

relation thereto, which regulations the Board of Supervision is hereby authorised and required to make and issue." The power, and indeed the duty, to make regulations is here expressed in large language, and seems to me to authorise such regulations as are contained in No. 7, which requires that "If any child named in the registrar's list shall have left the parish for another known place of residence in Scotland before an order to vaccinate such child has been issued and executed, the inspector of the poor shall give immediate notice of the fact and of the circumstances connected therewith to the inspector of the parish to which such child shall have gone, whose duty it shall be to use all lawful endeavours to have the said child vaccinated and a certificate of such child's vaccination transmitted to the registrar of the district within which the said child was born." The normal case provided for by section 18 of the Act is that in which the parent and child are still in the parish or combination in which the child was born, and the inspector on receiving the list from the registrar, has to lay it before the parochial board of that parish or combination, who thereupon issue the order to the vaccinator to vaccinate the persons named in the list. The section does not expressly provide for the case of a child having "with its parents removed to another parish or combination," and I think that this is just the kind of case which would naturally and adequately be provided for by regulations made under section 5. If this were not so, the Act would in many cases become a dead letter. Regulation No. 7 appears to me to supply the machinery for carrying out the provisions of the Act in such a case, and I consider that it authorised the course which was adopted in this case. The regulation has now been in operation for more than 36 years, and this is the first occasion, so far as I am aware, upon which either the power of the Board of Supervision to make it, or its applicability to such a case as the present, has been called in question. It would require some strong reasons to induce us to disregard or set aside a manifestly advantageous regulation which had been acted upon for so long a time.

The third question is, whether it was competent for the Inspector of Poor for the parish of Govan to prosecute the respondent for failure to vaccinate, and recover the statutory penalty, and for the reasons already given, I consider that this question should be answered in the affirmative.

LORD ADAM and LORD M'LAREN concurred.

The Court sustained the appeal.

Counsel for the Appellant—Deas. Agents—Gill & Pringle, S.S.C.

Counsel for the Respondent—Cullen. Agent—David Dougal, W.S.

COURT OF SESSION.

Tuesday, December 4.

FIRST DIVISION.

[Lord Low, Ordinary.]

DAIRON v. DAIRON'S TRUSTEES.

Expenses—Taxation—Witness—Party as Witness.

A and B, two of the granters of a family trust-deed, raised an action for reduction of the deed, in which they called as defenders C and D, the surviving trustees under the deed, as trustees, and C and E as individuals. C and E were parties to the deed under reduction. A and B alleged that the deed in question had been impetrated from them by the fraud of C and E. E, who was resident abroad, was asked by the trustees to give evidence in support of the trust-deed, and to rebut the charges of fraud, and he accordingly came to Scotland, attended at the proof, and gave evidence. The Court found that the charges of fraud were unfounded, and upheld the trust-deed.

Held that E was entitled to the outlay incurred by him in coming to this country and giving evidence at the proof—(per the Lord President) on the ground that he had been asked by the trustees, as the defenders of the trust-deed, to appear as a witness on their behalf, and that in that capacity he was entitled to his outlay; and (per Lords Adam and M'Laren) on the general principle that where a party to a case is examined as a witness, whether in his own favour or at the instance of his adversary, he gives his evidence under the same conditions as any other witness, and that if his evidence is necessary he is entitled to his expenses.

James Dairon and Mrs Catherine Dairon or Fleming, two of the children of the late James Dairon, raised an action for reduction of a trust-deed, which had been granted by the pursuers and their brothers Edward Dairon and David Dairon in favour of the said Edward Dairon, Andrew Dairon, another brother since deceased, and Mr John Brownlie, the family law-agent, as trustees, in which they called as defenders Edward Dairon and Mr Brownlie as trustees, and Edward Dairon and David Dairon as individuals. Under the trust-deed in question the heritable property left to the trusters by their father was conveyed to the trustees in trust, and the purposes of the trust were to pay the free income of the trust-estate in equal proportions to the members of the family, and in the event of any of them dying unmarried and without issue, to the survivors. Any member of the family dying and leaving a wife or husband was empowered to give such wife or husband a liferent of his or

her share, and children were entitled to succeed to their parents' share and to demand payment thereof.

The pursuers averred that the deed took the shape in which it was executed on the instructions of Edward and David Dairon, who were the only members of the family who had children, and that it was "part of a fraudulent scheme conceived by them in the interests of themselves and their families." The pursuers further averred that they executed the deed under essential error.

