it, nothing is to be taken as giving you any power whatsoever, except such as is here given for the purpose of interfering with the railway, or interfering with the traffic upon the railway. With that the whole thing is smooth and plain. The former act had, I think, expressly authorized the starting from the other railway at or near the gas works. There was a power to make another junction at the bridge. That is given in more precise terms in the second act, with certain adjuncts necessary to make it available, namely, with reference to the tolls to be taken; but except to that extent, this act is not to be taken as interfering in any manner with the Scottish Central Railway. This act does not interfere with it, but you are to have all the rights that you had before.

There was one argument which was adverted to the other day, that did not strike me as having any very great weight, but I wanted to see how it was borne out, which was this—that unless you hold that the legislature intended to have deprived them—the Stirling and Dunfermline Railway Co.—of the power which was given to them by the former act, there were certain words in the preamble of the second act that were inoperative. The preamble of that act states, that it is necessary, that some of the powers and provisions of the said recited acts should be repealed, amended, and enlarged. It is said there is nothing that will answer the word "repealed," unless this clause is to be taken as repealing the former power. I should not have felt much pressed by that argument, considering the very loose and tautologous sort of language which is used in those acts. Perhaps tautologous is not the proper word here. I may say inappropriate language. But there are in this second act clauses repealing parts of the former act, for I observe that in the former act it is said, for all judicial purposes the domicile of the company shall be held to be Glasgow; in the new act it is said, for all judicial purposes the domicile of the company shall be held to be Edinburgh; that is a repeal. Again, it is said in the former act, that all advertisements shall be put into Stirling newspapers and Glasgow newspapers; it is said in the second act, that under both acts all advertisements shall be put into Stirling newspapers and Edinburgh newspapers; which was, as far as it goes, a repeal of the enactment that they should be put into Glasgow newspapers. I point that out, because, if you are to spell out an argument from anything so very unsatisfactory as the finding of that word "repealed" in the language of the preamble, which probably had no real bearing upon the matter in the minds of the framers of the act of parliament, you may, in the same way, meet it by arguments which probably have as little bearing upon it. I go upon the more general view that I have stated. I confess that I think this is a case perfectly free from all doubt, and, therefore, the motion that I make to your Lordships is, that the appeal be dismissed, with costs.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend. I cannot help thinking that the word "junction" in these acts, is used by the legislature to describe where there is to be an auxiliary branch, as it were, between the one railway and the other, and that where they mean substantially a junction, though not in terms called a junction, they do not use that expression, but they say that one railway may join the other. They do not use the word "join," but they say that one railway may start from the other, when the one railway is to start from the other without any subsidiary branch, as it were, driven from the one to connect it with the other. I think that will account, amongst other things, for the different language used in the 19th sect. of the act of 1846, where it is said, "that the main line of the said railway shall commence at or near to the gas works in the burgh of Stirling," without saying by a junction; and then it adds, "and also by a junction with the Scottish Central Railway near the bridge." It is to commence near the gas works, without a branch driven from it, because that is unnecessary; it is to commence, as it were, from the bridge of Stirling by a branch driven from one to the other, because there the junction requires it.

Interlocutors affirmed, with costs.

Appellants' Agents, Davidson and Syme, W.S.—*Respondents' Agents*, A. J. Dickson, W.S., and Smith and Kinnear, W.S.

JULY 26, 1855.

ALEXANDER and JAMES MORGAN, *Appellants*, *v.* JOHN MORRIS, PETER WANLESS, and Mrs. E. WANLESS or LYALL and Others, *Respondents*.

Process—Verdict—Ambiguity—Not proven—Succession—Interlocutor applying verdict—Competency of Appeal—*In an action of multiplepoinding to determine who was entitled to succeed to the property of a party who died intestate, the claimants, A and B, who alleged the nearest propinquity, were appointed by the Court to stand as pursuers, and the case was sent to trial on these issues;*—(1) *Whether A is nearest and lawful heir of C; and* (2), *Whether B is, along*

with A, the next of kin of C. The jury found the case of the pursuers "not proven." The Court of Session *holding that this disposed of the claim of the pursuers of the issue, and that the other claimants were entitled to have the verdict applied, repelled the claim of the former.*
HELD (reversing judgment, LORD ST. LEONARDS dissenting), *That the verdict was uncertain, inasmuch as it did not shew whether the jury considered that the pursuers had failed in proving both issues, or only one of them, and accordingly must be set aside.*
An interlocutor applying a verdict repelling the pursuers' case, (which verdict is inherently bad,) as if it were good, is a final judgment within the meaning of 48 *Geo. III., c.* 151, § 15.[1]

The present appeal occurred in a process of multiplepoinding raised at the instance of Donald Lindsay, accountant in Edinburgh, the judicial factor on the estates of John Morgan of Coates Crescent, Edinburgh, who died on the 5th August 1850, leaving considerable property, principally moveable. Certain documents of a testamentary nature, by which various legacies were bequeathed, were found amongst the deceased's papers, but nothing to shew who his nearest relations were; and the question involved in the action was, who was the nearest heir in heritage and moveables. The points embraced in the present appeal related chiefly to the form of the proceedings, and, *inter alia*, of the issues adjusted for trying the case set up by the appellants, and to the effect of the verdict returned by the jury.

The appellants claimed as being the children of a brother of the father of John Morgan, while the whole of the respondents claimed to be descended from children of an alleged brother, and of two alleged sisters of the father of John Morgan. The claim of the appellants (with the exception after mentioned as to the heritage) rested on a nearer degree of relationship than that of any of the respondents.

The first question which arose in the appeal was—whether the Court of Session did right in refusing to allow the representatives of the deceased Mrs. Jean Morgan or Crocket, a sister german of the appellants, to be sisted as claimants: The second was—whether, where there were four different sets of parties, all claiming the same succession, and all of whose claims were distinct, and disputed, the proper course was that which was adopted in the Court below, viz., to select the appellants as being the claimants in the first degree, and to compel them to stand pursuers of issues framed to try their own case exclusively, at the same time making all the other parties claiming defenders therein, though no steps had been taken by any of them to establish their own propinquity. Or, third, whether the proper course would not have been to have sent all the cases to trial at once before the same jury, leaving it to the jury to decide, after hearing the evidence, which of the parties was truly the lawful heir of the deceased. A fourth question was—whether the proceedings, with a view to a trial of the issues, had not been abortive, by reason of there being no substantial defenders of these issues, viz., no person who represented the estate of John Morgan. The fifth and material point was as to the meaning and effect of the verdict returned by the jury on the issue which was sent to try the appellants' case.

The issues were in the following terms:—"1*st*. Whether the pursuer Alexander Morgan is nearest and lawful heir of John Morgan, sometime residing at Coates Crescent, Edinburgh, deceased? 2*d*. Whether the pursuer James Morgan is, along with the said Alexander Morgan, next of kin of the said John Morgan, deceased?"

The cause came on for trial before the Lord Justice Clerk and a jury on the 16th of August 1853, and three following days, when the following verdict was returned:—"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."

On a motion by the appellants to set aside the proceedings, on the ground of miscarriage in respect the verdict was unintelligible and inapplicable, the Second Division of the Court pronounced the following interlocutor:—"Apply the verdict of the jury; and in respect thereof repel the claims of Alexander and James Morgan, and decern."

At this stage the present appeal was presented against the above interlocutors, and an interlocutor as to expenses (15th Feb. 1854), on the following grounds:—1. Because there was a miscarriage in the Court below, and in the way and manner in which the trial was ordered to proceed, and took place; and more particularly, inasmuch as the estate of the testator was not represented in the issues, or upon the trial, and inasmuch as the appellants were sent down to try their case against all the respondents combined, and although none of the respondents had established a title or right to the claim or character which they advanced, or in which they appeared in Court.—*Watson* v. *Watsons*, (Sc. Jur. 1836). 2. Because the refusal of the motion of James, Elizabeth, and Mary Crocket, to be sisted as parties to the cause was erroneous, the record was thereby prevented from being complete and full, and the whole of the subsequent procedure had gone on in the absence of parties materially interested. 3. Because, in terms of the appellants' motion of 21st November 1853, the Court below ought to have set aside or discharged the verdict, or refused to apply it, or have arrested judgment, in respect the verdict did

[1] See previous reports 16 D. 82; 26 Sc. Jur. 49. S. C. 2 Macq. Ap. 342: 27 Sc. Jur. 602.

not meet or exhaust the issues, and was itself anomalous and unprecedented in form, and in its terms altogether ambiguous, vague, and uncertain.—*Irvine or Douglas* v. *Kirkpatrick*, 7 Bell Ap. 186. 4. Because the interlocutor of 15th February 1854, approving of the auditor's report on the accounts of expenses given in by all the other parties to the suit against the appellants, was pronounced altogether prematurely, and without an opportunity being afforded to the appellants to object.

The respondents supported the interlocutors on the following grounds:—1. It is not competent by appeal to review the interlocutor of 23d February nor that of 24th February, first and second appealed from, or the relative issues, in respect that the appellants did not, in the Court below, object to the course so taken, or to the issues so settled, and did not make any adverse or different motion, but did, on the contrary, acquiesce in and homologate the interlocutors; and further, in respect that such review by appeal is excluded by the provisions of the Act 55 Geo. III. c. 42, as continued by subsequent statutes. 2. The interlocutors of 23d February and of 24th February 1853, first and second appealed from, are well founded, and the issues thereby settled are apt and correct issues; and, more especially, the appellants, as claiming the nearer degree of propinquity, were properly put to prove their claim under the same, as first in order, while the other claimants were entitled to stand as defenders, and to meet the case of the pursuers of the issues by all competent evidence. 3. Further, it is incompetent for the appellants now to object to the right or title of the other claimants to appear and to oppose their claim, in respect that no such plea was set forth in the closed record, or urged on their behalf in the Court below. 4. The verdict returned by the jury under the issues sent to trial in this cause was a competent and sufficient verdict; and under the said Statute of the 55 Geo. III. c. 42, that verdict is final and conclusive as to the fact thereby found, and all objections thereto are now excluded. 5. As the appellants failed, after a full and fair inquiry before a jury, to prove their relationship, the interlocutor of 23d November 1853 embodied the only judgment proper to be pronounced in the then position of the cause. 6. The whole procedure and interlocutors pronounced in the Court below, and which are now complained of under the present appeal, were properly and competently taken, and ought not now to be set aside or altered on any of the grounds stated for the appellants. 7. The appellants having not only not opposed, but having acquiesced in and homologated the whole of the interlocutors complained of prior to the interlocutor of 23d November 1853, they are not entitled to seek the reversal of any of these interlocutors.—1 W. IV. c. 49; *Balfour* v. *Lyle*, 2 Sh. & M'L. 1; *Rae* v. *Gibson-Craig*, 1 Sh. App. 459; *Bald* v. *Kerr*, 3 Sh. & M'L.'s App. 1; *Waddell* v. *Hope*, 6 D. 1230; 55 Geo. III. c. 42, § 6; A. S. 29th November 1825, § 35; *Cleland* v. *Weir*, 6 Bell Ap. 402.

