cognition that the lieges must submit to at the instance of the Lord Advocate or the procurator-fiscal acting for him; it is examination. Secondly, that the Court will never pronounce orders which it knows it cannot enforce. If therefore the employer only exercises an indirect influence on the servant—such as, for instance, threatening to terminate his employment if he does not give a precognition—I do not see how any order of the Court can meet such a case. The Court cannot order the employer *not* to dismiss his servant, and put him in prison if he does so. The truth is that the sanction in such cases is of a different kind. If an employee is asked for a precognition by the opponent in a case against his employer, he is like every other person free to grant it or refuse it if he likes. If he refuses, it will always furnish matter of comment to a jury on the evidence which he eventually does give; for if he gives to one litigant what he withholds from the other it savours of partisanship, and will be easily thought to tinge his evidence; and this way of thinking will be enormously strengthened when the refusal comes, not from the unwillingness of the witness himself, but from the dominating influence which has been exerted upon him by his employer. It is for that reason that I do not hesitate to say that in general cases it is right that employers should give facilities for their employees to be precognosced; and I add that in most cases it is in their own interest to do so.

The further question of communicating a name and address so that application may be made to a specified witness to see if he will consent to be precognosced, and in any event for the purpose of citation, is a different question. Such applications made after the closing of the record must be dealt with as they arise. I deprecate laying down any rule, because I cannot foresee all cases. But speaking generally, I should say that when the person is, from the circumstances, put forward as representing the person against whom the suit is raised in the matters whereon the question turns, such a demand will be legitimate. When it is a demand to get the names of those who were mere bystanders and witnesses it is illegitimate, even although they may happen to be among the ranks of employees.

LORD KINNEAR and LORD JOHNSTON concurred.

LORD MACKENZIE was absent at the hearing.

The Lord Ordinary was directed to refuse the motion.

Counsel for the Pursuer—Sandeman, K.C.—A. M. Mackay. Agents—W. & F. Haldane, W.S.

Counsel for the Defender—Dean of Faculty (Dickson, K.C.)—Spens. Agents—Fraser, Stodart, & Ballingall, W.S.

Saturday, December 17.

FIRST DIVISION.

(SINGLE BILLS.)

BRIDGES *v.* BRIDGES.

Process—Husband and Wife—Divorce—Counter Action—Reclaiming Note—Right of Divorced Spouse to Insist in Counter Action.

A husband raised an action of divorce against his wife and she raised a counter action against him. The Lord Ordinary, pronouncing judgment in both actions on the same day, in the action brought by the husband granted decree of divorce against the wife, but in the action brought by the wife assoilzied the husband. The wife reclaimed against the decree which assoilzied the husband, but she allowed the decree of divorce against herself to become final.

Held (with the concurrence of the Second Division) that the marriage having been dissolved by the decree of divorce which had become final, the wife could not proceed further with the action brought by her, and the reclaiming note *refused*.

Thomas Bridges raised an action of divorce against Margaret Bridges, his wife, and she raised a counter action of divorce against him. The proofs were led on the same day, and on 29th October 1910 the Lord Ordinary (Dewar) pronounced judgment in both actions. In the action by Mr Bridges he granted decree of divorce, but in the counter action by Mrs Bridges he assoilzied the defender.

On 19th November 1910 Mrs Bridges reclaimed against the interlocutor which assoilzied Mr Bridges, and on 23rd November 1910 she moved the Court to send the case to the roll, but meantime the interlocutor divorcing her pronounced in the action by Mr Bridges had become final.

The respondent (defender) objected to the competency of the reclaiming note, and argued—The wife had allowed the decree of divorce to become final, and the marriage had now been dissolved. Therefore since it was impossible for her now to commence a new action of divorce, the mere fact that she had already raised this action before the decree became final, could not make any difference, and it was equally impossible for her to continue this action. The cases of *Walker* v. *Walker*, January 27, 1871, 9 Macph. 460, 8 S.L.R. 328; and *Brodie* v. *Brodie*, June 11, 1870, 8 Macph. 854, 7 S.L.R. 535, were different from this, because there the decree of divorce had been reclaimed against, and consequently the marriage continued to subsist. Moreover, in both these cases the Court sisted a reclaiming note by the wife against the decree of divorce with the express purpose of preventing the decree being affirmed and the marriage being dissolved before the action at her instance was ripe for judgment. With regard to the pursuer's

contention that the question of her access to the children would be foreclosed if the reclaiming note were held to be incompetent, that question was foreclosed in any event, because the question of the custody of the children, which covered questions of access, had been settled by the interlocutor which the pursuer had allowed to become final.

