and any payments of money by way of conversion or in lieu thereof, and all bridge-money and assessments heretofore leviable for the maintenance of highways within such county or burgh, shall cease and determine, any Act or Acts to the contrary notwithstanding; and all turnpike roads within the same shall thereafter be and become highways, and all highways shall be open to the public free of tolls and other exactions except as hereinafter provided, within the meaning of and for the purposes of this Act." Contrast that clause with what follows in section 35—"Until the said 15th day of May, or 26th day of May, or 1st day of June, as the case may be, the tolls and revenues of each of the roads now maintained as turnpike roads, and all assessments now leviable for the maintenance of highways within a county, shall respectively be received and applied by the trustees to the several purposes to which they are respectively applicable under the existing Acts relating thereto." It is quite true probably that if these clauses were held to be exceptional clauses, which was the argument presented from one side of the bar, then there would be no recourse, and the local Acts having been repealed there would be no provision, whatever for carrying on the management of the roads; but read in the light of all the other provisions, I think that what section 33, already quoted, comes to is this—That whether there are leases or not there is to be no clearing away of tolls until the 15th day of May or the 1st of June subsequent to the Act coming into operation, and up to that time it seems to me there is a power conferred on the trustees to levy tolls. That power is, I think, conferred by section 35. I therefore agree with your Lordship that by the provisions of the Act of Parliament, from the 1st of September down to the 15th of May, when the new trustees are constituted and power vests in them, the roads must be managed in the way your Lordship has indicated, and that the second question should be answered in the affirmative.

Lord Rutherfurd Clark—I am of the same opinion. I do not doubt that the provisional order should come into force on the 1st of September 1882, and that by the 6th section of the Act in question the subsisting Acts relating to roads are repealed. But I think there is a statutory exemption in the generality of these repealing words by sections 33 and 35, referred to by Lord Craighill. I cannot read the 33d section as limited in any sense. I think it applies to all the roads, whether the tolls on those roads are let or unlet, and it seems to me to be hardly susceptible of any other construction; for I think it declares in very plain language that if the Act shall happen to be adopted before the 1st of June 1883 the road shall not become toll free until the 15th of May or the 26th of May subsequent to the date of the adoption of the Act.

The Lords answered the first question in the negative, and the second in the affirmative.

Counsel for Parties of the First Part—D.-F. Macdonald—Keir. Agents—J. & J. H. Balfour, W.S.

Counsel for Parties of the Second Part—Mackintosh — Jameson. Agents—Gillespie & Paterson, W.S.

Friday, May 12.

SECOND DIVISION.

(Before Lords Young, Craighill, and Rutherfurd Clark.)

[Sheriff of Dumfries and Galloway.

EARL OF GALLOWAY *v.* STEWARTS.

Fishings—Salmon-Fishings—Solway—Privileged Fixed Engine—Salmon-Fishing Act 1861 (24 *and* 25 *Vict. c.* 109), *sec.* 11—*Salmon Fisheries (Scotland) Act* 1862 (25 *and* 26 *Vict. c.* 97), *sec.* 33—*Solway Salmon Fisheries Commissioners Act* 1877 (40 *and* 41 *Vict. c. ccxl.*), *secs.* 3, 4, *and* 5.

Held that no fixed engine used for taking salmon in the Solway Firth can be a privileged fixed engine in terms of the Act of 1877, for which the user cannot produce a certificate of privilege granted by the Commissioners appointed by that Act. The rights of the Crown are not excluded from the saving clauses of section 4 of that Act.

The Crown lodged with the Solway Salmon Fisheries Commission a claim of privilege to use certain nets. This claim was withdrawn before it had been determined, and the Crown tenant, whose lease had nearly expired, did not press the claim on his own account. The Crown thereafter let the fishings to a new tenant, restricting him to legal modes of fishing. The Lords *interdicted* this tenant from using these nets, in respect they had not been shown to the Commissioners to be privileged, and no certificate to that effect had been produced.

The defenders in this case, John and Robert Stewart, were tacksmen of salmon-fishings belonging to the Crown on the shores of the Solway Firth *ex adverso* of the lands of several proprietors, stretching from Luce Bay round Burrow Head into Wigtown Bay, and marching on their northern boundary with the lands of the pursuer Lord Galloway, who held the fishings *ex adverso* of his own lands partly (and these immediately adjoined the defenders' fishings) on lease from the Crown and partly as his own property. The pursuer's fishings were all situated in the district of the river Bladenoch, as such was defined by a bye-law made by the Commissioners acting under the Salmon Fisheries (Scotland) Act 1862. The defenders' fishings were outside of the statutory district of the Bladenoch. Fixed engines in the form of bag-nets had been used by the pursuer and by the defenders' predecessors in their respective tenancies. On the 10th of April 1878 the Solway Commissioners held a Court at Wigtown, at which the pursuer obtained certificates of privilege for his nets in the fishings which belonged to him. The Court, however, held the engines in use on the fishings leased from the Crown by the pursuer and other tenants of the fishings afterwards leased to the defenders, to be unprivileged and illegal. A claim that the engines on the latter fishings were legal and privileged was lodged by the Commissioners of Woods and Forests on 16th July 1878, but afterwards withdrawn on the 24th of October

following. The tenants of the fishings at that time, the defenders' predecessors, took no steps to vindicate their right to use fixed engines, and warrants were issued in February and March 1879 for the removal of the whole nets, and they were removed accordingly.

