lease, is it to be held that he nevertheless is bound to pay the rent? I cannot think so. There is no reason to doubt that a road might have been made before Martinmas—no excuse of that kind is alleged. On these grounds, I quite agree with your Lordships that in bringing this petition before the Court it was the duty of the petitioner to state what he had done with the road. I think the petition should be thrown out, with expenses.

Lord Justice-Clerk—I am of the same opinion.

The defender's counsel asked the Court to grant warrant in their interlocutor to uplift the consigned money, as the process being now at an end it would otherwise require fresh proceedings in the Sheriff Court to do so.

The Court pronounced the following interlocutor:—

"Dismiss the petition, Find petitioner liable in expenses, and Grant warrant to uplift the consigned money."

Counsel for Shearer—Watson and Trayner. Agent—P. S. Beveridge, S.S.C.

Counsel for Colonel Seton Guthrie—Lancaster and Kinnear. Agents—Hamilton, Kinnear, & Beatson, W.S.

M, Clerk.

Saturday, November 15.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

AGNEW AND MANDATORY *v.* SPROTT.

Trust—Reference to Oath.

In an action of declarator of trust the pursuer referred to the defender's oath. The defender having sworn that the copy of a document founded on as constituting the trust (the original not being forthcoming) was discovered by him many years subsequently in his predecessor's repositories, and that he was not until then aware of the existence of that copy,—*held* that the oath was negative of the reference.

This was a case at the instance of John Agnew and his mandatory against the Rev. William Sprott, United Presbyterian minister, Glasgow. The summons concluded for declarator that the defender held in trust certain heritable subjects in the village of Stewarton, in Wigtownshire, and that the disposition granted to his ancestor by the pursuer's ancestor, although *ex facie* absolute, "was really taken and granted without any money or price having been paid for the same at or upon the granting thereof, and was truly intended, with the title following thereon, only as a security for the repayment by the said deceased John Agnew to the said William Sprott and his foresaids of a sum of £145 sterling, then advanced by the said deceased William Sprott to the said deceased John Agnew, which sum of £145 sterling, with interest thereon till the date hereof, has been already repaid to and received by the said deceased William Sprott and his foresaids, including the defender, through his and their intromissions with the rents of the said property from the date of the said disposition until the present time."

The principal pursuer is the only son and heir-at-law of the late John Agnew, sea captain, some time residing at Stewarton, in the parish of Kirkcolm, and county of Wigtown, who died intestate on 18th January 1839, and he made up a title as nearest lawful heir-in-general to his father. By holograph mandate, 6th February 1873, he authorised his sister, Miss Margaret Anne Agnew, to act as his mandatory in the present action. On 16th April 1838 the deceased John Agnew sold, conveyed, alienated, and disponed to and in favour of William Sprott, writer in Stranraer, who acted at the time as his law agent, his heirs and assignees whomsoever, heritably and *ex facie* irredeemably, certain heritable subjects at Stewarton.

The pursuer maintained that this disposition, although *ex facie* absolute, was really executed as a security to the said William Sprott and his heirs for repayment of a sum of £145 sterling, then advanced by him to the said John Agnew; and that it was understood and agreed between the parties that when the said sum, with lawful interest, should be repaid by John Agnew or his heirs, or when by intromissions with the rents and profits of the subjects William Sprott and his foresaids should have repaid themselves the said sum and interest, he or they should denude and reconvey the same to John Agnew or his heirs.

In answer, the defender stated that he thought it proper to explain that on making particular search among his uncle Mr William Sprott's papers, in the summer of 1872, he found a writing, styled on its back, "Copy Back-Letter by William Sprott to John Agnew, 16th April 1838." Of the existence of this document he was previously unaware, and even now he knew no more regarding it than itself conveyed, nor was he aware of the existence of any original of the document.

William Sprott entered upon possession of these subjects, and died intestate on 7th January 1845, being succeeded by his brother John Sprott, who died insane and intestate, and was succeeded in the property and possession by his nephew William Sprott, the defender.

The defender at the date of the disposition was only eleven years of age; and then and afterwards he knew nothing of his uncle's private affairs; and when his uncle died he was only seventeen years of age.

Finally, the pursuer averred that by the intromissions of William Sprott, John Sprott, and the defender with the rents and profits of the subjects, the sum of £145, with legal interest to the date of this action, had been repaid.

All this the defender denied, adding that he had always been willing, without prejudice to the absolute nature of his title and his legal rights generally, to sell and reconvey the subjects, upon payment of the original price, with interest, and reimbursement of his outlays and expenses; and he now, upon the same footing, repeated his offers to do so.

The pursuer pleaded—"(1) The disposition of 16th April 1838, although *ex facie* absolute, having been truly granted in security for the repayment of a sum of money advanced by the defender's author to the father of the pursuer, the pursuer is entitled to decree of declarator as craved. (2) The nature of the agreement between the parties to the disposition having been well known to the defender at the time, can be competently proved by the oath of the defender. (3) The sum advanced having been repaid with interest; the pursuer is entitled to decree as craved."

