## AUGUST 8, 1854.

## DIONYSIUS ONUFRI MARIANSKI, *Appellant*, *v.* JANET FAIRSERVICE or CAIRNS and HUSBAND, *Respondents.*

Appeal to the House of Lords—Process—Issue—Amending Entry of Verdict—Remit to Court of Session—Resuming Consideration of Appeal—*An issue was sent to a jury in this form—"Whether, at the dates of the writings, Nos.* 5, 6, 7, *&c., (naming twenty,) the granter F was of weak mind? and whether the defender did by fraud, or circumvention, or intimidation, procure them from F?" The jury returned a general verdict for the pursuer. On appeal to the House of Lords on the ground of the ambiguity and uncertainty of this verdict, the House ordered the appeal to stand over, and the cause to be remitted back, that the pursuers might apply to the Court and to the Judge to amend the verdict according to the Judge's notes, and according to the meaning attached to the verdict by the jury. The pursuers having applied to the Judge accordingly, he certified that he had summed up in a particular way, and that the jury meant to say that all the documents were procured by each and all of the means stated in the issue. The Court thereupon amended the interlocutor, by entering the verdict according to this report of the Judge. The pursuers (respondents) then presented a petition to the House of Lords to resume consideration of the appeal, and affirm the interlocutors.*

HELD, *That the petition was proper, and that no supplemental petition of appeal was necessary to bring up the record, including the amended interlocutor; and the original and amended interlocutors appealed against were affirmed accordingly and finally disposed of.*[1]

In this case an action of reduction-improbation, &c., had been raised against Marianski by the respondents, and an issue had been sent to a jury in this form :—"Whether, at the date of the writings, Nos. 5, 6, 7, 8, &c., (naming twenty,) the said Alexander Fairservice (the granter) was of weak and facile mind, and easily imposed upon? and whether the defender, taking advantage of the 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 jury returned a general verdict—"Find for the pursuers."

An appeal was thereafter presented to the House of Lords against the interlocutor applying the verdict, on the ground that the verdict was too uncertain, for that it might mean that the jury thought some of the documents were obtained by fraud, some by intimidation, some by circumvention, &c. The House ordered that "the appeal stand over, and the cause be remitted back to the Court of Session, that the respondents might make application to the Court and to the Lord Justice Clerk, for the amendment of the entry of the verdict according to the substance of the finding, and to the notes of the Lord Justice Clerk." The House at the same time suggested, that though the verdict, as it stood on the record, was too uncertain and ambiguous, yet, if the Judge had in his summing up (and the House was bound to assume that the Judge had properly summed up) told the jury, that they might find a general verdict for the pursuers, if they were satisfied that all the documents had been obtained by each and all of the modes specified, viz. by fraud and circumvention and intimidation, while the granter was of weak mind and easily imposed upon, then that the generality of the verdict would be cured, and the error committed would be a mere clerical error of the clerk in the entering of the verdict, which might be amended on reference to the Judge's notes. (See the report, *ante*, p. 146.) This application was accordingly made, and the Lord Justice Clerk certified that he had summed up in the mode suggested, and that the jury had meant their verdict to apply distributively to all the modes of obtaining the documents specified. The Court of Session, on this report from the Lord Justice Clerk, amended the entry of the verdict accordingly, and thereafter pronounced an interlocutor amending the application of the verdict.

The respondents now presented a petition to the House of Lords to resume consideration, and praying to have the original petition of appeal finally disposed of, and to have the interlocutors appealed against affirmed with costs. The appellant resisted this course; whereupon the House ordered the matter to be argued by one counsel of a side.

*Sol.-Gen. Sir R. Bethell*, (with him *Anderson* Q.C.,) for the appellant.—It is incompetent for the House to take into consideration the amended interlocutor pronounced by the Court below subsequently to the remit, as neither that nor the original interlocutor is properly before the

[1] See previous report 12 D. 919, 1286; 22 Sc. Jur. 586; 24 Sc. Jur. 579; 25 Sc. Jur. 186. S. C. 1 Macq. Ap. 212; 26 Sc. Jur. 635.