The defenders' lease was granted as from Martinmas 1879. It bore to be "subject to the provisions of the laws and statutes now or to come in force regulating salmon-fishing in Scotland." The defenders produced a letter from the Commissioners of Woods and Forests in reply to an inquiry of theirs while negotiating the lease, whether fixed engines were permissible in the fishings in question, answering that "the mode or modes of fishing to be exercised are only such as are legal," and that "what particular mode or modes are legal at any particular place is a matter for local inquiry;" and also a letter from the Commissioner of Salmon Fisheries in reply to a similar inquiry, giving his opinion that they were entitled "to use bag, stake, or fly nets" as might best suit their purpose. The defenders thereafter erected the bag-nets now in dispute.

The present action was raised by the pursuer to interdict the defenders from the use of bag-nets or other fixed engines, alleging hurt and prejudice to his own fishings from such use.

The pursuers maintained that the nets in question were privileged fixed engines in the sense of the Solway Act of 1877, and that their fishings were exempted *jure coronæ* from the restrictive provisions of the Act.

After proof the Sheriff-Substitute (RHIND) found, *inter alia*—"That the 33d section of the Act of 1877 applied to salmon fisheries 'on the waters and on the shores of the Solway Firth, situated in Scotland,' and in its interpretation clause it was expressly provided that the proprietor of a salmon-fishery should also include Her Majesty, in right of her Crown; that the saving clauses of the 11th section of the English Act of 1861, which is extended to Scotland by the said section of the Act of 1862, and the similar clauses in the subsequent Act of 1877, could not be held to include the right or title of the Crown, which cannot be said to catch salmon in pursuance of any 'grant or charter or immemorial usage,' but were exclusively applicable to private patrimonial rights vested in subjects of the Crown; that the Act 1877 had not been passed for the purpose of declaring salmon-fishing by stake-nets or fixed engines in the Solway to be illegal, which had already been done by the Act of 1862, but to provide an executive authority for putting in force the provisions of section 33 of Act 1862 along the Scottish shores of the Solway; that the results of the Acts of 1862 and 1877 had been to deprive the Crown of the right to use bag-nets or fixed engines for the taking of salmon in the waters of the Solway Firth; therefore, that the defenders' contention that the Crown is exempt from the provisions of the Act of 1877 could not be maintained; that the use of bag-nets by the defenders was injurious to the pursuer's fishings; that the nets in question not having been certified by the Commissioners were unprivileged and illegal; and granted interdict."

The defenders appealed to the Second Division of the Court of Session, and argued—That the Crown did not require the Commissioners' licence, and that even if it did its rights could not be prejudiced by the negligence of its servants in not obtaining one.

At advising—

LORD YOUNG—I cannot agree with the Sheriff-Substitute that the saving clauses of the Act of 1877 cannot be held to include the right of the Crown. But I am nevertheless of opinion that the fixed engines of the respondents are not privileged engines according to the Act of 1877, and that the Earl of Galloway has a sufficient title to complain of them as illegal, as they are so unless privileged under the Act of 1877. I think there is no need to go to prior Acts on the subject of fixed engines. All fixed engines in England are illegal unless privileged in terms of the Act of 1861. That Act makes certain contrivances privileged fixed engines for the purpose of protecting and preserving existing rights within certain limits. Previous Acts had put down all fixed engines. The Scottish Act of 1862 extended the provisions of the English Act of 1861 in regard to fixed engines to the Solway fisheries on the Scottish side. That was superseded by the Solway Act of 1877. Its language, however, is not altogether the same as that of the English Act. The latter Act says—"But this section shall not affect any ancient right or mode of fishing as lawfully exercised at the time of the passing of this Act by any person by virtue of any grant or charter or immemorial usage;" while the words of the Act of 1877 are only these—"Such fixed engines as were in use for taking salmon during the open season of one or more of the years 1861, 1862, 1863, and 1864, in pursuance of any grant or charter or immemorial usage." That is the definition given in the Act of privileged fixed engines which are to be protected for the preservation and protection of existing rights. Commissioners who are appointed to itinerate for the purpose of executing the policy of the law, are directed to inquire into the legality of all fixed engines in the Solway in Scotland—"The Commissioners appointed under this Act shall inquire into the legality of all fixed engines erected or used for taking salmon in the waters and on the shores of the Solway Firth in Scotland, as the same have been fixed under the authority of the Salmon Fisheries (Scotland) Act 1862, and in the rivers flowing into the same." In the course of one of these journeys they were proceeding to inquire into certain fixed engines on Crown fishings, but where the fixed engines were in the possession of tenants of the Crown, and found and intimated the character of these nets according to the provisions of the Act; and the Commissioners of Woods and Forests lodged a claim of privilege. This was on 16th July 1878. They afterwards withdrew this on 24th October. Then the only person before the Commissioners was the Crown tenant M'Queen, whose lease was nearly out. He having no interest to continue the strife, lodged no claim on his own behalf. So there was nothing to show that these were original fixed engines. They were therefore declared not to be privileged fixed engines to the satisfaction of the Commissioners, and one sufficient reason was the absence of any evidence to the contrary. And so they were removed in the following year. The Crown then let the fishings to the respondents, and in answer to an inquiry

