

had to the special circumstances of each of them. Plainly, it would be unwise to add to a superfluous amount of endowment for female students. But we are told by the governors of the Spence Bursary Trust, who are the primary guardians of the endowment, and who are fully alive to the questions quoted in these papers, that the circumstances call for an extension to female students as beneficial and appropriate. Our reporter thinks the same. The University Court of Edinburgh University say the same; and the only authority of a contrary opinion is the University Court of the University of St Andrews.

But then that Court has adopted merely a negative resolution — not to approve of the alterations proposed. And they have arrived at that conclusion by a majority of five to four (two members declining to vote) in a court of eleven. No reasons at all are given for this opinion. It is not said that anything in the circumstances of the University of St Andrews make a new bursary for women inappropriate; and the reporter, being confronted by the resolution, says that he cannot find anything which renders the extension inappropriate to St Andrews.

I entertain a profound respect for the Court of each University, and if we had had any reasons for declining to approve, founded on the peculiar circumstances of St Andrews University, I should have paid the utmost regard to them. But there is nothing of the kind before us.

I think that, there being an almost equal balance of opinion, we cannot treat this as a matter where the mere fact of the decision of a majority should be allowed to influence us not to pursue the course which the Legislature lays down as a general rule.

LORD KINNEAR—I agree that as regards all the other alterations proposed by the governors of this trust no question of difficulty arises. My only difficulty is with reference to the extension of the bursaries to students of both sexes in St Andrews University, and it is founded solely on the statement of the Court of that University of their resolution not to approve of the proposed extension. There can be no doubt that such a question as this is a very proper one for the consideration of the Court of the University which is benefited by an endowment, and it is equally clear that the circumstances of different universities with reference to such endowments may differ so widely as to make it proper in the one case to extend a benefit to female students, which in the special circumstances of another case it might be more expedient to confine to young men. There can be no absolute rule applying equally to all universities and all bursaries, and accordingly I have some difficulty, in so far as regards St Andrews, in making a change which the University Court does not approve. I must, however, agree with your Lordship that we have no material for forming any judgment of our own upon the resolution of the University Court, and our reporter cannot find any, for they have stated no reasons

for the conclusions at which they have arrived. If any had been stated, we should have had to consider whether they were of sufficient weight to counterbalance the considerations advanced on the other side. As none have been stated, it comes to this, that the only reason against our approving the extension is that the University Court, by a majority of five to four, have withheld their approval. I am not prepared to dissent from the conclusion which your Lordships have reached, although I have difficulty in disregarding the opinion of the University Court, because we cannot speculate for ourselves on the reasons which may have influenced the University Court, and since they have given no reasons for withholding their approval, we must assume that there were none which they thought it necessary for us to consider. The result seems to be that no such objection has been formulated as would justify us in refusing to give effect to the general policy of the Act to which your Lordship has adverted.

LORD M'LAREN was absent.

LORD ADAM concurred.

The Court approved of the proposed alterations and variations in the scheme.

Counsel for the Petitioners — Neish.
Agents—John C. Brodie & Sons, W.S.

Friday, October 22.

SECOND DIVISION

INNES v. COGHILL.

Succession—Collation—Intestate Moveable Succession Act 1855 (18 and 19 Vict. cap. 23), sec. 2—Consanguinean—“Issue.”

By section 2 of the Intestate Moveable Succession Act 1855 it is enacted—
“Where the person predeceasing would have been the heir in heritage of an intestate leaving heritable as well as moveable estate had he survived such intestate, his child, being the heir in heritage of such intestate, shall be entitled to collate the heritage to the effect of claiming for himself alone, if there be no other issue of the predeceaser, or for himself and the other issue of the predeceaser, if there be such other issue, the share of the moveable estate of the intestate which might have been claimed by the predeceaser upon collation if he had survived the intestate.”

The child of a predeceaser who was the heir in heritage collated in terms of this section with the two next-of-kin of the intestate. At the date of the intestate's death there were alive two other descendants of the predeceaser, viz., a child of his second marriage and a child of a deceased younger son of his first marriage.

Held (1) that the child of the second

marriage was entitled to a share of the moveable estate taken by her half-brother, the heir, on collation; (2) that the grandchild was "issue of the predeceaser" in the sense of the statute, and was also entitled to a share; and (3) that collation did not operate conversion of the heritage, and that "the share of the moveable estate," the benefit of which the heir was bound to communicate to the other issue of the predeceaser, did not include the heritage.

