violent construction to hold that it was written in any other character than as the respondents' traveller.

"(7) The Lord Ordinary has only further to add, that when a loss has arisen through the fraud of a third party, and the question is, which of two innocent parties are to suffer thereby, there is an equitable principle which, other circumstances being equal, lays the loss on the party who appointed the wrong-doer, or placed him in a position which enabled him to commit the fraud. Dungan was selected and appointed, not by the suspender, but by the respondents. They were satisfied that he was honest and trustworthy, and they reposed in him certainly a large amount of confidence. They have been deceived. If they can show that he exceeded his actual and presumed powers, and that the suspender should have known this, they may succeed in making the suspender bear the loss. But if the question is doubtful; if the respondents have left it ambiguous: or if in the circumstances the suspender was fairly excusable in doing what he did, it is more equitable that the respondents should suffer than that the loss should be thrown on the suspender, who had nothing to do with Dungan's appointment, and who was not called upon to inquire regarding his character or honesty."

The respondents reclaimed.

GORDON and THOMS for them.

MILLAR, Q.C., and RHIND, in answer.

At advising—

LORD JUSTICE-CLERK—At the outset my opinion was in accordance with that of the Lord Ordinary; but after a careful consideration, I have come to be clearly of opinion that his interlocutor is wrong.

If the transaction had been one in which Dungan represented his constituents, I should have been disposed to give great weight to the prior occasion on which he had accepted bills for them, and particularly the one occasion on which Dungan had filled up his own name as drawer. But when I look closely into the case, I do not think that Dungan meant to bind his constituents. Dungan intended to interpose his personal credit for the accommodation of Cameron. The other question is, whether Tellyard and Howlett adopted this translation as their own. They did not know of it down to 26th April; and though they delayed to repudiate it for a few days, yet, upon the whole, I have come to think that they did nothing to bind them to a transaction with which they had no concern. We must return to the view of the Lord Ordinary on the Bills.

The other Judges concurred.

Agent for Pursuer—William Officer, S.S.C.

Agent for Defender—S. J. Macbrair, S.S.C.

Wednesday, January 25.

FIRST DIVISION.

THE TRUSTEES OF MRS DUNCAN OR ANDERSON *v.* MRS ANDERSON OR SKINNER.

Process —Curator ad litem—Curator bonis—*Insane.* *Held* that where a party to an action has become insane during the dependence of the cause, the appropriate procedure to follow is to apply for a *curator bonis* in common form, and not for a *curator ad litem* merely, by incidental application.

Before the reclaiming note in this case came on for discussion, a motion was made by the counsel for the respondent, for the appointment of a *curator ad litem* to his client Mrs Anderson or Skinner, who, it was stated, had become insane during the dependence of the action.

BALFOUR for the reclaimers.

RHIND for the respondent.

At advising—

LORD PRESIDENT—The difficulty which occurred to us when this motion was made on a previous occasion, I think in November last, has certainly not since been removed. The question is, whether, where a woman, who is litigating a cause, has, during the dependency, become insane, it is competent for us to appoint a *curator ad litem* to her? The application is, I think, unprecedented; at any rate no appointment has been made where the question of competency has been properly raised. Without saying that in all circumstances it would be incompetent, I think this is not a case in which to introduce such a novelty. The appropriate course to take here I consider to be for the parties to apply for the appointment of a *curator bonis* in common form. That is not a proceeding about the competency of which there is any doubt. While the appointment of a *curator ad litem* to a party under these circumstances, and on a mere incidental motion, is a matter about the competency of which there is a very great deal of doubt indeed.

The other Judges concurred.

The Court accordingly continued the case, to give time for a proper application to be made for the appointment of a *curator bonis* on the application of the proper parties.

Agents for Reclaimers—Hill, Reid & Drummond, W.S.

Agent for Respondent—William Officer, S.S.C.

Friday, January 27.

CALEDONIAN RAILWAY COMPANY *v.* WYLLIE.

Reparation—Damages—Culpa—*Master and Servant —Collaborateur.* Circumstances in which a railway company was found liable to a cattle drover for injuries sustained by him when engaged in assisting the servants of the railway in trucking cattle at their station. *Held* that every reasonable precaution must be observed by the company's servants in shunting trucks before freedom from liability for accident can be secured.

