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

March 1862.—that a payment made by a bankrupt within sixty days of bankruptcy, in specific implement of an obligation undertaken beyond that period, was not struck at by the Act 1696.

The truster advocated.

Young and Macintosh for him.

Clark and Asher in answer.

At Advising—

Lord Justice-Clerk—In this case the advocator, who is trustee on the sequestated estate of John Williams, seeks to set aside a payment of £60 made by the bankrupt to the respondent Falconer within sixty days of bankruptcy. It appears that the respondent had become drawer and indorser for the accommodation of the bankrupt of a bill for £60, dated on the 1st November 1866, and payable on the 1st February thereafter. While this bill was current, and on or about the 10th December, the sum of £60 was paid by the bankrupt to the respondent, while the bill was current. The bill had been discounted at its date, and was then held by the Bank of Scotland. The object of the bankrupt was to put his creditor in the obligation of relief in possession of a fund securing the payment of the bill when it should fall due. It was so used by the respondent. The trustee's challenge of this transaction was laid on the ground of the payment being a fraud against the bankrupt's creditors at common law, as well as being done in violation of the Act 1696. The first ground of challenge admittedly fails; the question is, whether the challenge under the Act 1696 is good. The Sheriff of Inverness, altering the judgment of his Substitute, repels this ground of challenge.

The bankrupt gave to the respondent a portion of his estate to the extent of the sum paid to secure him against the consequences of his obligation in relief contracted by the drawing and indorsing of the £60 bill. The circumstances, so far as regards the facts founded on by the trustee, clearly bring the case under the authority of *Speir* v. *Dunlop*. Accordingly, it is not disputed that, but for a special ground of defence taken by the respondent, the transaction must be set aside.

That special ground is, that the payment made was not a voluntary payment made by the bankrupt in the sense of the Act 1696, but a payment under the compulsion of positive obligation—that obligation having, it is said, been contracted at the time of the transaction under which the respondent agreed to accommodate the bankrupt, and having formed a consideration relied on at the time. It is therefore contended that the payment, as being merely an implement of a special engagement —part of the transaction— is saved from challenge under the doctrine given effect to in the case of the *Bank of Scotland* v. *Smart and Ross*, February 1811, and which case is recognised as a good decision in the recent case of *Taylor and Farrie*.

The advocator also disputes the doctrine that acts done by the bankrupt during the period of constructive bankruptcy can be protected by reference to antecedent obligation; and, on the authority of the case of *Inglis* v. *Mansfield*, maintains that the only protection given is to securities so far completed before the sixty days of constructive bankruptcy as to admit of being completed without the act or intervention of the bankrupt. And he denies also that there is any ground in fact for applying the doctrine here, even if it is held to be sound.

It appears to me that the latter contention of the advocator is well founded, and, therefore, that it is not necessary for the determination of this case to enter upon the question so largely and ably argued before us, as to what the state of the law might have been had it been true that the transaction here truly proceeded upon a state of the fact raising the question. It would require very serious consideration before coming to a conclusion, that the approval of that judgment in the opinion of the judges in *Taylor and Farrie*, and the principle on which it rested, was erroneous; but the question does not arise here. As I regard the facts of the case there is no room for the application of the principle at all.

In the case of the *Bank of Scotland*, an advance was proved to have been made on the faith of a security, the property of the borrower. The title-deeds were handed over at the time of the loan in order to the completion of the security. The execution of the deed effectuating the security was delayed, and the completion came to be within the period of constructive bankruptcy. The security was supported because there was a clear positive obligation in the very contracting of the obligation to grant it. The security was exigible instantly, was definite, and it was a right over a specific subject. The bankrupt was under an obligation enforcible by action. Immediate decree fell to be pronounced against him, and he was liable to imprisonment on the decree—to be obtained on delay or failure to implement the decree when obtained. It required no previous investigation to ascertain if the obligation was or was not prestable under the circumstance in which the supposed action would be brought. It required the occurrence of not any event, even of such act as a demand for the security, to render it a duty to grant it. The security was definite and precise. The circumstances of the present case disclose a condition of the facts wholly different.

The security, as it must be called, was the deposit of a sum of money in order to meet a current bill due about two months after *security* was given. I see no evidence which can warrant our coming to the conclusion that there was any engagement for constituting a security at all by way of depositing a sum of money in the hands of the respondent. From the evidence of the respondent himself, it appears that, it having been proposed by the bankrupt to him to lend him £60 in cash, he offered his name to a bill at a month, and that in reply the bankrupt said "Make it *three*, in case I shall not have money in a month, but as soon as I have money I shall pay it." That is what passed in words. We have a statement of the respondent's understanding that the whole matter as constituting the arrangement is this—that if the three months bill is signed, it, that is the bill, will be paid as soon as the bankrupt might have money to pay it. This is not a provision by way of deposit, but a payment of the bill, which confessedly was not paid, nor meant to be paid, till February. Nor is this of the nature of an obligation instantly and unconditionally enforceable. Suppose an action by the respondent on the date of payment against the bankrupt for obtaining a security for the bill due two months after the execution of the act by a deposit of £60 in his hands to await the maturing of the bill—the ground of action that when the pursuer gave his name to accommodate the defender by drawing a three month's bill, he told him that he would pay the bill as soon as he had money to pay it. How could such a conclusion be extracted from the statement of such premises? How could

payment be converted into security? How—if it could—could it be determined that a man in a condition of constructive bankruptcy, had money applicable to the constitution of such a security. Where, in an assurance that an obligation would be extinguished by payment, of course so soon as the debtor could, can he read obligation at all?

