proposes to prove is that the prisoner within the dates specified resetted various quantities of pig-iron amounting in all to 100 tons. This is not what the indictment says; for the indictment may he read as amounting to a charge that the prisoner resetted several parcels of pig-iron of 100 tons each, sometime within the dates libelled. This, however, is not the most important aspect of the objection, for this might be remedied by amendment, which I would allow. The important matter is, that under this indictment the prisoner is not afforded any information concerning his alleged offence, such as would enable him to answer the charge, if he has an answer to it. To illustrate what I mean? Suppose that at the time of the prisoner's apprehension there was found on his premises a bar of pig-iron which is in the course of the evidence shown to have been stolen. The prisoner must account for its possession so as to avoid the pains of reset. But how can he do so under an indictment like the present? The bar of pig-iron is part of the 100 tons libelled; but without any notice that it is so until the proof has been led by the prosecutor. The pursuer is unable then to offer evidence that he acquired that particular bar of pig-iron innocently. Even if his evidence were at hand, not having given in a list of witnesses as required by law, the prosecutor might object to the examination of any witnesses the prisoner proposed to call. The want of such list of witnesses and consequent loss of evidence in defence could not be said to be matter for which the prisoner was responsible. Having no information from the indictment as to any particular charge or part of the general charge which he would be required to meet, he cannot be blamed if he is not ready to meet it. Such an indictment as the present puts a burden on the prisoner which he is not bound to bear. I think it would be unfair to the prisoner to go to trial on this indictment, and I accordingly sustain the objection.

The diet was deserted *pro loco et tempore.*

Counsel for the Panel—A. S. D. Thomson. Agent—

Counsel for H. M. Advocate—Duncan Robertson, A.-D. — B. P. Lee. Agent — Procurator-Fiscal for Lanarkshire.

COURT OF SESSION.

Friday, March 2.

SECOND DIVISION.

BARRY'S TRUSTEES *v.* BARRY.

Succession—Obligation on Widow to Maintain and Educate Children — Whether applied to Child in Convent.

A testator directed his trustees to pay to his widow a free annuity of £700, and to permit her to occupy his dwelling-house, "providing and declaring that my said wife shall, out of the foresaid provision, educate and maintain my children, born or to be born, in a way befitting their station in life, until they shall respectively attain the age of twenty-one years, or if daughters, be married." One of the testator's daughters by a former marriage had entered a convent as a novitiate, and claimed from the widow a separate sum for her maintenance, This the widow refused to pay, but offered to receive her into her house and maintain her along with the other members of the family. *Held* that the terms of the settlement did not import an obligation on the widow to pay the daughter a separate sum for her maintenance in the convent.

John Barry, merchant, Leith, died at Leith on the 21st of May 1884, leaving a trust-disposition and settlement dated 14th April of the same year. By this settlement the testator conveyed the whole estate of which he should die possessed to his trustees, for the ends, uses, and purposes therein mentioned. The settlement provided, *inter alia*, that the trustees should pay to the truster's widow, if she should survive him, a free annuity of £700 sterling during her life, and should permit her to occupy and possess the truster's dwelling-house, No. 63 Ferry Road, Leith, or any other dwelling-house which might be occupied by him at his death, with the household furnishing and plenishing of every description therein; and it was declared that these provisions should be accepted by her in full satisfaction to her of all legal claims: "Providing and declaring that my said wife shall out of the foresaid provision educate and maintain my children, born or to be born, in a way befitting their station in life, until they shall respectively attain the age of twenty-one years, or if daughters, be married." The value of the trust-estate as at the date of the death of the truster amounted to the sum of £18,454, 5s. 4d. The annual value of the house liferented by Mrs Barry was £50.

Mr Barry was twice married, and had issue as follows, viz.—By the first marriage, Mary, born on 21st November 1858; Thomas, born on 17th September 1860; Kate, born on 26th August 1862. By his second marriage, John, born on 6th August 1867; Jessie, born on 11th July 1869; James, born on 4th February 1872. The whole of the children survived the testator, and the four last mentioned lived in family with Mrs Barry, and were maintained by her out of the annuity before mentioned. The mother of Miss Mary Barry, the eldest daughter, was a Roman Catholic, and Miss Mary Barry was educated as a Roman Catholic. and resolved to become a nun. With that view she on 15th November 1883, accompanied by her father and Mrs Barry, went to the convent at Rockferry, near Birkenhead, and entered the convent as a novitiate, and the truster then paid to the convent a sum of £40 as her board for one year. In November 1884 a further sum of £40 was sent to the convent by Mrs Barry, and the trustees placed the amount to the debit of Miss Barry's prospective share of her father's estate. Miss Mary Barry continued to reside at the convent at Rockferry, and claimed payment from her stepmother Mrs Barry of an annual sum for her separate maintenance. Mrs Barry disputed her liability to pay any sum for Miss Mary Barry's separate maintenance, but she offered to receive Miss Barry into the house liferented by her, and

maintain her there along with the other members of the family.

