At advising—

LORD JUSTICE-CLERK—I do not think there is any ground for interfering with the interlocutor of the Lord Ordinary so far as it sustains the first plea-in-law for the defender and dismisses the action. The arrestments have been used in the hands of the Insurance Company. The Insurance Company are in this position, that, if the sum in the policy came to be payable on the death of the defender, they would be bound to pay it to the marriage-contract trustees. I do not think that anyone else could successfully compete with the trustees for the sum which they hold in security of the annuity of £100 to be paid to the defender's widow. On the other hand, the trustees might be liable to account for any sum which was held to be part of the defender's estate in a competent process. This sum was arrested, not in the hands of the trustees, but of the Insurance Company, who have no right to pay any part of it to anyone but the trustees.

As regards the rest of the interlocutor, I am of opinion that a great deal is to be said for the view that the defender is not entitled to expenses in spite of the fact that his first plea-in-law has been sustained. I think it is quite plain on the face of the case that he did not make an honest disclosure of his position to the pursuer, but wilfully concealed it. I therefore think that he should not be awarded any expenses.

LORD YOUNG—I concur. This Court has no jurisdiction unless there has been a valid arrestment of property belonging to the defender. This fund which is in the hands of the Insurance Company, and which will become due at the defender's death, must in terms of the assignation be paid over to the marriage-contract trustees. We are not entitled to presume that there will be more than sufficient to meet the obligations of the trustees.

I am not able to consent to the argument that the widow is bound to take an annuity in place of her provisions. This Court, no doubt, when the ends of justice require it, may require a party to take something else than the mere letter of the obligation provides for if no injustice will be done to him by taking the equivalent. But the Court are always slow to make a party take something different from that which is due to him, and will only do so when it is safe for him to take it, and when it is necessary in order to do justice to another. There is no consideration of that kind in this case.

I agree also in the matter of expenses, as the defender acted with the greatest impropriety in misleading the pursuer as to the condition of the policy of insurance.

LORD RUTHERFURD CLARK—I have not been satisfied that any fund belonging to the defender has been arrested. I therefore agree. On the matter of expenses I also concur.

LORD TRAYNER—I think this arrestment was insufficient to attach any fund. On the question of expenses I have nothing to say.

The Court adhered to the Lord Ordinary's interlocutor except in so far as it found the defender entitled to expenses; therefore dismissed the action, and found no expenses due to either party.

Counsel for the Pursuers—A. S. D. Thomson—Hunter. Agent—R. J. Calver, S.S.C.

Counsel for the Defender—Salvesen—M'Lennan. Agents—Macpherson & Mackay, S.S.C.

Saturday, November 24.

FIRST DIVISION.

[Sheriff Court at Aberdeen.

SUTHERLAND *v.* MAGISTRATES OF ABERDEEN.

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

Section 42 of the Public Health Act 1867 provides that, where a hospital exists within the district of a local authority, a magistrate may, on the application of the local authority, with the consent of the superintending body of such hospital, "by order on a certificate signed by a legally qualified medical practitioner," direct the removal to such hospital of any person suffering from an infectious disease and being 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 the Act.

A child suffering from scarlet fever was removed to a hospital by the officers of a local authority. The removal was effected with the consent of the child's father, but without any warrant having been obtained. The child having died shortly after its admission to the hospital, the father brought an action of damages against the local authority, alleging that its death had been caused by the negligent manner in which its removal to the hospital had been conducted.

Held that, as the removal had not been effected under the powers conferred by the Public Health Act, the defenders were not protected by the provisions of section 118.

Process—Amendment of Record—Expenses.

In an action of damages the Sheriff-Substitute, being of opinion that the pursuer's averments were irrelevant, allowed him to lodge within six days a minute specifying what amendment, if any, he proposed to make

on his condescendence. Before the six days had expired the defenders appealed to the Sheriff, who allowed a proof before answer. The pursuer then appealed to the Court of Session for jury trial. The defenders argued that the case was irrelevant, and the pursuer moved to be allowed to amend.

Held that, in the peculiar circumstances of the case, he should be allowed to do so without any payment of expenses.

