tract from that to buy shares would distinguish the case. All that I say is, that if such a case arises, the consideration of the question whether it is decided by *Addie* v. *The Western Bank* is not meant to be prejudiced by anything I now say.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for the Appellant—The Lord Advocate (Watson)—Herschell, Q.C.—Romer. Agents—Simson & Wakeford, Solicitors.

Counsel for the Respondents—Kay, Q.C.—Benjamin, Q.C.—Davey, Q.C.—Balfour. Agents—Martin & Leslie, Solicitors.

Monday, March 8.

(Before Lord Hatherley, Lord O'Hagan, and Lord Blackburn.)

SMITH *v.* POLICE COMMISSIONERS OF DENNY.

Property—Possession—Right of Police Commissioners to Repair a Well on Private Property—Public Health (Scotland) Act 1867, *sec.* 89.

The proprietor of certain lands on which there existed a well used by the inhabitants of an adjoining village for the prescriptive period, applied for interdict against the local authority constituted under the Public Health (Scotland) Act 1867, sec. 89, who had cleaned and enclosed the well, so as to protect it against alleged pollution by drainage. *Held* (1) that the facts proved had established *prima facie* a possessory right on the part of the public; (2) that the local authority as such had a *locus standi* to vindicate the rights of the community, represented by them, to the effect in question.

Observations upon the construction of the above-named section of the Act.

This was an appeal from the Second Division of the Court of Session, who had held (*rev.* Lord Adam, Ordinary—*diss.* Lord Ormidale) that Mr Smith, the proprietor of the lands of Boghead, was not entitled to interdict the local authority of Denny from interfering with a well situated on Mr Smith's land which had been used by the public of that town from time immemorial—March 19, 1879, 16 Scot. Law Rep. 464, 6 R. 858. The sections of the Public Health (Scotland) Act 1867 under which the question was raised are quoted in the opinion of Lord Hatherley, *infra*. The local authority had entered upon the land and covered up the well with an unfastened iron cover, and erected a pump thereon, so as to protect it against pollution.

Smith appealed to the House of Lords.

At delivering judgment—

Lord Hatherley—My Lords, in this case a question has been raised with reference to the powers exercisable by commissioners under certain Local Acts for the improvement of towns and for preserving the health of towns in Scotland, and the question which arises is this, whether or not the commissioners in carrying into effect the objects of their Act of Parliament, and vested with considerable powers for that purpose, have exceeded those powers?

There is one part of the case upon which I think your Lordships will have no difficulty whatever. The question has arisen (to some extent collaterally, but principally, no doubt, from the form in which the proceedings were instituted in the Scottish Courts) as to whether or not what has been done by the commissioners, and which is resisted by the proprietor of a certain well, does or does not amount to a claim of right on the part of the commissioners to the *solum* in which that well is situated. The case is this:—Mr Smith, the appellant, is the undoubted proprietor, as it appears to me (and as far as the argument at your Lordships' bar has gone, his proprietorship is unquestioned), of the property in which the well in question is situated—he sets forth his conveyance, he asserts his right of property in his pleadings, and nobody denies it. That is a most remarkable part of the case. In no part of the proceedings can you find the respondents denying the right of the appellant in the present case to the well. The right on the part of the appellant being clear, and there being, I think, equally clear evidence of his exercising his right, the inhabitants of the district called Denny, which does not appear to be an incorporated burgh, had been, from a time which according to Scottish statutes gives a prescriptive right, in the habit of exercising the privilege of dipping their vessels into this well, in order by means of such dipping of their vessels to carry the water off for use at their own homes, or in such other manner as they thought fit. That, again, though it appears to have been disputed in the Court below, can hardly be said to have been in dispute before your Lordships, because before we rose on the last occasion on which the House sat it appeared to be conceded on both sides that this particular modified privilege or right of taking water from the well, and the right of access to the well for the purpose of taking that water, and so far of traversing the *solum* and the pathway for that purpose, was established by the evidence.

But then it is said that this being so, the right which the inhabitants have had of using the water in the mode which I have described does not in any way, through the medium of the Act of Parliament creating the power of the commissioners, extend to vesting in these commissioners the power of asserting that right as representing by virtue of the Act of Parliament all those powers and privileges which the inhabitants themselves could have asserted if matters had remained in their former condition and no Act of Parliament had ever been passed; and that really comes to be the question in the case—that is to say, what is the extent of the power vested in the commissioners under the Act, and whether or not by anything that they have done in this case they have exceeded that power?

