land. Pursuer got defender's address from him more than once. This friend wrote that he was surprised defender's wife did not hear from him, as he was doing well, and afterwards wrote that defender had ceased to correspond with him because he had spoken about his wife.

The Lord Ordinary (KINNEAR) dismissed the action.

"*Note.*—To support the action it must be proved that the desertion was originally wilful and malicious, and that it has been obstinately persisted in, notwithstanding remonstrance (*Bowman* v. *Bowman*, 4 Macph. 484; *Chalmers*, 6 Macph. 549; *Barrie* v. *Barrie*, Nov. 23, 1882, 10 R. 208). Neither of these points appears to me to be made out. It does not appear that the pursuer stated any objection to her husband leaving her in this country when he sailed to New Zealand, and she says that it was arranged that he should send for her; but there is no evidence that he has ever been in a position to do so. The continued separation of the spouses may therefore be owing to causes beyond the control of either; and if it should hereafter become practicable for the husband to return, or for his wife to join him in New Zealand, it cannot be assumed that the husband would refuse to adhere."

The pursuer reclaimed.

At advising—

LORD JUSTICE-CLERK.—I think the grounds stated by the Lord Ordinary in his note are quite sufficient in existing circumstances for dismissing this action. We know nothing about this man, except that he did not return and did not write to his wife.

LORDS YOUNG and RUTHERFURD CLARK concurred.

LORD CRAIGHILL was absent, being engaged in taking a proof.

The Court adhered.

Counsel for Pursuer — R. K. Galloway. Agents—Miller & Murray, S.S.C.

Tuesday, March 18.

FIRST DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

COMMISSIONERS OF POLICE OF OLD ABERDEEN *v.* LESLIE.

Police—Police and Improvement Act 1850 (13 *and* 14 *Vict. cap.* 33), *sec.* 212—*General Police Act* 1862 (25 *and* 26 *Vict. cap.* 101), *sec.* 149.

Police Commissioners served notice, under the 149th section of the Police and Improvement Act of 1862, upon the proprietors of houses within a burgh which had adopted that Act, requiring them to adjust and properly lay the footway in front of their property. Certain of the proprietors having paid no attention to the notice, the Commissioners repaired the footway and raised an action in the Sheriff Court against them for recovery of the expense. The defenders averred that the Commissioners in adopting the Police and Improvement Act of 1850, took over the footway as sufficiently constructed; and further, that the works contemplated in the specification amounted to reconstruction of the footway. *Held* that the items of the account libelled showed that the operations were of the nature of repairs; that sec. 149 of the Act of 1862, besides incorporating sec. 212 of the Act of 1850, imposed upon owners the burden of maintaining the footways opposite their lands; and that the defenders had made no relevant averment that the Commissioners had ever undertaken to relieve the defenders of this latter obligation.

The Police and Improvement Act 1850 (13 and 14 Vict. cap. 33), sec. 212, provides:—"That the owners of all houses . . . which are adjoining or fronting any street . . . within any burgh, shall at their own expense, when required by the commissioners, cause footways 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 commissioners shall direct; and in case such owners shall refuse or neglect or delay so to do, any magistrate before whom such complaint may be brought, may fine . . . such owners . . . and on recovery shall thereout defray the expenses incurred in making such footway."

The Police and Improvement Act 1862 (25 and 26 Vict. cap. 101), sec. 14, provides:—"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 property respectively on the side of such 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 commissioners shall direct, and shall thereafter from time to time, as occasion may require, repair and uphold said footways." . . . .

This was an action at the instance of the Police Commissioners of Old Aberdeen, and George Stables, their clerk, as representing them, against the Misses Leslie of Powis, Old Aberdeen, to recover a sum of £26, 19s. 7½d. which the pursuers had expended in paving operations, and for which they sought to make the defenders responsible.

