sufficient grounds upon which to set aside the sale. I agree with the Lord Ordinary that both objections might have been material if this had been a case of a sale under a bond with a power of sale, but it is quite different.

I am not sure as to the matter of warrandice; the sellers were entitled to give absolute warrandice, whereas they only gave their own from fact and deed. This was undoubtedly wrong, for the Parks in their disposition to the company had bound themselves in absolute warrandice, and the company in assigning this probably did all that was necessary, but this should have been stated. There was no excuse for not showing the titles; the excuses given out were only pretences; but even if this were a sale under a power, I doubt if it would be sufficient to invalidate it.

What lies at the root of the matter is the damage to the original owners, and in this case that affords another ground for decision, for the price received has been proved to have been sufficient at the time. I think that if we were to set aside this sale now we should probably be sacrificing a full sale for an imperfect one. I am therefore of opinion that the defenders should be assoilzied.

Lord Ormidale—I agree in the result your Lordship has arrived at, and I would only remark, in the first place, what is the fact, that most of the technical grounds of reduction—in fact all the grounds with the exception of two—were given up at the debate. I think it right that this should be known and understood. In the second place, there is here prescribed no form of sale or procedure in view of sale which the Alliance Company was bound to observe. In the ordinary form of bond and disposition in security, various forms in connection with a sale, should such be necessary, are generally prescribed; these are the mandate that a seller holds to which he must conform; but here it is quite different. The company held on an *ex facie* absolute disposition, and are in the position of absolute owners in bringing the property to a sale. It is quite true that we have here deeds which prove that the company only held the property in security, and they were of course bound to conform to these deeds. But there is no formality in the bond to which the creditor was bound to conform, except to give 10 days' notice to the original owners, which was done. The bond gives up every other kind of formality in express terms. In such a case, therefore, it is impossible that without relevant allegations of damages incurred a pursuer can prevail. I can quite conceive circumstances which might render the sellers liable in damages, but there is no conclusion for damages here, but only for reduction.

Lord Gifford—I am of the same opinion both in law and in the equity which shines through the case. The Alliance Company have an absolute disposition, and the very object of this is to give them the most ample and absolute power to sell. This must be given effect to if all is fair in the sale. The Lord Ordinary says—and I agree with him—that in a question with a *bona fide* purchaser the sale here could not be infringed.

In regard to the question of warrandice, absolute warrandice is in point of fact given against the Parks, for in the conveyance from the Parks to the company they bind themselves in absolute warrandice, and the company therefore in assigning all their rights assign the absolute warrandice of the Parks. There is nothing therefore in that objection. There is a little more on the question of non-production of the titles; it was gross carelessness; but the *bona fide* purchaser will not appear, and accordingly the Lord Ordinary, taking an equitable view of the matter, gave him a chance of getting off on the Parks finding caution. I should have been inclined to fall in with the Lord Ordinary's view and stretch a point if the parties could have agreed to this, but they will not, and therefore we have no alternative but to give absolvitor to the defenders.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders from the whole conclusions of the action.

Counsel for Pursuers (Respondents)—Lee—Mair. Agent—W. Officer, S.S.C.

Counsel for Defenders (Reclaimers)—Guthrie Smith—Strachan. Agent—T. F. Weir, S.S.C.

Saturday, January 24.

SECOND DIVISION.

[Sheriff of Aberdeen.

PETERHEAD GRANITE POLISHING COMPANY *v.* THE PAROCHIAL BOARD OF PETERHEAD.

Property—Diversion of Water from a Stream by Upper Proprietor under Public Health (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 101), *secs.* 89, 90 *—Right of Lower Heritor to Damages or Compensation.*

By the Public Health (Scotland) Act 1867 the local authority of any parish when desirous of providing a water supply for a district under their charge, are stated 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 further, for the purposes of this Act, the words 'lands' and 'land' in the said Acts (Lands Clauses) and in this Act shall include water and the right thereto." The 90th section provided for the observance of certain regulations with regard to the purchase and taking of "land" for the above purpose. *Held* that the abstraction of water by a local authority for the above purpose, which led to a diminution of the flow which the lower heritor used for the purposes of certain works, did not under the 89th and 90th sections of the above Act entitle a lower riparian proprietor to compel the local authority to treat with him as for the purchase of his interest in the stream, but entitled him only to compensation as for land injuriously affected; that he therefore was not entitled to interdict; and further, that an action of damages for compensation was incompetent under the Lands Clauses Acts, other procedure being therein provided.

