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

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

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

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

GUTHRIE *v.* ANDERSON.

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

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

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

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

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

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

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

The Court advocated the cause, and recalled the Sheriff's judgment, holding that as the defender had a right to the rents from Whitsunday 1862, he was bound to pay the account sued for if it was really due, and a remit was made to a man of skill to report upon a defence stated that the work had not been done in a tradesmanlike manner.

Thursday, Feb. 8.

FIRST DIVISION.

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

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

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

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

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

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

bursars was this: The money was to pass directly into the hands of the Magistrates and Town Council, who were to acquire with it a right of annual-rent of the aggregate amount of £1000 Scots. That body was to be accountable yearly in all time thereafter to each of the ten bursars for a specific sum out of the annual-rent, and there was a small balance of 20 merks which was to be paid to a collector. If these directions had been at once followed out there would have been constituted in favour of the bursars a right of annual-rent constituted upon land of the specific amount of £1000 Scots, and each of the ten would have had right yearly to the specific sum provided for him; the investment would not have been made in buying lands, and the bursars would not have been paid out of the rents of lands, which might rise or fall according to circumstances. Such rights of annual-rent upon land were then well known in the practice of Scotland. They were constituted sometimes only redeemably as securities, but often irredeemably as permanent investments. Their legal character was well established. Although incorporeal rights, they were independent feudal tenements, like a right of teinds. The right was completed by infeftment, the symbol being a penny. (Craig 1, 2, 37, Skene *voce* "Annual," Stair 2, 5, 1, and Erskine, 2, 2, 5). The right was transmissible, the successor being entered either by precept of Clare Constat, by resignation, or confirmation (2 Dallas, 146–8). But the truster's direction was not carried out. One reason was that the sum provided was not sufficient to obtain an annual-rent of £1000 Scots, and another reason was that the magistrates declined to accept the trust. In 1633 Sir Alexander, the truster's son, instituted an action to have it "found and decerned, by the Lords of Council and Session, that it shall be leisome to the said complainer to wair and bestow the said sum of £10,000 upon buying of land therewith, upon such easy prices and conditions as may be had therefor; and the said lands to be bought therewith, maills, farms, and duties of the same to be mortified and destinated to the use of the said four scholars in the Grammar School of 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 of Aberdeen, proportionally and *pro rata* effeiring to the quantities of the annual-rent of the said sum appointed to be paid to them by the said testament." In this action decree passed in absence on 27th February 1633, ordaining Sir Alexander to have retention and keeping of the said sum of £10,000 until Whitsunday 1640; and ordaining him then to provide for the use of the scholars and bursars sufficient well-holden lands for employing of the said sum of £10,000 worth in yearly rent to the sum of £1000 money, "which lands shall be bought and acquired by him heritably, without reversion, to the use and behoof foresaid against that term without further delay, according to the destination and mortification of the said Laird of Drum and his mind specified in his latter will." The import of this decree seems to be this:—1. It negatived the demand of the Town Council for a participation in the patronage of the bursaries. 2. It did not authorise either the proposal of the pursuer to buy immediately as much land as could then be procured with the £10,000 Scots, and to divide the rents thereof among the bursars, or an extrajudicial proposal of the Town Council that the investment should be postponed for seven years, or some other period, so that by accumulations of interest its amount should be increased so as to secure an annual sum of £1000 Scots. 3. In the exercise of its equitable powers, the Court made an arrangement with the defender's ancestor that he should keep the £10,000 without payment of interest until Whitsunday 1640, and that in consideration of this he should then have provided lands yielding at least £1000 Scots yearly, and that he should constitute on these lands a right of annual-rent in the terms set forth in the testament. It appears to me that that decree cannot be construed as directing that the provision in the testament should be innovated by converting the right from one of annual-rent of a fixed amount for all future time into a right of ownership of lands yielding rents of precarious amount. Such an innovation would have been beyond the power both of the Court and of Sir Alexander, and it cannot be presumed that they intended so to exceed their powers, even if the language of the decree were more obscure than it is. Sir Alexander Irving was taken bound to perform two different things. One was that within seven years from the date of the decree he should provide, at whatever cost to himself, lands worth at least £1000 Scots of yearly rent, which should be vested in himself by an heritable and irredeemable title—the consideration he was to receive for that obligation having been that he was to keep £10,000, and to appropriate to his own use all the profit he could make out of it during the seven years. The other thing was that Sir Alexander was to make the investment prescribed by the testament by creating on the land so to be provided a right of annual-rent in favour of the bursars. And as in the event of the fund in his hands, with its accumulations, being more than sufficient to provide lands worth £1000 Scots yearly, the reversion was to belong to himself, so in the event of the land which he might provide being of more value than was sufficient for the payment of the annual-rent, the reversion—that is, the right of fee under burden of the annual-rent—was also to belong to him. The only remaining question is whether Sir Alexander himself converted the claim into a right of fee by the bond of 1656. The only obligatory part of this bond is that by which he bound and obliged himself, and his heirs and successors, "to make, seal, subscribe, and deliver to the said ten scholars, and their successors to the said burses, all contracts, dispositions, charters, procuratories of resignation, and other securities requisite, containing all clauses necessary, with absolute, and ample warrandice at all hands, and that at what time and how soon I and my foresaids might be desired." I am of opinion that if a bond of annual-rent had been granted by Sir Alexander the obligation contained in this bond would have been duly implemented. His Lordship then proceeded to examine the documentary evidence in order to ascertain whether anything took place after 1656 which would entitle the bursars to demand the fee of the lands instead of such a right of annual-rent. He alluded, in particular, to the following facts as the leading features of the usage:—1. The right to the fee of the lands of Kinmuck has remained in the family of Drum during all the period since the date of the decree. 2. The persons who have been in possession letting the lands and drawing the rents have been the defender's predecessors and himself, and not the bursars, who have never received more than the annual payment of £1000 Scots, or £83, 6s. 8d. sterling. 3. A portion of the lands provided by Sir Alexander Irving in 1633 was afterwards sold by the proprietor of Drum, but the price was never claimed by the bursars or any one for their behoof. Grassums also were received at the renewals of the leases by the Lairds of Drum; but these were never claimed by the bursars, although, if they had been the owners of the lands, they would have been entitled to them. 4. In 1808 the then Laird of Drum wrote a letter to the Principal of Marischal College intimating that in 1816 he would be able to make up to the bursars the full annual payment of £83, 6s. 8d. which they had been receiving to the extent of only £57; and adding, "As the town of Aberdeen refused the money when offered, and both they and the college have an interest in the payment of the bursaries, I expect that both will relieve me of all claim on the lands after the payments are made up to £1000." To which letter the Principal replied—"I have now the pleasure of informing you that we unanimously acceded to your proposal, but we are

