to this question there is a broad distinction in principle between salmon and mussel fishings. Salmon fishing, while not granted out, is the patrimonial property of the Crown, in which the public has no right, either of property or use. The grant by the Crown to a subject merely transfers the property from one exclusive proprietor to another. The right to mussel-scalps on the shore of the sea or a navigable river is in the Crown, not as patrimonial property, but for public uses, like the shore itself. It may, indeed, be alienated to a subject, though the principle on which such alienation is sustained is not plain, and its validity must probably be referred to immemorial usage. But the effect of a grant of mussel-scalps is clearly quite different from that of salmon fishings. It deprives the public of a right which they previously possessed. And such being the nature and consequences of the grant, the Lord Ordinary thinks that not only is it not to be presumed, but that consistently with sound principle it cannot be inferred by construction or established in any way except by a conveyance in express terms. The Crown may have the power to alienate the right from the public, but the exercise of that power, when founded on by the grantee against the public, must, it is thought, have been carried out so as to be complete in itself, without the aid of possession by the grantee to construe it."

LYON *v.* MARTIN AND OTHERS (*ante*, p. 34).

(Before Lord Kinloch.)

Trust—Extinction—Declarator. Circumstances in which *held* (per Lord Kinloch and acquiesced in) that a trust constituted by a marriage contract had come to an end.

Vesting. A lady having directed, in her marriage contract, that upon the death or second marriage of her husband her property should descend and belong to her children, held (per Lord Kinloch and acquiesced in) that the fee vested in the children *a morte testatoris*.

Counsel for James Martin and Others—Mr Fraser. Agent—Mr John Galletly, S.S.C.

Counsel for Trustee—Mr MacLean. Agents—Messrs White-Millar & Robson, S.S.C.

This was an action of declarator, multiplepoinding, and exoneration brought by the beneficiaries under a marriage contract, in name of the trustee under it. The deed under which the case arose was an antenuptial contract of marriage dated in 1841, entered into between James Martin and Elizabeth Horn, afterwards his wife, whereby James Martin renounced and made over his *jus mariti* and right of administration and courtesy to the said Elizabeth Horn, and power was reserved to the said Elizabeth Horn to dispose of her estate during her life or by *mortis causâ* deed without his consent. In order more effectually to preserve and maintain her estate for behoof of herself and her heirs and assignees, Elizabeth Horn conveyed the same to trustees; and it was further declared that if Elizabeth Horn should not at the time of her death have disposed of her estate, heritable and moveable, in virtue of the powers to that effect reserved to her, and in case she should predecease James Martin at any time after the completion of the marriage, then, and in that event, the right of courtesy of James Martin should revive, and be as valid as if no renunciation of it had been made, but that his right of courtesy should be contingent upon his not entering into a second marriage, and should lapse if he should ever again marry—and upon the death or marriage of James Martin, the estate of Elizabeth Horn should descend and belong to her lawful child or children, if any were of the marriage, equally among them, share and share alike; and failing such children at the death of Elizabeth Horn, then the estate was to fall and belong to certain parties therein named in liferent and fee.

Elizabeth Horn predeceased her husband, and died in 1844 without having otherwise than as above disposed of her estate. James Martin, her husband, is still alive, and has not entered into a second marriage. There were two children born of the marriage between him and Elizabeth Horn, who have both attained majority,

In these circumstances James Martin and his two children brought the present action, in name of the only surviving trustee under the marriage-contract, to have it found and declared that the purposes for which the trust was constituted have been fulfilled, and that the right formerly vested in the trustees under the same was extinct, and for distribution of the estate of Elizabeth Horn.

They contended that the provisions in their favour vested *a morte testatoris*, and that as they were the only parties interested in the estate in the events which had occurred, and had all attained majority, and were desirous that the trust should be brought to an end, the Court should find and declare as concluded for.

The trustee was quite willing that the trust should be brought to a close, but he desired judicial sanction being given to this measure, and in discharge of his duty he contended (1) that the provisions in favour of the children of the marriage had not yet vested; (2) that at all events the period for payment of their shares had not come, and that it was the intention of the truster that the trust should continue till the death or second marriage of James Martin; and (3) that he was justified in resisting the conclusions of the action until it was judicially ascertained that the trust had come to an end.

