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*

that as the notice referred to the making of a roadway and footpath, with kerb and gutter, which were only provided for by section 150, it was to be held as given under sections 150 and 397, and was sufficient.

The General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. c. 101) enacts as follows:—Section 150. "Whereas it would conduce to the convenience of the inhabitants, and be for the public advantage, if provision were made for the levelling, paving, or causewaying and flagging of streets which have been laid out and formed by persons who have neglected to have the same properly levelled, paved, or causewayed or flagged, and for preventing such inconveniences in future: Be it therefore enacted, that where any private street, or part of a street, is, at the adoption of this Act, formed or laid out, or shall at any time thereafter be formed or laid out, and is not, together with the footways thereof, sufficiently levelled, paved, or causewayed and flagged to the satisfaction of the commissioners, it shall be lawful for the commissioners to cause any such street, or part of a street, and the footways thereof, to be freed from obstructions, and to be properly levelled, paved, or causewayed and flagged and channelled in such way, and with such materials, as to them shall seem most expedient; and no such street shall be considered to have been sufficiently paved or causewayed and flagged unless the same shall be completed with kerbstones and gutters to the satisfaction of the commissioners."

Section 151. "The whole of the costs, charges, and expenses incurred by the commissioners in respect of private streets shall be paid and reimbursed to them by the owners of the lands or premises fronting or abutting on such street," proportionately to their frontages.

Section 394. "Twenty-eight days at the least before fixing the level of any street which has not been heretofore levelled or paved, and before making any sewer where none was before, or altering the course or level of, or abandoning or stopping any sewer, the commissioners shall give notice of their intention by posting a printed or written notice in a conspicuous place at each end of every such street through or in which such work is to be undertaken, which notice shall set forth the name or situation of the street intended to be levelled or paved, and the names of the places through or near which it is intended that the new sewer shall pass, or the existing sewer be altered or stopped up, and also the places of the beginning and the end thereof, and shall refer to the plans of such intended work and shall specify a place where such plans may be seen, and a time and place where all persons interested in such intended work may be heard thereupon."

Section 397. "And in respect to appeal as to all other matters and things which the commissioners are by the police provisions of this Act empowered to do or perform, or to authorise to be done or performed, and the cost attending which falls by this Act to be provided for by way of private improvement assessment, the commissioners shall, where not otherwise hereby directed, give notice of their intention to do or perform, or to authorise to be done or performed, such matter or thing, either by public advertisement in some newspaper circulating in the burgh or in the county in which the burgh is situated, or by posting handbills in conspicuous places in the burgh, or by notice in writing to be transmitted through the post-office or delivered personally or at their dwelling-houses to the individuals having interest as the commissioners shall think proper, and it shall be lawful for any person whose property shall be taken or affected and who shall consider himself injured or aggrieved in respect of such matters and things by this Act so directed to be done or performed and provided for, to appeal to the Sheriff for any order made or notice given by the commissioners in respect of such matters and things," &c.

On 7th June 1880 the Police Commissioners of the burgh of Leven, which had in 1867 adopted the General Police and Improvement (Scotland) Act 1862, posted up in three places in the burgh the following notice, dated "Leven, 2d June 1880":—"Notice is hereby given—That the Leven Police Commissioners, acting under 25 and 26 Vict., c. 101, intend to fix the level of the road leading from Scoonie Place westwards by Blackwood Place to the Waggon Road to make the roadway thereof, and a footpath on both sides with kerb and gutter. Plan of the said intended works may be seen by all persons interested therein at the office of the Commissioners in Bank Street, Leven. Notice is hereby further given that the Commissioners will meet in the Town Hall, Leven, on Thursday the 1st day of July next, at ten o'clock a.m., when all persons so interested may be heard thereupon.—S. Youden, Clerk to the Commissioners."

After the work had been completed an action was raised by Stephen Youden, Clerk to the Commissioners, and as representing them, for the sum of £22, 6s. 3d., against Thomas Jackson, Solicitor, Kirkcaldy, who owned property abutting on Blackwood Road, as the proportion of the total cost of the work applicable to his frontage on the road. The defender stated the following three grounds of defence—(1) The road was a public road, and had been maintained by the Statute Labour Trustees from time immemorial. (2) On the assumption that the road was at the adoption of the Police Act in 1867 a private street, the notice was not in the terms required by that Act in the case of private streets, being in terms of the 394th section, and not of the 397th section. (3) The publication of the notice was insufficient. The pursuer in answer stated —(1) That the street was a private street, and (2) that the contents and publication of the notice were in terms of the 397th section of the Act.

After a proof the Sheriff-Substitute (Gillespie) found that the road was a private street within the meaning of the Act, "but finds, in law, that the notice which the Police Commissioners gave of their intention, of which notice No. 58 of process is a copy, was not a sufficient notice of their intention to deal with the road as a private street; assoilzies the defender.

