terlocutor pronounced by the Lord Ordinary, that when his Lordship suspends the "whole grounds and warrants" of this charge, I hold that to mean that "the whole grounds and warrants" of the charge are suspended as grounds and warrants for such a charge as this—not of any charge that may be given on this warrant.

Lord Deas—The tenant was imprisoned on this charge, and he now complains of that imprisonment, and necessarily therefore of the charge which was the foundation of it. I am not disposed to call in question the form of this extract. I see no reason to doubt that it is in the ordinary and approved form, but we must attend to what it is that it authorises. It authorises poinding and imprisonment under the charge that is to be given, "the terms of payment being always first come and bygone." Not "terms of implement," be it observed, but "terms of payment." Poinding you may use where poinding is competent, and poinding and imprisonment you may use where they are competent "when the terms of payment are come and bygone." But you are not to use poinding or imprisonment whether it be implement or payment that you desire. What must be done when implement of any of the obligations to do any of the acts required is desired is therefore to bring an action for implement, and thereupon the landlord can get personal diligence to enforce the decree in that action. The only other way I know of is this—It used to be competent (but whether it is so still or not I do not know) to bring a bill in the Bill Chamber, and to get from the clerk upon that bill a warrant, "*fiat ut petitur*," to do the particular thing that is required. That, too, is a decree. Whether it is still competent or not I am not sure, but it was not done here. These are the only ways in which you can make the thing you want specific, so as to enforce it by imprisonment. But the charge here is to implement "the haill obligations" of the lease. Any one of these obligations may be enforced by one or other of the means I have mentioned under pain of imprisonment. Without that you cannot so enforce any single one of them; much less can you put a general charge like this into force with the penalty of imprisonment attaching to failure.

Lord Mure concurred, on the ground that the landlord was bound to make specific the obligation he desired to have fulfilled.

Lord Shand—This is admittedly an attempt to introduce what is an entire novelty in our practice with reference to clauses of this general nature in instruments of this kind. No case can be found in the books to justify it. I am of opinion that the proceeding now attempted is incompetent. I think that the terms of the charge are obviously objectionable because of the general nature of the acts which the tenant is called on to perform. A charge in such general terms is, I think, incompetent, and it is obvious that it would lead to confusion if we were to hold such a charge good, for no one receiving it could possibly understand what it was he was required to do.

The case, as your Lordship in the chair has remarked, does not raise the question as to whether such a charge is competent for any specific act that may be demanded under the stipulations of the lease. I must say I entertain serious doubts as to whether it could be used to enforce any specific obligation. This lease contains, like all leases, a variety of obligations upon the tenant. Would it make matters any better if this charge referred to any one of these obligations? I am of opinion that a warrant of this kind cannot be used even for a charge to perform one of these specific obligations. In short, we find that obligations to pay money where claims have become liquid are the only class of obligations for which this summary warrant his hitherto been in use. And there is no hardship in not extending its operation. If the landlord has any objections to make against his tenant, that can be made the subject of a summary action, and he can work out his remedy in that way.

The Court adhered.

Counsel for Complainer—Strachan. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Respondent (Reclaimer)—Guthrie Smith—Millie. Agents—Watt & Anderson, S.S.C.

Wednesday, February 27.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

HOPE *v.* THE EDINBURGH ROAD TRUST AND HERIOT'S HOSPITAL.

Property—Edinburgh Roads and Streets Act 1862 (25 *and* 26 *Vict. cap.* 53)—*Private Street—Obligation to Causeway.*

Held that a "private street," in the sense of the Edinburgh Roads and Streets Act 1862, includes roads over which there is a general use, though not a public right, and that in these circumstances the Road Trust are empowered, in terms of the 33d section of the Act, to assume the management, and to require the owner to have such road "made up, constructed, and causewayed" at the expense of the owner.

These were conjoined actions of declarator raised by John Hope, W.S., the first brought against William Duncan, clerk to the Edinburgh Road Trust, and the second, a supplementary action, brought against The Feoffees of Trust and Governors of George Heriot's Hospital.

The summons concluded that it ought to be found and declared "that that road or way forming a continuation of London Street eastward to Annandale Street, within the city of Edinburgh, or at least so much thereof as lies to the eastward of the westmost line of march of the pursuer's lands of Gayfield, is not a street, private or otherwise, according to the true intent and meaning of the said Edinburgh Roads and Streets Act 1862, or at least is not a private street of which the carriageway has not been made up and constructed according to the true intent and meaning of the said Edinburgh Roads and Streets Act 1862; and that the provisions of the said Act with regard to private streets, where the carriageway shall not have been made up and constructed, and in particular the provisions of the 33d section of the

said Act, are not, and never have been, applicable to the said road or way."

