should be allowed them of their averments on record.

If the pursuers could have satisfied us that the case of Rutherfurd was distinguishable from that of John Laird junior we might have consented to the mode of inquiry proposed, but I cannot see that the pursuers have succeeded in making any such distinction.

These letters-patent themselves do not form a deed of trust, nor are they embodied in any deed of trust, but the grant was taken in the name of the defenders by the pursuers themselves, and that proves the peculiar feature of this case and makes these letters-patent equivalent to a deed of trust by the pursuers in favour of Rutherfurd and John Laird junior; nor can I see that the circumstance of John Laird junior being a partner of the late firm at the time when these letters-patent were granted makes any difference in the question now before us. I therefore agree with your Lordships in thinking that we should adhere to the interlocutor of the Lord Ordinary.

Lord Deas was absent.

The Court adhered, and remitted to the Lord Ordinary to proceed with the cause.

Counsel for Pursuers (Reclaimers)—Comrie Thomson—Guthrie. Agents—Henry & Scott, S.S.C.

Counsel for Defenders (Respondents)—J. P. B. Robertson—Fleming. Agents—Morton, Neilson, & Smart, W.S.

Wednesday, December 10.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

JAMESON AND OTHERS *v.* THE POLICE COMMISSIONERS OF DUNDEE.

Property—Boundary—River—Police—Right to Alveus *of Burn which has been from Time immemorial a Common Sewer—General Police Act* 1850 (13 *and* 14 *Vict. cap.* 33), *sec.* 228.

In the course of the construction of docks in a burgh certain land was recovered from the sea and came to be possessed by the adjacent proprietors whose lands were bounded by the sea flood. A burn which from time immemorial had been used as a public drain, and which was finally covered in and conducted through pipes, flowed southward through certain of these lands, and as the land was recovered from the sea the course of the burn or drain was extended till it came to form the sewer passing under the street adjoining the docks, which formed the seaward boundary of the adjacent lands. Over the channel of the burn immediately to the north of this street the police commissioners of the burgh had erected and maintained for more than twenty years a public urinal and privy. The *alveus* of the burn above the pipes was otherwise an open space. The proprietor of a warehouse on one side of this open space, and the proprietor of a shop on the other side, raised an action against the police commissioners for declarator that no part of the ground on which the urinal and privy were erected belonged to the commissioners, but that the whole of it belonged to them (pursuers) for their respective interests, and to have the commissioners ordained to remove the erections. The pursuers produced title-deeds of their authors in the lands to which the land gained from the sea had accresced, the earlier of which described the lands of each of them as bounded by those of the other, while the later titles of one of them described his lands as bounded not by those of the other but by the burn, and contained a measurement. *Held* that as the burn had been from time immemorial a public drain, and as such belonged to the police commissioners for behoof of the community, and as the pursuers had established no title to the *alveus* of the burn by grant from the magistrates, and no prescriptive title by use, the defenders should be assoilzied.

When the docks of Dundee were constructed under the Dundee Harbour Act of 1815, Dock Street, which runs east and west, was laid out on ground recovered from the sea or Firth of Tay, and formerly within high-water mark. By the construction of Dock Street some ground immediately to the north of it—that is, between it and the place still called the "Seagate" of Dundee—which had formerly been likewise within high-water mark, came into possession of the owners of property at and near the Seagate whose lands were bounded on the south by the sea-flood. A burn called (towards its eastern extremity) the "Mause Burn" or the "Mause Hole," formerly flowed into the sea at Burnhead at the west end of the Seagate. As the bed of the Tay was filled up down to Dock Street the burn made a new development of its channel seawards, and when Dock Street was completed it was carried into a sewer which was constructed under that street.

The General Police Act of 1850 was adopted by the town of Dundee in 1851. Section 228 of that Act (13 and 14 Vict, cap. 33) provides—"That all sewers and drains within the burgh, whether existing at the time when this Act is applied, or made at any time thereafter (except sewers and drains the private property of any person or persons, or made and used as of private right by any person or persons for his or their own profit, or for the profit of proprietors or shareholders, and except sewers and drains made and used for the purpose of draining, preserving, or improving land under any local or private Act of Parliament, or for the purpose of irrigating land), shall vest in and belong to and be entirely under the management and control of the commissioners."

