DUDGEON AND MARTIN, . . APPELLANTS.

THOMSON AND PATRICK, . . RESPONDENTS.

1854.
27*th*, 28*th*, *and* 31*st July*, 1*st August*.

Jurisdiction.—Where the Court below have acted as arbitrators, there can be no review by the House of Lords.

Where the parties agree to a particular decision, there can be no appeal from it.

Where in the exercise of its proper jurisdiction the Court below has only *one* course of proceeding preparatory to its decision, and the parties agree to a deviation, thereby giving the Court a power which it otherwise would not have possessed—no appeal will lie.

But where in the exercise of its proper jurisdiction the Court below has the option of two or more courses of proceeding preparatory to its decision, and the parties agree that the Court shall take *one* of them—an appeal will lie.

Stewart v. *Forbes*, 1 McN. & G. 137, commented on; *Craig* v. *Duffus*, 6 Bell, 308, approved.

Principal and Surety.—Doctrine of the Court of Session that an agent bidding at a sale by auction on behalf of an insolvent principal whom he names, is bound to put the Vendor on his guard, or to make good the purchase-money—not supported at the bar of the House.

Hard Cases make Bad Law.—Explanation of this maxim by the Lord Chancellor.

Pleading.—Strictness, accuracy, and precision of statement in all pleadings recommended.

Law Reporting.—Opinion of the Lord Chancellor as to Law Reporting.

IT was laid down in the Court of Session that if an agent, bidding as such for an estate, knows that his principal, whose name he discloses, is insolvent, he is

bound to apprize the Vendor; and if he fail to do so, he must himself make good the purchase-money.

Upon this conception of the law, the cause was remitted to the Jury Office; and ultimately the following issues were approved of by the Court and directed for trial.

It being admitted that the lands of Gartconnel were exposed to public sale, in terms of the articles of roup, on the 22d day of July 1846, and that the late Patrick Dudgeon, Writer to the Signet, appeared at the said sale, and made offer of 25,600*l.* for the said property, which, being the highest, was accepted; and it being further admitted that the said Patrick Dudgeon thereafter declared that he had purchased the said property for Henry Gordon, Esq., and bound the said Henry Gordon, his heirs and successors, to implement and fulfil the whole articles and conditions of sale, in terms of the minute annexed to the said articles of roup; and it being farther admitted, that sequestration of the estates of the said Henry Gordon, under the Bankrupt Act, was awarded on the 30th November 1847: it being further admitted, that the said Patrick Dudgeon is represented by the Defenders, John Dudgeon, and Thomas Martin, his trustee :—

1. Whether, in making the said offer, and enacting the said Henry Gordon as purchaser, the said Patrick Dudgeon was making the said purchase substantially for his own benefit; and whether the Defenders, as the representatives of the said Patrick Dudgeon, are liable to implement and fulfil the conditions and articles of sale, and have failed therein, to the loss, injury, and damage of the Pursuers? Or,

2. Whether, if the purchase was made for the said Henry Gordon, the said Patrick Dudgeon, while making said offer for him, and enacting him as purchaser, *was in the knowledge that the said Henry Gordon was wholly unable to fulfil and implement the said obligation as purchaser;* and whether the Defenders, as the representatives of the said Patrick Dudgeon, are liable to implement and fulfil the conditions and articles of sale, and have failed therein, to the loss, injury, and damage of the Pursuers?

3. Whether the said Patrick Dudgeon undertook to the Pursuers to become cautioner or security for the payment of the price of the said lands; and the said Defenders, as his representatives, are indebted, and are resting owing to the Pursuers the sum of 25,600*l.*, or any part thereof, with interest, &c. as libelled?

At the trial before the *Lord Justice-Clerk* (*Hope*) and a jury, while the *Dean of Faculty* was opening the case

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of the Defender, the learned Judge threw out a suggestion which induced the counsel on both sides to sign a minute or memorandum in the following terms:

In respect that the *Lord Justice-Clerk* stated, during the speech of the Defender, that he was satisfied the case was not one well fitted for a jury, in which opinion the jury expressed their entire concurrence, the parties agreed to discharge the jury in order that the case should go back to the Court for decision on the questions stated in the issues, upon the evidence in the Judge's notes;—all questions of damage therein involved having been previously withdrawn from the jury, and made the subject of judicial reference.