The 33d section of the Edinburgh Roads and Streets Act 1862 enacted—"In the case of such private streets as are or may be within the district, and as are not specified in said Schedule (C), where the carriageway shall not have been made up and constructed, nothing herein contained shall be held or construed to confer any right on the trustees to compel the making up, constructing, and causewaying of any such street until they have received intimation in writing from the superior that the said street is an open thoroughfare for public use, or until three-fourths of the intended houses in such street shall either have been erected or are in course of being erected, or the areas for such intended houses shall have been feued under an obligation to erect houses, or until the Sheriff on an application by the trustees or any three or more persons assessed in virtue of this Act, setting forth the circumstances of the case, shall determine that it would be for the public advantage that any such street should be made up, constructed, and causewayed ; but in any of these cases it shall be lawful for the trustees, and they shall be bound, to require the owners of lands and heritages in any such street, to make up, construct, and causeway the same to the satisfaction of the surveyor or other officer of the trustees for the time being . . . and if such owners shall fail or neglect within three months from and after the date of such notice to make up, construct, and causeway any such street as aforesaid, it shall be lawful for the trustees, and they shall be bound to make up, construct, and causeway such street in such way as to them may seem proper or necessary, and they shall levy the expense, as the same shall be ascertained by an account under the hand of their surveyor or other officer for the time, from such owners failing or neglecting as aforesaid, and shall recover the same in like manner as the assessment hereby authorised is appointed to be recovered, or otherwise according to law."

By the interpretation clause (sec. 3) of the Act, it was enacted, that "the word *street* shall include any square, court, or alley, highway, lane, thoroughfare, or public passage or place within the district defined in this Act open to be used by carts and carriages ;" and that "the words *private streets* shall mean streets within the district which are or may be maintained by superiors, proprietors, feuars, tenants, bodies politic or corporate, or other persons, and not by the trustees or the road trustees of the county."

The following statement of the facts of the case is taken from the Lord Ordinary's note :—"About ten years ago a road was made partly through lands belonging to Heriot's Hospital, and partly through lands belonging to the pursuer, in order to form a continuation of London Street, and to connect Broughton Street with Annandale Street. The road was made by the pursuer at his own expense, the Hospital giving the ground in so far as it passed through their property, and stipulating for a servitude over it. The purpose of making it was to open up the property of the Hospital and of the pursuer, with a view to feuing. The road was well made. It was not adapted for heavy traffic, but it was suitable for ordinary light traffic. Sometime after its formation it came to be used by the public, but without any permission on the part of the pursuer. There was, however, no attempt on his part to stop the public use until January 1876, when he put up barricades on it at the boundaries of his own properties ; but, on the objection of the Hospital, these barricades, after they had existed for about six weeks, were removed, and the public use was resumed ; indeed, it may be said that the public use was not interrupted, for the road had become impassable in winter, except perhaps for empty carts. The heavy traffic which had passed over the road had gradually put it into very bad order. No attempt was made to repair it in so far as it passed through the pursuer's lands ; and at the time when the proceedings were taken which have resulted in these actions, it was in a very bad condition indeed. After the road was formed, the Hospital had from time to time given off feus on each side of it, and they, or their feuars, had causewayed the portion of it in the Hospital's lands. The pursuer has given off no feus. On the one side his lands are in their natural condition, and on the other, there are certain building-yards. When the action was raised, the road was in use as an access to the Hospital's feus, as well as to the subjects held by tenants of the pursuer. This was in addition to the use by the public. Considering the road to be a private street within the meaning of their Act, the Road Trustees presented a petition to the Sheriff, with the view of throwing on the pursuer the obligation of causewaying it. The pursuer denies that the road is a private street, and therefore denies the right of the Road Trustees and the jurisdiction of the Sheriff. The present action has been brought to determine the question which has thus arisen."

The Lord Ordinary (RUTHERFURD CLARK) pronounced an interlocutor assoilzieing the defenders, and added this note :—

"*Note*—The first question in this case is—Whether the road which has been made through the pursuer's lands is a private street within the meaning of the Edinburgh Roads Act 1862? It is not alleged on either side that it can be regarded as a public road or street.

"A proof has been led at considerable length, with the result of establishing pretty clearly that the parties are not at variance on any matter of fact. The dispute between them is entirely a question of law.

[*Here followed the statement quoted above.*]

"The pursuer contends that no road can be a private street within the meaning of the Act unless the public have a right to use it. The statutory distinction between streets and private streets is, as he maintains, that while both are subject to public use, the former are maintained at the expense of a public rate, and the latter at the cost of private persons. He urges, therefore, that as the public have no right in the road in question, it is not a private street.

The Lord Ordinary thinks that the Road Trustees are right. He cannot say that the definitions of the Act are very clear, but he finds it impossible to hold that private streets comprehend no roads over which a public right-of-way does not exist. The word 'private' is not consistent with the view for which the pursuer contends; and if it was intended that the operation of the Act should be confined to public rights-of-way, the Legislature would have probably said so in express terms.