The appellants in this case, the Peterhead Granite Polishing Company, complained of a decision of the Sheriff of Aberdeenshire (GUTHRIE SMITH) dismissing two actions at their instance against the Parochial Board of the parish of Peterhead as local authority for the parish. The first action prayed the Court "to interdict the defenders from diverting the water naturally flowing to and from the lands adjacent to the pursuers' works at Millbank, in the said parish of Peterhead, or using any appliances for the purpose of diverting the water from the grounds occupied and possessed by the pursuers at Millbank aforesaid, and in particular from opening any conduits which may carry the said water and divert it from the pursuers' works to the village of Boddam, in said parish, or elsewhere, contrary to the natural flow thereof; and to interdict the said defenders from opening any projected conduit of or for the said water to the said village of Boddam, or elsewhere than its natural flow," &c. The second was for payment of £500 of damages or compensation in respect of the diversion of the water which was necessary for the working of their machinery.

The appellants were tenants under lease of certain polishing works, ground, and pertinents at Millbank near Peterhead, and as such had right to a stream of water and a water-dam used for the purposes of their trade. In 1878 the respondents as local authority for the extra-burghal part of the parish of Peterhead, and in virtue of the Public Health Act 1867 (30 and 31 Vict. cap. 101), as they alleged, executed certain works for the purpose of providing a supply of water for the domestic use of the inhabitants of a special water district comprehending the village of Boddam. In executing these works the respondents took a supply of water from certain springs and streams situated considerably above the lands and premises leased by the appellants, but the water from which, if not interfered with, would ultimately have flowed into the stream to which the appellants claimed right, and from which their granite polishing works were supplied with water. Shortly before the new water supply to Boddam was actually turned on, the appellants presented a petition to interdict the respondents from taking or diverting the water. The petition was presented on 16th May 1878, and five months afterwards, in October 1878, the appellants brought their second action.

In the Sheriff Court various points were argued which were not pressed in the Court of Session, among others that an agreement as to the amount of compensation to be paid had been come to between the parties.

The appellants' pleas-in-law in the petition for interdict were, *inter alia*—"(1) The pursuers are entitled to the natural flow of the water. (2) The defenders having interfered with the natural flow of the water, are liable to be interdicted as prayed for. (3) In any event, the defenders having made no arrangement for the diversion of the water from the pursuers' grounds, or ever having given any intimation or acted in terms of any statute thereanent, the proceedings complained of are illegal." In answer to this the respondents' 4th plea was—"At all events, the pursuers having no right or interest in the water in question, and having suffered no damage by its diversion, are not entitled to object thereto, and the action should be dismissed with expenses."

These pleas sufficiently show the question at issue between the parties.

The Lands Clauses Act 1845 (8 and 9 Vict. c. 19), secs. 17–23, provided the means of settling disputes as to the amount of compensation where land was taken under these Acts.

The Public Health (Scotland) Act 1867 (30 and 31 Vict. c. 101), sec. 89, gave power to the local authority in parishes to "acquire and provide and arrange for a supply of water" for domestic use, and for that purpose gave them "all the powers and rights given to promoters of undertakings by the Lands Clauses Act, 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," &c., "and further, that for the purposes of this Act the words 'lands' and 'land' in the said Acts and in this Act shall include water and the right thereto," &c.

The 90th section of the same Act provided a number of regulations to be observed "with respect to the purchase and taking of land, otherwise than by agreement, by local authorities" for this purpose, including the giving of notice, &c., which regulations admittedly had not been observed by the respondents.

Section 116 provided that when the compensation claimed exceeds £50 it was to be determined as provided by the Lands Clauses Act.

