

I can quite understand that he might be unwilling to alter his settlement or make a codicil there-to for the purpose of literally fulfilling his promise. Indeed, I think it was a most natural proceeding on his part on recovering from his illness in the spring of 1879 to resolve to make a sure provision for the pursuer, who had faithfully nursed him, by investing at once some money for her behoof. It appears to me that the terms of the receipt in question, when contrasted with those of the other receipts of the Water Commissioners for £200, dated 1st June 1878, in his own name alone, go very far indeed to prove that at all events in May 1879 the deceased had a fixed intention of giving the pursuer £200 at his death. I think it is proved that he then communicated that intention not only to the pursuer but also to his brother George, and that he repeatedly during his last illness, and when he believed himself dying, referred to that document as being a provision for the pursuer on his death. On the whole, I am of opinion that the pursuer has established as matter of fact that the deceased gave her this receipt as a donation *mortis causa*.

"I ought, perhaps, before concluding, to say that the defenders argued strongly against donation, on the ground that the deceased, who himself dictated the terms of the receipt, therein described the pursuer as Margaret Young his house-keeper, and excluded the *jus mariti* of any husband she might marry, although he must have been aware that she was then a married woman. I confess I am unable to see how the mistake (if it be a mistake) in the designation of the pursuer should affect the donation in her favour if otherwise competently proved. I may further mention that she had for fourteen years been separated from and had had no intercourse with her husband, and it is quite possible that at the time he took the receipt John Donald may have forgotten that she was anything but a widow, but, as I have already said, an error of the kind pointed out by the defenders cannot, in my opinion, affect the present question. The result of the whole case is that the pursuer is entitled to the decree which she asks, with expenses."

In this judgment parties acquiesced.

Counsel for Pursuer—Macfarlane. Agent—
Thomas M'Naught, S.S.C.
Counsel for Defenders—J. A. Reid. Agent—
J. Smith Clark, S.S.C.

Saturday, February 26.

FIRST DIVISION.

CAMPBELL AND ANOTHER (RANKINE'S
TUTORS-NOMINATE), PETITIONERS.

Tutor-Nominate—Nobile officium—*Powers*—
Necessity and Expediency.

Tutors-nominate petitioned for authority to accept a reconveyance of certain building feus. It appeared that the feuar was unable to pay the feu-duty, which was considerably in arrear, and that the rate of feu-duty was higher than the depressed state of the building trade in the locality warranted; but the

pupil's estate was in no way embarrassed in its circumstances. The Court (*ad. loc.* Lord Deas) authorised the tutors to accept the reconveyance on the ground that the expediency of the course proposed was so great as to amount to necessity in the legal sense.

This was a petition by the tutors-nominate to the children of the late W. M. Rankine of Dudhope. The estate of Dudhope lies wholly within the burgh of Dundee, and previous to his death Mr Rankine had feued to David Bremner, builder, certain areas of building ground belonging to the estate at the rate of 8s. per pole or £64 per acre, Bremner being taken bound to erect dwelling-houses within four years of the date of the feudisposition to the value of £6000 at least, and being entitled in disposing of the subjects in parts to allocate the feu-duty in sums of not less than £24, so that each part was to be liable for its allocated feu-duty only. Houses to the value of £6000 were erected within the stipulated period, and the feu-duty relating thereto allocated as above; but with reference to the areas as yet unbuilt upon the petition set forth "That at the date of the death of the said William Macbean Rankine the said David Bremner was due a considerable sum for arrears of feu-duty. In consequence of the great depression in the trade of Dundee the building trade has suffered likewise, and there is now no prospect of laying out money to advantage in the erection of houses on the ground feued. Mr Bremner feels himself unable to pay the annual feu-duty for which he is still liable; nor is he able to give your petitioners any security for the future payment of the feu-duty for the ground still unbuilt on." In these circumstances Mr Bremner requested the petitioners to accept a reconveyance of the areas still unbuilt upon, and in consequence this petition was presented to obtain the authority of the Court to that act of administration, the petitioners further stating that they "are satisfied that the said David Bremner is not in a position to be able to pay the annual feu-duty for the portion of ground he now wishes to reconvey to your petitioners; and your petitioners are satisfied that it would be for the benefit of the estate that such reconveyance should be accepted by them."

