the fault of the driver, I find no relevant averment of such fault. All that is said is, that after the boy had got upon the car the driver "drove on at full speed." I take it that that was the driver's duty, and the performance of it no fault. If he had driven off as the boy was mounting on the car, or when he knew the boy was leaving the car, there might have been fault. But the driver knowing that the boy was safely on the car was guilty of no fault in driving on. It is not said that he had any reason to think that the boy wanted to descend from the car, or that he knew the boy was preparing to do so. But the pursuer's averment discloses that the accident which happened was the result of the boy's own fault. In the knowledge that the driver had "driven on," and while the car was in motion, he jumped off the car, with the result that he sustained the injuries complained of. For such result the defenders are not liable. The record therefore, in my opinion, discloses no relevant ground of action against the defenders.

LORD MONCREIFF — I am of the same opinion. The two questions of fault on the part of the driver and contributory fault on the part of the boy run into each other. I think there is no relevant averment of fault on the part of the driver, because it is not stated, as I think it should have been, that the boy made any request that the car should be stopped. Accordingly, the accident, as stated, simply occurred because the boy jumped off when the car was in motion.

There might have been a question (but it is not necessary to consider it) whether the boy was a volunteer. A volunteer cannot be in a better position than a servant, and if this boy was a volunteer he was a fellow-servant of the driver, in respect of whose fault he could not recover damages from the driver's employers.

LORD YOUNG was absent.

The Court recalled the interlocutor reclaimed against, and dismissed the action as irrelevant.

Counsel for the Pursuer and Respondent —A. S. D. Thomson. Agent—J. Murray Lawson, S.S.C.

Counsel for the Defenders and Reclaimers —Salvesen, K.C. — Constable. Agents — Simpson & Marwick, W.S.

Tuesday, October 15.

FIRST DIVISION.

GRAHAM *v.* GRAHAM'S TRUSTEES.

Process—Motion to Sist Mandatary—Soldier on Foreign Service.

In an appeal from a Sheriff Court the defender moved that the pursuer and appellant, who was a soldier absent on service in China, should be ordained to sist a mandatary. The action was one of accounting, directed by the pursuer against his father's trustees. From a statement furnished by the trustees' agent to the pursuer, and produced in this action, it appeared that the pursuer would be entitled to a certain amount as legitim. Motion to sist mandatary *refused.*

Peter Macpherson Graham, gunner in the Royal Artillery, brought an action in the Sheriff Court at Glasgow against Alexander Lang and others, trustees acting under the trust-disposition and settlement of his father, the late Alexander Graham, wine and spirit merchant in Glasgow. The conclusions of the action were for an account of the trustees' intromissions, and for payment to the pursuer of the sum of £2000, or such other sum as should be found to be due to him as legitim.

In defence the trustees maintained that the goodwills of the licensed premises in which the deceased had carried on business were heritable and not moveable estate, and that unless these goodwills were treated as moveable there was no free moveable estate available for payment of legitim.

From a statement of the legitim fund on the late Alexander Graham's estates, furnished to the pursuer by the agent of the trustees, and produced in this action, it appeared that the amount due to the pursuer as legitim was £70, 9s. 9d. With reference to this statement the trustees now stated that it was not correct, in respect that it included the value of the goodwills.

On 6th July 1901 the Sheriff-Substitute (BOYD) pronounced an interlocutor whereby he found that the goodwills could not be regarded as moveable; therefore so far sustained the defences and assoilzied the defenders; and *quoad ultra* allowed a proof.

The pursuer appealed to the Court of Session.

On the case being called in the Single Bills, counsel for the defenders stated that the pursuer was absent in China on active service, and moved that he be ordained to sist a mandatary—*Dessau* v. *Daish*, June 26, 1897, 24 R. 976, 34 S.L.R. 739.

The pursuer argued, that in the circumstances of the case, having regard to the facts (1) that the trustees had, according to the statement of their own agents, a sufficient sum in their hands to which the pursuer had right to secure their claim for expenses, and (2) that the pursuer had not left the country voluntarily, but in pursuance of his duty as a soldier, the motion should be refused—*Simla Bank* v. *Home*, May 21, 1870, 8 Macph. 781, 7 S.L.R. 487; *Ritchie* v. *M'Intosh*, June 2, 1881, 8 R. 747, 18 S.L.R. 528.

