probably do. But, obliged as I am by the action of the defender to consider this counter issue on this record, I think the Lord Ordinary right.

LORD M'LAREN—I think the averments in the fourth answer would have entitled the defender to a counter issue if the answer had been amended in the manner suggested by your Lordship. It contains the elements of a relevant averment, though wanting in precision of statement. But, seeing that the defender declines to state his case more precisely, I think that we should disallow the counter issue, because, as I read the record, the defender's averment is nothing more than that on two occasions the pursuer had been guilty of sexual immorality, which is not a counter case to the charge as averred by the pursuer.

LORD KINNEAR—I agree that a slight alteration of the record would have made the averment in the fourth answer perfectly relevant to support the counter-issue. The defender was perfectly right not to make that alteration if he was conscious, as we must assume he was, that he could not bring the case up so far as to justify an averment which would have entitled him to a counter issue. That being so, we must dispose of the case on that footing, and I agree that we should not allow the counter issue.

LORD ADAM concurred.

The Court adhered.

Counsel for the Pursuer—Shaw, Q.C.—Morison. Agents—Kirk, Mackie, & Elliot, S.S.C.

Counsel for the Defender—M'Lennan—F. J. Thompson. Agent—William Gunn, S.S.C.

Friday, November 20.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

GLASGOW, YOKER, AND CLYDEBANK RAILWAY COMPANY *v.* MACINDOE AND OTHERS.

Burgh—Burgh Police Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 215—*Construction of Word "Sewer"—Vesting in Commissioners.*

Section 215 of the Burgh Police Act, 1892, enacts that "all sewers and drains within the burgh . . . shall vest in and belong to and be entirely under the management and control of the commissioners."

Held (*aff.* judgment of Lord Kyllachy, though on a different ground) that an open stream which flowed through a burgh, and was polluted by sewage from outside the burgh, but into which no part of the burgh sewage was discharged, was not a sewer within the meaning of the above section, and was therefore not vested in the commissioners.

Opinion reserved whether in order to fall within the section a sewer must be *opus manufactum.*

In 1893 the Glasgow, Yoker, and Clydebank Railway Company, as authorised by their Act of that year, served a notice upon Alexander Dunn Macindoe and others, *pro indiviso* proprietors of the estate of Duntocher, to take a certain portion of the said estate for the purposes of their undertaking.

On 5th April 1895 the oversman appointed under deed of submission between the parties, fixed the compensation for the lands at the sum of £3439, should it be found that the burn or water-course intersecting lot 22A of the lands on the plan lodged in the reference was not a sewer or drain vested in the Commissioners of Police of the burgh of Clydebank, in terms of the Burgh Police (Scotland) Act 1892, or, alternatively, the sum of £2989 should it be found that the said burn was a sewer or drain so vested in the said Commissioners.

In June 1895 the Railway Company raised an action against Alexander Macindoe and the other proprietors to have it declared (1) that the burn or water-course known as the Boquhanran burn, intersecting lot 22A of the plan lodged in the reference, is a sewer or drain vested in the Commissioners of Police of the burgh of Clydebank, in terms of the Burgh Police Act 1892; and (2) that the pursuers are bound to pay to the defenders the sum of £2989, and no more, as compensation for the lands purchased by the pursuers.

The pursuers averred that the burn in question had been "used for purposes of sewage and drainage continuously, exclusively, and increasingly during a long period of years by owners and occupiers both within and outside the burgh of Clydebank, and the defenders and their predecessors have acquiesced therein all along." They further averred that at the date when the Burgh Police Act 1892 came into force, the said burn "was and now is a sewer or drain in the sense and meaning of the statute, and is, by operation thereof, now vested in and belongs to the Commissioners of the burgh of Clydebank, within which burgh it flows, at least in its course of intersection of the field before mentioned."

The defenders explained that the properties alleged to be drained by the said burn were all outside the burgh of Clydebank; and averred—"No rights have been granted to any proprietors of subjects within the burgh to lead sewage from said subjects into the said burn until below the point where it leaves lot 22A. The burn where it passes through lot 22A is within private property of the defenders, who are entitled to divert the said burn away from the field in question, or to build over it in any manner they think proper."

The pursuers pleaded—"(1) The burn or water-course in question having been, at the date of the pursuers' notice to take, a sewer or drain within the meaning of the Burgh Police (Scotland) Act 1892, and having been

as such vested in the Commissioners of Police of the burgh of Clydebank, the pursuers are entitled to decree of declarator in terms of the first conclusion of the summons."