Lord Advocate (Moncreiff), *Sir F. Kelly* Q.C., and *Anderson* Q.C., for the appellants.—We object to the whole proceedings in this case as illegal. In the *first* place, certain parties called Crocket applied to be sisted in the cause, and the Court refused to allow it, though they claimed to be next of kin like the others. The Court had no right so to refuse.—*Murray* v. *Bullerwell*, Robertson's Ap. 436.

[LORD CHANCELLOR.—How were you damnified?]

We were prevented having the benefit of the Crockets' assistance, for they claimed to be related through the same stock as ourselves. Moreover the verdict could not be binding against the Crockets in these circumstances, because the issues were not framed to include them. Next, it was an improper course for the Court to order our issues to be sent to trial in the first instance, and to allow all the other claimants to be made joint defenders, and thus combine against us. Besides, there was nobody representing the estate at the trial. The judicial factor ought to have been a party. In his absence no verdict could be binding.

[LORD ST. LEONARDS.—He is a mere nominal party. It is a common practice in the Court of Chancery to allow the persons beneficially interested to defend. It was a natural thing to do here.]

He was bound to keep the funds, and see that they were paid over to none except the party entitled. How could he know that the claimants, among themselves, may not have combined, so as to allow a verdict to pass nominally for one party, but secretly intending to divide the property. It was not as if the defenders here were really entitled or interested; they were all mere pretenders, and had not proved a tittle of relationship, and yet they were allowed the undue advantage of leaguing together to defeat us; and we were not only bound to prove our own case, but to negative theirs.

[LORD CHANCELLOR.—Surely it did not matter whether one or a hundred parties were defenders of the issues, for they never could have been allowed, under those issues, to prove their own case. All they could do was to shew you had no case.]

Then it was a most expensive way of conducting the proceedings, to send the issues to trial by instalments. It greatly increased our expenses. The issues of all the claimants should have been sent to trial at one and the same time, and we should all have been on the same footing. The course pursued was totally unauthorized by *Watson* v. *Watson*, for the report of that case in the "Scottish Jurist" shews all the issues there were tried together. Moreover, the issues

here were not properly framed. They consisted of double propositions, whereas each fact should have been made the subject of a separate issue.
[LORD ST. LEONARDS.—They were of your own framing. You did not complain of them in the Court below.]

We could not help ourselves in the Court below. We were bound to go to trial, and we could not appeal against the interlocutor ordering the trial. It is only when a final judgment is pronounced that we can appeal against the interlocutor ordering issues.—*Galbraith* v. *Armour*, 4 Bell's Ap. 374; *Irvine* v. *Kirkpatrick*, 7 Bell's Ap. 186. It is accordingly now that we complain of them.
[LORD BROUGHAM.—The House can direct other issues to be tried, and remit the case for that purpose?]

Yes; the House can order that to be done, which ought to have been done, at any stage of the cause. The subject was fully considered in *Irvine* v. *Kirkpatrick*.
[LORD BROUGHAM.—Though that case was decided by myself sitting alone, yet I may mention that I consulted Lord Lyndhurst as well as some of the Common Law Judges, particularly Baron Parke, as to the points that arose.]

We then come to the verdict. A verdict of not proven in a civil case is wholly inapplicable and absurd, and such a verdict was never before heard of in Scotland in a civil suit. No jury has the power to give it, no Judge to receive it, and no Court to give judgment upon it. Such a verdict never can be final and conclusive. It is an error on the record. Nobody can tell what it means. It is not in terms of the issue. It is neither a verdict for the pursuers nor for the defenders. The jury should have said "Aye" or "No" to the issue.
[LORD ST. LEONARDS.—Why did you not apply to the Court below for a new trial, if you thought the verdict unintelligible?]

We contended it was a mistrial—no trial at all; and that there was no verdict at all.
[LORD CHANCELLOR.—What is called "a new trial" in this country is granted only in those cases in which you can make out, that the proceedings at the trial did not warrant the verdict.]

Just so; and that assumes that there was a verdict. Here we do not complain of the proceedings at the trial not warranting the verdict, for there was no verdict at all.
[LORD BROUGHAM.—Supposing a jury in this country to say, "We find the plaintiff's case not proved," and the Judge were to say, "I can't take that verdict; you must say whether you find for the plaintiff or the defendant," and the jury were to refuse, and answer, "All we say is, that the plaintiff has not proved his case;" would the Judge, in that case, not enter it up as a verdict for the defendant?]

Probably he would, on certain issues. If the Judge here had asked questions of the jury, he might, perhaps, have put the matter right, but he did not do so; and such a verdict, when entered, would be in this country an error on the record, and the subject of a *venire de novo*. The jury here, obviously, did not mean to preclude the plaintiff from afterwards coming forward with better evidence, and establishing his claim. But it is no longer a question what the jury meant. As it stands, it is no verdict, and no Court can treat it as such. Besides, the ambiguity of the verdict is increased fourfold by the words, "the case of the pursuers." The issues were two, and one of them contained a double proposition, and the fate of one issue was not in any way bound up with the fate of the other. The jury may have thought Alexander was proved to be heir, but that he and James were not next of kin, or *vice versâ*. It is impossible to say which of several things the jury meant.
[LORD CHANCELLOR.—It seems to me such a verdict could not have been a ground of judgment in this country; but there may be some difference between the law of Scotland and that of England on this subject.]

There is and can be no difference whatever as to that, as fully appears from Adams on Jury Trial.
[LORD ST. LEONARDS.—How do you make out your title to come here at all? You let the proper time go by for moving for a new trial in the Court below. The verdict in that case must have become final and conclusive as to the facts.]

That assumes there was a verdict, and that it found facts. We deny this verdict found any facts. We did not require to move for a new trial in the Court below. The Court pretended to give a final judgment on this elusory verdict. The moment that was done, we had a right to appeal, and to bring the whole of the previous interlocutors up, including that ordering the issues to be tried, as was done in *Irvine* v. *Kirkpatrick*.

Solicitor-General (Bethell), and *Dean of Faculty* (Inglis), for the respondents.—We contend that no appeal lies in this case either against the interlocutor ordering the issues, or that applying the verdict given upon those issues. It is not competent to appeal against an interlocutor ordering issues.—55 Geo. III. c. 42, §§ 1 and 4; 1 Will. IV. c. 49; 6 Geo. IV. c. 120. It is peculiarly a matter within the discretion of the Court below to regulate issues, and appoint them for trial, and the order in which they are to be tried. A similar course in directing one issue to be tried in the first instance was taken in *Waddell* v. *Hope*, and *Watson* v. *Watson*, which latter case is

misunderstood by the other side. The cases cited on the other side, viz., *Galbraith* v. *Armour*, and *Irvine* v. *Kirkpatrick*, are no authority for an appeal against such an interlocutor. The latter case was decided entirely on the relevancy of the averments. But there are direct authorities on our side.—*Balfour* v. *Lyle*, 2 Sh. & M'L. 1.

[LORD BROUGHAM.—That was merely a decision by the Appeal Committee, of no authority unless a law Lord attended.]

There is also *Bald* v. *Kerr*, 3 Sh. & M'L. 1. And such is the understood practice in the Court below.—*Dundee and Perth R. Co.* v. *M'Glashan*, 10 D. 1401. Moreover the issues appointed for trial were framed by the appellants themselves, and were sent to trial at their own suggestion. Nor is it competent to appeal against the interlocutor applying the verdict, for it does not involve any matter of law. The whole subject matter of the interlocutor was one of fact, viz., whether Alexander was heir at law, and whether he and James were next of kin. The Statutes 55 Geo. III. c. 42, §§ 6, 7, 8, and 6 Geo. IV. c. 120, § 9, say, that the verdict shall become final and conclusive as to the matter of fact found therein, if a new trial was not moved for within the proper time.

[LORD BROUGHAM.—But surely if this is no verdict, and the Court applied it as if it was one, you cannot say. that is not a matter of law?]

It might, no doubt, give rise to a question of law; but we do not admit it is not a valid verdict, and we say at the present stage the interlocutor is not a subject of appeal. The statutes give two remedies against bad verdicts. One is the bill of exceptions, and the other is the motion for a new trial under 55 Geo. III. c. 42, § 6, which provides for every case that can arise. The present case was clearly included under the words in that section—"such other cause as is essential to the justice of the case." The appellants ought therefore to have moved for a new trial. In a case quite analogous to this, the appeal was held to be precluded on the very ground that no application had been made for a new trial to the Court below.—*Cleland* v. *Weir*, 6 Bell's Ap. 402. They ought to have contended in the Court below, that the verdict did not exhaust the issues—*Lawson* v. *North British R. Co.*, 12 D. 1250; or that it was essentially ambiguous or defective.—*Foggo* v. *Craise*, 12 Sc. Jur. 638; *Cuthbertson* v. *Young*, 14 D. 375; *Ross* v. *M'Bean*, 18 Sc. Jur. 113.

But assuming that the appeal is competent, we contend the objections are all unfounded. It was said the verdict could not be final, because there was no representative of the estate at the trial, and because the other claimants were all made defenders of the issue. This is a misconception of the nature of the case. These were all claimants in a multiplepoinding, which is merely a machinery for protecting the holder of a disputed fund against paying it twice over, and the result in such a process is, that the claimant who proves the best title gets the money. But if a third party afterwards turns up, who shews a still better title, he is not prevented from recovering the fund.—Ersk. iv. 3, 23; Ivory's Process, 274; Shand, 507. In this view the Court directed the parties who claimed the nearest relationship to go to trial first. It was said the Crockets were not allowed to be sisted; but they did not require the authority of the Court to lodge their claim in the multiplepoinding, and they never did lodge it, which was their own fault entirely. If they had chosen to come in even after the issues were adjusted, the Court might have altered the issues to suit that new state of things.—*Inglis* v. *Great Northern R. Co.*, 11 D. 1257; *ante*, p. 77. The directing of the issues of the appellants to be first tried was quite proper in the nature of the case. It was said the issues of all the other claimants should have been tried at the same time, but that would have led to inextricable confusion. The sole case which the appellants made in their condescendence was, that their father was uncle of the deceased, and the jury gave a proper answer to that, by saying they had not proved that fact.

