[HEARD 12*th*—JUDGMENT 22*nd February*, 1849.]

ALEXANDER CRAIG, Merchant in Edinburgh, and Others, Members of the London, Leith, Edinburgh, and Glasgow, Shipping Company, *Appellants.*

JOHN DUFFY AND CO., Shipbuilders in Aberdeen, *Respondents.*

Jurisdiction —Appeal.—After an interlocutor remitting a cause to be tried by a jury, the Court of Session, as such, ceases to have jurisdiction to try it under its ordinary powers upon a re-remit—and subsequent proceedings before the Court, had by consent of the parties under such a re-remit, are extra-judicial, and such as cannot be the subject of appeal.

THIS appeal arose out of an action brought in the year 1833, by the Appellants against the Respondents for breach of contract and for damages arising out of the defective construction of a steam-engine, which the Respondents had supplied for one of the vessels of the Appellants.

After a record had been duly made up, an interlocutor was pronounced by the Court on the 19th February, 1835, in these terms:—"The Lords appoint this cause to be tried by a special "jury, and that rules be issued for that purpose in common "form." An issue was subsequently prepared, which came on for trial before a jury upon the 17th of March, 1835. Upon that day, on the suggestion of the Judge before whom the issue was about to be tried, that, from the nature of the case, and the evidence to be adduced, the rights of the parties would be more satisfactorily ascertained by a proof upon commission, than by a jury trial, the parties consented to the cause being sent back to the Court of Session to be tried in the form sug-

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gested. In consequence, on the 17th of March, 1835, an interlocutor was pronounced in these terms,—"Of consent remits "these cases to the Court of Session, that a proof may be there "taken on commission, and the cases there disposed of. And "further, of consent appoints the Solicitor-General, whom "failing, James Ivory, Esq., Advocate, with power to him to "act in the absence of the Solicitor-General as Commissioner, "to take the said proof."

After this very elaborate proceedings by proof upon commission took place, which resulted in an interlocutor finding the Respondents liable in certain items of damage claimed from them by the Appellants, and assoilzieing them from others. Against this interlocutor the appeal was taken.

Mr. Bethel and *Mr. Gordon* for the Appellants, and *Mr. Wortley* and *Mr. Anderson* for the Respondents, argued the case at great length upon the merits, but as these did not involve any question of law they do not require notice. The case is only valuable because of the objection to the competency of the appeal, which was taken for the first time at the hearing, upon the ground that the cause having been remitted to the Jury Court for trial by jury, the Court of Session had no power to determine it under their ordinary jurisdiction —that the remit for trial by jury was final, and by the statutes could neither be reclaimed against, nor appealed from; and that all the proceedings of the Court after the remit were therefore *coram non judice*, and could not be reviewed.

Although the Peers who spoke at delivering the judgment of the House, did, in consideration to the Appellants for the protracted litigation and serious expense which had been incurred, extend their observations to the merits of the case, and express their opinion that the judgment below was in that respect well founded, the judgment of the House was confined to the objection upon the competency.

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LORD CHANCELLOR.—My Lords, this case comes before your Lordships under circumstances of extreme difficulty upon the question of fact, if we were to enter into the details of the evidence upon the matter in contest between the parties. The question is, whether a certain steam-engine, fitted to a steam-vessel many years ago, was, or was not such as is described in the contract, under which it was provided; the contract being that the steam-engine should be supplied by the manufacturer—that it should be used for six months—and that if it appeared to be defective from any cause, not arising from accident, during the course of those six months the manufacturer should be liable to make it good. And the contest between the parties is, whether the steam-engine which was certainly defective at the end of the six months, was so at the time it was furnished, or whether it had become so from certain accidents or mismanagement, as is alleged, which happened to the vessel in the course of those six months' working, and the question principally turns upon whether a certain crack in the cylinder, which appears to have been repaired, was a crack which was occasioned from the original formation of the cylinder, or whether it arose from the ship having been permitted to lie in an improper berth in Leith harbour; a matter of inquiry upon which it is not very easy for your Lordships to come to a very satisfactory conclusion at a distance of twelve or fifteen years.

