a lime quarry in the immediate neighbourhood. That, to my mind, cannot be part of a public right-of-way, and it seems to be a strong confirmation of the testimony to which I have alluded that at Kay's House there was a gap in this line. Now, that being the case, I think we must deduct a great deal of the general evidence as to people being seen coming out at the point D, because it was quite easy for them to get to D when they were at G by walking across the common and coming down in many ways, without coming through the Balloch, and down that peculiar piece of ground, which is rough and deviating, and uncertain even to the pursuers themselves, between Kay's House and the point D. Now, when you have so defective a proof of that important piece of the line, I think we are shut up to this conclusion, that excluding the mere strollers, and excluding the proprietors, tenants, and dependents, and excluding the workers at the kilns and mines upon the proprietor's property, the residuum of persons who were traversing this alleged pathway is reduced to a very limited amount indeed; and even that residuum is capable of still further reduction when you consider that a portion of it consists of the Craigend miners. And so far as I can understand the evidence, if these men went the nearest and most convenient way they would not go to the point D at all, but, coming up from Touchadam smithy, they would cross to near Kay's House, and get into the Murrayshall pathway. Now that, I think, brings the case very much to this, that you have now, and from what we can gather of the facts would likely have again if there were another trial, a great defect in the proof of a connected line of way from point to point. I don't mean to say that the fact that the road claimed is longer and steeper and rougher than the statute-labour road is of itself sufficient to make it impossible that the public could establish a right-of-way there; but these are circumstances which make it more difficult to establish, and make it less likely that there should be a right-of-way there. With that qualification, I am of opinion that the line of way alleged here has not been made out from end to end, from one public place to another, and that a decided break in any portion of it between the two public places is now, and must hereafter be, fatal to the demand for this right-of-way.

The LORD PRESIDENT—Then we make the rule absolute, and set aside the verdict.

Expenses reserved.

Agent for Pursuers—George Donaldson, S.S.C.

Agents for Defender—Russell & Nicolson, C.S.

MOSES AND ANOTHER *v.* GIFFORD.

*Bankruptcy—Recal of Sequestration—*23 *and* 24 *Vict. c.* 33, *sec.* 2. A sequestration recalled in respect (1) the bankrupt was an Englishman and his creditors chiefly English; and (2) he had applied for sequestration under a designation calculated to mislead his English creditors.

The respondent John George Gifford, who is, or was in 1864, a clerk in holy orders, and curate of the chapelry of Holdenhurst, in England, had his estates sequestrated by the Lord Ordinary on 6th May 1864. The application for sequestration was made in name of "John George Gifford, clerk, residing at Innerleithen, in the county of Peebles," and the concurring creditor was John James Wynter Gifford, of Hertingfordbury, in the county of Hertford, the bankrupt's son, who was represented as a creditor to the amount required by law. In July 1864 the petitioners, two creditors of the respondent, presented an application for recal of the sequestration. The application for recal was founded on section 2 of the Act 23 and 24 Vict. c. 33, which provides that, "if in any case where sequestration has been or shall be awarded in Scotland, it shall appear to the Court of Session, or to the Lord Ordinary, upon a summary petition by the accountant in bankruptcy, or any creditor, or other person having interest, presented to either Division of the said Court, or to the Lord Ordinary, at any time within three months after the date of the sequestration, that a majority of the creditors in number and value reside in England or in Ireland, and that, from the situation of the property of the bankrupt or other causes, his estate and effects ought to be distributed among the creditors, under the bankrupt or insolvent laws of England or Ireland, the said Court, in either Division thereof, or the Lord Ordinary, after such inquiry as to them shall seem fit, may recal the sequestration."

It was averred that the bankrupt's permanent domicile was in England, and that his whole estate and effects were situated there; and he had admitted in his examination under the sequestration, which was taken in London on commission on 30th June 1864, that he had upwards of twenty creditors resident in England, whose united debts amounted to upwards of £2590; that he had only two Scotch creditors, whose debts amounted to £10, 15s.; and that he had five French creditors, whose united debts amounted to £236. No procedure took place under this application for a long time, but on 31st May last Lord Mure appointed intimation to be made to the respondent personally, his agent having ceased to act for him, and in respect of non-appearance, his Lordship on 19th June last recalled the sequestration.

The bankrupt reclaimed.

SCOTT, for him, argued that the Lord Ordinary was not entitled to proceed to recal the sequestration merely because of no appearance. The letter intimating the interlocutor of 31st May last had not been received.

The LORD PRESIDENT said that that might be a ground for reponing the bankrupt on conditions, and counsel were asked to speak to the merits of the application.

SCOTT argued—When the sequestration was awarded the bankrupt was resident in Scotland. It was not sufficient ground for recalling it that a majority of the creditors were resident in England. The clause of the statute relied on required something more, and there was no other ground suggested here.

F. W. CLARK was heard in support of the application for recal. The sequestration was a mere device to obtain protection from the diligence of the English creditors, who were misled by the deceptive character of the designation assumed by the bankrupt, and under which his estates were sequestrated.

