

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-

foot Scaur, and in a south-westerly direction from the village of Powfoot, in the said parish of Cummertrees, to appear before them at the Town Hall, Annan, on the 7th day of May 1878, in order that there might be an inquiry by the said Commissioners touching the legality of the said fixed engine; and the said James Coulthard having appeared by his agent, and pleaded that the said fixed engine was neither erected nor used for taking salmon, the said Special Commissioners for Solway Fisheries, after receiving evidence and hearing parties, Find that it has been proved to their satisfaction that the said fixed engine is erected and used for taking salmon, and that it has not been proved to their satisfaction that the said fixed engine is privileged: Find that the same is illegal, and do hereby, acting under and in pursuance of the Solway Salmon Fisheries Commissioners (Scotland) Act 1877, order the said fixed engine to be abated and removed on or before the 30th day of May 1879.—Given under our hands," &c.

The Special Case was, at the instance of Coulthard and the other fishermen, settled in terms of the Act by the Commissioners, and further was settled in terms of the 8th section of the same Act by Lord Gifford.

The question on which the judgment of the Court was craved was in these terms:—"Were the Commissioners entitled to order the said nets or engines used by the appellants to be abated and removed?"

At advising—

LORD JUSTICE-CLERK—I am not prepared to say that there has not been some very serious omission in the adjustment of this case, but I feel on the whole quite satisfied that there is no ground upon which we are called upon to make any further inquiry. On the case as it stands the result is that the Commissioners have found that the fixed engines forming the subject of their inquiry were erected and used for the taking of salmon, and that they were not privileged. If that be true there is an end of this appeal. It was said on the part of the complainers that the Commissioners had no jurisdiction. It would have been more correct to say that they had no jurisdiction to decide any other matter. The matter which they have decided is the very one for which they were appointed. The real ground on which the complainers have founded their appeal is that in the case of *Gilbertson v. Mackenzie*, 5 R. 610, the Court laid down certain propositions regarding the matter. But in that case the Court very carefully abstained from giving any opinion as to whether the engines were privileged to catch salmon. I think therefore that the result of this Special Case must be that they should be put down. I should not have hesitated to brush aside any decision of the Commissioners in order to arrive at the true state of the facts had it been necessary, but here there is no need for any such step.

LORD ORMDALE—So far as the regularity of the procedure is concerned, I do not understand the force of any objection that was taken unless it be the irregularity as to the evidence. In all other respects the regularity of the proceedings has been unobjectionable. The Commissioners had a statutory duty to discharge. They intimated

their meeting (at which they were prepared to hear parties) by advertisement in terms of the statute. That was not objected to. The appellants were heard—that is not denied. They led evidence—that is not disputed; and then we have the Commissioners setting forth the facts which they have found proven.

There is an objection taken to their jurisdiction, and a great deal was said about that. There are various kinds of Special Cases settled and stated in a mode analogous to that prescribed under this Solway Act—for example, we have the Special Cases in connection with Registration appeals. These cases are framed by the Sheriffs, some of them appending the whole evidence, but that was held by the Judges who sat in the Registration Appeal Court in succession to be quite irregular; there was a judgment to that effect, and that mode of stating a Special Case was put an end to, with the result that subsequent cases of the same kind have been stated merely with the facts found by the Sheriff as the consequence of the evidence adduced before him, and then with the deduction in law to which he has come. Now, in the present appeal there is a very similar condition of matters. The Court is called upon to say merely whether the Commissioners are wrong in their law, but the statement of the facts as found by them after taking evidence must be deemed conclusive, just in the same way as it has been held so in the case of the Sheriff's findings of fact in registration appeals.

In the cases which come up under the Solway Act of 1877 there is also one check—and it may be a very salutary one—against any serious mistake being made by the Commissioners. I do not suppose the Commissioners here would wilfully fall into mistakes in stating the case, but in case they might unintentionally do so, the remedy is given to parties to have it adjusted at the sight of one of the Judges of this Court. In the present case it came before one of our number, and the case having been adjusted in his hands we now have it before us.

The only objection stated for the appellants is that the evidence would bring us to a different result from that to which the Commissioners have come. That was the argument, and it was a little startling. From the explanations which were made from the bar, and also from the observations of my brother Lord Gifford, I am quite satisfied that the Commissioners did not, and never did, intend to disregard the case of *Gilbertson*. Probably they considered and read it; but even though they did not, the evidence led in that case was evidence led in a different cause and between different parties. The Commissioners moreover would have been acting wrongly to admit that evidence except of consent. They however adduced evidence for themselves. The sole question, then, truly left for the Court to consider is, whether there is a sufficiency of findings in fact, as we have them here presented to us, to justify the decision come to by the Commissioners? Now, we have certain clear enough findings in fact, and those are that the engines in question "catch white fish as well as salmon, as do also the ordinary salmon stake-nets." The Commissioners also found it 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 then we have the order of removal. These are the grounds of the decision they have come to, as well as the decision itself, and it appears to me that the Commissioners have acted in strict conformity with their statutory powers.

