is that the pursuer, after receiving the offer, like a sensible man set about making inquiries as to whether or not it was worth his while to accept it. Accordingly, the proposition in law which of necessity was put forward by Mr Christie is to the effect that when an offer, neither holograph nor tested, has been made, if the person to whom it is addressed does anything to inform himself whether it will be to his interest to accept, such actings will be enough to turn the offer into a completed contract. Such a proposition is contrary both to law and to common sense, and accordingly I think the Lord Ordinary's decision is right. The bank are entitled like everyone else to stand upon their legal rights, and all that they have done has been to point out and found upon the fact that there was no legal agreement. We are not called upon to inquire into or make any observations on their conduct in the matter.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer — Craigie — Christie. Agents — Anderson & Green, S.S.C.

Counsel for the Defenders—W. Campbell —Cullen. Agents—Tods, Murray, & Jamieson, W.S.

Thursday, December 12.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

ALSTON *v.* ROSS.

Process — Sist — Right-of-Way—Poverty of Defender—Local Government (Scotland) Act 1894 (57 *and* 58 *Vict. cap.* 58), *sec.* 42.

A heritable proprietor raised an action of declarator and interdict to restrain a member of the public from using a path which he had been admittedly in the habit of using for sixteen years, and over which he claimed that a public right-of-way existed. The defender, before the proof was taken, lodged a minute, in which he averred that his poverty prevented him from proceeding with the defence, and that the County Council had under consideration whether, in virtue of the powers conferred upon them by the Local Government Act of 1894, they should vindicate the right-of-way claimed by him. He craved the Court to sist process pending the decision of the County Council.

The Court *granted* the sist upon an undertaking by the defender not to use the path during the sist.

Mr Robert Lockhart Alston, of Rosehall, Sutherland, raised an action of declarator and interdict against Alexander Ross and others, craving the Court to interdict the defenders from walking along a certain path passing through his property, over which the defenders claimed that a right-of-way existed.

It was admitted that for sixteen years previous to the property coming into the hands of the pursuer, the path had been used by the public without check, but on the pursuer acquiring the estate in 1894 he challenged the right of the public, and raised the present action. The Lord Ordinary, after some delay had been granted on motions by the defenders, fixed the diet of proof in the action for 6th November 1895.

On 30th October the defender Ross lodged a minute, in which he stated that his funds were exhausted, and that he was unable at present to prepare for the proof; that the averments of parties had been brought before the County Councils of Ross and Sutherland, and were being considered by them with a view to deciding whether or not they should use the powers conferred upon them by section 42 of the Local Government Act of 1894 for vindicating rights-of-way; and that, even in the event of their declining to take action, he would obtain sufficient subscriptions from the public to enable him to defend the action. The defender accordingly craved the Court "to sist the cause *hoc statu*, or otherwise to adjourn the diet of proof for three months;" and undertook, if this were granted, to refrain from using the path during the period of the sist.

The Lord Ordinary (KYLLACHY) refused the motion to sist, and on 6th November, the proof having been called and no appearance having been made for the defender, pronounced decree against him.

The defender reclaimed, and argued that the sist should be granted till the County Council had decided whether to vindicate the right-of-way. The poverty of a party had been considered a sufficient ground for granting such a motion in the cases of *Sassen* v. *Campbell*, March 10, 1830, 8 S. 707, and *Clark* v. *Newmarch & Grant*, Nov. 17, 1825, 4 S. 182.

The pursuer argued that the decree pronounced against this defender in absence would not constitute *res judicata* against the County Council should they decide to vindicate the right of way; that he had already caused much unnecessary delay, and had given no indication until the last moment that he was not prepared to go on.

At advising—

LORD PRESIDENT—If the person asserting a right-of-way had been the pursuer, and he had failed to attend a diet of proof, we should have been slow to alter the Lord Ordinary's interlocutor. But the pursuer in this case is seeking to negative a right-of-way claimed by the defender, and to interdict him from using a path which admittedly he has been in the habit of using for a considerable number of years. Accordingly we find that the user of the path is the party attacked, and it is his possession of it which would be altered by an interdict.

