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

certain subjects to the second parties. The parts of the feu-contract which are material for the purposes of this report were as follows—"The first party, for and in consideration of the feu-duty and other prestations and obligations on the part of the second party hereinafter written, has sold, assigned, and in feu-farm disponed, and hereby sells, assigns, and in feu-farm, fee, and heritage dispones, to and in favour of the said Hugh Livingstone and William Brown Alexander, and the survivor of them, and the heir of the survivor, as trustees and in trust for behoof of the said Hugh Livingstone and William Brown Alexander, and their respective heirs and assignees whomsoever, each to the extent of one-half *pro indiviso*, heritably and irredeemably, all and whole that plot or area of ground lying within the parish of Cathcart and county of Lanark, formerly county of Renfrew, and on the west side of Millbrae Crescent, Langside, containing 680 square yards and 7 square feet or thereby, and bounded as follows, viz.— . . . Declaring that the said Hugh Livingstone and William Brown Alexander, and the survivor of them, and the heir of the survivor, as trustees and trustee foresaid, shall have full power, without the consent of any person whatever, to sell and dispose of the said plot or area of ground above disponed, or any part thereof, by public roup or private bargain, with or without advertisement, and at such price or prices as they or he may think proper, and to borrow money on the security of the said plot or area of ground, or any part thereof, and for these purposes or any of them to grant all necessary or requisite deeds or writings containing a clause of absolute warrandice, and that purchasers and lenders, and all other parties paying or lending money to or otherwise transacting with the said trustees or trustee, shall have no concern with or right to inquire into the application of the money so paid or lent, but shall be sufficiently exonerated by the receipt of the said trustees or trustee therefor." . . .

A tenement of houses (No. 17 Millbrae Crescent) was erected by Alexander and Livingstone upon the ground disponed in the feu-contract. Disputes having arisen between them as to the adjustment of their accounts, they referred the matters in dispute to Daniel Wilkie, measurer in Glasgow, conform to minute of reference dated 24th April and 23rd May 1897. This minute of reference proceeded upon the narrative that a number of transactions had taken place between the parties thereto, and between Livingstone's firm of A. Craig & Company, plumbers, Langside, and Alexander's firm of M. & W. Alexander, joiners, Bridge of Weir, in connection with the erection of three tenements of dwelling-houses at Millbrae, Langside, one built on joint account (this was the tenement built upon the ground feued by the feu-contract mentioned *supra*), and the other two on behalf of the parties as individuals, and also work done by the parties in connection with their respective firms elsewhere; and that questions had arisen between the parties as to their accounts incurred to or for each other, and as to the indebtedness of the one party to the other on an accounting.

The arbiter under this reference, after sundry procedure, issued a decree-arbitral dated 18th April 1898, whereby he found Alexander liable to Livingstone in the sum of £184, 19s. 3½d., together with £80 of expenses; and also found him liable for £70 as the expenses of the clerk and legal assessor in the reference.

By disposition and assignation dated 23rd and recorded in the Register of Sasines 25th April 1898, Alexander, for certain good and onerous causes and considerations, assigned, disponed, and conveyed to James Allan and John Allan, both wholesale provision merchants in Glasgow, and their assignees whomsoever, and failing assignees, to the survivor of them and his heirs and assignees whomsoever, heritably and irredeemably, his, the said William Brown Alexander's, one-half, *pro indiviso*, of the subjects conveyed by the feu-contract above mentioned, together with the buildings erected thereon, and pertinents, and his whole right, title, and interest therein, with entry as at Martinmas 1897.

Thereafter, by agreement between Livingstone, Alexander, and the Allans, the subjects disponed by the feu-contract were conveyed to William M'Luckie Buchan, writer, Glasgow, in trust for the parties interested, in order that he might sell the subjects, and account for the proceeds to the persons entitled thereto. He accordingly sold the subjects in question, and accounted for one-half of the free proceeds thereof to Livingstone, and lodged the other half thereof, amounting to £273, 7s. 10d., in bank on deposit-receipt.

Thereafter Livingstone, as real raiser, brought an action of multiplepoinding in name of Buchan as nominal raiser, in which Alexander, and James Allan and John Allan were called as defenders.

Claims were lodged by Livingstone and by the Messrs Allan.

