and estate of Cromartie "to enable them to support the dignity and title of Earl of Cromartie."

Now, under the deed of entail, when the succession descends to heirs-female, it is the eldest heir-female who is called to succeed without division and to the exclusion of heirs-portioners. Accordingly, the second party has succeeded as heir of entail to the lands and estate of Cromartie, and she bears the title of Countess of Cromartie. It is she who has to "support the dignity and title" of the earldom. It was to enable the holder of the title and possessor of the estate to support that dignity and title that the trust funds in question were provided. If therefore we read the words "heirs-female" as meaning heirs-female in succession, that is, heirs-female entitled to succeed under the entail, the first party would be entitled to the trust funds. I think such a reading is consistent not merely with the general tenor of the trust deed, but also one which enables the purpose of the truster to be given effect to. To divide the trust funds between the second and third parties would not fulfil the purpose of the truster as it would be conferring funds intended for the support of the dignity and title of the earldom of Cromartie on one who had no such title or dignity to support. It might indeed frustrate the plain intention of the truster. I accordingly adopt the reading of the deed which I have indicated, and am of opinion that the first question put to us should be answered in the affirmative.

The LORD JUSTICE-CLERK intimated that LORD RUTHERFURD CLARK, who was not present at the advising, concurred in the judgment.

The Court answered the first question in the affirmative, and found it unnecessary to answer the other questions.

Counsel for the First Parties—Blackburn.

Counsel for the Second Parties—Asher, Q.C.—Macphail. Agents for the First and Second Parties—Mackenzie & Black, W.S.

Counsel for the Third Party—Dundas—Craigie. Agent—J. C. Couper, W.S.

Thursday, July 4.

SECOND DIVISION.

(Before Seven Judges).

[Lord Low, Ordinary.

COMMISSIONERS OF PETERHEAD *v.* FORBES.

Public Health — Water Supply — Public Health (Scotland) Act 1867 (30 *and* 31 *Vict. c.* 101), *secs.* 89 *and* 90.

By agreement with a proprietor the local authority of a burgh inserted a pipe in a stream running through his lands for the purpose of obtaining a water supply for the burgh. *Held* that the local authority was not entitled under sec. 89 of the Public Health Act of 1867 to divert water from the stream to the prejudice of a lower riparian proprietor, without acquiring a right to the water in the manner provided by sec. 90 of the Act.

Peterhead Granite Polishing Company v. *Parochial Board of Peterhead*, January 24, 1880, 7 R. 536, *overruled.*

Public Health — Water Supply — Public Health (Scotland) Act 1867 (30 *and* 31 *Vict. c.* 101), *sec.* 89 — *Public Health Amendment (Scotland) Act* 1871 (34 *and* 35 *Vict. c.* 38), sec. 1.

Sec. 89 of the Public Health Act provides, "with respect to the improvement of burghs having a population of less than ten thousand, . . . and not having a local Act for police purposes," . . . that the local authority may acquire and provide for a supply of water for the inhabitants.

Sec. 1 of the Public Health Amendment Act 1871 provides that, where the local Act for police purposes "of any burgh" does not make suitable provision for a supply of water, or does not authorise an assessment to be levied for that purpose "(as to which questions the decision of the sheriff, on a requisition made to him by ten inhabitants, shall be final)," then such burgh shall be held to come under the provisions of sec. 89 of the Act of 1867.

Held by Lord Low that the decision of the Sheriff, on a requisition made to him, was a condition-precedent, without which a burgh of more than 10,000 inhabitants could not exercise the powers conferred by sec. 89 of the Act of 1867.

This was an action of interdict at the instance of the Provost and Magistrates of the Burgh of Peterhead, and as such Commissioners and local authority of the burgh, against Simon Forbes, distiller, Glenugie Distillery.

The circumstances in which the action was brought were as follows:—The respondent was proprietor of the lands of Invernettie, through which a stream called the Wellington Burn flowed. There was a distillery and meal mill upon the lands of Invernettie which were supplied with water from the burn. By agreement with the proprietors of the Merchant Maiden Hospital, who were proprietors of lands further up the burn than the respondents' lands, the complainers had constructed a dam across the burn, and inserted a pipe therein for the purpose of supplying water to Peterhead. The result was to diminish the volume of water passing down to the respondent's lands, and he challenged the right of the complainers to take water from the burn without his consent, and removed some of the works which they had constructed.

The complainers accordingly sought to have the respondent interdicted from interfering with the dams or other works constructed or to be constructed on the lands

of Wellington, for the purpose of maintaining, improving, or increasing the water supply for Peterhead, and to have him ordained to renew the works he had destroyed.

