

June 15. 1824. should be done, she was actually taken. Then the question is, Whether she was in the prosecution of that voyage which was contemplated? The Judge-Admiral appears to be of that opinion; but the Court of Session undoubtedly seems to have thought that that was not the case. On the best attention I have been able to pay to this case, it appears to me that the Court of Session have come to a wrong conclusion, and therefore it will be my duty to move your Lordships that this interlocutor shall be reversed. I will not move your Lordships this morning, because it may be necessary to introduce some special findings.

My Lords,—We heard at your Lordships' Bar that this was a case in which the party had been kept out of his money so long, that it was proper, if your Lordships should think that the interlocutor should be reversed, that your Lordships should give interest on the money. Looking at the circumstances of this case, I do not think it is a case in which the Court ought to exercise that power, which undoubtedly it possesses, of adding the interest. I will take the liberty of handing to your Lordships in the course of this day, or to-morrow morning, the minutes of the judgment which I will move your Lordships to adopt in this case: the principle of it undoubtedly will be to reverse the judgment in the Court of Session, affirming by that the decision of the Judge-Admiral.

Appellant's Authority.—Planch v. Fletcher, 1. Douglas, 251.

Respondents' Authorities.—1. Park, 266. and Cases there; Marshall, 184. and 326.; 1. Bligh's Reports, 87.

J. RICHARDSON—J. CAMPBELL,—Solicitors.

(*Ap. Ca. No. 62.*)

No. 48. MAGISTRATES of LANARK, Appellants.—*Brougham*—*Robert Bell*.

ROBERT HUTCHISON and Others, Respondents.—*Forsyth*—*Skene*.

Process—*Jury Court.*—A case having been remitted to the Jury Court by the Inner-House, and thereafter transmitted back to decide certain points of law;—Held, (affirming the judgment of the Court of Session), That it was competent, notwithstanding, to order the proof to be taken on commission.

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2D DIVISION.

IN the month of November 1821, Hutchison and others, Trades' Councillors of the burgh of Lanark, presented a petition and complaint to the Court of Session, complaining of the election of the Magistrates and Councillors of that burgh at Michaelmas 1821, on various grounds, and particularly, that an illegal compact had been entered into, and reduced to writing, by which the mem-

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bers of the Town-Council bound and obliged themselves 'to support one another in the Council, and the minority to fall in with the majority, and all voting with one another;' under which illegal compact the election had been made, but that the writing had been destroyed. After some procedure, and ordering condescendence and answers, the Court granted warrant against havers for recovery of the document, but this proved unsuccessful; and when the case again came before their Lordships, they pronounced an interlocutor, by which they found 'it expedient, that in this case, before answer, issues in fact shall be adjusted, and tried by a jury; and for that purpose remit the condescendence, and answers, and proceedings, to the Jury Court, to direct special issues of fact to be framed, and tried by a jury, and that the jury be directed by the Jury Court to find, and the Jury Court to indorse on their verdict, all such matters of fact as shall appear to be material to the proper decision of the cause.' The case was accordingly sent to the Jury Court; but in the course of preparing the issues it occurred, that there were certain questions of law which ought, in the first place, to be decided before going to trial; and particularly, whether it was competent to prove the terms of the document alleged to contain the illegal compact by the testimony of witnesses; or whether it was not essential that these should be established by a decree of proving the tenor. In consequence of these doubts a motion was made; and the Jury Court 'ordered, of consent, that this cause be transmitted to the Court of Session, to consider such questions of law and relevancy as ought to be decided previous to the trial.' Minutes having then been lodged by the parties, the Court, on the 25th of January 1823, pronounced this interlocutor: 'Recall the remit to the Jury Court; find no need of a formal proving of the tenor of the compact or agreement referred to; and before further answer, allow to the parties a conjunct probation, and grant commission, &c. for taking the same.' Against this judgment the appellants reclaimed, and contended, that the Court had no power to recall the remit to the Jury Court; that that remit was final; and as the case had only been sent back with the view of having points of law decided, it must of necessity return to the Jury Court immediately upon that being done. On the other hand, the respondents maintained, that as there was a broad and sweeping declaration in the Jury Court Act, 'that nothing in this Act contained shall extend, nor be construed to extend, to prevent the Court of Session, in either of its Divisions, or the Lords Ordi-

