a style improper, either for married or unmarried parties, and were 'simply loathsome' to right-thinking persons from their immodesty and immorality; or it makes one or more of these false and calumnious representations or insinuations. Although the history of her whole life from childhood was fully investigated, in order that her character might be assailed, and was made the subject of lengthy evidence in the proof in the conjoined actions upon which the House of Lords gave judgment, the said article falsely asserts that 'she is an adventuress, launched into the world nobody knows how, with a previous history that has never been told,' insinuating, and intending to insinuate, by these false and calumnious assertions, that her previous history had been of so disreputable a character that it could not be told without shocking public decency; or making some similar insinuations prejudicial to the pursuer's moral character." She further states that the said article contains statements for the making of which there was and is no probable cause, and the said statements are malicious, and are not justifiable as fair newspaper comments upon proceedings taking place in a court of justice.

The defenders' pleas, so far as affecting the jury trial, were as follow:—

3. The article complained of is not defamatory of the pursuer, and is not actionable at her instance,

4. This action cannot be maintained, and the defenders are entitled to be assoilzied, in respect the article complained of is within the limits of fair criticism.

LORD JERVISWOODE charged the jury that a newspaper was entitled to report the proceedings in a court of justice in the ordinary case where the court was open; and they all knew that that was done every day. But while a newspaper and the publishers of a newspaper were entitled to report the proceedings of a court, if they went beyond the mere report of these proceedings, and if they made comments on the report of the proceedings of the court of justice, then he had to state in law that they had no special privilege in that matter. If they made comments on the conduct of the parties, and if any individual conceived he was injured by these comments, then it was a question for the jury to determine whether these were fair and right comments, and whether the publishers were justified in making them. That was the question for the jury, and the publishers had no privilege as regarded that particular matter. He had no doubt that the jury would be of opinion that the article set forth in this schedule as taken from the newspaper was an article which *prima facie* —that was to say, at the first blush of reading it—detracted from the pursuer's character. He need not read the article fully, but there were statements in it which would probably strike them as in some degree detracting from the pursuer's character. There might be something in this article against Major Yelverton as well as against Miss Longworth; but with that neither he nor the jury had anything to do. The case had reference to Miss Longworth alone. Now, the defence made on the part of the newspaper on this subject was that this was a legitimate comment on the proceedings in this case, and these proceedings were so far before the jury for the purpose of this action. His Lordship proceeded to quote various passages from the correspondence which had taken place between the parties, and the opinions of the judges upon them, both in the Court of Session and the House of Lords. He concluded by saying—Gentlemen, it is for you to say, with reference to the whole of these letters, whether you think the newspaper was warranted in using these expressions as to the "interests of morality," and so forth. I think it would be wrong in me, after the very long and able addresses you have heard, to detain you by going through all the documentary evidence which has been submitted to you at so great length. The question which you have to consider is whether the comments made by this newpaper are fair, looking to the whole circumstances of the case, the position of the parties, and the public discussion of the case within the courts of justice, or are they the reverse? Are they unfair comments—such comments as you think the publisher or conductors of this paper ought not to have made? If you think them fair, you will give effect to that view. If you, on the other hand, think the newspaper has gone beyond that line, and has published remarks on the pursuer's character which are not warranted in the circumstances, then it will be your duty to return a verdict for the pursuer.

After an absence of nearly six hours, the jury, by a majority of nine to three, returned a verdict for the defenders.

Thursday, Dec. 7.

FIRST DIVISION.

PETITION—JAMES COLLIE.

Process. Form of procedure under the "Companies' Act 1862."

Counsel for Petitioner—Mr Fraser. Agents—Messrs Murray & Beith, W.S.