On the 27th October 1893 Elizabeth Sutherland, a child aged five years, the daughter of George Sutherland, blacksmith in Aberdeen, was seized with an attack of scarlet fever. On the following day she was removed to the Aberdeen City Hospital by persons in the employment of the Magistrates and Town Council of Aberdeen, as the local authority under the Public Health Act. The removal was carried out with the consent of the child's father, but without any warrant having been obtained under section 42 of the Public Health Act. The child died on the day following her admission to the hospital.

George Sutherland thereafter raised an action of damages for the death of his child in the Sheriff Court at Aberdeen, against the Lord Provost, Magistrates, and Town Council of Aberdeen, as the local authority under the Public Health Act.

The pursuer averred that he had told the sanitary official, who called upon him in reference to his daughter's illness, that his own medical man, who had been in attendance on her, "had instructed him to inform the authorities when they came of the dangerous state in which the girl was, and that she would have to be taken the greatest care of;" that he consented to her removal only upon being assured that the greatest possible care would be taken of her; that he had again urged the necessity for the greatest care being taken upon the persons in the employment of the local authority who came to take his child to the hospital, but that nevertheless the removal had been carried out in a negligent and unskilful manner, and the child had been neglected after its admission to the hospital, with the result that it died.

The pursuer pleaded, *inter alia*—"(4) The defenders having had no legal warrant of removal, as required by the Public Health (Scotland) Act 1867, were not acting in the execution of that statute, and are barred from founding on its provisions.

The defenders pleaded, *inter alia*—(1) That the pursuer's averments were irrelevant; and "(2) The defenders, the Town Council of Aberdeen, having acted, in the removal and treatment of the pursuer's child, under the Public Health (Scotland) Act 1867, are not liable in damages to the pursuer."

The Public Health (Scotland) Act 1867 (30 and 31 Vict. cap. 101), by sec. 42 provides 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 disease, and being without proper lodging or 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, or for anything done by themselves in the *bona fide* execution of this Act."

Upon 26th April 1894 the Sheriff-Substitute (ROBERTSON) pronounced the following interlocutor—"Allows, with reference to the annexed note, the pursuer to lodge within six days after intimation hereof, if so advised, a minute specifying what amendment, if any, he proposes to make on his condescendence; and allows the defenders to answer said minute within six days thereafter: Reserves all question of expenses, and grants leave to appeal.

"*Note.*—I think this action is hardly relevant just now, but I think it can easily be made relevant. To begin with, in my opinion, the defenders, the Town Council, cannot here claim the protection of the statute. What was done was not done under the Public Health (Scotland) Act 1867, sec. 42, because there was no magistrate's warrant obtained. No doubt the consent of the child's parents to its removal was obtained, and this would be sufficient protection if the removal was properly conducted, but if the child's death was due to improper and careless conduct on the part of the servants of the local authority during the course of the removal, then I have no doubt the defenders may be liable. What I desiderate in the pleadings is a more precise statement of how the alleged improper and unskilful conduct contributed to the child's death, and what that death was due to.

"I allow the pursuer, if so advised, to amend his record in this respect." . . .

The defenders appealed to the Sheriff (GUTHRIE SMITH), who on 28th June 1894 recalled the Sheriff-Substitute's interlocutor, and allowed a proof before answer.

"*Note.*— . . . I do not think the warrant was essential if the pursuer agreed to dispense with it, which the defenders say he did. But the proper time to raise a question as to the scope and meaning of a protecting clause, such as sec. 118, is at the trial—after the facts have been sufficiently opened—and not on relevancy, unless of course in a very clear case, and therefore I have allowed a proof before answer."

The pursuer appealed to the First Division for jury trial.

Argued for the defenders—(1) They were protected by the 118th section, unless, which was not averred, there had been gross negligence or *mala fides*, because they were carrying out the provisions of the 42nd section of the Public Health Act. Hospital, nurses, power of removal, all existed by virtue of that Act which they were executing. A warrant was

obtained where the parent would not give his consent, but they found it more beneficial and expeditious to act where possible with consent, than to delay until a magistrate's warrant had been obtained. Consent was virtually a waiving of the necessity for a warrant, and did not deprive the local authority of the protecting clause of the statute. In *Mitchell's* case the pursuer's averment was that the removal had been effected against his wish, as well as without a warrant. (2) The averments were irrelevant. It was not said what should have been done that was not done.

