in such a case as the present, it should not be stipulated that the provision is to be free of duty.

My brother Lord Salvesen has been good enough to call my attention to the judgment of North, J., in the case of *Gray* v. *Gray* [1896], 1 Ch. 620. The circumstances of that case were substantially identical with those of the present case, with this difference, that the marriage-contract provision was not charged upon any particular property. That difference, however, seems to me to be essential, because the fact that the provision was not charged upon any particular property rendered section 14 (1) of the Act inapplicable. It therefore seems to me that the judgment in *Gray* has no bearing upon the present question.

The conclusion, therefore, at which I arrive is that, all the requirements of section 14 (1) being present in this case, no sufficient reason has been shown for refusing to give effect to that section. I am accordingly of opinion that both the questions should be answered in the affirmative.

LORD SALVESEN—I have had an opportunity of reading Lord Low's opinion in this case, and concur in the result at which he has arrived. My only doubt arises from the fact that the marriage-contract trustees not merely had a security over real estate of the late Major-General Sir Claud Alexander, constituted by bond and disposition in their favour, but that they had also his personal obligation for the amount contained in the bond. In the case of *Gray* v. *Gray*, to which reference has already been made, it was held that where the marriage-contract provision was constituted merely by a personal obligation, the creditors were entitled to have the full amount of the debt paid at the debtor's death without any deduction of duty under the Finance Act. It seems anomalous that a creditor in exactly the same position, except that in addition to the personal obligation he holds a security over heritable estate belonging to his debtor, should be thereby so much the worse than an unsecured creditor that he must suffer abatement of his debt to the extent of the duty exigible on £30,000, which we were told amounts to the very substantial sum of £1500. It is, however, no reason for not applying section 14 (1) that it may disclose anomalies of this kind if the conditions required to bring it into operation are all present as they seem to be in this case. In *Hasket* v. *Gardiner* [1907], 1 Ch. 385, a very similar question arose, and it was strongly contended that the contention of the plaintiffs there, who were the executors of the deceased, "would lead to this curious result, that the persons entitled to the sum of £25,000 secured by the covenant of the testator would, if he died having only real estate, have recourse to the real estate for the full amount of the debt, and would not have to bear any part of the duty, whereas the persons entitled to a similar sum charged on real estate by a testator who had no personalty would have to bear a proportionate part of the duty." This argument was, however, rejected by Joyce, J., who held that section 14 (1) did include the particular case. Thus the only argument for the marriage-contract trustees which I thought worthy of serious consideration has been expressly held to be untenable in England, and although I do not agree with the learned Judge in the Chancery Division in holding that there would have been a defect in the legislation with respect to estate duty if the consequence for which the testamentary trustees here contend did not result, I find myself unable to construe the section as not including such a case as the present.

LORD JUSTICE-CLERK—I concur in the opinion delivered by Lord Low, which I have had an opportunity of reading.

LORD ARDWALL and LORD DUNDAS were absent.

The Court answered both questions of law in the affirmative.

Counsel for the First Parties—Johnston, K.C.—Spens. Agents—A. & A. Campbell, W.S.

Counsel for the Second Parties—Chree—Mitchell. Agents—Hugh Martin & Wright, S.S.C.

Friday, March 18.

FIRST DIVISION.

(Along with Four Judges of the Second Division.)

[Sheriff Court at Wick.

TAYLOR (POOR) *v.* SUTHERLAND.

Sheriff — Process — Jury Trial in Sheriff Court—Ambiguous or Inconsistent Verdict—Appeal—New Trial—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 31.

In a jury trial under the Sheriff Courts (Scotland) Act 1907 the questions put by the Sheriff-Substitute and the answers returned thereto by the jury included the following:—Ques. 2—Whether the pursuer was in the employment of, and performing work for, the defender, and acting under his instructions at the time when he received the said injuries? Ans. 2—The second question in the affirmative. Ques. 3—Whether the said injuries were caused by the fault or negligence of the defender, and if so in what did that fault or negligence consist? Ans. 3—The first part of the third question in the affirmative in respect that the defender in assisting the railway company in shunting the trolley on which the mill was placed failed to explain to the pursuer that it was no part of his duty to assist in that operation. Ques. 4—Whether the said injuries were caused, or at least

materially contributed to, by the pursuer's own fault or negligence? Ans. 4—The fourth question in the negative. The jury awarded damages to the pursuer, and assessed the same at £75.

Held that the verdict was not ambiguous or inconsistent, that the jury necessarily negatived all negligence except the negligence they specified, that that was not in law negligence, and that accordingly the verdict must be applied for the defender.

