on 23rd inst. it will probably be here in a few days, and immediately on its receipt we shall represent it at its London domicile for payment." Now, this was not an intimation by the National Bank to Mr Mackenzie to collect for them, it was, on the contrary, an expression of their intention to collect the bill themselves. Between the 31st of May and the 7th of June, however, a change came over the relation of parties, for on the 7th of June the London agent of the National Bank of Scotland wrote to Mr Mackenzie as follows:—"Referring to your letter of 21st ulto., we now enclose for collection and remittance through your London office (bill being accepted payable in London) Anderson £2939, 9s. 6d. Should the acceptors decline to pay protest charges, 12s. 6d., please return protest to us. Acceptors will of course pay the remitting charge. We presented the bill to-day at your London office, but they state that they are still without instructions regarding it."

The change which had thus taken place was just this, that from this time onward Mr Mackenzie was to act for both parties. He did not give up acting for Mr Anderson, but he proceeded also to act for the National Bank, and in this position he goes on to correspond with the National Bank, and on 9th June 1887 writes to them thus:—"Dear Sir,—With reference to your letter of 7th inst., I enclose herewith a communication received from W. Anderson & Company, from which you will observe that they would pay the 12s. 6d., together with the remitting charge, *re* the bill, on condition that they were held free of further responsibility. Please favour me with your instructions. *P.S.*—As Mr Anderson is presently living at Callander, and may not be here till Monday morning, we retain the bill till that day if we have not contrary instructions from you."

The meaning of this is, that he has laid a proposal before them, and he asks them if they will entertain it. To this letter he received no instructions in answer, nor was that to be wondered at, for the demand was a curious one to make, and one to which the National Bank could not assent to without the authority of the Toronto Bank.

On the 13th of June matters came to a crisis. The contents of the bill were paid by the defenders and received by Mr Mackenzie, and intimation was sent to the National Bank of what he had done on their behalf. Now, looking to the position which Mr Mackenzie held between Mr Anderson and the Bank, one cannot but say that this was a somewhat serious transaction. Only one hour elapsed after the cancelling of his signature when Mr Anderson brought the bill with this note attached—"*M'Arthur Bros. Coy., Bill p.* £2939, 9*s.* 6*d.*—"Dear Sir,—Confirming our former respects we hand you payment of this bill on the distinct understanding that we are freed from all responsibility for interest, expenses, &c." That note being attached to the draft by Mr Mackenzie connected the two things, and made the conditions contained in the note binding on the National Bank if they accepted payment. In order, however, to make things clearer, Mr Mackenzie wrote on the 13th of June to the National Bank in these terms—"Dear Sir,—I beg to enclose draft for £2940, 2s., being amount of W. Anderson & Company's acceptance referred to in your letter of 7th inst., with 12s. 6d. of protest charges. Of course you distinctly understand, in accordance with Messrs Anderson & Company's letter herewith enclosed, that so far as that firm is concerned the draft is accepted by you in settlement of the transaction without any reservation." No doubt this letter is somewhat vague if taken by itself, but the expression in the defenders' note attached to the bill, "that we are freed from all responsibility for interest and expenses," puts all doubt at an end as to Mr Mackenzie's meaning. He, acting for both parties, sends the draft with the defenders' note attached to the National Bank, and encloses these documents with his own letter, in which he stipulates that the draft must be accepted subject to the conditions attached to it by the defenders or not at all. In these circumstances the National Bank refused to accept the draft. Now, one thing is quite clear from beginning to end of this transaction, and that is, that no one representing the pursuers ever consented to these conditions. In consenting to such conditions on behalf of the Toronto Bank Mr Mackenzie was undoubtedly in error, and in spite of the clever way in which he has given his evidence he has, I think, admitted quite sufficient to show that the Bank had not agreed to these conditions. There is this passage in his evidence—"(Q) If you were wrong in supposing that the bank had assented to the conditions expressed in your letter of the 9th, then you gave up the bill in error?—(A) No, I cannot admit that; I must say the bill was not given up in error. If I had known that the bank did not agree to the conditions expressed in my letter of the 9th, I would certainly not have given up the bill." From this it is clear that Mr Mackenzie acted throughout either in gross error or without authority, and that being so, it is manifest that under the statute this cancellation cannot receive effect, and the pursuers having proved that this cancellation took place in one or other of these ways, are entitled to succeed. I am therefore for adhering, and taking the view I do, and have just expressed, it is unnecessary to deal with the other conclusion of the summons.

Lord Mure and Lord Adam concurred.

Lord Shand was absent from illness.

The Court adhered.

Counsel for the Pursuers — Balfour, Q.C. —Ure. Agents—J. & J. Ross, W.S.

Counsel for the Defenders — Asher, Q.C.— Burnet. Agent—W. B. Rainnie, S.S.C.

Saturday, February 11.

SECOND DIVISION.

MILNE, PETITIONER.

Trust—Aliment—Nobile Officium.