Argued for the pursuer—(1) The local authority were not executing the Act, which only contemplated and authorised compulsory removal under a magistrate's warrant, and they were therefore outside the protecting clause of the Act—*Mitchell* v. *Magistrates of Aberdeen*, January 17, 1893, 20 R. 253. (2) He desired the opportunity to amend which the Sheriff-Substitute had given him, but which he had lost by the defenders' appeal to the Sheriff.

The Court continued the case, and when it was again called the pursuer tendered a minute of amendment, which the defenders admitted made the record relevant.

At advising—

LORD PRESIDENT—The debate which we heard originated in the plea of the defenders that they were protected against such an action as this by the 118th section of the Public Health Act of 1867. Now, the 118th section lays it down that the local authority "shall not be liable in damages for any irregularity committed by their officers in the execution of this Act, or for anything done by themselves in the *bona fide* execution of this Act." The defenders allow that it was under the former of the two branches in that enactment that they desired to shelter themselves—that is to say, under the words "any irregularity committed by their officers in the execution of this Act." We have then to consider whether the matter of complaint here can, even with any latitude of expression, be described as "an irregularity" committed by the defenders' officers "in the execution of" the Act.

That leads one to consider the 42nd section, which is the branch of the Act which the defenders allege themselves to have been executing on this occasion. Now, it seems to me that the 42nd section applies solely to the case where a magistrate has on a certificate signed by a legally qualified medical practitioner directed the removal of someone to an hospital, so that the execution of this part of the Act by any officer would mean his going with the warrant of a magistrate which had been obtained on the certificate of a doctor and removing a person or a child to the hospital. But the admitted facts here are that there was no certificate by a doctor, and no warrant by a magistrate, and therefore this officer, when he went to remove the pursuer's child to the hospital, was not executing the 42nd section of the statute at all. He was, on the contrary, apparently going on a mission of the local authority to invite those parents to hand their child over to him, and accordingly it seems to me that the 118th section does not apply, because this officer was not executing the Act, and what he did was not an irregularity at all. I think therefore that the defence on the statute completely fails.

The defenders, however, attacked the relevancy of the pursuer's averments on the ground that they have not set forth any fault or omission in the measure of care or precaution which was taken by this officer in conducting this child to the hospital. The pursuer was conscious of the weakness of his case on that head. He has now lodged a minute of amendment of the record, and the defenders have at once, and without further parley, admitted that the defect on the record has been cured by this amendment. We are now dealing therefore with a record relevant to support a claim of damages on the ground that, the officer of the local authority having asked that the child should be placed in their hands for removal to the hospital, they failed to take due and reasonable precautions for its safety during transit, and during its stay in the hospital. The first question is, are we to allow this amendment? and that we must answer in the affirmative, for we have the admission of the defenders that it renders the record relevant. The next question is, on what terms? and this gives rise to a somewhat peculiar point in procedure, for the Sheriff-Substitute, appreciating the defect which now, after two appeals, has been cured, took the very sensible course of allowing "the pursuer to lodge within six days after intimation, if so advised, a minute specifying what amendment, if any, he proposes to make on his condescendence." But the defenders met this by at once appealing to the Sheriff, and unfortunately the Sheriff recalled the interlocutor allowing the amendment. Then an appeal is taken by the pursuer to the Court of Session, and it is only now and here that we have got the amendment. Now, if the pursuer had been obdurate in his adherence to an irrelevant record, we should of course only have allowed him to amend on serious terms, but this unfortunate history of procedure in the Sheriff Court removes the case from that position, and I think that, as we have to determine the question now, we should allow the amendment to be made without any pecuniary condition. Accordingly, I propose that we should open up the record, allow the proposed amendment to be added, of new close the record, and allow the pursuer to lodge such issues as he may be advised for the trial of the cause.