The Court remitted the petition to the Junior Lord Ordinary (ADAM), who remitted to Mr Patrick Adam, S.S.C., to inquire and report. The substance of Mr Adam's report sufficiently appears from the following note added by the Lord Ordinary (LEE) to his interlocutor reporting the petition to the Court:—

"*Note*.—This is an application by the tutors-nominate of the heir of the late Mr Campbell Rankine of Dudhope for power to transact with a feuar—to whom the deceased proprietor, by his factor and commissioner, had granted certain feus—for a discharge of his obligations under the feu-disposition to the extent of £139 per annum, upon payment of arrears of feu-duty to Martinmas 1879, and upon his granting a reconveyance of the feus which have not been built upon.

"The circumstances in which the application has been made are set forth in the petition, and the Lord Ordinary understands from the petitioners' counsel that although the report of Mr Adam does not expressly bear that these circumstances have been found by him to be accurately

set forth, it is desired that the matter should be reported to the Court without further inquiry—the view being that the report sufficiently discloses the necessity of granting the powers craved.

“It appears to the Lord Ordinary that it would have been desirable, if possible, to obtain before reporting upon the application more distinct evidence that loss must be caused to the estate if the application be not granted. The petitioners, however, desire a judgment on the matter as it stands, and as tutors-nominate the Lord Ordinary thinks they are entitled to have the case reported for the purpose of enabling them to ask a judgment.

“Notwithstanding the doubts which have been expressed as to the competency of authorising tutors-nominate to exercise such powers, the Lord Ordinary thinks that it may be taken as now settled that there is no incompetency if a case of necessity be made out. The cases of *Mackenzie*, Jan. 27, 1855, 17 D. 314; *Morison*, July 19, 1861, 23 D. 1313 (previously reported under date Feb. 20, 1857); and *Turner*, March 1, 1862, 24 D. 694, are illustrations of such powers being granted to tutors-nominate; and a tutor-at-law was authorised to accept a renunciation of a lease in the case of *Brown*. Dec. 11, 1846, 9 D. 250. In the case of *Berwick*, Nov. 13, 1874 2 R. 90, the Court, while refusing as incompetent an application by trustees for power to accept a renunciation, indicated an opinion that in the case of tutors-nominate such powers might have been granted.

“It is only, however, on the ground of necessity that the Lord Ordinary understands such applications can be entertained. If no necessity for the interposition of the Court can be shown, the tutors-nominate will be left to act on their own responsibility. In the present case Mr Adam reports that ‘it would be for the benefit and advantage of the estate if the petitioners were authorised to accept of the reconveyance offered by Mr Bremner.’ He also reports that ‘the petitioners are satisfied that he is not in a position to be able to pay the annual feu-duty of the portion of ground he now wishes to reconvey to them.’ The question is, whether this is enough to enable the Court to grant the powers craved?”

On 17th July 1880 the Court again remitted the petition to the Lord Ordinary for inquiry, and the former reporter (Mr Adam) proceeded to investigate the circumstances of the feuar Mr Bremner. The result appears from the following note by the Lord Ordinary and from the opinions of the Court *infra* :—

“*Note*—The Lord Ordinary, in terms of the remit of 17th July last, has caused further inquiry to be made, and now again reports, with a second report by Mr Patrick Adam, and relative valuation.

“The result of Mr Adam's second report appears to be that the feuar Mr Bremner is a builder in large business in Dundee, and is also proprietor of house property to the value of £16,280, burdened with debts to the amount of £15,763; but it was stated by counsel for the petitioners that the valuation of Mr Alexander is too high in some particulars. Mr Bremner is at present engaged in two very considerable building contracts, and Mr Adam reports that ‘it would seem to merit consideration whether, in order to

avoid a crisis in his affairs, and probable loss to the pupil's estate, it might not be expedient to grant the prayer of the petition.’

