

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—Assolzie—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 north-most 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-