

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

1854.  
 4th, 7th, 8th,  
 August.

*Jurisdiction.*—When the House of Lords remits a cause to the Court below in order to have a certain thing done, the power of the Court below to do the thing ordered, is not to be disputed.

When the House retains an appeal, but makes a remit to the Court below for the purpose of some additional proceeding—such additional proceeding ought to be reported when completed—and on receipt of the report the House will resume consideration of the cause and take cognizance as well of the matter involved in the appeal as of the additional proceedings had under the remit.

The Appeal Committee drops with the Session ; therefore if no report is made upon petitions which have been referred to it, such petitions, at the close of the Session, return to the House, which thereupon resumes its original jurisdiction.

*Verdict.*—A Judge may amend the entry of a verdict from memory, although he have no note either of the evidence or of his summing up to the jury.

THE House in the Session 1852 had held that the entry of the verdict was, from its uncertainty and ambiguity, inapplicable to the issue which had been tried before the *Lord Justice-Clerk Hope*, and a jury ; and therefore in order to have this defect rectified, judgment was given as follows :—

It is ordered and adjudged that the interlocutor disallowing the Bill of Exceptions be affirmed: and it is further ordered that the

(a) See this case reported in its previous stage, *suprà*, p. 212.

said appeals *do stand over*, and that the said causes be remitted back to the Court of Session in Scotland, in order that the Respondents in the said appeals may make such applications to the said Court of Session, and to the Lord Justice-Clerk, as they may be advised to make, for the amendment of the entries of the verdicts in the said actions respectively found for the Pursuers on the issues in the said petitions and appeals mentioned, according to the substance of the actual findings and to the notes of the Lord Justice-Clerk, and also for such amendment of the application of the verdict in the said action of reduction-improbation, exhibition, count, reckoning, and payment, and for such amendment of the application of the verdict in the said action of reduction-improbation and declarator as the said Court may deem necessary in consequence of any amendment which may be made in the entries of the said verdicts.

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The Respondents applied to the *Lord Justice-Clerk* and to the Court of Session, in conformity to the above remit, praying that the entry and application of the verdict should be rectified.

The Appellants opposed the application, contending that the Court had no power to comply with it.

On the 17th December 1852, the *Lord Justice-Clerk Hope*, having referred to his notes, directed the Jury Clerk to rectify the entry of the verdict in such manner as to render it applicable to the issue.

The order of the *Lord Justice-Clerk* was duly executed on the 17th December 1852.

On the 15th January 1853, the Lords of the Second Division of the Court of Session, having resumed consideration of the cause, applied the verdict as amended, and pronounced judgment reducing and setting aside the documents in question conformably to the prayer of the summons (a).

On the 10th February 1853, the LORD CHANCELLOR acquainted the House that the *Clerk-Assistant* (Mr. *Lefevre*) had received by post from Mr. John Russell, one of the Principal Clerks of the Court of Session, by direction of the *Lord Justice-Clerk* and the other Judges

(a) See *suprà*, p. 212.

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of the Second Division, copies of the proceedings had in the Court below in pursuance of the remit. So that by means of this return a certified transcript of the Record, including the new interlocutor of the 15th January 1853, was brought before the House.

On the 22nd February 1853, the Respondents presented a petition praying the House to “resume consideration of the said appeal with the remit, and the proceedings and interlocutors of the Court of Session pursuant thereon, and to pronounce final judgment on the said appeal, so as to dispose of all the matters not disposed of by the judgment of the House pronounced on the 1st July 1852.”

This petition was referred to the Appeal Committee, but no report was made. The Petition therefore at the end of the Session reverted to the House.

Next Session, on the 3rd August 1854, the House ordered the petition “to be considered to-morrow.”

On the 4th August 1854, the following order was made:—“Consideration put off *sine die*, and cause to be heard by one Counsel (*a*) of a side on Monday next.”

Accordingly, on the 7th, 8th, and 9th August 1854, the question raised by the Respondents’ petition was fully argued.