"*Note.*— . . . . . It remains to inquire whether the Police Commissioners have satisfied the requirements of the statute as to notice. The decision of the House of Lords in *Campbell* v. *Leith Police Commissioners*, February 18th 1870, 8 Macph. (H. L.) 31, L.R., 2 Sc. App. 1, shows that these requirements must be strictly followed. Now, although no particular form of notice is prescribed, it humbly appears to the Sheriff-Substitute that the notice which the

Commissioners gave is defective and misleading. It contains no intimation that the Commissioners intend to deal with the road as a private street. Any one reading the notice would naturally take it as a notice under sec. 394 of the Act, which relates to public streets, and not as a notice under sec. 397, which the House of Lords have decided to be the section applicable to the present case. The inference which one would naturally draw would be that the Commissioners were intending to execute the contemplated improvements at the expense of the community. An adjoining proprietor might have no objection to this, though he might have great objection to a heavy outlay being incurred, of which a large share was to fall on him. It may perhaps be said that the defender has not been prejudiced by the want of notice, because he would have had no valid ground of objection. But when a statute allows a community to impose a burden, which may be very onerous on individuals, the community must take care to fulfil the conditions which the statute prescribes.

"Apart from the terms of the notice, it is doubtful whether there was sufficient publication of it."

On appeal, and after additional evidence had been led, the Sheriff (MACKAY) found in fact (1) that the road was a private street within the meaning of the Act, "(3) that notice was given by the Commissioners, by posting handbills in the burgh of Leven, of the operations intended to be performed on the said street, which consisted in paving the roadway thereof, and a footway on both sides, with kerbs and gutters; and (4) that such operations were duly performed by them: Finds in law—(1) That these operations were of a kind which the Commissioners, under the said Act, were entitled to perform on a private street, and to assess for as private improvement assessment, under sections 397 and 150 of the said Act; (2) that the notice given of the Commissioners' intention to perform these operations was sufficient notice under the said Act, and was sufficiently published by posting handbills in conspicuous places in the burgh, one of the modes of notice authorised by section 397 of the said Act: Therefore grants decree in favour of the pursuer, in terms of the conclusions of the petition, &c.

"*Note.*— . . . . . The second question in the order of argument addressed to the Sheriff was, whether there was legal notice in terms of sec. 397, and sufficient publication thereof? On both of these points the case is narrow, but the Sheriff, who has had the advantage of hearing some additional evidence, has come to an opposite opinion from the Sheriff-Substitute. He thinks that the terms of notice were sufficient, and that it was sufficiently published.

"Its terms were, 'That the Leven Police Commissioners, acting under 25 and 26 Vict., chap. 101, intend to fix the level of the road leading from Scoonie Place westwards by Blackwood Place to the waggon road, to make the roadway thereof, and a footpath on both sides, with kerb and gutter.' Sec. 397, under which the Commissioners contend notice was given, describes no form of notice, but only that 'the commissioners shall give notice of their intention to do or perform, or to authorise to be done or performed, such matter or thing, either by public advertisement in some newspaper circulating in the burgh, or in the county in which the burgh is situated, or by posting handbills in conspicuous places in the burgh, or by notice in writing, to be transmitted through the post-office, or delivered personally or at their dwelling-houses to the individuals having interest, as the commissioners shall think proper.'

"The particular matter here, in fact, to be done, the pursuer contends, was the proper formation of a private street, by laying out the roadway and footpaths under sec. 150, which provides, 'that it shall be lawful for the commissioners to cause any such street or part of a street, and the footways thereof, to be free from obstructions, and to be properly levelled, paved, or causwayed, and flagged and channelled in such way and with such materials as shall seem to them most expedient, and no such street shall be considered to be sufficiently paved or causewayed and flagged unless the same shall be completed with kerbstones and gutters to the satisfaction of the commissioners.'

"The Sheriff-Substitute was of opinion that the notice here given was in such terms that any one reading it would take it to be a notice under sec. 394 of the Act, which relates to public streets. But if reference is made to the terms of sec. 394, it will be found that although the words 'fixing the level' and not 'levelling,' as in sec. 150, are used, and the notice here given no doubt commences with the words 'fixing the level,' it continues its description of the work intended to be done with the words 'to make the roadway thereof and the footpaths on both sides with kerb and gutter.' The latter words are descriptive of improvements under sec. 150 as to private streets, and not under sec. 394 as to public streets. In the case of *Campbell* v. *Police Commissioners of Leith*, the Police Commissioners throughout pleaded that their notice was a notice under sec. 394 of the Act, and it was in consequence of the House of Lords holding that the street there in question was a private street, and that the notice should have been under secs. 397 and 150, that it was held to be bad. In the present case, on the contrary, the nature of the improvements and the character of the notice are both defended as being of the kind applicable to private streets under sec. 397. As the notice states distinctly what was intended to be done, the Sheriff thinks it would be too strict a construction to hold it bad merely because the words 'fixing the level' has been used instead of the word 'levelling'"

The defender appealed.

