petent for this Court to remit such cases to the Sheriff Court for proof when they have been appealed to the Court of Session for jury trial under the section of the Judicature Act allowing that procedure. That point having been matter of decision, and considering as I do that this is eminently a case in which the evidence should be taken rather by a proof before the Sheriff than by a jury trial in this Court, I move your Lordships to remit the case to the Sheriff Court for proof so far as relates to the matters set forth in the 13th, 14th, and 15th articles of the condescendence.

LORD YOUNG—I am of the same opinion. It must be distinctly understood there is no doubt about the competency of this appeal, and in this competent appeal it is within our competency and our duty to consider, in the interests of the parties, whether it should be sent to jury trial or to a proof.

We have considered this competent appeal, and in our opinion it is not a fit case for jury trial, but should be sent for proof before the Sheriff-Substitute. The appeal is brought under the 40th section of the Judicature Act, and it would be an unfortunate thing if the language of the statute had been such as to prevent us doing what in our opinion was best in the interests of the parties, but that point has been considered and decided, and I am of opinion that the result arrived at is both a sound and expedient one. I think we should follow the course pointed out by the former decisions in this case.

I merely make this explanation to show that in my opinion when an appeal is brought competently before us, it is open to us to consider, in view of the whole facts of the case, what is the best course to follow in the interests of the parties.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER—I think it may now be held to be settled by the decisions cited in the course of the discussion that it is competent for this Court, if they think fit, to remit back to the Sheriff, for the purpose of taking proof, a case appealed from the Sheriff for jury trial under the 40th section of the Judicature Act. But for these decisions I should have entertained doubt of the competency of that proceeding, although I have no doubt of the expediency of the course which the Court has adopted. The power of the Court, however, so to deal with an appeal like the present being determined, I think this a case in which that power should be exercised. Many of the pursuer's averments appear to me to be quite irrelevant, and therefore the remit to the Sheriff to take a proof should be restricted to the matters set forth in the proposed issue—that is, a proof of the 13th, 14th, and 15th articles of the pursuer's condescendence, the other averments so far as relevant being admitted.

The Court remitted to the Sheriff to take the proof, restricted to matters contained in articles 13, 14, and 15 of the condescendence.

Counsel for the Appellant—G. Smith—Able. Agents—Gill & Pringle, W.S.

Counsel for the Respondent — Clyde. Agents—Drummond & Reid, S.S.C.

Tuesday, January 24.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

THE WICK AND PULTENEYTOWN STEAM SHIPPING COMPANY, LIMITED *v.* PALMER.

Relief — Reparation — Relief among Co-Delinquents — Judgment Debt — Right of One of Two Joint-Debtors who has Paid Whole Debt contained in Decree to Assignation of Debt.

A widow and children raised an action against a shipping company for damages, on account of the death of her husband and their father, who was killed, while unloading a steamer, by being hit on the head by the pulley of a crane, the hook of which had suddenly given way. The fault alleged was defective tackle. Thereafter a supplementary action was raised on the same grounds by the same parties against the stevedore, the fault alleged on his part being that he had handled the tackle in a defective manner. The actions were conjoined and went to trial. The jury returned a verdict for the pursuers, and the two defenders were decerned to make payment conjunctly and severally of the damages found due.

The pursuers in the conjoined actions having charged the Shipping Company for the whole sum, and received payment thereof from them, and granted in exchange a receipt and assignation of the sums so paid, together with the extract decree—*held* that the Shipping Company were entitled to exact one-half of the damages from the stevedore.

Opinion by Lord Young, that where there is a judgment debt, it is inadmissible to look behind the decree, and that if one of two joint debtors under such a decree pays the whole, he has a right to assignation of the debt from the person to whom he has paid it, in order that he may recover one-half thereof from his co-debtor.

On 11th September 1891 Helen Brown or Fowlis, the widow of David Fowlis, lumper, Grangemouth, and their six children, raised an action against the Wick and Pulteneytown Steam Shipping Company, Limited, concluding for damages to them on account of the death of her husband and their father, who was killed while assisting to unload the said Shipping Company's steamer "St Fergus" at Grangemouth on the morning of the 23rd April 1891. His death was caused by his having been hit upon the head by a

heel block or pulley, which formed part of the tackle of a derrick crane connected with the ship, in consequence of the hook of the heel block suddenly giving way. The fault alleged was that the tackle used, and in particular the block and hook, were defective, and insufficient for the purpose to which they were put.

In their defences the Shipping Company alleged that if anyone was to blame for the accident, it was the stevedore George Palmer, who must in that case have handled the crane and tackle in a negligent manner.

On seeing the nature of the defence Mrs Fowlis and her children raised a supplementary action against George Palmer, the stevedore. On 24th November 1891 the two actions were conjoined, and following the course adopted in the case of *Dacres*, 27 S.L.R. 230, an issue was granted against each of the defenders, the issues being in the following terms:—"1. Whether on or about 23rd April 1891, at Grangemouth harbour, the deceased David Fowlis, the husband of the pursuer Helen Brown or Fowlis, and father of the other pursuers, was struck on the head by an iron block or pulley, and fatally injured, through the fault of the defenders, the Wick and Pulteneytown Steam Shipping Company, Limited, to the loss, injury, and damage of the pursuers? 2. Whether on or about 23rd April 1891, at Grangemouth harbour, the deceased David Fowlis, the husband of the pursuer Helen Brown or Fowlis, and father of the other pursuers, was struck on the head by an iron block or pulley, and fatally injured, through the fault of the defender George Palmer, to the loss, injury, and damage of the pursuers?"

