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* 10*th 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

ought to be allowed, the Lord Ordinary, if himself satisfied of the propriety of the proof proposed, shall appoint the same to be taken. . . (5) In every case in which proof is to be taken before a jury, issues shall be adjusted either at the time of proof being appointed in the cause, or on a day to be fixed not later than eight days thereafter; and the parties shall lodge the issues respectively proposed by them two days before the day so fixed."

The pursuer reclaimed, and argued—The Lord Ordinary, proceeding on the ground that he was bound by the interlocutors which he had pronounced, had taken a course which opened the way for the pursuer to bring all the interlocutors under review by reclaiming-note. The Act of Sederunt 10th March 1870, sec. 1 (2), only applied to interlocutors refusing or allowing proof. Here there was neither a refusal nor an allowance of proof; and the Court should recal all the interlocutors subsequent to that appointing a date for the adjustment of issues, and proceed to exhaust the cause.

Argued for the defenders — An interlocutor approving of issues imported an allowance of proof—*Mason* v. *Stewart*, February 21, 1877, 4 R. 513; *Little* v. *North British Railway Company*, July 4, 1877, 4 R. 980—therefore an interlocutor disallowing issues imported a disallowance of proof, and accordingly was not reclaimable except within six days. The interlocutor of 21st January imported a disallowance of proof, and not having been reclaimed against within six days, was final; and the cause having got to such a pass as was indicated by the Lord President (*ante*, vol. 35, at p. 533), the Lord Ordinary was right in dismissing the action.

LORD PRESIDENT—The question here is really whether this interlocutor of 21st January 1898 was a determination of the whole question of proof, and I have come to be of opinion that it was, and that this was a six days' interlocutor which precluded all further discussion about issues. The logical result is that the Lord Ordinary's interlocutor must stand, and for this reason. The history of the case is that, apparently of consent, a jury trial was regarded as the mode of proof for the case, and indeed looking to the nature of the case it could not be otherwise, for it was an action of damages for slander. Well, then, issues were given in, and an extremely copious discussion seems to have taken place. We held before, when the action was last before us, that the proper duty of the Lord Ordinary is, once the issues are put in, to consider these issues and dispose of them finally. In the course of his consideration he may modify the proposed issue, and if the pursuer is willing to go to trial on the issue so adjusted, he can settle it accordingly; or again, in the course of his consideration he may write a clean draft or revised version of the issue, and of course may adjourn the hearing for these purposes. But the end of the discussion is either that an issue is adjusted, or that the proposed issue—by which I mean the ultimately proposed issue — is disallowed. What has taken place is that it was agreed that there should be a jury trial, that issues were put in and considered, and that the issue proposed by the pursuer for the trial of the cause was disallowed. Now, it seems to me that after that it was impossible for the Lord Ordinary to revive the discussion, because that was really to begin it of new, and therefore his Lordship was quite right to decline to receive the amended issue which was put in after the interlocutor of 21st January. Therefore I think that the case has come to an end, and accordingly that the interlocutor reclaimed against is sound.

LORD ADAM—I am of the same opinion. The interlocutor of 7th December 1897 was an interlocutor pronounced with reference to sub-section 2, section 1, of the Act of Sederunt, parties having agreed that the proof in this case should be a proof by a jury on issues. Under sub-section 5 it is enacted that in every case in which proof is to be taken before a jury, issues shall be adjusted either at the time of proof being appointed in the cause, or on a day to be fixed not later than eight days thereafter; and the parties shall lodge the issues respectively proposed by them two days before the day so fixed. Issues being so allowed, the issue lodged by the pursuer being the issue under which he is prepared to try the cause, the parties, with the assistance of the Lord Ordinary, proceed to adjust the issue as being the issue for the trial of the cause. In the course of the adjustment they may modify the issue, or the question may be put in another issue, but when the matter comes to a conclusion the Lord Ordinary has to decide once for all what is the proper issue for the trial of the cause. If the pursuer chooses to say this is the issue I propose, and this is the issue by which I have elected to stand, the result is, that if on the disposal of the discussion on the issue, the Lord Ordinary approves of the issue, he allows it for the trial of the cause. If he thinks it is not a proper issue, then he disallows it, and in my humble opinion there is an end of the case. After that interlocutor is pronounced, the case is not to go on for an interminable period, and the parties are not to be allowed to lodge fresh issues, and to have meetings for the adjustment of these. The interlocutor by the Lord Ordinary in this case disallowed the issue which had been proposed, and it appears to me that there can be no further proof in the case, and that therefore the interlocutor disallowing the issue is an interlocutor importing a refusal of proof. That is an interlocutor which is final if not reclaimed against within six days.

