MARIANSKI, ... APPELLANT.

JANET CAIRNS, WIFE OF JOHN CAIRNS, AND THE SAID JOHN CAIRNS, FOR HIS INTEREST, ... RESPONDENTS (a).

1851. 19th, 23rd, 27th, and 30th June. 1852. 1st July.

Alternative issues may produce an available verdict; but they require great care and discrimination on the part of the Judge in his summing up. Thus, where the issues were alternatively—1, Whether A was a person of weak mind; and 2, Whether he had been imposed upon; a general verdict simply "for the Pursuer" was held *bad*. But the House, assuming that the Judge had correctly directed the jury at the trial, sent the case back, to have the judgment properly entered up from his notes.

Time within which an application for rectifying the entry of a judgment upon a verdict may be applied for.

Semble, alternative issues ought to be discontinued.

Where it is agreed at a trial that a certain objection shall apply to all evidence of a certain description,—HELD, that in afterwards completing the record, the objection must be repeated articulately to each question embraced by the agreement.

Report of *Irving* v. *Kirkpatrick* corrected by Lord Brougham.

A man's acts and declarations are the best and the only evidence of his capacity.

Repetition of the censure (pronounced in the last case) upon the non-authentication of documents forming the groundwork of a bill of exceptions.

Although, in general, pleadings in one suit cannot be used in another, as evidence of the truth of the allegations contained in them, yet, where a pleading *is signed by the party*, it will be regarded in the light of an *admission*, and, as such, it will be evidence against him, not only with reference to a different subject-matter, but in a suit maintained against a different opponent.

ALEXANDER FAIRSERVICE, by a deed of trust, disposition, and settlement, dated the 28th January, 1841, so regulated his succession that when, on the 16th July, 1846, he departed this life, the free residue of his estate, heritable and moveable, was equally divisible between his two daughters, Elizabeth, the wife of the Appellant, and Janet, the above-named Respondent.

Upon the death of the settlor, the Appellant claimed to be a creditor on his estate for large sums of money; and in support of his demand produced twenty different documents subscribed by the settlor.

The Respondents disputed the claim, and took proceedings in the Court of Session to have the documents set aside.

The summons and condescendence alleged that the settlor had attained the age of ninety-three; that he had "devoted himself to the accumulation of property with such success that his wealth amounted to upwards

(a) Reported in the Court of Session Cases, Second or New Series, vol. xii. 919—1286.

of 20,000*l.*; that the Appellant, by plausible pretences, contrived to bring about a marriage between himself and the daughter of the deceased in 1839;" that the Appellant's claim consisted chiefly of alleged cash advances to the settlor; that the settlor was never in a situation to require, nor the Appellant to make, such cash advances; that the Appellant was a mere hawking quill-seller; that nevertheless he very soon "established himself and his wife as permanent inmates in the house of the settlor, then upwards of eighty-six;" that he acquired great influence over the mind of the settlor; that the settlor had by this time become "weak and facile;" that the Appellant took advantage of the settlor's weakness and facility; and that by means of his ascendency over the settlor's mind, and by flattery, persuasion, force, fear, threats, intimidation, fraud, and circumvention, he "feloniously" and without value or consideration "extorted or obtained" from the settlor the documents and subscriptions sought to be set aside.

Such were the Pursuer's allegations. The conclusion or prayer of the summons was that the documents and subscriptions should be reduced and rescinded; and further that the Appellant should "hold just count and reckoning with the Respondents and with the trustees of the settlement, or with one or other of them, for his intromissions with the property, estate, and effects of the deceased;" and that he should pay to the said trustees such sum as should be found to be due from him, or to the Respondents their just and equal moiety thereof.

