

Thursday, July 10.

FIRST DIVISION.

SOLWAY SALMON FISHERIES COMMISSION—
HUGHAN'S CASE.

Fishing—Salmon—Solway—Privileged Fixed Engine—Act 1563, c. 68—Salmon Fisheries (Scotland) Act 1862 (25 and 26 Vict. c. 97), sec. 6, subsec. 2—Salmon Fisheries (Scotland) Act 1868 (31 and 32 Vict. c. 123), sec. 10 and Sched. (B)—Solway Salmon Fisheries Commissioners (Scotland) Act 1877 (40 and 41 Vict. c. 240), secs. 3, 4, and 5—Seaward Limit of the Solway and Jurisdiction under Act of 1877.

In an appeal against a decision of the Solway Salmon Fisheries Commissioners 1877, held (rev. the determination of the Commissioners) that under the Acts passed before the year 1877 the seaward limit of the Solway Firth for the purposes of salmon-fishing was conclusively fixed to be a straight line drawn from the Mull of Galloway to Hodbarrow Point in the parish of Millam, Cumberland, and that the only duty of the Commissioners appointed under the Act of 1877 (40 and 41 Vic. c. 240) was to settle what were and what were not "privileged fixed engines" within the terms of sec. 4 thereof.

This was an appeal from a decision of the special Commissioners appointed under the Solway Salmon Fisheries Commissioners (Scotland) Act 1877 (40 and 41 Vict. cap. 240).

By that Act it was enacted that (sec. 3) "subject to such appeal as is hereinafter mentioned, the Commissioners appointed under this Act shall inquire into the legality of all fixed engines erected or used for the taking of 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, and shall abate and remove all such fixed engines as are not proved to their satisfaction to be privileged as hereinafter provided." Further, by sec. 4, that "In this Act and in 'The Salmon Fisheries (Scotland) Act 1862,' and in any Act incorporated therewith, 'fixed engine' shall include any net or other implement for taking fish fixed to the soil or made stationary in any other way, not being a cruive or mill-dam; and 'privileged fixed engine' shall only include 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, provided always that no person shall, by proving the use of different fixed engines during the said years, or any of them, be allowed to maintain a number of privileged fixed engines exceeding the greatest number of such engines in use by him during any one of the years foresaid." Further, by sec. 5, "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."

There was an appeal under section 8 of the Act, which was allowed, against the decisions of the

Commissioners to either Division of the Court of Session. The decisions of the Court of Session, as well as those of the Commissioners which were not appealed against, were by sec. 16 declared to be final, and not subject to review.

The appellant had claimed "two certificates" for two stake-nets in the waters of the Solway Firth *ex adverso* of his lands of Kirkbride and others, in the parish of Kirkmabreck and stewartry of Kirkcudbright, as privileged engines under the Act.

The Commissioners having received evidence and heard parties, pronounced a decision in which they "find that it has not been proved to their satisfaction that the said fixed engines are privileged: Find that the same are illegal, and do hereby, acting under and in pursuance of the 'Solway Salmon Fisheries Commissioners (Scotland) Act 1877,' order the said fixed engines to be abated and removed on or before the 30th day of May 1879."

The claimant appealed. The following was the statement of facts in the case settled by the Commissioners:—

"The Commissioners held the following facts to be proved:—The stake-nets in question are placed on the east side of Wigtown Bay, *ex adverso* of the claimant's lands of Kirkbride and others. At low water the nets are on dry sand, in the position laid down in sheet 42 of the Ordnance Survey map for the county of Kirkcudbright. They are both at a considerable distance from the channel by which the river Cree discharges itself into Wigtown Bay, and are the nearest nets to the north of the junction of the rivers Cree and Bladenoch. At high tide they are entirely covered with salt water to a considerable depth. The said lands of Kirkbride are held on a title *cum piscationibus*, and the claimant and his predecessors have from time immemorial, and particularly during the open seasons of the years 1861, 1862, 1863, and 1864, been in use to fish for and take salmon with fixed engines at or about the places in question. As to the Cree and its estuary, it was proved that as high up as the Cassenarie nets, which are further up the estuary than those of the claimant, flounders and other sea fish were frequently caught, but not fresh water fish even of the salmon kind, salmon and sea trout excepted. There was evidence even of a shark becoming entangled in one of the nets. Marine plants are also found *in situ*, and not merely as drift-ware, and the large proportion of salt water which must be found is seen at a glance by inspecting the Ordnance or Admiralty maps, and was observed on the spot by the Commissioners.