Parties having been heard, the Lord Ordinary has issued an interlocutor which, we understand, has been acquiesced in by the parties, in which he "Finds and declares that the time has arrived for the nominal raiser, William Lyon, denuding and being exonered of the trust constituted by the marriage contract libelled, and appoints the cause to be enrolled in order to be proceeded with in accordance with this finding." In a note to his interlocutor the Lord Ordinary says:—

"The Lord Ordinary has no doubt that the two daughters of the marriage (now both major) have the fee of the trust-estate fully vested in them. It was conceded that their father had a liferent in the heritable subjects, defeasible by his contracting another marriage. There appears to the Lord Ordinary no reason why, with mutual consent, the daughters should not have the fee conveyed to them, subject to this defeasible liferent."

HOUSE OF LORDS.

Monday, Feb. 26, and Tuesday, Feb. 27.

BECKETT *v.* HUTCHESON.

Road Trustees — Jurisdiction of Court of Session. Held (aff. Court of Session) that Road Trustees acting in execution of an Act of Parliament were not controllable by the Court of Session in regard to a matter committed to their discretion, as to which the review of the Court of Session was excluded.

Counsel for Appellant — The Attorney-General (Palmer), and Mr Anderson, Q.C. Agents—Messrs J. & F. Anderson, W.S., and Messrs Deans & MacLuckie, London.

Counsel for Respondent—Mr Rolt, Q.C., and Mr Buller. Agents—Mr John Forrester, W.S., and Messrs Loch & M'Laurin, London.

This is an appeal from an interlocutor of the Second Division of the Court of Session, deciding that the Statute-Labour Road Trustees of the Eighth Statute-Labour District of Dumbartonshire have such a discretion vested in them by the Act from which they derive their authority (10 Geo. IV., cap. 71), as renders them uncontrollable by the Court of

Session in case of their refusing to keep in repair a statute-labour road within their district; there being ample funds at their command for doing so, but no corrupt motive attributable to them.

The respondent is the clerk of and represents the trustees. The statute under which those trustees act, and by which their duties and powers are defined is the 10th of George IV., cap. 71, entitled "An Act for further regulating the statute-labour and repairing the highways and bridges in the county of Dumbarton." The second section of that Act nominates and appoints all persons having the *dominium utile* of lands in the said county valued in the cess-books at £100 Scots of valued rent, and also various other persons, to be trustees for making and repairing the highways, roads, and bridges, within the said county, and for executing all other the powers granted by the Act. The fifth section enacts that the trustees shall meet at Dumbarton at certain stated times in order to carry the Act into execution. The fifteenth section provides that the trustees shall have power to appoint the order in which the several roads and bridges within their districts shall be repaired, and to appropriate the services and monies to be exacted by virtue of the Act. The nineteenth section provides that if any person shall think himself or herself aggrieved by the valuation put upon their property by the trustees for the purpose of assessment, he or she may complain to the next general meeting or quarter sessions for redress, whose determination shall be final, without being subject to review by suspension, advocation, or reduction, or in any manner whatsoever. The sixty-fourth section enacts that all actions and complaints for all or any of the penalties and forfeitures imposed by the Act, and for any wrong or injury done or suffered in any matter relative to or in consequence of the powers by the Act given, shall, unless therein otherwise provided, be originally brought before two or more justices of the peace of the county; and the sixty-fifth section enacts, that in case any person shall think himself aggrieved by the determination of such justices, it shall be lawful for him to appeal to the next general quarter sessions of the peace, and the decision then arrived at shall not be subject to review in any court whatever.

