should be altered so as to increase the powers of the company. That could only be done in one way—by the passing of a resolution at an extraordinary general meeting of the company, and the confirmation of that resolution at a subsequent extraordinary general meeting called for the purpose. Now could any procedure be taken under that resolution until the second meeting was held? I do not think it could, and I think that the illustration which I suggested at the discussion tests the matter very well. Suppose that at the first meeting, when the resolution to reduce capital was put to the meeting, a shareholder had objected that it was incompetent because the resolution altering the articles of association had not been confirmed and therefore the power did not exist, would there be any answer to his objection? I can see none, and under these circumstances I am afraid that the changes which this company desires to carry out must be obtained by more regular procedure than has been taken as disclosed in the report.

LORD ARDWALL — I am of the same opinion. I was at first disposed to pass from the objection taken by the reporter on the grounds ingeniously suggested by Mr Watson. But on considering the question in view of the terms of the Companies Act, I have come to the same conclusion as your Lordship as to the inadvisability of confirming the reduction of capital alleged to have been authorised by the third resolution mentioned in the petition. I do not think it would be safe to sanction a practice which is not in strict accordance with the Companies Acts, as that might prove a very dangerous precedent in other cases.

LORD DUNDAS concurred.

LORD LOW was absent.

The Court continued the petition.

Counsel for the Petitioners—Hon. W. Watson. Agents—Auld & Macdonald, W.S.

Friday, July 8.

SECOND DIVISION.

SPRING *v.* MILNES (MARTIN'S TRUSTEES) AND OTHERS.

Process—Jury Trial—Reduction of Will—Issues of Incapacity and of Facility and Circumvention—Verdict for Pursuer on both Issues—Inconsistency—Application for New Trial.

In a reduction of a will two issues were sent to a jury, namely—(1) whether the will was not the deed of the deceased; and (2) whether the deceased was weak and facile and easily imposed upon, and whether the defender did by fraud or circumvention impetrate the will from the deceased, to his lesion. The jury found for the pursuer on both issues. On a motion for a new trial, the Court, being of opinion that there was evidence to support the verdict on the first issue, but no evidence to support it on the second, *held* that the verdict was inconsistent and must be set aside, and *granted* a new trial.

Robert Spring raised an action against James Milne and George Milne and others concluding for reduction of a trust-disposition and settlement, bearing to have been executed by the late William Martin on 24th November 1896, and a codicil thereto bearing to have been executed by him on 18th January 1897, under which settlement and codicil the defenders James Martin and George Martin were trustees and the other defenders beneficiaries.

The case was sent to trial on the following issues:—"1. Whether the pretended trust-disposition and settlement, dated 24th November 1896, and the pretended codicil dated 18th January 1897, are not the deeds of the late William Martin? 2. Whether on or about 24th November 1896 and 18th January 1897 the late William Martin was weak and facile in mind and easily imposed upon, and whether the defenders, Mrs Agnes Martin or Milne and James Milne, or one or other, and which of them, taking advantage of the said William Martin's weakness and facility, did by fraud or circumvention impetrate from him the said trust-disposition and settlement and the said codicil,—to the lesion of the said William Martin?"

The case was tried before Lord Ardwall and a jury on 23rd, 24th, 25th, 26th, 27th, and 30th November 1909.

The jury found "by a majority for the pursuer on both issues."

The defenders moved for a rule on the pursuer to show cause why a new trial should not be granted, on the grounds that the verdict was (1) inconsistent, and (2) contrary to evidence.

