

The petition is presented under the fifth clause of the trust-disposition, by which the trustees were to hold the estates and "apply the free yearly revenue arising from the same, or such portions thereof as may be necessary as after mentioned, for the benefit of the lawful descendants of my father, and for obtaining for the young among the said descendants such a good sound, plain, and useful education as will enable them to earn a livelihood for themselves." That purpose, of course, precedes the seventh purpose by which the trustees are directed to divide among themselves, as they also are beneficiaries under the settlement, the free surplus revenue arising from the trust-estate. Now, I think the trustees acted fairly in giving this sum of £24 to the Ritchie family. It is not a large sum, but it is not said to be too small. I do not think that they should withdraw or diminish it. I do not think that the trustees have shown any good reason why it should be diminished, and the trustees almost admit that they are willing to continue it, as they state they are willing to pay for certain expenses which amount to nearly the same sum. I think it would be a better plan if a fixed sum of money was given, and I would propose that the sum of £24 should be paid to the Ritchie family as from 17th July 1889.

The case of the other beneficiary is a different one. The first question that arises is, whether George Davidson is a beneficiary under the fifth clause of the trust-deed at all. It is said that he is not, because he receives a legacy of £20 under the third purpose, and that the trust-deed provides that no relation of the truster is to receive more than £20 altogether. I am satisfied, however, that he remains a beneficiary under the fifth purpose, besides being a legatee under the third purpose. The question then arises, how is this to be managed? The trustees propose to do it by paying for medicines and medical attendance for the old man, but I think that the fairer way would be to order them to pay to him the sum of £10 per annum.

LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court pronounced an interlocutor fixing the allowances to be made by the trustees to the respective petitioners at £24 per annum for the petitioners Elizabeth Taylor Ritchie, Sarah Jane Ritchie, Peter Ritchie, Sylvester Davidson Ritchie, and Mary Scott Ritchie, payable to their said father, and £10 per annum for the petitioner George Davidson.

Counsel for the Petitioners—Kennedy. Agent—J. D. Macaulay, S.S.C.

Counsel for the Respondents—W. Campbell. Agents—Skene, Edwards, & Garson, W.S.

Saturday, March 15.

FIRST DIVISION.

[Lord Wellwood, Ordinary.]

FRASER-TYTLER AND ANOTHER
(FRASER-TYTLER'S TRUSTEES) v.
MILTON AND OTHERS.

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

In an action of declarator of the absence of a public right-of-way and of interdict, it appeared from the productions that the roads claimed by the defenders did not terminate within or at the boundary of the pursuers' property, and that the defenders would require to prove prescriptive use of the continuation of a specified road to some public terminus through the lands of other proprietors who were not parties to the process. The Court *appointed* the action to be tried by proof before the Lord Ordinary.

This was an action of declarator and interdict by the trustees of William Fraser-Tytler of Sanquhar, Elgin, against certain parties residing in Forres, to have it declared that the portion of the said estate which lay between the town of Forres and the farm of Marcassie, the property of A. D. Ainslie, of Delgetty Castle, was free of any public right-of-way.

The defenders, as members of the public, claimed a right-of-way over a portion of the lands of Sanquhar, and they averred as follows—"From time immemorial, or at least for forty years immediately prior to the raising of the present action, there has been a public road and right-of-way for foot-passengers, which has been used continuously and without interruption by members of the public through the said estate. The said public road and right-of-way was the original or at all events a very ancient public road between the burgh of Forres and other places to the south and west, and the village of Rafford and other places to the south and east, and was used by the public from the first, and for greatly more than the prescriptive period, not only for foot passage but for driving sheep, cattle, and other bestial, and for cart traffic." They averred that after reaching the march of the Sanquhar estate the road entered the farm of Marcassie, and thence proceeded to the village of Rafford.

Mr Ainslie was not called as a party to the process.

The pursuers denied the existence of any such right-of-way as that claimed by the defenders.

In April and May 1889 an agitation was commenced in Forres with a view to induce the public to vindicate their rights over the road in question; and upon several occasions members of the public proceeded along the said road after taking, when necessary, violent measures to obtain access.

The defenders pleaded—"The road in

question having been used as a public road and right-of-way from time immemorial, or at least for the prescriptive period, continuously and without interruption, and the defenders having done, and having claimed to do, no more than use and assert the said right-of-way as members of the public, are entitled to absolvitor, with expenses."

By interlocutor of 12th February 1890 the Lord Ordinary (WELLWOOD) allowed the parties a proof of their averments.

