

to me that this was of the nature of a typical case to be presented in this form beforehand to the Court. This point, however, was not argued before us, so any expressions of opinion by us upon the matter must be taken as *obiter dicta*.

DUNDAS — With reference to what has fallen from your Lordships on the question of the competency of this special case, I think it right to say that the point was carefully considered by the parties, and if your Lordships had expressed a desire for argument upon the point I would have cited authority which would have satisfied your Lordships that the case was competent.

The Court pronounced the following interlocutor—

“Answer the first and second questions therein stated by declaring that the parties of the first part have power under the trust-disposition and settlement of the deceased David Thomson, according to their discretion, to sell by public roup or by private bargain, or let, the engineering works and fixed plant and tools therein: Answer the third question therein stated in the affirmative: Find and declare accordingly, and decern.”

Counsel for First Parties—Dundas, Q.C. —Salvesen. Agent—F. J. Martin, W.S.

Counsel for Second Parties — Jameson, Q.C.—Sym. Agent—F. J. Martin, W.S.

Saturday, October 16.

FIRST DIVISION.

GOVERNORS OF SPENCE BURSARIES TRUST, PETITIONERS.

Trust—Educational Endowment—Amendment of Scheme—Proposed Extension of Benefits of Fund to Both Sexes—Educational Endowment (Scotland) Act 1882 (45 and 46 Vict. c. 59), secs. 17 and 20.

The governors of an educational trust were bound by the scheme framed for the administration of the fund to award bursaries among deserving students at the Universities of Edinburgh and St Andrews. At the date of the scheme all the ordinary university classes were closed against women. The governors applied to the Court to amend the scheme by extending the bursaries to women, and the petition was communicated to the University Courts of Edinburgh and St Andrews. The former approved of the proposal, but it was stated on behalf of the latter that “by a majority of 5 to 4 (the Lord Rector and one of the other members abstaining from voting), it was resolved not to approve of the alterations proposed.” . . . No reasons were given in support of this resolution, and the reporter to whom the Court

remitted the petition stated that he could find no obstacle to the granting of the petition either in the regulations of the universities or in the provisions of the Educational Endowments Act, section 17 of which directly recommended the inclusion of women.

The Court sanctioned the proposed alterations.

The late Rev. John Spence, minister of Kinnaird, Perthshire, by his trust-disposition and settlement directed his trustees to hold the residue of the trust-estate “for the purpose of providing as many bursaries as the fund will support to promote the education at the Universities of St Andrews and Edinburgh of such deserving students as shall be preferred and selected by my trustees, each of the said bursaries not to be less in amount than £50 per annum, and my trustees having full power in exceptional cases, as to which they shall be the judges, to increase the bursary to a greater amount than the foresaid annual sum, and I authorise and empower my trustees to form such rules as they shall deem requisite to carry out the object I have in view, and to vary and alter such rules and regulations as they shall deem circumstances require.”

In 1888 a scheme was approved under the Educational Endowment (Scotland) Act 1882 for the administration of the endowment, and a governing body was duly incorporated.

The residue of the trust-estate amounted to nearly £13,000, and the income arising from it was applied by Mr Spence's trustees for the purposes of the bequest till the endowment passed into the hands of the governing body appointed under the scheme.

By article 24 of the scheme it was provided with regard to the application of the income arising from the fund — “The governors shall establish as many bursaries for university education as the funds at their disposal will allow, which shall be called the Spence Bursaries. They shall be awarded by competitive examination among deserving students who have attended one or two sessions in the Faculty of Arts in the University of St Andrews or Edinburgh — that is to say, who have attended one session in the case of students who have, immediately after matriculation, entered the second year's classes of Humanity, Greek, and Mathematics, and intend to graduate in three years from the time of their entrance, or who have attended two sessions in the case of those who have entered the first year's classes and intend to graduate in four years from the time of their entrance session in the Faculty of Arts in the University of St Andrews or Edinburgh, as the case may be, and shall be tenable for two years in the Faculty of Arts at either of these universities.”

A petition was presented by the governors of the scheme craving the Court to approve of certain alterations and variations on the scheme.

It was proposed to substitute the following paragraph for that in italics printed above—

“Among deserving students of either sex, who after passing the preliminary examination or such other examination as may from time to time be accepted by the Joint Board of Examiners as equivalent thereto, have attended one winter session, or its equivalent, in the Faculty of Arts in the University of St Andrews or Edinburgh, and have attended at least two classes qualifying for graduation, and who intend to complete the course of study for the degree of Master of Arts in the University of St Andrews or Edinburgh.”

