

viously high expediency as in the eye of the law amounts to necessity. That is the doctrine which has been laid down again and again, and in acting upon it now I cannot see my way to entertain this petition. It may be that it would turn out better for this young lady when she comes of age that this mansion-house should be built now, but it may be that it would turn out to be the very reverse, and no one can tell whether it would be a benefit or not. There is certainly neither necessity nor high expediency here, and I am therefore for refusing the petition.

**LORD DEAS**—Your Lordship has stated with perfect accuracy the principle to be applied to such cases. There is nothing like necessity or strong expediency here, and it would be quite out of place where there is no contradictor to enter into the consideration of the numerous decisions which have been referred to.

**LORD MURE**—I concur. The general rule is that either necessity or such strong expediency as the law holds to be equal to necessity must be shown before the Court can sanction such an act as the building of a mansion-house by a tutor. Now, in my view, there is no necessity for doing that in order to the proper management of this estate. I asked during the argument if there had been any decision on the point since 1798, when in the case of the *Earl of Hopetoun*, which regarded the mansion-house of Raehills, the point was expressly decided, and it appears that there has been none.

**LORD SHAND**—There are certainly considerations stated in this petition which serve to show that in some respects it would be desirable now to build a mansion-house on this estate, but I feel myself precluded by the decisions of my predecessors from giving sanction to the proposed building. I think that the later decisions go to show that a high expediency is to be held equal to necessity, but there is not any such high expediency here. The pupil might quite well say when she came of age that the mansion-house which had been built is not that which she would have wished.

I must say that the decision in *Lord Hopetoun's* case does not strike my mind so forcibly as it does that of my brother Lord Mure. There the defender, who was curator-dative to a lunatic ward, claimed to take credit, in accounting for the executry estate of the ward after his death, for a sum forming part of his moveable estate which he had expended in building a mansion-house on the estate, and was found not entitled to do so.

The Lords refused the prayer of the petition.

Counsel for Petitioner—J. P. B. Robertson—Darling. Agents—Horne & Lyell, W.S.

Tuesday, July 18.

## SECOND DIVISION.

(Before Lord Justice-Clerk Moncreiff, Lords Craighill and Rutherford Clark.)

### SPECIAL CASE—COMMISSIONERS OF SUPPLY OF MIDLOTHIAN v. THE TURNPIKE ROAD TRUSTEES.

*Road—Right and Duty of Levying Tolls—Act 5 and 6 Will. IV. c. 62—Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. c. 51), secs. 6 (sub-sec. 2), 9, 33, 35, and 122.*

In a county in which the Roads and Bridges Act by virtue of a Provisional Order came into operation on 1st September 1882 the repealing force as to local Acts of subsection 2 of section 6 of the Act is qualified by the provisions of sections 33 and 35, to the effect that tolls shall continue to be levied on all the roads of the county, whether let or unlet, by the existing body of Statutory Road Trustees till 15th of May 1883.

This was a Special Case between the Commissioners of Supply of the county of Midlothian of the first part, and the Turnpike Road Trustees of the said county, acting under 5 and 6 Will. IV. c. 62, of the second part. The statement of the Case was to the following effect:—Under sec. 9 of the Roads and Bridges Act, followed by the Provisional Order of 21st February 1882, and relative confirming Act of 3d July following, the provisions of the Roads and Bridges Act would come into operation on 1st September 1882. By sec. 6, sub-sec. 2, the adoption of that Act in any county operated the repeal of all local road Acts. Sec. 33 provided:—“From and after the 15th day of May, or from and after the 26th day of May, when the leases of the tolls in any county run from that date, immediately following the commencement of this Act in any county in Scotland, where such commencement shall happen before the year 1883, and otherwise from and after the first day of June 1883, all tolls within such county, and within any burgh wholly or partly situated therein, shall be abolished, and the exaction of statute labour 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.” Section 35 provided:—“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.” The tolls on turnpike roads within the county of Edinburgh had been and were at this time collected by the Turnpike Road Trustees under 5 and 6 Will. IV. c. 62, being the

local Act in force in the county. None of the tolls were let out upon leases to third parties, but were all collected by persons employed for the purpose by the Turnpike Trustees. The statute-labour roads within the county were maintained by trustees, who levied assessments therefor under 5 and 6 Will. IV., c. 68, being the local Act in force in the county of Edinburgh relative to the statute-labour roads.

