that where it is to two jointly, and the heirs of one of them, it must go to the one to whom the fee is assigned to go, and it cannot be prevented being charged with the debts.

Then, what is the true construction here according to these decisions, and according to these rules? It is simply that the two take as liferenters without the word "inheritance;" and the word "inheritance" not being necessary in the Scotch law, that does not exclude such a limitation as this, where there are words of inheritance applicable to one, whichever may be the survivor, and not applicable to the other. Therefore the limitation to them, and the survivors and survivor of them, and the heirs and assigns of the survivor, must be to them as liferenters, and the survivors and survivor of them, and then the fee to the last taker. I have already said that one of them must be the survivor; and the limitation being as if they could all dispose, that power is entirely consistent with the limitation.

My Lords, I have given my anxious consideration to this case, partly from my respect to the learned Judges who decided the case in Scotland, and also from its being a case the decision of which is dependent upon Scotch law. I have come to a clear opinion that this is a decision which cannot be supported, and which was not called for; because the result of it is not to effect the object of the deed, so as to let the destination go to the parties according to its language, but it is indirectly to put upon it a very strained construction, when, if you allowed the deed to speak for itself, according to the natural construction of the words, and according to the rules of Scotch law, every object contained in it would be effected. I therefore move your Lordships that the judgment of the Court of Exchequer be reversed.

Judgment reversed.

Dodds and Greig, *Plaintiffs' Solicitors.*—J. Timm, Solicitor of Inland Revenue, *for Defendant.*

JULY 1, 1852.

DIONYSIUS ONUFRI MARIANSKI, *Appellant, v.* JANET FAIRSERVICE OR CAIRNS, and Husband, *Respondents.*

Proof—Competency—Reduction—Facility—Jury Cause—*In a reduction, on the ground of facility and fraud, by the representatives of a party deceased, of documents of debt granted by him to the defender, who maintained that the same had been granted in respect of payments made by himself for behoof of the deceased:*

HELD (affirming judgment), *that the books and verbal statements of the deceased were competent evidence to shew the state of mind of deceased, but not that the payments in question had truly been made by the deceased, and not by the defender.*

Proof—Competency—Jury Case—Defences in separate action—*In a jury trial:*

HELD (affirming judgment), *that it was competent, with a view to proving that a party was a person of slender means, to put in, (but only as containing representations by himself as to his means,) defences, signed by himself, to an entirely separate action of aliment at the instance of his wife.*

Reduction on Ground of Facility, Circumvention, &c.—Issue—Verdict—Process—Jury Cause—*An issue in a reduction of documents on the ground of facility, circumvention, &c., went to trial in the form of issue adopted for the trial of such cases:—"Whether, at the dates, &c. of the writings Nos. 5, 6, 7, 8, (and 16 others,) of process, or any of them, the said A was of weak and facile mind, and easily imposed upon; and whether the defender, taking advantage of his said weakness and facility, did, by fraud or circumvention, or intimidation, procure or obtain the said subscriptions and indorsations, or any of them, to the lesion of the granter?" The verdict was "for the pursuer" generally—and the Court reduced, decerned and declared, in terms of the conclusions of the libel. On appeal, it was maintained that the verdict was incompetent, because, as the issue put two distinct alternative grounds to the jury, it should have distinguished the particular alternative ground on which it proceeded,—and, as it did not do that, no judgment could validly follow by reason of the uncertainty of the ground on which it proceeded.*

HELD (but without oversetting the judgment), *that the form of issue was objectionable, for ambiguity, but the verdict might be amended by the judge's notes; and remit made to the Court of Session to amend the entry of the verdict.*[1]

In this case, the general conclusion of the summons of reduction was to declare void and null the writings particularly narrated and referred to. The defender appealed against the interlocutors of July 18, 1850, disallowing the bill of exceptions and discharging rule for new trial, and

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[1] See previous report 12 D. 919; 22 Sc. Jur. 586. S. C. 1 Macq. Ap. 212: 24 Sc. Jur. 579.

of July 20, 1850, finding pursuers entitled to expenses. And he maintained in his *printed case* that they ought to be reversed for the following reasons:—Because the books, accounts, and other written, as well as the oral, statements of the deceased, were inadmissible as evidence on behalf of the respondents, suing in right of the deceased: Because it was incompetent to admit, in evidence against the appellant, judicial statements made by him in another process with another party, with reference to a different subject-matter—*Watson* v. *Hamilton*, 3 Mur. 481; *Wight* v. *Liddell*, 4 Mur. 325; *Little* v. *Smith*, 9 D. 737: Because the judgment following on the disallowance of the bill of exceptions, and by which the Court applied the verdict, and decerned against the appellant, was incompetently and improperly pronounced, inasmuch as the verdict was one on which no judgment could competently follow, by reason of its uncertainty.—*Per* Lord Brougham in *Irvine* v. *Kirkpatrick*, 7 Bell Ap. 215; 22 Sc. Jur. 637; *Watt*, Shaw's Just. Cas. 128; *Sinclair*, *ib.* 138. The ground of this objection was, that as the issue in substance put it to the jury substantially whether the numerous documents were obtained by fraud or intimidation—two separate and alternative grounds of reduction—the verdict ought to have set forth the particular alternative ground on which the respective documents were held to be invalid; and, accordingly, as the verdict was general, it was impossible and incompetent for the Court of Session to pronounce any judgment suitable to the case, by reason of the uncertainty of the ground on which any or all of the documents were to be set aside.

The *respondents* in their *printed case* maintained that the judgments ought to be affirmed for the following reasons:—1. Because the written and parole statements of the deceased formed admissible evidence as bearing on the questions put in issue, whether he was of weak and facile mind, and easily imposed on, and whether the appellant, taking advantage of such weakness and facility, did, by fraud or circumvention, or intimidation, obtain the subscriptions and indorsations sought to be reduced. 2. Because, in the circumstances of the case, and for the limited purpose for which the defences objected to were tendered and received, there was no incompetency in admitting these defences in evidence as a statement or representation by the appellant of the then state of his pecuniary affairs. 3. Because, even had the evidence objected to, or such part of it (if any) as it may now be held ought to have been disallowed, had been rejected, there remained sufficient evidence to warrant the verdict.

Sir F. Kelly Q.C., *Bethell* Q.C., and *Anderson* Q.C., for appellant.—As to the *first exception* taken at the trial.—The action was brought by a representative of Fairservice, with the object of increasing the share of estate falling to her. If the action succeeded, the estate, and thereby the pursuer, would be discharged of the amount of debt included in the deeds and documents. If Fairservice had brought the action in his lifetime, as he might have done, he would have been in the position of one offering his own books as evidence of his property—books to which the defender was no party, and which might have been manufactured for the very purpose of rebutting the evidence of the defender.

