Wednesday, October 21.

EXTRA DIVISION.

THE GOVERNORS OF THE ARBROATH EDUCATIONAL TRUST, PETITIONERS.

Charitable and Educational Trust—Alteration of Scheme under Educational Endowments (Scotland) Act 1882 (45 *and* 46 *Vict. cap.* 59)*—Provision for Free Education of Boys—Extension to Girls.*

The governors of an educational trust, constituted by a scheme prepared by the Commissioners under the Educational Endowments (Scotland) Act 1882, presented a petition to the Court of Session craving that a clause of the scheme, whereby a school board, in consideration of a certain sum annually paid to them by the governors, were bound to "educate gratuitously in the higher branches of education eight poor boys, to be selected by the governors," should be altered by the substitution of the word "children" for the word "boys." The petitioners did not aver any change in circumstances affecting the administration of the trust, except the increased demand for the education of girls, consequent upon the increase in openings for girls desirous of earning their own livelihood. The Court *refused* the prayer of the petition.

The Governors of the Arbroath Educational Trust, constituted and incorporated under a scheme prepared by the Commissioners appointed under the Educational Endowments (Scotland) Act 1882, and approved by Her late Majesty in Council on 15th October 1889, presented, with consent of the Scotch Education Department, a petition to the Court of Session to alter the scheme of constitution and incorporation as set forth in the petition.

The petitioners averred, *interalia*—"That certain endowments, known as the Gibson Fund, held and administered under the trust-disposition and settlement of William Gibson of Maulesbank, dated 1st February 1862, with codicil thereto dated 13th January 1868; the Colvill Mortification, held and administered under the trust-disposition and settlement of the late John Colvill of Brothockbank, town clerk of Arbroath, dated 6th July 1811; Dove's Charity, held and administered under the deed of mortification and settlement of Andrew Dove, millwright in Arbroath, dated 8th January 1834; Rickard's Legacy, held and administered under the trust-disposition and settlement of Mrs Rickard, sometime of Woodlands, near Arbroath, dated 26th October 1860; and the Funds of the Female Benevolent Society, held and administered by the School Board of the burgh of Arbroath, under the conditions of a transfer dated in 1873, were, except as therein otherwise provided, amalgamated by a scheme by the Educational Endowments (Scotland) Commissioners, approved by Her late Majesty in Council on 15th October 1889, and ordered to be administered by the governing body therein constituted and incorporated under the name of the Arbroath Educational Trust . . . That clause 33 of the said scheme is in the following terms:—'It shall be in the power of the Court of Session to alter the provisions of this scheme upon application made to them, with consent of the Scotch Education Department, by the governing body or any party interested, provided that such alteration shall not be contrary to anything contained in the Educational Endowments (Scotland) Act 1882.' That the course of time and the changes in the conditions of elementary education having shown it to be desirable that various alterations should be made on the original scheme with regard to expenditure and the distribution of bursaries, a committee of the Governors was appointed to consider and report as to the alterations which should be made; and after communication with the Scotch Education Department certain alterations were adjusted, and have been adopted by the Governors as the basis of the present application to the Court. That the alterations for which authority is craved are as follows:— . . . (*b*) In clause 25 to substitute the word 'children' for 'boys' in the last line but two of the clause. . . ."

Clause 25 of the scheme was in the following terms:—"The Governors shall pay the annual sum of £120 to the School Board of the Burgh of Arbroath, to be applied by them for the promotion of higher instruction in Arbroath. . . . The School Board shall be bound, as a condition of receiving the foresaid payment of £120, to educate gratuitously in the higher branches of education eight poor boys to be selected by the Governors. In making such selection the Governors shall pay due regard to merit as ascertained by examination, or in such other manner as the Governors shall determine."

The clause also provided that in a certain event the Governors should cease to pay the sum of £120 to the School Board and should apply it, under another clause, in providing bursaries to be awarded among present or past "pupils" of certain public or state-aided schools.

On 30th June 1908 the Court remitted to Mr J. Hepburn Millar, Advocate, to inquire and to report.

