MORGAN ET AL., ... APPELLANTS.
MORRIS ET AL., ... RESPONDENTS (*a*).

1853.
June 7th, 8*th*, 10*th*.
July 6*th*.

Case in which, under a Remit, the Second Division of the Court of Session having attempted to amend a verdict so as to render it unambiguous, the House of Lords held :—1. That the amendment was *ultra vires* of the Court below ; 2. That, even if the amendment had not been *ultra vires*, it was ineffectual ; and 3. That there must be a new trial.

Points to be considered.—Per the Lord Chancellor : Your Lordships are called upon to consider, first, whether the Lords of Session could amend the verdict at all ; secondly, if they could, whether the amendment which has been made does not still leave the verdict uncertain ; and thirdly, what is the proper course to adopt to do justice between the parties ; p. 331.

Deviation from the Remit.—Per the Lord Chancellor : The case had not been remitted for the purpose of making any such amendment. On the contrary, two of my noble and learned friends now present (Lord Brougham and Lord Cranworth) had intimated their opinion that there had been a miscarriage of the Jury, which could only be rectified by a new trial ; p. 331.

Verdicts : Power to correct Clerical Mistakes.—Per the Lord Chancellor : It must be competent to any Court to correct the erroneous entry of a verdict arising from the mistake or misprision of a clerk ; p. 333.

Per Lord Cranworth : It is only natural and reasonable to suppose that if the jury returned their verdict rightly and the clerk entered it incorrectly, the Court would have the power to correct that which had been erroneously entered ; p. 344.

Secus as to substantial Alterations.—Per the Lord Chancellor : It does not, however, appear that under any Act of Parliament the authority of the Courts in Scotland

(*a*) *See* this case as before the House in 1856, *suprà*, vol. 2, p. 342.

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extends to change a verdict substantially from what was actually delivered by the jury ; p. 334.

Per the Lord Chancellor : I cannot find that the Courts of Scotland have ever before taken on themselves to amend a verdict in the manner adopted here, and to the extent to which they have proceeded in this case ; p. 334.

Per the Lord Chancellor : The case of *Kirk* v. *Guthrie* (1 Murr. Ca. 278) was clearly an instance of a mistake in entering the verdict, a mistake which was properly corrected ; p. 334.

Per the Lord Chancellor : *Marianshi's* case (1 Macq. 212), when rightly understood, will be found not to go beyond this ; p. 334.

Per the Lord Chancellor : Here the Court of Session has made a new verdict for the jury ; p. 337.

Per Lord Cranworth : The Court of Session have not proceeded to correct the entry of the verdict ; but, starting from the proposition that the jury had found the verdict in the precise terms in which it is entered, the learned judges have proceeded to consider, from the notes of the judge who tried the case, what it is that they think the jury must have meant. Now that is taking upon themselves to do something which no Court can possibly have the power to do, at least no Court administering justice by means of trial by jury, for it makes the verdict the verdict of the Court, and not the verdict of the jury ; p. 344.

The attempted Amendment left the Verdict as ambiguous as before.—Per Lord Cranworth : Even if the attempted amendment were not *ultra vires*, it does not put the case in one particle better position than it was in before ; because, suppose the jury had returned the verdict in the very words in which it is now entered, it would still have been equally open to the charge of ambiguity ; p. 344.

Proper Course for the Judge when the Jury return an ambiguous Verdict.—Per the Lord Chancellor : The proper course would have been for the judge to refuse to receive the verdict, and to send the jury back with directions to find specifically, one way or the other, upon the issues ; p. 336.

Going out of the Issues.—Per the Lord Chancellor: It is most important always to bear in mind that the question to be tried is involved in the issues, and in these alone, and that you are not at liberty to go out of them; p. 339.

Power of the House to direct a new Trial.—Per the Lord Chancellor: By section 19 of 55 Geo. 3. c. 42. the House may direct issues to be tried. The House, therefore, might have directed the very issues in the present case. Then why may not the House order a new trial? There is no other mode of extricating the parties from the embarrassment in which these proceedings have involved them; p. 341.

Per Lord Cranworth: When this House says that there ought to be a new trial, it is in the power of the House to direct it at once; p. 345.

WHEN this case was before the House in a former stage, their Lordships, by their judgment of the 26th July 1855 (*a*), "declared that the verdict returned by the jury on the trial of the issues, in the pleadings mentioned was uncertain, inasmuch as it did not show whether the jury had considered that the Pursuers (Appellants) had failed in proving *both* the said issues, or only in proving *one* of them; and it was ordered and adjudged that the Interlocutors of the 23rd of November 1853 and of the 15th of February 1854 should be reversed; and it was further ordered that, with this declaration, the cause should be remitted back to the Court of Session in Scotland, to do therein as should be just and consistent with this declaration and judgment."

On the return of the case to Scotland a petition was presented by the Appellants to the Court of Session, praying their Lordships to apply the above judgment of the House of Lords; to recall the Interlocutors of 23rd November 1853 and 15th February 1854, reversed by said judgment; to set aside and

(*a*) See *suprà*, vol. 2, p. 389.

