AUGUST 1, 1854.

JOHN DUDGEON and ANOTHER, *Appellants*, *v.* JOHN THOMSON and ANOTHER, *Respondents.*

Appeal to the House of Lords—Competency—Process—Referring Cause to Court as Arbitrators—*After evidence for the pursuers had been led at the trial of a cause on issues directed by the Court of Session, the Judge suggested that it was unfit for a jury. The parties thereupon agreed to the following minute:—"In respect that the Judge stated, &c., 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." The case having gone back to the Court accordingly, an interlocutor was pronounced containing certain findings on the issues:*

HELD, *That this interlocutor was not a subject of appeal, as the parties had agreed to refer the matter to the Court as arbitrators.*

Sale—Roup—Principal and Agent—Cautioner—Implement—*D, at a public roup of an estate, being the highest bidder, was declared purchaser, when he stated that he purchased for G; and G accordingly was enacted as purchaser. The vendors having, in terms of the articles of roup, called for a bond of caution, D wrote, saying he thought a bond would be an unnecessary expense, but he would give his own obligatory letter if they would accept of it. The vendors' agent said he would consult his principal whether the bond could be dispensed with, and he did not afterwards press for a bond, but acted on the above offer of a letter. Afterwards, D having died, and G being unable to find caution, the vendors discovered that at the time of the sale G was insolvent, and that D held a disposition* omnium bonorum *of G, including all the property G might at any time acquire. The vendors then sued the representatives of D for implement or damages. The Court of Session directed three issues to try the questions—*1. *If D purchased on his own account?* 2. *If D at the time of the sale knew that G was unable to implement the sale? and,* 3. *If D undertook to be cautioner for the price?*

HELD (affirming judgment), *That these questions were properly raised by the record, and that it was not a simple case of principal and agent, where it could be said that, the agent disclosing the principal's name, such agent is not liable.*[1]

The defenders appealed against the interlocutor of 7th March 1850, remitting the case to the Issue Clerks, the interlocutor of 4th July 1850 approving of the issues, and the interlocutor of 4th June 1851, wherein the Court considered the questions stated in the issues upon the evidence in the Judge's notes, and came to specific findings on such issues in lieu of the jury. A fourth interlocutor, decerning for expenses, was included in the appeal.

The pursuers (respondents) presented a petition against the competency of such an appeal. The Appeal Committee reserved the consideration of the objection to competency, to be argued along with the merits at the bar.

The appellants, in their *printed case*, maintained the competency of the appeal because the first two interlocutors were on the relevancy of the record (55 Geo. III. c. 42, § 4; 59 Geo. III. c. 55, § 15; 6 Geo. IV. c. 120, § 33). See *Irvine* v. *Kirkpatrick*, 7 Bell's Ap. C. 186; *Galbraith* v. *Armour*, 4 Bell's Ap. C. 374; *Inglis* v. *Great Northern R. Co.*, *ante*, p. 77; 1 Macq. 112; 24 Sc. Jur. 434. *Craig* v. *Duffus*, 6 Bell's App. C. 308; *Russell* v. *Crichton*, 2 Bell's Ap. C. 81; *Matheson* v. *Ross*, 6 Bell's Ap. C. 374.

As to the *merits*, the appellants in their case asked for a reversal, for the following reasons: "1. Because the pursuers have not stated on record a relevant case to entitle them to support the conclusions of the action, or to obtain the issues which were directed by the Court. 2. Because the questions between the parties depended on the legal construction of written documents, and the Court ought not to have directed issues to be tried by a jury, but should themselves have given judgment in the cause. 3. Because it was not proved that, at the time of the sale, Mr. Dudgeon knew that Gordon was wholly unable to fulfil and implement the obligations imposed on him as purchaser. 4. Because Dudgeon did not undertake to be cautioner or security for the payment of the price of the lands. 5. Because the judgment of 4th June 1851, in so far as adverse to the appellants, proceeds on grounds wholly insufficient to infer any liability against the appellants."

