of the street there was this unfenced drop down to the level of the water. He was close to it every day, his own house being on the other side of the road. To my mind it is almost inexplicable how he could have fallen over without fault on his own part, unless indeed some one pushed him over.

As to the dangerous nature of the place, I concur with what Lord Trayner has said. At one time it was not thought necessary that such places should be fenced. One remembers many such places which were not fenced when one first knew them, and which no one thought it necessary to fence then, but nowadays most of these places have come to be fenced in accordance with modern ideas on the subject. This place seems to be just one of those which, though perhaps quite properly left unfenced at one time, when the general opinion on such matters was not so strict as it is now, ought to be fenced now, and I think the commissioners should consider whether it is not their duty in the interest of the public to do so.

LORD YOUNG was absent.

The Court pronounced this interlocutor:—

"Recal the 5th, 6th, and 7th findings in fact in the [Sheriff-Substitute's] interlocutor: Find in fact in terms of the first four findings in fact in the said interlocutor: Find further in fact (5) that there was the mark of a blow on the brow of the deceased James Barrie, (6) that there is no evidence as to there being any other injury, and (7) that there is no evidence of the cause of the said deceased's death: Find in law that the pursuers have failed to prove that the deceased met his death through the fault of the defenders: With these variations, affirm the interlocutor appealed against and dismiss the appeal: Of new assoilzie the defenders from the conclusions of the action and decern: Find the defenders entitled to expenses," &c.

Counsel for Pursuers—Younger—Grainger Stewart. Agent—J. Knox Crawford, S.S.C.

Counsel for Defenders—Salvesen—Glegg. Agent—Macpherson & Mackay, W.S.

Tuesday, December 6.

FIRST DIVISION.

[Lord Pearson, Ordinary.

FERGUSON, DAVIDSON, & COMPANY AND ANOTHER *v.* PATERSON, DOBBIE, AND OTHERS.

Agent and Client—Mandate to Raise Action of Reduction—Mandate in Sequestration.

An action was raised in the name of an unsecured creditor in a sequestration by a third party who had the real interest in the action, to reduce a sale of the bankrupt's heritage by the trustee. The trustee and the purchaser, who were called as defenders, averred that the action had not been authorised by the nominal pursuer; and in reply to this averment the *dominus litis* produced a mandate from the nominal pursuer authorising the former to act for the latter in the sequestration.

Held (*foll. Glen* v. *Glen*, Nov. 17, 1826, 5 S. 10) that the mandate produced was insufficient to authorise the institution of the action.

Agent and Client—Counsel—Mandate.

Where in course of ordinary procedure the authority of counsel and agent for a party to act for him is seriously disputed, time should be given to permit the production of a mandate.

The Court having allowed a mandate to pursue an action to be produced within eight days, where the mandate of the pursuer's counsel and agent was seriously challenged, and no such mandate having been produced, the action *dismissed*.

Opinion of Lord Young in *Fischer & Company* v. *Anderson*, January 15, 1896, 23 R. 395, *approved of*.

Title to Sue—Dominus Litis—Title to Sue of Party Sisted of Consent as Dominus Litis.

An action was raised in the name of a creditor upon a sequestrated estate to reduce a sale of the bankrupt's heritage by the trustee, and to this action the trustee and the purchaser were called as defenders. It was admitted that the proceedings had in fact been instituted by a former agent of the trustee who had procured from the nominal pursuer an obligation to execute an assignation of the pursuer's claim in the sequestration in his favour. No such assignation had in fact been executed, and the nominal pursuer, while admitting on record that the said agent was *dominus litis*, denied that he was a competent pursuer. The said agent was in the Outer House sisted as a party to the action *quâ dominus litis*.

The nominal pursuer having disclaimed the action, *held* that it could not proceed at the instance of the *dominus litis* alone, the obligation to grant him an assignation affording him no title to sue, and the pursuer's record expressly denying that he was a competent pursuer in the action.

