and it was for Mr Buckley himself and not the "boots" to tell Mr Pickett that he was giving the bag into his charge.

For these reasons I am unable to hold that negligence within the meaning of the first section of the Act had been proved against the defenders. I accordingly think that the Lord Ordinary's interlocutor ought to be recalled and the defenders assoilzied with expenses.

The Court recalled the Lord Ordinary's interlocutor, and finding "(1) that the pursuer's traveller did not deposit the bag of jewellery mentioned on record with the defenders expressly for safe custody, and (2) that it is not proved that the defenders negligently failed to take proper care of the said bag and contents," gave decree for the £30 tendered on record.

Counsel for the Pursuer (Respondent) —M'Clure, K.C.—Christie. Agents—Gardiner & Macfie, S.S.C.

Counsel for the Defenders (Reclaimers) —Watt, K.C.—Munro. Agents—Cuthbert & Marchbank, S.S.C.

Saturday, November 16.

EXTRA DIVISION.

(Before Lord M'Laren, Lord Pearson, and Lord Ardwall.)

[Lord Salvesen, Ordinary.

NAIRN AND OTHERS *v.* THE UNIVERSITY COURTS OF ST ANDREWS AND EDINBURGH AND OTHERS.

Election Law — Parliamentary Election — University Franchise — Right of Woman Graduate to Vote—Representation of the People (Scotland) Act 1868 (31 *and* 32 *Vict. c.* 48), *secs.* 27 *and* 28—*The Universities Elections Amendment (Scotland) Act* 1881 (44 *and* 45 *Vict. c.* 40), *sec.* 2, (3), (10), *and* (16) — *Universities (Scotland) Act* 1889 (52 *and* 53 *Vict. c.* 55), *sec.* 14, (6).

Women, graduates of a university, are not entitled to vote for a Parliamentary representative of such university, and the registrar of the university is not bound to issue voting papers to them.

The Representation of the People (Scotland) Act 1868 (31 and 32 Vict. c. 48) enacts —Sec. 27—"*Franchise for Universities*— . . . every person whose name is for the time being on the register, made up in terms of the provisions hereinafter set forth, of the general council of such university, shall, if of full age and not subject to any legal incapacity, be entitled to vote in the election of a member to serve in any future Parliament for such university in terms of this Act."

Sec. 28—"Under the conditions as to registration hereinafter mentioned, the following persons shall be members of the general council of the respective universities, viz.—(1) All persons qualified under the 6th and 7th sections of the Act 21 and 22 Vict. c. 83. (2) All persons whom the university to which such general council belongs has after examination conferred the degree of doctor of medicine, or doctor of science, or bachelor of divinity, or bachelor of laws, or bachelor of medicine, or bachelor of science, or any other degree which may hereafter be instituted. . . . . ."

The Universities Elections Amendment (Scotland) Act 1881 (44 and 45 Vict. c. 40), sec. 2, enacts — Sub-sec. 3 — "In case of a poll the registrar of the university, as soon as he conveniently can after the day of demand for a poll, and not later than six clear days thereafter (exclusive of Sundays), shall issue simultaneously through the post a voting paper . . . to each voter to his address as entered on the register of the general council of the university, who shall appear from said address to be resident in the United Kingdom or Channel Islands. . . . . ." Sub-sec. 10—"It shall be lawful for any candidate, or the agents of the candidates who may be in attendance, to inspect any voting paper before the same shall be counted, and to object to it on one or more of the following grounds:— . . . (2) That the person giving a vote by the voting paper is not qualified to vote, . . . and the vice-chancellor or one of his pro-vice-chancellors shall have power to reject, or receive and record as objected to, any voting-papers, . . ." Sub-sec. 16— . . . "Provided always that no person subject to any legal incapacity shall be entitled to vote at any parliamentary election or exercise any other privilege as a member of the general council of any university."

