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

should be detained for more than four days, the period allowed for their being filled and despatched.

After that date all persons using the sacks, and among them the defenders, received upon each occasion of obtaining possession of the sacks for the purposes of use in their business a copy of certain conditions on which the sacks were hired out by the pursuer. These conditions contained, *inter alia*, an article stipulating that the borrower of the sacks might have them four days free of charge for the purpose of filling and returning them to the station from which they were received; and that if the sacks were detained beyond such four days hire would be charged at one halfpenny per sack per week or part of a week; while if sacks were returned empty hire would be charged at the same rate from the date on which they had been received—the amount to be paid by the borrower when the sacks (full or empty) were delivered at the forwarding station. In like manner the time for getting sacks emptied and returned which arrived full was to be four days, after which hire at the same rate of one halfpenny per sack per week was to be charged. The borrower on receiving the sacks was required to sign an acknowledgment to the effect that they were received on these conditions, and the person who received them on his behalf was to be his agent for that purpose.

After as before 1874 the defenders used the pursuer's sacks, which were known in the trade as "Chisholm's sacks," in the course of their business, and after that date the pursuer rendered them accounts in an altered form, which showed that charges for detention of sacks were now made and intended to be recovered by him directly from the borrower of the sacks although they had been hired from the railway company. In various letters also written before the action was raised the pursuer distinctly intimated that the sacks were only obtained on the conditions above narrated. The defenders, however, refused to make any such payment, although there was evidence that on one occasion the pursuer's charges were admitted. They repeatedly repudiated the pursuer's accounts by sending them back unopened from the year 1876 onwards, and in 1881 the present action was brought.

The Lord Ordinary (LEE) after a proof pronounced this interlocutor and opinion:—"Finds it proved that the defenders, during the period embraced in the accounts libelled, used the pursuer's sacks for the purposes of their business, in the knowledge that they were let on hire on the terms stated in the printed conditions issued with the accounts, and that the hire charged by the railway company did not include the charges stipulated for detention: Therefore repels the defences other than the plea of overcharge, and before disposing of said plea remits to Mr Robert Cameron Cowan, C.A., to examine the accounts produced with the vouchers, in so far as still accessible, and to report how far the same appear to be accurately stated, and to be charged in conformity with the conditions furnished by the pursuer to persons using his sacks.

"*Opinion.—[After the narrative above quoted]* —In 1874 a change was made in the arrangements, and the business has since been carried on under the contract. The principal change in the arrangements was that under the new contract the pursuer personally undertook the recovery of the rates for demurrage, stipulating for all necessary assistance and facilities from the railway company, and reserving a right to refuse sacks in cases where he had good reason to believe the sacks would not be returned or the hire for detention duly paid.

"The defenders are extensive grain dealers in Perth and Coupar-Angus, and have been using the pursuer's sacks for many years in their business. These sacks are well known among grain dealers as 'Chisholm's sacks.' Prior to 1874 it does not appear that the defenders had ever paid demurrage. But it is proved to my satisfaction that in that year they were informed of the change of arrangement. Their accounts were subsequently rendered by the pursuer in a form which distinctly showed the change, and there is distinct evidence that these accounts were to some extent matter of discussion and adjustment in 1875, and that the leading defender was made aware of the condition as to payment to the pursuer for detention being a matter not included in the hire charged by the railway company. He resented the charge, as he says, as 'a piece of impertinence,' and repudiated it by sending back the accounts every month subsequent to May 1876 as they arrived. But he went on ordering and using the sacks in the knowledge of the practice alleged in the condescendence. Now, the first question which arises is, whether a man who goes on using the property of another, which he knows to be only let on hire for a specific charge, incurs an obligation to pay that charge? I am of opinion that he does, and that he cannot avoid that obligation by the kind of repudiation that took place here.

"It is said that there was no contract on the part of the defenders with the pursuer; that their only communication was with the railway company, or with the farmers from whom they bought the grain; and that they had nothing to do with the contract between the pursuer and the railway company. I think it proved, by the terms of the orders for sacks, and by the course of dealing which is shown to have taken place, that the defenders had communications with the pursuer through the railway company's officials, and through the farmers; and that it is not correct to say that their only dealings in connection with sacks were with the railway company. But even assuming no contract to be proved as between the pursuer and the defenders directly, I am of opinion that the law implies an obligation in many cases, and in no case more frequently than in the hiring of moveables. Suppose a coachhirer to carry on his business by a contract with a third party, who takes the order and receives the hires for all journeys, but which contract expressly reserves to the proprietor of the coaches a right to make charges for detention, and that one deals with the contractor, and makes use of the coaches, in the knowledge of the separate charge for detention, and of the fact that it is not included in the hire for the journey which he incurs to the contractor—Can there be any doubt that such an one by his use of the coach upon that footing will incur an obligation to pay to the owner hire for detention? Can it be said that the law recognises no claim against the hirer on the part of the owner because there was no direct contract between them? My opinion is that

the law is not so straitened in its remedies. Even in the law of England, it appears, from the authorities cited in Addison on Contracts, and particularly from the case of *Romsey* v. *The North-Eastern Railway Company* (32 L.J., C.P. 247), that the plea of no contract is not sufficient. In the law of Scotland, however, there is no difficulty. The fact that a subject is known to belong to another, and is to be had only upon hire, necessarily implies on the part of anyone who uses it in that knowledge an obligation to pay the hire. Of course the hire must be certain or ascertainable by reference to a fixed standard. But it will not enable the hirer to escape liability that he had no direct communication with the proprietor of the subject.

