

have gone wrong, and that their decision must be reversed. We will therefore remit to the Commissioners to reverse their decision, unless there is some other ground on which they considered the stake-nets to be illegal.

Further, I may mention as illustrating the inadequacy of the reason given by the Commissioners for refusing this claim, that it seems to me that if the engines of Miss Hughan were not within "the Water of Solway" the Commissioners had nothing to do with them, for under the Act of 1877 the jurisdiction of the Commissioners is confined entirely to "the Water of Solway." I do not understand how the Commissioners could first find that these engines were not within the water of Solway, and then hold that they were entitled to deal with them, and order them to be removed.

I may add that it appears to the Court that the question of the legality or illegality of an engine depends entirely upon whether it is a "privileged fixed engine" within the meaning of the 4th section of the Act of 1877. If it is a "privileged fixed engine" it is legal; if it is not "a privileged fixed engine" it is illegal. Now, a "privileged fixed engine" is this—viz., "Such fixed engines as were in use for taking salmon during the open season of one or more of the years 1861, 1862, 1863, 1864," in pursuance of any grant, charter, or immemorial usage. The legality or illegality of fixed engines thus turns entirely upon whether the proprietor has a right of salmon-fishing, and whether the engine was in use during the years mentioned in the Act.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court pronounced this interlocutor:—

"Recal the decision of the Special Commissioners for Solway Fisheries: Find that the two stake-nets mentioned in the Special Case are legal, and that the appellant is entitled to a certificate or certificates for the same as privileged fixed engines in terms of the 'Solway Salmon Fisheries Commissioners (Scotland) Act 1877'; and remit to the Commissioners to grant a certificate or certificates accordingly, and decern."

Counsel for Appellant—Darling. Agents—Mackenzie & Kermack, W.S.

Thursday, July 10.

FIRST DIVISION.

SOLWAY SALMON FISHERIES COMMISSION
—MACKENZIE OF NEWBIE'S CASE.

Fishing—Salmon—Solway—Privileged Fixed Engine—Solway Salmon Fisheries Commissioners (Scotland) Act 1877 (40 and 41 Vict. cap. 240), sec. 5—Situation and Description of Fixed Engine where Shifting Sand.

By section 5 of the above Act it was provided—"Where a claim is made by any person on behalf of a fixed engine that it is privileged, the Commissioners shall, on proof

being given to their satisfaction that such engine is in whole or to any extent privileged, certify to that effect, and shall state in their certificate the situation, and also the size and description of the engine so far as the same is privileged." The Newbie fishings extended along the shore of the Solway between Stennar Scour, near Annan Waterfoot, on the east, and the junction of the Lochar and the Solway on the west, being a distance of about five miles. It appeared to the Commissioners upon the evidence that "Within the limits of said fishery the shore is liable to great alteration from sudden changes in the course which the waters of the streams and tidal waters take within the firth. The course of the fresh and ebb waters may be half-a-mile farther north, or half-a-mile farther south at the end of a season than it was at the beginning. These changes are attended with great shiftings of the sand, which accumulates at places formerly free of it, and is removed from places lately covered. If at any particular point there be for years no alterations of the channel or shiftings of the sand, the accumulations of it may come to be covered with grass, and above high water-mark, yet the next year, or even in the course of the same season, the whole may be swept away and there may be laid bare the old stading of a stake-net disused for years. Sometimes lakes or lochs are left between the new channel and high-water mark, and these in turn get filled with sand. From these causes nets set in different seasons on certain sites within the fishery vary in length, and sometimes cannot be set on the old sites, and it has therefore been the practice to set them in various places within the limits of the fishery so as to suit the position of the channel at low-water, near to which the nets must reach." The nets in question which were found to be privileged consisted of ranges of pockets or chambers in which the fish were caught, each range containing from one to ten pockets, and each pocket having a relative flood, ebb, and cross arm.

The proprietor of the nets maintained—(1) that each pocket, and not each range of pockets, ought to be certified as a "privileged fixed engine;" and (2) that owing to the shifting nature of the sands he was entitled to have certificates for the number of pockets, with relative flood, ebb, and cross arms, and hooks, proved to be privileged, situated within the bounds of the fishery; and that these should be stated in the certificates to be situated in the waters and on the shore or sands of the Solway Firth in Scotland, extending from Stennar Scour, near Annan Waterfoot, on the east, and the confluence of the Lochar and the Solway on the west; or at least that the certificates should bear, after the description of the position of the nets, the words "or as near thereto as the nature of the foreshore will admit," or words to that effect.