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discharge the verdict as uncertain; and to appoint the issues for the Petitioner to be tried again by a jury, with such alterations on the said issues as might be necessary.

A counter petition was presented by the Respondents, praying the Court of Session to cause such amendment to be made as their Lordships might deem proper in the entry of the verdict, according to the substance of the actual findings and the notes of the *Lord Justice Clerk*, to the effect of finding that the Pursuers had failed to prove either of the said issues; and upon the entry of the verdict being so amended, to apply such verdict in the said action, and *de novo* to repel the claim of the said Alexander Morgan and James Morgan, and find them liable to the Petitioners in expenses.

On the 20th February 1856, the Second Division of the Court of Session, after considering these petitions, gave judgment as follows:—

The Lords having considered, &c., apply the judgment of the House of Lords, &c.; and the Counsel for the Petitioners having stated no objection to the manner in which the cause was tried and left to the jury, or to any part of the proceeding, except the uncertainty in the verdict; and having desired to have the notes of evidence taken by the Lord Justice Clerk, before whom the cause was tried, with any notes which his Lordship might have of his charge to the jury, and any explanations which his recollection enabled him to make of the way in which he stated the questions under the issues to the jury; and having received and considered the said notes, and relative statements by the Lord Justice Clerk of the matters of fact on which the answer to be returned to each issue really depended, and of his understanding as to the meaning of the jury, and as to the substance and import of their finding; and having farther requested the Lord Justice Clerk to state in what manner he would on his understanding of the import of the terms used by the jury, have directed at the trial the verdict to be entered, if any motion had been made to him at the trial in respect of the general terms in which it was returned by the jury; and having received a report to that effect from the said Lord Justice Clerk; and his Lordship having farther informed the Court that if such application had been made to him he would without

hesitation have directed the clerk to enter the verdict for the Pursuers in the following terms:—

"At Edinburgh, the 16th, 17th, 18th, and 19th days of August 1853, in presence of the Right Honourable the Lord Justice Clerk, compeared the said Pursuers and the said Defenders by their respective counsel and agents; and a Jury having been empannelled and sworn to try the said issues between the parties, say, upon their oath, that they find the case for the Pursuers is not proven; and therefore that upon the first issue they find it is not proven that the Pursuer, Alexander Morgan, is nearest and lawful heir of John Morgan, sometime residing at Coates Crescent, Edinburgh, deceased; and upon the second issue, that they find it is not proven that the Pursuer, James Morgan, is, along with the said Alexander Morgan, next of kin of the said John Morgan deceased."

The Lords find that such amendment of the entry of the verdict is competent under the remit from the House of Lords, if otherwise competent in point of law, and within the jurisdiction and functions of the Court. Farther, find that it is competent for the Court, after a verdict has been taken down in terms which are uncertain or ambiguous, to consider and examine the notes of the evidence and the summing up of the Judge, with the report of his opinion, in order to ascertain, provided they have clear materials for doing so, the true meaning of the jury, according to the actual substance of the questions at issue between the parties on the evidence adduced, so as to enter the verdict in the form and manner adapted to the truth and reality of the case; and with the materials afforded to the Court in this case in the Judge's notes of the evidence, and of his summing up, and his opinion on the case, the Lords find, in concurrence with the view taken by the Judge at the trial, that substantially one point, and one point only of importance, was in dispute between the parties, and on which the answer to each issue equally depended, viz., whether the father of the Pursuers, called in the evidence James Morgan of Fettercairne, was a brother of Thomas Morgan, brewer in Dundee, the father of the deceased John Morgan, whose succession, heritable and moveable, is in dispute in this process of multiple-poinding; and that if the Pursuers failed to prove to the satisfaction of the jury that the said James Morgan was the brother of the said Thomas Morgan, it followed according to the evidence in the trial that a verdict, finding that the case of the Pursuers is not proven, clearly imported, in the intention and opinion of the jury, that a negative answer must be returned equally on each of the issues; and that in finding the case of the Pursuers is not proven, the jury did really, in point of actual intention, decide according to the sense and substance of the matter, that the said James Morgan was not the brother of the said Thomas Morgan, and hence, that neither of the Pursuers, the sons of the said James Morgan, had established the character in relation to the said John Mor-

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gan, son of the said Thomas, which they severally asserted in the two issues on which the jury returned the verdict that the case of the Pursuers is not proven: And find, with the aid and information derived from the materials now legitimately before this Court, that, in point of justice, the verdict ought to be entered accordingly; and the Lords, therefore, on the whole matter, direct the entry of the verdict to be corrected in the manner above set forth; and find and declare that the correct entry of the verdict to be signed by the clerk present at the trial, and which he is hereby empowered to draw up and sign, shall be in the following terms:—

"At Edinburgh, the 16th, 17th, 18th, and 19th days of August 1853, in presence of the Right Honourable the Lord Justice Clerk, compeared the said Pursuers and the said Defenders by their respective counsel and agents; and a Jury having been empannelled and sworn to try the said issues between the parties, say upon their oath, that they find that the case for the Pursuers is not proven; and therefore that upon the first issue they find it is not proven that the Pursuer, Alexander Morgan, is nearest and lawful heir of John Morgan, sometime residing at Coates Crescent, Edinburgh, deceased; and upon the second issue, that they find it is not proven that the Pursuer, James Morgan, is, along with the said Alexander Morgan, next of kin of the said John Morgan deceased."

