issue sent to them—Our opinion is that the total amount of damages in this case is £225. We are asked to apportion, and we say, as we are asked to say, that the Home Trade Carrying Company should pay one-third of the £225, and the Trustees of Ayr Harbour should pay the other two-thirds. That was the verdict, and if such an issue is of consent of all parties sent to a jury why should it not be answered? They have answered it, and therefore it appears to me that the question of the competency at the time of fixing the terms of the issue does not arise—whether or not it was competent to send the issue in these terms to the jury, or whether, looking to the form of the action, if the issue had not been put in that way, whether or not—seeing that there are two actions against two separate companies—it would have been competent for the jury to apportion the damages. I do not say that it would, but we have no such question before us here at all. In this case we have an issue sent to the jury in which they are invited to give a division, and that being so, the verdict is in terms of the issue.

LORD M'LAREN—I agree with Lord Adam that it is necessary to distinguish between the claims at the instance of the mother of the deceased and the widow of the deceased. In the action at the instance of the mother the conclusions are that the two parties said to be in fault are to pay damages jointly and severally or severally or otherwise. Now I do not know whether the point strictly arises, but, to explain my view, I may say that under such a conclusion the pursuer has an election either to treat the claim as a claim affecting both sets of defenders or to treat the case as a case in which separate claims might be enforced against the respective defenders. But when this issue came to be adjusted I think it must be taken that the pursuer exercised her election to treat this liability as a conjoint and several liability, because she only claims one sum against the two parties or against one or other of them. However, as the jury in apportioning the sum have done so conditionally on its being competent, I think that is equivalent to a reference to the Court to say whether that condition is satisfied, and accordingly I think we may disregard the apportionment.

In the other claim at the instance of the widow of the deceased there were two conclusions, but in each of them a sum of money is claimed against each party alone, and I think no other issue could very well be taken after the actions were conjoined than an issue in which separate sums were claimed from each party, there being no conclusion for joint liability. The proper way of working that out was to have a schedule of damages with separate claims against several defenders. In that case, accordingly, I think the jury were quite right in distinguishing the liability of each of the parties. They were invited to do so by the form of the issue and I doubt whether it would have been a good verdict unless separate sums were awarded. I am quite satisfied that the verdict is good as it stands and that it ought to be applied.

LORD KINNEAR, LORD PEARSON, and the LORD PRESIDENT concurred.

The Court pronounced the following interlocutor:—

> "The Lords, with the addition of Lord Pearson, who presided at the trial, Refuse the motion for a rule to show cause why the verdict should not be set aside and a new trial granted: And having heard counsel for the parties (1) in the action at the instance of Mrs Sarah M'Phail or M'Innes, apply the verdict found by the jury on the issue in this cause, and in respect thereof decern against both sets of defenders jointly and severally for payment to the pursuers of the sum of £110 sterling; . . . and (2) in the action at the instance of Jessie Ford, Helen M'Innes' executrix, apply the verdict found by the jury on the issue in this cause, and in respect thereof decern against the defenders the Trustees of the Ayr Harbour for payment to the pursuer of the sum of £150 sterling, being two-thirds of the sum of £225, and also decern against the defenders the Home Trade Steam Carrying Company, Limited, for payment to the pursuer of the sum of £75 sterling, being one-third of the said sum of £225."

Counsel for the Pursuer—Salvesen, K.C. —A. S. D. Thomson. Agents—Whigham & M'Leod, S.S.C.

Counsel for the Defenders, the Ayr Harbour Trustees—Hunter. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for the Defenders, the Home Trade Steam Carrying Company, Limited—Guthrie, K.C.—Spens. Agents—Boyd, Jameson, & Young, W.S.

Tuesday, October 21.

SECOND DIVISION.

[Sheriff Court at Aberdeen.

C. DAVIDSON & SONS, LIMITED *v.* THE STAR FIRE AND BURGLARY INSURANCE COMPANY, LIMITED.

(*Ante*, July 16, 1902, vol. xxxix. p. 768.)

Contract—Insurance—Fire Insurance—Agreement to Insure—Mutual Company—Policy Containing Condition that Insurers should become Members of the Insurance Company—Condition not Disclosed in Preliminary Negotiations—Consensus in idem placitum.

An insurance company offered to accept the fire risk of a firm of manufacturers to the extent of £5000 at the

same rates as they were paying other insurance offices. The manufacturers accepted this offer. The insurance company thereupon sent a policy in their favour which proceeded upon the preamble that they had applied to be and had been admitted a member of the insurance company. The manufacturers had not been previously informed and were not previously aware that insurers with the company had to become members.

