In the present case the church is not a new one. So long as the extent of accommodation in a church is the same, and the original division was competently made, there is no need to distinguish the cases. But if the heritors voluntarily or otherwise erect a new church they must have regard to the increased population, and it must be made so large as to hold two-thirds of the whole population over twelve years of age. Therefore the area may be divided on different principles to what it was formerly, for there is both a larger church and a larger population. But so long as the old church stands the heritors need not increase the accommodation. Now this is an old church. A difference may then arise, as in this case, when the form of the sittings is altered, and when it does arise all I can say is that I think it ought to be amicably adjusted. That is often done, and I am not aware that such a difference has ever been judicially settled. But the petitioner says, that in respect of the alteration in the form of the sittings there should be a totally new division of the area in terms of law.

Now we must see what the petitioner's interest is, as compared to his demands. It is conceded that this body of feuars have the same number of sittings under the new arrangement as they had under the old, namely thirty-nine, and that therefore the pursuer and the class to whom he belongs not only do not suffer any prejudice by the new arrangement, but they receive advantage, as the new pews are more comfortable than the old. The pursuer's interest therefore is merely to secure his own share of these pews, but did anyone ever hear of making a division of this kind by means of a petition? The powers of this Court are very large, but I do not think that even this Court could seat two hundred feuars in thirty-nine seats. I am therefore of opinion that this application is without foundation, and instead of doing what the Sheriff-Substitute and the Sheriff have done, I should have dismissed the petition even before the preparation of the scheme of allocation.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court therefore recalled all the interlocutors of the Sheriff, and dismissed the petition.

Counsel for Pursuer (Appellant)—Kinnear—Pearson. Agents—Irons & Roberts, S.S.C.

Counsel for Defenders (Respondents)—Balfour—Darling. Agent—J. Stormonth Darling, W.S.

Friday, November 15.

FIRST DIVISION.

[Lord Young, Ordinary.

THE MAGISTRATES OF LEITH *v.* FIELD.

Police—Compensation for Sewer Passing Through a Street—Act 25 and 26 Vict. c. 101 (General Police and Improvement (Scotland) Act 1862), sec. 186—Act 8 Vict. cap. 19 (Lands Clauses Consolidation (Scotland) Act 1845), sec. 36.

Claims against Police Commissioners under the 186th section of the General Police and Improvement (Scotland) Act 1862, and the 36th section of the Lands Clauses Consolidation (Scotland) Act 1845, by the proprietor of the *solum* for ground taken to be permanently occupied by sewer and other drainage works underneath a street where it was not alleged that any cellars or vaults were interfered with, and for permanent way-leave and surface and other damage caused by the execution of the works in question—*held* to be irrelevant.

Observed (*per* Lord President) that it was doubtful whether a claim for compensation under the above Acts could competently be amended, and that in that case it would be necessary to lodge a new claim.

The complainers in this case were the Magistrates and Council of Leith, as Commissioners for the purposes of the General Police and Improvement (Scotland) Act within that burgh. The respondent was proprietor of the lands of Bowling Green and Redhall, Leith, through which two streets, named Bangor Road and Burlington Street, were being constructed.

By section 186 of the General Police and Improvement (Scotland) Act 1862, it is provided that the Police Commissioners of a burgh shall "from time to time, subject to the restrictions herein contained as to the notice to be given, and the plans and estimates to be prepared, cause to be made under the streets, public or private, or elsewhere, such main and other sewers as shall be necessary for the effectual draining of the burgh, and also if necessary for such drainage to deepen, divert, or cover over any burn or any ditch made use of as a common sewer or any ditch into which sewage flows, and shall also cause to be made all such reservoirs, sluices, engines, and other works as shall be necessary for cleansing such sewers; and if needful they may carry such sewers through and across all underground cellars and vaults under any such streets, doing as little damage as may be, and making full compensation for any damage done; and if for completing any of the foresaid works it be found necessary to carry them into or through any inclosed or other lands the Commissioners may carry the same into or through such lands accordingly, making full compensation to the owners or occupiers thereof, and they may cause the refuse from such sewers to be conveyed by a proper channel to the most convenient site for its collection and sale for agricultural or other purposes as may be deemed most expedient, but so that the same shall in no case become a nuisance: Provided always that if in making any such main and other sewers, or in repairing, constructing, or enlarging the same or existing drains or sewers, the contents at present carried into any existing

outlet shall be diverted therefrom to the prejudice of any actual existing legal right, the Commissioners shall be bound to make compensation therefor, which compensation shall be settled in the same manner as compensation for land to be taken under the provisions of the Lands Clauses Consolidation (Scotland) Act 1845 is directed to be settled."