The defenders pleaded—"(1) All parties not called. (2) The burn or water-course intersecting lot 22A on the said plan not having been, at the date of the pursuers' notice to take, a sewer or drain vested in the Police Commissioners of the burgh of Clydebank, in terms of the Burgh Police (Scotland) Act 1892, the pursuers are bound to pay to the defenders the sum of £3439, 11s. 1½d., with interest at 5 per cent. from 1st July 1894 until payment, and the defenders are entitled to absolvitor, with expenses."

The Court having on 26th November 1895 adhered to an interlocutor of the Lord Ordinary sisting the cause to give the pursuers an opportunity of calling the Police Commissioners of Clydebank by a supplementary action as defenders for their interest, the pursuers raised a supplementary action against the Police Commissioners of Clydebank, concluding for declarator in terms of the first conclusion of the leading action.

On 22nd January 1896 the Lord Ordinary conjoined the two actions and allowed a proof.

The defenders, the Commissioners of Clydebank, did not appear.

The facts as disclosed by the proof are thus summarised by the Lord Ordinary:—"The burn in question is, in its physical character, beyond all question a natural water-course. It is simply an ordinary Scotch burn, which rises at the foot of Duntocher, some three miles from the place in question, and flows thence through a comparatively open country till it joins the Clyde within the burgh of Clydebank. Moreover, up till about fifteen years ago, it was a practically pure stream—not perhaps fit for human use, but quite fit for watering cattle and similar purposes. Within recent years, however, it has undoubtedly become polluted by sewage, which has been permitted to pass into its course, and although open and in its natural state in and above the pursuers' property, it is after it leaves the pursuers' property, and for some distance before it reaches the Clyde, enclosed—at least in part—in a built drain or culvert."

It was further proved that one Somervail's works, situated within the burgh of Clydebank, drained into the burn, but that wholly by sufferance of the defenders, his superiors.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 215, enacts—"All sewers and drains within the burgh, whether existing at the time when this Act comes into force or made at any time thereafter (except private branch drains, drains made and used for the purpose of draining, preserving, or improving land, and sewers made under any local or private Act of Parliament), shall vest in and belong to and be entirely under the management and control of the commissioners." Sec. 217—"Nothing in this Act contained shall be construed to authorise the commissioners, contrary to any private right, to use, injure, or interfere with any sewers or works already made or used for the purpose of draining. . . . land under any local or private Act of Parliament, . . . or to use injure, or interfere with any water-course, stream, river . . . in which the owner or occupier of any lands . . . shall have right and interest without the consent in writing of the person legally entitled to grant the same."

On 10th July 1896 the Lord Ordinary (KYLLACHY) pronounced an interlocutor in which he assoilzied the defenders in the leading action from the conclusions thereof.

Opinion.—"The proposition of the pursuers is, and must be, that wherever within the bounds of a burgh there exists a burn or water-course materially polluted by sewage, that burn or water-course is by the Burgh Police Act of 1892 vested in the burgh authorities. Now, I must say this strikes one at first glance as rather a startling proposition. But the pursuers say that such is the result of the Act, and particularly of the 215th section, which is quoted on record.

"I do not think I need say more than that, having read the section in question, and relative sections of the Act, as carefully as I could, I am unable to accept the suggested construction. On the contrary, it appears to me that reading the 215th section by itself, and also in connection with the rest of the Act, there are two things which are fairly clear. The one is, that what is meant in section 215 by a sewer or drain is an *opus manufactum*. That, I think, is clear upon the language of the 215th section. The other is, that the Act throughout this part of it carefully distinguishes between sewers—that is, made or built drains—on the one hand, and natural water-courses, polluted or unpolluted, on the other. I refer specially to the sections of the Act which were all, I think, mentioned at the discussion—sections 217, 219, 221, 227, 228, 229, 230, and 234. And, as I have said, having regard to the terms of those sections and of section 215, I consider that the pursuers' claim is not well founded, and that the defenders are entitled to absolvitor."

The pursuers reclaimed, and argued—The Lord Ordinary was wrong. It was not essential to a sewer that it should be *opus manufactum*. An open water-course might quite well be a sewer—*Magistrates of Portobello* v. *Magistrates of Edinburgh*, November 9, 1882, 10 R. 130. This view received confirmation from the English Public Health Act of 1875 (38 and 39 Vict. c. 55), sec. 4 (the interpretation clause), and sec. 18, which empowered a local authority to "cover in or otherwise improve any sewer belonging to them," and these words were repeated with amplification in sec. 224 of the Burgh Police Act 1892—*Bonella* v. *Twickenham Local Board*, 20 Q.B.D. 63; *Travis* v. *Uttley* [1894], 1 Q.B. 233. As a matter of fact this stream was used for the discharge of sewage, and stank in summer. It made no difference that the sewage

entered it from outside the burgh—See sec. 234 of the Burgh Police Act 1892. There was, besides, a significant difference between the phraseology of the section under consideration here, and that of section 182 of the Police Act of 1862 (25 and 26 Vict. c. 101).

