and consequently no trustee or commissioners on his sequestrated estates were appointed.

On 26th December the Lord Ordinary (PEARSON), in respect of a minute from which it appeared that the meeting of creditors had proved abortive, reported the cause to the First Division.

Note.— . . . "The petitioners now move that I should appoint a judicial factor, in terms of the alternative prayer, their interest being to have some one appointed to whom they could make over the remaining asset of the sequestrated estate, and who could give a valid discharge for it. I should readily aid them in any competent steps to attain this object. But (1) the appointment of a factor does not fall within the terms of the remit, and (2) the proposal that I should make the appointment as under an ordinary petition is novel. The fund in question is an asset in an unexhausted sequestration which has been brought under the Bankruptcy (Scotland) Act 1856 by an order of Court, and I know of no authority for the appointment of a judicial factor by the Junior Lord Ordinary in such circumstances."

The petitioners moved for the appointment of a judicial factor, and argued—There was no case in the books precisely analogous to the present one. But it fell within the class of cases in which the Court was in use to appoint a judicial factor, as defined by Lord M'Laren in *Dowie* v. *Hagart*, July 19, 1894, 21 R. 1052. The machinery of bankruptcy had broken down and must be replaced by something else. The respondent's claim was by no means so clear as to entitle her to payment of this fund.

Argued for the respondent—The radical right in his estates still remained in the bankrupt or his representatives, and no creditors being forthcoming the respondent was entitled to immediate payment of the money—*Gavin* v. *Greig*, June 10, 1843, 5 D. 1190; *Air* v. *Royal Bank*, March 9, 1886, 13 R. 734.

LORD PRESIDENT—The position of these petitioners is very simple. They have no legal right to dispose of this money, but the late Mr Moncreiff was trustee in this sequestration, and they come into Court pointing out that here is money in their hands which they have no right to dispose of. In these circumstances it seems to me that enough is said to warrant the appointment of a judicial factor, and, after all, Mr Wilson's clients can have no higher right than the bankrupt if he were alive and here. Enough has been shown of possible questions and possible claims to make it impossible to authorise the trustees, who have no right to deal with such matters, to hand over the money to the bankrupt's executrix. The factor is to be appointed by your Lordships really in consequence of the failure of the attempt to revive the sequestration and place the money in the hands of a trustee in bankruptcy. An emergency has occurred which requires instead the appointment of a judicial factor.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court appointed Mr Archibald Langwill, C.A., to be judicial factor on the sequestrated estate of the bankrupt.

Counsel for the Petitioners—A. O. M. Mackenzie. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Respondent—J. Wilson. Agent—A. W. Gordon, Solicitor.

Friday, March 3.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

NAIRN *v.* KINLAY AND OTHERS.

Process—Proof or Jury Trial—Right-of-Way.

In an action by a proprietor to have it declared that no public right-of-way or servitude of passage existed over his lands, the defenders claimed a public right-of-way over the pursuer's lands, which, after leaving the said lands, and before reaching one of its termini, passed through the lands of eleven other proprietors who were not parties in the action. *Held (following Blair* v. *Macfie*, Feb. 2, 1884, 11 R. 515, and *Fraser Tytler's Trustees* v. *Milton*, March 15, 1890, 17 R. 670) that the case should be tried by a judge and not by a jury.

Michael Barker Nairn of Dysart House, Dysart, raised an action against James Kinlay and others, all residing in Kirkcaldy or Dysart, to have it declared that a certain portion of the policies and gardens of Dysart House belonged exclusively to him, and that neither the defenders nor the public had any right-of-way over the said subjects or any part thereof. The pursuer sought, in particular, declarator that there was no public right-of-way or servitude of passage over that portion of the Dysart policies extending between the Castle Rocks or Red Rock on the west and the Noop Rock on the east above high water-mark, and that these rocks, in so far as above high water-mark, were the exclusive property of the pursuer. There were also conclusions for interdict corresponding to the declaratory conclusions.

The compearing defenders averred that from time immemorial there had existed a public right-of-way along the shore beginning at Dysart Harbour, and terminating at a junction with the High Street of Kirkcaldy. This right-of-way, they further averred, followed for the most part a made footpath in the Dysart House policies, and numerous tracks or paths struck down from it to the shore. As it approached its western terminus it broke into two branches, one on higher ground, the other descending to the shore. "(Stat. 3) The path or right-of-way in question has been continuously

and extensively used by the public from time immemorial, or at anyrate for more than forty years prior to 1896. It affords a short and convenient access between Dysart Harbour and Kirkcaldy Harbour, and in consequence of the natural beauty of the shore at that point has always been a favourite and much prized resort for the inhabitants of both places. The traffic has been so extensive as to have worn steps in the rocks where these are crossed by the path."

