because it is contended for the reclaimers that although the trust is effectual the assignation to the trustees cannot prevail against the other claimants' arrestments, because it has never been duly intimated. Upon that question also it appears to me that there are a good many points which have been suggested as points of difficulty, and which the Lord Ordinary deals with, which really create no difficulty at all. It is quite sufficient, as his Lordship points out, that the sederunt-book of the marriage-contract trustees bears that the attention of the trust had been directed by the agent to a certain previous intimation, so that it might now be brought to the knowledge of a new trustee that the assignation in question had been intimated, and in order that that intimation might be complete. I am speaking of course of the trustees of the deceased John Wyllie, who were the debtors in this obligation, which was to be made effectual by intimation to them of James Wyllie's assignation of his right as against them. I entirely agree with the Lord Ordinary in what he has said upon that question, and I am therefore of opinion that the claim of the trustees in respect of an assignation which has been duly intimated has been rightly sustained by his Lordship.

Their claim, or rather the claim of the sole surviving trustee, is of course to hold the money for the purposes of the trust, and that is so expressed. No question was raised before us as to the right of the arresting creditor to any portion of the estate except the entire fee or capital of the right of succession, and therefore no question of that kind appears to arise, but it may be well to observe that nothing that is done by this judgment can affect in any way the right of the husband's creditors to the income coming due to him during his life. Of course the ground upon which we proceed is this –That he has effectually conveyed the fund to trustees for certain purposes. but that one trust purpose is during his own lifetime to make good the income of the estate to himself.

LORD ADAM, LORD M'LAREN, and the LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuers and Real Raisers —Ure. Agents—Dove & Lockhart, S.S.C.

Counsel for the Claimant Miss Boyd (Reclaimer)—M'Kechnie—Craigie. Agent—James Russell, S.S.C.

Counsel for the Claimant James Dickie—Vary Campbell—Lorimer. Agents—Morton, Smart, & M'Donald, W.S.

Saturday, July 11.

SECOND DIVISION.

[Sheriff Court, Glasgow.

ROBERTSON *v.* THE LINLITHGOW OIL COMPANY.

Reparation—Personal Injury on Railway—Unfenced Hole—Want of Light—Fellow-Servant's Breach of Duty—Action at Common Law and under Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42)—*Relevancy.*

A labourer engaged on a railway sued his employers for damages for personal injuries sustained by him in the course of his employment, and averred that the defenders had cut a pipe-track across the line of rails, and allowed it to remain uncovered and in a dangerous state longer than was necessary; that the defenders had failed to provide any or at least sufficient light for the proper and safe discharge of the pursuer's duties; that while he was at work between two waggons of a train, standing on the rails, the engine-driver, who had previously uncoupled from the train, returned with his engine and one or two waggons in front which had no light, and suddenly and culpably drove against the standing waggons, and that both the engine-driver and the guard of the train had failed to give him any warning; he "was in the act of coming out from between two of said waggons when said collision occurred, and he would, notwithstanding the want of warning, and the danger he was placed in, have probably escaped any injuries but for said hole or trench. One of his feet slipped into it, and he was thereby unable to get the other clear in time, and a waggon went over one of his legs."

Held that as upon the pursuer's statement neither the hole nor the want of light would have caused the accident but for a breach of duty on the part of the defenders' servants, against which the defenders were not bound to provide, the pursuer, although entitled to proceed under the Employers Liability Act, had not stated a relevant case for an issue at common law.

The Employers Liability Act 1880 (43 and 44 Vict. cap. 42) provides—"1. Where, after the commencement of this Act, personal injury is caused to a workman—(5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal-points, locomotive-engine, or train upon a railway—the workman . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work."

John Robertson, a labourer in the em-

ployment of the Linlithgow Oil Company, Limited, at their works at Champfluerie, Linlithgow, sued his employers for damages for personal injury.