[LORD CHANCELLOR.—But surely the jury were bound to say "Yes" or "No" to the issue; for instance, to say—(1.) Alexander is not heir at law; and, (2.) he and James are not next of kin. An issue being once directed, all we can look to is, whether that issue is properly answered by the verdict. What does it matter how the pursuers make out their case, provided they establish the affirmative of the issue?]

The appellants could not prove their case in any other way than what they stated it to be in their condescendence.

[LORD BROUGHAM.—But the jury can't look at the record—they can't look beyond the issues.]

[LORD ST. LEONARDS.—I understand the law of Scotland to be this, that if you state in your condescendence a particular mode of making out your case, and an issue is directed, then you are restricted at the trial to that particular mode of proving the issue.]

That is a correct view of the procedure. The pleadings control the issue. The province of the condescendence is to define with some particularity the proposed mode of proof, as was explained in *Neilson* v. *Househill Coal Co.*, 4 D. 1187.

[LORD CHANCELLOR.—But that was a patent case. There is a special statute which requires full particulars to be given in such cases, which shews that that is an exception to the general rule.]

That statute, however, does not apply to Scotland, and for the very reason, that the Scotch condescendence supplied the particulars without the aid of any statute.

[LORD CHANCELLOR.—For my part, I think the strict way of looking to the issues alone is the best. It may be a very good reason for the Court directing issues so framed, that they can be proved only in the way indicated in the condescendence; but when once the issue is directed, I think neither the Judge nor the jury has anything to do with the record.]

[LORD ST. LEONARDS.—Has the Judge, at the trial, the record before him?]

Yes, the record is before the Judge, and the issue before the jury; and if the pursuer attempts to prove the case in any other way than that set forth in the condescendence, the Judge interferes to prevent it.

[LORD ST. LEONARDS.—Is this statement of the practice below admitted by the other side?]

[*Lord Advocate.*—It may be, that the record is *de facto* before the Judge at the trial, but we contend it is an irregular practice, and not warranted by the statute. The issue is the sole thing to be looked to at the trial.]

Then, as to the verdict of not proven. It has always been the practice for the Courts in Scotland, long before jury trials were introduced, to express their finding in that form, whenever it was considered appropriate; and even since trial by jury it has been a common finding with juries.—See 1 Murr. 317; 2 Murr. 1, 187, 451; 3 Murr. 23, 323; 4 Murr. 198, 231; *Balfour* v. *Lyle*, 2 Sh. & M'L. 1. It is said the words in the verdict, "the case of the pursuers," are ambiguous; but the pursuers' case was one and indivisible, viz., whether their father was the uncle of the deceased. All that the verdict means is, that the pursuers did not prove that fact. The Court thereupon properly apply the verdict by repelling the pursuers' claim, which has the effect of putting the pursuers out of the field.

[LORD BROUGHAM.—Then, is this verdict *res judicata* against the pursuers?]

Yes, on this record. It is quite a mistake to say, that the jury are bound to say "Yes" or "No" to the issue. No particular form is necessary; and the jury are not always bound to find either for the pursuer or the defender.—*Mag. of Campbelton* v. *Galbraith*, 7 D. 255; *Lawson* v. *North British R. Co.*, 12 D. 1250.

The *Lord Advocate* replied—The cases of *Lord Fife*, 1 Murr. 121; 22d December 1825, F.C., (also in this House,) and *Irvine* v. *Kirkpatrick*, clearly shew, that we can, after final judgment, appeal against an interlocutor ordering issues to be tried. So it was held in *Campbell* v. *Campbell*, 1 M'L. & Rob. 387, that an appeal was competent against an interlocutor applying the verdict, even after a motion in the Court below for a new trial had been refused. Moreover, we have the common law right to appeal, unless it can be shewn, which it cannot, that some statute has taken away that right. The sole thing to be looked to in considering the validity of the verdict is, whether it is an answer to the issue.—*Leys, Masson and Co.* v. *Forbes*, 5 W.S. 403.

[LORD CHANCELLOR.—It seems to me that trials would be endless, if we were to be guided by anything but the issue in looking at the verdict.]

Yes, and this verdict is no answer to the issue. As to the argument, that such an interlocutor as this, applying a verdict which was no verdict, contains no matter of law, but is entirely a matter of fact, it is too frivolous to be noticed.

LORD CHANCELLOR CRANWORTH said, their Lordships had made up their minds as to several of the objections urged by the appellants, and he would now state their determination as to those. The first objection was, that there were no proper contradictors to the issue, inasmuch as the judicial factor was not made a party, and all the other claimants were made joint defenders. That objection was untenable. Such a suit as this exactly resembled a bill of interpleader in the Court of Chancery; and if the same suit had arisen in England, the Court would have followed the same course in making the other claimants, who were interested in resisting the claim of the appellants, defenders at the trial. The Court would of course take care to send a proper issue to trial, but the moment that issue was sent, the executor was *functus officio*, and had nothing more to do with it. As to whether the appellants ought to pay more than one set of costs in such circumstances was another thing; but it seemed a very reasonable and convenient course to try the appellants' issues in the first instance, for, if they succeeded, the whole of the other claimants must necessarily be defeated. The form of the issues was not objectionable. It was true the issues required the appellants not only to prove their own case, but to negative that of the other claimants; but that was an obligation always laid upon parties claiming in such circumstances. Then it was said the Crockets ought to have been sisted, and allowed to join in proving, that, along with the appellants, they were the next of kin; but it was a sufficient answer to that objection, that the appellants had never asked the Court below to allow the issue to be framed so as to include the Crockets, and they could not therefore now complain. As to these objections their Lordships were unanimous in thinking them untenable. There were, however, other more serious objections, viz., whether this was a proper form of verdict, and whether it was not so ambiguous that it was impossible for the Court to apply it; and lastly, whether, supposing it ambiguous, it was competent to the appellants to complain to their Lordships' House. As to these last objections their Lordships were not at once prepared to give judgment, and therefore the further consideration of the case would be postponed.

Cur. adv. vult.

LORD CHANCELLOR CRANWORTH.—My Lords, in this case I need not call your Lordships' attention to the facts, which occupied some time in discussion There were several grounds of appeal, all of which were dismissed immediately after the close of the hearing, except one point which arose, and which was, in truth, the important point, viz., upon the interlocutor applying the verdict, as it is called.

The pursuers were Alexander and James Morgan. There was, first of all, James, and afterwards Alexander, and there were two issues directed—"1. Whether the pursuer Alexander Morgan is nearest and lawful heir of John Morgan, sometime residing at Coates Crescent, Edinburgh, deceased? 2. Whether the pursuer James Morgan is, along with the said Alexander Morgan, next of kin of the said John Morgan, deceased?" These issues were tried, pursuant to certain interlocutors, in a multiplepoinding suit; and several days having been occupied in the trial, and the jury having been sworn to try the said issues, this is the record of the finding of the jury:—"Say, upon their oath, that the case of the pursuers is not proven." Thereupon the appellants Alexander and James Morgan contended that there was no proper finding, and made a motion to the Court to set aside and discharge the verdict, or to refuse to apply it, or to arrest the judgment. On the other hand, the other parties moved upon this verdict that the claim of the appellants should be repelled. The Court of Session thought that the verdict was a valid verdict. The interlocutor is in these terms:—"The Lords, upon the motion of the defenders, apply the verdict of the jury; and in respect thereof repel the claims of Alexander and James Morgan, and decern: Find them liable in expenses; and remit the account, when lodged, to the auditor to tax."

Now, my Lords, whether this was a proper interlocutor to be pronounced by the Court of Session is the only point that was reserved for your Lordships' consideration. The objections to the verdict rested upon two grounds: first, that this was not a verdict finding, in the terms of the issue, either way; but only finding that the case of the pursuers was not proven. It was said that this was a bad verdict upon issues directed in a civil suit; and, secondly, supposing that is got over, still that the verdict was bad, as not being a verdict which put a final end to the question by determining all the matters submitted to the jury. These were the two objections to the verdict. Then a third objection was raised of this nature, that it was a matter that was not a subject of appeal; that it was concluded by the verdict, and that there could be no appeal except upon matters of law; that this was not a matter of law falling within that rule; and that, consequently, the appeal could not be sustained.

Now, with regard to the verdict, if the objection had rested simply upon the ground, that it was a finding of "not proven," and that the jury did not return a verdict according to the terms of the issue, I confess that I should have been extremely loath to listen to such an objection. Your Lordships are always very unwilling to entertain objections of a technical nature, which relate rather to matters of the course of proceedings and practice, than to the merits of the case, especially in cases coming from Scotland, where the Lords of Session are, we must admit, probably more familiar with their own rules of practice than your Lordships can be. And if the objection had rested upon that ground, I confess that I think there would have been sufficient to sustain this verdict, though it is expressed in an inartificial manner.

Suppose, for instance, that there was an issue, "whether the pursuer Alexander Morgan is nearest and lawful heir to John Morgan of Coates Crescent, Edinburgh?" it is no answer, logically, to say that the pursuer's case is not proven. It does not appear upon the issue what the pursuer's case is. In England, we, who are more accurate and logical in our inquiries of this sort, put the matter in a train in which that would have been, I think, though an informal, necessarily a logical answer; because the course which would have been taken in England would have been—that a certain dispute having arisen (formerly it would have been upon the pretence of a wager, but that is got rid of now)—a dispute having arisen, whether Alexander was lawful heir to John Morgan, the plaintiff asserts that he is the lawful heir, whereupon the defendant said that he was not the lawful heir. And to decide that issue a jury would be summoned, and if the jury had said the pursuer's case is not proven, that would necessarily amount to this, that the pursuer has not proved that Alexander is the lawful heir. He has not proved it, and it being his business to prove it, that would be a verdict against him, and a verdict for the defendant. Here there is no such averment on the part of the pursuer, because, by the terms of the issue, the question simply is—"whether Alexander is the nearest and lawful heir." Therefore it is, logically, no answer to say that the pursuer's case is not proved. But I think we may fairly infer that that is the form in which an inquiry of this sort is directed. The pursuer having asserted that he, Alexander, was the lawful heir, when the Court directed an issue simply to try whether he is the lawful heir, if the jury say the pursuer's case is "not proven," and the Court of Session think that verdict amounts to this, that the pursuer has not made out that he is the lawful heir, I should be very unwilling indeed to dispute the verdict upon the ground that that is not a logical answer to the question put. Therefore, if the objection had rested upon that ground, I should have been extremely unwilling to entertain it. Indeed, as at present advised, I should have thought it untenable.

