

Friday, January 31.

FIRST DIVISION.

BOYD v. BOYD.

*Expenses—Husband and Wife—Petition for Custody of Children.*

A wife presented a petition for the custody of her children. Her petition was ultimately refused, but while the case was pending counsel for the parties had made an arrangement as to the access which she should be allowed in the event of her petition being unsuccessful. The petitioner having moved for expenses, the Court found her entitled to expenses down to the date of the interlocutor allowing a proof, and found no further expenses due to or by either party.

*Mackellar v. Mackellar*, February 16, 1898, 25 R. 883, at p. 886, 35 S.L.R. 483 followed.

A petition was presented by Mrs Elizabeth Mackenzie or Boyd craving the Court to find her entitled to the custody of the children of the marriage between herself and Robert W. Boyd. There were two children of the marriage, aged three and two.

The petitioner averred that owing to the bad conduct of the respondent he was not fitted to be the custodian of the children. She further stated that the respondent and his mother refused to allow her to see the children.

The respondent lodged answers in which he denied the allegations against his character, and stated that owing to the habits of the petitioner she was not fitted to have the custody of the children. He further averred that owing to the bad conduct of the petitioner he declined to reside longer with her, and that "the respondent has offered to aliment the petitioner while the parties remain in separation at a rate consistent with his means, and to allow her all reasonable access to the children, but so far this offer has been refused."

In August 1901 Mrs Boyd had raised an action of adherence and aliment against the respondent, in which the Lord Ordinary (KYLACHY) allowed a proof.

On 5th November 1901 the First Division remitted to him to take proof in the present petition.

Thereafter the Lord Ordinary decerned against the respondent for aliment at the rate of 12s. a-week.

While the cause was pending counsel for the parties made an arrangement with regard to the access which should be allowed to the petitioner if she was unsuccessful in the petition.

On 22nd January 1902 the First Division refused the prayer of the petition.

The petitioner thereafter moved for expenses.

LORD PRESIDENT—I think we may here follow the case of *Mackellar*—25 R. 883, at p. 886—not as laying down a general rule,

for each case must depend on its own circumstances, but because the course there followed appears to me to have been a reasonable one. As in that case, I think that in this case it would be fair to allow expenses down to the date of proof, because it is very probable that the parties would not have been able to arrange terms as to access except under the stress of legal proceedings.

LORD ADAM—I agree. In cases as to the custody of children there is always involved also the question of access to the children. That is so here. The answers make offer of reasonable access to the children, raising in this way the question as to what sort of access should be given. Now such an offer—an offer of reasonable access—is of a very indefinite character. What appears to be reasonable before coming into Court and after coming into Court may be very different. Here I have little doubt that it was only after the case came into the hands of counsel that the question of access was adjusted.

LORD M'LAREN and LORD KINNEAR concurred.

The Court found the petitioner "entitled to expenses to 5th November 1901, the date of the interlocutor, allowing to both parties a proof . . . and" found "no further expenses due to or by either party."

Counsel for the Petitioner—A. M. Anderson. Agent—J. M. Glass, Solicitor.

Counsel for the Respondent—M'Clure—Lamb. Agent—Andrew Gordon, Solicitor.

Tuesday, February 4.

FIRST DIVISION.

DALRYMPLE v. DALRYMPLE.

*Revenue—Income-Tax—Annuity Payable under Contract—Right to Deduct Income-Tax—Income-Tax not Paid by Person Paying Annuity—Income-Tax Act 1853 (16 and 17 Vict. cap. 34), sec. 40—Customs and Inland Revenue Act 1888 (51 and 52 Vict. cap. 8), sec. 24 (3).*

In an antenuptial marriage-contract the father of the husband bound himself to pay him a free yearly allowance of £3000. The spouses thereafter entered into a contract of separation whereby the husband, *inter alia*, bound himself to pay to his wife a free yearly allowance of £1000. The only income to which the husband was entitled was the £3000 payable under the marriage-contract. In paying this sum of £3000 the father did not deduct and retain any sum in respect of income-tax. The husband deducted income-tax from the £1000 paid to his wife. The wife claimed payment of the whole of this sum of £1000 without deduction of income-tax.

Held that as the annuity to the wife was chargeable with income-tax the