LORD ORMIDALE concurred.

The Court adhered.

Counsel for Pursuer—Balfour. Agents—J. & A. Peddie, W.S.

Counsel for the Trustees and Mrs Paterson—Marshall. Agents—Murray, Beith, & Murray, W.S.

Counsel for Paterson — J. P. B. Robertson. Agent—W. B. Glen, S.S.C.

Tuesday, May 12.

SECOND DIVISION.

[Sheriff of Ayr.

HEPBURN *v.* TAIT.

Action—Mandate—Dominus Litis.

Where a pauper sued an action of filiation and aliment of her pauper child, and attended a diet of proof in the cause before the Sheriff, but produced no mandate authorising the action until it came on for discussion in the Court of Session—*Held* (1) that the action was authorised by the pursuer, and that the action could not be delayed in order to sist the Parochial Board as the true *dominus litis*.

This was an appeal from a judgment of the Sheriff of Ayr. The summons in the suit, at the instance of Sarah Hepburn, Ballantrae, against Alexander Tait, Lagganholm, Ballantrae, concluded for payment of £2 in name of inlying expenses of an illegitimate child, "of which the pursuer was delivered at Ballantrae on or about the 12th day of November 1870, and of which child the defender is the father—item, of the sum of £6, 10s. sterling yearly, in name of his proportion of aliment for the support and upbringing of said child, and that quarterly, and per advance, in equal portions of £1, 12s. 6d. sterling each, commencing payment of the first quarter's aliment for the quarter ensuing as on the said 12th day of November 1870, and continuing the same payment quarterly from said period aye and until the said child shall attain the age of twelve years complete, with interest at the rate of five per centum per annum on said inlying expenses from the said 12th November 1870, and on each quarter's aliment from the time the same falls due till paid." The action was raised in 1871, and the pursuer and her child were paupers, and had received aliment from the parish of Ballantrae from their birth.

The plea for the pursuer was—"Being the father of the pursuer's child, the defender is bound to pay inlying expenses and aliment for it at a rate suitable to his circumstances, and as particularly concluded for in this action."

The pleas in law for the defender were—"(1) The Parochial Board of Ballantrae, being in reality the pursuers in the present action, are bound to sist themselves as such; and failing their doing so, the present action will fall to be dismissed. (2) The pursuer having neither instructed nor sanctioned the raising or carrying on of the present action, the same will fall to be dismissed. (3) The pursuer being insane, the present action will fall to be dismissed. (4)—*On the Merits*—The defender not being the father of the pursuer's child, is entitled to be assoilzied, with expenses."

No mandate was produced by the pursuer in the Inferior Court, but at the discussion in the Court of Session a mandate was produced, dated January 1874, authorising the action.

The Sheriff-Substitute (ROBISON) pronounced the following interlocutor:—

"*Ayr, 1st July* 1873.—The Sheriff-Substitute having heard parties' procurators and made avizandum, Finds that the pursuer's alleged insanity has not even been attempted to be proved; finds it not proved that the Parochial Board of Ballantrae alleged to be the real pursuers, authorised and are conducting this action; repels the whole preliminary defences; finds the defender liable in the expenses incurred in this contention, and allows an account thereof to be lodged for the Auditor to tax and report.

"On the merits, Allows the parties a proof of their respective averments, and to the pursuer a conjunct probation; appoints the cause to be enrolled to have a diet assigned for the proof.