This special case was presented to the Court, the parties of the first part being Mr Barry's trustees, Mrs Barry being the party of the second part, and Mary Barry being the party of the third part.

The parties were agreed that if Miss Barry should be held entitled to separate maintenance from Mrs Barry, the sum of £40 per annum should be held to be the amount to be paid by Mrs Barry.

The question of law was—"Is Mrs Barry bound to pay to Miss Barry a sum of money for her separate maintenance?"

Argued for the trustees and Mrs Barry—It was quite clear that the testator when he provided that his wife should educate and maintain his children, had also in view that they should all live in the same house as Mrs Barry, for he specially permitted her to occupy and possess his dwelling-house. It was unreasonable, then, and contrary to his obvious wishes, to expect Mrs Barry to support her stepdaughter outside that house. If the third party chose to disregard her stepmother's offer to maintain her in the Ferry Road home, and elected to reside in the nunnery, then there could be no obligation on her stepmother, and the clause of the will in regard to education and maintenance ceased to operate—Lewin on Trusts, p. 139.

Argued for the third party—Mrs Barry had no power to insist on her stepdaughter coming to live with her at Ferry Road. Her father alone, as in right of the *patria potestas*, could have asserted such a right. She had a perfect right to go into the nunnery, and that did not debar her from her claims to be maintained under the express provisions of her father's will. It was no answer that her stepmother had offered to receive her to live with her in the Ferry Road house—*Ayton* v. *Colvill*, 1705, M. 451; *Moncrieff* v. *Fairholm*, 1736, M. 454; *Jackson* v. *Jackson*, November 17, 1825, 4 S. 188.

At advising—

Lord Justice-Clerk—The claim here made on the part of the daughter can only be sustained if the provisions of the will bear out her contention. There is no doubt at all that the mother has £700 a-year as her jointure, and that she is bound to maintain out of that sum her unmarried daughters. That however is in my view only an obligation on her to maintain them in the house which apparently has been left to her for that purpose. It appears to me therefore that as Mary Barry has elected to live in a convent, that her stepmother is not bound to pay for her board there out of her alimentary allowance.

Lord Young—I am of the same opinion. Mrs Barry has no interest in the estate of her deceased husband except to the extent of an annuity of £700 a year. That annuity and the residence in Ferry Road is provided by her husband on the condition that she shall out of this provision educate and maintain her children in a way befitting their station in life until, they shall respectively attain the age of twenty-one years, or if daughters, until they are married. The question depends upon whether payment of an alimentary provision to this daughter for her maintenance in the convent is incumbent on the widow as the condition of her annuity. I am without any doubt of opinion that it is not. I think she is bound out of her provision to maintain and educate her children till they are twenty-one, though she is freed at an earlier period from alimenting the daughters if they marry. Mary Barry, however, is not within the obligation at all. I am therefore of opinion that there is no obligation on Mrs Barry to pay the alimentary provision sought from her.

Lord Craighill—I agree. I am clearly of opinion that there is under the will no obligation whatever on the widow to support Mary Barry in the convent.

Lord Rutherfurd Clark concurred.

The Court answered the question of law in the negative.

Counsel for the First and Second Parties—Dickson. Agent—Andrew Wallace, Solicitor.

Counsel for the Third Party—Crole. Agents—Tait & Crichton, W.S.

Friday, March 2.

FIRST DIVISION.

[Lord Fraser, Ordinary.

SUTHERLAND *v.* THE PRESTONGRANGE COAL AND FIREBRICK COMPANY (LIMITED).

Process — Jury Trial—Inspection of Locus by Juryman—New Trial.

In the course of the trial of an action of damages for personal injuries, caused by the pursuer being run over by a coal hutch, one of the jurymen visited the *locus* and examined for himself the defenders' method of working the hutches.

The Court *allowed* a new trial on the ground that the verdict had not been returned on the evidence laid before the jury.

Charles Sutherland, carter, Meadowhill, Tranent, raised this action against the Prestongrange Coal & Fire Brick Company (Limited) for personal injuries sustained by him through fault of the defenders.

The pursuer averred that while he was filling his cart with coal from one of the defenders' hutches, another hutch was culpably and recklessly despatched along the rails without warning to him, by the fault of a servant of the defenders, and that it knocked him down and ran over him.

The case was tried by Lord Fraser and a jury, and a verdict was returned for the pursuer by a majority of seven to five.

The defenders then obtained a rule on the pursuer to show cause why the verdict should not be set aside on the ground, *inter alia*, that one of the jurymen had before the conclusion of the case visited the scene of the accident, and had examined for himself the *locus* and the method of working the hutches.

The Court ordered the defenders to procure an