had been made to recover it for the hearing of the case in the Court below or in this Court.

At advising—

LORD M'LAREN—I am naturally unwilling to interfere with the decision of a judge sitting in the Small Debt Court, but where it appears that something like an error in essentials has been made, that is, I think, the kind of case for which an appeal to the Court of Justiciary is intended. The appeal is not for the purpose of reviewing anything to which the Sheriff has applied his mind, but for the purpose of correcting some abuse of practice or giving redress on some ground which never really was before the Sheriff at all. Wherever it can be shewn that the inferior judge did not apply his mind to the point which was the essential point in the case, I think you have gone a long way to establish the right to appeal.

If the original policy had been here I should have been quite disposed to sustain the appeal to the effect of limiting the decree to one-half the sum sued for. As we have only a copy, I think the proper course is to remit to the Sheriff with instructions to recover the policy or obtain secondary evidence of it, and to re-hear the case with that additional evidence.

Case remitted accordingly.

Counsel for Appellant—Younger.

Counsel for Respondent—Guy.

COURT OF SESSION.

Saturday, October 23.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

THE SCOTTISH RIGHTS OF WAY AND RECREATION SOCIETY (LIMITED) AND OTHERS *v.* MACPHERSON.

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

In an action of declarator of an alleged public right-of-way, the Court (*rev.* Lord Kinnear, and holding that *Blair* v. *Macfie*, Feb. 2, 1884, 11 R. 515, applied), in view of the fact that pending the action there had been newspaper discussions which might have a prejudicial effect on the minds of a jury, *ordered* the case to be tried by a proof before the Lord Ordinary.

The Scottish Rights of Way and Recreation Society (Limited), along with two members of the public, brought this action of declarator of the existence of a public right-of-way for passengers on foot and horseback and for driving cattle, from a point on a public road near Braemar and, *inter alia*, proceeding down Glen Clova and through the lands of the defender Duncan Macpherson of Glen Doll to a point on a public road leading to Kirriemuir. The defender Mr Macpherson denied the existence of any such right-of-way through his lands. It was stated at the bar that the circumstances which had given rise to the action and its merits had provoked a large amount of popular feeling in the district interested. The pursuers had published a report in the *Scotsman* newspaper of the action their Society had taken and proposed to take in the matter, and besides the appearance of two letters in that paper, a member of the Society had replied to a letter on the subject which had appeared in the *Standard* newspaper. In these circumstances, on the pursuers moving the Lord Ordinary (Kinnear) for an order for issues, the defender asked that the case should be sent to proof before his Lordship. His Lordship appointed the issues to be tried by a jury.

"*Note.*—The defender maintains that this case should be tried without a jury, on the ground to which the Court gave effect in *Blair* v. *Macfie*, viz., that the minds of the public, and particularly of that part of the public from which juries are drawn, have been prejudiced in regard to the merits of the case by discussions in the newspapers. But the only publications for which the pursuers are responsible appear to me to be of a very different character from the letters which were addressed to the newspapers by the pursuer in the case referred to. It cannot be supposed that the public mind has been so prejudiced by anything that appears in the pursuers' reports as to render a fair trial by jury impossible or improbable; and the mode of trial ought not to be affected by the letters of persons for whom the pursuers are not shewn to be answerable, or by letters addressed to a newspaper published in London. This case is distinguishable from that of *Blair* on another ground—because the road now in question is at a distance from Edinburgh, so that there can be no local feeling upon the subject in the district from which the jury are to be drawn."

The defender reclaimed, and argued—This case was parallel with *Blair* v. *Macfie*, Feb. 2, 1884, 11 R. 515, in which the Court appointed the cause to be tried without a jury. The minds of that part of the public from which the jury would be likely to be drawn had been prejudiced in regard to the merits of the case by the publications and letters in the newspapers for which the pursuers were responsible. The distinction drawn by the Lord Ordinary between this case and that of *Blair* as to local feeling vanished when it was seen that pending the case the pursuers by publishing their Society's reports had advertised themselves as the champions of the public right.

The pursuers replied—There were only two letters written to the *Scotsman*, and the *Standard* was not a paper which could be said to be universally circulated amongst the class of persons from whom the jury would be likely to be taken. The report was a perfectly harmless one. In *Blair's* case there was a thick mass of correspondence, for which the pursuer was himself responsible. There was, then, nothing whatever to prejudice a jury's mind here. The Court would, moreover, be slow to interfere with the Lord Ordinary's discretion in such a matter.

At advising—

LORD JUSTICE-CLERK—If I had had to proceed upon my own impression I should not have been disposed to interfere with the discretion of the Lord Ordinary in the matter. But I understand it is the opinion of your Lordships that on the whole

the case had best be tried before the Lord Ordinary, and looking at the case of *Blair* v. *Macfie*, and seeing that as in that case there has been public discussion, I am not disposed to differ from that view.

