we are told that the actual account, subject to taxation, amounts to over £200. Your Lordships' attention has been called to the two cases of *Hoey* v. *Hoey*, 1883, 11 R. 25, and *Johnston* v. *Johnston*, 1903, 5 F. 336. There seems to be some difficulty in reconciling these two cases, and therefore your Lordships have had to consider the matter afresh. I do not think that there is any doubt as to the principle to be applied in such cases. If a husband seeks to divorce his wife, and the wife is without means, she is entitled to have paid to her such funds as shall from day to day be sufficient to allow her to make good her defence. As to the amount to which she is from time to time entitled, that can only be arrived at by a rough estimate. Of that principle I think there can be no question. But if during the progress of the case the wife manages to carry on her case by means of her own funds, or of funds which she has succeeded in borrowing for the purpose, the necessity for interim payments is over, and her ultimate right to expenses will be left to be determined at the end of the day according to the ordinary rules. But if the wife has won her case in the Outer House and is brought to the Inner House, she is absolutely entitled to maintain her decree, and to be put in funds for that purpose, and if we see that the sum brought out in the account of expenses is considerably in excess of the amount already advanced, we are entitled to assume that the wife's resources are exhausted; and therefore a liberal view may well be taken if an application is made to us for an interim award to enable her to carry through the proceedings in the Inner House. If this case were in such a position that it might be in the roll within the next week or so, no doubt she could have claimed at this stage a sum sufficient for the instruction of competent agents and counsel. That, however, is not the case here, and the application is in a measure premature. But I think she is entitled to get something. No doubt the main expense of the reclaiming note at this stage is that of printing, and the printing has to be done by the husband. But the wife is entitled to have the printing revised on her own behalf, and to see that those documents are printed which are necessary for the proper presentation of her case; as we all know, additional prints for the respondent are often required. I am therefore prepared to assent to an interlocutor making an interim award of £15, and when the case is within reasonable distance of being put out for hearing, I shall be prepared to listen to a renewed application.

LORD M'LAREN—I am of the same opinion. The Lord Ordinary has granted absolvitor with expenses to the wife, which of course means with taxed expenses in so far as these are not covered by the interim payments already made. At this stage we cannot interfere with the finding of the Lord Ordinary, and in any case these interim awards are not brought under review by the reclaiming note. We have therefore to consider what interim award is necessary to enable the lady to continue her defence in the Inner House. It seems to me that there are several reasons for providing for her on a comparatively liberal scale. In the first place, a certain presumption of her innocence may be drawn from the Lord Ordinary's interlocutor. Then it is clear that she has not been fully reimbursed for the expenditure which she has already incurred. A third reason, perhaps, is that it is comparatively easy to estimate what expenditure is likely to be incurred in the Inner House. Here there will be only a debate upon the proof and documents, and there is a marked difference in this respect from the position in the Outer House, where the expenditure cannot be even approximately estimated, because it depends to a large extent upon the duration of the proof and the number of witnesses to be examined. I agree with the award proposed by your Lordship.

LORD KINNEAR—I agree with your Lordship in the chair.

LORD PEARSON was absent.

The Court decerned against the pursuer for payment to the defender of £15 to account of her expenses in connection with the pursuer's reclaiming note.

Counsel for Pursuer (Reclaimer)—Spens. Agents—John C. Brodie & Sons, W.S.

Counsel for Defender (Respondent) — Gunn. Agents—Mackay & Young, W.S.

Friday, February 19.

SECOND DIVISION.

[Sheriff Court at Dunfermline.

ADAMSON *v.* FIFE COAL COMPANY, LIMITED.

Process—Sheriff—Jury Trial in Sheriff Court—Motion for New Trial on Ground that Questions not Properly Adjusted—Competency — Adjustment of Questions for Jury—Appeal—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *secs.* 27, 28, 31, 32, *and First Schedule, Rule* 144.

