

[23d April 1839.]

(Appeal from Court of Session, Scotland.)

(No. 6.) MATTHEW MONTGOMERIE, Assignee of JOHNSTONE or CURRIE and others, Appellant. — *Pemberton* — *Sandford*.

Sir JAMES BOSWELL, Baronet, Respondent.¹—*Attorney General (Campbell)*—*Maconochie*.

Practice — Jury Trial. — In an action, in which the main question in dispute was, whether a party had intermitted with his father's effects, the Lord Ordinary found, 1st, "That further investigation is necessary;" and, 2d, "That no sufficient cause is assigned for departing from the general rule for ascertaining disputed questions of fact;" and therefore remitted the cause to the Jury Roll. On reclaiming, the Court refused the desire of the note as incompetent; Quoad ultra, of consent recalled the interlocutor of the Lord Ordinary hoc statu, in so far as it contains findings in the cause, and remitted to proceed as shall be just. An application was then made to retransmit the cause to the Ordinary Roll of the Court of Session, which was refused. On reclaiming, the interlocutor refusing was recalled, and the Court remitted to the Lord Ordinary to retransmit the cause to his Lordship's Court of Session Roll, and to order a proof by commission. The House of Lords reversed the judgment, but on the ground that the Lord Ordinary was right in directing a trial by jury, as the question was one which it was fit and proper so to try.

Question, whether an interlocutor of a Lord Ordinary directing trial by jury in an unenumerated cause can competently be submitted to review?

¹ 14 D., B., & M., 378; *ibid.* 681; 16 S. C., D. & B., 395; *ibid.* 1086.

THE late Sir Alexander Boswell of Auchinleck was at the time of his death, in March 1822, indebted to Alexander Boswell, writer to the signet, in the sum of 2,794*l.* 10*s.* 8*d.*

At the date of his death Sir Alexander was possessed of the entailed estate of Auchinleck and also of unentailed heritable property to a considerable extent.

Sir James Boswell, son and heir of Sir Alexander, made a proposal to the personal creditors of his deceased father, under which he offered to pay them a certain composition, on condition of his obtaining a discharge, and being thereby enabled to take up the whole succession of his father unburdened by any claim of personal debt.

In pursuance of this arrangement, Sir James paid the greater proportion of the creditors the stipulated composition, with the exception of Mr. Alexander Boswell, who refused to accept.

The appellant, Mr. Montgomerie, being a creditor of Mr. Alexander Boswell, used arrestments in the hands of Sir James Boswell of all sums due by him to the said Alexander, either personally or as representing his late father; and these arrestments were followed up by an action of multiplepounding.

It having been made a question in this action whether Sir James Boswell represented his father, a commission for recovery of written documents was granted in the course of the proceedings, and the Lord Ordinary after hearing parties pronounced the following interlocutor: — “ 19th December 1835.—Finds, that
 “ the question mainly in dispute between the parties is
 “ the question of fact, whether or not the nominal raiser
 “ of the multiplepounding and defender in the furth-

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1st DIVISION.

Lord Ordinary
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“ coming, Sir James Boswell, intromitted with the
 “ unentailed property and effects of his late father
 “ Sir Alexander Boswell: finds, that Mr. Mont-
 “ gomerie, the real raiser, and the pursuer of the
 “ furthcoming, declines to confine himself to the evi-
 “ dence in support of his case already recovered under
 “ the diligence formerly granted: finds, that no suffi-
 “ cient ground has been stated for departing in this
 “ case from the usual course for ascertaining disputed
 “ questions of fact, and therefore remits the case to
 “ the jury roll.”

Against this interlocutor Sir James Boswell presented a reclaiming note to the First Division of the Court, praying their Lordships “ to recall the remit to the
 “ jury roll, and to remit to the Lord Ordinary with
 “ directions to grant a diligence to both parties, and
 “ to grant a commission for a proof, in so far as the
 “ testimony of witnesses may be offered or required by
 “ either party.”

Judgment of Court, 29th Jan. 1836.

On this reclaiming note their Lordships pronounced the following interlocutor: “ 29th January 1836.—
 “ Recall the interlocutor of the Lord Ordinary, and
 “ remit to his Lordship to grant diligences to the
 “ parties, or to grant a commission for proof, or to
 “ proceed otherwise in the cause as to his Lordship
 “ shall seem just.”

The appellant, Mr. Montgomerie, being apprehensive that this interlocutor might be held, in the circumstances, entirely to preclude his being allowed the benefit of a trial by jury in the case, presented a petition for leave to appeal as from an interlocutory judgment; and the following interlocutor was then pronounced: “ 10th March 1836.—The Lords having

“ advised this petition with answers thereto, and heard
 “ counsel, refuse the desire of this petition, in respect
 “ that, according to the true meaning of the inter-
 “ locutor remitting the cause to the Lord Ordinary,
 “ diligence should in the first place be granted
 “ for recovering documentary evidence; and that
 “ on considering such evidence the Lord Ordinary
 “ should judge whether any farther investigation
 “ should proceed by a proof on commission or other-
 “ wise.”

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The case having returned to the Lord Ordinary, a fresh commission for recovery of written documents was granted; and parties having been again heard, the following interlocutor was pronounced by his Lordship: “ 5th December 1837.—In respect that the
 “ pursuer does not confine himself to the written
 “ evidence now in process, but demands a farther
 “ proof by witnesses, and that the defender does not
 “ maintain that the said written evidence is such as
 “ to exclude parole proof, finds that farther inves-
 “ tigation is necessary; and finds that no sufficient
 “ cause is assigned by the defender for departing
 “ from the general rule for ascertaining disputed
 “ questions of fact, and therefore remits the case
 “ to the jury roll.”¹

¹ “ *Note.*—The question between the parties is truly a question of fact,
 “ viz. whether or not Sir James Boswell, the defender in the action of
 “ forthcoming and the nominal raiser in the multiplepinding, took
 “ possession of the unentailed property of his late father Sir Alexander
 “ Boswell and intromitted with his personal effects. Under the diligence
 “ originally granted, and that which has been since issued agreeably to
 “ the remit from the Court, a vast mass of papers, consisting of letters,
 “ vouchers, and accounts, has been recovered. But, on the one hand,
 “ Mr. Montgomerie, who is truly the pursuer, states that he does not
 “ confine himself to that written evidence, and proposes to fortify it by

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Judgment of
Court, 27th Jan.
1838.