Argued for the respondents—The Lord Ordinary was right. The English Public Health Act was distinguished from the Burgh Police Act by having a definition of the word "sewer," and the language of the latter in the sections enumerated in the Lord Ordinary's opinion seemed to imply that a sewer must be something made or constructed. Nothing, at all events, could be vested in police commissioners under sec. 215, which was not administered by them, and the Commissioners had never exercised any administration over the burn in question. It was not competent for a local authority to turn its sewage into an unpolluted burn, and then claim the burn as vested in it—*Attorney-General* v. *Hackney Local Board*, 20 Eq. 626, *per* Bacon, V.-C., 631; *Attorney-General* v *Luton*, 2 Jurist (N.S.) 180.

At advising—

LORD PRESIDENT — The general facts about this water-course are concisely stated in the second paragraph of the Lord Ordinary's opinion, and I think that his Lordship has also accurately stated the controversy when he says—"The proposition of the pursuers therefore is and must be that wherever within the bounds of a burgh there exists a burn or water-course materially polluted by sewage, that burn or water-course is, by the Burgh Police Act of 1892, vested in the burgh authorities."

Now, in considering this proposition it is well to bear in mind what are the use and object of such vesting clauses as the one which is before us. They properly apply to things, be it roads or drains, which *de facto* are administered by the Commissioners under the executive clauses of the Act, and they are intended to give so much of a title as is necessary to get over any legal difficulties in the way of the Commissioners effectuating their statutory duties. Accordingly, to show that by way of vituperation of its impurity this burn may be characterised as a sewer is not to the purpose. The Act does not try to put down nuisances by vesting their *locus* in the burgh authorities, and the sewers vested are authorised sewers provided or adopted by the burgh as the conduits of such sewage as the burgh has a duty to dispose of.

But this burn in no sense acts as a burgh sewer. Only one house within the burgh drained into the burn, and when this use was challenged by the proprietor of the burn it ceased. Not only does the burn not in fact act as part of or in the service of the burgh's sewage system, but, apart from this vesting clause, the burgh cannot pretend any right to put their sewage into the burn *invito domino*. So far as the burgh is concerned, and apart from this vesting clause, the pursuers might by arrangement with the upper proprietors purify this burn so that there should be no sewage carried by it at all. Now, it surely can never be held that this vesting clause was intended to deprive the pursuers of any of their rights in this stream in order to support a non-existing administration of it by the Commissioners.

For these reasons I am for adhering to the Lord Ordinary's interlocutor. There is one part of his Lordship's opinion as to which I desire to express a reservation. I am not prepared to lay it down that the 215th section only applies to sewers and drains which are *opera manufacta*. It is quite true that a whole series of sections may be pointed to which can only apply to *opera manufacta*. But this may be because an artificial construction is much the most ordinary form of sewer or drain, and as the words "sewers and drains" do not in themselves exclude a wider construction, I prefer to rest my judgment on the other considerations advanced, leaving open the question whether the vesting clause may not cover some material water-courses which, in fact and lawfully, serve the sole purpose of conveying burgh sewage.

LORD ADAM—[*After citing section* 217 *of the Act his Lordship proceeded*]—It is clear, therefore, that there may be water-courses or streams within the burgh which do not vest in the Commissioners as drains or sewers, and with which they have no right to interfere.

The question therefore is, whether or not this Boquhanran burn is, in fact, a water-course or stream of that description.

Now, it appears from the evidence that this burn has a course of some 3 or 4 miles before it enters the burgh, and that when it enters the burgh it runs in its natural channel through the private property of the defenders. It forms no part of any drainage or sewage system of the burgh, and, in point of fact, while it flows through the defenders' property, it receives no sewage whatever from any house in the burgh, except by a private drain from Somervail's works, which are situated on the defenders' property, and which they can stop at any moment.

It seems to me to be clear that this is a water-course or stream in which the defenders have a right and interest, and that therefore the Commissioners have no right to use or interfere with it without the defenders' consent—or in other words, that it is not vested in them.

