the defenders as proprietors of the links, it is important to ascertain with precision what are the duties of a public authority with reference to a public park under their control. It has to be kept in mind as an essential fact in this case that the public have a statutory right to use the links for golf or other recreation. The public have thus equal opportunity with the defenders of making themselves acquainted with obvious dangers to be encountered on the links. The present case is thus different from such a case as *Indermaur* v. *Dames* (L.R., 1 C.P. 274), where the owner of private property has special opportunities, not open to those occasionally invited to the property, of ascertaining what are its risks and dangers. No invitation, express or implied, is needed by the public for user by them of the links. The cases in which it has been attempted to make local authorities having control of public parks responsible for accidents happening therein may be divided into two classes, those in which the danger was hidden, and those in which it was obvious. The former class is what is known as the "trap" type of case, and the circumstances which impose liability on the local authority are these—(1) That there is a certain allurement or attraction, and (2) that there is a lurking danger not obvious to the person attracted but presumed to be known to the local authority, that is, to their officials who actually control the park. The case of *Taylor* (1922 S.C. (H.L.) 1), in which there was an alluring poisonous berry in a public park, is a typical illustration of this class of case. It is not suggested that these elements of allurement and trap are present in this case. The other class of case in which it has been attempted to impose liability on local authorities is that in which the danger is obvious, that is, where it is just as easy for a member of the public as for the local authority's officials to perceive and estimate the risk. Examples of this type of case are *Hastie*, 1907 S.C. 1102, *Stevenson*, 1908 S.C. 1034, and *M'Kenna*, *supra*, 356. Where the danger is obvious in this sense the local authority is not responsible for injury sustained by reason of that danger (*per* Lord Shaw in *Taylor*, p. 10). In the present case the danger was just as obvious to a member of the public as to the defenders' officials. It may well be the case that the pursuer did not know or realise the danger. But this circumstance will not avail if the risk was obvious. It is assumed that everyone knows that fire burns, although some children may be ignorant of this fact. The management of the links at St Andrews would be impossible if it were not assumed that every person visiting the links knew that golf was played there, and that golf was a danger to non-golfers walking on the links who took no precautions for their own safety. It seems to me therefore that there was no duty on the defenders to protect the pursuer from a risk which was obvious.

Assuming that the path in question was a "street" in the sense of the Burgh Police (Scotland) Acts, the obligations of the defenders in connection therewith are well defined and settled. Such cases as *Innes* (M. 13,189), *Dargie* (17 D. 730), and *M'Fee* (17 R. 764) decide that road authorities are responsible for the *structure* of a street. Their duty is to keep the street free from dangers so far as its surface is concerned. But it has never hitherto been suggested that road authorities are responsible for accidents resulting from the mode of user of the street. It has never hitherto been maintained that road authorities are responsible for accidents resulting from runaway horses or negligently driven motor cars or from stones or golf balls improperly invading the roadway. Limitation of the liability of road authorities to structural defects is in no sense arbitrary. It is based on this rational consideration that the road authorities can control the structure of the street but they cannot possibly control the way in which the street is used. I am therefore clearly of opinion that the defenders as road authority had no duty to protect the pursuer from golf balls which might invade the footpath.

It appears to me to be futile to suggest that if the Sheriff-Substitute's judgment is affirmed the main point in the case will not, *ipso facto*, be decided. It would thereby be implied that the defenders had negligently failed to do something that they ought to have done, it does not appear what. Exactly the same attack could be made on those responsible for the management of other public golf courses, such as Musselburgh, Gullane, North Berwick, and Dunbar. The case is therefore of the highest importance to those who are charged with the duty of managing these public links. That feature of the case must be my excuse for having dealt so fully with it.

I am for sustaining the appeal and dismissing the action as irrelevant.

The Court affirmed the judgment of the Sheriff-Substitute.

Counsel for the Pursuer (Respondent)—W. T. Watson, K.C.—Strachan. Agents—Patrick & James, S.S.C.

Counsel for the Defenders (Appellants)—MacRobert, K.C.—S. M'Donald. Agents—Warden, Weir, & Macgregor, S.S.C.

Thursday, July 17.

SECOND DIVISION.

(Before Seven Judges.)

[Lord Constable, Ordinary.

ADAIR AND OTHERS *v.* DAVID COLVILLE & SONS, LIMITED.

(Reported *ante*, 59 S.L.R. 482.)

Process—Sheriff—Jury Trial in Sheriff Court—Questions Proponed by Sheriff to Jury—Failure to Embody Common Law Case in Questions—No Note of Evidence Taken—Application of Verdict—Miscarriage of Justice—Reduction.

The widow and children of a tractor engineman who was killed by an ex-

plosion while delivering molten metal in an outside pit, brought an action of damages against his employers in the Sheriff Court, which was laid alternatively at common law and under the Employers' Liability Act. The case was tried before the Sheriff and a jury, and at the conclusion of the evidence the Sheriff proponed three questions to the jury, of which the second and third embodied the case under the Employers' Liability Act and the first was as follows—"Whether the personal injuries sustained by the deceased, which resulted in his death, were caused by reason of the defective condition of the outside pit in the defenders' works, and if so, in what respect?" To this question the jury returned the following answer—"We are of opinion that the accident was caused by the pit being unsuitable owing to dampness, through the works having been closed and the pit not in use." The damages were assessed £800 at common law and at £566, 3s. 11d. under the Employers' Liability Act. The Sheriff found that the answers did not support the case on record either at common law or under the Employers' Liability Act, and applied the verdict as one in favour of the defenders. No shorthand notes of the proceedings were taken, and an appeal to the Court of Session against the interlocutor of the Sheriff applying the verdict was held incompetent on that ground. In a subsequent action of reduction on the ground that the Sheriff had failed in his questions to put the pursuers' common law case to the jury, and that a miscarriage of justice had in consequence resulted, *held* (by a majority of Seven Judges, the Lord Justice-Clerk *dissenting*) that no sufficient ground had been shown for impugning the questions put to the jury.

Mrs Jeanie M'Ghie or Adair, Glengarnock, and others, the widow and children of the deceased Robert Adair, *pursuers*, brought an action against David Colville & Sons, Limited, Motherwell, *defenders*, for reduction of a verdict returned by a jury on 7th March 1922 in a trial before the Sheriff of Ayrshire (LYON MACKENZIE) and the jury in question in an action at the instance of the pursuer against the defenders in the Sheriff Court of Ayrshire at Kilmarnock, and of a decree dated 16th March 1922 pronounced by the Sheriff applying the verdict, and for a new trial.

The averments of the pursuers in the original action sufficiently appear from the previous report of the case (59 S.L.R. 482).

The pursuers pleaded, *inter alia*—"1. The verdict as recorded not being the verdict returned by the jury is null and void, and decree of reduction thereof should be granted as concluded for. 4. In the circumstances condescended upon a miscarriage of justice having arisen to the great hurt and prejudice of the pursuers, a new trial should be ordered, or the pursuers should have such other redress as may be competent."

The defenders pleaded, *inter alia*—"2. The pursuers' averments being irrelevant and insufficient in law to support the conclusions of the summons the action should be dismissed."

The grounds of reduction sufficiently appear from the judgment of the Lord Ordinary (CONSTABLE), who on 8th January 1924 sustained the second plea-in-law for the defenders and dismissed the action.

Opinion—"The pursuers are the widow and children of the late Robert Adair, who was employed by the defenders in their iron works at Glengarnock. On 22nd November 1920 Adair was in charge of a tractor engine at these works, which was conveying and delivering molten metal into a pit, when an explosion took place and Adair received injuries from which he died a few days later. The pursuers thereafter raised an action in the Sheriff Court against the defenders concluding for damages at common law or alternatively under the Employers' Liability Act. On 6th and 7th March 1922 the action was tried by the Sheriff and a jury under section 31 of the Sheriff Courts Act 1907. In accordance with the provisions of section 32 of the Act the Sheriff proponed special questions to the jury, to which they returned answers, and by interlocutor dated 16th March 1922 he applied the verdict as one in favour of the defenders. In accordance with rule 137 of the rules appended to the Act the agents of the parties dispensed with a record of the proceedings, in which case rule 147 provides that the verdict shall not be subject to review. The pursuers then appealed on various grounds to the Second Division of the Court of Session, but the appeal was dismissed as incompetent under rule 147 (1922 S.C. 672), and the pursuers have now raised the present action for reduction of the verdict and decree applying the same.