LORD ADAM—The first question is whether or not the defenders are under the protection of a certain clause of the Public Health Act which they say excludes liability. Now, what the Sheriff says in his note is, "The proper time to

raise the question as to the scope and meaning of a protecting clause such as section 118 is at the trial after the facts have been sufficiently ascertained, and not on relevancy unless of course in a very clear case." Well, it appears to me that we are in the position here of having a very clear case, for we have it admitted that the defenders did not apply under the 42nd section of the Public Health Act for the warrant which it was necessary for them to have to bring them under the operation of the 118th section, and we were very candidly told that it was not the practice of the local authority in Aberdeen to use the powers given them by the Act, or to avail themselves of the provisions of the statute in regard to a matter of this kind, as their free movement was rather impeded thereby. Now, it may be that practically in the operation of this Act the magistrates, being men of experience and skill, in the great majority of cases use all reasonable and proper precautions, but, when the question is raised and we are told that the magistrates had not applied for the statutory warrant, and that the statutory provisions were not even thought of, that there was no medical certificate, and that none of the other conditions imposed by the statute were complied with, then I think that the defenders are not under the protection of the 118th section at all. That is the whole question now before us. The record was imperfect in the Sheriff Court, and the Sheriff-Substitute very properly allowed it to be amended, and I have no doubt if that course had been followed the amendment now tendered by the pursuer would have been accepted and the case would have gone on its regular course; instead of that the interlocutor allowing the amendment was recalled, and the Sheriff ordered a proof before answer. The case was then brought here for the purpose of raising this question on the statute. I agree with the result at which your Lordship has arrived.

LORD M'LAREN—In considering the point raised by the defenders as to their alleged statutory protection, it seems plain enough that the motive of the Public Health Act in the clause founded on was rather the good of the community, and the protection of the community against the spread of infectious diseases, than the benevolent treatment of the individual affected in the hospital.

But, while power is given for the general good to remove a person suffering from fever or other infectious disease, the authors of this statute recognise that the interest of the individual is also to be considered; they contemplate that the person lying ill of fever may be in such a condition that he cannot be removed to an hospital without injury to his health or to the prospects of his recovery, and accordingly it is provided that this shall only be done upon a medical certificate and with the approval of a magistrate. Now, I am very far from saying that it is contrary to the spirit of the Act that the magistrates should receive patients who voluntarily offer themselves, or whose parents are willing to bring them to the hospital, their motive no doubt being that the child would be better cared for than it could be in its own home. But this is not a case of the parent volunteering to send his child. The father was apparently very unwilling that his child should be removed, and he had some reason for that, as he says, because of the caution given to him by his medical attendant. Now, I must say that, while I appreciate the reasons that led the Magistrates and Council of Aberdeen to wish to dispense where possible with what is merely formal and ceremonial in the statutory requirements, yet, if they send their officers to remove sick children to hospital, it is their duty to see that the requirements of the statute intended to safeguard the health of the patient, and the natural feelings of the parent should be attended to. It is said that the child was not seen by any medical officer before being removed; the question of whether it was fit to be removed was left to the local officer or inspector, who was not a person of medical skill, or a proper person to judge of the state of the patient.

I agree with your Lordship that the case is a relevant case for trial, and I also agree that it is unfortunate that under the circumstances the pursuer had not the opportunity which the Sheriff-Substitute desired, of making an amendment on this record in the Sheriff Court.

LORD KINNEAR — I am of the same opinion. I think the Magistrates are not protected by the 118th clause of the statute, because they were not putting in force the compulsory powers of removal conferred on them by the statute. I should be sorry to question the wisdom or discretion of the Magistrates in following the course which we are told they find it expedient to follow in general—that is to say, to obtain the consent of the parents to the removal of children in cases where they might have exercised the compulsory powers given them by the statute. That may be an extremely proper course. It is for the Magistrates to judge of that, and I have no doubt they have adopted it in exercise of a wise discretion. But then I agree with your Lordship that, if they prefer, for whatever reasons, to remove children to the hospital with the consent of their parents, they must do so subject to the rule of common law, which requires a person who charges himself with such a duty to exercise reasonable care and diligence in performing it. Now, that being the legal position in which they are placed, I think we have here a relevant averment that the Magistrates who charged themselves with the duty of conveying the pursuer's child to the hospital failed to perform that duty with reasonable care and diligence; and, on the contrary, that the officers for whom they are responsible were negligent in certain particulars which are distinctly

specified. I am therefore of opinion that there is a case to go to a jury, and I quite agree with your Lordships that the amendment should be allowed without any conditions in the circumstances in which the pursuer was placed in the Court below.