June 15. 1824. ‘ nary, (save and except in the cases concluding for damages here-
 ‘ in before enumerated), or the Judge-Admiral, unless otherwise
 ‘ instructed as aforesaid by the Court of Session, to take proof on
 ‘ commission, by a remit or in presentia, and thereafter dispos-
 ‘ ing of the cause in the manner now practised in such cases,’ it
 was quite competent to the Court to order the proof to be taken
 on commission.

On advising the case, *Lord Glenlee* observed, that the expres-
 sion in the interlocutor, ‘ recall the remit to the Jury Court,’
 was unnecessary: That remit was exhausted; and the question
 is, whether, when the case has been sent back to this Court, there
 is any thing in the statute obliging us to re-transmit to the Jury
 Court. I see nothing to that effect in the statute.

Lord Craigie entertained much doubt as to the competency of
 ordering the proof on commission.

Lord Justice-Clerk.—There is nothing in the statute which
 prevents the Court from doing what it has done. There are no
 words prescribing the future course of proceeding after it has
 been transmitted from the Jury Court. It is no doubt said, that
 it shall be lawful to re-transmit the process; but there are no
 words compelling the Court to do so, or depriving it of the power
 at this stage of the cause, if it shall see expedient, to order the
 proof to be taken on commission. In this case it is highly ex-
 pedient that the proof should be so taken; and therefore I think
 the interlocutor should be adhered to, with a declaration that the
 expression recalling the remit was unnecessary.

Lord Bannatyne.—It does not appear to me that the Court is
 entitled to order the proof to be taken by commission, after it has
 been finally found that it was expedient that the case should be
 tried by a jury, and a remit made accordingly. This can only
 be altered by the Jury Court declaring the case unfit for trial by
 means of a jury.

Lord Robertson.—With the exception of the expression as to
 recalling the remit, I think the interlocutor right.

The Court, therefore, on the 17th May 1823, pronounced this
 judgment:—‘ Find, that the words in the interlocutor complained
 ‘ of, “ recall the remit to the Jury Court,” were unnecessary; but
 ‘ quoad ultra adhere to the interlocutor, and refuse the desire of the
 ‘ petition, reserving entire all questions as to expenses hinc inde.’*

The Magistrates having appealed, the House of Lords ‘ order-
 ‘ ed and adjudged, that the interlocutor of the 17th May 1823

* 2. Shaw and Dunlop, No. 296.

‘ complained of be affirmed; and it is further ordered and ad- June 15. 1824.
 ‘ judged, that so much of the interlocutor of the 25th January
 ‘ 1823, also complained of, as is adhered to by the said interlo-
 ‘ cutor of the 17th May 1823, be also affirmed; and it is further
 ‘ ordered, that the said appeal be dismissed.’

LORD GIFFORD.—My Lords, There was a case argued before your Lordships, the Provost, Magistrates, and Town-Council of the burgh of Lanark *v.* Hutchison and others, the question in which related to the construction of the two Acts of Parliament passed, introducing jury trials into Scotland. I will state to your Lordships the proceedings in the Court of Session; and will call your Lordships’ attention to the Acts of Parliament on which this question turns.