The motion having been granted, the pursuer argued at the hearing:—The verdict could not be set aside on the ground of the alleged inconsistency—*Morrison* v. *M'Lean's Trustees*, February 27, 1862, 24 D. 625; *Scott's Trustees* v. *Bannerman*, January 12, 1848, 10 D. 353; *Scrimgeour* v. *Ker*, December 13, 1836, 15 S. 245. A verdict on the first issue did not require that the deceased be insane, but merely incapable of granting the particular deed. It might well be that the deceased was destitute of the requisite capacity to make the particular deed in question and at the same time that the defenders were guilty of fraud or circumvention. If there was such conduct on the part of the defenders as would warrant a verdict on the second issue, and if the deceased's state of mind was such as was required for a verdict on the first issue, then the fraud or circumvention on the part of the defenders was all the more palpable—*per* Lord Gillies in *Scrimgeour* v. *Ker*, *cit.* It might be true that in that case, as another report in 12 8vo. Fac. Coll. 229 seemed to suggest, the defender admitted that he could not impugn

the verdict on one of the issues, but that simply placed him in the same position as the defenders here would be in if the Court held that there was evidence to support the verdict on the first issue. Further, if the jury were of opinion that the will ought to be reduced because, firstly, they thought that the deceased was incapable of making the will, and secondly, in any event they were satisfied that the defenders had been guilty of practices amounting to fraud or circumvention, that was a perfectly logical view, and could receive effect only by returning a verdict for the pursuer on both issues. Even if there were any presumption against such a verdict as the jury had here returned, that presumption might be overcome—*M'Kellar* v. *M'Kellar*, December 6, 1861, 24 D. 143—and it had been overcome here. Alternatively, if the verdict could not stand then the Court might set it aside on the second issue only—*Hastie & Company* v. *Johnston*, February 17, 1848, 20 Sc. Jur. 244. Though in that case a new trial was granted, that need not be done here, because here a verdict on either issue involved the reduction craved, while in that case the pursuer could not succeed unless he got a verdict on all the issues. It would therefore be competent to set aside the verdict on the second issue only and apply it on the first. Counsel also argued that there was evidence to support the verdict on each of the issues, and cited *Toronto Railway Company* v. *King*, 1908, A.C. 260; *Cooke* v. *Midland Great Western Railway Company of Ireland*, 1909, A.C. 229; *Clunie* v. *Stirling*, November 15, 1854, 17 D. 15, at p. 18; *Morrison* v. *M'Lean's Trustees*, *cit.*

Argued for the defenders—The verdict was clearly inconsistent and could not stand. The two questions put by the issues must be kept wholly separate, and an affirmative answer could not be returned to both—*Jaffray* v. *Simpson's Trustees*, December 19, 1833, 12 S. 241; *Dewar* v. *Mackay*, July 18, 1836, 14 S. 1132; *Scott's Trustees* v. *Bannerman*, March 22, 1847, 9 D. 1052, *per* Lord Robertson at p. 1055; *Morrison* v. *M'Lean's Trustees*, *cit. per* Lord Justice-Clerk Inglis at pp. 628, 638, Lord Cowan at p. 648. A verdict on the first issue involved that the testator had no mind at all, that on the second that he had a mind which had been worked upon by the defenders so as to obtain the deeds challenged. A verdict for the pursuer on both issues was therefore illogical, and indicated that the jury had not understood the case, and the presumption against such a verdict had not been displaced—*M'Kellar* v. *M'Kellar*, *cit.* The two reports of the case of *Scrimgeour* v. *Ker* were not without discrepancies, and it seemed that the ground of the decision there was that a new trial would not avail the defender because he conceded that he could not impugn the verdict on the second issue. If the verdict was inconsistent, then a new trial must be granted. That new trial must be on both issues, and not merely on one, as in *Hastie & Company* v. *Johnston*, *cit.*, where the Court were of opinion that there was evidence to support the verdict on two of the issues. To set aside the verdict *quoad* one issue and apply it *quoad* the other would be amending the verdict, which was not competent—*Morgan* v. *Morris*, 1853, 3 Macq. 323. Counsel also maintained that there was no evidence to support the verdict on either issue.

