WALKER & Co., ... APPELLANTS.
SIR MICHAEL ROBERT SHAW STEWART, RESPONDENT.

1855.
March 9th, 12th, and 13th.
August 14th.

After a Reference: How far Jurisdiction resumable by the Court.—When on the eve of trial the parties agree to a reference, the Court cannot afterwards, except by express consent, supersede the agreement and resume jurisdiction.

Practice.—Opinion by anticipation expressed by the Lords in order to prevent further contest between the parties.

Appeal.—Remarks by Lord Brougham upon the question, How far in a case not enumerated as appropriate for jury trial, an appeal will lie against an interlocutor sending it to such trial?

The Appellants, sugar refiners in Greenock, had their manufactory near a stream called the West Burn, which formed the subject of a Feu Grant to them from the Respondent's father, the late Sir Michael Shaw Stewart. The water of the West Burn served other factories besides that of the Appellants, whose supply was limited by the contract to such quantity as would pass through a pipe of twelve inches in diameter; but there was no stipulation guaranteeing the quantity of water that should be coming to the Appellants; it was not to exceed a certain amount, but it might fall short of it. The Appellants moreover were bound, after the water had served their purposes, to return it again to the stream.

The Appellants, however, established a dam or weir on the stream for the purpose of securing to themselves a steady supply of water. This the Respondent alleged it to be beyond their authority to do.

The question brought for decision under the Appeal was one arising out of the course of proceeding adopted by the Court below.

Sir Michael (the Respondent) brought an action to try the right under the contract of Feu. A remit was made to a jury; but on the eve of trial the parties consented to refer the matter to a civil engineer, who was to decide what works were necessary to secure to the Appellants a proper supply of water, and he was empowered to order the execution of works for that purpose, and if any point should arise, on which he might require light, he was to be at liberty to apply to the Court.

Very soon after the referee had commenced his inquiries, a point arose on which he applied to the Court for instruction. The Court, instead of giving instruction, pronounced an interlocutor, whereby they put an end to the reference altogether, and ordered the trial to proceed.

The principal appeal was against this order, but there was also a cross appeal by Sir Michael Shaw Stewart against the remit to the Jury Court.

Sir *Fitzroy Kelly* and Mr. *Anderson* were heard for the Appellants.

The *Solicitor General* and Mr. *Neil Campbell* for the Respondents.

Dispensing with a reply from Sir *Fitzroy Kelly* to the arguments of the Respondent's counsel, the House at once proceeded to deliver the following judgment.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*a*):

The circumstances of this case were these. Legal proceedings having been instituted by Sir Michael Shaw Stewart for the purpose of raising the question whether or not the Defenders, the Messrs. Walker, were entitled, and if entitled, to what extent, to abstract water from a burn the soil of which belonged

(*a*) Lord Cranworth.

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to the Pursuer; the result was that Sir Michael obtained from the Court an issue to try, "Whether during the year 1850 the Defenders, or others for whom they are responsible, wrongfully constructed a dam, breastwork, or weir upon and across the bed or channel of the West Burn of Greenock, and wrongfully erected embankments on the sides or banks thereof within the property of the Pursuer." On the other hand, shortly after this, the Defenders obtained two cross issues, the first of which appears to have had little, or indeed, perhaps, no bearing upon the question. The second was, "Whether, having regard to the ordinary supply of water in said Burn in and subsequent to 1850, the foresaid dam, breastwork, or weir, and embankments or works of some similar description, are required for the proper exercise of the privilege of using said water conferred on the Defenders by the said feu contract."

Those original and counter issues came on for trial on the 3d of August 1852, and on that occasion the parties did that which often happens on trials of this sort. It appears to be a question which would probably be very unsatisfactorily decided by a jury, therefore they agreed to refer the question to a gentleman, a civil engineer, of the name of Leslie, and the terms of the reference were these:—"The parties agree to refer to Mr. Leslie the question of what works and operations are necessary or proper to enable the Defenders to obtain and secure to them the full supply of water from the West Burn to which the feu contract entitled the Defenders, in such way and manner as may least interfere with the use of the burn by the Pursuer or others, and that either by the present weir, if necessary, or in any other way which the said referee may direct, with power to him to continue,

alter, or pull down the existing works, and order the erection of such other works, if any, as he may think proper, with power also to the referee to report to the Court any point which may arise on which he thinks it necessary to take that step; the expenses to be disposed of by the Court after the referee has disposed of the case."

My Lords, the arbitrator proceeded, and several meetings took place, but then a difficulty arose, for this civil engineer was to determine what works were necessary and proper to enable the Defenders to obtain the full supply of water from West Burn, *to which the feu contract entitled the Defenders.* Now that makes it necessary that your Lordships' attention should be called to what the rights of the parties were under this feu contract.