Argued for the reclaimer (pursuer)—The competency of the reclaiming note was fixed once and for all at the date when it was lodged, and at that date the decree of divorce had not become final. Accordingly since at that date the marriage was still in subsistence the reclaiming note was competent. In any event, although the marriage was now dissolved there remained the question of access to the children, and also the question of the expenses of the action, and the wife was entitled to reclaim because these questions could only be raised in this process, and their determination depended on the granting or refusal of the divorce.

At advising—

LORD PRESIDENT—The facts out of which this reclaiming note arises are these: Mr and Mrs Bridges raised what are sometimes called, though it is not a very accurate expression, mutual actions of divorce. These actions came to depend before the same Lord Ordinary; the proofs in the two actions were led on the same day, and the Lord Ordinary pronounced judgment on the same day in both actions. In the action by the husband against the wife he found the wife guilty of adultery and pronounced decree of divorce, whereas in the action at the wife's instance he found her averments not proved, and assoilzied the husband from the conclusions of the action. The present reclaiming note is taken by the wife against the decree which assoilzied her husband, but she has not presented a reclaiming note against the decree which divorced her, and accordingly that decree is now final.

The question raised by the respondent was argued to us as one of competency. I do not think it is a question of competency, and so far as competency is concerned there is no reason why the case should not go to the roll. But as the whole question was argued before us, I see no reason for sending it to the roll, because nothing more can be said, and accordingly I think we can give judgment at once.

The point argued was that it was impossible for us now to deal with the Lord Ordinary's judgment in this case, in respect that it will be impossible for us to reach an opposite conclusion from his Lordship, because there is now no marriage to dissolve. The marriage has already been dissolved by a final decree in the husband's action, and it was argued that, that being so, it is impossible for us in this action to recal the decree of absolvitor of the husband and to pronounce decree against him. I think that that argument must prevail, and this really follows from what was said by the Lord President in the case of *Walker* v. *Walker*, 9 Macph. 460, where one action was allowed to catch up the other just in order to avoid the situation which we have here. I think the present case is in exactly the same position as if one of the parties had died. If a spouse raises an action of divorce, and during the pendency of that action the other spouse dies, the proceedings fall, because decree of divorce can no longer be pronounced. Accordingly I am of opinion here that although the question is not strictly one of competency we should refuse the reclaiming note, because really it is impossible for the case to go on.

I wish to add that as we thought the question one of general interest and of difficulty, we consulted the Second Division on the matter, and the Second Division are unanimously of the opinion I have just expressed.

LORD KINNEAR—I concur. I think it clear that we cannot entertain as an open question, a question that has already been decided by a final judgment which we have no power to review. If the summons had contained any separate or separable conclusion rested upon some other basis than the marriage which the pursuer seeks to dissolve, I think it might have been right and proper that we should have allowed that separate conclusion to remain and consider it on its own merits. But there is no such conclusion in this action, because all the conclusions are in reality consequences of the main decree in which the pursuer asks divorce. I therefore agree that the present reclaiming note cannot be entertained.

LORD JOHNSTON—In this case the Lord Ordinary pronounced decree of divorce for adultery at the instance of Mr Bridges against his wife, and, by her failure to reclaim, that decree has become final and cannot now be reviewed. As it stands it forms *res judicata* against Mrs Bridges.

But Mrs Bridges had also raised a counter action of divorce against her husband, and in this also the parties had not merely joined issue before decree in the action at Mr Bridges' instance, but the actions which could not be conjoined were running *pari passu*.

It is maintained that the moment the decree in the husband's action had become final, the marriage being then dissolved, the wife's action *ipso facto* fell and could not be proceeded with.

When the case was discussed in the Single Bills I was disposed to think, notwithstanding what was said in the case of *Brodie*, 8 Macph. 854, that this was not a necessary result of what has happened here.

