a speculative one; whether it has turned out a good or a bad bargain for Dick, Kerr, & Company there is no evidence to show.

Further, in considering the probability or improbability of any such fraudulent scheme having been entered into, it appears to me that it would have been a very improvident arrangement for the Assets Company to have entered into on the assumption that the contract price was an extravagant one. The agreement for the purchase of the assets of the Cable Corporation by Dick, Kerr, & Company was contingent on a very doubtful event—that the sanction of the Court should be obtained to it, and this sanction had not been obtained on the 15th June, when the agreement sought to be reduced was entered into. But this agreement was not contingent on sanction being obtained to the agreement of 22ndMay, so that it was very probable that the Assets Company might have been left with the Cable Corporation assets in their hands, and have still been bound to pay the contract price under the agreement of 15th June, to their own loss as shareholders of the Tramways Company.

It does not appear to me to be probable that so acute an agent as Mr Brown would bave advised the Assets Company to embark in a scheme likely to lead to such a result. I can see no evidence of fraud with reference to the agreement of 15th June.

But it is further maintained by the pursuer that the agreement of 15th June was entered into by directors who held their qualification in trust for and were under the control of the majority of the shareholders of the company, with said holders for their benefit, and to the prejudice of the company, and that therefore the agreement is null and void, or at least voidable. It is true in point of fact that the directors were the nominees of the Assets Company and were under their control, and that the agreement was entered into for their benefit; but it was for their benefit only because they were shareholders of the company, and because it was believed to be a contract for the benefit of the company. It is clear that the interest of the Assets Company and the Tramways Company in this matter was identical. Whatever was for the benefit of the shareholders of the company was for the benefit of the company.

The directors were in no way under the control of Dick, Kerr, & Company, and were not contracting in their interest.

Moreover, the agreement has since been confirmed by the company at a general meeting, and if, as I think, there is no fraud in the matter, that is conclusive.

The only other matter that requires to be referred to is the plea that the contract is *ultra vires* of the company because it did not form the subject of competition. This plea is founded on a clause in a contract between the Lord Provost, Magistrates, and Town Council of Edinburgh and the promoters, and which is confirmed by the incorporating Act, to the effect that all the works to be executed should form the subject of competition and contract. I concur with Lord Kinnear and the Lord Ordinary in thinking that this is a stipulation which can only be enforced by the parties to that contract, and that the pursuer has no title to insist in it.

On the whole matter, I am of opinion that the Lord Ordinary's interlocutor ought to be affirmed.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer—H. Johnston—Ure. Agents—A. & G. V. Mann, S.S.C.

Counsel for the Defenders — Graham Murray—C. K. Mackenzie. Agents — Graham, Johnston, & Fleming, W.S.

Wednesday, December 17.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

FLORENCE *v.* MANN.

Process—Jury Trial—Verdict—Ambiguity in Verdict—Reparation—Contributory Negligence.

In an action of damages for personal injury a jury returned as their verdict, "Find for the pursuer, but in respect of there being contributory negligence on the part of the pursuer, assess the damages at £300." Thereafter each of the parties moved in the Inner House to have the verdict set aside and a new trial granted, and also moved before the Lord Ordinary, who had presided at the trial, to have the verdict applied, the pursuer claiming decree for the damages found due, and the defender decree of absolvitor. The Lord Ordinary reported these motions to the Inner House, in respect of the motions for a new trial there pending. *Held* that the verdict, being either ambiguous or contrary to law, could not be applied as a verdict in favour of either party, and that it must therefore be set aside and a new trial granted.

This was an action of damages against the lessee of a hotel at the instance of a person who alleged that while in the hotel on business he was injured by falling into a hoist therein through the defender's fault.

Upon 20th June 1890 the First Division of the Court approved of this issue—"Whether, on or about the 29th day of July 1889, in the Palace Hotel, Aberdeen, the pursuer was injured in his person by falling down the space through which the lift is propelled in said hotel, through the fault of the defender, to the loss, injury, and damage of the pursuer? Damages laid at £2000."

The case was tried upon the issue as thus approved before Lord Ordinary (KYLLACHY) and a jury upon 16th and 17th October 1890, and upon the latter day a verdict was returned, the material part of which was in the following terms—"Find for the pursuer, but in respect of there being contributory

negligence on the part of the pursuer, assess the damages at £300."

