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

has come to be of opinion that the appellants are not bound to obey it, and that the Police Commissioners must themselves, out of the assessment they have levied, perform the work referred to in the order. The footway in front of the appellants' property was paved with dressed flagged pavement many years ago. The order complained against is to relay this existing footway with new pavement stones, according to specifications of the Police Commissioners. But the 22d section of the Forfarshire Roads Act specially exempts proprietors in the position of the appellants from the obligation to relay existing footways. It throws the *onus* of doing this on the Police Commissioners, who are to pay the cost of doing so out of the assessment levied. In other words, one of the purposes of the Act is to provide money for doing what the appellants are now ordered to do at their own cost by the order complained of. The money has been raised, and if the Police Commissioners do not themselves defray the cost of relaying this footway, they are not applying the money they have raised for one of the purposes for which they raised it.

"All this appears so clear that it is difficult to understand why the Police Commissioners have issued the order complained against. But they adopted the Lindsay Act in 1875, and they now fall back upon the 149th section of that Act, under which they argue that the appellants are bound to execute the work at their own cost. That section provides for the formation of foot pavements at the cost of proprietors whenever they are called upon by the Commissioners to do so. It is argued that this clause, being one of a General Police Act for Scotland, overrides the provisions of any local Act. In other words, the Police Commissioners avail themselves of the Roads Act to get the appellants' money, and then avail themselves of the Lindsay Act to avoid spending it. They collect an assessment, and refuse to do the work for which they collected it.

"The Sheriff-Substitute holds that the Commissioners having exacted the maximum assessment under the Roads Act, are barred by equity and common law from pleading the Lindsay Act as overriding the statutory claims on this assessment."

To this interlocutor the Sheriff (MAITLAND HERIOT) adhered.

The Police Commissioners appealed to the First Division of the Court.

A question of competency was raised but not insisted in.

Argued for the appellants—On the adoption in 1875 of the General Police Act of 1862 it at once repealed by virtue of the 35th clause any prior police Acts, and the clauses of any local or general Acts dealing with police matters that might be in force in the burgh. Accordingly the liability here fell upon the owners of adjoining property, for paving is by the Act of 1862 declared to be a police purpose.

Authority—*Campbell* v. *Leith Police Commissioners*, June 29, 1865, 3 Macph. 1035.

Argued for the respondents—It is perfectly clear that the Forfarshire Roads Act is intended to stand along with any Police Act that may be in force or that may be adopted in the burgh, and there is a constant reference to the Police Act of 1862 implied in this local Roads Act, which shows that they were intended to be read together.

At advising—

LORD PRESIDENT—The respondents in this case are owners of certain property in the High Street of Kirriemuir, and it is not disputed that the footway in front of their property is laid with dressed flag pavement, and has been in use for some time; and in particular it is not disputed that it was in existence before 1874. But on the 27th of October last the Police Commissioners served a notice on the respondents, ordering them to relay this pavement. The order sets out that the "footway in front of the property in High Street, Kirriemuir, belonging to" the respondents or under their charge "requires to be repaired and relaid with pavement in accordance with the following specifications." Then they go on to describe what is to be done, which is in effect to relay this pavement with stones of certain specified dimensions. This order bears to proceed under the authority "of the 149th clause of the General Police and Improvement (Scotland) Act 1862," and if the footways here are regulated by that section of the Police Act, that order, it is not disputed, is in proper form and must be obeyed. But the respondents maintain that the matter is regulated by the 22d section of the Forfarshire Roads Act 1874, and the question therefore is, whether the maintainance of this footway is provided for by the one Act or the other. The history of the matter is rather peculiar. The Road Act of 1874 proceeds on the principle of transferring all the roads in the county that are situated in any burgh to the Police Commissioners of the burghs, and of course lays on them the burden of maintaining the roads so transferred. At that time the Police Act in force in Kirriemuir was the Police Act of 1833, and under the 105th section of that Act it was provided that the footways should be maintained and relaid when necessary at the expense of the owner of the property abutting on them. In short, it was a provision substantially, and almost in words, identical with the provision in the 149th section of the Act of 1862. But the Road Act of 1874 notwithstanding provided that "wherever, before the commencement of this Act, footways have been constructed and are existing along any parts of the sides of any of such roads, these footways shall exempt the owners of lands and heritages along which they are constructed, so far as the length of these footways extend, from all obligation to construct footways or to alter the existing footways, but such Commissioners may in their own discretion reconstruct or alter such existing footways as to them may appear expedient for the public interest, and defray the cost out of the moneys to be raised by them under this Act."