My Lords,—In this case the respondents presented a petition and complaint to the Lords of the Second Division of the Court of Session in Scotland, founding upon the Acts 7. Geo. II. cap. 16. § 7–16.—Geo. II. cap. 2. & 14.—Geo. III. cap. 81. respecting the elections of Magistrates and Councillors of the royal burghs in Scotland, complaining of the election of Magistrates and Councillors for the burgh of Lanark, at the term of Michaelmas 1821, upon various grounds. The first of these consisted of a statement, ‘ that certain of the appellants
 ‘ had entered into an engagement to stand by and support their joint
 ‘ influence and interest, for the purpose of keeping each other in the
 ‘ Council. With that view they undertook to vote with one another;
 ‘ and that, in entering into this illegal compact, the parties alluded to
 ‘ had no great confidence in each other. They did not dare trust to
 ‘ mere verbal engagements, or solemn promises, but held it necessary
 ‘ to reduce into writing the conditions of their conspiracy. An obliga-
 ‘ tion was regularly reduced into writing, and subscribed by those
 ‘ members of Council, engaging to support and vote for each other,
 ‘ and to keep each other in office.’

My Lords,—In the course of the proceedings upon this petition and complaint, the Court of Session, on the 12th of June 1822, pronounced an interlocutor, by which they granted warrant for letters of incident diligence at the instance of the complainers against havers, for recovering the writing or memorandum described and referred to in the pleadings.

My Lords,—In pursuance of this interlocutor, several persons were examined as havers, all of whom were among the appellants; and the consequence was, that the pursuers became satisfied that there was no writing in existence; and, on a subsequent day, July 6. 1822, the Second Division pronounced this interlocutor. (Here his Lordship read the interlocutor, p. 387.) Your Lordships will perceive by this judgment that the cause was remitted to the Jury Court, in order that issues might be framed there for the purpose of ascertaining the facts which were in dispute in this cause, and with liberty for them to indorse on

June 15. 1824. their verdict all such matters of fact as should appear to be material to the proper decision of the cause.

My Lords,—When the case came before the Clerks of the Jury Court, in order to settle those issues, it appeared that there was a question which it was thought ought to be previously decided in the Court of Session; and in consequence of that, on the 29th November 1822, a motion was made, which is stated to be by consent:—‘ It is ordered, of consent, that this cause be transmitted to the Court of Session, to consider such questions of law and relevancy as ought to be decided previous to the trial.’ My Lords, in consequence of this transmission to the Court of Session, the Court of Session entertained the question of law, and, on hearing the case on January 25. 1823, the Court pronounced this interlocutor. (Here his Lordship read the interlocutor, p. 387). The appellants presented a petition against this interlocutor, and the Court, on advising that petition, pronounced this interlocutor on the 20th of May 1823:—‘ The Lords having advised this petition, with answers thereto, find, that the words in the interlocutor complained of, “ recall the remit to the Jury Court,” were unnecessary; but quoad ultra adhere to the interlocutor, and refuse the desire of the petition, reserving entire all questions as to expenses hinc inde.’

My Lords,—From these interlocutors an appeal is brought to your Lordships’ House, upon this ground, that it was not in the power of the Court of Session, having once remitted this cause to the Jury Court, afterwards, when the cause came back to them to decide those questions of law, to order a proof in the ordinary way, but that it was absolutely incumbent upon the Court of Session again to remit the cause to the Jury Court; and, my Lords, this depends on the Acts of Parliament for the trial by jury in civil cases in Scotland. The first is in the 55th year of his late Majesty’s reign. My Lords, when this new mode of trial in civil cases was introduced into Scotland, however much we may be wedded to jury trials in civil cases here, yet knowing that the Courts and the people of Scotland were not used to that form, it was introduced with great care and great caution when the Act passed, and it was left very much to the discretion of the Court to order a jury trial or not; but if a jury trial was ordered, it was then thought expedient, in particular cases, to prevent any appeal against such an order by the Court of Session; and therefore, by the 55th of the King, which introduced for the first time trial by jury in civil cases, it is enacted, ‘ That it shall and may be lawful for either Division of the Court of Session, in all cases that may be brought before them during the continuance of this Act, wherein matters of fact are to be proved, to order and direct, by special interlocutor, such issues as may appear to them expedient for the due administration of justice to be sent to the said Court,’ in order to be tried by a jury; and that where the Lord Ordinary should see cause for issues to be directed to be tried by a jury, then he should take the cause verbally to report to the Division of the Court to

which he belonged, so that the Division might determine, whether the issue should be sent to the Court to be tried by a jury, or the cause to be disposed of as then practised. Then the third section enacts, 'That it shall and may be lawful for the Judge of the Admiralty to report, in writing, to either of the Divisions of the Court of Session,' and so on. And then by the fourth section it is enacted, 'That 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.'