The case was tried before Lord Wellwood with a jury on 8th and 9th March 1892, and the jury returned a unanimous verdict for the pursuers in the conjoined actions on both issues, and assessed the total damages at £600, payable among Mrs Fowlis and her children in certain proportions.

On 17th March 1892 the verdict was applied, and the Shipping Company and George Palmer were decerned and ordained to make payment conjunctly and severally to Mrs Fowlis and her children of the said damages, and by a subsequent interlocutor of 29th May 1892, decree passed in similar terms against the Shipping Company and George Palmer for £239, 4s. 1d., consisting of expenses in the action and dues of extract.

Mrs Fowlis and her children extracted their decree, and on 10th June 1892 charged the Shipping Company to make payment to them of the whole sums, damages, and expenses. The Shipping Company paid the said sums and received from Mrs Fowlis and her children a receipt and assignation of the sums so paid, together with the extract decree. The receipt and assignation proceeded on the narrative that the Shipping Company and George Palmer being both liable jointly and severally for the sums mentioned in the extract decree, "We, the parties foresaid (Mrs Fowlis and her children), resolved to charge the defenders, the said Wick and Pulteneytown Steam Shipping Company, Limited, for payment of the whole sums due in terms of the said extract decree;" and further, considering that on the 10th day of June 1892 they charged the Shipping Company to make payment of the said sums, and that the latter had made payment to Mrs Fowlis and her children of the damages and expenses decerned for, they acknowledge receipt of the said sums; "and now seeing that the said Wick and Pulteneytown Steam Shipping Company, Limited, have requested us, as a condition of the foresaid payment, to grant them the assignation hereinafter written, which (although advised that we are under no legal obligation to grant the same) we have agreed to do," therefore they assign the principal sums mentioned in the decree, and whole interest due and to become due thereon, and the expenses and dues of extract, "together with the said extract decree and execution themselves, and whole tenor and contents thereof, for all force and effect, if any, which the same may have after payment to us as aforesaid of the foresaid sums by the said Wick and Pulteneytown Steam Shipping Company, Limited: But declaring, as it is hereby expressly provided and declared, that no warrandice of any kind whatever is granted or to be implied by the foresaid assignation."

Thereafter the Shipping Company applied to George Palmer to relieve them of one-half of the damages and expenses paid by them, but he refused to do so, maintaining that by law there was no right of relief or contribution among wrongdoers, and that as the Shipping Company had paid the debt in full he was discharged, and the assignation was worthless.

The Shipping Company raised an action against George Palmer to have it declared that the defender was bound to free and relieve the pursuers of the sum of £423, 13s. 5d., being one-half of the damages and expenses paid by them to Mrs Foulis and her children, and to have the defender ordained to make payment to the pursuers of the said sum with interest.

The pursuers pleaded—"(1) The pursuers having paid the whole debt constituted by the said extract-decree, for which debt the defender was bound conjunctly and severally with them, the defender is bound to free and relieve the pursuers of one-half of the said debt by making payment to them of the sums concluded for. (2) The pursuers and defender being *inter se* liable each for one-half of the said debt, and the pursuers having paid the whole debt and obtained an assignation to the said extract-decree constituting same, the defender is bound to repay the pursuers, as assignees foresaid, the sums concluded for, being the half of said debt."

The defenders pleaded—"(1) The action is incompetent. (2) The pursuers' statements are irrelevant and insufficient to support the conclusions of the summons."

On 25th November 1892 the Lord Ordi-

nary (WELLWOOD) sustained the second plea-in-law for the defender, and dismissed the action.

"*Note.*—This case raises an interesting question as to the right or absence of right of relief among co-delinquents." *His Lordship then stated the facts as above*—"To a certain point I do not think that the case is attended with much difficulty. By the law of Scotland, following the civil law, there is no relief among wrongdoers or co-delinquents. The person injured may proceed against anyone of the wrongdoers and recover the whole of the damages from him; in which case the others are free, and the one who is compelled to pay has no right of relief against the others—Ersk. i. 3, 15. The result is the same if the person injured sued all the wrongdoers and obtains decree against them conjunctly and severally, but only gives one of them a charge for the damages found due.

"The right of relief, when it exists, will always be found to depend upon contract or *quasi*-contract. Where the right does not form the subject of express stipulation, the law will on equitable grounds infer it from the nature of the transaction in which the parties have joined. Thus a cautioner has a right of total relief against the principal debtor *ex mandato*, and a partner who is called upon to pay has a right of relief against copartners *ex socio*. And generally in the case of co-obligants or *correi debendi* the one who is obliged to pay is entitled to an assignation of the debt to enable him to operate his relief according to its nature against the other *correi* or co-obligants.