The Mause Burn was originally a burn of pure water flowing through what was formerly known as the Meadows of Dundee, but had been since the beginning of this century or earlier used as a public sewer of the town, and had become foul. At the time of the adoption of the Police Act 1850 it was still open, but as building in the neighbourhood increased it was in 1864 covered over, and at the time the present action was raised it flowed entirely in pipes underground till it joined the sewer in Dock Street. There was then (with the exception of the buildings after mentioned) no building upon the bed of the burn above the pipes, and it thus remained (above

these covered pipes) as an open space between the walls of the buildings on each side of it which had a frontage to Dock Street.

In or about 1854 the Police Commissioners erected a public urinal, and some time afterwards (and about twenty years before the date of this action) a public privy, over the drain or sewer in the channel of the burn, immediately north of the line of Dock Street.

In June 1884 George Jameson, merchant, and Matthew Allison and James Allison, partners of the firm of James Allison & Sons, sailmakers, raised the present action against the Police Commissioners of the burgh to have it declared "that no part of the ground upon which the said commissioners have erected a privy and urinal near to and entering from the north side of Dock Street, Dundee, belongs to the said Police Commissioners, but that the whole of the same belongs to the pursuers, for their several interests, but this without prejudice to the statutory rights of the said Police Commissioners in or to any sewers laid in the said ground;" and "that the said defenders had and have no right to erect any privy, urinal, or any other buildings or erections on said piece of ground;" and to have them ordained to take down the urinal and privy, and failing their doing so to empower the pursuers to do so themselves.

The pursuers averred that they were both owners of lands situated on the north side of Dock Street, which were conterminous, and that the ground on which the urinal and privy were erected was the *alveus* of the Mause Burn, which *alveus* was their property, "the western portion of the *alveus, ad medium filum*, having belonged to the authors of the pursuer Jameson, and the eastern portion to the authors of the pursuer Allison." They stated that the urinal and privy injuriously affected their property, and maintained that the erection thereof was beyond the power of the defenders, and that they had no right or title to make it. No question of nuisance was raised by the action.

The defenders maintained that the pursuers' lands were not conterminous, but were divided by the Mause Burn, which belonged to and was vested in them (defenders) either as Police Commissioners or as magistrates of the burgh, for behoof of the community. They further denied that the pursuers or either of them had ever possessed the *alveus* of the burn, or that it was embraced in their titles. It had always been, they averred, "and has also always been treated, as public property under the control and administration of the defenders and their predecessors, and the pursuers have no title to or interest in it, or any ground that now, owing to the operations of the defenders, has come in place of it."

The pursuers pleaded—"The ground libelled not being the property of the defenders, but belonging to the pursuers, decree should be granted as concluded for."

The defenders pleaded—"(2) The said privy and urinal having been erected by the defenders on ground belonging to them, or on public property, the defenders are entitled to be assoilzied from the conclusions of the summons, with expenses. (3) The pursuers having no title to or interest in the Mause Burn, or the ground which now occupies the place of said burn, are not entitled to have decree of declarator pronounced as concluded for."

The oldest title which the pursuer Jameson produced was a disposition by the town of Dundee to James Marshall, dated 30th August and recorded 2d September 1746, of a piece of ground which was described as lying within flood-mark, and bounded with the sea-flood on the south. This piece of ground lay immediately to the west of and was afterwards incorporated with a tenement of land described in the next oldest title produced by the pursuer Jameson, being a disposition by David Jobson to Robert Jobson dated 22d and recorded 25th September 1815, as "All and Whole that large tenement of land, up and down, high and laigh, which was formerly two ruinous tenements, but sometime ago rebuilt by John Barclay, shipmaster in Dundee, and haill privileges and pertinents thereof, with the yard behind, area in front, and stable and offices built thereon, lying on the south side of the Seagate of Dundee, betwixt the lands of the heirs of George Brown of Horn on the east, the lands sometime of Alexander Jack, thereafter of the Baker Trade of Dundee on the west, the sea flood on the south, and the Seagate on the north parts." The Mause Burn flowed between the lands conveyed by this deed and the lands of the heirs of George Brown of Horn. The immediate title of the pursuer Jameson was a disposition to him by John Thoms, dated and recorded in May 1865, of subjects described as "a large warehouse fronting Dock Street, Dundee, bounded on the south by Dock Street, on the east by the property of the successors of William Kirkcaldy, . . . together with the ground on which the said warehouse is built, measuring 56 feet or thereby along Dock Street," and which ground was further said to form part of (1) the subjects acquired by James Marshall as above mentioned, and (2) of the subjects described in the title to Robert Jobson as betwixt the lands of George Brown of Horn on the east.