The estates of William Deans, builder, Edinburgh were sequestrated in 1882, and Mr Hugh Miller, C.A., was appointed trustee thereon by the Sheriff on November 6th of that year. The bankrupt's estate consisted principally of house property, estimated to be worth £4000, but burdened with an heritable debt of £2800. His moveable property amounted to about £500. The heritable property was exposed for sale at the price of £3200 in 1884, but was not sold. It was again exposed for sale in March 1896 at £2700, and was then knocked down to Mr Joseph Dobbie for £2735. Mr Miller died on 15th July 1896, and was succeeded in the office of trustee in the sequestration by Mr James Paterson, C.A., conform to act and warrant of the Sheriff dated 27th August 1896. Mr Paterson was also judicial factor on Mr Miller's estate.

In these circumstances an action was raised by Messrs Ferguson, Davidson, & Company, and Patrick Knox, plumber (un-

secured creditors on Deans' estate for £1846 and £125 respectively), against Mr Paterson, Mr Dobbie, and certain other persons, commissioners or pretended commissioners on the sequestrated estate, to reduce the disposition of the heritable subjects executed by Paterson in Dobbie's favour, and certain other writs, including a minute by the Accountant of Court dated 10th March 1896, concurring in the sale of the subjects to Dobbie for £2735.

The grounds on which the pursuers sought to reduce the sale were (1) that the property had been sold by the trustee at a price under the amount of the bond, fixed by himself, and without the concurrence of the commissioners in the sequestration; (2) that a minute bearing that the sale to Mr Dobbie had been approved of at a meeting of a majority in number and value of the creditors was incorrect, unwarranted, and false; and (3) that the Accountant of Court was induced to give his consent to the sale by a certificate granted by Paterson that those who had signed the said pretended minute were a majority in number and value of the whole creditors.

The defenders Paterson and Dobbie denied "that the nominal pursuers, Ferguson, & Company, are now creditors on the said estates. By missives dated 11th and 12th August 1897, the said pursuers, in consideration of the sum of £5 paid to them by Mr R. Ainslie Brown, S.S.C., the agent who acted for the former trustee in the sequestration . . . and an obligation by him to hand over any surplus in the event of his recovering more than £5, assigned to the said R. Ainslie Brown their claim in the sequestration. By said missives it was further agreed that said pursuers were to be relieved by Mr Brown of all responsibility and expenses in connection with his investigation into the matter, and that they were to grant a formal assignation when required. . . . The true *dominus litis* is the said Robert Ainslie Brown, and he should be ordained to sist himself as pursuer."

It was admitted on record by the pursuer in answer to this averment that Mr Brown, "who as formerly law-agent in the sequestration has substantial claims in the sequestration of the said William Deans, but is not himself a competent pursuer, is *dominus litis* in the present action."

The defenders pleaded, *inter alia*—"(3) The action not having been authorised by the nominal pursuers, and *separatim*, having been disclaimed by them, falls to be dismissed. (4) Robert Ainslie Brown, mentioned in the defences, being the true *dominus litis* in the present proceeding, ought to be ordained to sist himself as party pursuer."

The writings founded on by the defenders were the following:—

"Letter, Ferguson, Davidson, & Co. to Mr Brown. "11*th August* 1897.

"Dear Sir,—*Wm. Deans' Seqn.*—We are in receipt of your favour of to-day's date. We are agreeable to assign to you our debt on this estate on the conditions mentioned by you, viz., (1) Cash payment of the sum of five pounds (£5). (2) In the event of your receiving more than £5, after deduction of expenses, such overplus to be handed over to us. 3. We are to be relieved of all responsibility and expense in connection with your investigations into this matter. If you will send us your cheque for £5 and an assignation duly prepared, we shall return the latter with our signature.—Yours faithfully,

"Ferguson, Davidson, & Co.
"Geo Muat."

"Letter, Mr Brown to Ferguson, Davidson, & Co. "12*th August* 1897.

"Dear Sir,—*Wm. Dean's Seqn.*—I am in receipt of your favour of yesterday agreeing to assign to me your claim in this sequestration in consideration of the sum of £5, for which I enclose my cheque. The bargain is under the second and third conditions stated in your letter, to which I agree. I do not think a formal assignation will be necessary meantime, but I will be content with the letter and mandate enclosed, which I shall thank you to subscribe and return to me.—Yours faithfully,

"R. Ainslie Brown."

"Letter of Acknowledgment, Ferguson, Davidson, & Co. to R. Ainslie Brown. "*Edinburgh*, 12*th Augt.* 1897.