Against this interlocutor Sir James Boswell again reclaimed to their Lordships of the First Division, and the following interlocutor was pronounced: “ 27th January 1838. — The Lords having advised this

“ the examination of witnesses; on the other, it is not contended by Sir James Boswell that the documents are conclusive of his defence, and are such as to exclude parole proof. There being no doubt, then, that some farther investigation is necessary, the only point is, whether it shall proceed by jury trial or by proof on commission.

“ In considering this point it must be kept in view, in the first place, that this is not a case in which both parties concur in resorting to a proof by commission; and secondly, that the jury trial is demanded by the pursuer, who manifestly has a legitimate interest to insist in a course of investigation peremptory in its forms and conclusive in its results, in preference to that required by the defender, which in practice admits of being indefinitely protracted, while the conclusion of it only forms the opening of a litigation on its import competent in every successive tribunal from that of the Lord Ordinary to the Court of last resort.

“ In these circumstances the Lord Ordinary thinks that nothing short of a conviction that the case was absolutely unfit for the consideration of a jury would warrant him to depart from the ordinary course; and after hearing the matter argued, he remains of the opinion that there is no sufficient ground for refusing the pursuer’s motion.

“ In the first place, though there are now recovered and put into process on the part of the pursuer an enormous collection of papers, which from their nature might perhaps afford the materials of a very intricate accounting, that does not appear to be the true character of the inquiry. There is no question here as to the amount of the intromissions with which the pursuer is charged, and no pecuniary result, in the proper sense of the term, is sought to be inferred from these papers by the pursuer. The only point which he seeks to establish is, that the defender took possession of the unentailed estate and personal property of the late Sir Alexander Boswell. The Lord Ordinary understands, that these documents, or part of them, are to be adduced in support of that averment, and, for any thing yet seen, the use to be made of those materials may be such as to render a very limited selection of them necessary; and the combined investigation of them and of the parole evidence of the factors, managers, or other witnesses examined in relation to them may turn out to be a much more convenient and satisfactory procedure for reaching the truth than a proof by commission.

“ Secondly, the demand of the pursuer is unquestionably agreeable to the general rule, sanctioned by statute, for the investigation of disputed matters of fact; and it would seem inexpedient and improper to adopt

“ reclaiming note, and heard counsel for the parties,
 “ refuse the desire thereof as incompetent, in so far as
 “ it reclaims against an order remitting the cause to
 “ the jury roll. Quoad ultra, of consent recall the
 “ interlocutor of the Lord Ordinary hoc statu, in so
 “ far as it contains findings in the cause; and remit to
 “ the Lord Ordinary to proceed as shall be just.”

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The case having again returned to the Lord Ordinary, the respondent, Sir James Boswell, moved that the cause should be retransmitted from the jury roll to the ordinary roll of the Court of Session. The Lord Ordinary pronounced the following interlocutor: “ 14th February 1838.—The Lord Ordinary, having heard parties procurators on the motion of the defender to retransmit the case to the ordinary roll on the ground that it involves matters which cannot be satisfactorily investigated by a jury, in respect that the pursuer does not confine himself to the written evidence now in process, but demands a further proof by witnesses, and that the defender does not maintain that the said written evidence is such as to exclude parole proof, finds that further investigation is

“ a different course in opposition to that demand, founded on what at best must be but a presumptive and hypothetical view of his case. The Lord Ordinary is not entitled to anticipate, and the pursuer cannot be called upon, at present, prospectively to open the kind of case he is to submit to the jury; and when the proper time comes for his doing so, and if it shall turn out from the statement for the pursuer that it is utterly unsuited for the consideration and determination of a jury, experience has shown that there are practically the means of obliging the pursuer to withdraw his case from that tribunal, and to adopt a course of investigation better fitted to do justice between the parties.

“ On these grounds the Lord Ordinary does not conceive himself warranted in refusing the pursuer’s motion for a remit to the jury roll.”

MONTGOMERIE “ necessary ; and finds that no sufficient cause is
 v. “ assigned by the defender for departing from the
 BOSWELL. “ general rule for ascertaining disputed questions of
 23d April 1839. “ fact by the verdict of a jury, and therefore refuses
 Statement. “ the motion.”¹

Against this interlocutor Sir James Boswell reclaimed to the First Division of the Court, and their Lordships pronounced the following judgment: “ 12th May 1838.
 Judgment of “ —The Lords having considered this reclaiming note,
 Court, 12th May “ and heard counsel for the parties, alter the inter-
 1838. “ locutor reclaimed against, and remit to the Lord
 “ Ordinary to retransmit the cause to his Lordship’s
 “ Court of Session roll, and to order a proof by
 “ commission.”

Against this interlocutor the appellant appealed.

The parties put in issue the general question of competency of reviewing a Lord Ordinary’s interlocutor ordering a cause to be tried by jury, but the House of Lords reversed, simply on the ground that the Court were in error in considering the question between the parties not fit to be tried by jury. An analysis of the statutes bearing upon the general question, with some valuable observations, will be found at the close of the Lord Chancellor’s speech.

¹ “ *Note.*—As by the former interlocutor of the 5th of December 1837
 “ the Lord Ordinary did not merely remit the case to the jury roll
 “ subject to the contingency of being retransmitted, but found expressly,
 “ after an argument on the point, that it was fit for the consideration of
 “ a jury, he considered that the interlocutor might be competently
 “ brought under review,—and indeed he so expressed it,—for the very
 “ purpose of enabling the defender to take the opinion of the Court, as
 “ had been done before. But as that procedure was found incompetent,
 “ and as the question has now been again raised in the form of motion
 “ to retransmit to the ordinary roll, he sees no reason to alter his former
 “ opinion ; and therefore repeats the interlocutor, *mutatis mutandis*, and
 “ the reasons given in his former note.”

Appellant.—1. The interlocutor of the Lord Ordinary was incompetently altered, inasmuch as under the statutes passed with reference to jury trial in Scotland the appointment by his Lordship of a jury trial was final and conclusive.

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Appellant's
Argument.

The temporary statute 55 Geo. 3. c. 42, which established trial by jury in Scotland in ordinary civil causes, was superseded by the 59 Geo. 3. c. 35, which permanently created the jury court.