The Court allowed the proposed amendment, and appointed the pursuer to lodge issues.

The following issue was afterwards approved for trial of the cause:—"Whether on or about the 28th day of October 1893, the defenders, or those for whom they are responsible, having undertaken to convey Elizabeth Thomson Sutherland, daughter of the pursuer, from pursuer's house at Chapel Street, aforesaid, to the City Hospital, wrongfully failed to take due and proper precaution for her safety, and to afford proper medical treatment to her in said hospital, in consequence of which or part thereof she died, to the loss, injury, and damage of the pursuer."

Counsel for the Pursuer—Watt—A. M. Anderson. Agent—R. J. Gibson, S.S.C.

Counsel for the Defenders—Lord Adv. Balfour, Q.C.—W. Brown. Agents—T. J. Gordon & Falconer, W.S.

Tuesday November 27.

FIRST DIVISION.

[Court of Exchequer.

AIKIN (SURVEYOR OF TAXES) *v.* MACDONALD'S TRUSTEES.

Revenue — Income-Tax — Money Remitted from Abroad—Deductions—Income-Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *Sched. D, Case* 5—*First Rule Applicable to First and Second Cases.*

The profits returned by a body of testamentary trustees for assessment under Schedule D of the Income-Tax Act 1842 consisted entirely of moneys remitted from India, being the annual profits of indigo and tea estates in that country belonging to the trust.

Held that duty fell to be charged on the whole amount of the sums received by the trustees from India without deduction of expenses incurred in this country in connection with the management of the trust.

The trustees of the late Charles Macalister Macdonald were part proprietors of the Dowlutpore Indigo Concern, Tirhoot, and of certain tea estates in India. The average annual profits received in this country by remittances from said concern and estates amounted to the sum of £1684, 2s. 2d., and the whole income of the trust (other than dividends on shares from which income-tax was deducted before payment) was derived from said concern and estates. The trustees in making their return for the year ending 5th April 1894 for the assessment of profits under Schedule D of the Income-Tax Acts deducted from the above sum of £1684, 2s. 2d. the sum of £200 as the average annual expenses incurred in this country in connection with the management of the trust. The Surveyor of Taxes assessed the trustees on the full sum of £1684, 2s. 2d., and the trustees appealed against this assessment to this Commissioners for General Purposes.

The Commissioners held that, in computing the assessable profits under the provisions of the fifth case, effect fell to be given to the directions contained in the first of the rules described in the 100th section of the Income-Tax Act 1842 (5 and 6 Vict. c. 35) as applying to the first and second cases of Schedule D, and that the average annual expenses incurred in this country formed a proper deduction from the average annual sums received in this country.

Upon the motion of the Surveyor of Taxes, who was dissatisfied with their determination, the Commissioners stated a case for the opinion of the Court of Exchequer.

The Income-Tax Act 1842 (5 and 6 Vict. c. 35), sec. 100, provides—"Fifth Case. The duty to be charged in respect of possessions . . . in any of Her Majesty's dominions out of Great Britain. . . . The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the actual sums annually received in Great Britain either for remittances from thence payable in Great Britain, . . . computing the same on an average of the three preceding years as directed in the first case without other deduction or abatement than is hereinbefore allowed in such case." The first rule applying to both the first and second cases provides that "In estimating the balance of the profits or gains to be charged . . . no sum shall be set against or deducted from . . . such profits and gains for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade, manufacture, adventure, or concern, . . . nor for any disbursements or expenses of maintenance of the parties, their families or establishments, . . . nor for any sum expended in any other domestic or private purposes distinct from the purposes of such trade, manufacture, adventure, or concern." . . .

Argued for the Surveyor of Taxes—The deductions proposed to be made were clearly in the teeth of the precise provisions of the Act. They were for private or domestic purposes, and not for the purposes of trade. The only allowable deductions were those incidental to earning the money abroad, sending it home, and (possibly) turning produce into money. Here it was admitted that £1684, 2s. 2d. had been remitted. That was the nett sum which could be uplifted from the bank by those at home entitled to the money. The Inland Revenue had no concern with how it was spent. Income-tax must be paid on the nett amount. If it belonged to an individual, it was out of the question that he could pay the expenses of a secretary or law-agent out of it. That it belonged to