residue in the following terms:—"After accomplishing all the other purposes of this trust, the said trustees are hereby directed to lay out and invest the whole residue that may remain of my heritable and personal estates in the purchase of lands and heritages situated as near and convenient as they can be reasonably had to my said estate of Cluny and my other principal estates, and to execute a deed or deeds of strict entail, in terms of the foresaid Act of the Parliament of Scotland passed in the year 1685, intituled 'Act concerning tailzies of the whole of the foresaid lands so to be purchased as aforesaid, to and in favour of my eldest son, John Gordon,' &c." (Here follows a destination in the same terms as that in the third purpose of the trust; and there is a provision that the trustees shall record the deed so executed by them in the Register of Tailzies, and also in the Books of Council and Session, and complete proper feudal titles thereon, so as to render them effectual in terms of law.) Charles Gordon, the youngest son of the truster, predeceased his father unmarried, and without leaving any heirs, and the truster died without having executed any deed of nomination naming any persons as heirs of entail in whose favour the said disposition and deed of entail was to be conceived. In consequence of this predecease and the failure of the truster to nominate any other heirs, the landed estates in Scotland of the truster having devolved on the pursuer, Mr Gordon, the trustees proceeded, in implement of the directions of the trust-deed, to execute a deed of entail according to the destination expressed in the trust-deed. The residue realised by the defenders amounted to £251,598, 15s. 4d., out of which the truster's debts were paid and some landed property was bought, but a large balance is still in the hands of the trustees.

There is no question in regard to the third clause of the trust-deed *per se*. The dispute is as to the effects of the sixth. On the one hand, Mr Gordon maintains, on the authority of the Dalswinton case, that the destination to John Gordon and his heirs whatsoever cannot be made the foundation of a good entail, and therefore it is a fee-simple destination. The trustees, on the other hand, maintain that they are bound to give effect to the directions of the trust-deed, and that they are entitled to cure the defect in the destination by reading the destination to John Gordon and his heirs whatsoever as a destination to John Gordon and the heirs of his body. On the suggestion of the Court, it was pleaded alternatively for the trustees, that if the destination of the trust-deed was not valid to make a good entail, it is valid to defeat the interest in his father's succession, to which Mr Gordon lays claim, and that *quoad* the residue Colonel Gordon must be held to have died intestate.

To-day the Court made avizandum.

Wednesday, Dec. 13.

FIRST DIVISION.

MP.—BROWN'S TRUSTEES *v.* PATONS AND CRAIG.

Reduction—Force or Fear. Held that an averment by a married woman that she was induced to subscribe a deed, out of anxiety to prevent the incarceration of her husband for civil debt, is not relevant in a reduction on the ground of force or fear.

Cautioner. Held that a person who subscribes a deed as a cautioner, after hearing another person, who was named in it as a co-obligant, refuse to subscribe, was barred from pleading that she was discharged because the deed was not subscribed by all the proposed parties to it.

Counsel for Mr Craig—Mr Deas. Agents—Messrs Duncan & Dewar, W.S.

Counsel for Mr and Mrs Paton—Mr Scott. Agent—Mr D. F. Bridgeford, S.S.C.

This was a competition for the share of the moveable estate of the late Thomas Brown, writer in Glasgow, thereafter residing at Irvine, falling to his niece, Margaret Brown or Paton, under his settlement. It was claimed by Mrs Paton and her husband, Adam Paton, and also by James Craig, Comely Park, Glasgow. The grounds of Mr Craig's claim were, that on 12th September 1860 Mr and Mrs Paton had granted to him a promissory-note for £128, 10s., payable three days after date, and in order to secure the payment thereof, had, on 29th September 1860, assigned to him their respective interests under the late Mr Brown's settlement. Mr Craig had used diligence on the promissory-note, and arrested in the hands of the trustees. It was originally stated for Mrs Paton that Mr Craig obtained the promissory-note under a promise that it would be kept by him only by way of security of advances made and to be made, and that no diligence should be used on it; that immediately after receiving it he gave a charge of payment to her husband; that when the charge was about to expire, Craig "requested the presence" of herself and her husband at the Glasgow Police Office, where a lieutenant of police produced the assignation, and, under threats of the immediate incarceration of her husband, coerced her to sign it. Her subscription, she said, was extracted from her by force and fear; the deed was never read over or ratified by her, no consideration was given for it, and its narrative was false. Mrs Paton was allowed to lodge an issue to prove these averments; but in February last her issue was disallowed by the Court in respect of the irrelevancy of her averments. Mrs Paton did not state on record what was the nature of the incarceration, the fear of which induced her to sign the deed. She could not say that it was anything other than the diligence which Mr Craig was entitled to use for recovery of his debt, and the Court held that it was not a sufficient averment of force or fear that a wife has acted out of anxiety to save her husband from imprisonment for debt.

The case then returned to the Lord Ordinary, when Mrs Paton pleaded that the assignation was not binding, in respect that although it bore *in gremio* that her brother, Matthew Brown, was also a party to it, it had not been signed by him. She averred that, being a married woman, she could not legally undertake the obligation in the promissory-note, and that she signed the assignation merely as a cautioner, and on the understanding that Matthew Brown was also to sign it as a co-obligant. She therefore pleaded that on the principle of Pringle *v.* The Scottish Provincial Insurance Company (20 D. 465) the assignation was not binding on her. The Lord Ordinary (Ormidale) held that there was nothing in the assignation to indicate that Mrs Paton and her husband were cautioners merely, but that from the admissions on record it rather appeared that they were principal debtors, and were therefore not entitled to the equities pertaining to cautioners. In such a case the subscribers are liable for the whole, provided the omission of the signature has not arisen from any fault or collusion of the creditor. (M'Donald *v.* Stewart, 5th July 1816, F.C.). Mr Craig was therefore preferred in the competition. The Patons reclaimed. The Court to-day, without calling for a reply to the reclaimers' counsel, adhered.

The LORD PRESIDENT (after narrating the previous procedure) said—It is now said that Mrs Paton was only a cautioner. There is nothing very clear about that. The assignation bears that the money was paid to them all. But though she be only a cautioner, I don't think the absence of Matthew Brown's signature renders the assignation nugatory. It is said on record by Mrs Paton that Matthew Brown was present in the Police Office and refused to sign. The deed is not signed by him. It is said that it does not appear that

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