[LORD CHANCELLOR.—But you must first see what is the issue, before you can judge whether the evidence be admissible under it.]

Let us suppose an issue directed out of Chancery to try the validity of a bond to which the defendant, who is obligor, pleads fraud: At the same time he brings what we shall assume to be a cross action to set aside the security on the same ground: If, in support of the reduction, the party can give in evidence his own acts, to shew the improbability of his having borrowed, why cannot he do so also in the other action, on the same issue, and between the same parties? If it is evidence for the one, it is so for the other; and thus it would be in fact allowing a party to make up his own evidence.

[LORD CHANCELLOR.—Unless it could be shewn that these books were accessible to both parties. The fact of their living in the same house here, would be a circumstance to go to the jury.]

We deny the books would be admissible unless it had been first clearly proved that the other party was cognizant of them.

[LORD CHANCELLOR.—But in actions, for instance, against directors of railways, a prospectus lying on the table in the room where the defendant was, and circumstances of that kind, all raise presumptions that the defendant had notice.]

We do not say that these books were kept by Fairservice behind the back of Marianski, but the evidence should have shewn that they were not kept at all secret by one of the parties. Now, there is no evidence at all that Marianski ever heard of such books, and it does not appear that they were put forward on that ground.

[LORD BROUGHAM.—Still, if they were admissible on any ground, was that not enough?]

[LORD CHANCELLOR.—In the *Irish Soc.* v. *Bishop of Derry*, 12 Cl. and F. 641, I argued, that if a document be produced for a specific purpose, but be not admissible for that purpose, the document would fail; but it was nevertheless held that it was enough if the document was admissible generally.]

[LORD BROUGHAM.—I was going to say, that the purpose of putting in the book or leaf of the book might have been to compare it with the other business-like letters purporting to be at least spelled (*i. e.* not composed) by Fairservice, as going to shew fraud.]

[LORD CHANCELLOR.—You do not point to the evidence and say it is not admissible for any purpose?]

That would make all the difference. There can hardly be imagined any evidence which would not be admissible for some purpose or other.

[LORD CHANCELLOR.—You don't tell us for what purpose, then, it was admitted; if it was admissible for any purpose, we must assume it was for some proper purpose.]

It may go to shew dictation; but here there is nothing in evidence to shew that was the purpose for which it was given in. The evidence, indeed, does not at all connect Marianski with these account-books.

[LORD BROUGHAM.—But it is all one issue to try whether there was undue practising on Fairservice. It may be material to shew that the thing to be reduced was not Fairservice's instrument but Marianski's. If the document is admissible for any one purpose, then it is admissible for all purposes.]

We do not dispute, that the books, from the mode in which they were written and other circumstances, might have been given in as evidence of impaired capacity. But here they were given in to prove the existence of Fairservice's property, and to contradict the evidence of the documents sought to be reduced. So far from their being given in to shew Fairservice's insanity, it was to shew his extreme correctness and careful habits; and the Judges below decided the question as if sanity had been raised, and as if they were sitting as a commission of lunacy. Notwithstanding the authority of the *Irish Soc.* v. *Bishop of Derry*, it is impossible for a counsel who has put forward a book for one purpose, it being clearly inadmissible for that purpose, to turn round and afterwards say it was competent to have used it for another and very different purpose, not then thought of. The rule in that case is at least not to be extended. It is true here, that during the argument no intimation was given of any other purpose than that for which the evidence was tendered; but there is no authority for saying that an instrument which, standing alone, is not admissible, can afterwards become so by being coupled with something else which is admissible. Now, here, the books standing by themselves, may be given in evidence to shew the impaired capacity of Fairservice, but they were only admissible if this evidence was coupled at the time with the other for which they were put forward.

[LORD BROUGHAM.—Did no argument take place at the bar below as to the question of dictation, for here is a document evidently composed by a business man, and yet the spelling is most illiterate?]

None could arise, because there was no evidence to shew it.

[LORD CHANCELLOR.—One of the witnesses says he wrote some of the documents for Marianski to be signed by Fairservice, which seems to shew that the documents were first drawn out, and then dictated to Fairservice.]

If it could be reasonably supposed that the book, though professedly used for the wrong purpose of proving the amount of the testator's property, yet was afterwards used also for another purpose—viz. to shew the impaired capacity of the testator—then we do not deny it was admissible; but the latter purpose is clearly an afterthought.

[LORD CHANCELLOR.—Yet that is exactly what was done in the *Bishop of Derry's case*.]

Here these books were put into a witness's hand, who was an accountant, and who said he had examined them,—and he was asked by the pursuers' counsel to state their contents, in order thereby to prove the amount of Fairservice's property. The defender's counsel then says, "I object to this evidence;" and the pursuer's counsel replies, "No, you cannot, because the book is evidence of impaired capacity." I, as the defender's counsel, would have said, "No; I don't object to its being used to shew impaired capacity, but what I do object to is its being used to shew that certain bills, receipts, &c., were at the time in the hands of Fairservice, and that certain property then belonged to him." Then, supposing the book actually given in evidence to shew impaired capacity, does that entitle the pursuer's counsel to read it by the mouth of the witness as evidence to shew the amount of property belonging to Fairservice?

[LORD CHANCELLOR.—Such things are often done in practice.]

We apprehend not, when, as in this instance, the book is *bonâ fide* offered to shew the amount of property. We admit that if papers once get into the hands of a jury rightly or wrongly, you cannot help their looking into these papers and going beyond the purpose you had in view, and coming to a general conclusion as to them. But here, how can the books be evidence of impaired capacity? Thus, for instance, if we look at Marianski's account, we find an item—"9th Dec. 1840, Paid to Francis Hamilton, £19 10*s*. 7*d*.;" and then if we look at the account-book kept by Fairservice, we find the same sum marked as "paid to Francis Hamilton;" and yet the former is one of the documents sought to be reduced. The account-book cannot shew unsound mind; on the contrary, it is quite correct. There are many other instances of the same nature. But even supposing the book might be admitted, the excerpts might not be admissible. 2. As to the *second exception*, which was directed against parole statements of Fairservice being received for the same purpose, the same remarks apply. 3. As to the *third exception*.—The true rule here is, that if any document, whether signed or not by the party, be offered in evidence against

him, if it is a document in which it is supposed he pledged his veracity, then it is admissible, but otherwise it is not. Thus an answer in Chancery is admissible; and why? because it is given on oath. But, on the other hand, documents in the nature of pleadings in a cause, to which the writer is not supposed to pledge his veracity as a man, are not admissible.