Mr. *Rolt*, in support of the petition, attempted, but was not allowed, to begin.

The *Solicitor-General* (*b*), for the Appellant: The direction to amend the entry of the verdict had excited the greatest amazement in Scotland. The Jury Statutes gave no authority for such an operation. How could the *Lord Justice-Clerk* undertake to remember after an interval of two years all that had passed and all that he had uttered at the trial? But yet he had ventured to correct this entry, although

(*a*) This does not mean that counsel were to *hear* but to *argue*.

(*b*) Sir Richard Bethell.

his more prudent brethren had doubted the power to do so.

[Lord BROUGHAM: You cannot assume that the *Lord Justice-Clerk* had not a note of the evidence and of his summing up.]

But what can the House do with the new interlocutor of the Court below, that of the 15th January 1853. It is not here. Your Lordships have no cognizance of it. There must be another appeal to give you jurisdiction. At present, by the return of the record to Scotland under the remit, the House is *functus officio*.

[Lord BROUGHAM: No. The appeal was to “stand over.” Why did not you appeal against the new interlocutor?]

The case was before the Appeal Committee, and was left there in a state of amicable repose for seventeen months. It was for the other side, not for us, to set that tribunal in motion. This House cannot take notice of matter not coming before it in the regular course of its appellate jurisdiction. The transcript of the record dispatched through the instrumentality of the post-office is a thing not to be looked at by a Court the highest of all, which is to give an example of formality and good order to the inferior tribunals.

We submit, therefore, that the petition—being still before the Appeal Committee—cannot be taken cognizance of by the House without a violation of its own consistency and settled practice; and we contend that your Lordships cannot deal with the new interlocutor of the Court below till we have brought a supplemental appeal, which we shall be ready to do next session.

Mr. *Rolt*, for the Respondents: There is a precedent, *Elliott v. Cleghorn (a)*, which removes the supposed difficulty respecting the new interlocutor.

(a) M'Lean & Rob. 1036.

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The power to amend the entry of the verdict has been denied. But when this House remits to the Court below to do a certain thing, the jurisdiction which the House has affirmed is not to be disputed.

The record was not sent back by the remit.

The *Solicitor-General*, in reply : The question is, can the House consider again the original appeal? The report of *Elliott v. Cleghorn* is wrong. The journals show that that case was a complete contrast to the present.

The LORD CHANCELLOR (a) :

*Lord Chancellor's  
opinion.*

That the alteration in the entry of the verdict might competently be made, is established by the fact of your Lordships having remitted the case for the purpose.

If it turns out that the mode in which a verdict has been entered up, does not express that which the jury upon the direction of the Judge had intended to state, it is obvious that there must be some mode or other of getting that set right. Now that is what has happened here—because upon this remit application is made to the *Lord Justice-Clerk*, and his report, as I interpret it, is to this effect:—"I did say, that unless the jury found upon each and every of the instruments that fraud, circumvention, and intimidation had taken place, they could not find a verdict for the Pursuers generally." They have found a verdict for the Pursuers generally. Therefore that is now set right.

If there is any doubt as to whether this course is taken in the Courts of this country, I can only say from an experience of many years that it is done fifty times in a year. Generally the Judge has a note of what took place. If he says, I have no note of what I said, but I am quite sure that it was so and so; nobody

(a) Lord Cranworth.

supposes that a Judge would mislead or misstate. Here the *Lord Justice-Clerk* is quite distinct; and it is not a point upon which he could have been mistaken.

The only doubt which I entertained at first was whether this matter was so before the House, that your Lordships could deal with it.

In the case of *Elliott v. Cleghorn*, the petition was by the Appellants. Here it is by the Respondents; but that circumstance can make no difference. The substantial thing—the appeal itself—is still before the House. Therefore, my Lords, it appears to me that the parties have a *locus standi*, and that it is competent for your Lordships now to give judgment as you would have done if there had not been a necessity for the remit.