The Appellant in his defence stated that he was a Pole, who, having fought for the liberty of his country, was determined afterwards to support himself by industry; that he was no quill-hawker, but a manufacturer of quills on a great scale; and that he had realised a considerable sum of money, "not less than

some thousand pounds;" that he and his wife took up their residence with the settlor, in compliance with his request; that the "discreditable statements in the summons and condescendence were groundless;" that the settlor was "not facile;" but, on the contrary, was a most careful old gentleman; that he had legal advisers in all his concerns; that, however, the Appellant did assist him in business matters; and that "he had occasion from time to time to advance money to him;" and that the amount contained in the documents sought to be reduced was a very inadequate compensation for "the sacrifice he had made in abandoning his business and prospects, to say nothing of the services which he had rendered the deceased."

The defence further stated that the prayer of the summons for "accounting to the Pursuers *or* to the Trustees was anomalous."

Two issues were directed for trial by jury. The first issue was whether the settlor, at the times when his subscriptions were obtained to the documents in question, was "of weak and facile mind." The second issue was whether the Appellant, "taking advantage of the settlor's weakness and facility, did by fraud, circumvention, or intimidation, procure the said subscriptions or any of them."

At the trial before the *Lord Justice-Clerk* (*Hope*), the Respondent's counsel tendered as evidence certain books of account in the settlor's handwriting. The Appellant's counsel objected that these were inadmissible, "in respect that any written statement or books made or kept by the deceased, in whose right the present action was pursued, was not competent evidence on behalf of the Pursuers thereof." The *Lord Justice-Clerk* repelled the objection; and against this ruling the Appellant's counsel excepted.

One of the witnesses having sworn that the deceased

had frequently spoken to him about law expenses which he had been put to, the Respondent's counsel proposed to ask him the following question, "Did he tell you whether he had paid these expenses himself?" when the Appellant's counsel objected "in respect that no verbal statement by the deceased was competent evidence." The *Lord Justice-Clerk* repelled the objection, and allowed the question to be put. Against this ruling, the Appellant's counsel excepted; and the bill of exceptions stated that it was thereupon *agreed that the same objection should be understood to be taken and repelled, subject to exception as to all other evidence of the same character.*

Thereafter the Respondent's counsel proposed to give as evidence a certain pleading signed by the Appellant, whereby he represented himself as being in great poverty. The Appellant's counsel objected that this pleading was inadmissible, "in respect it was incompetent to put in evidence against a party pleading on his behalf in a proceeding with a different party, and as to a different subject-matter." The *Lord Justice-Clerk* repelled the objection; and against this ruling the Appellant's counsel excepted.

The jury returned a *general* verdict for the Pursuers (the Respondents) on both the issues.

On the 18th of July, 1850, the bill of exceptions, signed by the *Lord Justice-Clerk,* was, after argument by counsel, disallowed by the Second Division of the Court of Session, who by a further interlocutor of the 20th July, 1850, applied the verdict, and reduced and set aside the documents which it was the object of the action to displace. Hence this appeal.

Sir *Fitzroy Kelly,* Mr. *Bethell,* and Mr. *Anderson,* for the Appellant. Mr. *Peacock,* and Mr. *Hugh Hill,* for the Respondents.

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The argument turned mainly on the alternative form of the issues, and the generality, uncertainty, and ambiguity of the verdict; upon which the Appellant's counsel urged that it was incompetent for the Court below to have entered up judgment. The Respondent's counsel said,—Suppose an indictment for stealing a goose or a duck, and suppose the jury to return a verdict for stealing a goose. That would do.

[Lord BROUGHAM: Aye, but suppose the verdict to be *general*, as in this case, how could you be sure that the jury were unanimous? Six of them might have thought the proof confined to the goose, and six to the duck.]

The points material to the decision are fully entered into by the noble and learned Lords, upon whose advice the judgment of the House was pronounced; for in this case, as in the last, the course ultimately taken proceeded upon grounds not suggested by the arguments of counsel.

1852. *1st July.*

Lord Truro's opinion.

Lord TRURO:

My Lords, Mr. Fairservice having been a person of considerable property, it excited very great surprise that so large a demand should be made against his estate, when, throughout the period embraced by the documents which are supposed to evidence the debt, he had been possessed of abundant means to answer all his purposes, without having occasion to borrow money, or to be under obligation to any one for pecuniary assistance.