After the cause had been thus sent back, counsel were heard before the Court upon the questions in the issues, and upon the evidence in the Judge's notes; and the following interlocutor was pronounced:

4th June, 1851.—The Lords having considered the questions stated in the issues upon the evidence in the Judge's notes, and heard parties thereon, find on the first issue, that in making the offer referred to in the admissions prefixed to the issues, and enacting Henry Gordon as purchaser, the deceased Patrick Dudgeon was not making the said purchase substantially for his own benefit, and that the Defenders, as the representatives of the said Patrick Dudgeon, are not liable to implement and fulfil the conditions and articles of sale, and have not failed therein to the loss, injury, and damage of the Pursuers: find on the second issue, that the said Patrick Dudgeon, while making the said offer for the said Henry Gordon, and enacting him as purchaser, *was in the knowledge that the said Henry Gordon was wholly unable to fulfil and implement the said obligation as purchaser*, and that the Defenders, as the representatives of the said Patrick Dudgeon, are liable to implement and fulfil the conditions and articles of sale, and have failed therein to the loss, injury, and damage of the Pursuers: find *separatim*, on the third issue, that the said Patrick Dudgeon undertook to the Pursuers to become cautioner or security for the payment of the price of the said lands, and the said Defenders, as his representatives, would on that ground be liable for the said price.

Against this judgment, or award, or finding, and against the two preceding interlocutors the present appeal was taken.

The *Solicitor-General* (Sir *Richard Bethell*), and Mr. *Anderson*, for the Appellants: The issues sent to trial

were irrelevant. There was no ground for fixing the agent with liability. He was not bound to disclose the circumstances of his principal. He mentioned his name at the auction, and the vendors might have objected if they had thought proper. Legal liability on the part of the agent there could be none, but an attempt was made to show a sort of equitable obligation. The *Lord Justice-Clerk* (*a*) had said that it was a breach of duty in an attorney, bidding for his client, not to have disclosed his insolvency. But where was the authority for such a proposition? On this point there was no difference between the law of England and that of Scotland. There was no contract express or implied binding the attorney; nor were there any allegations in the record from which liability against him could be inferred. The Court, however, had held the averments relevant, and had sent the case to a jury; and there could be no appeal from orders directing issues. But the interlocutor sending the case to the jury roll was virtually an ascertainment of the relevancy; and brought the case within the rule laid down in *Kirkpatrick* v. *Irving* (*b*), where Lord *Brougham* said, that "no valid judgment could pass unless there were in the record enough to support it"(*c*).

It would be contended on the other side that the orders complained of were pronounced in *foro domestico*, and not in the ordinary course of public jurisdiction. A case which ought never to have been reported, *Stewart* v. *Forbes* (*d*), before Lord *Cottenham*, gave some countenance to this contention—and was in fact the parent of all the fallacies on which the Respondents were to rely. There the Court was entitled to exercise a

(*a*) Sec. Ser., vol. xiii. p. 1034. (*b*) 6 Bell, 213.

(*c*) The Solicitor-General here suggested that it might be fit to repeal the section of the statute which interdicts appeals from orders sending cases to trial by jury. (*d*) 1 McN. & G. 137.

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discretion whether to direct an issue or not. But Lord *Cottenham* went on the idea that Sir *Launcelot Shadwell*, whose decision he was reviewing, had no authority to do what he did without the consent of parties. This was a mistake. The marginal note of the Report affirms, that "if a case involves matter which can only be properly tried by a jury, and on the hearing in the Court below the Judge by the consent of the parties decides the question at issue,—the decision cannot be made the subject of appeal."

[The LORD CHANCELLOR: If the Court had no power except by consent, that proposition would have been safe enough.]

[Mr. *Rolt*, for the Respondents, interposing: That, my Lords, is the case here.]