"In support of their action the pursuers have stated a great many grounds, which may be roughly divided into two groups, viz., (1) failure of the Judge properly to ascertain and apply the verdict of the jury, and (2) breach of statutory rules and other informalities of procedure.

"Before discussing these in detail it will be convenient to refer to various authorities which were quoted as to the grounds which will warrant reduction of the decree of an inferior court which is statutorily declared to be final. The pursuers found upon what Lord Lyndhurst termed the superintending authority exercised by the Court of Session over inferior jurisdictions where they have been guilty of an excess of their jurisdiction or have acted inconsistently with the authority with which they were invested—*Campbell* v. *Brown*, 3 W. & S. 448. Excess of jurisdiction is a clear case for the exercise of the *jus eminens*, though it may arise from the mistaken construction of a statute which the subordinate court must interpret in the first instance—'A clause of finality cannot protect a sheriff's judgment when taking an erroneous view of a statute he either refuses to sanction a lawful act or sanctions an unlawful one—*per* Lord Justice-Clerk Moncreiff in *Lord Advocate* v.

Police Commissioners of Perth, 8 Macph. 244. Similarly informality or irregularity in procedure may competently found an action of reduction if it involves either a breach of express statutory rules or a violation of those implied rules of procedure which are necessary for the due administration of justice. In the latter case I think there is good authority for the proposition that the irregularity must be such as to render the proceedings fundamentally null—*Munro* v. *Rose*, 18 D. 292. The defenders in the present case sought to apply the same criterion to the breach of statutory rules of procedure. But the authorities are somewhat difficult to harmonise. The general rule undoubtedly is that breach of an express or clearly implied statutory direction will be fatal—*Maitland* v. *Douglas*, 24 D. 193; *Anderson* v. *Widnell*, 7 Macph. 81; *Stirling* v. *Hutcheon*, 1 R. 935; *United Collieries, Limited* v. *Gavin*, 2 F. 60. But in the case of breach of statutory rules with regard to the lodging of reclaiming notes the Court has drawn a distinction between the actual lodging and boxing of the note and ancillary matters such as the lodging and delivering of prints—*Allan's Trustees* v. *Allan*, 19 R. 15; *Henderson* v. *D. & W. Henderson*, 1912 S.C. 171; and in other cases it has refused to grant the remedy of reduction for what may be termed minor statutory irregularities—*Brown* v. *Lindsay*, 7 Macph. 595; *Tough's Trustee* v. *Edinburgh Parish Council*, 1918 S.C. 107.

"In order to appreciate the pursuer's case with regard to the ascertainment and application of the verdict it is necessary to consider their averments in the original action, the record in which was produced in the present action and referred to by both parties. The averments were that the accident which resulted in Adair's death was caused by molten metal coming in contact with dampness in the pit into which it was poured. The pit in question was the only pit at the works which was not under cover, with the result that rain water collected therein. Water also collected therein from the surface owing to faulty drainage and from a broken pipe in an adjoining laboratory. In consequence of this dampness the pit was defective, and the defenders, who made no sufficient inspection of it before allowing it to be used, were responsible for its defective condition. The pursuers also averred that Adair was instructed by David Graham, the foreman in charge, to convey the molten metal to the pit, that Adair was bound to obey Graham's instructions, and that Graham was negligent (1) in utilising the outside pit for molten metal, and (2) in not taking precautions to ascertain that the pit was free from water or dampness. The material pleas were (1) that the pursuers having suffered damage through the negligence of the defenders in utilising a defective pit or in failing to see that a safe and proper pit was provided, were entitled to reparation, and (2) *separatim*, that they were entitled to reparation under the statute because the deceased had died in consequence of injuries sustained through conforming to an order given by a servant of the defenders whom he was bound to obey. On these pleadings the action was appointed to be tried before a jury.

"After evidence had been led before the jury and the Sheriff had summed up he prepared and submitted to the jury the following questions as recorded in the interlocutor sheet:—'1. Whether the personal injuries sustained by the deceased Robert Adair while employed as a tractor engineman at the furnaces of Glengarnock belonging to the defenders on the 22nd day of November 1920, which resulted in his death, were caused by reason of the defective condition of the outside pit in the defenders' works, and if so, in what respect? 2. Whether the personal injuries sustained by the deceased Robert Adair, resulting in his death, were caused by the negligence of Gavid Graham, Glengarnock, in the exercise of superintendence entrusted to him by the defenders, and if so, in what respect? 3. Whether the personal injuries sustained by the deceased Robert Adair resulted from the deceased having conformed to an order negligently given by the said David Graham, to whose orders or directions at the time of the injury he was bound to conform, and what was that order?'

"The verdict of the jury in answer to these questions, as recorded in the interlocutor sheet in terms of rule 145 appended to the Sheriff Courts Act, was as follows:—'1. We are of opinion that the accident was caused by the pit being unsuitable owing to dampness, through the works having been closed and the pit not in use. 2. We answer this question in the negative. In our opinion there was no negligence on the part of David Graham, who we consider did all that was possible in the circumstances. 3. We answer this question in the negative, not being satisfied that David Graham gave any order, but that the deceased Robert Adair returned to his position from a sense of duty.'

"On the same day, 7th March, the Sheriff having heard parties' agents on the motion of the pursuers' agent to have the foregoing verdict applied made avizandum, and on 16th March he pronounced an interlocutor in the following terms:—'Finds in law that in respect the answers returned by the jury to the questions proponed to them do not support the case laid on record either at common law or under the Employers' Liability Act 1880, the verdict is for the defenders: Applies the verdict accordingly. . . .'

"Apart from pure points of procedure which I shall discuss separately, the pursuers table three objections to the regularity of the verdict and the application thereof. In the first place they say that the verdict recorded was not the actual verdict of the jury, because the foreman stated that for the reasons stated in the verdict as recorded they answered the first question in the affirmative and assessed the damages at £800 on a common law basis. In my opinion this objection is bad for various reasons. I think that the verdict as recorded shows that they did answer

the question in the affirmative because the verdict affirms the unsuitableness of the pit owing to dampness, and dampness was the one and only defect which was condescended on. Further, it is admitted that the jury agreed to the answer as framed by the Sheriff. But even if the verdict as recorded did not properly interpret the verdict as announced, that would not in my opinion found an action of reduction, because the Sheriff in interpreting it was not acting beyond his powers. It is well settled by the jury practice of the Court of Session that if a jury returns a verdict which the presiding judge considers ambiguous he may either send them back to consider it—*Morgan* v. *Morris* (20 D. (H.L.) 18)—or he may construe it, and if he thinks that the meaning is clear he may in entering it up alter its wording or effect accordingly—*King* v. *N.B. Railway Company*, 12 S.L.R. 53; *Robinson* v. *Wm. Hamilton (Motors) Limited*, 1923 S.C. 838. In the latter case parties are not without a remedy, because they may take an exception as was done in *Robinson's* case, but a party failing to take such an exception cannot have recourse to reduction. It appeared to me that the pursuers' objection to the terms in which the answers were recorded was really based on a failure to appreciate the distinction between a general and special verdict which I shall discuss later. They seemed to imagine that an affirmative answer to the first question, together with an assessment of damages, necessarily meant a finding in their favour, but in this, as I shall explain later, I think that they were mistaken.

"The pursuers' next objection is that the application of the verdict failed to give proper effect to the verdict as recorded. In my opinion this objection is equally bad and for a similar reason. In applying the verdict the Sheriff was again acting within his powers. If the presiding judge makes a mistake in doing so, section 31 of the Sheriff Courts Act provides a remedy where the evidence has been recorded, but the pursuers here voluntarily debarred themselves from such a remedy. And they cannot have recourse to a reduction simply because a decision of the presiding judge acting within his powers was erroneous.