By the first section of this act. it was rendered imperative on the Lord Ordinary to remit certain specified cases (being all of the nature of actions of damages) to the jury court in order to be tried by a jury; by the fourth section it was declared to be discretionary to the Lord Ordinary also to remit all other cases in like manner, and by the fifteenth section it is declared incompetent to bring under review the Lord Ordinary's interlocutor making such remit.

Then followed the 6 Geo. 4. c. 120, the fifteenth section of which provides in express terms, “ that
 “ where the parties differ as to facts which require
 “ to be ascertained by jury trial, the Lord Ordinary
 “ shall have it in his power either to remit the whole
 “ cause to the jury court for trial, or to send to that
 “ court a particular issue or issues, in order to have
 “ such matter of fact ascertained as he may deem
 “ necessary for deciding the cause; and the order by
 “ the Lord Ordinary, in so far as it thus remits a
 “ cause, shall be final.”

The next statute bearing upon the point is the 1 Will. 4. c. 69, by which the jury court was entirely abolished as a separate tribunal: it was declared,
 “ that the jurisdiction for trial by jury in civil causes

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“ shall be united with and shall form part of the ordinary administration of justice in the Court of Session in Scotland.” Since the passing of this act, in place of there being a jury court to which cases were transmitted by the Lords Ordinary, each Lord Ordinary has possessed a jury roll, to which causes appropriated to jury trial are remitted by him; he himself thereafter proceeding to mature these cases for trial in the same way in which the now abolished jury court would have done.

Where the interlocutor of the Lord Ordinary remits a case to the jury roll on the ground of its being proper for jury trial, no reclaiming note to the Inner House is competent against that interlocutor; and this being so, it is difficult to perceive how the power of review should be gained merely by directing the reclaiming note against the interlocutor of the Lord Ordinary refusing to retransmit the case to the Court of Session roll as unfit for jury trial. The refusal to retransmit is in fact, like the remit itself, a finding by the Lord Ordinary that the case must be tried by jury. The twelfth section of the 59 Geo. 3. c. 35, which appears to have given rise to some misapprehension in the Court of Session, does not apply, as the jury court has ceased to exist as a separate tribunal.

2. Supposing the Inner House had a discretionary power of review, the interlocutor was erroneously altered, inasmuch as the case was an apt and proper one for a jury trial, and not for a proof on a commission.

In order to entitle the respondent to obtain the judgment under appeal, the onus lay upon him to prove in a clear and satisfactory manner that the case was one which was not fitted for trial by jury. The

general rule established by the statutes, and by the practice of the Court of Session following on those statutes, unquestionably is, that all cases involving disputed matters of fact must be tried by jury; and in order to withdraw any individual case from a jury, it is necessary to substantiate good and sufficient reasons for holding that case to form an exception to the general rule; the now settled system of the Court of Session is to send all cases involving disputed matters of fact to a jury, unless very sufficient grounds are shown for an opposite course.

This case is of a character which renders it peculiarly fitted for the cognizance of a jury, as it is one in which the whole question is substantially one of fact, and hinges upon the mere fact of intromission by the respondent with the estate and effects of the deceased Sir Alexander Boswell his father. Assuming that a question of law might arise, this forms no reason whatever why the case should not be tried by jury, for in almost every case which is tried by jury a question or questions of law are involved; and as cases are sent for trial on a general issue, there can scarcely occur one in which there is not matter of law for the direction of the judge; and if this were a reason for withdrawing cases from the cognizance of a jury, there would be scarcely a single case tried. So little has the objection now considered weighed in the practice of the Court with reference to a case of the present kind, that the very issue of vitious intromission, out of which a question of law too delicate for a jury is supposed to arise, is in use to be sent to trial as matter of ordinary course. A case is reported in which the issue runs in these identical words:—"Whether

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Argument.

MONTGOMERIE “ subsequent to the death of the said Robert Penman;
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 BOSWELL. “ the defenders or any of them vitiously intromitted
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 Appellant’s “ Penman?”¹
 Argument.

The mere amount of documents recovered under a commission in the preparation of a cause forms no sort of test whatever of the extent to which these documents will afterwards be used in the actual trial; the commission forms the mere instrument for the recovery of such documents as by possibility may be used on the trial. It is employed to recover all manner of writings, without any discrimination, in the first instance, between what is admissible and what is inadmissible evidence; and from this mass the selection is made at the trial, of what is to be given in as evidence; and in this way a very large mass of recoveries often presents the smallest possible extent of actual available documents.²

Respondent’s
 Argument.

Respondent.—1. It is admitted that by the law and practice of Scotland the Court of Session has power to ascertain disputed facts by ordering a proof to be taken on commission, by remit, or in presentiâ, in all causes, with the exception of those appropriated to jury trial by special statutes; and it will be kept in view that the Court of Session possesses the powers and jurisdiction both of the Courts of Common Law and the Courts of Equity in England, besides deciding admiralty and consistorial questions, including a vast

¹ Kerrs & Co. v. Penman, 11th Jan. 1830; Murray’s Jury Reports, vol. v. p. 143.

² Ersk. b. iii. tit. 9. sec. 49, 53. and note; Macfarlane, Practice in Jury Causes; Scott v. Lord Belhaven, 25th May 1821; Forbes v. Forbes, 12th June 1823; Bald v. Kerr, 19th June 1837, 3 Sh. and Maclean, 1.; Sir Gibson Craig v. Sir Wm. Rae, 5th Feb. 1822, 1 Shaw, 270, new ed.

variety of cases to which trial by jury cannot be beneficially applied.

By the twelfth section of 59 Geo. 3. c. 35. it was provided, “that it shall be competent for the Jury Court, when it appears to the said Court in the course of settling an issue or issues that a case turns upon matter of complicated accounts, or other matter to which trial by jury is not beneficially applicable, to remit back the whole process and productions as aforesaid with their report thereon, in order that the division, Lord Ordinary, or Judge Admiral may proceed with the same in such manner as shall appear to be most expedient for the administration of justice.”

By the thirteenth section of the same statute it is expressly declared, “that nothing in this act contained shall extend to prevent the Court of Session in either of its divisions, or the Lords Ordinary (save and except in the cases concluding for damages herein-before enumerated), or the Judge Admiral, unless otherwise instructed as aforesaid by the Court of Session, to take proof on commission by a remit or in presentiâ, and thereafter disposing of the cause in the manner now practised in such cases.”