The following narrative of the statements upon record is taken from the Lord President's opinion:—"The averments of the complainers are that they resolved to proceed with the drainage of No. 4 of the districts into which the burgh had been divided, and on 15th October 1875 they gave the statutory notice of their intention so to do, and to receive and consider objections thereto, in terms of the Act. The plans of the scheme showed that the sewers were to pass through the streets known as Bangor Road and Burlington Street. The Commissioners having met and considered the objections, resolved that the work should be proceeded with, and the respondent Mr Field appealed against this resolution to the Sheriff. After hearing parties, and considering the report of Mr Stevenson, civil engineer, the Sheriff repelled the objections, and affirmed the order of the Commissioners. Now, this is not precisely admitted, but it is not disputed that the plans for the construction of these sewers were approved of by the Sheriff acting under the statute. The Commissioners then proceeded with the works, and in the month of June 1877 the respondent presented a petition to the Sheriff to have them interdicted from entering upon his lands of Redhall and Bowling Green, but the Sheriff refused interim interdict, and the petition was not proceeded with. The complainers accordingly proceeded with the construction of the sewers in question, and they aver that the whole work was completed and the surface restored to its former condition in or about the month of August 1877. Now the respondent admits that the works were completed about the time here mentioned, so that we are dealing now with the sewers that have been actually constructed. But the respondent maintains that in saying that these sewers have been constructed under existing streets the complainers are mis-stating the facts of the case, and that in point of fact these streets are not so completed as to be 'private streets' within the meaning of the statute. He says, in the first article of his statement of facts—'The line along which the sewer has been carried coincides to a considerable extent with the line of two projected streets which the respondent has laid down upon his feuing-plan under the names of Bangor Road and Burlington Street. These projected streets lie at about right angles to one another. They are planned so as to run into each other, but they do not lead to any public place. They are not thoroughfares. The march wall between said properties ran across Bangor Road. A part of it has been temporarily removed, but the respondent has full power to rebuild it. The said streets were projected and delineated on the plan of 1862 merely for the use of feus the greater part of which have not yet been taken, and of buildings the greater part of which have not yet been built. Bangor Road, which is of the length of about 350 yards, has been feued to the extent of about 230 yards. Burlington Street has not been feued or built on at all except to the extent of 65 feet. The frontage of both sides of Burlington Street belongs to the respondent.'"

Under the above quoted 186th section of the Police Improvement Act 1862, the respondent lodged the following claim with the complainers, stating at the same time that he desired that the amount of compensation to be paid to him should be fixed by a jury:—

"Claim for compensation for Thomas Field of Hawkhill, Leith, against the Provost, Magistrates, and Council of Leith, as Police Commissioners of Leith.

"To compensation for loss, damage, and injury caused or to be caused to my properties of Bowling-Green and Redhall, Leith, in consequence of the execution of drainage works through said properties in virtue of the General Police and Improvement (Scotland) Act 1862, viz.:—

"1. For ground taken or to be taken to be permanently occupied by the sewer and other drainage works.

"2. Surface, underground, and other damage, loss, and inconvenience caused by and during the execution of the works through my said grounds.

"3. For right-of-way for the sewer and other drainage works and operations through my said grounds, including access through said grounds to and use of the same for inspections, repairs, and other operations on the works after execution, and in all time coming.

"In all, twelve hundred and fifty pounds sterling."

The complainers accordingly petitioned the Sheriff of Edinburgh to summon a jury under the Lands Clauses Consolidation Act 1845, but under protest, and immediately thereafter this note of suspension and interdict of the respondent's claim was lodged.