The case was argued on the three grounds stated by the defender. On the second ground, which alone is of importance, the following arguments were submitted:—For the defender—On the assumption that the road was a private street, the notice was invalid as not being in terms of the statute. It contained no instruction that the Commissioners were intending to deal with the road as a private street. Anyone reading it would take it to be a notice under section 394 of the Act, which related solely to public streets. It was said that the notice was given under sections 150 and 397, which applied to private streets, but then the word in section 150 was "levelling," while the notice here was worded

"fixing" the level. Then the reference to the plan, the notice of the meeting of the Commissioners, and the twenty-eight days' interval between the date of the notice and of the meeting, were all matters enjoined by section 394, but not by section 397. In the case of *Campbell* v. *Leith Police Commissioners*, Feb. 28, 1870, 8 Macph. (H. L.) 31—Feb. 28, 1870, 2 L.R., Sc. & Div. App. 1, it was held that notice under section 397 applied to private streets.

For the pursuer it was argued—In the case of *Campbell* it was conceded by the police commissioners that the notice there in question was not given under section 397, but under section 394, and the House of Lords only negatived the plea because they were of opinion that the road was a private street, to which sections 150 and 397 were applicable. *Esto* that the words "fixing" the level were used in the notice instead of the word "levelling," the succeeding words used to describe the work intended to be done were words descriptive of improvements under section 150 as to private streets, and not under section 394 as to public streets. As regarded the reference to the plan and the notice of meeting, no special injunctions on these points being contained in section 397, it was natural to adopt the procedure of section 394.

At advising—

The opinion of the Court (Lord Justice-Clerk, Lords Young, Craighill, and Rutherfurd Clark) was delivered by

Lord Craighill—[*After concurring with the Sheriff that the road was a private street, and that there had been sufficient publication of the notice*] —The next question is, whether or not the notice which was given was such as was required by the statute? The 397th section, under which, as the pursuer says, the notice was given, prescribes no special form. All that is required is that the Commissioners shall give notice of their intention to do or to perform or authorise to be done or performed such matter or thing in one of the ways specified. Now, what was intimated was that the Commissioners "intend to fix the level of the road leading from Scoonie Place westwards by Blackwood Place to the waggon road, to make the roadway thereof, and a footpath on both sides, with kerb and gutter." These are within the works which are authorised by section 150, and therefore it appears to me, as it did to the Sheriff, that the notice was all that was necessary. The defender says that the notice, such as it was, is as applicable to operations on a public street as to operations on a private street; but on a comparison of the provisions of section 394 with those of section 150, it will be found that a part of the works of which intimation was given occur in and are authorised by section 150 only, which relates to private streets. These things have been pointed out by the Sheriff, and I concur in the conclusion at which he has arrived.

The Court pronounced this interlocutor:—

"Find in fact (1) that the piece of ground now called Blackwood Place was at the date of the proceedings set forth in the fourth article of the condescendence for the pursuer a private road within the meaning of the General Police and Improvement (Scotland) Act 1862; (2) that the notice given by the Commissioners represented by the pursuer, of their intention to clear, level, macadamise, and form to their satisfaction the said piece of road, was in terms of said Act, and was published by handbills posted at the end of Blackwood Place, and in a conspicuous place in the High Street of Leven: Find in law that the Commissioners of Police were entitled to execute the said operation, and that the notice thereof was duly given: Therefore dismiss the appeal, affirm the judgment of the Sheriff appealed against, of new decern in terms of the conclusion of the petition: Find the pursuer entitled to expenses in this Court," &c.

Counsel for Appellant—Rhind—Hay. Agent—James Skinner, S.S.C.

Counsel for Respondent—Gloag—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Saturday, July 16.

SECOND DIVISION.

[Lord Lee, Ordinary.

BUCKNER *v.* JOPP AND OTHERS.

Trust—Purchase of Trust-Estate by Trustee—Challenge by Beneficiaries—Mora.

The acquisition by a trustee of trust-estate under his control is regarded by the Court with great jealousy, and if it is challenged timeously by the beneficiaries it will be incumbent on the trustee to show that the arrangement which led to it was one entirely for the benefit of the beneficiaries, and that they had been fairly dealt with, and received full information with regard to it. If, however, the beneficiaries acquiesce in the arrangement, and only bring their challenge after a long lapse of years, the Court will require a very special case to be stated before granting an inquiry into the facts.

A truster died in 1844 possessed of considerable means, and leaving legacies to legatees, and the residue of his estate to persons named. The trustees found his affairs deeply involved by reason of liabilities which he had contracted in connection with certain mercantile firms, and they were compelled to delay paying in full the legacies, &c., until the value of the property of the deceased involved in this way was ascertained. The legatees becoming impatient to have the trust wound up, the trustees instructed their agent, who was a trustee, to send their whole accounts for audit and report to an accountant. The report of the latter showed, in the view of the trustees, that the realised funds were insufficient to meet the legacies, &c., and that the assets were doubtful, and would take some years to realise. It was sent to the agent of the beneficiaries, who, along with other men of business, made a careful examination of it. In the course of negotia-