MORGAN ET AL., ... APPELLANTS.
MORRIS ET AL., ... RESPONDENTS.

1856.
16th, 17th, 19th, and 26th July.

Directing of Issues—Verdict—Uncertainty.—In a multiple poinding or interpleader suit, if a question arises which of two persons is heir or next of kin, the Court will put the matter in a train of inquiry by directing an issue, and upon that issue the party asserting title will have cast upon him the duty not only of proving his own case, but of negativing that of others.

Two issues were directed. The first was in these words: "Whether the Pursuer Alexander Morgan is nearest and lawful heir of John Morgan, deceased?" And the second was as follows: "Whether the Pursuer James Morgan is, along with the said Alexander Morgan, next of kin of the said John Morgan, deceased?" The jury returned a verdict, "*They find the case of the Pursuers is not proven.*" The Court of Session thereupon gave judgment repelling the claims of Alexander and James Morgan. This decision reversed on the ground that the verdict, by reason of its uncertainty (not showing whether the jury considered that the Pursuers had failed on both, or only on one, of the issues), did not warrant, and could not be the foundation of, *any* judgment.

Lord St. Leonards *dissentient.*

Verdict of not proven.—A verdict in the words *not proven*, though more usual in criminal proceedings, is not necessarily bad in matters of civil jurisdiction.

Appeal against a Judgment merely applying Verdict.—An appeal lies wherever a judgment upon matter of law is pronounced. And, therefore, when the Court applies a verdict, by repelling a party's claim, the thing so done by the Court is to all intents and purposes a judgment within the meaning of the Jury Statutes, so as to admit of an appeal to the Lords.

Lord St. Leonards *dissentient.*

John Morgan, of Coates Crescent, in the city of Edinburgh, died there on 25th August 1850, leaving

a large succession, almost wholly personal, including therein upwards of 90,000*l.* in the 3¼ per cent. Government Annuities. His real property was of comparatively small value.

Mr. Lindsay, Accountant, in Edinburgh, was, by the Court of Session, appointed judicial factor on the estate of the deceased, and was also, by the Commissary Court of the diocese, decerned and confirmed his executor-dative. It being uncertain what party or parties had right to the real and personal succession, the present suit was resorted to by Mr. Lindsay, for the purpose of having the right judicially ascertained.

The claimants who appeared were of two classes. One class consisted of parties claiming legacies under certain writings said to be of a testamentary nature. The other class consisted of parties claiming to be the legal representatives of Mr. Morgan.

After sundry proceedings had and orders made in the cause, the Court of Session ultimately directed the following issues for trial:

"1. Whether the Pursuer Alexander Morgan is nearest and lawful heir of John Morgan, sometime residing at Coates Crescent, Edinburgh, deceased?

"2. Whether the Pursuer James Morgan is, along with the said Alexander Morgan, next of kin of the said John Morgan deceased."

The trial took place before the Lord Justice Clerk *Hope* and a jury, in August 1853, and lasted four days, at the close of which the verdict returned was in these words: "The jury say, on their oaths, that they find the case for the Pursuers is *not proven.*"

No exceptions were taken in the course of the trial, and no application was made for a new trial within

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the time allowed by the Statute, which is six days after the meeting of the Court immediately following the trial.

The Morgans, not attempting to disturb the verdict, the Defenders gave notice of motion: "That the Second Division of the Court would be moved to apply the verdict, and in respect thereof, to repel the claims of the said Alexander Morgan and James Morgan, and to find them liable in expenses."

Two days after this notice had been intimated, but before it was moved in Court, notice of motion was given by the Morgans: "That the Second Division of the Court would be moved to set aside or discharge the verdict, or refuse to apply it, or arrest judgment."

On the 23d Nov. 1853, the Lords of the Second Division, having heard Counsel in support of both motions, pronounced an interlocutor in these words: "Apply the verdict of the jury, and in respect thereof repel the claims of Alexander and James Morgan, and decern; find them liable in expenses," &c.

Against this interlocutor the Morgans presented their Appeal to the House.

Sir *Fitzroy Kelly* and the *Lord Advocate* (*a*) were heard for the Appellants.

The *Dean of Faculty* (*b*) and the *Solicitor General* (*c*) for the Respondents.

The questions are gone into so fully by the Law Lords in delivering their opinions, and this report is consequently so expanded, that the arguments of Counsel are by necessity omitted.

On the 19th of July 1855, the *Lord Chancellor* made the following observations:

(*a*) Mr. Moncreiff. (*b*) Mr. Inglis. (*c*) Sir R. Bethell.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*a*):

My Lords, although I am not prepared at once to dispose of this case, yet I think it may be useful (as I believe your Lordships have made up your mind upon some of the points which have been argued) to clear the way by disposing of them; and then leave the other questions to be decided at some future day.

Now, the first point which has been argued here is that improper contradictors, so to say, were set up to the Pursuers, that it was improper to make Alexander and James Morgan come forward in the character of Pursuers, and that it was improper that they should be opposed by the conjoint opposition of all the other claimants. I think that that is an objection utterly untenable. An action of multiple poinding in some few particulars differs from an interpleader in this country; yet in essentials it is the same thing; and I take it to be perfectly clear that if a bill of interpleader is filed in the Court of Chancery, or, which is the more common thing, a bill in the nature of a bill of interpleader, an executor bringing money into Court to distribute amongst the claimants, if there arises a question of fact which of two persons, or of two or more persons, is heir or next of kin entitled, the Court directs that to be put into a train of inquiry, and the executor who brings in the money is *functus officio*, he has nothing more to do with it. There can be no term defined *ab ante* in the abstract which shall meet every possible case; but the Court takes care to frame the issue to make such person plaintiff and such person defendant as according to the particular circumstances of each case appears to be most convenient.

(*a*) Lord Cranworth.

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Now, applying that rule here, I cannot conceive of anything more convenient than that any one person who said that he was entitled should be told by the Court, Make out your case, and those who oppose you shall all be at liberty to join in resisting you. I need not say anything at the moment upon the question whether they were entitled to more than one set of costs, that is quite another thing. But there being two claimants claiming in the same right, Alexander and his brother James, and there being a vast number of other persons, all of whom would be defeated if Alexander and James made out their claim, nothing could be so proper as for the Court to say, You shall assert your title, and they shall resist it, and an issue shall be directed that shall try the question. That question originally was, whether James was heir or next of kin? but before that issue came to be finally adjusted, or the matter put in course of trial, it turning out that James had an elder brother, Alexander, who had been living in America, the issue was altered, so as to raise the question whether Alexander, the elder brother, was the heir, and whether James and Alexander were next of kin? That was their proposition; and unless Alexander make out that he is heir, he fails as to the real estate, and unless Alexander and James make out that they are next of kin they fail as to the personal estate. Nothing could be so convenient and so reasonable as to direct the trial of an issue of the question in which they should be the Pursuers, and in which all the others joining together should resist them, all having a common interest in showing the negative of that proposition. In that respect I think it is clear that there was no miscarriage at all.

