have pointed out, the chief use being to clear the property sold of the defender's bond.

The Lord Ordinary here, I think, misapprehended the case of *Nicholson's Trustees*, which he refers to in his note. That case relates to a security *pari passu* with that of the bondholder selling or proposing to sell, which is a *casus improvisus* in the Act of 1868 and also in the Act of 1874. These Acts provide that prior securities shall be paid in full by the selling creditor out of the price, and that the holders of posterior securities shall either go unpaid, or have such payment as the consigned surplus may yield, the property being disencumbered of them without any discharge; but no provision is made regarding securities *pari passu* with that of the selling creditor. In *Nicholson's* case the Court held that they were not at liberty to supply the omission. It has now been supplied in the only way in which it naturally could be by sec. 11 of the Act 57 and 58 Vict. cap. 44. We have no case of the kind to deal with here.

The Lord Ordinary has not noticed the defender's first and second pleas. They are, I think, clearly bad. The third plea is perhaps included in the fourth, and, at any rate I think it bad, being of opinion that the pursuer, in his capacity of lawful seller of the property, was entitled, and indeed in duty bound, to give the premonition, as necessary to enable him to fulfil his obligation, and apply the price as directed by the statute under which he sold. I am therefore prepared to repel all the pleas-in-law for the defender, and to sustain those for the pursuer, to the effect of finding—1st, that the defender had by the premonition of 10th August good and sufficient notice that the bond held by him would be paid at Martinmas 1894; 2nd, that he is liable to account to the pursuer, so as to show the amount due on the bond at Martinmas 1894; and, 3rd, that on payment thereof, with interest from Martinmas 1894 at bank deposit rate, he is bound to grant a discharge of the bond.

With regard to expenses, these must, of course, so far as the pursuer is concerned, follow the result. But the defender is judicial factor on a testamentary estate, and in finding him liable to the pursuer in expenses I think we must guard against indicating that we think they will form a good charge by him against the factorial estates. His conduct in declining the payment offered, and so necessitating this action, is *prima facie* inexplicable, and his counsel, when appealed to, could suggest no explanation of it. It is probably sufficient to say that by finding him liable in expenses to the pursuer we mean only to give the pursuer his due, and abstain from expressing any opinion on the question which may arise on his factorial account, regarding either those which he must pay to the pursuer or those which he has incurred in conducting his defence.

LORD TRAYNER—The pursuer in this case gave premonition in statutory form that the bond held by the defender would be paid up at Martinmas 1894. That premonition bears that it was given by the pursuer with the consent of the debtor in the bond, but it is objected to it that it is not signed by the debtor. I do not regard that as essential. All that the statute requires is that it shall be a premonition by the grantor of the bond, and I should think a premonition given for the grantor by his authorised agent would be sufficient. It is not said here that the pursuer was acting without the consent or authority of the grantor, and I therefore presume that he was acting with it. But the whole purpose of the statute was undoubtedly served by the premonition in question. It has no other purpose than to give the holder of the bond such reasonable notice of the debtor's intention to pay up the bond, that the creditor may have time to look out for another investment. This purpose was, as I have said, amply served by the premonition in question. If, however, the premonition was sufficient, the defender was not entitled to refuse payment of his money at Martinmas 1894. In that view of the case, the pursuer is entitled to decree, in terms of the 2nd and 3rd conclusions of the summons.

I think this sufficient for the decision of the case, without considering the effect of the different statutory provisions which have been referred to by Lord Young, from whose opinion, however, I am not to be regarded as differing.

The LORD JUSTICE-CLERK concurred.

LORD RUTHERFURD CLARK was absent.

The Court recalled the Lord Ordinary's interlocutor, and gave decree in terms of the second and third conclusions of the summons.

Counsel for the Pursuer—C. S. Dickson—Wilson. Agent—P. Pearson, S.S.C.

Counsel for the Defender — Dundas — Abel. Agents—Hope, Todd, & Kirk, W.S.

Tuesday, July 2.

SECOND DIVISION.

THE DUKE OF SUTHERLAND'S TRUSTEES *v.* COUNTESS OF CROMARTIE AND OTHERS.

Succession — Trust-Disposition — Construction — Heirs-Female.

A granted a trust-disposition, whereby, "in order to make and secure additional provision" for his second son and "the other heirs of entail succeeding to him in the lands and estate of Cromartie, to enable them to support the dignity and title of Earl of Cromartie," he conveyed a number of securities to trustees, and directed them, after his death, to pay the free annual proceeds of the funds conveyed to his second son and the heirs-male of his body, whom

failing to certain substitutes, whom failing "to the heirs-female" of his body. The truster's second son was survived by two daughters, and upon his death the succession under the trust-disposition opened to the heirs-female of his body. The elder of the daughters succeeded to the dignity and estates of the earldom of Cromartie.