Held that there was no common employment between the pursuer and the company's servant in the sense in which it would have relieved the company from liability, the pursuer being employed in his own master's business, giving, as the servants of the railway were taking, delivery; and that, under the circumstances, it was a duty incumbent upon him to assist in trucking the cattle, and that, therefore, he could not be looked upon as a volunteer in the service of the company.

This was an appeal from the Sheriff-court of Lanarkshire. The pursuer, Thomas Wyllie, was a drover in the service of Mr Dunlop, cattle-dealer, Stewarton, and raised the action for £200, as damages due to him by the Caledonian Railway Company for loss, injuries, and suffering sustained by him under the following circumstances, viz.:—

While employed in his duties as cattle-drover on 26th October 1868, between six and eight o'clock P.M., at the "cattle bank" of the defenders' station at St Rollox, Glasgow, and when engaged putting cattle of his master's into a truck, with the assistance of one of the defenders' servants and two other persons, an engine, pushing before it some other trucks, came into collision with the truck at which the pursuer was working, and drove the door of that truck against him, threw him to the ground, and also broke his left ancle, and otherwise severely injured him. The pursuer averred that no previous or sufficient warning of the coming of the engine had been given, and that the accident was the result of gross negligence on the part of the defenders or their servants. He farther stated that his health and physical system were seriously and permanently injured, and that he had suffered severe pecuniary loss in consequence of his being unable to resume his customary avocation. The defenders denied all fault or negligence in themselves or their servants, and farther claimed exemption from liability, on the ground that the pursuer and their servants were, in the particular circumstances, fellow-workmen, and engaged in the same common employment.

The Sheriff-Substitute (DICKSON) allowed a proof, from which it appeared, that it was customary for an engine, coming to the "cattle bank," to whistle when about 50 yards off, and for a cry of "cattle bank" to be made when it came nearer, and also for the brakesman to show a light. It was also proved that the night in question was pretty dark, with a considerable breeze blowing in an opposite direction from that in which the engine came. The evidence was conflicting as to whether the usual signals were given, and as to an additional warning which the defenders' foreman was stated to have given to those engaged in trucking.

The Sheriff-Substitute sustained the defences, with the exception of that of common employment, on the ground that all the ordinary precautions had been complied with, and that the fault, if any, lay with the pursuer.

The Sheriff (GLASSFORD BELL), on appeal, recalled the Sheriff-Substitute's interlocutor, and found the pursuer entitled to £70 in name of damages, holding that no blame was imputable to the pursuer; that the collision ought to have been avoided; and that there was no proof of sufficient warning having been given.

The defenders appealed.

The LORD ADVOCATE and SHAND, for them, argued that there was no fault on the part of the company's servants, and that the usual precautions had been taken. Moreover that, supposing there had been fault, the defenders were not liable, as the pursuer was engaged in a common operation with their servants, and therefore he undertook all the risks. The following authorities were quoted:—*Degg* v. *Midland Rail. Co.*, 1 H. and N. 773; *Potter* v. *Faulkner*, 31 L. J. (Q. B.), 30; *Wilson* v. *Merry & Cunningham*, 6 Macph., H. L., 84–89; *Paxton* v. *N. B. R. Co.*, 1st Nov. 1870, 8 Scot. Law Rep. 58; *Abraham* v. *Reynolds*, 5 H. and G. 143; *Southcote* v. *Stanley*, 25 L. J. 339; *Morgan* v. *Vale of Neath Rail. Co.*, 1 L. R. (Q. B.), 149; Smith on Master and Servant, p. 200; Godefroi and Shortt on Railways, p. 408.

SCOTT and STRACHAN, for the pursuer, maintained that the practice of the company, even though proved to have been complied with, did not fix the law of the case. The precautions, if taken, were evidently not sufficient. The pursuer was lawfully present in his master's service, and he could not be held to have a contract without guarantee with the defenders. The proof here clearly showed that the precautions had not been taken, and the defenders were liable accordingly.