And therefore the Lords, under the remit in respect of the above findings, and of the said full and corrected entry of the verdict, refuse the prayer of the petition of the foresaid Alexander and James Morgan to set aside and discharge the verdict returned by the jury at the trial."

Thereafter the Second Division of the Court of Session authorized and directed the clerk to sign the entry of the verdict as amended; and the clerk having done so, and the verdict being thus amended and duly authenticated, their Lordships of the Second Division applied it by an Interlocutor of the 20th February 1856, in the following terms:—

The Lords, upon the motion of John Morris and others, Defenders in the issues, apply the verdict of the Jury according to the entry of the verdict as now amended under the authority of the preceding Interlocutor; and in respect thereof repel the claims of Alexander and James Morgan, and decern: Find them liable in expenses up to the 23rd November 1853, as the same have been already taxed (*a*).

(*a*) See the reasoning on which the Second Division proceeded, copiously reported 18 Sec. Ser. 797.

Alexander and James Morgan appealed to the House.

The *Solicitor-General* (*a*) and Mr. *Anderson* for the Appellants.

The *Lord Advocate* (*b*) and Sir *Richard Bethell* for the Respondents.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*c*):

My Lords, this appeal is one of various proceedings which have arisen out of a process of multiple-poinding raised at the instance of the judicial factor on the estate of John Morgan, of Edinburgh, who died on 5th of August 1850, leaving considerable property. Amongst the various claimants to the succession were the Appellants, Alexander and James Morgan, who claim to be first cousins of the deceased, and therefore nearer in degree of relationship to him than any of the other claimants.

On behalf of the Appellants, certain issues were framed by the *Lord Ordinary* to be tried by a jury: —"First, whether the Pursuer, Alexander Morgan, is nearest and lawful heir of John Morgan, some time residing at Coates Crescent, Edinburgh, deceased; secondly, whether the Pursuer, James Morgan, is, along with the said Alexander Morgan, next of kin of the said John Morgan, deceased."

The issues came on for trial before the *Lord Justice Clerk* on the 16th of August 1853, when, after a three days' trial, the jury found the case for the Pursuers not proven.

Notices of motions were given by the parties respectively. On the part of the Appellant, "to set aside or discharge the verdict, or refuse to apply it, or arrest judgment;" and on the part of the Respondents, "to apply the verdict in this case, and

(*a*) Sir Hugh Cairns. (*b*) Mr. Inglis.
(*c*) Lord Chelmsford. His Lordship's opinion was in writing.

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in respect thereof to repel the claims of the said Alexander Morgan and James Morgan, and to find them liable in expenses, and to remit the account thereof to the auditor, to tax the same, and to report."

The Judges of the Second Division pronounced an Interlocutor "repelling the claims of Alexander and James Morgan, and found them liable in expenses, and remitted the account when lodged to the auditor to tax and report, and refused the motion of the Pursuers, the said Alexander and James Morgan."

The Appellants presented a petition of appeal to this House against the several Interlocutors which had been pronounced in the course of the proceedings; and upon the appeal, the question arose as to the finding of the jury upon the issues which had been directed respecting the claim of the Appellants. The House, after hearing the case fully argued, declared that the finding of the jury (*a*) "is uncertain, inasmuch as it does not show whether the jury considered that the Pursuers (Appellants) had failed in proving both the said issues, or only in proving one of them. And it is ordered and adjudged, that the said Interlocutors of the 23rd of November 1853, and of the 15th of February 1854, complained of in the said appeal, be and the same are hereby reversed. And it is further ordered and adjudged, that as respects the remainder of the Interlocutors appealed against, the said petition and appeal be and is hereby dismissed this House. And it is also further ordered, that, with this declaration, the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this declaration and judgment."

The Judges of the Second Division Court pronounced the Interlocutor of the 20th of February 1856, to which I shall presently refer more particularly; and upon this the entry was made of the corrected verdict

(*a*) *Suprà*, vol. 2, p. 389.

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by an Interlocutor of the 21st of February 1856 in these terms :—"And a jury having been impannelled and sworn to try the said issues between the parties, say, upon their oath, that they find the case for the Pursuers is not proven, and therefore that upon the first issue they find it is not proven that the Pursuer, Alexander Morgan, is nearest and lawful heir of John Morgan, sometime residing at Coates Cresent, Edinburgh, deceased; and upon the second issue, that they find it is not proven that the Pursuer, James Morgan, is, along with the said Alexander Morgan, next of kin of the said John Morgan, deceased."