But, my Lords, in the first place, it will be desirable to ascertain what are the actual facts, and what have been the dealings of the commissioners with regard to the well in question. The well seems not to have been a very deep well. I think in answer to one question it was said that it was

three feet deep. I am not aware whether that was stated in evidence, or whether it was a reply given at the bar in answer to a question put by one of your Lordships. It is surrounded by something which is described, not as an enclosure, but as a sort of horseshoe fence, which surrounds the circle of the well at some little distance from it, there being an opening at one particular place, not closed by a gate, through which opening a path formed of cinders leads up to the well in question, so that persons desirous of using it can get access to it. It seems to be a perennial spring, continually filled with water, which appears to have been valuable to the different inhabitants of Denny, who gave their opinions of its merits—some of them declaring that it is particularly advantageous to be used for mixture with spirits, and others that it is remarkably well adapted for making tea. For these combined purposes, and for others for which water might be valuable, the well has been for sixty or seventy years used in the mode that I have described.

That being the case, the respondent Archibald, representing the commissioners, has as a matter of fact done this:—He has caused this open well, into which the pitchers were dipped, to be covered by a cover which closed in the top of it. It is said that some part of the cover projected a little beyond the old circle of the well, but there is no very distinct evidence of that having taken place. It is proved in the case that there is no damage done to any of the surrounding portion of the property on which this well is situated. Some question has been raised as to whether carts could get there, but the evidence I think is quite conclusive that there is nothing in the cover of the well which would prevent the access of a cart into the corner of the field in which the well is situated in the manner to which they were formerly accustomed.

That being the condition of things—the commissioners having, as I have said, put this cover on the well—of course, there being a cover, there must be some means of people getting the water otherwise than by dipping their pitchers in. For that purpose the commissioners have placed a pump upon what they thought the most convenient place, and this pump is the instrument by which the water is raised and brought to the pitchers instead of the pitchers being let down into the well.

Under these circumstances, however, the question arises as to whether the commissioners had any right to place the cover there at all. Because the place was convenient, or because other people may have had a right to go there, the commissioners cannot claim the right themselves to go there without some authority being vested in them to do so; and the whole of the proceedings in the present case have been for the purpose of ascertaining whether by virtue of the Act of Parliament to which I just now referred this right became vested in the commissioners so as to authorise these acts which have been done, and which appear to me from the evidence to have been done without any claim of right to the *solum* having been raised or established, and solely for the purpose of protecting the water in the well.

The Act of Parliament of 30th and 31st Vict. cap. 101 (Public Health (Scotland) Act 1867), sec. 89, says this—"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, and with respect to parishes (exclusive of any parts of such parishes as are situated within the district of any local authority other than the parochial boards of such parishes)"—then follow several sub-sections. The first sub-section is this:—"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 lake, river, or stream, may dig wells, make and maintain reservoirs, may purchase, take upon lease, hire, construct, lay down, and maintain such waterworks, pipes, and premises, and do and execute all such works, matters, and things as shall be necessary and proper for the aforesaid purpose, and may themselves furnish a supply of water, or contract or arrange with any other person to furnish the same; 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." This sub-section seems to be a clause in which a variety of powers is given to be vested in the commissioners. They are all classed together.

I cannot quite agree with the Lord Advocate in that part of his argument in which he contended that we are bound to consider all the subsequent sub-sections as governed by the first sub-section. At the beginning of the clause, before the sub-sections, we find a short recital indicating that in places not having a certain machinery which has been appropriated to places of a larger description, there shall be certain regulations as regards water supply. The first of those regulations is that the commissioners may provide a supply of water by means of buying the water of any existing company, or by forming or obtaining waterworks of their own. The second sub-section is that—"If any house within the district is without a proper supply of water at or near the same, the local authority shall compel the owner to obtain such supply, and to do all such works as may be necessary for that purpose." That is a totally independent branch from the first sub-section. The second sub-section contains further powers which are conferred upon the commissioners. Then the third sub-section is—"The local authority, if they have any surplus water after fully supplying what is required for domestic purposes, may supply water from such surplus to any public baths and washhouses, or for trading or manufacturing purposes, on such terms and conditions as may be agreed on between the local authority and the persons desirous of being so supplied: Provided that when water is thus supplied from such surplus it shall not be lawful for the local authority to charge the parties obtaining the same both with the special water assessment and also for the supply of water obtained by them; but the local authority may either charge the special water assessment leviable on such premises, or charge for the supply of water furnished to the same, as they shall think fit."

A great deal was said upon what is contained in the first sub-section—that the commissioners shall have all the powers given by the Lands Clauses Act for the purposes described in the sub-section; but the Lands Clauses Act would have applied not only to those cases where land was to be bought, but also to cases where land may be used even for a limited time. An instance of that is the using of a field during the construction of works—that is a power of using a field for a particular purpose. There are a variety of other purposes of that kind for which the Lands Clauses Act provides. This clause only says that where there is something to be compensated for, the compensation is to be such as is given by the Lands Clauses Consolidation Act. That is all the first sub-section seems to me to say as to that.

