

aforsaid for the tenure of the said bursaries. 3. The trustees shall annually publish the terms of the said regulations, and of any alterations made by them thereon as aforsaid in the Glasgow University Calendar. 4. In the event of any holder of a bursary being guilty of grave moral misconduct, or of any serious breach of University discipline, or of any persistent neglect of his or her studies (of the occurrence of any of which events the trustees shall be sole judges), the trustees shall have power to forfeit such holder's bursary. 5. Save as hereinbefore provided, the trustees shall continue to administer the said bursaries in terms of the directions contained in the said trust-disposition and settlement of the said Miss Bethia Stewart."

On 20th October in the Single Bills counsel for the petitioners moved the Court to grant authority to the petitioners to modify the regulations in accordance with the conditions suggested by the reporter, and referred to *Paul (Guardian of Thomson's Mortification), Petitioner*, July 4, 1908, 45 S.L.R. 899.

At advising—

LORD PRESIDENT—In this petition for alteration of the administration of a bursary scheme we have a very complete and excellent report from the reporter to whom it was submitted, and I do not think your Lordships will have any difficulty in granting the prayer of the petition and approving of the scheme which he has prepared. But there is one point of novelty which your Lordships thought it well to consider before judgment was given. The testatrix here gave directions for certain bursaries, which were to be given to students who attended the Arts course, and she gave the directions in specific shape. Now the specific shape at that time when she wrote perfectly well fitted in with the Arts course as it then existed. A difficulty has arisen from the fact that the University has altered its Arts course, and consequently the specific directions given do not accord with the present curriculum. The reporter has brought it to your Lordships' notice not only that this is so, but that also it is quite probable, seeing the tendency of modern times, that the Arts course may be altered again, and he accordingly has proposed that the trustees might have a general power of from time to time altering the regulations which are now approved. Now at first sight it would seem as if by this we were delegating to the trustees the power pertaining by statute [Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97), sec. 16] to ourselves and to ourselves alone, namely, the power to modify schemes. But on closer examination I am satisfied that is not the case, because the regulation which the learned reporter has proposed is this—"That the trustees shall frame regulations for the tenure of these said bursaries by students attending the Arts curriculum in the said University, and may by such regulations prescribe the period for which such bursaries shall be

tenable, provided that the holders of such bursaries shall be bound to attend the said Arts curriculum for at least three years, and to take such branches of study in each year as the trustees shall in each individual case approve." And then comes the clause—"The trustees shall have power from time to time to alter the regulations made by them as aforsaid for the tenure of the said bursaries." The regulations, even as altered, will still fall under the proviso I have just read, and the proviso which I have just read is really a proviso which maintains the certainty that the scheme shall be in accordance with the original wish of the testatrix. Accordingly I think the prayer of this petition may be granted, and that the scheme proposed by the learned reporter may be approved.

LORD KINNEAR and LORD SALVESEN concurred.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

The Court approved of the scheme, and appointed it to be the scheme for the future administration of the bursary funds.

Counsel for the Petitioners—Valentine. Agents—Mackenzie & Kermack, W.S.†

HOUSE OF LORDS.

Thursday, December 10.

(Before the Lord Chancellor (Loreburn), Lord Ashbourne, Lord Robertson, and Lord Collins.)

NAIRN AND OTHERS *v.* ST ANDREWS AND EDINBURGH UNIVERSITIES' UNIVERSITY COURTS & OTHERS.

(In the Court of Session, November 16, 1907, 45 S.L.R. 122, and 1908 S.C. 113.)

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

Held, on a consideration of the statutes dealing with the franchise for universities, that women graduates of a Scottish university are not entitled to vote at the election of a Member of Parliament for the university, and, not being voters, are not entitled to receive voting papers from the registrar of the university.

The case is reported *ante ut supra*. The sections of the Acts of Parliament in question are quoted in the previous report.

The pursuers, Margaret Nairn and others, appealed to the House of Lords,

At delivering judgment—

LORD CHANCELLOR—This appeal has been argued temperately with the evident knowledge that your Lordships have to decide what the law in fact is, and nothing beyond that simple question.

