The Court pronounced this interlocutor—

"Find that on the arrival at Stranraer of the cattle mentioned in the record they were immediately placed by the defenders' servants in the cattle-pen at the harbour, while, by order of the pursuer, his son Hugh Crawford went for a licence from the local authority for their transmission to Newton-Stewart by a cattle train to leave about ten o'clock that night, the pursuer himself going on by a passenger train about 8·30 p.m., leaving his said son in charge of the cattle; that Hugh Crawford did not return until after his father started for Newton-Stewart, and he thereupon took the cattle out of the pen and placed them in the loading-yard of the railway; that the defenders' servants warned him that they would be at his risk if they remained there, and that he agreed to this; that during the night the cattle broke down part of the fence of the yard and strayed on to the line of railway, where five were killed by a goods train, another so damaged as to render it necessary to kill it, and two were seriously injured; that the damage thus sustained was not caused by fault of the defenders or their servants: Therefore sustain the appeal: Recal the interlocutor of the Sheriff appealed against: Affirm the judgment of the Sheriff-Substitute: Of new assoilzie the defenders from the conclusions of the action: Find them entitled to expenses in the Inferior Court and in this Court: Remit to the Auditor to tax," &c.

Counsel for the Appellant — Asher, Q.C. — Jameson. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for the Respondent — Strachan — M'Lennan. Agent—Robert Broatch, L.A.

Saturday, March 9.

FIRST DIVISION.

BEEDIE *v.* BEEDIE.

Parent and Child—Petition for Custody of Child—Competency—Guardianship of Infants Act 1886 (49 *and* 50 *Vict. cap.* 27), *secs.* 2 *and* 3.

In an undefended action of separation and aliment by a wife the Lord Ordinary found that the defender had been guilty of grossly abusing and maltreating the pursuer, and decerned for the defender, finding her entitled to the custody of the youngest child of the marriage, who was about four years old. Two months and a-half after this decree had been pronounced the husband presented a petition to the First Division craving the custody of his youngest child The Court *held* that the petition was competent, but in the circumstances *refused* to grant the prayer.

This was a petition by James Beedie, farmer, in the county of Aberdeen, in which he craved the Court to discharge an order pronounced by Lord Trayner finding his wife Mrs Margaret Beedie entitled to the custody of their youngest child Alexander Bartlett Beedie, and discharging the petitioner from interfering with the said child or Mrs Beedie as his custodier, and to find the petitioner entitled to the custody and keeping of the said child. He further craved the Court to restrict the amount of aliment decerned for by the Lord Ordinary, and in the event of their Lordships refusing him the custody craved, he asked for reasonable facilities of access to the child, but with these two latter points it was unnecessary for the Court to deal, as they were made matters of arrangement between the parties.

The petitioner averred that "on 29th June 1888 his wife raised an action against him in the Court of Session concluding, *inter alia*, that it should be found proven that he had been guilty of cruelly maltreating her, and that she had full liberty and freedom to live separate from him, and that she should be found entitled to the custody and keeping of the children of the marriage in pupillarity, viz., Ann Bartlett Beedie and Alexander Bartlett Beedie.

"On 23d October 1888 the Lord Ordinary (Lord Trayner), before whom the cause came to depend, allowed Mrs Beedie a proof of her averments. The petitioner instructed agents to represent him and to defend the said action on his behalf, but no defences were lodged by said agents, and they resigned their agency a few days before the date fixed for the proof. The petitioner, who had no personal knowledge of legal proceedings, was unable after this occurrence timeously to make the necessary arrangements for his being represented at the said proof, and it consequently proceeded in his absence.

