certain place by nets of a certain description, I must understand him to mean availably carried on. He states the localities, or at least the distance from the salmon-fishing ground, at which the nets may be used with advantage. He also describes the construction of net that may be so used. But the counsel for the respondents—who seem to have changed their mind, or to have instructed their counsel differently from what they did formerly—says, "Oh! this is quite idle. Really the construction of nets which we are using are the only nets, and the places where we have set them are the only places where white-fishing can be carried on availably, and it would be quite useless to go elsewhere."

Therefore it seems to me we cannot afford any further protection to the white-fishers in this matter, but, confirming the judgment of the Lord Ordinary, must prohibit the use of those nets in those localities which are proved and reported by a judge of the respondents' own selection to be injurious to the rights which they are not by law entitled to injure.

Lord Craighill—I am of the same opinion. I think the interlocutor of the Lord Ordinary ought to be adhered to. In the interests of the reclaimers I do not think it necessary or expedient that any change should be made on the terms of the interim interdict that has been granted. The Lord Ordinary is of opinion that the stake-nets which were at the time on the ground, and which are complained of, were nets by which salmon as well as other fish might be taken. The nets, other than those which are matter of interdict, are not said to be of a nature to do injury to the complainers, and the respondents are at liberty to put up any nets which are not calculated to catch salmon. Therefore it appears to me to be unnecessary to do anything for the purpose of protecting what is the white-fishers' right, namely, to plant nets which are not calculated to do injury to the complainers' nets. Even if there were no other protection, it seems to me that ample protection is afforded by the interlocutor of the Lord Ordinary reclaimed against.

I may say further that I am of opinion that the argument submitted to-day is entirely inconsistent with the true reading of the judgment of the Court in the case of *Gilbertson*, which was the first of the actions referable to this matter brought into this Court. What occurred to us at first on hearing the address of the respondents' counsel was this—that on that judgment there had been an absolute permission of the right of the white-fishers to fish for white fish with any manner of engines, whatever the effect of using such engines might be upon salmon-fishing; but on looking at the judgment it is as plain as possible that that is not the view that was declared by the Court. On the contrary, what was declared was this—the right of the white-fishers to fish by means of fixed engines for white fish, and by such engines as those in question, providing there was no material or substantial injury done to salmon-fishing. Accordingly there was included a reservation under which either of the parties was left at liberty to make any new application to the Court which might be necessary for the protection of the rights thus recognised. Accordingly the present suspension and interdict was presented, and in that action there was sought interdict against the use of the stake-nets which in the interval had been erected. A proof was allowed, and afterwards when the case came to the Inner House there was a remit made by all concerned to Mr Anderson, in order that after inspection of the stake-nets his opinion might be obtained. The result of his report is that the engines used by the respondents for the purpose of white-fishing interfere with the complainers' right of salmon-fishing. The Lord Ordinary granted interdict against the use of these nets or engines, and I agree with your Lordships that the Lord Ordinary's interlocutor should be adhered to.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for Complainers—R. Johnstone—Keir—Forrest. Agents—Hope, Mann, & Kirk, W.S.

Counsel for Respondents — Nevay — Sym. Agent—W. N. Masterton, Solicitor.

Friday, December 2.

SECOND DIVISION.

AIKMAN AND OTHERS, PETITIONERS.

Trust—Nobile Officium—*Where Trust unworkable in consequence of Disagreement between Trustees.*

Two surviving trustees under an antenuptial marriage-contract having been unable to agree upon an investment of the funds, or upon a person or persons to be assumed into the trust, and the estate having suffered loss thereby, the Court, on the application of the beneficiaries, *authorised* the appointment of new trustees nominated by the beneficiaries.

By antenuptial contract of marriage between the Rev. Henry Walker and Miss Eleonora F. J. Gordon, with consent of her father Thomas Gordon of Park, Mr Walker agreed to assign to the marriage-contract trustees a policy of assurance over his life for £500, in addition to the whole property he might acquire during the marriage, which provisions, in addition to the annuity to which she would be entitled from the Ministers' Widows' Fund of the Church of Scotland, Miss Gordon accepted as in full of her legal rights. On the other hand, her father agreed to pay to the trustees, at the first term after his decease, a sum of £2000 to be invested by them for behoof of the spouses and the survivor, and after the death of the survivor the principal sum was to be divided among the children of the marriage, if any. The trustees were Andrew Steuart of Auchluncart, Major Duff of Drummuir, and three others, who had died before the date of this petition. Mr Gordon died in 1857, and the £2000 was paid to the trustees. Mr Walker died in 1860, predeceasing his wife, and leaving three children. The proceeds of the policy were paid to the trustees, and were invested at the date of the petition along with other sums in a mortgage of the North British Railway Company, in the names of Messrs Mackenzie, Innes, & Logan,

W.S., who had granted a declaration of trust to the effect that they held it to the extent of £500 (the sum in the policy) for Mr Steuart and Major Duff as trustees under the marriage-contract. This bond was paid up in November 1880, and the money paid into bank.

