must bear the consequences, and one of the most natural, as well as one of the most frequent results of such a proceeding is, that the unsuccessful litigant is out of pocket. But I have no doubt that the course taken by the Auditor in this matter is right, and is warranted by the decision in the case of *Robertson* v. *Steuart*, July 15, 1875, 2 R. 970. The joint defence has certainly not increased the burden laid upon the pursuers by their bringing actions against persons against whom, according to the verdict returned in the case, they had no claim. This objection by the pursuers to the Auditor's report must therefore, in my opinion, be repelled.

2. The next matter in controversy relates to the expenses of the four actions claimed by the pursuers. The Auditor has allowed the full expenses of the action first raised and also of one of the actions raised in the month of June last, but as regards the other two actions raised in June he has practically disallowed all the expenses except those incurred with reference to the adjustment of the issues. The view, as explained to us, on which the Auditor proceeded, is that the three actions raised in June might and should have been combined by the pursuers; he accordingly allows the expenses of one action, and one action only, against the defenders. The defenders object to this in so far as the full expenses of one of the actions raised in June is concerned on the ground that the whole four claims of the four pursuers might and should have been stated in the action brought in March, and that no more than the expenses of one action should be allowed. The pursuers object on the other hand to the disallowance of the expenses of (what I may call) the third and fourth actions, on the ground that each pursuer was entitled to bring her action separately, and that the expenses as for one appearance should only commence when the pursuers did combine for the trial. If the Auditor's view is right, I can scarcely see on what principle he allows the full expenses to the pursuer of the second action and disallows them to the pursuers of the third and fourth actions. Applying his principle strictly, the Auditor should have allowed to each of the three pursuers who brought their actions in June a proportion, probably one-third, of the full expenses, and not have given the full expenses to the one pursuer and none to the other two. But I think the view of the Auditor on this matter is wrong. Each pursuer was entitled to bring her own action. The whole pursuers ought perhaps to have combined their claims in one summons, but they were not bound to do so. They were as much entitled to have separate actions as separate issues. I think therefore the pursuers of the third and fourth action (I mean the pursuers Jeanie Walker and Elizabeth Macfarlane) are entitled to have their expenses from the raising of their actions down to the time when the cases went to trial. The objection by the defenders on this head falls in my opinion to be dismissed, and the objections by Jeanie Walker and Elizabeth Macfarlane sustained.

3. The only other objection is stated by the successful defenders to the disallowance of the charge made by them for one-half of the fees paid to the jury, one-half of the expenses of the refreshment for the jury, and the fee fund dues of the account of expenses. These objections, I think, should be repelled. The defenders cannot charge the pursuers with the fee paid to the jury, as these charges fell upon the unsuccessful defenders only and were not, or should not, have been paid in whole or in part by these defenders. The expense of the refreshments provided for the jury may stand in a different position, although I do not know that it does. It is, however, so small a matter that I would not interfere with what the Auditor has done, who must know the prevailing practice and has doubtedly given effect to it. The reduction of the defenders' account by taxation, reduced the fee funds exigible on the defenders' account, and this is what the Auditor has given effect to.

The result is that the objections taken by the pursuers Jeanie Walker and Elizabeth Macfarlane should be sustained and the accounts in their actions be sent back to the Auditor to give effect to this opinion. *Quoad ultra* I think all the objections should be repelled.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD MONCREIFF concurred.

Interlocutors in accordance with Lord Trayner's opinion were pronounced in the four actions.

Counsel for all the Pursuers—Dundas, Q.C.—Watt. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders—Ure, Q.C.—Deas. Agents—Dove, Lockhart, & Smart, S.S.C.

Friday, June 3.

SECOND DIVISION.

[Sheriff of Aberdeen.

DUTHIE *v.* CALEDONIAN RAILWAY COMPANY.

Reparation—Liability to Servants—Effect of Special Rules Issued for Conduct of Work—Neglect of Duty by Foreman—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 1, *sub-sec.* 2.

