worth £10,000) they will have to pay the defenders £5000 or £6000.

Again, it is not immaterial that if the defenders are right the provisions in their favour exceed those in favour of the truster's own sons.

I leave out of view the cancelled deed of 1880; it is at least doubtful whether it can be looked at.

I am therefore not prepared to concur in the judgment proposed. I think the facts should be ascertained by a proof before answer if parties cannot agree upon a joint-minute of admissions.

LORD YOUNG was absent.

The Court adhered, with additional expenses.

Counsel for the Pursuer—Dundas, Q.C.—C. K. Mackenzie. Agents — Dundas & Wilson, C.S.

Counsel for the Defenders—Balfour, Q.C.—Craigie. Agent—William Duncan, S.S.C.

Friday, March 3.

FIRST DIVISION.

[Lord Pearson, Ordinary.

LORD MONCREIFF AND OTHERS (MONCREIFF'S TRUSTEES) *v.* HALLEY.

Judicial Factor—Bankruptcy—Sequestration—Casus improvisus—Nobile Officium.

On the death of the trustee on a sequestrated estate fifty years after the date of the sequestration, a sum of money belonging to the estate was in his possession, but it was impossible to discover the creditors who were entitled to it. The Court, upon the application of the trustee's executors, *ordered* a meeting of the bankrupt's creditors to be called with a view to electing a trustee on the estate; and thereafter, the meeting having proved abortive by reason of no creditors appearing thereat, *appointed* a judicial factor on the bankrupt's estate.

On 26th May 1845 the late Mr William Moncreiff, C.A., was confirmed as trustee on the sequestrated estates of James Pedie, W.S., then deceased.

The bankrupt's creditors were mainly heritable creditors who held bonds over his heritable estate to the amount of about £12,257, but by arrangement with them Mr Moncreiff managed the bankrupt's heritable properties and accounted to them for the rents. The heritable properties were sold in 1850, and the proceeds were paid over or accounted for to the heritable creditors, though they were not sufficient to pay their debts in full.

Part of the sequestrated estate consisted of an annual feu-duty of £5, 5s., believed to be payable from subjects situated in Stockbridge. As it could not be ascertained at the time of the distribution of the heritable estate under which of the securities this feu-duty was included, it was left over for investigation by the trustee's law-agent, who, however, died without clearing up the matter. The feu-duty continued to be paid to the trustee, and at his death on 31st August 1895 the accumulations amounted to £275, 7s. 4d.

Claims were lodged in the sequestration by ordinary creditors to the amount of £211, but no funds being available to meet them no dividend was declared thereon.

In these circumstances Mr Moncreiff's trustees and executors presented a petition to the Court in which they set forth the foregoing facts, and averred that both Mr Moncreiff and they had been unable to discover any of the creditors, whether heritable or ordinary, or their representatives. They therefore craved the Court to appoint a judicial factor on the bankrupt's sequestrated estates, or otherwise to pronounce such other orders or direct such other procedure to be taken as might seem proper to the Court with a view to the appointment of a trustee upon the said estates.

Answers were lodged by Mrs Halley, one of the children and executrix-dative *quâ* next-of-kin of the bankrupt, who averred that there were no claims outstanding against the bankrupt's estate. The heritable bonds had been discharged, or had prescribed, and the ordinary creditors had never been ranked by the trustee for the amounts of their respective claims. Mrs Halley accordingly claimed that the funds in the hands of the petitioners were payable to her as executrix-dative of her father, and as such entitled to take up the bankrupt's estate after payment or satisfaction of any claims thereon.

On 3rd December 1898 the Court pronounced the following interlocutor:—"Order and direct that in future the proceedings in the process of sequestration of the estates of the late James Pedie, W.S., shall, from and after this date, be regulated by the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79) and Acts explaining and amending the same; further, remit to the Lord Ordinary officiating on the Bills to appoint a meeting of the creditors of the said deceased James Pedie to be held at such time and place as his Lordship may fix, to elect a trustee or trustees in succession on the said sequestrated estates, with the whole powers conferred by the said statutes, and to appoint said meeting to be advertised in the *Edinburgh Gazette*, with power to remit to the Sheriff of the Lothians and Peebles at Edinburgh to proceed further in said sequestration in manner mentioned in the statutes."

In terms of this remit the Lord Ordinary appointed a meeting to be advertised and held. The meeting, which took place on 21st December, was attended by the petitioners' and respondent's agents, and the sederunt-book and the claims of the ordinary creditors in the sequestration were, *inter alia*, produced. After delaying for half-an-hour beyond the hour at which the meeting was called, no creditors or representatives of creditors of Mr Pedie appeared,

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