"*Note.*—The pursuer's alleged insanity, and the Board's alleged control of the action, were thought to be cognate matters for inquiry, and a proof of them was allowed concurrently. No attempt was even made to prove the first; so far from it, the pursuer was offered as a sane witness by the defender. No proof has been led that the action has not the pursuer's sanction. No member of the Board but one has been adduced in proof of the second point, and his evidence is next to negative, as he says, 'I have no idea that the Parochial Board is carrying on this case;' and although this witness speaks to having heard a certain member of the Board express his willingness to contribute £50 towards the expense of this action, that party has not been examined. Only three references are made to the case in the Board's minute book, and these show that three ways of proceeding crossed the minds of the members at different times—(1) To insist in an action (at the Board's instance) against the defender, 18th May 1871; (2) to have the action brought in the pursuer's name, 29th June 1871; (3) to have nothing to do with an action the one way or the other, 13th July 1871. This is the last reference to the case which the minute book contains (excepting intimation of certain interlocutors made by the Inspector in obedience to the order of Court on the 22d May last), and the resolution which was adopted at a special meeting of the Board is in these terms:—'The meeting having considered the circumstances respecting the claim of Sarah Hepburn on Alexander Tait, and of Martha Linton on Hugh Clarke, for paternity of their children, resolve that the Board do not prosecute the claim of either of said parties, but leave Hepburn and Linton to prosecute their claims themselves, and direct the Inspector to let them know this.' In reference to this resolution the Inspector states in evidence that he 'saw pursuer, and told her the Board had withdrawn from the action about to be raised. I cannot speak to the conversation we had beyond remembering that pursuer expressed desire to have the action proceeded with in some way or other.' He adds, 'Although I have no special recollection, still it is my belief that I had pursuer's authority for instructing Mr Rowan to raise the action.' It appears that a correspondence has been maintained between the Inspector and the pursuer's agent in reference to the case, in which the former instructs the latter on the facts of the case, and the latter keeps the former advised of the pro-

ceedings in the action. The Board's minutes make no reference to this correspondence after the 13th July 1871, when the resolution was adopted to abstain from prosecution. The action was raised on the 13th October 1871. Mr Rowan's authority for doing so appears to be a letter dated 7th August 1871, received from the Inspector, in reference to which Mr Wason states that 'he was certainly not authorised by the Board to write said letter to Mr Rowan. I informed pursuer of the fact of the action being raised when it was done, and have been keeping her informed of the proceedings in it to this day.'

"The defender insists on the Parochial Board of Ballantrae being sisted as pursuers *qua domini litis*. This motion seems to proceed on the assumption that the Board, disregarding their resolution of the 13th July 1871, have been covertly carrying on the action. The Sheriff-Substitute has been unable to draw this inference from the proof.

"The pursuer being a pauper, and not having applied for the benefit of the poor's roll, it may be surmised that she has some backing in regard to the expenses of the action. But even if it were to be supposed that the Board is her backer in respect of the expenses, they would not become *domini litis* for that reason (*Mathieson*, 26 Jur. 24). Whatever liability the Inspector's interposition here may eventually be found to entail upon himself, his proceedings, which are not shown to have emanated from the authority of the Board, cannot affect them (*Crawford*, 32 Jur. 488)."

The Sheriff (CAMPBELL), on appeal, pronounced the following interlocutor:—

"29*th November* 1873.—The Sheriff having heard parties' procurators in the appeal for the defender from the interlocutor of 1st July last, and considered the closed record, proof, productions, and whole process, recalls the said interlocutor: Finds that the alleged insanity of Sarah Hepburn, the pursuer, is not proved: Finds that her illegitimate child, whose aliment is the subject-matter of this action, was born on or about the 12th of November 1870: Finds that this action, which concludes for inlying charges and the aliment of the child from its birth, was raised by Mr C. B. Rowan, the ordinary agent for the Parochial Board of Ballantrae: Finds that he was instructed to raise it by Mr Wason, the inspector of poor for the said parish, by letter No. 28 of process, dated 7th August 1871, and that the said letter bears to be written expressly in his official capacity: Finds it averred by the defender on record that the said Sarah Hepburn neither instructed nor sanctioned the raising or prosecuting of the said action; that the child has been alimented by the said Board from its birth; and that the Board are the real pursuers, and bound to sist themselves as such: Finds that the said Sarah Hepburn has been a pauper from her birth, and as such has been alimented by the said Board: Finds that the said child is also a pauper, and has been alimented along with its mother by the said Board from the date of its birth till now; and that there is no prospect of the Board being relieved of their obligation to aliment it until it arrives at an age to earn its own livelihood, or its paternity is established against some one able to relieve the parish: Finds that, in these circumstances, having both a title to sue and the substantial interest in suing the father of the child, the said Board, by their minute of 18th May 1871, instructed Mr Wason, the Inspector, to write the defender 'and ask him to relieve the Board of the maintenance of Sarah Hepburn's child, and to raise an action at law for that purpose if necessary:' Finds that the said Sarah Hepburn had no means whatever to enable her to raise or prosecute the present action, and that this was well known to the Inspector and the Board at the date of the said minute and when the action was raised: Finds that the action, if successful, would practically have the effect contemplated by the said Board in their said minute, viz., the effect of relieving the parish of the aliment of the child, both past and future; and that the Inspector in his official capacity, as his letters bear, has got up the case, and given all the information and instructions for its conduct: Finds, in point of law, that it was the duty of the said C. B. Rowan, who appeared as procurator for the said Sarah Hepburn, to procure and produce a written mandate authorising him to act for her, especially considering that his right to act for her was challenged: Finds further, in point of law, that, failing to produce a mandate, the action must be held as unauthorised (1 Stair, xii. 12; Shand's Practice, p. 79; *Hamilton* v. *Marshall*, 25th November 1813, F.C., see Meadowbank's opinion; and *Philip* v. *Gordon*, 5th December 1848): Finds that the said C. B. Rowan, recognising his duty, applied to the Inspector for a mandate from the said Sarah Hepburn; and that, by letter dated 25th January 1872, the Inspector in effect told him that she had not been asked to sign a mandate prior to the raising of the action: Finds that on the 29th of January the said C. B. Rowan wrote the Inspector, suggesting that he should now get a mandate from her, 'dated 2d October last, requesting me to raise an action in the Sheriff-court at her instance against Tait for aliment of her child' (Letter No. 37 of pro.): Finds that this was a most improper and reprehensible suggestion: Finds that again, on the 15th of July 1872, the said C. B. Rowan reminded the Inspector of the want of a mandate: Finds that no mandate was ever obtained from the said Sarah Hepburn, and that the said C. B. Rowan had no authority from her to raise or prosecute the present action: Therefore sustains the defender's second plea in law; dismisses the action as unauthorised; finds the said C. B. Rowan liable to the defender in the expenses of process, whereof allows an account to be given in, and remits the same when lodged to the Auditor of Court to tax and report, and decerns; reserving to the said C. B. Rowan his relief against his employer or employers.

