[*6th June* 1839.]

(Appeal from the Court of Chancery, Ireland.)

(No. 14.) ALICIA O'CONNOR and others, Appellants.

[*Knight Bruce—Pemberton—Lowndes.*]

JOHN MALONE, Respondent.

[*Attorney General (Campbell)—Jacob—Hall.*]

New Trial—Verdict—Evidence—Venue.—A party in a cause in equity to establish the trusts of a will under which he claimed estates of great value, stated and adduced evidence that he was the eldest legitimate son of a marriage of his parents in January 1801, and an issue having thereafter been sent to trial at law, the evidence at which trial adduced by the same party went to show that the marriage had taken place in January 1802, and the party having got a verdict; and the Court of Equity having, upon motion by the adverse parties, ordered a new trial, before a jury of the same county, upon payment of the costs of the former trial, and allowed the former verdict to be used in evidence at the new trial, Held, 1, (affirming in part said order,) That a new trial ought to be granted, in respect that the issue sent had not been satisfactorily tried, the case made at the trial being different from that made in equity; 2, (further affirming in part said order,) That manifestations of applause by one or more of the jury at the close of the speech to evidence of the counsel for the successful party at the trial, was no sufficient reason for altering the venue, or for directing the new trial to be had in one of the counties where the estates in question were situated; 3, (reversing in part said order,) That the verdict obtained on the former trial ought not to be given in evidence on the new trial of the issue; 4, (further reversing in part said order,) That costs of the former trial ought not to be allowed to the party who got the verdict, but that said costs ought to be reserved.

Observed, per L. C., When a Court of Equity has directed an issue to be tried at law, in order to ascertain the facts by which that court is to be guided in the exercise of its equitable jurisdiction, and after a trial of such issue thinks fit to order a new trial of the same, it is not the practice of the Court of Equity, in making such order, to interfere with or take any notice of the former verdict, to the effect either of setting aside that verdict, or of allowing it to be given in evidence on the new trial; and that a practice which had prevailed in the Court of Chancery in Ireland, of setting aside the former verdict on ordering a new trial, was erroneous.

COURT OF CHANCERY, IRELAND.

Lord Plunket, Chancellor.

IN 1836 John Malone (respondent) filed a bill in the Court of Chancery in Ireland with the view to establish a title as heir tail male to estates of great value in Westmeath and other counties in Ireland, devised by the will of the Right Honourable Anthony Malone, dated in 1774. In his amended bill the respondent set forth that he was the eldest legitimate son of Captain Richard Malone deceased, who was the second son of Richard Malone, the brother of the original settlor; and that the marriage of his parents had taken place on the 22d day of January in the year 1801, in Townsend Street chapel in the city of Dublin.

Mrs. O'Connor and others (the appellants), trustees under settlements of said estates, by their answer denied the legitimacy of the respondent, and maintained that the alleged marriage of the respondent's parents was illegal, the same having been solemnized by a Roman Catholic clergyman, the respondent's father being at the time and for twelve months previously a protestant. Issue was joined, and witnesses examined for both parties in the Court of Chancery. After several witnesses had been examined for the

O'CONNOR and others v. MALONE.

6th June 1839.

Statement.

respondent, but before publication, the appellants solicitor discovered that there had been a son born of the same parents at Preston in Lancashire, in the month of June or July 1801, and baptized by the name of Anthony Malone in the Roman Catholic chapel at Preston on the 26th of July 1801. The solicitor for the appellants apprised the solicitor for the respondent of this circumstance. After publication it appeared from the depositions that several of the respondent's witnesses, including the mother of the respondent, had given evidence that the father and mother of the respondent had returned from Preston, and ceased to reside there in the end of the year 1800; and that they had been married, as stated in the amended bill, in the city of Dublin on the 22d of January 1801.

The cause came on to be heard on the 13th of November 1837, whereupon, by consent of parties, the Lord Chancellor of Ireland (Lord Plunket) directed an issue be tried in the Court of Queen's Bench, "whether the plaintiff was the heir at law of Richard "Malone deceased, who was the son of Richard "Malone, one of the brothers of the Right Honourable "Anthony Malone in the pleadings mentioned?" That issue was tried before Mr. Justice Crampton and a special jury of the county Dublin, and a verdict had for the plaintiff (respondent). In stating the case at the trial, the respondent's counsel announced that the witnesses in the equity cause had been mistaken as to the true date of the marriage of the respondent's parents, which had really taken place in January 1802; and evidence was accordingly adduced by the respondent to prove that the said marriage had taken place in Dublin in January 1802.