Question reserved whether under section 31 of the Sheriff Courts (Scotland) Act 1907 an ambiguous or inconsistent verdict must necessarily be applied for the defender, or whether the Court had power to order a new trial.

Question reserved whether a pursuer who raises an action at common law and also under the Employers' Liability Act against his employer, and abandons the latter ground, is entitled to a jury trial.

Dicta of the Lord Justice-Clerk and Lord Ardwall in *Adamson* v. *Fife Coal Company, Limited*, 1909 S.C. 580, 46 S.L.R. 459, *commented on.*

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), section 31, which is the first of three sections under the general heading "Jury Trial in Sheriff Court," enacts—". . . . . The verdict of the jury shall be applied in an interlocutor by the Sheriff, which shall be the final judgment in the cause, and may, subject to the provisions of this Act, be appealed to either Division of the Court of Session, but that only upon one or more of the following grounds—(1) That the verdict has been erroneously applied by the Sheriff; (2) That the verdict is contrary to the evidence; (3) That the Sheriff had in the course of the trial unduly refused or admitted evidence or misdirected the jury; (4) That an award of damages is inadequate or is excessive. Upon such appeal the Court may refuse the appeal or may find under head (1) that the verdict was erroneously applied and give judgment accordingly, or under the other heads may set aside the verdict and order a new trial, provided that if the judges are equally divided in opinion the verdict shall stand."

William Forbes Taylor, carter and labourer, minor son of and residing with John Taylor, carter, 6 Market Street, Wick, with consent and concurrence of the said John Taylor as his curator and administrator-in-law, raised an action in the Sheriff Court at Wick against George Sutherland, engineer, Wick, in which he claimed £250 damages at common law for personal injury sustained while in the defenders' employment and through his alleged fault, or, alternatively, £150 under the Employers' Liability Act 1880.

The pursuer and defender made, *inter alia*, the following averments and answers—"(Cond. 2) The pursuer on or about 6th October 1908 was employed by the defender as an engineer or labourer at a weekly wage of 7s. with board and lodgings, his special employment being to accompany one of the defender's threshing mills wherever it might be required, and to be employed in connection therewith. (Ans. 2) The pursuer was employed as a labourer, not as an engineer. *Quoad ultra* admitted. (Cond. 3) On or about 23rd October 1908 the pursuer was engaged in the employment of the defender in placing one of the defender's threshing mills on a trolley at Lairg Railway Station, and that under the personal directions and superintendence of the defender. The threshing mill having been placed on the trolley, the pursuer was requested by the defender to assist the defender and others in pushing the said trolley a short distance along the rails at said station. A truck containing coals was standing on the rails at said railway station a short distance in front of the said trolley, and the defender directed the pursuer and the others assisting him to push the said trolley along the rails with sufficient impact to drive the said truck containing coals forward along the said rails. The said threshing mill was not fastened in any way on the said trolley, and this was well known to the defender. When the said trolley was pushed along the said rails according to the directions of the defender it came into violent contact with the said truck containing coals, and in consequence the said threshing mill was thrown out of position, one of the hind wheels thereof coming into violent contact with the pursuer's left hand which had been partially placed over an upright iron band on the side of the said trolley, resulting in the third finger of the pursuer's left hand being completely severed at the second joint, and the fourth finger of his left hand also being completely severed at the first joint. The defender's statement in answer is denied. (Ans. 3) Admitted that on the date mentioned the pursuer John Taylor had been engaged in the employment of the defender in placing one of his threshing mills on a truck at Lairg Railway Station under the directions and superintendence of the defender. *Quoad ultra* denied. Explained and averred that the pursuer John Taylor got his fingers injured after he had finished assisting defender to place the said threshing machine on said truck and while he was voluntarily assisting the Highland Railway officials to move said truck. Believed and averred that in any event said injuries were caused through the said John Taylor negligently and carelessly placing himself in a position of danger, and in which he remained after being warned of said danger. (Cond. 4) The pursuer's said injuries were caused by the fault of the defender. It was gross fault on his part to order the pursuer and his other workmen to push the said trolley against the coal truck without first having securely fastened the threshing mill to the trolley. He knew that the pursuer was, and had to be, owing to the position he was placed in by defender, in such a position that if the threshing mill moved it would injure him, and that the trolley coming into contact with the truck would cause the threshing mill to move. The pursuer was young and

inexperienced and was not aware of the danger, which, however, was known to defender. The pursuer's injuries were the direct natural and probable result of defender's fault. The defender is thus liable in damages at common law. And further, he is liable under the Employers' Liability Act 1880, section 1, sub-section 1, in respect that the accident was caused by reason of a defect in the condition of the plant connected with and used in the business of the defender, such defect being due to the defender's own negligence as aforesaid. (Ans. 4) Denied."