The defenders denied that prior to the purchase of the estate by the pursuer in 1896 there had been any interruption of the use of the footpath in question by the public.

The pursuer denied the existence of the alleged public right-of-way, and averred that there had been a great deal of trespassing on his policies. The made footpath referred to was a private estate walk, and the tracks branching off therefrom were made by trespassers without the knowledge of the proprietor. As a matter of tolerance the pursuer's authors had allowed boys and lads to scramble over the Red Rock, but any climbing over it that took place was not in the exercise of a public right-of-way. "In 1852 some of the inhabitants of Kirkcaldy put up a ladder against the Red Rock for the purpose, it was stated in the newspapers at the time, of enabling bathers to get over the rocks at half tide. Immediately after this ladder was fixed up, the then Earl of Rosslyn asserted and vindicated his legal rights by sending men to remove the ladder, and it was accordingly taken down and removed. The public recognised the Earl of Rosslyn's right at the time, and then and ever since have acquiesced in his decision."

The pursuer further averred that the alleged right-of-way claimed by the defenders, after leaving the pursuer's property, was shown on the plan produced by them as passing through the properties of eleven different owners. The branches from the main track near its west end were servitude roads for the accommodation of the Pathhead feuars. The pursuer finally produced and founded on a contract of excambion entered into in 1820 between one of his authors and the Town Council of Dysart, whereby the former became entitled to enclose the ground at the Lethem Wells entirely within his own policies, it being provided that the inhabitants of Dysart should continue to have the privilege of taking water from the wells, "and that by the present access or footpath leading from the harbour of Dysart to the said wells, to be used for that purpose only."

On 4th February 1899 the Lord Ordinary (KYLLACHY) dispensed with the adjustment of issues, and before answer allowed parties a proof of their respective averments.

Opinion.—"I do not think it advisable to say much in disposing of this matter. The argument has touched upon points which, if I tried the case as judge, or as directing a jury, I should require to consider and deal with deliberately. All I have at present to decide is, whether this case presents sufficient specialties to take it out of the ordinary rule, and justify its being tried by a judge without a jury. I find on the whole that the case does present sufficient specialties, and that therefore the trial should go to proof before myself. I do not go over the specialties of the case which have been enumerated by Mr Wilson and Mr Jameson. I dispense with issues, and appoint proof on a day to be fixed."

The defenders reclaimed, and argued—The Lord Ordinary was wrong. There was no specialty to take this case out of the general rule that actions of right-of-way must go to a jury. That rule could not now be disputed—*Hope* v. *Gemmell*, March 1, 1898, 25 R. 678. The coincidence of the right-of-way and the made footpath left the question precisely what it would have been if there had been no such coincidence, viz., had there been use of the footpath for forty years as a matter of right?—*Napier's Trustees* v. *Morrison*, July 19, 1851, 13 D. 1404. The fact that alternative lines were suggested for part of the right-of-way was no obstacle to trial by a jury, for a verdict in favour of the pursuers of the issue could be worked out and given effect to by the Court—*Mackintosh* v. *Moir*, March 2, 1872, 10 Macph. 517. The cases of *Blair* v. *Macfie*, February 2, 1884, 11 R. 515; and *Fraser Tytler's Trustees* v. *Milton*, March 15, 1890, 17 R. 670, which were the leading exceptions from the general practice, were clearly distinguishable from the present one. In the former the main consideration that influenced the Court was the prejudice that had been excited in the public mind by newspaper discussion (*per* Lord Shand 11 R. 517), and even in the latter there were indications that the Court would consider the presence of that element as of paramount importance in determining that an action of this kind should be tried before a judge. But there was no suggestion of such an element here, and accordingly the usual practice ought to be followed.