By rule 347 of the Caledonian Railway Company's rules issued to employees it is provided with reference to the work of platelayers—"In busy yards the foreman ganger or leading man must at his discretion appoint look-out men placed at such a distance as circumstances may require."

Where a platelayer was run down by a train in consequence of the ganger neglecting to provide a proper look-out in terms of this rule, but no allegation was made that the ganger was unfit for the duty with which he was charged,

or that in the knowledge of the company he neglected that duty—*held* that the company, although they were liable for the fault of the ganger under the Employers Liability Act 1880, sec. 1, sub-sec. 2, were not liable at common law for not taking steps to see that the ganger did his duty under the rules.

Reparation—Neglect of Proper Precautions for Safety of Workmen—Shunting Train without Look-out Man on Rear Waggon.

Where a platelayer in the employment of the Caledonian Railway Company was, while engaged at his work, run down by a North British Railway train which was backing on a portion of the Caledonian Railway line over which the North British Railway Company had running powers—*held* that the North British Railway Company had neglected reasonable and proper precautions in not having a man on the end waggon to keep a look-out in front, and were therefore liable in damages at common law for the injuries caused by their neglect.

Reparation—Joint Wrongdoers—Apportionment of Damages when Liability of One of Two Joint Wrongdoers Limited by Statute.

Where two separate defenders were found liable in damages to the same pursuer for actionable fault resulting in injuries, the one at common law and the other under the Employers Liability Act 1880, the Court (*diss.* Lord Trayner) *found* that the defender whose liability was not limited by statute was liable for the full amount of the damages, and accordingly *decerned* against the defenders conjunctly and severally for the sum found due under the Employers Liability Act and against the defender found liable at common law for the balance of the damages.

James Duthie, Aberdeen, raised an action in the Sheriff Court at Aberdeen against the Caledonian Railway Company and the North British Railway Company, in which he prayed the Court "to ordain the defenders, jointly and severally, or severally, to pay to the pursuer the sum of £2000 sterling, or, alternatively, to ordain the defenders, the said Caledonian Railway Company, to pay to the pursuer the sum of £156 sterling with the legal interest thereon from the date of the decree to follow thereon till payment."

The pursuer while performing his work as a platelayer in the employment of the Caledonian Railway Company at a siding belonging to the company in the Joint Station, Aberdeen, was seriously injured by being run down by a goods train belonging to the North British Railway Company. This train was being backed over this portion of the Caledonian Railway line by reason of the North British Railway Company having running powers over it. The train while being backed into the station had a goods van in front with no one riding in it, the brake van in which was the guard being next the engine.

As against his own employers, the Caledonian Railway Company, the pursuer maintained (1) that they were liable at common law on the following grounds: (*a*) By rule 347 of the company's rules issued to employees it is provided with reference to the work of platelayers—"In busy yards the foreman ganger or leading man must at his discretion appoint look-out men, placed at such a distance as circumstances may require," and they had failed to see that this rule was properly carried out. (*b*) By rule 253a of the company's rules it is provided—"Where authorised by the special instructions of the general superintendent, waggons are run on the main line without a brake van in the rear, the man provided with the necessary signals must in all cases ride in the last waggon," and the company had failed to see that the North British Railway Company's officials while using their line carried this rule into effect. (2) In any event they were liable under the Employers Liability Act for the fault of the pursuer's ganger William Duthie, who was working at the time of the accident and had thus failed to keep a proper look-out in terms of rule 347.

As against the North British Railway Company the pursuer maintained that they were liable at common law because (*a*) those in charge of the train had neglected rule 253a of the Caledonian Railway Company while passing over the latter company's line, or in any event had neglected a necessary precaution in not having a man in the end waggon of the train to keep a look-out in front; and (*b*) even if it was found that a man in the end waggon was unnecessary, no sufficient look-out had been kept on the engine.

