Mr. Mellish.—Will your Lordship allow me, before the question is put, to call your attention to the question of costs. These are regulated by the 25th section of the Montgomery Act, which, in substance, enacts, that, where the executor of an heir of entail recovers the full sum which he has demanded, then the defender shall be liable to full costs of the suit; but if the decree is not obtained for the full sum of money of which payment has been required, it shall be in the discretion of the Court to award costs of suit to either party, as the justice of the case shall direct.

Now, in the Court of Session, the Lord Ordinary declared full costs against us under the first provision of this section, because the respondent recovered under the decree of the Court of Session the full sum demanded. But now, in consequence of your Lordships—

LORD WESTBURY.—It is a most inconvenient thing to have any argument upon costs after judgment. When the counsel for a party considers that there is any question of costs in the case to which he wishes to address himself, he must make it part of his original argument, and not wait till after judgment has been pronounced, and then claim to be heard with respect to costs.

Mr. Mellish.—I beg your Lordship's pardon for not having done it before, but I thought your Lordship's attention not having been called to this clause—

LORD WESTBURY.—If we heard you upon the question of costs, we might have a long argument in consequence of your observations, because the other side would have a right to a reply.

LORD COLONSAY.—I do not think that section applies to the circumstances of this case.

LORD CHANCELLOR.—My Lords, I think your Lordships will not be disposed to hear any argument upon the subject of costs. According to your Lordships' usual practice, as your Lordships do not concur with the interlocutor pronounced by the Lord Ordinary in all respects, it would follow, that the costs ordered to be paid under that interlocutor should be repaid to the appellant.

LORD WESTBURY.—So far as the interlocutors require to be altered by reason of the particular point on which we agree with the appellant, I apprehend, that the judgment of your Lordships, after specifying distinctly the point on which we differ from the judgment below, and on which you reverse the interlocutors of the Court below, will direct the costs paid by the appellant under those interlocutors to be repaid to the appellant by the respondent.

Mr. Mellish.—They have not been paid; they are only ordered.

LORD WESTBURY.—That is immaterial; reversing the interlocutors in that respect, you will reverse the direction as to costs.

LORD CHANCELLOR.—The question in the first appeal is, that the interlocutors complained of should be varied, by declaring, that the late Marquis of Breadalbane, by presenting his petition under the Act of 11th and 12th Vict. cap. 36, and the proceeding thereon, elected to adopt the remedies given by that Statute, and to abandon the remedies given by the Act of 10 Geo. III., and therefore assoilzieing the defenders from the operation of the summons as to the sum of £5202 16*s*., but without prejudice to any question in any other action, and order any costs paid by the appellant under those interlocutors to be repaid. And on the second appeal, that the interlocutor complained of be affirmed, and the appeal dismissed, with costs.

In first appeal, interlocutors varied, with direction as to costs in Court below, and cause remitted.

In second appeal, interlocutor affirmed, and appeal dismissed, with costs.

Appellant's Solicitors, Adam, Kirk, and Robertson, W.S.; Loch and Maclaurin, Westminster. —*Respondents' Solicitors,* Davison and Syme, W.S.; John Graham, Westminster.

MARCH 26, 1868.

THE UNIVERSITY OF ABERDEEN and Others, *Appellants*, *v.* ALEXANDER FORBES IRVINE of Drum, *Respondents.*

Trust—Charity—Increased Rents and Profits—Prescription—Long Irregularities—*A., in* 1629, *left and mortified* £10,000 *Scots to be bestowed by trustees upon land and annualrent in all time thereafter for the use of bursars in a grammar school. In* 1633, *on action brought, the Court of Session decreed that A.'s heir should provide lands worth* £1000 *Scots yearly rent to be bought and acquired by him heritably. And in* 1656 *A.'s heir by bond mortified certain lands then belonging to him worth* £1000 *Scots per annum for the use of the bursars as set forth in the*

will, and bound himself to secure them in lands for payment of that sum yearly. The heirs of A., in possession of these lands, had ever since paid only £1000 Scots yearly. The rent of the lands had increased to about £500 a year, the heir having always kept the surplus.