But it appears to me, after having given the fullest consideration to this case, that there is an objection to this verdict, not of form, but of substance. The case of the pursuers was this, that Alexander Morgan was the heir, and that James and Alexander were the next of kin—a double proposition, involving two affirmatives. Alexander is heir at law, and Alexander and James are next of kin. I will suppose that the two were united together in one person, so that it would be that Alexander was heir, and that Alexander was next of kin. That is the proposition.

Now, when the jury find that the case of the pursuers is not established, that may mean—I was going to say one of two things, but it may mean—one of several things. It may mean that, though Alexander has proved that he is heir, he has not proved that Alexander and James are next of kin ; or it may mean that, though Alexander and James have proved that they are next of kin, they have not proved that Alexander is heir. That was a very probable finding upon the different claims that were asserted. Because the way that Alexander and James attempted to make out their title was by proving that they were the first cousins of the deceased, being the two sons of the only brother of the deceased. But there is another class of claimants, who claim that they are the great nephews of the deceased, being descendants of another brother, and who might have been an elder brother of the parents of James and Alexander ; and if so, these descendants would have been the heirs at law, at the same time that James and Alexander were the next of kin, because a first cousin would come in as next of kin in priority to an heir at law who was more remotely descended, though descended in the line of the elder brother, and therefore the heir at law. I merely put these explanations by way of hypothesis, because though this pedigree was handed up to us, it was not pretended that it was in any way established. It was only to shew what the nature of the different claims was. 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 shew either that Alexander is not heir, or that Alexander and James are not next of kin. It only shews that the double 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 is so, it seems to me quite 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 mistrial—not giving rise to the necessity of any motion for a new trial, but shewing 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," which always means a new trial ordered by the Court, but a new trial, because the trial that took place was a trial that did not enable the Court to act. I cannot entertain the slightest doubt in the world, 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. But then it is said, supposing that is so, still that is not a matter which is the subject of legitimate appeal under the statutes to your Lordships' House, because, upon a matter of this sort, the verdict of the jury is conclusive, and it is not a matter of appeal to this House.

Now I confess, with all respect for those who differ in opinion from myself, I think that not only this may be, but that it must be a subject of appeal, because, otherwise, there is no means of getting injustice set right. The right to appeal to this House now depends upon the Statute 48 Geo. III. c. 151, the 15th sect. of which enacts, "that hereafter no appeal to the House of Lords shall be allowed from interlocutory judgments, but such appeals shall be allowed only from judgments or decrees on the whole merits of the cause, except with the leave of the Division of the Judges pronouncing such interlocutory judgments," and in certain other cases, "provided that, when a judgment or decree is appealed from, it shall be competent to either party to appeal to the House of Lords from all or any of the interlocutors that may have been pronounced in the cause, so that the whole, as far as it is necessary, may be brought under the review of the House of Lords." Therefore, after the passing of that act, there was an appeal to this House only from the final judgment, and not from interlocutory judgments. Now this undoubtedly was, within the meaning of that rule, a final judgment. It was a judgment that disposed of the case by repelling the claim of the pursuers.

Then comes the 55 Geo. III. c. 42, the Jury Act, and that act provides for the mode in which the Court may settle the issues, or rather the Court of Session is empowered to direct issues, and then the trial is directed to take place. Then by § 6 it is enacted, that "in all cases in which an issue or issues shall have been directed to be tried by a jury, it shall be lawful and competent for the party who is dissatisfied with the verdict, to apply to the Division of the Court of Session which directed the issue for a new trial on the ground of the verdict being contrary to evidence ; on the ground of misdirection of the Judge ; on the ground of the undue admission or rejection of evidence ; on the ground of excess of damages ; or of *res noviter veniens ad notitiam ;* or for such other cause as is essential to the justice of the case, provided also that such interlo-

cutor granting or refusing a new trial shall not be subject to review by reclaiming petition, or by appeal to the House of Lords."

Now that, I apprehend, was an enactment made in exact analogy to the English practice on similar subjects, that whenever there has been a trial, then, within a certain limited time, namely, within the first four days of the term next after the trial, any party dissatisfied with the verdict upon any of these grounds (which in the Scotch Act are evidently taken from the English practice)—that is to say, upon the ground of the verdict being contrary to evidence; misdirection of the Judge; undue admission or rejection of evidence; excessive damages; and of *res noviter veniens ad notitiam;* or for any other cause essential to the justice of the case, the party may apply for a new trial. When such an application is made in England, if the Court is of opinion, either *simpliciter*, without imposing any terms, or imposing terms, that there ought to be a new trial, what is done is this: what is called the *postea* is struck out—that is to say, the Court directs the case to proceed just as if there had been no trial. There is no notice ever afterwards taken of there having been a previous trial, and the cause goes down and is tried again. Where the Court granted or refused such an application for a new trial, until the recent alteration by the Common Law Amendment Act of last Session, that was a matter which could not be brought by appeal to any Court at all. That furnishes an exact analogy to the 6th section of the Scotch Jury Act.

But then it was thought that that would be a very stringent, and improperly stringent, enactment, because many of those cases in which the Court might grant a new trial, if applied for, are of extreme importance, and the whole question at issue may turn upon the decision of the Court upon that subject. And therefore it was thought extremely important that means should be given, if justice required it, of enabling parties to bring the decision that was made upon the subject under the review of a superior Court, and ultimately before your Lordships. Therefore it was that the 7th section provides for that by enacting, "that it shall be competent to the counsel for any party at the trial of any issue or issues, to except to the opinion and direction of the Judge, either as to the competency of witnesses, the admissibility of evidence, or other matter of law arising at the trial, and that on such exceptions being taken," it is to be reduced into writing, and is to form part of what we should call the record of the trial, and that may be brought just as exceptions may be in a trial in this country to a Court of error, and ultimately to your Lordships' House. Then there are special directions given as to the time within which that is to be done, and a certain precedence is given to appeals on these subjects. And then, upon their coming before this House, it is provided that "the House of Lords shall give such judgment regarding the further proceedings, either by directing a new trial to be had, or otherwise, as the case may require"—that is to say, if anything takes place at the trial, either by misdirection of the Judge, or from the reception of improper evidence or other matter of law arising at the trial, that may be brought before this House by exception.

Now, it is a perfectly well known rule in the English Courts, and of course the same must apply in the Courts of all countries, that an exception taken for anything wrong at the trial must be taken before verdict. Exceptions have never been favoured in England. I have known myself cases in which the moment a verdict has been returned, counsel have said that they wished to tender a bill of exceptions. It is always said in reply, You are too late. You cannot tender a bill of exceptions after the verdict; the bill of exceptions is only in the progress towards the verdict. If during the course of the trial the party has any ground of complaint, he may tender his bill of exceptions, and have his objection put upon the record.

In this case it was impossible, therefore, by a bill of exceptions, to have brought this objection as to the verdict being not a verdict, which enabled the Court to give a proper judgment. Let us see how the matter stood. A trial takes place, in which I will assume that there is an improper verdict, or a verdict that does not go to the bottom of the case—does not exhaust the subject. What is the course that the party is to take? He cannot have a bill of exceptions. But then the 8th section says—"that if a new trial shall not be applied for," (that is the case here, no new trial has been applied for,) "or shall be refused, or if the exception taken shall be disallowed, (there could be no exception taken here,) the verdict shall be final and conclusive as to the fact or facts found by the jury."

Undoubtedly the result of that enactment is, that it is to be taken as conclusively found by the jury in this case, that the pursuers have not made out the double proposition that Alexander is the heir, and that Alexander and James are the next of kin. What then? It still may be, that Alexander is not the heir, but that Alexander and James are the next of kin. If it necessarily followed, that the finding in the one case must involve the finding in the other, that would get over all difficulty as to matter of form. But that is not so. Cases may be put without the least difficulty, in which Alexander is not the heir, and yet Alexander and James are next of kin. Therefore what is the course that the pursuers are to take? The proposition which they undertake to maintain has not been proved in its integrity. But if the half of that proposition was proved, they would substantially have proved all that they cared about proving, because who is

the heir is a matter comparatively of indifference. It is a matter of very little importance to them, whether they are to have the house in Edinburgh or not. But if they should establish the other part of their proposition, that they are the next of kin, they will be entitled to this very large sum of money, £100,000.

Now let us see what follows in § 9—"That in all cases wherein the Court shall pronounce a judgment in point of law, as applicable to, or arising out of, the finding by the verdict, it shall be lawful and competent for the party dissatisfied with the said judgment in point of law, to bring the same under review, either by representation or reclaiming petition, or by appeal to the House of Lords." Well, what have the Court of Session done upon this verdict, which, for this purpose, I assume to be an unsatisfactory verdict—a verdict which does not exhaust the subject? They have applied the verdict, and repelled the claim of the pursuers. Now I have a right to interpret the verdict in any way consistent with the terms of it, and to assert, only for the purpose of testing the case, (of course I do not know how the fact is,) that the jury were perfectly satisfied that James and Alexander were the next of kin, and that they were perfectly satisfied that Alexander was not the heir. The verdict is quite consistent with that. What right have the Court to say, that that verdict authorizes them to adjudge that the pursuers' claim is to be repelled? It appears to me that that is, in the strictest and clearest sense of the word, a decision in point of law, arising out of the verdict, which the parties legitimately might bring under the consideration of this House. That it is a matter of law seems to me to be clear; because it is either a matter of law or a matter of fact. How can it be said to be a matter of fact, where the Court decides that the party has no claim? Judges decide law and juries decide facts. When in our Courts a jury has returned a verdict that so and so is entitled to something, say £1000 damages, the matter comes then in theory, not in practice (because it is quite clear what the judgment would be in such a case)—in theory it always comes with that finding before the Court. And in old times, when the entries were made in Latin, the terms used were "*et ideo consideratum est quod quærens recuperet*"—that is a decision in point of law; or if it is a verdict the other way, the entry is "*et ideo consideratum est quod defendens eat sine die*"—that is a decision in point of law. When this verdict comes to the Court of Session, they apply it, and they decide to repel the claim of the pursuer. Is not that a decision in point of law? It appears to me to be so. If it were not so it would leave the parties open to a liability to injustice. I do not say that it would be so in this case; but I can imagine cases in which the most monstrous injustice would result. Because it might be, that the jury had returned a verdict *nihil ad rem*—something quite immaterial to the case, and then the Court might decide upon that, that the plaintiff is to recover, or is not to recover; the verdict of the jury having no reference whatever to that, upon which the Court proceeded to make such adjudication.