After a proof the Sheriff-Substitute (ROBERTSON) on 24th July 1897 pronounced the following interlocutor:—"Finds (1) that on 10th June last pursuer was in the employment of the Caledonian Railway as a platelayer, and was engaged with a gang under the superintendence of William Duthie, a foreman or ganger of platelayers, working on the line within the confines of the Joint Station, Aberdeen; (2) That the spot where pursuer was working was a very busy place, where trains were constantly passing and repassing, and shunting going on both on the line where pursuer was working and on adjacent lines; (3) That the part of the line where pursuer was working belonged to the Caledonian Railway Company, but that the North British Railway Company have running powers over it, and are bound to obey the rules and regulations of the Caledonian Railway for the guidance of the traffic; (4) That on the day in question, about 4 p.m., a North British goods train was being backed into the North British goods yard, pushed by an engine; that the end or front waggon was a goods van; and that the brake van, in which was the guard, was next to the engine, and that there was no one riding on the last or front waggon or van; (5) That at the same time a Caledonian train was being backed into the Caledonian goods yard on an adjoining line

of rail; (6) That the gang in which pursuer was working consisted at the time of three men (including pursuer) and the foreman; that there was no outlook man; and the foreman was not looking out, but was taking the place of a workman who had left off work that afternoon; (7) That pursuer was working between the rails, and witness Paterson, who was along with him, was standing outside the rails and stooping towards the rails; while at a distance of 16 or 17 yards from them the foreman Duthie was outside the rails picking under the rail, while witness Hay was between the rails; (8) That the North British train was not proved to have been going too fast, but in point of fact the four platelayers did not observe its approach, nor did the men on the train notice the platelayers in front of them, though the line at the point was quite straight; (9) That the North British train struck and knocked down pursuer, and injured him so as to necessitate the amputation of both feet and his left hand above the wrist—Paterson also being knocked down but not seriously injured; (10) That according to rule 347 of the Caledonian rules, in busy yards the foreman ganger or leading man must, at his discretion, appoint look-out men, placed at such a distance as circumstances require, but that, as stated, the foreman Duthie on this occasion had no look-out man; (11) That in accordance with a sound construction of rule 253a of said rules, a man provided with the necessary signals should have been on the last, or, as it was at the moment of the accident, the leading waggon of the North British train, and that this would have been a reasonable and proper precaution in the circumstances: (12) Finds that at the time of the accident Duthie, the foreman of the gang, was a person who had superintendence entrusted to him in the sense of the Employers Liability Act 1880: (13) Finds that pursuer's wages were at the rate of 20s. per week: Finds in above circumstances, under reference to annexed note, that the accident by which pursuer was injured was contributed to by fault on the part of both defenders or their servants, and that both are liable in damages: But finds, as regards the Caledonian Railway Company, that they are liable only under the Employers Liability Act of 1880, in respect the fault, so far as they were concerned, was fault on the part of William Duthie, the foreman: Assesses the damages, so far as the Caledonian Railway are concerned, at £156 sterling, and as against the North British Railway Company at £250; for which sums decerns against the said defenders respectively, with interest, as concluded for: Finds defenders jointly and severally liable in expenses."

Both defenders appealed to the Sheriff (CRAWFORD), who on 20th January 1898 pronounced the following interlocutor:—"Recals the interlocutor appealed against: Finds in terms of the Sheriff-Substitute's findings, 1 to 10 inclusive: Finds (11) that at the time of the accident Duthie, the foreman of the gang, was a person who had superintendence entrusted to him in the sense of the Employers Liability Act of 1880; (12) That it was the duty of the Caledonian Railway Company, notwithstanding their appointment of Duthie, to see that the foregoing rule was regularly observed, and that they neglected to do so, and thereby contributed to the accident; (13) That it was a necessary precaution to have a man on the end waggon of the train to keep a lookout in front; that there was none; that the absence of a look-out man contributed to the accident, and was due to the negligence of both and each of the defenders: (14) Finds that the pursuer's wages were at the rate of 20s. per week: Therefore finds that both defenders are liable to the pursuer in damages at common law, and assesses the damages against each defender at £250, for which sum decerns against each defender, with interest, as concluded for: Finds that it is unnecessary to dispose of the conclusions of the summons so far as they are founded on the Employers Liability Act: Finds the defenders jointly and severally liable in additional expenses."