The appellant in 1856 became proprietor, by purchase, of the lands and estate of Solsgirth, which are situated within the above-mentioned district of the county, and the only access to which from the turnpike road is by the statute-labour road called the Langmuir Road. In 1857 he let the coal and ironstone upon the lands to a Mr Gardner, on a lease for nineteen years, at a rental of £200, and thereafter Mr Gardner was in the habit of using the Langmuir Road for the carriage of his minerals to the station of the Edinburgh and Glasgow Railway at Kirkintilloch. The road having become thoroughly unfit for use, the appellant made repeated applications to the road trustees to have it put in a state of repair, and those applications having been rejected, he raised an action of declarator against them, concluding that it should be found and declared that it was their duty to keep in repair the statute-labour roads within their district, including the Langmuir Road; that they had failed in that duty, and should be ordained to make payment to the appellant of the sum of £100 damage, sustained by him in consequence of their neglect. The allegations of the appellant were not generally controverted, and in particular the respondent admitted that the trustees had not exercised their powers of raising money by assessment or by borrowing to the extent authorised by the Act. On the 14th of January 1863, Lord Kinloch (Ordinary) ordered a remit to a surveyor to report on the nature and condition of the road in question. The surveyor reported that the road was not only unfit for mineral, but for ordinary country traffic. The Lord Ordinary thereafter pronounced an interlocutor finding that the trustees had failed to perform their statutory duties in reference to the road in question, and that they were bound to put it in a state of repair fit for ordinary country traffic. Against this interlocutor the respondent reclaimed to the Second Division of the Court, and their Lordships thereupon recalled the interlocutor of the Lord Ordinary, and dismissed the action. Against that decision the present appeal is brought.

The ATTORNEY-GENERAL, on the part of the appellant, said that there was no question as to the appellant having a sufficient interest to bring this action. The only questions to be considered were (first) whether the trustees had any duty imposed upon them by the statute; (secondly) whether the Court of Session had any jurisdiction, supposing that duty not properly performed; and (thirdly) whether there was in the present case such a non-performance proved. The learned counsel proceeded to review the different sections of the Act, contending that there was first of all imposed a duty, and next a discretion conferred as to the order in which it should be discharged; that the mode prescribed for settling disputes which might arise referred only to those arising amongst the trustees themselves, and was in no way applicable to an aggrieved heritor who was not a trustee.

Lord KINGSDOWN—The appellant is not a trustee?

The ATTORNEY-GENERAL said he was not, but proceeded as a person who paid commission-money, and had lands adjoining the road the state of which he complained. The special provision as to settling the disputes mentioned only showed that in all other cases the ordinary legal remedies remained. Then as to the jurisdiction of the Court of Session, the trustees were bound, for example, to hold meetings at certain stated times, and they were also bound to apply the produce of the assessment in the manner declared by the Act. Could it be said that in case of a failure in either of those respects the trustees were not amenable to law?

Lord CHELMSFORD—A *mandamus* would issue against them in this country.

The ATTORNEY-GENERAL said that the law of Scotland was the same, though in that country they had no such process. The question whether there had been a non-performance of duty had not been dealt with by the Second Division, but the Lord Ordinary had found that the road was quite unfitted for use. The learned counsel proceeded to review the opinions of the learned Judges in the Court below.

Lord KINGSDOWN directed the attention of the Attorney-General to the claim for damages made in the summons, and to the sixty-first section of the Act, which would not allow of the trustees parting with the funds to defray such a charge.

The ATTORNEY-GENERAL said he did not insist in the claim for damages, of which the other conclusions of the summons were quite independent; at the same time, in the case of Brownlow *v.* the Metropolitan Board of Works, decided by the Queen's Bench a short time ago, a similar provision had been held to include damages found to be due on account of injury inflicted. The learned counsel concluded by submitting that Lord Cowan was wrong in saying that the only instance in which road trustees had been controlled by the Court was in the case of Walkinshaw, under the General Turnpike Road Act, and referred to Guild *v.* Scott (21st Dec. 1809, F.C.); Mackintosh *v.* Stirlingshire Road Trustees (12 D., 85); Threshie *v.* the Magistrates of Annan (8 D., 276); and to Reid *v.* Knox (23 D., 216), in support of his contention.

Mr ANDERSON, Q.C., then followed on the same side, and said there was here no dispute as to the facts, but only as to whether an action would lie. Now, there was no such thing as a *mandamus* in Scotland; the only way it was possible to proceed was as they had done in the present case—by summons. He referred to Erskine 1, 3, 18, to show that the Court of Session had the power which the appellant endeavoured to evoke.

Lord CHELMSFORD — Who puts the Court in motion?