Then, was it a miscarriage or an error to direct the question simply in the form, whether Alexander was the nearest heir? The *Lord Advocate* has argued very

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strongly that that was very hard; because that put upon him not only the duty of proving his own pedigree, but of negativing the other pedigrees. Of course it did. That must be so in every case where a person is to prevail by establishing that he is heir; he must show positively and negatively everything that is to prove that proposition. The proof of the negative will be governed probably by different rules; presumptions may arise there which will not arise in respect of that of which he has to prove the positive. But exactly the same obligation is imposed upon him of negativing everything that is to show that he is not the heir, as of proving that which is to show that he is the heir. Indeed, tho two questions are so connected together, that it is impossible in theory or reason to separate them. Therefore I think the issue was quite properly directed, that the Pursuers were properly made the Plaintiffs, and that they were properly resisted by the persons who had a beneficial interest in resisting them, and not by a judicial factor.

Then, taking the objections chronologically as they occurred, the next objection made is that the Court of Session refused to let in the children of the deceased sister of Alexander and James, to join with them in showing that they were amongst the next of kin. My Lords, I think the short answer to that is, that Alexander and James never asked to have the issues altered by letting in the Crockets as co-next of kin, or setting up title with them. The objection might have arisen if, instead of there having been a mere minute at the instance of the Crockets, there had been, as there was in the case of Alexander, a minute by James and Alexander, saying, Since those issues were framed we have found out that another of our family has turned out to have been alive at the death of the testator, of whom we knew nothing previously; and

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we therefore wish to have the issues now altered, so as to meet that state of the case. If they had done so, that would have been a proceeding upon their part which would have admitted the children of the Crockets as next of kin to one-third of the personalty. They do not choose to take that course; they do not at all admit any title upon the part of the Crockets. The issue framed with reference to the next of kin is precisely in the form in which they asked to have it, and whether the Crockets can establish a title or not is a matter as to which they never raised any question; and the circumstance that the Court had paid no attention to the minute of the Crockets is a matter upon which Alexander and James Morgan do not appear to me to have any right of complaint.

My Lords, the matter went down to trial, and the jury returned a verdict, which is a verdict that we must all regret, whatever may be the result of it; because, at all events, it has given rise to a great deal of litigation. The first issue was, whether the Pursuer Alexander Morgan is the heir-at-law of the deceased; and the second issue was, whether James together with Alexander are next of kin of the deceased? In the course of the argument I asked the question, whether, in Scotland, they understood that to mean sole next of kin, and they consented on both sides that it did mean that, and I am afraid it does. However, that issue was an issue that was framed exactly in the form in which Alexander and James asked for it. But whether it means sole next of kin, or only some of the next of kin, those two issues came to be tried, and the jury, unfortunately, instead of returning a verdict separately upon each, which, if it was a proper verdict in form, would have decided and disposed of the question, have returned one general verdict that the case of the Pursuers is not proven.

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Now, several objections have been made. First of all, it is said that where a distinct proposition is put, whether Alexander is the heir-at-law, it is no answer to say that that is not proven. Properly speaking, there could have been but the answer Yes or No. He is next of kin, or he is not next of kin. That is one of the questions which I think would have arisen, just in the same way as it now arises, even if they had returned a verdict saying, Upon the first issue the case of the Pursuers is not proven, and upon the second issue the case of the Pursuers is not proven.

Secondly, an objection raised upon the verdict of the jury, which is, that it is one conjoint finding that the case of the Pursuers is not proven, which, it is said, may mean only that the whole of their conjoint case is not proven; so that it is left *in ambiguo* whether they mean that it is not proven that Alexander is heir, or that Alexander and James are next of kin, or both, or whether the verdict may not be satisfied by the suggestion that they only meant that it was not proven that Alexander was heir, which may be consistent with the fact that it was proved that the two were next of kin; for it might be that Alexander was not heir, although it might also be that the two were next of kin, or sole next of kin.

Then, this important question has arisen also, namely, supposing this verdict to be inaccurate (whether you call it an inaccuracy of form or of substance), Whether upon the true construction of the Scotch Judicature Acts, there can be an appeal from the interlocutor that is pronounced by the Court of Session upon that verdict, as being a matter of law, in applying that verdict.

Upon these three latter points, which depend upon questions that arise upon and subsequent to the ver-

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dict, I would rather not give any opinion at the present moment, but will move your Lordships that the further consideration be adjourned to a future day. The other points, as far as I am concerned, I consider already disposed of.

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Lord Chancellor's opinion.

At the close of a few days the case was put in the paper for final judgment; when the following opinions were delivered:

The LORD CHANCELLOR (*a*):

My Lords, in this case the pursuers were Alexander Morgan and James Morgan; and there were two issues directed: "Whether the Pursuer Alexander Morgan is nearest and lawful heir of John Morgan sometime residing at Coates Crescent, Edinburgh, deceased?" and "Whether the Pursuer James Morgan is, along with the said Alexander Morgan, next of kin of the said John Morgan deceased?"

Those were the issues directed, and several days having been occupied in the trial, this is the record of the jury: They say that they "find that case of the Pursuers is not proven." Thereupon the Appellants Alexander and James Morgan contended that there was no proper finding, and made a motion to the Court to set aside and discharge the verdict or to refuse to apply it or to arrest the judgment. The other parties moved upon this verdict that the claim of the Appellants should be repelled. The Court of Session thought that the verdict was a valid verdict. The interlocutor, which is the sixteenth, appealed from, is in these terms: "The Lords, upon the motion of the Defenders, apply the verdict of the jury, and in

(*a*) Lord Cranworth.

respect thereof repel the claims of Alexander and James Morgan, and decern.."

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Whether this was a proper interlocutor to be pronounced by the Court of Session is the only point for your Lordships' consideration.

The objections to the verdict rested upon two grounds, first, that this was not a verdict finding in the terms of the issue either way, but only finding that the case of the Pursuers was not proven. It was said that this was a bad verdict upon issues directed in a civil suit. And secondly, supposing that is got over, still that the verdict was bad, as not being a verdict which put a final end to the question by determining all the matters submitted to the jury. Those were the two objections to the verdict. Then a third objection was raised of this nature, that it was a matter that was not a subject of appeal; that it was concluded by the verdict, and that there could be no appeal, except upon matters of law; that this was not a matter of law falling within that rule, and that consequently the appeal could not be sustained.