"Witnesses adduced by the claimant stated that they considered these nets to be in the Solway. But the Commissioners hold that they are not, being of opinion that the proper estuary of the Cree extends seaward to the junction of the rivers Bladenoch and Cree, and that while fixed engines immediately to the seaward of that point would be lawful as being in the open sea, those on the north or landward side, including the claimant's, are not lawful, as being in an estuary. Had the Commissioners been satisfied that the said stake-nets were situated in 'the water of Solway,' in the sense of the Act 1563, c. 68, they would have considered the claimant entitled to certificates for the said two stake-nets, as privileged fixed engines within the meaning of 'The

Solway Salmon Fisheries Commissioners (Scotland) Act 1877.

“The Commissioners were of opinion that the object of the Salmon Fishery legislation of and since 1861 as regards the fishings on or *ex adverso* of the southern counties, stated shortly, was—to determine, within certain geographical limits, the extent to which proprietors of salmon-fishings were to be allowed for the future to exercise that right by means of fixed engines, the measure of that extent being the number of such engines legally used at a certain time.

“Prior to that legislation fixed engines could not be legally used on the southern coast of Scotland unless in the open sea, or on the open shores and deep sea of the Solway Firth, or in such narrow waters as could be considered the ‘Waters of Solway’ in the sense of the Act 1563, c. 68.

“If the geographical limits referred to in the recent Acts embrace any waters which could not previously have been regarded as Water of Solway, the giving privilege to all fixed engines within those enlarged limits would have the effect of legalising engines which might have been declared illegal and removed at any time prior to 1861.

“An interpretation of the statutes leading to a result thus contradicting what they consider to have been the policy and scope of the legislation which the Commissioners have been appointed to carry out is one which they could only accept if declared in the most explicit language, and a careful comparison of the language of the different statutes seems to require them to reject it.

“The Commissioners thus felt it their duty, in regard to all fixed engines situated in places where the tide ebbed and flowed, to consider whether they would have been legal irrespective of recent legislation, and in many cases, between the Sark and the Mull of Galloway, they had the advantage of evidence being led and discussed by opposing parties or their agents or counsel. In other cases—the claimant's for example—there were no contradictors.

“No case was disposed of till after a general inquiry had been made in each of the counties of Dumfries, Kirkcudbright, and Galloway, and after they had considered the evidence as a whole, the Commissioners resolved to allow further evidence and argument, and of this permission several—among others the claimant—availed themselves.

“The Commissioners examined and called the attention of parties to maps published in the seventeenth and eighteenth centuries, as well as the leading modern maps, and some additional ones were produced by the claimant. They also called attention to the leading gazetteers, and to the descriptions of lands and fishings in the titles and leases produced by the parties, and read proofs referred to or produced by various parties in litigations in which their right to fish for salmon under titles *cum piscationibus* had been called in question.

“Although each case had to be decided separately, it was felt that it would be important if an opinion could be arrived at as to what was formerly understood to be the limit of the Solway Firth, because although there might be places within it that were not to be considered ‘Waters of Solway,’ there could certainly be none outside it which could be called by that name. In com-

ing to a conclusion as to what was to be regarded as the outer limit of the Solway Firth before 1862 the Commissioners would have been very much influenced by the fact that a line from the Mull of Galloway to the English coast had been named as the limit by bye-law of the Commissioners of 1862, but for a statement by Mr James Leslie, C.E., one of their number (which statement has been published in a blue-book issued by Government—Parl. Papers, 1871, vol. xxv. M. S. p. 617) that neither he nor the other Commissioner whose names were appended, and whose names were the only names appended, did in fact sign the bye-law, and that they had ‘fixed on what to them seemed, whether considered geographically or nautically, to be really and truly the Solway Firth, viz., everything which is within the *fauces terræ*, as defined by a line drawn from Rosshead lighthouse on the north to St Bees lighthouse on the south.’