The Universities (Scotland) Act 1889 (52 and 53 Vict. c. 55), sec. 14, enacts—"The Commissioners shall have power, . . . after making due inquiry, to make ordinances for all or any of the following purposes as shall to them seem expedient:— . . . (6) To enable each university to admit women to graduation in one or more faculties and to provide for their instruction."

Ordinance No. 18, dated February 22nd 1892, provides—"1. It shall be in the power of the university court of each university to admit women to graduation in such faculty or faculties as the said court may think fit."

Margaret Nairn and others, graduates of the University of Edinburgh, brought an action against the University Courts of St Andrews and Edinburgh, and the officials thereof, in which they sought declarator that—"(1) Prior to 31st December 1905, and at the date of the demand for a poll at the election of a Member of Parliament for the Universities of St Andrews and Edinburgh, the pursuers were and have since been and now are on the register of the General Council of the University of Edinburgh; (2) While and so long as the pursuers are on the said register they are entitled at the present and on the occasion of any and every future Parliamentary election for the said universities (*a*) to receive voting papers from the registrar, (*b*) to vote by duly marking the

same, and (c) to have their votes so given duly counted; and (3) Whether decree is pronounced in terms of the conclusions above written or not, the defenders, or at all events the said registrar of said University of Edinburgh, ought and should be decerned and ordained by decree foresaid to make payment to each of the pursuers of the sum of £5 sterling."

The defenders pleaded, *inter alia*—"(4) In respect that the statutes and ordinances founded on by the pursuers do not confer upon them any right to vote at the election of a Member of Parliament for the said Universities, the defenders are entitled to absolvitor from the declaratory conclusions of the summons."

On 5th July 1906 the Lord Ordinary (SALVESEN) assoilzied the defenders with expenses.

Opinion.—"This case raises the important question whether women graduates are entitled to vote at the election of a Member of Parliament for the Universities of St Andrews and Edinburgh. The question is a new one, and the earliest opportunity has been taken of raising it, as the election which took place in 1906 was the first contested election for these two universities since women have been admitted to graduation. All the pursuers are members of the General Council of the University of Edinburgh, and their names are duly entered in the register of such members.

"The pursuers' claim is rested primarily on the Representation of the People (Scotland) Act 1868 (31 and 32 Vict. cap. 48). By section 27 of that Act it is, *inter alia*, provided that . . . [*quotes, supra*] . . . The pursuers' argument on this section may be stated thus: They say that 'person' is a word which ordinarily includes all human beings without distinction of sex; that therefore the words 'male or female' may be inserted after it in the section in question; and, if so, it would be meaningless to suggest that the clause, 'not subject to any legal incapacity' should be supposed to infer any incapacity on the ground of sex. They point to the fact that in Part I of the Act, where all the other franchises are dealt with, the word used instead of person is 'man,' that the difference in the phraseology cannot be assumed to be accidental; but that even if it were accidental or mistaken, effect must be given to the plain language of the Act. They further found on section 2, sub-section 3, of The Universities Election Amendment (Scotland) Act 1881, which provides for the registrar, in case of a poll, sending voting papers through the post to each voter to his address as entered on the register of the General Council of the University, who shall appear from said address to be resident within the United Kingdom or the Channel Islands, and especially on the proviso in the last clause of sub-section 16, which is to the following effect: . . . [*quotes, supra*] . . . Women having now, by the Ordinance of 1892, following on the Universities (Scotland) Act 1889, section 14, sub-section 6, been admitted to graduation, and the names of women graduates having been placed on the register of the General Council, they contend, with great force, that the legal incapacity dealt with in the above proviso must be construed as excluding any incapacity on the ground of sex, otherwise they would be equally disqualified from exercising other privileges as members of the General Council—privileges to which they have been admitted without objection and have regularly exercised.