The claimant Livingstone averred that in or about October 1895 he entered into a joint-adventure with Alexander to feu the ground conveyed to them by the feu-contract and erect a tenement of houses thereon, for the purpose of afterwards disposing of the tenement and dividing the net profits of the adventure equally, after paying or providing for all expenses connected therewith, and that in pursuance and for the purposes of the said joint-adventure they had entered into said feu-contract, and proceeded to erect on the said ground the said tenement of houses. He further averred that the reference mentioned above had been entered into mainly in connection with the adjustment of the accounts of this joint-adventure, though it embraced other and earlier joint transactions which had taken place between them, that he had made disbursements in connection with the joint-adventure amounting to £2069 or thereby, and that the arbiter had awarded him a sum of

£196 as the sum still due to him in respect thereof, the difference between that sum and the award actually given by the arbiter—£184—being a balance found due by the arbiter to Alexander on the adjustment of the accounts in connection with the whole other transactions embraced in the reference.

The claimant maintained that this sum, and the expenses awarded in the decree-arbitral, were proper charges against Alexander's interest in the joint-adventure, and against the other claimants as assignees of his interest. He accordingly claimed the whole of the fund *in medio*.

The claimants Messrs Allan averred that the disposition granted in their favour by Alexander had been granted in respect of a loan of £250 which they had procured for him from their mother, and payment of which they had guaranteed to the lender, and that the assignation though *ex facie* absolute was qualified by a relative agreement dated 23rd and 28th May 1898 between Alexander, Messrs Allan, and Messrs Robertson, writers, Glasgow, and produced by the claimants, which narrated that they had procured the loan from their mother on a promissory-note granted by Alexander to them, and endorsed by them to their mother, and provided that the disposition should be held by them in security and for payment of the amount due under the promissory-note, interest and expenses, and *secundo loco*, for payment of Messrs Robertsons' account, and that the security should not exceed in all £400. They averred that the principal and interest due in respect of the loan amounted to £265. This, with other sums falling under the security, exhausted the fund *in medio*, the whole of which they accordingly claimed. They denied that the subjects in question were included in any joint-adventure between Livingstone and Alexander, and also maintained that the reference embraced other transactions than those relating to the property in question, and that in any view the amount claimed by Livingstone was excessive.

They pleaded, *inter alia*—"1. The claimants are entitled to be ranked and preferred in terms of their claim, in respect that (1) by the said disposition and assignation the whole beneficial right, title, and interest of the said William Brown Alexander in the subjects conveyed by the feu-contract condescended on were effectually disponed and assigned to the claimants; (2) the claimants acquired Alexander's right, title, and interest in said subjects for a *bona fide* onerous consideration, and on the faith of his title as appearing on the public records; (3) the claimant's right, although in security as defined by the agreement condescended on, exceeds in amount the value of the subjects conveyed, and is preferable to all other claims against the said William Brown Alexander; and (4) the fund *in medio* forms a *surrogatum* for the one half *pro indiviso* pertaining to the said William Brown Alexander of the said heritable subjects. 3. The said claimant's (viz., Livingstone's) averments of joint-adventure are excluded by the terms of the title to the property, *et separatim* they can only be proved by writ or oath."

The Lord Ordinary (PEARSON) allowed the parties a proof.

Mr Livingstone gave parole evidence in support of his averments in regard to the joint-adventure. He also produced the claim lodged in the reference by Alexander, which corroborated his allegations as to the arrangements between them. The nature of the evidence led by him appears from the summary contained in the second paragraph of the Lord Ordinary's opinion, *infra*. He also gave evidence as to the accounting between him and Alexander.

The Messrs Allan deponed that they knew nothing of the joint-adventure, and further gave evidence as to the loan in respect of which the assignation had been granted to them.

Alexander was not examined as a witness by either party.

The Lord Ordinary on 7th August 1900 pronounced the following interlocutor:—"Finds that the claimant Hugh Livingstone is entitled to be ranked and preferred *primo loco* on the fund *in medio* for the sum of £172, 17s. 6d. sterling, and that *quoad ultra* the claimants James Allan and John Allan are entitled to be ranked and preferred on the fund *in medio* for the whole balance thereof, reserving as to the expenses of raising and bringing the action into Court, and ranks and prefers the respective claimants accordingly, and and decerns: And in the competition finds the claimants James Allan and John Allan liable to the claimant Hugh Livingstone in expenses, less one-third of the taxed expenses of the proof," &c.