Mr ANDERSON said any person injured could do so, and that in his own name.

Lord KINGSDOWN—Supposing we reversed the interlocutor of the Second Division, what means have we of compelling those trustees to obey our order?

Mr ANDERSON said they would be guilty of a contempt were they not to obey it; the appellant, if he chose, too, could put the road in repair, and an action would then lie against the trustees for the money expended.

Lord KINGSDOWN—A person who is a trustee is incapable by the Act of bringing such an action as this; you maintain that a person who is not a trustee is in a more favourable position.

Mr ANDERSON submitted that the provisions in the Act as to the settlement of disputes had reference only to disputes amongst the trustees themselves.

Lord CHELMSFORD—The qualification for a trustee is the enjoyment of property to the extent of £100 Scots; that is not a very large sum.

Mr ANDERSON explained that the valuation of the appellant's property was made in the reign of Alexander the Third.

Lord CHELMSFORD—Of whom?

Mr ANDERSON said the valuation was made before the time of Robert the Bruce, and that the property was, of course, very much more valuable now.

Mr ROLT, Q.C., on the part of the respondent, submitted three propositions to the House. 1st, That there was no obligation upon the trustees to keep the roads in any definite repair; 2d, That in that view of the obligation, it was impossible to raise any case against them unless for corrupt abandonment of duty; and 3d, That even if the obligation was larger than he had submitted by his first proposition, that the Court of Session never had any jurisdiction in the matter. "Repair" was a flexible word, and it would never do to allow a person to go to the Court of Session because his individual actions differed from those of the trustees. Then as to the jurisdiction of the Court, there was neither right nor obligation regarding the repairs of roads previous to 1669. New rights and obligations were then created by statute, and a specific remedy prescribed; that remedy was therefore the only one which could be pursued. The cases of Guild *v.* Smith and of Walkinshaw had no bearing on the present question; they were brought under a special provision in the General Turnpike Act, which was not contained in the Act now under consideration. Then, as regarded the Act itself, a person, if a trustee, could not appeal to the Court of Session, and it was absurd to claim a higher right for a person not in that position. The sixty-fourth and sixty-fifth sections provided an ample remedy for everyone. Justices of the peace had ample power to enforce this order; theirs was the proper jurisdiction, and their decision was final.

Lord CHELMSFORD—As we should say in this country, the right to a *certiorari* is taken away.

Mr ROLT submitted that was so.

Lord CHELMSFORD—Even were the trustees to break up the road, there would be no redress but under the sixty-fourth section.

Mr ROLT said he thought clearly not.

Mr ANDERSON, Q.C., then replied on behalf of the appellant. He said Mr Rolt was quite wrong in supposing that the Act of 1669 was the first upon the subject of repairing highways; he seemed to suppose that Scotland was a very barbarous country in that respect, whereas there were Acts to be found upon the subject as early as the reign of King David. The Act of 1669 did not therefore create new rights and obligations, and it was unnecessary that the remedy it provided should be exclusively followed. Again, as to the differences said to exist between the present Act and the General Turnpike Acts, the sole difference was, that by one the roads were kept in repair by funds derived from a toll, and in the other by statute-labour on its conversion into money. There was a trust to repair in the one case just as much as in the other. Guild *v.* Scott was not an action to recover penalties, but a declarator; and Walkinshaw's case, though brought under the authority of a clause in the General Turnpike Act, might have been equally well brought as an action at common law. He submitted that the present was the proper and only remedy open to the appellant; that the road was proved to be in a state unfit for traffic, and the trustees to have ample funds in their possession for its repair; and that the appellant was entitled to have the trustees ordered to perform their duties.

