to hold that the testatrix desired by that deed to benefit her brothers alone, and to cut out her nephews and nieces.

I think that cannot be gathered from the deed. Where you have a distinct provision in the first deed making it clear who the residuary legatees are to be, I think it would require an equally distinct declaration in the second to operate a revocation. The words in the second deed are "next-of-kin." But in the previous deed you have what the testatrix means by that; and I therefore think you can only read the clause commencing with the words "any residue" as referring back to what is in the previous settlement. Probably, if the second deed had been prepared by her law-agent there would have been some explanatory words added; but though owing to the fact that the deed was prepared by the lady herself, there are no such words, yet there can be no doubt as to her meaning. There is no suggestion in the case that there was any change of circumstances which might have caused her to have a different feeling with regard to her nephews and nieces, and in the absence of any such suggestion I think it fair to assume and take into consideration that there was no such change. In the case of *Young's Trustees*, the words "next-of-kin" occurred without description of any kind; and I do not think that the construction put upon those words in that case is to be imported into any other where those words are loosely used, and where there is something to indicate that persons other than the next-of-kin in a strict sense are meant.

Lord Adam—I am clearly of opinion with your Lordships that these two writings must be read together.

I am also of opinion, though not so clearly, that it was not the intention of the testatrix to make any alteration on the destination of residue contained in the first deed, and that when she makes reference in the second deed to her next-of-kin her real intention was to refer to those persons who are called in the first deed as next-of-kin.

The Court pronounced this interlocutor—

"Find that the parties of the first part are only entitled to one-fifth of the residue of the trust estate each, the remaining three-fifths being divisible among the parties of the second part, all according to the rules of intestate moveable succession, and decern."

Counsel for First Parties—Sym. Agent—A. Y. Pitcairn, W.S.

Counsel for Second and Third Parties—Gillespie. Agent—Thomson, Dickson, & Shaw, W.S.

Friday, November 21.

SECOND DIVISION.

[Sheriff-Substitute of Argyll.

PHILLIPS *v.* MUNRO (CLERK TO POLICE COMMISSIONERS OF DUNOON).

Burgh—Street—General Police and Improvement (Scotland) Act 1862 (25 *and* 26 *Vict. c.* 101), *secs.* 146, 394, 395, 396, *and* 397 — *Notice — Appeal.*

In the course of operations on a street within a burgh the police commissioners altered the levels of the street without giving notice to the proprietors of property therein. One of these proprietors sought interdict against them on the ground that the street had never been previously levelled, and that he was therefore entitled, under section 394 of the General Police and Improvement Act 1862, to twenty-eight days' notice of the operations. The commissioners alleged that the street had been previously levelled, and that the section did not apply. The Sheriff granted interdict without a proof of the pursuer's averments. *Held* that the interdict must be recalled, since section 394 did not apply unless the street had never previously been levelled.

Opinion (*per* Lord Rutherfurd Clark) that the commissioners were bound to give notice of their operations whenever those affected existing levels, whether the street had been previously levelled or not.

Observed—that assuming the operations to have required notice, it did not follow from the fact that it had not been given that the works executed must be undone.

Section 146 of the General Police and Improvement Act 1862 provides—"The commissioners may from time to time cause all or any of the streets within the burgh not under the management of any turnpike road or other trustees, or any part of such streets respectively, to be raised, lowered, altered, and formed in such manner and with such materials as they think fit, and they shall also repair such streets from time to time . . . and any person considering himself aggrieved may appeal to the Sheriff in manner after provided."

"The 394th section provides—"Twenty-eight days at the least before fixing the level of any street which has not been theretofore levelled or paved . . . 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 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 395 provides how the objection is to be heard by the commissioners; and that no work to which objection has been taken shall proceed unless the surveyor of the commissioners shall after the hearing certify that it ought in his judgment to be executed, and that it shall not be begun until

seven days after the order for its execution has been entered in the commissioners' books.