Argued for the pursuers—The general practice must be conceded to be beyond doubt—*Malcolm* v. *Lloyd*, March 17, 1885, 12 R. 843; *Fraser Tytler's Trustees*, *ut sup*; *Hope*, *ut sup*. But there were specialties in this case which made it a proper object for being excepted from the general rule. In the first place, the case was one of great complexity and difficulty. The facts presented a legal aspect, and a jury would not be the most suitable tribunal to decide them. The averments as to interruption, for example, and as to the effect of the excambion in 1820, raised questions more fitted to be solved by a trained legal intelligence than by the lay mind. The coincidence of the alleged right-of-way with a made footpath was another fact of the same nature. Then there was obvious confusion as to the exact line of the path. That was one of the main grounds of judgment in *Blair*, *ut sup*. Lastly, the alleged right-of-way before reaching its terminus passed through the property of eleven other proprietors who were not and could not be made parties to this action. A

similar state of matters formed the basis of the decision in *Fraser Tytler's Trustees, ut sup.* If the defenders here desired to have the question submitted to a jury, their proper course was to raise an action of declarator of right-of-way, calling not only Mr Nairn but the eleven other proprietors as well.

LORD PRESIDENT—The rule of practice is now settled that cases of right-of-way go for trial before a jury unless there be such special and distinguishing circumstances as satisfy the Court that that would not be conducive to the administration of justice. This is laid down by the Lord President in the case of *Fraser Tytler*, decided in 1890, but I think your Lordships will agree with me that the practice of the Court since then has been still more decidedly in the direction of sending cases of right-of-way as a rule to a jury, unless there be special and distinguishing cause shown to the contrary. Therefore I begin by saying that from that rule I would not allow any exception unless there are clear and definite grounds for making it.

In this case the Lord Ordinary says that there are a number of specialties, and Mr Jameson and his learned junior have enumerated various points upon which they rely. It seems to me that, with one exception, they come to no more than this, that there are points in the case which would require special and close attention on the part of the jury, the judge, and above all the counsel. But I do not think that the view of the Court is that juries are only to be trusted in easy and plain-sailing cases, and in cases where the points are so broad and palpable that they cannot be missed. On the contrary, I think our system is that cases may present difficulties requiring caution, attention, and skill, and yet be perfectly suitable for trial by a jury on matters of fact. Now, to say that at one point of an alleged public road there are alternative lines of road, and that at another the road leaves the ground above high-water-mark—such statements are within the region and province of the capacity of a jury rightly to discriminate and determine. All that is required to ensure that the case shall avoid miscarriage is that the counsel take great pains, and give their vigilance and attention to all those matters, and that the judge be correspondingly careful to see that the attention of the jury is challenged on all these points.

Therefore I am bound to say that, with the exception of the point to which I am now to advert, I do not think that any one or all taken together of the so-called specialties presents any reason for withholding the case from a jury.

But I do attach importance to the fact that this is a right-of-way not solely over Mr Nairn's property, but one which, beginning at the Dysart end, goes first over Mr Nairn's property and then over the property of a number of separate proprietors, and that it is only persons who, starting from Dysart and having passed over Mr Nairn's property, cross over by legal right the property of third parties who can reach that terminus which alone can warrant the idea of there being a right-of-way at all. Now, on the face of it, that is a predicament which does present difficulties, for in this action those proprietors are not parties—no blame to Mr Nairn, for he could not call parties as defenders who were not asserting right to cross his lands. Accordingly, we are confronted with the difficulty discussed and considered by the Court in the cases of *Macfie* and *Fraser-Tytler*, and the Lord President's opinion in the first of these cases and the decision in the second seem to bear directly upon this point. There the Court held that, because there were present the delicacy and difficulty of there being absent persons over whose property it was essential to prove a right-of-way in order to make available the evidence as to the defender's property, a case was presented calling for special treatment. Now, observe that the persons asserting the right-of-way are the true pursuers of the issue. They are asserting the right over this gentleman's land. Now, where the alleged right-of-way is not merely over his land but over that of several other people, the normal proceeding is that the asserters of the right-of-way should bring into Court all the persons over whose land this right is said to exist, for they have no case of right-of-way unless they have a continuous passage from one public place to another. Therefore the normal proceeding is that persons asserting the right-of-way should bring into Court all the persons whose land they propose to affect. In the present case they practically refuse to adopt that course, although it has all along been open to them to convene the whole in one action. They adopt the abnormal course of seeking to establish a right-of-way over the lands of, I think, twelve proprietors in an action with one of the twelve.

It is to me, therefore, not surprising that the Court should find it needful to provide an abnormal tribunal for an abnormal form of action. I am in the present case for following *Fraser-Tytler*. I do not gather that it lays down an absolute and inflexible rule. But I gather that, unless there be some answer to that difficulty, that case indicates the proper course to be taken. And on that ground I would propose to affirm the Lord Ordinary's decision.