He averred—"(Cond. 4) The work to which defenders put pursuer when he entered their employment as a labourer was work in connection with the trigging or stopping and uncoupling of waggons, and the breaking or crushing of shale, and the emptying of waggons which brought shale from the mines to be broken or crushed preparatory to the oil being extracted therefrom. (Cond. 5) The defenders . . . had railway lines laid down close beside the shale-breaking machinery, at or near which the pursuer was instructed to work. (Cond. 6) The shale-breaking or crushing machinery was constructed below the level of the ground and between the rails of one of said railway lines. . . . The object of said machines being placed between said rails was that waggons containing shale might be run on said railway lines to the breaking machinery, and the shale emptied therein from the waggons while they were standing on the railway lines. (Cond. 7) The railway lines near said shale-breaking machinery were on an incline of about one in forty. According to the system in vogue in defenders' works, trains of waggons containing shale were propelled along said railway lines towards and over said shale-breaking machines, the engines being behind the train. Said train of waggons were forced up said incline until they were beyond the shale-breaking machines. The waggons were then spragged, or blocks of wood or bricks placed before the wheels, so as to keep the waggons standing on said incline. . . . It was then the duty of men in the defenders' employment to go between each pair of waggons and to uncouple each waggon from the other, and to unloosen the fastenings at one side of the ends of waggons, so that the shale might be emptied therefrom into said breaking machines. It was necessary to unloose the fastenings at one side of the ends of the waggons, as the breaking machines were so situated that when the waggons were brought over the same for emptying only one side of the waggon could be reached. (Cond. 8) A short way up said incline, and a little beyond said shale-breaking machines, the defenders had made a trench or hole some feet deep and about two feet broad across and under said railway lines for the purpose of laying some pipe, or for some other purpose to the pursuer unknown. Defenders culpably and carelessly allowed said trench or hole to remain there longer than was necessary, and it was there on said 27th March 1891, and its presence rendered said railway lines and the ways and works near the same defective and dangerous, which contributed materially to the occurrence of the accident and the injuries to the pursuer after mentioned. Said trench or hole ought to have been covered by planks, or other means taken to cover the same, at least during the night time. The defective condition of said ways and works arose from the negligence of the defenders or of their manager or foreman in their service entrusted with the duty of seeing that said ways and works were in proper condition. (Cond. 9) On said 27th March 1891, and at or near said shale-breaking machines, there was no, or at least insufficient light. Defenders had had the electric or other light at one time fitted up in their said works, but for the purpose of unduly saving money, and without due regard to the safety of their workmen, they had for several months prior to the said date ceased to use said light at least near the place where the pursuer was working, and they had culpably and carelessly failed to provide any or at least sufficient light for the proper and safe discharge by the pursuer and defenders' other workmen of the duties devolving upon them. This fault on the defenders' part materially contributed to the accident after mentioned, and to the injuries sustained by the pursuer. (Cond. 10) On or about said 27th March 1891 pursuer was at his said work in defenders' employment. Pursuer was on the night-shift. Between two and three o'clock on the morning of said date a train of waggons containing shale was brought along said railway lines towards said breaking machines. An engine belonging to the defenders, called the 'Stag,' was behind said train propelling the same. The engine-driver was named William Martin, and the guard in charge of said train was named Thomas M'Parland. A number of waggons were forced over and beyond said breaking machine, and according to custom were then spragged or otherwise made stationary on said incline. The engine then left the spot, and pursuer, according to defenders' instructions and his duty as shown him by the defenders, or those for whom they are responsible, proceeded to go between said waggons and to uncouple them from each other, and to unloosen the fastenings at one side of the door at the ends of the waggons. (Cond. 11) While the pursuer was between two of said waggons, busily engaged at his said work, said engine-driver returned with said engine, having, it is believed, one or two waggons in front of it, which had no lamp or any light affixed to them, and drove suddenly and without warning, culpably and carelessly, against the waggons, between two of which pursuer was engaged working. The said engine-driver culpably and carelessly failed to sound or blow the engine-whistle or horn, as he ought to have done, when approaching said waggons and said shale-breaking machines, or to give any warning or intimation whatever. The said guard in charge of said waggons and trains also culpably and carelessly failed to warn the pursuer of the approach of said engine and waggons, and to take due precautions for his safety while engaged in his duties foresaid by preventing said engine and waggons from returning to the spot till pursuer was safe from danger. (Cond. 12) Pursuer was in the act of coming out from between two of said waggons when said collision occurred, and he would, notwith-

standing the want of warning and the danger he was placed in, have probably escaped any injuries but for said hole or trench. One of his feet slipped into it, and he was thereby unable to get the other clear in time, and a waggon went over one of his legs, close to the knee, and severed it from his body."

