medio, being one-sixth of the residuary trust-estate of John Donaldson, liferented by Allan Cuthbertson. Reverse so much of the interlocutors appealed against in the first and second cross appeals as is inconsistent with this declaration; and dismiss with costs the appeal of John Lawford Young.

In the two cross appeals of Macdougall's trustees, and Macdougall's children, affirm the interlocutor of 10th January 1864, in so far as it finds Allan Cuthbertson entitled to a liferent use and enjoyment of the fund *in medio*. And dismiss the two cross appeals of Macdougall's trustees and Macdougall's children, in so far as they complain of this finding of this interlocutor in favour of Allan Cuthbertson, with costs.

The questions being severally put, the same were agreed to.

Agents for Mrs Richardson and others and Cuthbertson's Representatives—Gibson-Craig, Dalziel, & Brodies, W.S.; and Grahames & Wardlaw, Westminster.

Agents for Colonel Macdougall's trustees and children—Adam Kirk & Robertson, W.S.; and Loch & Maclaurin, Westminster.

Agents for John L. Young—Thomson, Dickson, & Shaw, W.S.; and William Robertson, Westminster.

Thursday, March 26.

UNIVERSITY OF ABERDEEN *v.* IRVINE.

(4 Macph. p. 392.)

Trust — College — Charitable Bequest — Obligation. Held, on a construction of documents, that the whole rents and proceeds of certain lands were devoted to charitable purposes expressed in the will of a testator.

This was an action at the instance of the University of Aberdeen, the Magistrates and Council, the Masters of the Grammer School, and certain Bursars and Scholars, against Mr Irvine of Drum—the leading conclusion being, to have it found and declared that—under (1) the last will and testament of Alexander Irvine of Drum, dated 20th December 1629; (2) a decree of the Court of Session, dated 27th February 1633; and (3) a bond by the son of the said Alexander Irvine, dated 12th April 1656,—certain of the pursuers, being bursars and scholars presented by the defender to the bursaries and scholarships mortified by the said Alexander Irvine, as set forth in the will, and their successors, "have the sole and exclusive beneficial interest in the town and lands of Kinmuck," and that the pursuers were entitled to reduction of a deed of entail granted by the defender's father in 1821.

The Lord Ordinary (Kinloch) held, on a construction of these deeds, that the whole beneficial interest in the lands of Kinmuck were thereby transferred for behoof of the bursars and others mentioned in the bond and mortification of 1656, that the pursuers were entitled to have this right declared against the defender, and that the right had not been cut off by prescription. The First Division of the Court recalled this interlocutor and assoilzied the defender. The ground of judgment, as explained by Lord Curriehill, was, (1) that what was to be provided to the bursars by the testament of 1629 was to be, not a right to the fee of lands, but a heritable right of annualrent constituted out of lands; (2) that the effect of the decree of 1633 was to impose upon Sir Alexander Irvine, then of Drum, an obligation to constitute that right of annualrent over lands; and for that purpose, first, to purchase and obtain, vested in his own person, lands yielding a free yearly rent of £1000 Scots, and then to constitute the right of annualrent over the same; (3) that the effect of the document of 1656 was to set apart the lands therein specified as those over which the right of annualrent was to be constituted *habili modo* by Sir Alexander; and that the defender, as representing him, was now bound so to constitute the right of annualrent over these lands, so far as the same had descended to him; (4) but that, as that right of the bursars, although it remained effectual and entire, had not been innovated nor converted into a right to claim the fee of these lands, the defender was entitled to absolvitor.

The pursuers appealed.

Mellish, Q.C., and Young, for appellants.

Lord Advocate (Gordon), Sir Roundell Palmer, Q.C., and Anderson, Q.C., for respondents.

Lord Chancellor—My Lords, the appeal in this case is in an action brought by the University of Aberdeen and certain individuals interested, against Alexander Irvine of Drum, in which it is sought to have it declared that the lands of Kinmuck are mortified as to the whole profits thereof for the support of certain bursaries and scholarships in the University and Grammar School of Aberdeen, and that Alexander Irvine has in those lands no beneficial right, and no right other than that of a trustee, with the patronage of right of presentation of bursars and scholars. Alexander Irvine admits that he is bound to make good an annualrent or payment of £1000 Scots out of these lands for these bursaries and scholarships, but he contends that as to all the profits of the lands over and above £1000 Scots a-year he is absolute proprietor. The Lord Ordinary, by his interlocutor of the 2d of December 1863, adopted the view of the appellants, the University of Aberdeen, and made a decree substantially in accordance with the conclusions of the summons. From this a reclaiming note to the First Division of the Court of Session was brought. In the First Division, a proof was allowed and led for both parties; and, finally, by an interlocutor, dated the 8th February 1866, their Lordships recalled the interlocutor of the Lord Ordinary, and assoilzied the defender with expenses. From this interlocutor the present appeal is brought.

My Lords, the question mainly turns upon the construction of three documents, all of them more than 200 years old—The will of Alexander Irvine of Drum, dated 1629; a decree of the Court of Session of 1633; and a bond and deed of mortification made by Sir Alexander Irvine, his son, in 1656.

I must ask your Lordships' attention in the first place to the terms of the will of Alexander Irvine, of 1629. By that will, so far as it is necessary to read it, the testator devised in these words—"For the maintenance of letters by these presents, I leave, mortifie, and destinate ten thousand pounds Scots money which is now in possession and keeping of Marion Douglas my spouse, all in gold and weight appointed for the use under-written, of her own knowledge and most willing consent, to be presently delivered to the Provost, Bailies, and Council of Aberdeen to be bestowed and employed by them upon land and annualrent in all time hereafter to the effect after following, to witt—Three hundred and twenty pounds 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 ane of them four score pounds, and four hundred pounds to be paid yearly to other four scholars at the College of New Aberdeen, and students of philosophy thereat, ilk ane of them ane hundred pound during likeways the space of four years, and also I ordain to be given to other twa scholars who have passed their course in philosophy, being made masters, and are become students of divinity in the said New College, of 400 merks Scots money—viz., to each of them twa hundred merks of the said annualrent during the space of four years also, and the odd twenty merks which, with the deductions above specified, compleatt the said haill annualrents of ten thousand pound, I ordain to be given to any man the town of Aberdeen shall appoint for ingathering and furthgiving of the said rent to the said scholars as is above designed."

