

mode of life, that is not an averment which the petitioner can be called upon to answer. It is not a statement of any fact whatever in the life and conduct of the petitioner, but a perfectly irrelevant assertion about the respondent's state of mind, and that is not a matter which can be proved or disproved.

Accordingly I agree with your Lordships that the course proposed to be taken is the right one.

The Court pronounced this interlocutor:—

“Find the petitioner entitled to the custody of her child Mary Ann Kerrigan: Decern and ordain the respondent Mrs Helen or Ellen Hall to deliver up the said child to the petitioner, and of consent ordain the petitioner to make payment to the respondent of the sum of £12 in full of arrears of aliment, and decern: Find the petitioner entitled to five guineas expenses.”

Counsel for the Petitioner—Guy. Agents—Gordon, Petrie, & Shand, S.S.C.

Counsel for the Respondent — Munro. Agents—Gardiner & Macfie, S.S.C.

Tuesday, October 22.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

NATIONAL BANK OF SCOTLAND,
LIMITED v. CITY COMMERCIAL
RESTAURANT COMPANY, LIMITED

Process — Multiplepointing — Claims — Motion to Allow New Claim after Decree of Ranking and Preference in Outer House — Expenses.

In an action of multiplepointing the Lord Ordinary, after certain procedure, including a proof, sustained the claims for two of the claimants, and ranked and preferred them rateably upon the fund *in medio*. An unsuccessful claimant presented a reclaiming-note, and a person who maintained that he was in the same position as the successful claimants put in a minute of sist and craved the Court to allow him to lodge a condescence and claim in the multiplepointing. The minuter stated that he was not called in the multiplepointing, that there had been no public advertisement for claims, and that the dependence of the action had only come to his knowledge after the record had been closed and the case sent to proof.

The two respondents maintained that the motion should only be granted on payment of one-third of the expenses incurred by them respectively up to date—*Morgan v. Morris*, March 11, 1856, 18 D. 797.

The Court granted the minuter's motion on condition of his paying to each of the successful claimants one-third of the expenses already incurred by him.

Counsel for the Minuter — Lorimer. Agents—Patrick & James, S.S.C.

Counsel for the Respondents—Younger. Agents—Hamilton, Kinnear, & Beatson, W.S.

Wednesday, October 23.

SECOND DIVISION.

[Lord Pearson, Ordinary.]

CARSON v. MAGISTRATES OF
KIRKCALDY.

Reparation — Negligence—Precautions for Safety of Public—Hole in Partly-Formed Street Used by Public—Liability of Magistrates — Liability of Owner of Solum — Burgh Police (Scotland) Act 1892.

In an action brought by the representatives of a man who had been found dead in a hole in a partly-formed street within a burgh the pursuers called as defenders (1) the magistrates of the burgh, and (2) the owner of the *solum*, and concluded for decree against them jointly and severally or severally. They averred that the deceased, while passing along the road in question on the morning of 7th January, fell into a hole which had been made on 1st January and left unfenced and unlighted. They averred that the said road, although not properly levelled or paved, was one of the streets and public thoroughfares of the burgh, and maintained that the magistrates were liable in damages, being responsible for its safe condition both at common law and under the Burgh Police Act 1892. They maintained further that the owner of the *solum* was responsible, both at common law and under the said Act, for the safe condition of the road.

The Lord Ordinary (Pearson) sustained a plea to the relevancy stated by the owner of the *solum*, repelled pleas to the competency and the relevancy stated by the magistrates, and ordered issues. The Court recalled this interlocutor, and before answer allowed a proof as against both defenders.

This was an action brought by Mrs Margaret Carson, widow, and Elizabeth Carson and others, children of the late Alexander James Edwin Carson, butcher, Kirkcaldy, against the Provost, Magistrates, and Town Council of Kirkcaldy, as such and as Commissioners of the said burgh, and also against John Oswald, Esquire of Dunnikier. The pursuers concluded for decree ordaining the defenders, jointly and severally, or otherwise severally, to make payment of certain sums to the pursuers as damages for the death of their husband and father, the said Alexander J. E. Carson, which, as they maintained, was caused by the fault of the defenders in failing to repair or protect the place at which the deceased met his death.

The pursuers averred that on the morning of 7th January 1900, shortly after mid-