

gregation previously forming the Evangelical Union to introduce them to the benefits of the bequest is that that connection is not of a kind to alter their identity, and that in their original condition the Evangelical Union was of purpose not included by the testator. This consideration does not apply to the new congregations, which had no former identity to change.

In my opinion the proper answer to the question on which our direction is asked is, Find that the congregations which the petitioners are entitled to recognise as eligible to participate in the benefits of the Ferguson Bequest provided to "the Congregational or Independent Church in Scotland," are the congregations which prior to 1896 belonged to the Congregational Union of Scotland, irrespective of whether they have not joined the new Union called "The Congregational Union of Scotland, comprising the Evangelical Union and Congregational Union as existing at 1896," and also the congregations which have been formed since the formation of the last-mentioned Union and belong to that Union, but that the congregations which before the formation of the last-mentioned Union belonged to the Evangelical Union are not so eligible.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court pronounced this interlocutor—

"Find in answer to the question submitted in the petition that the congregations which the petitioners are entitled to recognise as eligible to participate in the benefits of the Ferguson Bequest provided to 'The Congregational or Independent Church in Scotland,' are the congregations which prior to 1896 belonged to the 'Congregational Union of Scotland,' irrespective of whether they have or have not joined the new Union called the 'Congregational Union of Scotland, comprising the Evangelical Union and Congregational Union as existing at 1896,' and also the congregations which have been formed since the formation of the last-mentioned Union, and belong to that union, but that the congregations which before the formation of the last-mentioned Union belonged to the Evangelical Union are not so eligible, and decern: Appoint the expenses of all parties in the proceedings . . . to be paid out of the trust funds," &c.

Counsel for the Petitioner—Shaw, Q.C.—Tait. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for the Respondents, the Congregational Union—Guthrie, Q.C.—Craigie. Agents—Coutts & Palfrey, S.S.C.

Counsel for the Respondents Henderson and Glaister—Ure, Q.C.—M'Clure. Agents—J. W. & J. Mackenzie, W.S.

Tuesday, December 6.

FIRST DIVISION.

COWAN AND OTHERS v. POLICE COMMISSIONERS OF ARDROSSAN.

Police — Street — Statute — Construction — Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), secs. 141 and 142.

The police commissioners of a burgh, having under sec. 142 of the Burgh Police (Scotland) Act 1892 resolved to undertake the maintenance and repair of all the footways of the burgh, more than two years afterwards called upon the owner of certain property in the burgh, under sec. 141 of the said Act, to cause the footway which bounded his property to be made and to be well and sufficiently paved or constructed.

Upon an appeal from the order of the commissioners, *held* (1) that sec. 141 applied to cases where a footpath was already in existence as well as to cases where there was no footpath, (2) that the commissioners were not debarred from putting sec. 141 into operation by the fact of their having passed a resolution under sec. 142.

Opinion reserved, whether in sec. 142 the word "footways" means no more than "foot-pavements."

This was an appeal presented under sec. 339 of the Burgh Police (Scotland) Act 1892 by Samuel W. T. Cowan and others against an order of the Police Commissioners of the burgh of Ardrossan requiring the appellants, under sec. 141 of the same Act, to cause a footway before certain property belonging to them at Barr Street, Montgomerie Street, and Barr Lane to be well and sufficiently paved or constructed according to an annexed specification.

The appellants stated that they thought themselves aggrieved by the said order for the following reasons:—(1) That there are and have been since the passing of the said Act, existing footpaths along the appellants' said property in the street and lanes named in the said order, that said footpaths are made of cobble stones with kerbs, are very strong and seldom go out of order, and are in a sufficient state of repair. (2) That on or about 13th January 1896 the said Commissioners, at a meeting specially called for the purpose, resolved under section 142 of said Act to undertake the maintenance and repair of all the footways of the burgh, and that in consequence thereof the said order under section 141 of said Act is incompetent; and (3) that in respect of said resolution it is now the duty of the said Commissioners, under section 142 of the said Act, themselves to maintain the said footways."