At advising—

LORD DUNDAS — I am of opinion, as I understand all the members of the Court are, that in the voluminous print before us there is no evidence to warrant a verdict for the pursuer on the second issue. It is not to my mind a question of balancing testimony for and against the case propounded; I think there is no evidence at all to support this issue. As regards the first issue, I think, as I believe your Lordships do, that there is evidence in support of it upon which the jury might proceed, so that if that issue stood alone we could not properly interfere with the verdict returned under it, whether or not one may agree as to its soundness. A question of considerable general importance is thus raised sharply for decision, whether a verdict for the pursuer upon both issues can be allowed to stand. I am clearly of opinion that, as we hold that there is no evidence at all to warrant a verdict on the second issue, the question must be answered in the negative. The issues are in common and familiar form; they are really alternative issues, or at all events inconsistent with each other, and an affirmative answer to both is a logical absurdity. The mental conditions postulated by the two issues could not co-exist in fact in any human being at one and the same time. The first issue assumes the absence of a disposing mind. The second issue assumes the presence of a disposing mind, but in a weak and facile condition, of which the defender took advantage to impetrate the deed by fraud and circumvention. A verdict for the pursuer upon both issues is therefore manifestly illogical. Mr Watt, however, stoutly maintained that such a verdict is good, and that a series of decisions establishes its unassailable validity. I am satisfied that this contention is erroneous. I shall afterwards deal with the decisions referred to. But before doing so it may be useful to note something as to the history of the issues in question and the manner in which they have been treated by Judges in charging a jury. The case of *Jaffray* (1833, 12 S. 241, 6 Scot. Jur. 144) is one of much importance, though the reports are unfortunately somewhat scanty. It seems indeed to mark the genesis of the now familiar issue of facility and circumvention, and to design its appropriate function as distinguished from that of the "general" issue of "not the deed," under which apparently cases involving the subject-matter of both or either of the issues now familiar to us had theretofore been in use to be submitted to juries. Then in *Dewar* (1836, 14 S. 1132), Lord Justice-Clerk Boyle, after explaining to the jury the meaning of the