The complainers pleaded—"(1) The complainers as local authority and Commissioners foresaid, by virtue of their agreement with the proprietors of the ground, and of the Public Health Act 1867, and Acts amending the same, being entitled to construct and use the waterworks referred to subject to any claim for compensation which the respondent may legally instruct, are entitled to interdict as craved.

The respondent pleaded—"(2) The complainers having no right to the water in the burn in question, the note of suspension and interdict should be refused with expenses. (4) The operations of the complainers being illegal, and not authorised by any of the statutes founded on, and being injurious to the respondent, the present interdict should be refused with expenses."

The Public Health (Scotland) Act 1867 (30 and 31 Vict. c. 101), provides, sec. 89—"With respect to the improvement of burghs having a population of less than ten thousand, according to the census last taken, and not having a local Act for police purposes. . . . (1) The local authority, if they think it expedient so to do, may acquire and provide or arrange for a supply of water for the domestic use of the inhabitants, and for that purpose may conduct water from any river, lake, or stream; and for the purposes aforesaid the local authority shall be held to have all the powers and rights given to promoters of undertakings by the Lands Clauses Acts: Provided always, that they shall make reasonable compensation for the water so taken by them, and for the damage which may be done to any lands by reason of the exercise of the powers hereby conferred in terms of the said Acts; and further, that for the purposes of this Act the words "lands" and "land" in the said Acts and this Act shall include water and the right thereto." . . . Sec. 90 provides a number of regulations "with respect to the purchase and taking of land otherwise than by agreement by local authorities for the purposes of this Act." (1) The local authority, before putting in force any of the powers of the Lands Clauses Act with respect to the purchase and taking of land, is bound to publish advertisements as to the land intended to be taken, and serve notices upon every owner and occupier of such land, (2) Upon compliance with these provisions the local authority is authorised to apply to the Secretary of State to be allowed to put in force the Lands Clauses Acts with respect to the purchase and taking of such land. (3) Upon receipt of such petition the Secretary of State is to take it into consideration, and may either dismiss it or direct an inquiry to be made. (4) After the completion of the inquiry the Secretary of State may make a provisional order empowering the local authority to put in force the powers of the Lands Clauses Acts; but (5) no provisional order is to be valid until confirmed by Act of Parliament."

Section 1 of the Public Health (Scotland) Amendment Act, 1871, provides, *inter alia*, "that, when the local Act for police purposes of any burgh does not make suitable and sufficient provision for a supply of water for the domestic use of the inhabitants, or does not authorise an assessment to be levied for that purpose (as to which questions the decision of the Sheriff, on a requisition made to him by the inhabitants, shall be final), then such burgh shall be held to come under the provisions contained in sections 89 and 94 of the said first recited Act (*i.e.* the Public Health Act, 1867), and not under those contained in sections 88 and 95 of the said Act."

Upon 31st January 1895 the Lord Ordinary pronounced this interlocutor:—"Finds that the burgh of Peterhead, having a population of over 10,000, and the provision of the first section of the Public Health (Scotland) Act, 1871, not having been complied with, the complainers are not entitled to exercise the powers conferred upon the local authority of a burgh by the 89th section of the Public Health (Scotland) Act, 1867: Therefore sustains the fourth plea-in-law for the respondent, repels the reasons of suspension, refuses the prayer of the note, and decerns," &c.

Opinion.—[*After narrating the facts stated above*] "The question depends upon whether the complainers are in a position to exercise the powers conferred by the 89th section of the Public Health Act, 1867, because, if they are entitled to do so, the case of *The Peterhead Granite Polishing Company*, 7 R. 536, is an authority binding upon me, to the effect that the complainers were entitled to take the water in question, without the respondent's consent, and without purchasing his interest in the stream, and only upon the condition of compensating him as for lands injuriously affected.

"The 89th section of the Act of 1867 applies only to burghs having a population of less than 10,000, and the population of Peterhead admittedly exceeds that number. By the Public Health Amendment Act, 1871, however, it is provided that when 'the local Act for police purposes of any burgh does not make suitable and sufficient provision for a supply of water for the domestic use of the inhabitants, or does not authorise an assessment to be levied for that purpose (as to which questions the decision of the Sheriff, on a requisition made to him by ten inhabitants, shall be final), then such burgh shall come under the provisions,' of (among others) the 89th section of the Act of 1867.

"In the case of the burgh of Peterhead, there has been no requisition to or decision by the Sheriff, but the complainers allege that, as a matter of fact, their local Act does not make provision for a suitable or sufficient water supply, and does not authorise an assessment for that purpose. They accordingly contend that the burgh falls under the scope of the Act of 1871.