In these circumstances the parties of the first part maintained that on a sound construction of the repealing clauses, viz., sections 6 and 122 of the Roads and Bridges Act, all power to levy tolls under 5 and 6 Will. IV., c. 62, ceased on and after the 1st September 1882; the parties of the second part, on the other hand, maintained that they or the trustees to be appointed under the Roads and Bridges Act were entitled and bound to continue to levy such tolls till 15th May 1883.

The parties submitted this question (as finally adjusted during the hearing of the cause) for the opinion and judgment of the Court:—"Whether under the provisions of the Roads and Bridges (Scotland) Act 1878, the power of levying tolls within the county of Edinburgh under authority of the Act 5 and 6 Will., IV. chap. 62, presently exercised by the parties of the second part, ceases at 1st September 1882? or Whether the parties of the second part are entitled and bound to levy such tolls until the body of trustees under the Roads and Bridges (Scotland) Act 1878 has been duly constituted?"

The Court having intimated that a judgment could not be pronounced between the parties unless some member of the public subject to assessment within the county should come forward in the capacity of objector to the payment of tolls in the interval from 1st September 1882 to 15th or 26th May 1883, it was intimated that Sir James Gibson Craig, Bart., was willing to be made a party to the cause in that capacity, and the case was ordered to be amended to that effect.

At advising—

**LORD JUSTICE-CLERK**—I do not think it necessary to indicate the views I hold upon this case at any great length. Our opinions have been indicated pretty plainly in the course of the discussion. I think the 122d clause of the Roads and Bridges Act is a very material one indeed. It says—"From and after the commencement of this Act in any county, the Act passed in the 8th and 9th years of the reign of Her present Majesty, chapter 41, and the Act passed in the 1st and 2d years of the reign of His Majesty King William the Fourth, chapter 43, except the sections thereof incorporated herewith as after mentioned, shall cease to have effect therein: provided that nothing contained shall affect anything duly done or suffered or any right or liability acquired, &c.: provided, also, that until the 15th day of May, or 26th day of May, as the case may be, following the commencement of this Act in any county where such commencement shall happen before the year 1883, and otherwise until the first day of June 1883, all provisions for levying collections and recovering toll-duties, statute-labour conversion money, bridge-money, and other moneys of whatever kind for management, maintaining and repairing roads, bridges, and highways situated or partly situated in such county,

or in any burgh therein, and also all provisions against persons evading or attempting to evade payment of such toll-duties and other moneys, shall continue in full force and effect, and may be put in operation by the trustees or burgh local authority under this Act, as the case may be, in the same manner as they might have been put in operation by the trustees under the other Acts mentioned in this section." I think that indicates what the rules of construction must be in regard to this matter; that until the former management—that is, the existing management—is superseded by the new trustees, the affairs of the roads must continue to be administered by the former administrators. Indeed, I think that is the general rule which is applicable. At all events, we have nothing in this statute to lead to any contrary result; and in this present case I have no doubt on this matter at all. The tolls are continued. I do not think the argument in regard to the county of Edinburgh being exempted can be maintained, for I am of opinion that it is clear that until the parties who are authorised to lay on the assessment are constituted the old mode of maintaining the roads must needs exist. These parties are the only parties who can exist before the new trustees are inaugurated, and it could not have been contemplated that an interval should elapse during which neither they nor their successors should have the administration of so important a department. I think it necessarily follows, from the very fact of their administration, that the former body of trustees should continue to discharge their duty in the interval before their successors come into being, otherwise any provision for the maintenance of the roads during that time would be of little or no avail. On these short grounds I am for answering the question in the way it has been proposed.

**LORD CRAIGHILL**—I am of the same opinion. The Act in question comes into operation on the 1st of September 1882, and section 6 of the Act says, speaking of the adoption of the Act by the commissioners of supply in counties where tolls have not been previously abolished—"Upon the adoption of the Act in any such county, any local Act or Acts in force therein relating to roads, highways, and bridges shall stand repealed;" and so it is plain that with reference to any powers derived from these local Acts in regard to the collection of tolls and other circumstances it ceases to have any operation. But the matter does not end there, for the Act of 1878 makes the provisions which your Lordship has distinctly explained already, and which I need hardly repeat. That Act does not intend immediately to do away with the exaction of tolls, or the rights of those concerned in the administration of the roads, as we see still more clearly from the 33d and 35th clauses. It is important to see the exact terms of these provisions. Section 33 says—"From and after the 15th day of May (or from and after the 26th day of May, when the leases of the tolls in any county run from that date) immediately following the commencement of this Act in any county in Scotland, where such commencement shall happen before the year 1883, all tolls within such county, and within any burgh wholly or partly situated therein, shall be abolished; and the exaction of statute labour

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 Rutherford 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. ccl.), 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