LORD YOUNG, LORD CRAIGHILL, and LORD RUTHERFURD CLARK concurred, and the case was sent back to the Lord Ordinary for proof.

Counsel for Pursuers — W. C. Smith — Graham Murray. Agent — Andrew Newlands, S.S.C.

Counsel for Defender—Asher, Q.C.—Cosens. Agents—Tait & Crichton, W.S.

Saturday, October 23.

SECOND DIVISION.

[Sheriff of the Lothians and Peebles.

HOGG *v.* J. WALDIE & SONS.

Reparation—Relevancy—Coal Mines Regulation Act 1872 (35 *and* 36 *Vict. c.* 76), *sec.* 51, *sub-sec.* 4.

The representatives of a miner who had been killed by a fall of stone in a coal-pit brought an action against the lessees of the pit, alleging that the accident occurred through his having, in accordance with a custom of miners, gone into a disused working to ascertain if the coal was better there, which working was not fenced off as required by the Coal Mines Regulation Act 1872 to prevent persons "inadvertently" entering such a place. *Held* that the action was relevant.

This was an action by the widow and children of William Hogg, a miner, who was killed on 30th December 1885 by being crushed by a fall of earth and stones in a pit at Tranent, of which the defenders J. Waldie & Sons were lessees.

The pursuers averred that the pit was being worked on the "long wall" system, with passages or main roads, intersected by side roads in the workings; that the deceased was working in one of these; that a face had been prepared for them by being "brushed" for a certain length; that the working, however, proved so arduous and unremunerative that William Hogg went further along the seam to see if the face improved in quality; that his acting as aforesaid was in conformity with a common and recognised practice in coal mines, and in particular in the defenders' mine, and further, was in consequence of what the oversman had told him and his squad; and that a few minutes afterwards he was heard to utter a cry, and when his companions found him he was lying crushed to death at an unused working face some little way further on, a portion of the face having fallen on him. The pursuers further averred that the coal at the place in question had for several years been abandoned as unworkable to profit, but the entrance to it was not fenced, nor had a fence been erected to bar the entrance to it from the deceased's working-place close by, and that the place had not been inspected for some time. They averred that the deceased lost his life through the fault of the defenders, as they had not the opening to the unused working face at which the accident happened properly fenced in terms of the Coal Mines Regulation Act.

The Coal Mines Regulation Act 1872, sec. 51, sub-sec. (4), enacts "that all entrances to any place not in actual course of working and extension, shall be properly fenced across the whole width of such entrance, so as to prevent persons inadvertently entering the same."

The defenders stated that the deceased ought not to have left the squad, and any purpose for which he did so was not in any way connected with their work. They explained that the portion of the mine where Hogg was killed was the air course thereof, which was a most important statutory requisite. They averred that the deceased had lost his life through his own recklessness and want of precaution.

The pursuers pleaded—"(1) The death of the said William Hogg having been caused by the fault of the defenders, or person or persons for whom they are responsible, they are liable in reparation and damages."

The defenders pleaded—"(2) The action is irrelevant. (4) The said William Hogg having met his death through no fault of the defenders, or those for whom they were responsible, they are entitled to absolvitor."

On the 23d of September 1886 the Sheriff-Substitute (SHIRREFF) found that the pursuers had not averred facts relevant to infer the claim of damages sued for, and assoilzied the defenders from the conclusions of the prayer of the petition.

"*Note.*—The averments of the pursuers on which this cause depends are in statements 3 and 4 of the pursuers' condescendence. They are to the effect that the pursuer's husband and father William Hogg, along with his squad, were working in the defenders' pit at a portion of the wall face where the seam, being only 2 feet 3 inches thick, the work was not remunerative. The oversman promised to have a working place 'brushed' for the squad farther along the wall face where the working had been disused for some time, and where the coal improved. Accordingly a working place was brushed for the deceased and his squad. On going to their work at this new working place on 30th December 1885 the deceased, on his own suggestion, and with the concurrence of his father and brother, went along the passage to see whether the seam improved, as the oversman said it did. That the deceased met his death when going about the mine in search of a place where the seam may be thick will certainly not found an action against the defenders. Going about the mine was no business of his. The addition made on revisal, to the effect that the deceased went to the place where he met his death for the further purpose of having the working-place of his squad transferred to it if the seam improved, and that was in conformity with a common and recognised practice in coal mines, and in particular in the defenders' mine, and further, was in consequence of what the oversman had told deceased and his squad—the Sheriff-Substitute does not think that the addition much improves the pursuer's case. If the practice is for miners to go about a pit looking for the best working-place, particularly in a pit where working has for some time been discontinued, the miners must make these investi-