By section 2 of the Intestate Moveable Succession (Scotland) Act 1855 it is enacted—"Where the person predeceasing would have been the heir in heritage of an intestate leaving heritable as well as moveable estate had he survived such intestate, his child, being the heir in heritage of such intestate, shall be entitled to collate the heritage to the effect of claiming for himself alone, if there be no other issue of the predeceaser, or for himself and the other issue of the predeceaser, if there be such other issue, the share of the moveable estate of the intestate which might have been claimed by the predeceaser upon collation if he had survived the intestate, . . . and where in the case aforesaid the heir shall not collate, his brothers and sisters and their descendants in their place shall have right to a share of the moveable estate, equal in amount to the excess in value over the value of the heritage of such share of the whole estate, heritable and moveable, as their predeceasing parent, had he survived the intestate, would have taken on collation."

On 26th December 1895 Andrew Liddell Innes died at Saughton Hall near Edinburgh, unmarried and intestate. He left heritable estate, consisting of house property in Edinburgh of the value as realised by sale of £2485. He also left moveable estate of the value, after deducting estate and residue-duty and funeral and other expenses, of £21,685, 9s. 10d.

The heir in heritage of the deceased Andrew Liddell Innes was Peter Innes, the eldest son of Robert Innes, who was a cousin-german of Andrew Liddell Innes. Had Robert Innes survived Andrew Liddell Innes he would have been his heir in heritage. At the date of the death of Andrew Liddell Innes two other descendants of Robert Innes were alive, viz.—(1) Mrs Isabella Janet Innes or Coghill, a daughter of Robert Innes by his second marriage, and thus a sister consanguinean of Peter Innes; and (2) Mrs Margaret Calder Innes or Stewart, the only child of the deceased James Innes, second son of Robert Innes by his first marriage.

The heirs *in mobilibus* of Andrew Liddell Innes were his two cousin-germans, Mrs Anne Innes or MacBeath and Mrs Mary Ann Gunn or Gordon. They were duly discerned executrices-dative *qua* next-of-kin of the deceased, and as such obtained confirmation of his moveable estate.

Peter Innes resolved to exercise the right conferred on him by the section of the Act above narrated and collate the heritage of

the deceased with the moveable estate. His claim to do so was admitted by the executrices and next-of-kin. He made up his title to the heritable estate and sold it at public auction for £2485. No part of the price thus realised was paid to the next-of-kin, but the whole sum was put to the credit of Peter Innes in account with them, and he further received from them part of the proceeds of the moveable estate. There remained due to him a considerable sum in order to make up, along with the proceeds of the heritage, the full amount of one-third of the deceased's whole estate.

In these circumstances questions arose as to who were entitled to share in the moveable estate which Peter Innes had taken on collation, and the amount of their respective interests therein.

For the settlement of these points a special case was presented to the Court by (1) Peter Innes, (2) Mrs Isabella Janet Innes or Coghill, and (3) Mrs Margaret Calder Innes or Stewart.

The questions at law were—" (1) Whether the first party is bound on collation to communicate to either of the second or third third parties any share of the moveable estate of the intestate Andrew Liddell Innes taken by him on collation? (2) In the event of the preceding question being answered in the affirmative, whether the third party is entitled to participate in the share of the moveable estate of the intestate Andrew Liddell Innes which might have been claimed by the predeceaser Robert Innes upon collation if he had survived the intestate, or whether such share falls to be divided between the first and second parties to the exclusion of the third party? (3) Whether, in computing the share, if any, of the moveable estate of the intestate which falls to be divided by the first party between himself and the other issue of the predeceaser Robert Innes, any sum falls to be deducted as the value of the intestate heritage from the one-third of the intestate's whole estate, heritable and moveable, taken by the first party upon collation? (4) In the event of the preceding question being answered in the affirmative, whether the whole value of the intestate's heritage falls to be deducted from said one-third of the intestate's whole estate, or whether only one-third of the value of said heritage falls to be so deducted?"

Argued for the first party—(1) The second party was not entitled to a share of what he took on collation, on the principle that the full blood excludes the half—Bell's Prin., sec. 1861. (2) The third party was not entitled to a share, because the expression "issue" in section 2 of the statute was limited to children of the predeceaser, and did not extend to children's descendants—*Young's Trustees v. M'Nab*, July 13, 1883, 10 R. 1165. Therefore he was entitled to the whole of the estate taken on collation. (3) In any event, he was not bound to divide between himself and the other issue of the predeceaser more than the difference between the value of the heritage and one-third of the whole estate. Taking the value of the heritage at £2485, and the value of

the moveable estate at £21,685, the value of the whole estate was £24,170, and the one-third thereof £8056, 13s. 4d. Therefore the sum which he was bound to divide in equal shares between himself and the other issue of his father, in the event of his being bound to make any division, was £5571, 13s. 4d., being the difference between £8056, 13s. 4d. and £2485. In collation there was no constructive conversion—the heir retained his character as heir and his heritage as heir. The character in which he took was not affected, although the law allowed him to claim so much of the moveable estate as would equalise the share which he received with that of each of the next-of-kin—*Fisher's Trustees v. Fisher*, December 5, 1850, 13 D. 245, opinion of Lord Moncreiff, p. 259.

