there was fault on the part of anybody (other than the shipowners) which unduly delayed the discharge of the 'Fortescue,' the defenders must answer for it to the pursuers. They may have claims of relief, but the defenders in the first instance are directly liable to the pursuers.

"The case, I think, comes to this, the defenders as charterers of the vessel have bound themselves to take delivery of the cargo as fast as the vessel can give it, as customary, at a certain wharf. If that is not done the defenders are liable in the consequences unless they can validly excuse themselves. The only excuse (for there is no assertion that the ship was in fault) which in my opinion can be considered valid is, that delivery sooner or at a more rapid rate was impossible because of the want of the appliances necessary to deliver 'as customary.' But there was no lack of such appliances in the present case which could have been made available. If they were not so made available from any cause unconnected with the ship or its owners, and the ship was consequently unduly detained, the defenders must at least primarily be answerable for the consequences of such detention. The railway company's fault or the purchaser's fault is a thing with which the pursuers have no concern; they have no contract with either. Neither the railway company nor the purchaser had any duty to perform to the owners of the vessel. But beyond that, it is quite apparent from the proof that if the defenders had done their duty, instead of expecting the railway company to do it for them, they could have had all the necessary waggons to discharge the vessel in due time by directing (as they latterly did) the waggons to be delivered to other purchasers whose conduct had not created the impediment which stood in the way of delivery to the Clyde Iron Company.

"The pursuers claim three days' demurrage. There appears to me, however, to be some reason for saying that if the vessel had not changed her berth on the 29th the discharge would have been completed on that day. I give the defenders the benefit of any doubt on this subject, and find them liable in £59, 4s., being two days' demur rage."

Counsel for the Pursuers — Dickson. Agent—F. J. Martin, W.S.

Counsel for the Defenders—Low. Agents —Ronald & Ritchie, S.S.C.

Friday, October 16.

FIRST DIVISION.

[Lord Low, Ordinary.

EDINBURGH NORTHERN TRAMWAYS COMPANY *v.* MANN AND BEATTIE.

(*Ante*, vol. xxviii., p. 828.)

Process—Appeal to House of Lords—Leave to Appeal—Interlocutory Judgment—Possibility of Two Appeals.

Circumstances in which the Court *refused* a petition for leave to appeal to the House of Lords against interlocutors which did not exhaust the conclusions of the action.

Process—Appeal to House of Lords—Effect of Intimation of Order of Service.

Intimation of an order for service on an appeal to the House of Lords renders any further procedure in the Court of Session incompetent.

In this action the Lord Ordinary (TRAYNER) on 18th July 1890 pronounced this interlocutor—"Finds that the defenders George Villiers Mann and William Hamilton Beattie are bound to account to the pursuers for the whole sums of money, debentures, shares, or other considerations received by them under and in virtue of the agreement entered into between them and the Patent Cable Tramways Corporation, Limited, dated 25th October 1884: Appoints the said defenders to lodge in process by the first sederunt day of next session an account of all sums of money, debentures, shares, or other considerations received by them under said agreement, as also an account or accounts of all sums which they claim respectively to be entitled to set against the before-mentioned sums of money, debentures, shares, or other considerations, with the vouchers of such account or accounts: *Quoad ultra* continues the cause: Grants leave to reclaim."

The defenders having reclaimed, the First Division on 26th June 1891 adhered to the Lord Ordinary's interlocutor.

On 15th July the defenders presented a petition for leave to appeal to the House of Lords.

Argued for the defenders—The question of law between the parties had been settled by the judgment of the Court, and all that remained was a question of accounting; it was usual for the Court to grant leave to appeal at such a stage of the proceedings—*Bell* v. *Kennedy*, July 10, 1868, 6 Macph. 1062; *Gardner* v. *Beresford's Trustees*, July 17, 1877, 4 R. 1091.

Argued for the pursuers — There was more than a mere question of accounting remaining here. There was the question of the company's liability for the cost of promoting an abortive Act of Parliament. There was thus the possibility of a double appeal to the House of Lords, and in such a case the Court were in the habit of refusing leave till the whole cause was decided—*Stewart* v. *Kennedy*, February 26, 1888, 16 R. 521.