"My Lords, the only question upon the construction of this will arose upon the meaning of these words, "to be bestowed and employed by them upon land and annualrent." A suggestion was made that the conjunction between "land" and "annualrent" ought not to have been "and" but "or," according to the more correct copy of the will. The parties, however, by their proceedings, have admitted this to be a true copy of the will, and I own that it appears to me of but little consequence whether the will is taken as having the word "and" or the word "or." Taking it as I find it printed at page 112, it appears to me that the testator means nothing more than to give a double power of investing "upon land," whatever that may be, and "upon annualrent," whatever that may mean; and does not mean to require the investment either to be upon both land and annualrent, or upon one subject matter which is to be described by the collective term of "land and annualrent."

As to the meaning, then, of these words, unless some technical signification were proved to be applicable to them, I should have thought, beyond all doubt, that a power to bestow and employ the money in question upon land, was equivalent to a power to buy with the money land which would produce an income for the purpose of the charity; and that, by the power to "bestow and employ upon annualrent," what was intended was the purchase of what we may term an annualrent issuing out of land, or an annualrent charge or investment upon securities which would produce an annual income, which in these documents, and in all documents of about the same date, appears to me to be a word used as synonymous with annualrent.

My Lords, the result of this construction would be that in my opinion it would have been no breach of trust upon the part of the trustees who were appointed to execute this will if, with the money the testator left, they had either bought land producing rent, or, if they had with the money bought a rent charge issuing out of land, and yielding to them a fixed definite annual sum; or if, in the third place, they had lent and employed the money upon securities of a personal character producing an annual income. The only difference between these different modes of investment and application would have been that, in the second and third cases that I have put the income would have been fixed and not capable of extension, whereas, in the first case, the charity would have become the owners of the land bought, with the benefit of any increase, and with the risk of any diminution in the rental of the land.

My Lords, Alexander Irvine died in 1630. It is sufficient to say that his widow and son tendered the £10,000 to the Provost and Bailies of Aberdeen. The Provost and Bailies appear to have been afraid that by receiving the sum left by the will they would, under the terms of that will, place themselves under some obligation to have forthcoming from the very first the annualrent or payment of £1000 for the purpose of the charity; and upon those terms they demurred to receiving the money, and the result was that Sir Alexander Irvine retained the money—he appears to have lent it at interest to the Earl of Mar, and to have used the interest for some years for the payment of the scholarships and bursaries mentioned in the will. Finally, in 1632, he raised an action in the Court of Session against the Corporation of Aberdeen to have it declared what was to be done with this bequest, and who was to have the patronage of the bursaries and scholarships.

In the summons in that action two alternative modes of application of the funds were proposed, to which I will next call your Lordships' attention. At page 144 of the appellant's case, these alternatives are thus stated in the conclusion of the summons:—"And, therefore, and that the said sum of ten thousand pounds be na langer iddle and unprofitable and that the ten scollars to whose behoove and use the said sum is left mortifeit and destinat, be not altogether defraudit of the benefit thereof, but may have sic benefit and commoditie as may be weil and surely haid, theirfor necessary it is that it be fund and decernit be the Lords of Counsall and Session that it sall be leesum to the said complier to wair and bestow the said sum of ten thousand pounds upon bying of land theirwt upon sic easy pryces and conditions as may be haid theirfor, and the said lands to be boct thairwt, maills, farms, and duties of the samen to be mortifeit and destinat to the use of the said four scollars in the Grammar School in Aberdeen, four scollars, students of philosophy in the said New College of Aberdeen, and twa scollars being laureate maisters students of divinity in the said New College of Aberdeen *proportionally*, and *pro rata* effeirand to the quantities of the @rent of the said sum appoyntit to be paid to them be the said testament in caise the said provost, bailies, and counsall of the said borough of Aberdeen had ressavit and imployit the said sum for @nnel according to the said testament, and the yierly rent, profeits and duties of the said lands to be boct and conquest with the said sum to be in place and satisfaction to the said ten scollars of the @rents and profeits of the said sum in all time coming, in respect of the said provost, bailies, and counsall of the said burgh of Aberdeen their refusal to resave the said sum to be bestowit and employit be them upon land or @rent in time coming in manner, form, and to the effect above written contenit in the said testament." That is the first alternative proposed. The other alternative is—"or otherways, the said sum of ten thousand pounds money left mortifeit and destinat be the said umq'l Alex. Irvine to the effect foresaid, in respect of the said provost, bailies, and counsall of Aberdeen, their refusal theirof, as said is, aught and suld be employit and bestowit to the best behoove and weil of the said ten scollars rexve above written mentionat in the said testament, as the said Lords of Session sall appoynt and decern the same to be employit and bestowit, in respect the said complur is content putlie to consign the samen in pns of the Lords to be employit as said is." My

Lords, I do not think that any doubt can be entertained as to the meaning and purport of those two alternatives. I read the propositions made by the then Sir Alexander Irvine to the Court of Session, as being a proposal first to buy the land with the money in the ordinary sense in which those terms are employed, at such prices as land could then be obtained for; and the other alternative, in case the first was not accepted, was an alternative by which he threw it upon the Court of Session to say how and upon what security the money in question was to be employed, he being willing to consign or pay it over in the presence of the Court of Session.

In this action thus raised the Corporation did not appear, but from other papers in process of the same date, it appears clear that they knew that the action was pending, and that they took an interest in its progress, and in the conclusions of the summons; and the decree that was ultimately made bears evident traces of having been made by arrangement between the pursuer and the Corporation of Aberdeen.