The appellants applied by motion, with notice, to the Lord Chancellor Plunket, to set aside the verdict on the ground of surprise on the trial and variation from the case made in the equity cause; and also that a new trial might be directed before a jury of any county save the county of Dublin. The motion was founded on the judge's report of the trial, and on affidavits by the appellants solicitor, that said solicitor had relied on the respondent attempting to prove that said marriage had taken place in January 1801, and that Anthony, the elder brother of the respondent, had died without issue, and that the appellants were prepared to prove that said marriage could not have taken place in 1801. The affidavits of the solicitor and his clerk further set forth, that two of the jurors clapped and applauded in the jury box on the conclusion of the speech to evidence of the respondent's counsel.

Statement.

The Lord Chancellor of Ireland (Lord Plunket), on the 19th of February 1838, made the following order:—"It is ordered that the motion for changing "the venue and for setting aside the said verdict be "refused; that there be a new trial of the said issue, "with liberty to the plaintiff on such new trial to give "such former verdict in evidence as he may be ad- "vised, the defendants to pay the costs of the former "trial, the costs of the motion to abide the result of "such new trial."

Order by Lord Chancellor of Ireland, 19th Feb. 1838.

The appellants appealed. The petition of appeal prayed in substance that the above order might be varied, by directing that the former verdict should be set aside; and that the new trial of the issue might take place before a jury of some county in Ireland

O'CONNOR and others v. MALONE.

6th June 1839.

where the lands in question or some of them lie, and that the appellants should not pay the costs of the former trial.

Appellants Argument.

Appellants.—A new trial had been ordered, and was absolutely necessary, not merely in reference to the amount of the property at issue, but also regard being had to the proceedings at the trial, which showed that a verdict so obtained was as worthless as the inconsistent evidence on which it proceeded. The former verdict had not been set aside, although it was the practice in Ireland to do so in ordering a new trial, and the Lord Chancellor of Ireland had not said whether he was satisfied with that verdict or not, but had ordered a new trial, and had allowed the former verdict to be given in evidence on a new trial. Now, where a new trial had been ordered, the former verdict had always been set aside; it might not always have been so in form, but in substance that was the nature and effect of the order for again trying the question. There was no difference in the form of order whether the judge be satisfied or not. In Seton on Decrees[1] there is the form of an order for a new trial of an issue in Watmore v. Watmore[2], where certainly, if the former verdict be not expressly set aside, there was no order that it should remain part of the proceedings, or be given in evidence at the new trial. In Locke v. Colman[3], and in Mudd v. Suckermore[4], where new trials had been ordered, the former verdict had been entirely disregarded, and no order made for giving it in evidence. The reason why the former verdict could not

---

[1] p. 350. [2] M. R. 14 Feb. 1815. [3] 2 My. & C. 42. [4] Rolls 1835.

be entertained as part of the proceedings, a new trial being judged necessary, was, that a verdict cannot be made evidence at law until it has ripened into a judgment, and then it is conclusive betwixt the same parties in the same matter. See Phillips's Evidence by Amos [1], and the case of Vooght v. Winch [2], and the cases therein cited. In equity, the Court, seeking to inform its mind, may order a new trial, as in Stace v. Mabbot [3], Cleeve v. Gascoigne [4], and in Harder v. Sise, cited in 2 Vernon, 285, in which last case there were five trials, and a case in Lord King's time, noticed in 2 Ves. sen., p. 554, by Lord Hardwicke in his judgment in Cleeve v. Gascoigne; but nothing had been said about giving the former verdict in evidence. But the authorities upon the point were supposed to be controverted by the judgment of Lord Hardwicke in the case of Baker v. Hart, twice reported [5], and which case required explanation and investigation. In Atkyns, Lord Hardwicke is made to say, "Where it "is a matter of inheritance, the court without setting "aside the first verdict, for the more solemn determi- "nation, in some cases direct a second trial; and if "the court direct such trial without setting aside the "former verdict, then the former may be given in "evidence, and will have its weight with the jury, and "therefore it is a very material difference to the "parties; because, if I was to direct a new trial on my "setting aside the first verdict, the defendant would "lose the benefit of urging the first verdict in his "favour at another trial."