The pursuer Allison was the successor of William Kirkcaldy and George Brown of Horn, in part of their lands, and his earlier titles, the first of which was dated in 1805, described the lands as bounded on the east by the property of the authors of the pursuer Jameson. But in a disposition to the said William Kirkcaldy dated in 1820 and recorded in 1826, the subjects were described as "a piece of ground . . . extending to the south until it reach the new pier or harbour wall presently built, at which place the same extends in breadth 59 feet 7 inches or thereby, bounded by . . . Mause Hole or Burn on the west." In a later disposition, viz., to John Fyffe, and dated in 1851, the Mause Hole or Burn was again stated to be the boundary on the west. The immediate title of the pursuer Allison was a disposition recorded in June 1878, in which the subjects disponed to him are described as two shops in Dock Street with two small warehouses behind, "bounded . . . on the west by the Mause Hole or Burn," all as the subjects thereby disponed "are delineated on the plan or sketch hereto annexed and subscribed by us as relative hereto." The subjects were also said to be part of All and Whole the lands or subjects as described in the titles to William Kirkcaldy and John Fyffe above referred to.

The Lord Ordinary assoilzied the defenders.

"*Opinion.*—In this case I may state the ground of judgment in a sentence. The Police

Commissioners of Dundee are vested by statute in the property of all the sewers of the burgh. Where such sewers are constructed in private property, I should not consider that the Police Commissioners had any right to the land in which the sewer was laid, except for the purpose of making and maintaining a sewer therein. But in this case the Mause Burn is a natural water-course; and the land on which the objectionable building has been placed is land gained from the sea. When the adjacent proprietors extended their possessions seaward, the Mause Burn was necessarily extended with them, and it is evident from the statements on record that neither of the pursuers have had such possession of that part of the water-course which was gained from the foreshore as would suffice to give him a prescriptive right to the *solum*. In the absence of such prescriptive acquisition by the pursuers, the *solum* of the water-course within the old high-water mark belongs either to the Police Commissioners or to the Crown, subject to a qualified right of property on the part of the Police Commissioners. I am therefore of opinion, that in a question with the pursuers, the Police Commissioners were acting within their rights when they put up the building to which the pursuers object.

"The case of the pursuers is not rested on nuisance, but on their alleged right of property, and as in my opinion that right of property has not been established, the defenders are entitled to be assoilzied."

The pursuers reclaimed, and argued—The titles of both pursuers clearly showed the pursuers' right each to one-half of the *alveus ad medium filum* of the burn, which was a natural water-course before it was confined in a drain. As the sea-shore receded each proprietor followed it, and the boundaries of continuous properties remained the same in the new ground as in the old. The right to the *solum* of the burn in the new ground must therefore be in the proprietors of the old ground—it could not go to the Crown or Police Commissioners merely because it was an extension of the channel through ground which had formerly been foreshore. The right of property given to the Police Commissioners in drains by the Police Act was not a right *a cœlo usque ad centrum*, but only to so much of the land as was necessary to make and maintain drains. The measurement in the later titles of Allison's property did not affect his right, for his land was described by boundaries, and it was settled that where there was a boundary description a measurement was not taxative. It was not necessary to show use of the surface of the ground over the burn when it was clearly within the boundaries of their titles.

Authorities—*Blyth's Trustees* v. *Shaw-Stewart*, November 13, 1883, 11 R. 99; *Hunter* v. *Lord Advocate*, June 25, 1869, 7 Macph. 899; *Wishart* v. *Wylie*, 1853, 1 Macq. 389; *M'Intyre's Trustees* v. *Magistrates of Cupar-Fife*, May 24, 1867, 5 Macph. 780; *Morris* v. *Bicket*, May 20, 1864, 2 Macph. 1082; *Gibson* v. *Bonnington Sugar Company*, January 20, 1869, 7 Macph. 394; Rankine on Land Ownership, 98.