Held that the manufacturers were entitled to refuse the policy tendered them.

This case is reported *ante ut supra.*

By letters dated 1st and 6th December 1900 the Star Fire and Burglary Insurance Company, Limited, carrying on business in Glasgow as fire and burglary insurers offered to accept the fire risk of C. Davidson & Sons, Limited, Mugiemoss Paperworks, Aberdeenshire, to the extent of £5000 at the same rate as they were paying to other offices.

On 10th December J. B. Keith, as insurance agent for C. Davidson & Sons, wrote informing the Insurance Company that he would be glad to give them the business.

On 22nd December the Insurance Company sent Mr Keith a fire policy for £5000, trusting it would be found in order, and asking payment of the premium of £43, 1s. 1d. This policy proceeded on the narrative that C. Davidson & Sons had, "by a proposal and declaration dated the 10th day of December in the year of our Lord 1900, and which is the basis of this contract, applied to be admitted a member of the Star Fire and Burglary Insurance Company, Limited, by effecting a policy for insuring against loss or damage by fire the property hereinafter described in the schedule hereto for an amount or amounts not exceeding the sum or sums in the same schedule, and the said Company has accepted the proposal of the member;" and stated that the company thereby agreed "with the insured (but subject to the conditions printed on the back" of the policy "and to the memorandum and articles of association of the Company which are to be taken as part of this policy)" to insure the property therein described against loss by fire thereof, or any part, from 25th December 1900 to 25th December 1901 inclusive, to an extent not exceeding £5000. Under the memorandum and articles of association there was mposed on each member of the Company a liability to contribute to the assets of the Company in the event of its being wound up during the time that he was a member or within one year afterwards, for payment of the debts and liabilities of the Company contracted before the time at which he ceased to be a member, and of the costs, charges, and expenses of winding-up the Company, and for the adjustment of the rights of the contributories amongst themselves, such amount as might be required not exceeding £1.

In the correspondence which preceded the sending of the policy no indication was given that persons insuring with the pursuers had according to their rules to become members of the company, and the defenders were not aware of this until they received the policy. They had not made themselves acquainted with the form of policy issued by the pursuers' company.

On 27th December Mr Keith returned the policy to the Insurance Company, having failed to get his principals to take it up.

Thereafter the Insurance Company raised an action in the Sheriff Court at Aberdeen against C. Davidson & Sons, Limited, for £43, 1s. 1d. as the premium under the policy.

C. Davidson & Sons lodged defences, and pleaded—"(1) The terms and conditions of said policy of assurance not being in accordance with the offer by the pursuers and the acceptance thereof by the defenders, the defenders are not bound to accept said policy or pay the premium therefor, and should be assoilzied with expenses. (2) There being no *consensus in idem placitum*, the pursuers are not entitled to insist on performance by the defenders of the alleged contact founded on."

On 2nd August 1901 the Sheriff-Substitute (ROBERTSON) repelled the defences as irrelevant and decerned against the defenders as prayed for. On appeal the Sheriff (CRAWFORD), on 23rd December 1901 affirmed the interlocutor appealed against.

The defenders appealed. Their argument sufficiently appears from the opinions of the Judges *infra.*

The pursuers and respondents maintained that on the authority of the *General Accident Insurance Corporation* v. *Cronk*, January 31, 1901, 17 T.L.R. 233, there was a concluded bargain before the acceptance of the policy, and that the plea of no *consensus in idem* was irrelevant, as it was the business of the defenders to acquaint themselves with the constitution of the company before entering into a contract with it, and they must be held to have applied for a policy in the form usually issued by the Company.

LORD JUSTICE-CLERK—Were it not for the decisions of the two Sheriffs I should have thought this a very clear case. The pursuers offered to accept a fire risk for £5000 over buildings belonging to the defenders, and the defenders intimated through an agent that they were willing to give them the insurance. But on receiving from the pursuers a policy embodying the arrangement, the defenders found to their astonishment that the policy which they had asked for was made out in their favour on condition of their becoming members of a limited liability company. They were under no obligation to become members of a limited liability company, and were in my opinion entitled to declare the whole matter to be off. There was here no *consensus in idem placitum*, and I think the judgments of the two Sheriffs should be recalled and the defence sustained.

