his refusal to sign took place till after the Patons had signed. But it is quite plain that as his name occurred first his refusal must have preceded the signing by the others. And they sign after hearing Matthew Brown refuse. Then it is said that Mrs Paton signed in the expectation that Matthew would sign. But she is precluded from saying this, having signed and delivered the assignation after hearing him say that he would not sign it.

The others concurred, Lord ARDMILLAN remarking that the case was the same as if Matthew Brown's name had been on the deed deleted when Mrs Paton signed.

KER *v.* SPROAT (THOMSON'S TRUSTEE) AND ANOTHER.

Settlement—Conditional Conveyance—Legacy—Construction. A declaration in a codicil annexed to a conveyance of land which held (alt. Lord Kinloch, diss. Lord Curriehill) sufficient to prevent the conveyance from taking effect.

Counsel for the Pursuer—The Solicitor-General and Mr Gifford. Agent—Mr W. S. Stuart, S.S.C.

Counsel for the Defenders—Mr Patton and Mr Horn. Agent—Mr Andrew Scott, W.S.

This was an action of declarator and adjudication at the instance of Mary Sproat Ker, against the trustee of the deceased Mrs Elizabeth Sproat or Thomson and her heir, in which the pursuer sought to have it declared that she was entitled (in virtue of the said Mrs Thomson's trust-settlement and codicil, dated respectively 13th April and 12th October 1861), to the properties of Tongue Croft and others. The action also contained conclusions for adjudication in implement of the trust-settlement and codicil. The circumstances under which these claims were made by the pursuer were as follows:—

The pursuer's uncle, Thomas Sproat, died on the 30th of January 1859, leaving a trust-disposition and settlement, by which he appointed separate trustees for the realisation of his estates in Scotland and Australia. He appointed the Australian trustees, after the fulfilment of certain purposes in that country, to remit the residue to Scotland; and by the second purpose of his deed he made this provision—"I appoint my said trustees (in Scotland) to invest the sum of £3000 sterling in Government or good heritable security, in their own names, as trustees foresaid, and hold and retain the same, and pay the interest, dividends, and profits thereof to my niece Mary Sproat Ker (the pursuer) during all the days of her life, and that at two terms in the year, Whitsunday and Martinmas. It was also provided that the said interests, &c., were not to be subject to the *jus mariti* of any husband she might marry. The fee of the said sum was destined to the pursuer's children if she had any, and if not, was to fall into the residue of the truster's estate.

Mrs Elizabeth Sproat or Thomson, sister of the said Thomas Sproat, and aunt of the pursuer, in April 1861 executed a settlement in which she left to the pursuer certain legacies and a share in the residue of her estate. On 12th October 1861 she executed a codicil to the following effect—"Considering that since the execution of the said settlement my said brother Alexander Sproat has returned from Australia, but I have received no statement of the affairs of my late brother Thomas, and as the provisions contained in my said settlement in favour of my niece, Mary Ker (the pursuer), were made under the impression that from the legacy bequeathed to her by the settlement of my deceased brother Thomas she would be amply provided for, but as I considered it just that she should receive an additional provision from my estate, in the event of her not receiving the said legacy from the estate of my said brother Thomas"—therefore, she disponed to the pursuer, by *de præsenti* words of conveyance the property of Tongue Croft and others; "but declaring that in the event of the foresaid legacy bequeathed to my said niece by my said brother being paid to her within one year after my decease, then she shall have no right to the lands hereby disponed, and the same shall be disposed of as provided for in the said settlement." Mrs Thomson died on 7th March 1862.

It appears that when the year which succeeded her death was drawing to a close, funds to the amount of £3000 were received in this country from the Australian trustees; and on 7th March 1863, exactly a year after Mrs Thomson's death, a deposit of the same was made in bank, on a receipt in the following terms:—"Received from Thomas Sproat, Esq., Rainton, for behoof of the trustees of the late Thomas Sproat, Esq., sometime of Geelong, for investment in favour of Miss Mary Sproat Ker, £3000 sterling, which is placed to his credit on deposit receipt."