The pursuer pleaded, *inter alia*—"(1) The pursuer having been injured as condescended on through the fault and negligence of the defender is entitled to compensation in respect thereof at common law. (2) The pursuer having been injured through a defect of the condition of defender's plant as condescended on, the defender is liable under the Employers' Liability Act 1880."

The defender pleaded, *inter alia*—"(2) The averments of the pursuer being irrelevant and insufficient to support the conclusions in the action, the action ought to be dismissed with expenses."

On 26th January 1909 the Sheriff-Substitute (STUART) pronounced this interlocutor—"Finds that the pursuer has stated no relevant case under the Employers' Liability Act 1880, and to that extent and effect sustains the defender's second plea-in-law and dismisses the action so far as laid under said Act: *Quoad ultra* repels said plea-in-law, allows parties a proof of their averments, and to pursuer a conjunct probation."

The pursuer lodged a minute asking for jury trial, and on 8th February 1909 the Sheriff-Substitute pronounced this interlocutor—"Appoints the cause to be tried before a jury in terms of the Sheriff Courts (Scotland) Act 1907, section 31, and further appoints parties to be heard upon the questions of fact proposed by them to be submitted to the jury."

On 16th February 1909 the Sheriff-Substitute pronounced this interlocutor—"Appoints the following questions as the questions of fact to be proponed to the jury, viz., (1) Whether by an accident at Lairg Railway Station on 23rd October 1908 the first-named pursuer sustained injuries to the fingers of his left hand? (2) Whether the first-named pursuer was in the employment of and performing work for the defender, and acting under his instructions at the time when he received the said injuries? (3) Whether the said injuries were caused by the fault or negligence of the defender, and if so, in what did that fault or negligence consist? (4) Whether the said injuries were caused, or at least materially contributed to, by the pursuer's own fault or negligence? (5) Damages laid at £250."

The case was tried on 12th and 13th March 1909, when the jury returned the following verdict:—"The jury unanimously answer the questions proponed to them by the Sheriff-Substitute in his interlocutor dated 16th February 1909 as follows, viz., the first question in the affirmative; the second question in the affirmative; the first part of the third question in the affirmative, in respect that the defender in assisting the railway company in shunting the trolley on which the mill was placed, failed to explain to the pursuer that it was no part of his duty to assist in that operation; the fourth question in the negative. The jury further assess the damages at £75 sterling."

On 22nd March 1909 the Sheriff-Substitute pronounced this interlocutor—"The Sheriff-Substitute finds that the verdict falls to be entered as a verdict for the defender: Applies the verdict accordingly, and in respect thereof assoilzies the defender from the conclusions of the action: Finds the pursuer liable to the defender in expenses."

Note.—"By the answer given to question 2 the jury found that the pursuer was in the employment of the defender when he received his injuries. Question 3 is in these terms—(*quotes, supra*). The jury returned the following answer to this question—(*quotes, supra*). It is not doubtful that the jury intended to return a verdict for the pursuer, and if it can be so regarded I should of course enter it in accordance with that intention. The defender maintains, upon several grounds, that the verdict is open to objection, and claims that it falls to be applied in his favour. The most serious objection, and that which I have most reluctantly come to think must be sustained, is that the fault imputed to the defender by the finding of the jury is in law no fault at all. It cannot, I think, be said than an employer is in fault in inviting or permitting his servant to do something which is not within the scope of his duty, and therefore liable for damages if the servant should be injured, no matter in what unforeseen way, and even if the employer has taken all reasonable precautions. In order to infer liability I think it must be found that the operation was a dangerous one, and that the employer failed to take due precautions. This was, necessarily, the basis of the pursuer's case, and in the evidence led, and in his agent's address to the jury, this was the ground of liability which the jury were asked to affirm. Their answer to question 3 does not find that the defender failed to take reasonable precautions, or even that the operation was a dangerous one requiring such precautions. In the absence of such a finding I fear that I must sustain the defender's argument, and hold that as no ground of legal liability has been found by the jury the pursuer cannot claim the verdict—*Adamson* v. *Fife Coal Company*, 1909 S.C. 580. It is no doubt true that in the present case the verdict affirms that the defender has been guilty of negligence. But I think it is not legitimate to take part of the answer and disregard the rest. Nor do I feel myself entitled to assume that the jury meant to imply what they have not expressed, viz., that this was a dangerous operation, and that due precautions were neglected. As I have already said, these points formed the bulk of the case in evidence, and I find it