"The whole of this argument depends for its validity on the construction which is put on the word 'person' in section 27 of the 1868 Act. I agree with the argument of the pursuers that in any ordinary statute this word would be presumed to include individuals of both sexes, but it is equally true that the word is open to construction; and if it sufficiently appears from the context, or on other grounds, that it must be construed as meaning male person, the case for the pursuers entirely fails. Acts of Parliament, no doubt, constitute, for the most part, alterations on the common law; but when the language used is ambiguous, that construction will ordinarily be preferred which is consistent with the common law, rather than a construction which would override it. Now in 1868 and 1881 women were legally incapacitated at common law from voting at the election of Members of Parliament. That was decided in England in the case of *Chorlton* v. *Lings*, L.R. 4 C.P. 374, and in Scotland in the case of *Brown* v. *Ingram*, 7 Macph. 281. That being so, it is scarcely conceivable that women should be entitled to vote at elections of a university member when they were to be debarred from the same privilege in county and burgh elections. It was said that they are expressly so debarred by the 1867 and 1868 Acts, which deal with the representation of the people of England and Scotland respectively, by the use of the word 'man' instead of 'person,' and that this does not apply to the university franchise. The alteration in language may, at first sight, seem curious; but I think it can be explained on the footing that in 1868 and 1881 there were many women who had the necessary qualifications for the occupier and ownership franchise; while at these dates women were not admitted to the university at all, and it was no doubt thought unnecessary to limit the university franchise to males, when males alone could, at that time, obtain the necessary qualification. Holding, therefore, that the word 'person' is open to construction, I feel constrained, for the reasons I have stated, to construe it as equivalent to 'male person.' An alternative view would be to construe the word as of common gender, and to hold that, as women were, at common law, legally incapacitated from exercising the Parliamentary franchise, their claim is excluded by the clause 'not subject to any legal incapacity,' which strikes at peers and aliens equally with women.

"The construction of the proviso in sub-section 16 of section 2 of the 1881 Act is, I think, somewhat more difficult, on the assumption that women graduates are legally entitled to be placed on the register

as members of the General Council, and to exercise the privileges, other than the franchise, which belong to such members. It is enough, however, to say that that sub-section conferred no franchise on members of the General Council, and that it can scarcely be used for the purpose of construing an Act of Parliament passed thirteen years before. Besides, it may be inferred here, as in the earlier Act, that the Legislature had within its purview only male persons, as the doors of the Universities had not then been opened to women. I think, moreover, it is extravagant to assume that when Parliament in 1889 conferred powers on the University Commissioners to make ordinances 'to enable each University to admit women to graduation in one or more faculties, and to provide for their instruction,' it was introducing so important a constitutional change as the extension of the franchise to women in University constituencies. What the Act of 1889 was dealing with was provision 'for the better administration and endowment of the Scotch Universities, and for improving and regulating the course of study therein,' and it was not an Act which had the remotest bearing on election law. If the proviso on which the pursuers found so strongly is to be interpreted literally it might lead to the conclusion that women graduates ought not to be on the register of the Council of the University at all.

"The only other matter which was argued was that in any event the pursuers were entitled, so long as they were on the register of the General Council of the University of Edinburgh, to receive voting-papers from the registrar, and that the registrar in refusing to issue such papers to them was in breach of his statutory duty. The short and, to my mind, conclusive answer to this contention is that the registrar is only bound to issue voting-papers to persons who are qualified to vote. If he makes a mistake by refusing to issue the voting-paper to such a person, he may render himself liable in a penalty, but it would be neither good sense nor good law to hold that he should be compelled to issue voting-papers to persons whose votes when given he would be compelled to reject. I am therefore of opinion that this separate ground of action also fails.

"I hope it may console the pursuers for their want of success if I remind them that the legal incapacity of women to vote at Parliamentary elections did not, in the opinion of that very learned Judge Mr J. Willes, 'arise from any underrating of the sex either in point of intellect or worth,' but was 'an exemption, founded on motives of decorum, and was a privilege of the sex (*honestatis privilegium*);' and again, 'that the absence of such a right is referable to the fact that in this country in modern times, and chiefly out of respect to women, and a sense of decorum, they have been excused from taking any share in the department of public affairs.' If this be so, I am afraid this action, if it has served no other purpose, has at least demonstrated that there are some members of the sex who do not value their common law privileges."