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My Lords,—The experiment under this Act having succeeded, another Act was passed in the 59th year of his late Majesty's reign, extending the power of the Jury Court, and introducing new enactments on the subject of issues, to be granted either by the Court of Session or the Lord Ordinary.

My Lords,—The first section of the 59th of the King directs, that in particular actions the process shall be sent by remit to the Jury Court; and then it enacts by the second section, 'That if it shall appear to the parties, or either of them, that there is a question of law or relevancy which ought to be decided previous to the remit of the cause to the Jury Court, it shall be competent for them to state the same orally to the Lord Ordinary.'

Then by the third section it enacts, that it shall be competent for the Lord Ordinary, if it shall appear to him that there is no question of law or relevancy which ought to be decided previous to the remit of the cause to the Jury Court, forthwith to order such cause to be remitted to the Court for the purpose aforesaid, 'Providing always, that it shall also be competent for the Lord Ordinary, if he sees cause, to reserve the alleged question of law for the consideration of the Court of Session, after the matters of fact shall have been found by a jury; and in all such cases the interlocutor of the Lord Ordinary ordering the cause to be remitted to the Jury Court; whether with or without a reservation of the alleged question of law, shall not be subject to review, by representation, petition, appeal to the House of Lords, or otherwise.'

Then, my Lords, the next section enacts, 'That it shall and may be lawful for the Lord Ordinary, in all cases other than the actions for damages herein before enumerated, when matters of fact are to be proved, to order the whole process and productions in the cause to be remitted to the Jury Court, without reporting to the Inner-House; and the Jury Court is hereby authorized and required to settle an issue or issues, and try the same by a jury; and if it shall appear to the Lord Ordinary to be expedient for the due administration of justice, they may pronounce an interlocutor, pointing out the matters of fact which they require to be determined by a jury; and the Jury Court is hereby authorized and required to settle an issue or issues, in terms of such interlocutor, and such other issue or issues

June 15. 1824. ' as may arise out of the examination of the case by the Court, and to
' try the same by a jury in manner aforesaid.'

The next section is applied to cases in which issues are directed, or in which the process is remitted to the Jury Court by the Lord Ordinary; and then by the sixth section it is enacted, ' That it shall be
' lawful and competent for the Court of Session, in either of its Divi-
' sions, in all cases depending in the Inner-House in which matters of
' fact are to be found, if it shall appear to them expedient for the ad-
' ministration of justice, to order and direct, by special interlocutor, the
' whole process and productions to be remitted to the Jury Court, for
' the said Court to settle the issues, and to try the same by a jury as
' aforesaid; and if it shall appear to the said Divisions to be expedient
' for the due administration of justice, they may pronounce an inter-
' locutor, pointing out the matter of fact which they require to be
' determined by a jury: and the said Jury Court is hereby authorized
' and required to settle issues in terms of such interlocutor; and the
' said Court may likewise settle such other issues as may arise out of
' the examination of the case by the said Court, and try all such
' issues by a jury in manner aforesaid.' This section, therefore, provides for an original remit, as in this case, by the Court of Session to the Jury Court; and your Lordships perceive it is not imperative upon the Court, but it is left entirely to their own discretion, and that it is competent for them in those cases to remit the question to the Jury Court.