Now, my Lords, this was beyond all question a matter for immediate investigation, and immediate investigation before a jury, and if it had occurred in this country it would have been disposed of in the course of a few months; and if it had been properly dealt with in Scotland, it would have been disposed of in an equally short space of time. Unfortunately, however, the parties thought proper to retire from the proper tribunal for the trial of the case; they came to the Court of Session, and the Court of Session pronounced an interlocutor upon

it, no doubt from supposed kindness to the parties; whether in the result it has proved so may be a matter of doubt, for instead of a litigation for a few months, there has been a litigation for a number of years, and at present the parties seem to be as dissatisfied with the adjudication, notwithstanding all the expense they have incurred during that period, as any parties can well be.

My Lords, the course the matter took was this:—On the 19th February, 1835, (we are now considering the question in 1849) this interlocutor was pronounced. "The Lords appoint "this cause to be tried by a special jury, and that rules be "issued for that purpose in common form." That was undoubtedly the proper order to be made by the Court; and that by the statute was final; neither party could complain, neither party could call in question the propriety of that order. It was final between the parties; and that interlocutor now stands as the order of the Court of Session. Subsequently on the 17th of March, in the same year, this interlocutor was pronounced:—"Of "consent remits these cases to the Court of Session, that a proof "may there be taken on commission, and the cases there "disposed of." The parties, therefore, consented to withdraw this matter from the investigation of a jury, and agreed that it should be disposed of in the Court of Session. The Court of Session were not bound of course to make any such interlocutor, but the Court of Session, out of supposed kindness to the parties, consented to investigate the matter, and this has led to the unfortunate litigation which has ensued.

Now, my Lords, the question arises on this appeal, whether after the interlocutor withdrawing the case from its proper jurisdiction, fixed as that proper jurisdiction was by the interlocutor of 19th February, 1835, under the authority of Acts of Parliament, it was at all competent for the parties to withdraw the case from that jurisdiction, so as to leave it in their power to come here. They might, no doubt, by consent, withdraw the

case, in order to refer it to anybody else, to any arbitrator, or to the Court of Session, if the Court of Session were willing to agree to that; but, the question that we have to consider is, whether it was competent for the parties so to withdraw the case from investigation before a jury and obtain a remit of it to the Court of Session, as to give either party a right to appeal to this House from the decision of that tribunal, not the proper tribunal according to law to dispose of the case, but the tribunal which by their mutual consent they had selected for the purpose.

Now, it was admitted—indeed it cannot be disputed—that if this had been one of the cases which the statute has expressly said should go to a jury trial, the parties could not have come here. They might have consented not to go before a jury, but if they had done so, they must have abided by the decision of the tribunal they had selected; and if the Court of Session had happened to be the tribunal that they had selected, they could not have come here to appeal, from the interlocutor of that tribunal not being the tribunal according to law to decide the case, but a tribunal which derived the whole of its authority from the consent of the parties.

The first question we have to consider is, wheher this case differs at all from the cases referred to in the statute. The statute says that certain cases shall go, without either the option of either of the parties or of the Court, to a jury trial; and with regard to other cases, it gives a power to the Court to send them there. But what does the Act say with respect to that power? The 55 Geo. III., chap. 42, sec. 4, says, "It shall not be competent either by reclaiming petition or "appeal to the House of Lords, to question any interlocutor "granting or refusing such trial by jury." The 59 Geo. III., chap. 35, sec. 15, says, "It shall not be competent by represen-"tation, reclaiming petition, bill of advocation, appeal to the

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" House of Lords, or otherwise to bring under review any " interlocutor by the said divisions, Lords Ordinary, or Judge " of the Admiralty ordering a trial by jury." The moment the Court had pronounced the interlocutor referring the matter to a jury, was there not a parliamentary direction that that should be the tribunal, and the only tribunal, to dispose of the case? Neither party had a right to complain, neither party had a right to appeal; the order is final between the parties, and though they may consent to take the decision of the Court of Session, as a matter of consent between them, they cannot give the Court a jurisdiction which it had not originally, independently of that interlocutor, which being made under the authority of the Act of Parliament, is, by that very Act made final and conclusive as to that point. Then there is, with regard to that interlocutor, a parliamentary enactment that after the matter is sent by the Court to a jury, it shall go before the jury, and that the order directing it to go before a jury, shall not be a matter of appeal or complaint. Is not this case so circumstanced, and does not it stand precisely in the same position as the cases do which are specifically named in the Act of Parliament as matters which must be tried before a jury? What is the difference between the cases? The moment the interlocutor is pronounced, both matters stand as matters which must be tried before a jury. If it is not disputed that those cases which are specifically named in the Act, must be so tried and cannot be matter of appeal—how can this be matter of appeal?