[LORD BROUGHAM.—But a person who has signed a statement, say, for, instance, a plea of infancy—he must have read it before signing it—would it not be at least admissible?]

No. It depends entirely on what is the nature of the instrument. If it is one requiring to be verified by affidavit, and that is done, then it would be evidence against him.

[LORD CHANCELLOR.—Suppose, in the case of an answer to a bill in Chancery, which has been sworn to, but it has got somehow into the hands of the opposite party before it has been signed, would that be evidence against him?]

We would say, yes, on account of the oath, which is the material distinction, and not the signature. But, at all events, such a question does not arise here. The signing of a defence is a mere form, which the Court requires, and the signature has the same effect as if counsel had signed it, and nothing more.

[LORD CHANCELLOR.—What do you consider as the foundation of the distinction between pleas which are required to be signed by counsel, and those which require to be signed by the parties? I know of no plea signed by the party, which is not verified by affidavit.]

Here it was a mere accident that the party signed the defences. If the cause had been in the Supreme Court, counsel would have signed it.

[LORD BROUGHAM.—Then, if so, the Court would have required some evidence to support it.]

That is what we say. The document is the statement of the party. The signature is an accidental practice; but, signed or not, the pleadings go for nothing unless there is evidence to support them. It always depends on what the signature imports, whether or no the party is bound. Thus, when counsel signs pleas, he is not bound by them.

[LORD CHANCELLOR.—No, because you can sign inconsistent pleas.]

So you can make inconsistent defences.

[LORD BROUGHAM.—I am not sure whether the Court would allow contradictory pleas to be pleaded, if it required parties to sign their pleas.]

Courts follow different rules. One may require the defences to be signed, and the Court next door may not. It is a mere form; and the sole reason why the party signs the paper is, because the Court requires it, and not because he pledges himself to the truth of it. A man will sign papers over and over again without ever dreaming of pledging his veracity. It is, of course, different when the party is expressly warned of the effect of the admission.—*Watson* v. *Hamilton*, 3 Murr. 481; *Ewing* v. *Crichton*, 4 Murr. 183. This is neither a representation nor an admission, and the whole record ought to have been given in evidence, and then it would have appeared as a statement by way of inducement.—*Studdy* v. *Sanders*, 2 D. and Ry. 347. Besides, it is only admissible where the one cause is material to the other; but here the suit for alimony had no possible bearing on the action of reduction.

[LORD CHANCELLOR.—Would it be different if an admission made by a party in a correspondence should be given in evidence against him—as, for instance, that he was at a particular place at a particular time, there being no connection between the case and the correspondence? Is there any exception to the rule, that a written statement under the hand of the party is admissible against him in an action by another party on another subject? Here you say it is like a pleading of "not guilty."]

We say that pleadings *simpliciter* are not admissible as evidence of facts stated therein, and that the signature imparts no differentiating quality. It may be fitting that certain allegations should be made, and yet they do not become thereby abstractedly true, so as to bind the party in another and distinct transaction. Nothing would be more injurious than the practice of thus cramping the rights of the parties whom the law is bound rather to protect in such circumstances.

As to the *verdict*—The verdict here was a general one, and the Judges seemed to think it of no consequence on which particular point it went. It resembles the case of *Irvine* v. *Kirkpatrick*, 22 Sc. Jur. 637.

[LORD BROUGHAM.—If I recollect rightly, though the issues there had been inartificially framed, the summing up and the finding of the jury might have cured the uncertainty.]

Here we do not think the finding could have cured it. The question put to the jury was,—whether at the date of twenty documents, or any of them, Fairservice was of weak mind; and whether Marianski, by fraud or intimidation, procured him to sign them. Now, we may suppose all possible states of mind in the jury, as to these documents, singly or together. Thus four of the jury may have thought they were all got by fraud, another four by intimidation, and the remaining four may have thought neither, but that Fairservice was of weak mind, and so on. It is clearly necessary that the jury should have been unanimous on some one point, which cannot be said to have been the case here. Who can say to what extent one proposition or another may have been affirmed or denied?

[LORD CHANCELLOR.—Would not the issue have been good if the Judge had said to the jury,

"Do you think that the first (or second, and so on) document was obtained by fraud or intimidation," and got an answer to each *seriatim?* Here the finding may be justified as to any one of the documents, but the judgment is on all. If there had been a proper summing up, there was a possibility of a good finding being come to. Suppose the Judge had said, "If you think there has been fraud in regard to each document, you must find for the pursuer; or if you think there has been intimidation used in obtaining each document, you must also find for the pursuer; but if you think that some of the documents have been obtained one way, and some not, then you must say which,"—if, after this, the jury had found generally for the pursuer, would it not have been a good verdict?]

That would be difficult to say, for it would make the pleadings double. In our pleadings, we put the charges in the alternative form in one count, otherwise duplicity might be pleaded. Thus suppose there is a separate plea of fraud and a separate plea of misrepresentation,—and that, perhaps, is the proper form,—the Judge may leave it to the jury alternatively. Here, in one count, there are three several causes of action; and it is not competent for the Judge to depart from the issue; it must be left for the jury as it stands.

[LORD CHANCELLOR.—Do you say that a verdict as to No. 5 or No. 20 would not have been a good verdict? Do you hold that it should have been as to the whole or none?]

No; we say that each document should have formed an independent count. But when so many alternative propositions are thrown, as here, into one question, a general answer of "yes" can never amount to a judgment; and we should therefore have an *arrest of judgment*, or judgment *non obstante veredicto*. The verdict should have been thus—"We find that, at the date of No. 1, No. 2 (mentioning how many), Fairservice was of unsound mind."

Then as to the *record*—On any possible pleadings in this country, this could not be a correct verdict. Thus, if an action were brought for obtaining a bond by fraud, a verdict finding it had been obtained by *fraud* or *intimidation* could not be pleaded in bar to the action, and much less in this case. By the law of Scotland, when there is a summons in general terms charging instruments to be reduced, no judgment can pass, or trial be had, until there has been a condescendence, in which he must state specifically on what grounds he relies. Thus, if he rely on fraud, it would be insufficient to allege that the granter was facile, and intimidated. And an issue granted on such a condescendence must follow the condescendence, and an alternative finding could not be sustained, as was the case in *Irvine* v. *Kirkpatrick*.

[LORD BROUGHAM.—It was an innocent concealment that formed one of the alternatives there; and that would not have supported the judgment, because it was such a concealment that the party was not bound to make a disclosure.]

