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.

The Court approved of the Auditor's report of the account of expenses, and decerned.

Counsel for Defenders — Graham Murray. Agent—R. Ainslie Brown, S.S.C.

Thursday, March 14.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

THE CALEDONIAN RAILWAY COMPANY *v.* ALEXANDER CROSS & SONS.

Railway—Undue Preference—Difference of Rates over Same Line of Railway—Railway Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 83—*Relevancy.*

In an action at the instance of a railway company for rates charged for the carriage of goods, *held* that averments were relevant to entitle the defenders to a proof that the pursuers had charged other traders lower rates for goods of the same description conveyed or propelled by carriages or engines passing only over the same portion of the lines of the pursuers' railway.

Railway—Undue Preference—The Railway and Canal Traffic Act 1854 (17 *and* 18 *Vict. cap.* 31), *sec.* 23—*Process—Railway Commissioners—The Railway and Canal Traffic Act* 1888 (51 *and* 52 *Vict. cap.* 25), *sec.* 58.

The Railway and Canal Traffic Act 1854 provides that no railway company is to give an undue preference to any person, company, or description of traffic.

Held (following the case of *Murray* v. *The Glasgow and South-Western Railway Company*, November 29, 1883, 11 R. 205) that interdict is the only remedy in a claim against a railway company for violation of the Statute of 1854; that the defenders' averments that the railway company had granted undue preferences to other traders in violation of the statute were irrelevant; and a motion by the defenders that the case be transferred to the Railway Commissioners *refused.*

Observed that any proceeding before the Commissioners to interrupt the illegal practice of which the defenders complained must be in the form of a complaint to stop illegal proceedings, and not in the form of a claim for payment of money.

This was an action by the Caledonian Railway Company against Alexander Cross & Sons, seed merchants and manure manufacturers, Hope Street, Glasgow, concluding for payment of £1635, being the balance of an account of £3481, which the pursuers alleged that the defenders had incurred to them for the carriage of goods between August 1886 and February 1888.

The action was raised in November 1888. The Railway and Canal Traffic Act 1888 came into operation on 1st January 1889, and judgment in the cause was given in March 1889.

The defenders averred in answer 2 as amended that they "conduct a large business in the manufacture and sale of chemical manures, which contain from 10 per cent. to 50 per cent. of sulphate of ammonia. The value of these manures is from £2 to £7 per ton. The value of sulphate of ammonia is £12 per ton. Nevertheless the pursuers have conceded to various oil companies, and amongst others to Young's Paraffin Light and Mineral Oil Company, Limited, mileage rates for the carriage of sulphate of ammonia which they refuse to concede to the defenders for the carriage of their chemical manures, although the goods are of the same description. The rates charged to the defenders are very much higher than the mileage rates charged to the said oil companies. The pursuers carry goods for the said oil companies and other traders between the following Glasgow stations, viz., Port Dundas, Stobcross, Buchanan Street, Sighthill, and London Road on the one hand, and the following stations on the other hand, viz., Auchterarder, Bridge of Allan, Brechin, Coatbridge, Cumbernauld, Crieff, Stirling, Balerno, Edinburgh, Midcalder, Biggar, and Lanark. The pursuers carry goods for the defenders between the same stations. For carriage of the same description of goods the pursuers have in the account sued for charged to the defenders between these stations, or some of them, higher rates than they have charged to the said oil companies and other traders. In like manner the pursuers have in the account sued for charged higher rates to the defenders than to the said oil companies and other traders as regards carriage of goods between the following Glasgow stations, viz., Eglinton Street and General Terminus on the one hand, and Bishopton, Port Glasgow, Kilmarnock, and Stewarton on the other hand. A statement of the said mileage rates, showing the differences between the rates charged to the defenders and those charged to the said oil companies for carriage from Glasgow to various places in Scotland is herewith produced and referred to. The defenders have applied to the pursuers for more precise information as to the mileage rates charged by them for goods of the same description as those sent for carriage by the defenders, but the information has been refused. Explained further, that the defenders deal largely in nitrate of soda, which is a substance of the same description and used for the same purposes as sulphate of ammonia. And similarly the defenders have been charged in the accounts sued on for the carriage of nitrate of soda, rates largely in excess of those charged to the said oil companies and other traders for the carriage of sulphate of ammonia. In particular, between Glasgow and Coatbridge, the pursuers have charged to Messrs Baird & Company, ironmasters, a mileage rate for the carriage of sulphate of ammonia very much lower than the rates charged in the accounts sued on for the carriage of nitrate of soda. Further, the defenders deal largely in sulphuric acid, which is conveyed by rail in tank waggons. Oil and coal tar are carried in a similar way, and are goods of the same description, in so far as relates to carriage. But the value of oil is about £12 per ton, and of sulphuric acid about £1, 10s. Nevertheless the pursuers carry oil and coal tar for the said oil companies at a mileage rate much lower per mile than they carry sulphuric acid for the defenders, and charge in said accounts." They also alleged —"If the mileage rates charged by the pursuers to the said oil companies and other traders be