as to the state of the labour market in Canada at the time of the offences libelled, and reference was made to Hume on Crimes, ii, 404–5, for cases where evidence not given in presence of the panel was used. It was argued that the Statute of 1587, cap. 91, was not intended for cases like the present, the conditions and times being quite different; what was struck at by the Act was the private communication of evidence to the assize. The lack of opportunity for observing the manner of giving evidence in the witnesses was here unimportant, since the evidence was not concerning the *res gestæ* of the crime. A witness had been allowed by the Crown to go back to Canada, and it was necessary in the interest of the petitioner that the evidence of that witness should be obtained, and it was desirable to examine him in Canada.

Counsel for the Crown argued that the prayer of the petition should be refused, and quoted Hume on Crimes, ii, 406. Time had already been given and a diet deserted to allow of witnesses being brought from Canada, and in any case the evidence desiderated was irrelevant considering the nature of the indictment.

LORD JUSTICE-CLERK—The law of the land as regards the leading of evidence at criminal trials is fixed by the Act of 1587, c. 91, which declares "that in all tyme cuming, the haill accusatioun, ressoning, writtis, witnessis, and uthir probatioun and instructioun quhatsumever of the cryme, sall be allegit, resonit, and deducit to the assyze in presence of the partie accusit in face of judgment and na uthirwayes."

That law has regulated the practice up to the present day. As Hume expresses it, the witnesses "must be produced to tell their own story themselves, and say what they know concerning those matters of their own proper knowledge." The only exception (which is not truly an exception at all) is that where a person has died before the trial what he said can be proved *quantum valeat*.

The petition now before us asks the Court to grant a commission to examine witnesses abroad with a view to their depositions being read to the jury at the trial. That, it appears to me, would be in direct breach of the statute and contrary to the practice since the establishment of the Court of Justiciary, and accordingly I am of opinion that the prayer must be refused.

I only desire to add this—that it is a different question whether in such a case as this the difficulties of the defence in bringing witnesses from a great distance may not be a legitimate matter for consideration of the jury in making up their minds upon the case.

LORD KYLLACHY and LORD KINCAIRNEY concurred.

The Court refused the petition.

Counsel for the Crown—Younger, A.-D. —Blackburn, A.-D. Agent—W. J. Dundas, Crown Agent.

Counsel for the Panel Hunter — A. J. Young. Agents — St Clair Swanson & Manson, W.S.

Counsel for the Panel Cowper — Spens. Agent—A. C. D. Vert, S.S.C.

Tuesday, February 21.

(Before Lord Adam, Lord M'Laren, and Lord Kinnear.)

PHYN *v.* KENYON AND ANOTHER.

Justiciary Cases — Salmon-Fishing — Solway—Relevancy—Locus of Alleged Illegal Fishing not Specified—"Owner" of Fixed Engine—Accused not Owner—Salmon Fishery Act 1861 (24 *and* 25 *Vict. cap.* 109), *sec.* 11—*Salmon Fisheries (Scotland) Act* 1862 (25 *and* 26 *Vict. cap.* 97), *sec.* 33.

In a summary complaint charging two persons with fishing for salmon in the Solway with a "hang or drift net, being a fixed engine," contrary to section 11 of the Salmon Fishery Act 1861, made applicable to the *locus* libelled by section 33 of the Salmon Fisheries (Scotland) Act 1862, it was proved that both the accused were fishermen in the employment of the tenant of the salmon fishings at the *locus* of the alleged offence, and that when the net was used in the manner complained of it was so used by his instructions.

The Sheriff-Substitute having assoilzied the accused, *held*, in an appeal, that section 11 of the Salmon Fishery Act 1861 applied only to the "owner" of the "engine"; that the accused were not the "owners" of the "engine" in the sense of the statute; and that therefore they had been rightly assoilzied.

