the Railway Company. If the petitioner had proposed to re-invest the money in any of the ordinary modes, for the benefit of the heirs of entail, these expenses would have been avoided, but he endeavoured, and successfully, to persuade the Court that the buying of the lease was a permanent improvement in the meaning of the Act. He is to be congratulated on his success, but it is quite another matter whether that success is to be purchased at the cost of the Railway Company, and I am of opinion that it is not reasonable.

The other judges concurred.

Agents for Petitioner—Henry & Shiress, S.S.C.

Agents for Railway Company—H. & A. Inglis, W.S.

Friday, June 26.

MAXWELL, PETITIONER.

Trust—Trust Act 1867—*Failure of Trustee by predecease.* Section 12 of the Trusts Act, 30 & 31 Vict., c. 97, applies to the case of trustees predeceasing the testator.

Miss Mary Maxwell died in 1868, leaving a trust-disposition and settlement dated 1850, whereby she nominated certain persons as trustees. These persons predeceased Miss Maxwell.

This petition was now presented under section 12 of the Act 30 & 31 Vict., c. 97, the "Trust (Scotland) Act, 1867," whereby it is enacted that "when trustees cannot be assumed under any trust-deed . . . . . the Court may, upon the application of any party having interest in the trust-estate, appoint a trustee or trustees under such trust-deed, with all the power incident to that office." The petition contained an alternative prayer for the appointment of a judicial factor.

The Lord Ordinary reported the point on the question of the competency.

JOHN MARSHALL for petitioner.

LORD PRESIDENT—The general words by which this clause is introduced, "when trustees cannot be assumed," &c., are intended to comprehend every case where a trust cannot be kept up by means of the powers within the trust itself. In every such case the power of the Court may be invoked. It is, however, a matter of discretion whether they will or will not interfere, and that is for the consideration of the Lord Ordinary in the first instance. I understand the point at present reported to us is the competency.

The other judges concurred.

Agents for Petitioner—Russell & Nicolson, C.S.

Friday, June 26.

STEWART AND OTHERS *v.* GREENOCK HARBOUR TRUSTEES AND GREENOCK POLICE COMMISSIONERS.

Road—Obstruction—Public Street. Harbour trustees and police commissioners *held* to have no right to lay rails, or allow them to be laid, on public street.

Res judicata—*Dismissal of Action—Assoilzie—New Action—Restriction of conclusion.* Dismissal of an action does not preclude the party from bringing a new action.

Miss Jane Stewart and others, proprietors of buildings in Virginia Street, Chapel Street, and Rue-End Street, Greenock, brought this action, asking declarator—"That the defenders, the said Trustees of the Port and Harbours of Greenock, are bound to maintain and leave open, as an entrance from the town of Greenock to the east harbour of Greenock, and breasts and quays thereof, a street of 40 feet in breadth in continuation of Virginia Street,—the said street in continuation of Virginia Street having its north end 130 feet or thereby from the north side of Rue-End Street, and terminating at the line of the north wall of the northmost buildings in the line of Virginia Street; and that the pursuers, as proprietors of lands and houses in Greenock, and particularly of lands and houses adjoining to Virginia Street, Chapel Street, and Rue-End Street, of Greenock, and to the said street in continuation of Virginia Street, are entitled to use, possess, and enjoy the said streets, and the streets intersecting the said streets, and the said street in continuation of Virginia Street, as freely in all respects, and in the same manner as the same were used, possessed, and enjoyed by the pursuers and their predecessors and authors in the said subjects prior to the formation of the railways or lines of rails after-mentioned: That the defenders, the said Trustees of the Port and Harbours of Greenock, and the said Board of Police of Greenock, or either of them, had and have no right or title to make, construct, or maintain railways, or a line or lines of rails, along or across any part of Rue-End Street, Delingburn Street, or Virginia Street, or the said street in continuation of Virginia Street to the said harbours and quays; and that they, or either of them, have no right to run, or permit or suffer to be driven, drawn, or conveyed along any railway, or line or lines of rails laid down on the said streets, or the said street in continuation of Virginia Street, or any part thereof, any truck, waggon, or other carriage, whether drawn by horse or steam power, or any locomotive engine, or to cause, or permit, or suffer any truck, waggon, or other carriage, or any locomotive engine, to be or remain on any portion of such railways, or line or lines of rails so laid down" The summons also contained conclusions of removal and interdict.