These provisions shew that the Court has full discretionary power to ascertain disputed facts without resorting to a jury trial in all cases except those specially enumerated in the statute.

The twenty-eighth section of the 6 Geo. 4. c. 120. declared, that the actions there enumerated “shall be held as causes appropriated to the Jury Court, and shall for the purpose of being discussed and determined in that Court be remitted at once to the

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“ Court in manner herein-after to be directed.” In all other cases the Court of Session was left in possession of full discretionary power to take proof on commission by remit, or in presentiâ, and the Jury Court was authorized as before to retransmit all causes to which trial by jury was not beneficially applicable. By the 1 Will. 4. cap. 69. trial by jury was united to the ordinary jurisdiction of the Court of Session, and under this statute the whole powers formerly possessed by the Jury Court have been transferred to and are now exercised by the Court of Session.

These statutes do not make it imperative on the Court of Session to send a cause for trial before a jury unless it happen to be one of the enumerated actions which have been expressly appropriated by the legislature to that mode of trial; and this construction of the acts of parliament has never been called in question; on the contrary, it is confirmed by numerous decisions of the Court.¹

2. The course of proceeding adopted by the Court of Session in refusing to send this case to be tried before a jury was highly proper and expedient, because the question turns upon an investigation of numerous and complicated accounts and a great and intricate mass of documentary evidence, so that the cause is one to which trial by jury is not beneficially applicable. The terms of the statute 59 Geo. 3. c. 35. itself are a declaration by the legislature, that there are causes to which jury trial is not beneficially applicable,

¹ Barker, 27th Feb. 1834, 12 S. & D. 500; Kerr, 10th March 1837, 15 D., B., & M., 784; Hutcheson v. Tod, 2 S. & D. 318, affirmed 15th June 1824, 2 Shaw's Appeal Cases, 386; Ralston v. Farquharson, 7 S. & D. 812; Buchanan, 17th Dec. 1836, 15 D. & B. 286.

as it has expressly recognised their existence, and given directions for disposing of them.

By the above statute the discretionary power of retransmission to the ordinary roll is still possessed by the Court of Session, and has never been limited or taken away by any of the statutes which regulate the system of jury trial in Scotland; and the respondent submits, that the present case is one which ought to be retransmitted to the ordinary roll of causes in the Court of Session under the provision of the statute now alluded to, because the question in dispute is one to which trial by jury is not beneficially applicable. If there is one case more than another to which jury trial cannot be beneficially applied, it is the case now under consideration. The enormous mass of papers which the appellant has forced into process could not be explained or made intelligible to a jury during the period of a trial; and, therefore, unnecessarily to subject the cause to this form of trial would be to inflict a serious injury upon the parties concerned, and expose the respondent to the hazard of an ill-considered, rash, and unjust judgment. If this cause be sent back to be tried by a jury, various intricate and important questions of law must be brought under the decision of the judge trying it, and among other questions which would arise, there would be one which this House in a recent case thought it necessary to remit back to the Court of Session, viz., the question of vitious intromission by a minor.¹

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Respondent's
Argument.

LORD CHANCELLOR.—My Lords, it is unnecessary

Ld. Chancellor's
Speech.

¹ Kerr v. Bremner, 14th July 1837, 2 Shaw and Maclean, 895.

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 Speech.

to state to your Lordships the course of pleadings in this cause, which are complicated; the result, however, of the proceedings in the cause is to raise a question on the part of the appellant, who contends that the respondent, Sir James Boswell, by having intromitted with the estate of Sir Alexander Boswell, has made himself liable for debts due to the appellant as a creditor of that estate. After a voluminous delivery of documents in the cause, the Lord Ordinary considered it a case to be tried by a jury, and accordingly he remitted it to the jury roll for that purpose. There had been an intermediate application to the Court of Session which came to nothing; they considered that at the time it was not proper to be remitted. The Lord Ordinary pursued the inquiry for the purpose of the production of original documents, and then the object of the party having been accomplished by that production he again remitted it to the jury roll to be tried. From that order of the Lord Ordinary the parties appealed to the Inner House, and the judges were of opinion that under the act they had no jurisdiction to interfere with the interlocutor of the Lord Ordinary; and accordingly they declined to interfere with what he had ordered.

An application was afterwards made to the Lord Ordinary for the purpose of transferring this cause from the jury roll into the Court of Session roll, the effect of which would have been, that it should proceed as a Court of Session cause, and not proceed as a cause to be tried by a jury. The Lord Ordinary, adhering to the opinion he had before expressed, that it was a proper cause to be tried by a jury, refused that application; from which order of his refusing the application,

the parties again applied to the Inner House; and the Inner House thought they had jurisdiction to interfere with that order of the Lord Ordinary, and therefore they remitted it back to him with directions to have the cause transferred from the jury roll to the Court of Session roll; which was the main object of the parties who made the application interfering with the order of the Lord Ordinary, and effected the object of the parties, who wished it to be tried by a proceeding in the Court of Session and not by a jury. Against that last order the present appeal is presented.

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Ld. Chancellor's
Speech.

My Lords, there were two questions discussed at your Lordships bar: the first was, whether under the section of the act of parliament, the Court of Session had power so to deal with the order of the Lord Ordinary; that is to say, whether by the course adopted they had the power of interfering and altering the decision of the Lord Ordinary directing the cause to be tried by a jury? The second was, whether, if that jurisdiction existed, it was wisely exercised in the particular case in question? I shall call your Lordships attention to the second point first, because, if your Lordships should agree with me in the opinion I have formed as to the nature of this cause and the proper tribunal before which it should be tried, it will not be necessary for your Lordships to come to any decision upon the first point. The question between the parties is simply this: the appellant says, you the respondent have so dealt with the estate of your father, by interfering with the personal estate and by interfering with the real estate, that you have by the law of Scotland made yourself responsible for all the debts for which your father was liable. That depends upon the fact of how far the

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Ld. Chancellor's
 Speech.