Two points were raised by the appellants. The first and main point was that they were entitled to vote at an election of a member to serve in Parliament for the Universities of St Andrews and Edinburgh. The second was that at all events they were entitled to receive voting papers, and on tendering their votes to have their claim decided by the authority set up under the Universities Elections Amendment (Scotland) Act 1881.

I will take these contentions in order.

In regard to the alleged right of voting, the appellants assert that if ancient records are explored there is evidence of women having enjoyed this right, and no adequate ground for affirming a constitutional or common law disability on the score of sex. And further, that the Representation of the People (Scotland) Act 1868, taken with the Universities (Scotland) Act 1880, and the ordinances made under the last-mentioned Act, do upon their literal construction confer upon women, if they comply with the requirements, a right to vote for university members.

Now, it may be that in the vast mass of venerable documents buried in our public repositories, some of authority, others of none, there will be found traces of women having taken some part in parliamentary elections. No authentic and plain case of a woman giving a vote was brought before your Lordships. But students of history know that at various periods members of the House of Commons were summoned in a very irregular way, and it is quite possible that just as great men in a locality were required to nominate members, so also women in a like position may have been called upon to do the same; or other anomalies may have been overlooked in a confused time. I say it may be so, though it has not been established. A few equivocal cases were referred to. I was surprised how few. And it is the same in regard to judicial precedents. Two passages may be found in which judges are reported as saying that women may vote at parliamentary elections. These are dicta derived from an ancient manuscript of no weight. Old authorities are almost silent on the subject, except that Lord Coke at one place incidentally alludes to women as being under a disqualification, not dwelling upon it as upon a thing disputable, but alluding to it for purpose of illustration as a matter certain. This disability of women has been taken for granted.

It is incomprehensible to me that anyone acquainted with our laws or the methods by which they are ascertained, can think, if indeed anyone does think, there is room for argument on such a point. It is notorious that this right of voting has in fact been confined to men. Not only has it been the constant tradition, alike of all the three

kingdoms, but it has also been the constant practice, so far as we have knowledge of what has happened from the earliest times down to this day. Only the clearest proof that a different state of things prevailed in ancient times could be entertained by a court of law in probing the origin of so inveterate an usage. I need not remind your Lordships that numberless rights rest upon a similar basis. Indeed, the whole body of the common law has no other foundation.

I will not linger upon this subject, which, indeed, was fully discussed in *Chorlton v. Lings*. If this legal disability is to be removed, it must be done by Act of Parliament. Accordingly, the appellants maintain that it has in fact been done by Act of Parliament. They say that the Act of 1868, while confining to men the franchise described in other sections, adopts different language in section 27, using in that section the word "persons." I agree that the word "persons" would *prima facie* include women. But in speaking of "persons" this same section limits them to those who are "not subject to any legal incapacity." I cannot doubt that by this limitation, if not otherwise, are excluded all such persons as may by law be disabled from voting. Peers are excluded, as are women. So also are others.

If the word "persons" in section 27 of the Act of 1868 is wide enough to comprise women, then they are shut out by the exception of those subject to a legal incapacity. If the word "persons" is not wide enough to include women, then there is nothing in any Act of Parliament that gives the smallest foothold for the appellants' contention.

I will only add this much as to the whole case of the appellants. It proceeds upon the supposition that the word "person" in the Act of 1868 did include women, though not then giving them the vote, so that at some later date an Act purporting to deal only with education might enable commissioners to admit them to the degree, and thereby also indirectly confer upon them the franchise. It would require a convincing demonstration to satisfy me that Parliament intended to effect a constitutional change so momentous and far-reaching by so furtive a process. It is a dangerous assumption to suppose that the Legislature foresees every possible result that may ensue from the unguarded use of a single word, or that the language used in statutes is so precisely accurate that you can pick out from various Acts this and that expression, and skilfully piecing them together lay a safe foundation for some remote inference. Your Lordships are aware that from early times courts of law have been continuously obliged, in endeavouring loyally to carry out the intentions of Parliament, to observe a series of familiar precautions for interpreting statutes, so imperfect and obscure as they often are. Learned volumes have been written on this single subject. It is not, in my opinion, necessary in the present case to apply any of those canons of construction. The Act in-

voked by the appellants is plain enough to repel their contentions.