Then, my Lords, by the twelfth section, upon which the question mainly turns in this case, it is enacted as follows: ' That it shall be
' competent and lawful for the Jury Court, when it appears to the said
' Court in the course of settling an issue or issues, or at any time be-
' fore trial, in the cases remitted to them as aforesaid, that there is a
' question or questions of law or relevancy which ought to be pre-
' viously decided, to remit back the whole process and productions to
' the Division of the Court of Session, the Lord Ordinary, or Judge-
' Admiral, who remitted the same to the Jury Court, that the ques-
' tion or questions of law or relevancy may be considered and deter-
' mined there: Provided always, that it shall be lawful to the said
' Division, Lord Ordinary, or Judge-Admiral, when matters of fact
' shall, after such consideration or determination, remain to be proved,
' again to remit the whole process and all the productions to the Jury
' Court, in order that an issue or issues may be prepared and tried as
' aforesaid: Provided further, that it shall be competent to the said
' Division and Lords Ordinary to prepare and settle an issue or issues
' in manner aforesaid, for the purpose aforesaid; and it shall be com-
' petent for the Jury Court, when it appears to the said Court, in the
' course of settling an issue or issues, that a case turns upon matter of
' complicated accounts, or other matter to which trial by jury is not
' beneficially applicable, to remit back the whole process and produc-
' tions as aforesaid, with their report thereon, in order that the Divi-

‘ sion, Lord Ordinary, or Judge-Admiral, may proceed with the same June 15. 1824.
 ‘ in such manner as shall appear to be most expedient for the adminis-
 ‘ tration of justice.’

Now, my Lords, that is what has happened in this case. After the remit to the Jury Court, the Jury Court conceived, and it appears that the parties were all agreed in the fact, that there were some questions of law and relevancy, which it was fit the Court of Session should determine before the cause came back to the Court for issues to be settled, and for the trial of those said issues; and the consequence was, that the whole process and productions were remitted back to the Division of the Court of Session from which the cause had been originally sent to the Jury Court. Then, my Lords, when it came back to the Court of Session, they having decided the points of law, they by an interlocutor decided, that instead of sending the case back to the Jury Court, the question of fact which then remained to be decided between these parties would be better examined into by the old mode of examination, which had prevailed in Scotland before the introduction of the Jury Court. The question is, as I have already stated to your Lordships, Whether it was competent to the Court of Session, after being again in possession of this cause in this mode, to make a decision upon the case in this way, or whether they must remit the trial of the fact, which remained to be decided between these parties, to the Jury Court?

My Lords,—I ought to have stated to your Lordships, that by a subsequent section it was enacted, as it had been in the 55. of Geo. III. ‘ That it shall not be competent, by representation, reclaiming petition, ‘ bill of advocation, appeal to the House of Lords, or otherwise, to ‘ bring under review any interlocutor by the said Divisions, Lords ‘ Ordinary, or the Judges of the Admiralty, ordering a trial by jury.’ So that your Lordships perceive, if the case had rested with the Jury Court in the first instance, no appeal, no reclaiming petition, no mode whatever of reviewing the decision of the Court of Session, by which they had directed the cause to go to the Jury Court, could have been entertained. That would have been final. The parties never could have questioned it; but having been remitted, the question is, Whether having been remitted to the Jury Court, and then referred back to the Court of Session, the Court of Session had not the same jurisdiction over the cause as they had when they first directed it to be remitted there? And when I call your Lordships’ attention to the subsequent part of the clause, I think you will see how anxiously the Legislature have made provision to enable the Court of Session, when a cause came back to them, to send the case back to the Jury Court; from whence your Lordships will see most clearly, that the Legislature intended that, when the Court of Session had possession of a cause, they should have possession of it to the full extent of directing what facts remained to be decided between the parties, to be ascertained either according to the old mode, or according to the new mode; for

June 15. 1824. it says, referring to the case having come back from the Jury Court, 'Providing always, that it shall be lawful to the said Division, Lord Ordinary, or Judge-Admiral, when matters of fact shall, after such consideration or determination, remain to be proved, again to remit the whole process and all the productions to the Jury Court, in order that an issue or issues may be prepared and tried as aforesaid.' 'So that it gives them the power, without which the Legislature seem to have doubted whether they would have the power when the cause was brought back to them,—it gives them the power, if they think fit to exercise it, to remit again to the Jury Court, in order that an issue or issues may be prepared and tried. It was not contended at your Lordships' Bar, that the original remit would have done after they had decided the questions of law. It is clear the cause could not have gone back under the original remit, but there must have been a new remit. The Court of Session have thought proper in this case not to make such new remit. And then it goes further, 'that it shall be competent to the said Division and Lords Ordinary to prepare and settle an issue or issues in manner foresaid;' so that when it comes back to the Jury Court, not only does the Act of Parliament give them the power to remit the cause back again, but it gives them the power, instead of sending the whole case to the Jury Court, to settle themselves the issues to be tried.