Opinion that a complaint, which omitted to state whether the *locus* of the alleged illegal fishing was within a portion of the Solway to which the Commissioners, in terms of section 6 of the Salmon Fisheries (Scotland) Act 1862, had determined that section 11 of the Salmon Fishery Act 1861 should be applicable, was *irrelevant*.

The Salmon Fishery Act 1861 (24 and 25 Vict. cap. 109)—an English Act—section 11, enacts—"No fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters, and any engine placed or used in contravention of this section may be taken possession of or destroyed, and any engine so placed or used, and any salmon taken by such engine, shall be forfeited, and in addition thereto the owner of any engine placed or used in contravention of this section shall, for each day of so placing or using the same, incur a penalty not exceeding ten pounds; and for the purposes of this section a net that is secured by anchors, or otherwise temporarily fixed to the soil, shall be deemed to be a fixed engine; but this section shall not affect any ancient right or mode of fishing as lawfully exer-

cised at the time of the passing of this Act by any person by virtue of any grant or charter or immemorial usage, provided always that nothing in this section contained shall be deemed to apply to fishing-weirs or fishing mill-dams."

The Salmon Fisheries (Scotland) Act 1862 (25 and 26 Vict. cap. 97), sec. 33, enacts that the provisions of the Salmon Fishery Act 1861 "shall extend and apply to salmon fisheries in the waters and on the shores of the Solway Firth situate in Scotland, as the same may be fixed by authority of this Act, and to the rivers flowing into the same, in so far as such provisions relate to the use of fixed engines for the taking of salmon, provided that all offences against such provisions shall be prosecuted and punished as directed by this Act."

On 23rd July 1904 Robert Kenyon and Peter Williamson, both fishermen, residing at Carsethorn in the parish of Kirkbean and stewartry of Kirkcudbright, were charged in the Sheriff Court at Kirkcudbright on a summary complaint at the instance of Charles Stewart Phyn, solicitor, Dumfries, Clerk to the Nith District Fishery Board, setting forth that they "did on 31st May 1904, in the Solway Firth, and at that part thereof in the parish of Kirkbean and stewartry of Kirkcudbright, opposite the lands of Arbigland in said parish and stewartry, place and use for catching salmon a hang or drift net, being a fixed engine, contrary to the Act 24 and 25 Vict. cap. 109, sec. 11, made applicable to the *locus* above libelled conform to the salmon Fisheries (Scotland) Act 1862, sec. 33, as amended by the Act 26 and 27 Vict. cap. 50, sec. 3, whereby the said Robert Kenyon and Peter Williamson are liable to forfeiture of said net, and in addition thereto to a penalty of £10 each for each day of so placing or using the same, and for the expenses of prosecution, and failing payment of said penalty and expenses to poinding or imprisonment for recovery thereof in terms of the 28th section of the said Salmon Fisheries (Scotland) Act 1862, said imprisonment being modified in terms of the 6th section of the Summary Jurisdiction (Scotland) Act 1881."

Objections were stated to the competency of the complaint (on the ground, *inter alia*, that a question of civil right was involved) and also to the relevancy.

The Sheriff-Substitute (NAPIER) repelled the objections, and after hearing evidence assoilzied both the accused.

Phyn obtained a case for appeal.