---

[1] vol. 2. p. 510. 8th edit.

[2] 2 B. & Ald. 662.

[3] 2 Ves. sen. 553. See also Ves. Sup. 429.

[4] 1 Amb. 323–24.

[5] 3 Atk. 542; S. C. 1 Ves. sen., 27.

O'CONNOR and others v. MALONE.

6th June 1839.

Appellants Argument.

In Vesey senior[1] the expressions are, "the applica- " tion here is not to set aside the former verdict; and " in doubtful questions relating to inheritances a court " of equity frequently grants a new trial without " setting aside the former verdict, which is of great " consequence to the parties, for then it may be given " in evidence, though not conclusive, either party " being at liberty to show on what grounds it was " obtained; but courts of law in that case always set " the former aside." But both reports were now understood to contain an inaccurate account, both of the facts of the case and of the order made for the new trial. The registrar's books, however, correctly set forth the order, and it appeared there was no order about giving the former verdict in evidence on the second trial.

The conduct of juries had frequently been made the ground for directing a new trial of issues, see Dent v. Hundred of Hertford[2], East India Company v. Bazett[3], in which last case a verdict was held not satisfactory, as the jury had been under great difficulty, and there was not a period sufficient for consideration, between the existence of the difficulty and its removal. Lord Eldon observed, "There is this difference between a " motion for a new trial in a court of law and in a " court of equity. In a court of law if a jury find the " fact, though the judge may think differently, yet it is " permitted to stand, for the finding of the fact is the " province of the jury; but here the verdict is somewhat " more than the verdict of the jury, it must be such " as to satisfy the Court that it can make that its own

---

[1] p. 28. [2] 2 Salk. 645; 1 Strange, 642. [3] Jacob, 91.

"declaration of the fact which the jury have made "theirs." [Lord Chancellor. A court of equity does not set aside a verdict at law; it only declines to act upon it.] Neither was there any practice in Ireland to sanction the giving the former verdict in evidence, Harrison v. Cumming, in 1808, being the only case in Ireland found upon a search of the records.

Appellants Argument.

2. The venue ought to be changed. The circumstances under which the former verdict was returned, indicated a feeling and partiality not merely in the minds of the individual jurors animadverted on, but a strong prejudice in reference to the matters under investigation; one of the counties where the lands in dispute lay ought therefore to be preferred.

3. Costs ought not to have been awarded. There may have been cases in which costs were awarded [1], even where a new trial had been granted, but never where the verdict was so objectionable as this was, being plainly not such a verdict as could ever be deemed satisfactory by the court that directed the issue; and the blame clearly lay with those who got up a case so inconsistent with that made in equity.

Respondent.—The value of the property in question might be deemed a good reason for enabling the parties to try the issue again, before being concluded upon claims, the ascertainment of which had been attended with difficulty. But there was nothing else in the case to justify the application for setting aside the former verdict, or for disturbing the order in so far as it allowed that former verdict to be submitted along with the

Respondent's Argument.

[1] Cleeve v. Gascoigne, 1 Amb. 323; So, in Stace v. Mabbot, 2 Ves. sen., 553.

O'Connor and others v. Malone.

6th June 1839.

Respondent's Argument.

evidence to be adduced on the new trial. The course which the appellants had adopted in supporting their application, made it incumbent upon the respondent to go fully into the judge's report of the trial, to ascertain how far it was such a verdict as must have been satisfactory to the court that directed the issue. For it was very clear that the admission or rejection of portions of evidence which ought, in strictness, either to have been excluded or let in, formed no sufficient ground for insisting that a court of equity must set aside or disregard the verdict; as that court, seeking merely to inform itself as to the facts upon which its determination might rest, looked to the effect of the evidence in judging how far the verdict was satisfactory; see Bootle v. Blundell [1], Hampson v. Hampson [2], Barker v. Ray [3]; in which last case Lord Eldon [4] observed, "Issues are "directed here to satisfy the judge, which judge is sup- "posed, after he is in possession of all that passed upon "the trial, to know all that passed here; and looking at "the depositions in the cause, and the proceedings "both here and at law, he is to see whether on the "whole they do or do not satisfy him. It has been "ruled over and over again that if on the trial of an "issue a judge reject evidence which ought to have "been received, or receive evidence which ought to "have been refused, though in that case a court of law "would grant a new trial, yet if this court is satisfied "that if the evidence improperly received had been "rejected, or the evidence improperly rejected had "been received, the verdict ought not to have been "different, it will not grant a new trial merely upon

---

[1] 19 Ves. 494. [2] 3 Ves. & Beam. 41. [3] 2 Russ. 63. [4] p. 75.