The Sheriff Courts (Scotland) Act 1907, section 31, makes provision for trial by jury in the Sheriff Court of cases under the Employers' Liability Act 1880, and directs that the verdict of the jury shall be applied by an interlocutor of the Sheriff, which shall be appealable to the Court of Session only on the grounds (1) that the verdict has been erroneously applied, or (2) that it is contrary to evidence, or (3) that the Sheriff had unduly refused or admitted evidence or misdirected the jury, or (4) that their award of damages is inadequate or excessive. Section 32 makes it competent for the Sheriff, where jury trial has been ordered, to fix the question or questions of fact to be put to the jury. By sections 27 and

28 appeal is competent to the Sheriff and Court of Session respectively against any interlocutor against which leave to appeal has been granted.

Held that it was incompetent to bring under review, in an appeal against an interlocutor applying the verdict, an interlocutor fixing the questions to be put to the jury against which leave to appeal had not been asked.

Opinion, per curiam, that an interlocutor adjusting the questions to put to the jury is an interlocutor against which leave to appeal may be granted.

Observed, per Lord Ardwall, that except in the case of a motion made plainly for delay, or other illegitimate purpose, it is the duty of the Sheriff-Substitute to grant leave to appeal against an interlocutor fixing the questions to be put to the jury, that being equivalent to the adjustment of issues in the Court of Session.

Opinion, per the Lord Justice-Clerk, that a verdict cannot be set aside on the ground of misdirection by the Sheriff where no exception has been taken at the trial.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) enacts—section 27—"Subject to the provisions of this Act an appeal to the Sheriff shall be competent against all final judgments of the Sheriff-Substitute and also against interlocutors . . . . (*d*) allowing, or refusing, or limiting the mode of proof, not being an interlocutor fixing a diet for jury trial; (*e*) against which the Sheriff-Substitute either *ex proprio motu,* or on the motion of any party grants leave to appeal. . . ."

Section 28—"Subject to the provisions of this Act it shall be competent to appeal to the Court of Session against a judgment of a Sheriff-Substitute or of a Sheriff, but that only if . . . . the interlocutor appealed against is a final judgment, or is an interlocutor . . . . (*c*) against which the Sheriff or the Sheriff-Substitute either *ex proprio motu,* or on the motion of any party grants leave to appeal. . . ."

Section 31—"In any action raised in the Sheriff Court by an employee against his employer concluding for damages under the Employers' Liability Act 1880, or alternatively under that Act or at common law, in respect of injury caused by accident arising out of and in the course of his employment, where the claim exceeds fifty pounds, either party may, so soon as proof has been allowed, . . . require that the cause shall be tried before a jury . . . of seven persons. The verdict of the jury shall be applied in an interlocutor by the Sheriff, which shall be the final judgment in the cause, and may, subject to the provisions of this Act, be appealed to either Division of the Court of Session, but that only upon one or more of the following grounds—(1) That the verdict has been erroneously applied by the Sheriff; (2) that the verdict is contrary to the evidence; (3) that the Sheriff had in the course of the trial unduly refused or admitted evidence or misdirected the jury; (4) that an award of damages is inadequate or is excessive. Upon such appeal the Court may refuse the appeal or may find under head (1) that the verdict was erroneously applied, and give judgment accordingly, or under the other heads before mentioned may set aside the verdict and order a new trial. . . ."

Section 32—"Where jury trial has been ordered the Sheriff shall, after hearing parties, if he shall think that necessary or desirable, issue an interlocutor setting forth the question or questions of fact to be at the trial proponed to the jury, and fixing a time and place for the trial. . . ."

William Adamson raised an action in the Sheriff Court at Dunfermline against the Fife Coal Company, Limited, concluding for £250 damages under the Employers' Liability Act 1880 (43 and 44 Vict. cap. 42) for the death of his son Robert Adamson, who was killed on 14th November 1907 while in the employment of the defenders in their No 1 Pit, Dalbeath.

At the time of the accident Adamson along with others was engaged in removing a brick arch in one of the midworkings of the pit, to make room for an engine seat. While this work was being carried on, the arch collapsed, thereby causing his death.

