proof; and that the pursuer ought to have gone to trial.

Lord President—This is a motion made under the most unfavourable circumstances I ever saw. There have been questions under this clause of the Act which have caused a good deal of trouble,—where there has been delay of a year and day on the one side, and no blame on the other, but some unintentional dilatoriness. In these cases, where the Court has seen that the pursuer had been led on to delay by the inactivity of his adversary, they have refused to apply the rule. But in this case it appears that the fault is as much that of the defenders as of the pursuer, if not more so, and it is out of the question for the defenders now to turn round and make this penal demand.

Lord Curriehill concurred.

Lord Deas—This delay is entirely attributable to the defenders. And this is just an example of what is constantly occurring. Issues were adjusted in this case seven years ago. It is said, Look at the delay of the Court of Session. But that is entirely due to the parties themselves. We have no power in the matter, and to-day half an hour or more of the time of the Court has been wasted in this discussion. It is very desirable that there should be some remedy for such cases.

Motion refused, with expenses.

Agents for Pursuer—Murdoch, Boyd, & Co., S.S.C.

Agents for Defenders—Hill, Reid, & Drummond, W.S.

Thursday, June 25.

SECOND DIVISION.

MELROSE *v.* SPALDING.

Sheriff—Act of Sederunt 15th Feb. 1851—*Findings in fact. Held,* in accordance with a previous judgment of the Court, that a Sheriff-substitute is bound to pronounce findings in fact in his interlocutor.

This was an advocation from Roxburghshire of an action for a plasterer's account. The Sheriff-substitute decided against the advocator, and the Sheriff adhered. The advocator's counsel, in opening, observed that he had difficulty in impugning the interlocutor, as the Sheriff-substitute had not set forth findings in fact, as required by the Act of Sederunt 1851; but stated that he was ready to waive all objections to the form of the interlocutor.

Pattison and Campbell Smith for advocator.

Thomson and Keir for respondent.

At advising—

Lord Justice-Clerk—In this advocation, although a proof was led, the Sheriff has pronounced an interlocutor, without any findings in fact. This matter has been brought under consideration by counsel, and we are referred to a judgment of this Division, in 1866, in the case of the *Glasgow Gas Light Company*, where a remit was made to the Sheriff, before entering upon the merits of the advocation, to recal his interlocutor, and to pronounce one in the form prescribed by the Act of Sederunt, 15th February 1851. It does not appear from the report of that case whether the Court, in deciding it, had the 16th section of the Sheriff-court Act of 1853 specially brought under their notice; but we have ascertained that the Act of 1853 was carefully considered, and was held not to over-ride the Act of Sederunt. It having been held that the generality of the Act of Parliament was not inconsistent with the provision of the Act of Sederunt as to cases where proof was led, we must therefore hold that decision as an authority directly in point, and remit this advocation to the Sheriff.

The other judges concurred.

Agent for Advocator—James Somerville, S.S.C.

Agent for Respondent—David Milne, S.S.C.

Friday, June 26.

FIRST DIVISION.

MARQUIS OF HUNTLY, PETITIONER.

(*Ante,* p. 360.)

Expenses—Entail Petition—Railway Company—Taxation—Montgomery Act—Lands Clauses Act. An heir of entail in possession obtained a judgment of the Inner-House (reversing judgment of Lord Ordinary) finding that consigned money might competently be applied in procuring a renunciation of a lease as a permanent improvement within the meaning of the Montgomery Act. *Held* that the expenses of the reclaiming note were not a reasonable charge against the Railway Company.

The Auditor, in taxing the petitioner's account of expenses, taxed off a sum of £24, 17s. 2d. of expenses incurred in connection with the reclaiming note presented by the petitioner on 28th January 1868, and on which judgment was given in the petitioner's favour on 1st March. The petitioner lodged a note of objection to the Auditor's report. The Lord Ordinary (Muir) reported the matter to the Inner-House.

H. Smith for petitioner.

Lancaster for Railway Company.

At advising

Lord President—The question raised by this note of objections is, whether the Railway Company are liable in the present case for certain expenses, said to have been incurred by the pursuer in re-investing the money consigned by the Railway Company. That depends, in the first place, on the construction of the 79th section of the Lands Clauses Act, and, in the second place, on the view which we may in our discretion take of this particular claim for expenses, for under that section it is not imperative to award all the expenses that fall under the general description of being incidental to the procedure, and the Court are left to deal with the matter as they think just. The words of the section are, that "it shall be lawful for the Court of Session to order the expenses of the following matters, including therein all reasonable charges and expenses incident thereto to be paid by the promoters of the undertaking," &c. It is left to them to consider what are reasonable. The matter here is the re-investment of money, and the question is, whether the expenses are reasonable charges and expenses, incidental to proceedings for the investment of money? The Auditor, as I understand, has allowed all the expenses incurred under this petition except that of reclaiming against the Lord Ordinary's interlocutor of 21st January 1868, and the bearing on that reclaiming note.

Now the question raised by that reclaiming note was singular and new, and attended with a good deal of difficulty, and it appears to me that it would not be reasonable to make that a charge against

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-