The pursuers reclaimed, and argued—(1) Everyone whose name was on the register was entitled to vote—*i.e.*, every member of the General Council. The university franchise was a very special creation of the Act of 1868, and the ordinary presumption against the right of women to vote did not apply to it. The qualification was entirely different, being mental and educational instead of resting on property, and the constituency was unique in having no geographical limitation. It could not be said that there was any universal disqualification of women as regards voting, as they could vote at school board elections, &c. Section 27 of the Act of 1868 gave this franchise to "every person"—an expression which could not be held to exclude women. Sections 3, 4, 5, and 6 of the same Act, dealing with other franchises, used the expression "every man." Therefore there was a strong presumption that the two expressions were not used synonymously. Such use of these expressions was not accidental, as it appeared from the Irish Reform Act 1832 (2 and 3 Will. IV, cap. 88) that they were similarly used there, on the one hand in sections 2 and 7, and on the other in sections 60 and 61. It had been held that when the Legislature used the word "person," the word included both man and woman—*Queen* v. *Crosthwaite*, 1864, 17 Irish C.L. Rep. 157. In the Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62, Schedule B, 2) precisely similar words were construed as including women. The words "legal incapacity" had no reference to sex, but to such disqualifications as the fact of a person being a peer, an alien, or a lunatic. It was manifest that these words were used in that sense only in the English Reform Act 1832 (2 Will. IV, cap. 45), sections 19, 20, and 27, where they stood in conjunction with the words "male person." The present case was distinguished from *Chorlton* v. *Lings*, 1868, L.R. 4 C.P. 374, and *Brown* v. *Ingram*, December 19, 1868, 7 Macph. 281, which were registration cases, where the names in question were excluded from the register, as here the name was quite properly on the register and could not be removed. Further, these cases dealt with a different franchise, where long-established custom was an element which was wanting in this case, which was concerned with a new franchise. (2) The registrar acted as a mere servant, and was not entitled to discriminate as to who should get voting papers and who should not. Every person who was entered as a member of the General Council was, in terms of the Universities Elections (Scotland) Act 1881, entitled to receive a voting paper. The duty of determining whether a vote was good or not devolved on the Vice-Chancellor at a later stage, in the event of an objection being raised.

Argued for the respondent—(1) At common law the Parliamentary franchise was a privilege peculiar to the male sex. If Parliament had intended to make an innovation on this rule, it would have done so

expressly. The *onus* was on the pursuers to show that the intention was to introduce this change in the case of universities, as distinguished from burghs and counties. It was decided in *Chorlton* v. *Lings* and *Brown* v. *Ingram*, *supra*, that women were not entitled, in these cases, to vote. At best the expressions in the Acts founded on were ambiguous, but something more was necessary to set up an entirely new right, contrary to the established principles of the franchise generally. The word "person," as used in the Act of 1868, could not be read as including women, because it was only by provision of the subsequent Act of 1889 that women were admitted to graduation. Further, the provision of the 1889 Act as to this was merely permissive, and women were only actually admitted by the Ordinance of the Commissioners following thereon. It was not to be presumed that the power of the Commissioners extended to conferring Parliamentary franchise along with the privilege of graduation. The proviso of the 1868 Act—"not subject to any legal incapacity"—covered women, along with others such as peers, who were not legally capable at common law of exercising the franchises—*Wilson* v. *Magistrates of Salford*, 1868, L.R., 4 C.P. 398; *Earl of Beauchamp* v. *Overseers of Madresfield*, 1872, L.R., 8 C.P. 245; *Beresford Hope* v. *Lady Sandhurst*, 1889, L.R., 23 Q.B.D. 79. Unless they were capable, the fact of their names appearing on the register did not entitle them to vote—*Stowe* v. *Jolliffe*, 1874, L.R., 9 C.P. 734; *Oldham Case*, 1869, 1 O'Malley & Hardcastle, p. 151; *Marquis of Bristol* v. *Beck*, 1907, 23 *Times* Rep. 224. (2) If not entitled to vote, women were not entitled to receive voting papers from the registrar. The Universities Elections Act 1881, section 2 (3), directed the registrar to send out voting papers to "each voter . . . on the register of the General Council." His duty in this respect was thus limited to voters, and women were not voters even if they happened to be members of the General Council.

