adopting the lease. But in his opinion the best course to take was to accept a slump sum from Mrs Imrie and to allow her to keep the proceeds of her management. In taking this course I do not think that the trustee can be held to have adopted the lease.

LORD YOUNG—I am of the same opinion.

LORD MONCREIFF—I am of the same opinion. I think that in the peculiar circumstances of this case the trustee cannot be held to have adopted the lease. I think that what he did was simply to wind up the estate in the way most advantageous for the creditors. There were only a few weeks of the lease to run, and in the trustee's opinion he got a better return than he could otherwise have done by obtaining payment of cash down for the stock from Mrs Imrie on condition of permitting her to manage the farm on her own account for the short remainder of the lease.

LORD TRAYNER was absent.

The Court pronounced the following interlocutor:—

"Having heard counsel for the parties in the appeal, Sustain the same: Recal the interlocutor of the Sheriff-Substitute of Stirlingshire dated 29th September 1897: Refuse the claim for James Charles Calder: Sustain the deliverance of the trustee rejecting the said claim, and decern," &c.

Counsel for the Appellant—M'Lennan—Munro. Agent—Robert D. Ker, W.S.

Counsel for the Respondent—William C. Smith. Agent—Alex. Morison, S.S.C.

Friday, October 22.

SECOND DIVISION.

THOMSON'S TRUSTEES *v.* THOMSON.

Trust—Administration of Trust—Power of Sale—Construction of Will—Implication.

A testator directed his trustees to pay to his wife during her lifetime "the free rents, interests, and profits arising from my means and estate, heritable and moveable, or from the proceeds thereof," and after her death to divide his "means and estate, heritable and moveable, or the proceeds thereof," into three equal parts, and to hold one share for behoof of each of his three children in liferent and his or her children in fee.

The testator was survived by his wife and three children, and left, *inter alia*, engineering works and other heritable property. There was no direction in the trust-deed to the trustees to carry on the engineering business.

Held that the trustees had power under the trust-deed to sell the heritable property, including the engineering works.

Process — Special Case — Competency.

Observations as to nature of controversy which may be made the subject of a special case.

David Thomson, engineer, Johnstone, died on 26th September 1895 leaving a trust-disposition and settlement, dated 24th September, in which he conveyed his whole estate, heritable and moveable, to trustees for the following purposes — *In the first place*, Payment of his debts, sick-bed and funeral charges, and trust expenses: "*In the second place*, In the event of my wife Mary Anne Hamilton or Thomson surviving me, that my trustees shall pay to her during her lifetime the free rents, interests, and profits arising from my means and estate, heritable and moveable, or from the proceeds thereof: *In the third place*, That my trustees shall, upon the decease of the longer liver of my said wife and me, divide my means and estate, heritable and moveable, or the proceeds thereof, into three equal parts or shares, and shall hold one of said equal parts or shares for behoof of my daughter Ann Crawford Thomson or M'Kenzie in liferent for her liferent use allenarly, and of her children in fee; they shall hold another of said equal parts or shares for behoof of my son David Thomson in liferent for his liferent use allenarly and of his children in fee, and they shall hold the remaining said equal part or share for behoof of my daughter Mary Stevenson Thomson or Stewart, in liferent for her liferent use allenarly and of her children in fee."

The truster was survived by his wife and three children. At the date of his death his estate included, *inter alia*, the engineering works at Johnstone in which he carried on his business of an engineer, and certain leasehold subjects at Kilchattan Bay, consisting of three houses erected on ground held on a ninety-nine years' lease from Whitsunday 1880 to Whitsunday 1979.

The trustees resolved, if it was competent, to sell the engineering works and the leasehold subjects by public roup or private bargain, or, failing sale of the former, to let them on lease for ten years or less; but questions arose between them and the beneficiaries as to their power to do so.

For the decision of the point a Special Case was presented to the Court by (1) the trustees and (2) the beneficiaries under the trust-deed.

The questions at law were—"(1) Have the parties of the first part power under the trust-disposition and settlement to sell the engineering works and fixed plant and tools therein by public roup or by private bargain? (2) Have they power to let the said engineering works and fixed plant and tools on lease for say ten years or under? (3) Have they power, under the said trust-disposition and settlement, to sell the said leasehold subjects at Kilchattan Bay by public roup or by private bargain?"