My Lords, we have in this country a case, not frequently arising, very similar in its nature, namely, a claim made against a party charged as executor; that is, a party who has taken upon himself to interfere with the administration of the effects, and by so doing become responsible to those who have claims against the estate. It is true the law upon the subject is not the same, but the question to be tried is identically the same in both cases; both depending upon the fact how far the party sought to be charged has or has not interfered with the estate of the deceased. The consequences are very different according to the laws of the two countries, but in considering what is the proper tribunal to investigate such claim the question to be tried is very much the same. By the laws of this country these are questions which are almost uniformly the subject of action, and the subject, therefore, of a trial and investigation before a jury: they turn entirely upon matters of fact. It is true a question of law founded upon those facts may arise, but it is absolutely necessary to ascertain the facts before the law can arise. What degree of interference, and what particular circumstances connected with that interference, will make a party liable as executor for his own acts in this country, and what interference will make a party liable in Scotland who takes upon himself to deal with the estate of his ancestor without authority so to do, will be matter of law; but, speaking of intromission, the circumstances connected with it are purely matter of fact, to be established by the evidence of those who can speak to them, or by the production of documents

by which it will appear what course has been adopted. There has been a large production of documents, which has been complained of on both sides. On the part of the appellant it has been complained that those who were called upon to produce documents had taken upon themselves to introduce many which were not required; but they say, you asked for all documents, and all documents you shall have. The party seeking the documents says, there have been more produced than were required; as on the part of those ordered to produce it is said, there has been an extravagant use of the power the Court gives of calling for the production of documents. Undoubtedly in point of number a great many have been produced, but for the purpose to which they may be used in investigating the facts it is very likely that very few will be required, except such documents as may prove the act of the respondent in interfering with the estate of the deceased. There is no question of accounts which can arise in the course of this cause. The mode in which particular sums have been dealt with,—whether, for instance, they have been received by a factor or an agent,—whether they have been received by that factor or agent on account of the estate, and assuming an authority to interfere with the estate,—or whether they were received by the factor or agent as dealing with the party sought to be charged, namely, the respondent, and acting for him,—may be undoubtedly ascertained by reference to some of those documents; but the purpose for which these documents have been used, and the character in which the property has been interfered with, are undoubtedly facts to be tried between those parties.

My Lords, the judges of the Inner House appear to

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have been impressed up to the last with a conclusive opinion that this was not a case to be tried by a jury; but that it was expedient to carry the investigation further, in order that it might be ascertained whether reference to a jury should be ultimately necessary or not. My Lords, there is a marked difference between the course the statutes prescribe to the Court of Session, in directing cases to be tried by a jury, and that which prevails in courts of equity in this country. The courts of equity in this country, except in cases where the question of *devisavit vel non* arises, exercise their own judgment first upon the matters proved, and they resort to reference to a jury only, where, from the facts brought in the course of the hearing before it, the Court feels that it cannot come to a satisfactory conclusion. Then it is in the habit of sending an issue to be tried in order that the facts may be investigated by the *vivâ voce* examination of witnesses in the presence of a jury, and the finding of the jury upon that evidence may give the Court better information upon the facts than the Court might be able to obtain by the mere production of the documents. But the acts of parliament with reference to the Courts of Scotland do not look to that course of proceeding: they enumerate certain actions in which proceedings by trial before a jury are directed without any discretion to be exercised by the Court; then in all other cases it is left to the discretion of the Court; but not to the discretion of the Court, after the Court itself has endeavoured to ascertain the facts and to decide upon them, but to a discretion to be exercised according to the nature of the case and the issue joined between the parties; that discretion being exclusively in the first instance to be exercised

by the Lord Ordinary, unless he feels it necessary from the difficulty of the case not to decide the case himself, but to report to the Inner House.

The first question to be considered is, what is the issue between these parties? Now, in looking through the case as stated on the one side and the other, there is no doubt that the safest way of ascertaining that, is, by referring to one or two statements to be found in the proceedings in the Court below and the mode in which these statements were made; and I think your Lordships will have no difficulty in saying that the whole question to be tried is, how far the respondent in this case has or has not intromitted, and under what circumstances he has intromitted, with the estate of the party in question?

My Lords, in the revised condescendence of Mathew Montgomerie, the appellant, there is this statement:—

“ Sir Alexander Boswell also left behind him moveable
 “ property and funds to a large extent. This com-
 “ prehended a valuable library and household furniture,
 “ and also a right to a large sum of money, estimated
 “ at 3,500*l.*, part of the fortune which came to him
 “ with Lady Boswell his wife, which was payable on
 “ the death of a Mrs. Cumming, then a very old lady.”

This article is denied, with the exception “ that
 “ Sir Alexander Boswell was possessed of a library and
 “ household furniture, which were sold by the late
 “ Mr. Hamilton Douglas Boswell, the executor cre-
 “ ditor of Sir Alexander. It is admitted also that
 “ Sir Alexander Boswell had a reversionary right,
 “ which was lately recovered by Mrs. Hamilton Douglas
 “ Boswell, the executrix creditor of Sir Alexander,
 “ for behoof of Sir Alexander’s creditors, and which

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“ amounted to about 2,300*l.* sterling. The respondent
“ believes that the whole of Sir Alexander’s personal
“ funds and property were considerable.” The fifth
article of the condescence is in these terms:—“ On
“ Sir Alexander Boswell’s death the nominal pursuer
“ Sir James Boswell, his son and apparent heir, by him-
“ self or by others on his behalf intromitted with the
“ whole or with part of the moveable property left by
“ his father, taking possession of and realizing the
“ same, and paying therefrom alleged claims and
“ debts to some extent.” The answer to that is: “ The
“ statements in this article are wholly unfounded, and
“ are expressly denied.”

The next allegation is in these terms:—“ In regard to
“ the unentailed heritable property of the deceased, the
“ nominal raiser Sir James Boswell also by himself or
“ by others in his behalf entered into possession
“ thereof in whole or in part, and drew the rents. In or
“ about the month of October 1822, a deed of factory
“ was executed by Sir James, under which the rents
“ were collected by the factor appointed by him and
“ accounted for to him or his agents; more particularly
“ there were so drawn the rents of the before-men-
“ tioned lands of Willochshill, Dalgere, and Howford,
“ over which there was no heritable burden, and to
“ which there was no title on the part of any one,
“ except that possessed by Sir James on his apparen-
“ cy.” The answer to which is: “ The statements here made
“ are also untrue, and are denied.”

