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

defenders at a time when he was not in a fit state to be removed. Said removal was reckless, uncalled for, wrongful, and illegal. It was reckless, in respect that the defender Peter Gorman was duly and specially warned that in Dr Skene's opinion the removal could not be effected with safety to the child's life, and that he proceeded to effect it without taking the obvious precaution of consulting with Dr Skene on the subject, and without having the child examined by the medical officer of health or by any qualified medical man. It was uncalled for, in respect that there was no allegation that the child was without proper lodging or accommodation, or that its parents had not the means of providing the necessary attendance and securing its isolation; and in point of fact the child was sufficiently accommodated, and it was attended to by its mother and by a skilled and competent medical man; the pursuer having no other family and no other person living in the house with him, could quite well have secured its isolation under the directions of Dr Skene. The removal of said child was illegal, and the defenders were not acting in the *bona fide* execution of the said Act in removing the said child. . . . Such removal was carried out without the order or warrant of the sheriff or of any magistrate or justice of the peace. The defender Gorman in acting as he did, as above condescended upon, was acting in conformity to orders received from the other defenders, and he knew that the said orders were wrongful and illegal, as they in fact and in law were. The other defenders in giving the said orders were not acting in the *bona fide* execution of the said Act."

The defenders admitted that the pursuer's child had been reported by Dr Skene as suffering from measles, that it had been removed by Gorman without a warrant, and had died in the hospital, but denied the rest of the pursuer's averments. They also founded on section 118 of the Public Health Act, and averred "that the proceedings of the officer were carried through *bonâ fide* for the purpose of executing the Act."

The defenders pleaded that the action was irrelevant in the case of both the defenders.

The 42nd section of the Public Health Act enacts that "Where a hospital or place for the reception of the sick is provided or exists within the district of a local authority, the sheriff or any magistrate, or justice, may, on the application of the local authority, with the consent of the superintending body of such hospital or place, by order on a certificate signed by a legally qualified medical practitioner, direct the removal to such hospital or place for the reception of the sick, at the cost of the local authority, of any person suffering from any dangerous, contagious, or infectious disorder, and being without proper lodging or accommodation, or lodged in a room occupied by others besides those in attendance on such person, or being on board any ship or vessel, or may direct the removal from the room occupied by such person of all others not in attendance on him, the local authority providing suitable accommodation for such other persons."

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" . . . .

On 23rd November 1892 the Sheriff-Substitute (ROBERTSON) repelled the first plea-in-law for the defenders, allowed both parties a proof of their averments, and the pursuer a conjunct probation.

"*Note.*— . . . The defenders plead in answer (1) that the action is irrelevant so far as the defenders the Town Council are concerned, in respect of the statutory provision contained in section 118 of the Public Health Act, which provides that 'the local authority and the board shall not be liable in damages for any irregularity committed by their officer in the execution of this Act.' The construction of this section has been the subject of recent judicial decision—*Edwards* v. *Parochial Board of Kinloss*, June 2, 1891, 18 R. 867—and the result of that case seems to me to be that where the allegation is that a local authority had done something which could be held to be outside the Act altogether, the 118th section would not protect them or bar action against them. In the present case the local authority do not repudiate the actings of their officer, the other defender, and must be held to have adopted them, and the question seems to be, whether the averments of the pursuer amount to this, that the defenders the local authority, or those for whom they are responsible, acted outwith the statute altogether, or that merely an irregularity was committed by one of their officers. If the averments of the pursuer are wholly true, it seems to me impossible to hold that merely an irregularity was committed. Gorman did what he had absolutely no right to do; he moved this child against the protest of its mother without the judicial authority or medical certificate which are declared by the statute to be necessary, and without which he, it seems to me, had no right whatever to put in force the provisions of the Act. If he has committed an absolutely illegal act, whether in the so-called execution of the statute or not, I cannot doubt that defenders will be liable. It may be that when the facts are elicited, it will appear that the defenders the local authority are protected by this 118th section, but on the pursuer's averments I cannot hold that action is barred against them." . . .

The pursuer appealed for jury trial, and the defenders having stated that they objected to the relevancy of the action, the case was sent to the Summar Roll.

Argued for the defenders—The action was irrelevant as against the local authority, for section 118 of the Public Health Act protected them against liability in respect of irregularities committed by their officers in the execution of the Act. That section might fairly be held to apply to such a case as the present, even though specific instructions had been given by the local

authority for the doing of the act complained of, for the officer was acting in execution of his duty under the Act. The decisions upon similar section in other Acts supported this contention—*Ferguson* v. *M'Ewen*, February 7, 1852, 14 D. 457; *Melvin* v. *Wilson*, May 22, 1847, 9 D. 1129; *M'Laren* v. *Steele*, November 13, 1857, 20 D. 48.