The actions were subsequently conjoined, and the Sheriff-Substitute (DOVE WILSON) after proof assoilzied the defenders on the ground that an agreement had been come to between the parties for the acquisition by the appellants of the water supply in dispute. On appeal the Sheriff (GUTHRIE SMITH) recalled the Sheriff-Substitute's interlocutor; and in respect the acts complained of were within the powers conferred upon the defenders by the Public Health Act 1867, refused the interdict and dismissed the petition; and in respect by the Act in question it was provided that when the compensation claimed by reason of the exercise of any of the powers of the Act exceeded £50 sterling it should be ascertained and disposed of in terms of the Lands Clauses Act, found that the Court had no jurisdiction to entertain the action. He added this note—

"*Note.*—The defenders are the local authority of the extra-burghal portion of the parish of Peterhead, and the present question arises out of the measures taken under the Public Health Act for obtaining a supply of water to the village of Boddam, which was formed in 1872 into a special drainage and water-supply district in terms of the statute. In October 1877 a scheme was adopted, which consisted in intercepting the water issuing from certain springs in the neighbourhood, and bringing it by a pipe into the village; and on 29th November a committee was appointed to superintend the execution of the works, adjust terms with the contractor, 'and make all arrangements that may be necessary with the proprietors or tenants through whose lands the pipe may pass.' The proprietor of the springs and of the lands through which the pipe fell to be laid was settled with on satisfactory terms, and on 2d May 1878 the works

were reported to be finished and the water ready to be turned on for public use.

"It cannot be disputed that in all these proceedings the local authority were acting quite within their powers. These, as defined in section 89 of the Act of Parliament, are of a very extensive character. They may conduct water from any lake, river, or stream, may dig wells, make and maintain reservoirs, 'and do and execute all such works, matters, and things as shall be necessary and proper for providing a proper supply of water for the domestic use of the inhabitants.' For this purpose it is declared that they possess all the powers conferred by the Lands Clauses Acts, subject to the condition that reasonable compensation shall be made for the water taken and the damage which may be done.

"As the effect of the defenders' operations was to cut off a tributary stream, or at least to diminish the supply of water which the pursuers collected in a dam for the use of their works, they appear under the statute to be entitled to some compensation, and were so dealt with by the defenders. They claimed £2 a-year, but on 4th March 1878 an offer was received from them proposing to reduce this annual payment to a nominal sum if the defenders would allow them to run a three-quarter inch pipe from the main to Stirling Village. This proposal not being agreed to, the present litigation commenced with an application for interdict in May 1878. In so acting the pursuers completely mistook their remedy. In the first place, the application was too late. A court of law cannot interdict a thing after it is done, and to say that a community is to have their water stopped till a particular creditor is paid is absurd. In the next place, the operations of the defenders could not be interfered with by the Court except on the ground of their being *ultra vires*, and, as far as the Sheriff sees, they were entirely within their powers. A local authority exercising for the public benefit statutory powers stands in a different position from the promoters of an enterprise like a railway—designed, no doubt, for the public advantage, but also and principally for the profit of the company. The money which they require to pay by way of indemnifying those who may suffer from the measures taken in the public interest is not purchase-money. They are not purchasers at all. It is compensation, and if in every case its adjustment was a condition-precedent to the lands being entered on, the delays would be endless and the difficulties inextricable. It has therefore been decided that the proper time for the assessment of compensation is not before, but after the works have been finished—(*North London Railway Company* v. *Metropolitan Board of Works*, 28 L.J., Ch. 909, and *Macey* v. *Metropolitan Board of Works*, 33 L.J., Ch. 377)—and it follows that when the pursuers say, 'I will stop your water until you pay me for it,' he is following an entirely mistaken course. The interdict has accordingly been dismissed.

"As regards the action of compensation, the Sheriff regrets that he is unable to deal with it, but he fears that under the statute (although all parties appeared to have overlooked the fact) there is no other course open. The statute in defining the nature of compensation which shall be given, has also—no doubt for wise reasons—determined the manner in which it shall be assessed. If the claim is under £50 it is to be fixed by the Sheriff 'summarily,' and when 'the sum claimed exceeds £50 sterling, such compensation shall be ascertained and disposed of in terms of the Lands Clauses Act' (section 116). These Acts provide that if the parties do not agree as to the amount of compensation they may have the matter settled either by arbitration or by a jury." . . .