Section 396 provides—"Any person liable to pay or to contribute towards the expense of any of the works aforesaid, or otherwise aggrieved by any order of the commissioners relating thereto, may at any time, within seven days next after the making of such order, give notice in writing to the commissioners that he intends to appeal against such order to the Sheriff, and along with such notice he shall give a statement in writing of the grounds of the appeal, and . . . the work so appealed against shall not be begun until after the judgment of the Sheriff upon such appeal; and the Sheriff . . . shall hear and determine the matter of the appeal and shall make such order thereon, either confirming, quashing, or varying the same, and shall award such costs to either of the parties as the Sheriff in his discretion thinks fit." . . .

Section 397 provides— . . . "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 other matters and things by this Act so directed to be done or performed and provided for, to appeal to the Sheriff from any order made or notice given by the commissioners in respect of such matters and things, in the manner and to the effect herein last before provided and directed; . . . provided always, that all such appeals provided for in this and the immediately preceding clause, and all other appeals to the Sheriff allowed by this Act not otherwise provided for, shall be disposed of summarily, and the decision of the Sheriff shall in all cases be final and conclusive, and not subject to review by suspension, reduction, or advocation, or in any manner of way."

The Commissioners of Police of the burgh of Dunoon resolved in the beginning of 1884 to rebuild the bridge over the Milton Burn where it intersected Mill Street within the burgh. In the course of doing so they found it necessary to make certain operations in Mill Street which altered the existing levels thereof in the neighbourhood of the bridge.

John Phillips, proprietor of houses and grounds on both sides of Mill Street, and north of Milton Burn, presented a petition in the Sheriff Court at Inverary to interdict William Munro, Clerk to the Commissioners of Police of the burgh, "from levelling Mill Street, Dunoon, or, where any part is already levelled, from altering the level of such part of Mill Street, Dunoon, and from encroaching on or in any way interfering with the pursuer's property on the east and west of Mill Street aforesaid, and immediately to the north of the Milton Burn which crosses or intersects said street; and to grant interim interdict:" Further, to ordain the defender to restore the street and the propertyb elonging to the pursuer, to the condition in which they were before the defender's operations; and failing the defender's restoring as aforesaid within such period as the Court should appoint, to grant warrant to the pursuer to get the said restoration effected at the expense of the defender.

He averred—"The defender has recently commenced to level part of Mill Street aforesaid where it was not previously levelled and made or paved, and has also commenced to alter the level of part of the said street which was partially levelled and made but not paved, without giving any notice or intimation to the pursuer of his intention to do so, or exhibiting to or giving the pursuer an opportunity of seeing a plan of the proposed operations, as is required by the General Police and Improvement (Scotland) Act 1862, or allowing the pursuer an opportunity of objecting or of appealing to the Court against the proposed operations."

The defender denied that the street was not previously levelled. He admitted that no notice was given to the pursuer, and maintained that in the circumstance no notice was required by the Act.

The pursuer averred, and the defender denied, that the operations had prejudicially affected the accesses to his property by making the gradients from the street steeper than they were before, and putting some of the floors of the houses below the level of the street, and by causing flooding in the houses from insufficient arrangements for carrying off the surface water.

The defender averred that the street had been previously levelled long before, and had been in use for many years. The bridge, which was a wooden one, had, he stated, become decayed and unsafe, and it was on complaints from the public, including the pursuer, that the commissioners resolved to build a new one. "The bridge could not with advantage be lowered below its present level, and the commissioners, acting for the general good, had to fix levels suitable for both sides of the burn. Their operations in rebuilding the bridge do not amount to fixing the level of the street, which had long ago been previously levelled. Those operations have been conducted in a reasonable and proper manner, and in the only suitable way in which the bridge could be rebuilt."

The pursuer pleaded—"(1) The defender having encroached on or interfered with the pursuer's property, and altered the said street which bounds the same and forms the means of access thereto, the pursuer is entitled to interdict as craved. (2) The operations complained of being illegal and incompetent, the pursuer is entitled to interdict as craved. (3) The requirements of the General Police and Improvement (Scotland) Act 1862 having been disregarded by the defender, the said operations are inept and incompetent, and *ultra vires* of the defender."