It will be observed that the issues now before your Lordships are not in the form in which issues in this country are usually directed. Issues from the Courts of Law in this country are so framed as to present a single question to the jury, an affirmation with a negation, admitting of a distinct answer by the verdict of the

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jury. I, however, have seen issues, even in this country, *from Courts of Equity*, which have assumed something like the form of those here; and they have led to no inconvenience, because issues from the Courts of Equity being merely to inform the conscience of the Court, and to afford collateral assistance, they were always accompanied by a direction and permission to the learned Judge to indorse special matter; so that, when it became necessary to distinguish parts of the verdict as applying to only certain parts of the issues, the circumstance would be made to appear from the postea.

No objection appears to have been made to the issues in the present case; the fact being that the form of these issues is the established form in the Courts below. We have every reason to believe that the books of forms applicable to such subjects contain issues very much in the form of the present. However, this is quite clear, that, whatever may be the form of the issue, it admitted, supposing a correct summing up on the part of the learned Judge, of an available verdict being returned on the part of the jury.

In the course of the trial one of the issues being as to the state of mind of the late Mr. Fairservice, a question was asked with respect to certain entries made by him in books of account, and questions were afterwards asked in relation to certain declarations of his. When the question was asked with respect to the entries in the books, the Defendant's counsel objected that Mr. Fairservice's statements or declarations could not be received in evidence; and in like manner, when the books were offered, the objection was made that entries made by Mr. Fairservice could not be received upon an occasion like the present. The learned Judge over-ruled the objections, as well to his declarations as to the entries in his books, which led to exception.

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Now I would just observe for a moment that it appears a proceeding (*a*) took place below, which is not brought before the House in such a mode as to enable the House to take notice of it. It is stated that, when the objection was made to the question relating to Mr. Fairservice's declarations, the learned counsel agreed that the objection then made should apply to all the evidence of the same character. But what sort of agreement is that? It is objected that the declarations are not evidence. But suppose they are made in the party's presence? The House can only deal with the exception as applied to the particular question stated. I mention this in order to guard against such an irregularity in future. The only way to carry the agreement into effect is, when the record comes to be completed, to repeat the exception to each question to which the agreement is intended to be applicable.

Now the question raised by these objections is this— In an issue relating to the state of mind of an individual are his declarations and conduct evidence? I must ask by what test do you always try whether a man is of sane or of weak mind? Shut out his declarations and his conduct, and what test will remain by which you are to try the state of his mind? If the issue had been whether Fairservice was indebted to Marianski, what Mr. Fairservice had said or done about this, not in the presence of Marianski, or to his knowledge, might be subject to objection. But when the question is imbecility of mind or insanity, there is in truth no other evidence pertinent to that issue but the man's declarations and conduct—his sayings and doings. You want to know, with reference to certain documents signed by him, the state of his mind and the state of his memory. Suppose he almost at the same instant writes in his book that he has paid certain sums of

(*a*) *Suprà*, p. 215.

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money out of his own resources, and also writes on a piece of paper to Mr. Marianski that he has paid them for him, and that it is a debt due to him, what would you say to such a case? Suppose you find on the same subject inconsistent conduct at the same period of time, so as to indicate either that the man has no memory at all, or that some most extraordinary fatuity must have attached to him, in order to induce conduct so opposite and so inconsistent. I put the illustration because it is of a character which applies to the case. He is supposed to have drawn money from his bankers on a certain day: he has entries in his books of payment on a certain day: he has almost contemporaneously admissions which purport to be admissions of those very payments by Marianski.

But without adverting to the particular evidence in the case beyond this, that it is a question as to Mr. Fairservice's declarations, and as to his entries, the exception taken to that is *general,* that no declarations, that no entries on his part, no writing on his part, can be evidence. That exception, my Lords, is much too wide. It was evidence to show the state of his mind. If used as evidence of the truth of the entries, as evidence connected with the existence of the debt, the exception would have been to the abuse of it; to an improper mode of dealing with it, and not to its admissibility itself. But that evidence being properly receivable with regard to the state of his mind, I take it for granted that it was properly used; and your Lordships cannot doubt but that the learned Judge, in summing up to the jury, told them to what part of the issue it was applicable, and to what extent it might be used, as supporting that issue. There is no exception taken to the summing up of the learned Judge.