difficult to believe that the omission from the verdict of a definite finding in regard to them was other than intentional. For these reasons I think the verdict cannot stand as a verdict for the pursuer, and that it falls to be entered for the defender. I regret this result, and would willingly have avoided it if I could have found some way of interpreting the verdict in the sense intended by the jury. But on reconsideration I have been unable to do so. I should perhaps mention, though it is not necessary to discuss them, the other objections to the verdict stated by the defender. These were, I think, two in number. First, that the fault, or supposed fault, found by the jury was neither averred nor supported in evidence for the pursuer; and second, that the verdict is inconsistent, in respect that by answer 2 the jury affirmed that the pursuer was in the defender's employment when he was injured, while by answer 3 they found as fault that the defender failed to tell the pursuer that it was no part of his duty to help in shunting the trolley. With regard to the first, it is enough to say that it is an objection which does not arise upon a motion to apply the verdict. The defender's remedy, if he has a remedy, is elsewhere. Of the second objection I need only say that I do not think that the answers referred to are so clearly contradictory as the defender maintains. It is, however, unnecessary to decide the point, as in my opinion the defender is entitled to succeed upon his main argument. I think expenses must follow the verdict."

The pursuer appealed to the Court of Session upon the grounds (*a*) that in the interlocutor complained of the verdict was erroneously applied, *et separatim* (*b*) that the verdict of the jury in so far as it related to their answer to the second part of question three was contrary to evidence, and inconsistent with their answers to question two, and the first part of question three."

The case was heard on 10th December 1909 before the Lord President, Lord Kinnear, and Lord Dundas, and counsel for the pursuer then stated that in so far as (*b*) formed a separate ground of appeal they abandoned it, because if the verdict meant that the defender was not in fault they could not maintain that it was contrary to the evidence.

On 21st December 1909 the Court appointed the cause to be argued by one counsel on each side before the Judges of the First Division, along with four Judges of the Second Division.

At the rehearing it was argued for the appellant—The verdict had been erroneously applied by the Sheriff in that he ought not to have applied it for either party. He should have refused to accept such a verdict. The verdict was in the category of ambiguous, imperfect, and inconsistent verdicts, and the result must be a new trial. It was ambiguous in that "his duty" in answer 3 might mean "pursuer's" duty or "defender's" duty. On the one hand "pursuer" was the more immediate antecedent to "his"; on the other hand the repetition of the word "assist" seemed to indicate that by "his" was meant "defender's." It was imperfect in that it did not negative other grounds of fault. It was inconsistent in that it found that the pursuer both was and was not in the defender's employment. There could be no doubt that in a jury trial in the Court of Session a verdict, either ambiguous or imperfect or inconsistent, ought not to be received by the judge at the trial, and if received the result *ex debito justiciæ* must be a new trial—*Morgan* v. *Morris*, July 26, 1855, 2 Macq. 342, esp. Lord Chancellor Cranworth at 355, and July 6, 1858, 3 Macq. 323, esp. Lord Chancellor Chelmsford at 336; *Florence* v. *Mann*, December 17, 1890, 18 R. 247, 28 S.L.R. 215, Adam on Jury Trial, 294-5. A construction of the Sheriff Courts (Scotland) Act 1907, which would establish a different result from that which obtained in the Court of Session, especially as the contrary would really amount to a denial of justice, must if possible be avoided. Even assuming that in the Sheriff Courts (Scotland) Act 1907, section 31, applied to such a verdict, the words "and give judgment accordingly" did not necessarily mean "apply the verdict for the appellant"; the phrase was wide enough to include the ordering of a new trial. The words "under the other heads may set aside the verdict and order a new trial" did not imply that under head (1) a new trial could not be ordered. The word "other" was merely used because under heads (2), (3), and (4) the verdict could not be applied for the appellant, and under these heads a new trial was the only course open. But section 31 did not apply here, and an appeal lay under section 28, the interlocutor of the Sheriff being a final interlocutor, because an ambiguous, &c., verdict was really no verdict; it was *nihil ad rem*—*Morgan* v. *Morris*, 2 Macq., Lord Chancellor Cranworth at p. 361; Adam on Jury Trial, p. 286. The *dicta* of the Lord Justice-Clerk and Lord Ardwall in *Adamson* v. *Fife Coal Company*, 1909 S.C. 580, 46 S.L.R. 459, to the effect that where a verdict could not be entered for the pursuer it must be entered for the defender, must be taken *secundum subjectam materiam*. The answers of the jury which there negatived fault were exhaustive and unambiguous. In any case the *dicta* were obiter. Reference was also made to *M'Coll* v. *Alloa Coal Company, Limited*, March 5, 1909, 46 S.L.R. 465. Alternatively, they submitted that the latter half of the answer to question 3 should be taken *pro non scripto*, and the verdict applied for the pursuer.