"There is a third objection based upon the insufficiency of the questions framed by the Sheriff which is distinctly averred in Cond. 5. *Ex facie* the questions appear to be defective because they do not ask for an assessment of damages. But the pursuers cannot found on this point, because it is part of their case that the Sheriff did make such a request and that the jury did assess damages. In argument the pursuers' complaint was that the Sheriff had not exhausted the possibility of liability under the statute because he had confined his questions to negligent superintendence or the giving of a negligent order by David Graham, and had not put the question whether the defective condition of the pit had not been remedied owing to the negligence of some other servant entrusted with the duty of seeing that the plant was in proper condition. Now in the note to his interlocutor applying the verdict the Sheriff explains that no such case was averred in the original record, and considering the original record I should be disposed to agree with him. But even if he were wrong that again would not be a good ground for reduction.

"But there is another aspect of the third objection which strikes me as raising much the most serious question in the case, and while it was not developed in argument I feel bound as it is covered by the pleadings to deal with it. The argument may be stated thus—The record in the original action set forth a case based alternatively on common law liability or liability under the statute in respect of the defective condition of the pit in which the explosion took place, and that case was sent to trial. The trial of it necessarily involved the consideration of two things, viz. (1) whether the pit was defective, and (2) whether the defenders, or otherwise a servant for whose fault the statute makes them responsible, were to blame. Now the questions framed by the Sheriff as recorded put to the jury an issue as to the condition of the pit; they also put to the jury two issues as to whether there was *culpa* on the part of the foreman, but they did not put any issue as to whether there was *culpa* on the part of the defenders, and they only put one very general question of fact bearing upon the common law liability of the defenders. In these circumstances the question arises whether the omission of a direct issue of negligence, or that omission coupled with the absence of questions sufficiently detailed to elucidate the facts necessary to determine the defenders' liability, do not constitute an *ex facie* fundamental defect in the procedure.

"The action is based on negligence, and under the well-settled form of general issue appropriate to the trial of such an action negligence on the part of the defenders must be affirmed or negatived by the jury, the damages being alternatively scheduled to meet the contingency of the jury affirming common law or merely statutory liability (*Magee* v. *Dalgliesh, Falconer, & Company, Limited*, 11 R. 857; *Goudie* v. *Paul & Sons*, 22 R. 1). An early illustration will be found in *Anderson* v. *Pyper*, quoted in Macfarlane's Practice in Jury Cases, p. 324. A passenger who had been injured by the overturning of a public coach sued the owners for damages, and the approved form of issues was (1) whether the coach had been faulty in certain specified respects; and (2) whether these defects were due to the negligence of the defenders. Negligence no doubt involves or may involve questions of law as well as questions of fact, and questions of law are for the judge. But under this form of issue the judge can only give the necessary directions in law to the jury in his charge. The jury remain masters of the verdict, affirming or negativing the general issue of negligence as the case may be.

"The present case is, however, rather different. Section 32 of the Sheriff Courts Act made it competent in any case, and imperative if either party required it, for

the presiding judge to propone to the jury particular questions of fact, thus reviving a practice which existed generally when jury trial was first introduced in Scotland, but which was abandoned very shortly afterwards—Macfarlane, p. 68. The result is, I think, to convert the verdict of the jury into a special verdict—a form of procedure with which Scots lawyers are not familiar, though it is still competent and is occasionally resorted to in the Court of Session (*cf. Wilson* v. *Boyle*, 17 R. 62). A special verdict as I understand it finds for neither party but simply makes special findings on the facts, leaving the Court to apply the law and enter up the verdict accordingly (Macfarlane, *per* Lord Benholme in *Murray and Others* v. *Arbuthnott*, 9 Macph. 198). This was the form of verdict prescribed by rule 144 of the Sheriff Courts Act 1907, though it was repealed when under the amending Act of 1913 it became no longer compulsory to take a special verdict in all cases. In a sense a special verdict enlarges the power of the presiding judge, because it enables him to apply the law directly instead of doing so by way of direction to the jury which they may disregard. On the other hand it does not extend his jurisdiction to any question of fact, and it requires that the facts to which the law is to be applied by the judge shall be fully and clearly determined by the jury.

"Now in the present case the jury, as already pointed out, were not asked to make and did not make any finding with regard to the defenders' negligence. In my opinion the omission was not in itself fatal, because the material facts necessary to determine common law liability might be ascertained by special questions. The point is whether the only question of fact put by the presiding judge was sufficient to enable the case to be fairly tried without a direct issue of negligence. The point is illustrated by the note to the Sheriff's interlocutor applying the verdict. The ground of his judgment as therein expressed is that the answer of the jury to the first question 'does not establish any proposition which imputes legal liability to the defenders.' In result the pursuers' case was thus left to depend on the terms which an unskilled jury employed in answering a very general question. An answer to a general question may of course be conclusive, because it may indicate a defect which either plainly excludes or plainly implies common law liability. But it is more likely to be indeterminate, as it appears to have been in this case. The facts may of course warrant no more than an indeterminate finding, but the theory of a special verdict as I understand it is that the opinion of the jury shall be elicited on all points of the evidence material to the determination of liability, and the question is whether the answer in this case exhausted the jury's opinion upon the relevant facts of the case. Having regard to the averments in the original record with respect to the sources of dampness, the covering of pits, inspection, and so forth, I should have expected the evidence to have included other facts, and appropriate questions to have been put to the jury thereon, but I cannot say what the evidence was and the pursuers have made no averment on the subject. The grounds of an action like the present must be clearly established, and the doubts which I entertain as to the sufficiency of the questions put to the jury, while they illustrate the inherent risks of miscarriage which attach to the system of particular questions and special verdicts, appear to me to fall short of what would be sufficient to reduce the proceedings. . . ."

The pursuers appealed to the Second Division, and on 10th July their Lordships appointed the case to be heard before the Judges of the Second Division with the addition of three Judges of the First Division, the argument to be restricted to matters having reference only to the questions put by the Sheriff to the jury.

Argued for the pursuers and appellants—The proceedings in the appeal *Adair* v. *David Colville & Sons, Limited*, 1922 S.C. 672, 59 S.L.R. 482, did not affect the competency of the present action, because the pursuers founded on a fundamental nullity which affected the essential justice of the case, while in the appeal they founded and could only found on the statutory grounds of appeal. In any event reduction and not appeal was the proper way to raise a question of the present kind. The pursuers' case was that they had never really had their case tried at all. They had come into Court alleging a certain ground of fault, but this had not been put to the jury in the questions framed by the Sheriff, and following on an inconclusive verdict the Sheriff had applied the answer as a verdict for the defenders. The Sheriff should have put a further question to the jury from which fault on the part of the defenders could have been inferred. The answer to the question put was uncertain, and where that was so the Court would not enter up the verdict but would order a new trial. If the Sheriff decided to propone questions of fact to a jury these questions must be complete, otherwise he would be unable to apply the law—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), section 31 and rules 133 and 187; *Taylor* v. *Sutherland*, 1910 S.C. 644, *per* Lord President Dunedin at pp. 650 and 651, 47 S.L.R. 541. The Sheriff had failed in his duty in proponing the proper questions. The Court of Session had a supereminent power to reduce the decisions of inferior judges when they went wrong—*Campbell* v. *Brown*, 1829, 3 W. & S. 441, *per* Lyndhurst, L.C., at p. 448; *Caledonian and Dumbartonshire Railway Junction* v. *Lockhart*, 1854, 17 D. 25, *per* Lord President M'Neill at p. 32; *Morgan* v. *Morris*, 1853, 16 D. 82, 1855, 18 D. (H.L.) 46, 1856, 18 D. 797, 1858, 18 D. (H.L.) 18, reported more fully 3 Macq. 323; *Florence* v. *Mann*, 1890, 18 R. 247, 28 S.L.R. 215; *Taylor* v. *Sutherland, cit. sup.*; *Campbell* v. *United Collieries Limited*, 1912 S.C. 182, *per* Lord President Dunedin at p. 185, 49 S.L.R. 140; Macfarlane on Jury Practice, p. 252.

