view, there is certainly no legal principle for it. It is possible that the decisions in regard to divorce for adultery and the forfeitures provided by statute in the case of divorce for wilful non-adherence, may have left the law in some obscurity, but I am of opinion that they do not support the defenders' plea here.

The Court recalled the Sheriff's judgment, repelled the preliminary plea for the defenders, and remitted the cause to the Sheriff to proceed, and with power to deal with expenses.

Counsel for Appellant—M'Kechnie. Agent—W. G. Roy, S.S.C.

Counsel for Respondents—Rankine. Agents—Auld & Macdonald, W.S.

Tuesday, January 30.

FIRST DIVISION.

SPECIAL CASE—SCHOOL BOARD OF LOCHGILPHEAD *v.* SCHOOL BOARD OF SOUTH KNAPDALE.

School Board—Board of Education—Statute 35 *and* 36 *Vict. cap.* 62, *sec.* 9—*Jurisdiction.*

Held that the words "any question or dispute regarding the area of any parish or burgh" in the 9th sec. of the Education Act, are not restricted to cases where a burgh is contained in a parish, but are universally applicable, and that the determination of the Board of Education is final.

Where a question as to the extent of a decreet of disjunction and erection of certain lands into a new parish *quoad sacra* had been submitted to the Board of Education by the School Board of the *quoad sacra* parish before there was a School Board in existence in the other parish having an interest, and a determination issued by the Board of Education on the question submitted, without reference to the terms of the decreet—*held* that there was no finality in such a determination.

By a decreet of disjunction and erection, of date 9th December 1846, the Teind Court erected certain lands attached to a Parliamentary church which had been built at Lochgilphead under the authority of the statutes 4 Geo. IV. cap. 79, and 5 Geo. IV. cap. 90, into a parish *quoad sacra*, to be called the parish of Lochgilphead. It was matter of doubt from the terms of the decree whether two farms, Daill and Craiglass, were included in the new parish or still belonged to the parish of South Knapdale, one of two parishes which contributed part of their area to form the new parish of Lochgilphead. A School Board was elected for the parish of Lochgilphead on 11th March, and one for South Knapdale on 24th April 1873. By a minute, dated 10th April 1873, the Board of Lochgilphead, under the 9th clause of the Education Act, resolved to submit an extract of the decreet of the Teind Court to the Board of Education, and ask their opinion as to whether these two farms were to be held to be part of the parish of Lochgilphead for the purposes of the Education Act. On 18th April the Board issued the following determination:—The Board of Education "having considered the application made on behalf of the School Board of the *quoad sacra* parish of Lochgilphead, and having examined and considered the decreet of disjunction and erection of the districts attached to said parish, with reference to the question submitted regarding the farms of Daill and Craiglass, which question the School Board crave may be settled by virtue and in exercise of the powers in them vested under the Education (Scotland) Act 1872, have settled and determined, and do hereby settle and determine, that for the purposes of the said Act the farms of Daill and Craiglass above mentioned shall be included and comprehended within the area of the said *quoad sacra* parish of Lochgilphead." Both submission and determination, it will be observed, were prior to the election of the School Board of South Knapdale.

The Parochial Board of South Knapdale, when required by the School Board of Lochgilphead to levy the necessary assessment "from those parts of the parish of South Knapdale attached to the parish of Lochgilphead, including the said farms of Daill and Craiglass," refused to do so "until it should be judicially decided to which parish, for the purposes of the said Education Act, they belonged," in respect that the School Board of South Knapdale were dissatisfied with the determination of the Board of Education.

The 9th section of the Education Act 1872 provided—"The area of a parish shall, for the purposes of this Act, be exclusive of the area of any burgh or part of a burgh situated therein for which a School Board is required to be elected, and the area of every such burgh shall, for the purposes of this Act, be taken to be the limits within which the municipal, or where there are no municipal, then within which the police, assessments thereof are levied. And any question or dispute regarding the area of any parish or burgh for the purposes of this Act shall be settled by the Board of Education, or by the Sheriff of the county . . . on an application by the School Board authorised by the Board of Education, and the determination of the Board of Education or of the Sheriff, as the case may be, shall be final."