Argued for the defender—The verdict was not ambiguous or inconsistent. The jury's answer to question 3 amounted to a finding that there was no fault, for the only fault that they had been able to find was no fault in law. Even assuming that the verdict was ambiguous or inconsistent under section 31, the pursuer was not entitled to a new trial under that section. Where a verdict was not clearly for the pursuer it must be for the defender—*Adamson* v. *Fife Coal Company* (*cit. sup.*),

opinions of Lord Justice-Clerk and Lord Ardwall. "And give judgment accordingly" meant allow the appeal and apply the verdict for the appellant. A new trial could be ordered only under "the other heads," viz., 2, 3, and 4—not under 1. They did not dispute that if there were an ambiguous or inconsistent verdict in the Court of Session the result must be a new trial.

At advising—

LORD PRESIDENT—[*Read by Lord Johnston*]—This was an action raised in the Sheriff Court at Wick by a labourer in the employment of the defender, and concluded for damages under the Employers' Liability Act, and alternatively at common law, in respect of injuries received while in the service of the defender.

The facts out of which the claim arose, as averred by the pursuer, were that he was engaged by the defender to work in connection with a steam threshing mill, the property of the defender. The defender having occasion to send the threshing mill by rail, he took it, accompanied by the pursuer, to Lairg Station, and there with a view to transit he put it on a trolley or waggon the property of the Highland Railway Company. Thereafter it was wished to push it along the rails to couple it up with other waggons. The pursuer at the desire of the defender lent a hand in the pushing, and the trolley coming in contact with the waggon, the threshing mill jerked forward on the trolley, came against the pursuer's hand, and crushed it between the mill and the iron stave on the trolley against which he had placed it, with the result of injury to two fingers. The fault alleged against the defender was that he had not secured the mill on the trolley, that he knew it was not secured, and that he knew or ought to have known that if it was unsecured an accident was likely to happen to the pursuer.

The Sheriff-Substitute found that the action was irrelevant so far as laid on the Employers' Liability Act—a finding which in my opinion was clearly right. He, however, notwithstanding, found that the pursuer was entitled to have his case tried by a jury in terms of section 31 of the Sheriff Court Act 1907. That question is not before us, and we have had no argument upon it. But lest this case should be cited as a precedent, and the imprimatur of the Supreme Court be claimed for it, I wish to say emphatically that I reserve my opinion on this point.

The case then went on, and in respect of section 32 of the same Act the Sheriff by interlocutor fixed certain questions to be put to the jury. They are as follows, and I append the answers.

[*His Lordship here read the questions and answers ut supra.*]

Thereafter, in terms of section 31 of the Act and rule 146 of the schedule, the Sheriff by interlocutor applied the verdict of the jury. In that interlocutor he found that the verdict fell to be entered as a verdict for the defender, applied the verdict accordingly, and assoilzied the defender. Thereafter the pursuer appealed to this Court in terms of section 31 of the Act.

The pursuer's argument is twofold. He says, first, that there having been no evidence that the defender failed to tell the pursuer that it was no part of his duty to assist in the operation (which indeed he never averred), that part of answer three should be struck out, leaving a simple averment of fault, and that therefore the verdict should be entered for the pursuer. I do not think that there is any difficulty in holding this argument radically unsound. The jury's answer three is—there is fault, which fault consists in something which in law is no fault at all. That is really a finding of no fault, and cannot possibly be twisted into a finding of fault. This was the view of the Sheriff-Substitute, and I agree with him.

The pursuer next says that the verdict is so self-contradictory as to be unappliable, and that therefore there must be a new trial. Now this involves two propositions, first, that it is unappliable, and, second, that, if so, there must be a new trial. Now the way the Sheriff-Substitute has dealt with this is as follows. He has not held that the verdict as it stands is a verdict for the defender, but, as for the reason above stated he cannot hold it as a verdict for the pursuer, he then says, founding his judgment on the observations of the Lord Justice-Clerk and Lord Ardwall in the case of *Adamson*, that the verdict must be for the defender. In other words, the proposition is this—that it is for the pursuer to obtain from the jury such answers in fact as will make a good foundation in law for a verdict in his favour. If he does not he fails, and the verdict must be for the defender.

