[20*th March*, 1846.]

ALEXANDER Mc LEAN, residing at Gilmerton, near Crieff, *Appellant*.

The RIGHT HONOURABLE HER MAJESTY'S OFFICERS OF STATE FOR SCOTLAND FOR HER MAJESTY'S INTEREST, *Respondents*.

Jurisdiction.—Service of Heirs.—The Court of Session, in a reduction of a service as heir, has jurisdiction to reduce or sustain the verdict of the jury in the service upon the evidence which was before the jury, or to call for additional evidence if it think fit.

Service of Heirs.—Verdict.—Where the Court is divided in opinion as to the value of the evidence upon which a jury have given their verdict, serving a party heir, it should rather submit the matter to another jury, than give its own judgment upon the evidence setting aside the verdict and reducing the service.

THE appellant sued out a brieve for serving him nearest and lawful heir in general to the deceased Alexander Mc Lean, road contractor in Aberdeen, which was directed to the magistrates of Aberdeen. The respondents advocated the brieve to the Court of Session, and raised a process of declarator of *ultimus hæres* for having it found, that the deceased had died without heirs, and that his property had consequently devolved to the Crown. These two proceedings were conjoined, and after records had been made up and closed, a remit was made to the Lord Ordinary to take trial of the brieve. The Lord Ordinary, (*Cunninghame*,) declined to name the jury as in the ordinary case of brieves, and directed them to be summoned by the Sheriff, as provided by the statute for trials by jury. The jury were so summoned and chosen by ballot, and the service proceeded. After the evidence had been concluded the Court was adjourned for a few days, and in the interim a

printed copy of the evidence was furnished to each of the jurymen. On the re-assembling of the Court, the evidence was summed up by the Judge, and the jury thereupon returned their verdict by a majority in favour of the appellant, and served him heir accordingly. This service was duly retoured.

After two actions of reduction of the retour at the instance of the respondents, one of which dropped by protestation, and the other was dismissed upon preliminary defences, the respondents brought a third action concluding for reduction of the service and retour as erroneous, and not supported by, but contrary to, the evidence on which it proceeded, and because the evidence was incompetent, inadmissible, and insufficient, to instruct the defender's claim, and that the claim was disproved by evidence on the part of the respondents; and to have it declared that the deceased had died without leaving any relations by the father's side, and that his whole property had fallen to the Crown as *ultimus hæres*.

After a record had been made up upon the import of the evidence, the Lord Ordinary pronounced an interlocutor repelling the defences and decerning in terms of the conclusions of the libel reductive and declaratory, to which he subjoined the following note:—

"The Lord Ordinary agrees with the defender in the respect
" that is due to a verdict pronounced, as this was, by a fairly
" chosen jury in a fairly tried cause. But, in reviewing verdicts
" in services the rule is, that it is *the Court* that is to be
" satisfied, and not satisfied from deference to the jury, but by
" the evidence. It is needless, therefore, for the one party to
" praise the intelligence of this inquest, or for the other to say
" that the verdict was only pronounced by a majority of one.
" The question now is, what, in the opinion of the Court, is the
" verdict that *ought* to have been delivered?

"The Lord Ordinary is quite clear that it ought to have
" been the reverse of what it was.

Mc Lean *v.* Officers of State, Scotland.—20th March, 1846.

"He formerly (10th July, 1835) decided what was nearly "this identical case, by an interlocutor which held that the "defender's *father* had no right. On that occasion he explained "the grounds of his judgment in a full note, to which he refers. "Upon the 12th of June, 1836, this interlocutor was adhered to "by the Court. But the matter is again called in question by "that defender's son.

"The evidence in both cases is certainly not *absolutely* "identical. But in substance it is so. The Lord Ordinary "does not think it at all strengthened on the defender's side, "nor weakened on the side of the pursuers; and, independently "of all bias from the result of the former cause, and considering "the proof as now adduced for the first time, he is of opinion "that the defender has totally failed. Something was said at "the debate about the inclination which one has rather to take "part with a poor man struggling against the Crown. The "inclination is extremely natural. But, however it may influ- "ence, (or may have influenced,) the jury, it must be utterly "repressed by a Court, which, even in such a case, is bound to "hold the scales perfectly even. The Lord Ordinary hopes he "may be excused for expressing his opinion that, letting jury- "men take copies of the evidence home with them before "disposing of it, can never increase the chances of a sound "verdict, especially if they get that opportunity of influencing "their minds before even hearing the parties. Its worst "tendency is to diminish the weight of the Court. Whether "the Court differ from the jury on this occasion or agree with "them, the pursuer has a greater interest to ascertain than the "defender."

