

attempting to bring before the Court a different claim, viz., damages, to that which his original action set forth, viz., restoration of the money which he had invested. Accordingly the amendment was incompetent by section 29 of the Court of Session Act 1868. The Court interpreted that Act very strictly—*Russell, Hope, & Co. v. Pillans*, December 7, 1895, 23 R. 256. Even if the amendment were competent, it was within the discretion of the Court to refuse it—*Taylor v. M'Dougall & Sons*, July 15, 1885, 12 R. 1304; *Lanning & Co. v. Seater*, June 21, 1889, 16 R. 829; *Forbes v. Watt's Trustees*, Nov. 9, 1870, 9 Macph. 96.

At advising—

LORD PRESIDENT—In my opinion the proposed amendments fall sufficiently within the scheme of the action to be within the section of the Act. I think they are necessary for the purpose of determining in this action the real question in controversy between the parties, and cannot be said, in the sense of the section, to subject to the adjudication of the Court any larger or other fund than that specified in the original action. The term "fund" seems to have been misapplied in the discussion, because in the Act it surely is applied to money set apart in the hands of some person, or earmarked and set aside for a special purpose. I may mention by way of illustration the fund *in medio* in a multiplepounding. In this case the pursuer on record is seeking compensation simply. He says to the defenders, Duncan & Brown, "I give you £500 to put into a ship; you put it into the "Triton"; you held the ship in trust for me to that amount; and you disposed of it without my consent, and I have never got back my money." It is true that he said on record "Because I gave you the money you must give it me back," but his first view, from which he lapsed but which he never abandoned, seems to be the more proper view, namely, that he has a claim of damages against the defenders, and the action is, I think, calculated to bring out this claim.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court allowed the proposed amendments.

Counsel for Pursuer—Sol.-Gen. Dickson, Q.C.—Clyde. Agents—J. & J. Ross, W.S.

Counsel for Defenders—Asher, Q.C.—Guthrie—W. Campbell—Orr—Aitken. Agents—Clark & Macdonald, S.S.C.

Saturday, October 24.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

COMMISSIONERS OF GOVAN  
v. AIRTH.

*Police—Street—Obligation to Make Footway—Burgh Police Act 1892 (55 and 56 Vict. cap. 55), secs. 6, 141, 327—General Police Act 1862 (25 and 26 Vict. cap. 101), sec. 149.*

Section 149 of the General Police Act 1862 empowered the commissioners to call upon owners of properties abutting on any street to make footways in front of their houses, to the satisfaction of the commissioners, and further provided that the owners should repair and uphold such footways. The Burgh Police Act 1892 (which repeals the Act of 1862) enacts by section 141 that the owners of properties abutting on any street shall, when required by the commissioners, at their own expense, "cause footways before their properties respectively on the sides of such street to be made, and to be well and sufficiently paved" to the satisfaction of the commissioners, who are thereafter to maintain such footways.

*Held (rev. the judgment of Lord Kincairney)* that a proprietor was not exempted from a requisition under the Act of 1892 by reason of his having already constructed a footway under the provisions of the Act of 1862.

Section 141 of the Burgh Police (Scotland) Act 1892 provides as follows:—"The owners of all lands or premises fronting or abutting on any street shall, at their own expense, when required by the commissioners, cause footways before their properties respectively on the sides of such street to be made, and to be well and sufficiently paved or constructed with such material and in such manner and form and of such breadth as the commissioners shall direct, and the commissioners shall thereafter from time to time repair and uphold such footways." . . . Section 142 provides that in the event of the commissioners undertaking the maintenance of all the footways of the burgh, "they shall call upon all owners to have their foot pavements before their properties put in a sufficient state of repair, and failing their doing so within six weeks, the commissioners may cause the same to be done at the expense of such owners, and thereafter the said foot pavements shall be maintained by the commissioners." By section 327 the commissioners are empowered, in default of their orders being implemented by the owners, to execute the necessary work at the expense of the latter. Section 149 of the General Police (Scotland) Act 1862, which is repealed by section 6 of the Act of 1892, provided that the owners of all lands or premises fronting or abutting on any street should, at their own expense, on the requisition of the commissioners,

construct and pave footways to the satisfaction of the commissioners, which the owners were "thereafter from time to time, as occasion may require, to repair and uphold."