In these circumstances, the present action was brought by Miss Ker upon the footing that the condition on which she was to get Tongue Croft has emerged, in respect that she was entitled, under Thomas Sproat's settlement, to an out-and-out payment of the sum of £3000, and that not having been paid this sum, and no *investment* of the same having been made within the time limited by Mrs Thomson's codicil, she (the pursuer) was entitled to the absolute property of Tongue Croft and others, or otherwise to have the subjects adjudged in implement of the trust-deed and codicil. The defenders resisted the action, pleading that the condition had not emerged upon which the lands were claimable by the pursuer—that the £3000 had been paid or satisfied according to the sound construction of both settlements, and that the pursuer was barred from maintaining the action in respect the deposit in bank was acquiesced in and accepted by her as in payment and satisfaction of the bequest.

A record was thereafter made up and a proof taken with reference to the circumstances attending the deposit of the £3000.

Thereafter the Lord Ordinary (Kinloch) found that in the true sense and legal construction of Mrs Thomson's codicil the legacy bequeathed to the pursuer by Thomas Sproat was not paid to her within one year after the decease of Mrs Thomson; and therefore found and declared in terms of the declaratory conclusion of the summons.

Against this judgment the defenders reclaimed; and parties having been heard, the case was advised to-day. The Court (diss. Lord Curriehill) reversed the interlocutor of the Lord Ordinary.

The LORD PRESIDENT was of opinion that under Thomas Sproat's settlement the pursuer was only to get the annual proceeds of an investment of £3000—not the payment of the capital sum—and therefore the pursuer's pleas (which were founded upon the language used in Mrs Thomson's codicil) that she was entitled to payment of the sum of £3000 could not be sustained. It was not suggested that Mrs Thomson had the least reason to suspect that the pursuer had got a bequest of any capital sum from Thomas Sproat. She had an interest in and must have been familiar with the deed. With regard to the other contention of the pursuer, that the sum of £3000 had not been invested within a year of Mrs Thomson's death, his Lordship referred to the deposit-receipt and its terms, and said that the defenders urged that the deposit of the money in this form was equivalent to an investment, and that the pursuer agreed to hold it to be so. A proof had been allowed upon this matter, which satisfied his Lordship of two things—(1) That the pursuer had been consulted, and was at the time opposed to an investment in Government or heritable securities; and (2) that she had agreed to hold the deposit of the money in bank as fulfilment of Thomas Sproat's deed, so far as the matter of investment was concerned. Assuming the deposit to be equivalent to investment, was the requirement of Mrs Thomson's codicil satisfied which speaks of the legacy by Thomas Sproat

being paid to the pursuer? It is admitted that no *payment* has been made, but the question was, what had Mrs Thomson in view to be done within the year? Was it payment of the interest which had accrued on the £3000 since Thomas' death; or was it that the payment of interest should begin within the year; or, lastly, was it that there should be the appropriation of the £3000 within the year to the purposes and for the uses mentioned in the settlement of Thomas Sproat? His Lordship was of opinion that the last was the meaning of the condition in Mrs Thomson's codicil. The narrative of the codicil gave ground for this view. She did not know the condition of her brother's affairs, and was afraid his estate might fall short, and so the provision in favour of the pursuer might not have effect. The codicil speaks of one payment of *the legacy* being made *to her* (the pursuer), and his Lordship was of opinion that that condition was satisfied by the trustees getting the money to hold for her, and by the deposit, which was equivalent to investment.

Lord DEAS held that the legacy to the pursuer by her uncle's deed could not be said to be payable to her in any correct sense. It was to be invested for her behoof in liferent, and for her children in fee. The whole puzzle in the case arose from Mrs Thomson's codicil speaking of the legacy as a thing to be paid; but she could not, by these words, have meant anything more or other than what was said by Thomas when he appointed the legacy to be invested. The only thing possible to be paid to the pursuer was the interest that had accrued on the £3000 sterling. If that were so, then upon the failure of the trustees of Thomas to pay this interest to the pursuer within a year after Mrs Thomson's death, she was to get Tongue Croft. That could not be the meaning of the codicil, which clearly pointed to securing to the pursuer an equivalent for the whole provisions with regard to the £3000 capital and interest, if she was not secured in these by investment of the money for her behoof within a year. Upon the result of the proof with regard to the deposit receipt, Lord Deas agreed with the Lord President.

Lord ARDMILLAN held that the words importing payment in Mrs Thomson's codicil must be read in connection with the terms in which the bequest was conceived in Thomas Sproat's deed, and did not import that actual payment of the money was necessary. His Lordship therefore agreed with the Lord President and Lord Deas.