The Peterhead Granite Polishing Company, petitioners and pursuers, appealed, and argued—The use of the water by a riparian proprietor was not a servitude, but a right of property, for each successive proprietor used what he required for primary purposes; the use of water-power was also a property. In the present case the respondents could not take the springs in question without notice to the appellants. The proper course to be followed if anyone wished to acquire a right of property in springs was to go and deal with the owner of the ground where the springs were, and also to give notice to all the proprietors through whose ground the water flowed. As between them and the local authority "water" meant "land" (see definition in statute quoted *supra*), and it must be acquired from the owner as land must. In the English Act (the Water-works Act 1847) "taking water" was said to be merely "injuriously affecting," but there was nothing of that sort in the Public Health Act 1867, and the distinction always was drawn between "injuriously affecting" a thing but not taking it, and "taking" it; here there was more than "injuriously affecting," for the water was actually taken. The difference between the two Acts was sufficient to destroy the authority of *Bush* v. *The Trowbridge Water-works Company*, L.R., 19 Eq. 291, and 10 Chan. App. 459. The decision there was founded solely on the wording of the Water-works Act, and afforded no analogy. The appellants were here in the position of having a right to the water of the stream; the statute said that when the expression "land" occurred in the statute it covered such a right. The statute further said that when "land" was to be taken under it certain regulations required to be observed (sec. 90); here these regulations were not observed, for the Sheriff had ignored this section altogether, and the appellants were therefore entitled to interdict.

Additional authorities—*North London Railway Company* v. *Metropolitan Board of Works*, 28 L.J., Chan. 909; *Macey* v. *Metropolitan Board of Works*, 33 L.J., Chan. 377; *Don* v. *North British Railway Company and Newport Railway Company*, June 21, 1878, 5 R. 972.

Argued for respondents — The question here was, Were the local authority within their powers in what they did? If they were, the only remedy to the appellants was under sec. 116 of the Public Health Act. They were not "taking" land here, but if anything only "injuriously affecting" it. [Lord Justice-Clerk — If you can show that there is an end of the case.] In regard to this what their Lordships had to decide was, what right a riparian proprietor had to water running through his lands. It was not a right of property. [In regard to the definition of "land" in the statute, the real meaning of that was that where the right to water was of the nature of a right of property—*e.g.*, water appropriated and

preserved, as in a tank or an artificial pond—then the definition applied, not otherwise.] The nature of the right of each riparian proprietor was to appropriate as much as he required while it was flowing past him for his primary uses—like game or air—nothing more. All that a lower proprietor had was the chance of any water that came down to him, and he could not complain if all the water was disposed of above him for primary purposes (Bell's Prin. 1100). Supposing notice had to be given here, it was very difficult to see what would be the nature of it—a notice that you were going to take what the other party had no right to sell. If a lower proprietor did get compensation as here claimed, he would require to keep away from the river altogether, or else he would have as much as ever he had, viz., use for primary purposes. The contention of the appellants would result in the most preposterous consequences, and render the Acts unworkable.

Authorities—*Newport Railway Co.* v. *Flemings*, Nov. 12, 1879, 17 Scot. Law Rep. 93; *Bush* v. *Trowbridge Water-works Co.* (quoted *supra*); *Ferrand* v. *Corporation of Bradford*, 21 Beavan 412.

At advising—

Lord Justice-Clerk—This case stands in an unsatisfactory position. Involving as it does a very simple claim, resting on fact and law which present no difficulty, it seems to have missed its way in the labyrinths of judicial procedure. After an elaborate proof in the Sheriff Court, and a judgment by the Sheriff-Substitute on the merits, the Sheriff has recalled that judgment, and has found that one-half of the claim—that for interdict—is unfounded, and that as regards the other—that for compensation—he has no jurisdiction to entertain it. I am of opinion that the result of his judgment on both points is right, although it is certainly to be regretted that the second, which was not pleaded, had not been earlier discovered.

The case itself rests on very simple grounds. The defenders in the conjoined actions are the parochial board of Peterhead, acting as the local authority of Peterhead under the Public Health Act 1867. Acting in the discharge of their public duty, the defenders resolved to execute, and have executed, certain works for the purpose of affording a supply of water to the village of Boddam within their jurisdiction, and for this purpose have acquired right to and have diverted certain springs which are the feeders of a stream on which the works of the pursuers, the Peterhead Granite Company, are situate, at a distance of about a quarter of a mile lower down. The pursuers, complaining that these operations deprive them of the amount of water to which they are entitled, raised an action to have them interdicted, and at the same time brought an action of damages for the injury thereby occasioned, and in these actions, when conjoined, the procedure and decision before us have taken place.