The defenders appealed to the Court of Session.

The Caledonian Railway Company admitted that they were liable under the Employers Liability Act, but argued that they were not liable at common law. (1) Under Rule 347 of their rules the ganger was bound to keep a good lookout. The ganger in the present case was a thoroughly competent man. The accident had arisen through his negligence in not doing his duty, but for that negligence the employers were not liable at common law—*Wilson* v. *Merry & Cuninghame*, May 29, 1868, 6 Macph. (H.L.) 84, opinion of Lord Chancellor Chelmsford, p. 89. (2) Under rule 253a of the Caledonian Railway Company's rules a man should have been in the end waggon of the North British Railway train while passing over the line. If this rule had been observed, or if reasonable outlook had been kept by the men on the train, they would have seen the platelayers and the accident would not have occurred. But it was preposterous to argue that the Caledonian Railway Company were liable for the other company's negligence.

Argued for the North British Railway Company—They were not liable. Rule 253a did not apply to the circumstances of this case. The rule referred to trains being pulled not pushed, the object for having a man on the rear waggon being to let the signalman know that it was the last waggon. It also applied only to the main line, not to a siding like the present. When the signal was lowered in the Caledonian Railway signal box the North British Railway train got an invitation to enter the yard, and those in charge of the train were entitled to assume that the line was clear.

Argued for pursuer—Both the defenders were liable at common law, the Caledonian Railway Company for not seeing that its rules were observed and a proper look-out kept, the North British Railway Company

for not taking the necessary precaution of having a look-out man on the end waggon. The North British Railway Company said that they were relieved of all responsibility because their train was signalled to go in, but the dropping of the signal only meant that the line was clear of trains and did not relieve those in charge of the train coming in from keeping a proper look-out to avoid running down those at work upon the line.

At advising—

LORD JUSTICE-CLERK—The pursuer was very severely injured when doing his duty as a platelayer at a siding of Aberdeen station, a train which was being backed along the line on which he was working having thrown him down and passed over him, causing the loss of both feet and one hand. The train which was backed on to him was a North British train, the line was the Caledonian line, and the pursuer was a Caledonian servant, and was engaged in his work for that company at the time. The fault alleged against his own employers is that no look-out was provided to warn the platelayers to clear the line on the approach of a train. He alleges that the company was in fault in not having such a look-out provided for in such a case, and that in any case if such a look-out should have been kept on the occasion in question, the foreman of the gang committed fault in not having a look-out, and that accordingly they are liable under the Employers Liability Act. The faults alleged against the North British Railway Company are—(1) that those in charge of the train neglected a rule of the line by which it is required that there shall be an official on the end vehicle of a train furthest from the engine, and (2) that a bad look-out was kept on the engine, so that the platelayers were not observed, and the train backed on to them without any warning. The Sheriff-Substitute found that the Caledonian Company were liable only under the Employers Liability Act, in respect that according to their rules the foreman or ganger of platelayers had the duty placed upon him of appointing look-out men for the protection of his platelayers when working in "busy yards," and that it was the failure of the foreman to do so in this case that led to the accident. He has therefore found the Caledonian Railway Company liable in damages under the statute. He has also found liability against the North British Railway Company because their train was backed along the line without having any man on the leading waggon, the North British servants being bound by the Caledonian rule requiring this, when exercising their powers of using the Caledonian line. The Sheriff on appeal held that the Caledonian Company were liable not only under the statute for the fault of their foremen in not providing a look-out, but also at common law, on the ground that there should have been supervision over the foreman to see that he did his duty properly. He also finds liability against the North British Company in respect there was no one on the train who could see properly ahead, but he does not hold that the Caledonian rule founded on by the Sheriff-Substitute applies to the case. He only holds that the precaution was in the circumstances necessary and was neglected, and he holds that the Caledonian Company were in fault for its being neglected. He also holds the North British Company liable for the same neglect. He also holds that company in fault for failure of those on the engine to keep a good look-out, and thus failing to see that there were platelayers on the line.