The pursuer averred—"(Cond. 7) The fireman, who also acted as oversman, appointed by the defenders in connection with the pit where the pursuer's said son was working was John Fleming. The said John Fleming was specially appointed by the defenders' manager to give particular attention to the arch and the work generally, because of the unusual nature of the operations and of the danger in working. The defenders' said manager instructed the said John Fleming to see that all the necessary precautions were taken for the safety of the men employed. (Cond. 8) It was the duty of the said John Fleming, before the commencement of the shift on said 14th November, to make an inspection before the 6 o'clock shift began, and to satisfy himself that everything was safe and secure for the workmen to be employed in connection with said work. Whether or not the said John Fleming made the inspection before the commencement of the said shift the pursuer does not know, but the pursuer believes and avers that the said John Fleming did not make any inspection during the course of the shift, and before the deceased went to work on the day of the accident. Alternatively, if he did make said inspection, it was made in such a grossly careless and negligent manner as to be useless. If the said John Fleming had made the inspection which he ought to have done under the Coal Mines Regulation Act 1887 and [certain] special rules [passed in pursuance thereof and in force at the pit] during the course of said forenoon shift, and before the pursuer's son went to work at 2 o'clock, he would have ascertained . . . . that said wall and the arch itself were in such an insecure condition that it was dangerous to allow any workman to proceed to work before ample precautions had been taken for their safety, and it was the duty of the said John Fleming to prevent the pursuer's son and the

other workmen going to their work until all the requisite and necessary precautions for their safety had been adopted. . . . . The said John Fleming failed to take any precautions whatever for the safety of the pursuer's son and the other men working there, with the result that the pursuer's said son was killed. (Cond. 10) Said accident was also caused or materially contributed to by reason of the negligence of the said John Fleming, in connection with his superintendence of the dangerous operations in connection with the removal of said brick wall and arch referred to, and the defenders are liable for the said John Fleming's negligence, as fireman and oversman, under subsections 1 and 2 of the Employers' Liability Act 1880."

The pursuer pleaded—"(1) The pursuer's son having been killed while in the employment of the defenders, through defects in the condition of the works and ways in the defenders' said pit, and the said defects being due to the negligence of the defenders or those for whom they are responsible, having been known to or otherwise not having been discovered or remedied owing to the negligence of the defenders, or those for whom they are responsible, as condescended on, the pursuer is entitled to damages and *solatium* under the Employers' Liability Act 1880. (2) Alternatively, pursuer's said son having been fatally injured by reason of the negligence of the said John Fleming, the person appointed by the defenders to superintend the dangerous operations condescended on, whilst in the exercise of said superintendence, the pursuer is entitled to damages and *solatium* for the death of his said son under said Employers' Liability Act 1880."

On 30th June 1908 the Sheriff-Substitute (HAY SHENNAN), on the motion of the pursuer, directed the cause to be tried by jury, and on 23rd July 1908 pronounced an interlocutor fixing the date of the trial and directing the following questions to be put to the jury:—"It being admitted that pursuer's son Robert Adamson was, on 14th November 1907, while in defenders' employment, killed in the course of his work through the collapse of a brick erection which was being taken down in No. 1 Pit, Dalbeath—(1) Was the accident to pursuer's son caused by reason of any defect in the ways and works in said pit? (2) Was the accident to pursuer's son caused by reason of the negligence of John Fleming, the oversman, in the exercise of his duties as oversman? (3) What is the amount of three years' wages of a person in the same grade of employment as pursuer's son prior to the date of the accident? (4) Assuming the pursuer to be entitled to recover damages, what sum (not exceeding the amount found in answer to question 3) is it fair and reasonable to award him?"

The jury unanimously answered the questions as follows—(1) Yes. (2) No. (3) £273, 15s. 6d. (4) £200.

On 6th October 1908 the Sheriff-Substitute pronounced an interlocutor finding that the verdict fell to be applied in favour of the defenders, and assoilzied them.

Note.—"Pursuer has been given a verdict in his favour to the effect that the accident to his son was caused by reason of defect in the ways and works in the pit. Therefore section 1, sub-head (1), of the Employers' Liability Act 1880 applies. But under section 2, sub-head (1), of that Act compensation in such a case cannot be recovered 'unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.' There is no such finding in the verdict of the jury, and therefore I cannot find pursuer entitled to compensation."