"But there is no room for such equitable right in the case of wrongdoers. There is no contract or *quasi*-contract among them that the damages exacted for the wrong shall be borne *pro rata*, and the law in their case will not infer any such right. It is the general policy of the law not to assist a wrongdoer to enforce an illegal transaction, or help to restore him against the consequences of such a transaction if he has paid in respect of it; the law leaves the loss where it falls.

"Some pertinent remarks by Baron Hume on the principle of this rule in cases of delinquency as distinguished from cases of contract or *quasi*-contract will be found in his report of the case of *Smith* v. *O'Reilly and Others*, February 13, 1890, Hume's Decisions, 605.

"I do not think that any distinction can properly be drawn between delicts which contain a criminal element and would form the subject of a criminal prosecution and *quasi*-delicts which only ground a civil action for pecuniary damages. Causing the loss of life by gross negligence, which was the ground of action against the present pursuers and the defender, falls under the head of delinquency, although the facts might not warrant a criminal prosecution —see Stair, i. 9, 4, and 5. This matter is so fully and authoritatively treated by Lord Justice-Clerk Inglis in the case of *The Liquidators of the Western Bank Company* v. *Douglas & Company*, 1860, 22 D. 447, that I need only refer to his opinion on pages 475 to 478.

"The pursuers also maintain that the rule that there is no relief among wrongdoers does not apply where the party seeking relief is a wrongdoer by inference of law merely, that is, through a servant or agent, and that being a public company they necessarily conducted their business through their officials and servants. One curious result of this contention, if well founded, would be that while the pursuers would have a good claim of relief against the defender Palmer, Palmer, who I believe superintended the work of unloading himself, would not have had a good claim of relief against the pursuers if he had been compelled to pay damages. It is also to be observed that the fault here alleged, viz., the neglect to provide proper machinery and plant, is the fault of the owners and employers, and not that of their servants, and therefore supposing the distinction contended for were well founded it would not avail the pursuers. No Scottish authority was quoted in support of this contention, and the English cases quoted do not when examined bear it out. Three of the cases—*Adamson* v. *Jarvis*, 4 Bingham 66; *Betts* v. *Gibbins*, 2 A. & E. 57; and *Dugdale* v. *Lovering*, L.R., 10 C.P. 196—go no further than this, that when one person has been induced by another to do some wrongful act in respect of which he is compelled to pay damages to the person wronged, he will be entitled to indemnity against the person who induced him to do the wrong, provided it appear from the facts of the case that the act was not in itself necessarily wrongful, and that the party seeking relief was not aware that he was committing any wrong. In such a case a contract to indemnify may be inferred. The principle to which effect was given in those cases was thus expressed in *Toplis* v. *Grane*, 1839, 5 Bingham N. C. 650, in the judgment of Chief-Justice Tindall—'And we think this evidence brings the case before us within the principle laid down by the Court of Queen's Bench in *Betts and Another* v. *Gibbins*, that where an act has been done by the plaintiff under the express directions of the defendant, which occasions an injury to the rights of third persons, yet if such act is not apparently illegal in itself, but is done honestly and *bona fide* in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof.'

"The only other case quoted, *Pearson* v. *Skelton*, 1836, 1 M. & W. 504, is very shortly and badly reported. The tort in that case consisted in the coachman employed by a coaching firm having occasioned the death of a horse belonging to a person of the name of Pickles. Pickles brought an action of damages against Pearson, one of the partners or joint adventurers, and recovered damages, and Pearson brought an action for contribution against Skelton the defendant, another partner. It was maintained on the part of the plaintiff that the rule laid down in *Merryweather* v. *Nixan* only applies

where both parties are actually employed in the commission of the tort, and does not apply where a party has been made a tort-feasor by inference of law for the act of his servant. In support of this the case of *Adamson* v. *Jarvis* was quoted, but, as I have said, I do not think it supports the proposition. In regard to this point all that Baron Park says is—'The first objection made at the trial' (that is, that there is no contribution among wrongdoers) 'does not apply.' In the end the case seems to have been decided against the plaintiff on the ground that there was a partnership fund out of which expenses fell to be paid, and therefore the non-suit directed by the judge who tried the case was held to be right. On the whole I am not satisfied of the soundness of the distinction which the pursuers seek to draw.

"If, then, the present pursuers had simply relied on the fact that they were singled out and compelled to pay the whole of the damages found due, I should have held without much difficulty that they had no right of relief against the defender. The pursuers, however, found upon two special points. First, they say that owing to the pursuers in the conjoined actions having taken decree against them, the present pursuers and the defender, conjunctly and severally, a change has been effected as to their right of relief against the defender. I cannot adopt this view. The decree was taken in that shape simply for the convenience of the persons injured, and I do not see how its form can possibly affect the rights of the present pursuers and defenders *inter se*. It enabled the original pursuers to recover from both or either of the defenders—that was all.

"A plea with more substance is that the pursuers are entitled to recover as assignees of the original pursuers to the decree in their favour. This plea raises a difficult question, and it is not without hesitation that I have come to the conclusion that it is not well founded. It is plausibly put in this way. The original pursuers were *ex hypothesi* entitled to enforce their decree against either of the original defenders. They might have enforced it against the present defender George Palmer, and entirely liberated the present pursuers; and they have practically done the same thing, because although they have taken payment from the present pursuers, they have assigned their decree to them, which they in their turn may enforce against the present defender, either in their own name or in the name of the original pursuers. In short, it is said the original pursuers were masters of the situation, and it was in their power to liberate either of the defenders in whole or in part, in any way they pleased.