Lord CURRIEHILL expressed agreement with the other judges in his views as to the result of the proof, but differed from their Lordships in the result at which he arrived in the case. His Lordship held that under the will of Thomas Sproat nothing was payable to the pursuer but the half-yearly interests or dividends on the £3000. The capital was to be retained by the trustees till her death. If she left children it was to go to them; if not, it was to form part of the residue of his estate. The trustees under this will were bound to make the investment ordered at once; and he must look at the case as if it had been so made. Now, no interest had been paid to the pursuer from the death of Thomas Sproat, when it began to run up, to the execution of the codicil by Mrs Thomson. The pursuer was living with Mrs Thomson, and the latter was aware of this fact. In the autumn of 1861 a considerable portion of the Australian property was realised, which would have supplied funds to meet the legacy in favour of the pursuer. Mrs Thomson knew this, and therefore could have been under no apprehension that the pursuer would lose her legacy. This could not have been the meaning of the condition in her codicil. She did not mean that the pursuer was not to get the lands of Tongue Croft if the trustees of Thomas Sproat merely made an investment of the £3000 for her behoof, within the year after her (Mrs Thomson's) death, without paying her any of the interest that had accrued. The meaning appeared to his Lordship to be, that she deprecated delay in the payments of the interest, and as they were to form in part the means of the pursuer's support, her object was to secure her against a continued delay in the payment of them after her (Mrs Thomson's) death. Nothing therefore having been *paid* to the pursuer within the year, his Lordship held that the condition had emerged upon which the pursuer was to be entitled to the property claimed in the action.

The interlocutor of the Lord Ordinary was therefore altered, and the defenders assoilzied, with expenses.

SECOND DIVISION.

DUKE OF BUCCLEUCH *v.* THE MAGISTRATES AND TOWN COUNCIL OF SANQUHAR.

Teinds—Arrears—Usus. Defence to an action by a titular of teinds for payment of arrears founded upon an alleged *usus*, repelled.

Counsel for the Pursuer—The Solicitor-General and Mr Watson. Agents—Messrs J. & H. G. Gibson, W.S.

Counsel for the Defender—Mr Cook and Mr Hall. Agent—Mr Kennedy, W.S.

This is an action at the instance of the Duke of Buccleuch as titular and patron of the parish of Sanquhar, concluding against the defenders for payment of the whole teinds in their lands lying within the parish of Sanquhar, under deduction of that proportion of the teinds which is payable to the minister as stipend. It is not disputed that the Duke is in right of the teinds of the lands in question. The summons contains conclusions applicable to two sums of £310, 0s. 5½d., and £718, 19s. 9d., with interest respectively. It is proved from the rental of the Queensberry estates, of which the teinds in question form part, and from the accounts of the factors, that down to Martinmas 1810 no higher sum was exacted in name of teind from the burgh of Sanquhar than £5, 18s. 2d., which was the sum received from the burgh in full of their teinds, less the teind for the Duke's property in the burgh. The defenders admit that from this date (1810), although they continued to be charged on the rentals as due annually in name of teind this sum of £5, 18s. 2d., no actual payment of teind has been made by the burgh of Sanquhar; and one of the reasons assigned for there being no settlement is, that in 1815 the Buccleuch family became tenant of the burgh in certain leases, which gave the burgh a counter claim in name of rent of £18, 10s. annually. The pursuer alleges that from the year 1822 down to crop and year 1830 inclusive, the teind of the defenders' lands was not much more than sufficient to meet the share of the stipend modified on 18th December 1822, which was ultimately localled thereon, and has been paid by him (the pursuer) to the minister of Sanquhar. It is to this payment by the pursuer of the stipend of the minister throughout the above-mentioned period that the first conclusion of the summons is applicable. But this claim has been arranged by the pursuer obtaining credit for the amount in the counter-account of rents due by him to the burgh; and a minute restricting the libel was accordingly put in. The second and remaining conclusion of the summons is for payment of teind alleged to be due by the defenders to the pursuer as titular from 1830 to 1863. The defence against this claim is that down to 26th June 1862, when the agent of the Duke intimated an intention to exact the full measure of his legal right, no higher sum can be charged against the burgh in name of teind than the sum of £5, 18s. 2d., payable by use and wont. It is admitted that the teind has never been valued.

The Lord Ordinary (Kinloch) sustained the defence, holding it to be finally established in teind law that where for a long term of years there has been a use of payment of a certain annual sum in name of unvalued teind, this must be held to be the