at the same time of opinion that, as the town of Aberdeen had refused the offer when it was formerly made, that body had thereby renounced their right of interference. How far this opinion is well founded you will judge for yourself." Accordingly, although since 1808 the rents have considerably exceeded £1000 Scots yearly, no claim for the surplus was ever made. 5. Certain annual burdens, duties payable to the Crown, minister's stipend, schoolmaster's salary, &c., were paid out of the rents, and only the residue was accounted for to the bursars. But this only took place when the whole of the rents drawn were less in amount than £1000, and by law such burdens are payable proportionally by annual renters and owners. (Fleming, M. 8279, and Bruce, M. 11,185.) Hence, such burdens fell wholly on the annuitants when the whole of the rents were absorbed in their right. His Lordship concluded—On the whole, the usage, although in some respects it may not be easily reconcileable with the construction which the pursuers put upon the three documents upon which the action is founded, does not appear to me to be conclusive in favour of either party, and therefore the true meaning of the documents must be ascertained from their own terms. And as these documents, according to what appears to me to be their true meaning, do not support the claim of the pursuers, I think that decree of absolvitor should be pronounced in favour of the defender.

Lord DEAS—Although the conclusions of this action are multifarious enough, they resolve substantially into a conclusion that the lands of Kinmuck belong to the pursuers for behoof of certain bursars. The only question raised is that of absolute property in the lands. It is incumbent, of course, on the pursuers to make out the case they allege. They refer, in support of their claim to the lands, to three documents—the will of 1629, the decree of 1633, and the bond granted in 1656—all of which, they say, are to be interpreted by the usage which has followed upon them. A great deal of the discussion before us had reference to the applicability of the positive and negative prescription to this case. I am very clearly of opinion that there is no room for the defender's pleas of prescription. On that point I have no doubt. The material question is, What is the legal import and effect of the three documents? First, in regard to the will, it is all important to observe that what is given by it is a sum of money, and it disposes of this sum by stating that it is to be divided into certain specific sums, which altogether amount to £1000 Scots. It does not provide that the annual-rent is to be bestowed in certain proportions, but specifie sums are to be paid. The testator did not contemplate or provide for the possibility of the sum left exceeding or falling short of the specific sums which he mentioned. I think this is one of the things which made the magistrates decline to accept the trust. They thought that if they did so they would require to make good the whole sum. All parties at the time so interpreted the will, as is proved by the correspondence. The testator's son also looked on it in that light. His widow only wished to see carried out what she knew to be her husband's will, but her son and the magistrates were each desirous to throw the responsibility of the thing on the other. Latterly, at the request of the magistrates, the widow handed over the money to her son; but it is not an immaterial circumstance that the responsibility was thus thrown upon him very much against his will. The result was to devolve on him the responsibility which the testator had devolved on the magistrates, and it is to be assumed that he undertook the same obligation as the magistrates must have undertaken had they accepted the trust. That obligation was to invest the money in land in such a way that the bursars should get certain specific sums. It is very important to attend to what a bond of annual-rent then was. The form of it originated before the Reformation, at a time when the taking of interest was illegal. The oldest form was the "rent charge;" but the bond of annual-rent soon followed it. It contained no clause of reversion and no personal obligation, because, had these been inserted, the objection would have at once arisen that there was an illegal taking of interest. It therefore gave the granter no right except to the rents of the lands. He was infeft not in the lands but in a certain sum leviable from them. It was like a wadset. If the rents fell short there was no recourse against the granter. This is material, because under a bond of annual rent the bursars would have got less whenever the rents fell short. Yet at the time of the correspondence the granting of a bond