“The Lord Ordinary is not aware of any precedent for authorising tutors-nominate in similar circumstances to accept a renunciation of a portion of a feu taken for building purposes; and he begs to refer to his former report for his view of the principle upon which such applications have been dealt with. It will be observed from the petition that a large part of the ground feued by Mr Bremner has been used by him for the purpose for which it was acquired. He has allocated the feu-duty stipulated for in the feu-disposition upon the houses which he has built; and it is feu-duty for the ground still unbuilt on, and which is proposed to be reconveyed, that is said to be beyond Mr Bremner's means of payment. The Lord Ordinary cannot report that in his opinion any necessity for the intervention of the Court has been established.”

On resuming consideration of the petition, the Court continued the cause for a week to enable “the petitioners to state in a minute whether there is any immediate prospect of re-feuing the ground in question at a lower rate of feu-duty than that stipulated in the feu granted to Mr Bremner, and if so, at what reduction of rate; and to furnish the Court with such evidence as may be possible of the probability of so disposing of the ground.” The petitioners in consequence lodged a certificate by Messrs James Salmond, land valuator, Dundee, and William Alexander, town architect, Dundee, in which they stated that they considered “that 8s. per pole, or £64 per acre, is an excessive rate in present state of the building trade, and that such a rate is unlikely again to be obtained, at least for a very considerable time: And we are further of opinion that if under the authority of the Court the tutors and curators nominated by the late Mr Rankine are authorised to receive a reconveyance of this ground from Mr Bremner, they will in all probability be able, between this and the term of Martinmas next, if the ground in question is properly advertised, to get the whole or a portion of it feued off at the rate of from 4s. to 5s. per pole, and that offerers would probably have presented themselves ere this had the ground been in the market at the above rate.” And the petitioners also lodged two offers for feus of portions of the subjects at the rates of 4s. 6d. and 4s. 9d. per pole respectively.

At advising—

LORD PRESIDENT—This is a case of an unusual kind, and is attended with a good deal of difficulty in point of principle. The Court have not been in the habit of granting extraordinary powers to tutors for the disposal of the estates of their ward on the mere ground of expediency, or on the consideration that the exercise of the powers granted will be of advantage to the estate or enhance its value. I do not think that that is a sufficient ground for granting such an application. But, on the other hand, the expediency of a certain course of management may be so high as to amount to what the law will hold to be necessity. The question is, whether this is a case of that kind? Are there circumstances to justify us in holding that there is here a case of necessity entitling us to deal with the estate in the manner proposed?

It is clear that Mr Bremner, to whom this feu has been granted, is not in a position to fulfil his obligations as feuar. So far from that being the case, it is obvious that he will not and cannot do anything in the way of feuing this ground. His own circumstances are such to preclude that idea at present. That of itself creates a great difficulty in the way of dealing with this ground. It is totally unproductive, and will remain unproductive for an indefinite time. There is no doubt the chance that Mr Bremner's circumstances may improve, and there is also the chance that the value of the ground may rise. The chance of Mr Bremner's circumstances improving is not very rose-coloured, and as regards the value of the ground, the estate will not of necessity lose by the tutors being authorised to accept this reconveyance, because accepting the reconveyance does not necessarily mean that they are to feu the ground out again at a much lower rate than in Mr Bremner's feu. They may retain it in their own hands, if there is a rise or a prospect of a rise in the value of building ground in Dundee, and of their getting offers equivalent or nearly equivalent to Mr Bremner's. There will be no greater immediate loss than there is at present. But if there is no such immediate or reasonably immediate prospect of getting as high a feu-duty, it will be for the tutors to consider, in the exercise of their discretion in the proper administration of the estate, whether they ought not to accept a lower rate; and in this matter it is not to be left out of view that the Court have already authorised other feus of this estate at a lower rate than in this feu-contract. The question therefore is, Whether the ground ought to be left in the hands of Mr Bremner with no immediate prospect of getting anything from it, or whether the tutors ought to accept a reconveyance with the possibility of feuing it again at a lower rate? Now, the position of this estate is not so embarrassed as to make it in the strict sense necessary to grant this petition in order to extricate the estate out of its difficulties. There is, however, a necessity in the sense of a very high expediency, and I am disposed, though not without a good deal of difficulty, to grant authority to the tutors to accept this reconveyance, reserving to them their right to bygone feu-duties, and leaving it to them to sue for damages on account of Mr Bremner's breach of contract.