The sub-sections are all independent. The fourth says—"The local authority may cause all existing public cisterns, pumps, wells, reservoirs, conduits, aqueducts, and works used for the gratuitous supply of water to the inhabitants, to be continued, maintained, and plentifully supplied with water." Now, Mr Benjamin relied greatly upon the words "plentifully supplied with water" as indicating that the purpose was that it is all to be on a large scale—that the commissioners are to purchase waterworks for the purpose of meeting the provisions of the Act—and that they could have no reference to a mere well, the water of which is itself supplied apparently in this particular case plentifully without any works being executed for the purpose of giving an additional supply. I think, my Lords, we need not so construe the fourth sub-section as to limit it entirely by those words, and if that be so the argument fails. If the argument rested on the last words be of any use at all, it would apply to almost every place and to every sort of work which might be used. For instance, it would apply to a case that was referred to in the course of the argument—the supply of water to Glasgow from Loch Katrine—because when the works for bringing the water from Loch Katrine to Glasgow were once executed, it must be a thing within the purview of this particular Act, which applies to places which are "plentifully supplied with water."

All these powers are vested in the local authority —the commissioners—who are to have the power of taking possession of all such wells as are here mentioned, and they are under this clause to be "continued and maintained."

Now, my Lords, what has been done here? All that has been done has been done as a matter of right, whatever amount of damage there may be. What has been done? The commissioners found a well—a "public well" I must call it, for it had been supplying that portion of the public which resides in Denny, which seems to be a populous parish—and they took care that those rights which were vested in the inhabitants of the parish by long user, whereby they acquired the right of using the water in the way I have described, should be maintained, and that the well itself which supplies that water should be maintained. That right was vested in the commissioners. The very object of all these Acts of Parliament passed with regard to local improvement is, that certain matters which were under the direction of an unincorporated body like a parish or a burgh, which had no existence as a corporation—the right being vested in persons who cannot protect those rights because they are a large number of individuals,—are to be given into the hands of one person or body, who is to have the control and the power defined by the Act of Parliament for the maintenance of these wells and for other objects. It is provided that all the rights which are in the inhabitants of the district shall be concentrated now in these commissioners, and they shall have all those rights which could have been exercised by those persons who enjoyed the rights individually, but which they had a difficulty in bringing into full force and effect owing to their being numerous, and to its not being so easy to direct in the case of the whole parish what should properly be done as would be the case with a single officer.

I do not find that anything more has been done than an exercise of those rights which were formerly vested in the inhabitants to take the water as I have described. That being the case, I have come to the conclusion that the interdict originally granted by the Lord Ordinary was one which ought not to have been granted, because the commissioners were in their right in exercising the power they did exercise, and that the revocation of that interdict by the Court of Session was right, and that the commissioners should be freed from any such impediment.

Now, there is a question which I believe has really exercised the minds of some of your Lordships, and that is, Whether or not anything should be done for the purpose of taking care that what I have said I conceive to be the right and power of the commissioners should not be extended to any claim hereafter to the ownership of the soil, because ownership does not seem to have come fairly into the contest between the parties. I do not find that any issue either of law or of fact was ever brought to bear upon ownership. It may be said that on the one side at least it was raised—that is to say, the present appellant raised the question, he being the owner of the soil on either side. In his pleas-in-law he seems to say that the commissioners are by virtue of his ownership excluded from the right of doing anything at all on his property. It is possible that the question of *res judicata* may be afterwards raised when a matter is asserted on one side and no issue taken against it on the other, and the parties had a certain bye-question which was decided. Under these circumstances it is said that the Court might at some future time, considering the nature of the case, possibly think that it was held that the commissioners had an ownership here. I do not myself feel that very strongly, but I for one do not object—and I think your Lordships would not object—if it were thought necessary that some reservation of that kind should be made.

Speaking for myself, if I were in the position of the present appellant Mr Smith, I should be quite satisfied with the expression of opinion which I believe all your Lordships are ready to concur in, namely, that there was no question whatever intended to be decided, or actually decided, either upon the argument before us or upon the form in which the question arises for decision, which can possibly affect the ownership of the soil. The only question that is decided is, Whether or not the power exercised on behalf of the inhabitants by the commissioners has