"There is much force in this contention, but this does not convince me. For one matter it goes too far. As assignees the pursuers are entitled *ex facie* of the assignation to total relief, although they do not demand this. I much doubt whether one co-delinquent can, by any transaction with the creditor, keep alive the debt if he once pays it up; and I think further, that looking to the terms of the receipt and assignation granted to the present pursuers, the debt was on payment by them finally extinguished to all effects, and there was thereafter nothing to assign.

"If a debt is paid in full by a debtor who is bound *in solidum*, and who has no right of relief, it seems to me that the debt is extinguished; and that it would be entirely contrary to such a debtor's legal rights and position that he should be able by means of an assignation to keep the debt alive and obtain total or partial relief against a co-delinquent. A creditor may no doubt make a present of his debt to his debtor if he pleases; but can he accept payment from the debtor and thereafter keep the debt alive by assignation? The cases in which an assignation may be demanded, and is effectual, are cases in which the person who gets the assignation is not the true debtor, or at least is not the true full debtor, although he may be so in a question with the creditor. But in the case of delinquency, not only is each delinquent liable *in solidum* in a question with the creditor, but each co-delinquent is the true debtor, there is no relief; and once payment is made the debt is extinguished.

"But to come to the particulars of the assignation in the present case. As I have already said, the original pursuers at the outset selected the present pursuers, and directed their action against them alone. On the suggestion of the present pursuers they brought the present defender also into the field. They obtained decree against both defenders in terms which enabled them to recover the whole sum from either, and they again selected the present pursuers, and charged them to make payment of the whole damages and expenses. To that charge there was no stateable defence, and no ground has been suggested upon which it could have been suspended. The original pursuers could not more emphatically have made their selection.

"Being threatened with a charge for the whole damages and expenses, the present pursuers were not unnaturally extremely anxious to come to some arrangement by which they should only have to pay one-half. But the original pursuers rejected their proposals and finally gave them a charge for the whole. The receipt and assignation which is annexed to the extract decree is very curiously framed."—[*His Lordship read portions of the receipt and assignation as quoted supra.*]

"It seems to me that the substance of this transaction is simply this—that being charged to pay the debt in full, the present pursuers did the only thing they could do, they paid it; the creditors would accept nothing less, and there was no defence. The money having been paid, I think the debt was extinguished, because although the money is said to have been paid on condition of getting an assignation, it was quite plain that there was no real condition in the matter, and that all that the creditors intended to do and did was, having got payment in full, to assign their exhausted decree to the present pursuers for any legal

force and effect it might have after payment, which was simply none.

"I am therefore of opinion that the pursuers are not entitled to succeed. At first sight there may seem to be some hardship in this, but it is not so great as it appears to be. The defender, no doubt, has escaped in a way which he had no right to expect. But the pursuers are no worse off than they would have been if they had not, when first sued, induced the original pursuers to bring the present defender into the field, on the averment that he alone was to blame for the accident. If the original pursuers had proceeded and recovered against the present pursuers alone, the latter would not have had any right of relief against Palmer. So far as I am aware, such a claim would have been unprecedented in our Courts, and in the view which I have expressed above would, if made, have been untenable. It would be strange if the pursuers, by getting the defender made a party to the suit on the ground that he alone was responsible for the accident, which has been negatived by the verdict of the jury, and thereafter obtaining an assignation to the decree pronounced against themselves as well as the defender, should succeed in escaping the whole, or at least the half of the liability which would otherwise have attached to them."

The pursuers reclaimed, and argued—The action was competent. Unless it could be shown that the accident was caused by wilful delict, there was no rule of law which excluded an action of contribution. The fault here was not a personal fault; it was merely an imputed fault. In order to exclude the right of relief, the wrongdoing must be equal to evildoing. This argument was founded on the civil law—Digest, 9, 3, 1 (10), 2, 3, and 4; and Digest, 27, 3, 1 (13), (14), and (15). Kames in his Principles of Equity, 1, 1, 3, 1, holds that a creditor must act impartially, whether the *correi debendi* were bound for a civil debt or *ex delicto*, and although this statement might be too wide, it supported the proposition contended for. They demurred to the *dictum* of Hume in *Smith* v. *O'Reilly*, February 13, 1800, Hume's Decisions, 605, that there must be a contract, expressed or implied, in order to found an action of relief. The case of *Hay* v. *La Neve*, June 15, 1824, 2 Shaw's Appeals, 395, decided otherwise. In both cases of *Western Bank* v. *Douglas*, March 20, 1860, 22 D. 447, and *Western Bank* v. *Bairds*, March 20, 1862, 24 D. 859, there was fraud alleged, so these cases did not apply. They quite admitted that where an action was raised against one of two wrongdoers, he could not take the exception that all parties were not called, for this reason, that the law would not in such a case do anything to delay the injured party getting his remedy —*Croskery* v. *Gilmour's Trustees*, March 18, 1890, 17 R. 697. But Lord Shand in that case (p. 701) remarked that if he thought he was prejudicing the question whether, if there was no fraud, there would be an action of relief by the one trustee against the others, it might have been different, and indicated that in his opinion there was such relief. The only case cited in support of the defence which was at all in point was *Merryweather* v. *Nixon*, April 13, 1799, 8 Term Reports, 186. This was very shortly reported, and doubts had been thrown on its soundness in subsequent English cases—*Adamson* v. *Jarvis*, February 5, 1827, 4 Bingham's Reports, remarks of Best, C.-J., pp. 72 and 73; *Betts* v. *Gibbins*, November 11, 1834, 2 A. & E., remarks of Lord Denman, p. 74; *Pearson* v. *Skelton*, 1836, 1 M. & W. 504; *Wooley* v. *Butte*, March 10, 1826, 2 Carrington & Payne, 417; Pollock on Torts (3rd ed.), p. 183.