HELD (reversing judgment), (1) *The will of* 1629 *gave an option to the trustees to invest the money in purchasing land or an annualrent;* (2) *the decree of* 1633 *gave the same option, and in* 1656 *A.'s heir having mortified certain lands of his own worth £*1000 *Scots, the whole rents and profits thereof now belonged to the charity, and were held by A.'s heir as trustee;* (3) *that as there was a clear trust impressed on the land, the Prescription Act did not apply.*[1]

This was an appeal from a decision of the First Division of the Court of Session. An action of declarator was raised by the University of Aberdeen, by the Town Council, the masters of the grammar school, and certain bursars in the University, seeking to have it declared, that, by virtue of certain writings, the pursuers, the scholars, and bursars, and their successors, have the sole and exclusive beneficial interest in the town and lands of Kinmuck, Peithill, Mill of Kinmuck, and others, and that the respondent, Alexander Forbes Irvine, and his heirs and successors in the lands of Drum, have no beneficial right of property in the said lands, but only the patronage or presentation of scholars or bursars. The action also raised the question, whether the said estate was part of the entailed lands of Drum, and whether the respondent and his family had wrongly possessed the said estate for the last 200 years. The rental of the lands at present was about £500. The pursuers alleged, that the said lands had been mortified for the use of the scholars and bursars, and that the will of Alexander Irving of Drum in 1629 followed by a decree of the Court of Session in 1633, and a bond by the testator's son, dated 1656, declared the trust. It was admitted by the respondent, that he was bound to pay a certain sum out of the income, amounting to £1000 Scots, but the appellants claimed the whole improved rents also. The defender pleaded in defence, that he had a complete and sufficient prescriptive title to exclude the present action, and that certain decrees, founded on by the pursuers, had not been acted on for more than forty years, and the claim was now excluded by the negative prescription.

Lord Ordinary (Kinloch), held, that the pursuers were entitled to have the right declared and enforced; but on reclaiming note the First Division recalled the interlocutor, and assoilzied the defender. The present appeal was then brought.

The appellants in their *printed case* gave the following reasons for reversing the interlocutor:— 1. The deeds founded on created a valid and subsisting trust for behoof of the bursars, under which the trust estate consisted of the lands of Kinmuck, and the respondent and his predecessors were trustees; and the bursars, as beneficiaries, were, according to the true conditions of the trust, entitled to the whole free income of the trust estate. 2. The usage, from the date of the deed of mortification down to the present century, was in accordance with the construction put on them by the appellants, and since the date of the deed of mortification, the lands of Kinmuck have been held for and dealt with as belonging to the charity. 3. Though, for a long period, the trustee for the time had withheld from the bursars for the time, and appropriated to himself a portion of the income of the trust estate, the appellants were entitled, by means of the present action, to have the terms of the trust judicially ascertained and enforced upon the trustee for the future.

The respondent in his *printed case* stated the following reasons for affirming the interlocutors: 1. The appellants' demand is inconsistent with and contrary to the provisions of the will of Alexander Irving of 26th December 1629. 2. The appellants' demand is unsupported by and inconsistent with the terms of the decree of 27th February 1633, and of the bond by Sir Alexander Irving of 12th April 1656. 3. The appellants' demand is inconsistent with and contrary to the whole usage which has followed upon the testament of 1629, the decree of 1633, and the bond of 1656. 4. The appellants' claim to the property of the lands of Kinmuck is excluded both by the positive and negative prescription.