"*Note*—This is a singular case. The nominal pursuer is a pauper, and her child a pauper, and both have been alimented by the parish of Ballantrae from birth till now. And according to the Inspector's account of matters, the parish will be liable for the child's aliment during the whole time for which aliment is asked for it in the summons unless a father should be found for it. It is therefore the parish that has the main interest in finding a father for the child and suing him.

"And assuming the defender to be the father, it appears to the Sheriff that the Parochial Board judged and acted rightly when, by formal resolution, they of this date (18th May 1871) instructed the Inspector to raise action against the defender to compel him to 'relieve the Board of the maintenance' of the child. The Board had a perfectly good title and interest to sue such an action.

"It is alleged that this resolution was abandoned; but there is no legal evidence of this. The alleged minutes to that effect were not signed when the minute book containing them was produced and put *in manibus curiæ*, and the signing of them after that was improper and illegal. Besides, neither the signatures nor the contents of the alleged minutes are proved.

"Mr Rowan, sa agent for the Board, no doubt suggested that it would be better that the action should be raised in name of the mother than of the Board. And accordingly the action was raised in her name. But neither the Inspector nor Mr Rowan are good enough to inform the Court what was the reason for this. But the reason is not far to seek. If the action were raised at the instance of the Board, the Board would be liable for the defender's expenses, in addition to their own, in the event of the suit being unsuccessful; whereas, if the mother sued in her own name, and the Board had nothing to do with the case, the Board would escape liability for the defender's expenses.

"But *have* the Board nothing to do with the case?

"Not only did the Board think they had an interest in it, but the parties by whose instructions, information, and agency it was raised and has been conducted, are Mr Wason, the inspector, and Mr Rowan, the usual agent of the Board; and the whole matter has been conducted precisely in the manner in which it would have been conducted had the action been raised under the authority of the minute of the Board above referred to, except in regard to the use of the name of Sarah Hepburn as pursuer.

"And further, the effect of the action, if successful, will be substantially the same as if it had been raised in the name of the Board. It will relieve the Board of the aliment of the child.

"In these circumstances, the defender pleads, first, that the action is raised by the authority and for behoof of the Board, and that the Board should be sisted as parties to it; and secondly, that it should be dismissed, as unauthorised by Sarah Hepburn.

"Now, in the first place, he has proved that Sarah Hepburn neither by word of mouth nor by writing communicated directly with Mr Rowan on the subject of the suit, and therefore he got no authority from her directly.

