operations. If it be made a condition of the powers thereby conferred upon them to deepen and enlarge the channel of the river that they shall lay the soil on the banks nearest the place from which the soil is taken, then the complainer may be entitled, on the merits, to prevail. His Lordship then quoted several portions of the 76th section of the Act, and said—I am clearly of opinion that the trustees are empowered to lay all this soil on the most convenient bank, by which I understand the bank most convenient for them, but not without regard to the interests of other parties. That is a most reasonable power in the circumstances. It would be very inconvenient, and might be very much to the injury of private parties, if the trustees were only empowered to lay it on the bank opposite the place where it is raised. But the question is, Whether, having the power to lay it on the most convenient bank, they may not dispose of it in any other way? I see no reason for saying that they may not. There is nothing in the clause except power. It is descriptive of the undertaking, and in describing it the Statute seems to proceed simply on what they are empowered to do. I am therefore against the construction contended for.

But the complainer's argument was based also on previous acts. These can have no direct operation on a question under this Act, but I am not disposed to say they may not be referred to in a question of doubtful construction, for the purpose of seeing how, in a long course of legislation, some words may have been used. His Lordship then quoted from the previous Acts, and observed, that the expressions there used confirmed his reading of the Act of 1858, and he was therefore of opinion that the interlocutor of the Lord Ordinary was well founded.

Lord Curriehill concurred.

Lord Deas concurred.

Lord Ardmillan—We are not here in a question of compensation, or of declarator. The question is one of interdict. And to interpose to regulate the proceedings of a great public body of trustees by such an interdict is an exceedingly delicate matter. Trustees for public purposes, acting under the authority of Statute, are not to be presumed to act in excess of their powers. The proof that they are so acting must be very clear before the Court will stop their proceedings by interdict. A much clearer case must be made out than has been presented here. Any judgment which we might pronounce in this process would not be *res judicata* in a declarator. So far as I have formed an opinion on this matter, I agree in holding that the contention of the complainer is unfounded.

Agents for Complainer—Dundas & Wilson, C.S.
Agent for Respondents—James Webster, S.S.C.

Friday, May 29.

BLACKBURN *v.* MEIKLEM.

Property—Servitude road—Challenge—Acquiescence. Circumstances in which *held* that a party was entitled to the use of a servitude-road as an access to his farm.

These were conjoined actions of declarator, the one at the instance of Mr Blackburn of Killearn against the Rev. James Meiklem of Dukehouse, and the other at the instance of Mr Meiklem against Mr Blackburn, relating to a servitude road claimed by Mr Meiklem.

The Lord Ordinary (Barcaple) after a proof, pronounced this interlocutor:—

"Finds, as matter of fact, *first*, that for time immemorial, or at least for forty years prior to the year 1845, the authors of the Reverend James Meiklem, defender and pursuer, in the lands or farm of Dukehouse, possessed and enjoyed a servitude road as an access between the public turnpike road, known as the Gartness Road, and the said farm of Dukehouse, in the line second described in the conclusions of the action at the instance of the said James Meiklem, passing through a field forming part of the farm of Drummore, belonging to the pursuer and defender, Peter Blackburn, and thence by a ford across the river Endrick into the said lands of Dukehouse, and that for horses, carts, cattle, and sheep, as well as foot passengers; *second*, that in or soon after the said year 1845, when the public turnpike road from Glasgow to Aberfoyle was opened, the line of said servitude road was, by mutual consent of the former proprietor of said lands of Dukehouse and the said Peter Blackburn, changed to the line first described in the conclusions of the action at the instance of the said Reverend James Meiklem, leading from a gate near Killearn Bridge, in the fence of the said Glasgow and Aberfoyle turnpike road, which communicates with the said Gartness turnpike road, and thence along or near to the bank of the river Endrick, and through the said field belonging to the said Peter Blackburn, and forming part of the said farm of Drummore, and thence by said ford across the Endrick to the said lands of Dukehouse; *third*, that from that time the said new line of servitude road was possessed by the said James Meiklem's authors and the said James Meiklem himself, for the use of the said lands of Dukehouse, without interruption, until the year 1866; *fourth*, that after the line of said servitude road was changed as aforesaid, the said Peter Blackburn ploughed up, or otherwise obliterated, the former line of road, and a quarry has been wrought across the same by the road trustees of the district, and that the said old line is not now available as a servitude road: Finds, as matter of law, that the said Reverend James Meiklem is entitled to the free use and enjoyment of said servitude road in said new line thereof, as an access to and from the said lands of Dukehouse: Therefore sustains the defences for the said James Meiklem and William Henderson, the other defender in the action at the instance of the said Peter Blackburn, and assoilzies the said James Meiklam and William Henderson from the conclusions of said action, and decerns; and, in the action at the instance of the said James Meiklem and William Henderson, repels the defences, and finds, decerns, and declares that the pursuer, the said Reverend James Meiklem, as proprietor of the said lands of Dukehouse, and the pursuer, William Henderson, as the tenant thereof, and all others residing upon or occupying the said lands, and their successors, as proprietors, tenants, or occupants of said lands respectively, have a good and undoubted right and title, at all times and on all occasions, to the free use and enjoyment of a servitude road leading from the public turnpike road known as the Gartness Road, or from the public turnpike road leading from Glasgow to Aberfoyle, through the defender's lands of Killearn to the said lands of Dukehouse, and that they are entitled to resort to said road, and to exercise and enjoy a free passage along the same, and to drive horses and carts, cattle, sheep, and bestial along it: And finds, decerns, and declares that the line of said servitude