Argued for the defender—The decision of the Lord Ordinary was right, and the legal arguments in his note were sound. The principle of the law was that it showed no favour to delinquents, and where a joint wrong was done it was no part of the duty of the Court to adjust the rights and interests of the wrongdoers among themselves. In short, the Court would not appraise a wrong. As soon as the damage for the wrong was paid, the obligation founded on the damage was extinguished—Erskine, iii. 1, 15. In all cases, quite irrespective of whether the act was criminal or negligent, no contribution could be claimed as between joint wrongdoers—Addison on Torts, p. 96; *Colbain* v. *Patmore*, 1834, 1 C. M. & R. 73, Lord Lyndhurst's opinion, 83; *Western Bank* v. *Bairds*, *supra*, 24 D. 859, Lord Justice-Clerk Inglis' opinion, 901. This was also the law in America—*Churchill* v. *Holt*, April 1881, 41 American Reports, 191. The obligation founded on the injury having been extinguished by the payment of the damages found due, the injured party was deprived of all his right to sue, and his assignation was valueless. The contention of the defender also found support in the civil law—Digest, 9, 2, 11, 2; Hunter's Roman Law, 707.

At advising—

LORD JUSTICE-CLERK—This is a somewhat peculiar case, the action being resisted on the ground that there is no right in law upon the part of a wrongdoer to recover any part of what he may be subjected to in the way of damages from a joint wrongdoer. Now there is no doubt whatever that in law if parties commit what is a delict, and one of those parties is sued by the injured party for the purpose of making him pay damages for the delict, he cannot sue the other wrongdoer for the purpose of recovering from him the whole or any part of what he had been compelled to pay. That is a well-established principle in law, but the question is, whether it is applicable to this case. The points which arise in this case for the purpose of considering whether it is applicable are (first) whether this is in its essence a delict which shall place the wrongdoers in the position of having no right in law to recover from one another. And the next question is, whether, supposing that it is a delict, the circumstances of this case, which are peculiar, prevent a party who holds an assignation to a decree from making good that

decree against another party against whom that decree has been given.

Now, as regards the first question, I am of opinion that this is not a case in which the doctrine "that there is no contribution between wrongdoers" applies. That rule is intended to apply only to cases in which the Court have to deal with persons whom it ought not to regard at all as in the transaction then before them. In such cases they refuse to give any help to the one party against the other. I do not think that there is any ground for holding, unless it be the old English case of *Merryweather* which was quoted to us, and which has been remarked upon frequently somewhat adversely—I say except that very old case the exact circumstances of which we do not know, and the report of which is extremely meagre—there is no distinct authority that the doctrine applies in such a case as this where the wrong done is not a personal wrong, not a wrong inflicted on an individual such as assault, or some legal wrong of that kind—but is a wrong done by neglect in regard to the strength of a rope or anything of that kind. But even supposing that the doctrine did apply in the case of supplying a defective rope which had not been examined properly, in this particular case the circumstances are quite different from those which ordinarily come before the Courts in such cases. In such cases as have occurred hitherto, the almost invariable state of facts has been that a pursuer having two or more wrongdoers against whom he could go jointly or severally or against anyone of whom he could go, selected one of these wrongdoers, brought him into Court, charged him with the wrong that had been done, succeeded in proving the wrong against him in the absence of the other parties, got decree against him, and exacted the amount of that decree from him. Now, in these circumstances if he were to go against the other party it would be necessary in such a case, if it were competent, that the pursuer should bring that other party into Court and prove the whole case over again, and prove that although he was convicted of the fault in the case which was brought against him he could prove conjoint fault upon the part of another party. But that is not the case which we have here at all. The case that we have here is this—that the two parties who were said to be liable have both been brought into Court simultaneously, have both had the opportunity of contesting the pursuer's case, have both had an opportunity of leading their own evidence in support of their own case, and have both failed before the jury, and the jury have found as matter of fact that both of them were in fault. Accordingly, the pursuers in this action have obtained an assignation to the decree, which bears upon the face of it to be a decree against the defender in this action.