The pursuer appealed on the following grounds, as set forth in his note of appeal —"(*a*) That the verdict was contrary to evidence in certain respects. (*b*) That the Sheriff-Substitute misdirected the jury in regard to the first question submitted to them. . . The first question as stated by the Sheriff-Substitute was incomplete, and the Sheriff-Substitute, though called upon at the trial to amend said question so as also to ask the jury if the said defect arose from, or had not been remedied owing to the negligence of the defenders, or of some person in their service entrusted by them with the duty of seeing that the ways and works were in proper condition, refused, because he considered he had no power to do so. This addition to the question was absolutely essential to the justice of the case. Further, the second question was incomplete, inasmuch as it limits the matter of Fleming's negligence to his duties as oversman, while the defenders would have been liable in this action for his negligence as fireman, which negligence was proved. It was essential to the justice of the case that the jury should have been asked to say whether his negligence as fireman had caused or contributed to the accident. (*c*) That, in the interlocutor complained of, the verdict was erroneously applied."

He argued—(1) The questions formulated by the Sheriff could be competently brought under review in the present appeal—Fyfe, Sheriff Court Code, p. 54. The Act made no provision for appeal against an interlocutor setting forth the questions for the jury. The interlocutors (other than final interlocutors) against which appeal was competent to the Sheriff or to the Court of Session were set forth in sections 27 and 28 of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), and an interlocutor adjusting the questions for the jury was not mentioned there. The interlocutor in question was an interlocutor fixing a diet for jury trial and was specially excluded from appeal by section 27 of the Act. There was thus no provision for bringing the interlocutor fixing the questions under review at an earlier stage. Further, in adjusting the questions the Sheriff had misdirected the jury, and that was a competent ground of appeal under section 31 of the Act. The pursuer could not have taken exception to the questions at the trial, as he might have

done had the Sheriff given verbal directions to the jury. (2) The questions put did not exhaust the case made on record by the pursuer. The pursuer was entitled to a verdict if it was established that the accident was due to defect in the ways and works which had not been discovered or remedied owing to the negligence of the defenders, or of some one entrusted by them with the duty of supervision of the ways and works —Employers' Liability Act 1880 (43 and 44 Vict., cap. 42), sections 1 (1) and 2 (1). That ground of liability was not put to the jury, and the first question was incomplete. The second question put to the jury was also incomplete because it limited the ground of liability to the negligence of Fleming *qua* oversman, whereas he was charged on record with negligence *qua* fireman, and *qua* the person appointed by the defenders to superintend the dangerous operation which resulted in the accident. (3) The verdict was erroneously applied, because the answers given by the jury were consistent with the defenders' liability. Counsel also argued that the verdict was contrary to evidence.

Argued for the defenders (respondents) —(1) It was not competent to object to the form of the questions put to the jury after the trial had taken place and the verdict had been brought in. The interlocutor fixing the questions might have been appealed to the Sheriff under section 27 (*e*) of the Sheriff Courts (Scotland) Act 1907, or leave to appeal to the Court of Session might have been applied for under section 28 of the Act. The pursuer having done neither of these things could not now competently object to the form of the questions. The questions took the place of issues—First Schedule, rule 136—and not of directions, and section 31 (3) did not apply. In any case no exception had been taken at the trial. (2) The questions put to the jury fairly placed the case before them. If question 2 had been answered in the affirmative the pursuer would have got his verdict. Since that question was answered in the negative the verdict must be applied in favour of the defenders. Counsel also agreed that the verdict could not be set aside as contrary to evidence, and cited *Kinnell* v. *Peebles*, February 7, 1890, 17 R. 416, *per* L.P. Inglis, at p. 424, 27 S.L.R. 365.

LORD JUSTICE-CLERK—I must say this is a most unfortunate case. The record is most unfortunate; the questions which were put to the jury were most unfortunate, and I am afraid the whole result of the case may well be described as unfortunate.

