judgment was finally given which was not in favour of either out and out. The Lord Ordinary dealt with the question of expenses in accordance with his judgment on the merits, and the matter was arranged between the parties by the heritors paying modified expenses.

It must be observed that during the whole process the Presbytery were not only not parties, but could not be so. The statute shut them out.

That being so, the question comes to be, whether the Presbytery are to be prevented from recovering from the heritors expenses which they would have been entitled to get had the matter remained before themselves. The difficulty has been suggested that Mr Rhind's report is part of the expenses of process. It is no doubt quite established in law that if you cannot recover expenses in a process itself you cannot recover them by a separate action, and I should be sorry to throw any doubt upon that point. But here the expenses in question are not the expenses of any process whatever, but are due in respect of the Presbytery having been under the necessity, in the exercise of a public duty, of employing a man of skill to report. I am of opinion that these expenses were fairly and properly incurred, and that there is no good ground why the Presbytery should not recover them from the heritors.

Lord Deas—I do not know that the ultimate result of this case affects very much the particular question which we are now called upon to decide. The circumstances were these:—The minister of the parish of Pitsligo presented a petition to the Presbytery setting forth that the drainage of his manse was in a very unhealthy state, in addition to other defects which needed remedy. The Presbytery required an inspection by a skilled architect and a report by him, and no one doubts that Mr Rhind, who was employed, was a thoroughly competent person. He reported that these defects existed, and recommended that certain limited measures should be taken to remove them, the expense of which would have been comparatively small. But the heritors were not satisfied that they should incur any expense, and they appealed to the Sheriff and then to the Lord Ordinary, who appointed another architect to report upon the building. He advised the same course as Mr Rhind had proposed, but thought the cost would be greater than what that gentleman had stated; so that the application of the minister was successful, and more than successful.

The whole objection by the heritors to pay the cost of Mr Rhind's report comes to be that the Presbytery missed their time by not appearing and getting decree in the first action. But I agree with your Lordship that the Presbytery were no parties to that suit, and were not called upon to appear in that appeal and get judgment there. I do not know whether Mr Rhind could have appeared; but he was no party either—he might have found out about it, but he had no knowledge of it. He had a perfect right to recover payment at common law, and no obstacle must be placed in the way of that right, unless decree might have been already obtained in the previous process, which, as I have already said, could not be expected.

Lord Ardmillan—I am of the same opinion. There is no doubt that expenses incurred in a process cannot be recovered in another process. But this account is not correctly described as expenses of the previous process. It is the duty of the Presbytery in the discharge of its duties to see to the interests of the benefice, and to protect it for future ministers. In this instance ultimately a considerable sum was expended. Whoever is liable for it the Presbytery is not, for they were acting in a sense judicially. The result of my consideration of the cause is, that I think that but for the recent statute the Presbytery could have given decree without doubt against the heritors, and no argument has been adduced to us why their claim against the heritors is not now good. The only argument used is that the Presbytery could have become parties to the appeal to the Sheriff and Lord Ordinary, and could have pressed their claim there. I doubt that; and I do not think that by refraining from appearing there they are debarred from getting decree in this action.

Lord Mure concurred.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming note for the Rev. John Mitchell and others against Lord Shand's interlocutors of 11th January 1876 and 28th January 1876, and on the whole cause, Recal the said interlocutors: Repel the defences, and decern against the defenders for payment to the pursuer the Rev. John Mitchell, as representing the Presbytery of Deer, of the sum of £62, 4s. 8d., and that in the proportions mentioned in the conclusions of the summons: Find the defenders liable in expenses, and remit to the Auditor to tax the account thereof, and report."

Counsel for Pursuers (Reclaimers)—Asher—Darling. Agent—Alexander Morrison, S.S.C.

Counsel for Defenders (Respondents)—Dean of Faculty (Watson)—Jameson. Agents—Stuart & Cheyne, W.S.

Friday, July 7.

SECOND DIVISION.

[Sheriff of Fifeshire.

HENDERSON *v.* SOMERS.

Filiation—Proof.

Defender assoilzied in an action of filiation, in which it was admitted on both sides that the last occasion on which intercourse had taken place was 311 days before the birth of the child.

This was an action of affiliation and aliment at the instance of Jane Henderson against John Somers, in which the pursuer alleged that the defender was the father of her child, born 311 days after what was on both sides admitted to have been the last occasion on which the pursuer and defender had connection. It was maintained by the pursuer that this was a case of protracted

gestation, or at least of protracted labour, the pursuer having for a month before delivery complained of pains like those of labour. No doctor, however, was called in to attend her between the time at which these pains were felt and the date of the birth.

