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

of the deceased Daniel M'Coll not having been caused through the fault or negligence of the defenders or those for whom they are responsible, defenders are entitled to decree of absolvitor, with expenses."

On 4th September 1908 the Sheriff-Substitute (MITCHELL), on the motion of the pursuer, appointed the action to be tried by jury in terms of section 31 of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), and thereafter on 15th October pronounced an interlocutor appointing the following questions to be put to the jury:—"(1) Was the death of the said Daniel M'Coll due to the fault of the defenders themselves. (2) Was defenders' system of work defective, and was the death of Daniel M'Coll due thereto: (3) Was the condition of the works, machinery, or plant used in raising or lowering said scaffold defective, and in what respect. (4) If so, did said defects or any of them arise from, or continue owing to, the negligence of the defenders, or of James Roberts and Robert Clements or either of them, while in the defenders' employment and entrusted with seeing that the works, etc., were in proper condition. (5) Were James Roberts and Robert Clements or either of them superintendents for the defenders, or persons to whose orders or directions deceased was at the time of the injury bound to conform, within the meaning of the Employers' Liability Act 1880. (6) Was the death of the said Daniel M'Coll due to the negligence of the said James Roberts and Robert Clements, or either of them, when in the exercise of any such superintendence, or when giving orders or directions on behalf of defenders to deceased to which he was bound to conform and did conform. . . ."

Questions 7, 8, and 9 related to the amount of damages.

In the course of the trial the defenders' agent took, *inter alia*, the following exceptions to the Sheriff's charge:—"(1) The first direction to which I take exception is that in which your Lordship directed the jury that the deceased Daniel M'Coll was in the employment of the defender. (2) That there being no averment on record alleging incompetence against the manager Roberts, I take exception to your Lordship's direction to the jury that they might consider whether Roberts was a reasonably competent manager. . . . (4) I take exception to your Lordship's direction that the manager Roberts was a person in superintendence. (5) I take exception against your Lordship's direction to the jury that Roberts, the manager, should be held as knowing that the winch was being used for raising and lowering men. . . . (7) I take exception to your Lordship's direction that the jury should consider the position in which the winch was placed as inferring liability upon the defenders at common law."

The jury unanimously returned the following answers:—"(1) Yes. (2) Yes. (3) The condition of the machinery was defective in respect that the drum was not capable of carrying with safety the amount of rope which was coiled on it at the time of the accident. The danger was aggravated by the fact that a young and inexperienced man was in charge of the winch at the time of the accident. (4) Said defects arose from and continued owing to the negligence of the defenders and of their manager James Roberts while in the defenders' employment, and instructed with seeing that the works, etc., were in proper condition. (5) Yes; both were superintendents within the meaning of the Employers' Liability Act 1880. (6) The death of the said Daniel M'Coll was due to the negligence of the said James Roberts when in the exercise of such superintendence."

On 11th December 1908 the Sheriff-Substitute applied the verdict as at common law, and decerned against the defenders for payment of the sum found due by the jury.

The defenders appealed, and argued that the verdict should be set aside on the grounds, *inter alia*, (*b*) that the verdict was contrary to evidence, (*c*) that evidence was unduly admitted and rejected; that the Sheriff misdirected the jury, and that he refused certain directions asked.

The pursuer argued that as liability at common law had been established the question whether the deceased was in the employment of the defenders or not was irrelevant. They cited *Smith* v. *London and St Katherine Dock Company*, 1868, L.R., 3 C.P. 326; *Simpson* v. *Paton*, March 12, 1896, 23 R. 590, 33 S.L.R. 413; *M'Lachlan* v. *S.S. Peveril Company, Limited*, May 27, 1896, 23 R. 753, 33 S.L.R. 634; *Heaven* v. *Pender*, 1883, L.R., 11 Q.B.D. 503; *Trail & Sons* v. *Actieselskabat Dabeattie, Limited*, June 7, 1904, 6 F. 798, 41 S.L.R. 614. The pursuers also cited (1) in support of their contention that the appointment of competent servants did not relieve the defenders of liability—*M'Killop* v. *North British Railway Company*, May 29, 1896, 23 R. 768, 33 S.L.R. 586; and (2) with regard to the form of the exceptions and the directions asked—*Woods* v. *Caledonian Railway Company*, July 9, 1886, 13 R. 1118, 23 S.L.R. 798; *Addie* v. *Western Bank*, June 9, 1865, 3 Macph. 899; *Hogg, &c.*, v. *Campbell, &c.*, June 23, 1865, 3 Macph. 1018; *Glass* v. *Paisley Race Committee*, October 16, 1902, 5 F. 14, 40 S.L.R. 17.