My Lords, this is a very important point. The effect of the proceeding is, to bring to the bar of this House, matters which this House is by no means competent to deal with—matters of fact after the lapse of a great many years, and which the Act of Parliament has expressly said are matters which ought not to come under investigation by way of appeal, but ought to be concluded by the jurisdiction appointed to try them—the object

of the Act being to take from this House a difficult investigation on matters of fact, which this House could not satisfactorily dispose of.

Upon that ground alone I should certainly be of opinion, and am now distinctly of opinion, that this is an appeal which this House ought not to entertain.

LORD CAMPBELL.—My Lords, I agree with my noble and learned friend, that your Lordships have no jurisdiction over this case as a Court of Appeal. It seems to me that the Lords of Council and Session, when they undertook to investigate the merits of this case, were merely private arbitrators; they were the Judges selected by the parties, and the parties virtually agreed that they would be satisfied with the decision to which they might come. An order was made that the case should be sent to a jury. Under those circumstances the case stands precisely in the same position as if it had been one of the enumerated cases that must be referred to a jury. The parties might by consent have set aside that interlocutor, and have restored things to the same situation they were in before the interlocutor was pronounced. But we have not now to consider that, for the interlocutor never was set aside. It now stands without any question ever having been made respecting it. That being so, by the statute a jury was the only tribunal to which this case could be referred, and the course adopted at the trial is very much to be regretted; indeed, I cannot sufficiently express my surprise at the course that was adopted. This might be a difficult case from the great length of the investigation, and the number of witnesses to be examined, and the accounts to be investigated, for a jury to determine; but if it was not fit for a jury to determine, it was wholly unfit for the Judges of the Court of Session to determine it, and the proper course would have been to refer it to one single engineer, who, by examining witnesses, would have come to a right conclusion

in the course of forty-eight hours. Instead, however, of doing that, they agree to take the evidence in writing, and to refer it to the Court as a jury, and it is most lamentable the consequences that have ensued.

My Lords, my humble opinion is that the Court, as the Court of Session, had no jurisdiction over this case; that they were merely private arbitrators; and that as no corruption is imputed to the arbitrators, and nothing at all is brought forward which would set aside the award, their award is final.

LORD BROUGHAM.—My Lords, not having been present during the argument in this case, of course I can take no part in the decision which relates to the merits, but which indeed are not now before us, because we dispose of the case upon the ground of jurisdiction. But my noble and learned friends having wished me to look into the matter with a view to the very important point of jurisdiction as affecting future cases, I have considered it with all the attention I have been able to give to it, and I have no doubt whatever, that taking the two Acts together, this case is withdrawn from our jurisdiction by the interlocutor which has been pronounced; that though this is not among the enumerated cases, where there is no option given to the parties, but where the case must at all events go before a jury, this, like an unenumerated case being by the interlocutor sent to a jury, does by force of that interlocutor, stand in the same position as an enumerated case, and consequently is withdrawn from all other jurisdictions.

My Lords, I really can have no hesitation whatever in saying that this case, unfortunate as it is in its consequences to the parties, would be still more unfortunate to the Legislature, to the judicature of the country, and to your Lordships' House, if it should be followed by other cases of a like miscarriage in the Court below, because it really does amount to this, to enabling parties, no doubt under the authority of the Court, to get

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rid of a plain statutory provision, to get rid of a most important Act of Parliament, and to bring cases to this House which were positively meant to be excluded from its cognizance. I therefore can have no doubt whatever that there has been a miscarriage in considering this as a question subject to our jurisdiction as a Court of Appeal.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors so far as therein complained of be affirmed, with costs.

RICHARDSON, CONNEL, and LOCH—D. E. FORBES, *Agents.*