Argued for the pursuer—The officer's action was on the pursuer's averments entirely outwith the powers conferred on a local authority by the Act, and the case was therefore relevant against both defenders—*Edwards* v. *Parochial Board of Kinloss*, June 2, 1891, 18 R. 867; *Hastings* v. *Henderson*, July 15, 1810, 17 R. 1130; *Murray* v. *Allan*, November 29, 1872, 11 Macph. 147; *Cann* v. *Clipperton*, 1839, 10 Ad. & Ellis 582.

At advising—

LORD PRESIDENT—In my opinion this case should go for trial before a jury. The question which we have to determine arises on the defence stated by the local authority that they are entitled to remove a person suffering from an infectious disorder to the hospital without applying for a warrant to the Sheriff, or any magistrate or justice. The proper way to consider the question is to take the case of actings by the local authority *in invitum*, or against a person not consenting, and this is the averment against them. Of course if they first obtain the person's consent, then they are not under the statute, or at all events are justified altogether apart from the statute. Here the local authority, by denying the relevancy of a record which alleges that the removal took place *in invitum*, boldly maintain that they are entitled to effect the removal without having either obtained the consent of the patient or the warrant of a magistrate. That appears to me to be quite an untenable proposition. This is a very strong power which the Public Health Act, by section 42, gives to the local authority, but then its exercise is carefully fenced. The local authority are not thereby empowered to enter by their officers the private house of any person, and, will-he nill-he, at their own hand remove his sick child to their hospital. They may do so only if they have obtained the warrant of a magistrate, following on a certificate signed by a legally qualified medical practitioner. Notwithstanding their disregard of those provisions this local authority say that they were acting under and in the *bona fide* execution of the Act, and therefore that they are only at the most guilty of an irregularity, against the consequences of which they are protected by section 18.

The cases under the Poor Law Act referred to by the defender's counsel seem to me to support his argument to no extent at all. I pass by the questionable assumption that this is rightly described as an irregularity, for there is another very palpable distinction. The protecting section relied on here declares that the local authority "shall not be liable in damages for any irregularity committed by their officers in the execution of this Act"—that is to say, the section, so far as it goes, cuts off all grounds of action against the local authority for legal wrongs committed by their officers. But then when we turn to those cases under the Poor Law Act we find that what the Act of Parliament did was not to cut off the right of action in the privileged class of cases, but to send such actions to a particular Court within a particular time; and in *M'Laren* v. *Steele*, 20 D. 48, Lord Wood was careful to say, "These provisions do not deprive any party who may be injured by those acting in the execution of the statute, of his redress, but point out the way in which it must be sought;" and later, "We are not to determine here, in the first instance, that any acts for which damages are sought were done under the authority of the Act." It seems to me, therefore, that the cases referred to have no application. I am of opinion, therefore, that the Sheriff-Substitute has done right in repelling the first plea-in-law for the defenders, which is a plea to the relevancy.

I think, further, that nothing that Mr Salvesen has said really affords a substantial ground for refusing what is the *prima facie* right of the pursuer to take a case of this kind to a jury.

LORD M'LAREN—It seems to me that the only case which the Court or the jury would have to consider in this case, apart from those facts which are really common ground, would be whether the child was removed to the hospital with or without the consent of the parents, because I cannot for a moment entertain the notion that the sanitary authority can disregard all the provisions of the statute which arms them with authority, and then plead the statute as protecting them in what they have done. The cases cited to us appear to me to be very distinct in principle from a case arising under the clause which is now founded upon by the defenders, for the reasons stated by Lord Wood in the passage referred to by your Lordship. Where a statute limits the right of action by providing that it must be brought within a particular time or in a particular Court, that amounts to a variation of the jurisdiction of the Courts of the country, and raises nothing but a question of jurisdiction, and in such cases it is in accordance with the mode of dealing with all questions of jurisdiction that the Court should look at the averments of both parties in order to find out whether the point raised between them is a point of a description which the statute has dealt with in that special manner. In such a case, if the defender pleaded the statute as justifying the act complained of, then clearly there is a point raised under the statute, and then if the clause is properly framed, it would follow that the case must go to the special jurisdiction as being a wrong, or an act alleged by one party to be a wrong, but alleged by the other party to have been done in the execution of his statutory duty. But here there is no question of jurisdiction, but an extinction of

all claims of damage in certain cases. The question to be tried is, whether the defender is within the exception, and it is quite impossible that we can, antecedently to all inquiry, prejudge the question and give the defenders the benefit of the statute if the circumstances are as alleged by the pursuer.