The case is thus rather complicated in consequence of the difference of opinion between the Sheriff and the Sheriff-Substitute. As regards the liability of the Caledonian Company, I have after consideration come to be of opinion that the view of the Sheriff-Substitute is the right one. The company made a rule by which a foreman platelayer had the duty in busy yards of putting out look-out men to protect his gang. It is not said that in appointing Duthie to be the foreman of a gang the company through its superior officials failed to exercise due care, and it must be taken that he was fit for his position. If so, the neglect in this case to appoint look-out men was a neglect of his duty, for which his employers are responsible, but only under the statute, he being engaged in a common employment with the pursuer and therefore there being no liability for his fault at common law. I cannot hold that there is liability at common law on the ground stated by the Sheriff, which is, that some-one else should have looked after the ganger and seen that he did his duty. It is not averred that the company failed to provide proper officials to supervise the platelayers' foremen or gangers, and if they did, and such officials were careless in doing their part, that would be just a failure of a servant entrusted with superintendence, for which the master would be liable under the statute but not at common law. I therefore think that the right conclusion as regards the Caledonian Company is that as their foreman who had the duty imposed on him by the rules to place look-out men in this busy yard when his gang was at work failed to do so, the company are liable under the statute for his fault, and that the Sheriff-Substitute came rightly to that conclusion.

As regards the North British Company, I agree with both the Sheriffs in thinking that there was fault in backing a train in the circumstances without there being a proper look-out provided in such a position as to be able to see that the line was clear. I am not careful to determine whether such a look-out should have been on the end waggon, or whether the rule which is discussed in the case applies. I hold that it is made out that at such a place, some-one with the train should be in such a position as to see that the line is clear, it not being possible that this should be seen sufficiently from the engine, which was at the back of the moving train. I incline also to the opinion that it is proved that a good look-out was not kept on the North British train, otherwise it would have been seen that there were platelayers at work so

close to the rails as to be in danger if the train was moved on without warning. I concur with the Sheriff-Substitute in thinking that in this there was fault on the part of the servants of the North British Company.

I am therefore of the same opinion with both Sheriffs that the North British Company is liable in damages at common law, and with the Sheriff-Substitute that the Caledonian Company being the pursuer's employees are liable under the Employers Liability Act for the fault of their foreman Duthie, whom I hold to fall under the class of superintendent as defined in that Act.

As regards the damages, I consider that £500 is not more than fair compensation to the pursuer, who is a hopeless cripple, having only one of his four limbs left sound, both his feet and one of his hands having been amputated. The fact that one of the defenders, if your Lordships agree with me, is found liable only under the Employers Liability Act makes the adjustment of the damages somewhat difficult. The Caledonian Railway Company, if your Lordships agree with me, cannot be made liable at common law, but only under the statute, and therefore can only be decerned against for the statutory amount, which it is ascertained is £156. The North British Company not being the employers are at common law liable for the whole damage sustained. It will be necessary to consider what form that part of the interlocutor decerning for the damages should take, as the ordinary interlocutor decerning against two wrongdoers for the whole damages, jointly and severally, cannot be appropriate where there is a restriction of the amount of damages in the case of one defender by a statute, or that restriction brings the amount which that defender may be called upon to pay below the amount of compensation to which it is thought that the pursuer is entitled for the injuries he has sustained.