This Special Case was accordingly submitted to the Court, the first parties (the School Board of Lochgilphead) maintaining that the determination of the Board of Education was final; and, on the merits, that by decreet these farms made part of the parish of Lochgilphead.

The parties of the second part, (the School Board of South Knapdale) on the other hand maintained (1) that section 9 of the Education (Scotland) Act 1872, does not apply to such a question as the present, being limited to the case of a parish containing a burgh or part of a burgh, or at all events to questions of mere boundaries between parishes; (2) that in any case the Board of Education had no power to dispose of any such question on an *ex parte* application, and without giving other parties interested an opportunity of being heard; and, on the merits, that these farms still belonged to South Knapdale.

The following were the questions submitted to the Court:—"(1) Whether the determination of the Board of Education for Scotland, . . . is final, and conclusive of the question whether, for the purposes of the Education (Scotland) Act 1872, the farms of Daill and Craiglass form part of the parish of Lochgilphead, or of the parish of South Knapdale? (2) Whether the farms of Daill and Craiglass, for the purposes of the Education (Scotland) Act 1872, form part of the parish of Lochgilphead? Or (3) Whether the said farms, for the purposes

of the said Act form part of the parish of South Knapdale."

The first parties argued—The determination of the Board of Education is final, and it is not necessary that all parties should be called who have conflicting interests in the determination. There are provisions in the 11th, 17th, 18th, and 19th sections of the Education Act 1872, for the determination of questions affecting very materially the interests of parties who are not required to be called. There might be a case submitted for the determination of the Board of Education, without the possibility of there being any other parties heard, for there might be, as was the case here, no School Boards in existence in the neighbouring parishes. In matters which are, as this was, left to the discretion of any Board, the Court will never interfere. *On the merits*—The decreet sets the farms in question in the parish of Lochgilphead.

Authorities quoted—*Guthrie* v. *Miller*, May 25, 1827, 5 S. 711 (Lord Alloway's opinion); *Leith Police Commissioners* v. *Campbell*, December 21, 1866, 5 Macph. 247; *Lord Advocate* v. *Perth Police Commissioners*, December 7, 1869, 8 Macph. 244.

The second parties argued—The review of the Supreme Court cannot be excluded except by an express declaration that it is excluded. There is a broad distinction in the statute between questions of contentious disputation, and questions of administration which may be arbitrarily and finally determined by the Board of Education. The right to dismiss a schoolmaster, given to the School Board, and the power of the Board of Supervision to regulate the conduct of inspectors of the poor, have been held not to be subject to the review of this Court but at the same time it is the province of this Court to see that the procedure is according to the statute; such Boards can be made to use this discretion in a proper mode, although the merits of their decision may not be subject to review. This deliverance is an absolute nullity, for parties very materially interested are not called. *On the merits*—These farms are not included in the district erected by the decreet.

Authorities quoted—Erskine, i. 2, 7; *Lord Advocate* v. *School Board of Stow*, February 19, 1876, 3 Rettie 460; *Macfarlane* v. *School Board of Mochrum*, November 9, 1875, 3 Rettie 88; *Clark* v. *Board of Supervision*, December 10, 1873, 1 Rettie 261; *Dubs* v. *Police Commissioners of Crosshill*, June 1, 1876, 3 Rettie 758; *Pryde* v. *Kirk-Session of Ceres*, February 14, 1843, 5 Dunlop 552.