"*Opinion.*—In this action the pursuers, who are proprietors in trust of the estate of Sanguhar, seek declarator to the effect that they hold part of the estate, which lies between the town of Forres and the farm of Marcassie free of any public right-of-way, or servitude of road or passage over the same, or any part thereof, and conclude for interdict against the defenders, who are inhabitants of the town of Forres.

"The defences to the action have varied. In the original defences the defenders maintained that a public right-of-way existed through the pursuers' property from the point A on the plan, near the town of Forres, running past B and C to the point D at the south-eastern extremity of the estate, and thence across the lands of other proprietors to the village of Rafford, and other places towards the south and east; and by another road to the south-west, to the road leading from the village of Rafford to the old quarries of Coathill. It is not maintained that the point D is a public place.

"On adjustment of the record, however, a material addition was made to the defences, the effect of which was that the defenders claimed three additional rights of way through the pursuers' property—the *first* running from A to the point C on the line ABCD, and thence to the point E, where it joins the public road from Forres to Rafford; the *second* from A to C, and thence westward to F, where it joins the Altyre public road; and the *third* from E through the point C to F.

"The defenders proposed five separate issues applicable to the five roads thus claimed, and asked that the case should be tried with a jury. The pursuers maintained that it should be tried without a jury. I took time to consider the matter, and was prepared to give judgment, when the defenders stated that they did not desire a proof as to the three additional roads claimed on adjustment, and asked leave to withdraw the proposed issues applicable to those roads. I allowed this to be done, and reconsidered the case; but I remain of the opinion which I entertained at the close of the first discussion—that it is desirable that the case should be tried without a jury.

"As the case stood on the closed record the defenders claimed a public right-of-way over not fewer than five roads, and this of itself appeared to me to be a strong reason for not sending the case to a jury. The matter is, to a certain extent, simplified, because the defenders now claim only two roads instead of five. At the same time, the case is not restored to the position in which it stood when the defences were lodged,

because the defenders have disclosed, if there is any foundation for their averments, that an extensive use by the public was made of the road from A to C, not for the purpose of proceeding to D, and thence southward, but to E or to F; and although the defenders do not now ask to have it found that a prescriptive right-of-way exists over these roads, it may be anticipated that there will be a good deal of difficulty and confusion as to whether persons seen on the road between A and C were proceeding to D, or to E or F.

"Moreover, the roads now claimed do not at their southern extremity terminate within or at the boundary of the pursuers' property, and it will be necessary for the defenders to prove prescriptive use of the continuation of the road ABCD to some public terminus through the lands of other proprietors who are not parties to this process. As has been pointed out in previous cases, and especially by the Lord President in *Blair v. Macfie*, 11 R. 517, questions of delicacy may arise in regard to the character and sufficiency of the evidence requisite to establish the necessary use of such continuations of the road.

"The pursuers also founded on popular feeling on the subject of public rights-of-way as a reason for not trying the case with a jury. I do not in this case attach very much importance to this objection, and if it stood by itself I should not be prepared to withhold the case from a jury. It is not alleged that the case has been made the subject of newspaper discussion by the defenders, or even by others; and it is also true that the case is not to be tried in the locality but in Edinburgh. At the same time, I do not think that popular feeling on the subject can be entirely ignored. It is a matter of common knowledge, and indeed has been brought under the notice of the Court in more cases than one, that there is at present an unusual amount of public interest taken in the assertion and maintenance of public rights-of-way all over Scotland, and that a society exists for the express purpose of supporting and enforcing such claims. The natural result is that every right-of-way case, with whatever locality it may be connected, is keenly watched and canvassed not only by the inhabitants of the district but also by members of the association and other persons interested in other claims of the same kind throughout the country.

"In this class of cases it is a matter of some delicacy to decide as to the mode of proof. They are not among the enumerated causes, and there is no statutory provision that special cause must be shown for trying them without a jury. The defenders, however, founded strongly upon the previous practice of the Court. I doubt whether this can be pressed so far now as it was at one time, because since the re-introduction or resuscitation in 1866 of trial before the Lord Ordinary without a jury, and especially since 1872, many of the more important right-of-way cases have been tried without a jury, in particular *Macfie v. Stewart*, 1872, 10 Macph. 408; *Blair v. Macfie*, 1884,

11 R. 515; *Hozier v. Hawthorne*, 1884, 11 R. 766; *Brodie v. Mann*, 1884, 11 R. 925, and 12 R. (H. of L.) 52; *Scottish Rights of Way and Recreation Society, Limited, &c. v. M'Pherson*, 1886, 14 R. 7 and 875, and 15 R. (H. of L.) 68; *Winans v. Lord Tweedmouth*, 1888, 15 R. 540. It is said by the defenders that stronger reasons existed for ordering proof before the Lord Ordinary in *Blair v. Macfie* and *The Scottish Rights of Way and Recreation Society, Limited v. M'Pherson*, than exist in this case. This may have been so as regards popular prejudice, at least in the case of *Blair v. Macfie*. But it must be observed that in the two cases just mentioned, the Court in ordering trial without a jury, altered the judgment of the Lord Ordinary; and no doubt in dealing with a question of discretion stronger reasons were required to induce the Court to take that course than if the case had come before them in the first instance.