The first question that was put by the Sheriff-Substitute was a question whether the accident to the pursuer's son was caused by reason of any defect in the ways and works in said pit. Now I am unable to see that there is any real record for that plea, and I am unable to see how there could be. I do not see myself that there was anything of the nature of a defect in the ways and works of the said pit proved at the trial. A particular operation was being carried out which was not of the nature of works or ways of the pit, but a piece of work that required to be done for a special purpose. Well, the jury held upon the questions put to them that there was a defect in the ways and works of the said pit. Having found that, the next question was put for the purpose of ascertaining whether the Employers' Liability Act, section 1, sub-section 2, applied. That subsection says that "Where after the commencement of this Act personal injury is caused to a workman . . . by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence," . . . the workman shall have right to compensation. Now it was, I suppose, with reference to that particular sub-section that the second question was put in the following terms:—"Was the accident to pursuer's son caused by reason of the negligence of John Fleming, the oversman, in the exercise of his duties as oversman?" That is the only question put under which by any possibility a verdict could have been given for the pursuer. If the answer to that had been "Yes," the question would then have arisen—Was that a verdict for the pursuer? The jury have answered that question in the negative, and that being so, it seems to me to be plain that, assuming this verdict was a verdict on the question which was pnt by the Sheriff-Substitute—which it certainly was—it is certainly not a verdict for the pursuer, and I think Mr Watt, with his usual candour, admitted that it could not be held to be a verdict for the pursuer. If the pursuer, then, has not got a verdict, he is just in the position of having failed in his case, and the case must be disposed of on the footing that the defender is entitled to absolvitor.

Now, seeing that, the pursuer very ingeniously takes up ground for the purpose of getting rid of that difficulty. The ground he takes up is that the questions are not questions which should have been put to the jury. The Act of Parliament is very specific as to what the duty of the Sheriff is in getting the case prepared for trial. He has a duty under section 32 to consider what questions are to be put to the jury, because in these new cases under this new Act the issue is to be put in the form of questions adjusted by the judge and laid before the jury. Now in doing that he may, if he thinks it necessary, consult the parties, take them into consultation with him, hear what they have to say, and then consider and dispose of the matter, and if he does that it is entirely in the exercise of his discretion. In this case I understand he did so, and having considered what the parties had to say he framed these questions. Now we are told that these are questions upon which the case should not have been sent to trial. In these circumstances it appears to me that it was the duty of the pursuer to have endeavoured to get proper questions adjusted before the trial took place, and that he could have done so by asking the Sheriff-Substitute for leave to appeal the matter if he did not see fit to

readjust his questions before the trial. I cannot assent to the idea that where a case is to be tried by jury a Sheriff-Substitute's view as to the questions to be put is to be final, thus giving the Sheriff-Substitute finality in the settling of issues—a matter which in the Court of Session is not remitted to the final judgment of a Lord Ordinary. I feel sure that most Sheriffs-Substitute would feel it to be a very serious matter if the responsibility were put upon them of finally settling the questions to be put to the jury. The present case is an illustration of the danger of such a rule, for which I see no authority in the statute. In this case no motion was made for leave to appeal, and these questions were without objection laid before the jury for them to dispose of. I can see no ground for holding that there is any remedy open after the case has gone to trial, and after the questions that had been adjusted had been answered. It would be a very extraordinary thing if after a trial had taken place, and the jury had disposed of the questions adjusted for them, it should be open to the pursuer to say—"All this trial must be set aside and I must have a new trial." I think that is quite out of the question.

Another technical ground is that the verdict was erroneously applied by the Sheriff-Substitute. I am unable to see that it was. He had before him the finding of the jury in fact, in answer to the second question, and that answer was in the negative, and as I said before, without an affirmative answer to that question no answer to the first question could possibly be effective.