Argued for the defenders and respondents—The object of the questions put to the jury was to analyse the evidence led before

them, and until the evidence was led the questions could not be put. The questions put by the Sheriff did this sufficiently, and the answers returned by the jury negatived the liability of the defenders. But even if the questions were not sufficient, the pursuers must show that they were so outrageously bad that they completely failed to analyse the material placed before the jury. Wherever a decision was contrary to law there would be in a sense a miscarriage of justice. The cases founded on by the reclaimers were cases where the Court, which had jurisdiction was exercising a competent power of review, but they were not cases where review, having been excluded by statute, the jury returned a wrong answer to questions put and reduction was given. The reclaimers could only succeed if they could show that something was withheld from the jury which ought to have been put to them, subject to the proviso that in this particular case no record of the proceedings had been kept. It was impossible to say whether a wrong question had been put unless the Court knew what it had been put upon—*Whitton* v. *Ewing*, *Aitken* v. *Edgar*, 1911 S.C. 781, 48 S.L.R. 672.

At advising—

LORD PRESIDENT (CLYDE)—This is an action of reduction brought by the representatives of a deceased workman against his employers. The purpose of the action is to set aside an interlocutor by the Sheriff interpreting the verdict of a Sheriff Court jury in an action which the representatives brought against the employers at common law and under the Employers' Liability Act 1880 in respect of the workman's death.

Under section 31 of the Sheriff Courts Act 1907 the application of the verdict of the jury is one of the permitted subjects of appeal, but by rule 148 of the rules appended to the Act that appeal is cut off in any case (such as the present) in which the parties have not had the proceedings taken down in shorthand. It appears clear that if the Sheriff's application of the verdict is not appealable under the Act it cannot be submitted to review by way of reduction, for that would be an evasion of the statute. Moreover, an error in the application of the verdict (assuming that any error occurred) is an incident in the exercise of the Sheriff's undoubted jurisdiction, and involves nothing *ultra vires*. It cannot therefore form the basis of an action of reduction on the ground that what the Sheriff did was *funditus* null.

I do not wish to outstep the limitation placed on your Lordships' remit to the seven Judges. But I should like to point out one thing in this connection which has a material bearing on what I am going to say about the specially remitted matters, and it is this. Any cutting off of the general right of appeal is apt to wear an odious aspect. But there is really nothing inequitable or unreasonable in excluding from appeal a point which cannot be brought to the test without full knowledge of the circumstances under which it arose for decision in the Inferior Court, when the absence of such knowledge is due to the course of action pursued by the appellant. The precise nature of the matters requiring to be decided by the jury and the true meaning of the verdict itself cannot be safely determined by simply collating the bold terms of the verdict with the written pleadings in the closed record. Your Lordships are familiar with the change which sometimes takes place in the aspect of a case after the evidence has been completely led and the points in controversy have been drawn to an issue by the arguments of parties, from the aspect which the same case wore when originally presented on the closed record. A point which looked at first of leading importance may sink to comparative insignificance, and another which appeared (like the proverbial cloud) to be no bigger than a man's hand may turn out to overshadow the whole field of controversy. But the points remitted for the consideration of the Court of seven Judges affect the application of the verdict only indirectly in this sense, that they are immediately concerned with the questions of fact put to the jury by the Sheriff in accordance with section 32 of the Sheriff Courts Act 1907 (as amended), on which question the jury's verdict was returned.

The Sheriff put three questions to the jury. All of them were questions of fact. The first related to the condition of a pit used for the reception of molten metal, and the question was as to whether the pit was defective or no, and (if it was defective) in what respects. There were two other questions as to whether one of the servants of the employers had been guilty of negligence in certain duties committed to him with regard to supervision, and so on, in relation to the pit.

Attack is concentrated on the first question, and the attack takes this shape. It is said that the first question, although it put to the jury a perfectly clear issue in fact, was insufficient from the point of view of section 32, because it was not accompanied by other questions which, if answered in a sense favourable to the pursuer, would have logically led to the same result as a verdict in favour of the pursuer on a general issue. It is complained that the question was not—if I may borrow a phrase which my brother Lord Skerrington used in the course of the discussion—self-explanatory and self-interpretative.

I could understand that objection if it were legitimate to consider the sufficiency of the question or questions of fact put to a jury under section 32 of the Act upon the assumption that they superseded or displaced all other duties of the presiding judge in summing up the case for the jury's consideration, and in charging and directing the jury in law. If the procedure prescribed by the Act were that the sheriff was required to place before the jury a series of questions analysing the evidence which had been led before them, and to say—"You have nothing to do with the law which governs the case—no duty except to answer the following bare questions of fact," then I could understand that the

exhaustive or self-explanatory character of the questions might perhaps be a paramount consideration. But that is not the procedure prescribed by the Act, and if it were it would, in my opinion, be unworkable and productive of injustice. The procedure prescribed does not avoid all necessity for a summing up, a charge, and directions in law. That is plain on the terms of the Act, because a wrong direction is a permitted subject of appeal. In most, if not in all, cases it is indispensable in the interests of justice that the sheriff should explain to the jury what is the relation of the questions submitted to them to the merits of the action. The merits of the action when these are finally submitted for judgment depend on the effect of the evidence led and on the arguments submitted by the parties on that evidence. How is it possible to judge of the sufficiency or propriety of the particular questions put to the jury for answer when these are divorced from the setting in which they were presented to the jury in the sheriff's charge?

In my opinion the sheriff is at perfect liberty to put questions of fact for the jury's answer which are not exhaustive of all possible points in the case, but which he thinks crucial to the real merits of the case, having in view the evidence led and the arguments presented. It is no doubt possible that the sheriff, like any other presiding judge, may fail to appreciate at their true value some of the legal pleas which are competently maintainable on the evidence. It is at all events theoretically possible that legal omniscience might detect many unobserved flaws in the charges delivered by presiding judges to juries, just as it might detect many flaws in juries' verdicts notwithstanding the unimpeachable character of the judge's charge. But even if it be assumed that the sheriff erred in law in the directions he gave to the jury and consequently put special questions of fact to the jury which failed to exhaust the true merits of the action, the worst that can be said is that he had misdirected the jury. Such a misdirection might well be reflected in the sheriff's application of the verdict, but appeal on that head is allowed (as has been seen) only if a record of the proceedings has been taken in shorthand, and that was not done in the present case. If review by appeal is excluded, so is review by way of reduction.

In fairness to the Sheriff I think it right to say that I find no ground in the present case on which I would be justified to hold that the Sheriff did anything wrong. If he told the jury—as he may have done (in effect) for all that I can know—that at common law a master is under the threefold obligation to his workmen (1) of employing competent servants, (2) of establishing a safe and proper system in his works, and (3) of putting into his workmen's hands plant that is not defective, and then told them that the only one of these three obligations which arose on the evidence for the consideration of the jury was the third—in relation to the alleged defects of the pit into which the molten metal was poured—I confess I see no criticism which can be justly brought against the first question which the Sheriff put to the jury. The jury did not affirm the defective character of the pit as a part of the employers' works, though they negatived its suitability as a place of deposit of the metal in the circumstances and at the time in which it was so used. It is not suggested that this unsuitability was due to the employment of incompetent servants. It may have been due to a defective system of working. But how can we say that a question raising the latter point ought to have been put when we are left in ignorance of what the evidence was, and know nothing about the state of the controversy when the Sheriff came to charge the jury?

For these reasons it seems to me impossible to affirm that any ground has been made out for impugning the sufficiency of the questions put to the jury.

At the worst the Sheriff may have failed to charge the jury correctly. I am not convinced that he did so fail. But even if he did, the case is not one of fundamental nullity, and accordingly I see no ground to differ from the result arrived at by the Lord Ordinary.

