether or not it is contrary to the public good, or injurious or prejudicial to the many, the Court will clearly be dealing with a modern usage arising within living memory. I am not at all sure that the proper inference to draw from the evidence and from the use of the word "cutching" (derived from "cutch," a plant of great astringent power, imported in great quantities from the Malay Archipelago, which, so far as the evidence goes, seems to be still used to prepare and preserve the nets for fishing) is not that the process of cutching first began to be used in the eighteenth or nineteenth century. But perhaps the Court may assume without evidence that some process of tanning nets before using them for sea fishing has prevailed ever since the date of legal memory. Of course, if these customs are to be treated otherwise than as the expansion of the old custom, the custom relied on by the plaintiffs could not be supported. But I have persuaded myself that the Court may regard the custom (as Cozens-Hardy L.J. says in his judgment) as a custom for fishermen "to dry nets at all times necessary or proper for the purposes of the trade or business of a fisherman," and the modern usage of drying after cutching or oiling as a development of an ancient custom to do all the drying necessary or proper for the trade or business of a fisherman on the beach, and may so regard the custom, notwithstanding the increase of the burden on the land resulting from the modern user.

As to the contentions of the defendant based on the recession of the sea and usage of a part of the beach, now free of sea but formerly covered by sea water, not raising a custom in respect of the land gained by the gradual and, as it proceeded, imperceptible recession of the sea, I think those contentions fail entirely, for the reasons given in the judgments of my brothers, which I have had the advantage of reading. But I wish to add this, that I think there is evidence in this case to

shew that the practice of drying nets has really in time gone by extended to any convenient places on the seashore, and not only to the eleven acres of land in question, although of late years the shingle beach, of which the eleven acres consists, has afforded the most convenient spot for drying after oiling and cutting, and has, therefore, come to be freer of weeds and vegetable growth than other parts where the beach adjacent to Walmer happens to be shingly. Moreover, it seems to me that the right of drying nets must have always been exercised on the shingly ground which happened for the time being to be nearest to the foreshore and yet generally free from overflowing by the sea at high tides. If this view were taken of the evidence the result would be that the drying would, by following the receding sea, always take place on that part of the beach convenient for drying nets which is next to the sea. This part of the beach, although covered by the sea in times gone by, would, on the principles which the Court has recognised in respect of land gained by accretion, be subject to the custom in favour of drying nets, and the area subject to the custom would always be adjacent to the sea. Take the beach which is now nearest to the old Cinque Port of Rye, which is now miles away from the port, though the sea formerly was immediately adjacent, it would be difficult to my mind to avoid the conclusion that the drying area must in such a case follow the sea. The custom began at the boundary between beach and sea. As the sea imperceptibly retires the law does not recognise any alteration in the land owned, or that there are new boundaries farther away from the centre of the close, and, on the same principle, the area of drying would always be adjacent to the boundary for the time being between the beach and the sea. Such a custom would obviously be more reasonable than that which we are supporting. But neither the plaintiffs nor the defendant put forward at the trial or since this view of the custom. On the contrary, when I suggested it during the argument, both sides rejected it. This being so, I do not think it ought to be taken into consideration in this case. The result is that I agree with the rest of the Court that this appeal should be dismissed, with costs.

