had not appeared by counsel or in person in the Outer House, he was not thereby barred from presenting a reclaiming-note against the Lord Ordinary's judgment, because he may change his mind, and the decision is not final until the expiry of the reclaiming-days.

LORD KINNEAR—I have no doubt as to the competency of the reclaiming-note. I think a defender in an action of divorce may appear at any time, though he has not put in defences.

The Court sent the reclaiming-note to the roll.

Counsel for the Pursuer—D.-F. Asher, Q.C.—W. Campbell. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender — Sol.-Gen. Dickson, Q.C.—J. C. Thomson — Pitman. Agents—J. & F. Anderson, W.S.

Saturday, July 3.

FIRST DIVISION.

[Sheriff of Stirling, Dumbarton, and Clackmannan.

PAOLO *v.* PARIAS.

Expenses—Decree in Name of Agent—Compensation.

Held that the unsuccessful party in an action against whom decree had been pronounced for expenses was not entitled to set off against the account of the successful party the expenses for which, prior to the said decree being pronounced, the former had obtained and extracted a decree against the latter in another action relating to the same subject-matter.

Decree for expenses accordingly *allowed* to go out in name of the agent-disburser of the successful party. *Portobello Pier Company* v. *Clift*, March 16, 1877, 4 R. 685, *distinguished.*

Philip Parias raised an action in the Sheriff Court of Clackmannan against Pasquale di Paolo concluding for payment of £30, being the balance of the purchase price of the pursuer's ice-cream business which the defender had contracted to purchase.

The defence was that the pursuer having failed to implement a material part of the contract entered into between the parties, the defender was entitled to refuse to implement his obligation thereunder.

On 17th January 1896 the Sheriff-Substitute (JOHNSTONE) assoilzied the defender on the defence stated, and his judgment was acquiesced in.

On 1st April 1896 decree for expenses was pronounced against the pursuer, on 20th April this decree was extracted, and on 24th April the pursuer was charged thereon. No payment of expenses was made by the pursuer.

In March 1896 Paolo, the successful defender in the above-mentioned action, raised an action in the same Court against Parias to have him interdicted from carrying on the business of an ice-cream merchant within a radius of ten miles of Alva.

The complainer founded upon the agreement which he had repudiated in the previous action, and on 20th April 1896 the Sheriff-Substitute (LIDDELL) found that the contract founded on by the complainer had been discharged in virtue of the judgment in the previous action, and refused interdict.

After sundry procedure the Sheriff (LEES) adhered to this interlocutor on 2nd June 1896.

On 8th July 1896 the Sheriff-Substitute (JOHNSTONE) approved of the Auditor's report on the defender's account of expenses, and allowed decree for said expenses to go out and to be extracted in name of a solicitor at Alva as agent-disburser for the defender.

The complainer appealed against this interlocutor, and, relying on the case of the *Portobello Pier Company* v. *Clift*, March 16, 1877, 4 R. 685, maintained that the account of expenses in the first action, which had not yet been paid, should be set off against the account of expenses in the present action, and that the complainer should be found liable for payment of the balance only.

The respondent argued that the case was distinguishable from *Clift*, the two actions not being concurrent, but the former one having been disposed of and decree extracted before judgment was pronounced in the latter.

LORD PRESIDENT—I must own that I have some sympathy with the proposal to refuse to allow decree to go out in the agent's name, but at the same time this is a matter of right, and we can only assent to Mr Wilson's proposal if it falls within some recognised rule of practice. Now, it seems to me that the fatal defect of the argument is that the decree in the other action in the Sheriff Court was granted and had been extracted before this appeal ever came into Court. It had therefore passed into the region of a judgment debt, historically, no doubt, arising out of a dispute on the same subject-matter, but not out of a living proceeding.

I am of opinion, therefore, that the case of *Clift* does not apply, and that we cannot refuse the motion.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court approved of the Auditor's report, decerned against the pursuer for the taxed amount of the defender's account, and allowed the decree therefor to go out in the name of the agent-disburser.

Counsel for the Complainer—Wilson. Agents—J. B. Douglas & Mitchell, W.S.

Counsel for the Respondent—Forsyth. Agent—W. Ritchie Rodger, S.S.C.

Saturday, July 3.

SECOND DIVISION.

[Sheriff of Lanarkshire.

THOMSON *v.* THE LANARKSHIRE & DUMBARTONSHIRE RAILWAY COMPANY.