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

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sufficient to sustain this verdict, though it is expressed in an inartificial manner.

Suppose, for instance, that there were an issue "Whether the Pursuer Alexander Morgan is nearest and lawful heir to John Morgan, sometime residing at Coates Crescent, Edinburgh?" It is no answer logically to say that the Pursuer's case is not proved. It does not appear upon the issue what the Pursuer's case is. In England, we, who are more accurate and logical in inquiries of this sort, put the matter in a train in which that would have been, I think, though an informal, necessarily a logical answer. Because the course which would have been taken in England would have been this; an issue would have been directed, stating that a certain dispute having arisen (formerly it would have been upon the pretence of a wager) whether Alexander was lawful heir to John Morgan, the Plaintiff asserts that he is the lawful heir; whereupon the Defendant would say that he is not the lawful heir. And to decide that issue a jury would be summoned; and if the jury were to say the Plaintiff's case is not proven, that would necessarily amount to this, that the Plaintiff had not proved that Alexander is the lawful heir; and it being his business to prove that he is the lawful heir, that would be in substance a verdict against him, and a verdict for the Defendant. Here there is no such averment on the part of the Pursuer, because by the terms of the issue the question simply is, whether Alexander is the nearest and lawful heir? Therefore, it is logically no answer to say that the Pursuer's case is not proved. But I think we may fairly infer that that is the form in which an inquiry of this sort is, according to the ordinary practice in Scotland, directed. The Pursuer having asserted

that he, Alexander, was the lawful heir, when the Court directed an issue simply to try whether he is the lawful heir, if the Jury say, "The Pursuer's case is not proven," and the Court of Session think that verdict amounts to this, that the Pursuer has not made out that he is the lawful heir, I should be very unwilling, indeed, to dispute the verdict upon the ground that that is not a logical answer to the question put. Therefore, if the objection had rested upon that ground, I should have been extremely unwilling to entertain it. Indeed, as at present advised, I should have thought it untenable.

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

Now, when the jury find that the case of the Pursuers is not established, that may mean, I was going to say, one of two things, but it may mean one of several things. It may mean that though Alexander has proved that he is heir, he has not proved that Alexander and James are next of kin; or it may mean that though Alexander and James have proved that they are next of kin, they have not proved that Alexander is heir. That was a very probable finding upon the different claims that were asserted; because the way that Alexander and James attempted to make out their title was by proving that they were the first cousins of the deceased, being the two sons of the

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only brother of the deceased. But there is another class of claimants, who claim that they are the great nephews of the deceased, being descendants of another brother, and who might have been an elder brother of the parents of James and Alexander, and if so, these descendants would have been the heirs-at-law at the same time that James and Alexander were the next of kin; because a first cousin would come in as next of kin in priority to an heir-at-law who was more remotely descended, though descended in the line of the elder brother, and therefore the heir-at-law. I merely put these explanations by way of hypothesis, because, though the pedigree was handed up to us, it was not pretended that it was in any way established. It was only to show what the nature of the different claims was. All that it is important, in my view of the case, is this, that the verdict does not necessarily show either that Alexander is not heir, or that Alexander and James are not next of kin; it only shows that the double proposition that Alexander is heir, and that Alexander and James are the next of kin, is not made out; that is consistent with the hypothesis, that though Alexander is not heir, yet that Alexander and James are next of kin.

Then, if that be so, it seems to me impossible to say that the claim of Alexander as heir, or of Alexander and James as next of kin, is disposed of; for the jury have returned a verdict that does not enable the Court to act. The verdict is a bad verdict, and in this country it would amount to what we should call mis-trial, not giving rise to the necessity of any motion for a new trial, but showing a record upon which it was clear that the Court could not adjudicate, and upon which, according to the practice of our English Courts, there must have been a *venire de novo*, not what we technically call a new trial, but a second

trial, because the trial that took place was a trial that did not enable the Court to act. I cannot entertain the slightest doubt, therefore, that if this was an English case there must have been a *venire de novo*, which would be equivalent in the Scotch process to a new trial.

But then it is said, supposing that is so, still that is not a matter which is the subject of legitimate appeal under the Statutes to your Lordships' House, because upon a matter of this sort the verdict of the jury is conclusive, and cannot be made a matter of appeal to this House.

Now, my Lords, I confess, with all respect for those who differ in opinion from myself, I think that not only this may be, but that it must be a subject of appeal; because otherwise there is no means of getting injustice set right. The right to appeal to this House may be considered as depending upon the Statute of the 48th of George the Third, Chapter 151, the 15th section of which Statute enacts, "That hereafter no appeal to the House of Lords shall be allowed from interlocutory judgments, but such appeals shall be allowed only from judgments or decrees on the whole merits of the cause, except with the leave of the division of the Judges pronouncing such interlocutory judgments," and in certain other cases; "provided that when a judgment or decree is appealed from, it shall be competent to either party to appeal to the House of Lords from all or any of the interlocutors that may have been pronounced in the cause, so that the whole, as far as it is necessary, may be brought under the review of the House of Lords."

Therefore, after the passing of that Act there was an appeal to this House only from the final judgment, and not from interlocutory judgments. Now this undoubtedly was, within the meaning of that rule, a

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final judgment, it was a judgment that disposed of the case by repelling the claim of the Pursuers.

Then comes the Statute of the 55th of George the Third, Chapter 42, the Jury Act; and that Act provides for the mode in which the Court may settle the issues, or rather the Court of Session is empowered to direct issues, and then the trial is directed to take place. By section six it is enacted; "That in all cases in which an issue or issues shall have been directed to be tried by a jury, it shall be lawful and competent for the party who is dissatisfied with the verdict to apply to the Division of the Court of Session which directed he issue for a new trial, on the ground of the verdict being contrary to evidence, on the ground of misdirection of the Judge, on the ground of the undue admission or rejection of evidence, on the ground of excess of damages, or of *res noviter veniens ad notitiam*, or for such other cause as is essential to the justice of the case: provided also, that such interlocutor granting or refusing a new trial shall not be subject to review by reclaiming petition or by appeal to the House of Lords."