The LORD CHANCELLOR then rose and moved the judgment of the House. He said—My Lords, I can entertain no doubt whatever that the interlocutor of the Court below is quite right. The action in which that interlocutor was pronounced was founded upon a local statute passed in the year 1829, for the purpose of regulating the statute-labour and repairing the highways and bridges in the county of Dumbarton. There had been previous Acts upon the same subject, which had, however, expired; and in coming to a decision upon the question now before us we must be guided by the Act of 1829 alone. The second section of the Act, my Lords, nominates and appoints gentlemen enjoying a certain property qualification to be trustees for making and repairing the highways, roads, and bridges within the county, and for executing all the other powers by the Act given and granted. I called the attention of the Attorney-General to the fact that there seemed to be no clause which expressly imposed upon the trustees the duty of putting the roads in repair, and he admitted that he could only refer me to the clause which I have just read. Now, there is no doubt that the purpose which the Legislature had in view in appointing those trustees was that the highways might be kept in a state of repair, and it accordingly directed them to do everything which would reasonably tend to the accomplishment of that object. How did the Legislature think this duty would be most adequately performed? The second section applies to all the road trustees in the county, but section five directs them to divide the county into districts, and at their general meetings to appoint convenient times for the meeting of the trustees within their respective districts. Then the duties of those district trustees are defined by the fifteenth section. They are to have the direction and cognisance of the several roads and bridges within their districts, and to have power to appoint the order in which the same shall be made or repaired, and to appropriate the services and monies to be raised by virtue of the Act. The section also provides—that no trustee shall act within a district in which the lands do not lie upon which he rests his qualification; that they shall hold meetings at certain times; and that in case any difference of opinion should arise amongst the trustees concerning the application of the services or money, any one of the trustees who shall think himself aggrieved, or shall think such application improper, may complain to the next general meeting, or to the next quarter sessions of the peace, if joined in such complaint by any one of the trustees in the same district; and the sentence or determination of the said general meeting or quarter sessions is declared to be final and conclusive, without being subject to review by advocation, or suspension, or by process of reduction, or in any manner of way whatsoever. Now, what do we gather from these enactments is the duty of the trustees? No more than this—to meet together at certain times, and to the best of their knowledge and judgment to determine what sum of money should be raised, and how it should be expended. Should they fail in the performance of that duty—fail to hold meetings and to exercise the powers conferred upon them—a right to compel them would arise upon general prin-

ciples of law to any person interested. But here it is sought to make them do that which they are not directed to do; and it is asked what remedy there exists for such a state of circumstances? Perhaps a remedy is furnished by the sixty-fourth and sixty-fifth sections, which enact that all actions or complaints for any wrong or injury done or suffered in any matter relative to or in consequence of any of the powers by the Act given and granted, shall be originally brought before two or more justices of the peace, from whom an appeal lies to the next general quarter sessions. Mr Anderson argued very elaborately, very ably, and with some degree of plausibility, that these sections supplied no remedy for a mere non-feasance; but if that be so, it is simply all the more clear that the Legislature intended that there should be no control over the discretion of those trustees. With regard to Guild *v.* Scott, I am of opinion it has no bearing upon the present case, founded as it was upon a special Act of 1789. The same remark applies to the case of Walkinshaw, and to all the other cases decided under the General Turnpike Acts, because they were all specially authorised by those Acts. I have addressed your Lordships thus shortly, because the subject has already been exhausted by the judgments of Lord Cowan and Lord Neaves, with whom I entirely concur. I therefore beg to move your Lordships to affirm the interlocutor of the Court below, and to dismiss this appeal with costs.

Lord CHELMSFORD—I entirely agree with my noble and learned friend. The question is of some importance, but of no great difficulty. It is admitted that those trustees have a duty, but it is of a discretionary character, and the question is how it is to be enforced and limited. Now the fifteenth section confers upon them the superintendence of the roads in the district, and gives them power to appoint the order in which the same shall be repaired, and to appropriate the service and monies exacted by the Act. There is no question as to those powers being conferred upon them; but is there any control provided for their proper exercise? Yes; that control is given by the same section. It provides that if any trustee shall think himself aggrieved, or that the monies are improperly applied, he may complain to the next general meeting, or to the next general quarter sessions of the peace, which general meeting or quarter sessions are empowered to determine the same, and their determination is declared to be final and conclusive. That is the only provision made for controlling the trustees, and would seem to cover every case in which they are called on to exercise their powers. Then the sixty-fourth section provides for cases in which they inflict injury in the exercise of their powers. It enacts that all actions and complaints for any wrong or injury done or suffered in any matter relative to, or in consequence of, any of the powers by this Act given and granted, shall be brought before two or more justices of the peace. It was argued, however, that this had no reference to cases of non-feasance, but only to acts of immediate wrong. I cannot so construe the clause, because its object was to redress any wrong suffered in any matter relative to or in consequence of any of the powers given by the Act. I do not see why in the present case an action should lie in the Court of Session because the injury complained of is consequential instead of immediate. I think the section refers to all injuries of either kind; and if that is so, then we have a specific remedy provided; and according to a well-known principle, that specific remedy can alone be had recourse to. My Lords, this appears to me to be the proper construction of the Act; and it certainly is a very strong argument in its favour that for two hundred years it has never been sought to control the trustees in the manner now attempted. I cannot hesitate to concur with the noble and learned Lord on the Woolsack.