two issues and the difference between them, said — "You cannot mix the whole together, but will have to make up your minds on the one ground or the other. . . . The two sets of issues are not to be mixed up together except in so far that, if the evidence as to the first should not be sufficient to warrant your finding a verdict on it, that verdict will be a most important element in your consideration of the second." The jury found for the pursuer on the second set of issues. In *Scott's Trustees* (1847, 9 D. 1052) Lord Robertson, in charging the jury, said—"If therefore you find on due consideration of the evidence that at the date in question General Scott had not the 'discerning understanding' and the 'willing mind,' you will bring in a verdict for the pursuers. In this case you will have nothing to do with the second issue. If, on the other hand, you shall not be satisfied of the want of capacity on the part of General Scott, you will then have to consider" the second issue. The jury found for the pursuers on both issues; and the sequel of the case (to be afterwards referred to) is reported in 10 D. 353. In *Morrison* v. *Maclean's Trustees* (1862, 24 D. 625)—the well-known "eagle's nest" case—there were thirteen issues relating to the various deeds sought to be reduced, and falling under three categories, viz. (1) not the deed, (2) facility and circumvention, and (3) imperfect execution. In charging the jury, Lord Justice-Clerk Inglis, after explaining the meaning of an issue under the first of these heads, went on to say (at p. 628)—"The second issue is of a different kind, and it is not, in my opinion, altogether consistent with the first issue. I do not think you could well find in favour of the pursuer upon both issues." His Lordship then read the second issue to the jury, and said—"The second issue differs from the first in this, that it is founded upon an allegation of a certain degree of mental weakness and facility, not sufficient of itself to void the settlement but rendering the testator open to improper practices and solicitation by interested parties. That state of mind is not sufficient to entitle you to return a verdict upon the first issue." The jury, however, found "for the pursuers on all the issues." The result was that a new trial had to be granted. Lord Cowan, who delivered the opinion of the Court, pointed out (p. 647) that "the necessity for this course becomes all the more apparent when the generality of the verdict returned by the jury is kept in view." It is unnecessary to cite further authority for the proposition that a verdict such as we are here considering is one which a jury ought not to return. The decisions upon which Mr Watt relied, and with which I propose now to deal, establish no more than this, that it need not always be set aside, and that the Court may under special circumstances (*e.g.*, when a new trial would lead to no practical difference in result) allow it to stand. The cases are three in number. The first in date, *Scrimgeour* v. *Kerr*, 1836, is reported in 15 S. 245, but a fuller report, which brings out much more clearly the gist of the case, will be found in 12 8vo Fac. Col. 229. Indeed, the report in 15 S. 245, is so obscure as to be almost misleading. The verdict was substantially the same as that now under consideration. The defender moved for a new trial so far as the first issue was concerned, but admitted that he could not successfully impugn the verdict upon the second issue. Lord Gillies was of opinion that in these circumstances "a new trial will be of no benefit to the defender"; that a new trial "ought never to be given where it will lead to no practical result, even though some irregularities or mistakes have been clearly proved"; and that "even on the supposition that the verdict here was so irregular that a new trial ought properly to be granted, if it could lead to any practical result, yet, it being evident that so long as the verdict as applicable to the second issue is held to be in accordance to evidence, a new trial would be of no practical benefit to the defender. . . . I am for refusing the rule unless the defender can show some interest . . . to have the verdict on the first issue altered." The defender's counsel was given an opportunity of maintaining, upon grounds which are explained in the Fac. Col. report, that he had an interest to obtain if possible a verdict in his favour on the first issue from another jury. The pursuer's counsel thereupon lodged in process a minute which completely "annihilated" any interest the defender might otherwise have had to obtain a new trial on the first issue, and the Court accordingly refused the rule. The next case is *Scott's Trustees*, 1848 (already referred to), reported in 10 D. 353, and also (rather more clearly) in 20 Scot. Jur. 120. This was the converse of *Scrimgeour's* case; for the defender, while asking a new trial as regarded the second issue, admitted that the verdict upon the first issue was sufficiently supported by the evidence. The opinion of the Court was delivered by Lord President Boyle, whose views as expressed in *Dewar's* case, as to the necessity of not mixing up the two issues, I have already quoted. His Lordship said — "While the first issue stands, as it does, supported by evidence, it is out of the question to ask a new trial because the second one is not so supported. The inconsistency in the matter cannot be listened to in the circumstances of this case as a ground for setting aside the verdict." Thus both in *Scrimgeour* and in *Scott's Trustees* the defender while asking for a new trial was in the position of having to concede that he must submit to an adverse verdict on the case, because he could not attempt to assail it as regarded one of the two issues. To grant a new trial under such circumstances would have been little better than a solemn farce, the ultimate fate of the case being already determined by the defender's own concession. But in the case before us the position is radically different, for the Court holds in favour of the defenders upon the second issue, and the defenders obviously have a strong interest to obtain if they can a verdict from a new jury in their favour upon

the first issue, which would result in a complete victory for them upon the whole case. The third case cited by Mr Watt—*M'Kellar* (1861, 24 D. 143)—seems to me to afford him no more aid than the two earlier ones. Lord President M'Neill, who delivered the judgment of the Court, proceeded upon a consideration of the special facts and circumstances of the case, with which we have here no concern, to the conclusion that the verdict should stand; but his observations upon the general law and practice may be usefully quoted. "The issues, it is said, are rested upon two separate grounds. They apply to two different states of mind, and therefore it is contended a verdict for the pursuer on both of them is inconsistent and contradictory. Now, in general, it cannot be denied that such a verdict indicates that the jury have not given such attention as was to be desired to the distinction between the two grounds of challenge. The presumption is against such a verdict, but it is not necessarily conclusively so. On the contrary, cases have occurred, and have been quoted to us, where such verdicts have been sustained." The only cases quoted appear to have been those of *Scrimgeour* and of *Scott's Trs.*, the grounds of which I have already endeavoured to explain; and it may fairly be noticed that the reports of these cases then before the Court were the obscure if not misleading ones already referred to. I ought here to mention that Mr Watt also called our attention to the case of *Hastie* (1848, 20 Sc. Jur. 244). But I think it aids him not at all. It related to quite a different region of fact and law; the issues were in no proper sense alternative to or inconsistent with one another; and though the procedure resorted to appears to have been special and peculiar, it can, in my judgment, form no precedent for the present case.