As both defenders are public companies quite able to meet the liability found, I should hope it may be possible to adjust the matter in the event of the judgment on the facts being in accordance with the views I have expressed.

LORD YOUNG—The only peculiarity in this case is that there are two defenders, and that while both have been found guilty of actionable fault, both have been found liable by the Sheriff at common law, but by the Sheriff-Substitute one had been found liable at common law and the other under the Employers Liability Act. I do not think this has occurred before, but it appears to me to be a simple enough matter.

As the case was argued before us only two questions arise for our consideration, (1) Whether the North British Railway Company is liable at all? and (2) Whether the Caledonian Railway Company is liable otherwise than under the Employers Liability Act, it being admitted that they are responsible for the admittedly actionable fault on the part of one of their servants, and therefore liable under the Act. The Sheriffs agree that the North British Railway Company is liable for fault at common law; they also agree that the Caledonian Railway Company is liable for actionable fault, but differ as to whether their fault is at common law or only under the Employers Liability Act. The Sheriff-Substitute assesses the damages at £406, as against the Caledonian Railway Company at £156, and as against the North British Railway Company at £250. The Sheriff is of opinion that the damages should be assessed at £500. I concur that the pursuer is entitled to that sum if liability is proved against the defenders.

I agree with both the Sheriffs and your Lordship that the North British Railway Company are guilty of actionable fault at common law, and that it led directly to the injury. The North British Railway Company are therefore liable for the whole of the damages found due, and if they had alone been sued they would have been found liable for the whole £500. Had the Caledonian Railway Company been found also liable at common law, decree would have been given against both defenders conjunctly and severally for the whole amount. But if our judgment is that the Caledonian Railway Company were liable only under the statute for £156, then there being no question as to the ability of the defenders to pay the sums decreed for, I think that the only just and sensible course is that the North British Railway Company should be relieved of that amount, and that decree should be pronounced against the Caledonian Railway Company for £156 and against the North British Railway Company for the difference between that sum and £500.

I am not disposed to express, except quite briefly and generally, any dissent from the view which your Lordship has stated, that the Sheriff-Substitute was right in holding the Caledonian Railway Company liable only under the statute. I must say that I think there are reasonable grounds for the view taken by the Sheriff that the Caledonian Railway Company are liable at common law. I do not however press this point; it is not material to the pursuer, as he will get the whole £500 damages in any view of the matter.

If it should occur again that two parties are found guilty of actionable fault leading to injury, the one at common law and the other under the Employers Liability Act, the decree, unless there is doubt as to the liability of the latter to pay the damage, may be against the one for the amount due under the Employers Liability Act, and against the other for the full amount of the damage with the exception of that. If there is a doubt as to the ability of the parties concerned to pay, the decree should probably be against the party found liable at common law for the whole amount, subject to deduction of any sum recovered from the party liable under the Employers Liability Act.

LORD TRAYNER—I agree with the Sheriff and Sheriff-Substitute in thinking that the

fault of the North British Company caused or materially contributed to the cause of the pursuer's injuries, and that they are therefore liable to the pursuer in damages. As to the liability of the Caledonian Company, I agree with the Sheriff-Substitute and differ from the Sheriff. These defenders had enacted and published a rule, in itself, I think, clearly enough expressed, which if obeyed, would have prevented the accident which did the pursuer so much injury. They had, further, employed a servant whose duty it was to see that rule carried out. It is not said that he was unfit for the duty with which he was charged, nor is it proved that in the knowledge of the company he neglected that duty. He did neglect it, however, and being a person entrusted by the company with superintendence, they are responsible for the consequences of his neglect or fault under the Employers Liability Act. The grounds on which the Sheriff holds the Caledonian Company liable to the pursuer at common law appear to me untenable. These grounds are (1) that they should have placed some supervision over Duthie to see that he carried out the rule to which I have referred. I dissent entirely from that. Where would such a duty end? If they employed a man to supervise Duthie, who also neglected his duty, should they have had some-one else to supervise the supervisor? Duthie being fit for the employment which they entrusted him with (and there is nothing said against his fitness and suitability), the company were not, in my opinion, bound to do more. (2) The Caledonian Company are said to be liable at common law, because they did not see that the North British Company fulfilled their duty in observing the rules. I think it enough to say that the Caledonian Company had no such duty.