The defender pleaded—"(3) The said commissioners having power by the 146th section of the General Police and Improvement (Scotland) Act 1862 'to raise, lower, alter, and form, in such manner and with such materials as they think fit, all or any of the streets within the burgh not under the management of any turnpike road or other trustees,' they are entirely within their right in making the alterations complained of. (4) The street referred to having been previously levelled and long in use, the commissioners are not in the circumstances stated required by said Act to give any notice or intimation to the pursuer of the operations complained of. (5) The operations complained of not being a fixing the level of the said street, no notice was required. (6) The defenders being entirely within their right in the operations complained of, and not having in any particular violated the provisions of the before-cited Act, and further, no material or avoidable injury having been inflicted on the

pursuer's property thereby, decree of absolvitor ought to be pronounced, with expenses."

The Sheriff-Substitute (CAMPION) pronounced this interlocutor:—"Finds (1) that the pursuer is proprietor of houses and ground on either side of Mill Street, close to the spot where the street is crossed by Milton Burn; (2) that the defender has recently commenced to level and alter the level of said street opposite to pursuer's houses and ground; (3) that no notice or intimation of the defender's intention to do this was given to pursuer: Finds that notice was required under The General Police and Improvement (Scotland) Act 1862: Therefore grants interdict in terms of the prayer of the petition: Further, ordains the defender to restore the said street and the property belonging to the pursuer to the condition in which it was before the said operations commenced, and failing his doing so within a period of thirty days, grants warrant to the pursuer to get the said restoration effected at the expense of the defender: Finds the defender liable to the pursuer in expenses, &c.

"*Note.*—The sole question here is whether notice was required to be given under The General Police and Improvement (Scotland) Act 1862. It is admitted that none was given. The facts are very simple. Leading out of Dunoon there is a street now only partly formed, intersected by a burn called the Milton Burn, over which there was an old wooden bridge. This was considered dangerous, and was removed by the commissioners, and replaced by a stone bridge. In doing this the commissioners had, as stated in the statement of facts for defender, 'to fix levels suitable for both sides of the burn.' The pursuer complains that his property has been thereby injured, and asks interdict and the removal of what has been already done, on the ground that these operations were illegal without due notice of what was intended to be done, against which he might have appealed. The Sheriff-Substitute is of opinion that the pursuer was entitled to notice under section 394 of the Act. It is true that the defender places upon record the general statement that the 'street was levelled long ago.' It is not, however, stated when, or by whom, or whether notice was then given, and it is clear that, as the street is not yet finished, that the levelling contemplated by the Act is only now in progress. The operations may possibly vastly benefit the pursuer's property, and add much to its value and amenity; but the pursuer may think not, and prefer his legal notice and right of appeal. But beyond section 394 it appears to the Sheriff-Substitute that the pursuer is further protected by sections 146, 169, and 397 of the Act. In any alterations upon private property rendered necessary by the operations of the commissioners acting under the powers conferred upon them by the Act of 1862, it was intended by these sections that the proprietor should receive notice, and appeal if he considered himself aggrieved. No notice was given, and the pursuer has adopted the remedy open to him, viz., presenting a petition for interdict (*Campbell* v. *Commissioners of Leith*, 8 Macph. 31)."

The defender appealed to the Court of Session.

The arguments and sections of the Police Act referred to appear from the opinion of Lord Young.