been rightly and duly exercised? The inhabitants had the power of maintaining this well, and I hold that the commissioners had the power of maintaining it also—they had a privilege of this description thrown upon them as a burden involving the doing of what was absolutely necessary for upholding and maintaining that privilege. I do not think that anything more has been attempted to be claimed or was intended to be asserted by the course which has been taken. Any such addition is therefore to my mind unnecessary, but I see no objection to such an addition for the purpose of making it clear what are the conclusions your Lordships come to in this case and preventing future litigation. For myself, I should be contented with simply affirming the interlocutor of the Court of Session, and therefore reversing the interlocutor of the Lord Ordinary. However, my Lords, the opinion which I believe your Lordships have unanimously come to upon the main merits of the case, being such as I have given expression to, namely, that we should affirm that interlocutor of the Court of Session, there can be no objection to a day or two being given, if it is desired, for considering whether it is necessary to put any such safeguard as I have suggested in order to prevent the decision which we have come to from being misunderstood at a future time. I should like to hear what your Lordships have to say upon that subject—as to whether the order of the House shall be *simpliciter* to affirm the decision of the Court of Session, or whether that shall be our order with such an additional qualification as I have described. In either case it is not intended in any respect to vary the costs of the appeal on that account. The appeal itself will be dismissed with costs, with or without such an addition to our order as I have described.

Lord O'Hagan—My Lords, I am very clearly of the same opinion, and I shall say a word in the first instance upon the last observations which have fallen from the Lord Advocate. I was not aware that much reliance was intended to be placed upon that view of the 89th section of this statute, and I do not think, with great deference, that the argument in favour of the contention of the Lord Ordinary has been very successful. No such question, so far as I can see, was raised in the Court below, and no opinion was judicially given upon it there. Upon the question whether under the 89th section the local commissioner or commissioners cannot interfere at all unless they take the property into their own hands and become the managers for the public—I really can scarcely conceive that the point is arguable.

The section contains a number of provisions, but it appears to me that, taking it with common sense and clear reason, those provisions are independent of one another, and that the particular sub-section which affects the present case cannot be mixed up with those other sections which have regard to circumstances in which it is necessary for the commissioners to be the actors. The sub-section in question (viz. the fourth) speaks of "all existing public cisterns, pumps, wells, reservoirs, conduits, aqueducts, and so forth—it is not connected at all with any other sub-section—it stands by itself, and it fulfils a plainly necessary purpose. It was necessary not only that in certain circumstances the commissioners should become the actors in working out the machinery for certain purposes, but that in other circumstances they should act merely for the purpose of carrying out what had been going on before. Here they found a public well used by the inhabitants of this particular place liable to obstruction or allowed to be affected by pollution. Clearly there was nothing that they could do with any propriety but to go to the place and insist that the well should be maintained as it was maintained before.

Now, my Lords, I observe that Lord Ormidale, who was the dissenting Judge in the Court below, gives a very clear opinion on the construction to be put upon those words "public well." He says—"In these circumstances I must own my inability to see upon what ground the respondents could take possession of or interfere with the Boghead well in question in the way they have done. To justify them in doing so it must be shown, in accordance with the terms of the Public Health Act—(1) that the Boghead well is a public well; and (2) that the inhabitants of a defined district have had a right gratuitously to use its water." Those are the two conditions, and in the case before the House those two conditions are abundantly fulfilled. Therefore it appears to me, upon that view of the matter (which would be an exceedingly serious one if we had to consider it as very much to be argued for), the judgment of the House ought to be for the respondents.

Now, assuming that the above construction of the 89th section is the true construction, what have we as a matter of fact here upon the general question in the case? We have a well used admittedly for seventy years by the inhabitants of a particular village—the village of Denny and the neighbourhood. We have those inhabitants for a period of seventy years maintaining the well at their own expense. We have the well, I believe, sixty years ago lined in a particular way by the inhabitants, and we have it cleaned, cleared of pollution from time to time, and made useful for the neighbourhood by those inhabitants at their own expense. We have all that, and then we have to consider whether the well which has been so used, so maintained, and so preserved by those inhabitants is a "public well" within the meaning of this Act of Parliament. It appears to me that that is the sole and the simple question to which the whole controversy reduces itself.

Strangely enough, indeed, almost everything that was argued in the Court below has been abandoned here on the part of the appellant. I can scarcely perceive, when one goes carefully through the course of the contention, that anything remains now that was relied upon strongly in the Court below. In the first place, the learned Judges there had to determine upon a lengthened contention, which resulted in a difference of opinion between themselves, whether or no the inhabitants of a village not constituting a corporation could have and exercise a right like this. But the Lord Advocate comes here, and with the greatest propriety admits most frankly and reasonably that that contention cannot be maintained. There was another important question on which the Lord Ordinary gave an elaborate opinion, namely, the question as to