"On 10th November 1888 the Lord Ordinary heard proof in absence of the petitioner, and issued the following interlocutor:—'Finds it proved that the defender James Beedie has been guilty of grossly abusing and maltreating the pursuer Barbara Paterson or Beedie, his wife: Therefore finds that the pursuer, the said Barbara Paterson or Beedie has full liberty and freedom to live separate from the defender, the said James Beedie, her husband: Ordains him to separate himself from the said Barbara Paterson or Beedie *a mensa et thoro* in all time coming: Finds the pursuer entitled to the custody and keeping of Alexander Bartlett Beedie, the youngest child of the marriage between the pursuer and defender: Interdicts, prohibits, and discharges the said defender from interfering with the said child, or the pursuer as his custodier, and decerns.'

"After ceasing to be represented by his agents as aforesaid, the petitioner heard nothing regarding the result of his wife's action until 30th December 1888, when Mrs Beedie's Edinburgh solicitor sent him a copy of the said interlocutor of 10th November, and requested him to deliver up the said pupil child. The petitioner then immediately instructed his present agent to investigate the stage which the process in said action had reached, when it was found that the Lord Ordinary's judgment had become final and could not be reclaimed against.

"The petitioner believed and averred that his conduct towards his wife had not only been much exaggerated and misrepresented, both in Mrs Beedie's summons and at the proof, but also that the acts of cruelty alleged by his wife had not been established in evidence so as to justify the remedy of judicial separation, and that had he been represented at said proof Mrs

Beedie would not have obtained decree of separation. The petitioner therefore felt much aggrieved by the said judgment, and particularly in so far as it deprived him of the custody of his pupil son.

"The circumstances under which the application was made were as follows:—The said pupil-child was about four years of age; he had always resided in his father's house, and his father, the petitioner, was deeply attached to him. Mrs Beedie, the child's mother, left the petitioner's house, as already stated, on 4th April 1888, and from that time onwards the care of the said child had devolved entirely on the petitioner. The child had the benefit of an experienced nurse, and was under the supervision and care of a lady housekeeper. The pupil was under her care, and was much attached to her. He also enjoyed the society of his sisters, who were all solicitous for his welfare; and the petitioner believed and averred that the child's health, which at the present time was excellent, would inevitably suffer if he were deprived of the society of his sisters. The petitioner had always treated his said pupil son with the utmost care and affection, and no harm could possibly happen to the child from his remaining in the petitioner's custody. The child was much attached to the petitioner, and would suffer in health and spirits if removed from the petitioner's house."

In these circumstances the petitioner humbly conceived that the Lord Ordinary's order as to custody should be entirely discharged and set aside, and the said pupil left in the petitioner's custody.

Answers were lodged for Mrs Beedie, in which she averred, "in the first place, that this petition was incompetent, and should not be entertained, in respect that it was an attempt to bring under review or set aside a judgment of the Lord Ordinary, which could only be reviewed by way of reclaiming-note, or set aside in a process of reduction. The section of the Guardianship of Infants Act 1886 (49 and 50 Vict. cap. 27) referred to was not applicable to the case of a regular action of separation and aliment, and there had been no application to the Court in virtue of that Act under which the prayer of the present petition could competently be granted.

"Assuming the competency of the petition, the averments of the petitioner as to the relations between himself and the respondent, his conduct towards her, and the petitioner's means, were denied. The facts were truly set forth in the respondent's summons in the action of separation and aliment, and her averments were fully established in the proof which followed thereon, to both of which reference was made. The respondent submitted that the petition should be refused."

By section 5 of the Guardianship of Infants Act 1886 it is, *inter alia*, provided as follows:—"The Court may, upon the application of the mother of any infant [that is, 'pupil' according to the law of Scotland] (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant and to the conduct of the parents and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent."