The case, which appears to me to bear the closest analogy to this in English jurisprudence, is where there has been a claim by a plaintiff which is brought upon two counts—one I will suppose to be a bad count, stating something which, if true, does not entitle him to any damages at all, and the other I will suppose to be a statement of some case which does entitle him to damages. The parties do not observe that the one count is bad, and the case goes down for trial, and the jury return a verdict for the plaintiff, assessing £1000 damages upon the two counts. It comes back, and the Court is asked to give judgment. The Court would say, that the plaintiff is to recover £1000 damages, because the jury have given their verdict for £1000 damages upon two grounds of complaint, one of which afforded no ground of complaint at all in point of law. What is to be done in such a case? Of necessity there must be a *venire de novo*, because there has been a mistrial; at least not technically a mistrial, but a wrong verdict, which does not answer the ends of justice. There ought to have been an assessment upon both counts. Then the Court would have given judgment that the plaintiff should recover upon the good count, and that there should be entered "*eat sine die*" upon the other count.

I state this more for the purpose of shewing that there is nothing anomalous in the conclusion at which I have arrived, than for the purpose of saying that it very distinctly bears upon this question. The short ground, upon which it appears to me that there has been a miscarriage, and that this interlocutor applying the verdict ought to be reversed, is, that there is a verdict finding that which is not conclusive, because it negatives the truth of a proposition consisting of two parts, either of which, if true, would have made it improper to repel the claim of the pursuers altogether, and because the Court have applied it in a manner which the verdict did not justify. Therefore I shall move your Lordships that the interlocutor be reversed, and that the case be remitted back to the Court of Session, with a statement that there ought to be (they do not call it in Scotland a *venire de novo*, but) a new trial, in order to obtain a proper verdict.

I should observe that a case was cited which at first, I confess, seemed to me to have some considerable bearing upon this point, but upon looking at it I think it is clearly distinguishable from the present case. I allude to a case that was brought to your Lordships' House, *Cleland* v. *Weir*, 6 Bell's Ap. C. 402. That was a case in which also, as here, there was an imperfect verdict returned, and, nevertheless, this House sustained the judgment of the Court upon the interlocutor applying that verdict. But that was a case of this nature:—The jury were directed

to inquire into certain facts—it is not material to go into all the particulars—and the jury found certain findings in favour of the pursuer, but they did not exhaust the whole subject, which the pursuer wished to have exhausted. When the case came before the Court of Session, the Court of Session said—This is true, but you should have applied for a new trial here, because the verdict is not a verdict that we cannot act upon, but an imperfect verdict, as you, the pursuers, say; but it has found certain facts, upon which facts we can adjudicate. And all that the Court of Session did was to adjudicate upon the facts that were found; and all that this House upheld them in so doing was to say—upon the facts which are found distinctly as facts—what the Court of Session has done is right. It is no answer to that to say, that there might have been further facts found; that if the question had been put in a train for further investigation, that would have led to a further finding, upon which further directions might have had to be given. The jury had distinctly, clearly, and categorically found one fact, and upon that the Court acted. That case would have been analogous to this, if the jury had made no answer at all to the second question as to the next of kin, but had simply found that Alexander was heir, or that he was not heir. In that case *Cleland* v. *Weir* would have been an authority for saying that the Court of Session might properly, upon that finding, have adjudged in favour of Alexander as heir, or against him, as the case might be, but it does not at all touch this case, as it appears to me; and the finding of the jury here is such, that the Court of Session cannot say what the jury did ascertain to be the facts, either upon the one issue or upon the other.

LORD BROUGHAM.—My Lords, there are here two questions, one of which could only have been raised at your Lordships' bar upon the appeal coming to this House. The other was raised before the Court below, and is of a different nature.

The question raised here regards the right of appeal in this case. It is said that under the statute this appeal is excluded, because the party ought to have applied for a new trial, and that, if that was refused, there was no appeal from the interlocutor refusing it; or that he ought to have excepted, and that, upon his bill of exceptions coming before the Court, and having a decision given against him, then, upon the interlocutor refusing to allow the exceptions, he might have appealed to this House. But it is said that here the appeal is excluded upon the verdict—upon the finding in point of fact,—and that it can only be upon matter of law.

Now, in the first place, with respect to the motion for a new trial, unquestionably that is so, that the pursuer might have moved for a new trial, and upon the refusal of that application no appeal would lie. It is equally certain that exceptions might have been taken at the trial upon other grounds than those here taken, and that the exceptions taken, if refused to be allowed by the Court, could have been brought before your Lordships by appeal. But here the ground of objection to the interlocutor in question could not by possibility have been made a ground of exception at the trial, because the exception is not to the verdict, but to the course of the Court in dealing with that verdict, to the judgment of the Court in applying that verdict, and to the judgment which they pronounced in consequence of that verdict. It is past all doubt, therefore, that there was no ground of exception at the trial. The exception, as my noble and learned friend has just stated, must have taken place at the trial before the verdict, either to some ruling of the Judge in refusing or in admitting evidence, or to some direction of the Judge to the jury before they gave their verdict. That is the ground of exception. After the verdict has once been given, no ground of exception exists to that verdict. The ground of objection, therefore, is reserved for a future stage of the proceedings, namely, the judgment of the Court upon that verdict.

Is, then, this judgment of the Court matter of law? I protest that I can see no other description under which an objection to the judgment can come, except that of an objection in point of law. The objection is, that upon a certain verdict the Court pronounced a judgment which upon that verdict it ought not to have pronounced, and that therefore, in point of law, the judgment is erroneous. And it is objected to here upon that ground, in point of law. I have therefore no doubt whatever, that this is a competent appeal, notwithstanding the objection urged in this last stage of it in this House.

This brings us, then, to the only other point, namely, whether or not the Court rightly applied this verdict, and gave this judgment repelling the claim of the pursuers? Now, I certainly take the same view of this with my noble and learned friend. I should, in the first place, however, state, that I have an objection to these proceedings at an earlier stage than the application of the verdict by the Court. I mean to the framing of the issues. I think nothing could be more inconvenient, and more likely to lead to uncertainty and confusion in the result, than the manner in which these facts were sent to the jury by the framing of the issues; or if the issues were not incompetently and inconveniently framed, if their imperfection might have been cured at the trial (which I do not say it might not have been) by the learned Judge who tried the issues, still nothing could be more inconvenient, more likely to lead to confusion, more almost certain to prevent an accurate knowledge of what the finding of the jury is, than complex questions all sent to the jury at once, without requiring a separate finding upon the different points.

I have had occasion more than once in former cases which have come before your Lordships

to object to this course of proceeding. But it appears now to be inveterate. And, therefore, all we can do is, when it leads, as it has done in this case, to an erroneous decision, to apply the only remedy that remains for us to apply, to reverse the erroneous decision.

Now, what were the issues? It was not that the jury were, in the first place, to inquire whether Alexander was the heir at law, and to answer that question, aye or no, or to answer it, as the affirmative issue was upon him, by saying he has not proved his case. With my noble and learned friend at present I will say, I should not, upon mere technical grounds, have objected to the verdict, if it had merely been that he had not proved his case. The *onus probandi* was upon him, and therefore I will take their verdict of "not proven" to be a verdict against the party upon whom the burden of proof lay. I do not at present object to that, more especially as I find that it has been a very constant practice, not only in criminal cases, in which it very often happens, but also in civil suits, to find a verdict of "not proven." I therefore will not say a word further upon that. But supposing the first question put to the jury had been, "Is Alexander heir at law?" and they had said, "He has not proved his case," the affirmative proof being on him, I will take it, that that would have been a sufficient answer to that question, and a sufficient verdict upon that issue. If, again, a second question had been put to them, "Is Alexander next of kin?" and they had said, "He has not proved his case," I should have said that was a verdict against Alexander, who had the proof of his being next of kin cast upon him. So if, in answer to the question, "Is James next of kin?" the jury had said, "He (the other pursuer) has not proved his case," I should have taken that to be substantially a verdict against James, upon whom the proof of that affirmative was placed.

But here the second question was, "Is Alexander, with James, next of kin?" that is, are Alexander and James together next of kin? And upon that the jury have found that the pursuers have not proved their case. And not only so, but upon both the issues, the issue as to the heir at law, and the issue as to the next of kin, upon both taken together, they have found a general verdict that the pursuers have not proved their case. Now, what case? There are half a dozen cases which may be considered to have been before them, and the finding that these pursuers have not proved their case may either mean, "Alexander is not heir at law, but he and James together are next of kin;" or it may mean, "Alexander is heir at law, but he and James together are not next of kin;" or it may mean, "Alexander is next of kin, but not heir at law;" or it may mean, "James, separate from Alexander, is next of kin, and Alexander is neither heir at law nor next of kin." And I might figure two or three other cases before your Lordships, to every one of which this verdict of "not proven" would be applicable. Because the verdict is, that these pursuers, Alexander and James, have not proved their case, and any one of these several propositions being negatived, namely, either that Alexander was not next of kin, or that James was not next of kin, or that Alexander was not heir at law, any one of those negatives would have supported this finding. Because, incontestably, upon any one of those propositions being found in the negative, the pursuers would not have proved their case, being the whole taken together, or any one part of it. And no mortal can discover, by looking at the issues, and looking at the verdict, what it was that the jury really meant to find.

I am therefore clearly of opinion, that upon such a verdict, so equivocal, and so ambiguous, the Court ought not, in applying it, to have pronounced this judgment, namely, a judgment repelling the claim of these pursuers.

My noble and learned friend has referred to a case very analogous—I should say the next thing to identical—with the present; the case of a verdict given upon two counts, without specifying the one upon which it was that the jury meant to give it, but a verdict given upon two, one of which was bad, and might have been demurred to, but not having been demurred to, went down to trial with the other, which was good; and the jury finding a verdict upon both, without distinguishing the damages upon both, the case comes before the Court. It is past all doubt that a *venire de novo* would have been a matter of course in that case.