I think it is clear that none of the cases gives a shadow of authority for the proposition that a verdict for the pursuer upon both issues can be allowed to stand where the Court holds that as regards one of them there is no evidence to support it. The cases, and the common sense of the thing, are against such a doctrine. To assent to Mr Watt's argument would, in my opinion, be tantamount to the Court in effect reforming the verdict by substituting a different verdict (viz. for the pursuer on the first, and for the defenders on the second issue) for that returned by the jury (viz., for the pursuer on both issues). It has been authoritatively settled that the Court has no power so to re-form a jury's verdict (*e.g.*, *Morgan* v. *Morris*, 1858, 3 Macq. 323).

The reasons which I have stated appear to me to be sufficient for the disposal of this case; and upon the whole matter I am of opinion that the rule must be made absolute, and the case be tried again, unless the parties can arrive at terms of amicable settlement. This, it may be hoped, should not be impossible now that the Court has negatived, upon the evidence as it stands, all ground for imputing impetration on the part of the defenders.

LORD ARDWALL—The defenders have moved for a new trial in this action on the ground that the verdict is contrary to evidence, that being one of the grounds on which an application for a new trial may be made in terms of the Act 55 Geo. III, cap. 42, section 6, and besides maintaining this directly upon the evidence, they maintain that the verdict cannot stand, being inconsistent with itself, and in that view being necessarily contrary to evidence so far as the answer to one or other of the issues is concerned.

Taking the direct question whether the verdict on one or both of the issues was contrary to evidence, it might be expected that as I am the judge who presided at the trial I should enter into some detail on the matter; but as your Lordships are of the opinion in which I concur, that a new trial must be granted, I think it would be undesirable, at all events with regard to the first issue, that I should say more than this, that had I been in the place of the jury I would probably have come to a different conclusion than that at which they arrived, but that in my opinion there was evidence to go to the jury on which they were entitled to hold that the deceased William Martin was not of sound disposing mind when he made the will and codicil in question.

Their verdict on the second issue is, however, to my mind in a totally different position. . . . [*His Lordship went over the facts affecting this issue*]. . . .

Having heard the evidence and perused the shorthand writer's notes since, I am perfectly clear that there was no evidence whatever of fraud and circumvention to go to the jury, and no evidence from which fraud and circumvention could reasonably be inferred.

I therefore think that the verdict upon the second issue was contrary to evidence and cannot be allowed to stand.

In this state of matters the serious question arises whether it is competent for the Court to sustain the verdict upon the first issue and to upset it upon the second in view of the fact that the defenders maintained that the verdict was wrong upon both issues.

I have found this question to be one of some difficulty. Logically it cannot be said that at a certain date an alleged testator had not a sound disposing mind, and was incapable of making a deed, and that at the same date he was capable of making a deed, and was induced by fraud and circumvention to make it in a particular way. Accordingly I do not think that a verdict which affirms both these facts can be regarded as otherwise than self contradictory. And without adding more I content myself with saying that I agree with the views expressed by my brother Lord Dundas on the law applicable to this question.

On the whole matter I think in this case

the verdict cannot be allowed to stand. If the Court had been of opinion that there was evidence of fraud and circumvention in the case, I think the question would have been more difficult, though I do not know that even then we could have come to any other conclusion than that the verdict ought to be set aside as inconsistent with itself.

It is right perhaps that I should explain the course that matters took at the trial. The trial was a long one, extending over six days in all, and on the last day the jury retired at 7·46 p.m. and returned a verdict by a majority at 10·47 p.m., having been unable to come to a unanimous verdict.