Now, that, I apprehend, was an enactment made in exact analogy to the English practice on similar subjects—that whenever there has been a trial, then within a certain limited time, namely, within the first four days of the term next after the trial, any party dissatisfied with the verdict upon any of these grounds (which in the Scotch Act are evidently taken from the English practice), that is to say, upon the ground of the verdict being contrary to evidence, misdirection of the Judge, undue admission or rejection of evidence, excessive damages, or of *res noviter veniens ad notitiam*, or for any other cause essential to the justice of the case, the party may apply for a new trial. When such an application is made in England, if the Court is of opinion,

either simpliciter without imposing any terms, or imposing terms, that there ought to be a new trial, what is done is this: The postea is struck out, that is to say, the Court directs the case to proceed just as if there had been no trial. There is no notice ever afterwards taken of there having been a previous trial, and the cause goes down and is tried again. Where the Court granted or refused such an application for a new trial, the propriety of what was so done by the Court could not (until the recent alteration by the Common Law Amendment Act of last Session)(*a*), be brought by appeal to any Court at all. That furnishes an exact analogy to this 6th Section of the Scotch Jury Act.

But then it was thought that that would be a very stringent, and improperly stringent enactment; because many of those cases, in which the Court might grant a new trial, if applied for, are of extreme importance, and the whole question at issue may turn upon it. And therefore it was thought expedient that means should be given, if justice required it, of enabling parties to bring the decision under the review of a Superior Court, and ultimately before your Lordships. Therefore it was, that the 7th Section provides for that by enacting "that it shall be competent to the Counsel for any party at the trial of any issue or issues to except to the opinion and direction of the Judge either as to the competency of witnesses, the admissibility of evidence, or other matter of law arising at the trial—and that on such exception being taken" it is to be reduced into writing, and is to form part of what we should call

(*a*) The Common Law Procedure Act, 1854, (17 & 18 Vict. c. 125.) Section 34, as to appeals on motions to enter a verdict or nonsuit, or for a new trial.

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the record of the trial, and that may be brought, just as exceptions may be on a trial in this country, to a Court of error, and ultimately to your Lordships' House. Then there are special directions given as to the time within which that is to be done, and a certain precedence is given to appeals on these subjects: And then, upon their coming before your Lordships, it is provided that "the House of Lords shall give such judgment regarding the further proceedings, either by directing a new trial to be had, or otherwise, as the case may require." That is to say, if anything takes place at the trial, either by misdirection of the Judge, or the reception of improper evidence, or other matter of law arising at the trial, that may be brought before this House by exception.

Now, it is a perfectly well known rule in the English Courts, that an exception taken for anything wrong at the trial must be taken before verdict. Exceptions have never been favoured in England. I have known myself cases in which the moment a verdict has been returned, Counsel have said that they wished to tender a bill of exceptions. It is always said in reply, You are too late; you cannot tender a bill of exceptions after the verdict.

The objection that the verdict was not one which enabled the Court to give a proper judgment could not therefore have been made the subject of a bill of exceptions. Let us see how the matter stood. A trial takes place, in which I will assume that there is an improper verdict, or a verdict that does not go to the bottom of the case, does not exhaust the subject. What is the course that the party is to take? He cannot have a bill of exceptions. But then the 8th section says "that if a new trial shall not be applied for" (that is the case here, no new

trial has been applied for), "or shall be refused, or if the exception taken shall be disallowed" (there could be no exception taken here), "the verdict shall be final and conclusive as to the fact or facts found by the jury."

Undoubtedly, my Lords, the result of that enactment is, that it is to be taken as conclusively found by the jury in this case that the Pursuers have not made out the double proposition that Alexander is the heir, and that Alexander and James are the next of kin. What then? It still may be that Alexander is not the heir, but that Alexander and James are the next of kin. If it necessarily followed that the finding in the one case must involve the finding in the other, that would get over all difficulty as to matter of form. But that is not so. Cases may be put, without the least difficulty, in which Alexander is not the heir, and yet Alexander and James are next of kin. Therefore, what is the course that the Pursuers are to take? The proposition which they undertake to maintain has not been proved in its integrity. But if the half of that proposition was proved, they would substantially have proved all that they cared about proving, because who is the heir is a matter, comparatively of indifference. It is a matter of very little importance to them whether they are to have the house in Edinburgh or not. But if they should establish the other part of their proposition, that they are the next of kin, they will be entitled to this very large sum of nearly 100,000*l.*

Now, my Lords, let us see what follows in Section 9: "That in all cases wherein the Court shall pronounce a judgment in point of law as applicable to or arising out of the finding by the verdict, it shall be lawful and competent for the party dissatisfied with the said

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judgment in point of law to bring the same under review, either by representation or reclaiming petition or by appeal to the House of Lords." What have the Court of Session done upon this verdict, which for this purpose I assume to be an unsatisfactory verdict, a verdict which does not exhaust the subject? They have applied the verdict, and repelled the claim of the Pursuers. Now, I have a right to interpret the verdict in any way consistent with the terms of it, and to assert, only for the purpose of testing the case (of course I do not know how the fact is), that the jury were perfectly satisfied that James and Alexander were the next of kin, and that they were perfectly satisfied that Alexander was not the heir. The verdict is quite consistent with that. What right have the Court to say that that verdict authorizes them to adjudge that the Pursuers' claim is to be repelled? It appears to me that that is, in the strictest and clearest sense of the word, a decision in point of law arising out of the verdict, which the parties legitimately might bring under the consideration of this House, That it is a matter of law seems to me to be clear, for how can it be said to be amatter of fact where the Court decides that the party has no claim? Judges decide law, and juries decide facts. When, in our Courts, a jury has returned a verdict that so-and-so is entitled to something, say a thousand pounds damages, the matter comes then in theory, not in practice (because it is quite clear what the judgment would be in such a case), in theory it always comes with that finding before the Court. And in old times, when the entries were made in Latin, the terms used were "*et ideo consideratum est quod querens recuperet.*" That is a decision in point of law; or if it is a verdict the other way, the entry is "*et ideo consideratum est quod*

defendens eat sine die." That is a decision in point of law. When this verdict comes to the Court of Session they apply it, and they decide to repel the claim of the Pursuer. Is not that a decision in point of law? It appears to me to be so. If it were not so, it would leave the parties open to a liability to injustice. I do not say that it would be so in this case; but I can imagine cases in which the most monstrous injustice would result, because it might be that the jury had returned a verdict *nihil ad rem*, something quite immaterial to the case, and then the Court might decide upon that that the Plaintiff is to recover, or is not to recover, the verdict of the jury having no reference whatever to that upon which the Court proceeded to make such adjudication.