LORD GIFFORD—I have come to the same conclusion, and would only add a few observations on this matter. As to the question of privilege, this has clearly been held by the Commissioners not a case of privilege, and it is not to be wondered at, for privilege could only have existed in favour of those who had right of salmon-fishing, and the appellants in the present instance had expressly disclaimed any such pretension. They have maintained that their only wish was to be let alone where they were. Well, the Commissioners pronounced an order of removal, and then arises the question of review. The appellants applied to the Commissioners for a Special Case, and that Special Case was duly granted, prepared, and settled by the Commissioners; then it fell to be settled by one of the Judges of the Court, and I happened on this occasion to be the Judge on whom devolved the duty of adjusting the case.

Now, there was, I felt, a difficult question to be settled as to what were the proper functions to be exercised by the Judge in such an adjustment. First of all, there was the difficulty, who is to settle the facts—the Judge or the Commissioners? If the Judge is to do so, he must have the whole of the evidence before him. But the statute makes no provision whatever for recording the evidence. It is no doubt true the proof happened to be taken down at the time by a shorthand writer, but he was not judicially sworn, and his notes are not therefore admissible. Secondly, even suppose the Judge reads this evidence thus taken and considers it, he is applying his mind to that on which the Commissioners arrived at their conclusions of fact, and he becomes at once an Appeal Judge. Now, I find in the statute that the Appeal Court is not the single Judge sitting to settle the Special Case, but your Lordships' Court, and therefore I said I must take my facts from the Commissioners, and I proceeded to settle the case in the sense of seeing that it was in proper form, and that, I humbly conceive, is all that the statute contemplates as the function of the single Judge under the 8th section.

Now, as to the present appeal, we must either get at the whole evidence and have it before us, or we must take it as from the Commissioners. For my part, I can only conclude that these Commissioners who were charged with duties of inquiry, inspection, and so forth, have fulfilled all those duties as to these nets or engines in the present instance. The net, we learn from the Special Case, was of the same construction as an ordinary salmon net, but of smaller dimensions. The Commissioners have come to the conclusion that these nets are really "erected and used" for the purpose of catching salmon. If a net is erected with the best of purposes to catch, we may say for instance, white fish, but does catch salmon, then in the words of the Act it is "used" to catch salmon. I may also observe that the finding of the Commissioners is that these nets were "erected and used" for the illegal purpose, whereas the Act says it shall be a sufficient ground

for inquiry if nets shall have been "erected or used" for that purpose.

In conclusion, I may say that if the findings in fact are to be held as final, there is no law in the case at all. It may be a hard case on these fishermen, but I cannot help thinking that this was what was contemplated and intended by the Legislature.

LORD JUSTICE-CLERK—I wish to add that I do not express any opinion upon the question of how far the functions of the Judge in chambers settling a case such as this extend. The matter may become one of much importance, and I wish to keep the ground clear. There is nothing here to enable us to look behind the case as settled.

The Court pronounced an interlocutor finding that the Commissioners "were entitled to order the nets or engines used by the appellants to be abated or removed," and dismissing the appeal.

Counsel for Appellant—Mair. Agent—W. Officer, S.S.C.

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

Friday, July 18.

SECOND DIVISION.

[Sheriff of Forfarshire.

MACKENZIE v. BLAKENEY.

Agent and Principal—Sale of Shares by Stockbroker—Non-Disclosure by Principal—Commission—Loss on Difference Purchase.

B instructed M, a broker, to sell through his London correspondents certain bank shares, which proved to be not transferable in this country. B knew this when giving the order, but did not disclose it. The shares were sold, and M in order to give delivery in accordance with the rules of the Stock Exchange had to purchase other shares of the same bank capable of transference. *Held*, in an action at the instance of M against B for payment of the difference of price and for commission, that M was entitled to recover.

Thomas Blakeney, the defender in this action, called with a Mr Ross on the pursuer William Mackenzie, stockbroker, on 6th December 1877, and employed him as a stockbroker to sell 20 shares of the Bank of Victoria and 130 of the National Bank of Australia, through his London correspondents. The shares were sold, but when the time came for delivery, it appeared that they were registered in the Colonial register of the banks, and consequently were not transferable in London, and incapable of passing as delivery on the London Stock Exchange. The rules of that body entitled the buyer in these circumstances, on the defender's failure to deliver, to buy in against the defender or his brokers shares of these banks standing or registered in the London registers, or to insist against the defender or his brokers for delivery of such shares. After an unsuccessful effort to arrange the matter