Per the Lord Chancellor :— Your Lordships are called upon to consider, first, whether the Lords of Session could amend the verdict at all; secondly, if they could, whether the amendment which has been made does not still leave the verdict uncertain; and thirdly, what is the proper course to adopt to do justice between the parties.

The questions which have been raised before your Lordships are, first, whether the Lords of Session could amend the verdict at all; secondly, if they could, whether the amendment which has been made does not still leave the verdict uncertain; and, thirdly, what is the proper course to adopt under all the circumstances to do justice between the parties.

It is necessary to bear in mind that when this case was before the House upon the former occasion, the question of the power of the Judges in Scotland to amend the verdict was not raised at the bar, nor considered by your Lordships, nor was the case remitted to the Court of Session for the purpose of their making any such amendment. On the contrary, two of my noble and learned friends now present intimated their opinion that there had been a miscarriage of the jury, which could only be rectified by a new trial.

Per the Lord Chancellor :— The case had not been remitted for the purpose of making any such amendment. On the contrary, two of my noble and learned friends now present (Lord Brougham and Lord Cranworth) had intimated their opinion that there had been a miscarriage of the Jury, which could only be rectified by a new trial.

My noble and learned friend, Lord *Cranworth*, said (*a*): "All that it is important in my view of the case to establish on the part of the Appellants is this, that the verdict does not necessarily show either that Alexander is not heir, or that Alexander and James are not next of kin. It only shows that the double

(*a*) *Suprà*, vol. 2, p. 354.

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proposition, that Alexander is heir and that Alexander and James are the next of kin, is not made out. That is consistent with the hypothesis that, though Alexander is not heir, yet that Alexander and James are next of kin. Then, if that be so, it seems to me impossible to say that the claim of Alexander as heir, or of Alexander and James as next of kin, is disposed of; for the jury have returned a verdict that does not enable the Court to act. The verdict is a bad verdict, and in this country it would amount to what we should call mis-trial, not giving rise to the necessity of any motion for a new trial, but showing a record upon which it was clear that the Court could not adjudicate, and upon which, according to the practice of our English Courts, there must have been a *venire de novo*; not what we technically call a 'new trial,' but a second trial, because the trial that took place was a trial that did not enable the Court to act. I cannot entertain the slightest doubt, therefore, that if this was an English case, there must have been a *venire de novo*, which would be equivalent in the Scotch process to a new trial" (*a*). And again, my noble and learned friend says: "Therefore I shall move your Lordships that this Interlocutor be reversed, and that the case be remitted back to the Court of Session, with a statement that there ought to be a new trial, in order to obtain a proper verdict" (*b*).

My noble and learned friend, Lord *Brougham*, said, "I am, therefore, clearly of opinion, with my noble and learned friend, that in this case the judgment cannot stand, that the Interlocutor appealed from must be reversed, and that the case must be remitted to the Court below to direct a new trial" (*c*).

My noble and learned friend, Lord *St. Leonards*, was of a different opinion; and, while maintaining

(*a*) *Suprà*, vol. 2, p. 355. (*b*) *Suprà*, vol. 2, p. 362.
(*c*) *Suprà*, vol. 2, p. 370.

Lord Chancellor's opinion.

that the verdict was free from ambiguity, he considered that to order a new trial would be contrary to the provisions of the Scotch Judicature Acts (*a*).

When the case was remitted to the Court of Session, there was no express direction given that a new trial should take place, in consequence of the counsel interposing (*b*) after your Lordships' opinion had been delivered, and suggesting that it would not be the proper form to direct a new trial, or to make any declaration respecting it. Your Lordships, that the case might not be prejudiced, acquiesced in this suggestion, and made the order remitting the cause back to the Court of Session, in such a form as to leave the question open for the Court "to do therein as should be just and consistent with the declaration and judgment" of the House.

It now comes back with an alteration of the verdict, which, whether warranted or not by law, seems to leave the matter in the same unsatisfactory state as before.

Under these circumstances your Lordships are, in the first place, called upon to consider the question, whether the Court of Session possessed the power, not merely to amend the entry of the verdict, but to correct and alter the terms in which the verdict was pronounced by the jury. There is no inherent power in the Courts in this country to amend the verdict of a jury, although it must be competent to any Court to correct an erroneous entry of a verdict arising from the mistake or misprision of a clerk. The power of amending a verdict, or, to speak more correctly, of amending the postea, which is the record of the verdict, is not a power possessed by the Courts or the Judges of this country by common law, but is given to them by statutes, many of them of a very early date.

Per the Lord Chancellor:— It must be competent to any Court to correct the erroneous entry of a verdict arising from the mistake or misprision of a clerk.

(*a*) See *infrà*, p. 341. (*b*) *Suprà*, vol. 2, pp. 387, 388, 390.