LORD M'LAREN—I believe we are all agreed that when a Lord Ordinary, in the adjustment of issues, merely disapproves of an issue in the particular form proposed, but is of opinion that an issue in a different form can be extracted from the record, it is not necessary for him to pronounce any

interlocutor until he has the issue in its final form before him. In such cases it is not unusual for the judge to suggest to the pursuer that he had better try another form, because if he does not, then the form of issue first proposed will be disallowed. I was at first disposed to think that all that the judge meant in this case by his interlocutor of 21st January disallowing an issue was to disallow an issue in that particular form, reserving to the pursuer to lodge an amended issue. But on looking again at the Lord Ordinary's note I observe that his Lordship in dealing with the issue considered the innuendo of the proposed issue inadmissible, and he says, "No other innuendo was proposed or discussed, and I am therefore not in a position to say whether the pursuer could frame any other issue which could be allowed." I think it is plain that on 21st January, when the Lord Ordinary came to consider the question of issues, his opinion was that an inadmissible issue had been tendered, and that the pursuer declined to amend it or to propose any other issue. In these circumstances I think it would be useless for the judge to adjust an issue, because the pursuer would not go to trial on any other issue than that proposed by himself. One can quite understand that in such a case the judge's course is simply to disallow the issue altogether. I think it would have been better if the Lord Ordinary had gone on to say, "dismisses the action," but that was left open perhaps, because this was an interlocutor which was not necessarily final. But I agree with your Lordship that this is an interlocutor necessarily leading to the dismissal of the action, and that it is too late now to propose another issue.

LORD KINNEAR was absent.

The Court adhered.

Counsel for the Pursuer—Jameson, Q.C.—M'Lennan. Agent—T. M. Pole, Solicitor.

Counsel for the Defenders—Ure, Q.C.—Hunter. Agent—Peter Morison, S.S.C.

Friday, December 9.

SECOND DIVISION.

[Sheriff of Forfarshire.

FORFAR PARISH COUNCIL *v.* DAVIDSON.

Poor—Relief—Maintenance of Lunatic—Relief against Lunatic's Estate.

At the time of the committal to an asylum of a lunatic he had money on deposit-receipt, but the parish of his settlement were unaware of the fact, although they became aware of it prior to the lunatic's liberation. The asylum in which the lunatic was confined being in another parish, the parish of his settlement admitted liability for the lunatic's maintenance and paid therefor.

After the lunatic had been liberated as recovered, *held* (*diss.* Lord Young) that the parish of his settlement was entitled to recover from him the sums which they had spent on his maintenance.

By section 75 of the Lunatics (Scotland) Act 1857 (20 and 21 Vict. c. 71) it is enacted—"Every pauper lunatic detained in any district asylum under this Act shall be deemed and held to belong and be chargeable to the parish of the legal settlement of such lunatic at the time the order for his reception in such asylum was granted, and the expense of his maintenance in such district asylum shall be defrayed by such parish accordingly, and the residence of any pauper lunatic in any such district asylum shall be deemed to be the residence of such lunatic in the parish legally chargeable with the maintenance of such lunatic."

By section 77 of the same Act it is enacted—"The expense incurred by any superintendent of any asylum, or by any other party, for or in relation to the examination, removal, and maintenance of any lunatic, shall be defrayed out of the estate of such lunatic, or if such lunatic has no adequate estate, and if such expense shall not be borne by the relatives of such lunatic, then the lunatic shall be treated as a pauper lunatic, and such expense shall be defrayed by the parish of the settlement of such lunatic, and the superintendent or other party disbursing such expense shall be entitled to recover the same from or out of the parties or estate liable to defray the same as aforesaid."

By section 15 of the Lunacy (Scotland) Act 1862 (25 and 26 Vict. cap. 54) it is provided that it shall be lawful for the Sheriff of the county in which a lunatic charged with assault or other offence inferring danger to the lieges, or found in a state threatening danger to the lieges, or in a state offensive to public decency may have been apprehended or found, upon application by the procurator-fiscal or inspector of poor or other person, accompanied by a certificate from a medical person bearing that the lunatic is in a state threatening such danger, or in a state offensive or threatening to be offensive to public decency, forthwith to commit such lunatic to a place of safe custody. It further provides that the Sheriff, at the time of granting the warrant to commit the lunatic to an asylum, shall grant decree against the parish within which the lunatic shall have been apprehended or found at large for the expenses of the application and for such sum as may be necessary for the maintenance of the lunatic, and "the parish so decerned against and paying such expenses and cost of maintenance shall have relief and recourse therefor against the lunatic and his estate and any of his relatives legally liable for his maintenance, and also against the parish of settlement of such lunatic in the event of the parish in which the lunatic was apprehended or found at large not