decree for expenses has gone out in name of the agents disbursers, and it has not been appealed. It is impossible then to give the petitioner execution pending the appeal.

As regards aliment, I also agree. We should not give decree in terms of the prayer of this petition. Some limitation must be placed. I think that the safe course is to give *interim* execution to the extent of arrears due before the appeal was presented. It was rightly stated for the defender that our usual practice is to grant *interim* execution only on caution. But there is no incompetency in granting it without caution, and that being so, we could not have a stronger case than the present.

LORD ARDMILLAN—I concur as to the expenses. The question of aliment is one of some nicety. We cannot under form of *interim* execution give final execution. We cannot therefore give direct judicial recognition of the petitioner as the wife of the defender, pending the appeal. But the awarding of aliment past due is not direct but only inferential recognition of her status. *Interim* execution always implies, to this extent, recognition of the right in dispute. There is nothing objectionable in point of form, in awarding arrears past due. If it were incompetent, caution would not solve the difficulty. The offer of caution may make it more easy and natural to allow *interim* execution, but it will not create competency. In this case I am of opinion that the petitioner cannot reasonably be called upon by the defender to find caution.

LORD KINLOCH concurred.

The Court, in respect it was stated by the respondent's counsel that he was out of the kingdom and his address unknown, and in respect that the said respondent has paid no aliment to the petitioner, allowed execution to proceed, notwithstanding the appeal, to the effect of enabling the petitioner to recover the aliment payable from Whitsunday 1866 to Whitsunday 1871, with interest at 5 per cent; and refused the petition as regards expenses, in respect that the decree is in name of the agents disbursers, and has not been taken to appeal.

Agents for Petitioner—Philip & Laing, S.S.C.
Agents for Respondent—H. & A. Inglis, W.S.

Friday, June 16.

CALDERS *v.* CALEDONIAN RAILWAY CO.

Reparation—Solatium—Culpa—*Master and Servant*—Collaborateur. The N. B. Rail. Co. have running powers over a portion of the C. R. Co.'s line. *Held* that the C. R. Co. were liable for injuries sustained by a guard in the employment of the N. B. Rail. Co. while in charge of a train passing over that portion of the C. Co.'s line, in consequence of the negligence of a pointsman in the employment of the C. Co., there being no common employment between the guard and the C. R. Co.'s servant, in the sense in which it would have relieved the C. R. Co. from liability.

This was an appeal from the Sheriff-court of Glasgow. The widow and only child of the late Alexander Calder sued the Caledonian Railway Co. for the sum of £500, to be paid to each, as reparation and *solatium* for the loss sustained by them through his death, which was caused as they averred, by the negligence of the defenders and their servants.

The facts of the case, as disclosed by the evidence, were shortly as follows:—On the night of the 22d May 1868, Calder, who was a guard in the employment of the North British Railway Co., was engaged as guard of a goods train from Glasgow to Dunfermline. As the train was approaching Stirling from the south, on the down or west line of the Caledonian Railway, over this part of which the North British Railway Co. have running powers, the last carriage (being the brake van) in which Calder was, along with some other carriages, became detached from the rest of the train, which moved on past a set of points and then stopped at a place where, in the ordinary course, the train would have been backed along the points on to the Caledonian up line, and thence on to the Dunfermline line. The points were in charge of a man named Sinclair, a servant of the Caledonian Railway Co. After the fore part of the train had stopped, he kept the points so as to allow it to return on the down line, and showed a white light or "all right" signal. In consequence the driver, not being aware that any waggons had been detached, or that there was any special occasion for proceeding slowly, and supposing that the signal was given in order to take the train on to the up line as usual, backed the engine and fore part of the train with some speed on to the detached waggon. The concussion threw Calder out of his van, and in consequence of the injuries so received, he died on 17th June following.

It was not clear from the evidence whether or not Sinclair noticed that the train was incomplete, but there was little doubt that he was to blame in either case. If he did not notice the fact, he was guilty of negligence in not doing so. As every train ends with the guard's brake van, it is easy for the pointsman to notice whether the train is complete or not, and it is his duty to do so. Further, if he did not observe that the brake van was wanting he was guilty of negligence in not adjusting the points so as to have taken the returning portion of the train off the down and on to the up line, instead of allowing it to go along the former line till it ran into the detached waggon and guard's van left thereon. If, on the other hand, Sinclair did observe the break which had occurred in the train, then he was guilty of negligence in shewing, as it is clearly proved he did, the white light instead of the green, thereby signalling that all was right, and inducing the driver to believe that he was about to cross from the one line to the other, and that he might safely do so at the usual rate of speed, the result of which was that the collision became inevitable, the points not having been adjusted in crossing.

The defenders pleaded that they were not liable on the following grounds:—(1) Because the accident was mainly due to the driver of the North British train backing his engine at an unwarrantable speed. (2) "Contributory negligence" on the part of Calder in not getting out of his van when it stopped. (3) Because, even supposing the accident to have been caused by the carelessness of Sinclair, inasmuch as the North British Railway Co. have running powers over their line, Calder and Sinclair must be considered to have been fellow-servants acting in one common employment, viz., passing the train from the Caledonian line on to the Dunfermline line.