The defenders replied—For a longer period than the pursuers' titles covered, this burn had been nothing more than a public drain, and as such belonging to and vested formerly in the magistrates and afterwards by statute in the Police Commissioners for public uses. The pursuers therefore must show a title from the magistrates or a prescriptive title by use to the *alveus* of the burn. They had shown no title from the magistrates, and as regarded use, the defenders, on the other hand, had shown that they and not the pursuers had made use of the ground for the prescriptive period.

Authorities—*Smart* v. *Magistrates of Dundee*, 1797, 3 Paton's App. 606; *Blyth's Trustees* (*supra*); *Todd* v. *Dunlop and Others*, June 8, 1841, 2 Robinson's App. 333; *Berry* v. *Holden*, December 10, 1840, 3 D. 205.

At advising—

Lord Young—This is a peculiar case, involving questions both of fact and law. The pursuers are proprietors of house property in Dock Street of Dundee, and it appears that the site of Dock Street and of the houses of which the pursuers are proprietors was at a not remote period within the flood-mark, but that ground having been recovered from the sea Dock Street was constructed, and what is now the pursuers' ground became filled up. There is a conduit or sewer running through this ground which was originally a stream. In the days when it was free from contamination it was a little burn. There is little evidence when it ceased to be so, but there is no doubt that from a remote period it has served as a drainage conduit for the inhabitants of Dundee. The ground both within and without high-water mark was, we know, originally the property of the burgh, that is to say, of the community, and vested in the magistrates as guardians of the community's rights. The pursuers have a title to their property flowing not immediately but mediately from the magistrates, and they complain of the uses which the magistrates in their capacity of commissioners of police, and in exercise of the powers and discharge of the duties imposed on them by the Police Act are now making of this conduit.

The conduit of course extended as the ground was recovered from the sea. It entered the sea originally further north than it now does, and the use complained of is the erection of certain public conveniences immediately to the north of Dock Street, to which the pursuers' premises have frontage. The pursuers' title, as I said, flows mediately from the magistrates, but we are in possession of no earlier title than that of 1746, which though flowing immediately from the magistrates throws little light on the subject. The complaint is rested on an alleged right of property in the pursuers, so the question is, Are they proprietors or not? Now, I think it appears on the face of the deeds which are before us that this has always been a conduit, and in a question with one of the pursuers must be taken to have been a public conduit from a very remote period, for the pursuer Jameson's predecessor, so long ago as 1805, at the request of the magistrates, to satisfy an immediate purpose of his own, executed a formal deed acknowledging that so far as he was concerned it should be esteemed a public conduit then and in all time coming. But it was really conceded by the pursuers' counsel at the bar, and is alone consistent with the record and all the deeds before the Court, that it has always—at least as far back as we are interested to look—been a public conduit for drainage purposes, and as such under the ad-

ministration of the proper public body for the time being having charge of the public drainage, which would be the magistrates till the Police Act was passed, and after that still the magistrates under the name of police commissioners. They make the use complained of, and no one is entitled to complain but the proprietors of the ground which is used. These are the pursuers. They have produced no title from the magistrates, who are admittedly the original proprietors, conveying the ground to them or to any predecessor of theirs, and when it was put to the counsel for the pursuers whether they desired any aid from the Court in recovering any original title flowing from the magistrates which showed that they were divested of the property by the original conveyances, the answer given was that counsel was not in a position to say that any inquiry had been made on the subject, so that he could not suggest that even any aid from the Court would succeed in recovering any title flowing from the magistrates at all favourable to the pursuers' case, that is to say, such a title as would show that the property of the ground in dispute was thereby conveyed from the magistrates so that they were divested to any extent. We must then proceed on the assumption that it is not proved to us that by any deed proceeding from themselves the magistrates, in that capacity in which they could deal with the town's property, had divested themselves or invested the pursuers or either of them.