Mellish Q.C., and *G. Young*, for the appellants.—The will of 1629 shews a clear trust in favour of a continuing series of beneficiaries, where all the benefit is clearly conferred on the bursars, and there is no trace of an intention, that the trustee was to have any other interest than that of presentation and patronage. No doubt, the testator assumed the fund would yield £1000 Scots a year; but if it did not, the reduced sum would only be apportioned. There was obviously an option given to the trustees to purchase land or to purchase an annual rent out of land. The Court below was wrong in assuming, that it was contrary to the trust to purchase lands. The Court in 1633 decided otherwise and rightly. All that happened afterwards was consistent with that construction. The actings of the parties are always important as explaining ancient deeds and documents—*Campbell's Trustees* v. *Dingwall*, 4 Macph. 50.

As to prescription, if the deed of mortification declared a trust, the negative prescription cannot exclude this action. This is not a claim for past misappropriation, but for the future application

[1] See previous report 4 Macph. 382; 38 Sc. Jur. 259. S. C. L. R. 1 Sc. Ap. 289; 6 Macph. H. L. 29; 40 Sc. Jur. 459.

of the rents and profits. No lapse of time can bar the claim of beneficiaries, if the trust estate still exists—*Barns* v. *Barns' Trustees*, 19 D. 626; *Baird* v. *Magistrates of Dundee*, 24 D. 447.

Nor is there any absolute title on which to found the positive prescription. The decree of the Court and the deed of mortification qualified the right of property, the effect resembling that of an absolute disposition with a back bond.

Lord Advocate (Gordon), *Sir R. Palmer* Q.C., and *Anderson* Q.C., for the respondent.—The will of the founder shews no intention to give more than an annuity of £1000 Scots to the beneficiaries, and that was to be obtained by purchasing an annual rent, and it was a violation of the trust to purchase land. The decree of 1633, and the bond of 1656, did not and could not alter the effect of the original will. The bond of 1656 shews, that the then heir of the testator merely intended to grant a security over the lands to the amount of the £1000 Scots. Such was the effect at that time of the right of annual rent—*Gray* v. *Graham*, M. 566.

The usage since 1629 and 1656 contradicts the present claim. There has never been paid more than the £1000 Scots; moreover, all the time the heir has possessed the land; and the claim is excluded by the positive and negative prescription. Under the former the respondent's absolute title, coupled with immemorial possession of 300 years, renders the title indefeasible; and by the latter all claim on the part of third parties is cut off. The title on which the respondent has possessed was not a trust or limited title; the trust was no part of the title on which possession was had—Bell's Pr. §§ 606, 2002; Stair ii. 12, 2; Ersk. iii. 73.

The bond of 1656 was nothing more than an obligation to give real security, not followed up or acted upon; the only thing that subsists is the obligation to pay £1000 Scots interest, and that the respondent is willing to pay.

Cur. adv. vult.

LORD CHANCELLOR CAIRNS.—My Lords, the appeal in this case is in an action brought by the University of Aberdeen, and certain individuals interested, against Alexander Forbes 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 Mr. Irvine has in those lands no beneficial right, and no right other than that of a trustee with the patronage or right of presentation of bursars and scholars. Mr. Irvine admits that he is bound to make good an annual rent 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 conclusion 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 of 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.

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

I must ask your Lordships' attention, in the first place, to the terms of the will of Alexander Irving 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, Baillies, and Council of Aberdeen, to be bestowed and employed by them upon land and annual rent in all time hereafter, to the effect after following, to wit, 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 one of them four score pounds, and four hundred pounds to be paid yearly to the other four scholars at the College of New Aberdeen and students of Philosophy thereat, ilk one of them, an hundred pounds during likeways the space of four years, and also I ordain to be given to the other two 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 other of them 200 merks of the said annual rent during the space of four years also, and the odd twenty merks, which, with the deduction above specified, compleatt the said haill annual rents of ten thousand pound, I ordain it 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."

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 annual rent." A suggestion was made, that the conjunction between land and annual rent 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, 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 annual rent whatever that may mean, and does not mean to require the investment either to be upon both land and annual rent, or upon one subject matter which is to be described by the collective term of land and annual rent.