The Commissioners lodged answers in which they denied the appellants' statements as to the present condition of the footpaths in question, and further maintained that the appeal was irrelevant. "By said section 142, where a resolution

under that section had been adopted by the Commissioners, the Commissioners are bound to maintain 'foot-pavements' after these have been put in a sufficient state of repair by the owners. The adoption of a resolution under said section does not exclude the right of the Commissioners, under section 141, to require 'footways' to be paved and constructed as they may direct, where the footways in question are not already 'foot-pavements.' Upon the admission of the appellants, there are no existing 'foot-pavements' along their said property. The said order, under section 141, was therefore competent."

The Burgh Police (Scotland) Act (55 and 56 Vict, cap. 55), sec. 141, enacts that "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 or form and of such breadth as the commissioners shall direct, and the commissioners shall thereafter from time to time repair and uphold such footways."

Sec. 142. "It shall be lawful for the commissioners to resolve, at a meeting specially called for the purpose, to undertake the maintenance and repair of all the footways in the burgh. When the commissioners shall undertake the maintenance and repair of the foot-pavements [in 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."

The arguments of parties sufficiently appear from the opinion of Lord Adam. The case of *Police Commissioners of Govan v. Airth*, October 24, 1896, 24 R. 41, was referred to by the respondents.

At advising—

LORD ADAM—The question in this case is, whether it was competent for the Commissioners of the Burgh of Ardrossan, after having resolved in terms of the 142nd section of the Burgh Police (Scotland) Act 1892, to undertake the maintenance and repair of all the footways of the burgh, to issue an order on the appellants under section 141 of the Act, to cause the footway before certain property belonging to them in Barr Street, Montgomerie Street, and Barr Lane, to be made, and well and sufficiently paved or constructed according to a specification thereto annexed, all to the satisfaction of the Commissioners.

It appears that the appellants are proprietors of the Caledonian Hotel, which is bounded by the streets and lane above-mentioned. It is averred by them that there are and have been since the passing of the Act existing footpaths along the said property in the streets and lane. These are said to be made with cobble stones with

kerbs, and to be in a sufficient state of repair. It is not disputed by the respondents that such footpaths do exist, although it is disputed that their condition and state of repair is as represented.

By section 141 of the Act, under certain limitations which are not material in this case, it is enacted that the owners of all lands and tenements fronting or abutting on any street shall at their own expense, when required by the commissioners, cause footways to be made, and to be well and sufficiently paved and constructed in such manner and form as the commissioners shall direct, and the commissioners shall thereafter repair and uphold such footways.

It was maintained by the appellants that the order in question was incompetent, because section 141 applied only to cases where there is no existing footway at all, whether footpath or foot-pavement, before the properties in question, but not to cases like the present, where there are existing footpaths or foot-pavements.

But I do not consider that to be a reasonable construction of the Act. I think it was intended to give power to the commissioners to have what in their estimation were sufficient foot-pavements constructed throughout the burgh, and this appears to be as necessary in the case of footpaths as where there are none. It will be observed that the construction of sufficient foot-pavements would naturally be a gradual process.

As streets and buildings extended, new foot-pavements would become necessary where none had existed before, and where mere footpaths had formerly been sufficient for the traffic, it might be desirable that they should be converted into foot-pavements. I see no reason why the powers conferred by section 141 should not have been intended to be exercised in the one case as in the other, when from time to time it might become necessary—or why in the one case the expense of the necessary works should be imposed on the private individual, and in the other upon the commissioners (which I suppose is the alternative)—when it is obvious that the existing footpath might be little better than no footway at all.

Have then the Commissioners lost the powers conferred upon them by section 141, by passing a resolution under section 142 to undertake the maintenance and repair of all the footways in the burgh. And in construing section 142, I think it is to be kept in view that a resolution passed under it, was presumably intended to apply to a state of matters existing in a burgh such as I have indicated.

Now, I think that the two clauses deal with different things. Section 141 deals with the making of sufficient foot-pavements or footways, and section 142 with the maintenance and repair of them when made, which are not at all inconsistent powers.

It appears to me that to put upon section 142 the construction for which the appellants contend would be to impose upon the Commissioners, not only the expense of

the maintenance and repair of the footways of the burgh, which certainly the clause does not in terms provide, but also the expense, in future, of making all footways into sufficient foot-pavements as the clause provides.