The Petitioner was appointed by the Court, on 5th March 1864, official liquidator of the Fraserburgh Arctic Seal and Whale Fishing Company, which company the Court ordered, on 24th February 1864, should be wound up under the Companies Act, 1862. The petitioner having after his appointment investigated into the affairs of the company, found that there was an apparent defficiency of £838, 13s. 3d. He therefore, on 9th June 1865, presented a petition for powers to proceed with the winding up, and *inter alia* to settle a list of contributories, and to make a call on each of them at the rate of £9 per share. This power having been granted, the petitioner made the call authorised, which has been paid by some of the contributories but not by others, and he now prayed the Court, in terms of section 121 of the Companies Act, to pronounce decree against those who had failed to pay the call, for the sums due by each, with interest, "in the same way and to the same effect as if they had severally consented to registration for execution on a charge for six free days, of illegal obligation to pay such sums and interest, and to grant warrant for extracting the said decree immediately, and to declare that no suspension thereof shall be competent except on caution or consignation, unless with special leave of the Court or the Lord Ordinary."

The Court granted the prayer of the petition.

UNIVERSITY OF ABERDEEN *v.* IRVINE.

Trust—Mortification—Annual Rent—Positive and Negative Prescription.

Counsel for Pursuers—The Solicitor-General, Mr Patton, and Mr John Hunter. Agents—Messrs Patrick, M'Ewen, & Carment, W.S.

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

This is an action of declarator and reduction at the instance of the University of Aberdeen, the Lord Provost, Magistrates, and Town Council of Aberdeen, as managers and patrons of the Grammar School of Aberdeen, the masters of the said Grammar School, and certain bursars in the University and Grammar School, against Mr Alexander Forbes Irvine of Drum. The object of the action is to declare the pursuers' right to the Lands of Kinmuck in Aberdeenshire, which are said to be worth about £700 a year.

It appears that an ancestor of the defender, Alexander Irvine of Drum, made the following provisions by his testament and last will, dated in 1629, viz.:—

"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 Marian 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 comptable for the said annual rent to be employed as is above appointed in all time coming."

The testator died soon after executing this deed, and was succeeded by his son, Sir Alexander Irving. When the legacy was communicated to the Provost, Bailies, and Counsel of Aberdeen, they, on 9th May 1630, "considering that their reeeipt of the said legacy of £10,000 would make the town liable in time coming perpetually in yearly payment of £1000 for the annual rent thereof, to be bestowed for the maintenance of the said ten bursars, which the town could not undergo without their great hurt and prejudice, refused to receive the said sum on the conditions above written." But "the Council thought it meet and expedient that the Provost and Baillies should write, and direct their letter to the said Marion Douglass, desiring her to deliver the said £10,000 to the said Sir Alexander Irving, then of Drum, his son, upon his acquittance to be given thereupon to her; to the end he may ware the same on profite to the use foresaid whereunto the same was destinate and left, and be comptable and answerable therefor till such time as the Council and he may agree on reasonable conditions thereanent, as said is."

In 1633 Sir Alexander Irving raised an action in the Court of Session, which concluded 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 wellholden 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 pursuers averred that Sir Alexander appropriated to his own use the said sum of £10,000 Scots, and in consideration thereof, in 1656, mortified by deed the lands of Kinmuck and others for the use and behoof foresaid. The lands so mortified were then of the value of £10,000 Scots, and no more. In this deed Sir Alexander 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."

The defender contends that this deed was only a bond granted for the purpose of securing to the bursars the annual payment of £1000 Scots, which sum he is and has always been willing to pay as his ancestors have always done. The deed does not contain, he says, any absolute conveyance of the lands, and it was never followed by possession or acted on in any way. On the contrary, the lands have remained all along in the possession of the Irvines of Drum, as part of the estate of Drum.

The defender is now in possession, under a deed of entail, executed by his grandfather in 1821, which (along with the deeds following upon it) the pursuers now seek to reduce, on the ground that it proceeded *a non habente potestatem*. In the course of this process Mr Irvine has made up another title to the lands by serving himself as heir in special to Alexander Irvine of Drum, who died in 1735, and then stood infeft. He thus holds, he maintains, a double or cumulative title to the lands of Kinmuck.