The appellant reclaimed to the Inner House. Two out of three of the Judges, Lords Medwyn and Moncrieff, were for adhering to the Lord Ordinary's interlocutor. The third, the Lord Justice Clerk, thought it impossible, on the evidence, to set aside the service and disregard the verdict of the jury; and

that, if the majority were not satisfied that the verdict was supported by the evidence, it should be submitted to another jury, upon the respondents paying the expenses of the first trial. The majority, however, pronounced an interlocutor adhering to that of the Lord Ordinary.

The appeal was against both interlocutors.

Mr. Anderson, for the Appellant, besides commenting on the evidence as in truth supporting the verdict, argued on the authority of Galbraith *v.* Galbraith, 5 *Wil. & Sh.*, that the Court had no jurisdiction to review the verdict in an action, upon the evidence which was before the inquest; that it was incumbent on a party seeking to reduce a service, to disprove it upon fresh evidence; and that, until he did so, the Court was bound to hold the verdict as conclusive; that, however doubtful this might have been in earlier times, it could no longer be so, since jury trial had been established in Scotland as an ordinary part of the administration of justice; and more particularly was this applicable to the present case, inasmuch as the jury had been summoned and chosen in the manner pointed out for the trial of civil causes.

The Lord Advocate and *Mr. Mure* appeared for the Respondents, but at an early period of the Lord Advocate's address he received such a strong intimation of the sense of the House, that the case could not be disposed of without being submitted to another jury, that he sat down, and Mr. Mure did not address the House at all.

Lord Campbell.—My Lords, in this case I cautiously abstain from giving any opinion either way, on the merits, either for the Crown, or for the claimant; but I am clearly of opinion that your Lordships ought to direct an issue to try the question, whether the appellant be heir at law of Archibald Mc Lean, the deceased, or not.

Mc Lean *v.* Officers of State, Scotland.—20th March, 1846.

My Lords, I think it right to say, that I entertain no doubt at all with respect to the first point that has been made by Mr. Anderson at the bar. There seems to be no ground, either upon principle or authority, to say that a retour of this sort, though it be in *foro contentioso*, may not be reviewed and set aside by the Court of Session, although there be no fresh evidence given. Indeed, it would be strange if it were so, as it is allowed that the Court of Session is a court of appeal and has jurisdiction over such retours, where fresh evidence may be given. How absurd it would be to say that they can have no jurisdiction without fresh evidence; and that if the verdict is manifestly wrong on the evidence which has been given before the jury, it may not be set aside. Suppose all the evidence is documentary, and no fresh evidence can be given, but the jury either corruptly or ignorantly have come to a wrong conclusion; in that case it would be most monstrous to say that the law affords no remedy for the injured party. It seems to me that there is no authority for such a proposition.

In the case of Galbraith and Galbraith, the only case relied on, when it comes to be examined, it will be found that they did examine the evidence in the Court of Session, and this House would have been prepared, if the evidence had not satisfied them, to set aside the decision; for they thought they had complete jurisdiction to do so. I would not say, that whenever the Court examine the verdict on an inquest, they ought in every case to grant an issue. If they manifestly see either that the verdict was right, or if they see that the evidence is all on one side, and that the verdict ought to have been the other way, they may then exercise a power belonging to them, *proprio vigore*, without an issue; and they may give final judgment and set aside the retour. But where the case is clear, where a claimant has made out his case to the satisfaction of a jury; and where the evidence, if believed, shows that he has a clear title to the verdict that has been obtained, I think in the exercise

of a sound discretion, the Court ought not to set aside the verdict and finally decide against him; but under such circumstances, the proper course is to direct an issue as to whether the claimant be heir at law of the person he represents; and on the verdict the Court will afterwards proceed to give their decision on the question of reduction.

In this case, a number of witnesses have been called, who may have been guilty of perjury, and who may on a fresh investigation, be considered as guilty of perjury; but who, if they are to be believed, make out the case. I cannot take on myself to say that that evidence is false. It would be infinitely more satisfactory to me that there should be an issue directed, in order that a jury, seeing the witnesses examined, and observing their demeanour, may know what credit is to be given to the testimony they adduce. Therefore I have no hesitation in saying, that in my opinion, the Lord Justice Clerk took a just view of this case, and that it ought to follow the course he suggested, namely: that the evidence not being satisfactory to the Court, so that they could not establish the retour, it ought to be returned for further investigation. I therefore advise your Lordships to reverse the interlocutor whereby this matter was finally determined, and to direct an issue to try the question, whether the claimant, Alexander Mc Lean, be the heir at law of Archibald Mc Lean, or not.

