and quite in point. The Judges who there declined were members of the societies who were parties to the litigations. They never doubted for a moment that they must decline; and I suppose none of your Lordships could doubt that it would be incompetent for him to sit in the case of a company in which he was a shareholder. That is a matter of everyday practice, and nobody has ever thought of doubting it. No doubt the objection may be removed by the parties minuting their waiver of the objection. But that only confirms what I have been saying, for if it were not necessary it would not be done. I have said before, and I am prepared to say again, that this objection might be removed by legislation, and to some extent this has been done by the 103d section of the Court of Session Act 1868. But the provision there is limited, and certainly does not apply to arbiters or oversmen, and accordingly we are now exactly where we were in *Blaikie's Trustee* v. *Scottish Widows Fund, supra.* I may add that a very important case in England—*Dimes* v. *Grand Junction Canal Proprietors,* June 29, 1852, 3 Clark's H. of L. Cas. 759—occurred, where Lord Cottenham was set aside, when acting as Lord Chancellor—one of the litigants in a case before him being a company in which he was a shareholder. And the question was considered so important that not only was it very fully argued in the House of Lords, but the English Judges were consulted, and in an elaborate judgment it was decided that the whole proceedings were void. It was said that the law was not the same as to this in England and Scotland. I think as regards this particular objection it is absolutely identical. I was anxious to learn if this company was incorporated, because the A.S., February 1, 1820 empowers Judges to act although they are shareholders in chartered banks which are parties to the litigation. The ground of this enactment is that the litigant is the corporation and not the corporator. Accordingly in that case there is not the same objection. But where the company is not incorporated, as is the case here, each shareholder is a party to the litigation, and thereore the Act of Sederunt does not apply.

Lord Mure, Lord Shand, and Lord Adam concurred.

The Court pronounced this interlocutor:—

"Recal said interlocutor in so far as it sustains the reasons of reduction set forth in the first plea-in-law for the pursuer: *Quoad ultra* refuse the reclaiming-note, and adhere to said interlocutor in so far as it sustains the reasons of reduction set forth in the fourth plea-in-law for the pursuer, and reduces, declares, and decerns in terms of the conclusions of the summons, and finds the defenders liable to the pursuer in expenses," &c.

Counsel for Pursuer and Respondent—Shaw—Wilson. Agent—J. J. Dyer, S.S.C.

Counsel for Defender and Reclaimer—Darling—G. R. Gillespie. Agent—A. P. Purves, W.S.

Saturday, July 16.

FIRST DIVISION.

[Lord Trayner, Ordinary.

WYLLIE GUILD (M'MILLAN'S FACTOR).

Judicial Factor—Investment of Funds—Loan on Buildings in course of Erection.

Held that a judicial factor was not entitled to take credit in his accounts for a sum of money lent by him on the security of buildings in course of erection.

On the 20th December 1886 Mr Wyllie Guild, chartered accountant in Glasgow, was appointed judicial factor upon the estate of the deceased Michael M'Millan. By his last will and testament, dated 28th September 1811, Mr M'Millan directed that after payment of certain bequests the remainder of his property should be funded for the erection and endowing of a school in Glasgow for soldiers' children, and he named a body of managers.

This estate fell within the provisions of the Educational Endowments (Scotland) Act 1882. The Educational Commissioners included it in a scheme, approved of on 19th May 1885, relating to Glasgow, and called upon Mr Wyllie Guild to make it over to them. He accordingly presented a petition to the Court of Session praying the Court to authorise him to denude and to exoner and discharge him of his office. The Lord Ordinary ordered service upon the Glasgow City Educational Board, and thereafter remitted the factor's accounts to an accountant. From the accountant's report it appeared that the factor had, among other investments, lent in February 1878 £2000 over subjects in Burnbank Gardens, Glasgow, which were at the time in course of erection. It was estimated that the building would "be worth when completed £3250. On 20th February 1878 the architect granted a certificate that £1200 might be paid to account. This was done, and in addition the balance of £800 was deposited in bank to await the requirements of the building. Shortly thereafter the borrower failed, leaving the security-subjects unfinished, and the feu-duty in arrear. The judicial factor thereafter expended the £800 balance in completing, as far as possible, the subjects, but this was insufficient to erect a portion of the buildings intended for stables, &c., estimated to produce one-fourth of the whole rental. The free rents from the property were insufficient to meet the interest at 4½ per cent. on the bond by £424, 7s. 9d., being the amount of interest in arrear at 20th June 1886."

The Educational Endowment Board objected to the factor taking credit in his accounts for the sum of £2000 invested by him in this manner.

On 25th January 1887 the Lord Ordinary (Trayner), having considered the accountant's report and heard parties, found that Mr Wyllie Guild in his factorial accounts was not entitled to take credit for the sum of £2000 advanced by him in loan on the security of the subjects in Burnbank Gardens, Glasgow, and granted leave to reclaim.