The respondents, in their *printed case*, urged objection to the competency of the appeal.—55 Geo. III. c. 42, § 4; 59 Geo. III. c. 35, § 15; 6 Geo. IV. c. 120, § 34; *Balfour* v. *Lyle*, 2 Sh.

[1] See previous reports, 13 D. 1029; 23 Sc. Jur. 474. S. C. 1 Macq. Ap. 714: 26 Sc. Jur. 626.

& M'L. 1. *Craig* v. *Duffus*, 6 Bell's App. C. 308: 55 Geo. III. c. 42, § 6; 59 Geo. III. c. 35, §§ 16, 17.

The case being called upon by the House of Lords—*Rolt* Q.C., for respondents, claimed to begin, as he objected to the competency of the appeal, and if that point were disposed of first, it might be unnecessary to enter upon the merits.

The *Lord Chancellor* said, the point of competency had been reserved by the Appeal Committee to be argued along with the merits, and it was therefore only one of the points relied on. It might, however, be mixed up with the merits, and as in the late case of *Shedden* v. *Patrick*, *ante*, p. 332, much time had been lost by taking the argument on the point of competency separately, he thought it would be better for the appellants to begin.

Sol.-Gen. Bethell, and *Anderson* Q.C., for appellants.—We admit the two first interlocutors *per se* were not appealable, but when the final interlocutor was pronounced, then it remained open to bring up these interlocutors also. Taking 48 Geo. III. c. 151, § 15, along with 6 Geo. IV. c. 120, § 33, the result is, that all interlocutory orders may be brought up with a final interlocutor, and questions of relevancy remain unaffected by any number of intermediate orders as to jury trial. It was on that ground that *Irvine* v. *Kirkpatrick*, 7 Bell's App. C. 186, was decided, where a similar course was followed. As to the third interlocutor, it is said that the Court below turned itself into a court of arbiters, by the minute at the trial, and that no appeal lies from their decision in that capacity. There has been some countenance given to such a view by a recent decision of Lord Cottenham in Chancery.—*Stewart* v. *Forbes*, 1 Macn. & G. 137. But it is a dangerous principle to admit that a Judge can thus easily throw off the judicial character and assume that of the arbiter, and it is a practice not to be encouraged. The case of *Stewart* v. *Forbes* was, however, one in which the Lord Chancellor thought that the Vice Chancellor had received authority from the parties to decide the cause; though Lord Cottenham went too far in that case. The case of *Craig* v. *Duffus*, 6 Bell's App. C. 608, was also a case where the minute of consent bore on its face, that it was with consent that the parties referred the matter to the Court as individuals; but here there was no such consent, and neither party ever understood that they were removing the ultimate judgment beyond the scope and reach of authority. When the Jury Court was a distinct Court, it had the power, up to the last hour, of sending back the case to the Court of Session, on the ground that it was not a fit case to be tried by a jury, and when the Jury Court was merged in the Court of Session by 1 Will. IV. c. 69, no difference was made in this respect. The discharging of the jury had merely the effect of leaving the case exactly in the same position as if the jury had never been summoned. They might have, no doubt, made a special verdict of it, as was done in *King* v. *Crichton*, 4 D. 62, and 2 Bell's App. C. 81, which was a case that pointed much more strongly to a reference than this case, and yet no such objection to the appeal was ever dreamt of. The first time such an objection was heard of was in *Matheson* v. *Ross*, 6 Bell's App. C. 374, but it entirely failed. There is no doubt, that where a case has been sent back from the Jury Court as unfit for a jury, the Court of Session may order the evidence to be taken in another way.—*Magistrates of Lanark* v. *Hutchinson*, 2 Sh. App. 386; *Buchanan* v. *Dennistoun*, 15 S. 286. Here not only the parties never meant to make a reference of the case to the Judges of the Court as individuals, but the Court itself treated it as a matter of ordinary business, and the interlocutor is signed in the usual way by the President of the Court—"J. HOPE, *I.P.D.*" II. As to the *merits*.—This was merely a case of principal and agent. The agent disclosed the name of his principal at the time of the purchase, and it is the law of Scotland as well as England, that when that is done the principal alone is liable.—*Rankine* v. *Mollison*, Elch. *voce* "Factor," No. 4; *King* v. *Sherra*, 5 S. 231; 1 Bell's Com. 494. It is not therefore to be confounded with cases of representation or guarantee of solvency of a third party. Here no person was deceived, for all the respondents knew Gordon the principal, and it must be taken to be the same thing as if Gordon had, in person, attended the sale. As to Dudgeon offering to give his obligatory letter, that was a mere offer and nothing more, and being unaccepted it fell to the ground. An offer is no contract.—Bank. i. 4, 24. Besides, the acceptance must be in writing.—*Chaplin* v. *Allen*, 4 D. 616. But there is no allegation here of any acceptance in writing; and therefore, as there is no relevant case of cautionary obligation stated on the record, the defender should have been assoilzied.—*Bell* v. *Mylne*, 2 Rob. App. C. 286.