road is the line, or nearly so, coloured blue, laid down on a sheet of the Ordnance survey produced with, and referred to in the summons, leading from a gate in the fence of the turnpike road which leads from Glasgow to Aberfoyle, near the bridge commonly known as Killearn Bridge, at a point marked B on said sheet, and thence along or near to the banks of the river or water of Endrick, through a field belonging to the defender, and forming part of the farm of Drummore, to a point marked A on said sheet, and thence across the said water of Endrick, and into the said lands of Dukehouse: And finds, decerns, and declares that the pursuers and their foresaids have undoubted right, title, and privilege to use and enjoy the said line of road as a means of access to, and exit from, the said lands of Dukehouse on the south, and particularly for the purpose of passing along the same, and driving horses and carts, cattle, sheep, and bestial along it, and that the defender, the said Peter Blackburn, is not entitled to shut up said line of road; and decerns and ordains the defender to desist and cease now, and in all time coming, from troubling, molesting, or obstructing the pursuers and their foresaids in the peaceable use, enjoyment, and possession of said line of road, and interdicts, prohibits, and discharges him accordingly, and decerns: Finds the said Peter Blackburn liable in the expenses in both actions; allows an account thereof to be given in," &c.

Mr Blackburn reclaimed.

Blackburn and Maitland for reclaimer.

Gifford, Thomson, and Guthrie for respondent.

The Court unanimously adhered.

Lord Deas said that though the public did use the road that was not conclusive. In many cases a proprietor might allow his neighbours or the public to use a road through his property to which they had no right. If a road so used was either made or kept up by the proprietor for his own purposes, it would be very difficult for the neighbours or the public to maintain that they had a right to continue the use of it simply because they had been allowed to go that way without challenge for forty years. The very absence of challenge would be a great difficulty in the way of establishing a right to the road. If a proprietor challenged the use of the road, and the use was persisted in, that was an assertion of the right on the one hand and a denial on the other, which, in the end, might be favourable to the right to the road being made out. The only difficulty was whether this was not a case of that kind—whether this was not a road that the proprietor of Killearn kept open for his own purposes. But it rather appeared that that element was not in the case. His Lordship then went briefly over the evidence in the case, and observed that he concurred with the Lord Ordinary.

The other judges concurred.

Agent for Blackburn—Colin Mackenzie, W.S.

Agent for Meiklem—D. J. Macbrair, S.S.C.

Friday, May 29.

SECOND DIVISION.

LINDSAY AND LONG *v.* ROBERTSON AND OTHERS.

(*Ante*, vol. iv, p. 91.)

Mussel-Fishings—Barony—General Title—Exclusive Possession—Issue. Form of issue adjusted to try the question of mussel-fishings with the view of explaining a general title.

In this case, in which Sir Coutts Lindsay and Colonel Long seek interdict against the fishermen of St Andrews from gathering mussels from the scalps on the north bank of the river Eden, the Court, after determining the question of interim possession, appointed the complainers to lodge issues to try the question of fact whether they had the possession necessary to complete their titles. The complainers proposed the following issues :—

"It being admitted that the pursuer, Sir Coutts Lindsay, is heritable proprietor of the lands and others described in the Crown Charter of Sale, dated 20th December 1782, and written to the Seal, and registered 14th January 1783, No. 85 of process, as in the schedule No. I., hereto appended: And it being further admitted that the pursuer, Colonel Samuel Long, is heritable proprietor of the lands and barony of Earlshall, comprehending the lands, fishings, and others described in the Crown Charter, dated 20th, and written to the Seal, and registered 28th December 1815, as in the schedule No. II., hereto appended.

"1. Whether, for forty years previous to 1867, or for time immemorial, the pursuers and their predecessors, proprietors of the lands and others foresaid, possessed the mussel-scalps, beds, or fisheries lying to the north of the *medium filum*, or central base line of the river or water of Eden, at low water of spring tides, between the points marked A and B respectively on the plan, No. 9 of process, or any part thereof?

"2. Whether, for seven years previous to 1867, the pursuers possessed the mussel-scalps, beds, or fisheries lying to the north of the *medium filum*, or central base line of the river or water of Eden, at low water of spring tides, between the points marked A and B respectively on the plan, No. 9 of process, or any part thereof?

Young, Watson, and Balfour, for complainers, argued that in their pleas they expressly relied upon Colonel Long's charter, and that the quotation from the infeftment was sufficient specification, it not being alleged that the descriptions were different. They were entitled to an issue as to the prescriptive possession without the word 'exclusive,' because that was a misleading expression, and might affect the jury. Besides, it had been held by the Court in the case of *Mushet*, 18 D. 656, that possession in regard to a claim of property meant exclusive possession; and the form of issues in questions of property was there intended to be definitively settled. The complainers were entitled to the second issue because this was no case of competition of rights, the respondents having withdrawn their private title alleged in the record, and it having been held by the Court, in the case of the *Duchess of Sutherland*, that the right to mussel-fishing was not *in re publica*.

Clark and W. A. Brown, for respondents, objected to the proposed admission, that it was not warranted by the record or the state of the titles as regards production. The complainer, Colonel Long, produced no charter, and only founded on an infeftment in 1824. The first issue must put the question of exclusive possession. It is true that in the case of *Mushet*, founded on by the complainers, the Court held the word possession to mean exclusive possession in questions of property, but this case is peculiar, in so far that the property admits of a possession, and there has been *de facto* possession