averments and the husband's answers thereto.

Argued for the respondent—The case was before the Lord Ordinary in the action for adherence, and no order should be pronounced here. An application of this kind to the Inner House when an action was pending in the Outer House, though competent, would only be granted in exceptional cases—*M'Callum* v. *M'Callum, cit. sup.* There was nothing exceptional in the circumstances here. No allegation was made against the husband's character, and he had done nothing that he was not entitled to do. He was entitled to turn his wife out of his house if he chose—Fraser on Husband and Wife, ii., 868-873.

LORD PRESIDENT—It appears to me that we are in a position, on the papers before us, to dispose of this case to the only extent to which it is now competent to deal with it—that is, *ad interim*, until some further order shall be pronounced either here or by the Lord Ordinary. The spouses apparently lived together until August 1900, when their fourth child was born, and then the husband, for some unexplained reason, took a dislike to his wife, and ordered her to leave his house. She says that she had no option but to comply with that order. But assuming that she was bound to leave, it is a very different question what effect the giving of the order by the husband and her obeying it should have on the interim custody of the children. It is stated in the petition that she has raised an action of adherence, and alternatively of separation and aliment, against her husband, with conclusions craving that she should be found entitled to the custody of the children, and if it were necessary for the decision of the present question that there should be an inquiry, there would be great force in the consideration, on which the Court proceeded in the case of *M'Callum* (20 R. 293), that it would be inexpedient to have separate inquiries in the petition for custody and in the action in the Outer House. That might be a very valid reason, but it does not exist in this case if there is sufficient material in the papers before us to enable us to make what is after all only an interim order. There is no allegation, far less any *prima facie* evidence, of any misconduct on the part of the wife which would render her unfit to have the custody of her children, three of whom are girls of tender years, who should therefore, *prima facie*, be under the care of their mother, while the fourth is an infant boy. The husband alleges that there was a difference of opinion between himself and his wife as to the chastisement of the eldest girl, but no case involving cruelty to the child is alleged. Under these circumstances the first consideration is the welfare of the children, though no doubt the wishes of the spouses are also to be taken into account. I think that the natural place for girls of such tender age is with their mother, especially in a case like this, where the father is engaged in business, and away from home for the greater part of the day, so that he could not devote much attention to them. If a decree of separation is pronounced hereafter, the Lord Ordinary will regulate the custody of the children, and it may be that the proof will put a different complexion on the case. It is, of course, understood that any order which we pronounce now is only *ad interim*, and does not in any way interfere with the power of the Lord Ordinary to regulate the custody of the children as he may see fit upon the facts proved before him. In the circumstances stated, and on the *prima facie* aspects of the case, I see no ground for depriving the mother—against whom no allegation of misconduct or unfitness is made—of the custody of her children, and accordingly I am in favour of granting the prayer of the petition, subject to the qualifications which I have just mentioned.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court granted the prayer of the petition *ad interim*.

Counsel for the Petitioner—J. C. Watt. Agent—W. A. Farquharson, S.S.C.

Counsel for the Respondent — Kennedy —M'Clure. Agents—Simpson & Marwick, W.S.

Wednesday, January 9.

FIRST DIVISION.

[Sheriff Court at Ayr.

GILCHRIST & COMPANY *v.* SMITH.

Expenses—Appeal—Withdrawal of Appeal —Printing by Respondent.

An appeal from a Sheriff Court was abandoned before the case appeared in the roll for discussion. The respondents asked for full expenses, and stated that they had printed a correspondence which had passed between the parties. This they had done without asking the appellant what he intended to print. The Court *refused* to allow more than the ordinary modified expenses of £3, 3s.

James Gilchrist & Company, salt merchants, Glasgow, brought an action in the Sheriff Court of Ayrshire at Ayr against Walter Smith, grain merchant, Irvine. On 19th March 1900 the Sheriff-Substitute (ORR-PATERSON) decerned against the defender for the sum sued for. On appeal the Sheriff (BRAND) adhered, and on 28th June 1900 the Sheriff-Substitute approved of the Auditor's report on expenses, and decerned against the defender therefor. On 12th July 1900, the defender appealed to the Court of Session, and on 16th October the case was sent to the Short Roll.

On January 9, 1901, before the case had been put out in the roll for hearing, the appellant moved that the appeal should

be dismissed, and that he should be found liable in £3, 3s. of modified expenses.

