building unprofitable or impossible. But for the purpose of construing or controlling the antecedent agreement, this clause is entirely unavailing. The essence of the complainer's case in reality is the supposed hardship which the plain words of the contract are said to imply, and some views of policy or expediency, which are more suited for the legislature than for a court of law. I cannot say that I am impressed by either consideration. I greatly doubt if there be any hardship. Building over mineral wastes is no novelty, and in this case an existing danger was disregarded, while the risk of future danger was foreseen and undertaken. Nor have we any evidence that the bargain, even under the most stringent construction of the clause, was not a good one for the feuar. As to the houses in Coatbridge, the rights of the feuars there must depend on the terms of their contracts, by which, like the complainer, they must be bound. I do not see that, even if we knew what they were, they could aid us in the construction of this agreement. But in Coatbridge, as elsewhere, we shall best protect property by seeing that parties fulfil their engagements. In the present case I look on these obligations to the mineral owner as part of the consideration for the feu, and I can see no reason for permitting the complainer, while he retains the benefit, to repudiate the conditions of his right.

Agents for Henderson & Dimmack—H. & G. Cairns, W.S.

Agents for Mr Buchanan—Duncan, Dewar, & Black, W.S.

Agents for Mr Andrew—J. & R. D. Ross, W.S.

Saturday, February 25.

FIRST DIVISION.

JOHNSTON *v.* BUDGE.

Process—Maills and Duties—Bankrupt—Trustee—Expenses. A heritable creditor of a bankrupt raised an action of maills and duties, concluding for expenses of process against the trustee on the sequestrated estate. The trustee in no way disputed the rights of the pursuer, but appeared to resist the conclusion as to expenses. *Held* that he was not liable in expenses, and the pursuer found liable to him for the expenses of his appearance.

This was an appeal from the Sheriff-court of Edinburgh. Miss Margaret Johnston held a bond and disposition in security, granted by Alexander Gordon Smith, over certain subjects in Edinburgh. Smith was afterwards sequestrated, and Mr Budge, C.A., appointed trustee on his estate. Miss Johnston raised a summons of maills and duties, in which she called as defenders the tenants and occupants of the subjects, and also Mr Budge, as trustee. The pursuer concluded for expenses against Mr Budge as trustee, and against the other defenders if they should appear to oppose. Mr Budge appeared, and objected to the conclusions in so far as expenses were craved against him as trustee. No appearance being made for the other defenders, the Sheriff-Substitute (CAMPBELL) decerned in terms of the conclusions, except as to the conclusion for expenses against Budge, and found the latter entitled to the expenses of his appearance.

Miss Johnston appealed, but the Sheriff (DAVIDSON) adhered, with additional expenses, and added the following note:—

"*Note*—The only conclusion against the defender Mr Budge, as trustee on the sequestrated estate of Smith, is that he be found liable in expenses. A distinction is taken between him and the other defenders, who are the tenants of the subjects covered by the bond. Expenses are asked against the tenants only if they appear as defenders. Expenses are concluded for against the trustee whether he appears or not. He does appear only to defend himself against this demand; and if he is not liable to pay the pursuer's expenses, he was entitled and bound so to defend himself.

"The pursuer has not been able to adduce any authority or practice for her demand. Her contention is, that as, if there had been no sequestration, and the debtor in the bond himself had been called, he would have been bound to pay the expenses of this decree, so he, being sequestrated, the trustee on his estate stands exactly in his place, and is equally bound to pay these expenses. But the trustee is not exactly in the position of the debtor. He has, no doubt, as trustee to regard the interests of the bankrupt, but he is trustee for his creditors, and the estate is vested in him for their benefit. The estate in the trustee, so far as heritable, is qualified and limited by all preferable securities existing at the date of the sequestration not null and reducible, and subject to an action such as the present. While the pursuer after sequestration is entitled to have such a decree as this, the statute which gives that right and limits its extent, does not provide that the trustee or the other creditors are to pay the expenses of obtaining it.

"The trustee has not disputed and has in no way interfered with the rights of the pursuer, and was not entitled to do so. It may be doubtful if anything more was required than an intimation of the action to the trustee, without his being called as a party. Be that as it may, he is not bound to pay the pursuer's expenses.

"Whether the pursuer, in virtue of the obligations in the bond, is entitled to be ranked as a creditor for the expense of getting her decree, is not now for consideration.

"If the trustee was entitled to appear and defend on the ground he did, and is right in his contention, he is entitled to his expenses."

Miss Johnston appealed to the Court of Session.

The SOLICITOR-GENERAL and WATSON for her.

SCOTT and STRACHAN for Mr Budge.

The Court adhered, with additional expenses.

Agents for Pursuer—Millar, Allardice, & Robson, W.S.

Agents for Defender—Watt & Anderson, S.S.C.

Saturday, February 25.

SECOND DIVISION.

IRVINE *v.* FIELD.

Landlord and Tenant — Verbal Lease — Wrongous Ejectment—Notice—Damages—Issue. A party was ejected from a piece of ground which he alleged he held under a sub-lease, but did not set forth any written title. Issue of damages for wrongous ejectment allowed.