In regard to the second point made by the appellants, namely, that they are entitled to receive voting-papers, in my opinion they are not so entitled, because the Act only says that voters shall receive them. They are not voters.

For those reasons I respectfully advise your Lordships to dismiss this appeal with costs.

LORD ASHBOURNE—The claim of the appellants is founded on their status as graduates of one of the two universities named. 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," and to provide for their instruction. By the Ordinance of 1892 this power was exercised, and it was declared "to be in the power of the University Court of each University to admit women to graduation in such Faculty or Faculties as the Court shall think fit."

The first thing which at once attracts attention is that neither the Act nor the Ordinance gives the slightest hint that the franchise was at all in contemplation, and there is no allusion to the Register of the General Council. The appellants therefore must look elsewhere to support their claim, and they accordingly in their careful arguments rely on the Representation Act of 1868 and the Universities Elections Act of 1881.

By section 27 of the Representation Act of 1868 a vote 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," and the appellants claim that they come within the description that they are persons whose names are on the register. The case turns mainly on the meaning of the word "person" in that Act. It is an ambiguous word, and must be examined and construed in the light of surrounding circumstances and constitutional principle and practice. Holding the views I do it is not necessary I should discuss the words "legal incapacity."

In 1868 the Legislature could only have had male persons in contemplation, as women could not then be graduates, and also because the parliamentary franchise was by constitutional principle and practice confined to men. The appellants strongly relied on the use of the word "man" in some earlier sections dealing with counties or boroughs. It is, however, to be noted that in six later sections before the 27th the word "person" is used instead of "man," and must mean "male person," and I cannot hold that the same word "person" in section 27 could have a different meaning, even if I could ignore other arguments. I can give but little weight to the few old cases referred to, which are obscure and unexplained, and which are opposed to uninterrupted usage to the contrary for several centuries.

I can then entertain no doubt that when

examined "person" means male person in the Act. The parliamentary franchise has always been confined to men, and the word "person" cannot by any reasonable construction be held to be prophetically used to support an argument founded on a statute passed many years later.

If it was intended to make a vast constitutional change in favour of women graduates, one would expect to find plain language and express statement. So far from the Act giving any intimation of a serious innovation, it guards in a saving clause, subject to the provisions of the Act, all existing "laws, customs, and enactments."

But here the Act of 1889 and the ordinance are absolutely silent on the subject, and only refer to graduation and academic arrangements. The Act of Parliament itself does not confer the right of graduation, and only delegates that authority to commissioners who did not directly exercise the power, but ordained that it should be in the power of each University Court to admit women to graduation in such "Faculty or Faculties as the said Court may think fit," and directed how academic functions are to be provided for.

It is to my mind impossible to imagine that the Legislature should have conferred by a delegation to Commissioners the power either of extending the franchise themselves to a perfectly new class, or by devolution passing on that power to university courts—a power always jealously kept in its own hands. It is inconceivable that Parliament should do this by implication without a word to indicate the intention, and should thus indirectly place a new construction on an Act passed years before and reverse a settled and uniform constitutional practice and principle.

Having reached this conclusion I must hold that there is no substance in the argument that the appellants were entitled to be sent voting-papers. It is true that voting-papers should be sent to voters, but if they were not voters, where was the right and where was the damage?

In my opinion the judgments of the Lord Ordinary and of the Lords of the Extra Division were quite correct, and this appeal should be dismissed with costs.

LORD ROBERTSON—The central fact in the present appeal is that from time immemorial men only have voted in parliamentary elections. What the appeal seeks to establish is, that in the single case of the Scottish universities Parliament has departed from this distinction and has conferred the franchise on women. Clear expression of this intention must be found before it is inferred that so exceptional a privilege has been granted.

We had not the assistance of counsel; but fortunately the question is not difficult. In truth, the case of the appellants rests on a very narrow and slender basis, and that is the word "person" in the 1st and 2nd sub-sections of section 28 of the Representation of the People (Scotland) Act 1868. It is said that while in the clauses relating to counties and burghs

the persons enfranchised are described as "male persons," the neutral term "person" is used in describing the university elector, and the suggested inference is that this was done deliberately so as to admit women.