LORD YOUNG—I am of the same opinion. There is no contract here except what is

to be derived from the letters. If it had been the case that the defenders knew that the pursuers' company was a mutual company I think the contract would have been established; but the case is presented by both Sheriffs on the footing that the defenders were under a complete misapprehension on that subject, and did not understand that it was a mutual company. The moment they discovered that they returned the policy, and that without any detriment to the pursuers. That being so, I hold, on the authority of many cases, that they were entitled to be off and not bound to go on with the contract on that footing.

LORD TRAYNER—I am of the same opinion. The defenders agreed to enter into a contract of insurance with the pursuers—nothing more. But the policy which the pursuers tendered contained a contract of insurance *plus* a contract of copartnery, which was a thing the defenders never contemplated and never agreed to. I think the defenders cannot be made partners of the pursuers' company against their wish, or without having given their deliberate consent to such a contract. Never having consented to become the pursuers' partner, they were entitled to refuse the policy tendered to them, and are consequently entitled now to be assoilzied from the pursuers' claim.

LORD MONCREIFF was absent.

The Court recalled the interlocutors appealed against, and assoilzied the defenders.

Counsel for the Pursuers and Respondents—Salvesen, K.C.—Graham Stewart. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders and Appellants—Campbell, K.C.—Macfarlane. Agents—Tawse & Bonar, W.S.

HIGH COURT OF JUSTICIARY.

Monday, October 27.

(Before the Lord Justice-Clerk, Lord Kyllachy, and Lord Low.)

BROWN *v.* EDINBURGH HOUSE PROPRIETORS COMPANY, LIMITED.

Justiciary Cases — Small-Debt Appeal — Refusal to Hear Evidence—Evidence in Support of Defences which were Held Irrelevant or Incompetent — Small-Debt Act 1837 (1 *Vict. c.* 37), *sec.* 11—*Sheriff—Small-Debt Court.*

In an action for rent brought in the Small-Debt Court the defence stated was that the defender had certain deductions or counter-claims valid against the pursuers' claim for rent. The pursuers and defender had witnesses in Court to prove their respective allegations. The Sheriff-Substitute held that the defences stated by the defender were either irrelevant or incompetent under section 11 of the Small-Debt Act 1837, because a copy of the counter-claims had not been served on the pursuer, and on these grounds he refused to hear evidence, and granted decree.

In an appeal, *held* (1) that the decision of the Sheriff-Substitute that the defences were irrelevant or incompetent was a decision in law and therefore not subject to appeal; and (2) that, the evidence which it was proposed to lead being in the judgment of the Sheriff-Substitute irrelevant or incompetent, he was not bound to hear it, and appeal *dismissed.*

Renfrew v. *Hall*, December 21, 1901, 4 F. (J.C.) 27, 39 S.L.R. 280, *distinguished.*

On 22nd May 1902 the Edinburgh House Proprietors Company, Limited, brought an action in the Small-Debt Court at Edinburgh against James William Brown, writer, 15 Mertoun Place, Edinburgh, for payment of £8, 17s. as the rent of a house at Temple Park Crescent, Edinburgh, for the period from Martinmas 1901 to Whitsunday 1902.

The defence was that the defender had a right to certain deductions and counter-claims in respect of the insanitary condition of the house, which reduced the sum due by the defender to £1, 7s. 6d.

On June 11th 1902 the Sheriff-Substitute (MACONOCHIE) granted decree for the sum sued for with expenses.

The defender appealed.

In the note of appeal it was stated that on the case being called in the Small-Debt Court the appellant appeared by procurator and stated various defences to the action. "In particular, he stated that the premises in question had been declared insanitary and uninhabitable by the public authorities, and in consequence he had left said premises on the 2nd day of April 1902 after due intimation to the respondents' agents by registered letter on 24th March; that therefore the claim for rent was illiquid; and he was prepared to lead proof in support of these statements. He also stated and was prepared to prove that it was agreed in the lease that his occupation of the premises was subject to the express condition that in the event of the laundry situated in the adjacent tenement becoming a nuisance, his (the appellant's) legal claims in respect thereof were reserved."

The appellant maintained that he was not liable for more of the rent than £1, 7s. 6d., and averred that a note of the grounds upon which he claimed not to be liable for more than this sum had been previously sent by his agent to the agents of the respondents who had taken no objection to the sufficiency of the intimation, and the respondents were prepared with witnesses who were present in Court.

The appellant, in the note of appeal, further stated—"The Sheriff-Substitute declined to hear any evidence on the part of the defender (appellant) in support of