Both parties moved in the Inner House to have this verdict set aside and a new trial granted. Such motions must be made during session within ten days, and the object of each party in the present case was precautionary in case his motion for the application of the verdict in his favour before the Lord Ordinary (which motion can only be made after the ten days have elapsed) should be decided adversely by the Lord Ordinary. The motions were allowed to stand over pending the discussion on the application of the verdict.

Thereafter both parties moved in the Outer House to have the verdict applied and upon 13th November 1890 the Lord Ordinary (KYLLACHY) pronounced this interlocutor—"The Lord Ordinary having considered the motion of the pursuer to apply the verdict and decern for the damages found due, and the counter motion of the defender to enter the verdict as a verdict for the defender, and to apply the same by granting decree of absolvitor, in respect it is stated that both parties have applied to the First Division of the Court to set aside the verdict and grant a new trial, Reports the said motions to the First Division of the Court, and grants warrant to enrol in the Inner House rolls."

"*Note.*—The Lord Ordinary has difficulty in dealing with these motions to apply the verdict while an application to set aside the verdict is pending in the Division. There might not perhaps be the same difficulty in his merely construing the verdict, and entering it up for one party or the other, but in the circumstances he has thought it better to report the matter with his opinion.

"After hearing counsel and giving full weight to the argument adduced for the pursuer, he is unable to read the verdict otherwise than as a verdict for the defender. Taking it by itself, and without reference to what the Lord Ordinary knows of the evidence, it cannot, it is thought, be doubted that the imputation of contributory negligence to the pursuer is *prima facie* fatal to the pursuer's case, and although it may be the Court's duty in construing such a verdict to reconcile if possible its different parts, the Lord Ordinary does not himself know of any proper or received sense in which contributory negligence could in such a case be imputed to a pursuer consistently on the one hand with a verdict for such pursuer, and on the other hand with a reduction of damages in respect of such contributory negligence.

"Nor would the result be different if the Lord Ordinary were to apply to the construction of the verdict his knowledge of the evidence. No view of the facts occurs to him upon which the jury could legitimately have found against the pursuer on the question of contributory negligence, and at the same time given him a verdict. It is not, the Lord Ordinary thinks, possible to represent the finding as amounting merely to this, that the pursuer might by extraordinary caution have avoided the accident. Negligence implies want of ordinary caution, and this the jury quite understood. Neither was the case one in which there was any suggestion that the accident, being due to the sole fault of the defender, the injury was aggravated by some fault of the pursuer. In that case the verdict might not have been appropriate, but it might have been understood. Nor, again, is it possible to represent the case as one of the class of cases of which *Davis* v. *Lamb*, 10 M. & W. 546, and *Radley* v. *Great Western Railway*, L.R., 1 App. Cas. 754, are the best known examples; cases, viz., where the operative and proximate cause of injury being the fault of the defender, there is at the same time some antecedent or initial fault on the part of the pursuer. There was nothing of the sort suggested. Altogether the case was, in the Lord Ordinary's opinion rather one where the affirmation of contributory negligence on the part of the pursuer really negatived any fault—that is to say, any operative fault on the part of the defender.

"For these reasons the Lord Ordinary, if he had fallen to pronounce judgment, would have entered up the verdict for the defender, and in respect thereof would have pronounced decree of absolvitor."

The case accordingly came before the First Division upon the report of the Lord Ordinary for discussion, when the following cases were referred to—*Macnaughton* v. *Caledonian Railway Company*, December 17, 1858, 21 D. 160; *Davis* v. *Lamb*, 10 M. & W. 546; *Radley* v. *Great Western Railway Company*, L.R., 1 App. Cas. 754; *Woods* v. *Caledonian Railway Company*, July 8, 1886, 13 R. 1118; *Moffat & Company* v. *Park*, October 16, 1877, 5 R. 13; *Walton* v. *London, Brighton, and South-Western Railway Company*, 1866, Harrison & Rutherfurd's Rep. 424; *Smith* v. *Dobson*, 1841, 3 Manning & Granger's Rep. 59; Pollock upon "Torts" (2nd ed.), p. 400, *et seq.*

At advising—

LORD PRESIDENT—The verdict in this case is expressed in these terms—"Find for the pursuer, but in respect of there being contributory negligence on the part of the pursuer, assess the damages at £300." Now, of course in construing this verdict a great deal depends upon what the jury meant by the words "contributory negligence," and we must take it, I think, for granted that they were well instructed as to the proper meaning of the words in point of law. There was apparently evidence to go to the jury upon the fact of contributory negligence, and there is no complaint made of the way in which the case was left in the hands of the jury by the presiding Judge.