The facts stated in the case were as follows:—"The respondents are salmon fishermen in the employment of the tenant of Arbigland salmon fishings. When fishing they used a net 340 yards or thereby long with a mesh of three inches from knot to knot, or twelve inches round. The net is seven to eight feet deep. It has corks on the top side and lead weights attached to the bottom side. Such a net has been used at Arbigland at least for the last thirty years, and until the case of *Duke of Atholl* v. *The Glovers Incorporation of Perth*, 28th May 1900, 2 F. (H.L.) 57, no one considered that it was illegal to catch salmon with it, no matter how it was used. This net can be used either as a draught net or as a whammel net, *i.e.*, a hang or drift net. When it is used as a draught net it is not a fixed engine, and is admittedly used in a legal manner. But it cannot always be so used, profitably at least, and the respondents have instructions from the tenant that when they cannot use the net as a draught net to use it as a whammel net. When so used it is said to be used in an illegal manner. The way in which a whammel net is used is as follows:—It is not secured by anchors or otherwise temporarily fixed to the soil, but it is put in a boat, and when it has been carried a sufficient distance from the shore in order to float it, the men in the boat, generally two in number, shoot it out from the shore towards the sea or English coast. If it be shot at low water it stands like a wall in the water, and is nearly though not quite stationary. When so hanging in the water it would obstruct the passage of the fish, but as Arbigland is situated in the Solway, near the mouth of the estuary of the Nith, there is at either end of it, and also below it when it is floating, ample room for fish getting up the Nith—the distance from Arbigland to the English coast being about fourteen miles, and the distance from Arbigland to the nearest bank in the Solway being about four miles. The net can, however, be shot at any state of the tide, which at Arbigland, when ebbing or flowing, runs at a great pace, sometimes as fast as six miles an hour. When it is shot when the tide is ebbing or flowing it is never stationary, nor does it hang like a wall in the water, but is moved about by the tide. Fish, however, are caught in it when it is being moved about by the tide just as often as when it is nearly stationary. On 31st May 1904, about 8 a.m., when the tide was almost full out, and at a time when the respondents do not say that they could not have used the net as a draught net, they, when at a considerable distance from the shore, shot a net of the dimensions above described outwards towards the sea or English coast, from a boat opposite Arbigland and on the Arbigland fishing, and so used the net as a whammel net."

The Sheriff-Substitute further stated in the case as follows:—"I held that in respect that the proprietor of Arbigland fishings may have a right to fish in the manner above described, especially seeing it has been the mode of fishing in use for at least thirty years, and that the question whether he had or had not such a right would presumably have to be decided in an action between a proprietor of salmon fishings in the Nith or Solway and the proprietor of Arbigland fishings. It would not be proper to decide that question in a summary prosecution, especially one at the instance not of a proprietor of fishings but of the appellant, and directed not against the proprietor of Arbigland fishings but against the servants of the tenant. I further held that the net used was not a fixed engine within the meaning of sections 4 and 11 of the Salmon Fishery Act 1861, as extended to the shores of the Solway Firth situate in

Scotland by the Salmon Fisheries (Scotland) Act 1862, section 33. Accordingly I assoilzied the respondents with expenses."

The questions of law were—"(1) In the circumstances above stated is it competent to prosecute the respondents under the Summary Procedure Acts 1864 and 1881? (2) Is a whammel net, *i.e*, a drift or hang net, a fixed engine within the meaning of the Salmon Fishery Act 1861? (3) Whether in the circumstances the respondents were properly assoilzied?"

(As the Court decided the case on grounds other than those argued, the argument is not reported.)

LORD ADAM—The respondents in this case are charged with having on 31st May 1904, in the Solway Firth and at a part thereof in the parish of Kirkbean and stewartry of Kirkcubright, opposite the lands of Arbigland in the said parish, placed and used for catching salmon a hang or drift net, being a fixed engine, contrary to the Act 24 and 25 Vict. cap. 109, sec. 11, made applicable to the *locus* above libelled conform to the Salmon Fisheries (Scotland) Act 1862, sec. 33, as amended by the Act 26 and 27 Vict. cap. 50, sec. 3, which is merely a verbal amendment.

Section 11 of the Act 24 and 25 Vict. c. 109, which is an English Act and does not extend to Scotland, enacts that no fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters, and that any engine so placed or used might be taken possession of or destroyed, and that any engine so placed or used and any salmon taken by such engine should be forfeited, and in addition thereto it is declared that the owner of such engine so used should incur certain penalties.