The argument has run here as though this was used in order to enable a man by his own declarations to

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defeat a claim made against him of a pecuniary nature. If used for that purpose it was proper matter of objection.

It therefore comes to this, the summing up of the learned Judge is free from objection; this was pertinent evidence to the issue, if properly used; therefore, the House must take it for granted, as every Appellate Tribunal must take it for granted, that that which might have been properly done in the jurisdiction below, was properly done, more particularly when the parties are understood to have taken every objection which was fairly open to them, and yet took no exception to the summing up.

The second matter of objection relates to the application of the verdict. Now it will be observed that the issues were framed, as I have before said, in a manner which possibly may be thought deserving of the attention of the learned Judges below, with regard to future practice. If the issue, instead of saying "Whether the said documents or any of them," had said, "Whether the said documents were respectively obtained by fraud," it would have got rid of the objection; but looking at it as it is, it is said that there is a great difficulty in applying the verdict to the issue, so as to make that verdict the foundation of a correct judgment.

The first issue directed, is whether Mr. Fairservice "was of weak and facile mind, and easily imposed upon;" the second is, whether the said documents, or any of them, were obtained "by fraud, or circumvention, or intimidation." Verdict for the Pursuer. My Lords, this mistake is committed. Instead of entering the verdict of the jury according as it must have been understood to have been pronounced, the officer's *note* of that verdict was entered. It will be perfectly well understood at your Lordships' bar, that, although the

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clerk at Nisi Prius takes the verdict for Plaintiff or Defendant, the postea is not entered up "Verdict for Plaintiff," or "Defendant." The postea is entered up "And the jury upon their oaths say that the Defendant did promise and undertake," or that the Defendant did this, that, or the other; embodying in the entry on the postea that which is the substance of the finding. The learned Judge says to the jury, if you are of opinion that such and such facts occurred, then you will find your verdict for the Plaintiff; if you are of opinion that such and such other facts occurred, you will find your verdict for the Defendant. It is well known that when (though the clerk takes a note of the verdict as being simply for Plaintiff or Defendant) the entry comes to be made upon the postea, it is expanded so as to form in substance an answer to the question put; just as when you ask a witness, was so and so present? Yes, is his answer; but if you had to state that man's evidence, you would not put his answer "Yes," you would state that the witness had said that A. B. was present. So that here, this appears to me to be little more than a misprision of the clerk in making the entry. Suppose the learned Judge directed the jury thus,—Gentlemen, in whatever verdict you give, you must be unanimous; you cannot find a verdict for the Pursuer, or for the Defender, upon the ground that some of you think that five of the documents were obtained by fraud, and others of you think that some of them were obtained by intimidation, and so dividing yourselves. You all agree that the twenty documents were obtained by some of these means, but you differ with regard to the means as applicable to certain sets of them; you cannot find your verdict at all for the Pursuer in such a case: but if you are unanimously of opinion that the whole of these twenty documents were obtained by the same means, being

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unanimous as to the documents, and being unanimous as to the means, you may find your verdict for the Pursuer; or if you are of opinion, unanimously, that certain of these documents were obtained by given means, and others were not, you may give your verdict for the Pursuer with regard to the documents numbers one to ten, and for the Defender with regard to the documents from ten to twenty. I say, my Lords, supposing the learned Judge had so directed the jury, this issue, notwithstanding the form in which it is framed, would admit of such a summing up as might be the foundation of a correct verdict.

Then are your Lordships to presume that there was a correct summing up in this case? No doubt you are, and are bound so to do, there being no objection to it, and no reason upon earth why the common principle should not prevail, of presuming things to have been rightly and properly done, until you have some ground presented for inferring the contrary.