"I am of opinion that the true construction of the clause of that Act, which I have quoted, is that a burgh with a population of more than 10,000 shall only come under the provisions of the 89th section of the Act of 1867 if and when the Sheriff has decided, upon a requisition by ten inhabitants, that the conditions required by the enactment are fulfilled.

"It was argued for the complainers that a decision of the Sheriff was only necessary if a question was raised whether or not the conditions of the enactment were fulfilled. If no question was raised, there was no need to appeal to the Sheriff. I cannot take that view. The decision of the Sheriff is to be given on a requisition made to him by ten inhabitants. That is a very extraordinary provision if no more was meant than that the Sheriff should be the sole judge if a question happened to be raised whether a burgh did or did not fall within the scope of the enactment. Take this very case. Suppose the respondent alleged that Peterhead did not come under the Act of 1871, because it had a local Act which made ample provision for a supply of water and gave powers of assessment, how could he have that question determined? It could only, I imagine, be determined by the Sheriff, because his decision upon the question is declared to be final. But the respondent could not approach the Sheriff unless he could get ten inhabitants of the burgh to sign a requisition. That cannot have been the intention of the Legislature.

"Further, I think that the words used show that it was only in the event (which might or might not happen) of some one raising a question, that a decision of the Sheriff was to be obtained. The words are, 'as to which questions.' These words point to questions which have already been referred to in the section. Now, the questions which have already been referred to are, whether the local Police Act does or does not make provision for a sufficient water supply, or authorise an assessment for that purpose? If these questions are answered in the affirmative, the burgh cannot take advantage of the enactment; if they are answered in the negative, it can do so. They are, therefore, not questions which may or may not arise, but questions which must arise in every case; and it is the decision of the Sheriff upon these questions which settles whether or not a burgh falls within the enactment. The decision of the Sheriff, therefore, appears to me to be a condition-precedent, without which a burgh of more than 10,000 inhabitants cannot exercise the powers conferred by the 89th section of the Act of 1867.

"As, therefore, no requisition has been made, and no decision obtained from the Sheriff in the case of Peterhead, I am of opinion that the provisions of the Act of 1871 have not been complied with.

"That is enough for the decision of the case (as the complainers do not rely upon the use which they have had of the water of the burn for the last forty years), and it is not necessary that I should deal with the argument which I heard in regard to the rights and powers of a local authority under the 89th section of the Act of 1867."

The complainers reclaimed. After a hearing in the Second Division, the case was remitted to be re-heard by the Judges of that Division along with three Judges of the First Division.

The complainers argued—Under the Act of 1871, if a sufficient water supply could not be got, the local authority of a burgh was authorised, although it had over 10,000 inhabitants, to take water as provided in the 89th section of the Act of 1867, on condition of paying as for lands injuriously affected. The appeal to the Sheriff was provided only in case ten of the inhabitants presented a petition to have it declared that the present supply of water was not sufficient for the wants of the inhabitants. The complainers had come to an agreement with the person upon whose lands the water was which they proposed to take, and they only required to get a provisional order when they could not get an agreement. The lower heritor could not complain because the water was taken by agreement with the proprietor, and not compulsorily; for, if it had been taken under compulsory powers, the loss to him would have been the same, and he could only have claimed damages as for injurious affection. The only agreement necessary was with the owner of the land from which the water was to be taken; it was not necessary to make agreements with all the lower proprietors—*Peterhead Granite Polishing Company* v. *Parochial Board of Peterhead*, January 24, 1880, 7 R. 536; *Mason* v. *Hill and Others*, 1833, 5 Barn. & Adoph. 1; *Ferrand* v. *Corporation of Bradford*, 1856, 21 Beavan's Reps. 412; *Bush* v. *Trowbridge Waterworks Company*, 1875, L.R., Ch. 459; *Stone* v. *Corporation of Yeovil*, 1876, L.R., 1 C.P.D. 691, *aff.* 1876, L.R., 2 C.P.D. 99.

The respondent argued—The Commissioners had two courses before them if they wished to get water for the use of the burgh. As the population was above 10,000, they could either have agreed with the riparian proprietors what compensation was to be given to them either in water or in money, as had been done in the case of the purification of the Water of Leith, or they could, under the section of the Act of 1871 quoted by the Lord Ordinary, have gone to the Sheriff, and then, if his decision was in their favour, got a provisional order under section 90 of the Act of 1867, when they would have had the advantage of the 89th section. They took neither of these courses, and got no provisional order and no compulsory powers, so could not claim the benefit of the section they proceeded under. In the previous case of *The Peterhead Granite Company* the Court had not observed that in all the cases cited there and in this case compulsory powers had been obtained; here no compulsory powers had been obtained. The Commissioners might take away in their view all the water in the burn, and the respondent would not have the right to appear and object. In addition to the cases

cited above, the respondent referred to *Owen* v. *Davies*, July 24, 1874, Weekly Notes, p. 175.