At advising—

LORD YOUNG—The General Police and Improvement Act 1862 is always difficult, long, confused, and perplexing. It makes provision for levelling streets. It also makes provision for repairing, improving, and maintaining them. It provides an appeal to the Sheriff by any individual proprietor, or any member of the public who considers himself aggrieved by the action of the police commissioners—not always or even generally an appeal in the sense with which we are familiar, but in a more popular sense in which appeal is equivalent to addressing oneself to a court with a complaint. In the majority of sections in which appeal is mentioned, it is not appeal in a regular judicial process that is intended, but merely a direction or permission to the person who conceives himself aggrieved to address himself to the Sheriff and to state the grievance, who will give redress if in his opinion the circumstances warrant it. Under sections 394, 395, 396, an appeal of the more formal kind is provided. The ordinary and less formal appeal is given under the 146th section, and very specially under the 157th section. The latter words of the 397th section makes provision for the summary disposal of all appeals to the Sheriff not otherwise specially provided for, and though no form of appeal is suggested, it is plain that there must be a written note to the Sheriff stating the alleged grievance, asking him to satisfy himself whether such grievance exists, and if so, to give such relief as he thinks right. But the 394th section makes provision for a more formal appeal in certain matters where the police commissioners require to precede their action by public notice, appointing a time when any persons who object to the commissioners' proceedings shall be heard before the commissioners themselves. What the commissioners may order after such hearing is subject to appeal to the Sheriff, under the 396th section, and that appeal is not only against an order or deliverance entered in the commissioners' books, but is to be taken by notice to the commissioners, accompanied by a statement in writing of the grounds of appeal. The present case is presented to the Sheriff on the footing that the operations complained of were only lawful under the 394th section—that is, a previous public notice, &c.—and therefore the application proceeds on the assumption that the local authority, having done what they did without notice, have put themselves without the statute, and the complainer maintains that the operations actually performed must be undone, leaving the commissioners to proceed under the statute if they still want to carry them out. If the operations were of the character provided for under section 394, I do not think it follows—though on this point I pass no decided opinion—that what has actually been done, I assume irregularly, must be undone. The statute does not provide that, and it would be a very unfortunate thing indeed, to my mind, if such provisions had been made that the undoing was inevitable. The result might be to ordain very proper operations to be undone. Now, it does not always follow in law that what has been done irregularly should be undone, for it may not be the fact that it would be for the interest of anybody that it should be undone, or that if it were left standing anybody would be prejudiced. And therefore it may be better that what may have been done

irregularly should nevertheless remain, as a legal alteration, if otherwise found advantageous. For there the maxim applies—*Quod fieri non debet factum valet.* We might give the complainer opportunity to state his complaint now, and to convince the Sheriff that there was something about the operations performed in respect of which they ought not originally to have been commenced or performed, and the Sheriff could thus give redress if he thought proper. I should be very averse to agree with the Sheriff-Substitute to the effect of again altering the works on this street in order that he might have the opportunity—after the procedure had been made regular by due notice being given to the pursuer—of applying his mind to the question, whether as things now exist they are advantageous or not? Though the foregoing remarks are not necessary to the decision of the present case, they are, I think, not foreign to the matter before us, and may be useful to the parties in their future conduct of the case. If they take the line of conduct which I venture to suggest to them, they will still appeal to the Sheriff in the popular sense of the term, and ask him if in his opinion there is any grievance—anything which ought not to have been done—to see it redressed and parties restored against it. But I am prepared to decide the case on the argument which Mr Robertson presented at the outset, viz.—that the Sheriff has on this record and without inquiry assumed that the proceedings were lawless and outwith the statute, and ordered matters to be restored to their former condition. Now, I do not think that can be assumed, for clause 394, on which he bases his judgment, provides that "28 days at the least before fixing the level of any street, which has not been *theretofore* levelled or paved, &c., the commissioners shall give notice of their intention," &c. Now the complainer here avers that the street in question has not been "heretofore levelled or paved." He avers in fact what is the condition of the application of the 394th section. The Sheriff, without any inquiry, accepts his averment, and therefore concludes that the 394th is the governing section. He assumes that the street has not been previously levelled or paved, against the defender's denial of the pursuer's averment and the defenders' counter averment, and he does so apparently because the date of the previous levelling or paving, and the notice of it which must then have been given, are not condescended on. I do not think it is necessary to condescend upon the date at which the previous levelling was done, for it may not be known. I think it is enough to state that it has been done. The Sheriff's assumption may therefore be true, but it is not true on this record, and his judgment therefore cannot be supported. It is for the pursuer to show that the street to which his complaint refers has not been previously levelled. He has not shown that; he has only averred it. Mr Robertson's argument, therefore, seems right. Mr Mackintosh urged that any relevelling would bring the case under the 394th section. If necessary, I should decide adversely to that argument, because the clause refers to "fixing the level" of a street which had not before been levelled, which necessarily implies that the levels of a street which had before been levelled might be fixed—that is to say, a relevelling might be made—without notice. If the clause is not senseless, that must be what it means. No doubt the operations of the commissioners might have been the subject of appeal, but not of appeal proceeding on twenty-eight days' notice and preliminary hearing by the commissioners. The statute has not provided twenty-eight days' notice in such a case. One can see how it might have been very reasonable had it done so, but it has not, except in the case of streets which have not theretofore been levelled, and we must take it as it stands. I should therefore recommend your Lordships to recall the Sheriff-Substitute's judgment, and remit the case back to him. The legitimate formal course would be to allow parties a proof. But if they have apprehended what I said in the earlier part of my opinion in the spirit in which it was addressed to them, they will not so proceed, but will go before the Sheriff now and ask him if he thinks that there is anything objectionable in the works as they now stand, and if so to order what alterations and modifications he may think necessary to meet the circumstances of the case.