The next allegation is, “ That in the year 1824, and
“ in or about the month of October thereof, arrange-
“ ments were made between the creditors of Sir Alex-
“ ander Boswell and the pursuer, or those acting for

“ his behoof, under which a dividend of 2s. per pound
 “ was paid to the personal creditors of Sir Alexander.
 “ In the scheme of division Mr. Alexander Boswell
 “ was, after having made affidavit to the debt, ranked
 “ as a creditor for the above-mentioned sum of
 “ 2,794*l.* 10*s.* 8*d.*, and on the 11th of January 1825 he
 “ drew the sum of 276*l.* 18*s.* 4*d.*, being the dividend
 “ corresponding to the said claim ;” therefore charging
 the present Sir James Boswell as a party in the arrange-
 ment. The answer to that is : “ It is denied that any
 “ arrangement whatever as there stated was entered
 “ into between the creditors of Sir Alexander Boswell
 “ and the respondent. The respondent believes that a
 “ scheme of division of part of the personal estate of
 “ Sir Alexander Boswell was made up by Mrs. Hamil-
 “ ton Douglas Boswell, the executrix creditor of
 “ Sir Alexander Boswell, and in that scheme Mr. Alex-
 “ ander Boswell was ranked for the claims here set
 “ forth, and drew the dividend stated,” but not under
 his authority. This, therefore, leaves no doubt as to
 what is the nature of the case. There is a further
 statement in the condescendence, thus : “ In consequence
 “ of the said transaction Sir James Boswell not only
 “ acquired right to the other personal funds of
 “ Sir Alexander Boswell, mentioned in the said letter
 “ of 1828, but has actually realized the same to a con-
 “ siderable extent, and in particular a sum of not less
 “ than 2,300*l.*” That is also denied.

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My Lords, upon this view of the case it appears,
 therefore, that the contest between these parties might
 have been purely a matter of fact, namely, whether
 Sir James Boswell had or had not done that which
 these allegations charge him with having done, and

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which he denies. The Lord Ordinary thought that a proper question for investigation before a jury. I do not find any substantial reason stated why it should not be tried before a jury: if it depends upon documents, the documents may be produced before the jury, or the fact may be proved of his having taken the management of the estate by those who will state whether they had so managed on the authority and under the direction of Sir James Boswell or under other authority; which will exempt him from the consequences of the intromission with the property of the deceased. I see no reason why those facts should not be tried by a jury in Scotland, in the same manner as a question of the same nature would be tried in a cause in this country raising that question. The reasons given by the learned judges who have given an opinion that it should not be tried by a jury appear to rest in a great degree on the supposed difficulty of bringing this case before a jury, arising, as I apprehend, from the suspicion that it is a little complicated, because there has been a great number of documents produced; documents which both parties agree were, by far the greater number of them, wholly inapplicable to the present case.

I find the Lord President says: "I think it clear that
 " a case of this kind should not be sent per aversionem
 " to a jury. It is chiefly written evidence, apparently,
 " that will require to be considered, and in applying
 " the law to the facts of intromission which may
 " thereby appear I think there is no need for the
 " intervention of a jury." Lord Gillies says: "I am
 " not sure but that a general question, whether there
 " has been vitious intromission or not, may not be

“ quite proper for a jury to try, but in this special case
 “ I disapprove of the general remit which has been
 “ made.” Lord Mackenzie says: “ I think it would be
 “ following an inexpedient course to send this case as it
 “ stands to a jury; I think it would be inconvenient
 “ for a jury to try. It would be better to allow a proof
 “ on commission in supplement of the written evidence,
 “ if this should be necessary.” Lord Balgray con-
 curred.

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My Lords, it appears to me pretty obvious that if the question had been simply whether on such an issue it was proper to refer the case to a jury, the judges would not have come to the conclusion they did after hearing what can be said upon the documents by the counsel on either side. Looking to the nature of the documents, it appears to me that it is scarcely possible that many of them should be submitted to a jury; but even if a large portion of them were to be submitted to a jury, I cannot see any reason why they should not be submitted accompanied with such observations as may be called for in order to enable the jury to come to the right conclusion on the question, whether the one party or the other is justified in the allegations they have made; namely, whether Sir James Boswell has or has not so intromitted with his father's estate?

My Lords, it is very desirable that cases which in their nature are proper to be tried by a jury, should be sent to that tribunal, not only because it would come to a much more speedy conclusion, but that it would generally come to a much more satisfactory conclusion. The parties know the issue to which the case has come, and see whether they can prove it on the one side, and

MONTGOMERIE on the other. The Learned Judge who tries the casé
 " directs the jury, and if he mistakes there are obvious
 BOSWELL. means of setting that right, instead of incurring the
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 Ld. Chancellor's discussion of the evidence submitted to the Court. I
 Speech. see nothing in the nature of the cause, no peculiar
 circumstances in this case which appear to deprive it
 of the character of causes which ought to be tried before
 a jury; therefore, I am of opinion the Lord Ordinary
 came to a right conclusion upon the form of issue
 joined between the parties, when he decided that a
 jury was the proper jurisdiction to which this case
 should be referred. If your Lordships concur in that
 opinion it will be decisive of the present case, for all
 your Lordships have to do is to decide between the
 opinion expressed by the Lord Ordinary, and the
 opinion expressed by the judges of the Inner Court
 who took into consideration the interlocutor of the Lord
 Ordinary.

My Lords, on the second point, therefore, or rather
 the first, as it was argued at your Lordships bar, it will
 not be necessary to come to any decision, but at the
 same time I think it right to make some observations
 on the construction which has been put on the acts of
 parliament relative to trials by jury in Scotland;
 because this case exhibits, what one is very sorry to see,
 a direct contradiction in the proceedings in the very
 same cause. I will refer presently to the directions in
 the acts of parliament; but if your Lordships will per-
 mit me, I will first call your attention to the two
 interlocutors as they stand, and nobody can doubt,
 looking to the acts of parliament, that the object and
 intent of those who framed those acts of parliament

were, that your Lordships should not have to exercise the jurisdiction which you are now called upon to exercise; that the object was to make the consideration of the preliminary point of the jurisdiction by which the cause was to be tried conclusive, in order to avoid the great delay and great expense which arise upon appeals on interlocutory matters. It was seen that if, in every instance in which a question arose whether it was to be tried by a jury or heard before a division of the Court of Session, the cause were remitted in the first instance from the Lord Ordinary to the Inner House, and from the Inner House appealed to your Lordships, that course would be attended with great expense and delay; when your Lordships had decided that question, the cause would have in fact to be commenced. That is attended with an evil too obvious to the parties seeking redress to be permitted, and the statutes were anxiously framed to guard against that consequence.