In July 1894 the Police Commissioners of the Burgh of Govan issued an order, in terms of section 141 of the Burgh Police Act 1892, calling upon Mr Alexander Airth to cause the footway abutting on certain houses in Carmichael Street, Govan, which was then in a bad state of repair, to be made and to be well and sufficiently paved. Mr Airth refused to implement the order on the ground that in 1878 he had been required by the Commissioners, in terms of the 1862 Act, to put into thorough repair and to pave the footway opposite the houses in question, and that he had done this to their satisfaction.

The Commissioners accordingly executed the work in conformity with the power conferred upon them by section 327 of the 1892 Act, and raised an action against Mr Airth for £43, 6s. 8d., being the expense of the work. The defender maintained that while willing to pay the expense of repairing the existing footway, which could be put into first class order at small expense, he could not be compelled to reconstruct it, having originally constructed it in accordance with his statutory obligations.

The Lord Ordinary (KINCAIRNEY) on 12th June 1896 assoltized the defender.

*Opinion.*—"This is a case of some difficulty and of general importance in reference to the provisions of the Police Act of 1892 (55 and 56 Vict. c. 55) in regard to the paving of public streets. The facts are simple. The Commissioners of the burgh of Govan have ordered the defender to cause the footway abutting on his property in Carmichael Street, Govan (admitted at the bar to be a public street), to be paved in the manner stated in the order with Caithness flag or granolithic paving. The order bears to be issued in virtue of the Burgh Police Act 1892, 'particularly clause 141.' It is not an order which proceeds on any averment that the existing pavement had fallen into a state of disrepair. It is not an order to repair or to re-construct an existing pavement. It could not have been, because section 141 of the Act imposes no obligation on owners to repair or to re-construct pavements. The order is expressed just as if there were no existing pavement, and in being so expressed it corresponds with its warrant (clause 141), which imposes on owners the obligation to make pavements but not to repair or reconstruct them.

"The defender has not complied with the order, and the work ordered has been completed by the Commissioners under section 327 of the Act, and they now sue for the cost. The defence is that in 1878 the defender had been ordered by the Police Commissioners, acting under the General Police Act 1862, to pave the street in question opposite his property with second class pavement or asphalt, and had implemented the order by laying down a pavement of asphalt. That defence is ad-

mitted to be true in point of fact, and the question is, whether it justifies the defender's refusal to implement the pursuers' order. I am of opinion that it does.

"The defender had right under section 339 to appeal against the order either to the Sheriff Court or Court of Session, and I suppose that the question now raised might have been decided in the appeal. It may be that the pursuers could have pleaded that the defender, not having adopted that remedy, cannot now be heard to object to the order. But the pursuers have—advisedly, as I was informed—abstained from stating a plea to that effect, because they are desirous of obtaining a judgment on the question.

"Although the Commissioners have chosen to proceed under clause 141, yet they had other remedies under the statute if they were dissatisfied with the condition of the pavement of Carmichael Street. They might have proceeded under clause 142, but that would have involved undertaking the maintenance of all the footways in the burgh, or they might have proceeded under section 129, which confers very wide powers to improve and form not only the public streets, but also public pavements and footpaths, but in that case they must, I apprehend, have done the work at their own expense, and not at the charge of the owners. But they have elected not to proceed under that section, and this case does not relate to the powers of the Commissioners under either clause 129 or clause 122, but solely to their powers under clause 141.

"Now, clause 141 is not a novelty introduced into the Act of 1892, and confers no new power on the Police Commissioners. It may be traced back to the Burgh Police Act of 1833 (3 and 4 Will. IV. c. 46). The 105th section of that Act enacted that the proprietors of houses fronting the street should, when required by the Police Commissioners, "cause footpaths before their property respectively on the sides of the said . . . streets . . . to be made and to be well and sufficiently paved with flat, hewn, or other stones, or to be constructed in such other manner and form and of such breadth as the said Commissioners shall direct.' The next General Police Act was 13 and 14 Vict. c. 33 (1850), and the 212th section is substantially to the same effect. Neither statute expressly declares who shall repair and uphold the pavement when made. The corresponding clause in the Burgh Police Act 1862 (25 and 26 Vict. c. 101) is the 149th, and it is substantially to the same effect, except that it enacts that, after the pavements are made, the owners shall "repair and uphold such footways." Section 141 of the Act of 1892 is substantially to the same effect, with the important difference that it enacts that when pavements are made 'the commissioners shall thereafter from time to time repair and uphold such footways.'