Then with regard to use. The use complained of has always been the proper use of a public conduit such as this by the authority entitled to use it or direct the use of it. It has been used for twenty—or, to some extent, for thirty — years in the very way now complained of. This is a lawful use in itself by this public body, unless there is a proprietor of the ground also entitled to complain, or an adjoining proprietor entitled to urge nuisance; but we are not now disposing of any objection or of any ground of objection such as that—that will still remain open to the parties—but only of an alleged title of ownership on the part of both or either of the pursuers. Now, I think the title of either of the pursuers has not been made out. The pursuer Allison has a title bounded by the public conduit. I do not think that gives him, *prima facie*, any right of property in the conduit, or any right to interfere with an otherwise lawful use made of it by a public body which was entitled to take charge of it. The other pursuer, Jameson, has a title which seems to include it, because his title says that his property is bounded on the east by the property on the other side of the burn, but that will not enable him to exclude the magistrates, in their character of Police Commissioners, from discharging a duty imposed upon them by the Police Act, unless there has been some prescription signifying a right of property confirmed to him against the world. But no proprietary use has been made of it. Jameson's property is a warehouse enclosed within high walls, and the conduit runs outside of it, and he has never done any act to assert a right of ownership over it, and his predecessors since 1805 have recognised it as a public conduit, with the magistrates' use of which they were not entitled to interfere.

Therefore, on these grounds, without entering into any question of foreshore, I propose that your Lordships should adhere to the Lord Ordinary's interlocutor, and assoilzie the defenders from the conclusions of the action.

Lord Craighill — I have come to the same conclusion. The defenders in this case are the Police Commissioners of Dundee, and therefore owners and proprietors of all drains within the burgh. Now, there is no dispute that this burn was a public conduit from a remote period, and as such belonged to them. Formerly it was open, but some twenty years or more ago it was covered in, but only for the purpose of rendering it more convenient as one of the drains of the town. By that operation the commissioners acquired no right which they had not at first. What the pursuers complain of is, not the use of the burn as a drain, but its use as a foundation for the erection of certain premises over it, and so encroaching on rights which the pursuers say belong to them. The pursuers say their predecessors acquired rights which included one-half each of the *solum* of the Mause Burn, and they now ask that the defenders should be prevented from using the ground any more as they have previously been using it. The only question now to be determined is, whether the ground of action has been established, and whether consequently the pursuers are entitled to prevail? It is clear that no power of the commissioners could operate against a right of property in the channel of the burn conferred on the pursuers. What therefore the pursuers have indubitably to establish, and without establishing which they cannot prevail, is such a right of property. My opinion is, that the pursuers have not shown that they or their predecessors ever acquired any right of property in the Mause Burn. There is no doubt that the burn has from time immemorial been used as a drain. It is so described in the oldest titles which the pursuers have produced. It is thus not likely that the magistrates would grant a right to one-half of it to a proprietor on one side, and a right to the other half to a proprietor on the other side. I do not think they would give such a right to anybody. But it might have been that for whatever reason they did grant such a right—and the language of the earlier deeds was presented by the pursuers as leading to such a conclusion—and if that description had been kept up in the later deeds, we might have been constrained to hold that a right to the burn had been granted to the pursuers' predecessors, but since the language of the earlier deeds has not been repeated in the later ones, we should require to be perfectly satisfied that such a right was intended to be conferred, and was actually conferred, by these deeds. Now, I am disposed to adopt the interpretation suggested by the defenders, and am further strengthened in that view by the fact that the description of the property in the earlier deeds has not been maintained in the subsequent deeds. In these deeds the west boundary has ceased to be the property on the other side of the burn, and has become the burn itself. In ordinary circumstances, when a property is described as bounded by a stream, there is a strong presumption that a right in the *alveus ad medium filum* is conveyed, but it is hard to conceive that there is any reason for such an interpretation. here

The question whether a right of property bounded by a burn which is a drain, and as such vested in the Police Commissioners, gives the disponee any right in the drain, has never been the subject of decision. But I am satisfied from the recent titles produced that the right of property in the *alveus* never was conveyed to them, for besides the omission of the opposite property as the boundary there is in those titles a specific measurement and a plan referred to, which is not consistent with the inclusion of a right of property in any part of the *alveus* of the burn. The only result which I can come to is that we are not driven by a consideration of the titles produced by the pursuers to hold that they have any right to the *alveus* of this drain or burn. It would require a very clear case indeed before I could hold that this burn which had been so long a public conduit could pass in property, one-half to a proprietor on one side, and the other half to a proprietor on the other. We have have no assistance in interpreting the titles from the possession of his property by either of the pursuers. The only persons who have used this conduit for thirty or forty years back, or for any period of which we have any account, are the defenders or their predecessors long before police commissioners existed. Taking everything into account, I think it safe to say that it has not been satisfactorily shown that a right of property exists in the pursuers, and that the Lord Ordinary has arrived at a sound conclusion, and that his judgment should be upheld.