Lord KINGSDOWN—I concur.

Interlocutor affirmed, and appeal dismissed with costs.

Thursday, March 1, *and Friday, March* 2.

WELLER AND ANOTHER *v.* KER'S TRUSTEES AND OTHERS.

Trust—Clause—Construction—Power of Trustees. A truster having given his trustees power to limit the provisions in favour of his children to a liferent in the event of their marrying or so conducting themselves as to merit the disapprobation of the trustees—*held* (aff. Court of Session) (1) That this clause applied to the truster's heir as well as his other children; (2) That the power was validly exercised before the heir attained 25 years of age; (3) That the trustees had not surrendered their power by approving of the heir's marriage. *Opinion*—That the power having been conferred on the trustees for the benefit of children, they were not entitled to surrender it.

Counsel for Appellants — The Attorney-General (Palmer), the Lord Advocate (Moncreiff), and Mr Bruce. Agents—Mr William Sime, S.S.C., and Messrs Domville, Lawrence, & Graham, London.

Counsel for Respondents—Mr Rolt, Q.C., and Mr Anderson, Q.C. Agents—Mr Wm. Waddell, W.S., and Messrs Dodds & Hendrie, London.

This is an appeal against two interlocutors of the First Division of the Court of Session, pronounced in an action of multiplepoinding and exoneration, at the instance of the respondents, the testamentary trustees of the late Robert Ker, Esq., of Argrennan, in the stewartry of Kirkcudbright, against the trustees under the marriage settlement of Robert Ker, jun., Esq., and Miss Hester Rosetta M'Alpine. Those interlocutors decide certain questions of construction arising upon the trust-disposition of the late Mr Ker; and also upon the effect of the exercise by trustees of a discretionary power, upon their right to exercise relative discretionary power.

The late Robert Ker, Esq., of Argrennan, executed a disposition and deed of settlement, dated 23d September 1839, whereby he directed his trustees *inter alia* to hold his whole means and estate, with exception of a sum of £15,000, for the benefit of his eldest son Robert, and the heirs of his body, whom failing, of his second son, with remainder to his daughters according to seniority, and to make over such means and estate to his eldest son upon his attaining his majority, or in case of his death, to the person next entitled, upon his or her attaining the like age. The deed further provides that, "In case any of our said children shall marry, or otherwise conduct themselves, so as not to meet the approbation of my said trustees, or a majority of them accepting and surviving at the time, the provisions hereby made in favour of said children so marrying or acting, shall belong to them in liferent only, for their liferent use allenarly, and to their heirs or issue above-mentioned in fee; but it is hereby provided that a regular minute must be entered in the sederunt book of the trustees, expressing their disapprobation of the conduct of any said children, to restrict them to a liferent as aforesaid." On the 26th of January 1847 Mr Ker executed a codicil to his will, whereby he directed his trustees that they should not convey to his eldest son Robert, or failing him, any other heirs-male or female of his body, his estate of Argrennan, or the residue of his means and estate, as he had directed by his disposition and deed of settlement to be done upon his or her attaining the age of twenty-one years, but should postpone such conveyance in the case of his son until he had reached the age of twenty-five years, and in the case of his eldest daughter, until she should have reached the age of twenty-eight years. The testator died on the 23d of March 1854, and the trustees he had nominated—viz., Mrs Elizabeth Ure or Ker, his widow; James Stewart, Esq., of Cairns-