At advising—

LORD JUSTICE-CLERK—This is the second case that has come before the Court under the jury trial clauses of the recent Sheriff Court Act of 1907. It could hardly have been conceived that a second case could present a more unfortunate instance of miscarriage than did the first, but I must say with regret that the case now before us is much more unsatisfactory than that which was disposed of a few days ago. The record is unsatisfactory, the questions put are unsatisfactory, the directions given to the jury are unsatisfactory, and as a necessary consequence of all these regrettable circumstances the verdict of the jury is unfortunate.

The undoubted facts are that one Clements undertook by a contract which is in writing the making of a coal-pit shaft, and that the

defenders supplied him with the plant necessary for the work, consisting of winding machinery and a cage, working from the pithead engine a winch moved by steam for operating the rope by which a stand for the men to work on could be moved, and which was on one side of the shaft. As the men finished the work at one elevation, this platform was to be moved by the winch to another position for continuing the work. The men employed at the whole work were engaged and paid by Clements, he receiving his contract price for the work done from time to time.

The accident which has led to the litigation was caused by a jerk to the rope, the result of the rope mounting the flange at the end of the drum and falling off, the platform hanging from the rope being thus made to move suddenly and stop suddenly, throwing a workman down the shaft. This is alleged to have been caused by the flange being too shallow for the quantity of rope coiled on the drum, and that the winch was set in a line not straight with the pulley, and that the winch was in charge of an incompetent man. The case made therefore is one of bad plant, badly handled.

The defenders' case is that the winch and rope, although their property, were handed over to Clements as a contractor in sound order, that it was not being used by them at the time, and that it was not intended to be used, and should not have been used, for raising or lowering the platform when men were standing on it.

One would have supposed that so simple a case could have been dealt with without any serious complication or difficulty. But as I have said the record is most unsatisfactory, neither the averments nor the answers being framed so as to bring out well the questions to be put in issue. The pursuers by the form of their condescendence accuse the defenders, a limited company, of supplying a winch, wrongly constructed, wrongly placed, and served by an inefficient man set to work at it by the defenders. They also say that Roberts, the defenders' manager, was responsible for the use and working of the winch, and that they are responsible for his fault. Their case is thus on record put solely on the allegation of the deceased having been at the time of his death an employee of the defenders. The only answer of the defenders is to be found in a *quoad ultra* denied, but they do not as one would have expected, make any specific averment as to how the facts stand according to their view, or state specifically that the deceased should not have been on the platform at a time when it was to be moved. The defenders proposed to put the matter as regards employment right, by making an addition to their answer by adding an averment that the deceased was in the employment of Clements, who was a pit sinking contractor, and not in their employment. But while the minute was lodged before the questions for the jury were adjusted, the amendment was never formally added to the record, but simply lay in the process.

All this is most unfortunate. Then the Sheriff-Substitute adjusted nine questions to be put to the jury. I do not think it necessary to go over them in detail. The defenders took no steps to have them amended. They are certainly in such number as is not I think advisable in such a case. I must also further remark that if such a crowd of questions were to be put, one would have expected to find a question as to whether the deceased was in the employment as a servant of the defenders —as to whether Clements was a contractor and the deceased was his servant. No such questions are put.

I pass over also the exceptions which were taken to the allowance or disallowance of evidence. I also pass over the directions asked from the Sheriff and refused by him. These might require careful consideration if it were necessary for deciding whether the verdict could stand. But in the view I take of the case they may be passed over.

But when we come to the directions given by the Judge to the jury, very serious considerations come in. Here again there are many directions excepted to. Most of the directions seem to me to be objectionable. The first was that the deceased Daniel M'Coll was in the employment of the defender. It is new to me that a judge can, in the exercise of his duty, tell the jury what they must find in fact. The matter on which the order to find a particular fact was given, was of the very essence of the questions of fact between the parties.

The second was that they might consider whether Roberts was a reasonably competent manager. On this I shall only make this comment, that there is no averment on the record, and no evidence, that Roberts was not a "reasonably competent manager." If the Judge meant that the jury might judge of the question whether the defenders selected a reasonably competent manager when they engaged him, by considering the facts proved in regard to the accident which was the subject of inquiry, and on the ground of these facts holding that they had not selected a competent manager, such a direction would be erroneous. I cannot imagine under what other idea the direction could have been given. Plainly the question of reasonableness in selection depended on the character and reputation and qualifications of the man at the time they engaged him. The propriety of their conduct cannot be judged of by something done or omitted by him on the occasion in question.