It 1871 it became necessary to uplift and to reinvest the sum of £2000 obtained from Mr Gordon. Mr Steuart declined to take any part in the matter, but Major Duff and the only survivor of the other two trustees, as a majority of the trust, reinvested the money.

In 1875, after the death of the only remaining trustee other than Messrs Duff and Steuart, the debtor in the security for £2000 intimated that he would pay up the money, and the agents of the trust suggested another investment, but Major Duff and Mr Steuart were unable to agree upon the investment proposed, or any other investment. Accordingly the money was paid into bank on 20th December 1875, where, owing to the discharge being unsigned, it remained at a low rate of interest till February 1877. The loss from this cause was considerable. Mr Steuart some time after February 1877 agreed to sign the discharge, and the money was reinvested. At the date of this petition it was on the point of being once more paid up.

Mr Steuart in 1880, when the mortgage of the North British Railway Company was paid up, suggested the appointment, as a third trustee, of the Rev. Mr Aikman, with whom Mrs Walker had some time previously entered into a second marriage. Major Duff objected to the appointment of a person so much interested in the income of the funds. Mr Steuart then suggested an application to the Court, and Major Duff, while not objecting to this course, declined himself to suggest any trustee.

This petition was then brought by Mrs Aikman and her three children by her first husband Mr Walker, the only beneficiaries under the trust. They asked the Court, in the exercise of their *nobile officium*, looking to the loss caused by the existing dead-lock in the trust, to appoint new trustees. The petitioners asked the appointment of three persons named, of whom Mr Steuart had suggested one, to act as trustees along with Major Duff and Mr Steuart.

No answers were lodged, but Major Duff lodged a minute at the bar stating that while he had no knowledge of the persons whose appointment was craved, he offered no opposition to the prayer of the petition being granted, on the Court being satisfied that they were suitable persons to be appointed. The minute also stated Major Duff's intention of resigning so soon as the new trustees were appointed.

The petitioners referred to *M'Aslan*, January 17, 1841, 3 D. 1263; *Glasgow*, December 5, 1844, 7 D. 178; M'Laren on Wills and Succession, ii. 219.

The Lords, without delivering opinions, granted the prayer of the petition.

Counsel for Petitioners—Lorimer. Agents—H. & H. Tod, W.S.

Friday, December 2.

OUTER HOUSE.

[Lord M'Laren.

GORDON, PETITIONER.

Entail—Fund to be Invested in Entailed Lands—Improvement Debt—Act 31 *and* 32 *Vict. cap.* 84 *—Act* 38 *and* 39 *Vict. cap.* 61.

A truster conveyed certain lands to trustees, with powers of sale, directing them to apply the price in payment of debts and other objects, and finally to purchase with the price other lands to be entailed on a certain series of heirs. The trustees held the lands so conveyed for several years, paying the annual proceeds to the first heir of the appointed series. Certain sums of money were expended on the improvement of the estate, and the first heir having died, bequeathing to his widow the amount of the sums so expended, she presented a petition craving that the trustees should be ordained to execute in her favour a bond over the estate for the amount. *Held* (*per* Lord M'Laren) that the petition was incompetent under the Entail Acts, first, because the estate was not "holden by virtue of a tailzie," and secondly, because the truster not having contemplated that the estate should continue to be held by the trustees *in forma specifica*, it did not fall within the scope of these Acts.

This petition was presented by the widow of the late William Cosmo Gordon, who was heir of entail in possession of the lands and estates of Fyvie, which he held under a disposition and deed of entail granted in 1811 by the Hon. William Gordon in favour of himself in liferent and his only son and the heirs-male of his body, and a certain series of heirs. In 1850 the heir of entail in possession, Mr Charles Gordon, disentailed the estate of Maryculter, described as part of the entailed estate of Fyvie, with the necessary consents, and in the same year granted a trust-deed, by which, among other provisions, he gave to the trustees named therein power to sell the lands of Maryculter by public roup or private bargain, and also directed them to invest the price so received on good security, to be afterwards applied in the purchase of land. The principal provision in the trust-deed was the third, by which it was provided that "The said price or prices shall be applied in the purchase of lands lying as nearly contiguous as can be got to the lands and estate of Fyvie, and judged to be a valuable addition to the entailed estate; and the said lands when purchased shall be conveyed by the said trustees to the heir of entail in possession of the estate of Fyvie at the time, and to the heirs succeeding to the entailed estate under the destination." The truster died in 1851, and was succeeded by his son William Cosmo Gordon, to whom the trustees paid the income derived from the estate conveyed to them, and who was by them allowed to expend considerable sums in the improvement of the estate during his lifetime. He died in 1879, and the entailed lands and estate of Maryculter remained in the hands of the trustees at the date of this application.

William Cosmo Gordon had bequeathed to his widow the sums which he had expended upon the