

as being according to the ordinary good feelings of the people of this country in such matters, leads me to give the same meaning to the word children in this settlement as if it had been used by the father of the children himself.

But the general question of the *conditio* has been raised, and the learned Judges have given their opinion upon it; it is therefore right that I should indicate my opinion upon the matter. I shall suppose that this is a provision by one sister to another. One sister may very well have a sister twenty years younger than herself and to whom she has acted the part of a mother for the greater part of her life. Well, she makes a will in her favour giving her the whole estate she possesses. She has other relatives, other brothers and sisters, but she prefers to give her whole estate to one of them, her favourite sister. It is manifestly given to her from what may be called *pietate materna*, the mother-like feeling which she has to her sister twenty years younger than herself. Well, the proposition is, that if this younger sister predecease her leaving issue, that what was intended for her either goes to her issue or is divided among the other brothers and sisters of the testatrix. In considering that question we are not entering upon a new field. The question has been considered and a conclusion reached in the case of a settlement by a father or mother in favour of their children, it has been considered and a conclusion reached in the case of an uncle or aunt giving a gift to a nephew or niece, and the question has been considered and a conclusion reached, not on the consideration of any rule *positivi juris* or of the provisions of any statute, but, as I have said, on the considerations which commend themselves as being right and proper to the customs and feelings of the people of this country in such matters. Can you sensibly reach in such a case as I have put any other conclusion than that which has been reached before in the other cases I have referred to? To my mind it is impossible to reach any other conclusion. I do not think that to apply the rule to this case would be to extend the principle; it would merely be to apply the same argument under the same circumstances. There is nothing suggested in the opinion of the learned Judges that will distinguish this case in principle from the cases in which the *conditio* has been held to apply. I would rather put it in this way. If there had been a statutory provision on the subject which said—If the father shall leave his estate to his children, then the *conditio* shall apply, or if an uncle leave his estate to his nephew, then the *conditio* shall apply. I do not think that it would be extending the argument of the act if we were to hold that the provision applied to a brother or sister making a gift to another brother or sister. The question to be determined here is, whether the argument employed in these cases will lead to one result at one time and to another result at another? I think not. The learned Judges have put it that in all these cases the *conditio* applies, because

they hold that the testator has the same affection for the child of his sister or the child of his niece that he had for the sister or for the niece herself. They cannot put it upon any other ground. I confess it appears to me to be a startling result that we shall impute to an uncle the same affection for his grandniece that he had for his niece, but that we shall not impute to a brother the same affection for his sister's children as he had for his sister. We shall impute to a father the same affection for his daughter's child as he had for his daughter, and the same affection in an uncle to his niece's daughter that he had for the niece, but we shall not impute to a sister the same affection for a sister's child that she had for the sister herself. I think it is irrational, and I am of opinion that the *conditio* applies, as well as that on the terms of this settlement we should hold that the word "children is inclusive of grandchildren."

LORD RUTHERFURD CLARK and LORD TRAYNER agreed with the opinion of the consulted Judges.

The Court answered the question in the negative.

Counsel for the First Party—Low—Dickson, Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Second Party—H. Johnston—Rankine, Agents—Macandrew, Wright, & Murray, W.S.

Tuesday, March 17.

## FIRST DIVISION.

### FORBES v. WHYTE.

*Process—Expenses—Party Conducting his Own Case.*

A successful litigant in the Court of Session, who lived at a distance from Edinburgh, and who had conducted his own case in its various stages, lodged an account of expenses including railway fares, personal expenses while in Edinburgh, and a daily allowance for detention from business.

The Auditor taxed his account on the principle that he was not entitled to professional fees but only to a reasonable allowance for his trouble.

The Court, while of opinion that a litigant who conducted his own case was not entitled to remuneration for time and trouble, in respect of no objections by the other party, *decerned* for the sum found due by the Auditor.

On 30th September 1890 a petition was presented in the Court of Session by Simon Forbes, distiller, Peterhead, praying for the sequestration of the estates of George Whyte, at one time a distiller in Aberdeen, and latterly a commercial traveller in London.

On 21st October the Lord Ordinary, after hearing parties, refused the petition.