"There is substantially no difference in the primary obligation imposed on owners by these clauses of the several statutes. It is to construct not to repair pavements. No new power is conferred by any of these Acts on the police commissioners. The old

power conferred in 1833 has been continued from statute to statute, and under all the Acts it is vested in one permanent and continuing body, the police commissioners. All these statutes confer power on the commissioners to do the work themselves on the failure of the owners at the owners' expense. The requirements of the police authorities are satisfied by the construction of the works either by the owners or by the commissioners. The legal result in either case is the same.

"Now, if a pavement were constructed under any of these Acts—say under the Act of 1850—on the order of and to the satisfaction of the commissioners, or by the commissioners at the owners' expense, I think that the obligation of the owners under that statute to make a pavement would have been exhausted, and that the Commissioners could not repeat that order under the same powers of that Act, unless indeed the pavement had become so destroyed as to be past repair, in which case there might be a question. Repeated orders to construct pavements do not appear to be contemplated; and if so, I cannot see why there should be any difference when a new Act is passed, not altering the powers of the Commissioners or the obligation of the owners. So, in this case, the owners having in 1878 constructed a pavement in implementation of the order of the Police Commissioners, I consider that the Police Commissioners could not in 1890, when the same Act was in force, have ordered the work to be repeated, unless, as before said, the work had gone into such decay as to be past repair, when there might possibly be a question. In such a case, under the Act of 1862, not only is the obligation of the owner to make a pavement exhausted, but a different burden is expressly imposed on him, viz.—the burden of repair. Can it then (repeating the question) make any difference that a new statute has been passed continuing the power of the Commissioners and the obligation of the owner? I think that the passing of a new statute can make no difference in that respect, and I do not see that the new provision, which throws the burden of maintenance on the Commissioners, affects that question.

"Consistently with this view, the words of clause 141 appear to me to apply to the case where there is no previous pavement, and to be inapplicable to the case where a pavement exists. The right of appeal may, it is true, protect the owners from oppression. But I do not proceed on the ground that it would be unreasonable and oppressive to hold that an owner could be compelled to construct a pavement twice, but on the ground that the sections of the various Acts which have been quoted impose the burden of constructing a pavement once for all, and are framed on the assumption that there is no existing pavement at the place to which the order authorised relates. Reference was made to the case of *The Commissioners of Old Aberdeen v. Leslie*, 15th March 1884, 11 R. 733. There an order as to a pavement under the 149th clause of the Act of 1862 was sustained,

notwithstanding a defence that the pavement was existing and was to be held as having been made under the Act of 1850. It had not in fact been so made, because it had been made before that Act was adopted. The Lord President, who gave the judgment of the Court, was careful to rest his opinion on the ground that the order was an order to execute repairs (which might be ordered under the 149th section of the Act of 1862, although not under the 141st section of the Act of 1892), and the impression seems permissible that, had the order been an order to pave of new, the judgment might have been different.

"I was referred to a judgment pronounced by Sheriff Blackburn in the Sheriff Court at Dumbarton, in reference to section 149 of the Act of 1862, to the effect that the obligation to pave was exhausted by implementation of an order of the Police Commissioners, in which judgment I concur.—*Irons on Burgh Police Act, 1892, p. 200.*

"It is not to be denied that this construction of the Act involves some difficulty. In particular, the pursuers pointed out that the Act of 1862 has been repealed by section 6 of the Act of 1892; and they say that it follows that persons who have made pavements under the Act of 1862 are therefore released from the obligation to uphold them, and that no such obligation can be enforced at all unless it can be enforced under section 141; and that they represented as a *reductio ad absurdum* of the defender's contention. That, however, is not a conclusive argument in regard to the construction of a statute. But while I do not require to decide what obligation now lies on persons in the position of the defender to uphold the pavements they have made, I see no obvious absurdity in supposing that it was the intention of the Legislature to relieve the owners in such a case, and to lay the burden on the Commissioners. That difficulty, if it be one, cannot, however, convert clause 141 into a clause empowering the Commissioners to order repairs of an existing pavement, or the order under consideration into an order to repair, which it admittedly is not."

The pursuers reclaimed, and argued—The Commissioners had not taken over all the footways, and accordingly they could not proceed under section 142 and call upon owners to repair existing footways, but must proceed under section 141, by which individual owners were bound, when required, to construct them; no distinction was drawn between imperfect and non-existing footways. The 1862 Act had been repealed by section 6 of the present Act, and accordingly it made no difference that the footway in question had been made in consequence of a requisition under the earlier Act, since the procedure was now regulated by the later Act. The case of *Bailey v. Shearer's Judicial Factor*, February 1, 1894, 21 R. 498, showed that in cases like this the common law liability of the owners revived. The case of *Aberdeen Harbour Commissioners v. Granite City Steam Shipping Company*, July 2, 1896, 33 S.L.R. 653, showed that

the Court would not regard such alleged vested rights.

