

take the custody of the said children, and thereafter to deliver the said children to the petitioner." This petition was presented while the husband was in this country, and the question was raised before the Sheriff, whether this case came under his jurisdiction. Now, this is a question of no little difficulty, and there has been as yet no authoritative decision of it in this Court. The Sheriff-Substitute at first sustained his jurisdiction in the matter, and then, when the circumstances of the case disclosed themselves, he altered that judgment. Now, I do not intend to express any opinion upon this subject at all, and do not think that I am required to do so as the case comes before us, for the following reasons:—While the case was in dependence before the Sheriff the petitioner left this country, and on 28d July last the Sheriff dismissed the petition, on the grounds, as I understand, that, whatever might have been his jurisdiction in the case under the original circumstances, it had become impossible for him to entertain the action now that the husband had left the country, to the effect of removing the children out of Scotland. Now that seems to me a reason which is so irresistible that I think we need not go beyond it. I took the liberty of asking the petitioner's counsel, in the course of his argument, what he proposed the Court should do with the children, and the answer was, that the petitioner's law agents, who were his mandatories in this country, were authorised to receive them. Now, the law agents of a person are certainly not the proper parties to take charge of his pupil children, and something more than an ordinary mandate would be required to entitle them to interfere in the matter at all beyond their proper sphere. But, supposing the petitioner's law agents were authorised to receive the children, what are they to do with them? They are not going to accompany them to Sherbrook, and yet, while they cannot travel alone, there is no other provision made for conducting them there—to say nothing of there being no provision for their reception if they by good chance did arrive,—and there is little prospect of their father being found there to take them in. Besides, therefore, the legal difficulty, there is also the practical difficulty to be overcome; and I think therefore that we shall be right in adhering to the Sheriff's judgment, so far upon the same grounds upon which he has gone, but declining to say anything upon the question of jurisdiction.

The other Judges concurred.

The question was now raised by the counsel (BLACK) for the appellant in the first action, as to how the question of future aliment was to be disposed of. He contended that he was now entitled to regular aliment, as the Court had held that the contract was still in subsistence, and that independently of his right at common law. Though the case was only in the roll for consideration of the above-mentioned minute, of consent of the respondent, this farther question was taken up in order, as far as possible, to exhaust the case.

FRASER, for the respondent, maintained that the action had only been sustained upon the contract of separation, and that, as his client's consent to that contract had been recalled, which it was quite in his power to do, the action could not be farther sustained, to the effect of giving future, or even interim, aliment. There might be a new action of aliment founded on the common law, but

the ground for this present action had been taken away by his revocation.

LORD PRESIDENT—It must be kept in mind that we have sustained the action, at a previous stage, only so far as it is founded upon a contract of separation, and without a good deal more discussion and consideration, I am not prepared at present to sustain it upon the other grounds stated. At the same time, I am still of opinion that we are in a position to give farther effect to its conclusions, even though still viewed as merely an action based upon a contract, because there is now due under this contract, if it still subsists, more than another year's aliment since the raising of this action. Now, I am of opinion that the husband is still bound by the contract, and has failed to withdraw from his obligations under it, for his letters both to his wife and her agent, and the minute now put in, and the proposals they severally contain, were not written or made *in bona fide*, but with the sole object of getting rid of his obligation under the contract, without any intention of receiving back the pursuer as his wife, and affording her a home. Entertaining this opinion still, I am quite prepared to give farther decree for aliment up to the present date. But though ready to do this, on the ground that the contract has not been adequately revoked, I am aware that it may be revoked to-morrow, or at any future time, and I therefore cannot see my way to giving decree for aliment prospectively.

The other Judges concurred.

Agents for Wm. Hood (in the first action)—Muir & Fleming, S.S.C.

Agents for Wm. Hood (in the second action)—Henry & Shires, S.S.C.

Agents for Mrs Hood—Macdonald & Rodger, W.S.

Tuesday, January, 24.

SECOND DIVISION.

CAMERON *v.* TILLYARD & HOWLETT.