The House, however, said there, though there was another ground of decision, that it was impossible to know whether the jury found their verdict on the one alternative or the other. This case is within the rule in *O'Connell's case*, 11 Cl. & F, 155, which applies to both countries. There are also two criminal cases to the same effect—*David Watt*, Sh. Just. Cas. 128; *Sinclair and others*, *ib.* p. 138. The law of Scotland is clear, that the condescendence must specify some particular acts of fraud or intimidation which amounts to what is here a tendering of the issue. If the pursuer fail to tender such specific issue of facts, or if the evidence don't support them, no judgment can be pronounced on any finding in any circumstances—Ersk. 4, 1, 10; 6 Geo. IV. c. 120, §§ 2 and 8; *Kyle* v. *Allan*, 11 Sh. 87, where it was held that a general summons of fraud, &c., is insufficient, except in the case of imbecility, when the general allegation is sufficient. Here it is different, for a general plea of fraud, covin, or misrepresentation, is sufficient, except in a bill in Chancery, which resembles the law of Scotland.—*Wilde* v. *Gibson*, 1 H. L. C. 605. Fraud must be pleaded specially, and a charge of fraud is not made out by proof of constructive fraud—*Harmer* v. *Mure*, 2 Dick. 489. So letters not distinctly mentioned in a plea, cannot be put in evidence—*Whitley* v. *Martin*, 3 Beav. 226; *Graham* v. *Oliver*, 3 Beav. 124; *Earle* v. *Picken*, 1 Russ. & M. 547;—though all possible grounds are not to be allowed to be introduced—*Jesus College* v. *Gibbs*, 1 Y. & Coll. 145. The appellant has a right to know here what offence he has been guilty of. The condescendence is more vague than the summons.

[LORD BROUGHAM.—In case of an absurd issue being given out by the Court of Session, can this House, notwithstanding, give judgment as it ought to have been given?]

Yes; the House stands in place of the Court at the time the record was closed, and when the issues were directed.—*Galbraith* v. *Armour*, 4 Bell's App. 374. The appeal is only taken away against interlocutors ordering issues; but when the judgments are perfected, then it lies against the whole. Thus all that is subsequent to the closing of the record may be swept away by this House. We say, then, on the whole case—1. That one or more of the exceptions taken at the trial should have been allowed. 2. That the verdict does not admit of being applied to the record. 3. That the record itself is incompetent to sustain any final judgment. 4. That the interlocutor "decerning in terms of the libel" is unintelligible, for the libel seeks a variety of things.

Peacock Q.C., and *Hugh Hill* Q.C., for respondents.—1. As to the *first exception*—The simple question here is, was the document or account-book admissible in evidence, or was it not.

[LORD CHANCELLOR.—Where a statement is put in for a particular improper purpose, and used for no other, can it be shewn afterwards that it might have been used for some other, so as to make the evidence admissible?]

[LORD BROUGHAM.—It might be admissible as evidence in the handwriting of the party.]

[LORD CHANCELLOR.—It must be relevant. It is not everything in a man's handwriting that can be poured into a cause against him. This will be the strongest case ever decided. I argued in the *Irish Society* on the only point on which the evidence was tendered.]

The party may have had no right to the evidence for this particular purpose, but still he had a right to have it.

[LORD BROUGHAM.—Suppose, in an action for breach of promise of marriage, a letter of defendant is produced which is merely about the state of the weather, or something quite independent of the issue, is it admissible? I apprehend the present case will go this length, that you are not bound to say for what purpose you put forward the document. We thought, at the time, the *Irish Society* was a strong case.]

We admit, that if we are bound by the reason given at the time by the counsel who tendered the evidence, it was wrong. Still it is obvious, that any papers of the deceased were admissible to shew his state of mind as to sanity, and there is nothing on the record to shew any improper purpose for which this paper was put in, or that the Judge used it improperly. The whole acts, words, and writings of a person, go to the question of his sanity.—*Wright* v. *Tatham*, 5 Cl. & F. 670. For instance, we have here an entry made by Fairservice himself, then aged 92, that he paid Marianski a sum of money to pay A B; and another account shews that it was so paid next day by Marianski as his agent. Yet Marianski gives in an account two years after, which represents that the sum was lent to Fairservice by him, and which Fairservice acknowledges to be correct. These documents were admissible to shew the state of Fairservice's mind.

[LORD CHANCELLOR.—They shew delusion of itself on the part of Fairservice.]

Yes, or imbecility or fraud. We do not say they would be evidence for any other purpose than to prove the state of Fairservice's mind.

[LORD CHANCELLOR.—Coupled with the very formal wording of the documents signed by Fairservice, and the mis-spelling, Fairservice, in effect, writes under one item the very opposite of what it purports. It might go to shew dictation.]

As to the remark, that though the account-books were admissible, yet that the excerpts might not be so, we say that the excerpts were merely to shew what parts of the books were material. 2. The *second exception* is subject to the same remarks. 3. As to the *third exception*—There is in evidence proof of Marianski having signed the "Answers" to the suit for alimony. Thus one witness says, "he had seen Marianski write,"—a question which could only have been applicable to this point. It is said that these "Answers" were in the nature of a pleading. We deny this; they are a mere statement by Marianski as to the alimony he could allow his wife; and he says he was a soldier wounded in battle, &c., which could not have been a pleading.

[LORD BROUGHAM.—The practice used to be different in Scotland from what it is here, and the pleadings resembled written speeches, which embraced both argument and illustration.]

[LORD CHANCELLOR.—How does the Court acquire a knowledge of the income of the husband in such cases? There must be some way of doing this. If it is got from the husband, will the information so got not be binding? The Court seem to have accepted the fact as true, and had no other evidence of it.]

It is as much admissible as an answer in Chancery. Suppose an answer in Chancery signed, but by some accident not sworn to, would it not be evidence in any suit? It is not like a pleading at common law, for the latter is merely intended to raise an issue, and put the party to proof. But if a party were to come into a county court and say he had only 2*s.* 6*d.* a-week, would the statement not bind him?—*Heane* v. *Rogers*, 9 B. & Cr. 577, 586. He would not be estopped by it, but it is admissible. It is said that the whole record should have been given in evidence: Here the judgment of the Sheriff was given in, and no exception was taken to that part of it.

[LORD BROUGHAM.—The Judges below seem to have thought it material in the question of admissibility, that the statement was made in another cause and between other parties, and no exception seems to have been taken to this. The only evidence it can be, must be *quasi in rem.*]

[LORD CHANCELLOR.—It hardly proves anything material.]