That decree was made on the 27th February 1633, and was in these words:—"The Lords of Council decernis and ordainis the said Sir Alex. Irving of Drum, persewar, to have retention and keeping of the said somme of ten thousand pund money forsd wt out payment of @rent or profet for the samen, quh'll the feist and terme of Whitsounday 1640 years, at the qlk term decerns and ordains the said persewar to provyde for the use of the said ten scollars and bursars of the College and Scolles of New Aberdeen sufficient well halden lands, for employing of the said sum of ten thousand pounds worth in yeirlie rent to the soum of ane thousand pounds money, qlk lands sal be bocht and acquirit be him heritable, without reversion, to the use and behove foresaid, aganis that term, wtout farther delay, according to the destination and mortification of the said umqll of Drum and his mynd spect in his latter will." My Lords, as upon the construction of the will it appears to me that no reasonable doubt can be entertained but that land might have been purchased without any breach of trust on the part of the trustees, so, upon the construction of this decree which I have now read, it appears to me that, without doing violence to the words used, it is impossible not to arrive at the conclusion that what was pointed out was the purchase of land in the ordinary sense of the term. That was what Sir Alexander Irvine had proposed to the Court should be done, and the only difference between the proposal of Sir Alexander Irvine and what was actually done by the Court appears to me to be this—that in place of the land being bought immediately, so much land as the money in hand was sufficient to purchase, he was ordered to keep the money for seven years, and then to produce land, not as much as the money would purchase, but land actually of the value of £1000 a year, an arrangement which, of course, must have been made either altogether or to some extent with his consent, and by agreement between him and the Corporation of Aberdeen.

My Lords, I am unable myself to agree with the view taken by the Court of Session that there was anything in this at variance with the will of the testator. I think that what was done was warranted by the will. Even if any doubt could be entertained upon that subject it appears to me that, if the meaning of this decree is that which I feel myself obliged to assign to it—it being a decree made in the presence and with the consent of the pursuer, who was entitled to dispose of and to deal with this property as he thought fit—he would be bound by the decree according to this construction, even although the decree should turn out to be (as I do not think it does turn out to be) a departure from the words and the power of the will of the testator.

Under that decree nothing in point of fact was done until the year 1656—no land was actually bought by Sir Alexander Irvine for the purpose of implementing the decree, but in the year 1656, he being the owner and in the occupation of the lands of Kinmuck and Richarcharie, a deed of mortification was executed by Sir Alexander Irvine, which is the next document to which I will call your Lordships' attention.

My Lords, the operative and important part of that deed occurs at pages 150 and 151; it recites:—"And seeing that I ever have been willing and most willing to obtemper and fulfill my said deceast father his latter will and testament anent the mortification and destination of the said sum of £10,000, and to obey the said decreet accordingly, whilk I have done hitherto since the term of Whitsunday, one thousand six hundred and forty years, and have acquired the town and lands of Kinmuck, Peithill, Mill of Kinmuck, miln lands, multures of the same, with the houses, biggings, yards, tofts, crofts, outsetts, insetts, tenants, tenandries, and service of free tenants, parts, pendicles, and pertinents thereof, lying within the parish of Kinkell, regality of Lindores, and sheriffdom of Aberdeen; and also all and haill the town and lands of Richarcharie, with the pendicle thereof called Torren and Torrharrian, extending to half an davach or eight oxgate of land, with the houses, biggings, yeards, woods, milns, miln lands, multures, annexis, connexis, parts, pendicles, and pertinents, together with the shillings, grassings, pasturage, used and wont in Glassiehill and Corriebeg, *alias* New Glass, lying within the parish of Glengarden, earldom of Marr, and sheriffdom of Aberdeen, whilk lands are worth in yearly free rent the sum of one thousand pounds Scots money, by and attour the feu-duties, teind-duties, ministers' stipend, and others, astrict furth thereof. Therefore and to the effect the said ten schollars and bursars may be paid yearly furth of the maills and duties of the said lands according to the division above written, I, the said Sir Alexander Irvine, my heirs and successors, has mortified, destinate, and appointed, and be thir presents for me and my foresaids, mortify, destinate, and appoint the above written lands, milns, and others foresaid, with the pertinents, for the use and behoof of the said ten schollars yearly in all time hereafter, to the effect the maills, farms, and duties thereof may be paid to them yearly for their maintenance, according to the divisions above written, with power to them, and their curators in their name, to uptake the maills, farms, and duties of the foresaid lands for that effect, suit, call, and pursue therefor, and all other things requisite to do and command, that I might have done myself before the making hereof; and that for implement and fulfilling of that part of my said deceast father's testament anent the mortification and destination of the said sum, and Lords of Session, their decreet above written." And then follows another clause, on the purport of which I shall afterwards observe.

Now, my Lords, stopping at this stage of the proceedings, two things appear to me to be necessary to be kept in view. In the first place, both by the recital and by the last words I have read, there is a clear and distinct intimation that that which the author of the deed had done, and was desirous of

doing, was this—He had acquired the lands in question for the purpose of implementing a decree of the Court of Session, and he was desirous of settling those lands for the purpose of implementing that decree and at the same time complying with the testament of his father. But if I am right in the construction at which I have arrived of the decree of the Court of Session, and of the will of the former Alexander Irvine, the consequence would be that this would be an expression of an intention to settle the land, which he thus states has been acquired according to the meaning and intention of the decree of the Court of Session, which I hold to be to settle the land as land bought out and out for the purpose of the charity.

My Lords, passing from that which is stated as the motive and object of the deed to the words of mortification, they appear to me to point entirely in the same direction. I am unable in this, which I will term the operative part of the deed, commencing at the word "Therefore," to find any word in the whole of it which limits the enjoyment of the land by the objects of the charity to an annual sum of £1000. I find that the mails, farms, and duties are to be paid to them yearly for their maintenance, according to the divisions above written; and I find that there is power to them and their curators to uptake the mails, farms, and duties, and to sue and take every proceeding for that purpose. And although the object in the beginning is stated to be to the effect that the scholars of the university may be paid yearly the farms and the mails and duties of the land "according to the division above written," even there it is not stated that the object is that they may be paid £1000 yearly, but that they may be paid according to the ratio of division which is given in the will of the testator.

My Lords, if the deed ended there it would appear to me that no reasonable question could be raised upon its meaning or upon its effect. It is only in the clause as to the warrant that any words have been found which raise a doubt as to the construction of this deed. The clause as to the warrant is this, "And to the effect the said ten scholars and bursars may be sufficiently secured in the said lands and others above written for payment to them, according to the division above written, of the mails, farms, and duties of the said lands yearly, extending to the said sum of one thousand pounds yearly, in all time thereafter, I bind and faithfully oblige me, my heirs and successors whatsomever to my lands and rents, to make, seal, subscribe, and deliver to the said ten schollars, and their successors to the saids burses all contracts, dispositions," &c.

