

families, and exclude children attending schools within the Square. These minutes, in my opinion, and the usage following on them, define the pursuers' rights, and disentitle them to the declarator concluded for in the present action."

I am therefore for affirming the Lord Ordinary's interlocutor.

LORDS DEAS, MURE, and SHAND concurred.

The Court adhered.

Counsel for Pursuers—R. V. Campbell—Pearson. Agent—A. Kirk Mackie, S.S.C.

Counsel for Defenders—Trayner—Jameson. Agents—Fyfe, Miller, Fyfe, & Ireland, S.S.C.

Wednesday, December 19.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MUIR v. TWEEDIE.

Parent and Child—Bastard—Filiation—Presumption—Admission by Defender of Intercourse with Pursuer.

This was an action of filiation and aliment of a child born in November 1882. The pursuer and defender were fellow servants at a farm from Martinmas 1881 till the summer of 1882, and were the only servants on the farm. The pursuer alleged intercourse with the defender in January, February, and March 1882. The defender admitted intercourse with the pursuer on a single occasion in May 1882, being six months before the birth of the child. There was some evidence of familiarity between the parties in the spring of 1882, and also evidence of familiarity to which the witness who deposed to it could attach no date. The defender led evidence to show that the pursuer and the farmer in whose service the parties were, were on terms of improper intimacy in March 1882. The pursuer did not accuse the defender of the paternity till at least ten days after the birth, though she had an opportunity of seeing him.

The Sheriff-Substitute (BIRNIE) assoiziled the defender. On appeal the Sheriff (CLARK) adhered.

The pursuer appealed, and argued that the admitted intercourse in May raised a presumption against the defender, which, taken with the opportunity at the date of conception, was as strong as the presumption arising from admitted intercourse prior to the date of conception, together with opportunity at that date—*M' Donald v. Glass*, 27th October 1883, *ante*, p. 45, and *Milne v. Thomson*, 24th October 1883, there cited. There was also strong evidence of familiarity, and the pursuer was entitled to complete the case by her oath.

The defender replied—No doubt the presumption from an admission of intercourse must be regarded as almost equally strong whether the admission applied to a term after or before the date of conception, provided there were opportunity at that date. It was still necessary, however, that the pursuer's should be an "unsuspicious deposition"—Lord Benholme in *Ross v. Fraser*, 13th May 1863, 1 Macph 783. In this case the pursuer's deposition was not reliable, and the case was therefore not proved.

The Court refused the appeal and affirmed the judgment of the Sheriff.

Counsel for Pursuer—Strachan. Agent—T. F. Weir, S.S.C.

Counsel for Defender—Sym. Agent—David Milne, S.S.C.

Wednesday, December 19.

SECOND DIVISION.

Lord Lee, Ordinary.

ROBERTSON AND OTHERS v. PAROCHIAL BOARD OF MIDCALDER.

Public Burden—Public Health (Scotland) Act 1867 (30 and 31 Vict. cap. 101), sec. 8—Powers of Parochial Board—Assessment.

The parochial board of a parish in which there was a considerable village, acting as local authority, arranged to pay part of the wages of a scavenger to clean the village streets, the remainder being paid by the district road trustees. *Held* that such an arrangement was within the powers of the parochial board under the Public Health Act.

The village of Midcalders, situated in the parish of Midcalders, contained at the date of this action a population of 657, the population of the whole parish being 1698. The population was insufficient to make the inhabitants of the village to adopt the General Police Act (the Act 30 and 31 Vict. c. 101). The Public Health (Scotland) Act 1867, sec. 5, constitutes the parochial board of the parish the local authority thereof for executing the Act in such parishes. Under sections 16 to 30 of the Act the parochial board, as the local authority, are clothed with extensive powers in the way of prevention of nuisances, and for proceeding against the authors of the nuisance, to ordain them to remove it, or to pay the cost of its removal by the local authority.

Section 8 provides—"The local authority may, and where it shall be thought necessary by the Board [of Supervision] for the purposes of this Act, the local authority shall, appoint a sanitary inspector or inspectors . . . and make byelaws for regulating the duties of such inspectors."

For some years prior to 1878 the Parochial Board of Midcalders had employed a scavenger to clean the streets. He was paid partly by themselves and partly by the Road Trustees of the district. In 1878, after the employment had been intermitted for a short time, the Board resolved that an arrangement should again be made for the purpose with the surveyor of roads, the sum to be expended by the Board not to exceed 3s. 9d. per week, and it being understood that owners of property were not to be relieved of their responsibility under the Public Health Act.

This was an action by certain ratepayers, who were proprietors and tenants of property in the landward part of the parish, against the Parochial Board for declarator that the defenders were not entitled, as Parochial Board or local authority of

the parish, to incur expenses in connection with cleaning the streets of the village, or to levy an assessment over the pursuers' property, or farms tenanted by them, for such expense; and further, that they were not entitled to incur certain sums charged in their accounts for the years 1879 to 1883 under the head "cleaning streets."