By the Fisheries (Scotland) Act 1862 commissioners were appointed whose duty it was, *inter alia*, sec. 6 (1), to fix and define for the purposes of the Act and the other Acts relating to salmon and salmon fisheries in Scotland the natural limits which divide each river in Scotland (including the estuary thereof) from the sea in so far as the same might not be already fixed by statute or judicial decision; and (2) to fix, for the purposes of the Act, the limits of the Solway Firth, having regard to the Act 44 Geo. III, c. 45 (the Solway Fishing Act).

The 33rd section of the Salmon Fisheries (Scotland) Act enacts that from and after 1st January 1865 the provisions of the Act 24 and 25 Vict. c. 109, shall extend and apply to salmon fisheries in the waters of the Solway Firth situated in Scotland as the same might be fixed by the authority of the Act, and to the rivers flowing into the same in so far as such provisions related to the use of fixed engines for the taking of salmon.

It is clear therefore that section 11 of the English Act, a breach of which is complained of, is not made applicable by the Scottish Act to fishing in the Solway Firth generally, but only to fishing in such portion thereof as may have been fixed by the Commissioners. But this complaint is an entire blank as to whether the Commissioners have ever fixed to what fisheries in the waters or on the shores of the Solway Firth situated in Scotland the Act shall be applicable, or that it has been made applicable by the Commissioners to the fishings in question. On that ground I think that the complaint is quite irrelevant. But further, by sec. 6, sub-sec. 1, of the Fisheries (Scotland) Act the Commissioners were directed to fix and define for the purposes of the Act the natural limits which divide each river, including the estuary thereof, from the sea.

The Commissioners by bye-law dated 26th April 1864, approved by the Secretary of State on 25th August 1864, and which came into force on 7th March 1865, fixed a common estuary for the Nith, the Annan, and the Esk, and fixed and defined the limits which divided it from the sea to be a straight line drawn from the Hotel of Skinberness, in the parish of Abbey Holme in the county of Cumberland, to the large house at Carsethorn of Arbigland in the county of Kirkcudbright. It is obvious that the Solway Firth opposite Arbigland is partly estuary and partly sea. To charge the respondents therefore, as is done in this case, with fishing with a fixed engine opposite the lands of Arbigland is not necessarily charging them with any offence. If they were fishing on one side of the line, they were fishing in the sea, and were committing no offence; if on the other side, that should have been libelled in the complaint.

The 11th section of the Act applies only to the owner of the engine complained of, and the forfeitures and penalties are imposed only upon him. It is not set forth in the complaint that the respondents are the owners of the nets the use of which is complained of. They are merely designed as fishermen. It was held, however, in the case of *Marshall* v. *Phyn*, 3 Adam 262, on the construction of this section of the Act, that it was not a good objection to the relevancy of the libel that it did not state that the respondent was the owner of the engine, and that if he were not the owner onus lay upon him to prove it. In giving judgment in that case the late Lord Justice-General said —"It seems to me that the word 'owner' in the statute is used in a somewhat large sense. It does not, in my view, necessarily mean the person in whom the technical right of property in the nets is vested. The meaning of the statute is in my judgment that the person against whom proceedings are to be taken shall not be, *e.g.*, a servant fishing in the employment of another, but the person who has the lawful possession and control of the nets, whether he is technically the proprietor of them or not."

Now, the Sheriff has found in fact that the respondents are salmon fishermen in the employment of the tenant of the Arbigland Salmon Fishings, and when the net is used as a whammel or drift-net it is by his instructions. That being so, it is clear to me that the respondents are not "owners" of the net in the sense of the statute, and that section 11 has no application to them, and that they were on that ground rightly

assoilzied by the Sheriff, and I think that we should answer the third question, which is enough for the disposal of this case, in the affirmative.