"such grounds." Now the report of the judge who tried this case did not express any dissatisfaction with the verdict, neither had the Court of Equity in Ireland held it unsatisfactory. Indeed, a careful consideration of the report of the trial showed that no other verdict would have been satisfactory to that court, and therefore parties were not to be excluded from the benefit of a previous investigation, the verdict on which could not be impugned. It was not sufficient to allege surprise at the trial, unless it was surprise of such a nature as must necessarily have prejudiced the cause by producing a different result from what the other party might have been prepared to bring about. Besides, it was admitted, that the appellants were aware that there must have been some mistake, and that the marriage could not have been had in January 1801, and that the respondent could not have been the eldest born after a marriage in that year. And the question being whether the respondent was the eldest legitimate son of a marriage betwixt certain persons named, and a marriage being proved, there could be no prejudice to the appellants, when the effect of the whole evidence was looked to, and the mistake explained. The admission of the former verdict was urged on the authority of Lord Hardwicke in Baker v. Hart [1], who, in both the reports of that case, was made to use the expressions as if familiar in the practice of the court at the time.

2. The venue had for obvious reasons been fixed in the county of Dublin, where the prejudice upon questions of local importance must have been less than in the counties where the lands were situated. Any manifes-

[1] 3 Atk. 542.; 1 Ves. sen. 27.

O'Connor and others v. Malone.

6th June 1839.

tation of feeling (supposing it to have been as stated in the affidavits) could not attach disabilities to other jurors impartially chosen.

Respondent's Argument.

3. Costs were properly found by the court not dissatisfied with the verdict, and which allowed that former verdict to be used on the new trial.

Ld. Chancellor's Speech, 14th Mar. 1839.

Lord Chancellor.—My Lords, this is a case of very great importance, not only from the value of the property in question, but on account of the peculiar circumstances which appear to have taken place in the court below. Upon the case itself, therefore, from the opinion which has been entertained by the court below by a very eminent and learned person, your Lordships perhaps will think it advisable, whatever the impressions of your Lordships may be, to look very carefully through the papers before you proceed to give your final judgment upon this appeal.

But my Lords, there is another reason which induces me to advise your Lordships not to proceed further at the present moment. In the course of this discussion a question has been raised shewing a practice in the courts of equity in Ireland, which is certainly quite inconsistent with the practice which exists in the courts of equity in England. Now, my Lords, there is no reason whatever why the practice of the courts in the two countries should be different. It certainly does appear to have raised a great difficulty in explaining the case of Baker v. Hart[1]; for the practice might be somewhat different in Lord Hardwicke's time, and can only be explained by supposing that the practice in

[1] 3 Atk. 542.; S.C. 1 Ves. sen. 27.

equity in this country is different from that in Ireland. My Lords, in order to ascertain that, I have directed a search to be made from 1750 backwards, in order to see whether those expressions attributed to Lord Hardwicke in the case of Baker v. Hart are or are not supported by the authorities in the Court of Chancery. That search has not yet been completed, but as far as it has gone, there is no instance to be found in which the order has set aside the verdict, or in which there is contained any direction as to giving or not giving that verdict in evidence on a new trial. I shall very shortly be furnished with the further result of that inquiry, which I haye directed to be made; and I believe, before I call your Lordships attention to this case again, which I purpose to do in the course of next week, that I shall be able to get some further information upon the point as to what passed in the court, beyond what is found in the printed reports and in the registrar's book. It is an extremely important question in this country and in Ireland; and on so important a point in equitable jurisdiction it is desirable that your Lordships should have all the information before you upon that subject, before you finally dispose of this case.

Judgment deferred.

LORD CHANCELLOR.—In this case the Lord Chancellor of Ireland directed a new trial of an issue which had previously been tried, for the purpose of ascertaining who was the heir at law of Richard Malone. Upon the propriety of the new trial no question has been made; but three points have been raised as to the propriety of some of the directions given upon that order for a new trial. The order directed that the verdict which was obtained upon the former trial of the issue should

O'Connor and others v. Malone.

6th June 1839.

