been a case of work done for which no remuneration had been paid, and no rate of remuneration agreed upon, either expressly or by implication, I should have been disposed to attach considerable weight to the scale of charges upon which the defender relies. But this is not a case of that description. The defender managed the properties in question for more than a quarter of a century under three different sets of employers, and during that period has been paid for his services at a certain rate; he has never suggested, and does not suggest now, that the remuneration was inadequate; and he does not say that he has done anything beyond the ordinary work of a factor. In such circumstances it seems to me that there was an implied contract in regard to the remuneration which the defender was to receive, and that he was not entitled without notice to charge a higher rate for ordinary factor's work than that which had been charged and paid in the past. If he was dissatisfied with his remuneration, he could have notified his employers that he would not continue his services except upon better terms, but unless and until he gave notice that he proposed to charge at a higher rate than formerly, I think that his employers were entitled to assume that the employment was being continued upon the same terms as in previous years.

"But the defender's extra charges do not appear to me to be of the nature of charges for work done. They amount rather to a claim of compensation for loss sustained by the defender by reason of the factory being brought to an end. If that is the nature of the charges, they are plainly untenable. The pursuers were under no obligation to continue the defender as their factor, much less were they under obligation to retain the properties in order that he might have the benefit of the factor's fee.

"If a case had been made of unusual or extraordinary work falling upon the defender during the last year of his factory, it may well be that he would have been entitled to claim extra remuneration. But not only is there no case of that kind, but the circumstances appear to me to be extremely unfavourable to the defender. Most of the unexpired leases (and these the leases of the most valuable subjects) are renewed leases, in regard to which the defender had very little trouble—much less trouble, I should imagine, than if he had let the subjects year by year. Further, as regards a considerable part of the properties, it appears that the defender has not lost his employment, because the purchasers have continued him in the factory.

"I am therefore of opinion that the pursuers are entitled to decree, with expenses."

Counsel for the Pursuers — Salvesen. Agent—F. J. Martin, W.S.

Counsel for the Defender — Dickson. Agents—J. & J. Ross, W.S.

Friday, January 13, 1893.

FIRST DIVISION.

FORBES AND ANOTHER (FORBES' TRUSTEES) *v.* FORBES.

Succession — Marriage-Contract Provision —Legacy—Misdescription.

A testator, after providing for payment of his debts, directed his trustees to allow his wife the use of a particular house at a rent of £10 a-year, to deliver to her his furniture, and to pay her the "annuity provided to her under our marriage-contract of £150 sterling." The marriage-contract only provided for an annuity of £100.

Held that the intention of the testator was to confer a bounty upon his wife, and therefore that she was entitled to the annuity of £150.

By antenuptial contract of marriage, dated 6th June 1860, John Forbes bound and obliged himself to make payment to Miss Susan Carnegie, his intended wife, if she should survive him, during all the days of her lifetime after his decease, of "a free yearly annuity of £100 sterling, and that in advance, beginning the first year's payment thereof as on the day of his decease, for the period of one year from that date, and the next yearly payment on the corresponding day of the following year, and so forth yearly during her lifetime, with interest of each yearly payment of the said annuity during the not-payment thereof." He also bound himself to make her an allowance, should she survive him, of £20 for mournings.

John Forbes died on 9th June 1891, leaving a deed of settlement whereby he disponed his whole estate to trustees for, *inter alia*, the following purposes—First, For payment of debts and expenses: "Second, He directed his trustees to give to the fourth party to this case (his wife), for her personal use all the days of her life, if she should wish to reside at Auchencleuch, at a yearly rent of £10 sterling, the principal dwelling-house at South Auchencleuch, with the garden attached thereto, and the policies around the same between the two avenue gates: Third, He directed his trustees to deliver to his said wife the whole household furniture, silver plate, books, pictures, bed and table linen, glass, and stone ware, and all cooking utensils in his house, for her liferent use, or as long as she should choose to reside at Auchencleuch: 'Fifth, For payment to my said wife of the free yearly annuity provided to her under our marriage-contract, dated 6th day of June 1860, of £150 sterling, and that in advance, beginning the first year's payment thereof as on the day of my decease, for the period of one year from that date, and the next yearly payment on the corresponding day of the following year, and so forth yearly during her lifetime, with interest of each yearly payment of the said annuity during the not-payment

thereof: Sixth, For payment to my said wife of the sum of £20 as an allowance for mourning, also provided to her under our said marriage-contract.'" In the seventh purpose the testator provided for payment of an annuity of £12 to a servant, and in the eighth to twelfth purposes for payment of certain money legacies, which he directed should "be paid after said annuities in their order have been provided for." The residue of his estate the testator directed should be made over to his brother Charles in liferent, and after his death to Alexander Edmond junior in liferent, and to the kirk-session of Corgarff in fee.