Lord Craighill—The appellants in this case are police commissioners who have performed certain works on Mill Street, within the burgh of Dunoon. They have erected a new bridge across the Milton Burn, and have raised the street on both sides of the bridge. Their operations have been challenged by a proprietor on both sides of the street north of the burn, and the challenge is made not by an appeal to the Sheriff, but by an application for interdict. Admittedly this course was incompetent under the statutes, for not only are certain powers conferred thereby on the commissioners, but certain remedies are given to those who think themselves aggrieved by their operations. The issue presented to the Court, accordingly, is, whether the course pursued was within or without the commissioners' powers under the statute. If it is not, then the complainer must have his common law right and remedies, whatever they may be found to be. The question, therefore, is—are the commissioners within the statute? Now, there are two clauses of procedure to which it is necessary to attend. The first relates to the levelling and maintaining of streets, viz., section 146—"The commissioners may from time to time cause all or any of the streets within the burgh . . . to be raised, lowered, altered, and formed in such manner and with such materials as they may think fit;" and the clause ends with a provision that—"any person considering himself aggrieved may appeal to the Sheriff in manner after provided." There is no word of any notice to be given, and as I read the clause they may effect any alteration, subject to the condition of appeal in manner after mentioned—*i.e.*, as pointed out in the latter part of section 397. All, then, that the party thinking himself aggrieved has to do is to apply to the Sheriff, who has it within his power to give redress. If there were no other clause it could not be pretended that the commissioners were outwith the Act. But there is another clause under which it is said the matter falls, viz., section 394—"Twenty-eight days at the least before fixing the level of any street which has not been *theretofore* levelled or paved . . . the commissioners shall give notice of their intention" as

therein provided. Now, the purpose of this enactment is, that as the cost of the alterations ordered by the commissioners is to be thrown on conterminous proprietors, they may have an opportunity of appealing to the Sheriff in the manner provided by the 396th section. The respondent seeks to take the case out of the 146th section and bring it within the 394th. But the only condition on which he can do this is by showing that the street "has not been theretofore levelled." On that matter there is a controversy between the parties, and yet the Sheriff has granted interdict on the assumption of the correctness of the complainer's assertion without any proof. But the respondent has no case unless he can show that the circumstances are not covered by the 146th section but by the 394th, and that has not been done. I therefore agree in the judgment which your Lordship has proposed.