Now it will be observed that, when this case came on before the Court below to apply the verdict, they would have had the report of the learned Judge's summing up, and they would have had the answer of the jury. There is no doubt, that, below, the learned Judge reported that, which, independent of any character belonging to the learned individual in the particular case, any Judge competent to his duty would have done. He would report "I directed the jury that they must be unanimous; and that if they were of opinion so and so, and so and so, they could find a verdict generally for the Pursuer." With this special report from the Judge, the Court below had the answer of the jury, "Verdict for the Pursuer." What does "Verdict for the Pursuer" mean? You must resort to the summing up to know what "Verdict for the Pursuer" means. It means that each and every one of the respective

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documents was obtained by such and such means. Then, when the Court had so assumed, the proper mode of entering up and applying the verdict upon the record would have been to state not "Verdict for the Pursuer," generally, but that the jury found that the said documents mentioned were obtained by such and such means. It seems to me, therefore, that this is a mere mis-entry of the verdict. What is the course to be followed in such a case? Why, it is a perfectly well known one. It is that, perceiving a verdict which appears to be inapplicable to the issue, from its uncertainty and ambiguity, you refer to the Judge who tried the cause, that the verdict may be entered according to the substance of the actual finding, which he may state from his notes. It is not at all too late to do that; and it has been of frequent practice. My Lords, there are several cases in which it has been done, even after a judgment of reversal. In one case which I may mention, a modern one (there are ancient cases to the same effect), *Richardson* v. *Mellish* (a), in which I was of counsel, the Court of Common Pleas had given judgment against a motion for arrest of judgment. A writ of error was brought in the King's Bench, and the judgment was reversed. Application was made to the Common Pleas to amend the record by the Judge's notes; I objected, the judgment being reversed. That was held not to be a valid objection, and the Court of Common Pleas amended the verdict by Lord *Gifford's* notes, and under remarkable circumstances, for Lord *Gifford* had ceased to be a Judge of the Court at the time, being then Master of the Rolls; but the Court sent for his notes, and they used his notes to correct the entry of the verdict. The parties then went to the King's Bench, to ask the King's Bench to alter the record in that Court, to make it correspond with the

(a) 1 Cla. & Fin. 224.

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record as it stood in its amended state in the Common Pleas; and then to amend and alter that judgment of reversal to a judgment of affirmance. Some doubt was entertained, and it was fought with considerable spirit. It was a large verdict, and the Court were induced to make a special entry of those circumstances, upon which a writ of error was brought to this House, and the objection was again raised before your Lordships; but you held that this was matter of practice of the Court below, of which you could take no notice, and the judgment was affirmed.

So, my Lords, we find in several other cases, though I need hardly refer to them, because, in Tidd's Practice (*a*), the matter is fully explained, with a note of the authorities. But I will just mention one case, in order to show how strong the practice is; because it was a criminal case, and the man was executed. The case of *Short* v. *Coffin* (*b*). There was, indeed, another case—that of *Harrison* v. *King* (*c*), where the amendment was refused. But why? It was not only after a judgment of reversal, but eight years after the trial. And the ground upon which it was refused was, that, coming so late, you had to trust to the memory and the recollection of the Judge; and when, as Lord *Tenterden* said, the gentlemen at the bar might have left the bar, whose assistance might be necessary to make the entry correspond with what had actually taken place at the trial. It was merely on account of the delay that the amendment was refused, although after a judgment of reversal.

It is a matter of constant practice, and your Lordships find it laid down by Mr. Tidd, that it may be done at any stage of the proceedings. It is in the

(*a*) Under the heads *Verdict* and *Postea*.

(*b*) 5 Burr. 2730. See also *Eddowes* v. *Hopkins*, Doug. 377-8.

(*c*) 1 Barn. & Ald. 161.

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discretion, of course, of the Court below, who will exercise, it is to be supposed, a sound discretion on the subject.