[*His Lordship then dealt with the question whether the verdict was contrary to evidence, and came to the conclusion that it was not.*]

Now there is only one other question I need refer to, and that is whether there can be any possibility of setting this verdict aside upon any question of law? I should have expected that in a case of this kind if questions of law arose, they would arise at the trial. There is only one possible way in which such a question can arise, and that is by exception being taken to the course the judge takes at the trial, definitely impugning what was done and definitely stating what he ought to have done,—excepting to what he did and asking for directions in an opposite sense from those he submitted to the jury. Here the case must be taken on the footing that nobody at the trial saw any objection to what the judge said to the jury.

On the whole matter, although I regret it very much in this first case under this Act of Parliament, I see no ground whatever for allowing a new trial in this case.

LORD PEARSON—I agree with the result at which your Lordship has arrived.

The Sheriff-Substitute, in the course of his duty under the Act, formulated four questions which were to be laid before the jury. I say nothing about the last two of them. They merely go to the amount of the damages; and though they are inserted as questions, instead of merely being left to the jury upon the evidence, it may possibly have been thought to conduce to clearness to have this set forth in the schedule of questions put to the jury. I have no doubt this is a matter of practice which will settle itself very easily.

As regards the other questions, it is said that they are not properly framed so as to exhaust the case, and that possibilities are left open which ought to have been foreclosed by the questions being expressed somewhat differently. This raises a preliminary point, how far these questions are before us for examination. Now I agree with your Lordship that inasmuch as the pursuer here did not object in the way the statute (as I read it) allows him to object to these questions, he cannot now raise the point as to whether these exhausted the matters in dispute. The pursuer, if dissatisfied with the decision of the Sheriff-Substitute as to the framing of the questions, was entitled, as I read the statute, to ask the Sheriff-Substitute for leave to appeal against the form of the questions. In my view, there was nothing incompetent in the pursuer asking the Sheriff-Substitute's leave to appeal on this point, whether the Sheriff-Substitute had previously applied his mind to the questions at a meeting of the parties or not. Here I understand the questions were adjusted by the Sheriff-Substitute after a hearing. But unless the parties then and there expressed themselves satisfied with them, it was surely competent for either to ask for leave to appeal on the ground that the questions were not satisfactory for the trial of the case.

But taking the questions as they are, the next point is whether any good objections have been stated to them as not exhaustively setting forth all the points to which the jury had to apply their minds. I agree that on a critical examination of the questions in the light of the record they are found to be not very well framed, and not sufficiently detailed. The first question does not seem to me to meet the facts of the case. But the parties have gone to trial upon it; and as the jury affirmed it in the pursuer's favour, we may assume that there was some defect in the ways and works which would found a claim on the part of the pursuer. Then it is suggested that this question as framed was not sufficiently specific, because it did not conclude with a charge of negligence against anyone in the matter of the defects in the works and ways. I do not think this objection is well founded. It seems to me quite a proper way of framing the questions to have one question as to defects causing the accident, and the second question as to liability on the head of negligence. The second question indeed can hardly be regarded as leaving the case to the jury on a satisfactory footing, for it did not set forth each of the alternatives on any one of which the pursuer claimed to succeed. But I think the Sheriff-Substitute would be well within his right and his duty in charging the jury, if he directed them that that question included all the capacities (to

put it shortly) in which John Fleming was engaged in these workings. I do not think the language is to be commended; but I think each of these capacities may be regarded as being within the question as put, having regard to the statements on record.

[*His Lordship then dealt with the question whether the verdict was contrary to evidence, and found that it was not.*]

LORD ARDWALL—I entirely agree with the observation made by your Lordship in the chair that this is a very unfortunate case. It seems to me from the very first to have got on to wrong lines, although the record states very clearly how the accident arose. The death of the pursuer's son was not, as I read the record, due to a defect in the ordinary works and ways of the pit. The accident arose in this way. An alteration was about to be made in the arrangements of this pit. An engine-seat was going to be put down in the mid-level. A brick arch was to be removed, and along with it a considerable quantity of minerals. That by itself was an operation having nothing to do with the works and ways of the pit, except that one of the ways passed through the place. I should have thought that the pursuer's case should have been from the outset conducted on the ground indicated in his second plea-in-law, viz., that the accident arose from the fault of the manager and of Fleming in not constantly supervising this somewhat ticklish operation of removing this brick arch from its place with greater care than they did. But the action drifted away from this point altogether, and consequently when the Sheriff-Substitute came to adjust the questions after hearing parties he put the first question in this form—Whether the accident to pursuer's son was caused by reason of any defect in the ways and works in said pit? In the next place, he had to find out from the record to whose fault it was due that this defect had not been discovered or remedied, and as the only person mentioned by the pursuer on the record as being in fault in this way was John Fleming, down went the second question to this effect—"Was the accident to pursuer's son caused by reason of the negligence of John Fleming, the oversman, in the exercise of his duties as oversman?" So those were the two questions put to the jury, the others referring only to the amount of damages.