The petitioner reclaimed, and on 29th November their Lordships of the First Division refused the reclaiming-note, with expenses.

The respondent lodged with the Auditor an account of his expenses, amounting in all to £55, 6s. 4d., and including railway fares between Edinburgh and London and Aberdeen, personal expenses at £1, 11s. 6d., and an allowance of £3, 3s. per day for detention from business.

The Auditor taxed off £43, 4s. 10d., leaving as the amount of the account £12, 1s. 6d.

In a note the Auditor stated that he had been informed that the respondent was a commercial traveller in London, that he (the respondent) "states his expenses on this footing, that he is entitled to charge his travelling expenses to and from his place of residence for the time, with personal expenses at 31s. 6d. per day, and an allowance of £3, 3s. per day for time detained from business. My view is that he is not entitled to professional fees, but only to a reasonable allowance for his trouble, and that having elected to conduct his case personally, in place of employing counsel and agent in the usual way, he is not entitled to charge more than if he were resident at the seat of the Court." . . .

The respondent lodged objections to the Auditor's report in respect of the items disallowed.

The claimer did not object to the sum brought out as due to the respondent.

At advising—

LORD ADAM—We have here a note of objections by George Whyte to the Auditor's report on his account of expenses in a petition for the sequestration of his estates. Whyte conducted his own case, and being successful was found entitled to expenses. He lodged an account of these expenses, amounting in all to £55, 6s. 4d., of which sum the Auditor has taxed off £44, 12s. 6d., and has added on a small sum of £1, 7s. 8d., bringing out a balance of £43, 4s. 10d., and deducting that from the amount of the account leaves a sum of £12, 1s. 6d. due to Whyte.

In his report the Auditor explains the principle upon which he has proceeded—*[His Lordship here read the passage in the report quoted above].*

Mr Whyte's objection practically comes to this—He says that he is entitled to all of what he calls outlays and other charges, his railway fares and other expenses in coming to Edinburgh from Aberdeen and from London, his personal expenses while in Edinburgh during the discussions, at the rate of £1, 11s. 6d. per day, and a sum of 3 guineas a day for the time when he was detained from business in consequence of his attendance in the Court.

Now, for myself, I should require further consideration before I could hold that when a person conducts his own case he is entitled to any remuneration at all for his trouble in the matter. If he is entitled to anything in name of outlay, I think it must be of the most moderate description, but

for a party who is living at a distance to come here each time the case is in the roll and conduct his own case personally, and then charge substantial sums for outlay, personal expenses, and loss of time, is absurd. The Auditor has allowed about £12 as being a reasonable allowance to Mr Whyte. As I have said, I doubt whether anything at all should be allowed, but we cannot consider that from the way in which the matter comes before the Court, the other party not having lodged a note of objections. All we can do is to repel Mr Whyte's objections, which I am of opinion we ought to do.

LORD M'LAREN—I agree that a person who conducts his own case is not entitled to remuneration for trouble and loss of time incurred in consequence of his having elected to attend the Court personally. I am therefore not prepared to affirm the principle on which the Auditor appears to proceed.

Nor as at present advised am I prepared to allow a person conducting his own case anything for his personal expenses, railway fares, hotel bills, and so on.

But as no objection is taken by the other party to the Auditor's report, we may give decree for the sum which the Auditor has allowed.

LORD KYLLACHY—I agree that a litigant conducting his own case is not entitled to any compensation for time and trouble. I participate in your Lordship's doubt whether such litigant is entitled to more than his judicial outlays—that is to say, his outlays in connection with the fees of Court, and outlays of that description.

But, in any case, I am clear that such litigant is not entitled to more than a reasonable allowance for his outlays, judicial and extrajudicial. And it seems to me that in the whole circumstances of this case the sum here allowed by the Auditor fairly represents such reasonable allowance.

The LORD PRESIDENT and LORD KINNEAR were absent.

The Court repelled the objections, and decreed for the sum found due by the Auditor.

Counsel for the Petitioner—Sym. Agent—A. Morison, S.S.C.

Counsel and Agent for the Respondent—Party.