of annual-rent would have clearly exonerated the magistrates and the defender's author from all obligation under the will. Now, he had no power to make the charity worse. The question is, Did he afterwards bind himself so as to give it any better security? That question turns on the decree and the bond. It turns out now that the value of land has risen, that the rents yield more than the annual-rent, and it is better to get the lands than the bond. But it might have been otherwise. Was there, then, a transaction by which the charity would have been bound to take less had the rents fallen? It is not very easy to suppose that this was intended. This would have been a change in the purposes of the trust, and it is for the pursuers to show clearly that it was made. We must therefore consider the object of Sir Alexander Irving in raising the action of 1633. His object plainly was not to make the charity either better or worse, but to get quit of the responsibility he had unwillingly undertaken. That was the purpose of the action. No doubt one of the alternative conclusions of the action imports that it should be lawful for the pursuer of it to buy lands for the charity. On this action being brought, there seems to have been a negotiation which it is not very easy now to understand. In our modern practice, when a defender does not appear the pursuer generally gets all he asks; but it does appear that the Court—perhaps because the interests of a charity were involved—did look into the rights of the question, and to some extent took the matter into its own hands. But it also appears that the magistrates did not in this action contend for a property in the lands. All that they stood out for was that the whole sum should be provided to the bursars, and that they themselves should have some share in the patronage. If a bond of annual-rent had been put into the process it does not appear that either the magistrates or the Court would have objected. Well, the decree is pronounced in 1633, and nothing is done until 1656, when Sir Alexander voluntarily executed the bond which remains in his repositories undelivered, and is not put on record until 1741. That bond, after narrating the decree, states that Sir Alexander had acquired the lands of Kinmuck; but it is very material to keep in view that what he had the option of doing under the decree—namely, to buy lands—he did not do. The lands of Kinmuck had been in the possession of the Lairds of Drum since 1596. There was no judicial investigation as to what these lands were worth. He just executed the deed and put it into his desk. Was the charity bound by this deed? If it was not bound, the defender is not bound either. If he had granted a bond of annual-rent, that, I think, would have been full implement of all his obligations. The only difficulty in the case may be said to be that if Sir Alexander Irving was a trustee for the charity, which, to some extent at least, he was, and if he invested the funds of the trust in a way which the truster had not authorised, he might benefit the charity but not himself. But, before applying that very strict rule, we must be sure that he did this. He did not buy lands. Nay, more, he did not even dispone lands. If he had disponed we would then have seen whether the disposition was absolute or not. No formal deed whatever followed upon the bond, and the whole uncertainty

arises out of this. It might have been a disposition or a bond of annual-rent, and if, as I have said, it had been the latter, this would have been quite sufficient to discharge the obligation. But this was not done, and in the bond there are no words which by the law of Scotland will convey heritage. They may imply an obligation to dispone, but they do not dispone. That essential word is not in the bond, and it is as open to repudiation now as on the day it was granted. As regards usage, the pursuers don't say they ever got more than £1000 Scots in any year. They sometimes complain that they got less; and, on the whole, I cannot say that I find in the usage anything inconsistent with the conclusion I have arrived at that the defender should be assoilzied.

Lord ARDMILLAN concurred. He had no doubt that the will bore the construction put on it by Lord Curriehill. Had a bond of annual-rent been immediately afterwards granted, Sir Alexander would undoubtedly have fulfilled the intention of the testator. Both in the decree and the bond the testament was adopted and held as the ruling deed, and therefore unless its purposes had been clearly innovated, it must still be held to be so. He also agreed that there was no room for pleas of prescription; and had it been necessary to decide that point he could not have supported the defender's contention.