Agent—Traveller—Bill. Circumstances in which held that a traveller, employed by a wholesale firm to collect orders and receive payment of accounts due to them, was not entitled to take bills granted in his own name in payment of trade accounts due to the firm.

This was a suspension of a charge upon a bill for £88, 7s. 6d., drawn by the respondents Messrs Tillyard & Howlett, and accepted by the complainer, Mr Cameron, shoemaker, Inverness. The question involved was whether a traveller of the name of Dungan, who was employed by the respondents, was authorised as their agent to accept bills in payment of accounts due to them. It appeared that on 3d December 1869 Dungan called on Cameron, who at that time owed to the respondents two sums, one of £50 odd, and the other of £88 odd. Cameron paid the first sum by a bill in favour of Dungan, which he retired at maturity; and in payment of the second sum he granted the bill, the charge upon which was now sought to be suspended, and which was payable on 6th April 1870. On 13th March the complainer informed Dungan that it would be inconvenient to retire this last bill at maturity. He alleged that "Mr Dungan thereupon offered to renew the bill to an amount to suit the complainer's convenience, and it was arranged between him and

the said Thomas Dungan, as the representative and agent of the respondents, that he should grant another acceptance to Mr Dungan for £58, 10s., to become due on 4th June 1870, which Mr Dungan, as agent foresaid, undertook to endorse and discount and remit towards payment of the bill for £88, 7s. 6d. The complainer accordingly granted a bill for the sum of £58, 10s. to the said Thomas Dungan, and received from him an acknowledgment in the following terms:—*'Inverness, March 15th 1870.—Received from Mr Duncan Cameron, his acceptance for £58, 10s., due 4th June 1870, and for which I am to remit him proceeds towards payment of bill of Messrs Tillyard & Howlett, due 6th April 1870. (Signed) THOMAS DUNGAN.'*

Dungan discounted this bill and, after obtaining payment, absconded. The complainer paid the difference between the amount of the original bill and the one granted on 15th March, and in these circumstances brought the present suspension of a charge on the original bill of 3d December for the whole debt.

The Lord Ordinary on the Bills passed the note on caution; and thereafter the Lord Ordinary (GIRFORD) ordered a proof, the import of which will appear from the following interlocutor and note pronounced by his Lordship:—

'Edinburgh, 20th December 1870.—The Lord Ordinary having heard parties' procurators, and having considered the record, proof adduced, and whole process, suspends simpliciter the charge complained of, and whole grounds and warrants thereof, and decerns: Finds the suspender entitled to expenses; and remits the account thereof, when lodged, to the auditor of Court to tax and to report.

'Note.—The bill for £88, 7s. 6d. charged on is an ordinary trade bill by the suspender to the respondents for goods sold and delivered. It was granted upon 3d December 1869, and was payable on 3/6th April 1870. The amount of said bill was undoubtedly and admittedly due by the suspender to the respondents at the time the bill was granted.

'The defence against payment of the bill is, that the respondents' traveller, Thomas Dungan, agreed to give the suspender delay in payment of a part of the said bill, and with this view took from the suspender the bill No. 20 of process for £58, 10s., dated 1st March 1870, at three months, granting at same time the receipt and obligation No. 8 of process. The suspender has paid to the respondents the sum of £29, 17s. 6d., being the difference between the two bills; and he duly paid and retired, when due, the bill for £58, 10s., thus paying in full the bill charged on for £88, 7s. 6d. The suspender's plea is, that the respondents' traveller, Thomas Dungan, had their implied authority to take the bill for £58, 10s., and to give the delay sought by the suspender, and that he cannot be required to pay to the respondents the sum of £58, 10s., for this would be to pay the same sum twice over.

'The respondents' case is, that their traveller, Thomas Dungan, acted without authority and beyond his powers in giving the suspender time, and taking the bill for £58, 10s., which is a bill in Dungan's own name; that the respondents are not bound thereby, but that the suspender must look to Dungan alone as an individual for relief from the bill of £58, 10s.

In the Bill Chamber the Lord Ordinary (LORD KINLOCK) refused the note of suspension, on the ground that a commercial traveller, in a position like that of Dungan, had no power to take a bill

in his own name, and bind his principals by a transaction such as that relied on by the suspender. This interlocutor, however, was altered by the Second Division, and the case remitted, with instructions to pass the note upon caution, which was accordingly done.