on the part of the latter, replied that only legal modes of fishing were to be exercised, and so put the respondents to their own inquiry. It is scarcely possible to doubt that the tenants knew the real state of the facts, but chose to take the adventure. The nets were not exactly on the same spot, but were in the same region as the former tenant's, and were in exercise of the same right—a lease from the Crown. The question is merely—Are these nets privileged or not? Fixed engines they are. Are they privileged? If not, the Earl of Galloway has a title to interdict them. I am of opinion that they are not, for it is not proved to the satisfaction of the Commissioners that they came under any of the exemptions in the Act of Parliament. The only party interested has offered no evidence to the contrary. In short, they are not privileged fixed engines in the sense of the Act of 1877, and the Earl of Galloway having sufficient title is entitled to interdict as craved.

Lord Craighill—I am entirely of the same opinion.

Lord Rutherfurd Clark—The question here is, Whether the fixed engines used by the respondents are privileged or not under the Act of 1877? I do not think an engine can be privileged unless the person using it produces the certificate of the Commissioners under the Act that it was used for the statutory period prescribed.

The Lord Justice-Clerk was absent.

The Lords recalled the Sheriff-Substitute's interlocutor, and granted interdict of new.

Counsel for Appellants (Defenders)—Mackintosh—Murray. Agents—Russell & Dunlop, W.S.

Counsel for Respondent (Pursuer)—Brand—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Wednesday, July 19.

FIRST DIVISION.

[Lord Lee, Ordinary.

CHISHOLM *v.* ALEXANDER & SON.

Implied Obligation—Recompense—Hiring.

When a person uses the property of another, not in virtue of a contract with him, but in the knowledge that that other intends to charge for the use of his property, he is liable to pay at least a reasonable sum for such use.

A person hired sacks from a railway company for use in his business, which sacks were the property of a person with whom the railway company contracted for supplies of sacks. The hirer knew that the sacks were the contractor's property, and knew also that he made certain charges for detention if the sacks were not returned within a definite time. *Held* that he was bound to pay the contractor these charges for detention of sacks beyond the time allowed for their use, although he had contracted with the railway company only.

The pursuer of this action was a sack contractor in Perth. The defenders were grain merchants carrying on business in Perth and at Coupar-Angus. This was an action concluding for a sum of £195, 4s. 7d. alleged to be due by the defenders as having hired sacks from the pursuer during a period of years, or otherwise as having had the use of his sacks on conditions which they well knew, for the purposes of their business, and therefore liable to pay for them at a reasonable rate. The defence was that there was no contract between the pursuer and defenders, and that the defenders had not only not hired sacks from the pursuer, but had hired them from the Caledonian Railway Company, and had paid to them the full amount of the hire which they charged. The pursuer averred a custom of the grain trade whereby farmers, millers, and others hire sacks for storing grain and for sending it by rail to all parts of the country. He averred also an agreement with, *inter alia*, the Caledonian Railway Company, under which the company were his agents in hiring his sacks and in distributing them for use to persons applying for them at their stations, and (Cond. 3) he averred—"In cases of railway journeys it is the practice of the pursuer, and it is so stipulated in his contracts, that a charge is made against the borrowers for certain sums, in addition to the charge for the journey itself, in the following cases, viz.—*First*, when they hire empty sacks for the purpose of filling them, and detain them longer than four days, there is a charge of one halfpenny per sack per week, or part of a week, from the expiry of the fourth day; and *second*, when full sacks are received for the purpose of being emptied or for storing purposes, there is a charge of one halfpenny per sack per week, or part of a week, for every week after the first." This practice was not admitted by the defenders. From the proof led it appeared that prior to 1874 the pursuer had carried on his business in the manner thus described by the Lord Ordinary—"Prior to 1874 the pursuer carried on his business through the railway company, under the contract. By that contract the pursuer was entitled to receive from the company (1) a hire for sacks, calculated according to the journey; (2) certain rates for detention or demurrage, calculated according to the time during which the sacks should be detained at stations after being sent out from the depot for the purpose of being filled and despatched, or according to the time during which they should be detained at any terminal station except Glasgow. At Glasgow the pursuer undertook the responsibility and risk of demurrage, but had right to collect the rate for demurrage directly from the parties in fault. Elsewhere the company undertook to do their utmost to recover these rates from the parties in fault, and to pay them over to the contractor."

In 1874 the pursuer and the Caledonian Railway Company entered into a new arrangement as to the hiring of sacks from the pursuer, by which the pursuer undertook to furnish sacks to the various stations of the company, in such quantities as might be required, and at a certain rate of hire, and the company was to give him all necessary aid in himself recovering from persons using the sacks payment for detention of them, and that at the rate of one halfpenny per sack per week, or part of a week, during which they