

indemnity as the trustees may have, and that they are bound to count and reckon with the pursuer for their intrusions as trustees foresaid with the said estate and effects, and remit to the Lord Ordinary to proceed with the cause," &c.

Counsel for the Pursuer and Respondent—**Johnston, Q.C.—J. C. Watt. Agents—Simpson & Marwick, W.S.**

Counsel for the Defenders and Reclaimers—**Dundas, Q.C.—Clyde. Agents—Dundas & Wilson, C.S.**

Wednesday, January 9, 1901.

FIRST DIVISION.

REID v. REID.

Minor and Pupil—Custody—Legitimate Children—Questions between Parents—Procedure—Interim Custody—Petition for Custody Pending Action of Adherence—Parent and Child—Husband and Wife—Guardianship of Infants Act 1886 (49 and 50 Vict. c. 21), sec. 5.

A husband ordered his wife to leave his house, and removed from her custody the three elder children of the marriage, all of whom were girls under seven years of age, leaving with her the youngest child, a boy of a few months old. She brought an action of adherence, and alternatively of separation and aliment, with conclusions for the custody of the children. Shortly after the summons in this action was called she presented a petition to the Inner House for the custody of the three elder children. In answers lodged by the husband no serious allegation was made against the wife's character or her fitness to have the custody of the children. The Court, without ordering inquiry, granted the prayer of the petition *ad interim*.

Mrs Agnes Jane Grant or Reid, wife of Alexander Reid, spirit merchant, residing at Bearsden, Dumbartonshire, presented a petition at common law and under the Guardianship of Infants Act 1886, in which she prayed the Court to find her entitled to the custody of her four children—Agnes, aged six, Sarah, aged four, Ethel, aged three, and Alexander Percy, aged six months.

In the petition Mrs Reid averred that she was married to the said Alexander Reid in 1893, and lived happily with him till August 1900, from which date there had been constant difficulties between them. In December 1900 she received a letter from his law-agent, in which it was stated that her husband insisted upon her leaving his house. She obeyed this order, and found a home with her father. She was allowed to take the youngest child along with her, but before she left her husband's house her other children were removed by the hus-

band from his house, and the petitioner averred that she did not know where they were. She raised an action of adherence, and alternatively for separation and aliment, with conclusions for the custody of the children and aliment for them. She further averred that her husband had an income of £1500 a-year, and that his business was of a nature that necessitated his absence from home the whole day. Her averments concluded with the following statement:—"The petitioner is not in a position to make any averments regarding the fitness or unfitness of her husband for their custody. She believes and avers that they are not in his custody. They are very young girls, and are in need of their mother's care, and it is averred are unhappy away from her, and the petitioner is entitled in the meantime to have their custody, and their interests demand that they should be with her. The petitioner will give her husband such reasonable access to said children as the Court may think proper."

Answers were lodged for the husband, in which he made, *inter alia*, the following statement:—" (Ans. 3) The respondent had serious differences with the petitioner, and was much dissatisfied with her conduct both as a housekeeper and towards their three elder children before as well as after August 1900. The respondent disapproved strongly of corporal punishment, and has had cause frequently to remonstrate with the petitioner for thrashing the three elder children. On several occasions he has had to interfere and take them away from her. She has beaten the eldest daughter, who has always been delicate, with special frequency and severity, and without cause. She has disobeyed the respondent's expressed wishes in this respect, and resented his remonstrances and interference on the child's behalf."

Section 5 of the Guardianship of Infants Act 1886 enacts—"The Court may, on the application of the mother of any infant, 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 the conduct of the parents and to the wishes as well of the mother as of the father."

Argued for the petitioner—This was a case for the interference of the Court without delay, and a sufficient *prima facie* case had been made for an order for custody *ad interim* without inquiry. The real question in such cases was the interest of the children, and the natural home of three girls under seven was with their mother. The petitioner was not bound to wait until her action for adherence was ready for proof—*Stevenson v. Stevenson*, Jan. 30, 1894, 21 R. 430. The case of *M'Callum v. M'Callum*, Jan. 24, 1893, 20 R. 293, was not in point, because the decision there was that the circumstances required inquiry, and that it would be improper to have two inquiries. Here the conduct of the husband was obviously unreasonable, and the case might be decided on the petitioner's

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