[The LORD CHANCELLOR: If there had been two modes of proceeding, and the parties had agreed that one of them should be taken,—then, I should say, that an appeal would have lain.]

We contend that there was nothing done by Sir *Launcelot Shadwell* in *Stewart* v. *Forbes ultra* the ordinary *vires* of the Court.

The other side will doubtless rely on *Craig* v. *Duffus* (*a*); but that case was special and does not apply. The Court retained its power notwithstanding the remit to the jury; and when the cause came back, it resumed its original jurisdiction, *Lanark* v. *Hutcheson* (*b*), *Matheson* v. *Ross* (*c*), *Russell* v. *Crichton* (*d*), *Galbraith* v. *Armour* (*e*).

Mr. *Rolt* and Mr. *Roundell Palmer*, for the Respondents: This is a case of conventional jurisdiction. If any one of the parties had said, "We don't consent," the Court below would have had no power. The "notes" of the learned *Lord Justice-Clerk* might have been in

(*a*) 6 Bell, 308. (*b*) 2 Sh. Ap. Ca. 386. (*c*) 6 Bell, 374.
(*d*) 2 Bell, 81. (*e*) 4 Bell, 374.

short-hand. Could the Court have discharged the jury without the consent of parties? Clearly not. Then there was no authority but that given by agreement. *Stewart* v. *Forbes* shows that there cannot be an appeal in such a case. There the *Vice-Chancellor* required the consent of parties to try the question without an issue. *Craig* v. *Duffus* is not so strong as this case (*a*).

The *Solicitor-General*, in reply: The relevancy was in effect disposed of by the sending the case to the issue clerks after hearing argument and appointing argument on the very question of relevancy. The exclusion of an appeal is therefore most mischievous.

The Court of Chancery often says—this is a legal question. But it is not therefore necessarily obliged to send the case to a Court of law. The parties may be desirous to leave the law and the facts to the equity Judge.

[The LORD CHANCELLOR: The usual note or memorandum made is "the parties not desiring an issue," &c.]

We admit that you cannot appeal where you have agreed to the *very thing*. The consent here, however, was not to a particular order, but that a certain course should be taken. The appeal in *Stewart* v. *Forbes* was not for want of an issue, but against the *Vice-Chancellor's* order. So in the present case, we do not complain of what was done at the trial, any more than the Appellant in *Stewart* v. *Forbes* complained of the agreement to dispense with an issue. What we complain of is the judgment of the Court. To make a

(*a*) The Respondent's counsel did not insist on the point relied upon in the Court of Session—namely, the agent's supposed liability for not disclosing his principal's insolvency. In *Ex parte Hartop*, 12 Ves. 352, Lord Chancellor Erskine says: "No rule of law is better ascertained or stands on a surer foundation than this, that where an agent names his principal, the principal is responsible, not the agent."

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short cut for the purpose of sooner arriving at the result involved no consent as to what that result should be. Nor did any one dream that the Court was to sit otherwise than as a public tribunal.

Lord *Cottenham* saw his mistake in *Stewart* v. *Forbes*, and by a very ingenious suggestion saved the parties from the consequences of his error.

Craig v. *Duffus* went on very peculiar grounds. I was of counsel in it; and I have to lament that in Mr. Bell's report one point of great importance is omitted; whereas in the Scottish Jurist (*a*) it is given very fully, and with an accuracy for which I can vouch (*b*). Lord *Cottenham* went on the circumstance that the House of Lords could not follow the course which had been taken in the Court below. This House, he said, could not institute "an inspection of the cylinders," &c.

The LORD CHANCELLOR (*c*):

Lord Chancellor's opinion.

My Lords, the Respondents, being trustees under an Act of Parliament for the sale of an estate, on the 22nd of July 1846, put it up for sale by public auction, in pursuance of their trust. Mr. Dudgeon, a Writer to the Signet, agent for a Mr. Henry Gordon, attended, and was declared, as the highest bidder, to be the purchaser at the sum of 25,600*l.*; but he was admitted to sign the contract on behalf of Mr. Gordon.