The LORD PRESIDENT said he had had very great difficulty in arriving at a conclusion. He agreed that the original deed had reference to the annual payment of a certain fixed sum. The decree was the least clear of the three documents. It was not easily read. He was not sure that there was any certain reading of it, or any construction free from doubt that could be put upon it. But he was of opinion that the bond which followed rather pointed in the direction of the original will than of the decree, and that this was the more intelligible explanation of it. The delay which took place in the investment was a circumstance in favour of this construction. He was not to invest the money for some time, and the profits during the interval while the money remained in Sir Alexander's own hands, and at his own disposal, were not to be accumulated and invested along with the principal sum, but were to belong to himself. After the bond had been granted, several proceedings took place which could not be very well explained consistently with the arguments of either side. In particular, there was the letter from the defender's ancestor in 1808, as to which he had been anxious to hear the views of his brethren, because it had caused a great deal of difficulty in his mind. This letter had been founded on on both sides. On the one hand it was contended that Sir Alexander knew that unless he were secured by some such proceeding he was liable for the whole rents, and on the other that he had here come to a definite understanding and final agreement with the University as to his liability. He did not think that any such transaction would have relieved Mr Irving from any of his responsibilities. But he thought that there were other reasons which might have prompted the writing of the letter. It was admitted that the full sums due under the will had not been paid, and the writer might have been reasonably apprehensive that he might be called upon to pay over any excess of rents to make up the deficiency. It was also a fact that he had been lately taking grassums, and he could not be sure that the University might not, at all events, make some claim upon him on this account. As to the other matters he thought they were all consistent with the defender's view, although he was bound to say that many of them were also consistent with that of the pursuers.

SECOND DIVISION.

MURRAY'S EXECUTORS *v.* FORBES (*ante*, p. 93).

New Trial. Motion for a new trial (1) on the ground that the verdict was contrary to evidence, and (2) on account of an alleged *instrumentum noviter repertum*, refused.

Counsel for Pursuers—The Solicitor-General and Mr Shand. Agent—Mr Alexander Morrison, S.S.C.

Counsel for Defender—Mr Gordon and Mr Watson. Agents—Messrs Webster & Sprott, S.S.C.

The following issue in this case was sent to a jury at the last jury sittings:—

"It being admitted that on or about the 14th day of January 1859 the defender received from the said deceased Ann Murray a deposit-receipt for £320, granted by the agent of the Union Bank of Scotland at Banff, dated 5th February 1858, endorsed blank by the said Ann Murray:

"Whether the defender uplifted from the branch of the Union Bank of Scotland at Banff the sum of £320, contained in the said deposit receipt, with £6, 1s. 2d. of interest thereon; and is resting owing the said sums of £320 and £6, 1s. 2d., with interest, since 14th January 1859, to the pursuer, or any part of these sums?"

The jury unanimously returned a verdict for the pursuer.

The defender moved for a rule to show cause why a new trial should not be granted, and his motion was supported on two grounds. He said (1) that the verdict was contrary to evidence; and (2) that since the trial he had ascertained that a letter had been written by his agent to the agent of the pursuers, which would have had a most important effect on the minds of the jury. The Court refused the motion on both grounds. The defence which the defender undertook to establish was that he had paid over the money to the deceased Miss Murray; and if that defence had been proved, it was conclusive. But he attempted to prove it by the evidence of himself, his brother, and his two sisters. There was some other evidence, but it was, independent of the evidence of the defender and his brother and sisters, altogether insufficient to establish the defence. Prior to the year 1853, the evidence of the defender himself could not have been admitted, and prior to 1840, that of his brother and sisters was in the same situation. When these relaxations in the law of evidence were proposed to be introduced, it was objected that they would lead to the increase of perjury. But the answer to that argument was that the jury would always have an opportunity of seeing the witnesses, and detecting perjury when it was committed. The matter on which the jury in this case had to form an opinion was the credibility of the defender and his witnesses, and they formed the opinion that the evidence was not credible, because, if true, it undoubtedly established the defence. It was not for the Court to usurp the functions of the jury by reviewing their verdict in regard to a matter so peculiarly within their province. In reference to the other ground, *instrumentum noviter repertum* was a good ground for asking a new trial. But there were two reasons for not sustaining it in this case. In the first place, the document was not material as evidence. The utmost that can be said of it is that if it had been before the jury it would have disarmed an observation which might have been made on its absence. But, in the second place, the letter is not *instrumentum noviter repertum*. It is laid before us as it appears in the letter-book of the agent of the defender himself, and must have been known to exist at the time of the trial by the defender or his advisers.

The LORD JUSTICE-CLERK mentioned the following facts in regard to this case as proving the superiority of jury trials over proofs by commission as a means of ascertaining facts:—"The Sheriff-Substitute of Banffshire allowed a proof on 9th January 1862, which we thought it right to quash as incompetently taken. This proof was taken by commission. Forty-seven witnesses were examined; their evidence occupies 100 printed pages, and the proof was advised by the Sheriff-Substitute on 25th May 1864, more than two years after it was allowed. On the other hand, when it was resolved to send the case to a jury,