“The present Commissioners have practically come to this last conclusion.

“The oral testimony as to where the Solway Firth commences is conflicting.

“They consider that the great preponderance of authority of maps, ancient and modern, and of gazetteers, is against holding that any river west of the Dee flows into the Firth of Solway.

“This view is confirmed by the fact that in two of the litigations referred to as to the exercise of the right of salmon-fishing in this Fleet or Fleet bay from the fresh water to the mouth of the bay, there were proofs taken, and not a single witness once mentioned the word Solway—a remark which equally applies to the still longer proof in the action between the Earl of Galloway and the burgh of Wigtown as to fishings on the opposite side of the Cree from the claimant's fishings. The claimant's titles never refer to the Solway as the *locus* of his fishings or the boundary of his lands.

“Fishings of the Earl of Galloway are referred to in his titles as ‘fishings in the water of Cree’—none are referred to as in the Solway—and his lands are described as bounded, not by the Solway, but by the ‘Firth of Cree and the Bay of Cruggleton,’ while the boundary of the burgh of Wigtown is described in its charter of 1457 as the ‘Mydstreme aquae de Cree usque ad mare de Ireland,’ without any allusion to the Solway—in marked contrast to the titles of Annan and the fishings beyond to the east, when the name Solway enters into the boundaries, and fishings in the Solway are expressly granted.

“Add to this that the reason assigned for exempting the ‘Waters of Solway’ from the ordinary rules for the preservation of salmon—viz., that as the English could not be made to observe them, the benefit of the rules would accrue to the English, has no application to the distant waters of the Fleet or the Cree.

“The Commissioners in these circumstances found that the fixed engines claimed by the appellant were not in the Water of Solway, but in the estuary of the Cree, and therefore illegal.

“The appellant maintains that by the terms of ‘The Solway Salmon Fisheries Commissioners (Scotland) Act 1877’ the area within which the Commissioners are authorised to grant certificates on the one hand, or to order fixed engines to be abated and removed on the other, is conclusively fixed under the authority of ‘The Salmon Fish-

eries (Scotland) Act 1862,' and the 'Salmon Fisheries (Scotland) Act 1868,' so as to exclude all inquiry into the meaning of the phrase 'Water of Solway' under the Act of 1863, and that the stake-nets in question being situated within the said area, and satisfying the other conditions required by the statute to entitle the appellant to certificates for them as privileged fixed engines within the meaning of the said Act of 1877, the appeal ought to be sustained. Further, it is maintained that, even if it be relevant to inquire into the meaning of the phrase 'the Water of Solway' as used in the Act of 1863, the stake-nets in question are proved to be situated in the Water of Solway within the meaning of the said Act of 1863, so far as that can be proved at so great a distance of time; or otherwise, that they are on the shore of the open sea."

The question for the decision of the Court was—"Whether on the facts above stated the appellant is entitled to have the said fixed engines, or either of them, certified as privileged fixed engines under the said Act of 1877."

The enactments relied on by the appellant are quoted in the opinion of the Lord President *infra*.

Argued for the appellant—The limit of the Solway Firth seaward was now conclusively settled to be a straight line drawn from the Mull of Galloway to Hodbarrow Point in Cumberland. The Act of 1868, sec. 10, and Sched. B. made that clear, and destroyed the effect—if in law it had any effect—of Mr Leslie's statement that the Commissioners of 1862 never did in fact sign or approve of the bye-law to which their names were appended. The Act of 1868 ratified the bye-law without regard to its origin. The duty of the Commissioners of 1877, therefore, was to take the limit so fixed, and settle what nets within that limit were legal, in terms of section 4 thereof. They had nothing to do in the way of fixing the limit. But even if the views of the Commissioners were sound, it was *ultra vires* on their part to order the removal of the nets, for on their theory the nets must be held to be outside their jurisdiction.