This was an action by Alex. Irvine, gardener, Hawkhill, against Thomas Field, proprietor of the

lands of Hawkhill, concluding for £150 of damages for wrongous ejectment. The pursuer alleged that by a lease, dated the 2d day of March 1868, the defender let to James Kinloch certain portions of the lands of Hawkhill belonging to him, for a period of ten years from and after the term of Candlemas 1868. By the said lease assignees and sub-tenants were excluded, but it was arranged and agreed to between the parties that Mr Kinloch was to be allowed to subset to the pursuer any part of the ground let. It was further stipulated in said lease that the defender could at any time resume possession of said ground for feuing purposes, he being bound to give the tenant three months' notice for removal of crops. After Mr Kinloch's entry under the said lease he sublet to the pursuer a portion of ground leased to him by the defender. It was agreed that the sub-lease should extend to the same period as the lease in favour of Mr Kinloch, the pursuer being bound to give up possession in the event of the ground being required by the defender for feuing purposes, on getting the same notice as Mr Kinloch.

The defender feued the ground, and the pursuer alleged that the understanding and agreement between them was that the pursuer was to continue possession of the ground until it should be required by Mr Dougall, the feuar. The pursuer alleged that he had prepared and manured the ground for the summer's crop, and the same was all planted prior to 3d May 1870. On or about that date the defender, without any previous notice or intimation, or applying for or obtaining any judicial authority, illegally and unwarrantably took possession of the said ground and crop thereon, and violently ejected the pursuer from the possession thereof *brevi manu.*

The Lord Ordinary (ORMIDALE) approved of the following issue:—

"Whether, on or about the third May, Eighteen hundred and seventy, the defender wrongfully ejected the pursuer from a portion of the lands of Hawkhill, then occupied by the pursuer as a market-garden, and took possession of the crop thereon belonging to the pursuer, to the loss, injury, and damage of the pursuer.

"Damages laid at £150."

The defender reclaimed.

ROBERTSON, for him, contended that in an action of damages for wrongous ejection it was necessary that a title of possession should be set forth by the pursuer (*Macdonald* v. *Chisholm*, 22 D. 1075), and that here there was no relevant averment of a title on which the pursuer could have maintained himself in possession. A verbal lease was not good against a singular successor even for a year, and a verbal arrangement with the defender's author, whom the defender did not represent, was the only title stated. The defender was entitled to take possession of the ground of which he was proprietor, and the price of any crop of the pursuer he might have injured by so doing could not be recovered in an action of damages.

STRACHAN was not heard in reply.

At advising—

The LORD JUSTICE-CLERK—The pursuer alleges that the defender agreed that he should remain until he got three months' notice. He cropped the ground in the meantime. The allegation that he was in lawful possession of the ground, and did not get sufficient notice, is enough to make us send the issue to a jury. I do not say at present what notice is required.

The other Judges concurred.

Agents for the Pursuer—J. B. Douglas & Smith, W.S.

Agent for the Defender—James Somerville, S.S.C.

Tuesday, February 28.

FIRST DIVISION.

MACKINTOSH AND OTHERS *v.* MOIR.

Road—Right of Way—Unenclosed Ground—Evidence, Legal Sufficiency of. Where (1) the right of way claimed passed over an unenclosed piece of ground, unrestricted use of which was allowed by the tolerance of the proprietors to the public, not only for passing to and fro, but also for other purposes, while it remained unenclosed, and where (2) no objections had been made to the obstruction of the alleged right of way for twenty years after the ground was enclosed and planted; and where (3) the evidence failed to show that the use of the public was confined to any definite track, and was in the assertion of a right, and not in the mere enjoyment of tolerance—*Held* that the evidence was not sufficient in a legal point of view to establish a right of way.

Observed, that a right of way may be established by prescriptive use over an unenclosed piece of land, provided that the use has been confined to a definite track.

This was an action of declarator of right of way, and of interdict, brought by Mackintosh and others, inhabitants of Dunoon, against Mr John M'Arthur Moir of Milton, seeking to have it declared that there existed a public road or right of way for horses, carts, and other conveyances, whether with or without wheels, and also for foot passengers, leading from Hillfoot Street, Dunoon, through the lands of Milton and Gallowhill to Argyll Street of Dunoon; and to have the defender interdicted from shutting up this public road or right of way, and obstructing the pursuers and others in the peaceable enjoyment of it.

The right of way thus claimed was alleged to have run from Hillfoot Street, which was one point upon the high road from Toward to Strachar, across an unenclosed piece of ground called the Gallowhill, and to have again formed the said high road at Argyll Street. This unenclosed ground on the Gallowhill was part of the Milton property, and in the year 1838 the proprietor of Milton had begun to enclose and plant it, which operation was completed about the year 1844. At that time no objection was raised to the shutting up of the alleged right of way, and no use of it was averred subsequent to that date. The pursuers founded upon the use and enjoyment of the public for forty years, or for time immemorial prior to 1844.

The evidence upon which the pursuers rested consisted, firstly, of certain old titles and plans of the properties adjoining the Gallowhill, in which there were supposed to be allusions to, and traces of, the road claimed; and secondly, of the parole evidence of inhabitants of Dunoon, who had resided there during the period previous to 1844. The nature and effect of both these kinds of evidence, sufficiently appear from the opinions of their Lordships.

The case was tried by Lord Gifford and a jury, and a verdict was brought in for the pursuers.