arbitrator was entitled to hold that the injury did not arise out of the workman's employment as a miner. In my opinion that question ought to be answered in the affirmative. With regard to the second question, which raises the issue of serious and wilful misconduct, I think it is unnecessary that we should answer that question, inasmuch as no question of misconduct can arise if the workman is not acting within the sphere of his employment.

LORD SKERRINGTON—I think that the arbitrator came to a sound conclusion when he decided that the facts proved or admitted in the present case were materially different from those upon which the House of Lords adjudicated in the case of *Smith* v. *Fife Coal Company*, 1914 S.C. (H.L.) 40, [1914] A.C. 723. In the case of *Smith* the injured workman had undoubtedly done a piece of work which he had no right to perform and which he was not employed to do, but the arbitrator took the view that this act of disobedience to the statutory order might be regarded as historical and incidental, and that in point of fact it was not one of the causes of the accident. In the present case it is enough, so far as I am concerned, to point out that at the moment of the explosion the injured workman was actually engaged in making the electrical connection. In view of that fact it seems to me that the arbitrator was entitled to decide that the injury to the workman did not arise out of his employment, but that it arose out of his doing something which he was not employed to do and which he had no right to do. Accordingly I agree with your Lordship that the first question of law should be answered in the affirmative, and that it is unnecessary to answer the second question.

LORD CULLEN—According to finding 10 of the Stated Case the workman when the accident happened was in the act of coupling the wire of the cable to the corresponding wire of the detonator or fuse by holding the wires in conjunction and twisting them together. In acting in this manner the appellant was doing work which under the Explosives in Coal Mines Order 1913 it was illegal for him to do, and which was exclusively the work of the shot-firer. That being so, it appears to me to be quite clear that the accident did not arise out of the workman's employment. It essentially arose in part from his illegally doing an act which was alien to his employment. I accordingly agree with your Lordships in thinking that the first question should be answered in the affirmative, and that it is unnecessary to answer the second.

LORD SANDS—The question which we have to consider in this case is whether it is distinguishable from the case of *Smith* v. *Fife Coal Company*, 1914 S.C. (H.L.) 40, [1914] A.C. 723. Now the cause of the accident in *Smith*, as in the present case, was in my humble opinion the confusion and misunderstanding occasioned by a miner undertaking the duties of a shot-firer—a course of procedure recognised by the rules as a source of danger which these rules are accordingly meant to guard against. The case of *Smith*, however, proceeded upon a strict view of the immediate causal relation. In applying or distinguishing the case of *Smith* I think we must proceed upon the same principles as that case itself proceeds upon, and proceeding upon these strict principles with regard to the causal relation I think we must come to the conclusion that this case, for the reasons your Lordships have stated, is distinguishable from the case of *Smith*. Accordingly I am of opinion that the question should be answered in the manner your Lordships propose.

The Court answered the first question of law in the affirmative, and found it unnecessary to answer the second question.

Counsel for the Appellant—Moncrieff, K.C.—Scott. Agents—Alex. Macbeth & Company, S.S.C.

Counsel for the Respondents—Robertson, K.C.—Mitchell. Agents—Wallace & Begg, W.S.

Wednesday, January 10.

SECOND DIVISION

[Sheriff Court at Hawick.

JACKSON *v.* M'KAY.

Process—Sheriff—Evidence—Objection to Question—Objection Sustained by Sheriff-Substitute—Failure to Appeal to Sheriff—Motion for Further Proof in Connection with Questions Disallowed—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *First Schedule, Rule* 75—*Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 72.

In a proof in the Sheriff Court certain questions put to the pursuer in cross-examination were objected to and the objections were sustained by the Sheriff-Substitute. No appeal to the Sheriff was taken against the ruling as provided for by Rule 75 of the Sheriff Courts (Scotland) Act 1907, but on the case being appealed to the Court of Session on the merits the defender at the hearing moved that further proof should be allowed in connection with the questions excluded, and founded on the power conferred on the Court by section 72 of the Court of Session Act 1868 to order additional proof. *Held* that the defender having failed to avail himself of the appropriate remedy provided by the Sheriff Courts (Scotland) Act 1907, First Schedule, Rule 75, could not invoke section 72 of the Court of Session Act 1868.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), First Schedule, enacts—Rule 75—"On the proof being declared closed, or within seven days thereafter, if the Sheriff-Substitute has not in the interval pronounced judgment, it shall be competent by leave of the Sheriff-Substitute to appeal to the Sheriff upon objec-

tions to the admissibility of evidence taken during the course of the proof, and the Sheriff shall, with or without a hearing, dispose of such appeal with the least possible delay, and if he think that evidence accepted should not have been allowed he may delete the same from the notes of evidence, and if he think that evidence has been improperly rejected he may appoint the same to be taken before the case is advised on its merits."