The Sheriff-Substitute (BEATSON BELL) found for the pursuer, but on appeal the Sheriff Depute (CRICHTON) recalled his Substitute's interlocutor, and assoilzied the defender.

The pursuer appealed to the Court of Session, and quoted *Boyd* v. *Kerr*, 17 June 1843, 5 D. 1213; *Gibson* v. *M'Fagan*, 20 March 1874, 1 R. 853; Fraser on the Domestic Relations, p. 12; Guy's Medical Jurisprudence, pp. 126-129, 4th edition; Taylor's Medical Jurisprudence, pp. 817-831, edition 1865.

In the course of the argument pursuer's counsel suggested that further proof might be allowed on the medical question if the Court deemed it requisite.

Counsel for the respondent Somers were not called upon.

At advising—

LORD JUSTICE-CLERK—In this case, supposing that general medical evidence had been led to show the possibility of protracted gestation, nevertheless the improbability would have remained—an improbability so great as to be nearly the same as an impossibility, and one, I think, quite sufficient to warrant the judgment of the Sheriff. The position of matters might have been very much altered had there been evidence led to shew a hereditary tendency, for instance, to prolonged labour or protracted gestation. Had there even been a direct assertion of singular appearances in any way at the time of delivery I might have been disposed to allow further inquiry; but there is not any such assertion, and accordingly I am for adhering to the interlocutor appealed against.

LORD NEAVES—I entirely concur. The Court cannot allow a roving diligence to parties to examine medical men in such a way as is here suggested, and to implement such evidence. Moreover the Court cannot listen to books by medical authorities on such a subject, and receive as authorities cases cited by men who are not sitting as judges, and of course do not, or do not require to, sift the evidence in relation to the instances of such protracted gestations as they mention.

LORD ORMIDALE concurred.

LORD GIFFORD—I agree. The fact to be reached by the Court in such inquiries is that the man was the father of the child. That in every case can be only a fact reached by inference. Now the time, if the fact were so, would be here 311 days, *ex facie* an improbably long period of gestation. I do not deny that abnormal cases may occur, but the mere possibility of such cases is not enough to raise any presumption. Evidence to shew an unusual labour or gestation or hereditary tendency to this might have justified a further inquiry, but there is nothing of the kind here.

The Court dismissed the appeal, and found the appellant liable in expenses.

Counsel for Pursuer—Rhind. Agent—James M'Caul, S.S.C.

Counsel for Defender—Black. Agents—Macrae & Flett, W.S.

Friday, July 7.

FIRST DIVISION.

[Sheriff of Forfarshire.

COMMISSIONERS OF POLICE OF KIRRIEMUIR *v.* REID'S TRUSTEES.

Commissioners of Police—Statute 25 and 26 Vict. cap. 101, sec. 35 and 156 (Police and Improvement Act 1862)—Private Roads Act.

The 35th section of the Police and Improvement (Scotland) Act 1862 provides, in the event of its adoption by a burgh, for the repeal of any general or local Police Act inconsistent with it and in operation within the burgh.—*Held* that a County Road Act, proceeding upon the principle of transferring all the roads in the county situated in a burgh to the Commissioners of that burgh, was not a local Act repealed by the adoption of the Police Act.

On 27th October 1875 the pursuers served a notice under the 149th clause of the Police Act of 1862 on the defenders, as proprietors of the "footway in front of the property in High Street, Kirriemuir, belonging to you," requiring them to have the footing in front of their property relaid in a certain specified manner.

Against this order the defenders appealed to the Sheriff, on the grounds that the footways of the burgh were regulated by the Forfarshire Roads Act of 1874, and not by the Police Act under which the notice proceeded; and that by the Forfarshire Roads Act the expense of repairing or relaying such footways must be met by the Police Commissioners out of the funds which they were thereby empowered to raise by assessment. The ground on which the Police Commissioners made their demand under the Police Act of 1862 was, that it had been adopted subsequently to the passing of the Forfarshire Roads Act, and must be held therefore to be the ruling Act.

The Sheriff-Substitute (ROBERTSON) recalled the order, and found the Commissioners liable in expenses, adding to his judgment the following note.

"*Note.*—In 1874 the streets and footways in the burgh of Kirriemuir which are parts of statute-labour roads were handed over to the Police Commissioners, who are empowered to assess the inhabitants for the maintenance of said streets and footways, and for certain other purposes. This was all done under the Act of Parliament called the Forfarshire Statute-Labour Roads Act.

"The Police Commissioners have availed themselves of their powers of assessment, and have levied the full maximum assessment allowed by the Act. They must apply the money in carrying out the purposes of the Act, and in no other way. After carefully considering the order complained against, the Sheriff-Substitute