At advising—

LORD PRESIDENT—I believe I may say that we have all felt this case to be one of very considerable difficulty, upon the import of the proof; and so it seems to have been dealt with in the Inferior Court. However, we have had the satisfaction of arriving at a unanimous conclusion. The pursuer in the action is Thomas Wyllie, a servant of Mr Gabriel Dunlop, cattle-dealer, Stewarton, who, on the 26th October 1868, while in pursuance of his duty as Mr Dunlop's drover, went to the station belonging to the Caledonian Railway at St Rollox, in charge of some cattle, for the purpose of having them placed upon trucks there, and conveyed along the company's line to Aberdeen. After he arrived at the defenders' station, he proceeded, along with certain servants of the company, to the cattle bank to assist in trucking the cattle, and while he and they were engaged in this operation, he sustained the injury, in respect of which this action is brought.

The mode of trucking cattle at this station is well ascertained in the evidence. The cattle are driven on to the cattle bank, from which they pass to the truck which is drawn up alongside it to receive them; and in order to connect the truck to the embankment in such a way as to prevent any injury to the cattle as they pass from one to the other, the side of the truck next the bank is let down, so as to form a sort of gangway between the two. Now, in the course of driving the cattle into one of the trucks, the pursuer had occasion to be standing on the west side of this gangway, and while he was so standing, an engine from the east side came into the siding where the cattle bank is situated, driving before it some waggons and one truck which was loaded with sheep, which truck was intended to be unloaded there, and to be afterwards used for some of the cattle which the pursuer had in charge. The engine was driving these trucks before it; now, although the engine came in at a very slow pace, it was not so slow but that the truck with the sheep in it struck that into which the cattle were being put. It struck it very gently indeed, but with sufficient force to move it about three yards, and this brought the side of the truck, which had been let down, in contact with the pursuer's legs and ancles, so as to throw him down and break one of his legs, and otherwise injure him.

Now, these being the circumstances in which the accident happened, two questions arise which must be answered to enable us to dispose of the case. The first is a pure jury question—namely, Whether the injury sustained by the pursuer was caused by any negligence or fault on the part of the railway company's servants?

The second is a mixed question of fact and law —namely, Whether, assuming that it was so caused, the pursuer, in the circumstances of the case, and looking to the nature of the employment in which he was engaged, is entitled to succeed in this action?

The first question, of course, depends entirely upon the import of the proof which is before us. There is no doubt, I believe, that if people trucking cattle have a sufficient warning of the approach

of a train into the siding in which they are engaged, it is their duty to stop until the train is stationary, or has completed the operation for which it came in. It stands to reason that this should be so, as it is not easy or even possible for the engine-driver and his assistants to calculate distances to such a nicety, in the shunting of waggons, as to avoid all risk of danger to those engaged in other work upon the siding. I am very far, therefore, from saying that it is not the duty of those in charge of the engine and trucks coming up, to calculate these distances with such care as to avoid accident. I think that this should certainly be done to the utmost extent that it is possible. But while there is this duty incumbent upon them, there is also a duty incumbent upon those persons who are engaged on the stationary trucks or other work in the siding, themselves to take every reasonable precaution on their part, to avoid and get out of the way of accidents. I entirely approve therefore of the statements made by the company's servants, the witnesses Baxter and Dow. On the other hand, however, there cannot be the least doubt that it is the duty of the company's servants, who are coming into the siding, to give notice by signal to those who are at work on the siding. The recognised rule seems to be—(1) That the engine should whistle; (2) that the brakesman stationed on the front of the trucks coming in should call out as loud as he can; and (3) that, at all events when it is dark, he should have a lamp with him, and wave it to show the approach of his waggons. I think that if any of these signals are omitted there is negligence on the part of the company's servants. But there is another precaution, which is also, in my opinion, of very great importance. The witness Baxter says—"When an engine pushing waggons comes up to waggons or trucks standing, it often knocks them on a little way." But then he adds, "it should not do so if the truck has cattle in it, and the door or gangway is down. I have not often seen that happen." Now, that suggests to us another precaution that should be taken by the driver—viz., to make sure of stopping short before striking the stationary waggons.

In this, therefore, as in many similar cases, there are a number of precautions which ought to be observed. Some of these may fail from accidental causes in having the desired effect, and yet the rest may succeed. And then, while as regards the people trucking, there was the duty incumbent upon them of attending to the signals and securing their own safety, there was also incumbent on those servants of the company, in charge of the engine and trucks being shunted, the duty of stopping short of the cattle truck which was being loaded, and of giving the three signals above mentioned. If they failed in any of these, I come to the conclusion that there was negligence on their part.