As regards the damages, I view the case in this way. The Sheriff and Sheriff-Substitute alike assess the damage due by the North British Company at £250. I should treat that like a verdict, and not disturb it, as it is not excessive on the one hand nor inadequate on the other. The damages due by the Caledonian Company are fixed by statute, and cannot be increased. But because the Caledonian Company have only a limited liability under statute appears to me to be no reason for giving damages against the North British Company beyond the sum which both Sheriffs have fixed. The result, in my opinion, is that the interlocutor of the Sheriff should be recalled, and that of the Sheriff-Substitute affirmed.

LORD MONCREIFF—I agree with both Sheriffs that the North British Railway Company is liable in damages to the pursuer at common law. I think that the case against these defenders is almost too clear for argument, because no effective look-out was kept on the train, which was running backwards at the time of the accident. The fact that the Caledonian Railway Company, through their servant, also contributed to the accident affords no defence to the other co-delinquent.

I am also of opinion that the Caledonian Railway Company is liable under the statute in respect of the failure of their servant William Duthie to keep a proper look-out for the gang of platelayers of which he was foreman. His failure to keep a look-out is admitted, and it is not proved that he was commonly engaged in manual labour.

But I am of opinion that the evidence does not support a claim at common law against the Caledonian Railway Company. Even if habitual failure to keep a look-out were proved, which I doubt, it is not proved that such failure was ever brought to the knowledge of the company; and further, even if it should have been observed (if it existed) by one of the superior officers, such officer would, in a legal sense, have been a fellow servant of the pursuer. So far I agree with the Sheriff-Substitute.

On the amount of damages my view is this. Both Sheriffs have proceeded on the footing of apportioning the total amount of damages between the defenders. They both have limited the North British Railway Company's liability to £250, and under both interlocutors no larger sum could be recovered from that company. If this were the correct mode of assessing and decerning for damages as against two co-delinquents who are both found liable, I should have hesitated to interfere with the amount fixed by the Sheriffs; and I should certainly not have increased the damages against the North British Railway Company because the damages against the Caledonian Railway Company were reduced. But in my opinion the Sheriffs have not adopted a correct course. In all such cases where two defenders are sued in respect of the same *quasi*-delict, the first point which a judge or jury has to decide is, whether the pursuer is entitled to damages, and if so, against whom; and next, the total amount of damages to which the pursuer is entitled. If it is found that both defenders contributed in causing the injuries, the pursuer is entitled, in the absence of statutory limitations, to obtain decree against both, conjunctly and severally, for the full amount of damages found due. He may recover the whole from either of them, just as he would have been entitled to sue either of them alone for the whole sum. If he recovers payment in full from one of the defenders such defender may or may not be able to obtain relief against the co-delinquent (this point is not finally decided by *Palmer* v. *Pultneytown Steam Shipping Company, Limited*, 21 R., H.L. 39), but that is nothing to the pursuer. So again, where the liability of one of two defenders is limited by statute to a certain sum, that in my opinion has not the effect of diminishing the pursuer's claim against the other. His claim against the other defender remains exactly the same, viz., for the full damages, and the only effect of the one defenders' liability being limited is that the other's right of relief, if he has one, will to that extent be reduced. For instance, if in this case both defenders had been found

liable at common law, the pursuer would have been entitled to decree against both conjunctly and severally for the full amount of the damages found due, and not merely to decree against each of the defenders for one-half of the damages, although, seeing that both defenders are good for the money a decree in such terms would have produced payment in full. If that is the proper form of decree where the defenders are equally liable, the fact that the liability of one is limited by statute cannot affect the liability of the other whose liability is for the full amount awarded.