In 1863 the pursuers raised an action against the then Greenock Harbour Trustees, the predecessors of the defenders, the Trustees of the Port and Harbours of Greenock, to have it found and declared that they had no right to lay down rails upon Chapel Street, Virginia Street, and Rue-End Street, and upon the foresaid street in continuation of Virginia Street, or to run trucks or waggons on them by horse or locomotive power, and to have them ordained to remove the rails, or, in the event of their failure to do so, that the pursuers should be authorised to remove them at the expense of the said defenders in that action. In that action the Lord Ordinary, on the 12th December 1863, pronounced the following interlocutor:—"Finds that the defenders had and have no right to lay rails along or across any of the streets in Greenock, called Virginia Street, Chapel Street, and Rue-End Street respectively; and that the laying of rails by the defenders along or across any of the said streets, and the maintenance of such rails, was and is illegal; and to this effect finds and declares in terms of the conclusions of the summons, and decerns: With regard to any other of the conclusions still to be insisted in, appoints the cause to be enrolled." The said defenders in that action reclaimed against this interlocutor, but were unsuccessful, the interlocutor having been adhered to by the First Divi-

sion of the Court upon 7th June 1864, and the said defenders found liable in expenses since the date of the Lord Ordinary's interlocutor. Thereafter the pursuers lodged the following minute in process:—"Gifford for the pursuers stated that, in respect of the interlocutor of the Lord Ordinary, of date 12th December 1863, and of the interlocutor of the First Division of the Court, dated 7th (signed 8th) June 1864, affirming the same, the pursuers did not now insist in any of the conclusions of the summons in so far as they relate to the street of 40 feet in breadth from Virginia Street to the east harbour of Greenock, and to the lane mentioned in the conclusions; and that to that extent only they restricted the conclusions of the action." After a further debate, the Lord Ordinary pronounced the following judgment:—"*Edinburgh, 3d December* 1864.—The Lord Ordinary allows the pursuers to lodge the minute now tendered at the bar; and having heard parties' procurators, decerns and ordains the defenders, within three weeks from this date, at the sight of Mr Ronald Johnston, civil and mining engineer, Glasgow, to remove the railways or lines of rails laid down by the defenders along or across the streets in Greenock, called Virginia Street, Chapel Street, and Rue-End Street, and to restore the said streets to the same state in which they were prior to the formation of the said railways or lines of rails; and, failing the defenders doing so within the period above mentioned, authorises the pursuers to do so at the sight of the said Ronald Johnston, and at the expense of the defenders: *Quoad ultra*, in respect of the said minute, No. 22 of process, dismisses the action and decerns: Finds the pursuers entitled to the expenses of process so far as not already found due, subject to modification: Allows an account thereof to be lodged, and remits the same to the Auditor to tax the same and report." The defenders in that action again reclaimed, but the judges of the First Division again refused the reclaiming note with expenses. Against that judgment the said defenders appealed to the House of Lords; but, with consent of the pursuers, and on payment of the expenses, they were allowed to withdraw the appeal.

The pursuers stated that the defenders, the Harbour Trustees had removed certain of the rails complained of, but had refused to remove that portion of the rails in Virginia Street, and in the street in continuation of Virginia Street to the harbour, which lies next the harbour; the lines of rails laid down in Delingburn Street; and the four lines of rails branching from the said line of rails in Delingburn Street, and crossing Rue-End Street.

In consequence of these rails, and the use made of them by the defenders for waggons and trucks, the pursuer alleged their property was injured, and according they instituted this action to enforce their rights.

The defenders, besides defences on the merits, pleaded—"*Res judicata* so far as regards the rails on the said ground of 40 feet in width, in continuation of Virginia Street. At least the pursuers are precluded from maintaining the action, so far as regards these rails, by the proceedings in said former action."