The pursuers plead that in virtue of the decree of 1633, and the deed of mortification of 1656, they are entitled to the lands and the whole free rents thereof that the entail of 1821 forms no good title for the reason already stated; and that even if the title which the defender has expede *pendente processu* were valid, it could only vest him with the lands subject to the obligation of implementing the bond and deed of mortification granted by his ancestor.

The defender pleads that the pursuers have no title to sue, in respect neither they nor their predecessors ever held any title to the lands, or ever had any possession thereof: that he, in virtue of his titles and of the possession, by himself and his predecessors, for more than forty years, has a complete prescriptive title to the lands; and that the bond and decree founded on by the pursuers never having been followed by possession or acted on in any way for far more than forty years, all claim thereon is excluded by the negative prescription.

The Lord Ordinary (Kinloch), on 2d December 1863, found that according to the sound construction of the testament of 1629, the decree of 1633, and the deed of mortification of 1656, the whole beneficial interest in the lands of Kinmuck was transferred and made over for behoof of the bursars, and that the pursuers were entitled to have this right declared and enforced against the defender, as vested with the feudal title to the lands. His Lordship held that so far from its being intended to give the bursars a definite sum of £1000 Scots per annum, the object of all concerned, when the lands were mortified, was to avoid this result, which at the time was thought to involve a serious responsibility. Hence it was that the money was laid out on lands, the rents of which are expressly declared to come in room of the interest of the money, all concerned being discharged of further liability. If the rents did not amount to £1000 Scots per annum the bursars of course suffered, as by the necessity of all such cases. If the rents exceeded this sum it was only the fair counterpart that they

should enjoy the benefit of the excess. The clear object of the transaction was simply to mortify these lands, that the objects of the mortification might enjoy their whole proceeds, whatever these might be. In regard to the defender's pleas of prescription the Lord Ordinary held that they were not applicable to this case. The deed of 1656 substantially created a trust right in the person of Sir Alexander Irving and his heirs. The feudal title remained in their person on their original absolute right, and the lands might have been alienated to a *bona fide* purchaser. The rule is fixed that so long as the trust-subject remains entire in the hands of the trustee no lapse of time will bar a claim to it by the beneficiary. The whole foundation of the negative prescription, which is presumed dereliction of the right, fails in the case of property still subsisting in the truster's hands. (Barns *v.* Barns' Trustees, 19 D. 626). In regard to the positive prescription pleaded, his Lordship observed, that as in a question with the beneficiaries the defender's title was not an absolute one, because it was qualified by a concurrent deed, which contained a declaration of trust; but besides there had not been, on the defender's own showing, possession corresponding to an absolute title, because what he maintains is that to the extent of £1000 Scots per annum the rents had been all along drawn for, and applied to the use of the beneficiaries. These circumstances prevented the operation of the positive prescription.

The defender reclaimed, and on 30th March 1864, the Court, after a debate, allowed to both parties a proof before answer of their respective averments on record. This proof was led, and the case has been again fully debated. The Court to-day made avizandum.

In the course of the renewed debate a new view of the case was started by Lord Curriehill. His Lordship suggested that the Court might possibly have granted the decree in the action at the instance of Sir Alexander Irving in 1633 on the understanding that Sir Alexander should grant a bond of annual rent over his lands of Kinmuck for £1000 Scots, which was, under the will of 1829, to be annually paid to the bursars. Such deeds were very common in these days. In this view, the bond of 1656 would create a mere burden over the subjects to the extent of this annual payment.

Thursday, Dec. 7.

SECOND DIVISION.

EARL OF ROSSLYN *v.* N. B. RAILWAY CO.

Teinds—Public Burden—Minister's Stipend—Augmentation—Clause of Relief.—A proprietor of lands conveyed them to a railway company, but he did not convey the teinds. He bound himself to relieve the company of all existing casualties and public burdens, except poor-rates and prison assessment, which, together with any augmentations of existing burdens, and all new burdens, were to be paid by the company. Held (aff. Lord Barcaple) that this clause did not relieve the company from the payment either of old or augmented stipend, in respect it referred only to burdens on the lands.