The Sheriff-Substitute (DICKSON) repelled the

defence, and found the defenders liable to each of the pursuers in the sum of £300. Both parties appealed—the defenders on the merits, and the pursuers on the amount of the damages; but the Sheriff (GLASSFORD BELL) adhered.

The defenders appealed to the Court of Session.

MUIRHEAD for them.

MACDONALD, for the pursuers, was not called upon.

At advising—

LORD PRESIDENT—It is clear that the accident was caused by the negligence of Sinclair, and by that alone. The question then is, Whether the defenders are responsible for his acts? He was employed and paid solely by them. The defenders maintain that Calder and he were engaged as fellow-servants in a common operation, and that this was accordingly one of the risks which Calder undertook. There are sometimes difficult cases in reference to common employment. We had a case recently (*Wyllie* v. *Caledonian Railway Co.*, 27 Jan. 1871, *ante*, p. 325) where the pursuer was injured while engaged with the Company's servants in trucking cattle. In that case there was undoubtedly common employment in a certain sense, yet we found the Company liable. The present seems to me a much clearer case. Here we have two servants acting for different masters—Sinclair was acting for his master, the Caledonian Railway Co., and Calder for his master, the North British Railway Co. There was no community, but rather antagonism, in their operations. The North British train comes up, and in virtue of their running powers demands a passage, which the Caledonian Railway Co. and their servants are bound to give. Calder must be held to have been a stranger to the defenders. I entirely concur with the manner in which the Sheriff-Substitute and the Sheriff have treated the case.

The other Judges concurred.

Appeal refused.

Agent for Pursuers—T. F. Gordon, W.S.
Agents for Defenders—Hope & Mackay, W.S.

Wednesday, June 21.

SECOND DIVISION.

LYNCH *v.* STEWART.

Process—Jurisdiction—Forum non competens. An English woman sued a Scotchman for money, alleged to have been intrusted to him in a foreign country, where both the pursuer and defender were then resident, in order to be transmitted to Scotland. The defender was at present resident in Scotland, and arrestments *jurisdictionis fundandæ causa* had been used against him.—Plea of *forum non competens*, *repelled.*

Title to Sue—Husband and Wife. A defender objected that the pursuer was a married woman, and that her husband was not a party to the action. The pursuer denied that she was married, but offered to have her alleged husband sisted. This having been done,—*held* that she had a good title to sue.

This was an action by Mrs Eliza Lynch, sometime residing at Paraguay, against Dr Stewart, sometime residing in Paraguay, against whom arrestments had been used *jurisdictionis fundandæ causa*, concluding for a sum of £14,645.

The pursuer alleged:—"In the month of October 1868 the pursuer and defender were both at the headquarters for the time of the Paraguayan army, at a place called Pikysyri in Paraguay. On or about the 17th day of that month the pursuer deposited in the hands of the defender a quantity of specie belonging to her, consisting of 4400 ounces of coined gold, and 4659½ patacons. The defender undertook to transmit the said specie to this country; to lodge the proceeds thereof in the Royal Bank of Scotland in his own name; and to hold the same for behoof, and on account of the pursuer, until the amount should be restored to her."

The defender alleged that the pursuer was a married woman, whose husband was a domiciled Frenchman, and pleaded *inter alia*, "no title to sue," and "*forum non competens.*"

The Lord Ordinary (ORMIDALE) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties on the defender's first and second pleas in law, and having considered the argument and proceedings; repels the second of said pleas, which is to the effect that this Court is incompetent, or at any rate is not a convenient or appropriate *forum* for trying the questions raised in the present suit; and, in regard to the first of said pleas, finds, before disposing of it, that it is proper that the question, whether the pursuer is a married woman, as alleged by the defender, as well as all matters of foreign law bearing on that question, or otherwise on said first plea in law, should be inquired into and ascertained: Reserves in the meantime all questions of expenses, and appoints the case to be enrolled in the Procedure Roll, that parties may be heard as to the steps now to be taken.

"*Note.*—Although the defender's plea of *non forum competens* is stated as his second in the record, it properly falls to be first considered and disposed of, for the obvious reason that, if this is not the competent or convenient *forum* for trying the questions raised between the parties, the action ought to be at once dismissed without determining the question of title or any other question. Both parties expressed themselves satisfied as to this at the debate before the Lord Ordinary.

"1. The first question is that which is raised by the defender's second plea in law, now repelled by the Lord Ordinary, viz., '*non forum competens*, or at anyrate this Court is not a convenient or appropriate *forum* for trying the questions raised in the present suit.' The grounds upon which the Lord Ordinary has proceeded in repelling this plea may be shortly summarized as follows:—(1) It is not said that there is any want of jurisdiction. No plea of that description has been taken by the defender, nor indeed could be, for the proceeds of the specie which forms the subject of dispute, and which the defender says belongs to him, stands arrested in the hands of the Royal Bank, at the instance of the pursuer. There can be no doubt, therefore, of the jurisdiction of this Court. (2) The only other country, if not Scotland, in which, according to the defender's contention, the action ought to have been brought, is Paraguay. But it is not said that either of the parties have their domicile in, or are natives of that country. The defender is a Scotchman, and the pursuer an Englishwoman. The pursuer is now resident in London, and the defender describes himself in the title to his revised defences (No. 22 of process), lodged so recently as the 30th of January of the present year, as 'Doctor of Medicine, sometime re-