The fourth and fifth directions were "that the manager Roberts was a person in superintendence; that Roberts, the manager, should be held as knowing that the winch was being used for raising and lowering men." Both these directions were directions to the jury that they were not to form their own opinion on fact, but to take the opinion of the Sheriff. The observations I have already made on the first direction apply to these also.

The seventh direction was "that the jury should consider the position in which the

winch was placed as inferring liability upon the defenders at common law." This is most unfortunately put. It reads as if it meant that if a manager having to place a winch in a particular position did not place it exactly where it should be placed, the limited company, his masters, would be responsible at common law for his mistake. That is plainly not sound law as stated.

It seems to me that the case having gone to the jury on such directions as these, it is impossible to do otherwise than to sustain the exceptions to the directions 1, 2, 4, 5, and 7, and to order a new trial.

Had it been necessary to consider the case on the question of the verdict being contrary to evidence, I will only say that it would have been very difficult to hold that the verdict was not open to exception as being contrary to evidence.

I will only add that I think it lamentable that in a simple case like this there should be placed before us notes of evidence filling 163 pages of print, the case having occupied three long days. Such a case would certainly have been tried in this Court in one day, and the print of notes if required would certainly not have been one-third of the size of that in this case.

If such cases are conducted in the Sheriff Court as this one has been, instead of jury trial in that Court being a blessing to litigants, it will prove something very different to the unfortunate litigants who either come into Court as pursuers or are hailed to Court as defenders.

LORD LOW, LORD ARDWALL, and LORD DUNDAS concurred.

The Court pronounced this interlocutor—

"Sustain the appeal and recal the . . . interlocutor appealed against, as also the whole interlocutors since the closing of the record on 20th August last: . . . Allow the bill of exceptions, set aside the verdict, grant a new trial, and remit the cause to the Sheriff to proceed therein."

The defenders moved for expenses, and argued that the rule in *Canavan* v. *John Green & Company*, December 16, 1905, 8 F. 275, 43 S.L.R. 200, did not apply to jury trials in the Sheriff Court.

LORD JUSTICE-CLERK—This has been an unfortunate case, and it is a case in which both parties are more or less to blame. I think the proper course is to find neither party entitled to the expenses of the trial and of the appeal.

LORD LOW, LORD ARDWALL, and LORD DUNDAS concurred.

The Court found neither party entitled to expenses from the date of closing the record.

Counsel for the Pursuer (Respondent)—Crabb Watt, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders (Appellants)—Watt, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Tuesday, February 23.

SECOND DIVISION.

RAMSAY'S TRUSTEES *v.* RAMSAY.

Succession—Faculties and Powers—Power of Appointment — Exercise of Power — General Settlement—Appointment quoad "Residue" — Power Expressly Exercised with regard to Two out of Three Sums—Expressio Unius Exclusio Alterius — Presumption.

By his antenuptial contract of marriage, dated in 1851, A bound himself to pay a sum of £4000 at the first term after his or his wife's death, to the children of the marriage, equally among them, declaring that the spouses or the survivor should have power to appoint it among the children in such proportions as they or the survivor might think fit. By the same deed A and his future father-in-law each bound themselves to pay a sum of £3000 to the marriage-contract trustees for behoof of the children of the marriage, in such proportions as the spouses or the survivor might appoint. An additional sum of £1518, 18s. 11d. was subsequently conveyed to the marriage-contract trustees by directions of the wife's father, for the purposes of the trust.

In 1887 the spouses executed a mutual settlement and deed of appointment, in which, after providing for payment of debts and legacies, they disposed of the residue of their estate, which they apportioned among their children in certain shares. Clauses reserving the liferents of the spouses and dispensing with delivery followed. The deed then proceeded to narrate the marriage contract and the trust purposes relating to the sums of £6000 and £1518, 18s. 11d. and apportioned these sums among the children. No reference was made in this part of the deed to the sum of £4000.

Held that, looking to the construction of the mutual settlement as a whole, and to the terms of the residue clause in particular, the sum of £4000 had not been validly appointed.

Bray v. *Bruce's Executors*, July 19, 1906, 8 F. 1078, 43 S.L.R. 746, *distinguished.*

By his antenuptial contract of marriage, dated in 1851, James Ramsay junior, merchant, Dundee, bound himself to make payment of the sum of £4000 at the first term of Whitsunday or Martinmas after the death of the longest liver of himself and his wife to the child or children of the marriage then alive, equally among them, share and share alike—"Declaring that if there be two or more children of the said contracted marriage, then the said James Ramsay junior and Euphemia Wilson Baxter (Mrs Ramsay) shall have full power during their joint lives to divide and apportion the said sum of Four thousand pounds between and among the said chil-