Now, with regard to the signals, I think that there is a conflict of evidence. Those engaged on the train all say that the engine whistled; they all say also that the brakesman shouted at the proper time, and warned the people on the cattle-bank, and farther that he showed his lamp. The people engaged in trucking, on the other hand, all say that they neither heard nor saw anything. But then it appears that there was a strong wind blowing right in the teeth of the engine and waggons, and the men on them admit that the whistle might not have been heard—the shout of the brakesman was very likely not to be heard either, particularly if the men at the cattle-bank were making the noise which is always more or less a necessary accompaniment of trucking cattle; and it would depend upon chance whether the lamp was sufficient of itself to attract attention. The display of the lamp is only really valuable in conjunction with the other two signals. Now, it appears to me that in such a boisterous night there should have been additional attention paid to these signals, in order to make them available, and there certainly is no evidence of that. It would not have been unreasonable if the driver, instead of only whistling once on entering the siding, had continued to whistle, and if the shout had been constantly repeated. The failure in this looks to me very like negligence, in the circumstances. But in addition to this, it must be noticed that the other precaution was not observed —viz., the coming to a stop in proper time. It comes out in the evidence that it is the duty of the brakesman in the front of the waggon to direct the driver by his signals, and that the driver is entitled to trust entirely to him. There was on this night a more than usual amount of care due by the brakesman in bringing the driver to a stop in time, and he failed to do so. On the whole matter, therefore, I have come to the conclusion that there was negligence on the part of these servants of the company, such as would entitle the pursuer to damages, provided he was not guilty of contributory negligence, which is not attempted to be made out, and provided he was not at the time acting as one of the companys' servants.

The second question, therefore, resolves itself into this, was he at the time in the position of a servant of the company, so as to bar this claim? It is said, on the part of the defenders, that his duty to his master was concluded after he had brought the cattle to the loading place, and that when he helped the company's servants to truck them he was in the same position as a volunteer, offering and giving his assistance voluntarily and gratuitously. If that were so, there is authority for holding that he would place himself in the same category with the rest of the company's servants for the time, and could not, therefore, make the claim which he does here. But the question is whether he was in that position. It is in evidence that there an is undoubted practice, which grew up very soon after railways were opened, of servants of farmers, cattle dealers, and such like, assisting in trucking their master's cattle. Or it may be put in this way equally well, that the servants of the owner of the cattle are always in use to be assisted by the servants of the company in trucking the cattle under their charge. The reason of this is obvious, and the practice most intelligible. The railway servants are naturally not thoroughly accustomed to handle cattle, and it requires no little experience to handle them well. And certainly, if the mere driving cattle along a road is a work of difficulty and requiring experience, still more so must the operation of putting them on board what must appear to them an unknown and terrible place,—viz., a railway cattle-truck. It is not at all unreasonable, therefore, that the men who are constantly employed about them, and by whom they are accustomed to be handled, should be expected to give their assistance in trucking them. What then is the position of the owner's servants under these circumstances? I do not think that they are to be looked upon at all in the light of volunteers, giving their service voluntarily

to the company. On the contrary, they are attending to their master's business and nothing else, and what I should say was, the relative position of these men and the railway company's servants is precisely this, that the one is giving and the other taking delivery under the contract of carriage. The servants of the dealer are giving delivery, and those of the company are taking delivery. It does not affect the question to say, that they are engaged in a common employment. All that is true of many other cases of giving and taking delivery. For instance, if I send my servant to a shop to purchase something, which he receives from one of the shopkeeper's employées, it is true that they are engaged in a common employment, but one is acting for the shopkeeper, and the other for me. And there is no common employment, in the sense that they are both doing the work of the shopkeeper, and are responsible to him, and that seems to me to be the exact position that the servants of the dealer and those of the company held here respectively. It would have been the same thing if Mr Dunlop had driven the cattle himself, and it would be very difficult to contend that he was, while assisting in trucking the beasts, in the position of a servant of the company. Well then, in the present case he was only doing the same thing by the hand of the pursuer, his servant. Therefore I come to the conclusion, on this second question, that Wyllie was not in a position at the time of the accident which forms any bar to his claim under this action, and being of opinion that there was negligence on the part of the company's servants, I am therefore for adhering to the Sheriff-Principal's interlocutor.