There can be no doubt that the defenders were entitled under the statute to execute the works in question; and there is as little doubt that if the pursuers have sustained injury in consequence they are entitled to compensation. But the pursuers maintain that the defenders were not entitled to proceed with these operations until they had followed out the procedure prescribed by the 90th section of the Public Health Act. On the other hand, the defenders have pleaded, first, that the pursuers were barred from insisting in this action by reason of a special agreement with them; and secondly, that these springs did not reach the stream in question by the natural flow of the water. As regards these last questions, I am of opinion that there is no ground for them. The alleged agreement never was completed, and I am satisfied on the proof that the springs in question flow naturally into the stream. Putting these objections aside therefore, the only point of any general importance raised in the case is the construction of the 89th and 90th sections of the Public Health Act 1867.

It has been contended by the pursuers that the 89th section of the statute, in that part of it which contains an interpretation of terms, places such water rights as those now in question on the same footing as land rights.

The 90th section follows, and provides a very detailed procedure to be followed when land is taken. Its opening words are these—[*reads ut supra*]—and then in the following sub-sections a specific mode of procedure is prescribed, consisting of an elaborate system of notices and other provisions. It is contended that all these must be followed out in regard to all inferior heritors who may have an interest in the water supply before the local authority can commence operations.

The Sheriff seems to hold that it is a sufficient reply to this contention that the local authority are not promoters of a private enterprise, but are acting on behalf of the public. I am far from saying that the distinction has not a solid foundation to some extent, but I desire to place my opinion in this case on a simple ground. In the view which I take of this question it is not necessary to hold either that the words in the interpretation clause are limited to water actually appropriated for specific use, or that every inferior heritor is proprietor of the whole water supply of the stream above. It is true that the water of a running stream is not in its component particles the subject of property, excepting in so far as it may be actually appropriated for primary uses. But it is also true, and the distinction has always been recognised, that a running stream, composed of the banks, the channel, and the water, may be and is a separate tenement to many important effects, although the component parts of the stream are perpetually shifting. But there is a manifest and broad distinction between the stream as it flows through and over the property of an heritor, and the rights which an inferior heritor has in regard to water which has never reached his land. The subject is most learnedly and exhaustively discussed in the opinion of Lord Denman in the case of *Mason* v. *Hill*, reported in 5 Barnewall and Adolphus, p. 1, where the authorities in the civil law and the law of England are most lucidly and learnedly collected. Whatever views may be taken of this ancient controversy, it is quite sufficient for my present purpose to refer to the case of *Bush* v. *The Trowbridge Waterworks*, in which Lord-Justice James expresses the opinion at which I have arrived, in the following words (L.R., 10 Ch. Apps. 462)—"They (the Waterworks Company) entered upon the channel or bed of a stream somewhere above the plaintiff's land, and there they took, by way of diversion, water for the purpose of their waterworks, which

water, to put the case in the highest for the plaintiff, would in due course, if they had not so diverted it, have got down to her land, and would then, and so long as it was over her land, be water of which she was the owner and occupier in the sense in which a person is owner or occupier of a stream running through his land,—that is to say, the water would have become within the ownership, and to some extent within the occupancy, of the plaintiff. But when it was intercepted by the defendants, just as if it was intercepted by any other riparian proprietor, although it might have become part of her property, the water which was actually intercepted was not her property." This view, which is very clearly expressed, and as it appears to me is sound sense, is quite sufficient for the decision of this case. I do not say what construction I should put on the interpreting words in the 89th section of the Public Health Act, "water and the right thereto," if the question related to water within the property, and actually running over the land of the pursuers. The principles laid down in the passage I have quoted were applied to a case under the English Waterworks Act, which contains an express provision in regard to lands "injuriously affected." But this seems of no moment, because if the pursuers had no right of property, absolute or constructive, to the water, they are not, in my opinion, in any view within the true construction of the words. The water has been prevented from reaching them, and from thereby, in the most favourable view for the pursuers, becoming part of their property. Their claim is one for compensation for the injurious consequences thus caused.

The conclusion for interdict therefore cannot be sustained. In regard to the action of damages, I am very reluctantly compelled to concur with the Sheriff, and to find that the action is excluded by the terms of the 116th section of the Public Health Act. It is exceedingly to be regretted that this plea was not taken *in limine*, but I do not see that we have any alternative left.