Opinion.—"The fund *in medio* is a sum of £273, 7s. 10d., being one-half of the net proceeds of the sale of a tenement No. 17 Millbrae Crescent, Glasgow. Disputes had arisen among the defenders as to their respective rights in the subjects, and they agreed to convey the subjects to the nominal raiser that he might sell them and account for the proceeds to the persons entitled thereto.

"The facts as to the erection of the tenements are shortly these. In or about 1894 three tradesmen — Mr Livingstone, ironmonger, Mr Alexander, joiner, and Mr Emery, mason—combined to build three tenements, each supplying his own department of the work, and each ultimately to have one of the tenements at his disposal. Mr Livingstone had one tenement and Mr Alexander a second. The third was to have been Mr Emery's, but for reasons which are not material, Mr Emery, although he did the mason-work as an outside tradesman was supplanted in the speculation by Livingstone and Alexander jointly, who carried through the erection of the third tenement (No. 17 Millbrae Crescent) on joint-account. It is this tenement which gives rise to the present dispute.

"The title to the ground was a feu-contract dated 10th and 25th and recorded 27th February 1896, by which the subjects were disponed to and in favour of Livingstone and Alexander, 'and the survivor of them,

and the heir of the survivor, as trustees and in trust for behoof of the said Hugh Livingstone and William Brown Alexander, and their respective heirs and assignees whomsoever, each to the extent of one-half *pro indiviso*.' It was thereby declared that the trustees and the survivor and the heir of the survivor should have full power to sell and dispose of the ground, and to borrow money on the security thereof, and also that purchasers and lenders should have no concern with the application of the money paid or lent.

"Mr Livingstone financed this tenement and paid the contractors, and Mr Alexander made certain payments to him from time to time. The tenement was erected during 1896-97, and in May 1897 these two parties having failed to agree as to the accounting between them, submitted their disputes to a measurer in Glasgow as arbiter. The reference included all questions between them arising out of the erection of all the three tenements. The arbiter issued his award on 18th April 1898, finding Alexander liable to Livingstone in £184, 19s. 3d., together with £80 of expenses, and he decerned against Alexander for £70 as the expenses of the clerk.

"The tenement having been sold, one-half of the net proceeds has been paid or accounted for to Livingstone.

"Livingstone now claims that he is entitled to have the amount due to him by Alexander under the reference paid to him *primo loco* out of the other half of the proceeds, which is the fund *in medio*, so far at least as the sum due arises in connection with the tenement in question.

"His claim, however, is challenged by James and John Allan, who allege that they hold a security derived from Alexander, which must first be satisfied.

"It appears that on 23rd April 1898, five days after the date of the award, Mr Alexander, having borrowed £250 from James and John Allan, or from their mother Mrs Allan, disponed to the Allans his one-half *pro indiviso* of the subjects in question, 'being the ground as more particularly described in and disponed by' the feu-contract dated and recorded as aforesaid, with his whole right, title, and interest therein. This disposition was recorded in the Register of Sasines on 25th April. Though *ex facie* absolute, it was qualified by an agreement of even date entered into between (1) Alexander, (2) the Allans, and (3) Messrs Robertson, writers in Glasgow. This agreement narrates that the Allans had procured from their mother a loan for Alexander of £250 on a promissory-note for that amount granted by him to them, and endorsed by them to their mother. It provides, *inter alia*, that the disposition by Alexander should be held by the Allans in security only, and for payment of the amount contained in the promissory-note, interest, and expenses; and, *secundo loco*, for payment of Messrs Robertson's account. It was agreed that the security thus constituted should not exceed the sum of £400 in all of principal and interest. The agreement professed to confer on the Allans power to enter into immediate possession of the subjects, and also a power of sale.

"Mr Livingstone avers that the Allans were not onerous lenders, but were gratuitous assignees. It is true that the £250 advanced was not their money. It was procured by them from their mother's funds for this investment. But they became bound, as part of the transaction, to repay it to their mother; and they endorsed Alexander's promissory-note to her in token thereof. And as the money was certainly advanced to Alexander, I think it clear that the Allans are to be regarded in the matter as onerous assignees.