The complainers pleaded, *inter alia*—"(1) The respondent has no title to claim compensation. (2) The claim served on the complainers not being in its terms relevant or sufficient to entitle the respondent to compensation under the statutes founded on, the trial appointed by the Sheriff ought to be discharged. (3) Bangor Road and Burlington Street being private streets within the meaning of the General Police Act, the complainers were entitled to carry their sewers under the same without purchasing the ground or paying way-leave. (5) The procedure of the Lands Clauses Act being inapplicable save in the case of prejudice to an actual existing legal right by diversion of the sewage, and none such being averred, the proposed trial is incompetent, and ought to be interdicted as craved."

The respondent pleaded, *inter alia*—"(1) The grounds of suspension being irrelevant, the suspension ought to be refused. (2) The complainers' statements being unfounded in fact, the suspension ought to be refused. (4) Even if the streets in question were private streets, section 186 of the General Police Act does not cut off the respondent's right to compensation if he has actually sustained injury.

The Lord Ordinary on the Bills (ADAM) granted interim interdict as craved, and thereafter, on a record being made up, the Lord Ordinary (YOUNG) held that the first and third grounds of claim were irrelevant, but that under the second the respondent was entitled to prove whether he had sustained any damage, and that in the manner prescribed in the Lands Clauses Act of 1845.

The respondents reclaimed, and argued—The ground in question was not as yet converted into streets, but was still private property; it therefore fell under the latter portions of section 186 of the Act, which plainly entitled the owner of the property to compensation. Farther, even if they were streets, compensation was not excluded if damage could be proved.

Authorities—*Campbell* v *Leith Commissioners*, June 21, 1866, and February 28, 1870, 4 M. 853, 8 M. (H. of L.) 31; *Forth and Clyde Junction Railway* v *Crum Ewing*, February 24, 1861, 2 M. 684; *Falconer* v *Aberdeen Railway Company*, January 29, 1853, 15 D. 352; *Fife and Kinross Railway Company*, v *Deas*, July 12, 1859, 21 D. 1205.

Argued for the complainers—The ground in question had now become a street, and therefore no compensation was exigible under section 186 unless there was interference with vaults and cellars, which was not alleged in this claim. If the work had been negligently performed, that might be a ground of claim at common law—not under the statute; no such avernment however was here made. There had been no deviation from the plans which the Sheriff laid down.

Authorities—*Leith Police Commissoners* v *Campbell*, December 31, 1866, 5 M. 247; *Lord Advocate* v *Perth Police Commissioners*, December 7, 1869, 8 M. 244; *Millar's Trustees* v. *Leith Police Commissioners*, July 19, 1873, 11 M. 932; *Pettiward* v. *The Metropolitan Board of Works*, 34 L.J. (C.P.) 301.

The Court before giving judgment made a remit to Mr Blyth, C.E., in order that it might be determined whether the ground in question had become a street, and whether the plans laid down by the Sheriff had been followed. The nature of this report will be found in the opinion of the Lord President.

At advising—

Lord President—In this suspension and interdict Mr Thomas Field is proprietor of certain lands called Bowling Green and Redhall in Leith, and upon the 16th of July 1877 he lodged with the Town Clerk of Leith a claim which bears to proceed under the 186th section of the General Police and Improvement Act 1862, and section 36 of the Lands Clauses Consolidation Act 1845, and in that claim he intimated his desire to have determined by jury the amount of compensation to be paid to him by the Magistrates of Leith, as Commissioners, through certain sewage operations under the Police and Improvement Act "by reason of the execution by them of that part of No. 4 district sewage scheme, which has been resolved to be formed through the said lands and property of Bowling Green and Redhall belonging to me, as owner or proprietor of the said land and property, in respect of the ground taken or to be taken to be permanently occupied by the sewer and other drainage works, and the surface, underground, and other damage, loss, and inconvenience caused or to be caused by and during the execution of the works through my said grounds, and for right of way for the sewer through my said grounds," and for certain other damage particularly specified; and he claims compensation to the amount of £1250 sterling for the whole. Then he subjoins to this notice a particular specification of the items of damage. The first is "for ground taken or to be taken to be permanently occupied by the sewer or other drainage works; the second is "surface, underground, and other damage, loss, and inconvenience caused by and during the execution of the works through my said grounds;" and the third "for right of way for the sewer and other drainage works and operations through my said grounds, including access through said grounds to and use of the same for inspections, repairs, and other operations on the works after execution, and in all time coming." Upon receipt of this notice it was imperative on the complainers to present a petition to the Sheriff for the purpose of summoning a jury, for if they had failed to do so they would have been liable under the Lands Clauses Act to pay the sum of £1250 without further inquiry. Of course they presented the petition under protest, and having done so they come to this Court with a suspension and interdict for the purpose of restraining the respondent Mr Field from proceeding with this claim.