The respondent objected to the competency of the petition, and argued—The order which the Court was asked to discharge was pronounced under the Conjugal Rights Act (24 and 25 Vict. cap. 86), sec. 9. No doubt a decree of the Lord Ordinary in such cases was not of the finality of decisions in ordinary cases, and it was the practice of parties to come back to the Court for new orders. But that judgment could not be reviewed in the present application, which was under the Guardianship of Infants Act, and in which there was no averment of change of circumstances. In all cases where the Court had been asked to vary the amount decerned as aliment, the application had proceeded on alleged change of circumstances. The only remedy of the pursuer was therefore to bring an action of reduction. On the merits of the case the decision of the Lord Ordinary was right. He exercised no jurisdiction under the Guardianship of Infants Act, and had therefore come to that decision without considering the provisions of that Act. Under this application the Court was bound to have in mind the considerations suggested by that Act. It made no difference that the application here was by the father. Otherwise the Court might have to decide such questions on one set of grounds when the application was by the father, and on another when it was by the mother. This might lead to their having to undo to-day what they had done yesterday. Keeping in view the considerations suggested by the recent Act the Court would have no difficulty in holding that the mother was rightly appointed the custodier of the child.—*Mackenzie* v. *Mackenzie*, Dec. 22, 1887, 25 S. L. R. 183.

The petitioner argued—It was admitted that an action of reduction was competent, and everything necessary for the decision of the question could equally well be ascertained and settled under the present application, with the great advantage that the petitioner could thus obtain the redress craved without re-opening the question between him and his wife. Prior to 1886 the Court had, in virtue of its *nobile officium*, a similar though more limited power than what it now possessed under the Guardianship of Infants Act. There was never any finality as to orders for the custody of children. Parties could always come to the Court for a new order—*M'Lachlan* v. *Campbell*, May 25, 1809, F.C., *Macdonald* v. *Macdonald*, July 19, 1881, 8 R. 985; *Lang* v. *Lang*, January 13, 1869, 7 Macph. 445. If it were possible to ask for a variation of an order pronounced before the Guardianship of Infants Act, it was possible to ask for one now. Nothing could divest the Court of its *nobile officium*, which ran from day to day. It was a question how far it was necessary that there should be a change of circumstances. At all events, there was quite a sufficient change in the fact that the application was by the husband, who had not been represented before—*Robertson* v. *Stewart*, February 27, 1874, 1 R. 540 (*per* Lord Gifford). A series of cases established the rules which should govern the Court in questions of this kind, from which it appeared that the Inner House always gave the custody of a child to the father unless he was unfit. The fact that the petitioner had in the judgment of the Lord Ordinary been a bad husband by no means implied that he was an unfit guardian for the child. A man might be a bad

husband and yet a kind father—*Lang* v. *Lang*, *supra*; *Stewart* v. *Stewart*, June 3, 1870, 8 Macph. 821; *Lilley* v. *Lilley*, January 31, 1877, 4 R. 397; *Symington* v. *Symington*, July 15, 1875, 2 R. 974; *Bloe* v. *Bloe*, June 6, 1882, 9 R. 894; *Beattie* v. *Beattie*, November 10, 1883, 11 R. 85.

At advising—

Lord President—I think the prayer of this petition is rather unhappily expressed. It asks the Court to discharge the order of the Lord Ordinary, or alternatively to vary his interlocutor, which is language perfectly applicable if the petitioner was entitled to bring the judgment of the Lord Ordinary under review. But I hold he is not entitled to bring that judgment under review, as it has become a final judgment. I do not wish, however, to stand upon the mere language of the prayer of the petition as making the petition incompetent. In substance the petitioner asks us to reconsider the question as to the custody of his youngest child, and whether it is competent for him to do so without averring a change of circumstances is the first question before us.

Now, I think it must be competent for a petitioner to come at any time to ask the Court to interfere to regulate the custody of his child or children notwithstanding any judgment pronounced in the course of proceedings in the Outer House for divorce or separation. The question comes to be what the Court is to do. We cannot alter the Lord Ordinary's interlocutor, and find that it should not have been pronounced. I take it to have been very properly pronounced. But it is open to us to consider on any grounds put before us whether the present arrangements for the custody of the child are the most beneficial and most in accordance with the previous equitable rules regulating the proceedings of the Court in such matters, and to arrive at a conclusion on that question with the aid of these rules.