House. The order of the House directing the remit, was in fact a mistake altogether, for the Lords who advised that order went on the erroneous assumption that the practice as to entering verdicts in Scotland was the same as the practice in England. In Scotland, the verdict is at the trial entered at once on the record by the clerk, and once entered, therefore, it cannot be altered or tampered with by any Judge or judicial officer. In England, on the other hand, the practice is different, for the verdict is not entered until afterwards, when the *postea* is drawn up. An illustration of the difference of practice in these matters is seen in *Berry* v. *Wilson*, 4 D. 144, *per* Lord Justice Clerk Hope, who, himself, there states it is incompetent to do the very thing he has here done. The order of the House therefore was wrong in assuming that the verdict could be altered. It was also wrong in the mode of directing the alteration. It in fact referred the parties to the recollection of the Judge who tried the cause; but after the lapse of two years and a half it was obviously impossible the Judge could recollect what had passed at that distance of time. But the order did not merely refer the parties to what the Judge of his own recollection could speak to, but it referred a matter to him, which by the nature of the case he could not possibly recollect or know, viz. what particular meaning the jury attached to their verdict. How could the Judge tell what passed in the minds of the jury? There is no pretence for saying there is any record or note to which reference can be made, or by which the verdict can be corrected. The Judge's notes would only contain the evidence given at the trial, but could not possibly contain the details of his own charge to the jury. The House therefore ordered a simple impossibility, and the result is entirely elusory. And what the House erroneously ordered was still more erroneously carried out. The Judge not only took upon himself to say, that he had charged the jury in the manner suggested by the House as the only way which could save the verdict, but he, in fact, wrote out a new verdict—a thing beyond the power of any Judge to do, and never before attempted. The Court thereupon drew up a new interlocutor applying this new verdict. What power has the House now to deal with that new interlocutor? We have a right to appeal against it. There is, however, no petition of appeal at present, and the House has no means of knowing anything about it; it has no jurisdiction whatever, except what it gains by and through a petition of appeal which is here wanting. The record is not before the House at all. When the case was remitted back to the Court of Session, the appellate jurisdiction of the House was exhausted; the record left the House, which thereupon was *functus officio*. The remit, in fact, implied that the Court of Session was to go on to the completion of the case, and not that the case was to come back. It is true that the order says "that the appeals do stand over," but it does not say till when; and these words are in fact insensible, and are at variance with the rest of the order, and must go for nothing. Nothing, therefore, can be done by the House in the present stage of the case. The proper course was to wait till the appellant presented a supplemental petition of appeal, when the original and the new interlocutors would be properly before the House, and the record brought back. Then only could the House dispose finally of the cause.

*Rolt* Q.C., for respondents.—There is no pretence for the appellant now objecting to the final consideration of this appeal. The order of the House stated that the appeal was to stand over for a certain purpose, viz. until an application should be made to the Court below, and to the Judge who tried the cause. That having been done, it was competent for us at any time to present a petition to the House to resume consideration, for, while the cause is still undisposed of, the party in possession of the funds cannot pay the money over. The burden of the appellant's objection now is, that what the House ordered was *ultra vires* and illegal. It is, however, now too late to say the House had no power to order what it did, or that the Court below had no power to do what it has ordered to be done. Our simple answer is, that the order was right, because it was the order of the House. It is absurd to suppose the House would order the Court below to do what the House knew that Court had no jurisdiction to do. But, in reality, there was nothing wrong at all in the order, and it was quite proper in the circumstances. The House said this,—"We think the interlocutor ought to be affirmed, if you, the respondents, can satisfy us that the Judge summed up in a particular way, and we will give you an opportunity to ascertain that fact by applying to the Judge." Accordingly, the Judge in the Court below has certified that he did sum up in the mode suggested. It is said that it is impossible that the Judge could recollect, at a distance of two years and a half, how he summed up; but there was nothing extraordinary in such a circumstance being strongly impressed on his memory. It is also said that the practice is not the same in Scotland as it is in England, and that the verdict could not be corrected after it was once entered. The practice of jury trial, it was well known, had long grown up in England, and all the rules which existed in the English practice went along with the institution when it was transplanted to Scotland, save in so far as these were altered by express statute. There is no reason for saying that an interlocutor applying a verdict does not stand in the same position, with regard to the power of amendment, as any other interlocutor. Besides, all Courts, whether in Scotland or elsewhere, must have of necessity some mode of correcting a mere clerical error like this, in drawing up its decrees, or in entering verdicts in a wrong form. It is said that the House cannot take into consideration the new interlocutor pronounced by the Court below, because there is no petition of appeal against it, and that the record is not