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), enacts—Section 72—"The Court may, if necessary, order proof or additional proof to be taken in any appeal under this Act. . . ."

Elizabeth Jackson, Newcastleton, *pursuer*, brought an action of affiliation and aliment in the Sheriff Court at Hawick against John M'Kay, engine driver, Riccarton Junction, *defender*, in respect of the birth of an illegitimate male child.

On 31st January 1922 the Sheriff-Substitute (BAILLIE) after proof granted decree in favour of the pursuer. The defender appealed to the Sheriff (CHISHOLM, K.C.), who on 26th April 1922 recalled the interlocutor of the Sheriff-Substitute and granted absolvitor.

The pursuer appealed to the Court of Session, and in the course of the hearing the defender moved that further proof should be allowed on certain questions put to the pursuer at the proof in cross-examination which were objected to and as to which the objections were sustained.

The following passage from the evidence gives the questions objected to:—"(Q) Is it not a fact that during the months of October and November 1920 you were keeping company with different men?—(A) No, I deny that. I was not keeping company and going for walks in the evenings with James Ferguson, Riccarton Junction, and a man Graham from Hawick. I was with Ferguson on the 31st October last year, but not on any other occasion. (Q) Were you in a railway carriage at Riccarton Junction with a man about the end of October 1920? (Question objected to and objection sustained.) . . . (Q) Is it not a fact you tried to put the blame on someone else? (Question objected to and objection sustained.) . . ."

Argued for the defender—The questions put should have been allowed. Under section 72 of the Court of Session Act 1868 the defender was entitled to additional proof as to these questions, otherwise a miscarriage of justice would ensue—*Gairdner* v. *Macarthur*, 1915 S.C. 589, at p. 595, 52 S.L.R. 427; *Taylor* v. *Provan*, 1864, 2 Macph. 1226; *A* v. *B*, 1895, 22 R. 402, 32 S.L.R. 297.

Argued for the pursuer—The motion was incompetent in respect that Rule 75 of the Sheriff Court (Scotland) Act 1907 (7 Edw. VII. cap. 51) provided a remedy of which the defender had not availed himself. The cases cited were thus distinguishable.

LORD JUSTICE-CLERK—[*After dealing with the merits of the case*]—The only remaining point in the case is that which relates to the motion made by the defender this morning, that further evidence be taken in connection with certain questions which were put to the pursuer and which were excluded by the Sheriff-Substitute. One of the questions was—"Were you in a railway carriage at Riccarton Junction with a man, about the end of October 1920?" That question was objected to, and the objection was sustained. The other question was—"Is it not a fact you tried to put the blame"—that is, the blame of paternity—"on someone else?" That question was objected to, and the objection was sustained. In my judgment these were competent questions, and the objection taken to them by the pursuer's agent was ill-advised and groundless. The Sheriff-Substitute's decision in refusing to admit the answers to these questions was, having regard to what was said in the case of *A* v. *B*, 22 R. 402, clearly wrong. They were admissible, if only for the purpose of testing the credibility of the pursuer, but even if answered they would not, or might not, in the absence of due notice being given, render competent the leading of substantive evidence to prove what was implied in the questions. At this stage, however, it is too late, in my judgment, for the defender to raise this matter. We have been referred to the Sheriff Courts Act of 1907, which provides a full and appropriate remedy, exactly fitting the situation which has arisen here, assuming that the defender's agent believed that the questions were improperly excluded. That remedy the defender's agent neglected deliberately or otherwise, and in my opinion it is too late now to ask for further evidence upon a matter which ought to have been decided upon appeal to the Sheriff at the appropriate statutory time. We have been referred to the case of *Gairdner*, 1915 S.C. 589, which in my opinion raises a very different question from that with which we are here concerned. There the matter emerged after the case was in the Court of Session, and it does not seem to me that that case affords the slightest guidance to the solution of this particular problem—[*His Lordship dealt with another point which is not reported.*]

But, as I have said, having regard to the omission by the defender's agent to take advantage of the statutory remedy provided for circumstances which exactly coincide with those which arose here, I am of opinion that the defender's motion comes too late, and that, accordingly, it should be refused.