whether a servitude was established upon the evidence in this case. Now, the Lord Advocate admits with the greatest frankness and freedom that that argument cannot be maintained—he admits that there was a servitude. And when we come to see what the issue was in the Court below, and what the issue is before your Lordships, we find that the prayer of the pursuer, upon which the judgment of the Court proceeded, was a prayer that the people of this particular district of Denny should be absolutely deprived of all use of this water, and of the well to which the water belongs. So the adjudication is, and so the interlocutor is, upon which this House must now decide. Again, we find that the whole of that line of argument is abandoned, because upon the fullest consideration the learned counsel for the appellant found that they could not maintain any such view. They admit that the people of this district may have the use of this water just as they have had it for the last seventy years, but they say they are to have it as a servitude. I asked Mr Herschell on Friday, when he began his argument, what the argument was about, because looking at the matter practically it appeared to me that on the one side the Lord Advocate concedes everything that the respondent can demand, and on the other side I do not find that the respondent demands anything that the Lord Advocate does not concede.

It absolutely reduces itself to the question—if it be a question—in the first place, Whether a well of this sort was a "public well?" and in the second place, If it was a public well, what injury has been done? What difference of action has taken place between the use of this well for the last seventy years and the use that has been made of it recently, or the dealing with it on the part of this local authority? The whole matter is really reduced to that.

On the first of those questions, namely, Is this a public well? what are the facts. Here is a well used by the public, and used by the public for seventy years—used without contention or opposition by any human being, and used very largely by the inhabitants of the particular district. What is a "public well?" I think it is a well that is used by the public. It appears to me that the 89th section of the Act of Parliament puts upon the words "public well" a construction of its own—for it goes on to say "pumps, wells," and so forth, "used for the gratuitous supply of water to the inhabitants." What is the meaning of a public well except a well that is used by the public, and used gratuitously by the public? In this case the conditions to which Lord Ormidale points are completely fulfilled, and therefore in my opinion this is a "public well" to all intents and purposes within the meaning of the Act of Parliament.

A good deal of the very able argument of the Lord Advocate was rested upon the supposition that the claim of the respondents here was not only a claim to the use of the water in this well, but that a right of property in the well was asserted. Now, I do not find that asserted at all. I find nothing asserted on the part of the respondents except a right to the use of the water. As I said before in the course of the argument, they have put forward their own case, not only in their reasons for resisting this appeal, but also solemnly in the pleas upon which they determined to rely before they came into Court at all. It is worth while to repeat the statement of those pleas, because this really was a very substantial part of the argument on the part of the appellant. What they said in those pleas was this:—"(1) The operations of the respondents complained of in connection with the spring of water or well referred to having been completed prior to the presentment of the note of suspension and interdict, the same is incompetent in so far as referring thereto. (2) The said spring of water or well having been used for the gratuitous supply of water to the inhabitants of Denny, the respondents were entitled to protect the same from pollution, and the operations complained of having been executed with that object, the complainer is not entitled to interfere therewith,"—that is to say, the well has been used, and gratuitously, for so long, and therefore we the inhabitants are entitled to maintain it as it has been heretofore. The third of their pleas is this—"The spring of water or well referred to, and the access thereto, having been used by the public from time immemorial, the complainer is not entitled to the interdict sought by him." What is that but saying the same thing over again in other words? There is a well which has been used from time immemorial—we want to have a continuance of the user of that water—we want nothing more and nothing less.

My Lords, if that be so, there is an end of that part of the argument. Then we come to the other question, namely, if it be a public well—as I think, according to the common understanding of mankind with reference to a language such as ours, it must be,—has any damage been done by the respondents to the appellant? Now, I conceive, in my judgment of the matter, that the public authority had no power to transcend the action which would have been legitimate on the part of the householders of Denny. I believe that the public officer had no right to do more than would have been within the right of the public whom he represents. Therefore it is a fair question, and it really remains the only question in the case; and one wonders when one thinks of it how a question of that sort should have brought all the people so far away from the northern parts of the island to come before your Lordships' House,—what have those commissioners done with the well? Now, when we come to consider the evidence, all that is charged upon them is, that they being authorised—as I, for the purpose of my observations at least, hold that they were—to keep this public well clear, and to preserve it clean from pollution, with all possible facilities for its use by the inhabitants, have actually put a pump beside the well, and they have put upon the well a cover of iron. Now, if they were entitled to do anything at all, could they have done anything less than that? The way of using this well, which the people of Denny had had put in good order as well as they could, was to let down pitchers into it. No doubt it was open to the elements, and it was a perfectly certain thing that pollution would come into it; and what those commissioners who are charged with the public duty did was to prevent the pollution by covering the well over, not with a cover that is fastened, or a cover that is locked, or a cover that interferes with Mr Smith's perfect access to

the well, but with a cover that prevents dirt and filth going into it. And in order to save people the trouble of dipping their pitchers to the bottom of the well—the bottom may sometimes be hard to reach perhaps—they have put up a pump, which *ex concessis* cannot interfere with the well in the least degree beyond enabling the people to take out of it the water that goes into it. It seems to me to be perfectly idle to argue the matter upon that point, which is the only point that remains in the case.