Lord Rutherfurd Clark—I am disposed to take a different view of the case, though probably the result may not be very, if at all, different from that of your Lordships' proposed judgment. The commissioners of police have under the statute a power of raising, lowering, and altering streets. That is an extensive power entrusted to them for the good of the burgh, but which if exercised may very materially affect the interests of the inhabitants—adjoining proprietors and others; and therefore in so far as those powers are proposed to be exercised under the 146th section of the Act, any person aggrieved is entitled to appeal. Now, the complainer here alleges that the commissioners had resolved to alter the level of an existing street so as to affect the value of his property situated on either side of the street. He complains to the Sheriff that they had no power to do so unless they had given him previous notice of their intention in terms of section 394. On the other hand, the commissioners say that as the street was previously levelled they were not bound to give any notice, but were entitled at once to proceed, however much their work might affect existing levels or be prejudicial to the complainer's property, and that his only remedy was to appeal to the Sheriff, as provided under the 396th and 397th sections. Now, I confess I have great difficulty in reading the statute in such a way as to place such a power in the hands of the commissioners that they can proceed to alterations of so extensive a character without any previous notice to the proprietors, and I am rather disposed to read the 394th section as applying to the present case if the allegation of the complainer is in point of fact true—that is to say, that the commissioners were bound to give notice of their operations in so far as they might affect existing levels. No doubt the words of the statute are not well expressed to that end, and it is contended in a literal reading of them, that if a street has been already levelled the commissioners may make that street twenty feet higher or lower just at their pleasure without notice. Such a construction of the statute appears to me to be so injurious to the public interest that I cannot accept it when another reasonable construction is possible. I am disposed to construe the clause to the effect that whenever the commissioners' operations have the effect of altering the existing levels of a street they must give the statutory notice. If they are to leave the levels as they were before they may proceed without notice. As the levels of a street are all-important to the adjoining proprietors as well as to the public, the commissioners are not to be allowed to alter them without giving to any inhabitant who may consider himself aggrieved an opportunity of appealing to the Sheriff. If that be so, the complainer is quite entitled to apply to the Sheriff, for the commissioners were bound to give him notice, and did not do so. Now, that would tend to this result—if the complainer's statements are substantiated by evidence he would be entitled to the remedy he asks. But the Sheriff has proceeded without any inquiry, because he thought it appeared from the record, and probably from his own knowledge of the *locus*, that the commissioners had been too hasty. I cannot altogether think that the Sheriff has gone too fast, as your Lordships seem to think, for I cannot doubt that the commissioners really intended to alter existing levels. I am therefore inclined to think they were bound to give notice so that anyone affected by their operations might have an opportunity of applying to the Sheriff. But the operations have, in spite of this process of interdict, been carried on to completion, and the practical matter is not what we are now to do in this process, but what we are to do with the commissioners' works. It is quite out of the question to order them to be undone if they are just to be done over again, and therefore the only possible question is, whether or not the Sheriff thinks the work as executed should or should not stand as if he had been applied to before it was commenced. If, therefore, we remit the case to him, the only thing the Sheriff can do is to ascertain now whether the work is such as he would have sanctioned had it been regularly gone about. I would therefore recal the Sheriff's judgment, and remit the case back to him on that footing.

The Lord Justice-Clerk was absent.

The Court sustained the appeal, recalled the judgment of the Sheriff-Substitute, and remitted the cause back to the Sheriff Court.

Counsel for Pursuer (Respondent) — Mackintosh. Agents—Henry & Scott, S.S.C.

Counsel for Defender (Appellant)—J. P. B. Robertson. Agents—Skene, Edwards, & Bilton, W.S.

Friday, November 21.*

SECOND DIVISION.

[Sheriff of Lanarkshire.

BRANNAN *v.* THE NORTH BRITISH RAILWAY COMPANY.

Process—Jury Trial—Trial without Issues—Court of Session Act 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 27, *sub-sec.* 3.

This was an appeal for jury trial in an action for damages on account of the death of the pursuer's husband by an accident on the defenders' line. Parties were not agreed upon an issue for the trial of the cause, and in the course of the discus-

*Decided November 4.