It was one of the conditions of sale, that the purchaser should within ten days find security by bond for payment of the purchase-money. On the 25th of July, Mr. M'Ewen, agent for the vendors,

(*a*) 1849, vol. 21, p. 209.

(*b*) See the Lord Chancellor's remarks on Mr. Bell's report of *Craig* v. *Duffus*, *infrà*, p. 723.

(*c*) Lord Cranworth.

wrote to Mr. Dudgeon thus: "I will thank you to inform me who are to be cautioners for payment of the price of the property that the draft bond of caution may be immediately prepared and sent for revisal."

Mr. Dudgeon on the 28th answered: "I beg to say that I am quite ready to grant my obligatory letter in such terms as may be wished by Mr: Patrick, if he will accept of my obligation. I submit that there is no necessity for incurring the expense of the bond, and that the proposed obligatory letter by me, if accepted of, will be held as sufficient intermediate security until discharges of the entailer's debts are produced, duly executed and recorded. Do not press for a bond, it is an unnecessary expense, but I am perfectly willing to give you a letter."

Next day, the 29th, Mr. M'Ewen wrote, saying: "It would have been more satisfactory to have got a bond in common form, since Mr. Patrick is not in town, which would have taken all responsibility off me. If you grant any letter, it must be without prejudice to your own and Mr. Gordon's obligations, and I must be considered free to require implement in the same manner as if such letter had not been given. With every desire to meet your view, it would not be correct in me to tie myself up in any way whatever."

Mr. Dudgeon having died and Mr. Gordon having got into very great difficulties, the vendors have instituted this suit seeking to fix Mr. Dudgeon's representatives with the liability for this purchase-money; and they seek to fix them upon three grounds: First, they say that Mr. Dudgeon was himself the purchaser; secondly, that even if he was acting only as agent for Mr. Gordon, he knew that Mr. Gordon was incompetent to complete this purchase, and he ought to be considered as responsible by reason of his having virtually represented Mr. Gordon as a solvent man, when in truth he was not

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so; and thirdly, they say that he actually agreed to give security. Therefore they contend that the purchase not having been completed, the representatives of Mr. Dudgeon are now bound to make good so much of the purchase-money as shall not have been produced upon the re-sale; the difference being 6000*l.*

The Court of Session sent the case to a jury to try three different issues: First, whether in making the offer Mr. Dudgeon was making it for himself; secondly, whether he knew that Mr. Gordon was incompetent to complete the purchase; and thirdly, whether Mr. Dudgeon undertook to become security for the payment of the price. Upon these three issues the parties went down to trial.

Certainly, my Lords, this was not a very fit case to send to a jury, because the whole question depended not upon oral testimony, but upon the construction to be put upon a voluminous correspondence, a great portion of which had as little to do with the real merits of this case as with the case which was last heard before your Lordships, or with the one that may next come before you. But a jury trial having been directed, all these documents were put in evidence, when it was suggested, "This is a very absurd case to leave to a jury." It was therefore agreed that it should go back to the Court for decision on the questions stated in the issues, and upon the evidence in the Judge's notes.

Upon this agreement the Court found against the Pursuers upon the first issue; that is, they found that Mr. Dudgeon did not purchase on his own account; but secondly they found him liable because he was in the knowledge that Mr. Gordon was unable to fulfil the obligation; and then they "found *separatim* on the third issue," that the said Patrick Dudgeon undertook to the Pursuers to become cautioner or security for the payment of the price of the said lands, and the

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said Defenders, as his representative, would on that ground be liable for the said price."

My Lords, I am of opinion that what the Court of Session did in this case was out of the ordinary course of their procedure, and that to review their decision is consequently beyond your Lordships' jurisdiction.

The case of *Craig* v. *Duffus*, which was decided by this House in 1849, can scarcely be distinguished from the present. There the parties chose to arrange for themselves that the case should go back and be tried and decided by the Court, although there had been a direction for it to be sent to a jury. And this House, your Lordships said, ought not to entertain an appeal from that which was in truth the decision of arbitrators.