I am afraid, however, that a much more superficial reason was what led to the variation. If we turn to the Universities (Scotland) Act 1858, which set up the University Councils—the bodies which constitute the constituencies—we find that the word used is "person." Now this is exactly what Parliament would naturally do—minded to give votes to the members of the General Councils, it turns to the description of them in the Act which established those councils and adopts the term there used.

This is the genesis of the enfranchising section—what is its effect? Now the "persons" so described were in fact solely men, for in 1858 and in 1868 the universities did not receive women as students, and did not confer on them degrees. It is obvious, therefore, that the persons contemplated in the enfranchisement of the Scotch graduates were men.

As the case of the appellants is entirely one of words, it may be added that in 1858, as in 1868, the avail of the words "male persons" as distinguished from "persons" had been greatly reduced by Lord Brougham's Act, so that the choice of the word "person" had of itself the smaller significance in the direction of including women. The one expression, like the other, needs to be read in the light of the subject-matter.

The case of the appellants has, as I have said, the word "person" (in the Act of 1868) for its basis, but it is necessary to remember that it is only by virtue of an ordinance of the University Commissioners under an Act of 1839 (dealing purely with academic as distinguished from political matters) that women were made eligible for graduation and thus were introduced into the University Councils. Now it must be allowed that if Parliament has by this means conferred the franchise on women, it has taken the most roundabout way to do it. Whichever view be taken of the merits of the question whether women should vote for Members of Parliament, it is at least a grave and important question for Parliament to decide. This question, according to the theory of this appeal, Parliament devolved on a Royal Commission about the details of academic affairs which had power, moreover, to provide graduation (and by consequence the franchise) for women in one university or in all, according to its absolute discretion. It is difficult to ascribe such proceedings to Parliament and at the same time retain the conventional respect for our Legislature.

I have only to add that if I have not in this judgment relied on the words about legal incapacity, it is not that I do not consider the argument on them to be legitimate. But I prefer broader grounds, and I think that a judgment is wholesome and of good example which puts forward subject-matter and fundamental constitutional law as

guides of construction never to be neglected in favour of verbal possibilities.

LORD COLLINS—I am of the same opinion.

Their Lordships dismissed the appeal with expenses.

For the Appellants (Pursuers and Reclaimers)—Parties (Miss Macmillan and Miss Simson). Agents—William Purves, W.S., Edinburgh—Neish, Howells, & Haldane, London.

Counsel for the Respondents (Defenders and Respondents)—Dean of Faculty (Scott Dickson, K.C.)—Macmillan. Agents—W. & J. Cook, W.S., Edinburgh—John Kennedy, W.S., Westminster.

COURT OF SESSION.

Saturday, November 21.

EXTRA DIVISION.

MACDUFF v. SPENCE'S TRUSTEES.

Succession—Trust—Uncertainty—Amount of Charitable Bequest—Direction to Trustees to Apply Interest of Residue or so much thereof as they might Deem Expedient.

After bequeathing legacies and annuities a testatrix directed her trustees to hold the residue of her estate and "to apply the interest or annual proceeds thereof, or so much of said interest or annual proceeds thereof as they may deem expedient, towards such charitable purposes within the city or county of Aberdeen as my trustees shall think fit, full discretionary power being hereby conferred on my trustees as to the selection of the said charitable purposes above referred to." The testatrix's sole heir sought to have this bequest declared void in respect that the subject of the bequest was left uncertain and optional in amount.

Held that the discretion as to the amount to be distributed conferred by the testatrix upon the trustees did not invalidate the bequest, and that if in the future the trustees should fail to distribute the whole of the income any question regarding such possible surplus could only be determined when it emerged.

On the 23rd September 1907 Mrs Margaret Lucy Spence or Macduff, residing at 8 Greenhill Gardens, Edinburgh, brought an action against Lachlan Mackinnon, advocate in Aberdeen, and others, the trustees acting under the trust-disposition and settlement of the late Miss Caroline Jane Spence of 32 Albyn Place, Aberdeen, dated 11th May and recorded 26th November 1906. In it the pursuer, *inter alia*, (1) sought declarator that the directions as to the residue of the trust estate contained in the thirteenth purpose of the trust-disposition and settlement were void, invalid, and in-