The Lord BROUGHAM:

It would be a most cruel injustice if, upon a mere matter of form, whether or not we should have a report from the Appeal Committee, we were to stay the final disposal of this case.

Had that been before this House two years ago, which is before it now, and the want of which occasioned the remit, there would not have been the shadow of a doubt remaining in the minds of any of your Lordships what course you ought to take in disposing of this cause. My noble and learned friend (a) (unfortunately from the state of his health not now present) and myself both considered it quite a matter of course that if it should be found that the general verdict for the Pursuers on the part of the jury, under the direction of the learned Judge, implied (what it might well imply, though it did not of necessity imply) that all the twenty pieces of paper, bills, bonds, and so forth, had been obtained by the

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three several modes of malpractice resorted to by this Appellant upon the old man his father-in-law, namely, by working upon his facility of mind, by fraud and circumvention, and by intimidation,—if it had appeared that all those means had been taken to induce him to sign those instruments,—we could have had no doubt in our minds that the interlocutor reducing the whole of them, and decreeing in terms of the verdict, was well grounded and ought to be affirmed.

Something has been said with respect to the notes of the *Lord Justice-Clerk* having applied to the evidence only, and not to his recording, as it were, for his own use, and subsequently, as it might happen, for the use of the Court, what he had said in his direction to the jury. But, as my noble and learned friend has well observed, a Judge may have as distinct a recollection of his direction to the jury as if he had kept a note, word for word, of what he said at the trial,—*Non constat* that the *Lord Justice-Clerk* had not a note—there is nothing to exclude the supposition that he might have had such a note, which might have been more or less formal, or more or less full; but it is equally possible that, without any note at all, he had so distinct a recollection of what had passed at the trial, that he could, clearly and without doubt, state what his direction to the jury was.

My Lords, upon the whole I have no doubt whatever that your Lordships will do substantial justice by affirming these interlocutors with costs.

The following is the formal judgment of the House:—

DIE MARTIS 8<sup>o</sup> AUGUSTI 1854.

Whereas counsel was heard, as well on *Thursday* the 19th as *Monday* the 23rd, *Friday* the 27th, and *Monday* the 30th days of *June* 1851, upon the petition and appeal of *Dionysius Onufri Marianski*, complaining of an interlocutor of the Lords of Session

in *Scotland*, of the Second Division, of the 18th of *July* 1850, “ disallowing the Bill of Exceptions ” in the said petition and appeal mentioned, “ and finding expenses due; ” and also complaining of an interlocutor of the said Lords of Session in *Scotland*, of the Second Division, dated the 18th of *July* 1850, and made in an action of reduction-improbation, exhibition, count, reckoning and payment, in the said petition and appeal mentioned, discharging the rule granted to show cause why the verdict in this case should not be set aside, and a new trial granted, and appointing the verdict to be applied, and judgment to be entered up ; and also of an interlocutor of the said Lords of Session in *Scotland*, of the Second Division, dated the 18th of *July* 1850, and made in an action of reduction-improbation and declarator, in the said petition and appeal mentioned, discharging the rule granted to show cause why the verdict in this case should not be set aside, and a new trial granted, and appointing the verdict to be applied, and judgment to be entered up “ in so far as the said verdicts are appointed to be applied, and judgment to be entered up ; ” and also of two interlocutors of the said Lords of Session there, of the Second Division, dated respectively the 20th of *July* 1850, made in the said actions respectively ; and praying, “ that the same might be reversed, varied, or altered, so far as complained of, or that the Appellant might have such relief in the premises, as to this House, in their Lordships’ great wisdom, should seem meet.”

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As also upon the answer of Mrs. *Janet Fairservice* (or *Cairns*), wife of *John Cairns*, and of the said *John Cairns*, for their respective rights and interests, put into the said appeal.

