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COURT OF SESSION.

Tuesday, October 18.

FIRST DIVISION.

GOVERNORS OF STEWART'S EDUCATIONAL TRUST, PETITIONERS.

*Educational Trust—Alteration of Scheme—Consent of Education Department—Personal Bar.*

Scheme by the Educational Endowment Commissioners for the administration of an educational trust altered in terms of a petition presented with the consent of the Scotch Education Department.

Further alterations proposed by parties interested *rejected* on the ground (1) of personal bar, and (2) that the alterations were an entire departure from the Scheme embodied in the petition.

*Heriot's Trust, 25 R. 91, commented on.*

A petition was presented to the Court by the Governors of Stewart's Educational Trust for the alteration of the Scheme framed by the Educational Endowment Commissioners in 1889 for the administration of the endowment founded by Mr Daniel Stewart in 1814.

The Court remitted to Mr James A. Fleming, advocate, to report upon the questions raised in the petition, and the following extract from Mr Fleming's report sufficiently indicates the question before the Court—"The present endowment was founded by Daniel Stewart in 1814. He bequeathed £1200 for the purchase of land and the erection thereon of a school in the district of Strathtay, Perthshire, and a further sum of £2000 to maintain and support it. He directed that free education should there be given to poor children residing 'within the parishes of Logierait, Weem, and Moulin, in the district of Strath-

tay, presbytery of Dunkeld, and county of Perth,' who should be preferred, and thereafter to poor children 'from any of the other neighbouring parishes in the said district of Strathtay and presbytery of Dunkeld, lying next and adjacent to the three parishes above named.' He appointed as trustees the proprietors of the estates of Derculich, Cloichfoldich, Findynate, and Ballechin, and the parish ministers of Logierait and Weem. These estates all lie on the north bank of the Tay, and between the parish churches of Weem and Logierait. I am informed that the expression 'Strathtay' is locally understood as describing the slope on the north bank of the Tay, the slope opposite on the south being distinguished as 'Grandtully.'

"The trustees acquired lands near Cloichfoldich, lying partly within the parish of Logierait and partly within the parish of Dull, and on that part of the lands which lay within the parish of Logierait they erected a school. The parishes of Logierait, Weem, and Dull were a good deal interspersed at that point, and the scholars attending the school included several resident in the parish of Dull, as well as in the parishes of Logierait and Weem. It seems doubtful if any children from the parish of Moulin attended the school.

"In October 1889 the Educational Endowment Commissioners after an inquiry framed the Scheme under which the petitioners now act. By it they directed that the Governors should cease to maintain the school which was known as Stewart's Free School, and that the school buildings should be sold or let. Up to this time they have been let to the School Board of Weem, by whom a school is there maintained, but proposals are being considered for their sale. A small part of the income of the trust funds was to be employed in providing free education, books, &c., at Stewart's Free School, or at any school that might be erected in the district supplied by that school. The balance of income is to be applied in providing (1) bursaries for Uni-

versity or technical education; (2) school bursaries; and (3) bursaries for higher education, to be awarded to pupils in public or state-aided schools in the parishes of Logierait, Weem, or Dull, or, in the case of the University bursaries only, in the parish of Moulin.

“The inclusion of the parish of Dull as one of the preferred parishes no doubt arose from the very close proximity of portions of that parish to the school founded by the truster, from the fact that children from these portions attended the school, and from the consideration that when the school was discontinued as contemplated by the scheme, the burden of providing for the educational requirements of these portions would be thrown on that parish.

“On 24th November 1890 the Boundary Commissioners for Scotland issued an order to come into operation on the 15th May 1891 altering and adjusting the boundaries of, *inter alia*, the parishes of Dull, Logierait, Moulin, and Weem. The effect of that order is that all the portions of the parish of Dull within a distance of six miles by the shortest road from Stewart's Free School have been thrown into the parishes of Logierait or Weem, and that the district which was supplied by Stewart's Free School does not now include any part of the parish of Dull.

“Had this alteration of boundaries taken place before the Educational Endowment Commissioners framed their scheme it is difficult to see any ground on which they would have included the parish of Dull among the favoured parishes.

“A majority of the Governors proposed that application should be made to alter the Scheme in accordance with the altered parochial conditions of the district by striking out all reference to Dull as a favoured parish. This proposal was opposed by the Governor elected by the School Board of Dull, and finally a compromise was suggested by the Scotch Education Department, and agreed to by the Governors, that the parish of Dull should remain entitled to share in the bursaries for university or technical education, and in the bursaries for higher education, while the school bursaries should be confined to the parishes of Logierait and Weem.

“The petitioners ask your Lordships to make the alterations on the Scheme which will enable this compromise to be carried out. The School Boards of Logierait and Weem have asked me to consider and to report to your Lordships a representation which they make that the original proposal to strike Dull out altogether is more equitable, and should be given effect to by your Lordships. I feel that there is a great deal of force in this view, but this proposal has not been submitted to the Court by the governing body with the consent of the Education Department, and I apprehend that the Court will not deal with it—*Heriot Trust*, 25 R. 91. Further, I would point out that these School Boards have each elected one of the Governors by whom the compromise was made, and by whom the petition is presented, and that there is room

for doubt as to their right to propose alterations on the Scheme at variance with the views of the Governors as stated in the petition.”

The consent of the Education Department to application being made to the Court was given in the following letters:—

“London, 27th Oct. 1896.

“*Logierait, Stewart's Educational Trust.*

“Sir,—Adverting to our interview on the 14th instant, I am directed to inquire what would be the view of your Governors if my Lords proposed as a compromise that the application for a change in the Scheme should provide that in the case of the school bursaries, section 26 (1), the parish of Dull should be excluded, while in the case of the Higher Bursaries, sections 25 and 26 (2), Dull should stand as at present.—I have the honour to be, Sir, your obedient servant.

