

An objection to the jurisdiction was made on the part of the Appellant, as the appeal had been already disposed of; but the Chancellor had no doubt but the House had jurisdiction 'founded' on the undertaking of the agents.

May 7, 1813.

CASE OF A
CHURCH
LEASE.

It was accordingly ordered that the Court below should cause an account to be taken, and payment to be made of what was due up to the time of delivering possession.

SCOTLAND.

ERROR FROM THE COURT OF EXCHEQUER.

WALKER—*Plaintiff in Error.*

ADVOCATE GENERAL—*Defendant in Error.*

THE agent of the owner of an estate, to be sold at auction, attends at the place and time of sale; mentions the upset price, but no bidders. He gives notice that he will be ready to treat for a sale by private bargain. Soon after he is called into a private room by some of those who attended at the public meeting, and they give him offers in writing. He engages, before inspecting the offers, that the highest offer shall be accepted; and it is accepted accordingly. Question, Whether this be a sale at auction under the acts of the 17th George 3, c. 50, and 19th George 3, c. 56?

July 8, 1813.

CASE UPON
THE AUCTION
ACTS, 17 AND
19 GEO. III.

THE estates of *Foodie, Davisie*, and others, in Fifehire, belonging to the trustees of the Marchioness of Titchfield, were advertised to be sold by public auction, at Edinburgh, and a number of per- July 1801.

July 8, 1819.

CASE UPON
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19 GEO. III.

The upset
price 50,000l.
but no bidders,
and the meet-
ing breaks up.

Offers soon
after made in
a private room
by some of
those who had
attended the
public meet-
ing. The
agent engages
that the high-
est shall be ac-
cepted, and it
is accepted.

Information
filed in the

sons attended in consequence. The Plaintiff in error, a writer to the signet, was employed by the trustees as their agent to sell the estate. A licensed auctioneer attended at the place and time of sale, but Mr. Walker took the most active part in the business. No notice was pretended to have been given to the auctioneer of any intention to buy up the estates for the vendors in case the biddings did not reach the value. Mr. Walker stated the upset price at or about 50,000l.; but notwithstanding every exertion for that purpose, he could procure no biddings upon that sum. He then stated, that he should be ready to treat for the sale by private bargain, and the meeting broke up. Mr. Walker left the house, but soon after, while he stood near it, in the street, or in the court of the Exchange, some gentlemen, who had attended in the public room, came to him, and said they would make an offer, provided it was not communicated to others. Mr. Walker stated, that it would be unnecessary to make any offer, either verbally or in writing, unless it was something better than 50,000l., *and that the best, or highest offer above that sum, would be preferred without partiality.* In two or three hours after, letters or lines with offers were delivered to him; upon which, he went back with them to the Coffee House, opened the letters, and found in one of them an offer of 50,650l.; which, being the highest, he said would be accepted, provided the terms of payment could be adjusted; and these having been adjusted, the bargain was concluded the following day.

- An information, in the name the Advocate-Ge-

neral, was filed against Mr. Walker for payment of the auction duty, upon the sum at which the estates sold, amounting to 1,266*l.* 5*s.*

The question came on to be tried before the Barons of the Exchequer; and the jury returned a special verdict, finding the facts as above stated.— The Barons, after hearing the case argued, gave judgment for the Defendant in error; upon which Mr. Walker brought his writ of error.

July 8, 1813.

CASE UPON
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Exchequer for
payment of
the duty.
The Barons
decide that it
ought to be
paid.

Mr. Adam and *Mr. Dauncey* (for the Plaintiff in error) contended, that this was no sale by way of auction. The upset price was not a bidding, but the *terminus a quo* the bidding commenced. This had been decided by the Court of King's Bench: and the subsequent transaction was a private bargain, totally distinct from the public auction.

Cruso and
Crisp, 3 East,
337.

The Solicitor General and *Mr. M'Kendzie* (for the Defendant in error) maintained, that the whole was one transaction; that the vendor had the advantage of the competition; and that the sale in another room was a mode of sale at auction, "whereby the highest bidder was deemed the purchaser," and clearly within the meaning and letter of the statutes. The circumstance of time was essential, as it showed the connexion between the open and the more private transaction. Unless this second transaction should be held to be a continuation of the former, the payment of the duty might, in almost every instance, be evaded: and they relied upon the case of the *King and Turner*, decided at the Exchequer Sittings, Hilary Term, 1798; the cases of the *King*

July 8, 1813. *and Sterling*, and the *King and Christie*, were also mentioned.

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The Chancellor stated, that when he was Attorney General, they had a case in the Exchequer of a female auctioneer. She continued silent during the whole time of the sale; but, whenever any one bid, she gave him a glass of brandy.—The sale broke up, and, in a private room, he that got the last glass of brandy was declared to be the purchaser. This was decided to be an auction.

His Lordship suggested, that the information ought to have been against the licensed auctioneer; but that point had not been noticed below, and there appeared to have been an understanding that no advantage was to be taken of the circumstance.

