

intended to commence operations before the specified time elapsed. That time ran from the date when the interlocutor became final on the dismissal of the appeal by the House of Lords. The fact that they had inadvertently omitted to have the date altered by the House of Lords did not affect the case. Accordingly the defenders had made preparations to build after the dismissal of the appeal, and would have begun to do so but for the pronouncing of the interlocutor now reclaimed against. There had been no want of good faith on the part of the defenders, such as has been attributed to them by the Lord Ordinary, and on which he based his judgment.

Argued for respondents—The defenders had all through exhibited an absence of *bona fides*. Their appeal to the House of Lords did not necessarily suspend the running of the period for commencing to build, and it was their duty to ask the House of Lords to extend the time. As they had failed to do this the Lord Ordinary had done rightly in view of his doubts of the defenders' good faith, to refuse to extend the time, even if he had the power to do so.

The LORD PRESIDENT—When this case was withdrawn by the appellants' counsel from the consideration of the House of Lords, the parties omitted to advert to the fact that the interlocutor to be affirmed specified a date for the commencement of the work which was already passed. This seems to me to have been the fault of the respondent as well as of the appellants, for the pursuer of an action *ad factum prestandum* is interested, and it is his duty, to obtain a decree plainly specifying what is to be done.

The order of the House of Lords, however, does not present any practical difficulty in construction. In affirming the interlocutor of this division the Lords decided that there was to be re-building, that this was to be forthwith, and that from the date of final judgment three months were to be given for beginning, and two years for finishing the work. That I think is the fair reading of the order, as applied to the pleadings and statements before the House.

Now, the orders of this Court fixing the dates of commencement and completion having been orders of an executory nature, they might have been modified to meet any change of circumstances; and the affirmation by the Lords would probably not have rendered them the less flexible, no question having been raised on them specifically. Neither party, however, came to the Court proposing such a change; and accordingly, when the case came before the Lord Ordinary, the proper footing was that the three months were current from 8th May, the date of the judgment of the Lords. The Lord Ordinary, however, on 18th July 1896, much within the three months, found that the defenders had failed to implement the order to re-build and allowed a proof of damage.

I do not think that this judgment can be supported, and that on the ground that

the time allowed for commencing had not expired.

The pursuer by making this premature motion may have slightly complicated the question of the time of commencement by interrupting the currency of the permitted period and virtually calling on the defenders to stop preparing to build and to pay damages. But the defenders must remember that their primary duty was and is to commence forthwith, and that whether any allowance is to be made for the intervention of the pursuer or not, more than two months of the time of grace had expired before this intervention took place. None of these questions require present decision; nor do I think it necessary that we should do more than recal the Lord Ordinary's interlocutor.

LORD M'LAREN—I concur. I think it is perfectly clear that the true date of the interlocutor considered by the House of Lords is the date on which it was affirmed, the effect of the interlocutor having been suspended by the appeal to the House of Lords. Accordingly, the meaning of the order contained in the interlocutor that the defenders should commence to build within three months is that they must begin to build within three months of the interlocutor taking legal effect, that is, within three months reckoned from the date of the judgment of the House of Lords. It follows, therefore, in my opinion that the Lord Ordinary has been premature in holding that the defenders were in default at the time when his Lordship came to consider the cause.

LORD ADAM and LORD KINNEAR concurred.

The Court recalled the interlocutor reclaimed against.

Counsel for the Pursuer—Sol.-Gen. Dickson—J. Wilson. Agents—J. & J. Turnbull, W.S.

Counsel for the Defenders—H. Johnston—W. Campbell. Agents—Simpson & Marwick, W.S.

HOUSE OF LORDS.

Monday, July 27.

(Before the Lord Chancellor (Halsbury),
Lords Watson, Herschell, Morris and Shand.)

METCALFE v. COX.

(*Ante*, vol. xxxiii. p. 405.)

University—*University (Scotland) Act 1889*
(52 and 53 Vict. c. 53), secs. 16, 15 (3), and
21 (2).

An Ordinance of the University Commissioners under section 16 of the University (Scotland) Act 1889 incorporating the University College of Dundee with the University of St Andrews, is not

subject to revocation under the provisions of sub-sec. 3 of section 15 or of sub-sec. 2 of section 21 of that statute.

Judgment of Second Division affirmed, but on different grounds.