Counsel for the Pursuer—Mr Gordon and Mr Keir. Agents—Messrs Dundas & Wilson, C.S.

Counsel for the Defender—The Solicitor-General and Mr Shand. Agent—Mr Stodart Macdonald.

This is a question in the locality of Dysart between the North British Railway Company and the Earl of Rosslyn, who is possessed of considerable property in the parish. The Edinburgh, Perth, and Dundee Railway Company some time ago acquired from the Earl of Rosslyn a portion of his ground, and on 10th November 1851 a decree-arbitral was pronounced by the late Mr James Horne, land surveyor, in a submission between the parties fixing the price to be paid by the railway company. This decree contains the following clause—"And further, I ordain that the feu-duty, if any, and public and parish burdens exigible from the portions of ground acquired, extending to 34·457 acres and 1·106 acres, as aforesaid, the gross rental of which, without deductions from such burdens has formed the basis of my calculations of its value and of the price herein allowed for it, shall in all time coming be paid by the said Earl of Rosslyn, with the exception of the poor's rates and prison assessments, in respect of the lands acquired by them as aforesaid; which poor's rates and prison assessments shall be paid by the said company." In March 1856 the railway company obtained from the Earl of Rosslyn a disposition of, *inter alia*, the said ground, containing the following clause—"And I, the said James Alexander St Clair Erskine, Earl of Rosslyn, bind myself and my foresaids to free and relieve the said Edinburgh, Perth, and Dundee Railway Company and their foresaids of all existing feu-duties, casualties, and public burdens at and prior to the said terms of entry respectively" (being in 1846) "and also in all time thereafter, with the exception of poor's rates and prison assessment which have been or shall be laid or assessed on the said railway company, in respect of the said portions of ground hereby disponed, which poor's rates and prison assessments, together with any augmentations of existing burdens, and all new or additional burdens to be imposed on the said land, are to be paid by the said railway company from and after the foresaid terms of entry or the terms of the imposition of such augmentations or new or additional burdens." In 1863 the minister of Dysart obtained an augmentation in a summons in which the railway company was not called. The Earl of Rosslyn's lands were localled upon for the whole of the old stipend, and none of it was localled on the lands of the railway company. The Earl of Rosslyn complains of this, and also that too large a proportion of the augmentation was localled upon him, and that none of it was localled on the lands of the railway company, whereas these should have been localled upon *primo loco* as free teinds. The railway company pleaded that, in respect of the terms on which their predecessors purchased the lands belonging to them from the Earl of Rosslyn, and of the provisions of the decree-arbitral and disposition, no part of the old stipend ought to be localled on their lands, and that the Earl of Rosslyn having paid the old stipend since the date of the conveyance to the railway company without objection, he was now barred from maintaining relief for any part of the old stipend. The railway company further pleaded that it was not liable in any part of the augmentation. The Lord Ordinary (Barcaple) found that the railway company were not entitled to be relieved from payment of stipend. To-day the Court adhered.

The LORD JUSTICE-CLERK said—I see no reason for interfering with the interlocutor of the Lord Ordinary. It is impossible to resist his conclusion. This railway company buys a piece of land; they have got a conveyance of the land, but there is no conveyance of teinds. The obvious meaning of a clause of relief, such as occurs here, whether it be prospective or retrospective, is, that the purchaser is to be relieved of impositions on the subjects conveyed; but the subject here conveyed is land, and not teinds; and stipend being a burden on teinds, an obligation to be relieved of that burden could not be comprehended by this particular clause, as it would be relieving him of the burden on a subject which was not conveyed. It is impossible to make anything of this clause unless it be made out that there is a conveyance of teinds, and that is not maintained.

The other Judges concurred.