My Lords, the case which appears to me to bear the closest analogy to this in English jurisprudence is where there has been a claim by a Plaintiff which is brought upon two counts; one I will suppose to be a bad count, stating something which, if true, does not entitle him to any damages at all, and the other I will suppose to be a statement of some case which does entitle him to damages. The parties do not observe that the one count is bad, and the case goes down for trial, and the jury return a verdict for the Plaintiff, assessing 1,000*l.* damages upon the two counts. It comes back, and the Court is asked to give judgment. The Court would say, We cannot say that the Plaintiff is to recover 1,000*l.* damages, because the jury have given their verdict for 1,000*l.* damages upon two grounds of complaint, one of which afforded no ground of complaint at all in point of law. What is to be done in such a case? Of necessity there must be a *venire de novo*, because there has been a mis-trial, or, at all events, a wrong verdict,

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which does not answer the ends of justice. There ought to have been an assessment upon both counts. Then the Court would have given judgment that the Plaintiff should recover upon the good count, and that there should be entered "*eat sine die*" upon the bad count.

My Lords, I state this more for the purpose of showing that there is nothing anomalous in the conclusion at which I have arrived, than for the purpose of saying that it very distinctly bears upon this question. The short ground upon which it appears to me that there has been a miscarriage here, and that this interlocutor applying the verdict ought to be reversed, is, that here there is a verdict finding that which is not conclusive, because it merely negatives the truth of two propositions, either of which, if true, would have made it improper to repel the claim of the Pursuers altogether; and the Court, acting upon that imperfect verdict, have therefore applied that verdict in a manner which the verdict did not justify, and consequently they were not warranted in law in so doing. Therefore I shall move your Lordships that this interlocutor be reversed, and that the case be remitted back to the Court of Session, with a statement that there ought to be a new trial, in order to obtain a proper verdict.

I should observe that a case was cited which at first, I confess, seemed to me to have some considerable bearing upon this point, but upon looking at it I think it is clearly distinguishable from the present case. I allude to a case that was brought before your Lordships' House, *Cleland* v. *Weir* (*a*). That was a case in which, as here, there was an imperfect verdict returned, and, nevertheless, this House sus-

(*a*) 6 Bell's App. Ca. 402.

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

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Lord Brougham's opinion.

The Lord BROUGHAM:

My Lords, there are here before your Lordships two questions, one of which could only have been raised at your Lordships' Bar upon the appeal coming to this House; the other was raised before the Court below, or at least might have been raised before the Court below, and is of a different nature.

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

Now, in the first place, with respect to the motion for a new trial, unquestionably the Pursuer might have moved for a new trial, and upon the refusal of that application, no appeal would lie. It is equally certain that exceptions might have been taken at the trial upon other grounds than those here taken, and that the exceptions taken, if refused to be allowed by the Court, could have been brought before your Lordships by appeal. But here the ground of objection to the interlocutor in question could not by possibility have been made a ground of exception at the trial, because the exception is not to the verdict, but to the course of the Court in dealing with that verdict, to the judgment of the Court in applying that verdict, and to the judgment which they pronounced in consequence of that verdict. It is past all

doubt, therefore, that there was no ground of exception at the trial. The exception, as my noble and learned friend has just stated, must have been taken at the trial before the verdict, either to some ruling of the Judge in refusing or in admitting evidence, or to some direction of the Judge to the jury before they gave their verdict. That is the ground of exception. After the verdict has once been given, no ground of exception exists to that verdict. The ground of objection, therefore, is reserved for a future stage of the proceedings, namely, the judgment of the Court upon that verdict.

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

This brings us then to the only other point, namely, whether or not the Court rightly applied this verdict, and gave the judgment repelling the claim of the Pursuers? Now, my Lords, I certainly take the same view of this with my noble and learned friend.

I should in the first place, however, state, that I have an objection to these proceedings at an earlier stage than the application of the verdict by the Court; I mean to the framing of the issues. I think nothing could be more inconvenient, and more likely to lead to uncertainty and confusion in the result, than the manner in which these facts were sent to the jury, by the framing of these issues, or if the issues were not

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incompetently and inconveniently framed, if their imperfection might have been cured at the trial (which I do not say it might not have been) by the learned Judge who tried the issues, still nothing could be more inconvenient, more likely to lead to confusion, almost more certain to prevent an accurate knowledge of what the finding of the jury is, than complex questions, all sent to a jury at once, without requiring a separate finding upon the different points.

I have had occasion more than once, in former cases (*a*)

(*a*) See *Irving* v. *Kirkpatrick*, 7 Bell, App. Ca. 176, where Lord Brougham said: "It is improper to couple together two not necessarily connected or even dependent issues. It is highly improper, illogical, and in every respect mischievous to put a question on two separate matters, to one of which an affirmative answer might be returned, and to the other a negative. It is asking a jury to answer a double question, to one parcel of which they might say 'yea,' and to another 'nay,' contrary to every rule either of examining a witness or of interrogating a jury. But it is improper on another account, and most essentially, and for paramount reasons improper, when you consider that you are not asking the question, as in the case of a witness, of one individual, but of twelve, six of whom might say that the deed was obtained by fraudulent *misrepresentation*, and the other six that it was obtained by fraudulent *concealment*. How then can we say that we have a verdict at all upon such an issue sent to a jury, and such a general verdict returned? I do not mean to say that the fault of the issue might not have been cured by the verdict of the jury. I do not mean to say that if the jury had returned a verdict in answer to the compound question separating it into its parts, they might not have got rid of the evil of its duplicity, for they might have said, if they had chosen, 'we specially find' so and do. Then it must have been unanimous, and that would have taken away all the risk of there being no verdict at all, which exists in the present case. They might have said, 'we find that there was fraudulent misrepresentation, and that the deed was obtained by that, but we do not find that there was fraudulent concealment;' or they might have said, 'there was fraudulent *concealment*, but we do not say that there was fraudulent *misrepresentation*;' or they might have said, 'there was *both* fraudulent misrepresentation and fraudulent concealment;' or they might have said, 'there was *neither*.' Therefore they might, by a special finding, have cured the radical defect of the question put to them. And why, let me ask, did the most able and learned Judge who tried the cause not give his direction to the jury so to find?"

which have come before your Lordships, to object to this course of proceeding. But it appears now to be inveterate; and therefore all that we can do is, when it occasions, as it has done in the present case, an erroneous decision, to apply the only remedy that remains for us to apply, by reversing the erroneous decision.

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

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of kin?" the jury had said, "He (the other Pursuer) has not proved his case," I should have taken that substantially to be a verdict against James, upon whom the proof of the affirmative was placed.