"This being so, they contend that the terms of the title on which the subjects stood are conclusive in their favour, and that it is incompetent to look behind it. Their argument is, that while it is a trust title, it discloses a bare formal trust without purposes, each being beneficial owner of one-half *pro indiviso* of the subjects, and being entitled at any time to get rid of the trust by an action of denuding. They say that they advanced the money in reliance on the records, and that they are in the position of a *bona fide* onerous disponee or assignee acquiring from a trustee who is vested in the subject by a title *ex facie* absolute. It is necessary in considering this question to examine the Allans' title, and it at once becomes apparent that the principle does not apply. They hold no title from the trustees, and it was the trustees who alone had the power to sell that subject or to borrow upon it. The Allans' title is derived from Alexander alone, and although it bears to dispone his one-half *pro indiviso* of the subjects, and was recorded in the Register of Sasines, it really amounts to no more than an assignation of Alexander's beneficial interest under the trust. No doubt the registration in the sasines would accresce to the Allans so soon as the trustees had conveyed to Alexander his *pro indiviso* half (as they might ultimately be bound to do), and he had completed his title thereto; but until that time the Allans were merely assignees of Alexander's interest, and were subject to all the qualifications affecting that interest.

"Now one of these qualifications was, that Livingstone was not bound to concur in any deed affecting the subjects until he was reimbursed for his outlay on the subjects. This followed from the fact that the tenement was beyond all doubt erected 'on joint-account;' and I presume that the original title was taken as it was, not merely for convenience, but in order to secure the rights of the two joint-adventurers *inter se*.

"The Allans further object to this view of their rights, on the ground that even as between Livingstone and Alexander it is incompetent to qualify the terms in which the title was taken except by writ or oath, and that this rule holds good whether the case falls within the law of trust or the law of partnership, *Wilson* v. *Threshie*, 1826, 4 S. 366, being referred to. Alexander's

right, they say, is by the title declared to be a full half *pro indiviso* of the subjects, and this is an attempt to cut it down. I do not think this is accurate. The right of each co-adventurer was and remains a right to one-half of the proceeds of the joint-adventure. While the subjects remain heritable it is accurately expressed as a right to one-half *pro indiviso*, just as if the subjects had been sold under the power of sale it may be described as a right to one-half of the net proceeds. It does not really alter the copartners' equal rights that there may have to be an accounting between them as partners in order to ascertain what it is that they are to share equally. If writ be necessary at all to shew the relation between Livingstone and Alexander touching this property, it is furnished by the minute of reference between them, which expressly bears that the tenement in question was built on joint-account. It was not suggested that the original site could in this dispute be treated separately from the tenement built upon it. The sale was of the entire subject, and the fund in *medio* is one-half of the net proceeds of that sale.

"In my view, therefore, the Allans cannot compete upon the fund *in medio* with Livingstone's claim against Alexander on account of the tenement No. 17 Millbrae Crescent. It remains to ascertain the amount to which this claim is good.

[*His Lordship, after dealing with certain items claimed by Mr Livingstone, and finding that there was a balance due to him of* £132, 17*s.* 6*d.*, *proceeded*]—"In addition, Mr Livingstone claims to take credit for the expenses of the arbitration, including (as was explained) (1) a sum of £80, to which the arbiter modified Mr Livingstone's expenses in the reference, and which he ordained Alexander to pay to Livingstone; and (2) a sum of £70, which the arbiter fixed as the amount due to Mr M'Cosh as clerk and legal assessor to the submission, and which he ordained Alexander to pay to Mr M'Cosh. For the latter sum there was no decree against Mr Livingstone; and whether he has paid it or not, I do not see how he can take credit for it here. The former sum (£80) was incurred in reference proceedings which embraced other matters than the tenement now in question; and the evidence bearing on this matter points to an allowance of one-half of it as about the sum which may fairly be attributed to the 17 Millbrae Crescent disputes. The addition of this to the above sum of £132, 17s. 6d. brings out £172, 17s. 6d. as the sum to which Mr Livingstone is entitled *primo loco* out of the fund *in medio*. . . . .