Reparation—Negligence—Danger to Children—Safe Condition of Property.

A boy, ten years of age, when playing in a public court separated from a railway line by a wall belonging to the railway company, got on to the top of this wall by means of a heap of rubbish which had been left piled against it by the railway company's workmen, and while walking along the top of it fell on to the railway and received injuries from which he died. The wall in question, which was flat on the top, and 14 inches wide, was 4 feet 11 inches high on the side next the court, and 25 feet high on the side next the railway.

In an action by the mother of the boy against the company, he averred fault in respect (1) of failure of the defenders to place a railing on the top of the wall, (2) of their allowing the heap of rubbish to remain, and thereby rendering access to the top of the wall easy. *Held* that the action was irrelevant.

This was an action brought in the Sheriff Court of Lanarkshire at Glasgow by Mrs Sarah Boyd or Thomson, a widow, against the Lanarkshire & Dumbartonshire Railway Company, in which the pursuer sought decree for the sum of £500 as reparation for the death of her son.

The pursuer averred, *inter alia*, (Cond. 3) that the public court of the tenement at 80 Castlebank Street, Partick, was separated from the defenders' railway by a wall belonging to them; that this wall was about 4 feet 11 inches high on the side facing the public court, and about 25 feet in depth on the railway side, and that it was flat on the top and about 14 inches wide, and that it met another wall at right angles.

She further averred—"(Cond. 4) At the sharp angular corner of the said public court formed by the junction of the railway wall and the other wall, there is, or at least there was, at the date of the accident after mentioned, a heap of dirt of about 2 feet or thereby high, which had been left there by the defenders or their workmen. Easy access to the top of the railway wall could be had by this heap or by means of the lower wall in Anderson Street. (Cond. 5) The said railway wall was, on account of its broad flat top and the easy access to it, and the great depth on the railway side, dangerous to children. Explained that the defenders intended to protect the wall by a railing on the top, but they negligently left the wall in an incomplete and unsafe condition by failure on their part to place a railing or other obstruction along the top thereof. This was or ought to have been known to the defenders, but they failed to put a railing or other preventive obstruction on the top of it. The defenders failed to take ordinary and reasonable precautions to prevent young children from getting on to the top of the wall. (Cond. 6) On 9th August 1896 the pursuer's son Thomas Thomson, ten years of age, was playing in the said public court, and following the example of his playmates he got on to the flat top of said railway wall by the said heap of rubbish, and while walking along it stumbled and fell on to the railway, a depth of 25 feet. (Cond. 7) The boy was lifted up and carried to the Partick Police Office, and from there to the Western Infirmary, where he died. (Cond. 8) The said accident was due to the negligence of the defenders in leaving said railway wall in an incomplete and unsafe condition, and in not having a railing or some other obstruction on the top of said wall so as to prevent children from getting on to the top of same, and also through the negligence of defenders in having placed the heap of rubbish as aforesaid."

The pursuer pleaded, *inter alia*—"(1) The pursuer's child having been killed through the fault and negligence of the defenders as condescended on, the pursuer is entitled to reparation from them."

The defenders pleaded, *inter alia*—"(1) The pursuer's statements are irrelevant and insufficient to support the conclusions of the action."

By interlocutor dated 9th February 1897 the Sheriff-Substitute (BALFOUR) allowed a proof before answer, adding the following note:—

Note.—"This is a case for proof. The accident is said to have arisen from a boy of ten falling from a wall on to the defenders' railway, the wall forming the boundary of the railway, and being about 5 feet high, and the railway line being 25 feet below it on one side. The wall is said to face a public court in which the boy was playing, and a heap of rubbish 2 feet high was laid in the court by the defenders' workmen, which formed a stepping-stone to the top of the wall. It is further said that the defenders neglected to erect a railing on the top of the wall, which they intended to do, for the protection of the public. The defence is that the court is not a public court, that the railway was properly fenced, that the boy was a trespasser, and that he did not get on to the top of the wall by the heap of rubbish."

The defenders appealed to the Sheriff (BERRY), who, by interlocutor dated 15th April 1897, recalled the interlocutor appealed against, sustained the defenders' plea of irrelevancy, and dismissed the action, adding the following note:—

Note.—"I do not think that a relevant case is stated against the defenders. Setting aside any question as to the court being a public court or the boy being a trespasser, and assuming that he got on to the top of the wall by the aid of a heap of dirt said to have been laid or left in the corner of the court by the defenders or their workmen,