"Taking it, however, that the tendency of the Court still is, in the absence of special reasons to the contrary, to appoint such cases to be tried by a jury, I think that sufficient grounds exist here for adopting the other mode of trial."

The defenders reclaimed, and argued that the case was one specially suited for jury trial. There were no particular circumstances such as were present in the cases cited by the Lord Ordinary, and which had induced the Court to send them to proof. The mind of the public had not been inflamed by the press, nor would the jury be in any way biased, as the case would be tried in Edinburgh and away from the locality. There was no settled rule that such cases must be sent to a proof, and in the present case finality would be more speedily arrived at by a jury trial—*Malcolm v. Lloyd*, March 17, 1885, 12 R. 842; *Scottish Rights of Way and Recreation Society v. M'Pherson*, October 23, 1886, 14 R. 7.

Counsel for the respondents were not called upon.

At advising—

LORD PRESIDENT—I think and I understand that your Lordships are all of the same opinion, that the interlocutor reclaimed against ought not to be interfered with.

There is one passage in the Lord Ordinary's note which strongly confirms me in this opinion, and that is when he says that "the roads now claimed do not at their southern extremity terminate within or at the boundary of the pursuer's property, and it will be necessary for the defenders to prove prescriptive use of the continuation of the road A B C D to some public terminus through the lands of other proprietors who are not parties to this process." His Lordship then goes on to cite the case of *Blair v. Macfie*, 11 R. 517, as one in which delicate questions arose relative to the character and sufficiency of the evidence by which the necessary use of such continuations of the road was to be established, which rendered the case unsuitable for jury trial.

In the present case there will be certain to arise in the course of the trial questions of considerable difficulty, involving possibly a shifting of the *onus* of proof, and for that reason, I am unwilling to send it to a jury. Apart from that, however, I am prepared to adopt the grounds of judgment stated by the Lord Ordinary, and I consider them quite sufficient for the disposal of the present case.

I am not prepared, however, to agree with the view expressed by the Lord Ordinary in the next paragraph of his note, in which he says—"The pursuers also founded on popular feeling on the subject of public rights-of-way as a reason for not trying the case with a jury. I do not in this case attach very much importance to this objection, and if it stood by itself I should not be prepared to withhold the case from a jury. It is not alleged that the case has been made the subject of newspaper discussion by the defenders, or even by others; and it is also true that the case is not to be tried in the locality but in Edinburgh. At the same time, I do not think that popular feeling on the subject can be entirely ignored. It is a matter of common knowledge, and indeed has been brought under the notice of the Court in more cases than one, that there is at present an unusual amount of public interest taken in the assertion and maintenance of public rights-of-way all over Scotland, and that a society exists for the express purpose of supporting and enforcing such claims. The natural result is that every right-of-way case, with whatever locality it may be connected, is keenly watched and canvassed, not only by the inhabitants of the district, but also by members of the association and other persons interested in other claims of the same kind throughout the country." The result of this would be that no questions of popular interest, or in which popular feeling was likely to be excited, would be suitable for trial by jury.

Without, however, entering into that question, I find in the specialities of the present case quite sufficient to make me adhere to the Lord Ordinary's interlocutor.

LORD SHAND—With regard to the last matter to which your Lordship has referred I am quite of the same opinion.

Prima facie questions of popular interest are just the questions which should go to a jury, and it is one thing to say that in consequence of popular excitement in any special district a case ought not to be tried by jury there, and quite another to say that all questions of such a kind are unsuited for jury trial.

As to the practice of the Court in such cases—for the series of decisions has brought the procedure up to a practice—I think the custom has latterly been to send cases involving questions like the present to proof and not to a jury, and I agree with your Lordship that that is the course which ought to be followed here.

LORD ADAM—I concur.

LORD M'LAREN—I think that actions involving questions of servitudes or right-of-way are best decided by a proof before a Judge, and in the Outer House I invariably followed that practice. It is seldom in such cases that the inquiry is limited to questions of pure fact; indeed, it almost invariably involves delicate inquiries regarding the amount of possession, interruptions, and of tolerance—all questions other than that of public right. It is besides notorious that cases of this kind often raise very difficult questions of law, resulting not infrequently in a difference of opinion upon the bench, all which goes to show how unsuitable they are for trial by jury.