Ld. Chancellor's Speech.

be laid before the jury upon the second trial, and be used as evidence; it directed the appellants to pay the costs of the previous trial; and another point contended for here by the appellants, as having been erroneously disposed of below, is that the trial which is to be had should not be, in the county where the former trial was had, namely, in the county of Dublin.

My Lords, the question therefore for your Lordships to consider is, in the first place, whether the order for the new trial ought to contain the direction with regard to the verdict upon the former trial. It certainly struck me as a very singular direction, and when the case was argued at your Lordships bar, I had no recollection of any such provision being contained in any order for a new trial. I did not even recollect that I had ever seen an order, in which the court had taken notice of the verdict in a former trial. I directed searches to be made, and after the most diligent searches which the registrars of the Court of Chancery have been able to make, carrying them back for two centuries, there is no instance found but one, which I shall presently call your Lordships attention to, in which an order for a new trial has taken any notice of the verdict in the former trial. The reason is perfectly obvious. In a court of law the verdict is a necessary part of the proceedings in the cause; it is the foundation of the judgment of the court. If therefore the verdict which has been obtained is not such a verdict as in the opinion of the court to be properly the foundation of a judgment, the court puts the case in a train for having it tried again; and it necessarily sets aside the verdict, inasmuch as the opinion of the court is, that that verdict ought not to be the foundation of the judgment to be pronounced. But when an issue is directed by a court of equity

there are no further proceedings upon the verdict; the object of the verdict is to satisfy the court of equity as to the facts. It is not therefore a case in which any thing further is to be done. All that a court of equity does in directing a new trial,—the mind of the judge being made up upon the evidence, or the result of the evidence,—is to put it into a course of further investigation, in order better to satisfy himself of the facts before he proceeds to adjudicate upon the right of the parties.

In this case it was said the new trial was granted not on account of any thing unsatisfactory which had taken place on the first trial, but because as it concerned the inheritance of an estate, the parties proceeding at law would in the ordinary course of things have had an opportunity of trying their right over again in several ways; and therefore that it was not thought proper on the part of the Lord Chancellor of Ireland that he should at once determine the rights of the parties without giving them an opportunity of another trial; and two cases were cited upon that point which were before me,—one when I was Master of the Rolls, and the other when I was in the Court of Chancery. These cases are Locke v. Colman, in 2 Mylne and Craig, p. 42, the other Mudd v. Suckermore[1], which was before me at the Rolls, and in which I proceeded upon that principle. Mudd v. Suckermore was not in its circumstances the same as the present case, although it involved very much the same principle, because that was not the case of an issue directed by the court for the purpose of informing the mind of the court, but it was a case in which the court superseded the proceedings in the cause, giving

[1] Rolls, 1835.

O'Connor and others v. Malone.

6th June 1839.

Ld. Chancellor's Speech.

the parties leave to bring an ejectment; and the question was, whether an ejectment having been tried, and the question being with respect to the inheritance of an estate, the court should proceed to an adjudication without giving the parties an opportunity of another trial. And I observe that in my note of the judgment in that case, I drew the very distinction to which I have now called your Lordships attention. I observed, "The "distinction between these cases in which the court "directs an issue, and those in which it gives the "plaintiff an opportunity of establishing his title at law, "is most important to be attended to. In the first, "the object is to ascertain the facts by which the court "is to be guided in the exercise of its equitable juris-"diction, and therefore necessarily takes upon itself "cognizance of the evidence at the trial, and grants or "refuses a new trial without regard to those rules "which guide a court of law upon this subject. In "the other, it only suspends its proceedings till the "right is settled at law; and being so settled it acts "upon that without regard to the evidence upon which "such right has been established or inquiring whether "it was properly established or not." Therefore the case of an ejectment brought with the permission of the court, and an issue directed by a court, are not analogous, and do not come within the same principles. At the same time it is quite true that the court does as it did in Locke v. Colman[1], where there was a question of right to be ascertained depending upon the custom of a very extensive manor; I thought it right, although there was no objection to the trial, that there should be an op-

[1] 2 My. & Cr. 42.

portunity of again investigating the circumstances upon which the right of the party depended, by a new trial.