My noble and learned friend has referred to a case of *Cleland* v. *Weir*, 6 Bell's Ap. 402. In that case there was this most material difference—there was a partial verdict, no doubt, that is to say, a verdict which did not exhaust the case; but still there was a distinct finding, which was analogous to what would have been the finding in this case had the verdict been, "Alexander has not proved that he is heir at law;" and possibly, in that case, the verdict here might have been sufficient. Indeed, it would have been sufficient if there had been no finding upon the other at all, which is the case in 6 Bell, 402, and it would have been competent to the Court to have applied the verdict and given judgment. But that is not the case here. The verdict here is, that the whole case together is not proved. And you cannot tell from that, and the Court could not tell from that, what part of the case the jury considered not proved, and what part they considered proved; because the failure of proof of any one part of the several propositions which they had before them would have been sufficient to sustain this verdict, and to make the verdict that the pursuers had not proved their case an intelligible verdict.

I am therefore clearly of opinion with my noble and learned friend, that in this case the judg-

ment cannot stand, and that the interlocutor appealed from must be reversed, and that the case must be remitted to the Court below to direct a new trial.

LORD ST. LEONARDS.—My Lords, in this case, which has been fully discussed at the bar, there are two questions—first, whether it was competent to the appellants to appeal to this House against the interlocutors complained of; and, secondly, if the appeal will lie, whether the objections to the finding of the jury, and to the interlocutor thereon, can be sustained.

The first question depends upon the true construction of the several acts of parliament for regulating jury trials in Scotland, and the proceedings in the Court of Session in relation thereto. I may observe, that all the acts constitute one law, and are to be construed as such, although the many alterations introduced by the successive statutes may somewhat embarrass us in coming to a safe conclusion as to the real meaning of the legislature.

One great object was to prevent improper appeals to this House. With this view the 48 Geo. III. c. 151, § 15, prohibited such appeals from interlocutory judgments, with certain exceptions, or from interlocutors or decrees of Lords Ordinary, which have not been reviewed by the Judges of the division to which such Lords Ordinary belong.

The 55 Geo. III. c. 42, extended trial by jury to civil causes in Scotland, and in that statute we shall find the principal provisions upon which the first question depends, in some respects modified by later enactments. After authorizing the Court of Session to direct issues, it prohibits an appeal to this House against any interlocutor granting or refusing a trial by jury—(§ 4.) It then prohibits an appeal to this House against any interlocutor granting or refusing a new trial. But it authorizes any party, dissatisfied with the verdict of a jury on the trial of issues, to apply to the Court of Session for a new trial "on the ground of misdirection of the Judge, or of the undue admission or rejection of evidence, or of excessive damages, or of *res noviter veniens ad notitiam*, or for any such other cause as is essential to the justice of the case." An ample jurisdiction is therefore provided for the granting of new trials, although the appellate jurisdiction of this House is carefully excluded.

The act then provides, that exception may be taken, "at the trial of any issue to the opinion and direction of the Judge, either as to the competency of witnesses, the admissibility of evidence, or other matter of law arising at the trial." But the act gives to the party against whom an interlocutor shall be pronounced on the matter of the exception, power to appeal from such interlocutor to this House, and directs the appeal to be heard within a short time—(§ 7). But if "a new trial shall not be applied for, or shall be refused, or if the exception to the direction of the Judge shall be disallowed, the verdict shall be final and conclusive as to the fact or facts found by the jury," and shall be so taken by the Court of Session in pronouncing their judgment, and shall not be liable to be questioned anywhere. This is the provision of § 8, with a proviso in § 9, "that in all cases wherein the Court shall pronounce a judgment in point of law as applicable to or arising out of the finding by the verdict, the party dissatisfied with the judgment in point of law may bring the same under review by appeal to this House." And this House, in appeals from the Court of Session, is authorized to direct issues—(§ 19); and it was provided that reports should be made to parliament of the issues directed, and of those tried. But that was afterwards repealed.

Now to stop here for a moment. There can be no appeal to this House against an order granting or refusing a trial by jury of an issue, or against an order granting or refusing a new trial. Neither can there be any such appeal as to the facts found by a jury where a new trial has not been applied for, or has been refused, for in either case the verdict is made final and conclusive as to the facts, and is not liable to be questioned anywhere, and therefore not in this House. But as to matters of law the rule is otherwise, for if exception be taken to the ruling of the Judge in any matter of law, a party may appeal to this House against an interlocutor pronounced on this exception. So an appeal to this House will lie where the Court pronounces a judgment in point of law as applicable to, or arising out of, the finding by the verdict. The difference between matters of fact and matters of law is distinctly marked throughout the act. This act, by a later act to which I am about to refer, was continued in force in all respects, excepting so far as the same was thereby altered or repealed.—(59 Geo. III. c. 35, § 34.)

This brings us to the act 59 Geo. III. c. 35. I do not refer to the 2nd section, which was subsequently repealed. But the Lord Ordinary, by § 3, might order a cause to be remitted to the Jury Court, either with or without a reservation of the alleged question of law, and his interlocutor was not to be the subject of appeal to this House; and by § 15 there can be no such appeal against any interlocutor of the Divisions or the Lords Ordinary, or the Judge of the Admiralty, directing a trial by jury. And by §§ 16 and 17, where there were general verdicts, the motions for a new trial were to be made in the Jury Court, and the order for granting or refusing a new trial was to be final, and not the subject of appeal to this House. If the motion for setting aside the verdict were founded on the miscarriage of the Judge in matter of law, or on undue admission or rejection of evidence, a bill of exceptions might be tendered, to be regulated by the directions in 55 Geo. III. c. 42. The motions for a new trial on a special verdict, or special findings, were

to be made in the Court of Session, as directed by the same act, and the interlocutors to be pronounced on such motions were to be final, and not subject to an appeal to this House. By § 18, in special verdicts, and all cases where the verdict contains any special findings which may require the judgment of the Court of Session on the law, the verdict, with the process, is to be returned to the Court of Session, in order that the Court may pronounce decree in the cause.

All these provisions are consistent with those to which I have referred in the 55 Geo. III. c. 42, and, as I have already observed, the later act saves and continues the operation of the 55 Geo. III. so far as it is not altered or repealed.

These acts were followed by the 6 Geo. IV. c. 120, for the better regulating the forms of process. By § 15 the Lord Ordinary might remit the whole cause to the Jury Court, or send to it particular issues to ascertain disputed matters of fact, and his order, in so far as it thus remits a cause, is made final. Decrees or orders of the Court of Session are made final, and not subject to appeal to this House, unless the petition of appeal is lodged within a period limited (§ 25). By the 33rd section—*First*, Parties may admit the facts, and the law is to be determined by the Lord Ordinary. *Secondly*, The parties may require a question of law or relevancy to be determined before trial, and the Judge may remit the question to the Lord Ordinary for the decision thereof. *Thirdly*, Either party may require such a preliminary question of law or relevancy to be decided, and the Court to decide upon his claim. *Fourthly*, When the cause shall be remitted to the Court of Session for their opinion on a previous question of law, the Court of Session shall determine the same, and the determination of such previous question of law or relevancy shall not be open to appeal to this House, "without leave expressly granted, reserving the full effect of the objection to the decision in any appeal to be finally taken." So that ultimately the right of appeal to this House is reserved upon questions of law or relevancy. Some provisions as to issues are subsequently repealed, but they do not touch the question which we are called upon to decide.

The 40th section throws further light upon the intention of the legislature, although I am not sure that I understand the meaning of the concluding clause in it. This section provides, that the Court of Session, in reviewing judgments of Inferior Courts proceeding on proof, shall "distinctly specify in their interlocutor the several facts material to the case, which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found, or on matter of law, and the several points of law which they mean to decide, and the judgment on the cause thus pronounced" is to be subject to appeal to this House, "in so far only as the same depends on, or is affected by, matter of law, but shall, in so far as relates to the facts, be held to have the force and effect of a special verdict of a jury, finally and conclusively fixing the several facts specified in the interlocutor."

It appears to me that this last act is consistent with the others, and does not repeal those previous provisions which, as to appeals to this House, distinguished between matters of fact and matters of law.

The same distinction appears to me to run through the later act. The 1 Will. IV. c. 69, which united jury trial in civil cases with the ordinary jurisdiction of the Court of Session, then followed. It enacts, that "all proceedings for the correction of errors or injustice alleged to have been committed in the trial of a cause, and all questions reserved for decision after trial, and all questions relating to the application of the verdict," shall proceed before the Division to which the cause belongs—(§ 7). And it enacts, that all the provisions of the former acts then in force, so far as not inconsistent with the present act, shall be continued, and remain in force until altered by parliament—(§ 16).

The 1 and 2 Vict. c. 118, does not appear to me to have any bearing on this case.

The last act on this subject is the 13 and 14 Vict. c. 36. It recites the previous acts, and the expediency, in some respects, of altering and amending some of their provisions and enactments. It provides for the adjustment of issues in a manner conformable to the present procedure—(§ 38). The Lord Ordinary is empowered to try issues with the consent of parties, without a jury, and in his interlocutor he is to state specifically what he finds in point of fact—(§ 46). And it is then enacted, that unless such findings in point of fact by the Lord Ordinary proceeded on some erroneous view of the law as to competency of evidence or otherwise, such finding in fact shall be final. But either party may raise, on a reclaiming note to the Inner House, any question of law which may be relevantly raised upon the evidence, provided that any appeal to this House against any interlocutor pronounced by the Inner House on any such question of law shall be subject to the same regulations, and entitled to the same privileges, in all respects, as appeals against interlocutors or judgments upon bills of exceptions were then subject and entitled to—(§ 47).

We cannot fail to observe that the distinction between matters of fact and matters of law is still preserved and enforced, and that the last act assumes, that the provisions of the former acts, in that respect, remained still operative. Finally, it enacts that the previous acts shall be repealed, in so far only as they may be in any respect inconsistent or at variance with the provisions of this act—(§ 56).

Now, to apply this statute law to the case before the House. The Morgans claim the property as first cousins of the deceased. The parties opposed to them aver, that they were not in any way related to the deceased. The questions to be tried by the jury, were—1. Whether Alexander was the heir of the deceased; and 2. Whether Alexander and James were his next of kin. The jury found against their claims, and the Court of Session, applying this verdict, repelled the pursuers' claim.