Both pursuer and defender were represented by experienced senior counsel, and Mr Watt, for the pursuer, in addressing the jury, while he claimed a verdict on each issue, and did not abandon the second issue so far as my recollection goes, yet laid stress on the first issue, and as far as I recollect told the jury that if they found for the pursuer on the first issue he did not desire a verdict in his favour on the second.

In charging the jury I explicitly told them that the first question was to my mind the important one, because there was a great deal of conflicting evidence upon it, while with regard to the second I told them that although they were entitled to draw what inferences they pleased from the Milnes coming about the old man's house, I could not say, as far as I could see, that there was any evidence of fraud or circumvention. Neither counsel objected to my charge, nor was I asked to give any directions regarding the bearing of the two issues on each other. If I had contemplated that the jury could have returned a verdict upon both issues, it is possible though not certain that I would have pointed out to them the inconsistency of that course. As it was, the jury after an absence of three hours announced that they found by a majority for the pursuer on both issues. No objection was taken by the counsel for either party to this verdict being accepted and recorded, and it was recorded accordingly. On the whole matter I am of opinion that the rule should be made absolute and a new trial granted.

LORD JUSTICE-CLERK—I concur entirely in what has fallen from your Lordships. If under any circumstances a verdict on both the issues in such a case as this could be held not to call for a new trial, I am clearly of opinion that in this case there are no grounds on which it can be even plausibly maintained that the verdict in this case can stand. It does not resemble in any way the cases quoted to us at the debate. It seems to me that in a case such as this where the Court hold, as we do, that there is no evidence to support the verdict on the second issue, it would be most unjust to hold that the verdict should stand, because there may have been evidence on which the jury might find a verdict on the first issue. And this on many grounds, in particular two grounds—(1) the jury having found a verdict on the second issue, it is plain that they either did not understand the matter or did not give it proper consideration, for they have held that there was fraud or circumvention, of which there is no evidence, and (2) they have returned a verdict which casts a serious slur on the defenders, which they had no justification for doing, and from this the defenders are entitled to be freed, there being no ground for it.

I would desire to second what has been said by my brother Lord Dundas in expressing the hope that the parties might make a new trial unnecessary. The granting of a new trial completely exonerates the defender. It might therefore be very wise for the parties to endeavour to put aside personal feeling and come to some arrangement which would save the enormous expense involved in a continuation of this litigation.

The LORD JUSTICE-CLERK intimated that Lord Low, who was absent when the case was advised, concurred in the opinion of Lord Dundas.

The Court made the rule absolute, set aside the verdict, and granted a new trial.

Counsel for the Pursuers—Watt, K.C.—A. R. Brown. Agents—Alex. Morison & Co., W.S.

Counsel for the Defenders—Cooper, K.C.—Hon. W. Watson. Agent—F. J. Martin. W.S.

Saturday, May 21.

FIRST DIVISION.

[Sheriff Court at Paisley.

O'DONNELL *v.* WILSON.

Master and Servant — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Second Schedule, sec.* 17 (*b*)—*Sheriff Courts (Scotland) Act* 1907 (7 *Edw. VII, cap.* 51), *sec.* 39, *and First Schedule, Rule* 79—*Claim for Compensation — Instance of Claim — Amendment — Claim Made against Individual Partner instead of against the Firm, the True Employers.*

In an arbitration under the Workmen's Compensation Act 1906 a workman claimed compensation from an individual as his employer. No written defences were lodged. It appeared in the course of proof, and the objection was then taken, that in law the employer was not the individual but a firm of which he was a partner. A motion was thereupon made on behalf of the workman to be allowed to amend the instance of the application by substituting in place of the individual the name of the firm. The Sheriff acting as arbitrator refused leave to amend on the ground that the application fell under the Workmen's Compensation Act 1906, Sched. II, section 17 (*b*), to be dealt with in the manner provided for