"Secondly, the Inspector, who was Mr Rowan's only instructor, states he had only one personal interview with Mr Rowan about suing the defender, and that was undoubtedly before it was resolved to raise the action in name of Sarah Hepburn. All the communications between him and Mr Rowan about the matter are proved to have been in writing. But no writing or letter is produced, although called for, showing that the action was raised by authority of Sarah Hepburn. Indeed, the opposite conclusion is more in accordance with the terms of the correspondence.

"Now, whatever may be the law in regard to the authority of agents and counsel in the Supreme Court, it is quite settled, both by authority and practice, that in the Sheriff-court the procurator who raises an action must on challenge produce a mandate from the pursuer. And it is a most reasonable rule, and easily complied with.

"Mr Rowan, in accordance with the rule, wrote again and again to the Inspector, asking for a mandate from Sarah Hepburn. But no mandate was obtained. Indeed, Mr Rowan himself expressly depones that he has not got a mandate for her.

"The defender has thus discharged himself of any burden of proof that may have been incumbent on him. And there is really no counter evidence.

"Mr Wason says little upon the subject, and yet he is deeply interested in proving that the action was authorised by Sarah Hepburn, for, being raised by his instructions in her name, he may be ultimately responsible for the expenses of both the suit and defence if he acted without authority.

"But all he can say is this, '*I have no special recollection*, still it is my *belief*, that I had the pursuer's authority for instructing Mr Rowan to raise the action.' The authority he refers to is clearly verbal authority. But then he has 'no recollection' of obtaining it; and 'belief,' as distinguished from recollection, is of no value. It is not evidence until he states the grounds in fact on which his belief rests. Others cannot be expected to adopt his belief, particularly when it is considered how ready people are to believe on very insufficient grounds what they wish and have an interest to believe. All the communings which he relates with Sarah Hepburn are quite consistent with the belief that she had no idea that the action was raised in her name, or required her authority—particularly when his conduct towards her and his opinion of her capacity are considered. 'I do not think,' he says, 'I ever sent her any of Mr Rowan's letters to me. Nor do I think I ever told her the contents of any of these letters. I never consulted her about what I should write to Mr Rowan. My letters were not written under her direction. I did not consider her competent to direct me in that matter. I was related to her in no other way or capacity than as Inspector of the Poor.'

"And why, if an action was to be raised at her instance, *being a pauper*, was it not raised in the usual manner, viz., by getting her put upon the poor's roll, and her case conducted by a poor's agent? No answer has been given to this question.

"And when it was arranged that it should be raised by Mr Rowan, the ordinary agent of the Board, Who was to be liable for the expenses of the suit? It was certainly not arranged that Mr Rowan should act gratuitously. Was it contemplated that Sarah Hepburn should pay him? That could not be. The Inspector himself depones, 'she is quite unable.' Mr Cunningham, a member of the Board, says the same thing. In short, a pauper from her birth cannot pay expenses.

"But surely the Inspector, who employed Mr Rowan to raise the action, should know who was to pay them? But the simple-minded man depones, 'I have no knowledge as to who is to pay Mr Rowan's expenses!'

"As to Mr Rowan, it pleases him to say that he was employed by Sarah Hepburn, and that he held her responsible for the expenses of the action. All that can be said to this is, that it is inconsistent with the proved facts of the case. In the first place, it is proved he never had any authority from her. Indeed, he himself depones, as already mentioned, that he had no mandate. And as to holding her responsible for payment, the thing is ludicrous. And so well aware is he of this, that on being further questioned, he adds, 'If the facts I

have spoken to are of a nature to render Mr Wason or the Board responsible, I would likely look to them.'

"On reviewing the whole facts of the case, the Sheriff is satisfied that the Inspector and Mr Rowan raised and carried on the case in order to relieve the Board of aliment already advanced, and of the obligation for further aliment, and that Sarah Hepburn was a mere puppet set up by them for carrying out that object. They are both silent as to the reasons for raising the action in her name rather than that of the Inspector. If there was any other reason than that already hinted at, it would probably have been given.

"The Rev. Mr Little, the chairman of the Board, or Mr Wilson, a member of it, who were both cited as witnesses for the defender, might possibly have been able to throw some light on this matter, and also on various other matters which have been already touched upon; for the members of the Board, especially the chairman, must be presumed to have some knowledge of matters with which they themselves and their officers have been dealing, and which may materially affect the interest of the ratepayers. But neither of them has chosen to appear, and the reasons given for absenting themselves are not in the least satisfactory.