"With regard to expenses (in which I include those occasioned by the amendment) I think Mr Livingstone, with whom the main success lies, is entitled to expenses generally, but that he should only get two-thirds of the taxed expenses of the proof, as a substantial part of that was taken up with his unsuccessful attempt to shew that the Allans' transaction was not onerous."

The claimants Messrs Allan reclaimed, and argued—The relations and interests of Alexander and Livingstone were strictly defined in the feu-contract, under which each party had a half *pro indiviso* share, and could at any time get rid of the trust by an action of denuding. It was a formal trust without purposes, and constituted merely for convenience of title. It was not competent to go outside the feu-contract, and the measure of the right conferred on an assignee would be precisely that expressed in it—*Bailey* v. *Scott*, May 24, 1860, 21 D. 1105; *Henderson* v. *Norrie*, March 31, 1866, 4 Macph. 691, at 702; *Heritable Reversionary Company, Limited* v. *Millar*, August 9, 1892, 19 R. (H.L.) 43; *Redfearn* v. *Somervail*, 1813, 1 Dow's App. 50. This case was outside the rule as to the necessity for inquiring into the conditions of a trust, because all that was required was set out *ex facie* of the feu-contract. There was accordingly no necessity for the reclaimers to inquire further, and in point of fact they were quite ignorant of the existence of any joint-adventure, and thought they were getting the security of the whole of Alexander's share. The case must therefore be governed by the ordinary rule that where there is an express right to property clothed by something latent, the person with the latent right cannot compete with the onerous assignee of the person having the express right. Moreover, the respondent was only entitled to prove the existence of the joint-adventure by writ or oath—*Dunn* v. *Pratt*, January 25, 1898, 25 R. 461. He had tried to rear up a joint-adventure by the evidence of only one of the parties to it. The expression "joint account" in the minute of reference did not prove that the relation was one of joint-adventure, and the Lord Ordinary was wrong in holding it as writ proving the existence of such a relation.

Argued for the respondent — The title granted by the feu-contract was a proper and appropriate one for a joint-adventure in order to secure the rights of the joint-adventurers *inter se*. All that Alexander assigned was a *jus crediti* in the partnership estate, which was held under a trust. It was the duty of the assignees to ascertain what were the terms of the trust, the existence of which appeared *ex facie* of the feu-contract. The real purpose of the trust was to hold the subjects as estate of the joint-adventure, the existence of which it was competent for the respondent to prove in any way, and not merely by writ or oath, and which had been proved by him. Accordingly it was incompetent for Alexander to assign the property of the joint-adventure till all the liabilities affecting it had been satisfied, and the respondent's claim to the fund *in medio* was prior to that of the reclaimers—*Keith* v. *Penn*, February 21, 1840, 2 D. 633; *Creditors of M'Caul* v. *Ramsay and Ritchie*, 1740, M. 14,608; *Murrays* v. *Murray*, F.C., February 5, 1805.

Lord President—This action has been raised for the purpose of obtaining a decision as to the right to the sum of