The Lord Ordinary (Ormidale) on 17th December 1867 pronounced this interlocutor:—

"Finds that the pursuers are precluded from maintaining the present action, so far as its conclusions relate to the ground referred to in the summons as a street '40 feet in breadth in continuation of Virginia Street,' by the proceedings in the former action, founded on in the record, as having lately depended and been decided in this Court between the pursuers and defenders, the Greenock Harbour Trustees, and especially by the pursuers' minute, lodged for them and given effect to by the Court in said former action, to the effect that they did not insist in the conclusions of the action so far as they related to said street in continuation of Virginia Street: Therefore, to the effect and extent of the preceding finding, sustains the defences, assoilzies the defenders, the Greenock Harbour Trustees, from the action as laid, and decerns; reserving in the meantime all questions of expenses: *Quoad ultra*, appoints the case to be enrolled, that parties may be heard as to the further disposal of it."

The pursuers reclaimed.

Thereafter, a proof was taken, and the Lord Ordinary, on 25th February 1868, pronounced this interlocutor:—

"Finds that, as regards the ground referred to in the summons as 'a street 40 feet in breadth in continuation of Virginia Street,' the action has been already disposed of by interlocutor of the Lord Ordinary, dated 17th December 1867; and that by another interlocutor of the Lord Ordinary dated 28th January 1868, now final, it was found that, 'in respect all questions in regard to the rails in Virginia Street have been disposed of in a previous action, it is unnecessary to deal with them in the present action: Finds it is admitted by the pursuers, in article 17 of their revised condescendence, that the defenders have removed the rails complained of from Chapel Street, part of Virginia Street, and that part of Rue-End Street where it is intersected by Virginia Street: Finds that, in this state of matters, the complaint of the pursuers in this action has come to be limited to the line of rails laid down, as averred by them in said 17th article of their revised condescendence, in Delingburn Street, and the four lines of rails leading from the said line of rails in Delingburn Street, and crossing Rue-End Street: Finds it proved that the rails referred to in the immediately preceding finding were originally laid down by the defenders, the Harbour Trustees, and that they, and also the other defenders, are parties to the maintaining of them in and across said streets: Finds that the defenders had and have no right to lay or maintain rails in or across said streets; and that the laying down of said rails, and the maintaining of them in and across said streets, was and is illegal, and to this effect finds and declares in terms of the conclusions of the summons, and decerns: And further decerns and ordains the defenders, within three weeks from this date, at the sight of Mr Ronald Johnston, civil engineer, Glasgow, to remove the railways or lines of rails referred to as above, as laid down and maintained in Delingburn Street, and crossing Rue-End Street, and to restore the said streets into the same condition in which they were prior to the formation of said railways or lines of rails: And further, interdicts, prohibits, and discharges the defenders in terms of the conclusions of the libel, and decerns: Finds the pursuers entitled to expenses, but subject to modification."

The defenders reclaimed.

The reclaiming note for the defenders was first argued.

Young and Shand for reclaimers (defenders).

Gifford and Macdonald for respondents (pursuers).

Lord President—The rails were put down by the Harbour Trutees, and have been allowed to remain for a long time, but the Harbour Trustees are answerable for the creation of this obstruction on a public street. The other defenders, the Police Commissioners, are as clearly answerable in respect of their official duty to keep the streets clear of obstructions. It does not matter by whom the obstruction is created. The simple question is, whether their existence in a public street is lawful and defensible. It has been already determined in a previous case—if indeed any authority is needed in so clear a matter—that such an obstruction is clearly illegal.

The other judges concurred.

The reclaiming note for the pursuers was then argued.

Lord President—I don't wish to give any opinion as to whether the pursuers in that previous action were entitled to have that minute given effect to, or to whether the defenders might not have objected, and put the pursuers to the alternative of insisting in the conclusions of their summons, or consenting to absolvitor. But what was done was, to allow that minute to be lodged and given effect to in the terms proposed, and all that apparently with the consent of the defenders. Now the thing done was this. The pursuers say they do not now insist in any of the conclusions of the said action in so far as they relate to the said street of 40 feet in breadth from Virginia Street to the east harbour of Greenock, and to the lane mentioned in the conclusions; and that to that extent only they restricted the conclusions of the action. The Lord Ordinary giving effect to that, in respect of the said minute, dismissed the action and decerned, and to that interlocutor the Court adhered. I am very clearly of opinion that the dismissal of an action proceeding on such a minute does not preclude a pursuer from bringing a new action.