Lord Ormidale—[*After stating the facts and contentions of parties*]—It appears to me that the Sheriff-Substitute was wrong in holding that the alleged agreement had been established. Nor do I consider it necessary to enter into an examination of the evidence bearing on this point, as it was not pressed at the debate, but, on the contrary, virtually given up, and the argument confined to the question whether the respondents had or had not acted within their right and power by diverting the water supply in question from the appellants' works without first satisfying them by agreement or otherwise for the loss or injury they might thereby sustain.

If the respondents are to be held as having acted within their statutory powers as the local authority for the burghal part of the parish of Peterhead, then in that view the appellants' actions were ill-founded, and have been rightly dismissed by the Sheriff-Principal. But it was argued for the appellants at the debate that the respondents had no power to divert the water as they did without first purchasing the appellants' right of property therein, while, on the other hand, it was argued for the respondents that at the utmost the only claim the appellants could have was for damages in respect of their works being "injuriously affected" by the diversion of the water, and that such a claim did not require to, and indeed could not well be dealt with before the diversion was made, as in the case of lands or property taken or purchased, but only after the diversion had been completed.

In considering the question thus raised, it is necessary to keep in view the position of the two springs in question in relation to the appellants' works. [*His Lordship then examined the evidence on this point, proceeding thereafter*]—It is obvious therefore that no part of the appellants' works or property was interfered with by the respondents, for it is not said that the site of the two springs of water, or the ground through which they passed or percolated into the main stream, is part of the appellants' property. Nor is it said that any part of the *solum* of the burn itself belongs to the appellants. All that they say is, that the water (and "water" in the sense of the respondents' statute is included under the expression "land") of the burn, added to by the water from the springs, was before the diversion available for the purposes of the appellants as it passed their works. But supposing it to be so, I am unable to see how the appellants' contention can be sustained. They are only in the position of riparian proprietors having right to use the water of a stream passing their property. But they are not in any correct sense the proprietors of the stream itself, or even of any portion of the water in the stream except what they may actually have legitimately taken possession of and appropriated for their own use. But the respondents have not interfered with any such portion of the water of the stream or burn. They have not, indeed, taken or diverted or interfered at all with the water of the stream or burn as it passes the appellants' property. What they have done is merely to divert the water of two springs which find their way into the burn a considerable distance further up than the appellants' property. How, then, could they sell to the respondents the water of these springs? The springs are not on their property, and did not belong to them at all. At the very utmost they had only such a right to or interest in the water of the burn as every riparian proprietor in a stream from the source to the sea has. In this view, which I did not understand was disputed at the debate, the appellants would have had the same right or interest, and no more, in the water of the stream or burn in question if their works had been situated as many miles as they are yards below the springs.

It is obvious, therefore, I think, that unless there is something very peculiar and special in the statute under which the respondents have acted—a matter which will be presently examined into—the appellants must be wrong in maintaining that the respondents were bound, before they interfered with the water of the springs in the way they did, to have given them notice and called upon them to treat for the value or price of the water, just as if they desired to take or purchase a part of the appellants' lands. It has, accordingly, been decided in the case of *Bush* v. *The Trowbridge Waterworks Company*, by the present Master of the Rolls, Sir George Jessel, (10th February 1875, Law Reports, 19 Equity, 291), whose judgment was affirmed on appeal by the Lords Justices James and Mellish (4th May 1875, 10 Chancery Appeal Cases, 459), that the abstraction of water from a stream does not en

title a riparian proprietor below to require the company to treat, under the 6th section of the Waterworks Clauses Act 1847, for the purchase of his interests in the stream, but entitles him only to compensation as for land "injuriously affected." And the decision in that case was afterwards recognised and acted on by the Court of Common Pleas in the case of *Stone* v. *The Mayor, Aldermen, and Burgesses of Yeovil* (22d May 1876, Law Reports, 1 Com. Pleas Div. 691).

