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

owners and the other half upon the occupiers of all lands and heritages, and to levy and collect the same along with the assessment for relief of the poor where that assessment is so imposed and levied, and to pay over the amount to the school board; . . . . and should there be no assessment for the poor, or should that assessment not be laid one-half on the owners and the other half on the occupiers of all lands and heritages within such parish or burgh, the school board shall be entitled and bound directly to assess for and levy the said school rate in the same manner as if it were poor's assessment duly authorised to be assessed and levied in the same manner, and for that purpose shall have all the powers and authorities of any parochial board or other authority with respect to assessing, levying, and collecting poor's assessment, and the school rate shall in all cases be levied and collected in the same manner as poor's assessment, and the laws applicable for the time to the imposition, collection, and recovery of poor's assessment shall be applicable to the school rate."

The defender pleaded—(4) "The defender not being an owner or occupier of lands and heritages in the sense of the 44th section of the Education Act 1872, he is not liable for the school rate laid on by the pursuer's board. (6) The laws applicable for the time to imposition, collection, and recovery of poor's assessment practically exempting the defender from payment of poor's rates in respect of alleged ownership or occupancy, he ought to be exempted from school rates."

The Sheriff-Substitute (BLACK) on 28th March 1884 granted decree as concluded for.

"*Note*— . . . . On the merits, the sole question raised at the debate was whether the defender as a parish minister, and so free from liability to be assessed for poor's-rates as owner and occupier of his manse and glebe, is not in like manner free from liability to be assessed for school rates imposed in terms of section 44 of the Education (Scotland) Act 1872. In so far as this Court is concerned, the case is ruled by the case of *Hogg* v. *The Parochial Board of Auchtermuchty*, 22d June 1880, 7 R. 986."

The defender appealed, and argued—Before the Poor Law Act of 1845 ministers were exempt from payment of poor's-rates—*Heritors of Cargill* v. *Tasker*, February 29, 1816, F.C. By implication this exemption was continued in the Act of 1845, and this had been directly decided—*Forbes* v. *Gibson*, Dec. 18, 1850, 13 D. 341, *affd.* June 14, 1852, 1 Macq. 106. On a construction of sec. 44 of the Education Act the school-rate was to be imposed and levied along with the poor's-rates, and therefore ministers were exempt.

The pursuer replied—The terms of sec. 44 referred only to the manner of collection, not to the persons on whom the rate was to be laid. It was necessary to go to the Valuation Act of 1854 for the meaning of the word "owner." It included ministers — *Cowan* v. *Gowan*, July 9, 1868, 6 Macph. 1018. The present question had been decided in terms by the Second Division in *Hogg* v. *The Parochial Board of Auchtermuchty*, June 22, 1880, 7 R. 986.

At advising—

LORD PRESIDENT—The question raised in this case is one of general interest and importance, viz., whether parish ministers are liable to pay school-rates as owners and occupiers of lands and heritages possessed by them, viz., their manses and glebes, or whether they are exempted from the liability imposed by the Act of 1872 on "all owners or occupiers within the parish or burgh."

I think it may be laid down as a general rule that where a tax or public burden is imposed by statute upon certain defined classes of persons, or in respect of a particular class of property, no person within the class can claim exemption unless the statute gives him that exemption. There is but one exception to this rule, so far as I am aware, and that is the case of Crown property—an exception which depends not upon exempting words in the statute imposing the rate, but upon the constitutional principle that the Crown cannot be taxed without its consent.

A good deal of confusion and loose language was at one time introduced in regard to the nature of the occupation of public buildings which rendered them liable to assessment, and there was a difference of opinion on the question between the decisions of this Court and those in England. But at length it came to be settled that the question of beneficial occupation by individuals or by a corporation was not the test of assessability of subjects held for the use of the public, and thus all the cases of public docks, harbours, and others were decided adversely to the claims made for exemption, except in the case of Crown property. The rule accordingly is, that there must be an express statutory exemption from liability.

The peculiarity of the present case is, that the parish ministers of Scotland are exempted from payment of poor's-rates, and it is said, therefore, that according to a true interpretation of the Act of 1872 they are also exempted from the education rate.

It is necessary, in the first place, to understand on what ground the admitted exemption from poor's-rates rests. Prior to the year 1845 it was established upon authority that parish ministers were not liable to pay poor's-rates. That depended upon the construction of various statutes of a much earlier date than the Act of 1845, the terms of which it is needless to examine, the result being that it is fixed by the case of *Cargill*, Feb. 29, 1816, F.C., that ministers are not heriters, nor tenants, nor possessors, within the meaning of these statutes. But when the Act of 1845 was passed, an opportunity occurred for taking away the exemption, and accordingly the leading enactment would have been sufficient to abolish that exemption. By that Act (section 34) it is enacted that "when the parochial board of any parish or combination shall have resolved to raise by assessment the funds requisite, such board . . . . shall resolve as to the manner in which the assessment is to be imposed, and it shall be lawful for any such board to resolve that one-half of such assessment shall be imposed upon the owners, and the other half upon the tenants or occupants, of all lands and heritages within the combination, rateably according to the annual value of such lands and heritages," or to raise it in the modes there pointed out.