Mr Millar reported:—". . . The next proposal affects that part of clause 25 under which the School Board of Arbroath are bound, in respect of an annual payment to them by the trust of £120, 'to educate gratuitously in the higher branches of education eight poor boys to be selected by the Governors.' The petitioners desire to substitute the word 'children' for the word 'boys,' so as to include pupils of both sexes. The reporter confesses to entertaining considerable doubt as to whether in the circumstances your Lordships are entitled to sanction this proposal. The petitioners admit that they are unable to point to any absolute want of suitable candidates of the

male sex for the benefit which this clause confers; but they say that girls of superior merit to any of the boys have from time to time come forward, and have in practice, as the reporter understands, been preferred. It is perhaps not unnatural that the petitioners should desire to have this departure from the letter of the clause regularised, more especially as the School Board are strongly in favour of the proposed change. In support of their view the cases of the *Clark Bursary Trustees* (5 F. 433) and the *Governors of the Spence Bursary Trust* (25 R. 11, 35 S.L.R. 18) were pressed upon the reporter. He is not, however, prepared to concede that there is any ambiguity about the word 'boys.' The Commissioners who framed the scheme must be presumed to have had fully in view the terms of sec. 17 of the Educational Endowments (Scotland) Act 1882, which directs that 'provision shall be made, so far as can be equitably arranged, and as the circumstances of each locality require, for extending to both sexes the benefit of endowments.' They chose (no doubt after due consideration of the circumstances of the locality) to confine the benefit of the provision in this case to boys, and they were entitled to do so. The petitioners do not allege that to adhere to the plain meaning of the word would lead to a failure of the scheme so far as regards this purpose, which is perfectly workable as it stands. The reporter is disposed to think that the decision of your Lordships in the case of the *Grigor Medical Bursary Fund Trustees* (5 F. 1143) is conclusive of the point under discussion, and he would especially refer to the passage in Lord Kinnear's opinion on p. 1146. He would therefore respectfully submit that this alteration should not be allowed. . . ."

At the hearing in the Summar Roll counsel for the petitioners argued — There was nothing to indicate or suggest that the proposed extension of the scheme was contrary to the wishes of the testators. On the contrary, the scheme proposed by the Commissioners provided that in a certain event this sum of £120 should be devoted to establishing bursaries to be awarded to "pupils," *i.e.*, of both sexes. Further, the circumstances had changed since the scheme was proposed. A much larger number of careers were now open to women, and in consequence there was a much larger demand for female education. To admit girls to this benefit would thus greatly enhance the usefulness of the provision, and that justified sanctioning the extension—*Clark Bursary Fund Trustees*, February 5, 1903, 5 F. 433, 40 S.L.R. 352. The case of *Grigor Medical Bursary Fund Trustees*, July 15, 1903, 5 F. 1143, 40 S.L.R. 818, was distinguishable, because (1) there, if there was a failure of the bequest in any year, accumulation took place, while here the £120 had to be paid to the School Board each year whether eight boys were found or not; and (2) there was more reason to believe that the extension there was repugnant to the wishes of the testator.

LORD M'LAREN—I understand that the governing body have accepted all Mr Millar's recommendations except one; that is, on the point whether they should alter clause 25 of the scheme by substituting the word "children" for the word "boys," the purpose being to make children of both sexes eligible as free scholars under the trust. I cannot say that I look upon the proposed alteration as inequitable or objectionable on any ground that might have been considered by the Educational Endowments Commissioners. They had a free hand under their Act of Parliament to reconsider the provisions of Educational Schemes, and to extend to girls the advantages secured to boys, so far as equitable and consistent with the intentions of the testator. We know from other cases that have been before us that the Commissioners did make such extensions in cases where the funds were ample, and where there was no indication that the testator would have objected. In this case, the Commissioners have not thought proper to extend to girls the benefits provided for boys. It may be that the words of the gift made this extension difficult. But without entering on the question of the expediency of the change, I feel that it would not be consistent with the practice of the Court to give effect to the alteration proposed unless some change of circumstances affecting the administration could be shown. Our practice has been not to interfere with Endowed Schools Schemes unless there is a *prima facie* case for alteration made out by pointing to an alteration in the circumstances. If we gave effect to a proposed alteration not supported by any evidence of such change in circumstances, we should be reviewing the judgments of the Commissioners, and constituting ourselves an Upper House in matters which Parliament had remitted to the discretion of the Commissioners. It is not said that there is any difficulty in getting the required number of boys eligible for free scholarships under the scheme, and no other alteration of circumstances is averred except that, as is no doubt true, there are now more openings for girls desirous of earning their own livelihood, and a consequently increased demand for their education than when the section in question was formulated. I hardly think that would in itself justify us in sanctioning the proposed alteration.

LORD PEARSON and LORD DUNDAS concurred.

The Court refused to make the alteration craved.

Counsel for the Petitioners—Carnegie. Agents—Lindsay, Howe, & Co., W.S.