The other Judges concurred.

Appeal dismissed.

Agents for Appellants—Hope & Mackay, W.S.

Agent for Respondent—John Walls, S.S.C.

Friday, January 27.

MRS JANE ANN FRASER OR WALKER *v.* WILLIAM WALKER.

Husband and Wife—Divorce—Process—Competency—Counter action of Divorce—Expenses. After decree of divorce had been pronounced by the Lord Ordinary at the instance of a husband against his wife, and a reclaiming note had been lodged against the Lord Ordinary's judgment, but had not yet been disposed of, the wife raised a counter action of divorce against her husband, in which she alleged that the facts upon which her counter action was laid had only come to her knowledge since the date of the Lord Ordinary's interlocutor in the action at her husband's instance against her. *Held* that, the action at the husband's instance being still in dependence in and under the control of this Court, the pronouncing of decree of divorce by the Lord Ordinary was no bar to the raising of a counter action at the wife's instance against the husband, if otherwise competent.

Observed, that it would have been different had final judgment been pronounced in the husband's action by this Court, and appeal been taken to the House of Lords, as in that case this Court would have lost control of the cause.

An action of divorce had been raised at the instance of Mr Walker against his wife, and decree of divorce had been pronounced against her by the Lord Ordinary (ORMIDALE) on 28th July 1870. Against this judgment Mrs Walker reclaimed; and in November of the same year, before her reclaiming note was heard in the Inner House, she raised a counter action of divorce against Mr Walker, the summons in which was signeted on 19th November, or nearly four months after the date of the Lord Ordinary's decree. She alleged several specific acts of adultery, extending over more than fifteen years, and averred that they had only come to her knowledge during the said month of November.

Against this counter action Mr Walker stated the following preliminary plea:—"The pursuer having been divorced from the defender by decree pronounced by the Court of Session before the raising of the present action, has no right or title to sue for a divorce."

Upon this plea the Lord Ordinary (ORMIDALE) pronounced the following interlocutor:—

"*Edinburgh*, 11*th January* 1871.—The Lord Ordinary having heard counsel for the parties on the defender's first plea in law, and having considered the argument and proceedings, repels said plea in law, and appoints the case to be enrolled to be further proceeded with.

"*Note.*—The defender's plea in law, now repelled, proceeds on the assumption that the pursuer had been divorced from her husband, the defender, before this action at her instance was raised. But this is scarcely a correct or well-founded assumption; for although an interlocutor of the Lord Ordinary divorcing the pursuer from her husband had been pronounced in July last, that interlocutor was in the November following—when the present action was raised and brought into Court—the subject of a reclaiming note to the Inner House. In truth and substance, therefore, the action of divorce at the instance of the defender against the pursuer was when the present action came into Court, and is still in dependence, the reclaiming note referred to not having been yet disposed of. In this state of matters it appears to the Lord Ordinary that the defender's first plea in law must, in conformity with the decision in *Brodie* v. *Brodie*, 11th June 1870, 8 Macph. 854, be repelled, and the cause allowed to be matured for judgment, so as to be ultimately taken up and disposed of at the same time with the reclaiming note in the counter action. The only distinction taken before the Lord Ordinary, between the present and the case of *Brodie*, was, that while in the latter the action at the wife's instance was raised and in Court a few days before the Lord Ordinary's interlocutor divorcing her in the action at her husband's instance was pronounced, the present action was not raised or brought into Court till after the Lord Ordinary's interlocutor divorcing her in the action at her husband's instance had been pronounced, although before judgment in the reclaiming note against that interlocutor. The Lord Ordinary does not think that this distinction is sufficient to render the case of *Brodie* inapplicable as a precedent in point of principle."

Thereafter, on the 24th January 1871, the Lord Ordinary pronounced this farther interlocutor:—"The Lord Ordinary allows the parties a proof of the facts averred by them respectively, and to the defender a conjunct probation thereanent: Appoints the proof to be taken before the Lord Ordinary within the Parliament House, Edinburgh, on Thursday the 23d day of February next, at half-past ten o'clock forenoon; and grants diligence at