"Dear Sir,—*Wm. Deans' Seqn.*—We acknowledge to have received from you the sum of five pounds stg. in consideration of our assigning to you our claim in the sequestration of William Deans, builder, Hope Crescent, Edinburgh, and we undertake, when called upon by you, to grant a formal assignation in favour of yourself or your nominee of said claim, but always under the second and third conditions stated in our letter to you of 11th inst. In the meantime we send mandate for us in the sequestration.—Yours faithfully,

"Ferguson, Davidson, & Co.,
[Stamped] 12/8/97."

"Mandate by Ferguson, Davidson, & Co. in favour of R. Ainslie Brown. "*Edinburgh*, 12*th Augt.* 1897.

"Sir,—We, Messrs Ferguson, Davidson, & Co., timber merchants, Edinburgh and Leith, creditors on the sequestrated estates of William Deans, builder, Hope Crescent, Edinburgh, for the sum of £1846, 4s. 11d., conform to oath with account annexed lodged by us in the sequestration, and admitted by the late Hugh Miller, C.A., as trustee thereon, hereby nominate and appoint you to be mandatory in the sequestration, and to attend at all meetings of creditors therein, and to act and vote, and take all action in our names you may deem necessary, and with all powers competent to us, and we revoke all former mandates granted by us in connection with the sequestration.—We are, Sir, your obedt. Servants,

"Ferguson, Davidson, & Co.
"R. Ainslie Brown, Esq., S.S.C."

The following letter passed between the agents of Ferguson, Davidson, & Co. and those of Dobbie:—

"Dear Sirs,—*Deans' Seqn.*—We are favoured with your letter of yesterday's date. Our clients Messrs Ferguson, Davidson, & Co. agreed to sell their claim in the above sequestration to Mr Ainslie Brown for the sum of £5. On his paying that sum they granted an undertaking to execute an

assignation, and at the same time granted to him the mandate dated 12th August 1897 founded on in the proceedings. Beyond this they have done nothing in the matter, and have not given authority for the institution of the proceedings in their name. In fact they were not aware of the nature of these proceedings until some time after they had been instituted. They never authorised Messrs Welsh & Forbes to act for them in the matter, and they disclaim all responsibility in the proceedings. — Yours faithfully, "DAVIDSON & SYME."

On 7th April 1898 the Lord Ordinary (PEARSON) pronounced the following interlocutor:—"In respect it is admitted that Robert Ainslie Brown, S.S.C., Edinburgh, is the true *dominus litis*, appoint intimation of the action and of this interlocutor to be made to the said Robert Ainslie Brown that he may sist himself as pursuer if so advised."

On 14th May the Lord Ordinary, in terms of a minute lodged by Mr Brown, sisted him as pursuer *qua dominus litis*.

On 19th July the Lord Ordinary allowed parties a proof their averments on record, and to the pursuers a conjunct probation.

The defender Dobbie reclaimed.

On 28th October 1898 the pursuer Knox lodged a minute disclaiming the action, which minute the Court of the same date sustained.

Argued for the defenders—No authority was given by the nominal pursuers to raise this action. The mandates produced were not proper warrants for an action of reduction. The prevailing note of the decisions was that the mere appearance of counsel was not evidence of mandate which could not be rebutted. It was only *prima facie* evidence until challenged. In the case of *Thomson* v. *Incorporation of Candlemakers*, May 25, 1855, 17 D. 774, the denial of authority came only when everything was over. But even assuming that that was authority against the defenders' contention, Lord Young had expressed the contrary view in the recent case of *Fischer & Co.* v. *Andersen*, January 15, 1896, 23 R. 395, 399. See also *Cowan* v. *Farnie*, March 4, 1836, 14 S. 634, *per* Lord Mackenzie, 645. Granting that this mandate went as far as an ordinary mandate, the raising of an action of reduction was not within its scope—*Glen* v. *Glen*, November 17, 1826, 5 S. 10. In *Fraser* v. *Duguid*, June 19, 1838, 16 S. 1130, there was an assignation *ad hoc*. Brown had purchased the pursuers' right, but he was not entitled to augment the value of his purchase by attempting to cut down proceedings prior to the assignation—*Symington* v. *Campbell*, January 30, 1894, 21 R. 434. Messrs Ferguson, Davidson, & Company had assigned their claim and had lost their right of action. Brown had the claim assigned to him but not the right of action.—*Levett* v. *London and North-Western Railway Company*, July 17, 1866, 2 S.L.R. 207. Strictly speaking, he held no formal assignation, but merely an obligation to grant one. It was not enough to entitle him to pursue the action that he was supplying the funds. He must have full control of the action.—*Corson* v. *M'Lauchlan*, February 8, 1828, 6 S. 505.