Again, if the judgment here had been the other way, and the custody had been given to the father, it cannot, I think, be imagined that the mother would not have been entitled to present an application to the Court under section 5 of the Guardianship of Infants Act, because by that Act she is entitled to submit to the Court considerations which would be irrelevant before a Lord Ordinary. Section 5 provides, *inter alia*—"The Court may, upon the application of the mother of any infant [that is, 'pupil' according to the law of Scotland] (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent." By that section authority is given to the Court to consider or to "have regard," to use the words of the Act, to several things to which it could not competently attach weight before the passing of the Act. Now, this petition is at the instance of the father, because the judgment of the Lord Ordinary gave the custody of the child to the mother. But if we sustain it so far as to find that it is competently brought, we should be at once compelled to have regard to all the considerations contained in sec. 5 of the Guardianship of Infants Act, because, although the petition is not brought on behalf of the mother, it would be most anomalous to consider a question between a husband and wife without regarding the things which are suggested for our consideration by the recent statute. That would mean that we are called upon to administer the law in one way when the petition is by the mother, and in another way when it is by the father.

The fact that we are entitled to have regard to all the considerations suggested in the recent statute puts the petition in a very different point of view than it would have been in before the statute. It might then have been contended that there was no suggestion of a change of circumstances save that the child was three months older, which was not a sufficient ground for entertaining this application. If, however, I am right in the view I take of the effect of the recent statute it puts us in a very different position altogether than the Lord Ordinary was in, who had no jurisdiction under the recent statute. We have jurisdiction, and upon a consideration of the things suggested in the Act it might occur that we would arrive at a different conclusion from the Lord Ordinary. I am therefore of opinion that the petition is competent.

On the merits of the question I must say that a consideration of the petition has not led me to think that the present arrangement for the custody of the child is an improper one. We see quite enough to enable us to conclude that it is much more expedient and a most reasonable and proper arrangement that for the present the child should remain in the custody of his mother.

Lord Adam—There is no doubt that there were petitions to the Court before the recent Act to regulate the position and custody of children, and it is possible to consider the petitions in the abstract so to speak. But we must now consider the provisions of the Guardianship of Infants Act, and deal accordingly. I think that a petition presented to regulate the custody of a child is competent.

The only question in this petition which we have to decide is the question which relates to the custody of the child. I agree with your Lordship in holding that we must consider the mother to be entitled to defend the custody she has got by all considerations in her power, not only those present to the Lord Ordinary's mind, and which he alone could consider, but by all the considerations suggested in the Guardianship of Infants Act, and among other things the wishes of the mother, which the Lord Ordinary could not consider. If that be so it would be a very anomalous result that in the petition presented to us we were not entitled to take into consideration the circumstances mentioned in the Guardianship of Infants Act, but were obliged to go on the old law. If that were so it might lead to our granting an application by a father, and next morning we might have an application from the mother, and might have to undo to-morrow what we had done to-day. Whenever the petition is by the father, the mother, who must be presumed to have the custody of the child, is entitled to defend her custody by all the considerations

in the Guardianship of Infants Act.

In these circumstances I come to the same conclusion as your Lordship—a conclusion at which the Lord Ordinary has also arrived without taking these circumstances into consideration. On the merits of the case, and on consideration of these circumstances, I have no hesitation in concurring with your Lordship.

LORD LEE—I concur on both points. But I do not wish it to be understood that the Lord Ordinary, in my opinion, though he had no jurisdiction under the Guardianship of Infants Act in disposing of the merits of the case with regard to the question of the custody of the child, was not entitled to take into consideration any consideration affecting that question, including the conduct of the parents. By the general principles applicable, independently of the Act of 1886, I think he is entitled to consider all the circumstances relative to the welfare of the child.

LORD MURE and LORD SHAND were absent.

The Court refused the petition so far as relating to the custody of the child.

Counsel for the Petitioner—Balfour, Q.C.—M'Lennan. Agent—J. D. Macaulay, S.S.C.