"*Opinion.*— . . . . In this case the loan was given over subjects still in the course of erection.

They were estimated by an architect in November 1877 as at the value of £3250 'when completed,' over and above ground-annual and feu-duty. The buildings when completed were intended to be dwelling-houses, with 'a set of private stable offices,' and the estimated annual rental of the whole was £260. On 20th February 1878 the architect certified that £1200 of the loan might be paid to account, and that was paid, the balance of the loan, £800, being deposited in bank to await the requirements of the building. Shortly thereafter the borrower failed, leaving the subjects unfinished and the feu-duty in arrear. Mr Molleson reports that 'the judicial factor thereafter expended the £800 balance in completing, as far as possible, the subjects, but this was insufficient to erect a portion of the building intended for stables, &c., estimated to produce one-fourth of the whole rental. The free rents from the property have been insufficient to meet the interest at 4½ per cent. in the bond by £424, 7s. 9d., being the amount of interest in arrear at 20th June 1886.'

"In this case I think the investment was one which the judicial factor had no authority to make. It is no doubt the fact that money is often lent on the security of buildings still in the course of erection, but persons who make such loans take the risk upon themselves of the building ever being completed, and of its value when completed being such as to make their security sufficient. No objection can be taken to persons who thus risk their own money, but a judicial factor is not in that position. He is managing the property of others, and his first duty is to take care that (so far as acts of management go) nothing shall be done to endanger the safety of the estate or diminish its amount. No speculation is admissible even for the benefit of the estate. In this case the investment was a speculation, and unfortunately it failed.

"I come to the conclusion that the factor must make good to the estate the loss arising out of this transaction, a conclusion which I regret, because I do not doubt that the factor did what he thought was best for the estate. Accordingly I find that the factor is not entitled to take credit in his accounts for the sum now in question. This will make the factor debtor to the estate in £2000, with interest thereon at 4 per cent., under deduction of any interest received out of which the estate has had the benefit.

"I will allow the expenses of both parties out of the estate."

The petitioner reclaimed.

At advising—

LORD PRESIDENT—In this case I have no hesitation in agreeing with the Lord Ordinary. This was certainly not an investment for a judicial factor to make, or for anyone acting in a fiduciary capacity. Here money was lent over subjects which were in course of erection. There was really no security, for the subjects had to be brought into existence. It was a purely speculative investment, and for that reason it was quite beyond the powers of the judicial factor to make it.

LORD MURE concurred.

LORD SHAND—I am very clearly of the same opinion. Judicial factors, or those who act in the character of trustees, have it in their power to make investments of a kind recognised by this Court. Heritable securities are of this sort. But in this case the buildings which formed the subject of the security had yet to be built. That is an investment of a purely speculative character. The borrower may fail, and the buildings may be left unfinished. Now, that has happened in the present case. The factor proceeded to complete the building, but he was unable to do so from want of funds.

LORD ADAM concurred.

The Court adhered.

Counsel for the Reclaimer—D.-F. Mackintosh—Davidson. Agents—Fodd, Simpson, & Marwick, W.S.

Counsel for the Respondents—Graham Murray—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Saturday, July 16.

SECOND DIVISION.

[Sheriff of Fife.

YOUDEN *v.* JACKSON.

Road—Private Street—The General Police and Improvement (Scotland) Act 1862 (25 *and* 26 *Vict. cap.* 101), *secs.* 150, 394, *and* 397—*Notice.*

Section 150 of the General Police and Improvement (Scotland) Act 1862 provides, with regard to private streets, that "it shall be lawful for the commissioners to cause any such street or part of a street, . . . to be properly levelled, paved, or causewayed and flagged, . . . and no such street shall be considered to be sufficiently paved or causewayed or flagged unless the same shall be completed with kerbstones and gutters to the satisfaction of the commissioners." Section 394 provides that "twenty-eight days before fixing the level of any street," or making, altering, or stopping any sewer, the commissioners shall give notice of their intention by posting notices in a certain form. Section 397 deals with notices to be given when operations are to be commenced, the cost of which will fall to be defrayed by "private improvement assessment." That section provides no special form of notice.

The police commissioners of a burgh gave notice that acting under the above statute they intended "to fix the level" of a certain road "to make the roadway thereof, and a footpath on both sides, with kerb and gutter." With the exception of the words last quoted the notice was in the form prescribed by section 394. In an action by the commissioners to recover from a proprietor his proportion of the expense of the work above referred to, the defender maintained that the notice was insufficient under the Act, in respect the notice intimated an intention "to fix the level" of the road, and was otherwise in the form prescribed by section 394, which applied only to a public and not to a private street. *Held*