It appears that Sir Michael Shaw Stewart was the owner of some land through which this burn ran, the owner, therefore, of the burn and of the adjoining land, and that in the years 1825 and 1826, he conveyed the property adjoining the burn not to Messrs. Walker the present Appellants, but to their predecessors, we may say therefore to Messrs. Walker; he conveyed to them a portion of land for the purpose of enabling them to build certain mills and works, and then there was this clause, "with liberty to take water from the West Burn for the use of their work by a pipe not exceeding twelve inches in diameter, providing that after serving their purposes they return the water back again into the burn," with an express stipulation that Sir Michael Shaw Stewart in no respect guaranteed to them the water, but merely granted to them such right as he could lawfully grant. Therefore, that being the nature of the title that was given to the water, and the reference to Mr. Leslie

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being to ascertain how best the right they had to the water under the feu contract could be obtained by them, he proceeded with his reference. But he soon came to a stop, because he very naturally said, "I do not know how to proceed with this reference till I am satisfied as to what is the extent of the right that the parties have under the feu contract,—that is not a question of fact, but it is a question of law, and until that is cleared up I am proceeding in the dark; I may be giving a great deal to much, or I may be giving a great deal too little." With a view to get that matter elucidated, he made a report, which he considered the terms of the reference enabled him to do, viz., that portion of the reference which proceeds thus, "With power to the referee to report to the Court any point which may arise on which he thinks it necessary to take that step." It is not very happily or distinctly worded, but I think the fair import of that is, that in the progress of the reference, if for any purpose it became necessary for him to take the opinion of the Court, it should be open for him to do so.

Now, my Lords, Sir *Fitzroy Kelly* in the latter observations that he made suggested that the Court could do nothing, for that it had been brought within the category of cases in which it ceases to be a Court (so to say) and becomes a mere arbitrator.

I doubt whether that principle is properly applied to such a case, because here the Court was fully seized of the whole matter, and all that is with-drawn from it is by an arrangement that the facts are to be settled in a different way. The true meaning of that is, that subject to that which by arrangement is a settling of the facts in a different mode from that which the *cursus curiæ* would have taken, the

jurisdiction is to remain unimpaired. I think that is the reasonable construction of that clause, though I do not think it is necessary to decide that, but I wish to guard myself against being supposed to acquiesce hastily in that suggestion of Sir *F. Kelly*.

The arbitrator making his report, the matter came before the Court, and on the 23d of February 1853, the Court pronounced this Interlocutor: "The Lords have resumed consideration of this case and heard Counsel, recal the deliverance of the Judge of 3d August 1852, interposing his authority to the minute of reference settled between the parties, and allow the parties to proceed as if no reference had been entered into."

It is against that interlocutor that Messrs. Walker have appealed. We intimated yesterday that we had no doubt upon the case; and, having heard the *Solicitor-General* and his learned coadjutor on the subject, we still come to the conclusion, without any hesitation, that the Court had no authority whatever to take that step. Sir *Fitzroy Kelly* properly said that, when parties have by contract agreed to a judicial reference, that is a contract like any other contract, and the Court has no more authority to put an end to that contract than they would have to put an end to a contract for the sale of an estate or the lease of a house: it is irrevocably binding upon the parties, unless they have stipulated some mode by which they may get out of that binding contract.

The Lords of Session seem to have called back the case to themselves, either because they thought it might be a more expedient mode of proceeding, or, as it is suggested, because they understood that such was the wish of both parties.

Now, although I think we cannot act upon the

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notion of this having been an order by consent, not having been so expressed, yet I much incline to think the Lords of Session did suppose that they were doing that which both parties wished them to do; and I am glad to be able to come to that conclusion, because then, in point of fact, in overruling this interlocutor we are not deciding against anything which they thought they were deciding. We must deal with it, however, as an interlocutor not by consent; and so dealing with it, I think, it is clear that it was an interlocutor which there was no jurisdiction to make, and that therefore it must be reversed.

Then, my Lords, comes the question, What is to be done in disposing of this interlocutor? Several courses have been suggested. From what appears in the course of the printed arguments, and partly also from what was said at the Bar, and partly from what fell from the learned Judges in the Court below, I cannot but think, with all deference to the learned Judges and the gentlemen who have argued this case, that there has been a most unfortunate mistake here in talking about this being some abstract legal right to be decided. There was no abstact legal right to be decided. The question to be decided is--What is the right of the party according to the true construction of the feu contract? What right to the water had Messrs. Walker under the true construction of the contract? This is a question which Mr. Leslie, the referee, either must have decided himself or one which the Court must have decided for him, before we could by possibility know what were the rights of those parties. It appears to me a monstrous proposition to say to an arbitrator, Decide it as you please—go to the whole expense which would be incurred; settle what is to be done according to the true construction of the rights;

go through the whole question, and then come back and have it all undone, if you have taken a wrong view of the case. I think, therefore, all considerations of convenience require that the course should be taken which I conceive to be the natural and proper course in such a case,—that in this matter we must intimate our opinion to the Lords of Session, that they should give to the arbitrator their direction upon the point of law as to what the rights of Messrs. Walker were under the feu contract.