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It does not appear that there is any Act of Parliament which has conferred this power upon the Courts in Scotland, and their authority in this respect cannot extend to the correction of a verdict when once entered, so as to change it substantially from what was actually delivered by the jury, except under circumstances which do not touch the present case; such, for instance, as in the case of *Dalzell* v. *The Duke of Queensbury's Executors* (*a*), where, the jury having given damages for matters which it was not competent to them to include in their verdict, the Court said it might be corrected without the expense of another trial.

Per the Lord Chancellor:— It does not, however, appear that under any Act of Parliament the authority of the Courts in Scotland extends to change a verdict substantially from what was actually delivered by the jury.

The language of Lord *Brougham* in the *Don Fishery* case (*b*) is inapplicable to the present question, because in the passage which was cited at the bar, he was speaking of a clear and unambiguous verdict. His words are, "after the verdict has been returned and applied, it is incompetent to look into the notes of the evidence with a view to limit, define, control, or restrain the legal rights established by the verdict. I say 'established,' for after it is applied, the verdict is the final declaration and measure of the right."

Per the Lord Chancellor:— I cannot find that the Courts of Scotland have ever before taken on themselves to amend a verdict in the manner adopted here, and to the extent to which they have proceeded in this case.

I cannot find that the Courts of Scotland have ever before taken upon themselves to amend a verdict in the manner adopted here, and to the extent to which they have proceeded in the present case.

Per the Lord Chancellor:— The case of *Kirk* v. *Guthrie* (1 Murr. Ca. 278) was clearly an instance of a mistake in entering the verdict, a mistake which was properly corrected.

The case of *Kirk* v. *Guthrie* (*c*) was clearly an instance of a mistake in entering the verdict, which was properly corrected.

(*a*) 4 Murray's Jury Court Cases, 18.

(*b*) What is called the "*Don Fishery* case" is *Leys, Masson, and Co.* v. *Forbes*, cited *infrà*, p. 339. See *Berry* v. *Wilson*, 4 Sec. Ser. 145, where the words quoted above are attributed to the Lord Justice Clerk Hope, as proceeding "on the principle laid down by Lord Meadowbank, and adopted by Lord Brougham in affirming the Interlocutor."

(*c*) 1 Murray's Jury Court Cases, 278.

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Per the Lord Chancellor:— *Marianski's* case (1 Macq. 212), when rightly understood, will be found not to go beyond this.

Marianski's case, upon which the greatest stress was laid at the bar, when rightly understood, will be found not to go beyond this. It is reported in Macqueen (*a*). There the second issue, which is the only important one to be considered, was "whether the Appellant, taking advantage of the settlor's weakness and facility, did, by fraud, circumvention, or intimidation, procure the said subscriptions or any of them." There was a general verdict, which was of course a verdict affirming the issues in their terms; there was no doubt or uncertainty as to what the jury meant. Your Lordships did not reverse the judgment in that case, but ordered the appeal to stand over, and made a remit to the Court of Session, in order that an application might be made, if the party was so advised, to amend, not the verdict, but the entry of the verdict; and Lord Chancellor *Truro*, in delivering judgment, said, "This appears to me to be little more than a misprision of the clerk in making the entry"(*b*). The verdict was amended by stating that the Appellant did, by fraud, circumvention, and intimidation, procure the subscription to the writings. When the case came back (*c*), your Lordships held that the alteration in the entry of the verdict might be competently made. And my noble and learned friend, Lord *Cranworth*, then Lord Chancellor, said: "If it turns out that the mode in which a verdict has been entered up does not express that which the jury upon the direction of the Judge had intended to state, it is obvious that there must be some mode or other of getting that set right. Now that is what has happened here; because upon this remit, application is made to the *Lord Justice Clerk*, and his report, as

(*a*) Vol. 1, p. 212. (*b*) See *suprà*, vol. 1, p. 221.
(*c*) See *suprà*, vol. 1, p. 766.

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I interpret it, is to this effect: 'I did say that unless 'the jury found upon each and every of the instru- 'ments that fraud, circumvention, and intimidation 'had taken place, they could not find a verdict for 'the Pursuers generally.' They have found a verdict for the Pursuers generally; therefore that is now set right" (*a*).

Marianski's case, therefore, when carefully examined, is no authority for the amendment of an erroneous verdict but was merely the correction of an erroneous entry of a proper verdict. The verdict in the present case being a negative verdict was wholly uncertain. It was explained to your Lordships very clearly upon the former occasion, that it might mean any one of several different things, and that it was impossible to do more than conjecture which was intended by the jury. I apprehend that the Judges in this country would have no power to amend a verdict of this ambiguous and uncertain character, entered precisely as it was delivered by the jury. The proper course would have been at the trial for the Judge to refuse to receive it, and to send the jury back with directions to find specifically, one way or the other, upon the issues. If such a verdict had been received *per incuriam*, the only remedy would have been for the Court to grant a new trial.

Per the Lord Chancellor:— The proper course would have been for the judge to refuse to receive the verdict, and to send the jury back with directions to find specifically, one way or the other, upon the issues.