A proof was allowed, and David Dairon, one of the defenders, who resided in British Columbia, was called and examined as a witness by the defending trustees. Thereafter the Lord Ordinary (Low) on 11th August 1899 repelled the reasons of reduction and assoilzied the defenders.

The pursuers reclaimed to the First Division, who on 22nd June 1900 refused the reclaiming-note, found the defenders entitled to additional expenses, remitted the account thereof to the Auditor, and remitted to the Lord Ordinary with power to discern for the taxed expenses.

On 6th July the Lord Ordinary found the defenders entitled to expenses so far as the same had not been already disposed of, and remitted to the Auditor to tax the accounts thereof.

The pursuers objected to the Auditor's report on the defenders' account of expenses, in respect that he failed to tax off, *inter alia*, the following items:—"2. David A. Dairon, plasterer, Vancouver, British Columbia, 36 days at £1, 1s.; travelling expenses between Vancouver and Montreal, £38, 12s.; and passage money between Montreal and Glasgow, £25 (charged £101, 8s.), (taxed at £63)."

The Lord Ordinary (Low) on 20th July 1900 pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties on the note of objections for the pursuers to the Auditor's report on the defenders' account of expenses, taxing the same at £403, 1s. 8d., sustains the said objections to the extent of £61, 11s. 6d., and finds that the same falls to be deducted from the said sum of £403, 1s. 8d., and leaves a sum of £341, 10s. 2d. as the amount of the defenders' said expenses," &c.

The defenders reclaimed, and argued—By the Act of Sederunt 15th July 1876, sec. 5, sub-sec. 3, a witness coming from abroad to give evidence was entitled to his expenses. As under the Evidence Act of 1853 (16 Vict. c. 20) it was competent for the parties in a cause to give evidence, there was no reason why the provisions of the Act of Sederunt 1876 should not apply to them—*Willcox & Gibbs' Sewing Machine Company v. Stirling & Sons*, November 19, 1869, 7 S.L.R. 98.

Argued for the respondents—David Dairon being a party to the case must necessarily be present to defend it. He was morally bound to come and defend his character, and the fact that he happened to give evidence did not entitle him to the expense of his attendance. Till 1853 parties

were not allowed to be witnesses in their own cause. The cases in which any expenses had been given were limited to those in which a defender had been examined by the pursuer as a haver, or on reference to oath of party—that is, really as the pursuer's own witness, and even in these only travelling expenses had been allowed—*M'Gill v. Ferrier*, December 2, 1836, 15 S. 178; *Thorburn's Trustees v. Short*, May 22, 1838, 16 S. 1016. The regulations of the Act of Sederunt 15th July 1876 were repeated from the Act of Sederunt 10th July 1844, which was passed before the evidence of parties was competent, so they clearly did not entitle a party giving evidence to his expenses—*Rough v. Lyell*, January 21, 1854, 16 D. 381. A party was not entitled to the expenses of pleading his own cause, and there was no reason why he should be entitled to those of giving evidence on his own behalf—*Forbes v. Whyte*, March 17, 1891, 18 R. 688. Moreover, the witness might have been examined on commission, and unnecessary expense would thus have been saved.

LORD PRESIDENT—I think the Lord Ordinary has erred in this matter, as I am unable to see any reason why David Dairon should not get his expenses. His position in this action is peculiar. He was a party to the family arrangement which was challenged, but he is not one of the trustees. Hence, in so far as the action was directed against the trustees as defenders of the trust, he was not a party, but he was called as an individual defender, and he was asked by the trustees to appear as a witness. No ground has been stated why in that capacity he should not be entitled to his outlays, which is all he claims. It is not disputed that he was a necessary witness.

But we have heard an argument which covers a much larger ground. It is maintained by the pursuers as a general rule that a party to a cause is not entitled to expenses—even outlays incurred by him as a witness—and although he may be a necessary witness, and whatever the nature of the case may be. In this case a very serious charge of fraud was made on record against this defender, and it would be an unfortunate state of the law if an innocent party was not, under such circumstances, entitled to come and deny such a charge except on condition of paying his own outlays. In this case both the Lord Ordinary and the Court have held the charge of fraud to be wholly unfounded, and it would require much stronger authority than has been quoted to us to dispose me to hold that a witness is not in such circumstances to have his outlays merely because he is a party to the case. But the first ground which I have stated is, in my judgment, sufficient to warrant us in holding that David Dairon is, as a witness, entitled to the very moderate sum in name of outlays which was allowed by the Auditor.