Now, I think the meaning of these words is well settled in our law, and I do not know of any better exposition of the doctrine of contributory negligence than that given by Lord Wood in the case of *M'Naughton* v. *The Caledonian Railway Company*, in these words—"The fault must be such as to have directly conduced to the

injury suffered, and not merely remotely connected with it, for in that case it is not to be considered as contributing to the injury within the principle that fault or negligence on the part of the individual injured shall afford a good answer to a claim by him for damages against a defender who has also been guilty of fault or negligence. The fault by the injured party, when only remotely connected with the accident, is to be, as it were, discounted from the case. In a legal view it, in the question of the abstract right to damages, forms no part of the case—the negligence of the defenders alone being held to have caused the injury —whatever weight it may be entitled to in assessing the amount of the damages. But, on the other hand, if, while there was fault on the part of the defenders directly conducing to or causing the injury, there was at the same time fault on the part of the individual injured, by rashness or want of care which he was bound to exercise, or in any other way which also directly contributed to the injury, then damages cannot be recovered by him."

Taking the words "contributory negligence" in the sense thus expressed, the question is, what does the verdict mean? and if it means, as I think it plainly appears to import, that "in respect of contributory negligence on the part of the pursuer" the jury reduced the damages to £300, the verdict is bad in law, for the jury were not entitled after finding contributory negligence to bring in a verdict for the pursuer at all, and they were just as little entitled, after finding for the pursuer but that there was fault on both sides, to reduce the damages in respect of his contributory negligence. If the verdict, on the other hand, means anything else, I am quite unable to say what it does mean, and the conclusion therefore at which I arrive is, either that the verdict means something quite inconsistent with the law applicable to the case, or that it has no intelligible meaning at all —in other words, it is tainted by a fatal ambiguity, and the consequence is that it must be entered up for neither party.

There is no doubt that a very slight variance in the form of the verdict might have made a great difference in its effect, and enabled the defender to claim it as a verdict for him. Suppose, for example, the jury had found that the pursuer was injured by the fault of the defender, and that the injury was also caused by the contributory negligence of the pursuer, and assessed the damages at £300, that would have been quite an intelligible verdict. It would have been what is called a special verdict finding two matters of fact, and assessing the damages contingently upon the verdict being entered up for the pursuer, but it would have been left to the Court to decide whether it should be entered up as a verdict for the pursuer or for the defender. We would have had two substantive findings—first, that the defender was in fault, and second, that the pursuer was in fault, and that both faults contributed to the injury. The law applicable to such a verdict is not doubtful, and the pursuer could not recover damages under it, but the verdict in itself would be good. Observe, however, the difference between such a verdict and the present. The jury do not assess the damages contingently upon the verdict being entered up for the pursuer, but they assess at such a rate as they conceive to be proper in view of the fact that the pursuer's own fault contributed to the injury he suffered. But the legal consequence of the pursuer's contributing to the injury is that no damages are due to him at all. I think it is clear that the jury did not understand the nature and effect of contributory negligence, although they were well instructed by the presiding Judge upon the matter, and I therefore think we should set aside the verdict and direct a new trial.

LORD ADAM concurred.

LORD M'LAREN—It seems to me that the argument on the construction of this verdict resolves into a logical dilemma, which is the result of the jury having found the pursuer guilty of "contributory negligence." Either these words were used in their ordinary and legal signification, or they were used in some different sense, which the jury has failed to explain.

In the first alternative the verdict is void as being contrary to law; in the second alternative it is void for uncertainty or ambiguity. I need say no more, except to express my concurrence in the reasons given by your Lordship for setting aside this verdict.

LORD KINNEAR concurred.

The Court refused to enter up the verdict for either party, and remitted the cause to the Lord Ordinary for a new trial.

Counsel for the Pursuer—Comrie Thomson—Watt. Agent—Andrew Urquhart, S.S.C.

Counsel for the Defender—D. F. Balfour —Sym. Agents—Auld & Macdonald, W.S.

Thursday, December 18.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

DUKE OF SUTHERLAND *v.* REED AND OTHERS.

Property — Declarator — Res judicata — Effect of Judgment in Sheriff Court — Forum non conveniens—Crofters Holdings (Scotland) Act 1886 (49 *and* 50 *Vict. c.* 9), *sec.* 21—"*Questions Relating to Boundaries.*"

An action of interdict and removing was brought in the Sheriff Court by a proprietor against certain crofters upon his estate to have them prevented from pasturing their cattle and sheep upon a stretch of hill pasture belonging to the proprietor but let to another