We hold it was relevant to the issue here. If Marianski had advanced money to Fairservice, it was important to know where he got it from. In actions for money lent, it is common to prove that the plaintiff had not the money to lend. The principle here therefore is this, that whenever a party in any judicial proceeding puts forth a statement of facts as true, it may be used against him in any other suit.—*Brickell* v. *Hulse*, 7 Ad. & Ell. 454; *Gardner* v. *Moult*, 10 Ad. & E. 464; *Cole* v. *Hadley*, 11 Ad. & E. 807; *Pritchard* v. *Bagshawe*, 20 Law J.C.P. 161; *Hall* v. *Middleton*, 4 Ad. & E. 108. As to the *verdict* and *record*—There were here about twenty documents to be reduced, and it was necessary, under the issues for the respondent, to make out that each was obtained by fraud. The issue would have been framed here in the same

way. Suppose an action had been brought on all these documents, and defendants set up fraud, they would have pleaded, "all the documents were obtained by fraud;" to which plaintiff would have replied, "they were not so obtained, nor either of them;" and issue would have been joined. If, then, the jury should have given an affirmative answer to the issue, that would have exhausted all the particulars. The Court of Session does not go through the formality of making a pursuer deny that the whole were so obtained, but cuts the matter short by ordering the issue at once. Thus, let us take an action of trespass for breaking into a house and garden, the two being distinct trespasses: If the verdict is for the defendant, it means that he was not guilty of any of the trespasses.—*Ladd* v. *Thomas*, 4 Per. & Dav. 9. The same is the result of pleadings here. If the jury had meant that some of the documents had not been obtained by fraud, they would have said so, and it cannot be said they had no opportunity.—*Gomersall* v. *Gomersall*, 2 Leonard, 194. If the jury had said, We find so and so as to No. 5, the Judge would have said, What do you find as to No. 6 (and so on). A general verdict is not void because some of the parties may not have been guilty. If the meaning of the verdict were, that defendant was guilty of some only of the frauds, then it would be bad; but we hold the common sense meaning to be, that he was guilty of all or none.—Comyn's Digest 'Pleader,' §§ 19 & 26. So, in trover, where conversion of divers goods is alleged, and "not guilty" is pleaded, and the jury find a verdict of "not guilty," this means not guilty as to any of the goods. So, in the case of a Sheriff seizing goods, the issue is, "whether the goods, or any of them, were so seized." So it is in Scotland. If there was a separate issue as to each, there would be no end to the length of the record. So, in the case of documents charged to be obtained by fraud or intimidation, the jury might give a special finding unless they find that both took place.—*Balmer* v. *Hogarth*, 8 Sh. 715. If, then, the jury find both fraud and intimidation, the question becomes this, if both these are consistent. It is a matter of everyday practice to include fraud and intimidation in one count.—*Robson* v. *Luscombe*, 2 D. & L. 859: Plowd. 54 B; *Goram* v. *Sweeting*, 2 Saunders, 205 (n). As to *Watt's case*, the offences were quite distinct, but the alternatives here are quite consistent.

[LORD CHANCELLOR.—The issue here varies; it don't give the general result of the pleadings. The condescendence charges conjointly, but the issue is in the alternative.]

Here the verdict, however, cures the defect; for exception should have been taken at the time. —*Railton* v. *Matthews*, 10 Cl. & F. 934. But the general rule is, that the law yields to circumstances; and where certainty cannot be given by the pursuer, the court will allow a less degree of certainty. Now it is said here that neither the summons nor condescendence states that the documents were obtained by some one of the modes described; but a sufficient reason for this is stated in the summons. Fairservice was kept so entirely under Marianski's control, that it was impossible in the nature of things that the pursuer could tell whether it was fraud or intimidation that was practised. All that was certain was, that by one or other of these modes, or both, for they are quite consistent, the documents were obtained. Thus in *R.* v. *O'Brien*, 1 Denison's Cr. C. 9, a man was indicted for murder by killing in three ways—striking on the head, striking with a stick, and throwing a stone. A general verdict of "guilty" was found, and it was held good, because the mode of death was substantially the same, by whichsoever of the three it was brought about. Justice would be defeated unless this were the law. Suppose a man found dead in a pond with marks of a blow upon him: He may either have been dead before he was thrown into the pond, or, while yet alive, he may have been drowned in it: Suppose a person to confess he struck the blow, and also threw him in, but did not know whether he was alive or dead when he did so, could he not be found guilty merely for want of this certainty?—*O'Brien* v. *Regina*, 10 Irish Law Rep. 337: 1 Chitty Cr. pleading, 211; Bacon's Abr. Art. "Verdict," 9. In the same way, it may happen that the names of third persons cannot be found out, yet this ought not to stand in the way of a good verdict being come to.—*R.* v. ———, R. & R. 489. In all such cases, the law yields to the necessity of the case, and does not exact impossibilities, provided the pleadings give all the information that can be had.—*R.* v. *Sarah Willis*, Den. C. C. 80: Stephen's pleading, 367; *Buckley* v. *Rice Thomas*, Plowd. 118. So, here, Marianski alone knows whether it was fraud or intimidation that was used, and it is not for him to complain that the jury cannot state which it was. How is such a case to be met except by an alternative issue?

[LORD CHANCELLOR.—What you say is this, that where certainty is impossible, the pursuer may, by allegation, dispense with it as he did here.]

Yes. For instance, an executor can seldom know under what circumstances documents were obtained from the testator, so as to allege with certainty. But be the issue here right or wrong, it was given out by the Court of Session, and there is no appeal from its adjustment of that part of the cause.

[LORD CHANCELLOR.—There is no intermediate appeal at that stage, but when the case is ripe for judgment, the whole proceedings can be opened up. The other side admit there was no appeal then, but say there is now.]

The Court was justified, on the summons and condescendence, in sending the issue as they

did; and if it is correct, then the verdict cannot be impeached.—Lord Eldon in *Duff* v. *Earl of Fife*, 1 Sh. App. 498. It is said the issue must be read in connection with the summons and condescendence,—and the latter says, "that circumstances will not allow greater certainty." The law, therefore, will never allow the documents obtained by fraud, to be enforced simply because it is impossible to say which of two possible methods was resorted to, especially when these methods are not inconsistent, as in *Jesus College* v. *Gibbs*, *supra*. *Wilde* v. *Gibson* merely shews, that under a general allegation of fraud you cannot prove constructive fraud. Nothing can be deduced from *Kyle* v. *Allan*, *supra*, which was merely a case of misrepresentation by a man's brother being held irrelevant to reduce a document granted to a third party. In *Irvine* v. *Kirkpatrick*, the attention of the House was not sufficiently directed to the effect of an affirmative answer to an alternative issue.

[LORD CHANCELLOR.—It did not matter there which alternative was gone upon, for each was sufficient of itself.]

In *Railton* v. *Matthews*, it was held, that if an issue was sent down on concealment, that meant such a concealment as was fatal. There was no exception in that case to the form of the issue.

