Tuesday, July 18.

FIRST DIVISION.

SINCLAIR-WEMYSS, PETITIONER.

Nobile Officium—*Guardian and Ward—Powers of Tutor—Building of Mansion-house on Pupil's Estate and Borrowing on Security of Estate to Pay therefor.*

A tutor-nominate having applied to the Court for power to build a mansion-house on the pupil's estate, which was held under an entail, and for that purpose to borrow money on the security of the estate, on the ground that there was no mansion-house on the estate, that the pupil's father, now deceased, had intended to build one, and that it was desirable that the pupil should be brought up in the neighbourhood in which her property was situated, and that no suitable house for her residence was to be had in the district—the Lords *refused* the authority craved, on the ground that the proposal was neither necessary nor highly expedient.

George Sackville Sinclair-Wemyss of Southdun, in the county of Caithness, died on 30th March 1882. Previously to his death he had disentailed the estate of Southdun, but had not, as was his intention, executed a new entail, and the destination of the estate contained in the entail had therefore not been evacuated, though the estate was held by Mr Sinclair-Wemyss in fee-simple.

Mr Sinclair-Wemyss was survived by a widow and two daughters, the elder of whom was born in June 1879, and the younger in September 1880. By his disposition and settlement Mr Sinclair-Wemyss nominated his widow to be tutor and curator to his children, with all the powers pertaining to that office.

This petition was presented by Mrs Sinclair-Wemyss as tutor to her elder daughter, who was now proprietor of Southdun under the existing destination, for authority to build a mansion-house upon the estate, on a site selected and according to plans approved by her husband before his death for a mansion-house which he contemplated building. She also asked authority to borrow £3500 for that purpose upon the security of the estate, and to apply the surplus rents to that amount in defraying the cost of the mansion-house. The free rental of Southdun after deducting public burdens and interests on existing family provisions and other debts was £1175, but this was subject to an annuity in favour of the petitioner for £400, so that the pupil's clear annual income was £775.

It appeared from the statements made in the petition and at the bar that at one time Southdun was part of a larger estate, and that it had been disjoined therefrom about 1815, the larger part of the estate on which the mansion-house stood having come into other hands than those of the proprietor of Southdun. Thereafter for 40 years the proprietor of Southdun lived with a relative on an adjoining property, and so no mansion-house had been built on Southdun in his time. Mr Sinclair-Wemyss and his immediate predecessor Mr David Sinclair-Wemyss had both rented the mansion-house of Hempriggs, which was on the property adjoining Southdun, but at the time of the death of Mr Sinclair-Wemyss he had been informed that the proprietor of Hempriggs was about to resume possession of that house, and it was in view of that fact that he had procured the plan for a mansion-house on Southdun above referred to. At the time of presenting this petition the petitioner had been informed that her occupation of Hempriggs must shortly terminate. She averred—"It is absolutely essential, for the efficient management of the estate by the petitioner, as tutor to her infant daughter, the proprietrix, that she should reside upon or near the estate; and not only is there no residence upon the estate, but the petitioner is in a position to say, after making every inquiry, that there is none in the county which she could obtain as a tenant. Besides supplying a necessary want, a suitable dwelling-house for the owner would of course enhance the value of the property, at least in proportion to the cost of its erection. The two heirs next entitled to succeed to the said estate under the subsisting destinations are (1) the petitioner's second daughter, Marion Australie Sinclair-Wemyss, who was born on the 2d day of December 1880; and (2) Robert Dunbar Sinclair-Wemyss, lieutenant in the Gordon Highlanders, presently stationed at Anglesea Barracks, Portsmouth, the immediate younger brother of the said deceased George Sackville Sinclair-Wemyss, who is of full age, and who is most willing that the prayer of this petition should be granted."

No answers were therefore lodged.

Argued for petitioner—The only case in which it seemed to have been directly decided that a tutor cannot build a mansion-house on the pupil's estate was *E. of Hopetoun*, M. 5599, and the circumstances there, and the form in which the question arose, distinguished the case from the present. There was here a great expediency and a permanent benefit to the pupil's estate in the proposed erection of a mansion-house. It would give her the residence on the property she needed, and would increase the value of the estate if she ever wished to sell it. "Necessity" had been construed in such cases as the present to mean evident and positive advantage.

Authorities—Erskine, i. 7, 25; *Bellamy*, November 30, 1834, 17 D. 115 (borrowing on security of heritage to pay debt); *Somerville* (whole Court), February 6, 1836, 14 S. 451 (borrowing on security of pupil's estate); *Crawford*, July 6, 1839, 1 D. 1183 (borrowing on security of pupil's estate); *Tweedie*, January 16, 1841, 3 D. 369 (completing houses begun by the ancestor); *Vere* v. *Dale*, 1801, M. 16,389; and *Campbell*, July 17, 1867, 5 Macph. 1052 (feuing part of pupil's estate); *Lord Clinton*, October 30, 1875, 3 R. 62 (feuing part of pupil's estate). Other authorities—*Mackenzie*, January 27, 1855, 17 D. 314 (selling heritage to pay off heritable debt); *Campbell*, June 26, 1880, 7 R. 1032 (feuing part of pupil's estate); *Fogo*, December 14, 1877, 15 Scot. Law Rep, 221 (improving mansion-house on entailed estate).