LORD MURE—I have come to the same conclusion. I think that the Court can grant petitions like the present only when there is an expediency in carrying out what is proposed so great as to amount almost to a necessity. The feu-duty here is irrecoverable. That is the staggering fact. The builder cannot fulfil his obligation. His state of affairs is such that if he is pushed for payment he will be forced into the Bankruptcy Court. In these circumstances I think that he should be allowed to renounce this feu, leaving the tutors at liberty to feu the subjects again at the highest price they can get. The state of the building trade in Dundee at present is such that the present rate of feu-duty cannot now be got, for we know that these tutors have themselves been obliged to feu other parts of the estate at a lower rate; and there is little immediate prospect of the feu-duty being so high again. I think, therefore,

that there is an extreme expediency, amounting almost to a necessity, for authorising the petitioners to take this feu off Mr Bremner's hands, in order to feu the subjects again; and that this entitles us to grant the petition.

LORD SHAND—The position of the ground here is that it is entirely unbuilt on. There is no security whatever for the payment of the feu-duty. It appears that some time ago the parties entered into a transaction with regard to the arrears of feu-duty then due, but all that the tutors could get was a postponed bond—the fifth, as I understand, over some property in Dundee belonging to Mr Bremner. Since then matters have gone on as before, Mr Bremner professing to be quite unable to pay the feu-duty, and I am satisfied that he is unable. There is at present, therefore, simply a continual loss to the estate. It is true that the tutors may make Mr Bremner bankrupt, or they may wait until they can bring an irritancy of the feu *ob non solutum canonem*, but they would thereby involve the estate in expense and loss. It appears to me therefore to be highly expedient to grant this petition, as the only way of averting a certain loss to the estate. I have no hesitation in saying that the Court has the power, and ought in the present case to use it, of granting this petition, the ground upon which the Court proceed being to prevent what must otherwise be a serious loss to the estate.

LORD DEAS—As your Lordship is aware, I was necessarily absent during some of the previous stages of this case, but I have read the papers with great care. It seems to me to be attended with great difficulty. What your Lordships propose to do is really to hold a case of strong expediency to be one of necessity. Now, the result of all the authorities is that nothing will justify the Court in interfering with the property of a pupil except necessity. The reason is plain. The pupil can have no say in the matter, and long before he comes of age it may turn out to be for his advantage that his estate should have remained in his own hands. So much so is this the case that we know very well that acts grounded on strong expediency merely have been found not to be binding on the pupil when he came of age. We have had strong cases of that. It is a serious thing to call that necessity which is really expediency. It is very difficult to my mind to grant this petition without a relaxation of the principle on which the Court have hitherto proceeded. At the same time, I am much moved by what your Lordship in the Chair has pointed out, that it is not proposed to feu this property at a lower rate than 8s. per pole, but simply to cancel the existing feu. As your Lordship observed, the amount of feu-duty which was got formerly may be got again. This does not remove my difficulty as to the change in the principle on which the Court has hitherto gone, but as your Lordships have had the circumstances of this case before you so repeatedly, and have come to the conclusion that the petition ought to be granted, I am not prepared to dissent.

The Court authorised the petitioners to accept a reconveyance of the subjects mentioned in the

petition, but reserved to them all recourse for the recovery of the feu-duties payable down to the date of the reconveyance.

Counsel for Petitioners—Kirkpatrick. Agents—Pearson, Robertson, & Finlay, W.S.

Saturday, March 5.

SECOND DIVISION.

MOSS OR MACKENZIE v. MACKENZIE.

Husband and Wife — Voluntary Separation — Access to Child.

A wife who was residing apart from her husband under circumstances which did not disclose any ground in law for separation, petitioned the Court for access to the child of the marriage at all reasonable times, and in particular that she should have it sent to her at her separate residence for two whole days in each week. The husband invited her to return to cohabitation, or alternatively he offered access to the child at his own residence at any time she might come unaccompanied. *Held* that the wife not being entitled in law to absent herself from her husband's home, the petition fell to be refused.