LORD JUSTICE-CLERK (ALNESS)—The widow and children of the deceased Robert Adair sued his employers for damages in respect of his death, the action being laid at common law and alternatively under the Employers' Liability Act. The case was tried before the Sheriff of Ayrshire and a jury in the Sheriff Court at Kilmarnock. The jury returned a verdict which was entered by the Sheriff as a verdict for the defenders. The pursuers in the action appealed against the verdict to this Division, who, as no shorthand notes of the evidence led before the jury had been taken, dismissed the appeal as incompetent. The pursuers then raised the present action, which concludes for reduction of the verdict obtained by the defenders. The Lord Ordinary has dismissed the action, and against his interlocutor this reclaiming note has been taken.

The action is based on various grounds but I find it necessary to consider only one of them which relates to the questions which the Sheriff invited the jury to determine. These questions were three in number and they were couched in the following terms:—"(1) Whether the personal injuries sustained by the deceased Robert Adair, while employed as a tractor engineman at the furnaces of Glengarnock belonging to the defenders on the 22nd day of November 1920, which resulted in his death, were caused by reason of the defective condition of the outside pit in the defenders' works and if so in what respect? (2) Whether the personal injuries sustained by the deceased Robert Adair, resulting in his death, were caused by the negligence of David Graham, Glengarnock, in the exercise of superintendence entrusted to him by the defenders and if so in what respect? (3) Whether the personal injuries sustained by the deceased Robert Adair resulted from the

deceased having conformed to an order negligently given by the said David Graham, to whose orders or directions at the time of the injury he was bound to conform, and what was that order?" This opinion is concerned mainly if not exclusively with the first question which deals with the pursuers' common law case. The conclusions which I have reached may be summarised in the following propositions:—(1) That the pursuers whose action was laid, as I have said, alternatively at common law and under the Employers' Liability Act, were entitled to submit their common law case to the jury; (2) that the Sheriff intended to submit that case to the jury; (3) that the jury thought that he had done so and acted on that footing; (4) that in point of fact the Sheriff was mistaken in his belief in respect that an essential ingredient of the common law case—viz., whether the defenders were negligent in the matter—was omitted from the question put to the jury with reference to common law liability; (5) that the omission renders the proceedings fundamentally null and has resulted in a miscarriage of justice.

Let me deal with these propositions in the order stated—1. On this part of the case it is sufficient to say that the initial writ in its conclusions, in its averments, and in its pleas discloses a case at common law against the defenders. No doubt the defenders had a plea to the relevancy of the pursuers' averments at common law, but that plea appears not to have been insisted in, and parties joined issue before the jury on the double question whether the defenders were negligent (*a*) at common law, and (*b*) under the Act, and whether their negligence resulted in the death of Robert Adair. Something was said in argument regarding the relevancy of the averments of the pursuers at common law. I think on a consideration of these averments that they are perfectly relevant, but in any event I am clearly of opinion that the defenders cannot now be permitted to say that they are not. They had a full opportunity of insisting in that argument at the proper time but they omitted to avail themselves of it, and it seems to me idle to suggest that after issue has been joined, and after the common law case has been considered by the jury without objection on the part of the defenders, they should now be allowed to quarrel its relevancy. In these circumstances it seems to me too plain for argument that the pursuers were entitled to have their common law case adjudicated upon by the jury.

2. The second proposition seems to me to be documented beyond all doubt. But let me in the first place recal that the Sheriff availed himself of his statutory right to adjust and put to the jury specific questions, instead of leaving them to decide the question of fault in the general terms which are usual in jury trials in this Court. The relative merits of these methods of procedure do not seem to me to be *hujus loci*, and though the matter was discussed in argument before us I do not intend to allow myself to be drawn into a discussion of the topic. It is sufficient to say that the Sheriff determined to follow a course which he was well entitled to select in asking the jury for a special as distinguished from a general verdict.

That the Sheriff intended to submit the pursuers' common law case to the jury appears to me to be beyond all doubt. The written records amply instruct that fact. To the questions which he adjusted, and which I have already quoted, the Sheriff added under his own hand—"If any of the foregoing queries answered affirmatively what damages do you assess (1) at common law, (2) under Employers' Liability Act?" In these circumstances it appears to me vain to suggest that the Sheriff did not intend to submit the pursuers common law case to the jury.

3. That the jury thought they were seised of that case is no less clear. Their verdict purported to assess the damages due to the pursuer (1) under common law at £800, and (2) under the Employers' Liability Act at £566, 3s. 11d.

4. But in my judgment the fatal flaw in the proceedings is that the Sheriff had not in fact and in law done what both he and the jury thought he had done, viz., properly submitted the pursuers' common law case to the jury. That case is manifestly intended to be included in the first question put by the Sheriff and in no other. The other two questions relate to the pursuers' case under the Employers' Liability Act, and it is to be noted that in each of them the jury are invited to affirm or to negative the negligence of the foreman, in consequence of whose conduct liability under the Act was said to attach to the defenders. But the first question contained no such invitation. The jury are merely asked to say whether Robert Adair was injured by reason of the defective condition of the outside pit. That defective condition, even assuming it to have existed, might have been due to many other causes than the negligence of the defenders. It is consistent with their verdict that the jury found no fault proved on the part of the defenders, and, of course, unless they did no liability in law attached to them. It is clear, however, that both the Sheriff and the jury thought that an affirmative answer to the first question inferred common law liability on the part of the defenders. Indeed, as I have said, the Sheriff added in his own handwriting to the questions as adjusted by him—"If any of the foregoing questions answered affirmatively, what damages do you assess at common law or under the Employers' Liability Act?" If that addendum does not demonstrate that the Sheriff thought, and that the jury were invited to hold, that an affirmative answer to the first question involved a verdict for the pursuers at common law, then I am at a loss to expound its meaning. In that view, however, for the reasons which I have stated Judge and jury were in my opinion alike mistaken.

5. That the result is to render the proceedings fundamentally null and to produce a miscarriage of justice I have no

doubt at all. An affirmative answer to the first question was valueless to the pursuers. Defect was affirmed, but no fault on the part of the defenders for that defect was found, which is but another way of saying that by excluding from the purview of the jury the essential question of the defenders' negligence the Sheriff denied the pursuers the opportunity, to which they were entitled, of having their common law case effectively affirmed, and indeed, as from the hour when the question was adjusted, ensured a verdict for the defenders. In my judgment the verdict of the jury, though they intended to find for the pursuers at common law, was quite properly entered up by the Sheriff, in the absence of any finding on their part of fault at common law, as a verdict for the defenders. If all that be so, I cannot conceive a flaw more fundamental—more fatal—than that with which we are here concerned. In a sentence the pursuers had a right to have their common law case properly tried, but the form of the question adjusted by the Sheriff effectively prevented that result. In these circumstances I am clearly of opinion that a miscarriage of justice has resulted. It would in my opinion be regrettable if the Court were impotent to afford the pursuers a remedy. I do not, however, think that that is so. I am of opinion that a remedy is open to the pursuers, and that this action affords it. As Lord President Dunedin said in *Hughes* (1907 S.C. 613), having held that appeal was there excluded — "It is absolutely necessary that there should be some way of getting rid of what otherwise might be an injustice." An action of reduction there, as here, provided a "way."

It was argued that we cannot safely interfere with what the Sheriff did, because we are unaware of the evidence led prior to the adjustment by him of the crucial question. That consideration is to my mind quite immaterial. I am indifferent to the nature or quality of the evidence led so long as I am certiorated as I am that the Sheriff regarded that evidence, whatever it may have been, as warranting him in leaving to the jury the determination of the pursuers' common law case, and that in the event of their desiring to decide in favour of the pursuers he failed to provide the jury with machinery enabling them effectively to do so.