LORD ORMIDALE—[*After dealing with the merits of the case*]—There is only the matter dealt with by Mr Macgregor this morning. He asks us, under section 72 of the Court of Session Act of 1868, to allow additional proof. It is hardly a right description of what Mr Macgregor asks us to do to say that it is to allow his client additional proof. What he asks us to assist him in doing is to get the ruling of the Sheriff-Substitute sustaining the objections to certain questions put by the defender to the pursuer reviewed. Now there are four

questions which Mr Macgregor dealt with.—[*His Lordship dealt with a point which is not reported.*] With regard to the other two questions it seems to me impossible that we can hold that this motion falls under section 72 at all. There is a code of procedure laid down by rules 74 and 75 of the Sheriff Courts Act which deals with the very situation which we have here. I think that we should be, so far from promoting the ends of justice, tending rather in the direction of a miscarriage of justice if we allowed the matter to be inquired into now when it ought and might have been inquired into at the appropriate time. Nothing has come to light now that was not known at the time when the questions were put and the objections were taken to them and sustained. Everything that is proposed to be proved now, whatever that may be, must have or ought to have been in the mind of the defender's agent at the time. For my own part I think that the question, which at first seemed to me to be a question which it was perfectly competent for the cross-examining agent to put to the pursuer, viz., "Is it not the fact you tried to put the blame on someone else?" was a question which should have been allowed. I am not quite so certain that I remain of that opinion. It seems to me that it was really a question of a fishing character, and that its proper form would have been, "Is it not the fact that you tried to put the blame on A B or C D?" It was, however, answered by the pursuer in her immediately preceding answer, and therefore I see no ground for thinking that to have allowed the question would have been productive of any result other than that which the rest of the evidence indicates, an answer in the negative by the pursuer. Therefore I think that in no circumstances would it be expedient, even if it were competent, to allow additional proof in this matter or to remit to one of our own number to put this question again to the pursuer.

But I go upon the more particular ground that it is now too late to ask us to do what was not attempted to be done at the time. The right of appeal is given by the Sheriff Court rules to a person who objects to the way in which the Sheriff-Substitute has dealt with a question. He is given seven days from the close of the proof wherein to appeal if the Sheriff-Substitute has not already issued his judgment. The Sheriff-Substitute in this case did not issue his judgment within seven days, and that period was allowed to elapse without the appeal being taken. The defender's right to object to the ruling of the Sheriff-Substitute then came to an end. . . .

LORD HUNTER—The averments of the parties in this case are of a singularly defective character. The proof appears to have been led in a haphazard fashion with a conspicuous disregard of the rules of evidence that are supposed to govern the taking of proofs in all Scottish Courts on the part of both parties. That unsatisfactory condition of the proof causes considerable doubt in my mind as to whether the Sheriff-Substitute would have reached the result which he did if the case had been properly presented to him. I am, however, perfectly clear that the view taken by your Lordships that we ought not to give effect to the motion for additional proof is sound. That being so, and taking the case upon the evidence as I find it recorded in the unsatisfactory and imperfect condition in which it is recorded, I am not prepared to dissent—in fact, I concur with the view on the facts taken by your Lordships.

LORD ANDERSON—The pursuer, being cross-examined by the defender's solicitor, was asked the two questions which have been referred to by your Lordship. The pursuer's solicitor objected to these questions being answered, and the Sheriff-Substitute sustained that objection. In my opinion the objection taken by the pursuer's solicitor was improperly stated, and the Sheriff-Substitute was wrong in sustaining that objection. It seems to me, on the authority of what was laid down in *A* v. *B* (22 R. 402), that it was quite competent for the defender's agent, with a view of testing the pursuer's credibility, to put the questions which were put, and that those questions ought to have been answered by the pursuer. Of course if an answer unsatisfactory to the cross-examining solicitor had been obtained it was not open to him to adduce substantive evidence in the absence of notice on record.

An objection having been improperly sustained by the Sheriff-Substitute, what was the remedy of the defender's legal adviser if he was dissatisfied with that ruling? The remedy is a statutory one, and it is prescribed by rule 75 of the Sheriff Courts Act 1907. Shortly stated it is this—his duty was, if dissatisfied with the ruling, within seven days of the closing of the proof to have obtained leave from the Sheriff-Substitute, and to have gone to the Sheriff with an appeal on that leave to get the proof put right in respect to the evidence improperly rejected. According to the interlocutor sheet the proof was closed on 11th January, and the defender's solicitor had until 18th January to pursue his statutory remedy in this matter, but he did nothing in that period. Accordingly when the case came to be debated before the Sheriff-Substitute, as it was on 25th January, I take it that it was debated upon an agreed proof, and that the defender's solicitor had made up his mind that it would not be serviceable to his client to take the appeal which he might have taken under rule 75. The case therefore was debated upon the proof as recorded before the Sheriff-Substitute, and so far as the proceedings disclose it was also dealt with in that way before the Sheriff. And it seems to me that as the case was dealt with in that way, and the statutory remedy provided by section 75 was not taken, the defender's counsel is too late now in asking this Court to allow additional evidence to be taken here before one of our own number under the provisions of section 72

of the Court of Session Act of 1868. In my opinion that section is applicable only where the statutory remedy to which I have alluded is not applicable, and that is why it was allowed in the case of *Gairdner*, 1915 S.C. 589. That is what I have to say on the point of the procedure in the case. [*His Lordship then dealt with the merits of the case.*]

