admitted that the pursuer was the 'lassie' referred to. The author seems to have been at no pains to conceal her identity, and as she lived in her father's house it might have been very difficult to do so."

The defender reclaimed, and argued—No issue should be allowed. An innuendo must be a reasonable inference from the whole facts, and the only reasonable inference from the passage scheduled was that in Kelty there was overcrowding, and that overcrowding precluded delicacy. It contained no imputation against the character of the pursuer, but only a criticism of the manners of the society in which she lived. The words "prepared for and went to bed" in the issue were ambiguous, and might mean that she merely took off her hat and lay down in bed. There could be no slander in that statement. There was no statement that she undressed in the presence of strangers.

Argued for the pursuer — The article held up the pursuer to the contempt of the people with whom she lived, and was therefore slanderous, whatever the author may have meant. A charge of want of delicacy was sufficient even without the innuendo.

In answer to a question from the bench counsel for the defenders stated that they were prepared to amend the issue by substituting the words "undressed and" for the words "prepared for" in the issue.

The defenders proposed the following counter issue:—"Whether upon the occasion referred to the pursuer in presence of several persons of both sexes prepared for bed and got into it."

The pursuer objected to this counter-issue on the ground that it did not meet the innuendo.

The Court (without giving opinions) refused the counter-issue, and approved of the issue as amended at the bar.

Counsel for the Pursuer—Salvesen, K.C. —A. S. D. Thomson. Agent—John Veitch, Solicitor.

Counsel for the Defenders — Jameson, K.C.—Hunter. Agents — Horne & Lyell, W.S.

Tuesday, October 21.

FIRST DIVISION.

[Lord Pearson, Ordinary.

M'INNES *v.* AYR HARBOUR TRUSTEES AND ANOTHER.

Process—Jury Trial—Verdict—Apportionment of Damages by Jury—Issue.

In an action of damages against A and B at the instance of the mother of a man who was killed in an accident for which, as she alleged, they were responsible, the conclusions of the action were for payment of £500 from the defenders jointly and severally or severally. The issue put the question whether the deceased met his death through the fault of the defenders or one or other and which of them, and the schedule was simply "damages claimed £500." The jury found for the pursuer against both defenders, and assessed the damages at £110. The verdict then proceeded as follows:—"And they apportion the said sum, if they can competently do so, as follows: two-thirds thereof against" A, "and one-third thereof against" B. On a motion to apply the verdict, *held* that in view of the form of the conclusions of the action and of the issue the jury had no power to apportion the damages, but that their attempt to do so, in the words quoted above, did not invalidate the verdict, and verdict *applied* by decerning against both defenders jointly and severally for payment of £110.

The widow of the same pursuer brought an action against A, concluding for £1000 damages, and a supplementary action against B, also concluding for £1000. These actions were conjoined and tried under one issue, which put to the jury the question whether the deceased met his death through the fault of the defender or one or other and which of them. In the schedule of damages £500 was claimed from A and £500 from B. The jury found for the pursuer against both defenders, and added a clause of apportionment in the same terms as that quoted above. On a motion to apply this verdict, *held* that under the terms of this issue it was competent for the jury to apportion the damages, and verdict *applied* accordingly.

Duncan M'Innes, labourer, Ayr, was killed through the fall of a derrick at Ayr Harbour.

Mrs Helen Ford or M'Innes, his widow, brought an action of damages against the Home Trade Steam Carrying Company, Limited, concluding for £1000 damages. She subsequently brought a supplementary action against the Ayr Harbour Trustees. The conclusions of this latter action were that it should be conjoined with the action at her instance against the Home Trade Steam Carrying Company, and whether it should be conjoined or not that the defenders should be ordained to make payment to the pursuer of the sum of £1000. On the death of Mrs Helen M'Innes her executrix Miss Ford was sisted as pursuer in these actions.

Mrs Sarah M'Phail or M'Innes, the mother of Duncan M'Innes, also brought an action directed against the Home Trade Carrying Company and the Ayr Harbour Trustees. The conclusions of the action were that the defenders should be ordained "jointly and severally or severally, or otherwise as to our said Lords shall seem just, to make payment to the pursuer of the sum of £500."

On 21st January 1902 the Lord Ordinary (KINCAIRNEY) conjoined all these actions.

The issue approved of for the trial of the actions at the instance of Miss Ford (Mrs M'Innes' executrix) was in the following

terms:—"Whether . . . the said deceased Duncan M'Innes met with his death through the fault of the defenders or one or other and which of them, to the loss, injury, and damage of the pursuer the said Helen Ford as executrix foresaid?" Damages claimed—From the Home Trade Steam Carrying Company, Limited, £500; and from the Trustees of the Ayr Harbour, £500.