But here the second question was, "Is Alexander, with James, next of kin?"—that is, "Are Alexander and James together next of kin?"—and upon that the jury have found that the Pursuers have not proved their case. And not only so, but upon both the issues, the issue as to the heir-at-law and the issue as to the next of kin, upon both taken together, they have found a general verdict, that the Pursuers have not proved their case. Now, what case? There are half-a-dozen cases which may be considered to have been before them; and the finding that these Pursuers have not proved their case may either mean Alexander is not heir-at-law, but he and James together are next of kin; or it may mean Alexander is heir-at-law, but he and James together are not next of kin; or it may mean Alexander is next of kin, but not heir-at-law; or it may mean, James, separate from Alexander, is next of kin, and Alexander is neither heir-at-law nor next of kin. And I might figure two or three other cases before your Lordships, to every one of which this verdict of Not proven would be applicable; because the verdict is, that these Pursuers, Alexander and James, have not proved their case; and any one of those several propositions being negatived, namely, either that Alexander was not next of kin, or that James was not next of kin, or that Alexander was not heir-at-law; any one of those negatives would have supported this finding, because, incontestably, upon any one of those propositions being found in the negative, the Pursuers would not have proved their case, their case being

the whole taken together; and no mortal can discover, by looking at the issues and looking at the verdict, what it was that the jury really meant to find.

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

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

My noble and learned friend has referred to a case reported in 6th Bell's Appeal Cases (*a*). In that case there was this most material difference; there was a partial verdict no doubt, that is to say, a verdict which did not exhaust the case. But still there was a distinct finding, which was analogous to what would have been the finding in this case, had the verdict been "Alexander has not proved that he is heir-at-law," and possibly in that case the verdict here might have been sufficient—indeed, it would have been sufficient—if there had been no finding upon the other at all, which is the case in Bell, and it would have

(*a*) p. 402.

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been competent to the Court to have applied the verdict and given judgment. But that is not the case here. The verdict here is that the whole case together is not proved, and you cannot tell from that, what part of the case the jury considered not proved, and what part they considered proved, because the failure of proof of any part of the several propositions which they had before them would have been sufficient to sustain this verdict, and to make the verdict that the Pursuers had not proved their case an intelligible verdict.

I am, therefore, my Lords, clearly of opinion with my noble and learned friend, that in this case the judgment cannot stand, that the interlocutor appealed from must be reversed; and that the case must be remitted to the Court below to direct a new trial.

Lord St. Leonards' opinion.

The Lord ST. LEONARDS: (*a*)

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

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

(*a*) His Lordship's opinion was in writing.

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One great object was to prevent improper Appeals to this House. With this view, the 48th of George the Third, chapter 151, section 15, prohibited such Appeals from interlocutory judgments, with certain exceptions, or from interlocutors or decrees of *Lords Ordinary*, which have not been reviewed by the Judges of the Division to which such *Lords Ordinary* belong.

The 55th of George the Third, chapter 42, extended trial by jury to civil causes in Scotland; and in that Statute we shall find the principal provisions upon which the first question depends in some respects modified by later enactments. After authorizing the Court of Session to direct issues, it prohibits an Appeal to this House against any interlocutor granting or refusing a trial by jury (section 4). It then prohibits an Appeal to this House against any interlocutor granting or refusing a new trial. But it authorizes any party dissatisfied with the verdict of a jury on the trial of issues, to apply to the Court of Session for a new trial, "on the ground of misdirection of the Judge, or of the undue admission or rejection of evidence, or of excessive damages, or of *res noviter veniens ad notitiam*, or for any such other cause as is essential to the justice of the case."

An ample jurisdiction is therefore provided for the granting of new trials, although the appellate jurisdiction of this House is carefully excluded.

The Act then provides that exception may be taken "at the trial of any issue to the opinion and direction of the Judge, either as to the competency of witnesses, the admissibility of evidence, or other matter of law arising at the trial;" but the Act gives to the party against whom an interlocutor shall be pronounced on the matter of the exception power to appeal from such interlocutor to this House, and directs the Appeal to be heard within a short time (section 7). But if

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"a new trial shall not be applied for, or shall be refused, or if the exception to the direction of the Judge shall be disallowed, the verdict shall be final and conclusive as to the fact or facts found by the jury, and shall be so taken by the Court of Session in pronouncing their judgment, and shall not be liable to be questioned anywhere." This is the provision of section 8, with a proviso in section 9, "that in all cases wherein the Court shall pronounce a judgment in point of law, as applicable to or arising out of the finding by the verdict, the party dissatisfied with the judgment in point of law may bring the same under revision by appeal" to this House; and this House in appeals from the Court of Session is authorized to direct issues (section 19), and it was provided that reports should be made to Parliament of the issues directed, and of those tried, but that was afterwards repealed.

Now, to stop here for a moment. There can be no appeal to this House against an order granting or refusing a trial by jury of an issue, nor against an order granting or refusing a new trial. Neither can there be any such appeal as to the facts found by a jury, where a new trial has not been applied for or has been refused, for in either case the verdict is made final and conclusive as to the facts, and is not liable to be questioned anywhere, and therefore not in this House. But as to matters of law, the rule is otherwise, for if exception be taken to the ruling of the Judge in any matter of law, a party may appeal to this House against an interlocutor pronounced on this exception. So an appeal to this House will lie where the Court pronounces a judgment in point of law as applicable to or arising out of the finding by the verdict. The difference between matters of fact and matters of law is distinctly marked throughout the

Act. This Act, by a later Act to which I am about to refer, was continued in force in all respects, excepting so far as the same was thereby altered or repealed (59 George 3, chapter 35, section 54).

This brings me to the Act of the 59th of George the Third, chapter 35. I do not refer to the second section, which was subsequently repealed; but the *Lord Ordinary*, by section 3, might order a cause to be remitted to the Jury Court either with or without a reservation of the alleged question of law, and his interlocutor was not to be the subject of appeal to this House. And by section 15, there can be no such appeal against any interlocutor of the Divisions, or the *Lords Ordinary* or the Judge of the Admiralty directing a trial by jury; and by sections 16 and 17 where there were general verdicts, the motions for a new trial were to be made in the Jury Court, and the order for granting or refusing a new trial was to be final, and not the subject of appeal to this House. If the motion for setting aside the verdict were founded on the miscarriage of the Judge in matter of law, or on the undue admission or rejection of evidence, a bill of exceptions might be tendered, to be regulated by the directions of the 55th of George the Third. The motions for a new trial on a special verdict or special findings were to be made in the Court of Session as directed by the same Act, and the interlocutors pronounced on such motions were to be final, and not subject to an appeal to this House. By section 22, in special verdicts and all cases where the verdict contains any special findings which may require the judgment of the Court of Session on the law, the verdict with the process is to be returned to the Court of Session in order that the Court may pronounce decree in the cause.