Rolt Q.C., and *R. Palmer* Q.C., for respondents.—As to the two first interlocutors remitting to the Issue Clerks, and approving of issues, it has long been settled that they are not subject to an appeal.—*Balfour* v. *Lyle*, 2 Sh. & M'L. 1.. As to the third interlocutor, it is also exempt from review, because the parties referred the decision of the facts and law to the Judges of the Court of Session as arbiters. The Court of Session had no power, after directing an issue and summoning a jury, to say to the parties—"We will settle the matter ourselves, as it is not a fit case for a jury." This was beyond their jurisdiction, and nothing but the consent of parties could give them such jurisdiction. That consent, however, was given, and the result is, that no appeal can lie from the decision of the Court, any more than an appeal will lie from the award of any arbiter. This is clearly established by authority.—*Craig* v. *Duffus*, 6 Bell's Ap. C. 308;

Montgomery v. *Boswell*, M'L. & Rob. 136; *Steward* v. *Forbes*, 1 Macn. & G. 137; *Chuck* v. *Cremer*, 2 Phill. 477. It is said the consent of the parties does not appear on the face of the minute, but in substance it is clearly a matter of consent altogether. The case went back to the Court of Session, to be determined in point of fact as well as law, and the Judges were to draw such inferences from the evidence in the Judge's notes as they thought proper. In *Russell* v. *Crichton* the jury had found certain facts, and the Court held that the law applicable to such facts was so and so—a case quite different from the present. So in *Matheson* v. *Ross*, the jury merely said, If the law is so and so, then we find this; if otherwise, that. The point of law was merely reserved for the Court; but here everything was referred to the Court. II. Even assuming the appeal competent, the case was rightly decided on the merits.

Sir R. Bethell replied.—This is clearly an attempt to introduce into Scotland a most questionable practice which has grown up in England. The Court of Chancery, with one exception not material, stands in exactly the same position with regard to jury trial as the Court of Session does in all except the enumerated cases, which by statute must be sent to a jury. The Court can decide these, if it choose, without the auxiliary machinery of the Jury Court; and, therefore, as the Court was not bound here to send issues to a jury, so it could recall the jury up to the latest moment, and the result in such a case would simply be, that the case would be in the same position as if a jury trial had never been ordered. The Court had made a mistake at the first in ordering issues at all, for there was in reality no dispute as to facts, and when at the last moment they recalled the jury, it cannot be said that the correcting of such a mistake exempts the ulterior decision of the Court from review by this House. The case of *Craig* v. *Duffus*, when rightly examined, is no authority against us. That was a remarkable case, and peculiar reasons existed for the House refusing to review that decision, as will appear from the report of the judgment in the Scottish Jurist, which is more full and correct than the report of Mr. Bell, and having been counsel in the case he could vouch for its accuracy.