At advising—

LORD M'LAREN—The complainers are the Local Authority of the burgh of Peterhead under the Public Health Acts, and the supply of water to the burgh is under their administration. The chief supply is obtained from springs, which the Commissioners acquired from the proprietor of the lands in 1821. But that supply has become insufficient for the wants of the burgh, and it is desired to obtain a further supply from the Wellington Burn, which flows through the lands belonging to the Merchant Maiden Hospital, and thence to the property of the respondent, who is supplied with water for his distilling and meal mill from the stream.

By agreement with the Governors of the Merchant Maiden Hospital, the complainers have constructed a dam across the stream for the purpose of intercepting the water which they desire to bring into the burgh. The respondent disputes their right to diminish the volume of water passing to his lands, and it is stated in the note of suspension that he has on two occasions destroyed the connection between the stream and the water-pipe. This obstructive proceeding on the part of the respondent has been met by the presentation of a note of suspension and interdict.

Now, the proposed abstraction of water from the stream above the point where it enters the respondent's lands is, *prima facie*, an infringement of his rights as a riparian proprietor, because it is not said that the respondent had consented to the withdrawal of the water. But the complainers say that Parliament has given them the right to take water for public uses wherever they can find it without the consent of the riparian proprietors, without purchasing or compensating their interests, and only on the condition of compensating the proprietor as for lands injuriously affected. This is said to be the meaning or legal effect of the 89th section of the Public Health Act, 1867, on which the complainers found.

The respondent denies that such a right is given by the 89th section, and founds on the effect of the 89th and 90th sections, when taken together, as entitling him to the benefit of the provisions of the Lands Clauses Consolidation Acts with respect to compulsory sales.

This is the real question at issue between the parties, and in the Lord Ordinary's judgment it is not at all considered on its merits, because, in his Lordship's opinion, the question was ruled in favour of the complainers by a decision of this Division of the Court, in the case of *The Peterhead Granite Polishing Company*, 7 R. 536.

When the present case was originally heard in the Inner House, it was thought desirable that it should be re-heard by a larger number of judges, in order that the meaning of the provisions of the Public Health Act 1867 might be considered independently of authority. This has been done, and we are now to give our opinions on the meaning and effect of the 89th and 90th sections of the statute.

I shall not quote these sections at length, but the words of the 89th section on which the question depends are these:—(Sub-section 1) "And for the purposes aforesaid" (which include the acquisition of a water supply and the construction of the necessary works) "the local authority shall be held to have all the powers and rights given to promoters of undertakings by the Lands Clauses Acts, provided always that they shall make reasonable compensation for the water so taken by them, and for the damage which may be done to any lands by reason of the exercise of the powers hereby conferred in terms of the said Acts." It is added that the word "lands" shall be held to include water and the right thereto. These are the words of the 89th section which confer the right of compulsory acquisition; I do not read the words preceding them, which include the power of voluntary purchase and the making of contracts, as to which no question is raised.

If the statute had contained no further provisions with respect to compulsory acquisition, a difficulty, which I shall afterwards consider, would have arisen as to the exercise of the statutory power. But even in the case supposed I should be unable to assent to the proposition that the local authority might appropriate any water-rights which they might desire without payment and on condition only of making compensation as for lands injuriously affected. The statute certainly contains a proviso (in the passage quoted) to the effect that compensation is to be made for the "water" taken and for the damage done to any lands; and while it is added that "lands" includes water, it is not said that compensation for water is only to mean compensation for injury to lands.

But it is needless to consider how the 89th section would be worked out if it stood alone, because the 90th section contains a complete system of procedure applicable to the taking of land otherwise than by agreement for the purposes of the Act, and as already noticed "land" is to include "water and the right thereto." The regulations provide for the publication of a description and plan of the lands to be taken, and for notice to all parties interested. The local authority may then apply to the Secretary of State (now the Secretary for Scotland) for a provisional order empowering it to put in force the powers of the Lands Clauses Acts "with reference to the lands referred to in such order," and again the provisional order is not to be valid until it is confirmed by Act of Parliament in the usual way.