"The present Lord Ordinary understands that the Inner House Judges were of opinion that inquiry into the whole circumstances was necessary in order to determine how far the respondents were bound by the actings of their traveller. Such inquiry has now been made; and the Lord Ordinary is of opinion that, in the whole circumstances, the suspender was warranted in transacting with Thomas Dungan as he did, and in relying upon the implied authority which Dungan held from the respondents. He is therefore of opinion that the loss which has arisen from Dungan's fraud must fall on the respondents and not on the suspender.

"While the Lord Ordinary, however, has formed this opinion, he feels that the case upon the evidence is a very narrow one; and it is not without difficulty and hesitation that he has pronounced the present judgment in favour of the suspender. The grounds upon which the Lord Ordinary has proceeded are shortly the following:—

"(1) Thomas Dungan held no written or express authority from the respondents, and no limitation or restriction of his powers was ever intimated to the suspender. He was simply the respondents' traveller, and the nature and extent of his authority must be gathered from the character of his employment, and from his recognised actings and dealings in the course thereof. It appears from the evidence of Mr Tillyard himself, that even as between the firm and their traveller Thomas Dungan, nothing was ever said about the extent of his authority, or what he was to have power to do as their traveller. Such a case is a favourable one for the suspender, for it entitles him at least to the benefit of any doubt which might arise. The respondents themselves put their traveller, so to speak, in the position of announcing his own powers to the customers. There was no letter of introduction to the customers announcing or bearing upon its face the authority given, or the purposes for which the traveller was appointed.

"(2) It is proved that the suspenders' whole dealings with the respondents were through their traveller, the said Thomas Dungan, excepting when the suspender had occasion to write the respondents direct. The whole correspondence, so far as extant, is produced in process, and it refers chiefly to the period of credit and to applications for time. All orders were given through the traveller—all payments, whether by bill or cash, were made to him; and it appears that it was only when the traveller could not himself be applied to that correspondence took place with the principals. The correspondence will be immediately adverted to.

"(3) It is proved that the whole bills ever granted by the suspender for goods received from the respondents were handed by the suspender to Thomas Dungan, and were, when so signed and delivered, blank in the drawer's name. This is not seriously disputed by the respondents, and indeed it is expressly admitted by them on record (answer 2), that Dungan was entitled to take bills from the respondents' customers with the respondents' name blank as drawers.' The suspender expressly depones that the whole bills in process, including the bill for £58, 10s., and the previous

bill for £50, both of which now bear Thomas Dungan's name as drawer, were blank in the drawer's name when signed and delivered by the suspender. The suspender is corroborated in this, and the Lord Ordinary thinks it must be held to be a fact in the case.

"It is no doubt true that the respondents qualify their admission as to the traveller's power to take bills blank in the drawer's name, with the explanation, that 'such bills were so expressed as to exclude an individual drawer.' The meaning of this is, that the body of the bill was expressed 'our order,' and not 'my order.' The Lord Ordinary thinks that this is very narrow ground to go upon in the absence of any express intimation to the suspender. He thinks it would be very hard to hold that the suspender, who admittedly was entitled to grant Dungan bills blank in the drawer's name, was only entitled to do so when they bore 'our order,' but was not entitled to do so, and did it at his own risk, when they bore 'my order.' If this had been expressly intimated to the suspender, of course it would have been the bargain, but the Lord Ordinary cannot hold that a condition so peculiar is to be inferred from the circumstances proved. The suspender says that as the bills were always blank in the drawer's name he merely looked to the sum and currency, and this is most natural. If it was intended that he should only sign bills with the word 'our' in them, surely the respondents were bound to tell him so. It is plain that an authority to Dungan to take bills blank in the respondents' name, virtually made Dungan master of the bills, for if he intended to commit a fraud he might easily fill in a firm as drawers, or add 'and Coy.' to his own name.