Then it enacts, 'That it shall be competent for the Jury Court, when it appears to the Court, in the course of settling an issue or issues, that a case turns upon matter of complicated accounts,' to remit the case back to the Division from whence it came. Then the next section, the thirteenth, is in these terms:—'Be it enacted, That nothing in this Act contained shall extend, or be construed to extend, to prevent the Court of Session, in either of its Divisions, or the Lord Ordinary, save and except in cases concluding for damages, herein before enumerated, or the Judge-Admiral, unless otherwise instructed as aforesaid by the Court of Session, to take proof on commission, by remit, or in præsentia, and thereafter disposing of the cause in the manner now practised in such cases.' So that the Legislature was still more anxious, desirous as it was of introducing trial by jury where facts were disputed, at the same time not to force a trial by jury in the Courts of Scotland, but to leave to them to determine whether the case should be so examined or not. My Lords; it appears to me, therefore, that the Court of Session have done rightly in this case, in taking to themselves the power of deciding this question.

It has been argued, but not very strenuously, in this case, that if they had the power, it would not have been expedient they should exercise it. It would be difficult, my Lords, to decide upon that question. It has been argued by the respondents, and probably with some truth, that it was necessary not only to examine witnesses, but to do what the law of Scotland enables the Court of Session to do, namely, to

examine the adverse party himself; and that that was a circumstance which operated upon the minds of the Court, to direct, in this second instance, the ordinary mode of taking proof in the Courts of Scotland, instead of sending it to a jury. However, whether that may have been the operating motive in the mind of the Court of Session, it is not necessary for us to inquire. The question to be decided by your Lordships is, Whether they had the power in this case of so doing? My Lords, I must confess that it appears to me, from these Acts of Parliament, no reasonable doubt can be entertained that they had the power on the case being brought back to them; and that therefore these interlocutors must be affirmed. When I say these interlocutors must be affirmed, they have certainly been wrong in the words which they introduced into the first interlocutor, of recalling the remit. It appears to me very questionable whether they had the power of so doing; and in the second interlocutor they have found those words unnecessary; but as to the rest of the interlocutor, they adhere to it. The judgment I should propose, therefore, to your Lordships is, to affirm the last interlocutor, and so much of the first interlocutor appealed against as is adhered to in the last interlocutor: I would therefore move your Lordships, that this be the judgment of your Lordships.

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Appellants' Authorities.—55. Geo. III. ch. 42. § 4.; 59. Geo. III. ch. 35. § 2, 3. 12. 15.

Respondents' Authorities.—1. Ersk. 2. 7.; Buchanan, March 1754, (7347.); Countess of Loudon, May 28. 1793, (7398.); 59. Geo. III. ch. 35.; Tenant and Company, Jan. 15. 1822, (1. Shaw & Ball. No. 275).

J. RICHARDSON—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No. 63.*)

JOHN HAY and Others, Appellants.—*Lushington—Shadwell.* No. 49.

AUGUSTUS W. H. LE NEVE and Others, Respondents.—
Solicitor-General Wetherell.

Reparation—Collision of Ships.—One ship having run down another, and this having been occasioned equally by the fault of both;—Held, (reversing the judgment of the Court of Session), That the owners of the ship which ran down the other were liable only for the one-half of her value, provided that did not exceed the value of their own ship.

THE brig Wells, belonging to the respondents, Le Neve and others, sailed from London on the 18th February 1814, having on board a cargo of logwood, bound for Leith; and on the 28th of that month she arrived in the Firth of Forth; and in conse-

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1ST DIVISION.
Lord Gillies.