before the House. But the record is before the House, in the same sense that any record ever is. It is at most a mere fiction of law, that the record is brought up from the Court below, for all that is ever sent is merely a printed copy of the pleadings certified by the officer of the Court. That form has been complied with here, or rather the record originally sent up has never been returned. Moreover, the interlocutor amended by the Court is merely that which the Court ought originally to have pronounced; and it is quite competent to affirm that interlocutor now. The same course precisely was followed in *Elliot* v. *Cleghorn*, M'L. & Rob. 1033, and that was a much stronger case than this, for there it was a final interlocutor which was ordered to be amended.

*Sir R. Bethell*, in reply.—The case of *Elliot* v. *Cleghorn* has misled the respondents. As reported in M'L. & Rob. the circumstances do not fully appear; but I find on examining the journals (69 Journ. H.L. (1837) 389, 404; 71 Journ. H.L. 645) that there was in that case a supplemental petition of appeal bringing up the amended interlocutor. That is what I say should have been done here, and I admit *Elliot* v. *Cleghorn*, in that view, was quite regular, and ought to be followed. In that case the House remitted to the Court of Session to ask, if, in their interlocutor, they had had regard to so and so? But here the House exhausted the appeal by the remit. It affirmed that part of the interlocutor as to the exceptions, but as to the other part applying the verdict, the House in substance reversed the interlocutor, for the House said—"As the verdict stands it is impossible to tell on what ground the jury proceeded." The House therefore remitted to the Court of Session to do therein as it thought proper. I say, then, I have still a right to appeal against the amended interlocutor of the Court below: it is my concern, and not that of the respondents. The propriety of the course taken by the Court below may yet be the subject of consideration before the House, but not now. As to the bringing up of the record here being a mere fiction of law, it is well known, that when a petition of appeal has been duly presented, the effect in law is to bring the record into the House. When, therefore, the House has exhausted the appeal by a remit, the legal effect of that is, that the record ceases to be before the House, and hence a supplemental appeal is necessary to bring it back. It was the remit in *Elliot* v. *Cleghorn* that rendered the supplemental appeal necessary there.

*Rolt*, in rejoinder to the new matter.—I deny that in *Elliot* v. *Cleghorn* there was any supplemental petition of appeal at all. There was nothing more there than a mere petition to resume consideration, as there was here. If there had been a petition of appeal against the new interlocutor, then there must have been fresh recognizances entered into,—the case must have been signed by counsel,—answers must have been ordered, &c., and other characteristics of an appeal would have been present; but there is no pretence for saying any of these existed.

LORD CHANCELLOR CRANWORTH.—My Lords, the only question here is one of mere form—whether the matter is now before your Lordships in such a shape as to enable your Lordships finally to dispose of the case. Now, though perhaps the proceedings have not been conducted with perfect regularity, still there can be no doubt that the record is both in fact and in law substantially before the House, and that it is competent for your Lordships to come to a final determination upon it.

The matter in dispute arose out of certain issues, which had been framed in a most inconvenient form by the Court of Session, inasmuch as they contained so many alternatives, that in the case of a general verdict, as was the case here, it was impossible to say what may have been the precise meaning which the jury attached to it. The noble Lords who then advised the House accordingly were of opinion, that, if the Judge had summed up in a particular way, and told the jury that if they were satisfied, that each and all of the documents had been obtained both by fraud and circumvention and intimidation from the granter—that is to say, if they were unanimous as to the documents, and unanimous as to the means, then a general verdict for the pursuer might be given; but if not so, then they must specify in what respect they differed. Inasmuch, therefore, as the verdict was ambiguous in its then shape, the House gave the respondents an opportunity of applying to the Judge in the Court below, in order that he might state from his recollection of the circumstances, whether the jury had come to such a verdict after a charge of that description; for if so, then there had obviously been a clerical error of the officer in entering up the verdict.