LORD ADAM—I am of the same opinion. I always understood, and my impression has been confirmed, that by the old law, if

a party chose at his own convenience to attend the Court in his own case he was not entitled to remuneration for doing so. And if he chose to go further, as in the case of *Whyte*, and to plead his own cause, dispensing with the aid of agent and counsel, that would make no difference. But a material change in the law was made as to the position of parties by the Evidence Act, which enabled a party to become a witness in his own case, and if a party is entitled to give evidence, why should he not get his expenses? Now in this case not only was the evidence necessary, but I should think it was not such as could properly be taken on commission, because there was a personal attack on the defender's character—a charge of fraud—and he was one of the only two witnesses who could speak on that matter. The case turned upon the credibility of the witnesses, and the Lord Ordinary and we were of opinion that Edward and David Dairon had spoken the truth. No doubt if David had not come here he would have lost his case. There is accordingly no question as to the relative expense of his coming here and of his evidence being taken on commission. Being present he was examined as a witness, and why should not the rule applying to other witnesses apply to him. The necessity for his coming here was caused by the pursuers, and there was a decree for expenses given against them. Was the expense to him caused by them any the less because he was a party to the case?

LORD M'LAREN—When a party to a case is examined as a witness, whether in his own favour or at the instance of his adversary, he gives his evidence under the same conditions as any other witness, and if his evidence is necessary he will be entitled to his travelling expenses and to money for his subsistence during the journey.

It is strange that this point is raised for the first time so many years after the date of the Evidence Act by which it was made competent for parties to appear as witnesses, and the fact that no distinction has been taken during all this time (for I presume the Auditor has followed the practice of his office) leads me to suppose that a contrary view could not be maintained. If that be so, the only question is whether the evidence given by David Dairon was necessary for the determination of the case. It was said that a party is not to be allowed expenses for conducting his own cause. I agree in the decision quoted, in which I concurred, that no party can be allowed such expenses, because he is entitled to appear by counsel, and if he does not choose to avail himself of that privilege and thinks he can conduct his case better in person his election is not to be the means of subjecting the other party to a new liability. But if a person gives evidence he must do so in person, and I cannot see how he differs from any other witness.

As to the materiality of the evidence, I think that where a person is charged with fraud there is a direct challenge to him to appear and maintain the deed or the benefit

which is said to have been obtained by fraud. I cannot figure a clearer case for allowing the application of the ordinary rule.

I would add that while the Auditor's allowance has been reduced by £62, and the present reclaiming-note is only direct e to having that amount allowed, if the matter had been open I should have seen no reason for distinguishing between travelling expenses and subsistence money. If a witness is entitled to journey-money as costs in the cause, he must live on the way, and he is entitled to an allowance for subsistence in so far as it is not covered (as in the case of a steam-ship voyage) by the passenger fare.

LORD KINNEAR was absent.

The Court pronounced this interlocutor—

“Recal the said interlocutor [of 4th December 1900]: Repel the objections by the pursuers to the Auditor's report on the defenders' account of expenses: Approve of said report, taxing the same at £103, 1s. 8d., and decern for payment thereof to the defenders: Find the reclaimers entitled to the expenses of and connected with the objections to the Auditor's report in the Outer House and also to the expenses of the reclaiming-note,” &c.

Counsel for the Pursuers—Jameson, Q.C. —C. D. Murray. Agent—James E. Gordon, W.S.

Counsel for the Defenders—Clyde. Agent—James Skinner, S.S.C.

Tuesday, December 4.

SECOND DIVISION.

[Court of the Railway and Canal Commission.]

FORTH BRIDGE RAILWAY COMPANY v. GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

Railway—Railway Commissioners—Jurisdiction—Through Rates—Notice—Railway and Canal Traffic Act 1888 (51 and 52 Vict. c. 25), sec. 25, sub-secs. 1 and 7.

On 14th January 1890 the secretary of the Railway Clearing-House issued a notice calling a meeting of the Goods Managers Conference at the Clearing-House, and intimated the following business:—“Mr M'Dougall will intimate the probable opening of the Forth Bridge Railway in March next, and give notice that the North British Company (as the working company) will claim in division of receipts on traffic conveyed *via* the Forth Bridge an allowance as for nineteen miles in addition to the actual mileage of the Bridge railway.” Certain of the companies interested assented to the claim so made, but others objected, and the sums in dispute were accumulated