Counsel for the Respondent—D.-F. Mackintosh—Gillespie. Agent—Alexander Morison, S.S.C.

Tuesday, March 12.

FIRST DIVISION.

[Lord Fraser, Ordinary.

SIM *v.* THE NATIONAL HERITABLE PROPERTY COMPANY (LIMITED).

Process—Expenses—Fees to Counsel when not sent along with Instructions—A. of S., 15*th July* 1876, *sec.* 6.

The defenders of an action were represented at the closing of the record and at the discussion in the procedure roll both by senior and junior counsel, but at the proof which followed no fee was sent to junior counsel along with his instructions. In the defenders' account of expenses this fee was entered and claimed before the Auditor.

Held that this was not a "higher or additional" fee in the sense of section 6 of Act of Sederunt 1876, and the Auditor's report on the account, including this item, *approved.*

In an action by John Sim, 8 Balfour Street, Leith, against the Scottish National Heritable Property Company (Limited), the Court on 1st March 1889 assoilzied the defenders from the conclusions of the summons and remitted the accounts to the Auditor to tax and report.

When the Auditor's report of the account of expenses came up for approval a special report was submitted by the Auditor in which he stated that he had "taxed the defenders' expenses at £210, 19s. 3d., reserving for the determination of the Court the question of the right of the defenders to recover from the pursuer the fee stated in the account for junior counsel for attendance at the proof and previous consultation, amounting, with clerk's fees and agent's instruction fees, to £23, 16s. 8d." . . .

The Auditor appended to this report the following note:—"At the audit the defenders' agent stated that while the fees entered in the account for junior counsel prior to 5th June 1888 had been paid, the fees entered under that date and on 7th and 21st June had not been paid. It is provided in the general regulations, No 6, appended to the table of fees 1876 that 'a party shall not upon any account be allowed to pay a state higher or additional fees to counsel after he has been found entitled to expenses than were actually paid at the time.' But this rule does not apply either to cases on the poor's roll or to such as have been conducted gratuitously by the agent and counsel on account of the poverty of the party. Had the fees of counsel been wholly unpaid I should, in conformity with my practice, have passed the fees in question without remark but having regard to the terms of the regulation above quoted I think it best to reserve the question for the Court. If the Court shall be of opinion that the regulation is to be strictly interpreted, there will fall to be deducted from the taxed amount now reported £23, 16s. 8d., leaving £187, 2s. 7d. as the sum to be decerned for."

Argued for the defenders—The regulation cited by the Auditor did not touch the present question; the fee to junior counsel for the proof was not sent at all, consequently it could not in any sense be termed a "higher or additional" fee. The Court ought to be guided by the following cases—*Tough's Trustees* v. *The Dumbarton Water Commissioners*, May 14, 1874, 1 R. 879; *Batchelor* v. *Pattison*, July 15, 1876, 3 R. 1086; *Young* v. *Wright*, May 19, 1880, 7 R. 760.

At advising—

LORD PRESIDENT—The provisions of the Act of Sederunt regulating the table of fees has frequently been under our consideration, and the cases which were cited have a general bearing upon the present question. I do not think it necessary to go back upon these cases, because what we are here asked to do seems to me to be quite in accordance with these decisions.

When no fee is sent to counsel along with his instructions it may quite competently be forwarded at a later stage of the proceedings, but what the Act of Sederunt specially provides is that when a fee (and presumably a sufficient one) is sent along with instructions the successful party is not entitled, after obtaining a finding of expenses, to send an additional fee at the expense of the losing party.

In the present case no fee for the proof was sent to junior counsel and what we are now asked to pass is not a "higher or additional" fee but the fee which might at the time of the proof have been sent. I am therefore for allowing the fee upon the same grounds on which the fees were allowed in the cases of *Batchelor* and *Young*.

LORD ADAM and LORD RUTHERFURD CLARK concurred.

LORD MURE and LORD SHAND were absent from illness.