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STIRLING L.J. In this case the plaintiffs, on behalf of themselves and all other persons carrying on the trade or business of a fisherman in the parish of Walmer, claim a customary right to dry their nets upon a piece of ground (called the "beach ground"), covered with shingle, situate near the sea, and lying between the grounds of a house known as Walmer Place on the north, the grounds of Walmer Castle on the south, a public road called Wellington Road on the west, and the foreshore on the east, and contains at the present time about eleven acres. The evidence of living witnesses shews that for a period extending over seventy years, and by reputation for many years earlier, the inhabitants of Walmer who are fishermen have used so much of this piece of land as was not for the time being covered by the sea for the purpose of drying their nets in the following way: Down to a period of from twenty-five to thirty-five years ago, immediately before the commencement of the mackerel and herring fisheries respectively, the nets intended for use in those fisheries were tanned or cutched and brought to the "beach ground" and there dried; and, at the close of each of those seasons, the same nets were again brought there and dried before being put away until next required. From twenty-five to thirty-five years ago the practice of tanning or cutching nets was discontinued, and in lieu thereof the nets were oiled, and the oiled nets were taken to the beach ground and dried there in the same way as the cutched or tanned nets had previously been dried. As I read the evidence, sprat nets were never taken there at all until the introduction of oiling; but from that period the sprat nets, being oiled, have been taken there and dried. This user has extended over the whole eleven acres, except where for the time being covered by the sea. It was admitted in this Court (and, in my opinion, rightly) that a custom for fishermen to dry nets, which had become wetted by use in fishing, on a particular piece of land was good; but it was said that a custom to dry nets, which had not been wetted by the sea, but only in the process of tanning, cutching, or oiling preparatory to use for fishing, was bad; and that, as the evidence shewed that the alleged custom extended to such

drying no less than to drying at the end of the several fishing seasons, the alleged custom was bad in toto. Now the ground on which the custom to dry nets in the strict sense of the word has been upheld is that it is in favour of "fishing and navigation": Bacon's Abridgment, vol. ii. p. 566; and see what is said by Tindal C.J. in *Tyson v. Smith*. (1) The tanning, cutching, or oiling of nets belonging to fishermen tends to preserve the nets and make them useful for a longer period, and the subsequent drying of nets seems to me to fall within the reasons thus assigned for the custom. It is laid down by Holt C.J. in *City of London v. Vanacre* (2) that "general customs may be extended to new things which are within the reason of those customs." There is not, in my opinion, evidence from which it ought to be inferred that the practice of tanning or cutching has arisen within the time of legal memory. But it was said that, so far as related to the drying after oiling, the user has extended over a period of from twenty-five to thirty-five years only; and, moreover, that this user was more burdensome than the old user for drying after tanning or cutching. I think, however, that the law as laid down by Lord St. Leonards in *Dyce v. Hay* (3), cited by Farwell J., applies, and that those who are entitled to the benefit of a custom ought not to be deprived of that benefit simply because they take advantage of modern inventions or new operations, so long as they do not thereby throw an unreasonable burden on the landowner. The evidence does not convince me that an unreasonable burden has been cast on the owner. The practice has been in existence for twenty-five years at least, without any objection being raised until the land recently passed into the hands of the defendant, although, during the greater part of that time, the property belonged to one who seems to have stood on his rights, and to have objected to anything which went beyond the custom as stated. (See the evidence of the defendant's witness, William Thomas Hoyle.)

It is next said that a considerable portion of the "beach ground" consists of an accretion during the last fifty or sixty

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(1) 9 Ad. & E. 406, 421; 48 R. R. 539.

(2) (1699) 12 Mod. 270, 271.

(3) 1 Macq. 305, 312.

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years, and that the custom cannot extend to that part. Custom, it is argued, is a local law, which must have existed from time immemorial—that is, from the beginning of the reign of Richard I.—and cannot be applicable to land which can be shewn to have emerged from the sea in modern times. In *Rex v. Lord Yarborough* (1) it was established that lands “formed by alluvion, that is by gradual and imperceptible deposit, on the shore of the sea,” belonged, not to the Crown as owner of the foreshore, but to the owner of the demesne lands of a manor, which were formerly bounded by the sea, as parcel of those demesne lands. Every manor must have existed prior to the statute of *Quia Emptores*; but it was not suggested that the operation of the rule was excluded by reason of the accretions having taken place in modern times. The reason of that rule is stated by Alderson B. in *In re Hull and Selby Ry. Co.* (2) to be “that which cannot be perceived in its progress is taken to be as if it never had existed at all.” This was approved by Lord Chelmsford in *Attorney-General v. Chambers* (3), and has been applied in the present case by Farwell J., who held that this accretion is to be treated as though it had occurred in 1189.