And this appears to have been the proper course for the Court of Session to pursue in this case, according to the high authority of Lord Commissioner *Adam* in his Treatise upon Trial by Jury (*b*). He says:—"A verdict which is ambiguous or inconsistent has not the character either of a verdict where the jury have mistaken the import of the proof, or committed an

(*a*) See *suprà*, vol. 1, p. 770.
(*b*) Pages 294, 295.

error or misfeasance in any other respect; neither is it like a verdict which is to be set aside on account of the mistake of the Judge in administering the law. In all such cases of error, whether by the jury or the Judge, the defect of the verdict is to be made out *aliunde*, and not by anything that appears upon the face of the verdict, that is, from the terms in which it is expressed. But in the case of a verdict which is ambiguous or inconsistent, its effect is to be derived, and only to be derived, from the terms in which it is to be expressed. It is a written document submitted to the legal consideration of a Court, and always to be construed by the legal wisdom and faculties of the Court; the Court alone is the tribunal which must say whether the verdict is ambiguous or inconsistent or not. If it is not ambiguous or inconsistent, it must be applied, and judgment must proceed upon it. If the Court is of opinion that it is ambiguous, the ambiguity, imperfection, or inconsistency cannot be remedied by the Court changing the expressions of the verdict, as in that case the Court would encroach upon the province of the jury. The only redress which they can administer is ordering another trial."

The amendment, therefore, of the defective and equivocal verdict in the present case cannot be sustained.

But, assuming that the Court of Session possessed the power of amendment, the next question is, How has it been exercised? And here it appears to me that the Court of Session has not resorted to the proper materials by which to amend, or at least has not confined itself to them, but has gone far beyond the limits which it ought to have assigned to itself, and has made a new verdict for the jury.

Per the Lord Chancellor:— Here the Court of Session has made a new verdict for the jury.

In the Interlocutor of the 20th of February 1856 this is strongly exemplified. Your Lordships will find

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that it is said, "The Lords find that such amendment of the entry of the verdict is competent under the remit from the House of Lords, if otherwise competent in point of law, and within the jurisdiction and functions of the Court. Further find, that it is competent for the Court, after a verdict has been taken down in terms which are uncertain or ambiguous, to consider and examine the notes of the evidence, and the summing up of the Judge, with the report of his opinion, in order to ascertain, provided they have clear materials for doing so, the true meaning of the jury, according to the actual substance of the questions at issue between the parties on the evidence adduced, so as to enter the verdict in the form and manner adapted to the truth and reality of the case."

There is no doubt of what the jury actually found, but the *Lord Justice Clerk* gives an inference of his own of their opinion and intention, which is adopted by the Court. Acting upon these views, they take the verdict of the jury and then interpret it in their own sense, drawing a conclusion which is by no means warranted by the premises. If, as the Judges say in their Interlocutor, "substantially one point, and one point only, of importance was in dispute between the parties, and on which the answer to each issue equally depended, namely, whether the father of the Pursuers, called in the evidence James Morgan, of Fettercairn, was the brother of Thomas Morgan, brewer in Dundee, the father of the deceased John Morgan, whose succession, heritable and moveable, is in dispute in this process of multiple-poinding, and that if the Pursuers failed to prove to the satisfaction of the jury that the said James Morgan was the brother of the said Thomas Morgan, it followed, according to the evidence in the trial, that a verdict

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finding that the case of the Pursuers is not proven, clearly imported, in the intention and opinion of the jury, that a negative answer must be returned equally on each of the issues;" if that really had been the one and only point, the Judges would have been perfectly right, from the general negative finding, in deducing a specific negative finding to each of the issues; but from the evidence it appears that there were other brothers of Thomas Morgan, the father of the deceased, of whose existence proof was given, and who would have preceded Alexander Morgan in the line of heritable succession.

It is said that the issues, which were general as to Alexander being the heir and as to Alexander and James being the next of kin, were made specific and limited to a precise proof of heirship and of next of kin by the condescendence, which alleged that James Morgan, the father of the claimants, was brother german of Thomas Morgan, who was father of John Morgan, the deceased. But it is most important always to bear in mind that the question to be tried is involved in the issues, and in these alone, and that you are not at liberty to go out of them for the purpose either of limiting the inquiry or of defining with more particularity the points to be determined by the jury. This was strongly put by my noble and learned friend, Lord Chancellor *Brougham*, in the case of *Leys, Masson, and Co.* v. *Forbes* (*a*). My noble and learned friend says:—"This issue, as framed, becomes the order of the Court, and being sent down to be tried by a jury, it is too late—with very great submission I speak to some of the learned Judges, who appear ultimately to have dealt with this question—it is too late for the Court to say, and it is past all doubt too late for the Counsel to

Per the Lord Chancellor:— It is most important always to bear in mind that the question to be tried is involved in the issues, and in these alone, and that you are not at liberty to go out of them.

(*a*) 5 Wils. & Sh. 403.