"It seems to the Lord Ordinary that the Act was intended to include roads over which there was a general use though not a public right. It can hardly be doubted that there is within the district a number of roads made for the use of feuars which might be shut up if the consent of all were obtained. These are not public roads, for the public could not complain of their abolition. But they are roads which *de facto* the public use, and are intended gradually to come into public use. It seems to the Lord Ordinary that the purpose of the Act was to enable the Road Trust to assume the management of such roads in the cases provided by the 33d section of the Act.

"The 35th section throws considerable light on the question, and seems, indeed, to be conclusive. It declares that all private streets, when assumed by the trustees, shall be open to the public as fully in every respect as if they were the streets in Schedule A—in other words, the ordinary streets of the city. The public right begins on the assumption of the trustees, and this implies that it did not exist till the fact of assumption. The provision in the 32d section tends to the same conclusion.

"The pursuer further argued that the road in question did not fall within the operation of the 33d section, because that section applies only to roads which shall not have been made up and constructed. The meaning of the Act cannot be well ascertained without considering the 32d section along with the 33d. The former section relieves the trustees of any obligation to assume private streets 'in which the carriageway shall not have been made up and constructed and put in a state of repair.' But as soon as that is done the trustees are bound to assume the maintenance of them. The latter section entitles the trustees in certain cases to require that private streets shall be made fit for use by the owners of heritages in such streets, with the view of the trustees afterwards assuming the maintenance of them. The meaning seems to be, that when the trustees desire to assume a private street into their management they are entitled to have it 'made up, constructed, and causewayed' at the expense of the owners, and therefore it appears to the Lord Ordinary that when the 33d section deals with the case of a private street 'not having been made up and constructed,' it refers to its condition at the time when the trustees propose to assume it.

"The case is a hard one for the pursuer, but the Lord Ordinary is of opinion that he must pronounce decree of absolvitor."

The pursuer reclaimed, but the Court—viz., Lord Ormidale, Lord Gifford, and Lord Adam (the latter having been called in in the absence of the Lord Justice-Clerk)—unanimously adhered.

Counsel for Pursuer (Reclaimer)—Balfour—Keir. Agent—Party.

Counsel for Road Trust (Defender and Respondent)—M'Laren—Robertson. Agent—W. Archibald, S.S.C.

Counsel for Heriot's Hospital (Defender and Respondent)—Gloag. Agents—M'Ritchie, Bayley, & Henderson, W.S.

Thursday, February 28.

SECOND DIVISION.

SPECIAL CASE—GRANGER AND OTHERS (WILSON'S TRUSTEES) AND QUICK (WILSON'S JUDICIAL FACTOR).

Succession—Vesting—Postponed Payment.

A testator directed his trustees to pay to his children equally the free annual income of the trust, and at the majority of his youngest surviving child to realise and divide his estate equally among his children after providing for certain annuities, the issue of deceasing children receiving their parent's share. Power to advance a fixed sum to account of share at marriage or for setting up in business was also given.—*Held* that the provisions to children vested *a morte testatoris*, and passed, therefore, on the death of one of the children prior to the period of payment, to the legal representative of the deceased child.

This was a Special Case presented by Allan Granger and others, trustees of the late William Wilson, baker, Glasgow, of the first part; and William David Quick, accountant in Glasgow, judicial factor on the estate of William Wilson junior, and acting under section 164 of the Bankruptcy (Scotland) Act 1856, of the second part.

William Wilson senior died on 6th November 1874. His estate, which consisted of both heritage and moveables, amounting in value to £6762, fell to be regulated by his trust-disposition and settlement, dated 18th January 1867, whereby he appointed Granger and others his trustees and executors, and nominated them tutors and curators of his children. The third purpose of that deed provided for payment of annuities of £70 and £10 respectively to the truster's wife and his sister-in-law; and the fourth purpose directed the equal division and payment of the remainder of the free annual revenue of the trust-estate among the children until the youngest surviving child should attain majority. The fifth purpose, *inter alia,* made the following provisions:—"Upon the youngest of my surviving children attaining the age of twenty-one years complete, my said trustees and executors shall provide for the payment of the foresaid annuities after mentioned, and shall then sell, realise, and convert into money the whole residue and remainder of my means and estate, heritable and moveable, real and personal, and divide the proceeds equally among my lawful children; and in the event of any of my children dying before the said period for payment, leaving lawful issue, such issue shall receive equally among them the share to which the parent would have been entitled if in life, and the shares falling to minors shall be paid over to their lawful guardians for their behoof. . . . And notwithstanding the said period for the payment of the shares of the residue, I provide and declare that it shall be lawful to and in the power and option of my said trustees and executors, if they shall think fit, to advance and pay before the period of payment foresaid to any of my said children a sum not exceeding £100 sterling, for the purpose of establishing a son in business or