It was insisted, however, that the doctrine of accretion is a rule of property law, and has nothing to do with custom, which is truly described as a local law. No authority was cited in support of this contention, and I am unable to agree with it. The local law points out the particular piece of land on which the right is to be exercised; and then the rule of the common law steps in and says that, where imperceptible accretion has occurred, the piece of land is to be treated as having been as it is from the commencement of legal memory. Lastly, it was urged that other lands in the neighbourhood of Walmer were subject to the same custom; and that the whole burden was being thrown on the defendant’s land. The evidence does not appear to me to shew with certainty that there are other lands subject to the custom; but, even if it

(1) 2 Bligh. (N.S.) 147; 27 R. R. 292.      (2) 5 M. & W. 327, 333; 52 R. R. 733.

(3) 4 De G. & J. 55, 68.

were otherwise, all that the defendant would have to complain of would be an excessive user of his land, and this would not deprive the plaintiffs of the right to a reasonable use of the "beach ground." I am, therefore, unable to differ from Farwell J., and I think that the appeal ought to be dismissed.

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COZENS-HARDY L.J. This is an appeal from a judgment of Farwell J. establishing the right of the fishermen of Walmer to dry their nets on some land known as the "beach ground," the property of the defendant. I might content myself with saying that I agree, not only with the judgment, but also with the reasoning upon which that judgment is based. The only exception or qualification I should make is that, after the advice we have received from the officer sent by the Admiralty to assist us, I do not interpret Spencer's chart of 1795 in the manner which, upon the expert evidence at the trial, Farwell J. adopted. This, however, is not really of importance. The scale is so small that no safe inference can be drawn as to the precise line of high water at the spot in question in 1795. And, even if the sea has been steadily receding from 1795 to the present time, the result will not be affected, as pointed out by Farwell J. when dealing with the law of accretion.

Having regard, however, to the elaborate arguments addressed to us, and to the great importance of the case, I think it right to state in my own words, and as briefly as may be, why I think the appeal should be dismissed. The right asserted is based upon a custom extending beyond legal memory. Such a custom is often spoken of as a local law. Mr. Levett did not dispute, and in fact admitted, that a custom for the fishermen of a particular locality to dry their nets on the land of a stranger may be supported in law, though there is no actual decision to that effect. But, having regard to the numerous dicta referred to by Farwell J., I feel no doubt that his decision on this point was correct. The persons, if any, entitled to the customary right are sufficiently ascertained—namely, the fishermen of Walmer. The real contest has raged over two points—namely, (a) over what land does the customary right extend, and (b) what is the extent of the right pleaded and how far its

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existence is justified by the evidence. (a) It is contended that the "local law" can only affect a definite close, which must have been available for the exercise of the customary right in the reign of Richard I., and that the evidence shews that a considerable part of the "beach ground," now eleven acres in extent, was at that time covered by the sea, and therefore could not have been used for drying nets. In my opinion this contention ought not to prevail. It appears certain, from the evidence of geologists and from the discovery of Roman remains immediately to the west of the "beach ground," that at least the western part of the "beach ground" existed in and long prior to the reign of Richard I. in substantially the same condition as it does at present. Within living memory the sea has gradually receded on this part of the coast, but there is nothing improbable in the suggestion that the reverse process may have gone on since the reign of Richard I., with the result that the line of high water is now practically the same as at that date, in which case the point under discussion would not arise. Assuming, however, that the sea has gradually and continuously receded, I think the land which has been added by accretion to the defendant's land must be subject to the customary right. The principle stated by Alderson B. in *In re Hull and Selby Ry. Co.* (1), that "that which cannot be perceived in its progress is taken to be as if it never had existed at all"—a principle which is applied between two private owners, and between the Crown and a private owner—should be applied here. In the view of the law this is the same close as that which was affected by the local law in the time of Richard I. It is urged that this extension of area renders the custom uncertain, and, if the sea should still further recede, unreasonable. I cannot assent to that argument. It must not be forgotten that the persons claiming under the custom are bound to exercise their rights reasonably and with due regard to the interest of the owner of the soil.

