be dismissed, and that he should be found liable in £3, 3s. of modified expenses.

The respondents moved for full expenses, and stated that they had printed certain correspondence which had passed between the parties—*Sligo* v. *Knox*, November 2, 1880, 8 R. 41; *Little Orme's Head Limestone Company* v. *Hendry & Company*, November 25, 1897, 25 R. 124. They admitted that this correspondence had been printed without communicating with the appellant on the subject.

The appellant cited *Robertson* v. *Robertson's Executors*, November 8, 1899, 2 F. 77.

LORD PRESIDENT—It appears to me that no cause has been shown for departing from the ordinary rule in this case. If a respondent, who is not the party whose duty it is to print the papers, desires to do so at an early stage, he ought to communicate with the appellant and ascertain what he intends to print, otherwise the result will be—or in the ordinary course ought to be—that the appellant will at the proper time print the necessary papers, and there will be double and superfluous printing.

LORD ADAM concurred.

LORD KINNEAR—I quite agree, and think that if a respondent prints without notice and without inquiry he takes the risk of the prints turning out useless, and in that case he cannot recover the expense of printing useless prints from his opponent.

LORD M'LAREN was absent.

The Court found the respondents entitled to £3, 3s. of expenses.

Counsel for Pursuers and Respondents—MacRobert. Agents—R. & R. Denholm & Kerr, S.S.C.

Counsel for the Defender and Appellant—D. Anderson. Agent — Henry Bower, S.S.C.

Thursday, January 10.

FIRST DIVISION.

[Sheriff of Fife.

INNES *v.* FIFE COAL COMPANY, LIMITED.

Reparation — Negligence — Duty towards Children—Shunting on Unfenced Colliery Siding near Colliery Workmen's Houses—Engine-Driver Running over his Own Child—Volenti non fit injuria—Contributory Negligence.

In an action for *solatium* for the death of his child, the pursuer, who was an engine-driver in the employment of the defenders, a colliery company, averred that he was, in the course of his duties, backing some trucks into a siding belonging to the defenders, in circumstances which prevented him from seeing what was in front of him, and without any shunter being provided to assist him; that the siding was open and unfenced; that there were houses closely adjoining it which were let by the defenders to their workmen, and amongst others to himself; that the only access to the bleaching green used in connection with them was across the siding; and that in the course of backing the trucks the pursuer's child, a boy of two years old, who was playing with other children on the siding, was caught between one of the rails and the wheel of the foremost waggon, and was so severely crushed that he died. *Held* that the action was relevant, and that the pursuer was not personally barred from obtaining an issue.

John Innes, engine-driver, Lumphinnans, Fife, brought an action in the Sheriff Court of Fife at Dunfermline against the Fife Coal Company, Limited, concluding for £250 as *solatium* for the death of his son.

The pursuer averred as follows:—"(Cond. 2) In connection with the defenders' works at Lumphinnans, there is a branch line of railway belonging to them running from their No. 1 pit at Lumphinnans to the Thornton and Dunfermline Railway belonging to the North British Railway Company. Close to said pithead there is a siding off said branch line of railway used by the defenders for shunting operations and for the storage of trucks of coal awaiting removal along said branch line of railway. (Cond. 3) Adjoining said siding or lye (which is slightly curved), and at right angles thereto, are two rows of miners' houses, occupied at a rent by the pursuer and other workmen in the employment of the defenders. Said houses are in close proximity to the said siding, the nearest being about 8 yards and the pursuer's house about 15 yards distant therefrom. Across said siding, which has been partially removed, the defenders lately erected several new houses for the occupation of their workmen, and they have allowed them to be occupied without providing any buffer end or other protection to same. Said siding is on a level with the adjoining ground, and is entirely unfenced. On the other side of said siding from said first-mentioned houses is a bleaching-green in connection with said houses, the only access to which is across said siding. The children in said houses are in the habit of playing on said bleaching-green, and on and near said siding, a fact which was known to the defenders and their managers. The whole ground occupied by the siding, houses, and bleaching-green belongs to the defenders. (Cond. 4) On Friday the 30th day of March 1900 the pursuer received instructions from the defenders to make up a train of 150 tons of what are known as double coals. There were at the time two lots of waggons of coal standing on said siding, namely, one lot of nine waggons standing near said new houses, consisting of seven trucks of what are known as single coals and two trucks of double coals, and another lot of eleven