Upon the whole matter, my Lords, it appears to me that the commissioners have done what they were not only entitled to do, but bound to do, under the circumstances, and that they have acted fully within their right and according to the exigency of the Act of Parliament, and therefore the appeal cannot be maintained.

With reference to the form of our adjudication, I, for my own part, see no necessity for a special form at all. A certain case was made here by the appellant which has broken down in all its parts, and the case he originally made was not—according to the concession of his own counsel—maintainable on any ground at all. The demand conceded to him by the Lord Ordinary was a demand to take away from the people of the village of Denny the use of a well which they had enjoyed for 70 years. The judgment of the Court below simply says that that interdict shall not go, and I think that this House will not compromise any right or bring any right into question by simply affirming the judgment of the Court of Session.

Lord Blackburn—My Lords, I am of the same opinion. I wish, in the first place, to look at that which I think is the real substance at the bottom of the whole question between the parties, namely, what was the right of the parties before ever there was any corporation—before the Public Health Acts or anything of the sort were passed. It appears that in point of fact there is here a spring rising to the surface a little way from the public highway, at a distance I believe it is said of about 170 feet, and to that spring there comes a private occupation road, I believe, by which persons can in fact come down to the spring. It appears upon the evidence that in the year 1807—for that is the date that it goes back to—the spring had already been cleaned out and protected by walling it with coarse whinstone, so as to make it a spring rising inside a wall; and it appears that between 1807 and 1811—an old man is able to fix the date as being between those years, because he went out of his apprenticeship in 1811—the old rough whinstones were taken away and the well was walled-in and made a spring surrounded by a built-in wall, and that everybody in the neighbourhood used it—that is to say, all the public of Denny. Of course people did not come to drink of this well from Edinburgh or Glasgow, but all the inhabitants of the neighbourhood round it came whenever they liked after that down this occupation road to the well, and there drew some of the water and carried it away—dipping (that was necessarily the mode of getting the water from such a well as that) into it their pitchers and carrying away the water to their houses. That seems to have been done as a matter of right from 1807 down to the present day—that is, more than 70 years, and it is a reasonable presumption, I think, from seeing the way in which that well had previously been walled-in with whinstone, that the habit of so using it had begun much earlier.

Now, my Lords, the first question, which I think is an important one, is, What was the effect of this user? The people who used the water in this way were not a corporation like the corporation of a burgh or anything of that sort—they were the inhabitants of the neighbourhood. It is perfectly known to the law that there is a right which may be had in water—the right of *aquæ-haustus*—the right to get water for the purpose of drinking. Such a right may be given by grant to the owner of a tenement, or may be acquired by the owner of a tenement by sufficient user, to come and supply himself and the occupants of that tenement with water; that is not disputed at all. Nor is it disputed that when there is a right of that sort attached to a tenement, the owner of the servient tenement—the owner of the land where the well is—is not under any obligation to repair the well. But, on the other hand, the person who has the right to draw water from the well has the right to maintain the well and to do what is necessary to keep the well in order, and to exercise his right of drawing water from it.

Then came the question, Can that right be acquired by such a fluctuating body as the portion of the public who live in Denny and its neighbourhood, they not being incorporated? Could that be done? Apparently at one time—perhaps, I may say, at the present time—there seems to have been a good deal of puzzlement about that. Nobody, I think, disputes that every individual cottager—every owner of a cottage in Denny—might have acquired that right for himself and his cottage. Nobody, I think, disputes that every individual landowner there might, by means of his tenants, have acquired that right for himself. But as this well is used in substance, and in fact by everybody—for everybody goes there—there would be an aggregate of these individual rights. I do not know what the state of the title is there—whether the property all belongs to one landowner, or whether it is divided, as many districts are, into a vast number of small village feus. In that case each would have the right for himself to draw the water, and the aggregate of them would form in fact the whole of the inhabitants of the parish, each individual having one right, though occupying as it were, in fragments, each separately. That is an inconvenient state of things, and one would desire that it should be, as I take it it is in England, that such a right as this—a right of *aquæ-haustus*—not a right of property, but a right which is well known to the law, of drawing water—not to interfere with the soil, or to carry away the soil, but simply to draw water — that such a right might be enjoyed and acquired by the inhabitants — that is to say, that portion of the public which lives at Denny, without prescribing or calling in the aid of any corporation or burgh or landowner, or anything of the sort, to establish the right.