On the face of the claim, it would appear that the sewers to be constructed are to be made through private property, and if that were literally true there would perhaps not be much doubt that the respondent would have a claim for compensation, whether precisely in the form or under the heads specified by him it is needless to inquire, but he would have a claim of some sort. But the complainers submit that in the circumstances the respondent has no claim whatever, and their leading reason for saying so is, that the sewers that have been constructed by them have not been constructed through his "private property" in the proper sense of that term, but have been made under a line of private streets within the burgh of Leith; and they appeal to the 186th section of the Act for the purpose of showing that a person whose property has been converted into private streets has no claim for compensation for sewers constructed under these private streets.

[After stating the averments of parties on record]—Now, in that state of the averments of parties it seemed impossible to extricate the question, whether the respondent could be allowed to any extent to proceed with the claim of which he had given notice to the complainers, and we found it necessary to ascertain some matters of fact before we could decide that question. Accordingly we made a remit to Mr Blyth, civil engineer, to visit and inspect the subjects, and report "(1) whether Burlington Street and Bangor Road, or either of them, are roads, streets, or places within the burgh of Leith used by carts, and either are accessible to the public from a public street, or form a common access to lands or premises separately occupied; and (2) whether the sewers constructed under the surface of Burlington Street and Bangor Road have been constructed in conformity with the plan previously approved of by the Sheriff." The first of these queries was for the purpose of enabling us to judge whether the sewers had been made in what the statute regards as streets, or in what the complainer calls private property; and the second, to enable us to dispose of the statement made by the respondent, that the sewers had not been properly constructed, and not according to the plan approved of by the Sheriff. We have now Mr Blyth's report before us, and the result of it may be very shortly stated. There is no doubt that to a very considerable extent Bangor Road is in the condition of a street, but there