It was further argued for the defenders that there may have been included in the Sheriff's charge to the jury what is excluded from the first question which he put to them. The argument suggests the adjustment of questions such as these by reference, the reference being to the Judge's charge. Now, in the first place, I am not disposed in order to decide the matter submitted to us to have recourse to what is, with all respect to the Sheriff, at best mere surmise. There is no hint in the opinion which the Sheriff delivered in interpreting the verdict returned that his charge in any way supplemented the defect in the first question. Indeed, the opinion suggests——nay, to my mind establishes — the contrary. The Sheriff decided the case against the pursuers at common law on the shortand to my mind inconclusive view that when the jury stated as they did that the pit was unsuitable because of damp, they did not intend to affirm that it was defective because of damp. Apart from that, however, the questions put by the Sheriff bear to be self-sufficient, self-contained, and exhaustive. That they were so intended by the Judge and were so treated by the jury does not appear to me to admit of doubt. The questions purport to elicit from the jury all the materials necessary to enable them to affirm or deny the common law liability of the defenders. In my opinion a cardinal—nay, indispensable — part of the first question was missing, viz., to whose fault was the defect due? That being so, I respectfully demur to the view that that fundamental defect may safely be deemed to have been remedied by something which the Sheriff may have said in the course of his charge.

It was further argued for the defenders that at the worst the Sheriff laid down bad law, that that is a risk incidental to any judicial proceeding, and that its consequences cannot therefore be regarded as a fundamental nullity. To my mind the question is one of degree. When I find, as I find here, that the Sheriff excluded from the effective consideration of the jury the whole of the pursuers' common law case, I cannot assimilate the result to an ordinary error in law. The position is much the same as if, the pursuer having claimed the right to submit two cases to the jury—one at common law and one under the Act—the Sheriff had arbitrarily and openly decided that he would submit one of these to the jury, but had definitely refused to submit the other. If that had happened I should regard the result as involving a grievous miscarriage of justice, and I think it is inconceivable that our law should be impotent to afford a remedy.

If the case had been tried in this Court it would have been tried upon a document which would in effect, if not indeed in terms, have submitted to the jury two questions—(1) Whether the defenders were in fault at common law; and (2) whether they were in fault under the Employers' Liability Act. The second and third questions adjusted by the Sheriff quite properly put to the jury the case of fault under the Act. The first question omits all reference to fault at common law, and, as I have already indicated, until it be ascertained by the jury to whose fault the defect was due—and that is a pure question of fact—it is, in my view, impossible either to affirm or to deny the common law liability of the defenders. If the question of fault was appropriate and necessary for the consideration of the jury under questions 2 and 3, I can see no reason why it should be inappropriate and unnecessary in question 1. On the contrary, I think it was essential.

It therefore appears to me that all the propositions which I premised are proved, and if that be so, then for aught yet seen this verdict cannot, in my judgment, stand.

There remains for consideration the ques-

tion whether the pursuers are barred from the remedy of reduction (*a*) because they omitted to object to the form of the question when it was propounded by the Sheriff in the course of the trial, or (*b*) because they consented to dispense with a record of the evidence.

As regards (*a*) it must be remembered that both parties on the invitation of the Sheriff had proposed questions for the trial of the issue, and that the Sheriff, rejecting the proposals both of the pursuers and of the defenders, himself adjusted the questions which he conceived to be appropriate. In effect, after hearing parties, he gave judgment in the matter. In these circumstances I am not disposed to blame the pursuers' agent for the attitude which he adopted. He may well have thought that it would not have been seemly to protest against the considered opinion of the Sheriff. In any event, had the pursuers' agent protested, his protest might not have been recorded, and an exception was not open to him because the evidence was not taken down in shorthand. In any event I am not prepared to hold that the failure of the pursuers to resort to the futilities of protest or exception instructs an agreement on their part to waive the objection which they now take. As regards (*b*) the pursuers have already been penalised for their supineness, if it be supineness, in dispensing with a record of the evidence. Their appeal to this Court has been dismissed as incompetent. But that is quite another matter from holding that by the omission of the pursuers to require the evidence to be recorded they have forfeited all other rights open to them—*e.g.*, suspension or reduction—by the exercise of which they may get rid of an obnoxious verdict. I know of no authority for that proposition, which seems to me to be without warrant.

I will add one further observation only. It appears to me that the passing of the Sheriff Court Act 1913 has greatly intensified the responsibilities and increased the difficulties of the judge who tries a Sheriff Court action such as this. Prior to that Act the Sheriff adjusted the questions for the jury beforehand at his leisure, and either party if aggrieved had with his consent a right of appeal. Now the Sheriff is enjoined to adjust the questions, not prior to but in the course of, it may be, a complicated case, and that without any right of review, unless in the, I take it, exceptional case where the evidence is recorded in shorthand. I am bound to say that I sympathise with the position in which the presiding judge is thus placed. It is obviously difficult for him, under the circumstances which I have figured, to steer an unexceptionable course. It is obviously easy at one's leisure and after the event to criticise and correct what he has done. But I think it is by no means inappropriate that in an exceptional case such as this reduction should be resorted to as being the equivalent of the right of appeal, of which both parties are now deprived.

In the view which I take it is unnecessary for me to offer a concluded opinion regarding the other grounds of reduction on which the pursuers rely. I will only say that as at present advised I should find great difficulty in giving effect to them separately or cumulatively.

But as I think that the verdict is vitiated by the considerations to which I have adverted, my opinion, in which I differ with profound respect and regret from the consulted Judges and from your Lordships, while it cannot affect the result, is that the judgment of the Lord Ordinary should be recalled, decree of reduction granted, and a new trial ordered.

LORD SKERRINGTON—This is a painful case because it seems possible that a miscarriage of justice has taken place. At first I was disposed to attribute the miscarriage, if miscarriage there was, to the form of the questions to the jury as framed by the learned Sheriff. On further consideration, however, I am inclined to think that the Sheriff was placed in a position of difficulty owing to the fact that the pursuers' pleadings in the Sheriff Court action were not well adapted to meet their case as it came out on the evidence. It now appears as if the pursuers probably had the defenders on the horns of a dilemma, though in the absence of any record of the evidence it is impossible to express a definite opinion. The pit in question, though not proved to have been in bad order or of bad construction as averred by the pursuers, was apparently one which being uncovered and situated in the open air was likely to become unsuitable for the reception of molten metal, and dangerous if occasionally used for that purpose unless special precautions were taken which would eliminate the damp which would naturally accumulate beneath the pit. The simplest and most effective precaution would be to keep the pit in regular use and thus dry up any small amount of dampness which might accumulate beneath it from day to day. Accordingly it was, I should suppose, the defenders' duty to establish some system in order to secure that the pit should not be occasionally used for the reception of molten metal unless precautions were taken before it was so used to make it as safe as it would have been if it had been in regular use. The defenders were therefore presumably guilty of negligence at common law in failing to establish such a system and to appoint a competent person to carry it into effect. Alternatively, if they did establish such a system and appoint a competent person for that purpose such person was presumably guilty of negligence in the discharge of the duty entrusted to him by the defenders, viz., the duty of seeing that the pit in question was in a safe condition for the reception of molten metal. The pursuers' pleadings in the Sheriff Court action contain the germ of some such case but only in a very rudimentary and obscure form. Nothing is there said about the defenders' failure to establish a proper system in their works, nor do the pursuers found upon the appropriate clauses of the Employers' Liability Act 1880, section 1 (1) and section 2

(1). When it came, however, to suggesting questions for the Sheriff to put to the jury the pursuers' agent suggested that the jury should be asked whether the defenders had been negligent in permitting the injured workman to work at the pit in question. I am not surprised that the Sheriff refused to put a question for which the pleadings did not supply an adequate foundation. The mistake of the pursuers' procurator was a very venial and natural one when it is remembered that counsel (who ought to know better) constantly propose issues for which no proper foundation has been laid in the pleadings.