This case, which is reported in the Court of Session, March 4, 1896, 33 S.L.R. 405, 23 R. 559, is a sequel of case reported in the Court of Session, December 19, 1894, 32 S.L.R. 182, and 22 R. 210, and in the House of Lords, April 8, 1895, 32 S.L.R. 402, and 22 R. (H. of L.) 13.

The pursuers appealed to the House of Lords against the interlocutor of the Second Division of 4th March 1896.

The main question raised in the House was whether the provision in the agreement sought to be reduced, that the said union (*i.e.*, of the University College of Dundee and the University of St Andrews) should be indissoluble except by Act of Parliament, was *ultra vires*, and could not form the basis of a valid Ordinance affiliating the College and University under section 16 of the University (Scotland) Act 1889.

The appellants argued that this provision was inconsistent with the provisions as to the revocation of ordinances (1) in sec. 15, sub-sec. 3, and (2) in sec. 21, sub-sec. 2, of the Act.

Section 15 (3) provides as follows:—"The University Court, or any college which under this Act shall have been affiliated to the university, may respectively at any time thereafter resolve that such college shall cease to be affiliated to such university, and upon such resolution being passed by the University Court or notified to the University Court by such college, the University Court shall, subject to the approval of the Universities Committee, rescind the ordinance by which such college was affiliated to such university." Section 21 provides—" (1) After the expiration of the powers of the Commissioners, the University Court of each university shall have power to make such ordinances as they may think fit with the approval of Her Majesty in Council, . . . (2) Altering or revoking any of the ordinances affecting such university which have been or may be framed and passed under . . . this Act, and making new ordinances."

At delivering judgment—

LORD CHANCELLOR—My Lords, in this case I confess I have had some difficulty in following the objections which have been made, and I am afraid my difficulty has not been removed yet. Whatever may be the jurisdiction to reduce documents, about which I am afraid my mind is not very clear even up to the present moment, it appears to me that it is enough to say that no ground has been made good at present in this case to justify such a proceeding.

My Lords, I propose to deal very shortly with the only point which, as it seems to me, the case properly raises, and that is, what has in fact been done, and whether any objection can properly be raised to what has been done. In the first place, the document sought to be reduced has been variously described as a consent or an

agreement. I do not think it is very material to consider whether it is the one or the other. As a matter of fact it is one of the documents which formed a stage towards something which was ultimately to become an operative document in the sense in which the Dean of Faculty used those words. But apart from considering what its nature is, or what the power of reducing it was if it were susceptible of reduction on any grounds, it appears to me that the objection to it fails. What was consented to, and in the form in which it was consented to, appears to me to come within the Act of Parliament. That brings us back to the question, what has in fact been done? As I understand it, the objection comes to this—We want to keep alive, by the consent we give, the power, if it is thought proper, to dissolve the union which shall ultimately be made (I am using words different from those of the statute on purpose), and this document which is to be made in pursuance of the power given by the statute does something which is inconsistent with the statute. That is the objection. Well, my Lords, all I can say is that I think it is exactly in conformity with the statute, and that the Ordinance ultimately made is completely covered by the authority which the statute conveys.

Then we come to what is the real point, and the only point in this case which seems to me to be in truth susceptible of argument, namely, the point upon the 21st section, and the question which arises under the 2nd sub-section of the 21st section. The only point is this—You must keep alive and applicable to an affiliated set of institutions the same powers and the same facilities of dissolving the union which exist in the affiliated bodies.

My Lords, it must be conceded, I think, that the language of the statute and the mode in which the words are used are perhaps not a model of draughtsmanship, but the substance of it is clear enough. There is one thing which the statute describes as affiliation. Two separate institutions are to have such a bond of union between them as may be called affiliation. What that bond is and how far it involves the management of the two concerns it is immaterial to inquire. The statute has made the distinction and the statute must be obeyed. That affiliation can be dissolved at the option of either, that is certain, and the very fact that they are so distinguished that the partial union between them can be so dissolved at the option of either is carried out in the statute by this—that in order to be affiliated and to continue affiliated, they are absolutely separate institutions, and not incorporated into one. Then one comes to those institutions which are to be incorporated into one, so that one forms part of the other. It is no longer two separate institutions, but one institution, and when that second condition of things has arisen you must read the statute by the light which the statute itself gives as to what is the meaning of the institution so constituted. When so constituted let us see what the arrangements contemplated

by the statute would come to if the construction now insisted upon were the true one. "Divided again at the instance of either." What does that mean? There is no "either." There are not two but one. It appears to me, therefore, that the very starting point of the inquiry shows that the statute never could have contemplated that when they were once united they could be capable of being severed again at the instance of those who at one time had formed an independent institution. I say that the language is not susceptible of that. The whole difficulty of it is, I think, sufficiently exhibited by the mere statement of the proposition. When one comes to consider the subject-matter we are dealing with, an united body, one body which has one finance, it seems to me that it is impossible to say that that can be the meaning or the construction of the statute.