At advising—

LORD PRESIDENT—An application of this kind is always an appeal to the discretion of the Court, and in dealing with such applications the Court are influenced by a variety of considerations according to the circumstances of each particular case, but there is one consideration which is always present to the mind of the Court in disposing of such a question, and that is, that there must not be, if possible, two appeals in the same case. Now, from what we have heard here, it is, I think, obvious that if we should grant leave to appeal now there would be the risk of there ultimately being two appeals instead of one, for there cannot be any doubt that in the accounting which has been ordered questions of importance may arise which may be made the subject of a second appeal if an appeal at the present stage is allowed. On the other hand, what will be the position of the parties if the case is allowed to remain here? The parties will have an opportunity of going on with the accounting, and of obtaining our judgment on any questions that arise with reference to it, and so exhausting the cause before it is taken to appeal. I think it will be for the advantage of both parties that it should be so exhausted, and I am therefore for refusing leave to appeal.

LORD ADAM—I am of the same opinion. The question of granting leave to appeal is a question of discretion in each case, but in exercising that discretion one of the main things to be kept in view is whether or not it is probable that there will be a second appeal if leave should be granted. It appears to me to be very undesirable that there should be two appeals. I think that every cause should be exhausted in this Court before it goes to the House of Lords, except in very special circumstances. Here the interlocutor which we pronounced is to be followed by an accounting, and it is said that it is desirable to have the questions of law finally determined before going into that accounting. Now, it does not appear to me, as far as I understand the facts, that this accounting will involve any very grave or prolonged inquiry. It therefore does not seem to me to be any ground for allowing leave to appeal. On the other hand, it is said that it may involve questions of principle which may be considered important enough to take to the House of Lords, so that if we should grant the leave which is here prayed for, there would in that event be a second appeal. I therefore agree in thinking that leave to appeal should be refused.

LORD M'LAREN—If this matter were now arising for the first time, I should be inclined to think that the only question for consideration would be this, whether the judgment which it is sought to appeal involves a question of such a character as to be a proper subject of appeal at the particular stage at which the case stands, the object of requiring leave being to prevent frivolous appeals. But I see from the cases which were cited that one ground for refusing leave to appeal is found in the probability of there being a second appeal. Now, I must say for myself that I am totally unable to form an opinion as to the probability of there being a second appeal, for that depends on the reasonableness of the parties quite as much as on the importance of the case. If I may form any opinion from my knowledge of the present case, I should say that no question remains which might suitably form the subject of a second appeal. I should incline therefore to grant leave to appeal at this stage. At the same time, I do not wish to express dissent, but rather to suggest whether it may not be possible to lay down a better canon for the determination of these questions than the probability of a second appeal.

LORD KINNEAR concurred with the Lord President and Lord Adam.

The Court refused the petition.

On 30th June the Lord Ordinary (LOW) ordained the defenders to lodge in process on the second day in vacation the accounts referred to in Lord Trayner's interlocutor of 18th July 1890. The defenders did not obtemper the order contained in the above interlocutor, but after the petition for leave to appeal had, as above stated, been refused, they presented a petition of appeal to the House of Lords. Before an order of service had been issued the pursuers lodged a petition with the Clerk of the House of Lords objecting to the competency of the appeal, and craving that an order of service should not be issued until the question of the competency of the appeal was determined. Notwithstanding the pursuers' petition, however, an order for service was issued, and the appeal was served upon them.

On 16th October the pursuers craved the Lord Ordinary to pronounce a peremptory order upon the defenders to implement the order contained in his interlocutor of June 30th, and the defenders answered that they were not free to do so, in respect that the service of the appeal to the House of Lords had stopped further procedure in the Court of Session.

The question being a novel one the Lord Ordinary reported it to the First Division.

Argued for the pursuers—By presenting their petition for leave to appeal, the defenders had partially admitted that the judgment was an interlocutory one. The progress of the case must therefore not be interrupted, and in order to expedite the case it was necessary that a further order should be pronounced. The matter was with the Court, and they had power to pronounce the order craved.

Argued for the defenders—The question of the competency of the appeal was for the Judicial Committee of the House of Lords. All further procedure in this Court was stopped by the service of the appeal. That was the rule of the House of Lords, and the question was concluded by authority—*Tulloch* v. *Davidson's Executors*, July 17, 1858, 20 D. 1319; *Lindsay* v. *Lindsay*, July 11, 1811, F.C.