In that state of matters we are asked to hold that the verdict has been erroneously applied by the Sheriff-Substitute. Now, taking in the first place these questions and answers as they stand, I cannot say they have been erroneously applied. The answer to question 1 involves no liability upon the employer unless the defect was caused through the negligence of some person whose duty it was to look after the works and ways, and when we come to the second question the jury answer that in the negative. Answering that in the negative, they negative the only statutory ground which is set forth in these questions sufficient to infer liability on the part of the defenders, and therefore I do not see that the Sheriff-Substitute had any option but to enter this up as a verdict for the defenders, it being impossible to enter it up as a verdict for the pursuer.

But it became apparent before the discussion on the appeal before us had proceeded very far that the real question sought to be raised here was this—Whether this Court should now order a new trial on account of the erroneous terms in which the questions were framed. I was at a loss to understand how such a ground for upsetting the verdict of a jury came to be presented to this Court, but in a text-book referred to during the discussion I find this observation. The commentator, Mr Fyfe, a Sheriff-Substitute of Lanarkshire, says this in a treatise upon the Sheriff Courts (Scotland) Act 1907—"It is conceivable also that after a jury cause has been closed, and taken to the Supreme Court on appeal, a new trial might upon occasion have to be ordered because of a question having been erroneously expressed." Now, how any person who had studied the Sheriff Courts (Scotland) Act 1907 could have put in writing such a misleading observation as that passes my comprehension. It is settled by section 31 of the Act that the only grounds on which there is an appeal to the Court of Session against an interlocutor of a sheriff applying a verdict of a jury are the four there mentioned. The section of the Act deserves careful attention, because it seems to me that it clearly excludes the Court from interfering with the verdict of a jury in the Sheriff Court on any other ground. It runs thus—". . . [*His Lordship read section 31 of the Act, quoted supra.*] . . ."

Now these are the words of the Act of Parliament, and they are perfectly distinct. It is "only" upon one or more of the four specified grounds that an appeal to the Court of Session is allowed, and they appear to me to preclude the Court from taking up any question whatever as a ground for upsetting the verdict of a jury except the four there mentioned. I therefore hope no one will be misled in future by the passage on page 54 of the book which I have referred to.

But it was argued that if the Sheriff-Substitute goes wrong in adjusting the questions under section 32 of the said Act there is no remedy. Well, I am afraid upon the words of the Act that if the Sheriff-Substitute refuses leave to appeal against his interlocutor settling the questions, there is no remedy. That is the effect of the Act, and this same commentator to whom I have already referred seems to claim for the Act a great amount of wisdom on account of this very provision. This is what he says on page 53 of his Commentaries—"These questions take the place of the 'issue' of Court of Session practice. But there is no appeal as upon the adjustment of issues—(the stage of a jury cause where delay and expense may be most readily occasioned)." So the astonishing reason—if I may say so—for