The defender pleaded — "(5) The pursuer is bound, *ante omnia*, to prove the tenor of the alleged back-letter in a regular action of proving the tenor; and, *separatim*, he is bound to aver and to prove delivery. (6) The disposition of 16th April 1838, being absolute in its terms, and no competent proof being offered that it was granted in security, the defender is entitled to absolvitor. (7) The allegation that the defender holds the subjects in dispute in trust for the pursuer can be proved only by writ or oath. 9) The pursuer's averments being unfounded in fact and untenable in law, the defender ought to be assoilzied, with expenses."

The Lord Ordinary pronounced the following nterlocutor:—

"12*th June* 1873.—The Lord Ordinary, in respect the defender has now appeared and deponed in terms of the preceding interlocutor, and having considered the deposition of the defender, No. 17 of process, and heard counsel thereon, finds the oath of the defender to be negative of the reference: Therefore assoilzies the defender from the conclusions of the summons, and decerns: Finds the pursuer liable to the defender in expenses, and remits the account when lodged to the auditor to tax and report."

The pursuers reclaimed.

Argued for them—(1) The disposition was truly in trust, and this was known to the defender. (2) The price has been repaid.

The Court advised the case without calling on defender's counsel.

LORD JUSTICE-CLERK—I think that it is quite manifest that the interlocutor of the Lord Ordinary, so far as this oath is concerned, is perfectly right. At the date to which the document founded on as establishing a trust is referred, this gentleman, Mr Sprott, was only eleven years of age. At a subsequent period, many years after, he finds among his papers, not the document itself, but a copy, the original not being forthcoming. From this discovery, and from a perusal then of the paper found, is derived his whole knowledge and understanding of the transaction. He, in the most explicit and straightforward way, tells us about the matter, and says he does not know anything more, and your Lordships cannot hold that there is anything more than this before the Court. It seems to me that this was a purchase, and a purchase out and out, with power to dispose of the property, though admittedly under certain restrictions. The case, as it stands, is perfectly clear, and I think the pursuer should consider whether it would not be best for him at once to close with the offer made by the defender on record—if indeed it is still open to him to do so. I can only add that throughout the case the conduct of the defender, the Rev. Mr Sprott, reflects much credit upon him; he has been most straightforward in the matter.

LORD COWAN—A declarator of trust in property, of which the title is in the person of the disponee, can only be proved by writ or oath. In this action the pursuer has not any writ, and has referred to the oath of the defender; this oath is completely negative, I think, of the reference; by the result of the oath the pursuer fails entirely to instruct the existence of a trust. The whole case as on record, and as we have it from the defender on oath, is brought out in a light most creditable to the reverend gentleman.

The other Judges concurred.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for Pursuer — Lang. Agent — Thos. Carmichael, S.S.C.

Counsel for Defender — Balfour and Mitchell. Agents—Ronald, Ritchie & Ellis, W.S.

R. Clerk.

Saturday, November 15.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

ALEXANDER AND AUSTIN *v.* YUILLE.

Bill of Exchange—Sequestration— Composition — Instalments.

A sued B on two bills of exchange, B had been sequestrated subsequent to granting them, but his creditors had accepted under an arrangement a composition of 4s. in the £, to be paid by certain instalments.—*Held* that B, not having been discharged, had by failure timeously to pay the third instalment, suffered the original debt to revive, and that the pursuers were entitled to decree for the amount, less the two instalments as paid.

This case came up by reclaiming note against an interlocutor of the Lord Ordinary (Mackenzie). The summons, containing warrant to arrest, was dated 3d March 1873. The pursuers are glass-bottle manufacturers in London, and the defender is a practical chemist and oil merchant in Glasgow. The conclusions of the summons were for payment of two sums of £70, 9s. 6d. and £55, 11s. 10d., with interest as from 8th October 1871 till payment, but subject to deduction of two sums of £7, 17s. 6d. and £8, 7s. The pursuers averred that, by bill of exchange, dated 5th June 1871, they ordered the defender to pay them or their order, four months after date, the sum of £70, 9s. 6d. for value, and by another bill of exchange, dated 1st September 1871, they in like manner ordered him, four months after date, to pay them the sum of £55, 11s. 10d. for value. The defender duly accepted both of these bills, and they were dishonoured at maturity. The total amount of the two bills is thus £126, 1s. 4d. The defender made a payment of £7, 17s. 10d. on 31st May 1872, and another payment of £8, 7s. on 4th November 1872, on account of the principal sum contained in these bills, and the two sums of £70, 9s. 6d. and £55, 11s. 10d. were said to be due by the defender to the pursuers under deduction of the two partial payments of £7, 17s. 10d. and £8, 7s. The defender also owed to the pursuers the interest on these sums from the respective dates of the bills falling due, at the rate of 5 per cent. per annum. These claims the pursuers stated that the defender would not acknowledge. Further, Yuille's estates were sequestrated on 20th September 1871, before the bills in question fell due, and at the meeting of creditors held on the 9th day of October thereafter, for the election of a trustee, it was unanimously resolved that the estates should be wound up under a deed of arrangement, and that an application should be presented to the Sheriff to sist procedure in the sequestration for a period not exceeding two months from the date of the meeting. That resolution having been