My Lords, substitution of trial by jury, as your Lordships are aware, was effected by the institution of a separate court for the purpose of trying those issues. The Lord Ordinary deciding that a case was proper to be tried by a jury, the proceeding was immediately remitted to the Jury Court, and the act of parliament declared the interlocutor upon this subject to be final in certain questions, either before the Court of Session, or your Lordships House; the act so limits the power of appeal from the Lord Ordinary. The Lord Ordinary, in the present case directing it to be sent to the jury roll, which is now substituted for the Jury Court, the Court said, we have no jurisdiction to

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interfere; the statutes give the Lord Ordinary absolute power on that point; they therefore refused to interfere, thinking, and properly thinking, they had no jurisdiction under the acts of parliament. It being thought expedient that the matter should be well considered, whether they had any jurisdiction to interfere with the Lord Ordinary's order that the case should be sent to the jury roll for the purpose of being tried by a jury, the Lord Ordinary being applied to, refused to transfer the cause from the jury roll to the Court of Session roll, which had no jurisdiction over it. But though that order stands as a final order by the acts of parliament, and no other judge has a right to interfere with it, there is a subsequent order of the Inner House that the cause shall be transferred to the Court of Session roll. I throw out this, because it is worthy of the consideration of those whose duty it is to come to a decision upon these acts of parliament. It is quite obvious that if that be the proper construction of the statutes, it entirely defeats the professed object of the statutes, viz., that the decision of the Lord Ordinary should be final as to whether the cause should be tried by Jury or not.

It is well known that when the trial by jury was first introduced into Scotland it met with very great opposition on the part of the bar; an opinion fast giving way since the system has come into operation. I wish I could add that it was now viewed altogether with as much favour as I think it ought to be, and that attempts were not made to get rid of the wholesome provisions of the act of parliament giving jurisdiction for the trial by jury in certain cases.

I will very shortly refer your Lordships to some

of the provisions of the very few acts which have been passed upon this subject, and I think your Lordships cannot doubt that the intention of the acts was not only that you should never have a question of this kind to decide, but that the order of the Lord Ordinary should be final. The act of the 55th Geo. 3. c. 42. directs, “that it shall and may be lawful for either Division of the Court of Session, in all cases that may be brought before them during the continuance of this act wherein matters of fact are to be proved, to direct issues.” The second section directs the Lord Ordinary “to report to the Division of the Court to which such Ordinary belongs, so that the said Division may determine whether such issue shall be sent to the said Court to be tried by a jury.” There the Lord Ordinary had no jurisdiction; the first step was to authorize him to look to the nature of the case, and forming an opinion upon it himself, to report it to the Inner House for their final decision. That act in its fourth section provided “that it shall not be competent either by reclaiming petition or appeal to the House of Lords to question any interlocutor granting or refusing such trial by jury;” leaving it to the Court of Session finally to decide upon the question, whether the cause should be tried by a jury or not.

The act of 59 Geo. 3. c. 35. altered this scheme in many important particulars: it directed that in certain descriptions of actions, which are enumerated, the Lord Ordinary should remit “the whole process and productions forthwith to the jury court in civil causes, which last-mentioned court is authorized and

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“ required, according to rules and regulations which
 “ the said Court and the Court of Session are herein-
 “ after empowered to make, to settle an issue or issues,
 “ and to try the same by a jury, to be summoned
 “ and impannelled under the provisions now in force
 “ or herein-after enacted for that purpose.”

The second section directed, that if questions of law or relevancy arose, the Lord Ordinary was to dispose of them, and then to remit the cause to the jury court; and there is this provision: “ that the inter-
 “ locutor of the Lord Ordinary ordering the cause
 “ to be remitted to the jury court, whether with or
 “ without reservation of the alleged question of law,
 “ shall not be subject to review by representation,
 “ petition, appeal to the House of Lords, or otherwise.”
 That related to those actions which were enumerated.

The fourth section related to all other cases. In all other cases where matters of fact were to be proved, the Lord Ordinary was authorized to remit the whole process to the jury court and to direct the matter to be tried, the jury court being to settle the issues.

Then the sixth section gave the Court of Session a similar power to direct issues, and the fifteenth section contained this provision: “ that it shall not be com-
 “ petent by representation, reclaiming petition, bill of
 “ advocation, appeal to the House of Lords, or other-
 “ wise to bring under review any interlocutor by
 “ the said Divisions, Lords Ordinary, or Judge of the
 “ Admiralty ordering a trial by jury.” Now, my Lords, there can be no ambiguity or doubt upon these enactments.

Then comes what has been thought to be very

important in the previous part of the suit. The Lord Ordinary having remitted the whole cause to the jury court to settle the issues and proceed to trial, there is this provision: “that it shall be competent and lawful for the jury court, when it appears to the said Court in the course of settling an issue or issues, or at any time before trial, in the cases remitted to them as aforesaid, that there is a question or questions of law or relevancy which ought to be previously decided, to remit back the whole process and productions to the Division of the Court of Session, the Lord Ordinary, or Judge Admiral who remitted the same to the jury court, that the question or questions of law or relevancy may be considered and determined there.” Then comes this provision in the same clause, which also is relied upon: “and it shall be competent for the jury court, when it appears to the said Court in the course of settling an issue or issues that a case turns upon matters of complicated accounts, or other matters to which trial by jury is not beneficially applicable, to remit back the whole process and productions as aforesaid with their report thereon, in order that the Division, Lord Ordinary, or Judge Admiral may proceed with the same in such manner as shall appear to be most expedient for the administration of justice.” Now, this was to arise by an act of the Jury Court after the Jury Court had taken cognizance of the cause and had proceeded to settle the issues; a proceeding equally well adapted to the then state of the law of Scotland introducing a new system: not that the judges of the Court of Session should do this, but the Jury

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Court, who were familiar with the whole proceedings of the Court, and, therefore, much more competent in investigating the nature of the case to discover any difficulties in the particular case in hand which prevented the beneficial effect of the trial by jury. The act gave to that Court,—not to the Lord Ordinary or the Court of Session,—but the Jury Court exercising a jurisdiction under the act, a power to send it back, not to the Court of Session generally, but to the Lord Ordinary or the Division of the Court of Session before whom the cause had been fully investigated as to that objection which had occurred. If this course had been to be followed this question never could have arisen.