Held that the intention of the truster was that the income of the trust fund should be applied in upholding the dignity and honour of the earldom of Cromartie, and that accordingly it must be paid to the daughter who had succeeded thereto.

In 1784 the Cromartie estates were restored to the son of George Earl of Cromartie, who had been attainted of high treason in 1746. He entailed the estates on himself and the heirs-male of his body, whom failing the heirs-female of his body and other substitutes, with the declaration "the eldest heir-female and the descendants of her body always excluding heirs-portioners and succeeding without division through the whole course of heirs whatsoever, as well as heirs of provision, so often as the same shall descend to females."

By Royal Letters - Patent dated 21st October 1861 Anne Hay Mackenzie (then Duchess of Sutherland), who was then heir of entail in possession of the Cromartie estates, was restored to the family honours forfeited by the attainder, being created Countess of Cromartie, Viscountess of Tarbat, Baroness Castlehaven of Castlehaven, and Baroness Macleod of Castle Leod, with remainder to Francis Sutherland Leveson - Gower, the second surviving son of the Duchess, and the heirs-male of his body, and in default of such issue to the other younger sons of the said Duchess in their order, and the heirs-male of their bodies, and in default of such issue to the said Lord Francis Sutherland Leveson-Gower and the heirs of his body. In connection with and as a condition of this restitution of the said honours, provision had to be made for the due and proper endowment and maintenance of the earldom of Cromartie. By a private Act of Parliament the Duchess of Sutherland was authorised, with consent of her husband, to disentail the Cromartie estates (of which she was heir of entail in possession), and to entail them upon herself and her second son Lord Francis Sutherland Leveson-Gower and the heirs-male of his body; whom failing any son or sons of the Duchess of Sutherland to be thereafter born, in the order of seniority, and the heirs-male of his or their bodies, whom failing the heirs-female of Lord Francis Sutherland Leveson-Gower.

A disposition and deed of entail was afterwards executed in terms of the said Act.

In 1873 the Cromartie estates were again disentailed under the authority of the Court, and by a disposition and deed of entail bearing to be granted for the preservation and honour of the earldom of Cromartie, the Duchess of Sutherland, Countess of Cromartie, entailed the estates upon herself, whom failing Lord Francis Sutherland Leveson-Gower, designed Francis Viscount Tarbat, her second surviving son, whom failing certain other heirs of entail, with the provision "the eldest heir-female and the descendants of her body always excluding heirs-portioners and succeeding without division throughout the whole course of succession of heirs whatsoever as well as heirs of provision." It was further declared that, in the event of any of the said heirs of entail succeeding to the earldom and estate of Sutherland, the succession to the Cromartie estates should devolve upon the heir next entitled to succeed thereto under the destination before specified.

Upon 23rd July 1862 the Duke of Sutherland granted a trust-deed, whereby "in order to make and secure additional provision for his second son Lord Francis Leveson-Gower, known as Lord Tarbat, and the other heirs of entail succeeding to him in the lands and estate of Cromartie . . . to enable them to support the dignity and title of the Earl of Cromartie," he conveyed to trustees a number of bonds, policies of insurance, and other securities under, *inter alia*, the conditions and provisions afterwritten:—"*Third*, That my said trustees shall, during my lifetime pay the free annual proceeds of the said trust-funds to me: *Fourth*, That my said trustees shall, on my death, if the said Francis Sutherland Leveson - Gower, commonly called Lord Macleod, be then in minority, out of the free proceeds of the trust-funds, apply such amount as shall be requisite for his maintenance and education, and thereafter accumulate any balance which may remain, and invest the same in the purchase of Government Stock, or on any of the securities above mentioned, and upon the said Francis Sutherland Leveson - Gower, commonly called Lord Macleod, attaining the age of twenty-one years complete, my said trustees shall then pay the free proceeds of the said trust-funds, including the accumulated sum as aforesaid, to him, and the heirs-male of his body, whom failing to any son or sons to be hereafter born of my present marriage, in the order of seniority, and the heirs-male of his or their bodies, whom failing to the heirs-female of the body of the said Francis Sutherland Leveson - Gower, commonly called Lord Macleod, whom failing to certain other substitutes."

By antenuptial contract of marriage dated August 1, 1876, between Lord Francis Leveson-Gower and the Honourable Lilian Macdonald of the Isles, he, as heir-apparent of the Cromartie estates, with consent of his mother the Countess of Cromartie, and by virtue of the Act of Parliament 5 Geo. IV., cap. 87, and 31 and 32 Vict., cap. 84, bound and obliged himself and the heirs of entail succeeding to him to make payment out of the rents to the children of his intended marriage who should not succeed to the entailed estates, of the provisions specified therein, viz., to one such child

the sum of £7000, if two such children the sum of £14,000, and if three or more such children the sum of £21,000.