is a small portion near the centre of it which is not in a condition to be used except by foot-passengers, where the road is narrow, and where Broughton Burn has to be crossed by a foot bridge. The precise proportion of that street I have not before me, but it is a very small part of the whole length of the road. With regard again to Burlington Street, the two ends of that street are formed into a street—I do not mean paved and finished, but formed—while the centre and about one-half of it has not been so formed. That is the condition of the matter which we have now ascertained, and upon that we must come to a conclusion whether the claim which Mr Field has served upon the complainers can be allowed to go to a trial for the purpose of enabling him to recover the sum of £1250, or some other and smaller sum in the way of compensation for what has been done by the Commissioners. Now it is necessary in the first place, with a view to this question, to consider the provisions of the 186th section of the statute. That section provides that the Commissioners shall "from time to time, subject to the restrictions herein contained as to the notice to be given, and the plans and estimates to be prepared, cause to be made under the streets, public or private, or elsewhere, such main and other sewers as shall be necessary for the effectual draining of the burgh, and also, if necessary for such drainage, to deepen, divert, or cover over any burn or any ditch made use of as a common sewer, or any ditch into which sewage flows, and shall also cause to be made all such reservoirs, sluices, engines, and other works as shall be necessary for cleansing such sewers." Now that is the general power given to the Commissioners, and it is not provided in regard to that general power that compensation shall be made for all the damage that may be done in the exercise of that power. But the clause proceeds to give special directions and special powers to the Commissioners in regard to some matters. The next provision is—"And if needful, they may carry such sewers through and across all underground cellars and vaults under any such streets, doing as little damage as may be, and making full compensation for any damage done." Now I do not entertain any doubt that the words there—"doing as little damage as may be"—are applicable to that which immediately goes before, the power to carry the sewers through and across all underground cellars and vaults under any such streets. It may very well be, and it seems to be quite just and equitable, that while the Commissioners may be allowed to carry their sewers under streets already constructed—that is to say, under ground already dedicated to the purposes of streets and used as streets—they shall not be entitled even there to injure private property of the nature of cellars or vaults without making compensation. Then the clause proceeds further—"And if for completing any of the foresaid works it be found necessary to carry them into or through any enclosed or other lands, the Commissioners may carry the same into or through such lands accordingly, making full compensation to the owners and occupiers thereof." Now here again it is quite plain that the statute intends to distinguish between streets and lands, and it is with reference to lands only that the Commissioners, if they carry their sewers through these lands, are to make compensation. "And they may cause the refuse from such sewers to be conveyed by a proper channel to the most convenient site for its collection and sale for agricultural or other purposes as may be deemed most expedient, but so that the same shall in no case become a nuisance: Provided always that if in making any such main and other sewers, or in repairing, constructing or enlarging the same, or existing drains or sewers, the contents at present carried into any existing outlet shall be diverted therefrom to the prejudice of any actual existing legal right, the commissioners shall be bound to make compensation therefor." This is plainly compensation for the loss of sewage to somebody who had been in the habit of using it, "which compensation shall be settled in the same manner as compensation for land to be taken under the provisions of the Lands Clauses Consolidation (Scotland) Act 1845." That last sentence may be very fairly read as applying to all cases of compensation embraced within this section of the statute.

Now, as I read this section, compensation has to be paid in certain specified cases only, viz., in going through underground cellars or vaults under the streets, in carrying the sewers through lands other than streets, and in diverting sewage to the prejudice of somebody who was previously using it. But as regards the construction of sewers under streets, whether public or private, I apprehend that this section gives no compensation whatever to the owner of the adjacent land, or, if he prefers to be called so, the owner of the *solum* on which these streets are constructed. Now, applying that view of the statute to the present case, it appears to me that it may be a question of some difficulty whether Mr Field, the respondent, is not entitled to claim compensation for carrying the sewers through that portion of Bangor Road and Burlington Street which is not in the condition of a street as yet—the small portion near the centre of Bangor Road, and the smaller portion in the centre of Burlington Street. But as regards the rest of these streets, there can be no claim whatever, because the result of Mr Blyth's report seems to show that to the extent of these portions of the streets that have been formed they are within the meaning of the statute "private streets."

Now then, to return to the claim, is it possible as that claim stands to try that question, or to enable Mr Field, even if we should be with him on that question, to go to a jury for the purpose of assessing the compensation to which he is entitled for the passage of the sewers through these small portions of the lines of the streets in question? I asked the Dean of Faculty at the conclusion of the argument whether he proposed to alter the claim in any respect, but he declined, and stated that that would have been impracticable. I am not very sure if it would have been very regular to permit such an alteration, because a claim of this kind is presented under the special provisions of the Lands Clauses Act, and it takes its statutory course, and I doubt very much if it could be altered after it has once been served, because it is upon that claim that the petition is presented by the promoters to the Sheriff. It is upon that claim that the Sheriff summons a jury to sit and judge, and I doubt if the statutory machinery could be made applicable to any other

claim than this claim as it stands without undoing all that is done and serving a new claim upon the commissioners.

But whether that be so or not, the only claim before us, unaltered and unrestricted, is this, that the respondent Mr Field shall have compensation for the taking of the land under the streets, which I apprehend the 186th section of the Act does not give him. And in addition to that, of a claim for way-leave under these streets, which likewise that section of the statute does not give him; and again for surface, underground, and other damage, loss, and inconvenience caused by and during the execution of the works. Now, I do not think he can possibly claim under any of these heads. I think the statute has not given him such a claim, and if the statute has given him any claim, upon which I will give no opinion, it must be a claim for the taking of the land under these small portions of the streets that have not yet been formed—a very different claim indeed from the present. It is made, no doubt, under three different heads, each one of which appears to be clearly objectionable under the statute, and for which three heads taken together he claims a slump sum of £1250. I am of opinion that we cannot allow that claim to go to a jury, because it is clearly unauthorised by the statute.