The Commissioners held—(1) that each range of pockets, and not each pocket, constituted a "fixed engine;" (2) that a certificate permitting a change in the

site of the range in a lateral direction would be illegal under the Act of 1877, but that such a change seaward was legal. They therefore in the certificates described precisely the situation and direction of each fixed engine and of its pockets by reference to a copy of the Ordnance Survey map, and added these words—"With liberty to place the whole of said range of nets and pockets, with relative hooks or any portions of said range and pockets, either continuously or separately, at any place or places between high and low water-mark, in the line or direction indicated on the said sheet of the Ordnance Survey, or so near thereto as to be substantially in the said direction." The Court on appeal affirmed the determination of the Commissioners on the first point, but on the second point remitted "to the Commissioners to amend the certificates granted to the appellant by substituting in each for the words "or so near thereto as to be substantially in the said direction," the words "or so near thereto as to leave them substantially on the same banks or scours on which they were in the years 1861, 1862, 1863, and 1864" (being the years directed under the Act to be taken into account), "as shown upon said sheet of the Ordnance Survey, and that even if the sands come to be intersected by what are called lakes or lochs."

Counsel for Appellant—R. Johnstone—Asher.
Agents—Hope, Mann, & Kirk, W.S.

Friday, July 18.

SECOND DIVISION.

SOLWAY SALMON FISHERIES COMMISSION— COULTHARD'S CASE.

Solway Salmon Fisheries Commissioners (Scotland) Act 1877 (40 and 41 Vict. cap. 240)—Stake-nets—Removal Order—Finding in Fact—Review.

The Solway Salmon Fisheries Commissioners after taking evidence found that certain fixed engines had been "erected and used" for taking salmon, and that it was not proved that they were privileged, and ordered their removal. A Special Case having been settled, first, by the Commissioners, and afterwards by a Judge of the Court of Session, in terms of the 8th section of the above-mentioned Act, the appellants contended that the nets used by them were the ordinary stake-nets used for time immemorial in capturing white-fish in the Solway, and they asked the Court whether the Commissioners were entitled to order their removal. *Held* that the Court must take the facts from the Commissioners, and could not of themselves inquire into these, and that upon these facts there was no question of law involved which would entitle the Court to interfere.

Observations (per Lord Gifford) as to the duties of a Judge in settling a Special Case under the 8th section of the Solway Salmon Fisheries Commissioners (Scotland) Act 1877.

This was an appeal in the form of a Special Case presented to the Second Division of the Court under the provisions of the Solway Salmon Fisheries Commissioners Act 1877.

James Coulthard and others, fishermen, who resided close to the shores of the Solway Firth, had been in the practice of erecting certain kinds of stake-nets between high and low water-marks on the sands or shores of the Firth adjacent to or within a mile or two of their residences, and thus fell under the jurisdiction of the Commissioners, and a complaint was lodged with them by Mr Mackenzie of Newbie, a proprietor of salmon-fishings in the district of the river Annan, that these nets were salmon stake-nets, and were "erected or used for the taking of salmon." The fishermen were consequently cited to appear before the Commissioners at Annan, and did so on 7th May 1878 by an agent. They claimed that they were in right, as inhabitants of Great Britain (in terms of the Acts 1 Anne (1705), and 29 Geo. II. c. 23), to fish for white-fish in Scotland at all times and all seasons. They were also, they contended, in right to use stake-nets for the capture of white-fish in the Solway Firth, and the nets used by them were, they said, the ordinary stake-nets which had been used from time immemorial in capturing white-fish in the waters and along the shores of the Solway. They claimed no right of capturing salmon or fish of the salmon kind, but they submitted that by the decision in *Gilbertson v. Mackenzie*, 2d February 1878, 5 R. 610, their right to fish for white-fish with stake-nets was *res judicata*.

The Commissioners after taking evidence found as follows:—"Besides the ordinary salmon stake-nets, various kinds of fixed engines are used on the shores of the Solway. Nets such as those described below are common, possessing the same characteristics of construction as the ordinary salmon stake-net, but smaller in dimensions. They catch white-fish as well as salmon, as do also the ordinary salmon stake-nets; they have cross arms, covered pockets, ebb and flood arms, and runaway pockets; they often have also a barrel-shaped trap or paidle attached to them, but this does not affect their general structure; they seldom have in one net all of the features just mentioned combined; these stake-nets are fixed on scours of the same kind selected for ordinary salmon stake-nets; the under-mentioned nets belonging to the appellants were fixed as near low water as possible, quite as near as the most seaward pockets of the ordinary salmon stake-nets belonging to the tenant of Mr Mackenzie's fishings; they were fixed within the limits of the fishing; the appellants had fixed stake-nets of the dimensions following [then came detailed measurements of the nets in each case]." They further found "that it was proved to their satisfaction that the fixed engines so erected and used by the appellants were erected and used for taking salmon, and that it was not proved that these engines were privileged, and pronounced orders of removal in every instance in the subjoined form:—The Special Commissioners for Solway Fisheries having, by due notice under their hands, cited James Coulthard, fisherman, Powfoot, in the parish of Cummertrees and county of Dumfries, being the owner of a certain fixed engine, called a paidle net, alleged to be erected and used for taking salmon on the Pow-