It is said that this is a decision of the law. No doubt every decree or judgment is such. But is this a decision on "a point of law," as contradistinguished from "a matter of fact," which will justify an appeal to this House? It is simply a question of fact whether the Morgans were heir and next of kin; and that was to be found by the jury. All that the Court could do was to apply the verdict, that is, to act upon the fact as found. It was no "point of law," but it simply put out of Court parties who did not fill the characters on which the claim depended.

To hold otherwise would be to repeal the distinction established by the statutes between matters of law and matters of fact. For if this is a matter of law—a point of law—every interlocutor following a verdict must equally be so, and there would be no distinction between matter of law and matter of fact. If the legislature had intended what the appellants contend for, the acts of parliament, instead of drawing a clear distinction between matters of fact and matters of law, as regards appeals to this House, would, after prohibiting appeals to this House, as at present, from interlocutors refusing or directing an original or a new trial of issues, have proceeded to declare, that whenever a verdict was applied by an interlocutor, whether involving matters of fact only, or matters of law only, or both, an appeal should lie to this House. But the contrary is intended and clearly expressed. All that this House could now do would be to direct a new trial, (and I understand my noble and learned friend to contend that your Lordships should direct a new trial,) and, as I shall presently shew, upon mere forms, for we are altogether uninformed upon the merits of the case. The appellants raise objections of form, but none of substance, and some of those your Lordships disposed of immediately after the close of the argument at the bar. The appellants do not allege that the verdict was contrary to evidence, or that there was a misdirection of the Judge, or the like. No special ground of appeal is stated in the petition of appeal. But in the reasons for their appeal they ask for new issues and a new trial. Now, they themselves prepared issues, which issues were approved of by the Court, and by their opponents. These issues were tried, and none more appropriate could be framed. I do not know upon what grounds the issues have been objected to as imperfect. I think the issues were as perfect as any two issues could be, and perfectly distinct. It is perfectly wild to talk of finding fault with these issues as against the appellants, for they are the issues of the appellants framed by themselves after deliberation, and adopted by the Court because they framed them. And nobody ever found fault with them. And nobody at this moment can frame issues more pertinent and proper for the trial of the question between the parties. I am perfectly at a loss to conceive what the objection is to the issues.

A new trial they cannot seek on appeal, and yet a new trial, according to what your Lordships decide, they will have on appeal. They let the time pass in the Court below for an application for a new trial. If they had been in time, and had been refused a new trial, they could not have appealed to this House against the order. Can they be in a better position by not applying for a new trial?

But all this is settled, as we have seen, by 55 Geo. III. c. 42. The claimants might, "for any cause essential to the justice of the case," have applied to the Court of Session for a new trial. I understood my noble and learned friend who spoke last expressly to admit, that they might have applied for a new trial; therefore, upon that point, we are agreed. And so, clearly, they might. No man can doubt it. They might, then, at the trial have tendered a bill of exceptions to any direction of the Judge in matter of law, and then against any interlocutor pronounced on the exception they might have appealed to this House. The statute, however, expressly provides, that if in this case a new trial shall not be applied for, the verdict shall be final and conclusive as to the facts found by the jury, and shall be so taken by the Court of Session in pronouncing their judgment, and shall not be liable to be questioned anywhere. That is the express provision of the statute. Of course, therefore, the facts cannot be questioned here. As the claimants were found not to be heir and next of kin, the Court of Session were bound to repel their claim. The order followed of course. There was nothing for the Court to decide—certainly not any point of law. If the Court had pronounced a judgment in point of law, as applicable to, or arising out of, the finding by the verdict, then, by the express provision in the statute, the claimants might have appealed to this House, and, of course, the facts found might have raised a question of law to be decided by the Court.

In *Cleland* v. *Weir*, 6 Bell's Ap. 402, which is a considerable authority for the respondents, it was treated as clear, that as no motion had been made in the Court below for a new trial, the verdict stood, and the facts there found must be considered as having been established; and the only point which this House considered open was, whether the facts found by the verdict of

the jury, established, in point of law, that the party was wrongfully in possession of the property. In the present case an appeal would be an absurdity; for, as the facts are conclusively found, and as the facts constitute the whole case, there is nothing left to argue upon or to decide. This House must, as of course, dismiss the appeal, with costs.

The appellants relied upon *Irvine* v. *Kirkpatrick*, 7 Bell's Ap. 86, but it was there distinctly laid down, that this House had not anything to do with the question as to how the Court thought fit to deal with the case, first, in ordering the trial; and next, on the motion for a new trial. We were confined to the judgment finally pronounced setting the deeds aside. There the judgment acting on the verdict did raise serious questions of law or relevancy. But, of course, this House has not permitted an appeal from interlocutors directing a trial by jury, or granting a new trial, as appears from the note to *Balfour* v. *Lyle*, 2 Sh. & M'L. 12.

I do not think that any authority was quoted, which would sustain the appellants' case. A satisfactory explanation was, I think, given at the bar, by the Dean of Faculty, of *Galbreath's case*.

I have hitherto assumed that the finding of the jury was against the appellants. But it is objected, that it is vague and inoperative, because it finds that the case of the pursuers is not proven. I shall presently consider whether that objection is well founded, but I will now assume that the verdict is vague and uncertain. Still, my Lords, in my opinion, no appeal to this House lies in this case, for the appellants' only possible remedy was a new trial. Clearly they might have applied for a new trial in the Court below on this very ground of vagueness and uncertainty (and so, indeed, my noble and learned friend who spoke last expressly stated); for if the verdict was vague and uncertain, that was manifestly "a ground or cause essential to the justice of the case," and therefore sufficient to authorize an application under the statute for a new trial, and the parties could not abandon the right conferred on them by the statute and come to this House, whose jurisdiction in such a case is, as it appears to me, excluded.

If I am mistaken in all these views, still it remains to inquire, whether the verdict is open to the objections made to it, and I think that it is not. It should be borne in mind that the Court of Session is a Court of law and equity. The inquiry in this case before the jury was to satisfy the mind of the Court, and if that purpose was accomplished the object was effected.

The process in Scotland was an action of multiplepoinding for the distribution of the estate of John Morgan, deceased. There were various claimants; they were directed to prepare and lodge in process such issues as they considered proper to try the question. The issues proposed by Alexander and James Morgan, which, they state, were originally given in in the name of James Morgan alone, were, first, whether Alexander was heir to John Morgan; and, secondly, whether James was, along with Alexander, next of kin of John Morgan. Of course the original questions must have been confined to James, then the sole claimant under this title. To these issues no objection was raised, and the record was closed. Alexander, who was supposed to be dead, then came forward and claimed as elder brother of James, and as the brothers were agreed as to their respective rights, instead of Alexander making a separate claim, so as to render it necessary to make a new record, he adopted the proceedings of James, and accordingly Alexander and James lodged a minute, in which their respective claims were set forth as heir and next of kin. And Alexander adopted the proceedings of James with that explanation, and James restricted his claim to one for the personal estate. This minute was acted upon by the Lord Ordinary, and the record was finally closed. The Lord Ordinary postponed the consideration of the issues until the proceedings for trying the propinquity of Alexander were further advanced. Alexander and James presented a reclaiming note against this delay, in which they introduced an expression which has since led to some difficulty. They prayed the Court of Session to "adjust the issues and give all other necessary directions for trying the cause"—treating their claim, as it really was, as one common subject. The Inner House accordingly approved of the issues as then adjusted, and appointed them to be the issues "for trying the cause of the said Alexander and James Morgan," thus adopting the very expression of those parties. The interlocutor authenticating the issues was headed, "Issues for Alexander Morgan, &c., and for James Morgan, &c., pursuers of the same." The jury, after a trial of the issues, which lasted four days, before the Lord Justice Clerk, found that "the case of the pursuers is not proven." Instead of applying for a new trial they allowed the time to elapse, and then moved the Court to set aside or discharge the verdict, or to refuse to apply it or to arrest judgment. This was simply an attempt to do indirectly what an Act of Sederunt prevented them from doing directly, viz., to apply for a new trial. For if the Court set aside or discharged the verdict, or refused to apply it, or arrested judgment, a new trial must necessarily have followed. The only object of the order asked was to render a new trial necessary. The appellants having failed to establish their alleged descent during a four days' trial, could ask nothing more than a new trial, and if they could not obtain that, the order which they actually prayed for would if granted have been of no use to them. The Court applied the verdict, and repelled the claim of Alexander and James, and decerned, and thereupon the present appeal was presented.

The main objections to the proceedings were, as I have already observed, overruled by your

Lordships at the close of the argument. The appellants in their appeal case say a further point is—what is, the meaning, nature, and effect of the verdict? It was argued, that the verdict was vague and uncertain, as it was a verdict of "not proven," and not a direct plain answer to the question. In answer to this objection it was shewn by many cases, that even in civil cases a verdict of "not proven" was frequently returned, and was perfectly understood; and the authorities shewed, that it is not necessary that the verdict should be plain "yes" or "no," or finding the negative or affirmative in the words of the issue.

I have already explained to your Lordships that the verdict was to inform the conscience of the Court. They must, of course, as a Court of Law, apply the verdict. But in granting or refusing a new trial, they have not only to consider the abstract propriety of granting a new trial, but, having the whole case before them, they are enabled to judge how far a new trial is requisite, in order to enable them to decide in the process, which of the claimants are really entitled to the property.

Now the Judges of the Court, who understand Scotch law and practice better than I can pretend to do, entertained no doubt about the import of the words "not proven." The Lord Justice Clerk, who tried the issues, was of opinion that the jury did what was quite right, and returned a verdict which met the issues, for they "find the case for the pursuers not proven." He did not see how the Court could look at the verdict otherwise than as having upset the claim of the pursuers as made. Observations were made at the bar upon the opinion of the Lord Justice Clerk, which I do not think well founded. Lord Cockburn thought that in the issues and verdict they had a distinct question put and answer given. The jury did not think that the parties were the next of kin, and they might express the fact in any plain language—in any suitable intelligible language they thought proper. Well, they find the case for the pursuers "not proven." What better language than this could have been employed he did not know—there was no ambiguity whatever—a plain suitable answer was given to a simple question. The predominating feeling in his mind had been that of wonder, on what principle the pursuers could reasonably resist the application of the verdict. Lord Murray concurred, and Lord Wood agreed with Lord Cockburn, that a more appropriate answer to the issues could not be; indeed, so appropriate an answer he did not see. The only thing in the issues was the case of the pursuers, and the jury have found it not proved. It was as plain a case as could be.