On 7th August 1882 the following notice was served upon the defenders by the pursuers:—"I am instructed by the Commissioners of Police to request you to have, within 14 days from this date, the foot-pavement fronting or abutting your lands or premises at Powis Lodge, College Bounds, adjusted and properly laid in conformity with specifications which are in my hands for your inspection, and to be made to the satisfaction of their Inspector of Works, who will give the necessary levels for laying the same, failing which the Commissioners will themselves execute the work and charge you with the expense, in accordance with the 149th clause of the General Police and Improvement (Scotland) Act 1862.—Yours truly, GEORGE STABLES jun., Clerk to the Commissioners."

The defenders took no step to execute the work

required by the pursuers, who accordingly proceeded to carry out the operations referred to in the notice, and thereafter rendered an account to the defenders, the items of which were—"To re-dressing and laying old kerbstone, Supplying and laying new do., Laying concrete pavement, Re-dressing and laying old granite pavement, Supplying and laying new do. Re-dressing and laying old Caithness slabs, Supplying and laying new do., Do. do. wooden boxes."

The defenders refused payment, and the present action was raised in the Debts Recovery Court.

The pursuer averred that the burgh of Old Aberdeen in 1862 adopted the General Police and Improvement (Scotland) Act 1862, excepting only sec. 2 of part iii. and sec. 6 of part vi. thereof, and Commissioners for the purposes of the Act were duly appointed and acted for the said burgh. They admitted the statement in defence that in 1860 the burgh adopted the Police and Improvement Act of 1850.

The defenders averred that the burgh of Old Aberdeen about 1860 adopted the Police and Improvement (Scotland) Act 1850, as amended by sec. 64 of the Nuisance Removal (Scotland) Act of 1856 (19 and 20 Vict. cap. 103); and they stated that the road known as "College Bounds," where it fronted their property, was the most important and most frequented thoroughfare in Old Aberdeen; further, that the section of the General Police and Improvement Act of 1862 mentioned in the requisition was inapplicable, and that the notice was unwarranted, and without statutory authority; that the Commissioners in 1860, when adopting the Police and Improvement Act of 1850, took over the said street, including the footpath in question, as sufficiently formed and constructed, and that it was suitably paved at the time, and continued to be so until the date of the pursuers' operations.

The defenders further alleged that the works detailed in the pursuers' specification amounted not merely to a repair but to a reconstruction of the footpath, and also that the operations charged for were not in conformity with the notice or with section 149 of the Act referred to. With reference to the charge for a kerbstone, they denied that a kerbstone formed any part of a footpath.

The pursuers pleaded—"(1) The Commissioners of Police being authorised by said Act to require the defenders to execute the work in question, and failing the defenders doing so, to cause the same to be executed at defenders' expense, and having done so, the pursuer, as representing said Commissioners, is entitled to recover the cost thereof from defenders. (3) The defenders having neglected at the proper time to exercise the right of appeal given them by the statute, are not entitled now to refuse payment."

The defenders pleaded—"(1) The intimation of 7th August 1882 being unwarrantable and without statutory authority, the pursuer is not entitled to charge the defenders for any work done in terms thereof. (3) The former pavement having been sufficient, and, *separatim*, having been in terms of the statute, and recognised as such by the Commissioners of Police, the defenders are not liable for the expense needlessly and unwarrantably incurred by the Commissioners in replacing it."

The Sheriff-Substitute (DOVE WILSON) allowed the parties a proof.

"*Note.*—There are facts which seem important which are in dispute; in particular, the points (1) whether the footway in question was in existence prior to 1860 (when the first Police Act was adopted); (2) whether it was then well and sufficiently formed; and (3) whether between 1860 and 1862 (when the second Police Act was adopted) it was up to the requirements of the Commissioners of Police for the time being, are all unsettled on the record, and are all of more or less importance."

On appeal the Sheriff (GUTHRIE SMITH) recalled the judgment of the Sheriff-Substitute, found that no relevant defence had been stated to the action, and remitted to the Sheriff-Substitute to fix and decern for the sum for which decree ought to be pronounced.