As regards the first question framed by the Sheriff, to which alone the pursuers' counsel confined his criticisms, I think that it fairly put to the jury the only defect in the pit clearly and properly averred on the record, viz., defective construction or condition owing to a broken pipe, bad drainage, etc., as distinguished from unsuitability, which latter might be a merely casual defect not necessarily implying common law liability on the part of the employer but only negligence on the part of a fellow workman. No doubt the first question if considered by itself and merely in the light of the pleadings and without any further explanations may be regarded as suggesting an incomplete and even a misleading view of the case which the pursuers intended to present of common law liability on the part of the defenders, but it must be assumed that the Sheriff gave to the jury all necessary explanations in regard to the law applicable to the facts of the case and bearing on the question as framed by him. That assumption is always made in the Court of Session in considering the effect or validity of a verdict when no exceptions have been taken to the law as laid down by the presiding judge at the trial. If the same assumption is made (as I think that it ought to be made) in the present case the criticisms which have been made upon the form of the first question lose their force. If the pursuers' agent thought that the question as framed was misleading he had only to ask the Sheriff to give such a direction to the jury as he thought necessary in order to obviate any danger from this source. If the Sheriff refused to give such a direction I see no reason to doubt that the pursuers could have excepted and appealed upon the ground of misdirection in terms of section 31 of the Act of 1907 and rule 148—assuming of course that the pursuers had complied with the statutory condition of having a record of the proceedings taken by an official shorthand writer of the Court. It is easy to figure a case tried either in the Sheriff Court or in the Court of Session where an objection to a verdict, or a question how it should be applied, could be satisfactorily disposed of without any reference to the notes of evidence at the trial, but it was I think assumed in the Sheriff Court (Scotland) Acts 1907 and 1913 (sections 31-33 and rules 133-150), just as it was assumed in the Court of Session (Scotland) Act 1868 (sections 34-50) and earlier legislation, as a condition-precedent to the right to raise any such objection or question that there should be an authentic record of the proceedings at the trial, and that this record would be made available if the Court of Appeal or the court applying the verdict or one or other of the parties should desire to refer to it. Accordingly I am of opinion that if there was a miscarriage of justice (as to which I am doubtful) the pursuers have dispensed with any right to insist upon its being remedied. I therefore think that the Lord Ordinary properly disposed of the action in so far as regards the question with which the consulted Judges are alone concerned.

LORD CULLEN—The argument which we have heard related to the first of the questions proponed by the learned Sheriff to the jury at the trial. The pursuers complain of that question as being defective in respect that it did not, as they say, duly and sufficiently formulate the issue of fact under the common law aspect of the case which was being tried, and of the pleas-in-law advanced by them in the present action of reduction, that which their counsel alone tabled in this part of the case was the fourth, which is to the effect that a miscarriage of justice took place—a plea which seems to me somewhat vague as a ground of reduction at common law.

As the parties before the Sheriff agreed to dispense with the proceedings at the trial being recorded we do not have these before us; and as we do not know, apart from the terms of the question complained of, how the topics relevant to liability were handled at the trial by the parties and by the Sheriff in his charge, I confess that I do not find myself sufficiently seised of the case to be in a position satisfactorily to form an opinion as to what may have been, if any, the demerits of the question as a contribution to a solution of the ultimate question of liability. Assuming, however, what I understand to be the gist of the pursuers' case that the question as stated did not duly reflect all the elements of fact which on a correct view of the law entered into the question of liability on the part of the defenders, it remains to consider whether this affords a good ground for reducing the verdict. One thing is clear, that where, as in the present instance, there has by consent been no record of the proceedings at the trial, the statute explicitly withholds the right of appeal which it gives where the evidence has been recorded. The pursuers' counsel, however, maintained that the erroneous nature of the question as alleged was such as to constitute a fundamental nullity or irregularity in the proceedings warranting reduction at common law. I am unable to adopt that view. The Sheriff was of course entirely in accordance with the statute in proponing questions, and as to what the terms of any questions proponed should be that was a matter confided to his judicial discretion. The pursuers' case as it was presented to us does not seem to go further than this, that the Sheriff in stating the question under consideration as he did misapplied the law and did not formu-

late such an issue of fact as a correct view of the common law made appropriate. Had no questions been proponed the Sheriff might equally have made a corresponding misapplication of the law in his charge. But that would not have made a case of fundamental irregularity in the proceedings; it would have been simply one of a misdirection in law to the jury for which no remedy would have been available under the statute and none in my opinion outside it. The quality of the error which the pursuers here impute to the Sheriff being the same, I am of opinion that assuming it to have been made it affords the pursuers no good ground in law for the reduction which they seek.

LORD ORMIDALE—I agree that the pursuers' action is laid alternatively at common law and under the Employers' Liability Act. That is recognised by the defenders in their pleadings. I agree also that the pursuers were entitled to submit their common law case to the jury, and that the Sheriff intended so to submit it, and I take it that the jury thought he had done so. But for my own part I see no reason for holding that the first question—quite properly a question of fact, though very general—did not give the jury an opportunity of determining by their answer the common law liability of the defenders, or that it was necessary to state in addition to what is presented in it a direct issue of negligence. In our state of knowledge the question may not appear to have been expressed so appropriately as it might have been for eliciting from the jury their opinion on all the relevant facts of the case, and it may be thought that it would have been well to follow it up with other special questions so framed as to ascertain in detail their view on other material facts. But this is a matter which is left to the discretion of the judge upon whom the statute imposes the duty of proponing the question or questions to be answered by the jury. He is familiar with the evidence, and adjusts the question or questions with reference to it, and the jury will consider and answer it or them in accordance with his directions and charge. Accordingly the sufficiency of the questions must to a very great extent depend upon the evidence and the directions given to the jury with reference thereto. But we have before us the question only, isolated and apart from its context and setting. In the light of the evidence and of the charge it may be a perfectly appropriate question to elicit an answer on the vital point. Without them we cannot truly estimate its quality and effect. It has appeared to me from the first that the parties by agreeing to dispense with a note of the evidence have made it impossible for us to deal with the question as the pursuers suggest, and to say that it is necessarily defective and calculated to mislead the jury, or, indeed, to preclude them altogether from bringing in a verdict as to the defenders' common law liability. After all they were asked to say whether the accident was caused by reason of the defective condition of the outside pit, and if so, in what respect. This left it open to them to state in their answer facts relevant to infer negligence on the part of the defenders. At an earlier stage in these proceedings the pursuers maintained that the jury had done so, and they claimed the verdict as a verdict in their favour. But the Sheriff held that they had not. The Sheriff may be wrong—I am far from saying that he was—but even if he was, that would not infer any excess of jurisdiction or fundamental nullity, but merely an erroneous view of the law. In regard to the other grounds on which the pursuers seek to set aside the verdict, some were very trifling informalities which do not call for any observation, but others were admittedly irregularities amounting to breach of statutory requirements which, as I read them, are intended to be peremptory and not merely directory. I am not prepared, however, to hold in the absence of any averment that the pursuers were in any way prejudiced by them—that they render the whole proceedings null and void. I have some difficulty in coming to this conclusion, especially with regard to the alleged breach of rule 145 with regard to recording the verdict before the jury is discharged. I do so only because it is admitted that as a matter of fact the terms of the verdict as recorded are in precise conformity with the answers to the questions as read over to and approved by the jury, the main object of the rule being thus achieved. On a consideration of the many authorities cited to us it appears to me that each case has in the end been decided with reference to its own particular, and often peculiar, circumstances; and further, that in many of them really vital interests were or might have been affected by the irregularity or informality complained of, as, for example (to refer to only one of them), in *M'Laren* v. *Findlay*, 14 S. 143. Others, again, were concerned with diligence, in connection with which a very strict observance of formalities is always exacted. On this part of the case I entirely agree with the conclusion reached by the Lord Ordinary.

The reclaiming note should be refused.

LORD HUNTER—At the first argument before us a great deal of time was occupied in the contention by the pursuers to the effect that owing to the failure to observe certain statutory requirements of very minor importance the verdict of the jury should be set aside. Let me give one instance regarding what I think was described as the most important point taken on this part of the case. It is said that the verdict of the jury was not recorded until after the jurymen had left the box. It was therefore contended on behalf of the pursuers that although they were not able to say that the recorded verdict was other than the verdict that was pronounced by the jury, they were entitled to have the whole proceedings set aside without any allegation whatever of prejudice. At the time I suggested that such a contention

was extravagant. I think so still. I do not propose to go into the matter. In his argument on this branch of the case the pursuers' counsel cited a large number of cases decided under the Small Debt Act. To my mind these cases have no bearing upon this question. In my opinion if a person is to get a right of appeal only on complying with certain conditions, then it is essential that he should comply with these conditions in order to maintain his right of action. But it is a totally different thing to say that because of some defect in the recording of the proceedings by an official of the Court either party may have the whole proceedings set aside whether he was right or wrong. The whole matter is fully gone into in the careful and convincing opinion of the Lord Ordinary, and I content myself with expressing my entire concurrence with the result he has reached and the reasoning by which he reached it.