That rate is to be laid on and assessed one-half upon the owners and the other half on the occupiers of all lands and heritages. This would have included the parish ministers in

respect of their manses and glebes. But a clause was introduced into the Act which qualified the import of the leading enactment by providing that parish ministers should be liable in respect of their stipends; and it was held, both here and in the House of Lords, in the case of *Gibson* v. *Forbes*, 1 Macq. 106; that the result of that clause, imposing a limited liability in respect of stipends only, continued by very clear implication the exemption in respect of manses and glebes. That was the import of the judgment in that case. The implication was held to be as strong and conclusive as if the Act had said that the exemption in the case of manses and glebes shall continue. This makes the interpretation of the Poor-Law Act of 1845 on this matter very clear and distinct. We know why it was that until 1872 ministers were exempted from assessment in respect of their glebes and manses. It was on account of a statutory exemption which was implied as strongly as if it had been expressed.

Is this exemption continued, or, more properly speaking, is it introduced into the statute which imposes for the first time what is called a school-rate? The education of the parish before the Act of 1872 was provided for by a tax imposed upon the proper heritors of the parish, viz., those with valued rent, and it was imposed according to the valued rent. Down to the year 1872 no one who was not a heritor in the proper sense of that term was burdened at all with the cost of education in the parish. But the revolution effected by the Act of 1872 was this: The peculiar burden laid upon the heritors was taken away, and in place of it a rate according to the real rental of the parish was substituted, to be paid by all the inhabitants according to their rental. This was a tax imposed for the first time upon that class. Is there any exemption of any persons belonging to that class? This is the question submitted to the Court.

It is said that there is an exemption by reason of the forms of expression contained in the 44th section of the Act,—an exemption of parish ministers precisely corresponding with the exemption which they enjoyed under the Act of 1845. The question depends upon the construction of the 44th section. But I take leave to observe, that a clear ground for the exemption must be found within the corners of the statute which imposes the rate. It cannot be said that section 44, or any other section, confers an exemption in express terms. Is there, then, an implied exemption as in the Act of 1845?

It is not necessary to read the whole section, but it is worthy of notice that it sets out thus,—"Any sum required to meet a deficiency in the school fund, whether for satisfying present or future liabilities, shall be provided for by means of a local rate within the parish or burgh in the school fund of which the deficiency exists." There is not in these words any indication of an intention to make the imposition of the local rate partial, or to exempt individuals belonging to a certain class. It is then enacted that the school board shall make up their minds to provide for the deficiency in the school fund for the year, and shall fix upon a slump sum, which they shall require the parochial board to add to the next assessment for relief of the poor, and to lay on—the one-half upon owners, and the other half upon occupiers—and to collect along with the poor's-rates. The imposition and the levying of the tax are to be carried into execution by the parochial board. Where no poor's-rates are levied, or where they are not laid one-half on owners and the other half on occupiers, the enactment is that the school board is to be entitled, and is bound, directly to assess for and levy the rate in the same manner as if it were poor's-rates, upon the owners and occupiers of all lands and heritages within the parish.

Would it be possible to find in that section some ground of exemption lurking, or to find any implied exemption such as was found in the Act of 1845? It is only in certain cases—no doubt the major number—that the parochial board is applied to to make the assessment. Poor's-rates being levied within the parish, it is highly desirable, in order to avoid expense, to get the parochial board to levy the school-rate, and this fact affords the only possibility for saying that the exemption of the parish minister from liability for poor's-rate in respect of his manse and glebe shall extend to school-rate. It may be that there are exemptions in the case of the poor's-rate which are not enjoyed in the case of the other tax, and the circumstance that the same board has to levy both rates is not sufficient to found the implication that the exemptions, whatever they may be, shall extend from the one case to the other. I see no reason for this result, but yet this is the whole foundation for the argument which has been presented to us. It is said that because there is a class of rental from which the operation of the poor's-rate is excluded—viz., manses and glebes—that therefore neither can the school-rate be levied upon that portion of the rental of the parish.

I think it is a mistake in language to say manses and glebes are not included in the rental on which poor's-rates are imposed. Rental under the Valuation Acts includes all lands and heritages, not omitting manses and glebes. A minister claims exemption from poor's-rate because he is the minister of the parish, and is under the Act of 1845 exempted from the payment of poor's-rates. How is it to be said that the exemption of the Act of 1845 shall extend to a tax imposed by an Act which makes no reference to the exemption at all? It certainly was the general purpose of the legislation of 1872 that the school-rate should be levied on all lands and heritages, and there is nothing to show any intention to exempt the parish minister.

The Poor Law and the Education Act appear to me to present a most complete contrast to one another. The one contains by clear implication an exemption of the parish minister from liability. In the other there is no such implication. I therefore see no reason for doubting the soundness of the view taken by the Second Division in the case of *Hogg*, to which I entirely assent.