"*Note.*—The action is founded on section 149 of the General Police Act of 1862. The corresponding section of the Police Act of 1850 is section 212. In my opinion the effect of this last clause was to empower the Commissioners to have the footpaths of the burgh put into permanent form in their own way, at their own time, and at the expense of the owners of the adjacent property. As to the method to be adopted, the Commissioners were to be the judges. A footpath might be ordered to be made for the first time, or it might be re-made, of a greater width, and paved in a different way. But it is only 'when required by the Commissioners' that the owner was bound to do anything, the meaning obviously being that the process of re-forming the streets of the burgh should be a gradual one, dependent on the development of the traffic, the Commissioners taking the worst cases first, and so on till the whole of the burgh was properly provided with footways. The statute certainly did not contemplate that the operation in the case of any one individual was to be repeated at intervals whenever the Commissioners thought it would be for the advantage of the public to have some improvement in the original plan. That would be subjecting the owners to a very grievous burden indeed. If the reconstruction was well done under the statute, the proprietor's obligation was at an end, and the power of the Commissioners was exhausted. I observe that some years ago this view of the statute was taken by the late Sheriff Blackburn, and it is obviously right. (See *Chalmers* v. *Dumbarton Commissioners*, Oct. 15, 1874, printed in Mr Irons' 'Police Law,' Appendix, p. 200.) The averment now made by way of defence is, that at the adoption of the Act in 1860 the street was properly paved and 'recognised' or taken over by the Commissioners as such. But it must be observed that section 212 deals, not with streets, but with the footway at the sides of streets. As regards the former, it is a condition of the Commissioners' interference that in point of fact the street is not well and sufficiently paved at the adoption of the Act, but as regards the latter there is no such limitation; the owner is taken bound to reconstruct 'the pavement when required by the Commissioners;' and a power vested in the public interest in a body of public trustees cannot, in my opinion, be lost *non utendo* for several years after the Act came into force. Now, in the Act of 1862 we have a clause on the same subject, which is substantially a literal transcript of the clause of the

Act of 1850. It is not repealed, or if it is, it is in the same breath re-enacted. The community of this burgh have been therefore under the same laws since the adoption of the first Act in 1860, with, however, this addition, that the Act of 1862 declares that after the footpath has been re-constructed in the manner directed, the owner 'shall thereafter, from time to time, as occasion may require, repair and uphold such footways.' I am, therefore, of opinion that, on the admitted facts, the order now sought to be put in force was within the powers of the Commissioners. The kerbstone is also part of the pavement, and the only matter open for inquiry is that relating to the cost of the operation and the proportion chargeable against the defenders."

The defenders appealed to the Court of Session, and argued—The notice served upon the defenders was bad, because not in terms of the statute, for it was a requisition to "adjust and relay," whereas the words in the statute were "to repair and uphold." This was not a road of the class contemplated by sec. 149 at all, and it is applicable alone to roads made under it. The Commissioners could only order that class of roads to be repaired which were made before the Act of 1850, and the defenders could not now be called upon to repair what was taken over at the time as sufficient. They were not liable in these repairs under the statute — *Commissioners of Kirriemuir* v. *Wilkie*, July 7, 1876, 3 R. 993; *Police Commissioners of Dundee* v. *Mitchell*, June 2, 1876, 3 R. 762; *Commissioners of Johnston* v. *Donald*, Oct. 29, 1881, 20 Scot. Law Rep. 1, and 9 R. 613.

Argued for the respondents — The defence stated was irrelevant, and that the case should not be remitted to the Sheriff on any of the points stated by the defenders. The Act of 1862 was adopted as a whole, and the effect of that was to repeal the previous Act of 1850. If the footpath in question was still under the Act of 1850, then the notice served being under the Act of 1862 was admittedly bad. The construction of the Act claimed by the defenders was too narrow, and would, if given effect to, render the Act practically useless. The sections of the Act of 1862 must be held, as regards all footpaths within burgh, to supersede the sections of the Act of 1850. The case of the *Police Commissioners of Johnstone* did not apply, being under a different section of the statute—*Smeaton* v. *Police Commissioners of St Andrews*, May 17, 1865, 3 Macph. 816.