[LORD CHANCELLOR.—The concealment was admitted to be such as was fatal, and the summing up imported fraud. The doctrine of concealment does not depend at all upon fraud, but on a condition precedent.]

It was said that the interlocutor of Court "decerning in terms of the libel" was unintelligible, because the libel seeks many different things. But the meaning of that phrase is merely that the documents ought to be reduced. This was an action of declarator and reduction, and also a petitory action. It required the party to produce the documents, and in the event of not producing them, they are to be declared void. Now, here, they had been produced already, and therefore all the Court had to do was to reduce them. In Scotland, you cannot prevent one suing on a document so long as it exists, until it is reduced.—Macallan's Ersk. 4, 1, 19, p. 986-7. In conclusion, suppose this issue ought not to have been sent to trial, or was not sufficient, a judgment of absolvitor would not be the judgment to be given, as was contended for. If the verdict is uncertain, the proper and usual course is to get a *venire de novo*.—*Rosse's case*, 3 Leonard, p. 94; and so it was directed by Lord Eldon in *Duff* v. *Earl of Fife*; 55 Geo. III. c. 42, § 19. As to the statement of facts not being sufficient to warrant the Court in giving judgment for the pursuer, it is now too late to make that objection. It was not taken in the Court below after the verdict was found, and no objection was taken as to the direction of the Judge at the trial. The motion for a new trial was on the ground of being against evidence.

Anderson in reply—*First* and *Second Exceptions*.—The books of Fairservice were brought forward solely to prove that certain sums of money had been paid, which is an improper purpose. The *Irish Society case* merely shews, that if evidence is tendered for one proper purpose, it was admissible for every other. Here it is now alleged that the books might have been given in to prove weakness of mind. But they proved the very reverse; they shew that Fairservice was a strong-minded man down to his death. The books, therefore, were either admissible for the purpose for which they were admitted, or were not admissible at all.

[LORD CHANCELLOR.—The inference drawn from the books at first is, that Fairservice paid certain sums—that he drew corresponding sums from his banker, and then he signed a document to the contrary. Now, if he got the money from his banker, why should he have borrowed it?]

That is assuming that the books are in evidence,

[LORD CHANCELLOR.—Is it not legitimate to shew by these books his previous state of knowledge, and if he acted in accordance with that knowledge?]

[LORD BROUGHAM.—It may be competent to prove not only imbecility—which is, however, disproved by the evidence—but also to prove concussion.]

[LORD CHANCELLOR.—The question is, on what theory do you account for the state of facts, except by fraud or facility?]

We must look to the evidence, and not to the allegations. The books could only be given in to shew the reverse of what they were used for.

Third Exception.—It is said the defences to the summons of alimony contain Marianski's signature; but even if proved, which is not the case, that would not alter the admissibility. The reason why a solicitor generally requires a party to sign the first paper in his own name, is for the convenient proof it affords of a retainer, and is a matter of prudence merely. As to the *verdict*—The direction of the Judge should have been to this effect—"If you find that any one of the documents is not obtained by fraud or intimidation, you must specify which."

[LORD CHANCELLOR.—Is that not implied by the verdict?]

No; it is a relative answer. The jury are asked if one, two, or three things are true of the twenty documents, and they merely say "yes"—which is, in fact, an evasive answer. The Judge, on receiving such an answer, should have asked the jury if they meant that each and all of the documents were obtained under the three conditions of facility, fraud, and intimidation.

[LORD BROUGHAM.—That certainly would have been more satisfactory.]

No judgment can follow on such a record. The cases in English law are not analogous. *Balmer* v. *Hogarth*, *supra*, was cited to shew, that where the issue is framed disjunctively, a verdict may be found on one of the grounds; but that case goes against the respondents, for the grounds there were "false *and* fraudulent," and there was an appeal to this House, and the relevancy of the issue was decided by the Lord Chancellor Brougham. So *Clarke* v. *Thomson*, 1 Murr. 195, shews that an affirmative verdict is not sufficient to warrant a judgment. As to the *pleadings*—It is too late now, since *Irvine* v. *Kirkpatrick*, to say that after verdict is applied we cannot recur to the pleadings. Both in the summons and condescendence, the allegations as to fraud are vague. In particular, there is nowhere any allegation that any one of these documents was obtained by intimidation. But the respondents, indeed, do not say there is a specific allegation, but that the law will yield to the necessities of the case. Now, the whole use of particularity in pleading is to enable the defendant, at the trial, to know what is likely to be brought against him. It is therefore incumbent on the plaintiff to state certain specific allegations, which, if proved, will establish his case.—*Kyle* v. *Allan*, *supra*; *Irvine* v. *Kirkpatrick*, *supra*. It is said our objection was not taken at the proper time; but even though no objections had been taken at all, we are entitled to come here and state them.—*Luke* v. *Mag. of Edinr.*, 6 W. S. 241; *Burnes* v. *Pennell*, 6 Bell's App. C. 541. As to the judgment decerning in terms of the libel, which contains six or seven alternatives, *Galbraith* v. *Armour*, 4 Bell's App. C. 374, shews, that if the record is brought here, though the pursuer have got a verdict, he cannot get judgment in his favour.

Cur. adv. vult.

LORD TRURO.*—My Lords, this case consists in form of two appeals, but, in substance, it is but one appeal. There have been two proceedings below,—one a summons of reduction-improbation, exhibition, count, reckoning and payment—and the other a summons of reduction-improbation and declarator; but the object of both proceedings was to reduce certain documents, which the appellant Marianski sought to make the foundation of a claim of a very large debt against the estate of the late Mr. Fairservice. The only difference in the two appeals is the relation of the documents—the one containing some more documents than the other; but the questions in the two appeals are precisely the same.

My Lords, it appears by the summons in these two cases, that the late Mr. Fairservice was a person of considerable property; and Marianski, the appellant, married one of his daughters, which brought them into very close communication. At the time of Mr. Fairservice's death, Marianski brought forward a very large demand, and sought to evidence and establish that demand by twenty different documents. The object of these proceedings is to discuss the validity and propriety of those documents, and the circumstances under which they have been obtained. Mr. Fairservice being a person of considerable property, it excited very great surprise that so large a debt should be claimed against him, when he had throughout the period embraced by the documents which are supposed to evidence the debt, been possessed of abundant means to answer all his purposes, without having occasion to borrow money, or to be under any obligation to any individuals for pecuniary assistance.

That was the object of the two proceedings; and after proceeding to some length, they terminated in the Court directing two issues. It will be observed that those issues 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, and admitting of a distinct answer by the verdict of the jury. I have, however, seen issues even in this country, from courts of equity, which have assumed something like the form of those in question,—but it has led to no inconvenience, for this reason, that issues from the courts of equity, being merely to inform the conscience of the Court, and to afford collateral assistance, they are always accompanied by a direction and permission to the learned Judge to make any special indorsement that may be necessary; and when, therefore, it has become necessary to distinguish the parts of the verdict applying to only certain parts of the issues, that has been done by indorsement upon the *postea*.