£273, 7s. 10d. held by Mr Buchan, the pursuer and nominal raiser. The competitors are Mr Livingstone, who was, along with Mr Alexander, engaged in a joint-adventure in building, and Messrs Allan, who claim as the assignees of the share which belonged to Mr Alexander. It was not disputed that Mr Livingstone was entitled to one-half of the free proceeds of the joint-adventure, and the fund *in medio* consists of the other half, which would have belonged to Mr Alexander if no charge had been created upon or against it. Part, however, is claimed by Mr Livingstone, who maintains that upon a just accounting between the parties to the joint-adventure there would be very little left for Mr Alexander or anyone claiming in his right. Messrs Allan, on the other hand, contend that they are not affected by the result of such an accounting, because they made to, or procured for, Mr Alexander a loan of £250 on the security of his whole right in the property, which they say is not affected by the accounting. The success or failure of that contention must, in my view, depend upon their being able to establish that they were entitled to rely on the records or upon evidence submitted to them that the right assigned to them by Mr Alexander was not burdened with any debt or charge. I concur with the Lord Ordinary in thinking that the Messrs Allan were *bona fide* onerous assignees, and I shall deal with the case on that assumption. The question at once arises, what information did the Messrs Allan get from the title shown to them—did it or did it not show an unequivocal and an unburdened right. The title is a feu-contract dated February 1896, by which certain subjects were disponed in feu to Mr Alexander and Mr Livingstone, and the survivor of them and the heirs of the survivor, as trustees for behoof of themselves and their respective heirs and assignees whomsoever, each to the extent of one-half *pro indiviso*. The beneficiaries under the trust are the same persons as the trustees—that is to say, on an accounting between them each would be entitled to one-half of the free value or proceeds of the trust estate, but this their right rests upon the trust, not upon the feudal conveyance in the feu-contract. I agree with the Lord Ordinary in thinking that the principle applicable to a feudal title, *ex facie* absolute, in two persons does not apply here, although it happens that the trustees and the beneficiaries are the same persons. Their real position was that they were engaged in a joint-adventure in building, and were accordingly entitled to charge the trust property, which was in effect the capital of the adventure, with all the liabilities incident to it; so that all that Mr Alexander could effectually assign to Messrs Allan was half the free balance which might remain after the joint-adventure had been wound up. Though not technically a partnership, as no separate legal *persona* was created in whom the common stock could be vested, the case of such a joint-adventure is very similar to that of a partnership for the purposes of the present question. This follows from the decisions in the cases of *Keith* v. *Penn*, 2 D. 633, and *Creditors of M'Caul*, M. 14,608, which establish that the property embraced in a joint-adventure cannot be effectually assigned until all the liabilities of the joint-adventure have been satisfied.

It was maintained by the pursuer Allan that it is only competent to prove a trust by writ or oath, and this is true as in a question between the truster and the alleged trustee. But here the fact that the property was held in trust is proved by the writ of both, viz., the feu-contract. It was argued that there is a similar restriction as to the mode of proving the terms of a trust, but this is not so; it having been repeatedly decided that when the fact that property is held in trust has once been admitted or proved by writ or oath, the terms and purposes of the trust may be proved otherwise.

For these reasons I am of opinion that the Lord Ordinary's decision upon the main question is right. If this be so, the only remaining question is one of amount, and as it is evident that this question has been carefully considered by the Lord Ordinary we should be slow to disturb his decision upon it. After giving all due attention to the argument, I can see no reason for differing from him on that question.

LORD ADAM concurred.

LORD M'LAREN—I am of the same opinion. I do not think the case is one of difficulty, but it is interesting because it raises in a new form the well-worn distinction between the rights of an assignee and a creditor, either under his own diligence or through the trustee in a sequestration. Reference was made by both parties to the opinions expressed in the case of *The Heritable Reversionary Co.* v. *Miller*. The point decided in that case was that a creditor cannot acquire from a debtor who is in possession of estate anything more than the interest really belonging to him. He takes his debtor's interest *tantum et tale*, and if the debtor has no real interest will acquire nothing. But it was clearly recognised in that case in my opinion, and in the opinions delivered in the House of Lords, that an assignee may take a higher right than a creditor. He takes in general all that his cedent has to convey or is empowered to convey. In this case we are not concerned with any question of power, because the debtor as a partner is only assigning what is his own, *i.e.*, a *jus crediti* in the partnership estate held under a trust. Now, every assignee of a *jus crediti* under a trust is put on his inquiry to ascertain the terms of that trust, because the right assigned cannot be larger than the cedent's right against the trust. It is not enough merely to look at the terms of a trust-deed declaring that the trustees hold for two persons *pro indiviso*. In such a case there may well be a supplementary deed embodying contract rights, under which the trustees are bound to hold upon conditions not expressed in the deed of

conveyance. That is the case here, and it is the key to the decision of the case, because while for convenience the title was taken in favour of the two partners as owners each of one-half *pro indiviso* of the subject, the real purpose of the trust was to hold it as estate of the joint-adventure, and subject to the debts affecting such joint estate. I therefore agree with the Lord Ordinary that assuming the Allans to be *bona fide* onerous assignees, they took nothing beyond such rights in the property as their author could have insisted on, having regard to his contract with his copartner.

I also agree with your Lordship that in applying that principle to the accounting the Lord Ordinary has dealt with the case correctly and satisfactorily, and that no sufficient cause has been shown for re-opening the accounting.

LORD KINNEAR was absent.

The Court adhered.