"In the present case I hold it clearly proved that the defenders knew the sacks to be the property of the pursuer, knew that they were let for hire, knew the hire that was charged, and knew that the railway company, in obtaining for the defenders and for their grain the use of these sacks, acted to some extent as agents for the pursuer.

"I therefore repel the defence of no contract, and the other defences upon which the defenders maintain that they have incurred no liability to the pursuer.

"With regard to the plea of overcharge, while I think that the defenders, from the course followed by them, are not now entitled to throw upon the pursuer the burden of proving every date in the accounts, I think that they are entitled to have the accounts examined for the purpose of ascertaining how far they are accurately framed and stated, so as to enable the defenders to check the charges with reference to the third and fourth conditions mentioned in the condescendence. I think that it must be open to them still to point out any errors, and I shall therefore remit to an accountant to examine and report upon the accounts, with a view of enabling him to receive and report upon any objections that may be stated. The usual powers conferred by the Act of 1868 will, I think, be sufficient to enable the accountant to execute the remit."

The defenders reclaimed, and argued—The contract of the defenders was with the railway company only, and therefore they were under no liability to the pursuer arising out of contract. They had repudiated the accounts tendered them, and given ample notice that they did not accept the sacks on any conditions except those on which they agreed with the persons with whom they dealt. Nor was there any implied contract between them and pursuer, for they were not taking the sacks in a way which raised up an implied contract to recompense him; on the contrary, their contract was quite express but with another party. Additional hire for detention was surely not payable to one by whom hire for use was not stipulated.

Argued for pursuer—The defenders had used the pursuer's sacks for years in the knowledge that he charged hire for detention of them. There was thus an implied obligation on them of the nature of an obligation of recompense to pay for the property of another which they had knowingly used—Bell's Prin. secs. 5, 38-9; Storey on Contracts, sec. 12; Addison on Contracts, 1048; and case of *Romsey* cited by Lord Ordinary.

At advising—

Lord President—I have no doubt of the soundness of the interlocutor of the Lord Ordinary. He has found that the defenders "used the pursuer's sacks for the purposes of their business in the knowledge that they were let on hire on the terms stated in the printed conditions issued with the accounts, and that the hire charged by the railway company did not include the charges stipulated for detention." Now, the only peculiarity of the case is that the defenders contracted directly with the Caledonian Railway Company for the furnishing of sacks at a particular rate of hire, and this for long before 1874 as well as after 1874. The defenders declined to make any alteration in the course of dealing after 1874, and went on taking sacks from the Caledonian Railway Company and paying for them to the Company, and had there been no interposition on the part of Mr Chisholm it would have been difficult for the railway company to make new charges against the defenders after 1874. But Chisholm, the owner of the sacks, who gave them to the Caledonian Railway Company to use on hire, the Company acting as his agents, came forward and made a new contract with the Company, introducing very specific stipulations, and at the same time making it known to all traders using the sacks that henceforth certain charges were to be made for the detention of the sacks beyond four days. It is impossible to say that he was not entitled to do that. I cannot imagine on what ground in law it can be said that traders might use the sacks and not be bound by the conditions intimated to them as the conditions failing fulfilment of which they were not to have the use of the sacks. These printed conditions were sent to the defenders, and Chisholm's position is very clear from the letter in which he says—"These printed conditions, of which so many copies have been sent you, are the only conditions on which you are allowed to use my sacks. Let there be no misunderstanding on that point. Nothing you can write or say can alter this." I am of opinion, in point of law, that the sacks being the property of Chisholm, and it being in his power to prevent the defenders from using them, he was entitled to insist on their being used on the conditions which he intimated to the defenders, or that they should not be used at all. The defenders, however, said that they would not make any payment at all to Chisholm, with whom they had nothing to do, but went on using the sacks. Now, they might have given up using them, but I cannot imagine that there is any law which entitled them to go on using the sacks without paying Chisholm for them according to the conditions he had imposed and intimated. That would be a novelty in the law of contract or implied contract. I therefore agree with the Lord Ordinary.

Lords Deas, Mure, and Shand concurred.

The Lords adhered.

Counsel for Pursuer—J. P. B. Robertson—Lang—Chisholm. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for Defenders—Scott—Rhind. Agent Archibald Menzies, S.S.C.