I see no authority whatever—I would be surprised if there were any authority—for holding in these circumstances that the party in possession of an assignation to the decree is not entitled to make good that decree against the party who in that decree is found liable in a certain sum of money as due by him for a wrong proved against him. A remark was made in the course of the debate that the pursuers here were not in the position of an ordinary assignee, because they could only claim one half. That is perfectly true, because in the same decree upon which they are founding they are themselves found jointly and severally liable. Therefore in dealing with the other party that is found jointly and severally liable, it is quite plain that he could only claim the half. That is just one of the peculiar circumstances of the case which appear upon the face of the decree. It bars them from using their assignation to the full extent. Upon the whole matter I think that the Lord Ordinary has erred in this case, and that the pursuers are entitled to succeed to the extent of their claim made in the summons.

LORD YOUNG—I am of the same opinion. It is in my view sufficient for the decision of the case that we have here to deal with a decree of this Court which constitutes what may be called, and is familiarly called in England (and I think we are familiar enough with the expression now), a "judgment debt." In 1892 a Mrs Fowlis obtained two decrees against the pursuers and the defender of the present action. On the 17th March in that year she obtained a decree against them conjunctly and severally for the sum of £608, 2s. 9d. divided into certain portions to be distributed among Mrs Fowlis and her family; and on the 24th May she obtained another decree against them conjunctly and severally for the sum of £239, 4s. 1d.—the two decrees together (they are both in the same extract) amounting to £847, 6s. 10d. Now upon the face of these decrees the parties to the transaction were liable to Mrs Fowlis conjunctly and severally for £847, 6s. 10d. I do not think we have any occasion to go beyond the judgment of the Court and the decerniture of the Court, which is that these two are liable conjunctly and severally to her in the sum of £847, 6s. 10d. It is as absolute a debt as if it had been constituted by bond—indeed it is possibly more pressing than a bond, for there is nothing more energetic than a judgment debt. The Court has pronounced the two parties on the one side to be indebted conjunctly and severally to the other in £847, 6s. 10d. Now how was Mrs Fowlis to deal with this? I put the question more than once, and the answer given quite accurately was—she might exact payment from either of the parties, either of those who were found by decree to be conjunctly and severally liable to her in that sum, she might exact the whole from either, or she might exact the half, or any portion she pleased from each. There is nothing to control her at all. She exacted the whole from one of them, viz., the pursuers in the present action, so that the pursuers paid her the conjunct and several debt owing to her by themselves and the present defender. They now seek to make the present defender pay his half.

I should say that it was a familiar general rule of the common law that where two parties were liable conjunctly and severally for the same debt, and have been found to be so by decree of this Court, that the rules of equity—which are the rules of law—require that each shall pay his share—that is, one-half, unless there be some reason for another division; and no reason for any other division occurs here. We cannot go beyond the decree which makes this a joint debt, and declares these parties to be joint debtors. Accordingly, equal division is the law and equity of the matter in the absence of something conclusive to the contrary.

But the law, as contended for to us, was that it was in Mrs Fowlis' power, without injury to either, to select either as the party liable for the whole, and that if she exacted the whole from one, that had the effect of liberating the other. I ventured to point out that if that was her absolute right, and she could elect to make either liable with the result of freeing the other at her absolute will and pleasure, there was nothing in the world to prevent her making the most of it, and addressing her communications to each saying that that was her position, and that she would be glad to receive a communication from them informing her what each would give to induce her to put the whole liability upon the other. There is nothing to prevent that if that was the law. It is absolutely in her power, according to that view of the law, to exact from one with the effect of liberating the other, and there is no duty upon her to select the one more than the other, for each is liable for the whole, and each is so liable for the whole upon the same grounds—exactly the same grounds—that is, upon the same decree. Therefore she would be doing no wrong to anybody by making the most of her highly favourable position, in that view of the law, and saying to each—"If you will give me so much money I will exact the whole debt from the other and free you, so that you will have nothing to pay except what you agree to give me for making my choice of the other." I cannot conceive that any rule of our law could lead to that result. If this which is contended for by the defender here be a rule of our law, that is the result to which it would be lead. I pointed out in the course of the argument that the decree in her hands was an asset of hers. It so happened that she was a mother who was suing for behoof of herself and her children; but the holder of the decree might have been a man engaged in trade or business, and I pointed out that such a decree in her hands or in the hands of a trader in business would have been an asset passing to his representatives on his death as part of his estate, and passing to the trustee for his creditors in the event of his bankruptcy; and the doctrine would be the same. A trustee for creditors may just choose the debtor he pleases, and may liberate the other upon such terms as he pleases. Now, I think the holder of the decree for the creditors is entitled to dispose of the decree as he pleases. He may expose it to sale and sell it, and he may sell it to the extent of one-half to one party and to the extent of the other half to another party, and the assignee would be entitled to use it as a decree--a judgment debt—for the amount assigned to him as the purchaser.

Now, I think Mrs Fowlis would have acted with perfect propriety here if she had put into words—"I will take payment of your half and assign you to the other half for which I have a claim against the other party if you will take the position of paying the other party's half; you are liable for it at anyrate, but pay your half and I will grant you a discharge for that half, and I will assign my decree to the extent of the other half so that you may recover it, as I might have done without that assignation, against the other party." I think that was the result of what was done here. When the present pursuers paid the whole of the debt, I think that the legitimate view is that to the extent of one-half they were paying their own share of it, and that to the extent of the other half for which they were liable to the holder of the decree they were paying the other party's share of it; and that it was a fair and equitable proceeding, so fair and equitable that I think that the law would have enforced it—and that upon that payment they got an assignation to the decree to the extent of the other half. The other party is suffering no injustice whatever. I cannot distinguish between this decree and any other decree for a sum of money specified as a sum for which two parties were found conjunctly and severally liable.

