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 I think his Lordship gives too much weight to the repealed statutes and too little to the statute which is in force.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,

and they all were domiciled in England. No appointment of tutors or curators was made to the legatees under the trust-disposition and settlement, and no provision was made for payment to their parents or guardians of the principal of the legacies, or of the income thereof, or for the accumulation of the income during the minority of the legatees.

Application was made to the trustees by the fathers of the legatees to have the income accruing on the legacies paid over to them on behalf of their children. The trustees were willing to do so, but having been advised that by the law of England the fathers could not grant a discharge for the legacies, and being in doubt as to their power to pay over the income, presented a petition to the Court of Session, with the consent of the parents, and of the first two legatees themselves, craving the Court "to authorise, direct, and appoint" the trustees to pay over to the respective parents of the legatees the income of their legacies up to such time as they should attain majority.

The Court, on 17th June 1896, remitted to Mr J. C. Couper, W.S., "to inquire and report as to the regularity of the proceedings, and the reasons for the proposed authority to pay income."

Mr Couper reported that considering the financial position of the parents it might be to the interest of the legatees to employ the income of their bequests in their education and maintenance. He suggested, however, that as the interests of the parents and children might be antagonistic, it would be well to apply the income through a *factor loco tutoris* appointed to the pupils, and a *curator bonis* to the minor.

The petitioner argued that the Court, in exercise of its *nobile officium*, might authorise the trustees to make this payment to the parents, or that at any rate it might appoint a judicial factor. As he would be an officer of the Court they would practically be paying the money into Court.

LORD PRESIDENT—This seems to be a case of overdriving the *nobile officium* of the Court. The inherent difficulty is that no one is in a position to give a valid discharge of payment, and no decree of ours can supply that defect.

LORD ADAM—The question is whether we can authorise the trustees to pay money belonging to infants without obtaining a discharge. I think we can not.

LORD M'LAREN—I express no opinion on the question whether without an order the trustees would be entitled to pay the legacies to the minor children. I should imagine that if the money was paid for their benefit it would be unlikely that their action would ever be questioned. We cannot enter into that question, but if the trustees have not power to make such payment, we certainly cannot give it to them.

LORD KINNEAR—The statement of the trustees is that the legatees, or those who may ultimately be found entitled to these sums, are according to the law of their own domicile infants, incapable of granting a discharge, and they have no legal guardians capable of giving one binding on them and their heirs. The trustees say they are not in a position to make payment to the legatees themselves, or anyone on their behalf, because they can get no valid discharge. That shows that we have no power to supply a defect which makes it impossible for them to proceed upon their own responsibility.

The Court refused the petition.

Counsel for the Petitioners—Brodie Innes. Agents—Dove, Lockhart, & Smart, S.S.C.

Saturday, October 24.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

MONCREIFFE *v.* FERGUSON.

Bankruptcy — Voluntary Trust-Deed for Creditors—Assignation of Lease to Trustee for Purpose of Carrying out the Trust—Personal Liability of Trustee for Rent.

The tenant of a farm under a lease excluding "all assignees, whether legal or voluntary, and all sub-tenants and trustees, or managers for behoof of creditors," executed a trust-deed for behoof of creditors, in which he assigned to the trustee his whole estate, including the lease of the farm, with full power to enter on and manage the farm till the natural expiry of the lease. The trustee applied to the proprietor for his accession to the trust-deed and consent to the assignation, which were granted on condition that the trustee should execute a renunciation of the lease as from the next term of Martinmas, and this renunciation was executed. The trustee entered upon the management of the farm and ingathered the crop for the year.

Held that the trustee's possession of the farm was that of a tenant under the lease, and that accordingly he was personally liable for the rent of the year during which he was in possession.

This was an action at the instance of Sir Robert Drummond Moncreiffe, proprietor of the farm of Hilton, Perthshire, against William Scott Ferguson, farmer, concluding for payment of the sum of £380, being a year's rent of the farm up to Martinmas 1895.

The original tenant of the farm of Hilton was Mr Thomas Richmond, under a lease from the pursuer dated July 1886. The endurance of the lease was for three years from Martinmas 1886, and from year to year thereafter until it should be terminated by one year's written notice. The lease excluded "all assignees, whether legal or voluntary, and all sub-tenants or trustees, or managers for behoof of creditors." It further provided that in the event of the