At advising—

Lord President—The first question we have to determine is—"Whether the determination of the Board of Education for Scotland, printed in the appendix hereto, is final, and conclusive of the question whether, for the purposes of the Education (Scotland) Act 1872, the farms of Daill and Craiglass form part of the parish of Lochgilphead or of the parish of South Knapdale?" Now, the first thing to be done is to look at this determination, and see what it is that is said to be final and conclusive of that question. The School Board of Lochgilphead, by a minute which is also printed in the appendix and is made part of the case, having had before them an extract-decreet of disjunction and erection of the parish of Lochgilphead, and it having been submitted to them "that there was doubt whether the farms of Daill and Craiglass, according to the terms of the decreet, form part of the parish of Lochgilphead *quoad sacra*, having considered the matter, resolve to ask the opinion of the Board of Education on the question." The determination of the Board was as follows:—[quoted *supra*].

Now, one of the reasons assigned by the second parties to this case why this determination should not be final is, that the Board of Education are not entitled upon an *ex parte* representation, and without calling all parties interested in the question and giving them an opportunity of being heard, to pronounce any such deliverance; and there is another point that occurs to me, viz., that they do not by this deliverance determine the matter in question at all, viz., the interpretation to be put upon the terms of the decreet of disjunction; they merely come to the conclusion "that for the purposes of the said Act the farms of Daill and Craiglass above mentioned shall be included and comprehended within the area of the said *quoad sacra* parish of Lochgilphead." That is perhaps a critical view to take of the question, but I think it is an important objection to this deliverance, if we suppose that the Board has the powers contended for by the first parties. Now, what are their powers? Is this determination final? I am of opinion that it is not, and upon these grounds I am prepared to answer the 1st question in the negative.

But the second question is a question on the merits, and before we can consider it we are met by the objection that we have no right to determine it. My opinion is that the consideration of each question is competent to the Board of Education, and that their determination is final. There is no doubt that the 9th section of the statute commences by dealing with questions that may arise where there is a parish containing a burgh, and the words we have to construe are in the same section, but they are far too broad merely to apply to the case of parishes containing burghs. The present is without doubt a dispute regarding the area of a parish; for the purposes of this Act the determination of such disputes is committed to the Board of Education, and that determination is said to be final. There is no doubt a little difficulty in following the policy of the statute in committing the determination of legal questions such as this (which is a question as to the interpretation to be placed on a decreet of the Teind Court) to a Board of this kind, but it is not to be left out of view that an alternative is given; it may be settled by the Sheriff on an application by the School Board authorised by the Board of Education. That alternative is given, it appears to me, that in disputes such as this, where a legal question arises, parties may go to the Sheriff for its determination.

The other clauses of the statute that have been referred to go to support this construction of the 9th clause. The powers given by them are of a different kind, but they are very large, affecting materially the civil rights of parties, subjecting them to assessment or freeing them from it. This section is therefore, in the view I take of it, consistent with the whole purview of the statute; and considering further the very wide words used in the clause itself, I am of opinion that such questions as the present are committed to the determination of the Board of Education, and their determination is to be final.

We shall therefore answer the first question in the negative, and decline to answer the others, in respect that our jurisdiction is excluded.

Lord Deas—A decree of disjunction and erection was pronounced on 9th December 1846, by which certain lands were erected into a new parish, to be called the parish of Lochgilphead; and on looking at that decreet there is plainly room for question whether the farms in dispute do or do not belong to the parish in question. I agree in thinking that the 9th section of the statute puts that at the disposal of the Board of Education; when you come near the end of the section you must read it thus—"any question or dispute regarding the area of any parish or" the area of any "burgh." This is a question relating to the area of a parish, depending on the effect to be given to that decreet of disjunction. The question put to the Board was, "Whether the farms of Daill and Craiglass, according to the terms of the decreet, form part of the parish of Lochgilphead *quoad sacra*." That is the question they had to consider; it was their duty to apply their minds to the terms of the decreet, to hear parties concerned, and to consider whether they should interpret it themselves or send it to the Sheriff. They did not hear parties, and did not consider whether they should send it to the Sheriff, and consequently they do not give a properly framed answer at all; their answer looks as if they thought they had an arbitrary power to add to one parish and take away from another. I am of opinion therefore that, as the case stands, there is no finality in their deliverance, for they have not done the thing they were asked to do. If they had themselves considered the terms of the decreet and heard parties, or taken the more proper course of sending the case to the Sheriff, that determination would have been final.