This was a petition at the instance of Mrs Minna Amy Edwards Moss or Mackenzie for access to the only child (a girl aged two years) of her marriage with the respondent Osgood Hanbury Mackenzie "at all reasonable times," and "in particular" to be found "entitled to have the said child sent to her at Poolhouse for two whole days in each week," and to have access to the child "on the other days at all reasonable times during the day at Tournai House, or where the child may be for the time, and that in either case outwith the presence of the said Osgood Hanbury Mackenzie or of Dame Mary Hanbury or Mackenzie, his mother, or anyone on their behalf."

The petitioner stated that since her marriage in 1877 the respondent, her husband, had "treated her with much neglect and unkindness," and that the differences between them had principally arisen from pecuniary matters relating to the manner in which her funds were settled on her by her marriage-contract. In February 1880 she left her husband's house at Inverewe, Ross-shire, with his consent, and until the following June remained with her parents at their residence near Liverpool. During this time she was in weak health, which she alleged was partly caused by her husband's treatment, partly by the climate of the west coast of Ross-shire, which had disagreed with her, and partly by the pain of leaving her child. In June she wrote to her husband expressing her intention of returning to Inverewe, and there re-joining him and her child. This letter contained certain proposals as to money matters. She received an answer from her husband, in which he informed her that he had left Inverewe and had gone to reside with his mother in Tournai, at least in the meantime. The letter contained this sentence—"Should you like to come here, and write to say so, a room will be prepared for you." The petitioner went to Tournai, where she re-

mained for a month, when owing to certain painful circumstances "she left her mother-in-law's house." She then took Poolhouse, two and a-half miles from Tournai, with the view of being near her child, but being by her husband's legal advisers informed "that the actual access which her husband is prepared to permit is that she should see her child for an hour three times a week at Tournai House on the condition of her coming unaccompanied, but the child to be attended by either the nurse or Lady Mackenzie."

The respondent lodged answers, in which he explained that his reason for leaving Inverewe and going to reside at Tournai with his mother was the fact that his resources had been much crippled owing to the marriage-contract trustees having at the instance of his wife's friends withdrawn from his use her portion of £10,000 settled by her marriage-contract, and in particular by their having called up a sum of £6000, part of that portion which had been lent to him on security. In these circumstances he offered to receive the petitioner as his wife at Tournai House and to resume conjugal relations without reference to the past, the petitioner being mistress of the establishment as after the marriage; "Alternatively, in the event of the petitioner still wishing to reside at Poolhouse, to give her access to the child, provided she came unaccompanied and did not take the child out of the house except accompanied by its nurse, at all times when she might choose to come; and further, to arrange that during one or two hours on certain days in each week the child shall always be kept either in or immediately about the house, so that the petitioner might depend upon finding it."

After hearing counsel for the petitioner—

LORD YOUNG—We do not think it necessary in this case to call for an answer. We have read the petition and answers and also the correspondence, and we are all of opinion that the course taken by Mr Robertson in abstaining from all reference to the cause of the disagreement, and also from all reference to the letters, is to be commended. The separation between these parties has not been so long as to destroy the hope of reconciliation. For the same reason I do not enter into the correspondence. It would be against the interest of the parties to do so.

This lady has not been living with her husband, and she declines to return to his house, though affectionately invited to do so. We must assume, in the absence of evidence to the contrary, that her conduct in so doing is not legally warranted. Her legal duty as a wife is to return. The considerations which induce her to remain away are not stated fully, and in a moral point of view she may be more or less excusable, but legally—and we must look at the matter legally—her duty is to be with her husband, and she is not acting according to her legal duty in absenting herself from her husband and child. The fact of her removing her separate income, and thereby compelling her husband to break up his establishment and go to live with his mother, whose only son he is, is not in her favour. She has been invited, but declines, to return unless she is to be mistress in her mother-in-law's house.

We consider that demand not legally warrantable, and I confess that my sympathies after perusing the correspondence are to a large extent