Counsel for the Reclaimers—M'Lennan—Scott Brown. Agents—Cumming & Duff, S.S.C.

Counsel for the Respondent—Kennedy—Guy. Agents—Martin & M'Glashan, S.S.C.

Thursday, January 10.

SECOND DIVISION.

[Sheriff Court at Dingwall.

ROSE *v.* CAMERON'S EXECUTOR.

Donation—Donatio mortis causa—Essentials of Donatio mortis causa—Deposit-Receipt—Delivery—Expectation of Death.

Three deposit-receipts were found in the repositories of a deceased person after his death. They were dated five months before the date of his death, and were taken each respectively in name of himself and another person, payable to either or survivor. *Evidence* on which *held* that the joint payees had failed to prove *donatio mortis causa* of the sums contained in the deposit-receipts.

Question as to the essentials of *donatio mortis causa*.

Opinion (*per* Lord Young) that it is essential to the validity of a *donatio mortis causa* (1) that it should be made in expectation of death, and (2) that there should have been delivery or its equivalent.

Kenneth Cameron, sometime carpenter at Lews Castle, Stornoway, and afterwards residing at Dantryfail, Achterneed, in the parish of Fodderty and county of Ross and Cromarty, died at Dantryfail on 24th October 1899. After his death three deposit-receipts were found pinned together in a desk belonging to him, which was in a room occupied by him in the house of his niece Mrs May Cameron or Frank, Dantryfail aforesaid. These deposit-receipts were all granted by the National Bank of Scotland, Limited, and were as follows, viz.—(1) A deposit-receipt dated Stornoway, 10th May 1899, for £1000, in favour of himself and John Rose, farmer, Strathpeffer, payable to either or survivor; (2) a deposit-receipt dated Stornoway, 10th May 1899, for £1000, in favour of himself and Mrs May Frank, Strathpeffer, payable to either or survivor; and (3) a deposit-receipt dated Stornoway, 10th May 1899, for £650 in favour of himself and William Cameron, his nephew, payable to either or survivor.

Kenneth Cameron left no will of any kind, and he had never been married.

In January 1900 John Rose, Mrs May Frank, and William Cameron, as pursuers and real raisers, brought an action of multiplepoinding in the Sheriff Court at Dingwall, in which they called as defenders the National Bank of Scotland, Limited, as the holders of the fund *in medio* after mentioned, and Donald Cameron, furniture dealer, Inverness, Mrs Barbara Cameron or Campbell and her husband Donald Campbell, farm grieve, Dingwall, and Jessie Cameron or Macleod and her husband George Macleod, labourer, Achterneed. The fund *in medio* was the sum of £2650 contained in the three deposit-receipts referred to *supra*.

The pursuers and real raisers and the defenders Donald Cameron, Mrs Barbara Cameron or Campbell, and Mrs Jessie Cameron or Macleod, were all nephews or nieces and next-of-kin of the deceased Kenneth Cameron. After the raising of the action Donald Cameron was appointed executor-dative *qua* next-of-kin of Kenneth Cameron, and sisted himself in that capacity as a party to the action of multiplepoinding.

Claims in the action were lodged by the pursuers and real raisers, and by Donald Cameron as Kenneth Cameron's executor-dative.

The pursuers and real raisers averred as follows:— "(Cond. 2) The pursuers and claimants believe and aver that the said deceased Kenneth Cameron, who was their uncle, and was unmarried, intended to make, and did in point of fact make, a donation to them of the respective sums represented by the deposit-receipts above referred to, and that they are entitled to receive payment of the same. (Cond. 3) The said deceased Kenneth Cameron resided during the last two years or thereby of his life with the pursuer and claimant Mrs Frank, and was on friendly and intimate terms with her and the other pursuers and claimants John Rose and William Cameron, and frequently told them that he intended to provide for them, and the deposit-receipts referred to were taken in the terms stated for that purpose."

They pleaded—"The deceased Kenneth Cameron having made an effectual donation of the sums in the deposit-receipts for £1000, £1000, and £650 respectively to the claimants Mrs Frank, Mr John Rose, and Mr William Cameron, they are entitled to decree therefor with interest and expenses."

The claimant the executor-dative averred as follows:—"(Cond. 6) The deceased was a