Lord Curriehill concurred.

Lord Deas—I take the same view as your Lordship. This minute bore that [*reads minute*]. I give no opinion as to whether the pursuers at that stage were entitled to do that or not, or whether the defenders might have said, 'we must go on to decide the case or else I must be assoilzied; but that was not done. What was done was "in respect" [*reads interlocutor*]. The Lord Ordinary had heard parties on the minute and the rest of the case, and then he pronounced that interlocutor. It may be, on the one hand, that the party might have pleaded that he was entitled to absolvitor; but, on the other hand, he acquiesced in the opposite view. We have had this matter again and again before us, and if there be a distinction established in our practice, it is, that the word "dismiss" is used when it is open to the party to bring another action, and the word "assoilzie" when it is not open. Sometimes the form of expression "assoilzie from the action as laid" was made use of, and that deviation from our usual practice gave rise to an important question as to whether in such a case another action could be brought at all. It was contended that no other action could be brought; but ultimately it was held that that did leave it open to bring another action. Mr Shand admitted that he could not point to an instance where dismissal was held to preclude another action; and though there may have been some wrongly expressed interlocutors by Lords Ordinary, that must not be allowed to shake our well established practice. That would be most inexpedient. I don't concur with the observations of the Lord Ordinary in his note as to that matter.

Lord Ardmillan concurred.

Expenses to pursuers in both reclaiming notes since dates of Lord Ordinary's interlocutors.

Agent for Pursuers—T. Ranken, S.S.C.

Agent for Defenders—J. & R. D. Ross, W.S.

Friday, June 26.

SECOND DIVISION.

ROSE *v.* FALCONER.

Bankrupt—Act 1696—*Voluntary Payment—Reduction.* Circumstances in which *held* that a payment was voluntary in the sense of the Act 1696, and therefore voidable.

This was an advocation from the Sheriff-court of Inverness. The object of the original action—which was at the instance of Mr George Rose, corn merchant, Inverness, as trustee on the sequestrated estate of John Williams, baker, Inverness—was the reduction of a payment of £60 which the bankrupt had made to the defender within sixty days of bankruptcy. It appeared from the proof led before the Sheriff-substitute that on 1st November 1866 the bankrupt applied to the defender for a loan of £60, and that the defender accordingly drew a bill for that sum at three months' date, which was accepted by the bankrupt, and discounted by him. It further appeared that at the same time the bankrupt verbally promised to the defender that he would pay the £60 as soon as he was able, without reference to the time when the bill fell due, and said that very probably he would be in funds to enable him to do so within a month. Accordingly, in December 1866, the bankrupt paid to the defender £60 to enable him to retire the bill; and thereafter, on 8th January 1867, his estates were sequestrated.

In these circumstances the trustee on the sequestrated estate brought the present action to have the transaction reduced as illegal and prejudicial to the other creditors both at common law and under the Statute 1696.

The Sheriff-substitute (W. H. Thomson) gave effect to the pursuer's pleas, and reduced the transaction as illegal under the Act 1696. His Lordship was of opinion that, as no collusion had been proved to exist between the bankrupt and the defender, and no intention on the part of either of them to defraud the creditors, the pursuer had no case at common law. The promise to pay within the month was so vague and conditional that it did not come up to an obligation so to pay; and, consequently, the transaction itself must be considered voluntary on the part of the bankrupt, and as such was struck at by the Act. Nor could it be said to be of the character of a payment of a debt by cash in the ordinary course of business; the money was paid as a provision or security.

The defender appealed to the Sheriff-depute (Ivory), who altered the interlocutor of his Substitute, and found in point of law that the payment of the £60, having been made in implement of the obligation undertaken by him at the date of the original transaction, was not voidable under the Act 1696, c. 5, or at common law, but was a legal and valid payment.

His Lordship was of opinion,—on the authority of *Taylor* v. *Farrie*, 8th March 1855; *The Bank of Scotland* v. *Ross*, and *Lindsay* and *Shield*, 19th