It was argued, however, for the appellants that the 89th section of the statute—the Public Health (Scotland) Act 1867 (30 and 31 Vict. cap. 101)—by virtue of which alone the respondents can say they proceeded, is different in its terms from section 6 of the Waterworks Clauses Act 1847, which was founded on in the case of *Bush* v. *The Trowbridge Waterworks Company*. This is true to some extent—that is to say, it is true that the two enactments are not expressed in terms precisely the same, and they are to be found in different statutes. But, it appears to me that so far as the present dispute is concerned they are to the same effect. Thus, while by the 6th section of the Waterworks Act provision is made for compensation being given not only to the owners of lands taken or purchased, but also to the owners of lands "injuriously affected by the construction or maintenance of the works," there is likewise in the 89th section (subdivision 1) of the Public Health (Scotland) Act a provision to the effect that compensation should be given for land (or water) taken or purchased, and also "for the damage which may be done to any lands by reason of the exercise of the powers hereby conferred," which is just, I think, another way of saying for lands "injuriously affected." And if I am right in this, it follows that the observation of the Master of the Rolls in *Bush's* case, to the effect that it never was intended that a party should be entitled to "compel the company to purchase his interest in a stream because the company, not diverting the stream at all, took some water away higher up, whereby the flow of water in the stream was diminished," is equally applicable to the present case.

I apprehend, therefore, that on authority, as well as on any fair and reasonable view that can be taken of the matter, the respondents were not bound before interfering with the springs in question to give notice to the appellants of their intention to do so, and to call upon them to state the price or compensation they asked for them, but that they were entitled, so far as the appellants were concerned, to divert the water of the springs in the manner they did, leaving it to the appellants afterwards to claim, if they considered they had a claim, compensation in respect of their works being injuriously affected, or, in the words of the 89th section of the Public Health (Scotland) Act 1867, for the damage done to their land or works by reason of the exercise by the respondents of the powers conferred on them by that Act. The appellants are by that section of the Act entitled to the remedies afforded by the Lands Clauses Act 1845, by which it is provided that if any party shall be entitled to compensation in respect of lands—which by the Public Health (Scotland) Act may mean or include water—injuriously affected, they may give notice in writing of their claim, stating therein the nature of their interest, and their desire to have a settlement by arbitration or a jury. That was the course or remedy for the appellants to have adopted if they considered they had a claim, and not an action for interdict and an action for damages as if the respondents had acted beyond their powers.

The actions in question were therefore in my opinion clearly incompetent, and the Sheriff was right in dismissing them, and if further authority were necessary in support of this view, it is to be found in the case of *Macey* v. *The Metropolitan Board of Works*, 33 L.J., Chancery, 337.

Lord Gifford—[*His Lordship stated the facts ut supra*]—I am of opinion that the Sheriff-Principal has rightly dismissed both actions, and that this appeal against his judgment ought to be dismissed and his judgment affirmed. But while I agree with the Sheriff-Principal in the result which he has reached, I do not quite agree with him in some of the views which he has taken, or at least I think the terms in which he has expressed himself are too wide, and give too unqualified an interpretation to the provisions of the Public Health Act of 1867. Further, I think the views of that Act which the Sheriff has expressed are not necessary for the decision of the present actions.

The parochial board of Peterhead as local authority under the Public Health Act have undoubted right to acquire and take water for the domestic use of the inhabitants of water districts within the extra-burghal parish duly constituted under the statute. But it does not follow that they may take land and lay pipes and construct works and reservoirs at their own hands, and without any notice to or any proceedings against the owners or occupants of the lands they take or enter upon for the purpose of obtaining, storing, and distributing the water supply. On the contrary, I think that the fair construction of the statute is that where the local authority for the purposes of the projected water supply require to take and acquire lands for the purpose of erecting works or reservoirs, or even to enter upon lands for the purpose of laying pipes and acquiring and maintaining pipe tracks, they must do so under the proper clauses contained in the Public Health Act and in the Lands Clauses Act embodied therein—giving due notice, complying with all the provisions of the Acts, and making due compensation to the persons whose land is taken, entered upon, or interfered with. In this respect I think the Sheriff-Principal has expressed himself unguardedly and in terms too absolute and unlimited.

But I think the statutory provisions about provisional orders and about the ascertainment of purchase price properly so called do not apply so far as the present appellants, the Granite Polishing Company, are concerned. No part of their lands—that is, of the lands embraced in their leases—has been taken by the local authority—no part of them has ever been entered upon or touched or interfered with in any way. All that the local authority have done, even on the showing of the appellants themselves, is, that they have, by means of operations on the lands of superior heritors—that is, heritors whose lands are at a higher level than the lands possessed by the Granite Company—diminished the supply of water which would otherwise have flowed through the lands leased to the Granite Com-

pany. It is said—and the averment seems to be supported by evidence, and excepting as to degree is not really disputed by the local authority—that the water taken for the supply of Boddam, and which has been got from the upper streams and springs, has diminished the flow of water which formerly came to and passed through the pursuers' works, and I assume for the purposes of these actions that this is true. It is not very material to what extent the stream passing through the appellants' works has been lessened in amount. It rather appears that, taking the strongest view for the appellants, the lessening does not exceed one-third of the whole amount, but a diminishing of the flow to this extent or even to a less extent is quite sufficient to raise the present questions.