But, my Lords, I cannot think that that applies at all to this case, because it appears to me, without entering at all into the particulars,—which I carefully avoid, as the matter is to be tried again,—that there was enough in the circumstances of the first trial to make it the duty of the court not to act upon that verdict, but to give the parties an opportunity of again proceeding to trial. The party claiming as heir had in the equity cause stated the marriage of his parents, under which therefore he claimed as their legitimate issue, as a marriage in January 1801. That was the case he made in the pleadings, and it was the case he proved by witnesses in the cause where witnesses were examined, who spoke to the marriage as being in January 1801. It appeared that the parents of the claimant had gone to Lancashire, and that some evidence was to be obtained there. Both parties went into Lancashire; and then the party opposed to this claimant found that in the summer, the month of August, I think, of 1801, another child (named Anthony) had been born and baptized there; so that if the marriage had taken place in January 1801, the plaintiff could not possibly be the heir, because there was thus another brother, Anthony, born subsequently to the marriage, and anterior to the period of the birth of the plaintiff. It appears that that fact was brought to the attention of the agent for the claimant; notwithstanding which, when publication took place, and the cause came to be heard in equity, it appeared that witnesses had been examined and proved, —when I say proved, I say they deposed to the marriage being in January 1801.

O'CONNOR and others v. MALONE.

6th June 1839.

Ld. Chancellor's Speech.

The issue was then directed, and the parties went down to trial, and when they came down to trial it appeared then for the first time (there is some evidence of there being a communication made to the opposite agent before), but I say the first time with reference to any evidence given on the trial,—that the claimant set up a marriage not as in January 1801 but as in January 1802, which of course displaces Anthony, who was born in the summer of 1801.

Now, whether such marriage be hereafter to be established or not I do not at present at all inquire; it must necessarily be the subject of further investigation of the evidence before it goes to a new trial; and I shall therefore carefully abstain from saying any thing which can lead to a supposition that I have formed a very conclusive opinion as to the evidence upon which the claims of the parties are to be decided. But it is quite clear that, under these circumstances, the party who went to trial to meet the case to be made out was not at all prepared to meet the case which was brought before the court. He might have had a certainty of success if the case of the claimant had been adhered to as at first set out; because, if the claimant had continued to set up his title under a marriage in January 1801, all that it would have been necessary for the defendant to do would have been to show the birth of Anthony in the summer of 1801, and the case must have gone against the claimant.

Now this may have been a misapprehension or misstatement on the part of the witness, and may be set right on a further trial; but it cannot be said that the trial which has taken place was at all calculated to try the real question between the parties. For these

reasons I think it was quite right to grant a new trial. Upon that there is no dispute. But the ground upon which a new trial is to be granted is in order to try that over again which has not been satisfactorily tried, arising from the misapprehension (as I take it for the present purpose) of those who acted for the claimant in referring the marriage to another year, namely, 1801 instead of 1802.

But that is not the only point raised with reference to the grounds upon which a new trial is granted, although it is no doubt a very important one. With regard to the direction in the order, that the verdict in the former trial may be used upon the second trial,— why is that verdict which has been obtained under such circumstances to be used upon the new trial? If the case goes down to the jury for a new trial, with the order of the Lord Chancellor of Ireland that the verdict may be used upon that trial, it is all but directing the jury to find the same verdict on the second trial, because it is telling the jury that the Lord Chancellor is satisfied with that verdict; and if the Lord Chancellor is satisfied with that verdict, no doubt it would naturally make a very strong impression upon the mind of the jury that they ought to be satisfied with it also, unless there is some very important variance in the evidence between that produced on the first trial and that produced on the second. Again, if the Lord Chancellor was satisfied with the verdict, why should he send the case back to a jury? or why should he in terms direct the jury to take notice of that verdict, when by granting a new trial he has in substance declared that he does not think proper to give credit to it himself, at least to the extent of adjudi-

O'CONNOR and others v. MALONE.

6th June 1839.

Ld. Chancellor's Speech.

cating upon the rights of the parties in respect of that verdict? The case therefore stands entirely by itself. No instance has been produced in which the court has directed a verdict to be used. If the verdict be evidence without such direction, of course that direction is improper, because then it is giving it as legal evidence, an importance beyond that which ought to be given to it. If, on the other hand, it be not legal evidence, then it is directing the jury to try the rights between the parties upon that which the law does not recognize as legitimate and proper evidence. Upon the question therefore, whether the order ought or ought not to contain the direction to use that verdict upon the new trial, I have not, from the beginning of the argument up to this time, entertained the slightest doubt.