LORD CHANCELLOR CRANWORTH.—My Lords, this case has been for so many days under discussion, that I have had an opportunity of looking into the authorities and into the facts, so that I do not feel that I am at all acting hastily in at once stating my views upon the subject, and moving your Lordships, as I do, to dismiss this appeal. There are many grounds on which I think that such a course is justifiable, but I rely on one which, it appears to me, has never received any answer. It is this, that the main interlocutor, the last one, is one against which, upon principle, and upon conclusive authority, there is no right whatsoever on the part of the appellants to be heard at your Lordships' bar. I have said, my Lords, upon principle and upon authority. Upon the subject of principle, if it had been untouched by authority, a great deal might have been said on the one side and on the other, whether there was an appeal competent to the parties or not; but the question is precisely that which has been considered, and recently considered in your Lordships' House, only five years ago, in a similar case; and it having been elaborately discussed, and having been decided with the benefit of the assistance of Lord Cottenham, Lord Campbell, and Lord Brougham, and all those learned Lords having been quite clear in their opinion on the point, I think it would be a dereliction of duty to your Lordships and the public, if that same question were to be permitted to be again controverted in another case, the circumstances being precisely similar.

My Lords, the facts of the case are these:—In 1846 the present respondents, being the trustees under an act of parliament for the sale of this estate, called the Gartconnell estate, put up that estate to sale by public auction, in pursuance of their trust. Mr. Dudgeon, who was a W.S., and the agent of Mr. Henry Gordon, attended at that sale, and was declared, as the highest bidder, to be the purchaser, at the sum of £25,000. He bid himself, but he was admitted to sign the contract on behalf of Mr. Henry Gordon. The contract is this:—"The said Patrick Dudgeon offered £25,600, and being the last and highest offerer for the said lands and estate at the outrunning of the sand-glass, and he having declared that he made the purchase for behoof of Henry Gordon, Esq. of Craigmaddie, the judge of the roup hereby prefers him to the purchase. Therefore the said Patrick Dudgeon enacts, binds and obliges the said Henry Gordon, his heirs and successors, to implement and fulfil the whole of the foregoing articles and conditions," "and he consents to the registration," &c. Now, upon that taking place, as it did upon the 22nd July 1846, Patrick Dudgeon became, as agent for Henry Gordon, the purchaser of the estate. I do not stop to inquire how far that did of itself implicate Mr. Dudgeon in any liability for the purchase money. I take it for certain, that if the judge of the roup had said, "I know nothing of Henry Gordon, you are the person who bid £25,600, you cannot withdraw by saying you were the agent for Henry Gordon," it would not have been at all a clear question that Mr. Dudgeon would not have been, in respect of that bidding, alone liable, but that is a question upon which there are some niceties, and which I do not therefore discuss.

My Lords, it was a part of the terms of the articles of roup, that the purchaser was within ten days to find caution, by bond or some security, for the payment of the purchase money, and Mr. Dudgeon having signed that contract, and so entered into the agreement on behalf of Mr. Gordon within three or four days afterwards, on the 25th July Mr. M'Ewan, who was the agent for the

vendors, 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. Please let me know by Monday." Now I need not trouble your Lordships by repeating that there were peculiar relations between Mr. Dudgeon and Mr. Gordon in this transaction, which would not make it the ordinary case of a sale and a purchase by a mere party and his solicitor, concerned in effecting the transaction. Mr. Dudgeon took a great interest in this matter himself; he was the holder of a very extended security from Mr. Gordon, the precise nature of which we need not discuss, and he was very much interested in this transaction. It was the most natural thing in the world, therefore, that he having been himself the ostensible purchaser, though for Mr. Gordon, as appeared when the contract was signed, and he having been a party to the articles of roup, which required that there should be caution for the purchase money, application should be made to him in that way—"to whom are we to look to supply this caution?" Nothing, of course, could be so natural as that they themselves should suppose that Mr. Dudgeon would be the cautioner. It is not like being cautioner for a man who is engaging in transactions in the world, in which he makes ducks and drakes with the money; the cautioner, in such a case as this, has at all events the security of the estate to resort to.

Mr. Dudgeon writes this answer on the 28th:—"Your letter of the 25th respecting caution has been forwarded to me; and in answer 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. In regard to a bond of caution, Mr. Patrick is aware that, under the peculiar circumstances of this case, and anticipating *pro forma* such a demand, I made an alteration to suit in the articles of roup; but it was thought not advisable to insert it, and it was not inserted. The case anticipated by me has occurred by Mr. H. Gordon becoming the purchaser." And then he goes on with certain reasons, and says:—"I submit that there is no necessity for incurring the expense of the bond of caution, 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." Then he says:—"Do not press me for a bond; it is an unnecessary expense, but I am perfectly willing to give you a letter."