The pursuers averred that the resolution of the defenders was *ultra vires*, that there was no nuisance to remove, and if there had been, that the authors ought to have been made to remove it. They further averred that the defenders were not empowered by the Public Health Act, and had no power apart from its provisions to remove nuisances at the expense of the whole locality, nor interfere with the condition of the streets, nor undertake cleaning operations elsewhere within the parish, save when the condition of affairs amounted to a nuisance.

They pleaded—"The defenders not being entitled, either by statute or at common law, to incur the expenses or to levy the assessments in question, the pursuers are entitled to decree of declarator as craved with expenses."

The defenders averred that the employment of a scavenger was necessary, and that when for a time it was intermitted, the medical officer of health reported that danger would arise to the health of the parish if the cleaning was not at once renewed; that the scavenger's appointment was made under an arrangement with the Road Trustees, and with the sanction of the Board of Supervision.

They pleaded—"(1) The statements of the pursuers are irrelevant, and insufficient in law to support the conclusions of the summons."

The Lord Ordinary (LEE) sustained the first plea-in-law for the defenders, and assolizied them from the conclusions of the action.

"*Opinion.*—I am of opinion that in parishes such as Midcalder, where the parochial board is constituted the local authority in terms of the Public Health Act 1867, and there is a considerable village in the district placed under their authority for the purposes of the Act, it is not beyond the power of such local authority, acting under the supervision of the statutory board, to direct the inspector to see to the cleansing of the streets of the village, and if necessary to authorise the employment of a scavenger for the purpose. It is true that the statute contains no express enactment that the local authority shall have such power. It is also true that the Act contains a number of special provisions in Part II. for the removal of nuisances. But this is not, in my opinion, conclusive in favour of the pursuers' contention that the local authority has no power to authorise the employment of a scavenger. The question is, whether this is within the purposes of the Act which they are appointed to execute?"

"The statute purports to be 'for removal of nuisances, for prevention of diseases, and for sanitary purposes generally.' The terms in which the local authority is appointed (sec. 5), and is required to appoint sanitary inspectors, and authorised, with the sanction of the Board, to make bye-laws for regulating the duties of such inspectors (sec. 8), and appointed to take measures for the general prevention of disease (sec. 26, 39, *et seq.*, and particularly 41), seem to me

to show that it was not beyond the purpose of the statute that the local authority should be enabled to take all reasonable measures for sanitary purposes. If the employment of a scavenger is not expressly provided for, I think it fair to presume that such a measure, and other steps short of providing hospitals and erecting water-closets or privies, were not considered to require special mention, but were contemplated as sufficiently provided for by the general powers of appointing inspectors and regulating their duties.

"In the absence of any allegation that the resolution requiring the chairman and inspector to make the necessary arrangements for cleaning the streets has not been sanctioned by the Board of Supervision, and of any conclusion directed against the Board of Supervision, I sustain the first plea-in-law for the defenders, and assolizie them from the conclusions of this action."

The pursuers reclaimed, and argued—There was no enactment in the Public Health Act (under which the scavenger's appointment was made) authorising the Parochial Board at their own hand to appoint such an officer, and generally to assess the parish for his wages. All that the Act empowered them to do was to put down any existing nuisance, and to do it at the expense of the authors of the nuisance.

At advising—

LORD YOUNG—This case is really too clear for argument. It has been explained to us that the interest of these particular objectors is measured by a few pence in the year; in one case the amount for four years is 2s., in another 7½d. That is their interest, and the sum of the whole interest of the whole ratepayers of the parish is a matter of a few shillings a-week. There is a village which forms about one-third of the parish. The streets of it get dirty, and the Parochial Board, having the alternative of taking the opinion of over 600 people, after consultation with the Board of Supervision, arranged with the Road Trustees, as the most sensible course, to supply a scavenger to sweep away the nuisance at the small expense which I have mentioned. Now, I think it was clearly within the powers of the board, under the clause authorising them to appoint an inspector or other officer for carrying out the purposes of the Act, to appoint a scavenger, and I see no reason to differ from the Lord Ordinary or to doubt the soundness of the arrangement the board came to with the approbation of the Board of Supervision.

LORD RUTHVENFURD CLARK—I concur.

LORD M'LAREN—I also concur. I think that the Parochial Board was entitled to put the Act in force in the way it has done. To have appointed an inspector would have been out of place in this little village. But the Act does authorise them to appoint such inspector, and as the greater includes the less I am of opinion they were quite entitled in the circumstances to appoint the scavenger.

The LORD JUSTICE-CLERK and LORD CRAIGHILL were absent.

The Court adhered.

Counsel for Reclaimer—Mackintosh—Pearson. Agents—Cairns, M'Intosh, & Morton, W.S.

Counsel for Respondents—Graham Murray. Agents—J. & A. Hastie, S.S.C.