The Court of Session would, perhaps, not think that we were acting very fairly by them, and I think the parties would have a just right to say that we were not acting very fairly by them, if, in remitting the case back to do what is right, we were not to give our view as to the rights of the parties; and I am the more inclined to do that, because this appears to be a question which admits no doubt.

Sir Michael Shaw Stewart conveys the land to the Appellants, "with liberty to take water from the West Burn for the use of their works by a pipe not exceeding twelve inches in diameter."

The first question which has been raised is as to whether they may dam up the stream so as to make a pond for some other purpose than that of taking the water. I should have thought that that was hardly an arguable point. They are to do nothing but to take the water for the use of their works. But I go a great deal further than that. I think they have no right to dam it up an inch. All they are to do is just what is stated. They may "take water from the West Burn for the use of their works by a pipe not exceeding twelve inches in diameter." It seems to have been assumed that they are entitled to have the water in such a state that they shall always have a pipe twelve

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inches in diameter full of running water. That secures that the maximum they can take is twelve inches in diameter; but there is no provision that they shall always have that and nothing less. I agree with the observations of one of the very learned Judges (Lord *Murray*), who says that when the privilege is given to them to take water by a twelve-inch pipe there is given to them incidentally the power to do all that is necessary for that purpose—yes, all that is necessary for taking care that there is a twelve-inch pipe for conveying whatever water may flow into the twelve-inch pipe, but not all that is necessary for making the water always flow to the extent of filling that twelve-inch pipe. There is nothing pointing to such a provision.

I do not, however, propose to your Lordships that we should make that a formal declaration to the Lords of Session, but simply that we remit the cause with a direction to proceed therein as justice may seem to them to demand; but I wish them to have the strongest intimation that what I have stated is the only construction to be put upon this feu contract.

My Lords, the original appeal is thus disposed of. With regard to the cross appeal I have heard nothing from the beginning of the case that at all shakes my opinion not only that it must be dismissed—that cannot be questioned; because it is dependent upon the fact that the judicial reference was to come to an end,—but the judicial reference being to continue, it would be ridiculous to talk of appeals calling in question the issues which have been directed by the Court; but further, it must be dismissed with costs, upon two grounds. In the first place, I have heard nothing which satisfies me that this was under any circumstances a competent appeal, and even if it were

competent, after the issues had been directed, and the parties had gone down to trial without however raising such a point, it seems to me far too late, if it had been a matter of discretion, to allow of such an argument.

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My advice, therefore, to your Lordships is, to reverse the interlocutor, and to remit the matter back to the Court of Session, with a direction to do therein as justice may seem to them to demand; and upon the cross appeal, to dismiss it with costs.

Lord Brougham' opinion.

The Lord BROUGHAM:

My Lords, I quite agree. My only doubt was, whether we should make the expression of our opinion a part of the judgment, or intimate, in pronouncing it, what course was to be pursued. But I now entirely agree that the best course is that which my noble and learned friend has advised your Lordships to adopt, viz., not to make it any part of the judgment, but to intimate it as my noble and learned friend has done.

With respect to the other point, as to the competency of the cross appeal, I have only to observe upon the case of Breadalbane and McGregor,* that there is no doubt whatever that the interlocutor then under appeal was one finding the averments relevant and fit to be the subject of a jury trial; and it was upon that ground that the appeal was held competent. But there is an expression in the judgment, or in the argument of my Lord Chancellor *Cottenham*, in coming to that conclusion, which appears to me to go a little further than we who agreed with him, Lord *Campbell* and myself, can be said to have gone. He says the prohibition in the Act does not refer to those cases

* 7 Bell, Ap. Ca. 43, where it was held that an appeal was not excluded against an interlocutor directing a jury trial, in a cause not belonging to the class enumerated by the Statutes as appropriate for jury trial.

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where the Court of Session, having jurisdiction over the matter, finds it necessary for the purpose of disposing of the case, to direct an issue to be tried. That, probably, from an inaccuracy in taking down his Lordship's words, appears to go a good deal further than he himself can be supposed to have gone,—that in every case in which the Court of Session has jurisdiction, whensoever it chooses to direct an issue, that issue is not within the prohibitory provision at all of the Act. My Lords, I cannot go the length of that undoubtedly.

Interlocutor complained of in the original Appeal REVERSED; *and Cross Appeal* DISMISSED.