Now I shall have something to say about this in a moment. But first, logically we must endeavour to discover whether the findings as they are do not amount to a verdict for the defender, and I think that as a matter of construction they do. It seems to me that if a question is put to the jury as here, "Was there negligence on the part of the defender, and in what did it consist?" and they make answer, "Yes, it consisted of so and so," that the jury do necessarily negative all negligence except the negligence they specify, and if the negligence they specify is not negligence at all, then I think the answer is negative of negligence *in toto*. Accordingly I think as a mere matter of construction that the verdict can be held to be a verdict for the defender. The Sheriff-Substitute says that it was plainly meant to be for the pursuer, and that he is sorry he cannot so hold it. I think he is very likely to be right in the first part of the sentence, but I am not a a sharer of his sorrow in the second, for after all the plain English of it is that the jury were unable to find for the pursuer on any legal grounds, and therefore did the best they could for a pursuer with whom they sympathised by finding on an illegal one—a state of mind, alas, not unknown to those who have experience of juries, and

one that in other circumstances has often been productive of gross injustice. And looking behind the verdict, it is, I think, too clear for words that here there was no liability. The duty of strapping or otherwise securing a machine on a railway truck was no part of the duty of the sender of the goods but of the Railway Company's servants, the necessity for securing being only to avoid the evil effects of the bumps and jerks of transit, and even if strapping or chaining had been resorted to no such operation would have prevented the very small movement of this heavy machine which would be sufficient to crush a finger inserted just between the machine and the rigid standard of the trolley.

Now this is sufficient for the decision of the case, but as it is not the ground on which the Sheriff-Substitute decided it I feel myself constrained to say more, though I do not think it necessary to decide more. Some day or other we shall have a case where the answers to the questions put obviously do not permit of the extraction of a verdict for either the pursuer or the defender, and what then? I think the question full of difficulty. It is made more difficult by the phraseology of the final words of section 31, which, literally taken, would limit the remedy of new trial to the last three heads and exclude the first. I candidly confess I do not like the result at which my brethren, the Lord Justice-Clerk and Lord Ardwall, seem to have arrived in *Adamson's* case, namely, to put it upon the pursuer to get a verdict out of the questions, and to let him fail if he does not, because it would seem to me to lead to a denial of justice; for as far as I see he really has no power to influence the form of the questions. I myself, adverting here again to an opinion expressed in *Adamson's* case, would be inclined to think that no appeal, even with leave, against the interlocutor fixing the questions to be put to the jury was competent. But let that pass. Suppose it is competent and leave is refused. My attention has been called to a suggestion made by a learned Sheriff-Substitute of Lanarkshire in one case, who, while announcing that he means consistently to refuse leave should leave be required, as being against what he considers the spirit of the Act (with which, so far, as I have already said, I agree with him), goes on to say that the question may be made matter of exception. I think the suggestion absolutely inadmissible. Exceptions always are and must be to directions in law, or to the admission or refusal of evidence, which is also really a question of law. How can putting questions of fact to the jury be a matter of law? And, besides, it is not the handing of the questions to the jury in terms of rule 136 which settles them. That has already been done by interlocutor long before the jury was there, and the Sheriff could not, even if he would, alter to the jury, either at the beginning or end of the trial, those questions which by interlocutor he has already fixed. The whole difficulty arises from the provision as to questions. And certainly if it be permissible to question the wisdom of Parliament, one may well regret that with the experience of the English system and the Scotch system, which each in their own different ways have worked fairly well, the framers of this Act must needs devise a new plan, unfortified by experience, and which very little consideration would have shown would be full of difficulty and consequent risk of miscarriage. Specific questions of fact have often been put to a jury after evidence led. Even then it is not always an easy matter to put the right one. Look at the criticism in the House of Lords on the questions put in *Smith* v. *Baker*. And yet what a judge of the Supreme Court, with years of experience of jury trial, finds hard to do after the evidence, is supposed to be easy for a Sheriff-Substitute, who has had but little if any such experience, to do before the evidence is led, and when all the world knows that the record is too often imperfectly drawn, either from want of information, or want of skill, or occasionally by design. Take, for instance, the case of *Tullis* v. *The North British Railway Company*. The question of pure fact which would have decided that case would have been—"Did the deceased man negligently creep between the wheels of the truck standing in a siding when he knew that shunting was going on, and without paying any heed as to whether a shunted truck was coming along the siding?" And the answer would have been "Yes," and the verdict would have been applied for the defenders. But no Sheriff-Substitute without second sight could have framed such a question from the record, for the pursuer told, either ignorantly or, as I think (and I tried the case) knowingly, quite a different story as to where the man was when the accident happened, and the defenders did not aver the true facts either, because they did not know them till they extracted them from the pursuer's witnesses in cross-examination. It is obvious that if one of the questions put to the jury had been—"Was the deceased man guilty of contributory negligence?" then on that question they could have given a finding which would have been a verdict for the defenders. But that is just taking refuge in what is called the general issue, and I therefore think it necessary to say that until we get amendment of what I think a thoroughly mistaken plan, I see no reason in the phraseology of section 32 to forbid the putting of a question in such general form as is done in Court of Session issues. At the same time I candidly admit that I think the framers of the Act contemplated questions of specific fact alone, a state of mind which they forgot when they came to frame rule 139 and dealt with exceptions to points of law in the Sheriff's charge to the jury, it being obvious that if the questions put were questions of pure fact there never could be room for directions in law to the jury, whereas if there are questions which involve a mixture of fact and law then they are of the nature of the general issue.