It is not necessary to consider whether judge or jury may, if they think that there are degrees of culpability, limit the damages as against one or other of two defenders, although I doubt the competency of this course. It is, in my opinion, sufficient that they are not entitled to apportion the total damages found due between the defenders so as to deprive the pursuer of his right to recover the full amount from the defender whose liability is not limited. In other words, the liability of each defender must be judged of just as if he were the only defender to the action.

In the present case it is clear that but for the operation of the statute the Sheriff-Substitute would have assessed the total damages at £500, which is not too much for the pursuer's terrible injuries. The statutory restriction of the Caledonian Railway Company's liability should not have affected the pursuer's claim for the full £500 against the North British Railway Company. But the Sheriff-Substitute not only reduced the total amount of the damages from £500 to £406, but he pronounced a decree under which the pursuer could not have received more than £250 from the North British Railway Company. In my opinion the pursuer is entitled to a decree which will enable him in his option to recover the full £500 from the North British Railway Company, or £344 from them and £156 from the Caledonian Railway Company. The pursuer's strict right, in my opinion, is to have a decree for £156 against both defenders conjunctly and severally, and *quoad ultra* decree against the North British Railway Company alone for the balance, £344. In the present case it may be sufficient to decern against the Caledonian Railway Company for £156, and against the North British Railway Company for £500 under deduction of what is recovered from the Caledonian Railway Company. But with deference I think that in such cases, as a general rule, the decree should admit of the pursuer, if he chooses, recovering the full amount from the defender, whose liability is not limited by statute. I do not think the Court is concerned with questions of relief between the defenders.

The Court pronounced the following interlocutor:—

"Sustain the appeal, and recal the said interlocutor of 20th January 1898: Find in fact and in law in terms of the findings in fact, and in law in the said interlocutor of 24th July 1897, except so far as regards the amount of damages found due: Find the pursuer entitled to £500 of damages: Find that the defenders the North British Railway Company are liable for the full amount thereof at common law, and that the defenders the Caledonian Railway Company are liable to the extent of £156 under the Employers Liability Act 1880: Therefore decern against the defenders conjunctly and severally for the said sum of £156, and against the defenders the North British Railway Company for the sum of £344, being the balance of the damages of £500 found due to the pursuer: Find the defenders jointly and severally liable in expenses in the inferior Court and also in this Court."

Counsel for the Pursuer—Salvesen—W. Brown. Agent—Alexander Morison, S.S.C.

Counsel for Defenders the Caledonian Railway Company—Guthrie, Q.C.—Nicolson. Agents—Hope, Todd, & Kirk, W.S.

Counsel for Defenders the North British Railway Company—The Solicitor-General—Grierson. Agent—James Watson, S.S.C.

Saturday, June 4.

FIRST DIVISION.

MACPHERSON *v.* BROWN (LIQUIDATOR OF D. S. IRELAND, LIMITED).

Company — Winding-up — Voluntary Winding-up—Summary Application to the Court by a Creditor—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 138.

Summary application to the Court under section 138 of the Companies Act 1862 is not competent to the creditor of a company in voluntary liquidation, who, though once the liquidator of the company, has ceased to be so, and who, although a contributory, does not seek to make such application in that capacity.

Company — Winding-up — Voluntary Winding-up — Liquidator — Remuneration of Liquidator—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *secs.* 133 (3), 138.

The remuneration of the liquidator of a company in voluntary liquidation is left by sec. 133 (3) of the Companies Act 1862 in the hands of the company, and it is incompetent for the liquidator in such a liquidation to apply directly to the Court to fix the amount of his fee.

Company — Winding-up — Voluntary Winding-up—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 141.

Observed (*per* L. P. Robertson) that the fact that the Court has in a voluntary liquidation removed a defaulting liquidator and appointed another liquidator in his place does not convert that liquidation into one under supervision of the Court.