The LORD PRESIDENT—We have now heard the merits of this case. I think the Lord Ordinary was quite warranted in the circumstances in pronouncing the interlocutor reclaimed against. But we might, on conditions, have recalled that interlocutor if we thought it right after hearing the case to do so. I think, however, it is very clear, from the statement of the bankrupt himself, that he came to Scotland for the purpose of availing himself of the Scotch law of bankruptcy, not choosing to place himself under the bankruptcy

law of the country from which he came. He made his application for sequestration under a designation calculated to mislead his English creditors, and to conceal his identity from them. It appeared that his real designation was "John George Gifford, Clerk in Holy Orders," and he designed himself "Clerk, residing at Innerleithen;" but I did not discover what sort of clerk he really was until after I had read well through the printed papers. It appeared also that almost all the creditors reside in England, and a mere fraction of them in Scotland. It is therefore clear that England is the proper country in which to distribute any estate this bankrupt has. It was said that there was none in England, but it is not said there is any in Scotland. What he has he probably carries about with him. It was said there was no jurisdiction under which the bankrupt's affairs could be wound up in England; but if he wishes his affairs wound up, he can have no difficulty in replacing himself under the jurisdiction from which he has escaped.

The other Judges concurred, and the reclaiming-note was refused.

Agent for Petitioners—J. Y. Pullar, S.S.C.
Agent for Bankrupt—D. F. Bridgeford, S.S.C.

PETITION—J. R. FARQUHARSON.

Entail—Improvement of Land Act 1864 (27 *and* 28 *Vict. c.* 114). Procedure in a petition under the "Improvement of Land Act," one of the heirs of entail being a minor.

By the "Improvement of Land Act 1864" (27 and 28 Vict. c. 114), it is enacted that any landowner desirous of borrowing or advancing money under that Act for the improvement of his land shall make application to the Enclosure Commissioners to sanction the proposed improvements, in such manner and form and stating such particulars as the Commissioners shall from time to time direct. Sections 78 to 89 inclusive relate to the case where any landowner "shall be desirous of subscribing for any shares or stock in the capital, whether original or additional, of a company having power to construct a railway or navigable canal," and empower and enjoin the Commissioners to make all necessary inquiries, and, if satisfied that such railway or canal will effect a permanent increase of the yearly value of the lands exceeding the yearly amount proposed to be charged thereon, to grant provisional orders, and thereafter absolute orders, to the effect of constituting the price of such shares a real burden or charge on the lands by way of rent-charge.

On 28th October 1865 the petitioner, Mr Farquharson of Invercauld, presented an application to the Enclosure Commissioners, in virtue of the said Act, for their sanction to the improvement of his estates in Perthshire and Aberdeenshire. The petitioner proposed to invest £10,000 in the stock of the Aboyne and Braemar Railway Company, which passed for a considerable distance through his lands, and to charge the subscription price on the rents of the estate.

By section 18 of the said Act it is enacted that in case any person having any estate in, or charge or security on, the land to be improved, shall signify his dissent from the application, the Commissioners shall not sanction the improvements until authorised, in the case of lands in Scotland, by the Court of Session to do so; nor shall they sanction the same in any case where the landowner shall be the father of the person entitled either at law or in equity to any estate in such land, and such person shall be an infant or minor, unless or until authorised by the Court as aforesaid.

The application set forth that the three nearest heirs of entail were the petitioner's three younger brothers, and that the petitioner was not the father of the person or persons entitled either at law or in equity to any estate in the lands to be improved, or any part thereof, such person being an infant or minor.

After the application was presented—namely, in November 1865—a son was born to the petitioner, who is now the nearest heir of entail. He therefore now applied to the Court to authorise the Commissioners to proceed upon his said application, notwithstanding the circumstance that the petitioner is the father of a person entitled to an estate in the land to be improved under the application to the Enclosure Commissioners.

The Court appointed intimation of the petition and service upon the infant and on the petitioner, as his administrator-in-law. This having been done, the petitioner stated in a minute that as his interest might be adverse to that of the infant he craved the Court to appoint a curator *ad litem*

Mr James Webster, S.S.C., was appointed curator; and after some inquiry being made under a remit to Lord Mure, who made a report in favour of granting the prayer of the petition, it was today granted.

Counsel for Petitioner—Monro. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Curator *ad litem*—Shand. Agents—Webster & Sprott, S.S.C.

SECOND DIVISION.

M.P.—MURRAY'S EXECUTORS *v.* CARPHIN AND OTHERS.

Trust—Marriage-Contract—Husband and Wife—Jus crediti—Spes successionis. Held, on the construction of the terms of a marriage-contract, that the fee of an estate was effectually vested in the trustees, and that thereby a *jus crediti* was conferred upon children which was available to exclude the wife's creditors before marriage.

This is a question arising out of the antenuptial contract of marriage entered into between Miss Mary Jane Murray, daughter of the late James Murray, Esq., of Jamaica, and Robert Dawson Johnston, writer in Edinburgh. Under Mr Murray's will Mrs Johnston was entitled to a third share of his estate, which was declared to vest upon her marriage. Previous to her marriage, her husband having no means of setting up house, her father's executors consented that a sum of £400 should be withdrawn from her share of her father's estate, with the view of enabling her to purchase outfit and other necessary furnishings, including furniture. Her purchases, however, greatly exceeded the sum advanced, and the executors receiving more claims upon it than it was able to meet, stopped further payment. Mr and Mrs Johnston at the same time, previous to their marriage, entered into a marriage-contract in which mutual provisions were made on each side. The validity of this contract, on the intrinsic ground of effecting what it purports to do, was the question before the Court. The trustees under the marriage-contract failed, and a judicial factor was appointed in their stead. The dispute is between him on the one hand, and the creditors of Mrs Johnston before her marriage, and her husband's creditors, on the other hand. The judicial factor