LORD LOW—I agree with the Lord President, and for the reasons which he has stated, that the answer of the jury to the third question was truly to the effect that there was no fault on the part of the defender. If so, that necessarily negatives the pursuer's case.

That is sufficient for the decision of the case, and without indicating any dissent from what the Lord President has said on other matters, I should like to say for myself that I reserve my opinion on these points until they actually come up for decision.

LORD ARDWALL — I agree with your Lordship that the answer of the jury to question three was in substance a finding of no fault on the part of the defender, and that is sufficient for the decision of this appeal. I desire to reserve my opinion on the questions as to the construction of the Sheriff Courts (Scotland) Act 1907 which have been raised in the course of the discussion.

LORD DUNDAS—I agree generally with the Lord President, though I should like to reserve my opinion in regard to some of the topics his Lordship has alluded to until it becomes necessary to decide them. But I may say that I am not, as at present advised, disposed to agree with the argument presented to us to the effect that if a verdict is so worded that it cannot be applied in favour of the pursuer it must necessarily be applied for the defender.

LORD JOHNSTON—Groping, as in other parts of the Act there are indications that it does after English practice, which its framers have imperfectly understood, the Sheriff Courts Act 1907 has, I think, by its 31st and 32nd sections introduced a sort of hybrid system of jury trial in employers' liability cases.

There is not to be an issue or issues laid before the jury. But the Sheriff, not after the facts are disclosed at the trial, but merely after a consideration of the parties' statements, is to evolve a set of questions to be put to the jury. What a dangerous departure this is, and how liable to lead to miscarriage, is best known to those who have sat in this class of cases, and who know how constantly the interest of agents to state a relevant case, or their inability to grasp *a priori* the real points of their case, lead to averments being made which are far removed from the real case as it comes out at the trial.

But the Act says it is to be done, and the verdict of the jury is impliedly (for it is not so stated) to be their answers to these questions. This verdict is to be applied by the Sheriff. As, then, the verdict of the jury consists of their answers to certain questions, this involves that the Sheriff is not merely to make an operative decree consistently with the jury's verdict, as he would in the ordinary practice of the Court of Session in jury cases, but that he is to form his own conclusion from the jury's answers to these questions as to what their verdict technically regarded is, and then pronounce his operative decree. In fact I regard the intention of these sections to be practically to commit to the jury the task of making certain special findings in fact, and if they think it a possibly necessary *sequitur* to assess damages, with leave to the Court to enter up a verdict for either party on consideration of these findings in fact of the jury. That this is the meaning of the Act is, I think, clear from the directions contained in section 146 of the rules of procedure appended to the Act specifying how the Sheriff is to proceed in applying the verdict, coupled with the fact that appeal to the Court of Session is (section 31 of the Act) to be allowed on the ground, *inter alia*, "that the verdict has been erroneously applied by the Sheriff"; and with the further fact that the Court is empowered, if they find that the verdict was erroneously applied, to "give verdict accordingly," which, as this is not to lead to a new trial, can only mean apply it correctly. It is hardly possible to misapply the verdict on an issue as ordinarily understood, at least in a trial under the Employers' Liability Act. But it is very possible to misapprehend the jury's meaning in their answers, particularly as the questions are to be put to them with reference to a hypothetical case averred and not with reference to the facts as they come out at the trial, and equally possible to misconceive the result to be deduced from the jury's answers.

I am far from saying that our stricter method of dealing with jury trial in this Court would not be the better of some relaxation in the direction of the English practice, But I candidly confess that I do not fully understand that practice, though I know enough about it to appreciate that it requires great experience and great skill in its conduct. And I doubt whether it was a very happy inspiration to attempt to borrow from it, for the first time, in this the least important class of jury cases, and in the Sheriff Court. Certainly I am satisfied that it was a mistake to borrow from it in this fashion without more full knowledge and apprehension of its peculiarities.

But this hybrid between a plant of indigenous and exotic growth having been introduced into the Sheriff Court garden, I think that the trial must be conducted according to the directions given, and that in considering this appeal it must be recognised that the present case is not an ordinary trial by jury in Scotland, but one of a novel and exceptional class.