Circumstances in which the Court *authorised* a mother to take repayment by yearly instalments, out of the capital of funds held by her as tutor for her pupil children, of the amount of advances made by her from her own funds, and applied for their maintenance and education; and to make an annual payment

out of the remaining capital for the maintenance, education, and advancement in life of the children till the eldest attained majority.

This petition was presented on 24th June 1887 by Mrs Jessie Rankine or Milne, widow of the late Mr Nicol Milne, residing at Blainslie, Juniper Green, Edinburgh. It set forth that Mr Milne died on 25th April 1882, leaving three children, viz., Robert Milne, born 30th March 1875; James Rankine Milne, born 12th December 1876; and Jessie Catherine Milne, born 31st March 1881—all of whom were therefore in pupillarity, and who upon their father's death became entitled to the share of residue of the estate of a Miss Hunter, an aunt of their father's, which was liferented by him. Mr Milne left a trust-disposition and settlement, dated 9th August 1876, by which he made certain provisions in favour of the petitioner and his children, and gave his trustees power to make advances from capital as well to the petitioner as to the children if they should deem it proper. After paying his debts there only remained a reversionary interest in the house at Juniper Green which the petitioner occupied and liferented, and on which there was a debt of £400. Mr Milne did not appoint tutors or curators to his children. The eldest of them was in 1886 elected a foundationer of Daniel Stewart's Institution, Edinburgh, and as such was entitled to receive until he was fifteen years of age, a free education and an allowance on account of board, &c., of £20 a year, but with this addition, the only means available for educating and upbringing the children was their share of the residue of Miss Hunter's estate, the income from which since their father's death had been about £40 a year

Under the Guardianship of Infants Act, 1886 (49 and 50 Vict. c. 27), the petitioner was the tutor and guardian of her said pupil children, and at her request the trustee under Miss Hunter's settlement conveyed and made over to her as tutor foresaid, as their share of the residue of Miss Hunter's estate, the following funds and estate, viz.—(*First*) Six shares of the Edinburgh Gas Light Company, which had since been sold by the petitioner for the sum of £420; (*second*) £168 Consolidated Preference Stock No. 1 of the Caledonian Railway Company; (*third*) £358, 15s. Consolidated Preference Stock No. 2 of the North British Railway Company; and (*fourth*) £120 Consolidated Lien Stock of the North British Railway Company.

The petitioner stated that since her husband's death she had maintained the children from the interest of their share of Miss Hunter's estate so far as it would avail for this purpose, but she had been under the necessity of expending a considerable sum from capital belonging to herself, as she had been very desirous of affording her children as liberal an education as was within her power, and that as the children advanced, the cost of maintenance and education would be materially increased. She had expended, before obtaining the estate already mentioned, a sum of £253, 7s. 9d., or at the rate of £50 a year from the date of their father's death, in such maintenance and education over and above the income from the children's funds. The whole income which for the future would be available from the balance of the children's funds amounted, after repayment of the advances, to not more than from £32 to £35 annually, and this sum, the petitioner averred, was totally inadequate to meet the cost of their maintenance alone. The prayer of the petition was (1) for repayment of the advances out of the capital of the funds and estate held by her as tutor for her children, amounting to £250 or thereby; and (2) for payment of a sum, restricted to £75 in any one year, from time to time as might be necessary for their education out of the remaining capital, or any capital which she might acquire as tutor aforesaid.

The petition was duly intimated and served, and the Court ordered the Clerk of Court (Martin) to report on it.

Mr Martin on 18th July 1887 reported that after consideration he was of opinion that in the circumstances the petitioner had acted imprudently in expending £250 during the five years, and he did not think that she would be warranted in expending £75 a-year on her three children.

On 19th July the Court directed that before further procedure the petitioner should lodge a particular statement of the expenditure already made by her from her own funds, and applied for the use and benefit of the children. She accordingly lodged a minute in which she gave the details of her expenditure of £253, 7s. 9d., and stated that she had paid this sum out of the proceeds, amounting to £365, 5s., realised from the sale of an annuity of £20 which she possessed in her own right; that as that annuity and the income of £40 above mentioned formed the only source out of which the future wants of herself and her mother, who was an old lady and entirely dependent upon her, and the maintenance and education of the children, could be met, she had no alternative but to make the present application; the children had always been and still were of delicate constitution, and the expenditure upon them was absolutely necessary, and she had had in view that they would ultimately have to earn their own subsistence, and that the money now belonging to them could be best applied in giving them such an education and upbringing as would enable them efficiently to do so.

On the 11th of February 1888 the petition came up for consideration, and the petitioner lodged a minute restricting the prayer of the petition to repayment to her of £250 by five yearly instalments, commencing the payment of the first instalment as at that date, and further to payment of £50 annually until the eldest child attained majority.

The following cases were cited in support of the application—*Hamilton*, July 20, 1859, 21 D. 1379, and May 23, 1860, 22 D. 1095; and Fraser on Parent and Child, p. 233.

The Court granted the prayer of the petition as restricted in the minute lodged on 11th February 1888.

Counsel for the Petitioner—Graham Murray. Agent—Thomas Dalgleish, S.S.C.