It is to my mind perfectly clear that if this had been the scheme of a burgh having a population of less than 10,000 (the case originally contemplated by the Act) the local authority desiring to acquire land and water rights otherwise than by agreement could only use its powers under the conditions of the 90th section, and then only

with reference to the lands described in the plan and provisional order. Now, the Public Health Amendment Act of 1871, in a certain event or condition, which I shall notice before I conclude, extended certain of the provisions of the principal Act to larger burghs, and provided, *inter alia*, that such burghs might come under the provisions of the 89th section. I think it would be perfectly futile to propose to proceed under the 89th section without taking the 90th section along with it. Under such a measure the burgh could at most make use of the powers of acquisition by agreement. The compulsory clauses of the Lands Clauses Acts have no value until they are made specific by being applied to lands which are otherwise ascertained. But the 89th section of the Public Health Act does not ascertain or provide the means for ascertaining definite lands to which process of compulsory purchase might be applied, and unless the 90th section is applicable, there can be no compulsory purchase under the 89th section. It is easy to see why the 90th section is not specially mentioned in the amending statute. The motive of the enactment was, of course, to specify the particular powers which burghs in general might acquire, and the easiest way of doing this was by enumerating the clauses of the principal Act, which contain the powers intended to be given. Section 90 is an executorial clause prescribing regulations with respect to compulsory purchase for all the purposes of the Act; it is not merely supplementary to the 89th. But when the powers of the 89th section are granted to a burgh, it is implied that these powers are to be exercised in the manner prescribed by any correlative section such as the 90th. Even if this were doubtful, the doubt would be of no benefit to the complainers, because unless they could make use of the machinery of the 90th section, they would not be able to exercise the compulsory powers of the 89th section at all.

I do not propose to enter at large on the subject of the previous decision in the case of *The Peterhead Granite Polishing Company*. It is plain enough that it cannot stand along with the decision which we are now giving. I think that to some extent the judgment proceeds on the analogy of English decisions on the construction of cognate clauses. But it was pointed out in the course of the argument that all the English precedents are founded on a statutory power to take the water. If this had been brought under the notice of the Court in the first *Peterhead* case, it would have been seen that the cases were of no value as precedents for the purpose of determining the powers of burghs under the Scottish Public Health Acts, because under these Acts there is no power to take away specific water right until a provisional order has been obtained with reference to specific lands or rights to water. When such an order is got the question may then arise, who are entitled to be compensated, unless such questions are settled by the provisional order itself. If your Lordships agree with me in this opinion it will not be necessary to consider the view which is developed in the Lord Ordinary's judgment. It is there explained that while the Public Health Act 1867 is not directly applicable to the case of Peterhead, because the 89th section is in terms only applicable to burghs having a population of less than 10,000, the application of the 89th section is to certain effects extended by the effect of the Public Health Amendment Act 1871. Now, one of the conditions or qualifications of the powers given by this amending Act is, that on the questions whether the existing supply of water and assessing powers of the burgh are sufficient, the decision of the Sheriff, on a requisition made to him by the inhabitants, should be final. The Lord Ordinary has held that the Sheriff's decision is a condition of the statutory power, the complainers contend that it is not a condition, and that the Sheriff's decision is only required in cases of a difference of opinion amongst the ratepayers. Now, this is a question which may hereafter arise for decision if the complainers should find it necessary to set in motion the machinery of the 89th and 90th sections for the purpose of establishing a right to use the water of the Wellington Burn. There may be other parties who are interested in its decision, and it is therefore undesirable to enter on this topic. I need hardly say that in reserving my judgment on this point I do not mean to indicate any dissent from the Lord Ordinary's judgment.

If Mr Forbes, instead of removing the pipe at his own hand, had taken the more expedient course of applying to the Court for protection of his rights, he would have been entitled to a decree restraining the local authority from interfering with the stream. But in the shape in which the question comes before us, we are unable to grant interdict against the local authority, and can only refuse prayer of the note of suspension.

LORD JUSTICE-CLERK—That is the opinion of the whole Judges.

The Court pronounced this interlocutor—

"The Lords, along with three Judges of the First Division, having heard counsel for the parties on the reclaiming-note for the reclaimers against the interlocutor of Lord Low, dated 31st January 1895, in conformity with the opinion of the whole of the consulted Judges, Recal the interlocutor reclaimed against: Sustain the 2nd plea-in-law for the respondent: Repel the reasons of suspension: Refuse the prayer of the note, and decern," &c.

Counsel for the Complainers — Vary Campbell — H. Johnston. Agent — R. C. Gray, S.S.C.

Counsel for the Respondent — Guthrie —Burnet. Agent—A. Morison, S.S.C.