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 annual rent, what was intended was the purchase of what we may term an annual rent issuing out of land, or an annual rentcharge 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 annual rent. 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 difference between those 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.

Alexander Irvine died in 1630. It is sufficient to say, that his widow and son tendered the £1000 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 annual rent 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 Irving 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 fund were proposed, to which I will next call your Lordships' attention. These alternatives are thus stated in the conclusions of the summons: "And, therefore, that the said sum of £10,000 be no longer iddle and unprofitable, and that the ten scollars to whose behoove and use the said sum is left, mortified, and destinat, be not altogether defraudit of the benefit thereof, but may have sic benefit and commoditie as may be weil and surely paid, theirfor necessary it is that it be fund and decernit be the Lords of Councell and Session, that it sall be leesum to the said complainer to wair and bestow the said sum of £10,000 upon buying of land thereanent upon sic easy pryces and conditions as may be haid theirfore, and the said land to be bocht therewith, 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 Colledge of Aberdeen, and twa scollars being laureat maisters students of divinity in the said new College of Aberdeen proportionally and *pro rata* effeirand to the quantities of the annualrent 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 burgh of Aberdeen had ressavit and employit the said sum for annual according to the said testament, and the yearly rent, profeits, and duties of the said land to be bocht and conquest with the said sum to be in place and satisfaction to the said ten scollars of the annualrents and profits 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 annualrent in time coming, in manner, form, and to the effect above writing contenit in the said testament." That is the first alternative proposed. The other alternative is, or "otherways, the said sum of £10,000 money left, mortifeit, and destinate be the said umqhile Alex. Irvine to the effect foresaid in respect of the said provost, bailies, and counsell of Aberdeen, their refusal thereof as said is, ought and suld be employit and bestowit to the best behoove and weil of the said ten scollars rexve. above written mentioned 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 complnr. is content prntly. to consign samen in prns. of the Lords to be employit as said is."

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 pursuers 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 £10,000 money forsd. without payment of annualrent or profit for the samen quhill the feist and term of Whitsunday Javij fortie years. At the quilk term decernis 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 £10,000 worth in yeirlie rent at the soum of £1000 money, qlk. lands salbe bocht and acquirit be him heritablie without reversiun to the use and behove foresaid agains that term without farther delay, according to the destination and mortification of the umqle. laird 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 trustees, so upon the construction of this decree which I have now read it appears to me, without doing violence to the words used, it is impossible not to arrive at the same conclusion. What was pointed out was the purchase of the land in the ordinary sense of the term. That was what Sir Alexander Irving had proposed to the Court should be done, and the difference between the proposal of Sir Alexander Irvine and what was actually done by the Court appears to me to be this, that in the place of 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 purchase 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.

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 other 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 1666; no land was actually bought by Sir Alexander Irving for the purpose of implementing the decree, but in the year 1856, 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.

The operative and important part of that deed recites: "and seeing that I ever have been willing to obtemper and fulfil my said deceased 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 1640 years, and have acquired the town and lands of Kinmuck, Peithill, Mill of Kinmuck, miln lands, multures of the same, with houses, biggings, tofts, crofts, outsetts, insetts, tenants, tenandries, and service of free tenants, parts, pendicles, and pertinents thereof, lying within the parioch 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, mills, miln lands, multures, annexis, parts, pendicles, and pertinents, together with the shillings, grassings, pasturage used and wont in Glassiehill and Carribeg *alias* New Glas, 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, minister's stipend, and others astrict fourth 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 divisions above written, I, the said Sir Alexander Irving, my heirs and successors, has mortified, destinate, and appointed, and be their presents, for me and my foresaids, mortify, destinate, and appoint the above written lands, mills, 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 curator in their name, to uptake the maills, farms, and duties of the foresaid lands, for that effect, suit, call, and persue, therefor, and all other things requisite to do and command that I might have done myself before the making hereof, and that part of my deceast father's testament anent the mortification and destination of the said sum and Lords of Session their decreet above written." And there follows another clause on the purport of which I shall afterwards observe.