Now, the defender points to the statute under which a duty is imposed by Parlia-

ment upon the County Council to vindicate rights-of-way, and states that the question of vindicating this right-of-way is now under consideration by the County Council. Now, I think we are bound to give the system a fair chance, and to see that no person is prevented merely by lack of funds from trying this remedy. We cannot disregard the defender's averments that the County Council are considering whether to assert this right-of-way, and we are therefore bound to give him some latitude on his undertaking not to use the path till the case is disposed of.

I am therefore of opinion that we should recal the interlocutor and sist the case *hoc statu* on this undertaking being given by the defender, it being left open to either party to come and make a motion to the Court during the sist should matters move more rapidly than is anticipated.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court, in respect that the defender had undertaken to abstain from using the road in question during any sist of this action, recalled the interlocutor of the Lord Ordinary, and sisted process *hoc statu.*

Counsel for the Pursuer and Respondent—N. J. D. Kennedy. Agent—Andrew Urquhart, S.S.C.

Counsel for the Defender and Reclaimer—J. Wilson. Agent—Alexander Ross, S.S.C.

Friday, December 12.

FIRST DIVISION.

HALDANE'S TRUSTEES *v.* HALDANE.

Trust — Succession — Vested Provisions — Several Fiars — Right to Pay Provision before Period of Payment.

A truster directed his trustees to pay certain annuities to his wife and children, and on the death of his wife to pay over £18,000 to his son and £8000 to each of his daughters; the provisions to the children being declared to vest *a morte testatoris.* The son was declared residuary legatee, and the trustees were empowered to pay to him, with consent of his mother, £5000 out of his provision on his renouncing his annuity. Under this provision the trustees advanced part of the said sum of £5000 to the son, subject to a proportional diminution of his annuity.

Thereafter the son required from the trustees payment of the balance of his provision of £18,000, and offered to renounce his whole liferent interest, while his mother consented to the trustees advancing the sum in question, and offered to renounce her liferent so far as affected. At the time the application was made the trust-estate was amply sufficient to meet all the provisions.

Held that the trustees were not bound to make payment as demanded, in respect that the son was not sole fiar, and that in case of loss to the trust-estate, rendering it insufficient to meet all the provisions, the son's provision would fall to be diminished *pro rata* with those of the daughters.

Dr Daniel Rutherford Haldane died in April 1887, leaving a trust-disposition and settlement. The testator directed his trustees—to whom he conveyed his whole estate heritable and moveable—to hold and apply his estate for the payment of certain annuities to his wife and children, and of certain legacies and provisions, and "In the ninth place, at the first term of Whitsunday or Martinmas after the decease of the longest liver of me and the said Mrs Lowthrop or Haldane" (the testator's wife), "for payment of the following further provisions to my children, viz., to the said James Aylmer Lowthrop Haldane" (the testator's son) "£18,000, and to each of my four daughters £8000: And in the last place, and after fulfilment of all the previous purposes of this trust, I direct my said trustees to set aside and hold for behoof of my said son the whole residue and remainder of my estate, means, and effects hereby conveyed."

The testator further directed his trustees that, "notwithstanding the terms of payment before specified, . . . it shall be in the power of the said James Lowthrop Haldane, with the concurrence and approval of Mrs Haldane, and at any term of Whitsunday or Martinmas after my decease, to apply for and obtain from my trustees payment of the sum of £5000, and that as payment in part and to account of the provision of £18,000, but on payment of the said sum his annuity shall cease." It was further provided that, "notwithstanding the terms of payment of the provisions in favour of my son and daughters, the said provisions shall become vested in them at the date of my decease. . . ." The trustees were further invested with power to sell the whole or part of the estate, and in general with "the most full and ample powers to manage and administer the trust-estate in whatever manner they may consider most consistent with the objects and purposes of the trust, and to do everything in relation to the management of the said estate which I could do myself."

The truster was survived by his wife, son, and four daughters. Captain James Aylmer Haldane had received payment from the trustees of £3000 to account of his provision of £18,000, and the value of the investments representing the trust-estate in the hands of the trustees was in April 1895 £60,000. The total amount of the provisions under the ninth purpose of the trust is, after deducting the payment made to Captain Haldane, £47,000.

Captain Haldane having, with consent of his mother, who agreed to the diminution of her annuity so far as necessary, requested the trustees to pay over to him £15,000, being the balance of his provision