The Court refused the defender's motion.

Counsel for the Pursuer and Appellant—J. S. C. Reid. Agent—W. Melvin Ross, S.S.C.

Counsel for Defender and Respondent—Macgregor. Agents—Steedman, Ramage, & Co., W.S.

Wednesday, January 10.

FIRST DIVISION.

TRAIN & M'INTYRE, LIMITED, PETITIONERS.

Bankruptcy — Sequestration — Failure to Record Abbreviate of Petition in Register of Inhibitions—Application for Authority to Record—Expenses—Bankruptcy (Scotland) Act 1913 (3 *and* 4 *Geo. V. cap.* 20), *sec.* 44.

Petitioners for sequestration of a debtor's estates having omitted *per incuriam* to record an abbreviate of the petition in the Register of Inhibitions within the statutory period, the Court on the application of the petitioners *granted* warrant to the Keeper of the Register to record the abbreviate, reserving all objections to parties interested against the validity of the sequestration, the expenses of the application not to be charged against the estate.

The Bankruptcy (Scotland) Act 1913 provides—Section 44—"The party applying for sequestration shall present, before the expiration of the second lawful day after the first deliverance if given by the Lord Ordinary, or present or transmit by post before the expiration of the second lawful day after the said deliverance if given by the Sheriff, an abbreviate of the petition and deliverance, signed by him or his agent, in the form of Schedule (A, No. 1) hereunto annexed, to the Keeper of the Registers of Inhibitions and Adjudications at Edinburgh, who shall forthwith record the said abbreviate in the said Registers, and write and subscribe a certificate thereof on the said abbreviate in the form also specified in the said Schedule (A, No. 2). . . ."

On 5th January 1923 Train & M'Intyre, Limited, wholesale wine and spirit merchants, 60 Wellington Street, Glasgow, creditors of Neil Robinson, wine and spirit merchant, 10 Camden Street, Glasgow, presented a petition to the First Division craving the Court to grant warrant to and authorise the Keeper of the Register of Inhibitions at Edinburgh to receive and record in the said register an abbreviate of the petition for sequestration and the first deliverance thereon, and to write and subscribe a certificate thereof on the said abbreviate in the prescribed form.

The petition stated — "That on 20th December 1922 the petitioners presented to the Sheriff of Lanarkshire at Glasgow a petition for sequestration of the estates of the said Neil Robinson, and of the same date the Sheriff-Substitute pronounced a first deliverance thereon, granting warrant to cite the bankrupt.

Thereafter on 3rd January 1923 the Sheriff-Substitute awarded sequestration of the said estates. . . . That *per incuriam* the petitioners omitted to present or transmit to the Keeper of the Register of Inhibitions an abbreviate of the petition and first deliverance within the time allowed by the Statute. The present application is therefore made for authority to transmit the abbreviate, and to the Keeper of the Register of Inhibitions to record the same."

On the petition appearing in the Single Bills, counsel for the petitioners cited the case of *Stark and Hogg, Petitioners*, 1886, 23 S.L.R. 507, and moved the Court to grant the authority craved.

The Court without delivering opinions pronounced this interlocutor—

". . . Allow the petition to be amended as proposed at the bar: Grant warrant to the Keeper of the Register of Inhibitions at Edinburgh within three days from this date to receive the abbreviate of the petition for sequestration and deliverance thereon mentioned in the petition signed by the petitioners or their agents and in the form mentioned in the petition, and to record the said abbreviate in the Register of Inhibitions, and to write and subscribe a certificate thereof on the said abbreviate, all in conformity with and as prayed for in terms of the Bankruptcy (Scotland) Act 1913, sec. 44, and decern; reserving all objections to parties interested against the validity of the sequestration and all answers to such objections as accords; and declaring that the expenses of the present application and procedure connected therewith are not to be allowed against the estate."

Counsel for Petitioners—Grainger Stewart. Agents—Simpson & Marwick, W.S.