waggons of double coals. Between said two lots of waggons and opposite said first-mentioned houses was a space of about 14 feet. (Cond. 5) In accordance with his instructions, the pursuer proceeded to make up a race of waggons of said double coals, and in order to do so ran his locomotive and four waggons of double coal along said siding for the purpose of connecting the latter with said lot of eleven waggons, and thereafter with the two trucks of double coals attached to the other lot of waggons. No guard or shunter was provided to the said pursuer by the defenders. Owing to the curve in said siding it was impossible for the pursuer to see along the upper or south side of the same, his view being obstructed by said four waggons, but he kept a good look-out while the locomotive, pushing the four waggons in front, proceeded slowly and with caution down the siding. (Cond. 6) At the time when said shunting operations were being carried on, a number of children belonging to workmen in the employment of the defenders, among them James Innes, aged two years, son of the pursuer, were playing about between said first-mentioned houses and said siding, and opposite the open space before mentioned between the two lots of waggons, and on said siding itself. It was impossible, owing to the curve in said siding, and to his view being in consequence obstructed by the waggons in front of him, for the pursuer to see the children who were playing about. (Cond. 7) When the locomotive with said four waggons came against said lot of eleven waggons, the impact was so slight that it only sent the latter about 1 yard down the siding towards the children, and the said James Innes, son of the pursuer, was caught between the upper rail of said siding and the front wheel of the foremost waggon. He was in consequence so severely squeezed and injured on the legs and abdomen, although the front wheeel of the foremost waggon had not gone over him, that he shortly afterwards died. (Cond. 8) Said accident was caused through the negligence of the defenders in respect that they did not provide a suitable and sufficient fence to said siding. They knew that children were accustomed to play on and in the immediate vicinity of said siding, and were exposed to risk of injury through defenders' shunting operations upon it. It was the duty of the defenders to fence said siding in order to prevent the children resident in the adjoining houses from obtaining access thereto, but they did not do so. If they had done so, the accident would not have happened. (Cond. 9) Further, in the absence of a sufficient fence, it was the defenders' duty to have appointed a guard or shunter to superintend or take charge of said shunting operations, and to make certain that the line was clear for the passage of waggons. The defenders did not fulfil their duty in this respect, but neglected it, and so caused the accident."

The defenders pleaded *inter alia*—"(1) The action is irrelevant. (3) In any view, the pursuer having been guilty of contributory negligence, the defenders are entitled to absolvitor. (4) *Separatim*—The pursuer having engaged in an occupation and taken a residence which to his knowledge inferred danger to his child, was bound to have taken precautions to prevent the child reaching the siding."

On 6th July 1900 the Sheriff-Substitute (GILLESPIE) allowed a proof.

Note.—"This was a sad accident, for the driver of the train of waggons between which the child was crushed happened to be the father of the child. But whether any liability attaches to the defenders, even on the pursuer's own showing, is far from clear. It is a question belonging to a difficult category of law.

"It must be regarded as settled that there is not in general any common law obligation on the owners of a railway to fence the railway so as to prevent children straying on it. *Davidson* v. *Monklands Railway Company*, July 5, 1855, 17 D. 1038; *Houghton* v. *North British Railway Company*, November 29, 1892, 20 R. 113, is not inconsistent when examined.

"But the defenders having let a dwelling-house to the pursuer in immediate proximity to their siding, which, according to the pursuer's description, was a place of special danger, I am not prepared to say that, if the pursuer can prove his averments, there was no obligation on the part of the defenders to fence off the siding from the house, or, failing that, to take other precautions for the safety of their tenant's children, who, according to the pursuer's averments, would be very apt to get on to the siding. It is not necessarily conclusive against the pursuer's claim that he was as capable of appreciating the danger as the defenders, though this is doubtless an important element in the case. It is a defence which is best disposed of on a view of the actual facts."

On appeal the Sheriff (CHISHOLM) adhered.

The pursuer appealed to the Court of Session for jury trial.

The respondents argued—(1) The pursuer's averments were irrelevant. (2) As the pursuer's own act had been the immediate cause of the accident, he could not claim damages for the consequences. The maxim *volenti non fit injuria* applied—*Membery* v. *Great Western Railway Company*, May 14, 1889, 14 A. C. 179, per Lord Bramwell.

Counsel for the respondent were not called upon.