LORD PRESIDENT—It appears to me that there is no ground for compelling the pursuer to sist a mandatary. It is not disputed that the pursuer is a lawful child of the person whose estate is being administered by the defenders; and it is not alleged that his claim to legitim has been excluded by antenuptial marriage-contract or discharged

by himself. Accordingly, he has a right to legitim if there is any fund out of which legitim can be paid. The only question therefore is, whether there is a legitim fund? The answer to that question apparently depends upon whether the goodwill of certain public-houses is to be regarded as heritable or moveable. Mr Fraser tells us that the Sheriff has held this goodwill to be heritable, and that there is therefore no legitim fund. But in a statement of legitim produced by the trustees themselves I find that it is set down at £422, 18s. 6d., and one-sixth of that sum, being the share to which the pursuer would have right, is £70, 9s. 9d. Under these circumstances I do not think that it would be reasonable to require the pursuer to sist a mandatary as a condition of obtaining an accounting from his father's trustees. It therefore appears to me that the motion should be refused.

LORD ADAM concurred.

LORD M'LAREN—I concur, and desire to add that I am much impressed by the reasoning of Lord Deas in the case cited to us (*Simla Bank* v. *Home*, 8 Macph. 781) as to the position of a man who is abroad in the public service. It is often said that if a man is unable to find a mandatary who would be willing to represent him, he may at least return to this country and prosecute his suit. But a man who is absent on the public service may be unable to return, and on that ground deserves some consideration. The prominent point in the case is that this is a suit for the administration of an estate in the hands of defenders who are trustees. According to their own statement the pursuer is entitled to legitim; and I do not think that in claiming it he is making a claim contrary to the scope of his father's settlement, because it appears from the condescendence that the trustees were expressly directed to pay him his legitim. In these circumstances I cannot hold that this is a case in which the pursuer should be obliged to sist a mandatary.

LORD KINNEAR concurred.

The case was sent to the roll.

Counsel for the Pursuer and Appellant—W. L. Mackenzie. Agent—H. H. Macbean, W.S.

Counsel for the Defenders and Respondents—M. P. Fraser. Agent—James Reid, W.S.

Tuesday, October 15.

SECOND DIVISION.

[Lord Low, Ordinary.

DAVIES *v.* DAVIES.

Process — Reclaiming-Note — Reclaiming-Note Signed by Party only—Competency.

Circumstances in which the Court *repelled* an objection taken to the competency of a reclaiming-note on the ground that it was signed by the party reclaiming and not by counsel.

Mrs Rebecca Ash or Davies, wife of Simon Davies, tailor and clothier, Edinburgh, raised an action of separation and aliment against her husband on the ground of cruelty.

Defences were lodged by the husband. These defences were signed by counsel. After the closing of the record the defender ceased to be represented by counsel or agent, and he conducted the defence on his own behalf.

After proof the Lord Ordinary (LOW) found that the defender had been guilty of cruelly maltreating the pursuer, and granted decree of separation and aliment.

The defender presented a reclaiming-note signed by himself and not by counsel.

The pursuer objected to the competency of the reclaiming-note, and argued—The note was not signed by counsel, and no attempt had been made by the defender to get the signature of counsel. There being no special circumstances in this case the Court should refuse to receive the reclaiming-note—*Hawks* v. *Donaldson*, November 16, 1889, 2 F. 95, 37 S.L.R. 70; *Whyte's Judicial Factor* v. *Whyte*, June 19, 1900, 37 S.L.R. 784.

Argued for the defender—It was unnecessary for the defender to obtain the signature of counsel. He was a poor man and could not afford to employ counsel. By the law of Scotland a party was entitled to conduct his case in any court of law and to sign the necessary documents.

LORD JUSTICE-CLERK—It is the opinion of the Court that in the circumstances of this case the objection taken by the reclaimer should not be sustained.

LORD YOUNG was absent.

The Court sent the case to the roll.

Counsel for the Pursuer and Respondent—J. A. Christie. Agent—Geo. Meston Leys, Solicitor.

Counsel for the Defender and Reclaimer—Party. Agent—Party.

Friday, October 18.

FIRST DIVISION.

C D *v.* INCORPORATED SOCIETY OF LAW-AGENTS.

Administration of Justice—Law-Agent—Restoration to Roll—Forgery.

A law-agent was found guilty in 1894 of forging and uttering a copy of a pretended interlocutor of court, having the forged signature of a clerk of court appended thereto, with the object of uplifting certain money consigned in bank, and was sentenced to fifteen months' imprisonment. In 1896, on his own application, his name was removed from the Register of Law-Agents, and