Now, 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 these 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 Alexander Irving, 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.

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 to 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 divisions 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.

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 warranty that any words have been found which raise a doubt as to the construction of this deed. The clause as to the warranty, is this : "And to the effect the said ten schollars and bursers 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, or 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 scholars and their successors to the said bursers, all contracts, dispositions," etc.

Now the words relied upon here were "extending to the said sum of £1000 yearly." Now those 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 warranty, 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 those 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 warranty, as subverting 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.

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 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 landowner 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 burthen, if he looked forward to keeping and retaining the land himself as the owner of the land.

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 Irving. 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.

We find (at page 120) the town of Aberdeen in a minute say, that they refuse to receive the sum (that is, the sum of £10,000,) "on the conditions above written, contained in the said testament. But to the effect the same might be lifted out of the said Marion Douglas's hands and may be wared and laid up in 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 condition for settling and establishing the said sum in the heritable purchase of lands." Then at page 124 we find in another minute, that the Corporation, "all in one voice, resolved and concludit to refuis to receave or accept the said somme on the conditiones contenit in the said testaments, viz., 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 up in bank quher best employment may be had, and the annual rent thereof to access with the stok till the same ammount to that proportioune as may mak purchess of heritabill landis extending in yeirlie rent to ane thousand poindis, fifteen chalders vituall." And at page 126 the Corporation say, "Moneyes can mack no suire nor constant rent unlesse the same be employit on heritable purches off lands, and ten thousand pounds will scarcelie mack conquese above five hundreth punds of constant yeirlie rent, and so they could not receave the said somme upon conditioun foresaid." At page 127, in a letter from the Provost and Bailies to their legal adviser, they say, "We have offert to the Laird of Drum to accept of the monys, so being he will be content that the same be sequestrat and employed on annualrent till the annuellis might access with the stock to such proportion as micht make hereatable purchase of landis that would pay ane thousand pundis of constant yeirlie rent." There the contrast is drawn in the most marked way between annual rent 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. Patrick Copeland has given and mortified six thousand markes to a professor of divinity in our College, quhilk alredie, with the anualis, is accressed to six thousand poundis, redie to be employet on the buying of lands, and a professor of divinity aready 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 adviser of the Corporation, "Ye sall altogether refuse to accept of the moneys, but upon express condition that we gett this absolute right of presentation and admission of the equal half of the bursaries, to wit, two grammarians, one student in philosophie, and one student in divinitie, in regard of our perpetuall burden in managing off the moneyis, and of sic landis as sal be bocht theirwith"—speaking of the management of the land to be purchased as that which would create a burthen and a trouble. And finally, at page 144, your Lordships have the conclusion 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 authorize, 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, authorized by that document, and the course to which they would desire to resort.

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 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 Kinmuck 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 Irving of Drum, that the then Alexander Irving had petitioned the Treasury, and in his petition had stated, that the deceased Sir Alexander Irving 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 said deceased Sir Alexander Irving 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, destinate for the payment of mortifications to schools and colleges. These are the whole of the rents, 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 tracts of the land in which they are always termed the Burselands, 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 10*s*. 6*d*., 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 factrix for the owner for the time being : "To balance for trouble and charge, £6 7*s*. 11⅓*d*.," 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.

Upon these grounds of the construction of the original deeds, the contemporaneous exposition of those deeds by the Act of the parties, and the subsequent history of this property, and speaking with great respect of the contrary opinion of the Lords of the Inner House, I 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.

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 House, 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 Statute of Prescription has no real application.