I cannot agree with the course that has been adopted by the Lord Ordinary in endeavouring to spell out of this claim some infinitesimal portion which in the course of the trial might be eliminated by the jury, so as to be free from all the objections belonging to the great bulk of the claim, and made subject to a verdict for which he might obtain a sum for that small, and as it appears to me, undiscoverable portion of his claim; I think that the Lord Ordinary was wrong, and that we must hold that the claim in this action must stand or fall as made. The question is, whether this claim as it stands can go to a jury? and I unhesitatingly say that it cannot. I am therefore for altering the interlocutor of the Lord Ordinary and decerning in favour of the complainers.

Lord Deas and Lord Shand concurred.

The Court pronounced the following interlocutor:—

"Recal the interlocutor reclaimed against: Sustain the reasons of suspension: Suspend the proceedings complained of: Declare the interdict formerly granted perpetual, and decern: Find the complainers entitled to expenses, and remit to the Auditor to tax the account thereof and report.

Counsel for Complainers—Lord Advocate (Watson)—J. G. Smith—Harper. Agent—J. Campbell Irons, S.S.C.

Counsel for Respondent (Reclaimer)—Dean of Faculty (Fraser)—J. C. Smith. Agent—William Paterson, solicitor.

Friday, November 15.

FIRST DIVISION.

[Bill Chamber, Lord Shand.

STEWART AND ANOTHER *v.* PRESBYTERY OF PAISLEY.

Church—Jurisdiction of Church Judicatories—Act 37 and 38 Vict. c. 82 (Church Patronage (Scotland) Act 1874)—Appointment of Minister—Jurisdiction over Minister's Appointment.

In a question between a presbytery and the members of a congregation of a church which belonged to that presbytery—*held* that the jurisdiction of the Civil Courts to determine whether the right of appointment of a minister had accrued to the presbytery *tanquam jure devoluto*, was not excluded by the provisions of the 3d section of the Church Patronage (Scotland) Act 1874, which enacted that the Courts of the Church were to have a right "to decide finally and conclusively upon the appointment, admission, and settlement in any church and parish of any person as minister thereof."

Circumstances in which *held* that the right of appointment of a minister to a parish had accrued to the presbytery *tanquam jure devoluto*.

Observations per Lord President (Inglis) upon the effect and operation of the Church Patronage (Scotland) Act 1874.

This was a note of suspension and interdict presented by John Stewart and Francis Halden, both members of the congregation of the Abbey Church and Parish, Paisley. They sought to have the Presbytery of Paisley interdicted from following out a resolution come to by them "of date 3d July 1878, whereby they resolved, in connection with the vacancy in the first charge of the said Abbey Church and Parish, Paisley, to exercise their alleged *jus devolutum*, and to appoint a minister to the said church and parish at their next ordinary meeting to be held on 4th September then next, or at some future meeting to be held on an early day, and from proceeding with the appointment of a minister to the first charge of the said church and parish, or taking any step towards or in the matter of the presentation, collation, or admission of such minister *tanquam jure devoluto*, and from interfering with the right of the congregation of the said church and parish to elect a minister to the said first charge, in terms of the Act of Parliament of 37 and 38 Vict. cap. 82, and the regulations of the General Assembly of the Church of Scotland following thereon."

The vacancy in the first charge of the Abbey Church, Paisley, in connection with which the question arose, had been created on 19th October 1877 by the translation of the minister to another charge. The Presbytery of Paisley had thereafter appointed the Rev. P. W. Mackenzie to be moderator of the Abbey kirk-session in connection with the vacancy, and the charge was duly declared vacant on 4th November 1877.

After various previous meetings of the congregation, the Rev. Mr Jamieson was, at a meeting held on 6th March 1878, elected to the vacant charge, but at a meeting of the Presby-