At advising—

LORD M'LAREN—Apart from the right to university representation which is now claimed, it is an incontestable fact that women never have enjoyed the Parliamentary franchise of the United Kingdom. Prior to the Reform Acts of 1831 and 1832 there were many varieties of the Parliamentary franchise. The vote in counties was confined to freeholders. In Scotland the burgh members were elected by town councils. Some of the English boroughs had a representation as wide as that of the present law. In the greater number the franchise was more or less restricted, but not always in the same degree or on the same type.

All varieties of the Parliamentary franchise had this element in common, that its exercise was confined to men; and even in the cases where the right of election was confined to a few burgage tenures or even to a single tenement, if the owner was a woman she was not entitled to vote. In view of these facts we must conclude that it was a principle of the unwritten constitutional law of the country that men only were entitled to take part in the election of representatives to Parliament.

All ambiguous expressions in modern Acts of Parliament must be construed in the light of this general constitutional principle. We are not to be understood as invoking any merely technical rule of construction in this matter. What is meant is that if Parliament had intended to subvert an existing constitutional law in favour of women graduates the intention would naturally be expressed in plain language, and therefore if ambiguous language is used it must be construed in accordance with the general constitutional rule.

By sec. 27 of the Representation of the People (Scotland) Act 1868 a vote for the election of a university member is given to "every person whose name is for the time being on the register" . . . "if of full age and not subject to any legal incapacity." The qualification of "full age" was necessary, because the register of graduates might contain the names of men who had taken their degrees before attaining majority. The qualification "not subject to any legal incapacity" was also necessary. A peer, for example, might be on the register of graduates, but it was not intended that he should have a vote for returning a member to the House of Commons. It was not necessary to exclude women by express words, because at that time women could not lawfully be on the university register.

Now this is the Act of Parliament which created the university constituencies of Scotland, and therefore in its inception the university franchise had this element in common with the franchises of counties and burghs, that it was confined to men. It may here be observed that in the third, fourth, fifth, and sixth sections of this Act, which define the qualifications of voters in counties and burghs, the words used are "every man," so it appears that the expression "every person," which is used with reference to university elections, had the same meaning as "every man" in the earlier sections.

By the Universities Elections Amendment (Scotland) Act 1881 provision is made for taking the vote at university elections by means of "voting papers," and in particular by sec. 2, sub-sec. 3, the registrar in case of a poll is required to send through the post a voting paper "to each voter to his address as entered on the register of the General Council of the university, who shall appear from said address to be resident within the United Kingdom or the Channel Islands." The expression "each voter" here used could not give rise to any ambiguity as to sex, because at this date the university register was a register of men. The proviso of sub-sec. 16, excluding persons "subject to any legal incapacity," does not seem to have any material bearing on the present question.

The claim of the pursuers to vote at the election of a member for the universities of Edinburgh and St Andrews is founded on their status as graduates of one of these universities. By the Universities (Scotland) Act 1889 the Commissioners thereby appointed were empowered to make ordinances "to enable each university to admit women to graduation in one or more faculties." By the Ordinance of 1892 this power was exercised, and women have been admitted to graduation in certain faculties, the pursuers' names having been placed on the registers of the General Council of one of these universities in right of their respective degrees. It may be observed that the Universities Act 1889 does not empower the University Commissioners to admit women graduates to the franchise; and if it had been intended that the degree should carry with it the right of voting at Parliamentary elections, we should have expected to find a provision to that effect in the Act of Parliament itself. It is quite certain that the University Commissioners had no power to make any deliverance on this subject, and the same observation applies to the powers of the University Courts in the execution of the ordinance. The pursuers' claim accordingly must rest on the Representation Act of 1868 and the Universities Elections Act 1881.