The respondents moved for full expenses, and stated that they had printed certain correspondence which had passed between the parties—*Sligo* v. *Knox*, November 2, 1880, 8 R. 41; *Little Orme's Head Limestone Company* v. *Hendry & Company*, November 25, 1897, 25 R. 124. They admitted that this correspondence had been printed without communicating with the appellant on the subject.

The appellant cited *Robertson* v. *Robertson's Executors*, November 8, 1899, 2 F. 77.

LORD PRESIDENT—It appears to me that no cause has been shown for departing from the ordinary rule in this case. If a respondent, who is not the party whose duty it is to print the papers, desires to do so at an early stage, he ought to communicate with the appellant and ascertain what he intends to print, otherwise the result will be—or in the ordinary course ought to be—that the appellant will at the proper time print the necessary papers, and there will be double and superfluous printing.

LORD ADAM concurred.

LORD KINNEAR—I quite agree, and think that if a respondent prints without notice and without inquiry he takes the risk of the prints turning out useless, and in that case he cannot recover the expense of printing useless prints from his opponent.

LORD M'LAREN was absent.

The Court found the respondents entitled to £3, 3s. of expenses.

Counsel for Pursuers and Respondents—MacRobert. Agents—R. & R. Denholm & Kerr, S.S.C.

Counsel for the Defender and Appellant—D. Anderson. Agent — Henry Bower, S.S.C.

Thursday, January 10.

FIRST DIVISION.

[Sheriff of Fife.

INNES *v.* FIFE COAL COMPANY, LIMITED.

Reparation — Negligence — Duty towards Children—Shunting on Unfenced Colliery Siding near Colliery Workmen's Houses—Engine-Driver Running over his Own Child—Volenti non fit injuria—Contributory Negligence.

In an action for *solatium* for the death of his child, the pursuer, who was an engine-driver in the employment of the defenders, a colliery company, averred that he was, in the course of his duties, backing some trucks into a siding belonging to the defenders, in circumstances which prevented him from seeing what was in front of him, and without any shunter being provided to assist him; that the siding was open and unfenced; that there were houses closely adjoining it which were let by the defenders to their workmen, and amongst others to himself; that the only access to the bleaching green used in connection with them was across the siding; and that in the course of backing the trucks the pursuer's child, a boy of two years old, who was playing with other children on the siding, was caught between one of the rails and the wheel of the foremost waggon, and was so severely crushed that he died. *Held* that the action was relevant, and that the pursuer was not personally barred from obtaining an issue.

John Innes, engine-driver, Lumphinnans, Fife, brought an action in the Sheriff Court of Fife at Dunfermline against the Fife Coal Company, Limited, concluding for £250 as *solatium* for the death of his son.

The pursuer averred as follows:—"(Cond. 2) In connection with the defenders' works at Lumphinnans, there is a branch line of railway belonging to them running from their No. 1 pit at Lumphinnans to the Thornton and Dunfermline Railway belonging to the North British Railway Company. Close to said pithead there is a siding off said branch line of railway used by the defenders for shunting operations and for the storage of trucks of coal awaiting removal along said branch line of railway. (Cond. 3) Adjoining said siding or lye (which is slightly curved), and at right angles thereto, are two rows of miners' houses, occupied at a rent by the pursuer and other workmen in the employment of the defenders. Said houses are in close proximity to the said siding, the nearest being about 8 yards and the pursuer's house about 15 yards distant therefrom. Across said siding, which has been partially removed, the defenders lately erected several new houses for the occupation of their workmen, and they have allowed them to be occupied without providing any buffer end or other protection to same. Said siding is on a level with the adjoining ground, and is entirely unfenced. On the other side of said siding from said first-mentioned houses is a bleaching-green in connection with said houses, the only access to which is across said siding. The children in said houses are in the habit of playing on said bleaching-green, and on and near said siding, a fact which was known to the defenders and their managers. The whole ground occupied by the siding, houses, and bleaching-green belongs to the defenders. (Cond. 4) On Friday the 30th day of March 1900 the pursuer received instructions from the defenders to make up a train of 150 tons of what are known as double coals. There were at the time two lots of waggons of coal standing on said siding, namely, one lot of nine waggons standing near said new houses, consisting of seven trucks of what are known as single coals and two trucks of double coals, and another lot of eleven