Now, the words relied upon here were "extending to the said sum of one thousand pound yearly." Now, my Lords, these words may mean one of two things. They may either be descriptive as a repetition of what had been stated in the earlier part of this deed—namely, that the lands were worth at that time £1000 a-year, or they may possibly admit of the interpretation that they are a limitation of the extent of the warrant or the extent of the enjoyment of those lands. If the words are susceptible of those two constructions, it appears to me that upon all sound principles of construction your Lordships will adopt that interpretation of them which would be in harmony with the operative principle and the leading part of the deed, and with the decree of the Court of Session which this deed was intended to implement. And, adopting that principle of construction, it appears to me that you cannot do otherwise than read these words as simply containing a reference to the value of the lands which in the earlier part of the deed had been stated to extend to the sum of £1000 yearly, and that to read that clause of warrant as subverting to the meaning of all the earlier part of the deed would be to do violence to the construction both of the earlier part of the deed and of the decree upon which the deed was founded and implemented, which your Lordships would be slow to do.

My Lords, in addition to this conclusion at which I have arrived as to the proper and legitimate construction of these instruments, I have further to remind you that there is no suggestion or proof that the lands in question at the time of the deed which I have read were worth more than, although they are said to have been worth as much as, £1000 a-year. There is no suggestion or proof that at this time they were considered likely to rise in value—in point of fact they appear for a long time not to have increased in value. Therefore, looking at the probabilities of the case, it is highly improbable that the corporation would buy a rent charge exactly equal to the whole rent of the land which was the security for it, the result of which would be that the charity would lose if the value of the land fell, and would not gain if the value of the land increased. On the other hand, it is equally improbable that the land owner would grant over his land a perpetual rent charge to this amount without any power of redeeming that rent charge or of freeing his land from the burden, if he looked forward to keeping and retaining the land himself as the owner of the land.

My Lords, I should have been of opinion that the documents to which I have referred were sufficiently clear to require no aid from contemporaneous exposition; but it is satisfactory to my mind to observe that it appears to me that every person concerned in these transactions thought, at the time to which I have been referring, that land could be bought, and legitimately and properly bought, under the terms of the will of Alexander Irvine. I will take the liberty of referring your Lordships very briefly to a few passages, which appear to me to put this matter beyond doubt.

At page 120 we find the Town of Aberdeen, in a minute, say that they refuse to receive the sum (that is, the sum of £10,000), "on the conditons above written, contained in the said testament, but to the effect the same might be lifted out of the said Marion Douglas' hands, and may be wared and laid upon bank to the proper use whereunto the same is destinate, till such time as the council of this burgh may sort and agree with Sir Alexander Irvine, now of Drum, Knight, upon some reasonable and equal conditions for settling and establishing the said sum on the heritable purchase of lands." Then at page 124 we find, in another minute, that the corporation, "all in ane voice resolved and concludit to refuis to receave or accept the said soume on the conditiones contenit in the said testament,"—namely, that they should be liable perpetually, in all time coming, to pay £1000 a-year, —but are willing to receive the same on condition "that the samen be laid upoun bank, quher the best employment may be had, and the annuallrent thereof to accress with the stok till the same amount to that proportionne as may mak purches of heretabill landis extending in yeirlie rent to ane thousand poundis or fyifteine chalderis vituall." And at page 126, the Corporation says "Moneyes can mack no suire nor constant rent wnlesse the

same be employit on heritable purches off landis, and ten thousand punds will scarcelie mak conquese above five hundreth punds of constant yeirlie rent, and so they could not receave the said soume upon conditionn forsaid." At page 127, in a letter from the Provost and Bailies to their legal advisers, they say, "We have offert to the Laird of Drum to accept of the moneyes so being he will be content that the same be sequestrat and employed on annual rent till the annualles might accress with the stock to such proportion as micht mak heretable purches of landis that wold pay ane thousand pundis of constant yeirlie rent." There the contrast is drawn in the most marked way between annualrent and the heritable purchase of land yielding rent. Then at page 132 an instance is given by the Corporation of the mode in which they have dealt with another bequest which they speak of as a fitting and proper analogy for the employment of the bequest in question, "Mr Patrik Copland has guvin and mortifeit sex thousand merkis to a Professor of Divinitie in our College quhilk alredie with the annualis is accressed to sex thousand poundis redie to be employit on the bying of landis, and a Professor of Divinitie already settled in our College who gettis for his stipend the annual rent thairof." And at page 138, there is an instruction again to the legal advisers of the Corporation, "Ye sall alltogidder refuis to accept of the moneyes bot upon express condition that we gett the absolute right of presentation and admission of the equal half of the burseres to wit tua grammariaris, tua studentis in philosophie and ane student in divinitie in regard of our perpetuall burden in managing of the moneyeis and of sic landis as sal be bocht thairwith."—Speaking of the management of the land to be purchased, as that which would create a burden and a trouble. And finally, in page 144, your Lordships have the conclusions of the summons of Sir Alexander Irvine, whom I have already referred to, in which he proposes the buying of land at such easy prices as it could be got for.

We have therefore these documents which, upon the construction which I have submitted to your Lordships, would authorise, and which as regards the decree, would require the buying of land—we have the contemporaneous view of all the parties interested that the buying of land was in their judgment authorised by that document, and the course to which they would desire to resort.