The only case to which we were referred about contribution among wrongdoers or delinquents which was raised upon what may be called a judgment debt, was the case of *Merryweather* in last century, but of which we have a very unsatisfactory report. We do not know what the ground of action there was, and we do not know what form the judgment was in; but there is no case in Scotland, and that is the only thing approaching to an authority upon the subject in England. There is no other case of a party paying the whole of a judgment debt being denied relief against another party. I am quite disposed to hold that where you have that you cannot go beyond the decree, and that if one of the joint debtors pays the whole, he has an equitable claim for an assignation of the debt against the other party to the effect of justice being done.

But I also agree with what your Lordship in the chair has stated, that if we could get beyond the decree and inquire into the grounds upon which the Court pronounced it—that is, the issue which was tried before the jury and resulted in the verdict which led to the decree—if we could inquire into all that and found, as the result of our inquiry, the facts as they are set forth in the record here; I agree with your Lordship that, even if there had been no judgment debt—no decree—this

did not present a case of delict in which the Court would decline to interfere in order to do justice between delinquents. It is a misuse of language as it is commonly employed to speak of wrongdoing or delinquency as applicable to such a matter as the case in which the decree was pronounced presented. No doubt technically we have actions divided into actions upon contract and actions upon delict or *quasi*-delict, but that does not mean that the actions which are founded upon delict or *quasi*-delict are rested upon some conduct which is unconscionable, or of which a party need be ashamed. Yet it is in cases of conduct which is unconscionable, and of which the parties must be ashamed if they are right minded at all—in short evil-doing—crime—that the Court will decline to interpose with its aid to do justice among wrongdoers. The rule has never been applied—indeed, there has been distinct refusal to apply it in the case of trustees who are liable because of negligence for the loss of the trust-estate, or to the tutors and curators who are liable because of negligence for the loss of the pupil's estate or the diminution of it; and yet these actions in which such liability would arise are not founded upon contract, and may very well be represented to be founded upon delict or *quasi*-delict. I do not desire to throw any doubt upon the rule according to which the Court refuses its aid to evildoers—to do justice between evildoers themselves. But it is very easy to put gross cases in which no doubt or difficulty could arise as to the application of that rule which governs the conduct of the Court. If you have two or more knaves conspiring together to cheat and plunder honest people, and if recourse is had against one of them, and he is made responsible for the conspired knavery of which he was one of the plunderers—one of the wrongdoers—he would not be listened to in this Court if he brought an action against the other and said, "Well I have been made to pay for our joint knavery; and as you were as knavish as I was—indeed we conspired together to plunder the man—but you have your share of the plunder, and I have had to make the whole good to him, and it is only just—justice among thieves—that you should bear your share"—the Court would decline to interfere there, upon that rule that to adjust accounts among knaves is not the business of the Court, and they would not entertain such actions; and it may be also the same rule would apply in cases of violence. I put the case of a man who is assaulted by two people, and he recovers damages against one of them, and the one against whom he recovers brings an action against the man who was engaged with him in committing the joint assault, and says—"You hit him and bruised him more than I did, and I have been made to pay for the whole; it is fair you should contribute your share;" the Court would refuse there again to interfere or to entertain an action in which they were asked to say which of these two had damaged the man most. That is another gross case for the application of the rule; and, as in other departments, you might get down to cases where there will be a difficulty as to whether the rule is applicable or not, for the Court should refuse to allow its time to be occupied in investigating cases of quarrelling between evildoers. But I am clearly of opinion that a case such as that which was presented in the action in which the decree before us was pronounced is not within the range or region of the rule at all.

Upon all these grounds, therefore, I am of opinion that the judgment of the Lord Ordinary is erroneous and should be reversed. I do not think we have any occasion to consider the judgment which was pronounced in the case of the *Liquidators of the Western Bank*, and the opinion of the late Lord President delivered in that case. Nothing resembling the same question arises here, and therefore we do not need to consider it; but I should like to say this, that I am not at present prepared to concur in all the language which was used by the Lord President in that case. I think that many cases might arise in which directors, like trustees, or bodies of guardians, or managers, may be made liable by a sufferer for the loss of funds through their negligence, but nevertheless they would have a very fair claim to ask the interference of the Court to make others share in making up a loss to which they had equally contributed by their oversight or omission. But whether in a case of that kind, the rule which I have referred to about the Court refusing to interfere among wrongdoers would be applicable or not is a question which might arise; but I think it very plain that many cases might occur in which there would be no room for the application of that rule, even in the case of bank directors who are made responsible for losses which had occurred from their failure to take due care and charge of the bank's interest, and of the interest of the shareholders of the bank, by carefully and anxiously attending to their duties.