Authorities—*Murray v. The Earl of Selkirk*, June 9, 1824, 2 Shaw App. 299; *Oswald v. McWhir*, April 13, 1835, 1 Shaw and Macl. 399.

At advising—

LORD PRESIDENT—This case, as far as I can see—and I believe that all your Lordships are agreed upon this—depends entirely upon the question, Whether the fixed engines which Miss Hughan claims are situated within the water or shores of the Solway? The Commissioners have found that they are not in "the Water of Solway," but in the estuary of the Cree, and therefore illegal. Now, if they are really in "the Water of Solway," as the limits of the Solway have been fixed by Act of Parliament, then the conclusion of the Commissioners is necessarily wrong, and the only question therefore seems to the Court to be—What are the limits of the Water of the Solway as fixed by Act of Parliament?

The Commissioners under the Salmon Fisheries (Scotland) Act of 1862 were directed by the 6th section of that statute "to fix, for the purposes of this Act, the limits of the Solway Firth, having regard to an Act passed in the 44th year of the reign of George III. chapter 45;" and it appeared that they exercised that power, and did, in the

form prescribed by the statute—that is to say, in a bye-law—fix the limits of the Solway Firth for the purposes of the Act, and that bye-law is to be found in one of the schedules of the Salmon Fisheries Act of 1868. It is in the following terms:—"We, the Commissioners appointed under the said Act [of 1862], and empowered thereby 'to fix,'" &c. (*ut supra*) "do hereby fix the limit dividing the Solway Firth from the sea to be a straight line drawn from the Mull of Galloway, in the county of Wigton, to Hodbarrow Point in the parish of Millam, in the county of Cumberland." This bye-law is dated 22d January 1864, and is signed by two of the Commissioners, and bears to have been approved by the Secretary of State for the Home Department. Now, in the Act of 1868, section 10, it is enacted that "the bye-laws contained in the schedules to this Act annexed shall in all respects be held to have been duly made and published, so far as consistent with and authorised by the recited Acts, and to such extent shall be as valid and binding as if the same had been expressly enacted in this Act: Provided always, that notwithstanding the terms of the said recited Acts, any such bye-law shall be valid and binding as aforesaid, although it includes in one district more than one river, or makes provisions with respect to a district including more than one river, or two or more districts having assigned to them a common estuary."

Now, it appears to me, therefore, that not only did the Commissioners, in the exercise of the powers conferred upon them by the Act of 1862, fix the limits of the Solway Firth, but that the bye-law so made by them was adopted and made statutory by the subsequent Act of 1868. This line includes the estuary of the Cree, and therefore, if that delimitation of the Solway is binding in law, it is quite plain that the delivrance of the Commissioners is wrong, and that the fixed engines possessed by Miss Hughan are in the Solway Firth.

Now, what does the Act of 1877 provide in regard to this matter. The 3d section provides that "the Commissioners appointed under this Act shall inquire into the legality of all fixed engines erected or used for the taking of salmon in the waters and on the shores of the Solway Firth, as the same have been fixed under the authority of 'The Salmon Fisheries (Scotland) Act 1862,' and in all the rivers flowing into the same, and shall abate and remove all such fixed engines as are not proved to their satisfaction to be privileged, as hereinafter provided." Now, it is very difficult to read that otherwise than as directing the Commissioners to take the limits of the Solway Firth, as fixed under the authority of that Act of 1862, and to examine into the case of every fixed engine which they find within these limits, and which was in existence during these years, and either to pronounce it to be illegal, and direct it to be removed, or to grant a certificate that it is privileged within the meaning of the statute. In this case it is quite plain that if the Commissioners had thought that the estuary of the Cree was within the limits of the water of the Solway they would have granted a certificate in favour of Miss Hughan, but because they thought that it was not within the Solway water they ordered the nets to be removed. Now, the Court are of opinion that the Commissioners

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