No objection appears to have been made below to the form of these issues, and for a very obvious reason, that I believe there is not the slightest doubt that the form of these issues is the established form in the Courts below. We were not referred at the bar to any precedents, but 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 on the part of the jury.

This case went to trial in the form which I have mentioned; and, 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

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* The case was argued before Lord Truro when Lord Chancellor, and Lord Brougham, and time was taken to consider: meanwhile Lord St. Leonards became Lord Chancellor.

as to certain entries made by him in books of accounts, 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 on the part of the defender, it was objected by his counsel, 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 overruled the objections, as well to his declarations, as to the entries in the books which led to exception.

Now, I would just observe for a moment, that it appears a proceeding 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 first question relating to Mr. Fairservice's declaration, 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? How much it may vary. It is objected that the declarations are not evidence. Suppose they are made in the party's presence, is that of the same character? In one sense it is. However, the House can only deal with the exception as applied to the particular question to which it is stated. That will not affect the result of this case at all. I only mention it in order to guard against an irregularity of that sort in future. The only way to carry it into effect is, when the record comes to be completed, to repeat the exception to each of those questions to which it was supposed the agreement was intended to be applicable. However, I merely take the exception to apply to the question of Mr. Fairservice's declarations as to the payment of a certain sum of money, and also to page 72 of the account book given in evidence, which was the immediate subject of attention.

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 mind or of weak mind, or not? Shut out his conduct, his declarations and his acts, and what is the test by which you are to try the state of his mind? How do you try it in a criminal case? How do you try it in any case? The mistake seems to me to be this—the learned counsel seems to have mistaken the substance of these issues. If the issue had been, whether Fairservice was indebted to Marianski in this amount, 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 weakness or imbecility of mind, or insanity, there is in truth no other means, and no other species of evidence, pertinent to that issue, but the man's sayings and his conduct. Look at it as applied to this case. 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 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 as that? Suppose you find, on the same subject, inconsistent conduct at the same period of time, so as to evidence that either 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—no entries on his part—no writing on his part—can be evidence. That exception is much too wide. It was only evidence to shew 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 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 defeat a claim made against him of a pecuniary nature. If used for that purpose, it was proper matter of objection. But looking to the intelligence of the learned counsel below, and seeing that there was every disposition to preserve the utmost regularity in the proceedings, one cannot doubt, that if the learned Judge had left it in the manner which has been argued at the bar, it would have been a matter of exception. 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 be 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 no objection was taken to that.

Then the evidence is admissible; and the exception is undoubtedly too large—but that is the less material, the evidence being admissible. I would also mention another circumstance in this case, not material to the result, as it will appear, but which is important. This bill of exceptions, like another which came up to this House (*Hutchinson* v. *Ferrier*, 23 Sc. Jur. 404: and *ante*, p. 43,) is in a form which might have defeated the appeal. No appellate Court can take notice, in the matter of a bill of exceptions, of anything which is not authenticated by the Judge's signature. The whole of the documentary evidence which is the subject of exception, is appended to the record; it does not form part of the record, and is not authenticated by the Judge. The evidence says that document No. 47 was produced in evidence, which was matter of exception. What No. 47 is, you cannot tell in the course of the case; but you are told, that in the appendix you will find a paper which is brought up here under No. 47, (I do not refer to the particular number,) and that is signed by an officer of the Court. But I need not state to some of the learned counsel at the bar, that a bill of exceptions must be authenticated by the Judge in full; it may make the whole difference. Another case gave rise to the objection. I therefore mention it now by way of caution.

It seems to me, therefore, that I am bound to submit to your Lordships that the exception cannot hold in the present case, and that the interlocutor which relates to the disallowance of that bill of exceptions must be confirmed. It appears to me that the evidence was receivable, and that, with regard to the issue, it might be properly summed up to the jury. There is no exception with respect to any objection to the summing up, and it therefore appears to me that that interlocutor must be confirmed.

The second matter of objection to the interlocutor appealed against, relates to the application of the verdict. Now, it will be observed that the issues are 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, as, unless altered, it may tend to give rise to objections of a similar nature to the present, which might be avoided. 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, there is this mistake—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 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." When you come to make the entry upon the *postea*, though the clerk takes a note of the verdict as being for plaintiff or defendant, you expand it, and make it 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 the remaining fifteen 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 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 half of these documents were obtained by given means, and half 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:"—Supposing the learned Judge 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)—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 be rightly and properly done until you have some ground presented for inferring the contrary.

Now, it will be observed, that when this case comes on before the Court below to apply the verdict, they have the report of the learned Judge's summing up, and they have then 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 do. 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." Reporting that, the Judges 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 of the respective 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 have stated, 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 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 its 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 do by 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 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*, 11 Moore, 104; 7 B. & C. 819; 3 Bing. 334, 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 in a remarkable case, for Lord Gifford had ceased to be a Judge of the Court at the time, being then Master of the Rolls; but they sent for his notes, and used them in order 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 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 at the bar. But the House held that this was matter of practice of the Court below, of which they 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 the volume of Tidd's Practice, title "Verdict," you will find the matter all laid down, with a note of several cases. But I will just mention one case, in order to shew how strong the practice is, because it was a criminal case, and the man was executed. That is mentioned in *Short* v. *Coffin*, 5 Burrows, 2730, where it is said, that in the case of Mr. Francis, after the entry of the judgment of attainder, the verdict was altered according to the Judge's notes, and the man executed.

Now the cases, as I have before mentioned, are very numerous. There is the case, which is a very strong one, of *Harrison* v. *King*, 1 B. & Ald. 161. The amendment was refused there; but why? It was after a judgment of reversal, and 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 recollection of the Judges, 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 it was refused in that case, and there also after a judgment of reversal. There is another case of *Eddowes* v. *Hopkins*, 1 Doug. 376. In fact it is almost waste of time to refer to the cases—they are so numerous. It is a matter of constant practice; and your Lordships find it laid down in Tidd's Practice, that it may be done at any state of the proceedings. It is in the 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 case stand? Here 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 by fact and by justice—whether he will amend it in the way in which he may be asked. 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 case the record in this

House will be amended to correspond with it, and the House will give judgment according to the record in its amended state.

At present, therefore, I should recommend your Lordships not to act upon the ambiguous verdict as it stands, but to overrule the exception so far as it applies to the admissibility of the evidence, and to let the case remain over for ultimate judgment, until there has been an opportunity to make the application which I have mentioned. Such appears to me to be the correct view of the case, sanctioned by principle and practice; and I think it is the safest course for your Lordships to pursue.