Argued for Mr Brown—(1) The presence of counsel in this Court implied a mandate until the party had disclaimed. While the opposite party might do what he pleased or could in the way of urging the alleged client to disclaim, he had no right to call upon the advocate to produce his mandate, and could not ask a proof of whether he had such a mandate. Those propositions were well established by authority.—*Ballantyne* v. *Edgar* (1676), M. 348; *Earl of Marchmont* v. *Home* (1715), M. 358; *Hamilton* v. *Marshall*, November 25, 1813, F.C.; *Wallace* v. *Miller*, May 31, 1821, 1 S. 43; *Thomson, ut sup.*; Stair, i. 12, 12; Ersk. Inst. iii. 3, 33; Shand's Practice, pp. 79, 154, 313; Mackay's Manual, p. 286. Ferguson, Davidson, & Company had known of the action here, and not having disclaimed must be held to have authorised it.—*Reynolds* v. *Howell*, L.R., 8 Q.B. 398, *per* Bramwell, J., 400. (2) Apart from the question of mandate, Mr Brown, as assignee, was entitled to pursue the action on his own account. Though originally his interest in the action depended upon the expenses due to him, he was now here as pursuer in virtue of the assignation granted to him.—*Sanderson* v. *Campbell*, May 17, 1833, 11 S. 623; *Pitcairn* v. *Pitcairn's Trustees*, June 21, 1834; *Fraser, ut sup.*; *Fraser* v. *Dunbar*, June 6, 1839, 1 D. 882; *Barclay* v. *Glendronach Distillery Company*, October 21, 1868, 7 Macph. 9.

At advising on November 25th—

LORD PRESIDENT—The first question to be considered, as I view this case, is whether Ferguson, Davidson, & Coy. are necessary pursuers in this action. Mr Knox having disclaimed, is out of the action, and there remain Ferguson, Davidson, & Coy., the other original pursuers, and Mr Robert Ainslie Brown, who has been sisted as a pursuer *qua dominus litis*. Now, it was argued that Mr Brown did not require Ferguson, Davidson, & Co's instance, and that he could stand alone, and sue alone, in his own name, in virtue of his rights as assignee of Ferguson, Davidson, & Coy. It is to be observed, in the first place, that Mr Brown does not hold an assignation, but is merely entitled to obtain an assignation, and in a question of this kind these two things are not the same. A sharper and more conclusive answer is to be found in the pursuer's own record, which is now avowed to be, and is, Mr Brown's record. In condescendence 1, not merely is the assignation, or right to assignation, not founded on at all, but Mr Brown is, in so many words, said not to be a competent pursuer, and his interest in the dispute is alleged to arise from his own professional account in the sequestration, which of course is something totally different from Ferguson, Davidson, & Co.'s debt. The fact that Mr Brown has, by an unusual procedure, been sisted as a pursuer *qua dominus litis*, does not emancipate him from the limitations of the record which he thus fathers, and that record negatives his having an independent right to sue. Ferguson, Davidson, & Coy.