The defenders in the course of the argument amended their record. The amendment is quoted in the opinion of the Lord President.

At advising—

Lord President — This case arises through certain proceedings being instituted in the Sheriff Court of Aberdeen by the Police Commissioners acting under section 149 of the General Police and Improvement Act of 1862, to recover a sum of £26, 19s. 7½d., which they had expended in putting into repair the footways in front of the defenders' property, and which repairs the defenders had refused to execute though called upon by the Commissioners to do so. What the exact nature of the repairs was we gather from the account libelled. The first item there is—"To re-dressing and laying old kerbstone, £4, 10s. 10d.; and then a little further down—"To re-dressing and laying old granite pavement, £12, 8s. 11d." Now, these are important items in an account of £26, 19s. 7½d. They are entered in the account also as repairs, and they show that the footway was not being constructed for the first time. There is no doubt one item of £7, 12s. 10d. for new granite pavement, and another of 18s. 4½d. for new kerbstone, but the greater part of the account is incurred for the supply and restoration of material which was worn out, and for the relaying and re-dressing of pavement which was already there. Now, under sec. 149 of this Act it is provided 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 property respectively on the sides of such 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 commissioners shall direct, and shall thereafter from time to time, as occasion may require, repair and uphold such footways." . . .

Now, suppose that there was no other statute to be dealt with in this case but the Act of 1862, I should be prepared to hold that the operations here performed were operations to repair and uphold, and were of the character as plainly laid upon owners of property as were those for the original construction of the footway.

But we are told that these footways when they were made originally were constructed, not under this Act of 1862 at all, but were made prior to the adoption in 1860 of a previous Police Act of 1850. I do not say that the footways were made prior to 1850, but that they were made before the Act of 1850 was adopted by the Police Commissioners of Old Aberdeen.

Now, that carries us back to the consideration of the effect of the adoption by this burgh of the Police Act of 1850. If the appellants could have shown that under this Act (of 1850) something was done to relieve them of the upkeep of their footpaths—that some minute had been signed or obligation undertaken with reference to them—that would have been very relevant to the present inquiry; but it is not alleged that anything of that kind took place. As to the terms of this Act section 212 enacts:—"That the owners of all houses . . . which are adjoining or fronting any street . . . within any burgh, shall at their own expense, when required by the commissioners, cause footways 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 commissioners shall direct; and in case such owners shall refuse or neglect or delay so to do, any magistrate before whom such complaint may be brought, may fine . . . such owners . . . and on recovery shall thereout defray the expenses incurred in making such footway." Now, that is very much the same provision as is to be found in the later statute, with this difference, that in the later statute there is the additional burden imposed upon owners of repairing and upholding the footways after they are made.

The question therefore comes to be, whether the defenders have made any averment relevant to exempt them from the liability sought to be im-