My Lords, other acts of parliament were afterwards passed. By the 6 Geo. 4. c. 120., (the fifteenth section,) it is thus provided: “that where the parties differ
“ about facts which require to be ascertained by jury
“ trial the Lord Ordinary shall have power to remit
“ the whole process to the Jury Court, or send particular
“ issues of fact to be tried, and the Jury Court shall
“ settle the issues.” But it contains this particular enactment: “the order of the Lord Ordinary, in so
“ far as it remits the cause, to be final.” So the law stands as to any positive enactment respecting the order of the Lord Ordinary being final.

The object of the next statute was to get rid of the Jury Court as a distinct jurisdiction, and to unite it to the Court of Session; and accordingly the act of 1 Will. 4. c. 69. contains this enactment: “That from and after
“ such union all causes and issues, which if they had
“ occurred after the passing of this act must by law
“ have been tried by jury in the Jury Court, shall be

“ tried by jury in the Court of Session, and such
 “ causes shall be prepared for trial by the Lords
 “ Ordinary respectively before whom such causes shall
 “ be pending.” That simply unites the Jury Court
 with the Court of Session, and does not profess to make
 any alteration in the scheme provided by the prior
 acts of parliament as to the mode in which the trials
 should take place. But it seems to be presumed that,
 because the Jury Court no longer exists as a separate
 jurisdiction, the positive enactments of prior statutes
 which made the decision of the Lord Ordinary final
 no longer exist, and that this question, whether a case
 should or not be tried by a jury, may by a circuitous
 mode become matter of litigation and appeal, just as if
 no such act had been passed.

My Lords, I find the scheme by which this has been
 attempted explained in Mr. Macfarlane’s treatise on
 jury process; he states this in the fortieth page: “ As a
 “ remit with a view to trial is a most serious step
 “ in consequence of its finality, the Court have
 “ suggested that where the remit is objected to, the
 “ Lord Ordinary should report the case.” He un-
 doubtedly had power so to do, but it was at his
 discretion whether he should do so or not; and by
 a previous decision it would appear that where a party
 is dissatisfied with a remit to the Jury Court, his course
 is to move to get the case retransmitted, for the purpose
 of having the question of law or relevancy on which
 he founds disposed of. “ In this way the question of
 “ law or relevancy,”—which your Lordships recollect is
 one of the excepted cases in the prior statutes in which
 it may be proper to have the opinion of the Court

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MONTGOMERIE before it is sent to the jury court,—“ In this way
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 BOSWELL. “ the question of law or relevancy is brought under
 23d April 1839. “ discussion, and by section sixty-five of the A. S.,
 Ld. Chancellor’s “ 11th July 1828, it is provided, that in all cases of re-
 Speech. “ transmission by the Jury Court to the Lord Ordinary
 “ of the Court of Session, for the purpose of deter-
 “ mining any point of law or relevancy occurring
 “ previous to trial, the said Lord Ordinary shall report
 “ to the Inner House all such matters, and that either
 “ verbally or by cases, as to him shall seem expedient ;
 “ and in case of dilatory defences the Lord Ordinary
 “ shall proceed as in the case of dilatory defences in
 “ actions before the Court of Session. In all cases,
 “ therefore, where a dilatory defence or plea of rele-
 “ vancy or law arises, the course is obvious by which
 “ the opinion of the Inner House can be obtained ;
 “ but the difficulty still remains where expediency
 “ merely of a jury trial is questionable and no proper
 “ plea of law or relevancy has arisen. It is not to be
 “ supposed, however, that the Lord Ordinary will ever
 “ refuse, where the circumstances seem at all to require
 “ it, to give the parties an opportunity of going to
 “ the Inner House on the subject of a remit, either
 “ by reporting the case or pronouncing such findings
 “ as may be reclaimed against in the manner explained
 “ in the following section.” Undoubtedly in a case
 which requires it, the Lord Ordinary would not perform
 his duty without doing that, and therefore it is not
 to be supposed he would take the course of declining
 to give the parties the opportunity of taking the opinion
 of such Court where the case required it. But the course
 adopted here makes it feasible in every case. The

Lord Ordinary says, this is a proper case to be tried by a jury; accordingly he sends it to the jury roll. That is not subject to appeal; it must stand therefore; the Lord Ordinary's direction that it shall be tried by a jury is not to be questioned. So the Inner House have decided in this very case; but in the very next step of the case an application is made to the Inner House to bring it back again, and that is granted; by which it must be taken to be assumed, not only that it is the matter of a reclaiming note to the Inner House, but of appeal to the House of Lords. It is an expedient, therefore, by which, if successful, the express intention of the legislature will be defeated, and the parties in all cases whose cases have been directed to be tried by a jury, will be coming continually to your Lordships bar. I am sure your Lordships will not be disposed,—and it is not now necessary to make any further observations upon the subject,—that your Lordships will not sanction a practice which will occasion such consequences as that. If your Lordships should be asked to sanction such a practice, it will then have to be considered, whether it is necessary to make a further legislative provision, if the circumstances in the Court below should appear to render it necessary. I make these observations without feeling it necessary to advert to any opinions which the Learned Judges in the Court below have expressed upon this subject, as both parties agree that this point had not been raised in the Court below, and it is therefore one entirely unaffected by the decision of this case; and if that point should arise again, I have no doubt that it will receive all the attention in the power of

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MONTGOMERIE the Learned Judges. It will, however, be unnecessary
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 BOSWELL. for your Lordships to enter upon that if you shall agree
 23d April 1839. with me that the facts of this case are such as ought to
 Ld. Chancellor's be tried by a jury.
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The House of Lords ordered and adjudged, That the
 said interlocutor complained of in the said appeal be and
 the same is hereby reversed.

A. DOBIE—JOHN BROWNLEY, Solicitors.