All these provisions are consistent with those to

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which I have referred, in the 55th of George the Third. And, as I have already observed, the later Act saves and continues the operation of the 55th of George the Third, so far as it is not altered or repealed.

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

The 40th section throws farther light upon the intention of the Legislature, although I am not sure that

I understand the meaning of the concluding clause in it. This section provides that the Court of Session, in reviewing judgments of inferior Courts, proceeding on proof, shall "distinctly specify in their interlocutor the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found, or on matter of law, and the several points of law which they mean to decide, and the judgment on the cause thus pronounced" is to be subject to appeal to this House, "in so far only as the same depends on or is affected by matter of law, but shall in so far as relates to the facts be held to have the force and effect of a special verdict of a jury finally and conclusively fixing the several facts specified in the interlocutor."

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

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

The 1st and 2nd Victoria, chapter 118, does not appear to me to have any bearing upon this case.

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

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

Now, to apply this statute law to the case before the House. The Morgans claim the property as first cousins of the deceased. The parties opposed to them aver that they were not in any way related to the deceased. The questions to be tried by the jury were,

first, whether Alexander was the heir of the deceased, and, secondly, whether Alexander and James were his next of kin ; the jury found against their claims, and the Court of Session applying this verdict, repelled the Pursuers' claim.

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

To hold otherwise would be to repeal the distinction established by the Statutes between matters of law and matters of fact ; for if this is a matter of law, a point of law, every interlocutor following a verdict must equally be so, and there would be no distinction between matter of law and matter of fact. If the Legislature had intended what the Appellants contend for, the Acts of Parliament, instead of drawing a clear distinction between matters of fact and matters of law, as regards appeals to this House, would, after prohibiting appeals to this House, as at present, from interlocutors refusing or directing an original or a new trial of issues, have proceeded to declare, that whenever a verdict was applied by an interlocutor, whether involving matters of fact only or matters of law only, or both, an appeal should lie to this House. But the contrary is intended and is clearly expressed ; all that this House could now do would be to direct a new trial, (and I understand my noble and learned friend to contend that your Lordships should direct a

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new trial), and as I shall presently show upon mere form, for we are altogether uninformed upon the merits of the case. The Appellants raise objections of form, but none of substance, and some of those your Lordships disposed of immediately after the close of the argument at the Bar. The Appellants do not allege that the verdict was contrary to evidence, or that there was a misdirection of the Judge or the like. No special ground of appeal is stated in the petition of appeal, but in the reasons for their appeal they ask for new issues and a new trial. Now they themselves prepared issues, which issues were approved of by the Court, and by their opponents. These issues were tried, and none more appropriate could be framed. I do not know upon what grounds the issues have been objected to as imperfect. I think the issues were as perfect as any two issues could be, and perfectly distinct. It is perfectly wild to talk of finding fault with these issues as against ths Appellants, for they are the issues of the Appellants, framed by themselves after deliberation, and adopted by the Court because they framed them. And nobody ever found fault with them, and nobody can at this moment frame issues more pertinent and proper for the trial of the question between the parties. I am perfectly at a loss to conceive what the objection is to the issues.

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

But all this is settled, as we have seen, by 55th George the Third. The claimants might, for any cause

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

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

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

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

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

I have hitherto assumed that the finding of the jury was against the Appellant. But it is objected that it is vague and inoperative, because it finds that the case of the Pursuers is not proven. I shall presently consider whether that objection is well founded, but I will now assume that the verdict is vague and uncertain. Still, my Lords, in my opinion no appeal to this House lies in this case; for the Appellants' only possible remedy was a new trial. Clearly they might have applied for a new trial in the Court below on this very ground of vagueness and uncertainty, and so indeed my noble and learned friend who spoke last expressly stated, for if the verdict was vague and

(*a*) 2 Shaw & M'L. 12.

uncertain, that was manifestly a ground or cause essential to the justice of the case, and therefore sufficient to authorize an application under the Statute for a new trial; and the parties could not abandon the right conferred on them by the Statute, and come to this House, whose jurisdiction in such a case is, as it appears to me, excluded.

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

The process in Scotland was an action of multiple poinding for the distribution of the estate of John Morgan, deceased. There were various claimants; they were directed to prepare and lodge in process such issues as they considered proper to try the question.

The issues proposed by Alexander and James Morgan, which they state in their appeal paper, (which were originally given in in the name of James Morgan alone,) were first, whether Alexander was heir to John Morgan, and, secondly, whether James was along with Alexander next of kin of John Morgan? Of course the original questions must have been confined to James, then the sole claimant under this title.

To these issues no objection was raised, and the record was closed. Alexander, who was supposed to be dead, then came forward and claimed as elder brother of James. And as the brothers were agreed as to their respective rights, instead of Alexander making a separate claim, so as to render it necessary to make a new record, he adopted the proceedings of James; and accordingly Alexander and James lodged

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a minute in which their respective claims were set forth as heir and next of kin. And Alexander adopted the proceedings of James with that explanation, and James restricted his claim to one for the personal estate. This minute was acted upon by the *Lord Ordinary*, and the record was finally closed.

The *Lord Ordinary* postponed the consideration of the issues until the proceedings for trying the propinquity of Alexander were further advanced. Alexander and James presented a reclaiming note against this delay, in which they introduced an expression which has since led to some difficulty. They prayed the Court of Session "to adjust the issues and give all other necessary directions for trying the cause;" treating their claim, as it really was, as one common subject. The Inner House accordingly approved of the issues as then adjusted, and appointed them to be the issues "for trying the cause of the said Alexander and James Morgan," thus adopting the very expression of those parties. The interlocutor authenticating the issues was headed, "Issues for Alexander Morgan, &c. and for James Morgan, &c., Pursuers of the same."

The jury, after a trial of the issues, which lasted four days, before the *Lord Justice Clerk*, found that "the case for the Pursuers is not proven." Instead of applying for a new trial, they allowed the time to elapse, and then moved the Court to set aside or discharge the verdict, or to refuse to apply it, or to arrest judgment. This was simply an attempt to do indirectly what an Act of Sederunt prevented them from doing directly; viz., to apply for a new trial. For if the Court set aside or discharged the verdict, or refused to apply it, or arrested judgment, a new trial must necessarily have followed. The only object of the order asked was to render a new trial necessary.

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The Appellants having failed to establish their alleged descent during a four days trial, could ask nothing more than a new trial, and, if they could not obtain that, the order which they actually prayed would, if granted, have been of no use to them. The Court applied the verdict, repelled the claim of Alexander and James, and decerned; and thereupon the present appeal was presented.