Now, the first question is, Are the appellants entitled *ab ante* to interdict the whole proceedings of the local authority so far as regards the abstracting of water from the upper springs or streams, simply on the ground that this abstraction will diminish the amount of the ultimate flow of water which passes through the inferior grounds and subjects occupied and possessed by them? I am of opinion that they are not. I think that the remedy of the appellants if they have suffered injury and prejudice is of a different nature altogether. It is not said that the local authority have illegally entered upon the lands of the superior heritors, or have illegally laid the pipes and constructed the works required for the water supply of Boddam. On the contrary, it appears that the local authority under private agreements have had the full consent of the upper heritors and tenants, and had the full consent of everybody upon whose lands or property they entered or with whose lands or property they interfered in any way. The local authority did not enter upon the lands occupied by the appellants—they did not touch or interfere with the appellants' property at all—they were never within the bounds and limits thereof—and all that can be said is that something which the local authority quite lawfully did on the property of the upper heritors, and with the full consent of these upper heritors, has injuriously affected the rights of the appellants as tenants of a lower heritor.

Now, I think that this distinction between taking or interfering with property directly, and merely injuriously affecting property or rights without directly taking them or touching them in any way, is vital, and in a case like the present is conclusive as to the remedy which is open to the party whose rights are merely injuriously affected, but no part of whose property is taken or touched. In the one case the local authority or water company or railway must proceed under the statute by notices and by due exercise of the statutory powers. If this is not done interdict will be granted. In the other case, interdict is not the appropriate remedy, for the acts of the local authority have been legal, and the only remedy is a claim for compensation as for rights injuriously affected.

It appears to me that this view is really conclusive of the whole question. A party whose land is taken—and in land I include water in terms of the Act—has a claim for the price to be made good under the statute. He is really a seller under a compulsory sale, and the notice to him is a statutory purchase. It is quite different with a party whose land—and here I include water also—is not taken, but is only injuriously affected. He is not a seller, and does not sell anything to the local authority or to the company; he has only a claim, if he has a claim at all, for the injury which he has incidentally sustained by the quite lawful exercise of the local authority or of the public company's statutory right. The English cases quoted, although the circumstances were no doubt different—and it is possible to draw distinctions in some respects between them and the present case—are really conclusive on the question of principle, and I think are directly applicable to the present case. The water said to be abstracted from the upper springs and streams was never in any sense the property of the appellants. It never came near them, it never was within their lands, it never was possessed by them, and never was impounded or stored by them in any way. All they can say is that it should have been allowed to reach them and to flow past them as the rest of the water does. But this is not a right of property, but merely a right to have water running through one's grounds—only so much of the water as is lifted in a pitcher or stored in a cistern or tank can be said to be the property of the appellants, and there is no question here concerning water in such a position.

If the appellants' views are well founded, it would follow that in no case could a local authority or water company obtain right to take water even from the smallest spring or from the highest tarn in the mountains or in the interior of the country without giving notice and making a purchase from every riparian proprietor on the banks of the stream all the way to the sea, it may be for scores or for hundreds of miles. But this is extravagant. If the river passed a city, every householder in the city might require to be settled with as proprietor or joint proprietor of the water. This would be absurd, but it is the natural consequence of the appellants' argument.

Then, as to the action of damages, this must follow the same fate. The statutes give a remedy to those injuriously affected by the proceedings of the local authority, but it is a special statutory remedy. If the claim is under £50 it is to be fixed by the Sheriff summarily, but when the claim is above £50 it "shall be ascertained and disposed of in terms of the Lands Clauses Act"—that is, by arbitration or by a jury in manner provided in the statute. This excludes a common law action of damages, which is really an action arising out of tort or wrong, and not an action for compensation for injury legally and rightly caused by the exercise of statutory powers. I think therefore that the present appeal must be dismissed.

Appeals dismissed, with expenses.

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