The learned *Solicitor-General* having just now referred to the report of that case by Mr. Bell,, and having contrasted it with the Report in the Scottish Jurist, the accuracy of which he in some degree vouched for, having been himself counsel in it, I must take leave to say that the two reports are identical as to the right to hear the appeal. They are evidently taken from the same short-hand writer's note. It is true Mr. Bell gives only so much as relates to the right to appeal, which was the legal point that was decided; whereas the Scottish Jurist goes on to state something which was said by Lord *Cottenham* as to the facts of the case, but which had nothing to do with the legal decision, as Lord *Cottenham* expressly says. "It may be satisfactory to the parties," says Lord *Cottenham*, "to know that I have looked into this mass of three hundred folio pages of evidence, and in my opinion there would have been no difference if we had gone into the facts, because in my opinion the case was quite rightly decided." In order that there might be no mistake he added, "Forming the best opinion I can upon the

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evidence as I find it in those three hundred folio pages, and looking at the opinions of the persons of science who have been examined, and of the learned Judges who have commented upon what was brought before them, I have not the least hesitation in saying that I think the Court below, upon the facts as they appeared, came to a right conclusion. I do not, however, think it right to dispose of the case upon that ground. I merely mention having investigated the evidence as some satisfaction to the parties, that they can have lost nothing by the case being decided upon the question of jurisdiction, but upon the question of jurisdiction I move your Lordships that the decree appealed from be affirmed." So that Lord *Cottenham* took the greatest pains to show that whatever would have been the merits, it was the want of jurisdiction here, on which he moved your Lordships to affirm the interlocutor which had been pronounced below; and exactly the same discrimination is observable in what fell from Lord *Campbell* and Lord *Brougham*, both of whom are reported upon this point in the same terms verbatim by Mr. Bell and by the Scottish Jurist, the only difference being that in this House the object of the reporter being to guide persons as to the law, the facts of a case are not always set out at length. And I must take leave to say that in my opinion Mr. Bell rightly understood his duty. We are now overwhelmed with law Reports; and I think that every law reporter deserves well of his country who condenses; and that he best performs his duty who gives only the pith of what is necessary to the decision. I must farther say in justification of Mr. Bell that I never saw anything more accurately done than his report of *Craig* v. *Duffus;* because, although he does not inflict on his readers that which would be no rule in other cases, he gives a good reason for his abstinence; for he says,

"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,"—no doubt adverting to those words which I have just stated as having fallen from Lord *Cottenham*; and Lord *Campbell* and Lord *Brougham* took exactly the same view.

But the present case is *à multo fortiori*; because the Court below having had originally two modes of proceeding, namely by a jury trial or by proof on commission, the parties said in substance this: "We will not have the case decided by the jury, but the Judge who has heard the evidence shall report it to the Court, and the Court shall form their opinion upon the evidence just as if they were the jury." This is precisely what happens in this country when a verdict is taken subject to the opinion of the Court upon a case stated; the arrangement being that "the Court shall say upon reading all the evidence whether the verdict ought to be for the one or for the other, drawing such inferences of fact from what is proved as the jury ought to have drawn." In such a case there is no possibility of bringing the decision by way of appeal under review—because the parties have by agreement substituted the Court for the jury, and they are bound to take for better or for worse whatever may be their finding (*a*).

That being so, let us see what it is that the jury, *i. e.* the Court, have found here; for it is just the same as if the jury had found it. Upon the third issue it is found

(*a*) *Vide* "The Common Law Procedure Act 1854," sect. 32, and Mr. Kerr's Commentary.

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as a fact, "that Patrick Dudgeon undertook to the Pursuers to become cautioner or security for the payment of the price of the lands." If he did so, he is liable; and the estate having been resold, and there being a deficiency of 5000*l.* or 6000*l.*, he is bound to make it good. It may be said that this is hard—but Courts of Justice would get into great difficulty and inconvenience if they listened too readily to such suggestions. There is an observation, trite but true, that hard cases make bad law—that is to say, law which is soon found productive of embarrassment, because having been warped to soften its severity in a particular case, it is unsuited for general application, and no one knows with certainty how to proceed upon it.