"(4) The Lord Ordinary thinks it sufficiently proved that Dungan had implied authority to give time to the suspender. Perhaps this is one of the powers which, without any proof, would be held implied in a trade like that of the respondents, at least where the traveller had power to discharge accounts and take either bills or cash. At all events very little proof will establish such a power, and there seems to be enough in the present case.

"In May 1869, being long previous to the transaction in dispute, the suspender wrote the respondents for delay in payment of a bill then nearly due. Thomas Dungan came round on his ordinary journey and gave the delay asked, by taking from the suspender post-dated cheques, which were handed to the respondents and cashed when due. The respondents seem to have written the suspender before they knew of the arrangement made with Dungan complaining of the delay, but on being informed that Dungan had given the delay, they at once acquiesced and apologised for the terms of their former letter. The Lord Ordinary cannot read this otherwise than as a distinct recognition by the respondents of Dungan's power to give time. The terms of the letters between the suspender and respondents, of 8th, 29th, and 31st May, and 2d June 1869, are very material, as showing a recognition of large powers in Thomas Dungan.

"Now it is very material to observe that the delay granted by Thomas Dungan, by the transaction in dispute, when he took the new bill for £58, 10s., due 4th June 1870, as in part payment of the bill for £88, 7s. 6d. which fell due 6th April 1870, was a delay granted just as that of May 1869 had been, after a direct application by letter to the respon-

dents themselves. The letter asking delay is dated 23d February 1870. To this letter no written answer was returned, for the respondents' allegation of an answer in statement 5 has not been proved. The answer was given just as in May 1869 by Dungan coming personally, and giving the delay, though not to the extent sought. If therefore the bill for £58, 10s. had been filled in with the respondents' own name as drawers, or even if it had been blank in the drawers' name, but with the word 'our' in it, the respondents could scarcely have maintained that they were not bound by the transaction, and not bound to recognise the delay so agreed to by Dungan.

"(5.) This brings the case to the real point of any difficulty. The bill of £58, 10s. was filled in by Dungan in his own name, discounted by him, and the proceeds embezzled and applied for his own use.

"The Lord Ordinary has already remarked that a power to Dungan to take bills blank in the drawer's name (and this power is admitted), implied great confidence in Dungan, and even without any farther proof, he thinks it would be very strict to hold that he had only power to take such bills when the word 'our' was in them, but not when the word 'my' was used.

"In point of fact, however, it seems to be proved that previous to the transaction in dispute, Dungan had taken from the suspender a bill for a former account in his own name, drawn with the word 'my' in it, and that the granting of this bill came or ought to have come to the knowledge of the respondents. The bill now referred to is No. 6 of process, for £50, dated 3d Dec. 1869, and was duly retired by the suspender. Is it quite true that in Dungan's weekly statement this bill is not entered, but the account is represented as having been settled in cash, and only one bill by the suspender, being that for £88, 7s. 6d., was sent on by Dungan. But then, of the same date with that weekly statement, the suspender wrote the respondents a letter, clearly implying that he had granted two bills to Dungan and not one merely, as reported by Dungan; and this might have put the respondents on their inquiry. Not only so, but on 23d Feb. 1870, a fortnight before the £50 bill became due, the suspender wrote the respondents, asking the respondents for delay in payment of this very bill of £50 which Dungan had drawn and discounted in his own name. Surely this was enough to put the respondents upon their inquiry. At all events the suspender could hardly be called on to do more. As already observed, the Lord Ordinary holds it proved that no answer was sent by the respondents to this letter.

"(6) Taking into view the whole circumstances, the Lord Ordinary thinks there was enough to warrant the suspender in giving to Dungan, as the respondents' traveller, the bill for £58, 10s., blank in the drawer's name; and that this bill having been duly retired, the respondents are bound to give credit therefor as to account of the bill charged on. It was maintained that the terms of Dungan's acknowledgment of 15th March 1870 were such as to show that the transaction was an individual transaction of Thomas Dungan, and not one in which he represented himself as acting for his constituents. The Lord Ordinary cannot so read the document. No doubt it bears Dungan's individual signature, but it refers to a trade-bill due to the respondents; and it appears a very

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. :—