The parties had, as I have said, joined issue on the counter action on the question whether facts and circumstances exist which require the Court to divorce and separate the husband from the wife and her society, to find and declare that he has forfeited all the rights and privileges of a lawful husband. As certain of these rights and privileges are or may be patri-

monial, and as, at anyrate since *Lockhart's* case, 1790, M. *voce* Adultery, Ap. No. 1, mutual actions of divorce have been competent, the Court recognising that mutual guilt may affect patrimonial consequences, I could not say that I saw any reason why the prior decree in the husband's action should prevent the wife's action being carried to a conclusion, or any more inconsistency, issue having once been joined, in the Court pronouncing the formal decree of divorce in the mutual actions *ex intervallo* than *unico contextu*. But it is proper that in this matter I should defer to the opinions of your Lordships and of the Judges of the other Division who have been consulted.

LORD MACKENZIE concurred with the LORD PRESIDENT and LORD KINNEAR.

The Court adhered.

Counsel for Pursuer and Reclaimer—Ingram—Mercer. Agent—J. George Reid, Solicitor.

Counsel for Defender and Respondent—A. R. Brown. Agents—Grant & Gibb, S.S.C.

Saturday, December 17.

FIRST DIVISION.

[Lord Dewar, Ordinary.

CLELLAND *v.* ROBB.

Reparation—Negligence—Relevancy—Boy of Twelve Ordered to Yoke Horse Alleged to have been Known to be Addicted to Kicking, and Fatally Kicked while doing so.

In an action of damages the pursuer averred that his son, aged 12, was occasionally employed by the defender and was ordered by him to help in yoking horses to a threshing machine driven by horse power, and to yoke a certain horse to a beam, for which purpose it was necessary to stoop between the horses heels and the beam; that in performing this operation the boy was killed by a kick from the horse; that the defender knew the horse was addicted to kicking; that "the defender in ordering the deceased to yoke the said horse as aforesaid was negligent, and the deceased was killed owing to the defender's negligence."

Held (*aff.* judgment of Lord Dewar) that the pursuer's averment of negligence though in general terms was relevant, and issue *approved*.

Observations (*per* the Lord President and Lord Kinnear) upon liability for negligence being set up by failure to perform a duty.

William Clelland, miner, Whitburn, raised an action of damages against Robert Robb, farmer, Croftmalloch Farm, there, on the ground that his son had been killed through the negligence of the defender.

The pursuer averred—"(Cond. 2) For some time prior to 19th February 1910 the deceased James Clelland, a son of the pursuer, who at the said date was about eleven years and 11 months old and was still attending school, had been occasionally out of school hours employed by the defender at his said farm to do small pieces of light work. His remuneration consisted of such small sums as the defender chose to give him. (Cond. 3) At the said date the deceased James Clelland was at the said farm at the request of the defender. The defender was about to thresh corn. The threshing machine at the said farm is driven by horse power, the horses being yoked to the end of a beam by means of short chains from a swing bar hanging behind the horses' hips, which chains can be hooked on to the beam. (Cond. 4) The defender ordered the said James Clelland to help in yoking the horses to be used to drive the said mill. The said James Clelland accordingly, under the defender's directions, brought out one of the said horses, while the defender brought out another. When the said horses had been brought to the said mill the defender ordered the deceased James Clelland to yoke one of the said horses, which was a black horse, to the beam. The defender did not in any way warn the said James Clelland against attempting to yoke the said horse to the beam. It was necessary for the deceased James Clelland in order to do this to stoop down close behind the horse and between the horse and the beam. Just as he was fastening the said chains to the beam the horse kicked him in the forehead, rendered him unconscious, and caused injuries of which he subsequently died without regaining consciousness. (Cond. 5) The defender in ordering the deceased James Clelland to yoke the said horse as aforesaid was negligent, and the deceased James Clelland was killed owing to the defender's negligence. The said operation of yoking is one during which any horse is apt to be restive, and requires skill and quickness and experience in watching the behaviour of the horse on the part of the person performing it. The deceased James Clelland, as the defender well knew, was attempting the said operation for the first time, and was not of a proper age to do so with safety, and was without any experience in the management of horses. Further, the horse in question was, as the defender well knew, ill-tempered and given to kicking. For an inexperienced boy of the age stated to attempt to yoke the horse in question to the said beam was highly dangerous and well calculated to lead to the accident which occurred, and the defender, in ordering or permitting the deceased James Clelland to yoke the said horse, acted with gross negligence."

The defender pleaded—"(1) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed with expenses."

On 16th November 1910 the Lord Ordinary (DEWAR) approved of the following issue for the trial of the cause—"Whether,