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

amount legally due in any question as to arrears, and until formal intimation is made of an intention to exact the full measure of legal right. Against this judgment the Duke of Buccleuch reclaimed.

The case was advised to-day.

Lord Benholme, who delivered the leading judgment, said, that the plea which had been sustained for the defenders by the Lord Ordinary was the second which proceeded upon an alleged tack arrangement or use of payment. It appeared that in the year 1726 the chamberlain of the Duke of Queensberry received directions to take payment from the burgh of Sanquhar of the sum of £5, 18s. 2d., and therefor to grant them a complete discharge, but without specifying any amount. The chamberlain acted in terms of these instructions down to 1810, since which time no payments have been made, but it is quite clear that the arrangement was purely gratuitous, and that the titular was no longer bound than he chose to abide by it. His Lordship then referred to the cases upon which the Lord Ordinary's judgment was founded, and said that the principle of these cases was, that when a party took upon himself the character of titular, and in that character granted discharges for teinds, this was a colourable title under which the heritor might possess and consume surplus teinds. In the cases referred to the discharge had been granted by the minister, who, in so doing, necessarily assumed that he was parson, and had right to the teinds as such. His Lordship also referred to an older case, as illustrating the difference in reference to this question between a parson and a stipendiary. In the present case the Lord Ordinary's judgment appeared to proceed upon the ground that stipend was paid to the minister throughout the period to which the claim for arrears applies, and he can see no reason for distinguishing it from the cases in which such payments have been sustained as constituting a colourable title. But the minister of Sanquhar was notoriously a stipendiary, and therefore the ground of judgment relied upon by the Lord Ordinary completely failed. There was, however, another ground which, though not expressly pleaded on record, appeared to have been in the Lord Ordinary's mind. After the accession of the Dukes of Buccleuch to the Queensberry estates the sum of £5, 18s. 2d., which had been exacted from the burgh of Sanquhar in name of teind, was transferred to their rental books, and appears entered therein down to the year 1860. But these entries were not communicated to the burgh, and could not be regarded as limiting the titular's right to the sum in question. On these grounds the Lord Ordinary's interlocutor must be recalled. Whether that will prove beneficial to the titular or not he could not say.

The other judges concurred.

The interlocutor of the Lord Ordinary was therefore altered, the defenders' second plea-in-law repelled, and the case remitted back to the Lord Ordinary.

Tuesday, Dec. 14.

FIRST DIVISION.

CLOUSTON AND OTHERS *v.* EDINBURGH AND GLASGOW RAILWAY CO. AND OTHERS.

Public Company—Railway—Companies Clauses Act—Powers of Company. Held (1) that under the Companies Clauses Act, section 70, a motion involving special matter could not be made at a general meeting of a railway company without notice; (2) that a company which had ceased to exist except for the purpose of paying claims against it, and dividing the balance of its funds among the shareholders, could not legally appropriate its funds to any other object. *Question*—Whether a majority of a going company is entitled to make a gift of any of its funds against the will of a protesting minority.

Counsel for Complainers—The Lord Advocate, the Solicitor-General, and Mr Watson. Agents—Messrs Webster & Sprott, S.S.C.

Counsel for Respondents—Mr Gordon and Mr Anderson. Agents—Messrs Hill, Reid, & Drummond, W.S.

This was an interdict at the instance of several shareholders of the Edinburgh and Glasgow Railway Company against that company and its directors, by which it was sought to interdict the respondents from "voting, paying, or applying the sum of £16,600 of the monies, funds, or revenues of the company, or any parts of these monies, funds, and revenues, as a donation, gift, or present, by any name, or under any pretext," to Messrs Latham, Jamieson, Thomson, Tawse, and M'Gregor, sometime officials of the said company, or to Mr Blackburn, sometime chairman of the directors; or from "voting, applying, or paying any part of the said monies, funds, or revenues to all or any of these persons, otherwise than in discharge of legal obligations or debts justly due and resting-owing to them by the said company." The grounds on which the interdict was asked were—(1) That the voting of the money as proposed was *ultra vires* of the company or its directors; (2) That by the 12th section of the recent Act amalgamating the company with the North British Company, the directors were bound to divide the assets among the shareholders after all "claims" against the company are discharged; and (3) That the money was proposed to be voted although in the notice of the meeting no intimation was made of the proposal to do so, as was necessary under the Companies' Clauses Act.

Lord Curriehill, on 19th September last, granted interim interdict, and ordered answers; and on 25th September, after considering the answers and hearing parties, he passed the note and continued the interdict. His Lordship thought that the important question as to the power of the company to make donations to its office-bearers and servants for past services had not been settled by authority; and that the circumstances in which the question now arose were peculiar. No injury could arise by postponing the payment of the money until the question is settled. The respondents reclaimed.

Argued for the reclaimers—(1) At common law a private or joint-stock company has power to act by a majority in regard to matters within the proper sphere or province of the business of the company, at a meeting competently convened for the purpose. (Hodges on Railways, p. 57, and Lindley on Partnership, p. 509.) (2) The Court will not inquire very minutely into whether the thing to be done is strictly within the power of the company if it is fairly within the spirit of the contract. (Taunton *v.* Royal Insurance Company, 29th February 1864. 10 Jurist, 291.) In this case it was held by Vice-Chancellor Wood that the directors of an insurance company were entitled to pay loss sustained by an explosion of gunpowder, although the policy excepted all loss caused by explosion other than of gas. It was held that the damage was caused by something, though not within, yet analogous to, the risk insured against; and that a dissentient shareholder was not entitled to complain. Reference was also made to the cases of Clark *v.* Imperial Gas Company, 1832 (4 Barn. and Ad., 315), and Hamilton *v.* Geddes (4 Paton's Ap., 657), to show that it was competent for a company to remunerate retiring servants for faithful services, and that this was a matter of internal management in regard to which the Court could not interfere with the majority of a company. (3) This being the common law, there is nothing in the Company's Acts to derogate from it. In regard to the objection that notice was not given, it was contended that no notice was necessary. In regard to all the officials except the secretary, the directors might themselves have voted the money without consulting the shareholders; and if so, surely they might ask the opinion of the shareholders on the subject without giving notice beforehand that they intended to do so.

Replied for the complainers—This company has