The Sheriff has asked the jury this question—Was the pursuer in the employment of, and performing work for, the defender, and actually under his instructions at the time when he received the said injuries? And they have answered yes. But he has also asked this other question—Were the said injuries caused by the fault or negligence of the defender, and if so, in what did that fault or negligence consist? And they have answered that they were caused by the fault or negligence of the defender, and that that fault or negligence consisted in this, that the defender in assisting the

railway company in shunting the trolley on which the mill was placed failed to explain to the pursuer that it was no part of his duty to assist in that operation.

I do not think that the Sheriff had any concern with what verdict the jury meant to find—that is to say, what result in law the jury meant him to deduce from their answers in fact, or any right to regret that he could not give effect to their intention. I think that his business was to treat their answers as so much information, and to apply that information in reaching the conclusion whether in law the pursuer or the defender was entitled to a judgment. So dealing with the case, I can have no doubt that the Sheriff came to the sound conclusion that though the jury thought pursuer was in the employment of, performing work for, and acting under the instructions of, the defender, at the time of the accident, he was really only in his employment, and was, as a volunteer, assisting along with the defender in work which properly fell to be done by the railway company, and that as it was in law no fault or negligence on the part of the defender, involving liability for damages, that he did not tell the pursuer that it was no part of his duty to him so to assist, the result of the information which the jury have afforded to the Sheriff was that the defender was entitled to his judgment.

It cannot be said that the questions are altogether appropriately framed, as I have no doubt they would have been had the Sheriff been left, by the framers of the Act, with a free hand to put them after the facts were brought out at the trial. Of this I am certain, that if Sheriffs were left to put the questions at the trial instead of being compelled to evolve them before trial the questions would be much fewer and simpler than Sheriffs at present seem to think necessary, in order I suppose that they may try to meet every possible or conceivable turn of the evidence at the trial, to the great benefit of all concerned. But any defect in the questions here is more the fault of the Act than of the Sheriff.

I think, therefore, that the Sheriff has properly proceeded under the Act, and has correctly performed the not very easy task of applying this, at first sight inconsistent, so-called verdict.

LORD SKERRINGTON—I concur.

LORD JUSTICE-CLERK—I am of the same opinion as that which has been expressed by your Lordships. Stated in a word, an essential part of the verdict—the finding as to fault—is not a finding for the pursuer, and therefore the verdict giving damages to the pursuer has no basis in the findings of fact contained in the answers of the jury.

The only question remaining is whether the Sheriff-Substitute was right in holding the verdict of the jury to be a verdict for the defender. The findings found nothing that could in law be held to be a fault on the part of the defender. Therefore they could not justify the giving of damages to the pursuer. That being so, I am of opinion that the verdict must be held to be a verdict for the defender.

I am grateful for and concur entirely in the comments made by the Lord President upon the form of procedure under the Act in question.

As regards the question whether the adjustment made of the questions by the Sheriff-Substitute can be reviewed if leave is given to appeal, I join with my brethren of the Second Division in desiring to reserve my opinion.

LORD KINNEAR, who was absent at the rehearing, gave no opinion.

LORD M'LAREN was absent.

The Court refused the appeal, and found the appellant liable in expenses since 22nd March, the date of the Sheriff-Substitute's interlocutor appealed against.

Counsel for the Pursuer—Blackburn, K.C.—Boase. Agent—Robert Gray, S.S.C.

Counsel for the Defender—MacRobert. Agents—Bonar, Hunter, & Johnston, W.S.

Friday, March 18.

FIRST DIVISION.

(Before Seven Judges.)

STEWART *v.* CROOKSTON.
GALBRAITH *v.* STEWART.

Bankruptcy — Sequestration — Realisation of Estate—Private Sale by Trustee of Book Debts within Twelve Months of Sequestration—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 82, 96, *and* 136.

A trustee in bankruptcy, with consent of the commissioners and creditors, sold privately within twelve months of the sequestration the book debts belonging to the sequestrated estate. *Held* that the sale was ineffectual.

Crichton v. *Bell* (1833), 11 S. 781, and *Robertson* v. *Adam* (1857), 19 D. 502, *followed* and *approved.*

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), enacts—Sec. 82—"The trustee shall manage, realise, and recover the estate belonging to the bankrupt, wherever situated, and convert the same into money, according to the directions given by the creditors at any meeting, and if no such directions are given he shall do so with the advice of the commissioners. . . ." Sec. 96—. . . "The creditors assembled at such meeting" [*i.e., the meeting after the bankrupt's examination*] "may receive an offer of composition as hereinafter provided and may, either at this or any other meeting, give directions for the recovery, management, and disposal of the estate; and when any part of the estate consists of land or other heritable property, it shall be optional to the creditors to determine whether the trustee is to bring such property to judicial sale or to dispose thereof by voluntary public sale