After the testator's death a question arose as to the amount of the annuity to which his widow was entitled, and in order to have that question determined, the present case was presented by (1) the trustees under the deed of settlement, (2) Charles Forbes, (3) Alexander Edmond junior, and (4) the testator's widow, for the purpose of obtaining the opinion of the Court upon the following questions—(1) Is the fourth party entitled to an annuity of £100 sterling, and no more, out of the trust-estate? or (2) Is the fourth party entitled to an annuity of £150 sterling out of the said trust-estate?

It was stated in the case—"The estate of Auchencleuch was purchased by Mr Forbes between the dates of the execution of the said marriage-contract and of his deed of settlement. It is admitted that an annuity of £100 a-year is insufficient to enable Mrs Forbes to maintain herself in Auchencleuch and keep up the garden and policies."

The second party contended that the fourth party was entitled to an annuity of no more than £100 sterling; and the fourth party contended that she was entitled to an annuity of £150 sterling, payable in the manner and at the times stated in the deed of settlement.

Argued for the second party—In providing the annuity of £150 to his widow the testator dealt with it expressly as an antecedent obligation, and closely followed the words of the marriage-contract, and the other provisions of the will did not lead to the inference that it was the testator's intention to confer upon his widow a larger annuity than he was already bound to give her. The case therefore fell under the principle of *Wilson* v. *Morley*, 1877, L.R., 5 Ch. Div. 776, and not under that of *Whitfield* v. *Clemment*, 1816, 1 Merivale 402.

Argued for the fourth party—The inference from the provisions of the deed was that the testator did not mean to restrict his bounty towards his widow to his obligations, for before he came to deal with her annuity he provided that she should have the right to live at Auchencleuch, and bequeathed her the whole of his furniture. The conclusion to be drawn from the terms of the deed was strengthened by the fact, which was admitted, that the annuity of only £100 would not enable the widow to live at Auchencleuch. The rule therefore fell under the rule established in *Whitfield's* case.

At advising—

LORD PRESIDENT—I think the fourth party is entitled to an annuity of £150. It is quite true that when the annuity of £150 is named it is said to be the annuity already provided to the widow under the marriage-contract, but at the same time there are express words of bequest of an annuity of £150, and the question is whether the effect of these is taken off by the description which is introduced when the sum is named. An attempt was made to justify the restriction on the authority of the case of *Wilson* v. *Morley*, and the principle there very clearly explained. In order to bring this case within that principle it is said that the widow's annuity was a debt due by the testator, and that is quite true, but it does not exhaust the description of the provision. When the marriage-contract provision is mentioned it is not mentioned in its quality of a debt, but the testator when he mentions it is in the region of gifts, having already provided for his debts, though the subject is clearly the same as is mentioned in the marriage-contract. The effect of the marriage-contract was to make the annuity a debt, but in his settlement the testator refers to it when he has passed from the payment of his debts and fairly entered upon the region of gifts. He is minded to give his widow an annuity as well as the small gifts he has already made her, and apparently with an erroneous recollection of the amount of the marriage-contract annuity, he expresses himself in such a way as that the annuity of £150 is to come in the place of and not be additional to the annuity in the marriage-contract. I think the collocation of the clause in the will shows that the testator was in the region of gifts and bounty when he provides this annuity of £150 to his widow, and accordingly that the case of *Whitfield* rather than the case of *Wilson* applies.

LORD ADAM—I think the facts stated in the case, that the estate of Auchencleuch was purchased by the testator between the execution of the marriage-contract and the settlement, and that an annuity of £100 is insufficient to enable Mrs Forbes to live there, as the testator apparently intends her to, is not immaterial to the question before us. I think also that it is clear that the widow is in the position of a *persona predilecta*, and that that is seen in the will, for the testator provides that she shall have the use of Auchencleuch House, and leaves her his whole furniture. On the question of intention I think it is far more probable that the testator knew what was in the deed he was signing, and intended to give his widow an annuity of £150, and that his mistake lay in thinking that that was also the amount of the annuity in the marriage-contract, than that he only intended to give her the annuity which he was bound to give under the marriage-contract. I accordingly agree with your Lordship that this case rather resembles the case of *Whitfield* than that of *Wilson*.