Now the authorities seem to have come nearer and nearer to that. It was formerly the case that a burgh might prescribe for the inhabitants of the burgh, and now a *quasi* corporation, such as a burgh of barony, may do it too. But, as I understand it, a burgh of barony, which is called a *quasi*

corporation, is not a corporation at all—it is not an entity. The Lord Advocate felt pressed by that, and, as I understood him in his argument, he gave up that point altogether. He said—I cannot deny (at least so I understood him—of course I may have misunderstood him) that this right might be acquired by all the aggregate of small feuars and occupiers of land, each in his own individual right and in respect of his own individual tenement. Nor can I deny that such a right might be obtained by a burgh or a corporation, or even by the *quasi* corporation of a burgh of barony; and consequently I feel that I cannot contend in substance and effect that the public of Denny—that is to say, the inhabitants of Denny—although not a corporation, had not acquired this right, as against Mr Smith, to come down to the well to drink the water, and for the purpose, and in the exercise of that servitude, to do what was necessary to maintain the well in its proper and ordinary state.

I do not know whether or not it is necessary for the House to decide the question as to the form in which it should be maintained. I certainly should be very unwilling to hold that it was anything other than that which I understood the Lord Advocate not to dispute, and which certainly it would be in England, a right of drawing water—*aquæ-haustus*—(I confine it to that, and I do not extend it to anything beyond), which might be maintained by the public in the district, although it was an undefined district of this kind. It would be more difficult to prove, no doubt, in such a case, but I do not see why it should not exist.

Taking that to be so, I come to the point upon which there seems to have been most hesitation and doubt in the minds of the learned Judges below. Taking that which I have said to be established, we come to the question, what really are the merits? Now what was done was this—The inhabitants of Denny, although they were not incorporated for any purpose, adopted the Public Health Act of Scotland, and consequently they got a local authority, to the extent to which the local authority might act, to represent them. That being the state of things, the local authority took it upon themselves (the question will be whether they were right or wrong) to go to this well, to proceed to build the walls of the well a little higher than they had been before, to clean it out and put round it cinders, so that whereas before people who went to draw water from the well had to put their feet in a puddle, they might now stand upon dry ground. It comes to this, I think—they slightly raised the bank round it, so that whereas the burn in time of spate used to flow in and dirty the water for the time, now the water of the burn should not flow in, and they should be able to get pure water out of the well whether the burn was in spate or not. All this they did, and all this the inhabitants of Denny when once they had got the servitude, as I have described it, might have done for themselves before the Public Health Act came into operation. They went a step further—they put a cover over the top of it, to keep the well cool and dry, and on that they placed a pump to enable the people to pump the water out. Now, I do not see that they did Mr Smith any harm in this. Whether they, strictly speaking, had any right to do it, I do not know. I do not think that question arises now.

But what Mr Smith claimed by his note asking for an interdict, or his summons, was in substance this—that nobody had a right to come there and draw water at all. He claimed in his summons that they should be interdicted from doing anything to take away the water at all; and he claimed further, that all they had done for that purpose should be removed, and that things should be restored to the state they were in before. The Lord Ordinary did not grant him all his prayer (that should be observed)—he does not forbid the drawing of water; he seems to have paused upon that and thought it was unnecessary; but he did this—he interdicted the respondents from "making or erecting pumps," and from "otherwise using, appropriating, or interfering with the said well or spring." And then having done that—having forbidden them from interfering with the well or spring in that sense—he proceeded to say that what they had already erected they should take away.

Now, these two questions arise—First of all, was the thing that was done, a thing which Mr Smith has a right to complain of at all if it was done by the inhabitants? Now, on that point, differing from the Lord Ordinary, I think he had not. I think he had no right to complain of or to hinder the inhabitants from coming to the well and drawing water from it. I do not think it matters in the slightest degree to Mr Smith whether they draw the water by a pump or by pitchers. Whether they had a right to cover over the well might be another question if it did any harm. I have known a case where villagers came to draw water from a spring in which there was fish. I have no doubt that there, although the villagers had acquired a right to come and draw water, the laird had a right to the fish, and if this had happened in regard to such a well as that, and if Mr Smith had said, "Your covering over this well with an iron thing will kill my fish," he might have had a ground of complaint. But he does not say that the commissioners do him injury or injustice by covering up the well—he says all along that he wants to prevent people coming to the well at all, so that he may have the full use of his own ground for his private purposes. He does not say, but his counsel say for him, that the commissioners had no right to cover the well. If it does him no harm, although they have done a little more than they are entitled to do, I do not think that they would be bound to alter it; but we need not consider that.