After these opinions it is not to be expected, that your Lordships should profess to understand the verdict better than the Scotch Judges, or rather not to understand it, on account of its alleged vagueness and uncertainty.

But then it was objected, that the verdict was bad, as it was not a distinct finding on each issue, but was, that "the case of the pursuers was not proven;" for it might be, that they thought that one issue was not proved although the other was, and thus the whole case would not be proved although a portion of it was. Now this objection, in my opinion, is wholly untenable. One of the learned Judges below thought, that the jury had intended to follow the terms of the clerk who made up the issue papers, and who used the expression "the cause," and he thought "the case" a better expression. They, no doubt, are synonymous, but, as I have already pointed out, the expression is applicable to the whole claim. The expression "the cause," was introduced into the record by the appellants themselves, and they should not complain of the jury for using in effect the same terms.

We have still to consider whether the objection is well founded. I am clearly of opinion that it is not. The issues furnished by the appellants, and ordered by the Court, and which the appellants undertook to prove in the affirmative, must, I think, be treated as their case put to the jury, just as much as if the issues had been directed in the English form. The case of the appellants was, in truth, one issue. Although as between themselves, for the sake of form, it was divided into two, as between them and their opponents there was but one question—did they belong to the pedigree? which was denied They were sons of the same father, which was not disputed, and they were agreed which was the elder of the two. If one were entitled as heir, the two were entitled as the next of kin. If the two were entitled as the next of kin, the elder was entitled as heir. The sole question was—whether their father filled the character which they represented? It was not a question who might be heir and next of kin under other circumstances, but taking their claim to be as they set it forth on the record, and undertook to prove it, and went to the jury upon it, there was in substance but one question. If their claim was made out, they excluded all the other claimants: and this, of course, was the reason, why they were compelled to try their right before any of the other parties. They themselves, as I have shewn, treated their claims as one. Originally the record was closed as upon the single claim of James as heir and next of kin. When Alexander was allowed to adopt the proceedings, the real question to be tried was not varied; and so the appellants thought, for they asked and obtained leave for the immediate trial of the issues in the cause.

Upon the whole case, I think it clear that the verdict was free from ambiguity. It is not now a question, which was elaborately, but unnecessarily, I think, argued at the bar, whether the jury could look beyond the issues, because your Lordships, like the Court of Session when they

applied the verdict, have the whole case before you. It is reduced to a question of form. It is not one of substance. The appellants do not complain of any admission of improper evidence, or rejection of proper evidence, or of any misdirection of the Judge, nor do they allege that they have any further evidence, to establish their claim, or that they now claim in any other character. The effect of a reversal of the interlocutors would be to set aside all the proceedings in the Court below, and, without a shadow of merits, to allow the appellants to begin again, or, in other words, to permit a new trial; and, indeed, my noble and learned friend on the woolsack has proposed to direct the Court of Session to order a new trial. This appears to me contrary to the express provisions of the Scotch Judicature Acts, and to be rather an act of legislation, and it cannot fail to embarrass the Scotch Judges in the administration of justice.

I ought, perhaps, to notice the last ground of appeal, which referred to expenses. They do not constitute a sufficient ground of appeal, but they appear to be very large, and they were much increased by the different classes of defenders, whom the Court allowed to oppose the pursuers. This, clearly, was not necessary; and I do trust that the Court of Session will in future cases avoid a practice which is an abuse, and tends to the unnecessary increase of the expenses of litigation.

I must necessarily say "not content" to the motion of my noble and learned friend in this case. I never was more clearly of opinion upon anything in my life than I am in this case, that these interlocutors ought to be affirmed.

Solicitor-General.—My Lords, before the question is put, will your Lordships pardon me for a moment in suggesting, that all that your Lordships will do will be to reverse the interlocutor applying the verdict, and remit the cause, and that you will not say anything at all about a new trial.

LORD CHANCELLOR.—I will state what I propose to do. The appeal is against 17 interlocutors. I do not propose, that there shall be any reversal except upon the two last—the one applying the verdict, and the other, consequential upon it, directing the taxation of costs. What I propose to do would be to declare, that the verdict is uncertain, inasmuch as it does not shew whether the jury thought that the pursuers had failed in proving both the issues, or only one of them, and that there must be a new trial; and with this declaration to reverse the interlocutor of 23d November 1853, and of 15th February 1854, and remit the case to the Court of Session.

Solicitor-General.—My Lords, with great submission I would suggest to your Lordships that that would not be the form, because, with regard to directing a new trial, or making any declaration respecting it, I apprehend that that would not fall within the province of this House, but that we should adopt the course which the House directed in the case of *Marianski*, namely, that we should apply to the learned Judges below to alter the entry of the verdict. That was very much considered by the House in *Marianski's case.* There the late Lord Chancellor, Lord Truro, said that it was a mere misentry of the verdict, and that the course to be followed in such a case was perfectly well known, namely, that, perceiving the verdict to be inapplicable to the issue from its uncertainty and ambiguity, he referred the case to the Judge who tried the cause, that a verdict might be entered according to the substance of the actual finding. That case came before your Lordships recently, the present Lord Chancellor presiding, and that course was fully approved, and accordingly the House made an order in conformity with it.—See *Marianski* v. *Cairns*, *ante*, pp. 146, 416; 1 Macq. Ap. 212, 766; 24 Sc. Jur. 579; 26 Sc. Jur. 635.

LORD CHANCELLOR.—I do not mean to prejudice the case, and therefore I will strike out that, and declare that the verdict is uncertain, inasmuch as it does not shew whether the jury thought that the pursuers had failed in proving both the issues, or only one of them; and with this declaration reverse the interlocutors of 23d November 1853, and of 15th February 1854, and remit the case to the Court of Session.

Lord Advocate.—With submission, the case of *Marianski* has no application at all. Might I suggest, in the first place, that the Court should have power to vary the issues, because it is quite plain that, if these parties, the Crockets, were to appear, the issues would not be applicable to their case?

LORD CHANCELLOR.—I see nothing wrong in the issues.

Lord Advocate.—What I mean is this, that the Court should have power to vary the issues, to the effect of enabling us to put in the issue "one of the next of kin," or "among the next of kin."

LORD ST. LEONARDS.—For that you must apply to the Court below.

Lord Advocate.—One observation more. I would suggest to your Lordships, that in this case, looking at the state of the parties and the fund, the costs might properly be paid out of the fund, as in the case of the *Watsons.*

LORD ST. LEONARDS.—Certainly not. That would only be to encourage litigation.

LORD CHANCELLOR.—We do not know anything about the merits. The appeal as to the other interlocutors will be dismissed.

Lord Advocate.—Your Lordships will reserve to the Court below to deal with the costs?

Solicitor-General.—That follows as a matter of course. There is no necessity for that.

LORD CHANCELLOR.—Everything is reversed since the verdict.

LORD BROUGHAM.—Consequently the interlocutor giving costs in the Court below is reversed.

The following was the *order* of the House of Lords made in the case :—" Declared, that the verdict returned by the jury on the trial of the issues in the pleadings mentioned is uncertain, inasmuch as it does not shew whether the jury considered that the pursuers (appellants) had failed in proving both the issues, or only in proving one of them: And it is ordered and adjudged, that the said interlocutors of 23d November 1853 and 15th 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 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."

Appellants' Agents, Shand and Farquhar, W.S.—*Respondents' Agents*, Webster and Renny, W.S., and Adam and Kirk, W.S.

AUGUST 13, 1855.

THE BLAIR IRON CO., *Appellants*, *v.* ALEXANDER ALISON, *Respondent.*

Bill of Exchange—Liquid ground of Debt—Compensation—Authority of Manager to Sign Bills—Trading Company—*An action for payment, proceeding on a liquid ground of debt, (a bill of exchange,) having been brought by the payee against a mercantile company, it was met by the defence of want of authority on the part of the company to grant the bill, of want of consideration, of fraud, of payment, and of compensation.*

HELD (affirming judgment), *That* (1) *as the company's deed authorized A the manager to sign bills, and as A and a director signed this bill, it bore sufficient evidence of authority.* (2) *that as the fraud of the drawer alleged was subsequent to the pursuer becoming the bonâ fide holder of the bill it was no defence.* (3) *that an illiquid counter claim against the pursuer was no defence.*[1]

This was an action for payment of a promissory note for £1120, and a bill of exchange for £5000, the former made by two directors of the Blair Iron Co., and the latter accepted by them as the directors of the Ayrshire Malleable Iron Co., which was amalgamated with the Blair Company.

Various defences were set up, all of which are noticed in the interlocutor of the Second Division, 22d June, 1853, as follows:—" The Lords having advised the reclaiming note for Alexander Alison, and heard counsel, and having resumed consideration of this case, which the parties arranged should be disposed of in the Inner House, find that, on the statements and admissions made on record, it must be taken, in a question with the defenders, that the bill libelled on for £1120, for the value admitted to have been actually received by the Blair Iron Co., was validly signed by Alexander Alison, junior, on behalf of, and with authority from, the said Blair Iron Co., and is binding on said company: Find that no valid defence has been stated against the payment of said bill: Find that the defenders represent, and are liable for, the debts and obligations of the said company; therefore, find the pursuer entitled to enforce payment of the said sum of £1120, with the legal interest thereon from and after 21st January 1848, and decern for the said sum and interest; allow said decree to go out as an interim decree: Further, as to the bill of £5000 libelled on, find that authority was expressly given by the defenders, the partners of the Blair Iron Co., to Alexander Alison, junior, who, it is admitted by them on record, took the chief management of that business and of the subsequent Ayrshire Iron Co., to grant to the pursuer, in return for, and as the consideration of, a discharge of his real security for £23,000 over the lands of Pitcon, bills for the several sums of £5000, £5000, £3000, and £10,000 respectively: Find that bills for the said several sums were accordingly granted on behalf of the said company by the said Alexander Alison, junior, and that the said company received a discharge in their favour of the said real burden over the said estate, and thus became bound to pay the said sum of £23,000: Find that the bills for the said sums of £5000, £5000, and £3000, were paid out of the funds of the said company, in satisfaction of the bills for the same: Find that the defenders have not averred, and have not proved, that the bill for the sum of £10,000 was paid by them, or on their behalf: Find that the said bill remained in the possession of the pursuer, and has been produced by him; and although, when produced, it exhibits the acceptance cancelled, yet it has also on it a marking by the creditor that the said bill for £10,000 was exchanged for two bills of £5000 each: Find that it is admitted on record that one of the said

[1] S. C. 27 Sc. Jur. 614.