By an assignation in trust and bond and disposition in security, Lord Francis Leveson-Gower, in implement of his obligation in the marriage contract, assigned certain insurance policies to the amount of £21,000 to the trustees who were appointed, or who should be afterwards appointed, to that office under the Duke of Sutherland's trust-deed executed in 1862, but with a declaration that these policies were assigned for the following purposes, viz., that the trustees should, on his decease, out of the proceeds of the policies, relieve the entailed estate of Cromartie of the obligations undertaken by him in his marriage-contract in favour of his younger children; and as regarded the surplus of the sums contained in the policies, that they should invest the same in their own names as trustees, and apply the same and the annual income thereof for the purposes (other than the third purpose), and in the manner provided by the Duke of Sutherland with regard to the securities placed by him under the charge of the said trustees, all as if the said sums had been assigned by the said trust-deed by the said Duke of Sutherland, and as if at the death of the granter the said Duke were naturally dead.

The Countess of Cromartie and Duchess of Sutherland died on 25th November 1888, and was succeeded in the title and estates of Cromartie by her second son, Francis, Viscount Tarbat. The Duke of Sutherland died upon 22nd September 1892, and the income of the trust-funds provided under the trust-deed of 1862 was then paid to the Earl of Cromartie.

The Earl died upon 24th November 1893 survived by two daughters only. Upon his death the Cromartie estates passed to the eldest, Lady Sibell Lilian Mackenzie, who by Royal Letters-Patent dated 25th February 1895 was declared to be Countess of Cromartie, and to hold the earldom in as full and ample a manner as her father had done.

After deduction of the amount of the provision due to the younger daughter under her father's marriage-contract, there remained in the hands of the trustees under the assignation in trust above mentioned the sum of £19,392.

Questions having arisen as to the administration of the income of this fund and of the trust funds held by the trustees under the deed of trust granted by the Duke of Sutherland, a special case was presented by (1) the trustees acting under the Duke of Sutherland's trust-deed of 1862; (2) the Countess of Cromartie; (3) the Right Honourable Lady Constance Mackenzie, younger daughter of the late Earl.

The questions of law were—"1. Is the whole free income—(1) of the trust funds referred to in article 7 (*i.e.*, the funds held under the deed of trust granted by the Duke of Sutherland); and (2) of the trust funds referred to in article 9 (*i.e.*, the funds held under the assignation in trust granted by Viscount Tarbat), payable to Sibell Lilian, Countess of Cromartie. 2. Are (1) the whole free income of the trust funds referred to in article 9, and (2) the one-half of the free income of the trust funds referred to in article 7, payable to Sibell Lilian, Countess of Cromartie, and (3) the other one-half of the free income of the trust funds referred to in article 7 payable to her sister, the Lady Constance Mackenzie. Or 3, Is the whole free income (1) of the trust funds referred to in article 7, and (2) of the trust funds referred to in article 9, payable, in equal shares, to Sibell Lilian, Countess of Cromartie, and her sister, the Lady Constance Mackenzie."

Cases cited — *Farquhar* v. *Farquhar*, November 28, 1838, 1 D. 121; *Chancellor* v. *Mossman & Company*, July 19, 1872, 10 Macph. 995; *Inglis* v. *Gillanders*, January 19, 1895, 22 R. 266.

At advising—

LORD JUSTICE-CLERK—On the restoration of the Cromartie estates in 1784 to the son of George Earl of Cromartie, who had been attainted of high treason, he entailed the estates on himself and the heirs-male of his body, whom failing the heirs-female of his body and a number of substitutes, with the declaration "the eldest heir-female and the decendants of her body always excluding heirs-portioners, and succeeding without division through the whole course of heirs whatsoever, as well as heirs of provision, so oft as the same shall descend to females."

The late Duchess of Sutherland, who was a descendant of the entailer, succeeded to the estates under the entail, and was by Royal Letters-Patent restored in 1864 to the honours which had been taken away by the attainder, being constituted Countess of Cromartie with numerous other titles attached. As a condition of the restitution, certain provisions had to be made for the endowment and maintenance of the restored earldom, and accordingly by private statute the Duke and Duchess of Sutherland in 1861 obtained authority to disentail the Cromartie estate and re-entail them upon herself or her second son, Francis, to whom the title was to go on the Duchess's death by the Letters-Patent. The estates were in 1873 disentailed under authority of the Court, and a new entail made in 1878, bearing to be granted, as was the previous entail, for the preservation of the dignity and honour of the earldom, by which they were again entailed on the Duchess, whom failing on Francis, her second son, whom failing certain other heirs of entail, with the provision "the eldest heir-female and the descendants of her body always excluding heirs-portioners, and succeeding without division throughout the whole course of succession of heirs whatsoever, as well as heirs of provision."

