

the sum of £350, being the amount of fixed rent payable at the said term of Whitsunday, and paid to the deceased proprietor before his death; find that the parties of the first part have no right to any lordships or minerals raised to the surface prior to the said term of Martinmas 1869, but not payable in terms of the lease till the arrival of a term or terms subsequent to the said term of Martinmas 1869; and decern."

Agents for Executors—Duncan Dewar & Black, W.S.

Agents for Heir—Mackenzie & Kermack, W.S.

Thursday, March 17.

BROWN v. ORR.

Custody of Children—Expenses—Trust-Estate. In a competition for the custody of children between their maternal grandmother and their paternal aunt and uncle, the Court assigned the care of the children to the former, on the ground of her possessing a larger income than the two latter put together, and therefore being able to make the children more comfortable, and also because the uncle was somewhat irritable from ill health. As, however, the petition by the uncle and aunt was approved by the majority of the tutors nominated by the father of the children, they were allowed expenses out of the trust-estate.

Major Brown died in London in May 1869, predeceased by his wife, and leaving three children. He was also survived by a brother and sister, who have come to reside in Edinburgh. Major Brown appointed certain relatives and friends trustees in 1866, and nominated them also as tutors to his children. Four of these six tutors and trustees presented a petition to have the custody of the children given to Captain and Miss Brown, on the ground of the children's affection for their aunt, the suitability of Edinburgh for their education, and the desirability of aiding the income of Captain and Miss Brown by the board paid for the children. This application was resisted by the remaining two tutors and trustees, who thought it better the children should reside with their maternal grandmother. They stated, as grounds for their opposition, that of the petitioners one was the real applicant, Captain Brown, and another was his brother; and that Captain Brown, having suffered from a paralytic stroke, was of so peculiar and irritable a nature that his house would not be a suitable home for the children. The petitioners, on the other hand, replied that the respondents were sons-in-law of the children's grandmother; and that as Miss Brown for three years had taken charge of the children in India, where they were born, it was most suitable they should reside with her.

WATSON and BALFOUR for petitioners.

SOLICITOR-GENERAL and CRAWFORD in answer.

At advising—

LORD PRESIDENT—The question is one entirely in the discretion of the Court; and the exercise of that discretion involves many delicate considerations. On the whole matter, I am of opinion that the children ought not to be transferred from Mrs Ferrier to Captain and Miss Brown. Undoubtedly weight is due to the opinion of tutors. But in the present case that is greatly removed by the fact that the tutors are not agreed; that one of the four

petitioners has a direct interest in making the application, and that another is in Australia; and I cannot but doubt whether he was fully informed of all the circumstances when he wrote the letter produced. Other two, Messrs Latham & Fraser, may be neutral; but whether they are well acquainted with the comparative merits of Mrs Ferrier and Miss Brown we are not informed. Upon the whole, while weight is due to the opinion of the majority, it is not an opinion to which the Court is bound to defer. It is only one of the circumstances of the case. Nor are we determining the place of education of the children. They are of very tender years. What arrangement may afterwards be necessary we cannot now say. Circumstances may change. The question now is, Where these young children ought to live? I cannot doubt that either Mrs Ferrier or Miss Brown is well qualified to take charge of them. The only question is, What is the best home for them? As to the wishes of the father, I cannot say we have distinct evidence of any preference. He had confidence both in Mrs Ferrier and Miss Brown. The incomes of both parties are very moderate. But it is of great consequence to children born in India that their home should be made as comfortable as possible. Now, it is clear that they are more likely to be so with a single lady living in Rothesay, with an income of £300 a-year, than with a lady and gentleman living in Edinburgh, with a joint income of £228. The health, too, of Captain Brown is uncertain. I think his paralytic stroke ought not to be disregarded. We know that the temper of people suffering from such a malady as his is not very certain. On the whole matter, I do not think the petitioners have made out a case, or that we can grant the prayer of the petition.

LORD DEAS—I agree with your Lordship. I see no sufficient ground for removing the children. Both ladies are unobjectionable; but we must make a choice, and I give the preference to the grandmother under present circumstances.

LORD ARDMILLAN—Tutors are not the custodiers of the children. The grandmother is the natural and becoming custodian. This has been recognised by decisions of the Court, and it is commendable to reason. Some of the strongest and warmest affections have subsisted between a husband and his wife's mother; and Major Brown seems to have been much attached to his wife's side of the house, as is shown by the letters we have seen. To her Major Brown sent his eldest child. Although his mind may not have been quite made up, the correspondence shows that the tendency of his inclination was to place them with Mrs Ferrier. It shows deep affection for her; and I have no doubt that his wish was that they should be under the roof of the lady he loved better than any other, except his wife.

LORD KINLOCH—I am of the same opinion. I have no doubt whatever that, if given to Miss Brown, the children would receive every care and attention; but, in the circumstances, I cannot for a moment think of removing them from their present home. I decide on existing circumstances. There is no need to grant any order to give their uncle and aunt access to them. They will, I am sure, get more frequent and more ready access without it.