LORD PRESIDENT — The only question which we have at present to decide is whether this case should be dismissed as irrelevant, or whether it should be sent to a jury. We have no right to anticipate what the evidence may be—we can only consider whether a relevant case is stated on the record. The material allegations of the pursuer are that he being an engine-driver in the employment of the defenders, was shunting his locomotive with four waggons along a siding, which was open and unfenced, that he had no guard or

shunter associated with him, that some children were playing on and near the siding, one of them being the pursuer's own son, aged two years, and that this child was caught between a rail and one of the waggons which was being pushed by the engine, and received injuries from which he died. In close proximity to the siding were certain houses, let by the defenders to their workmen, one of them to the pursuer. It appears to me that the defenders must, in letting these houses to their workmen, be taken to have been aware that the ordinary incidents of occupation by persons of the working class would occur there. The siding was not fenced, and even if there had been nothing more in the case, I think that we could not have held in the absence of evidence that the children living in these houses were trespassers when they played on or near to the siding. But the pursuer further avers that there was on the other side of the siding from the houses a bleaching green used by the persons occupying them, and that the only access to it was across the siding. Under these circumstances it was not unnatural that the persons living in the houses and their children should frequently cross the siding. I do not think that the parents of the children were chargeable with neglect in not preventing them from playing near to or on the siding, especially as the defenders in letting their houses to their workmen must be taken to have been aware of the ordinary family conditions of persons of that class, who cannot keep servants to look after their children.

Accordingly, if a child of another workman had been killed on the occasion in question, I think the defenders would have had no answer to a claim against them, and if this be so, the only remaining question arising on the pursuer's averments is whether the fact that he is the father of the child who was killed should prevent him from obtaining *solatium*. Taking the case upon his averments, I do not think that this should debar him from obtaining an issue. It is true that the defenders allege that the pursuer drove his waggons backwards with too great force, and also that a shunter was associated with him, but these allegations cannot affect the relevancy of the pursuer's statements, although if proved at the trial they may have a very material, possibly a determining, effect on the verdict.

On the whole matter, and taking the case as stated by the pursuer on record, I do not think that we would be justified in preventing it from going before a jury.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court sustained the appeal and ordered issues.

Counsel for the Pursuer—Watt, Q.C.—M'Clure. Agent—P. R. M'Laren, Solicitor.

Counsel for the Defender—Sol.-Gen. Dickson, Q.C.—Clyde. Agents—Davidson & Syme, W.S.

Wednesday, December 5, 1901.

FIRST DIVISION.

[Lord Pearson, Ordinary.

LIVINGSTONE *v.* ALLAN.

Trust—Proof of Trust—Proof of Purposes of Trust—Trust Disclosed in Title but not Purposes—Heritage Held in Trust for Joint-Adventure—Disposition of Half by One Joint-Adventurer—Rights of Disponee—Partnership—Joint-Adventure—Assignation.

A and B obtained a feu of certain heritable subjects, and took the title in favour of themselves "in trust for behoof of 'themselves' and their respective heirs and assignees whomsoever, each to the extent of one-half *pro indiviso*." The purposes of the trust were not further disclosed in the feu-contract. A, in security of a loan, procured and guaranteed to the lender for him by C and D, disponed to them by disposition and assignation duly recorded, "one-half *pro indiviso*" of "the ground described in and disponed by" the feu-contract. In a competition between B on the one part and C and D on the other with regard to the one-half of the proceeds of the subjects, which had been sold of consent, B alleged that the feu had been taken in pursuance of a joint building adventure between him and A, and claimed to be ranked *primo loco* for a balance found due by A to him in a reference with regard to the accounting between them in relation to the joint-adventure, while C and D claimed the half of the proceeds of the sale in respect that they were disponees of A's *pro indiviso* share.

Held (1) that as the title did not show an unburdened and unqualified right in A, but disclosed the existence of a trust, it was incumbent upon C and D to ascertain the conditions of that trust; (2) that it was competent for B to prove *prout de jure* the purposes of the trust which was disclosed in the title; (3) that as B had proved that the subjects were held in trust for the purposes of a joint-adventure, C and D, although *bona fide* onerous assignees, were only entitled under their disposition and assignation to such right as A was entitled to assign to them in the property embarked in the joint-adventure; (4) that A was not entitled to assign anything more than what might be due to him after all his liabilities under the joint-adventure had been discharged, and that consequently B was entitled to be ranked *primo loco* for the sum due by A to him on their accounting in the joint-adventure.

By feu-contract dated 10th and 25th, and recorded 27th February 1896, between David Johnston, writer in Glasgow, of the first part, and William Brown Alexander, wright, Bridge of Weir, and Hugh Livingstone, wholesale ironmonger, residing at 95 Millbrae Road, Langside, Glasgow, of the second part, the first party disponed