The issue in the action at the instance of Mrs Sarah M'Phail or M'Innes was, *mutatis mutandis*, in the same terms, but the schedule was simply "damages claimed, £500."

The actions were tried on March 25th and 26th 1902 before Lord Pearson and a jury.

The verdicts returned were:—In the actions at the instance of Miss Ford (Mrs M'Innes' executrix) the jury "Find for the pursuer against both defenders, and assess the damages at £225 sterling, and they apportion the said sum, if they can competently do so, as follows, viz., two-thirds thereof against the Trustees of the Ayr Harbour, and one-third thereof against the Home Trade Steam Carrying Company, Limited."

The verdict in the action at the instance of Mrs Sarah M'Phail or M'Innes was in the same terms, with the exception that the damages were assessed at £110.

After a motion for a rule on the ground that the verdict was contrary to evidence had been refused, the pursuers moved the Court to apply the verdict.

Counsel for the defenders argued that the verdict was incompetent and invalid. A jury had no power to apportion damages—*Boettcher* v. *Carron Company*, January 17, 1861, 23 D. 322. If they had known this their verdict might have been different—they might have let the Home Carrying Company off altogether.

LORD ADAM—There are two cases here—one at the instance of Mrs Sarah M'Phail or M'Innes, mother of the man who was injured, and the other at the instance of Miss Jessie Ford, the executrix of his widow, Mrs Helen Ford or M'Innes. The defenders in both cases are the same, because their claim arises out of the same accident in Ayr harbour. I propose to treat these cases separately, and I begin with the action at the instance of Mrs Sarah M'Phail or M'Innes. The conclusion in that action was a conclusion by which the Court were asked to decern against the defenders jointly and severally or severally, and the issue sent to the jury was whether on a certain date at Ayr harbour the deceased Duncan M'Innes, the son of the pursuer, met his death through the fault of the defenders or one or other and which of them, and there is a single claim against both defenders of the sum of £500. Upon that issue the jury returned a verdict against both defenders, assessing the damages at £110, and they apportioned the said sum, "if they can competently do so," as follows—two-thirds against the trustees of Ayr Harbour and one-third against the Home Trade Steam Carrying Company. Now, in my opinion it was incompetent under that conclusion and under the issue sent to try the action for the jury to have apportioned the amount between the two defenders. The issue was sent to them as an issue of joint liability, and that being so it appears to me that the verdict must correspond with the issue and that the law implies a joint liability for one-half each, and that it was quite beyond the province of the jury to apportion the liability.

But then the question comes to be, whether upon this issue the apportionment by the jury is not mere surplusage and cannot affect the first part of the verdict where, in so many words, they fix the damages at £110. I think nobody can doubt that if the verdict had stopped there it would have been a perfectly good verdict in the case; and does it make any difference that the jury has expressed an opinion, if they might competently do so—which they cannot—that it should be divided according to their apportionment? I think that any apportionment was beyond their power; but I do not think that that invalidates the first portion of the verdict, where they fix the amount of damages to which pursuer is entitled. Therefore so far as this action is concerned I think the pursuer is entitled to have the verdict applied.

But the other case arises in this way. It seems that this action was originally laid against the Home Trade Carrying Company only, and the conclusion in that action was that the Company should pay the sum of £1000. But it would appear that, from the nature of the defence stated in that action the pursuers saw the propriety of bringing into Court also the Ayr Harbour Trustees, and accordingly raised a supplementary action in which they concluded to have the first action, which was pending in Court, conjoined with the second action, and "whether the said action is conjoined or not the said trustees of Ayr Harbour ought to be decerned and ordained to make payment of £1000."

There were therefore two actions brought by the pursuer in this case—the first against the Home Trade Steam Carrying Company, and the second against the Ayr Harbour Trustees. Now, as I understand, these actions were conjoined, and the issue which was sent to the jury was this—whether on the same spot the pursuer met his death through the fault of the defenders or one or other and which of them, to the loss, injury, and damage of the pursuer. Then the schedule of damages is put in this form—From the Home Trade Steam Carrying Company £500, and from the Trustees of Ayr Harbour £500. It appears to me that under that issue—whether it might competently be objected to or not I do not know, and it is not necessary to consider—it is quite clear that the jury are asked to assess how much the defenders the Home Trade Steam Carrying Company were to pay, and how much the Trustees of Ayr Harbour were to pay. And what the jury have said is just exactly in terms of the

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