On the question of expenses, the Court allowed

them out of the trust-estate. Considering the trust-estate was very small, it would be inadvisable to saddle the expenses of the litigation on it. But, on the other hand, it would not do to make the petitioners personally liable, as they formed the majority of the tutors nominated by Major Brown; and the applications had been made for the children's benefit. The taxed expenses of both sides should therefore come out of the capital of the trust-estate.

Agents for Petitioners—Dalmahoy & Cowan, W.S.

Agent for Respondents—John Martin, W.S.

Thursday, March 17.

SECOND DIVISION.

DUKE OF ABERCORN AND SIR W. H. DICK CUNYNGHAM, BART. v. REV. HENRY DUFF, CLERK OF PRESBYTERY OF EDINBURGH.

Church—Repairs—Assessment—Valued-Rent Heritors—Feuars—Possession—Lands Valuation Act 1854, sec. 33—Presbytery. Almost the entire area of the church of Duddingston had from time immemorial been let by the valued-rent heritors, and the sum derived from the seat rents and mortcloth dues had been handed over to a commissioner on behalf of these heritors, and had been by him expended in repairing the church, &c., any deficiency being made up by a voluntary assessment among the valued-rent heritors in proportion to their respective amounts of valued rent. It became necessary to execute considerable repairs on the church, and to defray the cost of these the Presbytery imposed an assessment on the heritors in proportion to their valued rent. There were only four valued-rent heritors, and on the other hand there were upwards of 500 seat-rent heritors, among which were comprised the feuars of Portobello. The valued-rent heritors brought a suspension. *Held* that the decree of the Presbytery was good, in respect it proceeded on the state of possession that had existed from time immemorial.

But any right of relief competent to the valued-rent heritors against the feuars reserved.

Observations by Lord Cowan on the *Mauchline* and *Peterhead* cases.

The question raised in this suspension was, Whether an assessment imposed by the Presbytery of Edinburgh to defray the cost of certain repairs executed under their authority upon the parish church of Duddingston was rightly imposed upon the heritors, in proportion to their valued rent—there being upwards of 500 seat-rent heritors in the parish, among whom were comprised the feuars of Portobello; while there were only four valued-rent heritors—viz., the suspenders, the Duke of Abercorn, and Sir W. H. Dick Cunyngham, and two others.

Several grounds of suspension were stated on record, but the only one which was seriously insisted on was—that having regard to the decisions in the *Peterhead* case (1802, 4 Pat. App., 356) and in the *Mauchline* case (1837, 15 S., 1148), and to the fact that the area of the church of Duddingston had never been allocated among the heritors ac-

cording to the valued rent, so as to bring the case within the *proviso* of the 33d section of the Lands Valuation Act of 1854—the Presbytery had done wrong in assessing according to the valued rent.

The material averments of the respondent, who as collector appointed by the Presbytery had given the charge sought to be suspended, were that the area of the church of Duddingston had been divided or allocated among the heritors of the old valuation; and that from time immemorial the expense of repairing the church had been borne by these heritors alone, the management also being kept entirely in their hands. The respondent pleaded in substance (1) that the suspenders were bound to convene the other heritors; (2) that they were barred from insisting in the suspension by their conduct before the Presbytery; and (3) that in the circumstances of the parish, and in respect of the allocation and usage condescended on, or of one or other of them, the Presbytery had done right in taking the valued rent as the rule of assessment for the repairs.

A proof was taken, from which it appeared that, with the exception of a loft and a gallery appropriated to the Abercorn and Prestonfield families respectively, the whole of the area of the church of Duddingston—which was a fabric of very great antiquity—had from time immemorial been let by the valued-rent heritors; and that the sum derived from the seat-rents and from mortcloth dues had been from time to time handed over by the kirk-treasurer to the commissioner for Lord Abercorn on behalf of these heritors, and had been by him applied in payment of repairs upon the church, manse, and schoolhouse, church-officer's salary, &c.; and that any deficiency had been made up by a voluntary assessment among the same four heritors in proportion to their respective amounts of valued rent.

On the 9th March 1869 the Lord Ordinary (MANOR) suspended the charge, finding no expenses due on either side.

The respondent having reclaimed, the Court, on 11th June 1869, repelled the pleas stated for him so far as urged to exclude consideration of the merits, but superseded consideration of the reclaiming note, to allow him, if so advised, an opportunity of bringing the feuars into the field.

The respondent having, after deliberation, declined to avail himself of this opportunity, the case was recently reheard.

SOLICITOR-GENERAL and MACKENZIE for suspenders.

WATSON and CHEYNE in answer.

At advising—

LORD-JUSTICE-CLERK—This is a suspension of a charge proceeding on a decree of the Presbytery of Edinburgh for sums required for the repair of the parish church of Duddingston. The suspenders do not deny that they are heritors of the parish, or that the repairs are necessary; but they maintain that the assessment ought to have been laid on by the Presbytery according to the real rent of property within the parish, and not according to the valued rent. Their plea amounts in substance to a contention that others besides themselves are liable to the burden.

The importance of the question thus raised is very great, as, if the plea of the suspenders is well founded, the large and populous communities of Portobello and its vicinity will be included in the assessment. Important however as it is to the heritors, it is one of comparatively little import-