No doubt, the Commissioners might cause a comprehensive survey to be made of the state and condition of all the footways in the burgh, and having had them put into a sufficient condition, then pass a resolution under section 142. But that would not meet the contingency I have already suggested of the necessity of new footways being only from time to time required, or of existing footpaths being from time to time converted into foot-pavements. In such circumstances I think the Commissioners would be slow to pass a resolution under section 142, and I think the construction of that section contended for by the appellants would practically render it inoperative. I am therefore of opinion that the order in question was competently issued by the Commissioners.

A doubt was suggested whether by section 142 anything more is meant to be included in the word footways there used, than foot-pavements, because it provides that when the Commissioners shall undertake the maintenance and repair of the foot-pavements of a burgh, they shall cause the owners to have them put in a sufficient state of repair, and after that has been done shall maintain them, while it says nothing whatever about footpaths. But I do not think it necessary to decide that question. I think that the appeal ought to be dismissed.

LORD KINNEAR and the LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court dismissed the appeal.

Counsel for the Appellants—Guy. Agent—A. C. D. Vert, S.S.C.

Counsel for the Respondents—M'Lennan. Agents—Forbes Dallas & Company, S.S.C.

Wednesday, December 7.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

MATHIESON v. SCOTTISH TRADE PROTECTION SOCIETY.

(Ante, vol. 35, p. 532.)

Process — Reclaiming - Note — Interlocutor Disallowing Issue—Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 28 — Act of Sederunt 10th March 1870, sec. 1 (2) and (5).

An interlocutor disallowing the issue proposed for the trial of a cause held to be an interlocutor disposing of the whole question of proof, to import a refusal of proof, and to be final if not reclaimed against within six days.

Observed that it is the duty of the Lord Ordinary once issues are put in, with or without adjournment of the discussion, to dispose of the issues finally, either by approving of an issue, or, failing adjustment, by disallowing the issue proposed by the pursuer.

On 11th October 1897 Donald Mackay Mathieson raised an action of damages for slander against the Scottish Trade Protection Society, Edinburgh.

On 7th December 1897 the Lord Ordinary (KINCAIRNEY) closed the record and assigned Tuesday the 14th December for the adjustment of issues.

An issue proposed by the pursuer having been disallowed, and the adjustment of issues having been continued, the Lord Ordinary on 21st January 1898 disallowed an amended issue proposed by the pursuer.

The pursuer having proposed another amended issue, the Lord Ordinary on 1st February refused to receive it, and reported the cause to the First Division, "in terms of the Statute 13 and 14 Vict. cap. 36, and relative Act of Sederunt of 15th July 1865." These statutory provisions having been superseded by the procedure prescribed by the Court of Session Act 1868, and repealed by the Statute Law Revision Act 1875, the First Division on 2nd March 1898 remitted to the Lord Ordinary to proceed with the cause—*ante*, vol. 35, p. 532.

On 11th March 1898 the Lord Ordinary dismissed the action.

Opinion.—"I believe the above interlocutor follows out the opinions expressed in the Inner House, and it is, I think, the only interlocutor which I can pronounce in the circumstances. It is the interlocutor which I should have pronounced when I reported the cause, overlooking the repeal of section 38 of the Act 13 and 14 Vict. c. 36, by the Statute Law Revision Act 1875, and failing to recognise that section 12 of the Act of Sederunt 15th July 1865, although expressed in imperative terms, and not expressly repealed so far as I know, was yet repealed in effect and inoperative. But I seem to have no choice now. On 7th December I assigned the 14th for adjustment of issues. I heard parties on issues proposed by the pursuer, which did not contain an innuendo, and intimated that I could not approve of them. Afterwards an amended issue was lodged, which, after debate, I disallowed on 21st January. After that another amended issue was tendered, which I by interlocutor of 1st February refused to receive. That interlocutor has not been recalled, and I, of course, am bound by it. I can therefore do nothing but dismiss the action, which, as I have said, I should have done had I not very unfortunately supposed that the alternative of reporting was open to me."

The Act of Sederunt, 10th March 1870 (following upon secs. 27 and 28 of the Court of Session Act 1868) enacts by sec. 1 (2):—"If the parties, or any of them shall not renounce probation, the Lord Ordinary shall require them to state what proof they propose; and if parties are agreed that proof is necessary, and as to what proof