Argued for the second party—(1) She was entitled to participate in the benefits of the statute as one of the “issue of the predeceaser.” (2) As the heritable estate of the deceased was collated, it was constructively converted, and the moveable estate falling to be divided among the issue of the predeceaser extended to £8056, 13s. 4d., being one-third of the whole estate, heritable and moveable, of Andrew Liddell Innes. Alternatively, by the law of collation, by which the heritable estate was thrown into a common stock with the moveable, only one-third of the heritable estate should be treated as retained by the first party (the other two-thirds thereof being treated as if conveyed to the intestate's next-of-kin). This was the moveable estate which he was bound to divide, £7228, 6s. 8d., being the full sum of one-third of the moveable estate of Andrew Liddell Innes, which amounted to £21,685 or thereby—*Erskine's Institutes*, iii. 9, 3.; *Bell's Com.* (7th ed.), i. 95; *Bell's Prin.*, sec. 1910.

Argued for the third party—(1) She was entitled to participate in the benefits of the statute. Issue, on a sound construction of the second section, included descendants of the children of a predeceasing parent—*Macdonald v. Hall*, July 24, 1893, 20 R. (H.L.) 88; *Turner's Trustees v. Turner*, March 4, 1897, 24 R. 619. (2) As regarded the amount of the moveable estate, she adopted the contention of the second party.

LORD YOUNG—I have looked carefully into the Act of Parliament and the cases, and have listened with attention to the exhaustive argument, and I am of opinion that the view presented by the first party is the right one. The deceased left at his death heritable estate of the agreed-on value of £2485, and moveable estate of the value of £21,685, making the value of the whole estate £24,170. The heir, who was entitled to keep to himself the £2485 of heritable estate, thought it was in his interest, as it undoubtedly was, to collate that with the personal estate of the value of £21,684, and divide the whole equally with two cousins of the deceased, who were the deceased's heirs *in mobilibus*. Adding the heritable and moveable estate brings out £24,170, and dividing this into three,

one-third to the heir and one-third to each of the cousins of the deceased, gives the heir £8056, 13s. 4d. instead of £2485. So the result is this, that what he took out of the moveable estate, *i.e.*, his gain by collation—for I use the two expressions as the same thing, as he could gain nothing but what he took out of the moveable estate—was £5571, 13s. 4d. Now, by section 2 of the statute he has to divide that with his brothers and sisters, and the question presented to the Court was whether he was to divide the £8056 or the £5571. As I read the statute, I think that a just construction of the section provides that what he takes out of the moveable estate by collation is to be divided by him with his younger brothers and sisters. Now, that was the sum of £5571. I am therefore of opinion that the contention of the first party is the right one.

LORD MONCREIFF—I am of the same opinion. I think that the construction of the statute which Lord Young has adopted is the sound one.

The clause of the statute provides that the heir in heritage of the predeceaser shall be entitled to collate the heritage, to the effect of claiming for himself and the other issue of the predeceaser the share of the moveable estate of the intestate which might have been claimed by the predeceaser upon collation if he had survived the intestate. It is to be observed that what the heir is entitled to claim is the share of the moveable, not the mixed estate. I take it that that expresses what is the rule of the common law, *viz.*, that the heir on collation is entitled to have the heritage valued and to retain the heritage and receive from the next-of-kin the difference between the value of the heritage and the value of his share of the whole estate. I think that the words used in the first part of the clause express shortly what is expressed in fuller language in the second part of the clause, *viz.*, “a share of the moveable estate equal in amount to the excess in value, over the value of the heritage, of such share of the whole estate, heritable and moveable, as their predeceasing parent, had he survived the intestate, would have taken on collation.” That is precisely the same thing as “the share of the moveable estate of the intestate which might have been claimed by the predeceaser upon collation if he had survived the intestate.” Perhaps the reason why it is more fully described in the latter half of the section is to make it quite clear that where the heir does not think fit to collate, the younger children are to receive from the next-of-kin the same share of the moveable estate that the heir, had he collated, would have received for himself and them.