And whereas this House did, on the 1st day of *July* 1852, order and adjudge, that the said interlocutor of the 18th of *July* 1850, disallowing the Bill of Exceptions, and finding expenses due, should be and the same was thereby affirmed ; and did further order that the said appeal should stand over, and that the said cause should be and they were thereby remitted back to the Court of Session in *Scotland*, in order that the Respondents might make such application to the said Court of Session and to the Lord Justice-Clerk as they might be advised to make, for the amendment of the entries of the verdict, according to the substance of the actual findings and to the notes of the Lord Justice-Clerk, and also for such amendment of the application of the verdict as the said Court might deem necessary in consequence of any amendment which might be made in the entries of the said verdicts.

And whereas certified copies of the proceedings of the Court of Session on the said appeal, in pursuance of the said remit, were laid before this House on *Thursday* the 10th day of *February* 1853, from which it appears that the said Respondents, on the 23rd of *November* 1852, presented a petition to the Lords of the Second

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Division of the Court of Session, praying their Lordships “to apply the hereinbefore mentioned judgment of this House, and to carry into effect the said judgment, and the remit of this House,” and that application was also made by the said Respondents to the said Lord Justice-Clerk to amend the entries of the verdict, and that accordingly the said Lord Justice-Clerk caused the said entry of the said verdict to be amended, and the Lords of the Second Division of the Court of Session, having resumed the consideration of the said petition of the said Respondents of the 23rd of *November* 1852, pronounced an interlocutor dated the 15th *January* 1853, which interlocutor applies the verdict entered up in its amended form, and finds, reduces, decerns, and declares, as therein mentioned :

And whereas a petition of the said Respondents was presented to this House on *Tuesday* the 22d day of *February* 1853, stating, among other things, “That after procedure had been made upon the said remit of this House, as mentioned in the petition, the Lords of the Second Division resumed consideration of the said application of the Respondents, and by interlocutors of the 15th of *January* 1853, pronounced in each of the two causes (being the interlocutors lastly hereinbefore mentioned, dated the 15th and signed the 18th of *January* 1853), applied the verdicts as thus entered up in an amended form ;” and praying this House “to resume consideration of the said two appeals, with the remit to the Court of Session therein, and the proceedings and interlocutors in the said Court of Session pursuant to the said remit, to hear counsel thereupon, and to pronounce final judgment in the said appeals, so as to dispose of all interlocutors and matters not disposed of in the said judgment of this House of the 1st of *July* 1852 ; and that for further hearing of the said appeals, as now prayed, their Lordships may be pleased to allow the petitioners to deposit in this House copies of the afore-said steps of procedure in the Court of Session, corresponding to the certified copies which have been sent by the Clerk of the Second Division of the Court of Session to the Clerk of the Parliaments, and upon such deposit being duly made to order the said two appeals to be heard on an early day, and further to award to the petitioners the costs of this petition, of any discussion thereon, and of the further hearing by their Lordships ;” which said petition was referred by this House to the Appeal Committee, but no report was made thereon :

And whereas by an order of this House of *Friday* last it was ordered, that the said cause on remit be heard by one counsel of a side on the *Monday* following :

And whereas counsel were accordingly heard yesterday and this day in the said cause on remit ; and due consideration being had of what was offered by the said counsel, and also of the said proceedings of the Court of Session upon the said remit, and of the said

interlocutor of the 15th of *January* 1853, and of the said petition of the Respondents :

It is *ordered* and *adjudged*, that the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutor of the 15th January 1853, be, and the same is hereby affirmed : and it is further *ordered*, that the Appellant do pay or cause to be paid to the said Respondents the costs incurred in respect of the appeal, the amounts of such costs respectively to be certified by the Clerk Assistant : and it is also further *ordered*, that unless the costs, certified as aforesaid, shall be paid to the parties respectively entitled to the same, within one calendar month from the date of the certificate thereof, the causes shall be and are hereby remitted back to the Court of Session in *Scotland*, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs respectively as shall be lawful and necessary.

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DODDS & GREIG—DEANS.