I agree also that the case, being an action for *solatium* for the loss of a relative, ought to be sent to a jury, because it is our practice to send all cases of that description to the jury court.

LORD KINNEAR—I quite agree that if the averments of the pursuer are proved, the defenders were not acting within the statute, and are therefore not entitled to the privilege of the exception which it provides for them.

I also agree that the pursuer is entitled to have this case tried by a jury.

LORD ADAM was absent.

The following issue was thereafter approved for trial of the cause without objection on the part of the defenders:—"Whether, on or about the 21st day of July 1892, the defenders, or either and which of them, wrongfully removed James Main Mitchell, the pursuer's only child, now deceased, from the pursuer's dwelling-house in Torry aforesaid, to the loss, injury, and damage of the pursuer?"

Counsel for the Pursuer—Orr—A. S. D. Thomson. Agents—W. & J. L. Officer, W.S.

Counsel for the Defenders—Lord Advocate Balfour, Q.C.—Salvesen—Broun. Agents—T. J. Gordon & Falconer, W.S.

Saturday, December 17.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

HERITABLE SECURITIES INVESTMENT ASSOCIATION, LIMITED *v.* MILLER'S TRUSTEES AND OTHERS.

Trustees — Personal Liability — Improper Payments — Payments by Trustees to Beneficiaries while Debts Unpaid, in bona fide Belief that Debts amply Provided for—Interest.

The trust-estate left by a testator consisted almost entirely of three heritable properties, which were burdened with debt to a large amount, due under personal bonds granted by the testator to an investment association. Part of this debt was repayable by instalments, the last of which was not due until 1889. At the date of the testator's death the security for the debt was believed to be ample, both by the trustees and by the heritable creditor, and in 1877 and 1878 the creditor allowed two of the properties held by him in security to be sold, and part of the price in each case to be paid to the trustees. The sum so received by the trustees in 1878 was handed over by them to a son of the testator, who was at the time largely indebted to the trust-estate for the price of heritable subjects taken over by him in terms of his father's settlement. The creditor was aware that this payment was being made, but not of the state of accounts between the parties. In 1885 the creditor called upon the trustees for the first time to pay up the debt. Prior to this date the trustees had from time to time paid various sums to the beneficiaries under the testator's settlement. The trust-estate having proved insufficient to satisfy the creditor's claim, *held* (*rev.* decision of Lord Wellwood) (1) that the payment made to the testator's son, he being a debtor of the trust-estate, was an improper payment, and that the trustees having failed to prove that the creditor had consented thereto, must replace the sum so paid away; (2) (*diss.* Lord M'Laren) that the trustees must replace the sums paid to the beneficiaries, it being no defence for them to say that when these payments were made they had good reason to believe that the heritable debt was amply secured and provided for; and (3) that the trustees, having not made nor attempted to make any profit for themselves, were not liable in a higher rate of interest on the sums improperly paid away by them than 3 per cent., that being the average rate of trust interest.

This action was raised by the Heritable Securities Investment Association, Limited, against William Miller and others, the surviving and acting trustees under the trust-disposition and settlement, of the deceased John Stevenson Miller, as such trustees and as individuals, and against the trustees and executors of certain trustees of the said John S. Miller who were deceased, for payment of the sum of £40,373, 8s. 2d., being the balance of principal and interest due to the pursuers under bonds granted by the deceased John S. Miller to them, or at least of such a sum as should be equal to the amount or value of the trust-estate wrongfully paid or conveyed by the defenders to the beneficiaries under John S. Miller's settlement, or to other parties. The pursuers concluded in any event against the surviving trustees, as trustees, for payment of the foresaid sum of £40,373, 8s. 2d.

The pursuers averred that the defenders had improperly paid away a sum of £25,035 in 1877, and a sum of £2163 in 1878, to the testator's son William Miller; that from time to time they had improperly paid away various sums, amounting with interest to £11,677, 14s. 9d., to the beneficiaries under the testator's settlement, without making any provision for payment of the debt due to the pursuers, and that they had also lost part of the trust-estate by culpably neglecting to exact from the