On 19th November 1896 the Court remitted to Mr Bremner P. Lee, advocate, to report upon the regularity of the procedure and upon the proposed alterations, and to communicate with the University Courts of Edinburgh and St Andrews inviting their observations.

Mr Lee reported that he had received the following letters from the Secretaries of the two University Courts—

“St Andrews, 27th November 1896.

“University Court of St Andrews.

“Petition—Governors of Spence Bursary Trust.

“Dear Sir,—I have to acknowledge receipt of your letter of 25th ult., enclosing copy of the above petition, presented to the First Division of the Court of Session, praying for an alteration of the scheme of the Spence Bursary Trust. Your letter and copy petition were submitted by me to a meeting of the University Court of St Andrews held yesterday.

“I am directed by the Court to inform you that by a majority of 5 to 4 (the Lord Rector and one of the other members abstaining from voting) it was resolved *not* to approve of the alterations proposed, in so far as they would allow the Spence Bursaries to be opened up to qualified women students. In other respects the Court unanimously agreed to approve of the alterations shown in Appendix II. of the petition.—I am, dear sir, yours faithfully,

“STUART GRACE,

“Secretary, University Court.”

“University of Edinburgh,
23rd Dec. 1896.

“Petition—Spence Bursary Trust.

“Dear Sir,—Referring to your letter of 25th ult., I am directed to state that the University Court—after consultation with the Senatus—have no objection to offer to the prayer of the petition being granted.—Yours faithfully, M. C. TAYLOR, Secy.”

With regard to these letters the reporter stated—“While the University Court of St Andrews by a majority of one (nine members voting, the other eight either being absent or abstaining) has resolved ‘not to approve’ of the bursaries being ‘opened up to qualified women,’ it is not stated that the Court actually disapproved, nor is any reason given for its decision. I have very carefully considered whether any such reason can be found either in the regulations of the universities, the provisions of the Act under which the petition is presented, or the general rules which have guided the decision of the Court in similar cases.

“This is not the ordinary case of an application to the *nobile officium* of the Court for a new charitable object. Were it so, the fact that the whole fund can be most usefully expended on the existing object would preclude the necessity, and therefore the probability, of interference by the Court. Here, however, the petitioners invoke your Lordships’ exercise of a statutory power. The section (45 and 46 Vict. cap. 59, section 20) which confers this power seems not merely to save the common law jurisdiction of the Court of Session, but rather to provide machinery by which the work of the Educational Endowment Commission might be carried on after the Commission had expired. Thus the section indicates as the test of the propriety of alterations on the schemes of the Commissioners, that ‘they shall not be contrary to anything contained in this Act.’ Judged by this test, there cannot, I think, be any doubt of the propriety of the alteration now proposed. Section 17 of the Educational Endowments Act 1882 provides:—‘In framing schemes, provision shall be made, so far as can be equitably arranged, and as the circumstances of each particular locality require, for extending to both sexes the benefit of endowments.’ When the scheme was framed the university classes and degrees were closed against women students, and provision could not be made for extending the benefits of this endowment to them. Now, however, that women are admitted both to the classes and to the degree of Master of Arts, and can therefore qualify for competition under the scheme, their inclusion appears to be contrary to nothing contained in the Act, but, on the contrary, to be directly recommended by it.

“The original words of bequest by the founder contain nothing to suggest the exclusion of women.”

Certain amendments were suggested by the reporter on the other proposed alterations, which were approved by both University Courts.

LORD PRESIDENT—This matter has been carefully considered by the reporter, and the scheme evidently skilfully adjusted.

I shall not say anything on any of the points except the first, which was opened and developed by Mr Neish, and that is the extension of the bursaries to both sexes.

Our jurisdiction is under the Educational Endowments Act 1882, sec. 17 of which provides — [*reads*].

Now, it happens that the benefit of Mr Spence’s foundation is not confined to any particular locality, and there is no consideration, therefore, such as a redundancy of male students coming from a particular district over female students coming from the same district, entering into this question so as to deflect us from what is, *prima facie*, the proper course to follow, viz., to extend the benefit of the endowment to both sexes.

The bursaries provided by Mr Spence are to be enjoyed by students of two specified universities, and therefore regard must be

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 predeceasing, or for himself and the other issue of the predeceasing, if there be such other issue, the share of the moveable estate of the intestate which might have been claimed by the predeceasing upon collation if he had survived the intestate.”

The child of a predeceasing 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 predeceasing, 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