LORD M'LAREN—This is an interesting

question of a class which often arises under wills as to whether words of description occurring in a bequest are to be held as merely descriptive or as conditioning the bequest. It is not exactly a case of *falsa demonstratio*, but bears a strong analogy to cases of that class. A case of *falsa demonstratio* generally occurs with reference to a specific legacy or subject of bequest, and if the testator has described the subject of bequest erroneously, but nevertheless in such a way that it can be identified, the rule is that the legacy must receive effect. I refer to such a case as a testator leaving all the money he possesses "in Consols" when he has no money in Consols, but has money in reduced annuities or something of the sort. On the other hand, if a testator leaves a legacy in a particular stock which he possesses at the time, and subsequently sells that stock, the legacy is held to be adeemed, and the legatee has no claim to what has been substituted for it. What we are dealing with here is not a bequest of a particular subject, but of an annuity with the description added that it is the annuity "provided under our marriage-contract." The question of intention is whether these words imply a restriction on the amount of the annuity or are merely descriptive. If a testator leaves a relative having a claim upon him a bequest in such terms as these—"In respect my wife is already amply provided for, I leave her nothing more than what she is to get under our marriage-contract," and it turns out that he has left her more, there would be difficulty in saying that he meant to give her more than the amount of her marriage-contract provision. But here there is nothing in the will to show that the testator meant to restrict his wife's provision to the precise sum which he was under obligation to provide. On the contrary, the provisions of the will show that he intended to give her more. Having that key to the interpretation of the will, I think we are brought a long way towards accepting the principle which I have referred to as familiar in the case of specific legacies, and I think the intention appearing from the whole will is that the testator meant to give his wife an annuity of £150, and that the mention of the marriage-contract annuity will not invalidate the bequest.

LORD KINNEAR—I am of the same opinion. I am disposed to think that the rule of construction laid down in the case of *Wilson* is perfectly sound, because what I understand Justice Fry there to lay down is, that where a testator directs his executors to pay a debt without evincing any intention to confer a bounty, either expressed in terms or to be inferred from the terms of the deed as a whole, a mere misdirection with regard to the amount of the debt will not be held to infer an intention on the part of the testator to bestow any bounty on the creditor, but will rather be referred to an erroneous belief in the mind of the testator as to the amount of his obligation, and that therefore if the testator describes the debt as larger than it really is the creditor will not be entitled to claim the excess. But holding that rule of construction to be perfectly sound, I find here, both from the series of provisions in the deed and from a consideration of the relative position of the testator and the annuitant, perfectly sufficient and relevant reasons to found the inference that it was the intention of the testator to confer a bounty upon the fourth party.

The Court answered the first question in the negative and the second in the affirmative.

Counsel for the First and Second Parties—Ross Stewart. Counsel for the Third and Fourth Parties—Sym. Agents for the Parties—W. & J. Burness, W.S.

Tuesday, January 17.

OUTER HOUSE.

[Lord Kincairney.

CAMPBELL *v.* COUNTY COUNCIL OF PEEBLESSHIRE.

Expenses—Jury Trial—Fees of Counsel—Auditor's Report.

In an action of damages in respect of the death of a child, *held* (following *Campbell* v. *Maddison*, November 5, 1875, 1 R. 149) that the successful pursuer was entitled to charge as fees for the trial £21 for senior and £15, 15s. for junior counsel for the first day, and £15, 15s. to senior counsel and £10, 10s. to junior counsel for the second day, on the ground that the trial, besides assessment of damages, involved questions of contributory negligence, and points of law as to liability between the defenders and certain other parties in a question with the pursuer, who was a tenant of these parties.

William Campbell, warper, Walkerburn, raised an action against the County Council of the county of Peebles for payment of the sum of £250 as compensation in respect of the death on 4th December 1891 of his son John Campbell, a boy six years of age, through the fault of the defenders in failing to sufficiently fence part of the turnpike road leading through the village of Walkerburn. The defence was a denial of liability, and contributory negligence on the part of the pursuer and the boy, and the defenders further maintained that certain feuars were liable for the maintenance of the wall at the part of the road in question, and over which the boy had fallen into vacant area ground in front of an adjoining tenement of dwelling-houses.

The case was tried by Lord Kincairney, Ordinary, with a jury, and lasted two days; thirteen witnesses were examined for the pursuer, and five for the defenders. The jury returned a verdict for the pursuer with £50 damages.