My Lords, we have now, in the last place, to look very briefly at the subsequent history of the case, so far as it throws any legitimate light upon the earlier transactions. For this purpose the only items of history to which I would refer your Lordships are these:—As to the value of the lands we have no information, beyond what I have already stated from the decree and from the deed of mortification; but in the year 1676 it appears from the print at page 152 that a proceeding was then pending for the augmentation of the stipend of the Parish of Kinkell—and certain deeds are stated to have been produced—and at page 155 the decree contains this statement:—"It was alleged for the Laird of Drum by his said procurators named that the lands of Kinmucks belonging to him could not be burdened in respect the haill rent thereof was mortified to the College of Aberdeen for maintaining of bursars." That appears to have been the statement made by the Laird of Drum. And the observation made upon that at your Lordships' Bar was, that in point of fact the rent did not at that time exceed £1000, and therefore he might well say that the whole rent was mortified to the college. I should have thought that, to make the statement consistent with the case of the respondent, it should have been not that the whole rent was mortified, but that the £1000 a-year, which was more than the whole rent would produce, was mortified; but, in truth, you have no information upon which you can safely rely, to the effect that the rent of the land at that time, before Richarcharie was sold, did not exceed £1000 a-year.

In the year 1687, we find, from a document printed at pages 164 and 165, which is an Act by the Commissioners of the Treasury in favour of Alexander Irvine of Drum, that the then Alexander Irvine had petitioned the Treasury, and in his petition had stated that the deceased Sir Alexander Irvine had appointed the lands of Kinmucks, in the Parish of Kinkell, and the lands of Richarcharie, in the parish of Glengairden, and the whole rent of the said lands, for the maintenance of the bursars. A statement not that the whole rent was at that time being paid to the bursars, but that the testator, the said deceased Alexander Irvine of Drum, the petitioner's father, the author of the deed of mortification, had appointed the lands of Kinmuck and Richarcharie, and the whole rent of the said lands, for the maintenance of the bursars. A more clear and distinct statement of mortification, out and out, could not be supposed.

In the year 1713 Richarcharie was sold, and the next document which your Lordships will probably deem of importance was in the year 1725—it is at page 169—that is an act and factory in favour of Thomson. The only material portion of it is at page 171, where there is excepted from the present factory and act the lands of Kinmuck, destined for the payment of mortifications to schools and colleges. There the whole of the rent, and not any portion of the rent, is excepted from the factory.

Then your Lordships find at page 211 of the print a series of tacks of the lands, in which they are always termed the "Burselands of Kinmuck," pointing to a complete mortification for a charitable purpose. And lastly, you have at page 249, in the year 1761, an account in process recovered from the defender by the pursuers, of the rental in 1761, where, upon the one side of the account, the whole rental for the year is put down at £72, 10s. 6d., a sum less than £1000 Scots. And upon the other side, you have this very remarkable entry. After stating all the payments that were made to the bursars and to the scholars, and that those payments amounted to about £66, you have credit taken by Mary Irvine, the owner for the time being—"To balance for trouble and charge £6, 7s. 11⅓d.," a charge quite consistent with the position of the Irvine at that time if a trustee for the whole land for a charitable purpose, but entirely inconsistent if that Irvine was the owner of the land, and liable to make good the profits of the land to the extent of £1000 a year.

My Lords, upon these grounds of the construction of the original deeds, the contemporaneous exposition of those deeds by the acts of the parties, and the subsequent history of this property, I, speaking with great respect of the contrary opinion of the Lords of the Inner Division, can have no hesitation in advising your Lordships that the case of the appellants has been made out, and that there is here demonstration that the whole of this land is at this moment devoted to the charitable trust contained in the will of the testator.

My Lords, something was said (though it was

not much gone into in the argument) upon the question of prescription. All the learned Judges of the Court below, both the Lord Ordinary and the Judges of the Inner Division, were of opinion that that argument could not be maintained—that, in point of fact, in the circumstances of this case, we have here a clear admission by the legal owner of the land that there is a trust impressed upon the land; and the only question is, whether the extent of that trust is greater or less. And the doctrine of prescription has no real application.

My Lords, something was said as to the effect of an entail made in the year 1821, but it appears that that entail expressly reserved by a clause, printed at page 262, that the heir of tail "shall be bound and obliged by the express quality and their acceptance hereof to pay, perform and fulfil, all and whatever debts, sums of money, bonds, and all other deeds, due or contracted by the said Alexander Irvine, as effectually as if the said persons hereby called to the succession had been personally bound for the said debts and obligements." Therefore if even the trust (as we should term it, the mortification) stood in the position of a personal contract, surely the heirs of entail taking the land would be bound to fulfil that contract just as if they had personally engaged to fulfil it. I do not desire to add upon the question of prescription anything to the words used by the Lord Ordinary at page 85 of the print, in which, in my opinion, he has most satisfactorily disposed of the argument upon that point.

I should therefore propose to your Lordships to reverse the decision of the Court of Session, and to substitute for it a declaration that the whole of the rents and proceeds of these lands are devoted to the charitable purposes expressed in the will. But, inasmuch as it appears that a change has taken place in the value of the lands, of course it would be proper to require what we should term in this country a scheme, to be framed by the Court of Session, having regard to the increased value of the lands.

Lord Cranworth—My Lords, I have little to add to what has fallen from my noble and learned friend. It is clear that Alexander Irvine of Drum, the son of the testator, incurred no liability in respect to this charity, except so far as he voluntarily took it on himself by receiving and appropriating the £10,000 Scots.

When the Corporation of Aberdeen refused to accept the money on the trusts prescribed by the will, it necessarily remained in the hands of the son, and he finding, as he must have found, that it was impossible to obey literally the directions of the testator (for £10,000 could not be made to produce £1000 annually), took a very natural course. He brought, or tried to bring, all parties interested before the Court of Session, and offered either to lay out the £10,000 in the purchase of lands, the rents whereof should be applied as far as they would go in all time coming for the benefit of the objects of the charity, or otherwise to consign the £10,000 in Court, to be dealt with as the Lords might think fit.

The course taken by the Court was to decree that Alexander, the son, should retain the £10,000 until Whitsuntide, 1640; at which time he was to provide lands, worth £1000 in yearly rent, to be applied to the use and behove aforesaid according to the will—that is, as I construe the decree, to be paid over to the objects of the charity in place and satisfaction of the annual rent of the £10,000. This seems to me to be the meaning of the decree. The Court appears to have adopted so much of the proposal of the pursuer as related to the purchase of lands, the rents of which should be in satisfaction of the £1000 per annum, but to have added as an additional term that, instead of making an immediate investment, he should retain the money for seven years, by means whereof he would be able to make a considerable accummulation, and then that he should be bound, not only to purchase lands, but to purchase lands which should be worth £1000 per annum. But the lands so to be purchased were to be purchased to the use and behove foresaid, which, looking to the language of the decree, I cannot construe otherwise than as meaning to the use and behove that the rents should be taken in place and satisfaction to the scholars of the rent and profit of the £10,000. That is the only use and behove to which the language of the decree can fairly be applied.