Lord Mure concurred.

Lord Shand—I agree that under the 9th section of the Act such a matter as this falls to be determined by the Board of Education, and if the Board themselves decide it or send parties to the Sheriff, that determination, having the limited effect of determining the bounds of the parish for the purposes of this Act, is final.

I think it is rather a narrow view of the question to say that the matter is not dealt with in the deliverance of the Board of Education. I prefer to put my judgment on the ground that they did not hear the parties interested. They should either have called some one who had an interest on the opposite side, or waited till some one should have an interest to appear on the other side.

The Court pronounced this interlocutor:—

"Find and declare that the question or dispute, Whether in terms of the decreet of disjunction and erection, dated 9th December 1846, the farms of Daill and Craiglass form part of the parish of Lochgilphead or of the parish of South Knapdale, is by sec. 9 of the Act 35 and 36 Vict. chap. 62, and for the purposes of that Act, competent only to the Board of Education, or to the Sheriff of the county, as therein provided: But find that the determination of this question by the Board of Education, by their minute of 13th April 1873, having been made and issued without hearing the party of the second part, or giving opportunity for any party representing the parish of South Knapdale being heard on the said question, is not valid or final, and that the said question or dispute still remains to be determined by the said Board of Education or the Sheriff, in terms of sec. 9 of the said Act: Therefore the Court answer the first question in the negative, and for want of jurisdiction decline to answer the second and third questions."

Counsel for First Parties—Darling. Agents—Tods, Murray & Jamieson, W.S.

Counsel for Second Parties—Kinnear. Agents—Mackenzie & Kermack, W.S.

Wednesday, January 31.

FIRST DIVISION.

PETITION—LILLEY.

Parent and Child—Custody of Children—Husband and Wife.

Held that where neither parent is personally disqualified for the custody of a child, the right of the father must prevail.

Husband and Wife—Expenses.

In a petition by a father for the custody of his child, which was granted, the petitioner *found* liable in expenses.

This was a petition presented by the Rev. J. P. Lilley for the custody of his infant child. He was married to the respondent in July 1875, and on returning home from a visit to his father in March 1876 found that his wife had left his house. She was delivered of a female child on 19th May 1876, in her sister's house, and since that date had remained there with the child. Answers were lodged by the respondent, narrating the causes of her leaving her husband's house, and stating that the child though healthy was not robust, and required all the care a mother could give it. She offered the petitioner free access to the child as he might propose or the Court fix. The petitioner made the same offer to her if the Court should grant his petition.

When the case first came before the Court, as it appeared that the child had not been baptised, their Lordships postponed consideration of the petition for a week that this might be done, as parties' counsel should arrange.

Argued for the petitioner—Without going into the merits of the dispute between the parties or touching on the allegations made against the petitioner, this question may be dealt with as one of legal right. It is necessary before a father can be deprived of the custody of his child that some danger to life, health, or morals should be shown to be a likely consequence of its being given into his care, and there can be no such danger apprehended here.

Authorities—*Lang* v. *Lang*, January 30, 1869, 7 Macph, 446 (Lord Neaves' opinion); *Nicolson* v. *Nicolson*, July 20, 1869, 7 Macph. 1118; *Steuart* v. *Steuart*, June 3, 1870, 8 Macph. 821; *Curtis*, May 7, 1859, 5 Jurist (n.s.) 1148, 28 L. J., Ch. 459.

Argued for the respondent—The circumstances here, without considering the allegations made against the petitioner, take this case out of the ordinary rule. The child has never been in the father's house; it is of a very tender age, and a girl. The Court in such a case must determine the matter according to the child's interest. In