But, further than that, I think the language is not susceptible of it. It does not appear to me that it is possible to suggest that an Ordinance which affects a university is an Ordinance which is capable of destroying the university. One might just as well say that a Rule Committee which is intended to regulate the process and practice of a court should, as one of its incidents, have the power to destroy that court altogether, and to say that no such court should exist. I am wholly unable to follow an argument of that sort, and it seems unnecessary to pursue the subject further than that. When once one begins to understand the technical language which is used in the statute, and to apply it to what the statute has enacted, it appears to me to be impossible to concede the proposition that the Solicitor-General contends for.

My Lords, I am not quite sure that I follow the reasoning of the Court below, nor is it necessary to consider it. I take the proposition that is now put before your Lordships; it is one which I cannot agree with, and I think that the order of the Court below was right, whatever reasoning it may have rested upon, and that this appeal ought to be dismissed, and I move your Lordships accordingly.

LORD WATSON—My Lords, I also am of opinion that your Lordships have no alternative except to affirm the judgment of the Court below, although in coming to that conclusion I certainly have not been influenced by any of the considerations which were assigned by the learned Judges of that Court.

My Lords, the case appears to me to be a very simple one, and to be within a very narrow compass. I do not think it necessary for the purposes of this appeal to discuss how far and in what circumstances a document of the character of what is termed an "agreement" in this case can be made the subject of a reduction or a declarator of nullity. It is quite sufficient for the disposal of the appeal in my opinion that the reasons urged in support of it are really, when one comes to examine them, perfectly illusory.

I shall only say a word upon one of the most important of them, viz., the objection taken that one of the conditions, which is that the union to be effected by the Commissioners shall not be dissoluble except by Parliament, is a condition which infringes the provisions of the Act. That is founded upon the idea that section 21 will, in the event of and after affiliation and incorporation, give to the University Court of the newly incorporated university a power, subject, of course, to the checks provided in the statute, to make ordinances putting an end to that incorporation. My Lords, I cannot so read section 21. It gives a power to alter ordinances which affect an existing university—a power on the face of it plainly implying that there is to be no power to destroy the university, or to impair the university as then constituted. The only power is to make regulations which shall prevail within that body—that corporation—which is then existing.

My Lords, I am very much strengthened, if it were necessary, upon this part of the case, by referring to the provisions of section 5. The most important governing body within a Scotch University under the Act of 1889 is the University Court. It is to them that many powers are conceded; it is to them that that power of making ordinances and of repealing ordinances is committed by section 21. The constitution of that court as part of the body is not committed to the Commissioners, and could not in any view of it be said to be committed to their successors the University Court. The University Court which is to have this power has its constitution prescribed by section 5 of the statute; which neither the Commissioners nor anyone who succeeds them in the right of making ordinances has power to repeal or touch.

My Lords, I shall not refer to any of the other grounds which have been urged in support of this appeal, and I shall simply content myself with expressing my concurrence with the views which have been already expressed by the Lord Chancellor.

LORD HERSCHELL—My Lords, I am of the same opinion. It is not necessary to inquire here, in the view which your Lordships take, whether upon the showing of the appellants themselves there was anything in this so-called agreement which was capable of being reduced, because, looking at the substance of the matter, I think it perfectly clear that there is nothing in that consent which can be said to be inconsistent with any of the provisions of the statute. The suggestion that the consent could not be made a conditional one, that it must be an absolute yes or no, appears to me to be incapable of serious treatment.

The other point that there is conflict with the statute in a clause which commences "subject to the provisions of the statute," appears to me, to say the least of it, as untenable.