Then comes the next question which has been argued, namely—whether or not the persons who built this (the public authority) had a right to do it? It seems to me that they had. I do not think they had the slightest right beyond what the inhabitants originally had. I do not think the erecting them into a corporation or anything else derogated in the least degree from Mr Smith's right to the land or to the surplus water, or to fish if there had been fish. But I think this being a well in which the public of Denny had rights, and it having become, as I think, a "public well" within the meaning of the 89th section of the Act, I do not think it is necessary to go further than to see what the 89th section does say. The local authority representing the public of Denny, amongst other things, have given to them by that section an authority to supply water for the use of that public of Denny.

There is a proviso put there, that if there is already a water company authorised by Act of Parliament to supply water to that district—whether that water company had supplied it or not does not seem to me to be material—they shall not interfere with their vested rights by supplying water until they have purchased that company's vested rights of water. Then it goes on to say further, that where there is a "public well" (I pass by all the other words) from which the public have been gratuitously supplied with water, the local authority may (it is one of the purposes to which they may apply their rates) "continue and maintain" that well from which the public had been gratuitously supplied with water. I cannot but think that that applies, and is meant to apply, to such a case as this. I do not know whether a public company could without excessive impudence, if there had been a public water company in Denny, say that the effect of the Public Health Act being introduced had been to take away the right which the public of Denny had to draw water from this well, and to force them to come to the company. That would be, I think, beyond a conceivable case for a company. Even a corporation, which it is said has no conscience, could not do that. What the Act says is —Notwithstanding that there may be a company with a vested right to supply the inhabitants, the local authority may, where there is such a well, and where there is such a public right to be gratuitously supplied as I have already mentioned, continue and maintain that well.

Now, has this local board done any more than that? I think not. If I am correct in what I have already stated to your Lordships as being my view of what has taken place, and of what the rights of the public of Denny were before the Public Health Act was introduced into the place, the respondents have not done one whit more than the public did before. Consequently, I think the Court of Session were quite right in saying—We will not interdict them from doing what they have a perfect right to do, and we will not order them to take away what they have done, even if in some trifling degree they may have injured Mr Smith, which I do not think they have.

My Lords, there remains the last question, on which, as my noble and learned friend who first addressed your Lordships has said some doubt has been cast, namely, whether or no if we were simply to affirm the interlocutor it might not be agreed hereafter that there was *res judicata* as to some further right which the local authority might have in respect of this as a public well. I think each of your Lordships who have spoken has stated—and certainly I myself positively and distinctly state—that I do not mean to decide anything of the sort. I do not think that the meaning of the Public Health Act is, that although this was a public well in the sense which I have described, the public authority has a right to do anything more to it unless they purchase it, as they may purchase any other well, for the purpose of making water-works. If any sanitary evils came from the well, they might stop it up, just as they may any other; but the mere fact that the public of Denny had a right to use it before the Public Health Act was passed does not give the local authority the right to do anything more than the public had the right to do before.

My Lords, looking at all that is asserted on each side on the record, and coupling that with the careful way in which each of your Lordships has guarded the expression of your opinion, I have no fear at all myself lest it should ever be supposed that this was *res judicata*. Nevertheless, if the parties are afraid of it, really I do not know that there will be any great harm in doing what would be, in my view of the matter, quite useless, namely, putting a note to the affirmance of the interlocutor saying that it is without prejudice to any question such as I have alluded to being mooted hereafter. I think it would require some care and attention to word that properly, because if it were not worded properly, the effect of it might be to leave things open which were not meant to be left open. I confess, for my own part, I should prefer simply to affirm the interlocutor. Upon that I should myself have liked to ask the Lord Advocate if he felt any fear on the part of his client, and if he wanted other words to be added, how it should be done. For myself, I really do not think it is required.

Lord Hatherley—My Lords, from what has fallen from your Lordships, it appears to me that your Lordships are of opinion that a simple affirmance of the interlocutor of the Court of Session will be quite sufficient without anything more, and that any misunderstanding of this decision will be guarded against by such declarations as have been made by your Lordships. What I threw out before was merely a suggestion with the view of eliciting your Lordships' opinions on this matter. I will move simply that the interlocutors be affirmed and the appeal dismissed with costs.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Counsel for Appellant—Lord Advocate (Watson) —Benjamin, Q.C. Agent—William Robertson, Solicitor.

Counsel for Respondents—Herschell, Q.C.—Mair. Agent—Andrew Beveridge, Solicitor.

COURT OF SESSION.

Wednesday, March 10.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

CITY OF GLASGOW BANK LIQUIDATION—(*FRASER'S TRUSTEES' CASE*)—ROBINSON *v.* MURDOCH AND OTHERS (FRASER'S TRUSTEES).

Trust—Liability of Trustees—Discretion as to Investment—Relief from Trust-Estate.

The trustees of a deceased party were directed, *inter alia*, to pay the "interest or annual-rent" of two sums of £2000 to each of the truster's two sisters—the "sums" in