Argued for first parties—A sale was competent, as the trust-deed directed them to pay to the widow the free rents, interests, and profits arising from his means and

estate, heritable or moveable, "or from the proceeds thereof," and on her death "to divide said means and estate, heritable and moveable, or the proceeds thereof." This necessarily implied a power of sale.—*Parker* v. *Tootal* (1865), 11 H. L. Cases, opinion of Lord Westbury, p. 161; *Affleck* v. *James* (1849), 17 Simon's Reports, 121; *Allan* v. *Glasgow's Trustees*, September 1, 1835, 2 S. & M., opinion of Lord Brougham, p. 352.

Argued for the second parties—It was incompetent for the trustees to sell or let on long lease any part of the heritable estate, including the engineering works, because the trust-deed contained no express powers to that effect and no sufficient ground for implying such power.

LORD JUSTICE-CLERK—I think this is a very proper case to bring before the Court. It is not a special case raising a bare point of law upon which the parties desire to have the opinion of the Court, but without intending to follow up that opinion by settling a dispute which has arisen among them. This case is one in which the trustees were placed in serious difficulty in respect of doubts concerning their power to sell expressed by more than one of the beneficiaries. They have therefore brought the matter before us.

The plain reading of the will shows that it was the intention of the testator that the trustees should have power to convert any part of the estate, heritable or moveable, into money if they thought fit to do so. I do not think the word "proceeds" can be used as applicable to the moveable portion of the estate only. The sequence shows that the word applies to the whole of the truster's means and estate, both heritable and moveable. A case was quoted in which Lord Westbury expressed his opinion that implication may arise from the form of expression in a deed which involves something else as contemplated by the person using the expression. Here I think the form of the direction to the trustees necessarily involves a power of sale.

LORD YOUNG—I concur and only wish to add that I think this is undoubtedly a competent case to present under the statute. I have no doubt that the trustees have power to sell, but I doubt very much whether they would have been entitled to carry on a mercantile business which is necessarily speculative and might have exhausted the trust-estate. I therefore think that the trustees would be acting reasonably in bringing the estate to a sale. The risk of carrying on the business themselves, or allowing others to do so on their behalf, is of itself an argument for holding that there is a power to sell. There are many cases where a power to sell may be implied from the very nature and character of the estate itself. But in the present case I also agree with the argument that the power is contained in the deed.

LORD TRAYNER—I have doubts as to whether this is a proper case to present to the Court in this form. The purpose of a special case is not to enable parties to consult the Court, but to enable them to obtain a judgment or opinion on a question which might form the subject of a proper *lis* between them; and in regard to which they are agreed as to the facts, but differ as to the law. Here there could be no *lis* except in the event of the trustees proceeding to sell the estate and the beneficiaries raising an interdict against them on the ground that no power of sale was conferred on them by the trust-deed. In this view of the case before us—that there might arise out of the facts submitted to us a *lis* between the parties—I am not disposed to regard the special case as an incompetent form in which to have the question raised determined.

On the question submitted to us I have no doubt. In the second purpose of the trust the testator authorises the trustees to give the liferent of the estate to his wife by paying her the free rents, interests, and profits arising either from his means and estate or the proceeds thereof. This implies that they may either keep the estate as it is or convert the estate and give her the interest of the proceeds. If this is right as regards the second purpose, the same reasoning is applicable to the third. A power is implied in that also to convert the estate. This view acquires additional force from two circumstances. The testator has given no direction that the trustees should carry on the business. It may therefore be inferred that he did not intend them to do so. In the second place, upon the death of the testator and his wife the trustees are directed to hold the estate for behoof of the children of the truster in liferent and their children in fee. It is impossible to think that the truster meant the trustees to carry on this business, not only during the lifetime of his widow, but also after her death during the lifetime of his children, and to hand it over intact to his children's children.

LORD MONCREIFF—I agree with all your Lordships that, on a sound construction of this deed, power to sell is impliedly conferred upon the trustees.

As regards the competency of the special case, I think it may be regarded as competent, in respect that the first parties might have proceeded to sell the business at their own hand, in which case the beneficiary might have objected on the ground that no power of sale is contained in the trust-deed, and they might have applied for interdict on that ground. I think that this case is an economical and convenient mode of settling that question.

LORD YOUNG—As regards the competency of the special case, I should like to add that the question of power to sell may always be determined in a *lis* such as an action of declarator. That is competent. Or again, trustees might proceed to sell on an arrangement that their title to sell was to be determined in an action raised by them against the buyer for the price. It occurred

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—