I think I have made it abundantly clear in the first place that this case constitutes no exception or abatement from the rule by which cases of right-of-way go to a jury, and in the second place that it is by reason of the option of the persons asserting the right-of-way that we are obliged to safeguard the interests of all concerned by prescribing an abnormal procedure.

LORD ADAM—I agree, and on the same grounds. To the best of my recollection a right-of-way is not one of the enumerated cases, but there is no doubt that it is according to the practice of the Court, unless there be some special reason to the contrary, that this class of case should always be sent

to a jury. The question therefore is, whether there is such special cause as to justify the course taken by the Lord Ordinary. Mr Jameson enumerated a great many points which he said made the case special. I was not impressed with any of them except the one to which your Lordship has alluded. Indeed, they seemed to me to be just very proper questions for a jury to judge of. But we have this speciality, that the alleged right-of-way passes not only through the pursuer's property, but also through the properties of a number of other proprietors. The pursuer who as asserting his right as proprietor against the alleged right-of-way, could not have called these parties, but the defenders might have called them in an action at their instance, as they are the pursuers of the issue raised in the action. I have never very well understood why a person asserting a right-of-way can select one of a number of proprietors through whose properties the alleged right-of-way passes as the object of his action, but according to the practice of our Court he can. There are, accordingly, absent parties who have interests to be protected. It is perfectly true that nothing decided in this action will be *res judicata* against them, but though this is true, an adverse issue to this case would in fact be most prejudicial to these parties, and impose a difficulty upon them in asserting their own rights. Accordingly, these parties being absent through the option of the parties who are pursuers of the issue, and having regard to the case of *Blair* v. *Fraser-Tytler*, I think the proper course to follow is to send the case to proof before a judge.

Lord M'Laren—In this case the Lord Ordinary has followed previous decisions in which the case of there being absent pursuers who might be defenders to an action of declarator of right-of-way is treated as exceptional, and I agree that his judgment should be affirmed.

Lord Kinnear concurred.

The Court adhered.

Counsel for the Pursuer—Jameson, Q.C. —J. Wilson. Agents—A. J. & J. Dickson, W.S.

Counsel for the Defenders—Guthrie, Q.C. —Constable. Agents—Wallace & Pennell, W.S.

Saturday, March 4.

FIRST DIVISION.

CRUICKSHANK *v.* GOWANS.

Process — Bankruptcy—Discharge — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 146.

An undischarged bankrupt applied to the Court for a remit to the Accountant of Court to report, and for his discharge thereafter on the ground that the report prepared by the trustee in terms of sec. 146 of the Bankruptcy Act 1856 was defective in the essentials required by that section, and that the trustee having been discharged, the machinery of the sequestration had broken down.

The Court *refused* the petition as incompetent, holding that the petitioner's proper course was to make his application to the Court which awarded sequestration.

White, March 18, 1893, 20 R. 600, *distinguished.*

The estates of John Cruickshank were sequestrated in the Bill Chamber, and John Stuart Gowans, C.A., was appointed trustee thereon on 19th October 1888.

Before applying for his discharge Mr Gowans lodged the following report with the Accountant of Court:—"The trustee has not been able to recover sufficient assets even to pay the expenses of taking out sequestration, and no dividend has been paid to the creditors. The trustee cannot certify that the bankrupt has made a fair discovery or surrender of his estate, and he cannot state whether or not the bankrupt has been guilty of any collusion. The trustee is unable to state that in his opinion the bankruptcy has arisen from innocent misfortune." Mr Gowans was discharged on 16th June 1892.

In these circumstances the bankrupt on 31st January 1899 presented a petition to the Court setting forth that he was now desirous of being finally discharged, and that Mr Gowans's report was defective in the essentials required by section 146 of the Bankruptcy Act "in so far as the trustee does not certify whether the petitioner made a fair discovery and surrender of his estate, whether he has been guilty of any collusion, and whether the petitioner's bankruptcy arose from innocent misfortunes or losses in business, or from culpable or undue conduct."

The petitioner accordingly craved the Court to ordain Mr Gowans to lodge a report with regard to his conduct in these particulars, and failing Mr Gowans's so doing to remit to the Accountant of Court, or other competent person, to furnish such report in lieu thereof, and thereafter to find the petitioner entitled to his discharge.

Mr Gowans lodged answers, in which he submitted that the application was incompetent.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), sec. 146, enacts that "the bankrupt may . . . petition the Lord Ordi-