But that raises another point perhaps not very important in the present case, but important as showing a considerable variance in the practice in Ireland from that which prevails in this country, and which in cases where the circumstances are precisely similar would be undoubtedly inconvenient, and ought to be altered, unless there is some good reason for it. It was stated, and I think that appears upon the cases with which your Lordships have been furnished, that the course of proceeding in Ireland is to set aside the verdict in directing a new trial; I would observe that that appears to me to be an erroneous proceeding. The inquiries which I have had made into the cases in this country, carried back for nearly two centuries, do not furnish any instance but one of such a proceeding; and when I refer your Lordships to that one case, it does appear to me that there is quite sufficient in the circumstances of that case to explain how it happened

that such a provision is to be found in that order. The only case to be found is that of Harcourt v. Cresswell in 1723, and it is furnished to me by one of the registrars of the Court of Chancery, but evidently we have not the terms of the order. Whether the order contains that I am not able to say; but what fell from the Lord Chancellor in giving his judgment was in these words:—"To set aside the verdict as being against "evidence or for excessive damages; for the trial being "directed to satisfy the conscience of the court, and "there appearing to have been means used to influ-"ence the jury, the conscience of the court cannot "be satisfied with the verdict; therefore set aside "the verdict and proceed to a new trial, and commit "the party who is found guilty of tampering with the "jury." It is quite obvious that that is not the order, but that these were the words which fell from the court at the time the order was made.

Now that case, and a case which I shall presently refer your Lordships to, namely, a case before Lord Hardwicke, are the only authorities I believe to be found in the records of the court, or in any records at all, foreign to the existing practice of not setting aside the verdict, or at all interfering with the verdict which has been obtained. The case which has been referred to, which was before Lord Hardwicke, is Baker v. Hart, which is very imperfectly reported in Atkyns.[1] I have, from the registrar's book, obtained a full note of the order and of the proceedings; and what appears to be the real history of that case explains some of the expressions attributed to Lord Hard-

[1] 3 Atky. 542.

O'Connor and others v. Malone.

6th June 1839.

L'd. Chancellor's Speech.

wicke, and which, according to the statement of the facts in Atkyns, are not at all intelligible. That also is a case where an ejectment was brought; the question of legitimacy there turning upon the fact of the date of the marriage of the supposed husband and the mother of the claimant. The claimant brought an ejectment, and obtained a verdict; affirming, therefore, the validity of the marriage of the parents. Afterwards a bill was filed, and the same question was raised, and two issues were directed; first, whether the daughter of the parties was the heir of the father, and upon that if the jury should find that she was not the heir of the father, then whether the other party claiming was the heir of the father. Those two issues went down to trial, and the jury found that the daughter was the heir of the father. Necessarily, therefore, if they found that the daughter was legitimate she would stand first, and the other would not be the heir. There were three verdicts; the verdict in ejectment, and the verdicts upon those two issues. Now in that case Lord Hardwicke is made to express himself in these words:—"Where it is a matter of "inheritance the Court, without setting aside the "verdict, for the more solemn determination, in some "cases, direct a second trial; and if the Court direct "such trial without setting aside the former ver-"dict, then the first may be given in evidence, and "will have its weight with the jury. And therefore "it is a very material difference to the parties; "because, if I was to direct a trial on my setting "aside the first verdict, the defendant would lose the "benefit of urging the first verdict in his favour at "another trial." His Lordship is made to say that it

had been stated by the judge who tried the issues, that the jury had been very much influenced by the verdict in the first trial. That must necessarily be in verdicts for ejectment, where the two are tried together. Those expressions, attributed to Lord Hardwicke, would assume that it was the practice of the Court of Chancery, upon an application for a new trial, to set aside the former verdict. But, my Lords, if any such practice existed, it would have been found of course in the registrar's searches, but no instances have been found except the one to which I have now referred.

I cannot therefore consider that that is the practice of the court. How those expressions of the Lord Chancellor are to be explained it is not now necessary to inquire. The investigation I have had made satisfies me that the impression which I entertained at the time this appeal was heard is correct,—namely, that it was not the practice of the court in directing a new trial to take any notice of the former verdict. Lord Hardwicke, it would appear from the report, assumed that if there is nothing said about the former trial, the verdict may be given in evidence. My Lords, I apprehend that Lord Hardwicke could not so have expressed himself, it being a well known rule of law that a verdict without judgment is no evidence at all, and the reason why at common law the courts will not receive as evidence a verdict without judgment is stated to be, because it does not appear that it may not have been set aside or disregarded, or that the court may have thought proper not to act upon it. There can be no judgment upon a verdict obtained in an issue directed from a court of equity. If, indeed, there be an order in equity acting upon the verdict, it would give the same quality and sanc-

O'Connor and others v. Malone.