It has been strongly urged by the appellant's counsel, that such an error as that which had occurred in entering the verdict was one which could not be corrected. But I should be sorry indeed if such a proposition could be sustained, and if a mistake of that nature should, like the laws of the Medes and Persians, be incapable of alteration. Suppose the word "not" to be entered by mistake in a verdict, can it be said that there was no means of rectifying the error? and so proceeding by steps, if a Judge had summed up in the way I am supposing, and if the jury had meant by their verdict what the Judge says they did mean, there must obviously, beyond all doubt, be some mode or other of getting at the correction of the verdict.

Now it had been said that it was impossible that the Judge could recollect precisely how he had summed up, and what the jury may have meant. The Judge, however, has a distinct and positive recollection of what took place. There is nothing extraordinary in that. It is not a

matter of every day occurrence. If, for example, you were to ask a person whether it rained on a particular day six years ago, he might be quite unable to speak to the fact; but if he were asked whether on such a day he was pushed down-stairs, for instance, it might be entirely the reverse. The Judge, in my opinion, might perfectly well recollect even the details of such a trial as this; and this, in particular, was not a point on which a Judge can very well be mistaken. At least what the learned Judge says is pointed and precise, and I think your Lordships can have no difficulty in acting upon it. I therefore think that the course which was taken was one which was quite competent; and I may say, speaking from my own experience, such things are constantly done—they are done fifty times in the year in this country.

The only question therefore is, the House having made such an order as I have alluded to, and that order having been carried out in the mode described, whether the matter is now so before your Lordships that you can deal with it? The Solicitor General has strongly relied on *Elliot* v. *Cleghorn*, as differing from the present case in this, that there a supplemental petition of appeal had been presented. It does not, however, appear that there was any substantial difference between the two cases. There it was at the instance of the appellants, no doubt, that the House resumed consideration of the appeal, but it might equally well have been at the instance of the respondents. The strictly regular way would have been here for the petition to have been referred by the House to the Appeal Committee in the first instance, and then for the Appeal Committee to have referred it back to the House; but there is no authority to compel your Lordships to refer the petition to the Appeal Committee or to prevent the matter being taken up at once. I am of opinion, therefore, that the parties here have a sufficient *locus standi;* that it was perfectly competent for them to bring the subject matter of the original appeal, and what has subsequently taken place in the Court below, before your Lordships; that the present application was correct, and that your Lordships may now give judgment. I therefore move that the interlocutors appealed against be affirmed, with costs.

LORD BROUGHAM.—My Lords, I entirely agree in the conclusion to which my noble and learned friend has come. It would, in my opinion, be a cruel injustice if, on a mere point of form, this petition should be delayed, in order that it might be referred to the Appeal Committee. The petition was properly presented to your Lordships to resume consideration of the case, and it enables your Lordships now to proceed to the ultimate disposal of it. If the interlocutor had been before the House two years ago in the shape in which it is now presented, there cannot be a shadow of a doubt as to the course your Lordships would have then taken. The only doubt which Lord Truro and myself then had was, whether the Lord Justice Clerk had summed up in a particular way, and we thought that it was quite possible that he might have done so; in which case, what must have occurred was a mere clerical error in drawing up the verdict.

Now, a great deal had been said as to the Lord Justice Clerk's notes as necessarily containing no record of his summing up at all, but merely containing the evidence; and that, therefore, as he could have no record to refer to, the House could not act on such information as he might supply. But, in my opinion, the Judge may have had a distinct recollection of his charge to the jury, even at the distance of time which occurred here, just as well as if he had taken a note of it at the time. The Judge might in this case have had a note of his charge. There was nothing to prevent the supposition of it. But at all events, it was quite possible that his recollection might have been so distinct as to enable him to make the statement which he has done.

I therefore think that your Lordships will do substantial justice, and will also act strictly according to form, in now permitting no longer delay in putting an end to this litigation; and I concur with my noble and learned friend that the interlocutors should be affirmed with costs.

*Rolt.*—Your Lordships affirm both the original and the amended interlocutors?

LORD CHANCELLOR.—Yes.[1]

*Interlocutors affirmed, with costs.*

Deans and Rogers, *Appellant's Solicitors.* Dodds and Greig, *Respondents' Solicitors.*

[1] On a future day the Lord Chancellor stated that Lord Brougham had mentioned to Lord Truro the course which the House had taken in this case, and that Lord Truro entirely agreed.