Now, it will be observed that the Commissioners do not themselves maintain that this stream is vested in them as a sewer or drain. The claim is made by a railway company who have interfered with it, and the ground of their claim is that where it enters the burgh it is more or less contaminated with sewage, and therefore is a drain or sewer in the sense of the Act.

It is true that the burn is so contaminated—to a considerable extent when the water in it is low, to an inappreciable extent when it is high.

But I fail to see how that displaces the

fact that the burn is a stream in which the defenders have a right and interest. If the sewage in it should at any time become a nuisance to the burgh the Commissioners have their remedy and can put a stop to it.

I therefore think that the interlocutor of the Lord Ordinary is right, and should be affirmed.

I observe, however, that he is of opinion that this stream or water-course does not fall within the 215th section of the Act, because it is not an *opus manufactum*.

I think that the grounds which I have indicated above are sufficient for the judgment in this case, and I have not found it necessary to form an opinion as to whether his Lordship's views in this respect are sound or not.

LORD M'LAREN—I consider that this is a case of the construction of an Act of Parliament expressed in ordinary language. There is no need of any interpretation clause, because Parliament has considered that the courts of law are quite capable of distinguishing between a sewer and a running stream. Casuists may suggest that there is some resemblance between the two when a stream becomes polluted, but they are essentially distinct, and I agree with your Lordship that a sewer must be a thing either constructed for the purpose of removing waste matter, or appropriated to that purpose in some way. It is not at all likely that there should be found existing a natural channel in all respects suitable for the purpose of a sewer. When one comes to consider too curiously the effect of pollution, there is hardly anything in nature not more or less polluted; but the mere fact that a stream is polluted will never entitle it to be treated in a question of property or administration as in any way identical with a sewer.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers — Dundas — Grierson. Agents—W. & J. Burness, W.S.

Counsel for the Defenders Macindoe and Others — Jameson — Guthrie. Agents — Maconochie & Hare, W.S.

Tuesday, November 10.

SECOND DIVISION.

[Lord Pearson, Ordinary.

THE MIDDLE WARD OF LANARK DISTRICT COMMITTEE *v.* MARSHALL.

Lands Clauses Acts—Acquisition of Land by County Council—Public Health (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 101), *secs.* 39 *and* 116.

A County Council, by private agreement with the proprietor, feued five and a-half acres of land in order that the District Committee might, as authorised by the Public Health (Scotland) Act 1867, section 39, erect a hospital upon it. The land feued formed part of a farm held by a tenant on lease for nineteen years, subject to a right in the landlord to resume for feuing, it being provided that the annual value of any ground thereby taken should be paid to the tenants at the rate of £4 per acre. The landlord had resumed the five and a-half acres under this power, and had feued it to the County Council, the tenant receiving an abatement of rent equivalent to £4 per acre. The tenant served upon the District Committee a claim of damages for unexhausted manure, improvements, &c., founding on the Public Health Act 1867, section 116.

Held that the claim was invalid, the tenant's right to compensation, if any, being against his landlord and not against the County Council.

Opinions (*per* the Lord Justice-Clerk, Lord Young, and Lord Moncreiff) that the Public Health (Scotland) Act 1867, section 116, only applies where there is a statutory power of acquiring land compulsorily.

Question whether the County Council or the District Committee was the proper party to be served with a claim for damages caused by the exercise of the powers of the Public Health Act 1867.

Title to Sue—Assignation pendente processu.

One of two joint-tenants under a lease, who has the real interest therein, is entitled to found on an assignation by the other, granted *pendente processu*, to complete his formal title to sue.

By lease dated 5th July and 26th August 1886, entered into between Mr J. G. Carter Hamilton of Dalzell on the one part, and James Marshall and David Marshall, both farmers at Airbles, on the other part, Mr Hamilton let to Messrs James and David Marshall the farm of Airbles for a period of nineteen years, from Martinmas 1881 as to the arable land, and from Whitsunday 1882 as to the houses and grass, at the rent of £246, 10s.

The lease contained a clause reserving to the proprietor the mines and minerals, with power to "search for, work, win, and carry away the same." It then proceeded as follows:—"Allowance being always given to the said tenants and their foresaids for the ground so to be resumed for the above purposes, or for any surface or other damage which may be done to the said lands by the said operations at the rate of £4 sterling per imperial acre for all ground so to be resumed or damaged to the west of the Muckle Burn, and at the rate of £3 sterling per imperial acre for all ground so to be resumed or damaged to the east thereof; as also reserving to the proprietor and his foresaids full power, liberty, and privilege, at any time during the currency hereof, to take off such part of the lands hereby let as may be considered expedient for the purpose of feuing