The main objections to the proceedings were, as I have already observed, overruled by your Lordships at the close of the argument. The Appellants in their appeal case say, A further point is, what is the meaning, nature, and effect of the verdict? It was argued that the verdict was vague and uncertain, as it was a verdict of "Non proven," and not a direct, plain, answer to the question. In answer to this objection, it was shown by many cases that even in civil cases a verdict of "Non proven" was frequently returned, and was perfectly understood, and the authorities showed that it is not necessary that the verdict should be plain "Yes" or "No," or finding the negative or affirmative in the words of the issue.

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

Now the Judges of the Court, who understand Scotch better than I pretend to do, entertain no doubt about the import of the words "not proven." The *Lord Justice Clerk*, who tried the issues, was of opinion that

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the jury did what was quite right, and returned a verdict which met the issues, for "they find the case for the Pursuers is not proven." He did not see how the Court could look at the verdict otherwise than as having upset the claim of the Pursuers as made. Observations were made at the Bar upon the opinion of the *Lord Justice Clerk*, which I do not think well founded.

Lord *Cockburn* thought that in the issues and verdict they had a distinct question put and answer given. The jury did not think that the parties were the next of kin, and they might express the fact in any plain language, in any suitable, intelligible language they thought proper. Well, they "find the case for the pursuers not proven." What better language than this could have been employed he did not know; there was no ambiguity whatever; a plain, simple, suitable, answer was given to a simple question. The predominating feeling in his mind had been that of wonder on what principle the Pursuers could reasonably resist the application of the verdict.

Lord *Murray* concurred, and Lord *Wood* agreed with Lord *Cockburn*, that a more appropriate answer to the issues could not be; indeed so appropriate an answer he did not see. The only thing in the issues was the case of the Pursuers, and the jury have found it not proved. It was as plain a case as could be.

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

But then it was objected that the verdict was bad, as it was not a distinct finding on each issue, but was that "the case" for the Pursuers was not proven; for it might be that they thought that one issue was not proved although the other was; and thus the whole

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

We have still to consider whether this objection is well founded. I am clearly of opinion that it is not. The issues furnished by the Appellants, and ordered by the Court, and which the Appellants undertook to prove in the affirmative, must, I think, be treated as their case put to the jury just as much as if the issues had been directed in the English form. The case of the Appellants was in truth one issue; although as between themselves, for the sake of form, it was divided into two, as between them and their opponents there was but one question—Did they belong to the pedigree? which was denied; they were sons of the same father, which was not disputed, and they were agreed which was the elder of the two. If one were entitled as heir, the two were entitled as the next of kin; if the two were entitled as the next of kin, the elder was entitled as heir. The sole question was, Whether their father filled the character which they represented? It was not a question who might be heir and next of kin under other circumstances, but, taking their claim to be as they set it forth on the record and undertook to prove it, and went to the jury upon it, there was in substance but one question. If their claim was made out, they excluded all the other claimants.

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And this of course was the reason why they were compelled to try their right before any of the other parties. They themselves, as I have shown, treated their claims as one. Originally, the record was closed, as upon the single claim of James as heir and next of kin; when Alexander was allowed to adopt the proceedings, the real question to be tried was not varied: and so the Appellants thought, for they asked and obtained leave for the immediate trial of the issues in the cause.

Upon the whole case, my Lords, I think it clear that the verdict was free from ambiguity. It is not now a question, which was elaborately, but unnecessarily, I think, argued at the Bar, whether the jury could look beyond the issues; because your Lordships, like the Court of Session when they applied the verdict, have the whole case before you. It is reduced to a question of form. It is not one of substance. The Appellants do not complain of any admission of improper evidence or the rejection of proper evidence, or of any misdirection of the Judge, nor do they allege that they have any further evidence to establish their claim, or that they now claim in any other character. The effect of a reversal of the interlocutors would be to set aside all the proceedings in the Court below, and, without a shadow of merits, to allow the Appellants to begin again, or in other words, to permit a new trial, and indeed my noble and learned friend on the woolsack has proposed to direct the Court of Session to order a new trial. This appears to me contrary to the express provisions of the Scotch Judicature Acts, and to be rather an act of legislation than a judicial determination, and it cannot fail to embarrass the Scotch Judges in the administration of justice.

I ought, perhaps, to notice the last ground of appeal which referred to expenses. They do not constitute

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

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

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

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

Mr. *Solicitor-General :* My Lord, with great submission I would suggest to your Lordships that that would not be the form, because, with regard to direct-

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ing a new trial, or making any declaration respecting it, I apprehend that that would not fall within the province of this House; but that we should adopt the course which the House directed in the case of Marianski, namely, that we should apply to the learned Judges below to alter the entry of the verdict. That was very much considered by the House in *Marianski's* case. There the late Lord Chancellor, Lord *Truro*, said that it was a mere mis-entry of the verdict, and that the course to be followed in such a case was perfectly well known, namely, that perceiving the verdict to be inapplicable to the issue, from its uncertainty and ambiguity, he referred the case to the Judge who tried the cause, that a verdict might be entered according to the substance of the actual finding. That case came before your Lordships recently, the present Lord Chancellor presiding, and that course was fully approved, and accordingly the House made an order in conformity with it.

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

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

The LORD CHANCELLOR: I see nothing wrong in the issues.

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

The Lord ST. LEONARDS: For that you must apply to the Court below.

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

The LORD CHANCELLOR: The appeal as to the other interlocutors will be dismissed.

The *Lord Advocate:* Your Lordships will reserve to the Court below to deal with the costs?

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

The LORD CHANCELLOR: Everything is reversed since the verdict.

The Lord BROUGHAM: Consequently the costs given in the Court below are reversed.

JUDGMENT.

It is declared by the Lords Spiritual and Temporal, in Parliament assembled, that the verdict returned by the jury on the trial of the issues in the pleadings mentioned is uncertain, inasmuch as it does not show whether the jury considered that the Pursuers (Appellants) had failed in proving both the said issues or only in proving one of them: And it is ordered and adjudged, that the said interlocutors of the 23d of November 1853, and of the 15th of February 1854, complained of in the said appeal, be, and the same are hereby reversed; and it is further ordered and adjudged, that,

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as respects the remainder of the interlocutors appealed against, the said petition and appeal be and is hereby dismissed this House. And it is also further ordered, that with this declaration the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this declaration and judgment.

JOHNSTON, FARQUHAR, & LEECH.—RICHARDSON, LOCH, & M'LAURIN.