fund. The main difference between the 'Congregational Union of Scotland' and the 'Evangelical Union' was, that while the former required no concurrence in any doctrinal principle as a condition of membership, the latter required concurrence 'in the following great distinctive principles, which great principles constitute the basis of the union, viz., the three great universalities of the love of God the Father in the gift and sacrifice of Jesus to all men everywhere without distinction, exception, or respect of persons; of God the Son in the gift and sacrifice of Himself as a true propitiation of the sins of the world; and of God the Holy Spirit in His present and continuous work of applying to the souls of all men the provisions of divine grace.' For some years prior to 1896 negotiations for amalgamation were carried on between these two Unions. A joint committee was appointed to prepare a basis of union; after the report of this committee was issued a plebiscite of all the congregations forming each Union was taken, and on 30th April 1896 the annual meeting of the Congregational Union of Scotland, after altering their constitution by the addition of a provision for admission of a body of churches without the steps required in the case of individual congregations, decided by a large majority to unite with the Evangelical Union on the basis recommended by the joint committee. The meeting was subsequently adjourned till October 1896, when a draft constitution was approved, and similar steps having been taken by the Evangelical Union, the two Unions were united in one, as from 1st January 1897, under the name of "The Congregational Union of Scotland, comprising the Evangelical Union and Congregational Union as existing in 1896." "The minority of the Congregational Union of Scotland which did not agree to unite with the Evangelical Union consisted of nine churches, which, through their representatives, actively protested against the union, and six churches which remained neutral. Of these six congregations two, viz., the Cambuslang Church and the Airdrie Church, have since joined with the nine other churches, and adhered to the protest and claim after mentioned. The congregations still remaining neutral are those at Cumnock, Hamilton, Stonehouse, and Paisley. It is expected that new congregations will from time to time be formed, some of which may associate themselves with the Congregational Union of Scotland, comprising the Evangelical Union and Congregational Union as existing at 1896, and others with the congregations referred to in the preceding paragraph." "With reference to the grants from the fund, it may be explained that they are given in different forms and for different purposes. Grants are given to aid in repairing old churches, in building new churches, in supplement of ministers' stipends, or to assist in the payment of missionaries' salaries."

The question on which the petitioners requested the guidance of the Court was the following:—"Which congregations ought the petitioners to recognise as eligible to participate in the benefits of the Ferguson Bequest Fund provided to the Congregational Union or Independent Church of Scotland?"

Answers were lodged for the Congregational Union of Scotland, comprising the Evangelical Union and Congregational Union as existing at 1896. These respondents submitted "alternatively, that the congregations or churches now composing the Congregational Union, or at all events those of them who originally belonged to the Congregational Union, are now entitled to the benefits and privileges provided by the Ferguson Bequest to the Congregational or Independent Church in Scotland—(1) adhering in all respects to the principles and practice of the Congregational Union as existing prior to 1897 and its constituent congregation or churches; and (2) as the majority of that union or body of churches, and as representing that majority?"

Answers were also lodged by Messrs Henderson and Glaisher for the Congregagational Union of Scotland, being the minority above referred to. They averred as follows:—"The churches of the Congregational order which have amalgamated with the Evangelical Union have lost the distinctive quality of the Independent churches. They have not only united themselves with churches professing a creed, which, besides, is at variance with the religious belief of many Congregationalists, but they have themselves adopted as a basis of union with these churches a form of creed which is set forth in the constitution of the new body. This act of the amalgamating majority of the Congregational Union is in derogation of the principles which have always characterised the Congregational and Independent Churches, and is essentially an abandonment of the Congregational position, and further it was carried through in breach of the written constitution regulating the admission of congregations to the Union. The constitution of the new body, moreover, differs essentially from that of the Congregational Union as it existed prior to 1896, and the churches which amalgamated have lost all title to be considered as the 'Congregational or Independent Church' in the sense of Mr Ferguson's settlement." They accordingly submit that "none of the churches of the new Union is entitled for the future to participate in the funds of the trust."

From the proof it appeared that the Congregationalists had no formal creed, and exacted no subscription to any such document. The Evangelical Union, on the other hand, was an offshoot to the United Secession Church, and its distinguishing note was adherence to Arminian, as opposed to Calvinistic views of the Atonement.

It further appeared that the following prefatory note was prefixed to the constitution of "The Congregational Union of Scotland, comprising the Evangelical Union and the Congregational Union as existing at 1896"—"While the Churches now proposing to enter into union do not require