At the time when the first entail was created, the Duke of Sutherland, by trust-deed, granted on the narrative that it was to enable his son Francis and those succeeding him to support the dynasty and title of Earl of Cromartie, assigned certain bonds, policies, and other securities, to

trustees, and bound himself to pay an annuity of £1500 a-year to her son Francis, during the Duke's life, on Francis succeeding to the earldom. By the third purpose he directed that after his death the free proceeds of the trust funds should be paid to Francis and the heirs-male of his body, and failing such, and failing other sons or their heirs-male, then to the heirs-female of Francis.

Francis, on his marriage in 1876, then heir-apparent of the Cromartie estates, with consent of the Duchess, then the institute in possession, bound himself by antenuptial contracts to pay to his children not succeeding to the estate, if one, £7000, if two, £14,000, and if three or more, £21,000. He also insured his life for £21,000, to free the estate of the burden of these younger children's provisions, the £21,000 to vest in the trustees appointed under the trust-deed of 1862, they to hold the funds "for the behoof and support of the said earldom," the trustees being directed to free the estates of the younger children's provisions and to invest any surplus remaining in terms of their power under the trust-deed, and apply the income thereof in terms of the purposes contained in that deed.

Francis succeeded to the earldom in 1888, and died in 1893, having survived his father for about a year, and enjoyed the income of the trust funds. He left only female issue, of whom the eldest, Lady Sibell, succeeded to the entailed estate, and was by Royal Letters-Patent declared Countess of Cromartie.

The present question has arisen between her and her younger sister, and relates to two subjects—first, the income of the trust fund created by the late Duke of Sutherland; and second, the income of the surplus of the £21,000 after meeting the marriage-contract provision of £7000. Both of these funds form part of the trust-funds in the hands of the trustees under the trust of 1862, and as regards both of them the question is—Does the sole right to them rest in the present Countess of Cromartie as the heir-female succeeding to the entire entailed estate, or is the expression "heirs-female" in the trust-deed to be read according to ordinary construction, so as to include both daughters of the late Earl? It was practically conceded at the debate that both funds—the fund coming from the Duke, and the fund provided by the late Earl, stand on the same footing, and therefore the question is simplified down to this —Are the trustees bound to pay over the whole income of the trust funds to the Countess, or is her sister entitled to one-half of them?

It appears to me that what was aimed at in all the deeds was to make a provision for the upholding of the dignity and title of the Cromartie earldom. And it is not to be merely traced as a motive, but is, I think, very clearly expressed in the different deeds, which all bear relation to the heir in possession, for the time being, of the estates of Cromartie. The trust-deed expressly bears that its purpose is to "secure additional provision for Francis and the other heirs of entail succeeding to him in the lands and estate of Cromartie," which, as heirs-portioner are excluded, and therefore the estates must be held by one individual, could not be carried out according to the plain intention, if one-half were to be given to one who is not an heir, who has succeeded to the estates. It was suggested in the debate that there was ambiguity in expression, and where that was so, the natural meaning of the words were to be taken, viz., that they applied to a class. But there does not appear to me to be any difficulty in so construing the trust-deed as to dispose of any ambiguity which the generality of the words used may create. The trust-deed was drawn up in direct relation to the entail then subsisting, which was made under authority of an Act of Parliament, and is in this particular in entire accord with the later entail which under the authority of the Court was substituted for it. It seems to me to be not at all a strained construction to read the destination as if the words "in succession" had been expressed, which reading brings the trust-deed into conformity with the entail, to which it relates, and makes it effectual for the practical aid of the heir of that entail. If effect were to be given to the contention of Lady Constance, the younger sister, we should in my opinion be in measure defeating the plain purpose for which the funds were placed under trust both by the late Duke, and his son the late Earl of Cromartie. The money must be applied for the aid of the holder of the estates in upholding the dignity and title in terms of the trust-deed. I would propose that the first question should be answered in the affirmative, and that would make it unnecessary to answer the second and third questions.

LORD YOUNG concurred.

LORD TRAYNER—The free proceeds of the trust funds in question are directed to be paid "to the heirs-female of the body of the said Francis Sutherland Leveson-Gower, Lord Tarbat." If these words are to be construed literally, then the destination must be read as conveying the proceeds of the trust funds to the second and third parties equally, who are the heirs-female of Lord Tarbat. But in construing the words of a settlement like the present, the intention of the testator or truster is chiefly regarded, and that construction will be adopted which appears most in accordance with that intention, the intention given effect to however being always consistent with the language used by the truster in the deed under construction. The purpose and intention of the maker of this deed—I speak of it as one deed, for the funds provided under the the second deed were directed to be held and applied upon the trusts and for the ends, uses, and purposes expressed in the first—is clear enough, and is more than once expressed. It was to make a provision for the heirs of entail succeeding to the lands

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