Lord Rutherfurd Clark—The Court having been asked by both parties to decide this case as it stands, I confess that in deciding it off-hand to-day I cannot free myself from grave doubts. The titles which have been produced are, so far as they go, in favour of the pursuers. I think any reading of the pursuers' titles could not carry their title further than to one-half of the burn. Jameson's title at all events gives right to one-half of the burn, and there is something to be said for the earlier titles of the other pursuer. But speaking now of Jameson's titles, these extended over a series of years, and certainly gave right either to one-half or to the whole of this burn. There is no doubt that these titles do not flow from the town, but from later proprietors, and therefore they are not altogether the grant of the town. But then they have not been in any way impeached. It is not said by the defenders that the later titles are not conform to the warrants on which they proceed, and my difficulty is whether I am not bound to assume that these titles are in conformity with their warrants, and therefore do describe the subjects as the town conveyed them, and if I were bound so to assume, I should be bound to hold that the judgment proposed by your Lordships should not be pronounced. But as I entertain only grave doubts, and as your Lordships have already decided the case, it is not necessary for me to say more.

Lord Justice-Clerk—I concur with the majority of your Lordships. I do not say I find no difficulty in the case, especially in its feudal aspect, but I have come to the conclusion that the pursuers have failed to prove what is necessary for their case, namely, that they are owners of the burn, and so entitled to prevent the use made of it by the Police Commissioners. The views on which that conclusion is founded have been so well expressed by your Lordships already that I need not enlarge on them further. I only think it necessary to say that the question of nuisance is in no way prejudiced by this decision, and I understand it to be agreed on both sides to be still open. My impression is that the magistrates would be doing rightly if by any arrangement they may make they can render the premises less objectionable to those persons whose property lies in the neighbourhood.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Keir—Hay. Agents—Rhind, Lindsay, & Wallace, W.S.

Counsel for Defenders (Respondents)—Mackintosh—Macfarlane. Agent—J. Smith Clark, S.S.C.

Thursday, December 11.

FIRST DIVISION.

[Sheriff of Ross, Cromarty, and Sutherland.

GILLANDERS *v.* CAMPBELL.

School—School Rate—Education (Scotland) Act 1872 (35 *and* 36 *Vict. cap.* 62), *sec.* 44—*Assessment for School Rate—Manse and Glebe—Parish Minister.*

Held that a parish minister is liable to be assessed for school rate in respect of his manse and glebe, under the Education (Scotland) Act 1872, sec. 44.

Hogg v. *Parochial Board of Auchtermuchty*, June 22, 1880, 7 R. 986, followed.

This was an action at the instance of William Gillanders, collector of parochial rates for the parish of Lochs, in the island of Lewis and county of Ross, against the Reverend Ewen Campbell, minister of the parish of Lochs, for payment of £89, 6s. 9d., being the school rates for the years 1880-83 inclusive, imposed, in terms of the Education (Scotland) Act 1872, on the defender in respect of the manse and glebe. The defender had been assessed in respect of the manse, glebe, and the shootings over the glebe (which last were let), as owner, and as occupier of the manse and glebe.

Section 44 of the Education (Scotland) Act 1872 provides—"Any sum required to meet a deficiency in the school fund, whether for satisfying present or future liabilities, shall be provided by means of a local rate within the parish or burgh in the school fund of which the deficiency exists.

"The school board of each parish and burgh shall annually, not later than 12th June in each year, certify to the parochial board or other authority charged with the duty of levying the assessment for relief of the poor in such parish or burgh, the amount of the deficiency in the school fund required to be provided by means of a local rate, and the said parochial board or other authority is hereby authorised and required to add the same under the name of 'school rate' to the next assessment for relief of the poor, and to lay on and assess the same, one-half upon the