(b) It remains to consider what is the custom pleaded, and how far it is supported by evidence. The custom pleaded is for the fishermen of Walmer at all times necessary or proper for the

(1) 5 M. & W. 333.

purposes of the trade or business of a fisherman to dry their nets upon the "beach ground," and for that purpose to spread those nets upon the surface thereof. The evidence proves that, so far as living memory goes, and by reputation prior to living memory, the "beach ground" has been used (1.) for drying nets after fishing when wet with sea water, the nets being either taken from boats immediately in front of the "beach ground" or brought in carts from some more convenient landing place; (2.) for drying nets which have been "cutched" in order to render them more fit for use, the nets being brought in carts from the place where the cutching process has been performed, and taken away when dry, so as to be ready for the fishing season. I think it probable that the dicta which recognise the validity of a custom to dry nets had reference only to drying nets after they have been used for fishing, and not to drying nets in preparation for fishing, though I do not feel certain of this. But every argument used to support the former seems to me equally valid to support the latter. It is equally "in favour of fishing and navigation." "Cutching" is merely another name for, and is equivalent to, tanning. What are the precise ingredients put into the catch-pot is nowhere explained. I see no ground for inferring that it is a comparatively modern process because "catch" is a material used for tanning and imported from the Malay Archipelago. There is nothing to lead me to doubt that tanning nets in preparation for fishing is an ancient process, and, if so, it cannot be seriously urged that the fishermen are bound to use only tanning materials known in the reign of Richard I. and that by substituting "catch"—if in truth they have substituted it—they have lost their right. Or, to put the proposition in another and perhaps more accurate way, I think the proved usage of cutching nets is sufficient evidence of a custom to dry nets treated with suitable materials in preparation for fishing.

This brings me to the third branch of the usage proved. About thirty or thirty-five years ago it was found desirable to oil herring nets, instead of cutching them. This change was probably due to the use of cotton, instead of flax or hemp, as the material from which herring nets are made. Since that

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date cutting has been applied only to mackerel nets. In my view this falls within the same principle. It is nothing more than the application of a new and improved method of securing the former result. It is consistent with and supported by the older usage. I have not overlooked the argument that the oiling imposes a greater burden on the land, as the nets take longer to dry. But, unless I am prepared to confine the fishermen to the precise methods adopted tempore Richard I., I cannot yield to this argument. The illustration given by Farwell J. of the game of cricket, which was justified in *Fitch v. Rawling* (1), although cricket was not known in the reign of Richard I., is much in point. It follows that, in my opinion, the custom as pleaded is sufficiently established by the evidence, namely, a custom to dry nets at all times necessary or proper (whether before or after the fishing season) for the purposes of the trade or business of a fisherman.

If I had not taken that view of the evidence which I have indicated I should have desired time to consider whether s. 2 of the Prescription Act does not apply. Farwell J. necessarily held himself bound by *Shuttleworth v. Le Fleming* (2) and *Mounsey v. Ismay*. (3) In those cases the Court of Common Pleas and the Court of Exchequer respectively held that the Prescription Act applies only to easements strictly so called, where there is a dominant tenement and a servient tenement, and that it does not apply to a customary right claimed by the inhabitants of a particular district, although the word "custom" is found in the section. Those cases are open to review in this Court, but I do not think it necessary on the present occasion to express any opinion upon the important point there decided.

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(1) 2 H. Bl. 393; 3 R. R. 425.

(2) 19 C. B. (N.S.) 687.

(3) 3 H. & C. 486.