The argument must be that a franchise originally conferred on graduates who were necessarily men has been extended to women graduates, not by a direct enfranchising enactment, but by the indirect effect of an Act of Parliament which does not profess to deal with political privileges, but is concerned only with academic functions, and which, in the interests of the higher education of women, authorises the admission of women to graduation. The degree itself, or rather the right to take a degree, is not even conferred by the Act of Parliament, but is made dependent, first, on the judgment of commissioners empowered to take evidence, and secondly, on the pleasure of the governing bodies of the respective universities. It is difficult to conceive that the Legislature should have conferred the power of extending the franchise by devolution to a class of persons hitherto excluded by a constitutional rule, a power which it has always kept in its own hands, and it appears to us that there is absolutely no evidence in the terms of the Universities Act 1889 that Parliament intended to extend the franchise to women, or had any question of political privileges in view, when it empowered the university authorities to admit women to graduation. We think that the Representation Act 1868 and the Universities Elections Act 1881 must be construed now, as heretofore, with reference to the political disabilities of women, and that the circumstances of the pursuers being on the university registers does not remove the disability.

In consequence of an amendment made on the record at the hearing of the case, the pursuers contend that in any event they are entitled to receive voting papers, leaving it to the candidate or his agent to object to the vote if tendered, and to the Vice-Chancellor or his deputy to dispose of the objection, all in terms of the 10th sub-section of section 2 of the Universities Elections Act 1881. It is, no doubt, true that if the registrar (taking a different view of his statutory duty) had sent the lady graduates voting papers, the votes might have been objected to and disallowed by the Vice-Chancellor.

But as our judgment on the main question is adverse to the claim of the lady graduates, it follows that no individual of the class has a cause of action for not receiving an invitation to give a vote which she could not lawfully exercise, or a title to sue for a declaratory finding that she is entitled to receive such a paper. We are therefore of opinion that the Lord Ordinary's judgment should be affirmed and the reclaiming note refused.

That is the opinion of the Court.

The Court adhered.

Counsel for the (Pursuers) Reclaimers —The Solicitor-General (Ure, K.C.)—Kennedy, K.C. — Munro — Mair. Agent — William Purves, W.S.

Counsel for the (Defenders) Respondents —The Dean of Faculty (Campbell, K.C.)— Macmillan. Agents—W. & J. Cook, W.S.

Thursday, November 21.

SECOND DIVISION.

[Sheriff Court at Glasgow.

MORTON *v.* FRENCH AND OTHERS.

Writ—Friendly Society—Execution—Signature by Mark—Privileged Document—Nomination under Friendly Societies Act Authenticated only by Mark and by Signatures of Witnesses—Friendly Societies Act 1896 (59 *and* 60 *Vict. c.* 25), *sec.* 56 (1).

The Friendly Societies Act 1896, section 56 (1), enacts—"A member of a registered society . . . may, by writing under his hand . . . nominate a person to whom any sum of money payable by the society or branch on the death of that member . . . shall be paid at his decease."

Held that in nominations under the above section no relaxations of the ordinary rules of law as to the authentication of deeds are permissible, and that accordingly a nomination authenticated only by the member's mark and the signatures of two witnesses was invalid.

The Friendly Societies Act 1896 provides as follows—section 56 (1)—"A member of a registered society (other than a benevolent society or working-men's club) or branch thereof, not being under the age of sixteen years, may, by writing under his hand, delivered at, or sent to, the registered office of the society or branch, or made in a book