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contend that your Lordships, or that the Court, or that Lord *Gillies* and the jury who tried the cause had anything to do with the condescendence and the answers out of which, in point of fact no doubt, but accidentally for the purpose of this argument, the issue arose that was so framed. Not only have they nothing to do with them, but it is too late to have to do with them, and they have no business to ask about them. The issue precludes them from saying a word upon what appears in the condescendence and answers, as much as the record of an Act, after the bill has become an Act, precludes any Court of Law dealing with an Act from looking back to the bill out of which that Act arose, or by referring to the speech of the honourable or noble person who may have introduced it, or to their conversation with an individual by which it might be made to appear, if you could get at it (which you never can), that the meaning was so and so, when the only question is, not what he meant, but what the law intends, in another sense of the word, what the law fixes as the legal meaning of the words which the Legislature, possibly upon his instigation, possibly in spite of his efforts, may have thought fit to use in framing the law arising out of his bill or proposition. This I think of great importance to be attended to by the Court, by Judges and practitioners. You are as much precluded from going out of the issue framed by the officer and adopted by the Court, as you are precluded from construing an Act by going out of the four corners of the Statutes, and looking into the bill or *dehors* of the bill to gather the meaning."

Adhering then to the issues as framed, and rejecting the suggested explanatory aid of the condescendence, the evidence introduces other elements than the mere fact of James not being the brother of Thomas, to dis-

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prove the case of the claimants, and the Court cannot draw the consequence which it has done from the finding, "That the case of the Pursuers is not proven; that they have failed of proof on each of the issues."

The amendment, therefore, is not warranted by what was before the Court even if they had the power to amend.

It only remains to consider what your Lordships ought to do under the circumstances. It would be in vain to remit the case to the Court of Session in the same manner as before without any specific direction, because it is now clearly seen that there is an inherent error in the proceedings, that the verdict is substantially defective, and that even if the power of amendment existed there are no means of ascertaining with certainty what the jury meant to say, nor any materials by which the verdict could with propriety be amended. The utmost that can be done for the parties is to direct a new trial upon the issues on which this unfortunate miscarriage has taken place.

I should have entertained no doubt of the power of the House to adopt this course if it had not been for the opinion of my noble and learned friend Lord *St. Leonards* when this case was laid before your Lordships on the previous occasion. He thought that for this House to order a new trial would be contrary to the provisions of the Scotch Judicature Acts (*a*); but there seems to me to be a short answer to that objection. By Section 19 of the 55th of George the Third, chapter 42, the House of Lords may direct issues to be tried. Your Lordships might, therefore, have directed these very issues. May you not then order a new trial of issues already framed which you might have directed to be tried originally? This

Per the Lord Chancellor.— By section 19 of 55 Geo. 3. c. 42. the House may direct issues to be tried. The House, therefore, might have directed the very issues in the present case. Then why may not the House order a new trial?

(*a*) *Suprà*, vol. 2, p. 386.

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reduces the whole question to one merely of form. It seems to me that there is no other mode of extricating the parties from the embarrassment in which these proceedings are involved, and though I am reluctant to increase the expense which has been already incurred by this hitherto unfruitful litigation, I fear that it is the only course now left open, and therefore I must recommend that the Interlocutors be reversed and a new trial directed.

Lord Chancellor's opinion.

There is no other mode of extricating the parties from the embarrassment in which these proceedings have involved them.

Lord Brougham's opinion.

Lord BROUGHAM:

My Lords, I take exactly the same view of this case with that of my noble and learned friend.

I will not trouble your Lordships with any further remarks upon it, except to say that I join in the reluctance which my noble and learned friend has expressed at prolonging the expense of this litigation; but it is inevitable, we cannot help it, we have no other mode of proceeding. Although there might, I think, be some doubt as to the competency of this Court of Appeal to direct a new trial, I agree with my noble and learned friend that the difficulty and difference resolves itself into a difficulty and difference of form only. Therefore I entirely concur in the course proposed by my noble and learned friend.

Lord Cranworth's opinion.

Lord CRANWORTH:

My Lords, I have little or nothing to add to the exposition which my noble and learned friend on the woolsack has given of this case. I will, however, just revert to what took place when the matter was before your Lordships on the former occasion. Your Lordships will recollect that the first intimation of opinion of your Lordships then was, that the case must be remitted to the Court of Session with a declaration

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that there should be a new trial (*a*). But it was then suggested at the bar that it might be possible to avoid the necessity of a new trial by getting the record amended, according to what had been decided by your Lordships when Lord *Truro* was Lord Chancellor, namely, that there was a power to amend clerical errors in the Court of Session as well as in all other Courts. After, therefore, your Lordships had expressed your opinion that the case must go back to be re-tried, that question was shortly discussed by your Lordships, and I had no hesitation in yielding to that suggestion to this extent simply, that instead of saying that there should be a new trial, the cause should be remitted to the Court of Session with a direction that they should do what justice required to be done, leaving it entirely open whether it was possible to make such amendment. My Lords, I have not before me at the present moment the report of what then took place, but if it is supposed that it was intended to intimate an opinion that the Court could in any respect whatever alter the verdict, certainly what was then said was quite misunderstood. The error which had occasioned the Appeal was this. There were two propositions maintained by the Pursuers:—First, that Alexander Morgan is heir; and secondly, that Alexander and James are next of kin. Your Lordships were of opinion, and as I think, not only upon legal but upon perfectly logical reasoning, that the verdict was an unsatisfactory one; because when the jury only said, it is not proven that Alexander is heir, and that Alexander and James are not next of kin; it was quite consistent with that verdict that Alexander was heir, but that Alexander and James were not next of kin, or the correlative proposition. And that being so, it was impossible to say