Lord Brougham.—My Lords, I entirely agree with my noble and learned friend, in the view he takes of these two interlocutors; that in March, of the Lord Ordinary; and that in December, 1843, of the Inner House, affirming the Lord Ordinary's interlocutor; that they should be reversed, and an issue directed to say whether the claimant be heir at law, or not.

My Lords, if I wanted any proof that the Lord Justice Clerk took a right view, or that my noble and learned friend

has taken a right view of the case, that proof would be supplied by looking at the judgment of the Lord Ordinary, and seeing how far that goes to show that an issue is the proper mode. He says, "There are some subordinate points as to which the "evidence for the defenders is preferable to that of the pur- "suers. But on the decisive facts, it is not only inconclusive, "but in its general character it is liable to very obvious "exception." He goes on to say: "Again, statements truly "made by Archibald are important, but they require to be well "proved." Then he says: "The rest of their proof may possibly "establish that the father of the defenders was Peter, that Peter "was the son of Nicol, and that Nicol had a brother, and called "John; but on the radical point of this John being the blind man, "it not only fails, but his propinquity is disclaimed." And then he concludes: "On the whole, the Lord Ordinary thinks that "the pursuers have established their case, and his impression is, "that the evidence in many respects is not quite honest." Very possibly. I do not take on me to decide that point here, when a jury who heard the evidence, and who saw the witnesses examined, have decided the other way.

I therefore entirely agree with the Lord Justice Clerk, except upon the point of paying the expenses of the former trial. That is quite out of the question. That cannot be done. There is nothing to pay them. With that exception I entirely agree with the view he takes, and I entirely differ from the view that was taken on affirming the Lord Ordinary's interlocutor. It is possible that the Lord Ordinary may be right; it is possible that the Lord Justice Clerk may be right; it is possible that the verdict may be wrong. But of course I abstain from giving the least opinion, either for the Crown or for the appellant, upon that. It is entirely a question which must be decided after we have the result of the trial before us. All I say is, that it is very possible that the defendants' witnesses, may not be quite honest, that they may have been guilty of perjury, and

that the jury may have done wrong in believing them. I think as it stands at present, the evidence is not sufficiently satisfactory to make it a perfectly clear case. Then I agree with my noble and learned friend in what he has thrown out in the course of Mr. Anderson's argument, that the Court had jurisdiction at one time, but that that jurisdiction was taken away by the Jury Act. But this is not a case calling for decision of that at present.

Lord Cottenham.—My Lords, this is peculiarly a case in which the Court of Session ought to have the assistance of a jury in ascertaining the rights of these parties. The interlocutor, as it stands, disposes of the title of the defendant, as to which title on the pedigree conflicting evidence upon the trial took place; and the result is that the Court before which this matter was discussed were divided, not as to the course they ought to pursue on the evidence, but as to the result of the evidence before it. Lord Justice Clerk says he considers it impossible, on the evidence before the Court, to affirm that judgment, that is the judgment of the Lord Ordinary, to set aside the appellant's service, and reduce the verdict which the jury has found in the appellant's favour. Here, then, we have a verdict on conflicting evidence, and the balance of evidence considered so uncertain, that the judges before whom the matter is discussed cannot decide upon it. And what my noble and learned friend has just read of the Lord Ordinary's judgment, who originally pronounced the decision, shows that it was a matter of doubt and difficulty to come to a right conclusion on an examination of the evidence. The Court of Session has decided on the title, and it has decided on the evidence brought before it without putting the matter into a train of inquiry by which the rights of the parties might be ascertained. Considering that the Court of Session had jurisdiction in this matter, and that they ought to have pursued the inquiry to satisfy themselves of the

rights of the parties, I think that an issue should be directed to ascertain, as the Lord Justice Clerk proposed,—to ascertain whether the appellant be the heir of the party he alleges himself to be heir to. Therefore I entirely concur in what has been proposed, that the interlocutor be varied by directing an issue.

It is ordered and adjudged, That the said interlocutor of the Lord Ordinary of the 18th of March, 1843, and the said interlocutor of the Lords of Session of the Second Division, of the 1st of December, 1843, respectively, complained of in the said appeal, be, and the same are hereby reversed: And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, with instructions to direct the following issue to be tried before a jury, in terms of the Acts of Parliament, and Act of Sederunt, establishing trial by jury in Scotland, viz.: whether the appellant, Alexander Mc Lean, is nearest and lawful heir in general to Archibald Mc Lean, road contractor in Aberdeen, deceased: and after such trial had to proceed further in the said cause as shall be just and consistent with this judgment and these instructions.