"The Sheriff regrets that he has been obliged to dismiss the case. If there is any foundation for the statement that the defender is the father of the child, it may be made the subject of another action, an action raised on proper authority, and in such a manner as not to be unfair to the defender."

Cases cited—*Potter*, 8 Macph. 1064; *Crawford*, 22 D. 1068.

At advising:—

Lord Justice-Clerk—I am clear the Sheriff has gone wrong here. He has dismissed the action as unauthorised, and this has not been maintained in argument, and is quite untenable. The other question is—Whether the pursuer is entitled to proceed unless the Board is sisted. I think they are the true *domini litis*, and it is for them to consider their position. Effect has been given to the plea of *dominus litis* in two ways:—1. After conclusion of the suit, by making the true *dominus* responsible in damages. 2. By requiring the pursuer to find caution if he is not the real pursuer, as in the *Elgin* case; but no other remedy has been applied, and in no case has pursuer been sisted. I think it is not reasonable that the action should be stayed in order to sist the Board as pursuers.

Lord Benholme—I concur.

Lord Neaves—I concur. I think if the action is well founded in fact, and can be proved, there is quite a good right of action. It is said the Board have insisted on the action, and supplied the funds and credit which are now withdrawn. Suppose it is so, will that force the pursuer to withdraw from the action or find caution? I am aware that in certain popular actions, where a man of straw has been put forward as pursuer, the Court has interfered, but not in such a case as this. I doubt if the Board could bring this action. If it is shown that the Board supplied funds and credit, they will be liable to action at the instance of the defender. The law of *dominus litis* would be most imperfect if it could not be put into operation after the action had ended.

Lord Ormidale—I doubt if the Board could have pursued this action; it had no interest so far as I see. The proper pursuer is the one we have here. It is said the Board is *dominus litis*. If defender gets absolvitor with expenses he has his action against the Board, and his claims can be reserved.

The Court pronounced the following interlocutor:—

"Find it established by the proceedings that the pursuer attended a diet of Court along with her agent as the party in the cause, and further, find that a mandate has now been produced, dated January 1874, executed by the pursuer before witnesses, authorising the action: Find that the allegations of the defender on the record in regard to the Parochial Board, are not relevant to exclude the pursuer's title and interest to sue this action; find that the defender has failed to prove that the pursuer is insane; and Repel the preliminary pleas stated by the defender, but reserving all questions as to the liability of the Parochial Board, as *dominus litis*, for the expenses of this action: Recal the interlocutor of the Sheriff appealed against, and the interlocutor of the Sheriff-Substitute dated 1st July 1873, and remit to the Sheriff to allow both parties a proof of their respective averments and to the pursuer a conjunct probation, and to proceed with the cause: Find no expenses of the appeal due to either pary."

Counsel for Pursuer—Jameson and Watson. Agents—Fyfe Miller & Fyfe, S.S.C.

Counsel for Defender—Asher. Agents—

Wednesday and Thursday, May 13 *and* 14.

FIRST DIVISION.

TOUGH'S TRUSTEES *v.* THE DUMBARTON WATER WORKS COMMISSIONERS.

(*Ante*, vol. x., p. 160.)

Expenses—Proof before Lord Ordinary — Fees to Counsel.

In a proof before the Lord Ordinary which lasted three days, and in which only one counsel was employed, and where it appeared that counsel was acting gratuitously unless expenses were recovered from opposite party, fees of £12, 12s. for the first day, and of £10, 10s. a-day for the second and third days, *allowed.*

Expenses—Witnesses, Payment of—Act of Sederunt of 10th July 1844*—Jury Trial—Proof before Lord Ordinary.*

Held that the Act of Sederunt of 10th July 1844, regulating the allowances to witnesses in jury trials, applied to proofs before the Lord Ordinary, in so far as it provides that charges in addition to the ordinary allowance for scientific persons qualifying themselves to give evidence shall be sustained, "provided the Judge shall certify that it was a fit case for such additional allowance."

In an action brought by the trustees of George Tough, contractor, the original pursuer of the action, against The Dumbarton Water Wor