LORD BROUGHAM.—My Lords, there have been very few cases in which I have had the good fortune to attend and to advise your Lordships, in which I have felt more anxiety than in the present case. That anxiety has been shared, as I know, by my noble and learned friend. We have applied our minds to it again and again during a very considerable course of time, and we have come to the result which he has now stated to your Lordships, that this is the course which we should recommend to be pursued. It has this great advantage, that it tends to prevent, as I most earnestly hope it may be found to prevent, opening the case 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 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, I hope and trust that nothing which has passed upon the present occasion will at all shake the opinion, which I venture to hope has been come to by professional men in the Court below, that the practice to which my noble and learned friend has referred is *mala praxis*. That it is the practice of the Court, and that it has been so, I am afraid is very true. I hope and trust that it will be considered, and that a new course will hereafter be taken. This case is 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*, 7 Bell's App. C. 186, to comment upon it; and I observe, that in the report of those comments there is rather an unfortunate error. It states (p. 215)—"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."

My Lords, I entertain the opinion, which entirely agrees with that of my noble and learned friend, which I held at that time, that this practice is very fit to be reconsidered, and ought to be altered. I therefore move your Lordships that this case stand over, with the intent and for the purpose stated by my noble and learned friend.

Mr. Anderson.—My Lord, I am afraid there will be some difficulty in point of form. The record is here, and I am afraid that unless your Lordships remit it to the Court of Session, the record will not be before them. I therefore apprehend that, in point of form, there must be a remit.

LORD TRURO.—The record is in the Court below, is it not? I do not apprehend that the original record is brought here.

Mr. Anderson.—Yes, my Lord; it is removed by the appeal; the record, embracing all the matters of appeal, is here.

LORD BROUGHAM.—It is not merely a transcript?

Mr. Anderson.—No, my Lord; the *record* is removed.

LORD TRURO.—Probably the House should direct a remit of the record for that purpose; there can be no difficulty in that.

Mr. Anderson.—That may do; the proper form of doing so is a remit.

LORD TRURO.—Very well; the record may be remitted for that purpose.

Mr. Anderson.—Yes, my Lord; and then when the Court below come to deal with any competent application, your Lordships may dispose of any further petition of appeal.

LORD TRURO.—It is much better that it should be remitted, because the probability is, that it will save the necessity of coming here again; the only thing will be to ask for costs, if the parties come here again.

Mr. Anderson.—Then your Lordships will remit it to the Court below to dispose of all questions of costs. My Lords, there is one point about which my learned friend Mr. Hill and I are not altogether satisfied, as to how your Lordships mean to dispose of it—namely, the point as to the admissibility of the defences in the suit of aliment.

LORD BROUGHAM.—Whether is was admissible evidence, being signed by him?

Mr. Anderson.—That was one point, my Lord. The question was, whether the defences that were put in to the action of aliment on behalf of Marianski, could be admitted?

LORD TRURO.—The ground upon which it occurred to me that that exception must fail, was this:—You are aware of the recent statute (13 and 14 Vict. c. 36), which directs that no exception, either on account of the reception of inadmissible evidence, or the rejection of competent evidence,

shall affect the judgment, if the Court of Appeal shall be of opinion that whether the evidence was received or rejected improperly, the pursuit of the right course would not have affected the judgment.

Mr. Anderson.—Will your Lordships allow me to mention, that that statute was passed since this judgment was given; and there is a clause in the statute providing that it shall only apply to cases commencing after November 1851;—it certainly, therefore, does not apply to this case. It is in operation from 1851, but it does not apply to this judgment.

LORD TRURO.—That document was well considered by my noble and learned friend and myself. That document, you observe, stood in rather a different situation from pleadings in general. The argument was addressed to the House as though it had been an ordinary pleading, such as takes place through the instrumentality of counsel; but that was a document signed by the party himself;—and I recollect to have asked, though I do not remember whether I received an answer, whether it was not upon oath. Assuming it not to be upon oath, still it is a representation made by the individual himself as to the state of his own circumstances. That representation was made in the suit for alimony to his wife, that he was then living upon 8*s.* a week, which included his lodgings, and every other expense to which he was put; and one of the points raised in the case being, whether Marianski had ever possessed the means by which to make the advances, the amount of which he claimed to be due to him as a debt from Fairservice, that was put in in order to shew his state of circumstances at a given period,—a period some time antecedent to that at which the supposed advances were made,—leaving it to the other evidence in the case to deal with the probability of his having, in the mean time, acquired any such fund. Now, it certainly appeared to me that that document was not open to the general objection which would apply to pleadings in ordinary, but that being a statement made by the individual of his own circumstances, it would not render it inadmissible because that statement had been made in the course of another suit. It did appear to me, as I have before said, not having adverted to what Mr. Anderson has pointed out as to the statute, independently of that; and I conferred with my noble and learned friend upon the subject, and it did appear to us both, I believe, that it was distinguishable from pleadings in ordinary, and that the objection could not prevail as to its admissibility.

LORD BROUGHAM.—I entirely agree with my noble and learned friend. We have conferred upon this point; and although we relied upon the statute, not being aware of the date, which has been pointed out by Mr. Anderson, we said—we are of this opinion, but it does not signify—we need not dispose of this question at all, because the statute includes it. Now, however, finding that the statute does not include it, we fall back upon the merits of the objection—and I agree, that although not in the same suit, yet it is admissible, and it would have been so, in my opinion, if signed by the party, though in no suit at all.

LORD TRURO.—I may just mention for satisfaction, that, in truth, I did not recollect the statute until after I had made up my mind upon the subject. I had considered the objection before the statute occurred to me, but when it did occur, it appeared to me to dispense with the necessity of saying more upon the subject. Supposing the statute had passed before, it would have been perfectly applicable to this case.

Mr. Hill.—Will your Lordship permit me to ask, whether anything is said about the costs with regard to the first part of the judgment?

LORD BROUGHAM.—As to the decision which we have affirmed? That is but one interlocutor. It is not a total affirmance—it is only one interlocutor.

Mr Anderson.—That is all, my Lord. Your Lordships say nothing about costs.

LORD TRURO.—The House will deal with the costs when it comes to deal with the ultimate judgment.

LORD BROUGHAM.—There is nothing said as to the costs either way,—either here or below.

One of the interlocutors affirmed, and cause remitted.[1]

Second Division.—Thomas Deans, *Appellant's Solicitor.*—Dodds and Greig, *Respondents' Solicitors.*

[1] See another appeal between the same parties, as to the next stage, *post*, 8 Aug. 1854.