I do not think that the fact that the second party is a sister consanguinean of the first party deprives her of her right to a share of the estate; and I am also of opinion that the grandchild is entitled to share.

LORD JUSTICE-CLERK—I entirely concur.

LORD TRAYNER was absent.

The Court pronounced the following interlocutor:—

“Answer the questions therein stated by declaring that the party of the first part is bound on collation to communicate to each of the parties of the second and third parts one-third of the sum of £5571, 13s. 4d., being the share of the moveable estate of the intestate Andrew Liddell Innes taken by the party of the first part on collation: Find and declare accordingly, and decern.”

Counsel for First Party—Dundas, Q.C.
—M'Lennan. Agents—Macpherson & Mackay, S.S.C.

Counsel for Second Party—W. Campbell—Anderson. Agents—Buik & Henderson, W.S.

Counsel for Third Party—Jameson, Q.C.
—Crole. Agents—A. & S. F. Sutherland, S.S.C.

Wednesday, October 27.

FIRST DIVISION.

GALLOWAY'S TRUSTEES v. GALLOWAY.

Succession—Testamentary Writing—Construction—Division per stirpes or per capita—Heritable or Moveable—Conversion.

A trustor directed his trustees at the death of his wife, whom he made life-rentrix of his estate, “to pay or divide the then free residue of my whole means and estate, heritable and moveable, real and personal, to and among my children,” four daughters, whom he enumerated by name—and the heirs of my son, the deceased J., and that equally between them, share and share alike.” The trustees were empowered to sell the whole or any part of the estate. It consisted wholly of heritage, which was sold by the trustees after the death of the life-rentrix. J., the testator's son, had two sons, both of whom were alive when the testator made his will, and survived him.

Held (1) that the residue was divisible *per stirpes* into five equal parts, of which the children of the testator took four and the heirs of J. one; (2) that the “heirs” of J. were his heirs *in mobilibus*, and that accordingly his two sons took equal shares of that part of the residue falling to them.

Opinion (per Lord Adam) that there had been conversion of the heritage into moveable succession.

Mr James Galloway of Clayslaps, Stirlingshire, died on 29th August 1892, leaving a trust-disposition and settlement, dated 13th March 1882, by which he conveyed to trustees his whole estate, heritable and moveable. After directing his trustees to pay his lawful debts, &c., to pay the life-

rent of the residue to his widow, with power to the trustees to make advances to her out of capital, and to pay to his son William a legacy of £40 in respect that he had already received a sum equal to his share in the residue, the trustor proceeded—“I appoint my trustees at the death of my said spouse to pay or divide the then free residue of my whole means and estate, heritable and moveable, real and personal, to and among my children, Margaret Galloway, Mary Galloway, Janet Galloway, Agnes Christina Galloway, and the heirs of my son, the deceased James Galloway, and that equally between them share and share alike, the same being payable only on their respectively attaining majority.”

The deed further conferred powers on the trustees, including the power to sell by private bargain or public roup the whole or any part of the estate.

The testator was survived by his widow and by his four daughters, who had all attained majority at the time of his death. His son James Galloway junior, who had predeceased the date of the settlement, left two sons, born in 1877 and 1879, who both survived the testator. The life-rentrix, Mrs Galloway, died in August 1896. The estate consisted principally of two heritable properties, and after payment of the debts and other charges affecting his moveable estate, the latter was completely exhausted. The heritable properties were retained by the trustees until the death of the life-rentrix, and were sold in 1897.

A special case to settle the question as to the distribution of the residue was presented by (1) Mr Galloway's trustees; (2) his four daughters; (3) James Forrester, the elder son; and (4) Robert Buchanan Galloway, the younger son of James Galloway junior.

The contentions of the parties as stated in the case were—“The second parties contend that on a sound construction of the trust-disposition and settlement the residuary clause imports an equal division, *per stirpes*, among the testator's children, the heirs of James Galloway taking the share of one child: Alternatively, and on the assumption of division *per capita*, they maintain that the term heirs falls to be construed *secundum materiam subjectam*, that the succession is wholly heritable, and that therefore the third party, as his father's heir in heritage, is alone entitled to participate with them. In either case the result, according to the contention of the second parties, is that the residue falls to be divided into five equal shares, of which they are entitled to four. The third and fourth parties contend that the estate is divisible into two equal parts, of which one falls to the second parties and the other to the heirs of James Galloway junior. Alternatively, the third party contends that the estate is divisible into five equal parts, of which four fall to the second parties and one to the heirs of James Galloway junior. In either case the third party maintains that the words ‘heirs of my son, the deceased James Galloway,’ must be read