“H. CRAIK.”

“London, 20th Nov. 1896.

“*Logierait, Stewart's Educational Trust.*

“Sir,—I have the honour to acknowledge the receipt of your letter of the 17th inst. My Lords hereby give their consent in terms of section 31 of the Scheme to application being made by the governing body to the Court of Session for the alteration of the provisions of the Scheme to the extent indicated in their Lordships' letter of the 27th ultimo.—I have the honour to be, Sir, your obedient servant,

“H. CRAIK.”

The Governors being desirous to include some further alterations in the application asked the Scotch Education Department for their sanction, and received the following reply:—

“London, 9th June 1897.

“*Logierait, Stewart's Educational Trust.*

“Sir,—Adverting to your letter of the 26th ultimo, I am directed to point out that my Lords have already, by their letter of the 20th November 1896, given their consent to the proposed application to the Court of Session, and that it is not necessary that they should signify their approval or otherwise of the specific alterations proposed. At the same time, I may add that it would, in their Lordships' opinion, be unwise at this stage to raise any question that might have the effect of unsettling the compromise that has been arrived at, and I am therefore to suggest that only such of the further alterations referred to in this letter as the governing body are unanimous in desiring should be submitted to the Court.—I have the honour to be, Sir, your obedient servant,

H. CRAIK.”

No answers to the petition were lodged by the parishes of Logierait and Weem, but counsel appeared on their behalf and craved the Court to amend the petition by striking out all reference to Dull as a favoured parish.

They argued that while the Education Department had not consented to the presentation of a Scheme completely excluding Dull, yet when once the Department had authorised the application, the Court had a complete discretion as to the details of the Scheme, and could accordingly consider any amendments proposed by parties having an interest. Accordingly, for the

reasons stated by the reporter, they maintained that the original proposal to strike Dull out altogether was the more equitable one, and should be given effect to by the Court.

LORD PRESIDENT—It would be impossible to maintain that persons having an interest are not entitled to come forward and suggest amendments of the Scheme proposed in a petition, merely because such amendments have not been consented to by the Scotch Education Department. The effect of that would be to preclude us altogether from amending the Schemes contained in such petitions. I think it is sufficiently clear that even in matters above the level of mere details, or rising to the position of what have been called organic details, we are free to give effect to amendments which have not been before the Scotch Education Department. There is nothing in the case of *Heriot's Trust* (25 R. 91) to contradict this view. There the proposals which we said we were unable to consider were not amendments of the proposed scheme, but simply competing or alternative schemes. But in the present case the petition itself was presented to us with the consent of the Scotch Education Department, as the result of a compromise suggested on the advice of the Department when the original proposal was made striking out all reference to Dull as a favoured parish. It seems to me therefore, looking to the history of the case, that the consent of the Department has not been obtained to a petition embodying that original proposal, and the like reasoning precludes us from entertaining an amendment, the result of which would be to entirely shut out the element of compromise. But that proposition is confirmed by the complicated position of Mr Harvey, because the persons whom he represents were themselves represented by Governors who were parties to the compromise, and promoted it as against the more absolute original proposition to exclude Dull altogether.

In the circumstances it appears to me that we cannot entertain the amendment, because it is outwith the proper subject submitted for our consideration.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court approved of a scheme under which the parish of Dull should remain entitled to share in the bursaries for university or technical education, and in the bursaries for higher education, while the school bursaries should be confined to the parishes of Logierait and Weem.

Counsel for the Petitioners—W. L. Mackenzie. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Objectors—J. Harvey. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Wednesday, October 19.

FIRST DIVISION.

[Lord Low, Ordinary.]

ALLAN, PETITIONER.

Judicial Factor—*Pro indiviso Proprietors*  
 —Trust.

A feu-contract was taken in favour of "L and A and the survivor and the heir of the survivor, as trustees and in trust for behoof of themselves and their respective heirs and assignees whomsoever, each to the extent of one-half *pro indiviso*."

Power was given to the trustees, and to the survivor and his heir, to sell the property as they or he should think proper.

A having conveyed his beneficial interest in the subjects to a third person by a disposition *ex facie* absolute, a petition was presented by the disponee for the appointment of a judicial factor to manage the property, on the ground that he was dissatisfied with the management of it by L. Both parties expressed their willingness to assent to the sale of the property, and the only question at issue between them was with regard to the collection of the rents for two terms which must elapse before a sale could be effected. With regard to this the respondent had offered to assent to the appointment of a neutral person to collect and lodge in bank the rents in the joint names of the parties.

The Court, in respect of this offer, refused the application.

Question reserved whether the parties to the contract had the common law right of *pro indiviso* proprietors to sue an action of division and sale.

By a feu-contract executed in February 1896 Mr David Johnston, writer, Glasgow, disposed to Mr Hugh Livingstone, Glasgow, and Mr William Brown Alexander, Bridge of Weir, a certain plot of ground situated at Langside, Glasgow, together with the buildings thereon, known as 17 Millbrae Crescent.

The disposition bore to be "to and in favour of the said Hugh Livingstone and William Brown Alexander and the survivor of them, and the heir of the survivor, as trustees and in trust for behoof of the said Hugh Livingstone and William Brown Alexander and their respective heirs and assignees whomsoever, each to the extent of one-half *pro indiviso*, heritably and irredeemably . . . Declaring that the said Hugh Livingstone and William Brown Alexander and the survivor of them, and the heir of the survivor, as trustees and trustee foresaid, shall have full power, without the consent of any person whatever, to sell and dispose of the said plot or area of ground above disposed, or any part thereof, by public roup or private bargain, with or without advertisement, and at