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 entail shall be bound and obliged by the express liability, 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 shall term it,) the mortification, stood in the position of the personal contract, surely the heir of entail taking the land would be bound to fulfil that contract, just as if he 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, 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 Sir Alexander Irving 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 Whitsunday 1640; at which time he was to provide lands worth £1000 in yearly rent to be applied to the use and behoof 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 accumulation, 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 rents 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 Sir 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 free 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 that were material, which I incline to think it was not, if they were really well holden lands yielding the required income. 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 prefatory 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., "Therefor, and to the effect the said ten schollars and bursars may be paid yearly furth of maills and duties of the said lands, according to the division above written, I, the said Sir Alexander Irving, my heirs and successors, have mortified, destinate, and appointed, and by 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 times 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 too vague to override 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, where 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 schollars 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 maills, farms, and duties of the said lands yearly, extending to the same 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 said bursars all contracts, dispositions, charters," &c. This, it was said, shews, 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 those 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 subtle 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 by 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 a 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 Irving gave a sum of £10,000 Scots to the Corporation of Aberdeen to be bestowed and employed by them upon land, and annual rent in all time thereafter, for the purpose of maintaining certain scholars and bursars in the University and Grammar 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 £1000 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 annual rent alone. There can be no doubt, that these words, directing the mode of investment, would have authorized 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 hand of the executor and heir of the testator, apparently upon a tacit understanding, that it should so remain, until by the accumulation of interest the fund should become sufficient for the purchase of land 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 Principals 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 lessum 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 land to be bought therewith, maills and farms and duties of the same, to be mortified and destinat to the use of the said four schollars in the grammar school in Aberdeen, four scholars students of philosophy in the said new College of Aberdeen, and two scholars, being laureate master students of divinity in the said new College, proportionaly and *pro rata* effeirand to the quantities of the annual rent of the said sum appointed to be paid by them by the said testament, and the yearly rent, profits, and duties of the said land, to be bought and conquest with the said sum, to be in place and satisfaction of the said ten scholars of the annual rents 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*, powers to employ the money given in the purchase of lands, *such land 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 annual rents and profit of the sum bequeathed. And *thirdly*, that the rents, whatever they were, might be divided among the scholars, in the proportion 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 the annual rent or profits of 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 ten scholars and bursars of the college and schools of new Aberdeen sufficient well holden lands for employing the said £10,000 worth in yearly rent to the said sum of £1000 money, which lands should be bought and 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 annual rentcharge 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 £1000 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 upon 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 furth of the maills 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, etc., for the use and behoof of the said ten scholars yearly, in all time thereafter, to the effect the mails, farms, and duties therefor 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 and 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 rent 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 a 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 the 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 stipend 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 interlocutors 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 signeting 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 signeting of the summons, and let the costs of the appellants be paid out of the funds that shall be recovered 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 Alexander Irving, so as to make payment for the bursars of the sum specified in the 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 has 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.

Interlocutors reversed, and cause remitted to the Court of Session with a declaration as stated in Lord Westbury's *opinion.*

Appellants' Solicitors, M'Ewen and Carment, W.S.; Dodds and Hendry, Westminster.—*Respondent's Solicitors,* A. F. Gordon, W.S.; Connell and Hope, Westminster.

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26 MARCH, 1868.

Mrs. Isabella Young or Richardson and Others, *Appellants*, *v.* Laurence Robertson and Others, *Respondents.*

Macdougal's Trustees, *Appellants*, *v.* Laurence Robertson and Others, *Respondents.*

Macdoudal's Children, *Appellants*, *v.* Laurence Robertson and Others, *Respondents.*

John Lawford Young, *Appellant*, *v.* Lawrence Robertson and Others, *Respondents.*

Trust—Legacy—Gift to Class—Grandnieces and Husbands in Liferent—Successive Liferents—*D. in his will gave the residue of his estate to his grandnieces and their respective husbands, only in liferent, for their, her, or his liferent use allenarly, and the fee of such shares to the lawful issue of his said grandnieces equally, whom failing, to the survivors of them and his grandnephews equally in liferent, and their issue also equally in fee, after the death of the*