July 12, 1813.
Judgment.

Lord Eldon. (Chancellor.) After stating the case and proceedings, and noticing the Auction Act of the 17th of the King, c. 50, he adverted more particularly to that of the 19th Geo. 3, c. 56, and read the material words upon which the question turned, from the 3d section, “who doth or shall exercise the calling, &c. of an auctioneer, by outcry, knocking down of hammer, candle, lot, parcel, or *by any other mode of sale at auction, or whereby the highest bidder is deemed to be the purchaser.*” The act therefore described, not merely the several *species* or modes of sale of which the word *auction* might be considered as the *genus*, but added the words “any *other* mode of sale, or whereby the highest bidder is deemed to be the purchaser.”

They had heard much argument about the justice

of making those pay the duty who had the advantage of the competition produced in this way; but that was a consideration not for their Lordships to enter into. They had to consider, temperately and soberly what was the meaning of the Act of Parliament, and to decide accordingly. Three or four cases had been mentioned, on which he should trouble their Lordships with a few short observations. By the 12th section of the Act of the 19th of the King, it was enacted, "That, in case the real owner of any estate, &c. put up to auction shall become the purchaser by means of his own bidding, or the bidding of any other person on his behalf, at such sale, the officers of excise are authorised to make an allowance to such divisor of the duties imposed by the Acts in question, provided the requisite notice be given to the auctioneer before the bidding." Then the question arose, What constituted a sale at auction, and how far this was such a sale? In the case of "*Cruso and Crisp*," the Court of King's Bench had decided, that the mere stating of the upset price was not a sale under the act. Three other cases had been mentioned, but all he need say of these was, that none of them were exactly similar to the present case.

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He should give no opinion how far it was necessary, in order to make a vendor a buyer, that there should be another bidding; but it would take more argument than he had as yet heard or read to convince him clearly of the contrary; for, where an estate was put up, whether there was another bidder or not, he had very great doubt whether that

The Chancellor doubted whether, notwithstanding the authority of "*Cruso and Crisp*," the mention

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CASE UPON
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of an upset
price was not
for the pur-
poses of the
Act, a buying
at the Auc-
tion by the
vendor.

was not a sale at auction, for the purposes of this act. But on that point he gave no opinion.

Here the Appellant put up the estate, and stated that he would not sell it for less than 50,000*l.* If the matter had stopped there, then it would have been necessary to determine upon the point which he had already mentioned; viz. Whether the putting up to sale, and naming an upset price, was not a sale at auction for the purposes of this Act? But it did not stop there; nobody having bid, Mr. Walker stated, in the presence of those assembled, that he was ready to treat for the sale of the estate by private contract. He then went into a private room, with several of those persons who had attended in the public room, and they having made offers, he engaged that the highest should be accepted. He put himself under an obligation to treat with them all, and to give the estate to the highest bidder. Here the question was; not, Whether this was what was usually called a sale by auction? but, Whether, for the purposes of this Act, every thing must not be considered as such a sale, where the contract was with various persons, with an engagement to let the highest bidder be the purchaser? He might have taken any individual he pleased and concluded a bargain with him; that would have been a transaction of a different kind; but here he treated with a number, and came under an engagement to accept the highest offer. He was of opinion, therefore, that this was a sale by auction for the purposes of the act, and that the judgment of the Court below was right.

Where the contract is with various persons, with an engagement to let the highest bidder be the purchaser, or to accept the highest offer, it is a sale at auction for the purposes of the Act.

Lord Redesdale concurred in this opinion. The point appeared to him perfectly clear. The second Act was passed for the purpose of further regulation, and to prevent evasions; and after pointing out who were the persons who must take out licences, it proceeded to describe what should be considered as a sale at auction. It was to be a sale "by outcry, knocking down of hammer, candle, by lot, or parcel, or any other mode of sale at auction, or whereby the last, or highest bidder, is deemed to be the purchaser."

The words, "or whereby the best or highest bidder is deemed to be the purchaser," he considered as explanatory of what was meant by the word "auction," and he conceived that all such sales were, for the purposes of this act, to be deemed sales at auction. Under this construction of the act, there was, in the present instance, clearly a sale at auction.

Judgment of the Court below affirmed.

SCOTLAND.

APPEAL FROM INTERLOCUTORS OF THE COMMISSARY COURT AND COURT OF SESSION.

AUGUSTA M. TOVEY—*Appellant*.

Major M. E. LINDSAY—*Respondent*.

Marriage at Gibraltar of a Scotchman (in the army) to an English woman. While retired on half-pay he resides with his family at *Durham*, for the education of his children, and is again employed in the military service, but still keeps his family at *Durham*, where it remains for about ten years.

July 12, 1813.

CASE UPON
THE AUCTION
ACTS, 17 AND
19 GEO. III.

May 24, 1813.

WHETHER A
SCOTCH
COURT HAS
JURISDICTION TO DIS-
SOLVE AN
ENGLISH
MARRIAGE.