I am not disposed, and I do not think it necessary, to answer the second question, which asks whether a drift or hang-net is a fixed engine within the meaning of the Salmon Fishery Act 1861. It is clear that the proper respondents in such a case are the owners of the engine complained of, but the owners are no parties to this case, the respondents being, as the Sheriff says, merely their servants. I therefore think that we should find it unnecessary to answer the second question, the more especially as it is asked in a case the libel in which in my view is quite irrelevant.

As regards the first question, I do not understand what particular question of law it is intended to raise, and I think we should decline to answer it also.

LORD M'LAREN and LORD KINNEAR concurred.

The Court answered the third question of law in the affirmative, and found it unnecessary to answer either of the remaining questions.

Counsel for the Complainer and Appellant—H. Johnston, K.C.—Chree. Agents—Bonar, Hunter, & Johnstone, W.S.

Counsel for the Respondents—Macphail. Agents—Lindsay, Howe, & Co., W.S.

COURT OF SESSION.

Tuesday, February 21.

FIRST DIVISION.

PRINGLE, PETITIONER.

Process — Proof — Depositions to Lie in retentis.— Proof and Oath de calumnia on Commission.

A naval artificer-engineer was the pursuer in an action of divorce. He presented a petition stating that the summons in the action of divorce had been signeted and served edictally on the defender, but could not be called until after the date when the ship on which he and another material witness were serving was under orders to proceed to sea. He therefore craved the Court to appoint a commissioner to take the evidence of himself and the other material witness, the depositions to lie *in retentis*, and also to take his oath *de calumnia*. The Court *granted* the prayer of the petition, reserving to the defender all objections competent to her to the competency of the petition.

This was a petition presented by Peter Pringle, artificer-engineer on H.M.S. 'Berwick,' then stationed at Chatham. The petition set forth that the petitioner was a domiciled Scotsman and had raised in the Court of Session an action of divorce against his wife Mrs Amelia Annie Russell or Pringle, then or lately residing at 53 Albany Road, New Brompton, and that the summons was signeted and executed edictally against the defender on 20th February, but could not be called in Court before 7th March. It was further stated that the petitioner and Alfred Baynton, gunner on H.M.S. "Berwick," were material witnesses in the cause, whose evidence was likely to be lost owing to the ship being under orders to proceed to sea with the Second Cruiser Squadron on February 28th, prior to the expiry of the *inducice*, and that it was also necessary for the petitioner to emit the oath *de calumnia*. The defender, it was stated, had no known agent in Scotland. The petitioner therefore prayed the Court to appoint the petition to be intimated to the defender in the action, to grant warrant for citing the said Alfred Baynton as a witness, and to appoint a commissioner to take the evidence of the petitioner and Alfred Baynton, and also to take the petitioner's oath *de calumnia* and to dispense with interrogatories, the depositions to lie *in retentis*—*Clouston* v. *Morris*, February 15, 1848, 20 Scot. Jur. 228, was referred to at the bar.

The Court granted the prayer of the petition, and pronounced this interlocutor—

". . . Grant diligence at the instance of the petitioner for citing Alfred Baynton, gunner, H.M.S. 'Berwick,' and the other necessary witnesses for the petitioner in the action mentioned in the petition, whose evidence owing to their being about to leave the country is in danger of being lost, and grant commission to James Adam, Esq., Advocate, to take the oaths and examinations of the said Alfred Baynton and the petitioners, and to secure any exhibits and productions made by them in regard to the matters at issue between the parties to the said action, at such time and place as the said commissioner may appoint, due notice thereof being given to the defender or her known agent, and also to take the oath of the petitioner *de calumnia* in common form: Dispense with the adjustment of interrogatories, and appoint the depositions of the witnesses and productions, if any, made by them to be sealed up by the commissioner and immediately thereafter transmitted to the Clerk of the process, there to lie *in retentis* subject to the future orders of the Court or the Lord Ordinary, to be reported *quam primum:* Reserving to the defender all objection competent to her to the competency of the petition."

Counsel for the Petitioner—Constable. Agent—Thomas Liddle, S.S.C.