Then, my Lords, how does the present case stand? There is an issue which, if properly conducted, would lead to a verdict which might be the proper foundation of a judgment; but here is an ambiguous verdict. The proper course, and the course sanctioned and called for by practice, seems to me to be to let this case stand over in order to furnish an opportunity for an application to the Court below to amend the entry of the verdict according to the Judge's notes. It is in that learned Judge's discretion (always meaning of course not an arbitrary discretion, but one governed by law and justice) what course under the circumstances he may think proper to pursue. If he thinks fit to alter the *entry* of the verdict, then it will be for the Court to say whether they will amend the *application* of that verdict; in which event, the record in this House will be amended so as to correspond with it, and the House will give judgment according to the record in its amended state.

My Lords, we had occasion to see in another case lately, that no Appellate Court can take notice of matter not contained in the bill of exceptions on which it proceeds; nor can it regard any matter which is not authenticated by the Judge's signature. The documentary evidence in the present case forms no part of the record; neither is any part of it authenticated by the Judge.

These circumstances (though for the reasons which I have stated not material to the result of the present appeal) deserve to be adverted to as affecting the regularity of judicial proceedings.

With respect to the question how far the pleading put in by Marianski to his wife's suit for alimony is

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evidence against him in the present suit, my noble and learned friend and myself have conferred a good deal. The document in question stands on a footing quite different from that of pleadings in general, for it is signed by the party himself; and I recollect to have asked (though I do not remember that I received an answer) whether it was upon oath or not. Assuming, however, that it was not upon oath, still it was a representation made by the individual himself under his hand, as to the state of his own circumstances. By that document he described himself as living upon 8*s.* a week. And one of the points in this cause being whether Marianski had the means to make the advances which he claimed to be due to him, the document was tendered to show his position and resources, at a period shortly antecedent to that at which the advances were alleged to have been made by him.

Now, it certainly appears to me that this document is not open to the objection which would apply to pleadings in ordinary; and I am of opinion, that, being a statement of his own circumstances, made by the individual and signed by him, the fact of its having been made in the course of another suit ought not to render it inadmissible as evidence in *this* suit.

At present, therefore, I should advise your Lordships to let this cause stand over, in order to afford the parties an opportunity of applying to the Court below in the manner and for the purpose which I have mentioned.

Lord BROUGHAM:

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My Lords, the result which my noble and learned friend has now stated to your Lordships has this great advantage, that it tends to prevent, as I most earnestly hope it may be found to prevent, opening the case

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again, and sending it to a new trial; because upon the evidence none of us entertain the shadow of a doubt. The merits appear to us to be all one way; and it would be a most cruel thing if it should happen that all this inquiry had to be gone into over again, which must lead to the same result, and only be the cause of additional expense, delay, and vexation to the unfortunate parties.

My Lords, nothing which has passed upon the present occasion ought at all to shake the opinion which I venture to hope has been come to by professional men in the Court below, that the practice (*a*) to which my noble and learned friend has referred, is *mala praxis*. That it is, and that it has been, the practice of that Court, I am afraid is very true. I trust, however, that it will be reconsidered, and that a new course will hereafter be taken; for this case is only one of the many instances in which we see the perils to which the suitor and the administration of justice are exposed by that practice.

My Lords, I had occasion two years ago, in the case of *Irvine* v. *Kirkpatrick*, to comment upon it; but I observe that in the report (*b*) of that case there is rather an unfortunate error, for it represents me as having said—

> It must be a bad course of proceeding which cannot be prevented from working confusion and begetting error by the accident of a jury finding specially, where no power exists of preventing them from finding a general verdict.

That is the reverse of what was said, obviously by the omission of the word *but*. It should be,—"Which cannot be prevented from working confusion and begetting error *but* by the special finding of the jury."

(*a*) As to the framing of issues in the alternative form.

(*b*) 7 Bell's Ap. Ca. 215.

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My Lords, I ought to state that I entirely concur with my noble and learned friend with respect to the pleading in the suit of alimony; holding as I do that the defence of Marianski, being in writing, and signed by himself, is to be regarded in the light of an admission; which will not only bind him, though in a different suit, but would have bound him, though in no suit at all (*a*).

Interlocutor disallowing the exceptions affirmed, and Cause remitted.

(*a*) Taylor on Evidence, 479.

DEANS.—DODDS & GREIG.