Argued for the respondent—The statutory obligation to construct had already been implemented, and the Commissioners had no power to reimpose it. If this had not been the case, it would have been no answer to the order to construct to say that a footway *de facto* existed; but the footway having been made under the 1862 Act, the Commissioners, not finding a section in the 1892 Act to enable them to enforce the obligation of the owners to uphold and maintain, were trying to apply section 141 for this purpose. In reality the obligation to uphold, contained in the 1862 Act, still subsisted, and the defender was willing to implement it—*Commissioners of Old Aberdeen v. Leslie*, March 15, 1884, 11 R. 733.

At advising—

LORD PRESIDENT—I am unable to agree with the Lord Ordinary. I think his Lordship gives too much weight to the repealed statutes and too little to the statute which is in force.

It would have been a very intelligible plan for the Act of 1892 expressly to take account of existing pavements which had been made under former statutes, and to limit the compulsory power in section 141 accordingly. But it has not done so. Or the statute might have provided for the commissioners requiring repairs of pavements to be made by individual owners where such repairs are required. But again it has not done so, for section 142 only applies to the event of the commissioners taking over all the footways of the burgh.

On the other hand, the scheme of the Act in the matter in hand is simple enough, if a little crude. It authorises the commissioners to order an owner to find them a pavement to their satisfaction, and on this being done once for all, the owner is relieved of all further responsibility. The section does not distinguish between imperfect footways and non-existing footways, still less between those existing footways which have, and those which have not, been made under statutory order; it recognises but one kind of footway, and that is a-footway up to the requirements of the commissioners under the Act of 1892.

In the administration of this section two things are to be observed—First, the commissioners will, of course, take account of existing footways, where what has formerly been done can be utilised so as to diminish what has to be required in order to bring the footway up to the legitimate wants of the community. Second, any excessive requirement is subject to the review of the Sheriff on summary appeal. Accordingly, the existing state of the pavement is necessarily taken account of, and anything done aforetime will go to the credit of the owner, if and in so far as it in reason affects what ought yet to be done. But I can see no warrant for holding that an existing footway is, under sec. 141, any better (or worse) for having had a statutory origin under a repealed Act.

The contrary view is very frankly stated in a passage in the Lord Ordinary's opinion. His Lordship, first, by way of illustration, puts the case as if it had occurred before the passing of the Act of 1892, to wit, in 1890, and says that the Commissioners could not have ordered work to be repeated in 1890, when the same Act was in force as in 1878, when the work was first done. Then the Lord Ordinary goes on—"Can it then make any difference that a new statute has been passed continuing the power of the Commissioners and the obligation of the owner?"

Now, with deference to the Lord Ordinary, I think the passing of the new statute makes all the difference, but then I do not think that his Lordship quite accurately describes the statute as "continuing the powers of the commissioners." The scheme of the statute is to make a fresh start, to repeal the former statutes, and (in the matter in hand) to authorise the commissioners in absolute terms to order certain things, without any qualification by way of reference to what has been ordered or done before.

I am for recalling the interlocutor reclaimed against, and granting decree in terms of the conclusions of the summons.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court recalled the interlocutor reclaimed against, and granted decree in terms of the conclusions of the summons.

Counsel for the Pursuers—Guthrie—M'Lennan. Agent—Marcus J. Brown, S.S.C.

Counsel for the Defender—J. Wilson—Findlay. Agents—Campbell & Smith, S.S.C.

Saturday, October 24.

## FIRST DIVISION.

### ATHERSTONE'S TRUSTEES, PETITIONERS.

*Trust—Nobile Officium—Petition for Authority to Pay Income of Legacies to Parents of Pupil Beneficiaries.*

Petition by trustees for authority to pay over the income of legacies to the parents of pupil and minor beneficiaries resident in England who had no legal guardians, *refused*, on the ground that there was no one to give a valid discharge to the petitioners—a defect which could not be remedied by a decree of the Court.

Mr John Greasley Atherstone, a domiciled Scotsman, died in June 1895, leaving a trust-disposition and settlement whereby he instructed his trustees, *inter alia*, to pay the following legacies, viz.—“£1000 to my niece Elfrida Marian Billiald, and a like sum to her brother Herbert Billiald, £1500 to be equally divided between the three children of my niece Mrs Charles Whitcombe.” The first of these legatees was in minority, and the others were in pupillarity,