applauding, as the commentator does, this provision of the Act which he says excludes appeal, is that there are frequent delays in adjusting issues in the Court of Session. It does not seem to have entered his mind that if a question is erroneously expressed, it is much better to have such error remedied before the parties incur the expense and trouble of a jury trial, than that the question should either not be put right at all, or put right with the result of setting aside the trial and whole other proceedings. Fortunately, however, as I read the Act, a remedy may be got by the Sheriff-Substitute, in a case like the present, granting leave to appeal to the Sheriff or the Court of Session under sections 27 (*e*) or 28 (*c*) of the Act. I do not think that interlocutors fixing questions are exempt from these provisions, and I also think that when Sheriff-Substitutes or Sheriffs are applied to for leave to appeal, they would grant it notwithstanding this note of the commentator to which I have referred. I go further, and say that I think it would be the duty of the Sheriff-Substitute—except in the case of a motion made plainly for delay, or other illegitimate purpose—to grant leave to appeal against an interlocutor fixing these questions which are of the highest importance in jury trial procedure, being equivalent to the adjustment of issues in this Court. I may add that it seems surprising that in this Court, where jury trials have been so long in existence, appeals against interlocutors approving of issues for the trial of a cause should be allowed, either by way of motion to vary issues or by reclaiming note, on the assumption that a Lord Ordinary may go wrong in the adjustment of the issues, whereas in this Act of Parliament Sheriff-Substitutes are supposed to be endowed with such wisdom as that they cannot err in the adjustment of issues, and the Act therefore makes their decision final, unless either *proprio motu*, or on the motion of one or other of the parties, the Sheriff grants leave to appeal against the interlocutor fixing the questions. I trust therefore that if in cases such as the present the parties are dissatisfied with the questions fixed by the Sheriff-Substitute, they will move for leave to appeal, and that such leave will be granted. But in the present case such leave was not applied for, and that being so, I am perfectly clear we cannot go back upon these questions, and if the pursuer unfortunately suffers injustice, it is owing to his having adopted this novel mode of procedure instead of being satisfied with the former mode of taking a proof before the Sheriff-Substitute, in which case he could, if he were dissatisfied, have appealed, first to the Sheriff and then to this Court. If people have recourse to trials by jury they must be content to be bound by the rules applicable to such procedure.

[*His Lordship then dealt with the question whether the verdict was contrary to evidence, and came to the conclusion it was not.*]

I do not think I need say anything upon the other questions that have been raised. I concur in what was said by my brother Lord Pearson, that under Rule 144 in the Schedule to the Sheriff Courts (Scotland) Act 1907 it is unnecessary to put a question as to amount of damages, because this form of verdict is prescribed, viz., "The verdict of the jury shall be returned in the form of specific answers to the questions proponed by the Sheriff, with the addition of a statement of the amount at which they assess the damages, in the event of damages being awarded." The amount of damages accordingly did not require to be put in the questions at all.

On these grounds I am of opinion that this verdict cannot be interfered with, and that we must affirm the judgment of the Sheriff-Substitute.

LORD LOW and LORD DUNDAS were sitting in the Valuation Appeal Court.

The Court dismissed the appeal.

Counsel for the Pursuer (Appellant)—Watt, K.C.—Munro. Agent—D. R. Tullo, S.S.C.

Counsel for the Defenders (Respondents)—Hunter, K.C.—Horne—Strain. Agents—W. & J. Burness, W.S.

Friday, February 5.

SECOND DIVISION.

[Sheriff Court at Stirling.

M'COLL *v.* THE ALLOA COAL COMPANY, LIMITED.

Process—Sheriff—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 31—*Jury Trial—Misdirection—Appeal—New Trial.*

Circumstances in which the Court, set aside the verdict of a jury in the Sheriff Court in an action for damages at common law, or alternatively under the Employers' Liability Act 1880, and ordered a new trial on the ground of misdirection.

Expenses — Sheriff Court — Jury Trial — Misdirection — Appeal — New Trial — Expenses of Trial and Appeal.

Circumstances in which the Court set aside the verdict of a jury in the Sheriff Court, on the ground of misdirection, and ordered a new trial, but found neither party entitled to expenses.

Mrs Bridget O'Donnell or M'Coll raised an action in the Sheriff Court at Stirling against the Alloa Coal Company, Limited, for damages at common law, or alternatively under the Employers' Liability Act 1880 (43 and 44 Vict. cap. 42) in respect of the death of her husband Daniel M'Coll, who was killed while at work in one of the defenders' pits.

The facts are given in the opinion (*infra*) of the Lord Justice-Clerk.

The defenders pleaded—"(1) The death