The only remaining point is that with which my noble and learned friends have dealt, whether the provision that the union should be only capable of dissolution by

Act of Parliament, was inconsistent with the power contained in the statute itself to dissolve that union by an order made under the statute, under the provisions of which the Ordinance is made, or is to be made, constituting this University of St Andrews with the Dundee College incorporated in it. My Lords, I do not think it necessary to say anything upon this point, because I entirely agree with what has been said. I think no violence is done to the statute by construing section 21 as wholly inapplicable to the revocation of such an ordinance as the present, in so far as it constitutes the University of St Andrews with the Dundee College incorporated in it.

My Lords, it is quite unnecessary, and it would be out of place now, to say what provisions might be dealt with by an Ordinance under section 21. All that at least seems to me certain on the present occasion is this, that it is hopeless to contend that by an Ordinance made under that section, any Ordinance, whatever its terms, which constituted the University of St Andrews with the Dundee College incorporated in it could be revoked.

LORD MORRIS— I am of the same opinion.

LORD SHAND—My Lords. The Court of Session in dealing with this case have not advanced to the consideration of the question which was raised between the parties on the merits, but have held that the action, so far as regards the documents which have now formed the subject of discussion, ought not to be entertained, because the whole of the matters in controversy ought properly to be discussed before the Universities Committee of Her Majesty's Privy Council. My Lords, I do not think it necessary to discuss this ground of decision further than to say I am not prepared on the argument we have heard to agree with it. It appears to me that cases may occur in which, where there is a direct violation of the statute, I shall not say by agreement only, but by the terms of an agreement or consent followed by an Ordinance, the Court of Session would have jurisdiction to cut down the proceedings, and should exercise that jurisdiction if called on to do so. It is a satisfaction to me that in this matter which has been so long a subject of litigation, and in which litigation is so very undesirable, your Lordships are able, on the argument which has been submitted to the House, to deal with the questions which have been raised in this action on their merits, and to some extent at least to decide questions which have been much disputed.

My Lords, on those questions I entirely agree with what has fallen from your Lordships. I think the pursuers have failed to show that any of their objections to the agreement and relative documents are well-founded. The main and substantial point on which argument has been maintained is that the provision of the agreement under its first head, viz., that the union between St Andrews University and the College of Dundee shall as regards duration be permanent, and shall be dissoluble only by Act of Parliament, is in violation of or con-

trary to the provisions of the statute. That argument was based on two provisions of the statute, the first of them contained in the third sub-section of section 15, and the second in section 21.

Now, my Lords, in regard to the third sub-section of section 15, I think one observation only requires to be made. The whole of that section deals with affiliation and affiliation only. One of its provisions is this:—"That the University Court or any College which under this Act shall have been affiliated to the University, may respectively at any time thereafter" (that is, after affiliation) "resolve that such College shall cease to be affiliated to such University." That applies, as it appears to me, to affiliation only; it has no application whatever to such a case as we have had before us, where the agreement, which has been followed by an Ordinance, is not only that there shall be affiliation, but that there shall be what has been called, in the former judgment in this case, incorporation. Section 16 provides that the Commissioners shall have power as therein stated "to affiliate the said University College"—that is, the College of Dundee—"and make it part of the said University." The result of that really is that the Dundee College would be merged in the University, and that the two institutions would no longer be two but one only—the University of St Andrews. The provision is for incorporation, not affiliation only. The provision, therefore, of section 15, which applies to affiliation alone, and gives the parties power to resolve that affiliation shall cease after a certain lapse of time, has no application to a totally different class of case, where you have not merely affiliation, but the College of Dundee merged in and forming part of the University of St Andrews.

My Lords, the other ground on which it was maintained that the provision of the agreement goes too far, and is contrary to the provisions of the statute is, that because section 21 provides that "After the expiration of the power of the Commissioners, the University Court of each University shall have power to make ordinances" "altering or revoking any of the ordinances affecting such University which have been or may be framed and passed under the Universities Act," it has been maintained in argument that this provision must apply even to the case of an Ordinance which provides not only that the College should be affiliated but should form part of the University. My Lords, I think that would be straining the provision of sub-section 2 of section 21 beyond its true meaning.

There appears to me to be great force—indeed irresistible force—in the argument which was submitted by the Dean of Faculty, that the meaning of that clause giving power to alter and revoke ordinances is satisfied by reference to section 14 of the statute, which contains power to the Commissioners to make ordinances with regard to endowments and bursaries and many other matters which are closely connected with the University and with the University alone. I

think it would be stretching the meaning of these words too far to say that they authorise the altering or revoking of an Ordinance which incorporates the College with the University. I accept the view as it was shortly put by my noble and learned friend opposite, that the ordinances there referred to are not ordinances constituting the incorporated body, but ordinances affecting the University after it has been so constituted, and affecting it in reference to the details of its management and other like matters. It does not embrace the power to bring a corporate body of that kind to an end; indeed, after such incorporation has taken place, it appears to me that it would be a matter almost inexplicable to go back upon what has been done, and formally done. That is a very strong consideration in my mind for interpreting the words "ordinances affecting such university" in this sense.