(*a*) See *suprà*, vol. 2, p. 387

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what the jury did really intend to find. But supposing the notes of the learned Judge who tried the case had proved that the jury in returning their verdict had said, "We find, first, that it is not proven that Alexander is heir, and, secondly, that it is not proven that Alexander and James are next of kin," and that the clerk, either of his own authority or by the direction of the Judge, had said, Then enter that as a general verdict, "Not proven;" it might be quite reasonable to correct that, because the jury had given their verdict rightly, and the correction would only have been to put into correct language what the jury had really found. Now every Court has an inherent power to do that. It is only natural and reasonable to suppose that if the jury returned their verdict rightly and the clerk entered it incorrectly, the Court would have the power to correct that which had been erroneously entered. But that is not what the Court of Session proceeded to do in this case. They have proceeded, not to correct the entry of the verdict, as my noble and learned friend has put it, but, starting from the proposition that the jury had found the verdict in the precise terms in which it is entered, the learned Judges have proceeded to consider, from the notes of the learned Judge who tried the case, what it is that they think the jury must have meant. Now that is taking upon themselves to do something which no Court can possibly have the power to do, at least no Court administering justice by means of trial by jury; for it makes the verdict the verdict of the Court, and not the verdict of the jury.

Per Lord Cranworth:—
It is only natural and reasonable to suppose that if the jury returned their verdict rightly and the clerk entered it incorrectly, the Court would have the power to correct that which had been erroneously entered.

Per Lord Cranworth:—
The Court of Session have not proceeded to correct the entry of the verdict; but, starting from the proposition that the jury had found the verdict in the precise terms in which it is entered, the learned judges have proceeded to consider, from the notes of the judge who tried the case, what it is that they think the jury must have meant. Now that is taking upon themselves to do something which no Court can possibly have the power to do, at least no Court administering justice by means of trial by jury, for it makes the verdict the verdict of the Court, and not the verdict of the jury.

I consider, therefore, that this is an attempt on the part of the Court, originating in a very laudable desire on their part to save the parties the expense of unnecessary litigation, but still an attempt to do that which was altogether *ultra vires*.

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Lord Cranworth's opinion.

Per Lord Cranworth:— Even if the attempted amendment were not *ultra vires*, it does not put the case in one particle better position than it was in before; because, suppose the jury had returned the verdict in the very words in which it is now entered, it would still have been equally open to the charge of ambiguity.

Further, I entirely concur with my noble and learned friend, that even if it were not *ultra vires*, it does not put the case in one particle better position than it was in before. Because, suppose the jury had returned the verdict in the very words in which it is now entered, it would still have been equally open to the charge of ambiguity, for they "say upon their oath that they find the case for the Pursuers is not proven, and therefore, that upon the first issue they find it is not proven that the Pursuer Alexander Morgan is nearest and lawful heir of John Morgan; and upon the second issue, that they find it is not proven that the Pursuer James Morgan is, along with Alexander Morgan, next of kin of John Morgan." That is, it is given as a logical corollary from finding that the whole case is not proven, that each and every part of it is not proven. That is just open to the very same complaint to which the former finding was open. Therefore, I do not think it would have helped the case, even if we had not come to the conclusion that what the Court has attempted to do is *ultra vires*.

Per Lord Cranworth:— When this House says that there ought to be a new trial, it is in the power of the House to direct it at once.

My Lords, as to the other point to which my noble and learned friend referred, I confess that I have no doubt upon the construction of the Act; that when this House says that there ought to be a new trial, it is in the power of the House to direct it at once. I do not even think it necessary to recur to the reasoning of my noble and learned friend, founded upon the consideration that we might have directed an issue. I say at once, that this being an Appeal to this House, the House is to do justice, which can only be done here by having this unfortunate case re-tried; unless, indeed, the parties will see at last the folly of persisting in the litigation.

Lord BROUGHAM: We say nothing about costs.

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JUDGMENT.

It is *Ordered* and *Adjudged*, by the Lords Spiritual and Temporal in Parliament assembled, That the said Interlocutors complained of in the said Appeal be and the same are hereby reversed. And it is further *Ordered* and *Adjudged*, That the cause be and is hereby remitted back to the Court of Session in Scotland, with instructions to that Court to give the necessary directions for a new trial of the issues for the Appellants in the pleadings mentioned.

JOHNSTON, FARQUHAR, AND LEECH RICHARDSON, LOCH, AND MACLAURIN.