The respondent speaks as to the understanding. He says that the understanding was that he should pay the bill whenever money came into his hands. Understanding and obligation are by no means the same. An expression of intention on the part of the bankrupt would create an understanding, but would fail to create an obligation enforceable at law; and an understanding, or even an obligation to pay when one shall have money to pay, is one which could not form the basis of an action. What kind of decree would it be to decern a debtor to pay when he could.

The statement of the respondent is enough, as it appears to me, for the disposal of the case against him. As might be expected when the constitution of the supposed obligation is only verbal, the import of the conversation between the parties at the time slightly differs. He says that the arrangement was not to pay it, that is, the bill, but to pay him, that is, the respondent, the £60, but after that he says that "he was to pay the money so soon as I should have it." "I told him," he subsequently says, "that I would pay him *as soon as I could.*" It seems to me to require a great deal of ingenuity to extract an obligation to any effect out of such an assurance. It is certain that no obligation was come under of a tangible description, or one clear or fixed as to period or in any way within the reach of legal compass. It would certainly appear to be a strange reading of the Act of 1696 to hold that an assurance given that something would be done, and when the debtor should be in a position to do it, should constitute an obligation, and take the act done out of the operation of the Statute. Loose understandings proved by conversations would form a very easy method of dispensing with the operation of the Act. So little faith can be put in such 'understanding' that we have here the fact that the two parties flatly contradicted each other as to a similar 'understanding' existing in respect of a whole class of other bills. Surely something of a very different character must be proved before supporting an appropriation to one creditor of a portion of the estate in security of an obligation not then pushed.

Such an assurance as this seems to have been here practically and substantially leaves the alleged obligant to do the act or not to do it just as he pleased. He is in no way bound or fettered. There was, at the date of its constitution, no pressure from any definite, precise, or tangible obligation, and therefore the payment must, I think, be viewed as voluntary and so made in violation of the Act 1696.

The other judges concurred.

Agents for Advocator—Gibson-Craig, Dalziel & Brodies, W.S.

Agents for Respondent—Murdoch, Boyd & Co., W.S.

Saturday, June 27.

FIRST DIVISION.

LECK *v.* MERRYFLATS PATENT BRICK CO.

Lease—Reversion of Possession—Interdict. A tenant of lands for a particular purpose interdicted from using the ground for another purpose.

Henry Leck, proprietor of the lands of Upper Merryflats, in the parish of Govan and county of Lanark, let the said lands in 1863, on a twelve-years' lease, to Caird, Watson, & Co., for the purpose of making and disposing of bricks, tiles, pipes, and other articles. These parties subset the lands to the respondents. The complainer alleged that the "Merryflats Patent Brick Co. have recently, unlawfully and unwarrantably, and without the complainer's knowledge or consent, sublet or otherwise granted the use of a portion of the said lands adjoining the road leading from Paisley Road to Greenock Road, to the respondent John Coghill, contractor, Clydebank House, Yoker, for the formation of part of a private railway or tramroad from the Glasgow and Paisley joint line of railway to the site of a poorshouse and other buildings proposed to be erected by the Govan Parochial Board, and others, on the lands of Lower Merryflats, adjoining the complainer's said lands on the north. The said private railway or tramroad is used, or is intended to be used, by the respondent John Coghill for the conveyance of building materials from the said Glasgow and Paisley joint line of railway to the said lands of Lower Merryflats, for the purpose of constructing the said poorshouse and other buildings, but the respondents have no right to use or occupy any portion of the complainer's lands for any such purpose."

The complainer asked interdict.

The Lord Ordinary (MURE) pronounced this interlocutor:—

"*Edinburgh, 15th June* 1868.—The Lord Ordinary interdicts, prohibits, and discharges the respondents, or any of them, and all others acting under their authority, from using the railway or tramroad in question, in so far as the same is constructed on the property of the complainer, for the carriage of materials from the Glasgow and Paisley joint line of railway to the site of a poorhouse, and other buildings connected therewith, proposed to be erected on the lands of Lower Merryflats, or for any purpose other than that of the carriage of materials for the use of, or manufacture at, the respondents' works."

The respondents reclaimed.

CLARK and LANCASTER for reclaimers.

YOUNG and MACKENZIE for respondents.

At advising—

LORD PRESIDENT—As to the last part of the Lord Ordinary's interlocutor, it is a sufficient objection to it that it is not clear, and in an interdict clearness is necessary in order that the party interdicted may know what it is he is not to do. As to the rest, I have no doubt that his Lordship is right. The attempt on the part of the respondent is plainly to invert the nature of his possession. The subject is given him for one particular purpose, expressed in the deed itself. The object of the agreement with the contractor is to use the ground for another purpose. Now, on the authority of *Mercer* and other cases, that is clearly illegal. I think we must adhere, only varying the interlocutor as I have suggested.

The other judges concurred, and the following interlocutor was pronounced:—"Recall the interlocutor complained of, and remit to the Lord Ordinary of new to pass the note, and interdict, prohibit, and discharge the respondents and all others from making any use of the railway or tramroad mentioned in the note of suspension except for the