Lord Mure—I agree with your Lordship that the result at which the Second Division arrived in the case of *Hogg* was well founded. In the present case, as the claim for exemption is rested mainly on the decision in the case of *Forbes* v. *Gibson*, it is necessary to examine the ground of judgment there. The ground upon which the Court then based their judgment was, that as for many years prior to 1845 ministers had been

exempt from the payment of poor's-rate—an exemption which was fixed by the case of *Cargill*—they continued by implication from the terms of the statute to be still exempt from assessment in respect of their manses and glebes. By the 49th section of the Act it was declared that clergymen should be liable to be assessed for the poor in respect of their stipends, and therefore it was held that the old exemption was intended to stand. The Lord President in *Forbes'* case described the principle on which the exemption rests as inveterate usage. But at the date the Education Act was passed there was no inveterate usage exempting ministers from school-rate, for at that date it fell on a different class — on the valued rent heritors. The education rate imposed by the Act of 1872 is therefore in a different position from the poor's-rate imposed by the Act of 1845, and I think that ministers are not in a different position with regard to it from the other proprietors.

That being so, the question comes to be, whether there is anything in the position of the parochial clergy that will take them out of sec. 44 of the Education Act of 1872, by which the assessment is to be imposed, one-half on owners and one-half on occupiers of all lands and heritages. Those words are broad enough to include the clergy, and unless there is an exemption elsewhere in the Act, express or implied, they will fall under the assessing words. It is admitted that there are no such words in the Act of 1872 as there were in section 49 of the Act of 1845, but I understand that the argument rests on the implication derived from the phraseology of the section. Section 44 appoints the school-rate to be levied and collected along with the assessment for relief of the poor, but that is merely a description of the manner in which the rate is to be levied. It does not affect the character of the parties on whom the assessment is to be imposed.

Then if the position of matters is such that either there is no assessment for the poor in the parish, or that the assessment is not laid half on owners and half on occupiers, then the school board is entitled and bound to assess for and levy the school-rate.

On these grounds I concur with your Lordship.

LORD SHAND concurred.

LORD DEAS was absent.

The Court refused the appeal and affirmed the judgment.

Counsel for Pursuer (Respondent)—Trayner—Lorimer. Agents—Stuart & Stuart, W.S.

Counsel for Defender (Appellant)—Pearson—Dickson. Agent—W. G. L. Winchester, W.S.

Friday, December 12.

FIRST DIVISION.

[Lord Fraser, Ordinary.

LORD ADVOCATE *v.* GRAHAM.

Revenue—Succession—Succession Duty Act 1853 (16 *and* 17 *Vict. cap.* 51), *sec.* 2—*Entail—Predecessor—Disposition—Devolution of Law.*

A truster who died in 1843 directed his trustees to entail certain lands belonging to him upon the series of heirs called after him in a deed of entail of the lands of B. executed by his great-grandfather. By that entail the entailer had destined his lands of B. to his five sons and the heirs-male of their bodies in succession. At the date of the truster's death the heir entitled to succeed under the entail of the lands of B. was a descendant of the entailer's third son, but owing to the dependence of litigations the trustees did not execute the deed of entail until after his death. At the date of the execution of the deed of entail the person entitled to be called as institute was J. M., eldest son of the deceased A. M., a descendant of the fifth son of the entailer of B. The trustees entailed on him as institute, and the heirs-male of his body, whom failing to his immediately younger brother, whom failing to H. S. M., the younger brother's eldest son. On the death of J. M. he was succeeded by his nephew H. S. M. *Held* that since, if the trustees had made the entail according to the directions of the truster, H. S. M. would have taken under a destination to A. M. and the heirs-male of his body, he was not to be prejudiced by the form of the conveyance, and that in the sense of the Succession Duty Act he did not succeed by "disposition" to the truster as his "predecessor," but that his "predecessor" was his uncle J. M., from whom he took by "devolution of law."

Lieutenant-General Thomas Lord Lynedoch died on 18th December 1843, leaving a trust-disposition and settlement dated 20th June 1821, and recorded in the Books of Council and Session 30th December 1843, by which he gave, granted, and disponed to the trustees therein named his whole heritable and moveable estate for the purposes therein mentioned, and *inter alia*, "*Fourthly*, That after fully accomplishing the purposes aforesaid, if any of my lands and heritages before disponed shall remain unsold, my said trustees shall in due form of law dispone and convey the same to the heirs of entail called after me in and by a certain deed of entail executed by Thomas Græme, sometime of Balgowan, and John Græme, his son, dated on or about the 7th day of February and 9th day of June in the year 1726, recorded in the Register of Entails on or about the 30th day of December in the same year, under all the conditions, provisions, and clauses prohibitory, irritant, and resolutive in the said deed of entail contained, so far as the same may be applicable, and so as to form a valid and effectual entail according to the law of Scotland; and shall also lay out the remainder of my personal estate and effects, if any be, as soon as convenient purchases of land in the county of Perth shall offer, in purchasing lands as aforesaid, and