This brings us to the deed of mortification; and this is the most important of all the documents. For though it is truly said it does not amount to a conveyance by Alexander Irvine, yet it is equally true that it was a formal declaration by him of the purposes for which he and his heirs would thenceforth hold the lands of Kinmuck and Richarcharie. The decree had imposed on him the duty of purchasing lands worth £1000 per annum for behoof of the objects of the charity. By the deed of mortification he declares that, in obedience to the decree, he had purchased those lands, and that they were worth in yearly fee rent a clear sum of £1000 Scots. It is impossible now to raise any question as to those lands not having been purchased, but having been lands of his own devoted to the purpose of the charity, even if it were material, which I incline to think it was not, if they were really well holden lands yielding the required income. However they were acquired, Sir Alexander expressly declares for himself and his heirs that he has mortified and destinated these lands for the use and behoof of the scholars to the effect that the maills, farms, and duties (*i.e.* the rents and profits) thereof may be paid to them yearly according to the divisions above written, which I can only interpret as meaning in the proportions indicated by the will, and recited both in the deed and the decree.

It was ingeniously argued that on the face of the deed it appears that the payment to the charity was not contemplated as a payment which would exhaust the whole rent, for in the prefaratory words preceding those in which Sir Alexander mortifies the lands, he speaks of the payments as payments to be made *furth* of the maills, &c.:—"Therefore, and to the effect the said ten schollars and bursars may be paid yearly furth of the maills and duties of the said lands according to the division above written, I, the said Sir Alexander Irving, my heirs and successors, has mortified, distinate, and appointed, and be thir presents for me and my foresaids mortify, destinate, and appoint the above-written lands milns, and others foresaid, with the pertinents, for the use and behoof of the said ten schollars yearly in all time hereafter, to the effect the maills, farms, and duties thereof may be paid to them yearly for their maintenance, according to the divisions above written." But this seems to me an unwarrantable refinement; and even if the word "*furth*" might point to a surplus of rents after satisfying the objects of the charity, yet that is not its necessary meaning, and it is far to vague to over-

ride the language which follows, which does not include the word "furth," and which was clearly intended to exhaust the whole yearly proceeds of the lands.

An argument was also deduced by the respondent from the subsequent part of the deed, whereby Sir Alexander binds himself and his heirs to do all necessary acts for procuring proper charters and other securities for confirming the title of those claiming the benefit of the charity; "And to the effect the said ten scholars and bursars may be sufficiently secured in the said lands and others above written for payment to them, according to the division above written, of the mails, farms, and duties of the said lands yearly, extending to the said sum of one thousand pound yearly, in all time thereafter, I bind and faithfully oblige me, my heirs and successors whatsomever to my lands and rents, to make, seal, subscribe, and deliver to the said ten schollars, and their successors to the saids burses, all contracts, dispositions, charters," &c. This, it was said, shows that nothing was considered as included in the mortification beyond the £1000 per annum. But I do not so understand this passage. Sir Alexander was bound to mortify lands which should be of the clear yearly value of £1000 Scots, which I agree must mean of not less than that sum. The mention of the value in this part of the deed was, I think, merely introduced, as it had been in the prior passage, "Whilk lands are worth in yearly free rent the sum of £1000 Scots money," for the purpose of making it appear on the face of the deed that the lands devoted to the charity were, in point of amount, such as were required by the decree—such, therefore, as exonerated Sir Alexander and his heirs from all subsequent liability. What the exact yearly value of these lands was at the date of the deed we do not know. Sir Alexander was not bound to mortify lands of a greater yearly value than £1000 Scots. But if he really understood that the land mortified was not at any time to be liable to a greater sum than £1000 Scots, I cannot but think that such a restriction on his liability would have been distinctly set forth, and not left to be discovered by subtile criticisms on words of doubtful meaning. This was a point of great importance, and which I cannot think would have been left doubtful. The plain import of the deed appears to me to be that Sir Alexander devoted the lands in question to the purposes of the charity in consideration of the £10,000 Scots which he had received, and that by so mortifying the lands, they being (as he alleged at least) of the clear yearly value of £1000 Scots, he and his heirs became for all time after absolved by the decree from further liability.

This being my view of the proper construction of these instruments, I concur in thinking that the interlocutor of the Lord Ordinary was right, and so that the interlocutor of the Inner-House ought to be reversed and the cause remitted with the declaration indicated by the Lord Chancellor.

Lord Westbury—My Lords, this is a simple case, and it is matter of regret that it has been made the subject of a protracted litigation during seven years in the court below. In the year 1629 Alexander Irvine gave a sum of ten thousand pounds Scotch to the Corporation of Aberdeen, to be bestowed and employed by them upon land and annualrent, in all time thereafter, for the purpose of maintaining certain scholars and bursars in the University and Grammer School of Aberdeen; to whom he directed certain annual stipends of different amounts to be paid, amounting, together with a small allowance for collecting the rents, to the annual sum of one thousand pounds Scotch money. It is contended by the respondent that the trust or direction to bestow or employ the money upon land and rent would not have warranted the purchase by the Corporation of land alone. At the same time, the argument of the respondent admits that it would have warranted the purchase of an annualrent alone. There can be no doubt that these words, directing the mode of investment, would have authorised the Corporation, as trustees, to have bought either land or rent, or both, according to what was best for the interest of the charity. The point is quite immaterial, and does not affect the decision of the cause. The Corporation of Aberdeen declined to accept the money so bequeathed to them—they disclaimed the trust, and would not charge themselves with the duty of carrying it into execution. The sum of £10,000 remained for some time in the hands of the executor, and heir of the testator, apparently upon a tacit understanding that it should so remain until, by the accummulation of interest, the fund should become sufficient for the purchase of lands or rent of the value of £1000 per annum, which it was considered could not be then obtained for the sum of £10,000.