formal subscription or assent to a doctrinal creed from their ministers or members, they are moved and encouraged to seek this union (1) in the belief that they agree in holding as the ground and condition of church membership, confession of personal faith in Jesus Christ as Saviour and Lord; (2) in the desire to hold fellowship with one another in the worship and service of God; and (3) in order to effective co-operation in extending the kingdom of God and proclaiming the gospel of Jesus Christ, through whose person and work as God Incarnate, and the saving and sanctifying grace of the Holy Spirit, God the father in His love has made provision for and is seeking the salvation of all men." The regulations of the Union as laid down in the constitution included the following:—"The Union shall comprise Churches of the Congregational order in Scotland whose membership consists of those who confess their faith in Jesus Christ as their Saviour and Lord, agreeing to promote its objects and contribute to its funds, ministers received and still recognised by the annual meeting, and Professors of the Theological Hall *ex officiis*. The Union as such does not require formal subscription or assent to any doctrinal creed, nor shall it be regarded as in any sense an ecclesiastical court or corporation, claiming to interfere with the freedom or independence of the churches, all such interference being contrary to the first principles of Congregational polity." The objects of the Union were stated thus:—"(1) The promotion of fraternal intercourse and fellowship among Independent Churches of Scotland. (2) Co-operation in aiding churches unable of themselves to fully maintain the ordinances of the Gospel, and in supporting mission and evangelistic agencies in Scotland and in foreign lands. (3) United action in maintaining and defending the truths of the Gospel and the principles and privileges of Independent Churches."

Argued for the Congregational Union—All the Churches allied with the Union were objects of the testator's bounty. The Union of 1896 had made no difference. Churches formerly connected with the Evangelical Union were now equally eligible with churches formerly connected with the old Congregational Union. What the trustees had to deal with was individual churches. The Congregational Union *qua* union had no claim upon the trustees. Adherence to Congregational principles was what qualified a particular church for participation in the benefits of the trust. The churches formerly in connection with the Evangelical Union now possessed that qualification.

Argued for the minority — Only the minority were now entitled to participate in Mr Ferguson's bounty. The majority, by uniting with the Evangelical Union, had abandoned Congregational principles. Congregationalism imposed no creed, but alliance with the Evangelical Union meant adherence to Arminian views on the doctrine of election. The new Union could not be identified with the body which Mr Ferguson had singled out for his favour. He was well aware of the existence of the Evangelical Union, but he had not preferred them in his will.—*Craigie* v. *Marshall*, January 25, 1850, 12 D. 523; *Couper* v. *Burn*, December 2, 1859, 22 D. 120, referred to.

At advising—

LORD PRESIDENT—Mr Ferguson by his will directed his trustees to apply the income of his estate for the maintenance and promotion of religious ordinances by means, *inter alia*, of payments for the erection or support of churches belonging to or in connection with four dissenting religious denominations in Scotland, which are named, or in supplement of the stipends or salaries of the ministers of those denominations. Similar provisions were made relating to the Church of Scotland, only that the benefits were confined to *quoad sacra* churches. The dissenting denominations selected for benefit are described as "the Free Church, the United Presbyterian Church, the Reformed Presbyterian Church, and the Congregational or Independent Church." It is with the last that we have to do, but it is convenient to bear in mind that the scheme of the bequest makes it the duty of the trustees to consider the case of individual ministers and congregations, and does not permit of general grants to churches in the sense of denominations, or the governing bodies of these denominations.

Now, it is quite clear on the facts that the words "the Congregational or Independent Church" is an inaccurate expression, for the theory of Congregationalism and of independency precludes the idea of those congregations being organically united so as to form a Church, and there never has in fact been any association of congregations calling itself "The Congregational or Independent Church." On the other hand, it is equally clear that what Mr Ferguson meant by these words was the denomination generally called in Scotland Congregationalist and less frequently Independent. That was in 1856 a perfectly well-known and definite denomination. Their congregations, although each an autonomous and self-contained ecclesiastical community, were associated by a very loose federal tie into what was called the Congregational Union.

Now, in 1856 there also existed in Scotland another religious denomination called the Evangelical Union. It had been formed in 1843. Historically it was an off-shoot from one of the Presbyterian bodies, and the cause of the secession of Dr Morison, and the *raison d'être* of the Evangelical Union was not a question of ecclesiastical polity but of religious doctrine. The new denomination was Congregationalist in practice, but its characteristic was not Congregationalism but its attachment to a theory of the Atonement which in 1856 was at variance with the doctrine predominant in all the five Churches named for favour in Mr Ferguson's will. What is more important, however, is that in 1856 the Evangelical Union was a well-known and considerable