LORD RUTHERFURD CLARK—I am of opinion that the pursuers are entitled to our judgment. They have right to enforce the decree to which they have been assigned. By the decree the persons against whom it has been pronounced are made jointly and severally liable for the whole of the debt. They are made jointly liable in order to express their liability *inter se;* they are made liable severally for the benefit of the creditor only, but not so as to produce any inequality between themselves. On all other matters I do not think it right to give any opinion.

LORD TRAYNER—I agree with the judgment which your Lordships propose to pronounce. The case presents a question of some novelty. As far as the Scotch books—decisions—are concerned, it is a case of first impression; so far as the English books are concerned, the only case which approaches it is the case of *Merry-*

weather. I agree with the observation which your Lordship has made upon that case, that we cannot proceed upon it with any confidence, because the report is so meagre. We do not know the facts upon which the judgment proceeded, nor any of the special features of the case which would enable us to say whether it can be regarded as an authority in the present case. But I am of opinion that the pursuers here are entitled to our judgment, because they are the holders of a decree against the present defenders for a sum of money. The decree which the pursuers seek to enforce constitutes a debt against the defender which anyone in right of the decree is entitled to claim. If we go beyond the decree, I am also of opinion that this is not a case at all for the application of the rule that there is no contribution among wrongdoers. The grounds of my view have been so fully stated by Lord Young that I think it quite unnecessary to repeat them.

The Court pronounced the following interlocutor:—

"Recal the interlocutor reclaimed against, ordain the defender to make payment to the pursuers of the sum of £423, 13s. 5d. sterling, with interest at the rate of 5 per centum per annum from 24th June 1892 till paid, and decern."

Counsel for the Pursuers — D.-F. Sir Charles Pearson, Q.C.—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Defenders — Shaw — Wilson. Agents—Macpherson & Mackay, W.S.

Wednesday, January 25.

FIRST DIVISION.

[Sheriff of Aberdeen.

MITCHELL *v.* MAGISTRATES OF ABERDEEN.

Reparation — Public Officer—Exercise of Statutory Powers—Public Health Act 1867 (30 *and* 31 *Vict. c.* 101), *secs.* 42 *and* 118.

Section 42 of the Public Health Act 1867 enacts that a magistrate may, on the application of the local authority, "by order, on a certificate signed by a legally qualified medical practitioner," direct the removal to the hospital of any sick person suffering from an infectious disorder, who is without proper accommodation. Section 118 provides that the local authority "shall not be liable in damages for any irregularity committed by their officers in the execution of this Act."

Held that where a sanitary officer removed a sick person without a magistrate's warrant, he was not acting in the execution of the Act, and therefore that the local authority were not protected by section 118 from responsibility for the consequences of such removal.

This was an action raised in the Sheriff Court at Aberdeen by Alexander Mitchell, labourer, against the Provost, Magistrates, and Town Council of Aberdeen, as the Local Authority of the burgh under the Public Health Act, and against Peter Gorman, the sanitary officer, for payment of £500 as damages and *solatium* for the death of the pursuer's son James Main Mitchell.

The pursuer made the following averments —"(Cond. 2) On Tuesday 19th July 1892 James Main Mitchell, aged fourteen months, only child of the pursuer and of Mrs Mary Ann Ritchie or Mitchell, his wife, was seized with an attack of measles. Dr Skene of Cove, who had been attending the child for irritation of the stomach, was at once sent for, and after prescribing for it, he reported the case to the local authority in terms of the Infectious Diseases Notification Act 1889. In informing the said Mrs Mary Ann Ritchie or Mitchell that he was to report the case, he told her that the child was not in a fit condition to be removed to the City Hospital, and in the event of the defenders' officers proposing to remove it, this fact should be pointed out to them. (Cond. 3) On or about 20th July 1892 the said Peter Gorman visited the pursuer's house, and stated to the pursuer's said wife that he had come to remove the child to the City Hospital. The pursuer's said wife objected to this step, and informed them that in the opinion of Dr Skene the child was suffering from irritation of the stomach from teething, and from measles complicated with congestion of the lungs, and that it could not safely be removed. She further pointed out that it was being sufficiently attended to, it being her only child. She was quite able to isolate it, and had nothing else to do than to devote herself to it. . . . (Cond. 4) On 21st July 1892 the said Peter Gorman returned to the pursuer's house with a conveyance, and notwithstanding the opposition and protests of the pursuer's said wife, he lifted the child from its cradle, placed it in the conveyance, and removed it to the City Hospital. . . . It died on the afternoon of the following day. . . . (Cond. 5) The sanitary officers' instructions from the defenders, through the medical officer of health for the city, and from the sanitary inspector (who exercise an unsatisfactory dual control in these matters, neither of them being responsible to the other), are to remove all cases of infectious disease occurring in any house with less than three rooms, without exception or distinction and without a warrant, and these improper and illegal instructions are carried out by unskilled and irresponsible officials in a correspondingly improper and illegal way, backed by representations that they are armed with legal authority in doing so. (Cond. 6) The removal of the said James Main Mitchell was effected by the defenders in the illegal manner before described. The said James Main Mitchell was at the time of his removal in the condition set forth in condescendence 3, as represented by the pursuer's wife to the defender Gorman, and his death was due to his removal by the