At length, in the beginning of the year 1633, Sir Alexander Irving, as son and heir of the testator, raised an action in the Court of Session against the provost and officers of the Corporation, and the principal and masters of the College of Aberdeen; and the summons, after stating the refusal of the Corporation to accept the bequest and trust, and that by reason thereof the sum of £10,000 had been lying idle, and had no ways been profitable to the scholars; and, therefore, in order that the said sum might no longer remain idle and unprofitable, it was necessary that it should be found and decerned by the Lords of Council and Session, "that it should be leesum to the said executor, the complainer, to wair and bestow the said sum of £10,000 upon buying of land therewith upon sic easy prices and conditions as might be had therefor: And the said lands to be bought therewith, maills, farms and duties of the same to be mortified and destinat to the use of the said four scholars in the Grammar School in Aberdeen; four scholars, students of philosophy, in the said New College of Aberdeen; and two scholars, being laureate masters, students of divinity in the said New College, proportionally and *pro rata* effeirand to the quantities of the annualrent of the said sum appointed to be paid to them by the said testament; and the yearly rents, profits, and duties of the said lands to be bought and conquest with the said sum to be in place and satisfaction to the said ten scholars of the annualrents and profits of the said sum in all time coming." The words I have cited, are the substance of the first conclusion of the summons, and they are very material; for the complainer thereby desires—First, power to employ the money given in the purchase of lands, *such lands to take the place of the money;* and, secondly, that the rents and profits of the lands so bought might be in place and satisfaction of the annualrents and profits of the sum bequeathed; and, thirdly, that the rents, whatever they were, might be divided among the scholars in the proportions in which the profits of the sum bequeathed are directed to be divided by the will.

The decreet of the Lords of Council was to the

effect that the said executor and heir, Sir Alexander Irving, should retain and keep the said sum of £10,000 without payment of annualrent or profit for the same until Whitsunday 1640—a period of seven years—at which time the pursuer was decerned, and ordained to provide for the use of the said ten scholars and bursars of the College and schools of New Aberdeen sufficient well holden lands for employing the said sum of £10,000, worth in yearly rent to the sum of £1000 money, which lands should be bought aad acquired by him heritably without reversion, to the use and behoof aforesaid, against that term without further delay, according to the will. The meaning of these words seems to be reasonably plain. An indulgence of several years is granted the pursuer, who engages, by the end of the time, to buy and provide lands worth annually £1000 at the least, and which lands are to be acquired to the use and behoof aforesaid; that is, to the use of the scholars and bursars of the College.

It is contended that these words did not impose upon the pursuer the obligation of doing more than granting an annualrent charge of £1000 per annum secured upon lands, or of conveying lands to the extent of that yearly sum, and no more. But this construction cannot be maintained. It seems plain that the mention of the thousand pounds per annum was made for the purpose only of fixing the minimum value of the lands to be provided.

This then was the obligation thrown on the pursuer by the decreet, and it was in conformity with the submission made by himself in the summons. The question is, whether this duty has been fulfilled by the deed of mortification subsequently executed by the pursuer. The deed of mortification was not executed by the executor, the then Sir Alexander Irving, until the 12th of April 1656. And thereby, after reciting the decreet, and stating that he, Sir Alexander, had ever been willing to obey the said decreet, which he had done since Whitsunday 1640, and had acquired the town and lands of Kinmuck, and other lands particularly described, and which are thereby stated to be worth in yearly free rent the sum of £1000 Scots money, by and attour the feu-duties, teind-duties, minister's stipend, and others, therefore and to the effect the ten scholars and bursars might be paid yearly forth of the mails and duties of the said lands, according to the division above written, he, the said Sir Alexander did mortify, destinate, and appoint the above written lands, &c., for the use and behoof of the said ten scholars yearly in all time thereafter, to the effect the mails, farms, and duties thereof might be paid to them yearly for their maintenance, according to the division above written, with power to them to uptake the mails, farms, and duties of the said lands, for that effect suit, call, and pursue therefor. The object of the deed is to execute the decreet, and the plain intent and legal effect, both of the decreet and of the deed, are that Sir Alexander Irving, having received considerable indulgence in point of time, was taken bound to convey, and does accordingly convey, lands being then of the value at least of £1000 per annum clear, to the use and behoof of the ten scholars, the rents being to be divided between them in the relative proportions of the sums directed to be paid to them under the will.

All that followed is in conformity with this construction. During several years the rents of the lands mortified were less than the sum of £1000, but the deficiency was not made good by the heirs and successors of the granter; and when the rents of the lands afterwards increased, and were likely to yield more than £1000 per annum, the device of taking grassums was resorted to for the purpose apparently of keeping the annual rents below the aforesaid sum. The right of patronage has been constantly exercised by the heirs and successors of the said granter, and the payments that have been made are a distinct acknowledgment of the right of the scholars and bursars to the full benefit of the deed of mortification. Since the decreet of 1633, Sir Alexander Irving and his heirs must be considered as having become trustees of the charity in the room of the Corporation of Aberdeen, who declined to accept the trust, and there is no ground therefore upon which any right by prescription, either negative or positive, can be founded.

It is easy to see that Sir Alexander Irving, the executor, having been permitted to retain the principal sum for several years after the death of the testator without payment of rent or profit, might well have undertaken the duty of providing lands for the charity, worth at least £1000 per annum; but it is only necessary to ascertain that this is the legal effect of the deed of mortification. If it be, the charity is entitled to the full benefit of all the rents of the mortified lands. The annual payment intended for a collector appointed by the Corporation was lost by the refusal of the Corporation to accept the trust.

It follows that it now belongs to the Court of Session to make a new distribution of the augmented rents among the original objects, according to the proportion of their respective payments; but the allowance to each bursar and scholar must be limited by the purpose of the trust, which was to provide such bursar or scholar with a competent allowance during his education in the College of Aberdeen. If, after such an augmentation of the amount of the original stipends as the change of circumstances and of the expense of living would seem to require, there be a surplus left sufficient to endow other bursaries or scholarships, the surplus may, in my judgment, be applied to that purpose by the direction of the Court. Any new disposition or scheme of this nature will be subject to be modified or altered by any further order of the Court at a future time, if required by circumstances. It is very desirable that the Court of Session, which has the same power and jurisdiction over trusts of this nature as are possessed by the Court of Chancery in England, should develope and exercise it in a correspondent manner.