At advising—

Lord President—I think that the import of all the cases taken together, and the practical result of the more liberal doctrine of recent cases, is, that to justify an application by a tutor for authority to borrow money to execute operations on the estate of the pupil, he must make out either a case of necessity, or such ob-

viously high expediency as in the eye of the law amounts to necessity. That is the doctrine which has been laid down again and again, and in acting upon it now I cannot see my way to entertain this petition. It may be that it would turn out better for this young lady when she comes of age that this mansion-house should be built now, but it may be that it would turn out to be the very reverse, and no one can tell whether it would be a benefit or not. There is certainly neither necessity nor high expediency here, and I am therefore for refusing the petition.

Lord Deas—Your Lordship has stated with perfect accuracy the principle to be applied to such cases. There is nothing like necessity or strong expediency here, and it would be quite out of place where there is no contradictor to enter into the consideration of the numerous decisions which have been referred to.

Lord Mure—I concur. The general rule is that either necessity or such strong expediency as the law holds to be equal to necessity must be shown before the Court can sanction such an act as the building of a mansion-house by a tutor. Now, in my view, there is no necessity for doing that in order to the proper management of this estate. I asked during the argument if there had been any decision on the point since 1798, when in the case of the *Earl of Hopetoun*, which regarded the mansion-house of Raehills, the point was expressly decided, and it appears that there has been none.

Lord Shand—There are certainly considerations stated in this petition which serve to show that in some respects it would be desirable now to build a mansion-house on this estate, but I feel myself precluded by the decisions of my predecessors from giving sanction to the proposed building. I think that the later decisions go to show that a high expediency is to be held equal to necessity, but there is not any such high expediency here. The pupil might quite well say when she came of age that the mansion-house which had been built is not that which she would have wished.

I must say that the decision in *Lord Hopetoun's* case does not strike my mind so forcibly as it does that of my brother Lord Mure. There the defender, who was curator-dative to a lunatic ward, claimed to take credit, in accounting for the executry estate of the ward after his death, for a sum forming part of his moveable estate which he had expended in building a mansion-house on the estate, and was found not entitled to do so.

The Lords refused the prayer of the petition.

Counsel for Petitioner—J. P. B. Robertson—Darling. Agents—Horne & Lyell, W.S.

Tuesday, July 18.

SECOND DIVISION.

(Before Lord Justice-Clerk Moncreiff, Lords Craighill and Rutherfurd Clark.)

SPECIAL CASE—COMMISSIONERS OF SUPPLY OF MIDLOTHIAN *v.* THE TURNPIKE ROAD TRUSTEES.

Road—Right and Duty of Levying Tolls—Act 5 *and* 6 *Will. IV. c.* 62 — *Roads and Bridges (Scotland) Act* 1878 (41 *and* 42 *Vict. c.* 51), *secs.* 6 (*sub-sec.* 2), 9, 33, 35, *and* 122.

In a county in which the Roads and Bridges Act by virtue of a Provisional Order came into operation on 1st September 1882 the repealing force as to local Acts of subsection 2 of section 6 of the Act is qualified by the provisions of sections 33 and 35, to the effect that tolls shall continue to be levied on all the roads of the county, whether let or unlet, by the existing body of Statutory Road Trustees till 15th of May 1883.

This was a Special Case between the Commissioners of Supply of the county of Midlothian of the first part, and the Turnpike Road Trustees of the said county, acting under 5 and 6 Will. IV. c. 62, of the second part. The statement of the Case was to the following effect:—Under sec. 9 of the Roads and Bridges Act, followed by the Provisional Order of 21st February 1882, and relative confirming Act of 3d July following, the provisions of the Roads and Bridges Act would come into operation on 1st September 1882. By sec. 6, sub-sec. 2, the adoption of that Act in any county operated the repeal of all local road Acts. Sec. 33 provided:—"From and after the 15th day of May, or from and after the 26th day of May, when the leases of the tolls in any county run from that date, immediately following the commencement of this Act in any county in Scotland, where such commencement shall happen before the year 1883, and otherwise from and after the first day of June 1883, all tolls within such county, and within any burgh wholly or partly situated therein, shall be abolished, and the exaction of statute labour and any payments of money by way of conversion or in lieu thereof, and all bridge-money and assessments heretofore leviable for the maintenance of highways within such county or burgh shall cease and determine, any Act or Acts to the contrary notwithstanding; and all turnpike roads within the same shall thereafter be and become highways; and all highways shall be open to the public, free of tolls and other exactions, except as hereinafter provided, within the meaning of and for the purposes of this Act." Section 35 provided—"Until the said 15th day of May, or 26th day of May, or 1st day of June, as the case may be, the tolls and revenues of each of the roads now maintained as turnpike roads, and all assessments now leviable for the maintenance of highways within a county, shall respectively be received and applied by the trustees to the several purposes to which they are respectively applicable under the existing Acts relating thereto." The tolls on turnpike roads within the county of Edinburgh had been and were at this time collected by the Turnpike Road Trustees under 5 and 6 Will. IV, c. 62, being the