At advising—

LORD ADAM—So far as I understand, the order of service has been intimated and served. There is no doubt that in the ordinary case such an order when served stops further procedure in this Court. The question of the competency of the appeal is, it appears to me, a matter for the Judicial Committee of the House of Lords to decide, and we cannot assume that it is so utterly and entirely incompetent that we are entitled to disregard the order of service. I am therefore of opinion that there can be no further procedure in the Court of Session, and that Lord Low should not pronounce any further order.

LORD M'LAREN—I have always understood that an order for service of an appeal stopped all further procedure in the Court below, the theory of our law being that a case cannot be in two places at the same time. It may be possible under a statute in certain cases to proceed with a cause in two courts at the same time, but there is no statutory provision of that kind applicable to the case before us, and therefore I think that there can meantime be no further procedure in this case in the Court of Session. The question of the competency of the appeal is for the Appeal Committee of the House of Lords.

LORD KINNEAR concurred.

Counsel for Pursuers—H. Johnston. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for Defenders—Sol. Gen. Murray. Agents—A. & G. V. Mann, S.S.C.

Thursday, October 22.

FIRST DIVISION.

[Sheriff of Renfrew.

WRIGHT *v.* GREENOCK AND PORT-GLASGOW TRAMWAYS COMPANY.

Arbitration—Reference—Exclusion of Ordinary Action—Process—Pleading—Denial of Claim on Record—Extrajudicial Admission—Proof.

A contractor entered into an agreement with a tramways company to work and horse their cars, under which he was to be paid at a certain rate per mile for the distance covered. The agreement contained a clause appointing A, whom failing B, as sole arbiter for the amicable adjustment and determination of all questions and differences which might arise between the parties as to the true import and meaning of the agreement, or as regarded the implementing or failure to implement the same or any clause thereof, and generally for the settlement of all questions of what nature soever which should or might arise out of, or be in any way connected with, the said agreement, including all pecuniary claims by one party against the other.

After the termination of the agreement the contractor raised an action against the company for a sum which he averred to be the amount due to him for work done under the agreement during the last month preceding its termination, "conform to statement thereof prepared by the defenders, and letter from the defenders' secretary, sending said statment to the pursuer, and admitting the correctness of the amount sued for." The defenders met this averment by a simple denial, and also made certain counter-claims of damages in connection with the work done by the pursuer under the contract. The letter from the defenders' secretary to the pursuer, which was produced by the pursuer and admitted by the defenders to be genuine, bore that "the usual statement of account" was therewith sent, the sum brought out being exactly the sum claimed by the pursuer. The defenders pleaded that the action was excluded by the reference clause of the agreement.

Held (1) that in face of the defenders' denial of the pursuer's claim on record, the claim could not be held as admitted, or as proved by the admissions contained in the letter of the defenders' secretary; and (2) that the question raised thereby and by the counter-claims of the defenders were matters to be disposed of by the arbiter nominated in the agreement; and action *dismissed.*

By agreement entered into between Peter Benjamin Wright, contractor, and the Greenock and Port-Glasgow Tramways Company, dated 25th and 28th November 1889, the former agreed to provide as many horses, to be driven by his drivers, as should be required to draw the cars of the Tramway Company, and the latter agreed to pay Wright at the rate of per mile for the distance travelled by the cars.

By the 19th article it was provided that the agreement should be terminable on six months' notice by either party.

By the 21st article it was provided that for the amicable settlement and determination of all questions and differences which might arise between the pursuer and the defenders as to the true import and meaning of these presents, or as regards the implementing or failure to implement the same or any clause thereof, and generally for the settlement of all questions of what nature soever, which should or might arise out of or in any way connected with the said agreement, including all pecuniary claims by the one party against the other, the same should be submitted to Arthur A. Macfarlane, veterinary surgeon, Greenock, whom failing William M'Geoch, veterinary surgeon, Paisley, as sole arbiter, with all the usual powers competent to arbiters.

The agreement was brought to an end on March 2nd 1891, notice having been given six months previously by the Tramway Company in terms of the agreement. At