The fourth head of the agreement was also objected to; but even if there were force in criticism on the details of that provision, the provision itself is made expressly "subject to the provisions of the statute," so the statute must prevail.

My Lords, I am of opinion with your Lordships that the case for the pursuer entirely fails on its merits; and if the Court of Session, instead of granting a decree dismissing the action, had granted a decree of absolvitor, dealing with the case on its merits, I should have been prepared to affirm that decree.

Their Lordships dismissed the appeal with costs.

Counsel for the Appellants—Sol.-Gen. Scott Dickson—Byrne, Q.C.—J. C. Pitman. Agents—Grahames, Currey, & Spens, for J. & F. Anderson, W.S.

Counsel for the Respondents—D.-F. Asher, Q.C.—Johnston—Clyde. Agents—Martin & Leslie, for J. Smith Clark, S.S.C.

Monday July 27.

(Before the Lord Chancellor (Halsbury), and Lords Watson, Herschell, and Shand.)

ROSS v. ROSS.

Minor and Pupil—Maintenance and Upkeep of Establishment of Pupil-heir—Allowance Where Mother Sole Guardian.

In an action of accounting raised by an heir of entail to large estates on attaining majority against his mother for her intrusions as his sole tutor and curator, held that the allowance to which she was entitled for the heir's maintenance and upkeep of establishments was to be determined with reference to the whole circumstances as they had arisen, and in particular with reference to what a prudent guardian would allow in order to secure for his ward the advantage of living with his mother.

Interlocutors of First Division varied, and allowance fixed at £3000 a-year.

This was an action at the instance of Sir Charles Ross, heir of entail of the estate of Balnagown, in the county of Ross, against Lady Rebecca Sophia Ross, his mother, the widow of the late Sir Charles W. A. Ross of Balnagown, who had nominated her his executrix and tutor and curator to the pursuer along with two other persons who did not accept office. The pursuer was the only child of the marriage between the late Sir Charles Ross and the defender, and was twelve years old when his father died.

The action concluded for count, reckoning, and payment against the defender in respect of her intrusions with the pursuer's estate from the date of his father's death, on 26th July 1883 until 4th April 1893, when he attained majority. Under the will of the late Sir Charles Ross the defender was entitled to his whole moveable estate, including the furniture of the principal mansion-house of Balnagown Castle, and of the shooting lodges and other residences upon the entailed estate. She was also entitled to the liferent of all the unentailed lands, and to a jointure of £2000 in the form of an annuity, which was made a burden upon the revenues of the entailed estate. The defender's income from the two last sources was about £4000. The pursuer succeeded to the entailed estate and also to the fee-simple of the unentailed estate upon his mother's death. The free rental of the entailed estate available for the heir was, on an average of the last eight years of his minority, about £5500.

Along with the present action various other actions were raised between the same parties shortly after the present pursuer's majority. By an action raised in the Sheriff Court of the county of Ross the present pursuer craved a warrant of ejectment against the defender from certain farms upon the estate of Balnagown (Dec. 11th 1894, 22 R. 174). Subsequently the present defender raised an action against the pursuer for payment of her jointure annuity, and against this claim the pursuer pleaded a counter claim for legitim and for the balance claimed in the present action of accounting (March 9th 1895, 22 R. 461). A separate action for payment of legitim was afterwards brought by the present pursuer against Lady Ross, and a counter action at her instance for declarator that Sir Charles Ross having elected to claim legitim, was, on payment, bound to renounce his interest in the unentailed lands in her favour (June 16th, 1896, 33 S.L.R. 607; and July 15, 1896, 33 S.L.R. 765).

In the present action many questions were raised as to the defender's intrusions with the ward's estate during the period of her curatory, but the main question in the House of Lords was as to the allowance to which the defender was entitled for upkeep of establishments and maintenance of the ward. In this question two others were involved as subsidiary, (1) what interest, if any, was due to the defender on the furniture in Balnagown Castle and the other residences upon the