6th June 1839.

Ld. Chancellor's Speech.

tion to the verdict which a verdict after judgment has at law. But when the court of equity for any reasons thinks proper to send the issue to a new trial, I apprehend that a mere verdict would not be evidence in the second trial of the issue; and whether it were used or not, it is quite obvious that the jury would be directed by the judge not to pay attention to the verdict which the court in granting a new trial had thought proper to disregard. Those expressions of Lord Hardwicke really appear to me to be quite unintelligible with reference to the known practice of the courts of equity.

I have thought it desirable, seeing that the practice in Ireland was a practice somewhat different from that which existed in England, namely, of setting aside the verdict where a new trial was directed, to call the attention of your Lordships to the state of the proceedings, in the hope that the courts of equity in Ireland may think it expedient to adopt a course of practice which has always prevailed and does now prevail in this country.

I therefore propose to your Lordships to reverse the order of Lord Plunket in so far as it has reference to the former verdict, leaving it as a simple direction that the parties should proceed to a new trial.

My Lords, the next point is with reference to the costs. The order of Lord Plunket directs the parties in applying for a new trial to pay the costs. In the view which Lord Plunket seems to have taken of the conduct of the parties, I was not very much surprised that that direction is contained in the order, because if it merely were an order applied for, and for the security of the respondent, it might be right to make such an order to indemnify him against the costs of the

trial. That assumes that there is no objection upon the face of the former trial, and that the party applying has not any ground of complaint against the conduct of the parties on the other side in the former trial; and I take it that that is his Lordship's view of the case. But without expressing any opinion as to the result of the evidence or the probable result of a new trial, I certainly see that looking at the conduct of the respondent upon the first trial, there was no chance whatever of the appellants obtaining from the hands of the jury a fair decision upon the real question between them. Differing therefore as I do from the Lord Chancellor of Ireland upon that point, I necessarily differ from him as to the propriety of the direction he has given with regard to costs. It appears to me that the costs of the former trial ought to be reserved, and the court will see better how to dispose of the question of costs when it sees how the rights of the parties are established by the verdict.

With regard to the other point of which the appellants complain, or rather the variation in the order which they ask for, that the trial may take place in some other county, and not in the county of Dublin, —the only fact stated as a ground for changing the venue is the indecorous manifestation of feeling exhibited by the former jury, not upon the verdict being pronounced, but at the conclusion of the address of the counsel for the claimant. On the one side that is attributed to too much feeling in some of the jury in favour of the claimant; on the other side it is attributed to mere admiration of the very eloquent speech which had been concluded by the counsel. Neither one nor the other would justify the jury in

O'CONNOR and others v. MALONE.

6th June 1839.

Ld. Chancellor's Speech.

the expression of feeling or applause in which some of them indulged; but I cannot consider the fact of some gentlemen of warm feelings happening to be upon that jury as disqualifying another jury of the county of Dublin from exercising the duty which devolves upon them of trying the question. It is very well known that in most instances there is more feeling in the county in which the property is situated than in another county where the jurors selected are not likely to have any connexion with either the one side or the other. I do not think there is any sufficient case stated to induce the House to alter the venue, or to direct the second trial to be had other than in the county in which the former trial took place.

The result, therefore, if your Lordships concur in the view I take of this case, will be to order a new trial, directing the costs to be reserved, and striking out that part of the order which takes notice of the former trial.

The House of Lords ordered and adjudged, That the said order of the Court of Chancery in Ireland, in part complained of in the said appeal, be varied, by omitting so much thereof as directs that the plaintiff be at liberty on such new trial to give the said former verdict in evidence, and that the defendants Alicia O'Connor, Hugh Morgan Tuite, and Thomas Ardill, the trustees, do pay the costs of the former trial; and that, subject to such variation, the said order be and the same is hereby affirmed: And it is further ordered, That the question of the costs of such former trial be reserved till after the new trial directed by the said order shall have been had.

PEMBERTON, CRAWLEY, & GARDINER — W. R. KING and SON, Solicitors.