I do not think it is capable of dispute, and indeed it was not disputed, that at the time of the passing of this Act the Police Commissioners could not have made the charge that they have done against the present respondents, because the Act of 1874, being an enactment subsequent to that of 1833, was of course the governing Act in reference to these footways. But it seems that in 1875 the burgh of Kirriemuir adopted the Police Act of 1862, and the effect of that, no doubt, was to put an end to the provisions of the

Act of 1833 and to put in their place the provisions of the Act of 1862 in the burgh. But it is said that it had the further effect of repealing the 22d section of the Forfarshire Roads Act. It rather appears to me that if that Act is so repealed at all it must be repealed *in toto*, for I can find no words which imply a partial repeal of existing Acts. The 35th section of the Act of 1862 provides that where it is adopted, "Any general or local Police Act in operation within such burgh shall be repealed, excepting in so far as it may relate to matters not provided for in this Act." If the Act of 1874 comes within the meaning of that 35th section, then for all police purposes the Act of 1874 must stand repealed; but I think that the Police Commissioners of Kirriemuir derive their sole interest from that Act, and I do not think that they can say that that Act of 1874 is repealed, for they are at present levying an assessment under the authority of that Act—the highest assessment permitted by it—viz., sixpence per pound on the rental.

But it will perhaps hardly do to say that any one is barred from pleading an Act of Parliament; we must go a little further. Now, I think it is extremely doubtful if the Road Act of 1874 is a local Police Act at all. The meaning of the repealing clause in the General Police Act of 1862 is—if you adopt this Act, then any local Police Act or any previous General Act under which the burgh may have been acting is repealed. The effect, therefore, of its adoption in Kirriemuir was to repeal the General Police Act of 1833, under which its police matters had previously been regulated. The 1st section provides that certain previous police Acts are repealed "except only as regards any burgh in which the provisions of the said Acts or any parts thereof have, on or before 1st August 1862, been adopted," and therefore they are not repealed by the passing of this Act; but then, by sec. 35, if these burghs go on to adopt the Act of 1862 the old Acts are repealed; the two sections read together plainly have that meaning. But while I am of opinion that the Road Act of 1874 is not a local Police Act, and is for that reason not repealed by the adoption of the Police Act of 1862, I am further of opinion that even if it were such an Act, it is plainly intended to be permanent. This Act is intended to have effect whatever may be the existing Acts regulating police matters, and is to stand alongside of any such Acts as may be in force in the burgh. In this very 22d section you have this express declaration—"for carrying into effect the provisions contained in this section, such Commissioners shall have and may exercise and enforce all the powers and authorities conferred on them by the Police Act in force within such burgh at the time for carrying into effect the provisions of that Act in reference to footways on the streets of such burgh." Now, that is to my mind conclusive evidence that this Act was intended to stand with any General Police Act that might be already in force, and to be read with it. There are other clauses in the Act of 1874 which go to the same effect, *e.g.*, the 38th, referred to by the Sheriff. Now, here is an express provision that this Act shall not prevent other Acts from receiving full effect in the burghs of Dundee and Broughty Ferry. Kirriemuir is purposely missed out, and very plainly because it was understood that if the Act of 1862 was afterwards adopted in Kirriemuir it should not interfere with the operation of this Road Act. In addition to this, I am not sure that the 149th section of the Act of 1862 applies to this case at all. That clause is found in part iv. sec. 3, of the Act called Paving and Maintaining Streets. There is a series of clauses, beginning with the 146th and going down to the 157th, on that subject. While the 149th provides that the owners whose property abuts on the footways shall be liable, there is another section, viz., the 156th, providing that "no liability attaching in law to the trustees of any turnpike or other road, or other persons liable to make, pave, causeway, maintain, or cleanse streets or the footways thereof, shall be affected thereby." Now, it seems to me that the Police Commissioners of Kirriemuir are within the description of persons so liable, and therefore the 149th section is not to affect their liability and transfer it to the owners of adjoining property. It is certainly satisfactory to come to this conclusion, for otherwise there would be a gross injustice done here. The Police Commissioners are levying money under their powers of assessment for the purpose of doing this very work, and at the same time they are trying to impose liability on the owner. I am clearly of opinion that the Sheriff and Sheriff-Substitute are right.

LORD DEAS concurred.

LORD MURE—I concur with your Lordships. I may add that there are other clauses in the Act of 1862 which reserve powers to continue local Acts in force, *e.g.*, section 81.

LORD ARDMILLAN was absent, but concurred in the judgment of the Court.

The appeal was dismissed.

Counsel for Appellants — Dean of Faculty (Watson)—Kinnear—Harper. Agents—Irons & Roberts, S.S.C.

Counsel for Respondents—Balfour—J. P. B. Robertson. Agents—Webster & Will, S.S.C.

Friday, July 7.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

MAGISTRATES OF GLASGOW *v.* WALTONS *et e contra.*

Servitude—Ish and Entry—Implied Grant—Conveyance.

Where A sold a portion of a property and there was an existing access to it through another portion, which he reserved, *held* there was an implied grant of access through the reserved portion.

Servitude—Confusio.

Where it was alleged that a plot of ground conveyed by A to B was identical with a plot which had formerly given right to a servitude of way over the rest of A's ground, *observed* (*per* the Lord President) that in