religious denomination in Scotland, and was not named in Mr Ferguson's will,

In these circumstances perhaps the most logical procedure is to consider, first, whether before the recent alliance between the Congregational Union and the Evangelical Union, the congregations of the Evangelical Union were eligible for the benefits of the Ferguson Bequest. In my opinion this question admits of but one answer—they were not. I hold that the words "the Congregational or Independent Church" were used to denote one definite denomination, to wit, the Congregationalists, who had been for upwards of forty years still further marked out and identified by their association with a union. The fact that the body founded by Dr Morison and called the Evangelical Union consisted of congregations who, like the Congregationalists, were bound together, not by allegiance to a common superior ecclesiastical jurisdiction but by a mere tie of alliance, was, in my opinion, a mere circumstance or point of resemblance, not affecting the question of identity. I hold, therefore, that the Evangelical Union was intentionally excluded by Mr Ferguson, not, of course, in the sense of an invidious exclusion, but that knowing of them he did not include them, just as was the case with other and older communions.

The next question is, does the recent union now entitle the congregations which up to that time had formed the Evangelical Union to share in the bequest, or, in other words, has it now brought into the favoured class those who previously had stood outside? The argument in favour of this extension is necessarily rested on the new relation of the Evangelical Union congregations to what Mr Ferguson called the Congregational Church, and what (for shortness and also for accuracy) I shall call the Congregationalists. Now, it is quite true that the words which we have to construe are "congregations belonging to or connected with the Congregational or Independent Church," and the words "connected with" afford the basis of the argument for inclusion. There are, however, what seem to me as conclusive reasons against this view. In the first place, the new tie is a very slender one, and it has made no difference at all in the identity of the congregations joining it. The alliance is for limited purposes, involving no surrender of or alteration in the powers formerly held or the principles professed by each of the allies. We heard a great deal of comment on the preamble of the agreement to form the new union, and I am not surprised to learn that high authorities entertain conflicting views as to which of the two parties attained the larger share of diplomatic success in the adjustment of the phrases used. But the more material point to remember is that neither party was doing anything more than arranging a basis of common action in the very limited sphere assigned to the union as such. Apart from this, the congregations each stood exactly where they did before.

The next point to observe is that this is not the case of a gradual absorption by the Congregationalists of the other community. If that had been the case—if historically and *bona fide* the congregations of the Evangelical Union had one by one, and from time to time, gone over to the Congregational Union, each acceding congregation would have substantially changed its ecclesiastical position, and each would in turn have come to be "connected with" the Congregational body designated by Mr Ferguson. What has taken place, however, is entirely different. The Evangelical Union has met the Congregational Union on equal terms, and has joined it on equal terms, and the title of the amalgamated Union, comprising theEvangelical Union and Congregational Union, "as existing at 1896," attests this result, and the continued identity of each of the two allies as distinguished from their fusion.

The conclusion which I draw from these facts is that nothing has occurred to change the identity of either of those two bodies, and it will be observed that the same reasoning which excludes the congregations of the Evangelical Union establishes the continuance of the right of the congregations formerly belonging to the old Congregational Union notwithstanding their accession to the new Union. Accordingly, I hold that while the congregations which before 1896 were admitted to Mr Ferguson's bounty, to wit, the Congregationalists, have not lost their rights under his will; on the other hand, the congregations which before 1896 were not admitted to that bounty, to wit, those of the Evangelical Union, have not gained a right to admission, and remain inadmissible.

The next question is a very easy one. Certain of the Congregational congregations refused to join the new Union, and although bereft of the alliance of the majority of their brethren they keep up the old Congregational Union. I can see no reason whatever for holding that, by staying where they were, those congregations have lost their rights under the Ferguson Bequest. The argument against them rests on an exaggerated estimate of the importance of the federal relation constituted by the Congregational Union. I do not think that Mr Ferguson, when he said Congregational or Independent "Church," meant Congregational Union, or that the existence or continuance of that institution is of any materiality except as an aid to identification. But here the identification is complete.

There remains what at first sight is rather a puzzle, and that is the case of the new congregations formed since the new union. The reasoning upon which the previous part of this opinion is based leads me to hold that they are eligible to be considered by the Ferguson trustees. They are, to use Mr Ferguson's words, "connected with" the Congregationalists, and they are not more closely connected with the congregations of the Evangelical Union. The reason why I hold that the connection with the Congregationalists does not avail the con-

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