But in the present case I do not see that there is any great hardship; because Mr. Dudgeon was mixed up with Mr. Gordon in all this transaction. He took a deep interest in the matter, and the finding is that he did agree to be cautioner or surety for the purchase money. And for the satisfaction of the parties, I may observe that the finding is one to which in point of fact I should myself have subscribed.

My Lords, the case is now disposed of, unless your Lordships should be of opinion that the whole of these proceedings have fallen to the ground as having been irrelevant. This point was urged by the learned counsel for the Appellants, who cited several authorities in support of their contention. "It does not matter, they said, "what the finding is. There is no allegation in the pleadings, there is nothing in the record, to support such a finding." The question then is whether or not in this summons and condescendence a case is made which warrants this finding, that Mr. Dudgeon agreed to become cautioner or surety.

Now upon that head I think there is no room for

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doubt; for the summons and condescendence, though loosely framed, bring out I think sufficiently the point intended to be raised. Here however I will remark, even at the hazard of that obloquy which attaches in the present day, and not improperly attaches, to mere formalists, that I should be glad to see strictness and accuracy and precision of statement in all pleadings, whether Scotch or English, as being in my opinion alike conducive to the benefit of litigants and the great convenience of Courts of Justice.

My Lords, before I close the case I will make an observation upon what is supposed to have passed before Lord *Cottenham* in *Stewart* v. *Forbes*. What I understand from that case is this. The parties being before Vice-Chancellor *Shadwell*, desired him to decide the matter in controversy without sending it to a jury, and an order to that effect was drawn up by consent of the parties. The *Vice-Chancellor* decided without sending the case to a jury. The parties who had so asked him to decide it, were dissatisfied with his decision—they appealed to Lord *Cottenham*; and Lord *Cottenham* in the first instance said, upon the very principle of *Craig* v. *Duffus* (*a*), "I cannot hear this appeal, because the parties have agreed to leave the matter to Vice-Chancellor *Shadwell*." Now, if it had been so, I confess, with all due deference, I should not have thought that right. The Vice-Chancellor *Shadwell* might have decided it either *proprio vigore*, or by sending it to a jury—he was not bound to one course. But what Lord *Cottenham* I apprehend really meant was,—"I will not hear the case if the question be whether it ought to have gone to a jury or not—because *that* the parties have precluded themselves from disputing; but

(*a*) *Craig* v. *Duffus* was decided in the House of Lords on the 22nd Feb. 1849. The point arose in *Stewart* v. *Forbes*, on the 18th Nov. 1848.

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if I should be of opinion that it ought not to have gone to a jury,—then the parties merely agreeing that it should not go to a jury was nothing at all—they only agreed to that which must have been agreed to;" and eventually he said, "I will hear it, because I am quite satisfied that it ought not to have gone to a jury, and it is still open for me to see whether or not the Judge has come to a right conclusion in point of fact."

Now if that case has gone further than I have now stated, I certainly desire not to be precluded from entertaining and reconsidering the question hereafter. For it appears to me that where, according to the course of the Court, a *Vice-Chancellor* may either decide the case himself or send it to a jury, if the parties say, as they generally do, "We do not ask you to send it to a jury (that is the way in which it is generally put—not, "We consent that it shall not go to a jury"), we prefer that you shall decide it,"—I say, my Lords, I should very much pause before I acceded to the notion that a wrong decision in point of fact upon such a state of things could not be reviewed.

My Lords, I conclude by moving that the appeal now before your Lordships be dismissed with costs.

Appeal dismissed, with Costs (*a*).

(*a*) The House went on the principle that it did not possess the jurisdiction of review. The appeal, being irregular, was dismissed; but the interlocutors or findings of the Court below were not affirmed. The "minutes" however represent the interlocutors as *affirmed*. The point is not very material; because if the House could not affirm, the judgment would be nugatory.

MAITLAND & GRAHAM—RICHARDSON, LOCH, & MCLAURIN.