

ing owing to the pursuers the said sums, or any part thereof, with interest at the rate of 5 per centum per annum from said 18th July 1865 till paid?"

The defender objected to the relevancy of the action. He urged that the first issue should not be allowed because malice, which was an essential element of the ground of action, had only been averred on reversal, the only averment in the original condescendence being that the pursuers "believed" that the arrestment was maliciously used. Farther, in regard to the first arrestment there was not even on the closed record an allegation of malice. He also objected to the second issue on the ground that the payment of the debt which the pursuers now said was not due by them but by the charterers of their vessel was a voluntary act on their part, and that they could not now claim repetition.

The Court allowed the issues, except in regard to the first arrestment, which the pursuers consented to leave out of the first issue. They thought that the averment of a belief that malice existed was sufficient, but that the ambiguity had been cleared up by the insertion on reversal of the words "and averred." In regard to the other objection it assumed the very question of fact which was to be tried.

As the relevancy of the action was objected to the Court, following the rule laid down in the recent case of Mackenzie v. Goldie (*ante*, p. 101), found the defender liable in expenses since the date of closing the record.

GUTHRIE v. ANDERSON.

Employment—Recompense. A party found liable for a tradesman's account, although he was not directly the employer, on the ground that he had reaped the benefit of the work.

Counsel for Pursuer—Mr Shand and Mr J. G. Smith. Agent—Mr William Saunders, S.S.C.

Counsel for Defender—Mr D. B. Hope. Agent—Mr Robert Hill, W.S.

James Guthrie, wright and joiner in Stirling, sued Samuel Anderson, coppersmith, Leith, in the Sheriff Court of Edinburgh, for payment of £74, 9s. 3½d. for "wright or joiner work done, and furnishings made, betwixt 19th May 1862 and 6th February 1863, on certain old houses in Stirling, on the employment of the defender's mother, who was then in the management of the property, and latterly on the employment of the defender himself, after he had examined the work done on the employment of his mother, of which whole work and furnishings the defender is now reaping the advantage, and which the defender promised to pay."

The defender had no written title to the property until 22d January 1863, and he was willing to pay the pursuer's account so far as incurred after that date. But it appeared that the property had been left to him by his uncle who died in 1857, by will, which was afterwards declared to be invalid for the conveyance of heritage; and that on 22d January 1863 his mother, who had previously conveyed the fee of the subjects to another, reserving her liferent, conveyed the liferent to the defender by a deed which gave him right to the rents from and after Whitsunday 1862.

The Sheriff-Substitute (Arkley) decided in favour of the defender. He found that the claim could only be established by proof of the defender's promise to pay it, and that the promise could only be proved by his writ or oath. The Sheriff (Gordon) adhered.

The pursuer advocated, and pleaded that the defender's mother in employing him acted as trustee for the defender, and that the defender having received the rents, and so reaped the benefit of his labour, he was liable on the principle of recompense.

The Court advocated the cause, and recalled the Sheriff's judgment, holding that as the defender had a right to the rents from Whitsunday 1862, he

was bound to pay the account sued for if it was really due, and a remit was made to a man of skill to report upon a defence stated that the work had not been done in a tradesmanlike manner.

Thursday, Feb. 8.

FIRST DIVISION.

UNIVERSITY OF ABERDEEN v. IRVINE
OF DRUM (*ante*, p. 55).

Trust—Charitable Purposes—Testament—Decree—Construction—Annual-Rent. Terms of three writings which held (alt. Lord Kinloch) not to constitute a right to the fee of an heritable estate.

Counsel for Pursuers—Mr Patton, Mr Clark, and Mr John Hunter. Agent—Messrs Patrick, M'Ewen, & Carment, W.S.

Counsel for Defender—Mr Gordon and Mr Gifford. Agent—Mr Arthur Forbes Gordon, W.S.

This case was advised to-day. The result of the judgment is to assolzie Mr Irvine of Drum from the conclusions of the action with expenses.

Lord CURRIEHILL said—The present action was instituted for the purpose of having it declared that the lands of Kinnmuck belong to ten bursars and scholars of the University and Grammar School of Aberdeen. The defender, though not admitting that these bursars have any right to the subjects, has expressed his willingness to create an heritable and irredeemable right of annual-rent or ground annual of £1000 Scots in their favour over his estate. The question in dispute is the right to the absolute fee of the lands. The demand of the pursuers is founded upon three documents—1st, A provision in the testament of Sir Alexander Irving of Drum, dated in 1629; 2d, A decree of the Court of Session dated in 1633; and 3d, A bond by Sir Alexander Irving, the son of the granter of the provision, dated in 1656. The provision in the testament is in these terms:—"For the maintenance of letters, by thir presents, I leave, mortify, and destinate ten thousand pounds Scots money, which is now in possession and keeping of Marion Douglass, my spouse, all in gold and weight, appointed for the use underwritten, of her own knowledge and most willing consent, to be presently delivered to the Provost, Baillies, and Council of Aberdeen, and to be bestowed and employed by them upon land and annual rent in all time hereafter to the effect after following—to wit, £320 of the annual-rent thereof to be yearly employed hereafter on four scholars at the Grammar School of Aberdeen for the space of four years, ilk one of them fourscore pounds; and £400 to be paid yearly to other four scholars at the College of New Aberdeen, and students of Philosophy thereat, ilk one of them one hundred pounds during likewise the space of four years; and also I ordain to be given to other two scholars who have passed their course of Philosophy, being made Masters, and are become students of Divinity in the said New College, 400 merks Scots money—viz., to each one of them 200 merks of the said annual-rent during the space of four years also; and the odd 20 merks which, with the dedications above specified, complete the said hail annual-rents of £10,000, I ordain to be given to any man the Town of Aberdeen shall appoint for ingathering and furthering of the said annual-rent to the said scholars, as is above designed; which scholars, of the kinds above written I will and ordain yearly in all time hereafter be presented by my said executor, as my heir, and his heirs and successors, Lairds of Drum, to the town of Aberdeen, Provost and Baillies thereof, and their successors, who shall be holden to receive them yearly upon their presentation, and shall stand obliged and comtable for the said annual-rent to be employed as is above appointed in all time coming." The nature of the right thus constituted in favour of the