I shall therefore humbly advise your Lordships to reverse the interlocutor appealed from, and by your order to declare that, according to the legal effect and true meaning of the deed of mortification of the 12th April, 1656, the whole of the lands thereby mortified and appointed, and the entirety of the rents and profits thereof, are destinate and given to the use and behoof of scholars in the College and School of Aberdeen, and ought to be applied accordingly. And with this declaration remit the cause to the Lords of the First Division, to settle a scheme for the proper management and collection of the rents of the lands now subject to the said deed of mortification, and the application of the net proceeds thereof, after deducting the expenses in augmenting the stipends directed to be paid to the ten scholars by the will of Alexander Irving, in such manner as, having regard to the

will and the altered state of circumstances, shall be fit; and declare that the defender is entitled to the patronage of the bursaries and scholarships that shall be so augmented; and also declare that the defender ought not to be decreed to account for or pay any of the surplus rents and profits of the lands over and above the sum of £1000 Scotch received by him prior to the date of the signetting of the summons, but let him account for, and pay in such manner as the Lords of Session shall direct, all the rents and profits of the said lands (including grassums, if any) that have come to his hands since the signetting of the summons, and let the costs of the appellants be paid out of the funds that shall be received by virtue of this order.

Lord Colonsay—My Lords, I agree in the opinion that has been expressed by all my noble and learned friends, that there is here no ground for the plea of prescription. I also am of opinion that the deed granted in 1656 is obligatory upon the defender, and that he can take no benefit from the circumstance that the further deeds which were then contemplated have never been executed. But still the question remains, what was the nature of the obligation so undertaken, and of the deeds so contemplated? Was it a disposal of the lands out and out? Or was it a grant of lands to the effect of securing in all time coming implement of the deed of the first Sir Alexander Irvine, so as to make payment to ten bursars of the sum specified in that deed? My noble and learned friends who have addressed the House entertain the former view, and in that view I think that the terms of the judgment which have been proposed are the proper terms. I may be permitted, however, with great deference to the opinions that have been expressed, to say that I doubt the soundness of that conclusion. My inclination is the other way. At the same time I express that with the greatest deference, and I think it quite unnecessary to go into a statement of the circumstances which raise these doubts in my mind.

Interlocutor reversed, and cause remitted to the Court of Session with a declaration.

Agents for appellants—M'Ewan & Carment, S.S.C., and Dodds & Henry, Westminster.

Agent for respondent—A. F. Gordon, W.S.

Thursday, March 12.

CAMPBELL *v.* BREADALBANE'S TRUSTEES.

(*Ante*, ii, 60, 66; and Macph., iv, 775.)

*Entail—Decree of Declarator of Improvement Expenditure—*10 *Geo. III., c.* 51—11 *and* 12 *Vict., c.* 36—*Charging with Debt—Finality.* In a question as to improvement expenditure between an heir of entail in possession of an entailed estate and the trustees of his predecessor in the estate, by whom the improvements had been executed, *held* (1) that a decree of declarator of improvements, obtained by such predecessor, was final and conclusive as against a person claiming as heir of the body of the heir of entail called in the process of declarator. Opinions—such decree was final against all succeeding heirs of entail; (2) that the decrees in question were not liable to certain objections in point of form stated against them; (3) the predecessor having obtained decrees of declarator of improvement expenditure to the extent of £25,000 under the Montgomery Act, obtained authority from the Court, under the Entail Amendment Act, to grant bonds of annualrent or bonds and dispositions in security for the amount. He executed a bond of annualrent for £20,000, and died four years after without taking any steps as to the balance. *Held*, that the proceedings taken under the Rutherford Act were an abandonment by the deceased of his position under the Montgomery Act, and that his executors were not entitled to proceed under the Montgomery Act personally against the succeeding heir for payment of the balance.

*Entail Improvement—*10 *Geo. III., c.* 51, *sec.* 12. The provisions of the Montgomery Act, sec. 12 sufficiently complied with in the case of an heir who died before Martinmas, by the lodging of accounts signed by his executors.

The appellant, John Alexander Gavin Campbell, Earl of Breadalbane, appealed against two interlocutors pronounced by the Court of Session in actions raised against him by the trustees of the late Marquis of Breadalbane. The first action concluded against the defender for payment (1) of £5202, 16s. 2d., being the balance of the sum of £25,354, 16s. 2d., contained in five decrees of declarator of entail improvements obtained by the late Marquis under the Montgomery Act; (2) of £21,354 16s., as due in terms of a certain other similar decree; (3) of interest on said sums till payment. The second action was an action of declarator and for payment of certain sums alleged to have been expended on the entailed lands of Breadalbane by the late Marquis, while heir in possession, in terms of the Montgomery Act. The contentions of parties appear sufficiently from the subjoined opinions. In both actions the claim of the pursuers was sustained by the Court of Session.

The defender appealed.

Sir Roundell Palmer, Q.C., Mellish, Q.C., and Young for appelant.

Lord Advocate (Gordon), and Watson, for respondents.

Lord Chancellor.—My Lords, these two appeals, brought by the Earl of Breadalbane against the respondents from certain interlocutors pronounced by the Court of Session in Scotland, raise some questions which are of importance certainly to the parties, but which do not, as it appears to me, present any difficulty as regards the conclusion to which your Lordships should arrive. My Lords, the questions may be conveniently divided into four—three arising out of the first appeal, and one on the second appeal. With regard to the three questions which arise on the first appeal, there is, in the first place, a question as to the finality and conclusiveness of certain proceedings taken by the late Marquis of Breadalbane in his lifetime for the purpose of having an expenditure made by him in improvements on his estates charged upon those estates. The second question relates to the form and wording of the decrees by which the improvements were to be constituted a charge on those estates. And the third question relates to the effect of the proceedings taken by the same Marquis of Breadalbane in his lifetime under the Act ordinarily termed the Rutherfurd Act, on the position in which the Marquis previously stood with reference to the prior Act, namely, the Montgomery Act.