posed upon them? As the case originally stood, the only averment was—"In particular, the Commissioners of Police at the adoption in 1860, as aforesaid, of the Police and Improvement (Scotland) Act 1850, took over the said streets as sufficiently paved in terms of said and amending Acts, and in point of fact it was well and sufficiently paved then, and up to the date, in August 1882, of the Commissioners' operations." Now, this is obviously irrelevant, because it refers to a street and not to a foot-pavement. The record was accordingly amended, and the answer to art. 3 now runs thus—"Explained and averred that the section of the General Police and Improvement (Scotland) Act 1862, mentioned in the requisition, is inapplicable, and that the said requisition notice is unwarranted and without statutory authority. In particular, the Commissioners of Police at the adoption in 1860, as aforesaid, of the Police and Improvement (Scotland) Act 1850, took over the said street, including the footway in question, as already sufficiently formed and constructed and sufficiently paved in terms of said and amending Acts, and in point of fact the said street, including the footway in question, was already sufficiently formed and constructed, and the said footway continued in that condition. It was well and sufficiently paved then, and up to the date, in August 1882, of the Commissioners' operations, at least so far as regards the footway of said street where it fronts the defenders' property. It is further explained and averred that the works detailed in the pursuers' specification, and which the defenders were called upon to execute, amount to a reconstruction of the footway." As to the latter part of these amendments, what is there set forth is met, I think, by what I have already stated regarding the different items of the account. The work executed by the pursuers is undoubtedly of the nature of a repair, while the averment of the defenders comes to this, that there was a good footway prior to 1860, and that as during the two years which elapsed between the adoption by the Commissioners of the Act of 1850 and the passing of the Act of 1862, they were not called upon to do anything to this footway, they are to be freed in the future from all expense connected with its upkeep. I do not understand that the amendment goes the length of averring that the Commissioners adopted this footway or accepted it from the defenders to the effect of undertaking the cost of all future repairs upon it. There is no minute in the books of the Commissioners referring to this, nor has any acceptance or understanding to that effect by them been produced. The Act of 1862 is adopted, and then in course of time it is discovered that this footway, like most other human structures, has become worn out and stands in need of repairs. Are the owners of the adjoining property in such circumstances not liable for the repairs? If, indeed, there was anything to be found in the statute supporting the idea that once a footway was put in good order by the owners, and accepted as in that condition by the Commissioners, that then it was to be maintained by them in time coming, that would go a long way to answer the contentions of the pursuers here. There is such a provision in the Act no doubt as to streets, but not as to foot-pavements. The defenders also appeal to sec. 149 by way of showing that under its provisions only footways constructed under it fall to be maintained by the owners of the adjoining ground, but I cannot give this section any such limited interpretation. The Commissioners here have pronounced this footway to be in a state of disrepair—a good road has to be made, and the expense thereby incurred falls to be borne by the owners of the ground. I therefore agree with the view of this case taken by the Sheriff, and I think his interlocutor must be affirmed and the appeal refused.

LORDS MURE and SHAND concurred.

LORD DEAS was absent.

The Court refused the appeal.

Counsel for Pursuers (Respondents)—Pearson. Agents—Stuart & Stuart, W.S.

Counsel for Defenders (Appellants)—Comrie Thomson. Agents—Horne & Lyell, W.S.

Tuesday, March 18.

FIRST DIVISION.

[Lord Fraser, Ordinary.

HENRY *v.* MILLER.

Proof—Evidence—Receipt for Rent—Proof prout de jure—*Delivery.*

In an action for the half-year's rent of a dwelling-house due at Whitsunday 1882, the defender produced a receipt for the rent due at that term, and averred that he had paid the amount. The pursuer averred that he had sent a note containing the receipt at Whitsunday 1882, but that the rent had never been paid, and that he had forgotten about the matter until Whitsunday 1883, when he demanded payment. The rents due at Martinmas 1882 and Whitsunday 1883 had been paid, and there was no averment of fraud. *Held* that the pursuer was entitled to a proof *prout de jure* of his averments.

This was an action at the instance of Alexander Henry, proprietor of the dwelling-house No. 5 Barnton Terrace, against John Miller, civil engineer, tenant of that house, for the sum of £63 with interest—£31, 10s. being the rent for the half-year ending Whitsunday 1882, and £31, 10s. being the rent for the half-year ending Martinmas 1883.

The defender was tenant of the house as a yearly tenant from Whitsunday 1876 to Whitsunday 1884. The pursuer stated that the rents had been paid half-yearly, with the exception of those sued for. The defender admitted liability for the half-year's rent due at Martinmas 1883, but averred that in May 1882 he paid the half-year's rent due at the term of Whitsunday in that year, conform to receipt which he produced, in these terms:—

"*Edinburgh, 15th May* 1882.—Received from John Miller, Esq., C.E., the sum of Thirty-one pounds ten shillings sterling, being rent of house No. 5 Barnton Terrace, for the half-year ending