He concluded against the defenders for the sum of £1000, with interest thereon, "or otherwise to grant a decree against the said defenders ordaining them to pay to the pursuer the sum of £182 sterling, or such other sum as may be found to be due to the pursuer under the Employers Liability Act 1880."

The pursuer pleaded—"(1) The pursuer having been injured, as condescended on, by and through the fault of the defenders, or those for whom they are responsible, the defenders are liable to the pursuer in the loss, injury, and damage he has thereby sustained. (2) The sum first above concluded for being reasonable compensation and reparation to the pursuer for the injury sustained by him, decree therefor should be pronounced against the defenders, with expenses. (3) Alternatively, the pursuer having been injured while in the employment of the defenders as a workman through the fault of the defenders or of those for whom they are responsible under the Employers Liability Act 1880, the pursuers are entitled to decree in terms of the alternative conclusion of the petition, with expenses."

The defenders pleaded—"The pursuer's statements are irrelevant in so far as the action is based on common law."

Upon 17th June 1891 the Sheriff-Substitute (SPENS) allowed a proof.

"*Note.*—The case is admittedly relevant under the Employers Liability Act, and a proof necessarily falls to be allowed. The question of whether or not there is common law liability, having regard to the fact that an inquiry has to be made into the whole circumstances, is one which, I think, may be left over for determination till after the proof. As something was said about a jury trial, I do not now fix a diet of proof. Pursuer before the 3rd July will make up his mind as to the course to be followed."

The pursuer reclaimed.

At advising—

LORD JUSTICE-CLERK—In this case I have a clear opinion that the pursuer has not averred any facts which would entitle him to an issue at common law, and that if the action had been brought before the passing of the Employers Liability Act it must have been dismissed as irrelevant. There are a large number of averments, but I am quite satisfied that they do not make out a relevant case. Two of them might be made relevant; one of them is the one averring insufficient light, but unfortunately there is no averment how it was that the insufficient light contributed to the accident. The other one is about an alleged hole into which the pursuer says he fell, and without falling into which he avers he might have escaped. But, as I understand it, the pursuer's case is that this engine should never have been brought into contact with these trucks at all, and it is not easy to see how the insufficiency of the light or the presence of the hole have anything to do with the accident which is alleged to have been caused by the engineman acting in breach of his duty. The defenders cannot be held in fault for a want of light or the presence of a hole, if neither of these could have caused the accident, unless some breach of duty was committed by one of their servants. They were not called upon to provide against such breach of duty. I think therefore there is no case at common law. The pursuer may, however, have an action under the Employers Liability Act under the provision in that Act which makes an employer liable for the fault of a person in charge of a locomotive-engine. He has two conclusions in his action, one for £1000, and one for £182 under the statute. I think therefore we may dismiss the action as laid at common law as irrelevant, and allow an issue under the Employers Liability Act.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

LORD YOUNG was absent.

The Court pronounced this interlocutor:—

"Find that the action is irrelevant so far as laid at common law, and dismiss the same so far as regards the first conclusion of the summons: Approve of the issue so far as founded on the Employers Liability Act as the issue for the trial of the cause, and decern, reserving all questions of expenses: Remit the cause to Lord Low to proceed therein as accords."

Counsel for the Pursuer—Shaw—Gunn. Agent—Robert Stewart, S.S.C.

Counsel for the Defenders — Comrie Thomson—C. S. Dickson. Agents—Gill & Pringle, W.S.

Saturday, June 20.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

MACLEOD *v.* MARSHALL AND OTHERS.

(*Ante*, February 27, p. 626.)

Slander—Counter Issue—Diligence—Specification of Documents—Access to Company's Books.

A defender in an action of slander was allowed a counter issue in justification of what he had said, based upon a statement that he had been induced to take shares in a mining company through the false and fraudulent representations of the pursuer. He sought, with the view of establishing the