The Court adhered.

Counsel for the Pursuers—Rankine. Agents—J. W. Fraser-Tytler, W.S.

Counsel for the Defenders—A. S. D. Thomson. Agents—R. Stewart, S.S.C., and A. Newlands, S.S.C.

Tuesday, March 18.

FIRST DIVISION.

[Lord Kinneir, Ordinary.]

SEXTON v. RITCHIE & COMPANY.

Reparation—Slander—Issue—Innuendo.

Circumstances in which the Court, in an action of damages for slander, held (*diss.* Lord Shand) that a writing, though of ambiguous meaning, was reasonably capable of bearing the innuendo put upon it by the pursuer, without the allegations of extrinsic facts to support such innuendo.

Opinion (per Lord Shand) that the primary meaning of the writing being inoffensive, the innuendo proposed by the pursuer should not be allowed without the allegation of extrinsic facts to support it.

This action was brought by the Right Hon. Thomas Sexton, M.P., Lord Mayor of Dublin, against John Ritchie & Company, proprietors, printers, and publishers of the *Scotsman* newspaper, for payment of £5000 in name of damages for alleged slander.

The pursuer averred—“(Cond. 2) In the number of the *Scotsman* of 19th July 1889 the defenders published the following:—

‘ONE OF MR SEXTON’S MISREPRESENTATIONS.

‘The following letters addressed to Mr Sexton, M.P., have been sent to us for publication:—

‘*Ulster Loyalist Union Offices,*

‘1 Lombard Street, Belfast, 25th June 1889.

‘The Right Hon. Thomas Sexton, M.P.,

‘Lord Mayor of Dublin.

‘Dear Sir,—Pray excuse the liberty of this note. From what accounts I have of you as a member of the Nationalist party, I am constrained to believe you would not willingly give currency to a falsehood. In any case, you could not surely use unfair means to wilfully malign one who has the

honour to be on the roll of the Division in Belfast which you represent in Parliament. If on no other grounds than this, I think I am entitled to a fair consideration at your hands. Having cleared the ground so far, I beg to direct your attention to the fact of your persistent efforts before the House of Commons on two or three occasions lately (indeed, one of those occasions not later than last evening) to give prominence to a statement that I had “insulted a virtuous girl at Gurlroe,” on the Ponsonby estate, last week, by asking her to kiss me. Perhaps you and I have different opinions on what an insult is. I consider, for example, that if I could have seen my way to administer a kiss on any of those young women, that I would have conferred an honour on her she was not likely to again receive during the rest of her lifetime. Be that as it may, my kissing days—*ad libitum*—are past and gone, “for into the sere and yellow leaf my way of life has fallen,” and especially before so many men I was not likely to use such liberties with this class of girl. She was too young to begin with. This brings me to say, therefore, that the insult you speak of, so far as it concerns me, is, from beginning to end, a wanton falsehood. Now I am not so unmannerly as to charge you with falsehood; but this I do charge you with. You have by your persistent questionings in Parliament brought me into prominence in a way that is anything like being dignified, without first assuring yourself that no one, especially one of your constituents, would suffer without a cause, even by implication. I think it was unfair, and I do think it very ungentlemanly, not to say indiscreet, for you to treat one who has never said or done you any harm in such an impolite way. I had hitherto looked on you as an ornament to your party, and one who would at least act honourably; but since this conduct which I have to complain of, and that justly too, has been so closely brought home to you, I think, at least, I am entitled to ask you to vindicate the good opinion I had of you by explaining how you were brought to cast, even by implication, such an uncalled for, and, indeed, a gratuitous insult on one who made it a point not to wound even the most susceptible of feelings.—Yours truly,

JOHN D. CROCKETT.

‘*Offices, 1 Lombard Street,*
‘*Belfast, 2nd July 1889.*

‘Dear Sir,—It is just seven days since I wrote you a matter that touches my character as a man, and I expected at least the ordinary courtesy of, if not an explanation, a reply to my polite note. You may rest assured I will not be put off with an evasion of my letter.—Yours very truly,

JOHN D. CROCKETT.

‘The Right Hon. Thos. Sexton, M.P.,
‘Lord Mayor of Dublin.’

‘*Offices, 1 Lombard Street,*
‘*Belfast, 15th July 1889.*

‘The Right Hon. Thomas Sexton, M.P.,
‘Lord Mayor of Dublin.

‘Dear Sir,—It is now three weeks since I wrote you first calling your attention to