In the course of the argument pursuers' counsel laid greater stress upon one point than apparently he put upon it when the case was argued before the Lord Ordinary. That point was whether the questions framed by the learned Sheriff for the jury's consideration were so absolutely defective that the pursuers' case had never been properly put before the jury. I confess for my own part that I never regarded this matter as of any importance in the present case, because I have never seen how the pursuers could put their argument upon this branch of the case upon any logical footing. But it was a matter upon which we were not at one, and we have taken the opinion of three Judges of the First Division. I express my entire concurrence in the opinion expressed by these Judges.

I confess I am at a loss to understand how, sitting here without any information as to the evidence which was before the Sheriff and the jury, we can possibly say of the questions that were framed and to which the jury were asked to deliver answers that these were not questions which enabled them to determine the whole case that was put before them. It seems to be suggested that because the pursuers averred a case—in my opinion a case of very doubtful relevancy—at common law and under the Employers' Liability Act, they were therefore entitled to have answers given by the jury as to whether there was fault under the one category or the other. To that view I entirely dissent. They had no such right. The fact that the defenders did not insist upon their plea of irrelevancy merely meant this, that the case would go to proof upon the averments, and that upon the facts as brought out at the trial, the judge and the jury, each doing his part of the work—and after all it is a composite piece of work—the proper result in law would be arrived at. In this particular case, after hearing the evidence, the Sheriff put to the jury as the first question, whether there was defect in connection with the outside pit that was used on this particular occasion, and if there was defect, in what particular? The jury, under that question, were entitled to find, first that the pit was defective, and then to state particulars. On that there remained the duty—which was that of the judge and not of the jury—to say whether the case at common law had been made out or not.

Now the answer given by the jury was, I think, rightly interpreted by the Sheriff as negative of the common law liability. In effect it was that the pit was unsuitable on this particular occasion because of dampness. That did not in any way indicate that there was common law responsibility upon the defenders. On the other hand, if the jury had found—which apparently they could not find, because, I presume, of an entire absence of evidence upon the matter—that the pit was structurally defective, there would or might have been a case against the defenders at common law.

In connection with this matter the Sheriff acted within his statutory power in putting special questions. If a Sheriff proceeds to put special questions to the jury I think he is quite right to put questions which deal solely with fact, and that it is objectionable that he should put questions of mixed fact and law. There is a clear distinction between the question whether a person other than the defenders has been guilty of negligence and the question whether the defenders have been guilty of negligence, because that second question is certainly one of mixed fact and law. The other question whether the particular employee of the defenders had been guilty of negligence was a matter upon which specific evidence was probably led.

Your Lordship in the chair has expressed the view that there had been a miscarriage of justice here. I confess I do not see it. So far as I can judge of the case, I think there might have been a miscarriage of justice if the Sheriff had thought fit to enter the verdict up for the pursuers. There is nothing, even now, stated by the pursuers which to my mind indicates that they had a common law case. One would have thought that since they desire to have the verdict for the defenders set aside and a new trial granted, they would have acquainted us with the facts which went to show that there was a common law liability—I mean a common law liability against the employers as that was laid down in *Reid* v. *Bartonshill Coal Company* (1858, 3 Macq. 268) and *Wilson* v. *Merry & Cuninghame* (1867, 6 Macph. (H.L.) 85), and after wards, it may be, extended by the House of Lords in the case of *Smith* v. *Baker*, [1891] A.C. 325. I find nothing to indicate that there was such a case,

It may be that the jury intended to give a verdict for the pursuers. But if the jury did intend to give a verdict for the pursuers and there was no legal evidence to support that verdict, that verdict would be a miscarriage of justice. Accordingly I think if the pursuers had got the verdict they would have got it upon grounds insufficient within the law to support it. It is not outside the experience of judges who preside at jury trials that with the directions which most experienced judges give

to juries, they may put a question asking generally whether there was any fault on the part of the defenders, and get a verdict for the pursuers returned inconsistent with the directions given. And under the Sheriff Courts Act, where juries have returned verdicts for pursuers, these verdicts have had to be corrected. An illustration of that is found in the case of *Taylor* v. *Sutherland*, 1910 S.C. 644. The Lord President in his opinion there indicates how juries may go wrong, and how where they do go wrong there is a miscarriage of justice.

But supposing in this case that there had been a wrong verdict I think it is quite clear that there would have been no right in law to the pursuers to get a new trial. They have no record of the proceedings, and therefore we are not in a position to know what the case was that was developed. They brought an appeal against what the Sheriff has done, because they maintained that the verdict returned by the jury was a verdict in their favour. That appeal was fully heard before us, and I must say I think it is a matter of regret that after there had been a full argument in that case as to the pursuers' right to have the verdict set aside, they should have prosecuted an action of reduction like the present, where, so far as I can judge of the matter, under a misuse of expressions like "fundamental nullity" and "miscarriage of justice," they seek to get a new trial upon grounds which are similar to those upon which they sought to proceed in the appeal in which they were unsuccessful.

On the whole matter I am quite clear that the reclaiming note ought to be refused and the Lord Ordinary's interlocutor affirmed.

LORD ANDERSON—The pursuers base their claim for reduction on two grounds—(1) That the first of three questions put to the jury was incorrectly framed by the Sheriff; and (2) that the prescribed statutory procedure for jury trial in the Sheriff Court was not duly observed. With reference to the second ground of reduction, it is not established that the pursuers suffered any prejudice by the alleged statutory irregularities. This being so, the impression I have formed is that non-observance of statutory procedure does not *per se* warrant a decree of reduction; there must, in addition, be substantial prejudice resulting from the irregularities. I am therefore of opinion that this is not a sufficient ground of reduction.

As regards the other ground of reduction, if it had been made clear that the pursuers' common law case had not been put to the jury, I should have been prepared to hold that there had been a fundamental nullity in the shape of a denial of justice entitling the pursuers to a new trial. But I do not read section 32 of the Sheriff Courts Act 1907 as imposing a duty on the Sheriff to frame questions in such form as to propone an exhaustive statement of the issues raised by the pleadings. It would undoubtedly be advantageous should questions be so framed, but the matter of framing questions is left to the discretion of the Sheriff, and his duty is, with the aid of the questions framed, to put to the jury the issues raised by the pleadings. Now the first question as framed seems to me to be useless in itself to determine any matter of legal responsibility. The defective character of the pit might have been due to *damnum fatale* or to the negligence of a third party, of a fellow-servant, or of the defenders. The question thus seems to be defective inasmuch as this essential matter of negligence is not adverted to. But the Sheriff charged the jury, and I am of opinion that we must assume that by his charge he supplemented the question so as to put to the jury the case made at common law by the pursuers. Anything lacking in the question to put that case must be assumed to have been stated by the Sheriff in his charge. I am therefore unable to hold that the pursuers have established that the common law case was not put to the jury. On this assumption the Sheriff was probably right, on the answer given by the jury to the first question, in entering the verdict as for the defenders.

I am therefore unable to affirm that this ground of reduction has been substantiated.

I accordingly agree that the interlocutor of the Lord Ordinary should be affirmed.

I desire to make two further observations. What has happened in this case seems to suggest that it is highly inexpedient to dispense with a record of the proceedings, where, as here, the action raises questions of difficulty. In the present instance we are left to surmise what evidence was led, and to speculate as to whether or not the question was appropriate to that evidence. The other observation is this—that the unfortunate history of these proceedings seems to justify and confirm what I ventured to state in the case of *Ferguson* (1915 S.C. 556) as to the advisability of trying jury trials in the Sheriff Court, as in the Court of Session, on general and not on special issues.

The Court adhered.

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