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.