Mr. Patrick, the vendor, was out of the country, and therefore Mr. M'Ewan, who was the agent, naturally did not like to forego that security which the articles of roup gave him the right to demand; but I suppose, knowing Mr. Dudgeon, or supposing that he was a solvent man, and thinking that there was no difficulty about it, he wrote the next day as follows:—"I have received your favour of the 28th inst. It would have been more satisfactory to have got a bond of caution in common form, since Mr. Patrick is not in town, which would have taken all responsibility off me; at the same time I would not wish to insist on more than what he might require. If you will grant me any letter, it must be without prejudice to the articles of roup and your own and Mr. Gordon's enactment and obligations; and I must be considered free to require implement in the same manner as if such letter had not been given. You will easily see from this that my wish is to await Mr. Patrick's return or instructions, to save trouble and expense, in case he shall dispense with the bond of caution; but, with every desire to meet your view, it would not be correct in me to tie myself up in any way whatever."

Now, what is argued on the part of Mr. Dudgeon, or rather Mr. Dudgeon's representatives—for he has since died—is, that there was never any obligation at all on the part of Mr. Dudgeon, more than that Mr. Dudgeon said this:—"I will give you a letter to state that I will be responsible, but do not insist upon a bond;" and that until the parties had closed with that, and said,—"we accept your letter instead of your bond," there was no obligation. Now, the question is, whether, taking this with all that went on afterwards, the reasonable conclusion in point of fact is, that what the parties understood was this, that the vendor Mr. Patrick, or Mr. M'Ewan acting for him, meant to say to Mr. Dudgeon—"I will take this"—(if it was to be a letter merely saying that he would be responsible, that letter which he had written would do as well as any other letter),—"I will take this till I know whether Mr. Patrick will insist upon a bond or not." If that be the construction, then Mr. Dudgeon was responsible, because he had in truth engaged to give a letter, which was just the same thing as if he had given it. At present I will only remark, that that is the important question in point of fact. This is not, as was argued, a question of how to construe an instrument. There is no doubt that, construing the instrument, it was only an engagement to give a letter if it was accepted, instead of a bond; but what we are to look to is in fact the conduct of the parties, coupled with that letter. Did they mean that, until Mr. Patrick had said, "I insist upon a bond," Mr. Dudgeon was to be made responsible upon what we should call a simple contract obligation, instead of giving that bond?

Now, that being the question, and Mr. Dudgeon having subsequently died, and Mr. Gordon having got into very great difficulties, it ends in a suit instituted by the vendors of this estate 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—that he made the purchase for himself, and is himself to be treated as the purchaser. *Secondly*, that if it was not so, that if he was acting, as he says he was, as agent for Mr. Gordon,

yet he knew that Mr. Gordon was incompetent to complete this purchase, and that he ought to be considered as responsible, by reason of his having virtually represented Mr. Gordon as being a solvent man, when in truth he was not so. That is the sort of obligation which is set up. And then, *thirdly*, they say that he is responsible because he agreed to give caution, and that, the sale not having been completed, he is now bound to make it good, or is at least bound to make good so much as shall not have been produced upon the resale. If, as is said, there has been a loss of £6000 on the resale, then he would be responsible for that deficiency. That is the subject of this suit. Now, Mr. Dudgeon's representatives dispute his liability upon each and every of these grounds.

In that state of the record, there being a condescendence which really hardly states more than I have now stated, and there being statements in answer—there being very little controversy in point of fact—the matter comes before the Court of Session, and the Court send it to a jury to try three different issues:—*First*, whether, in making the offer, Mr. Dudgeon was making it for himself? *Secondly*, whether he was in the knowledge that Mr. Gordon was incompetent to complete the purchase, and so the representatives of Mr. Dudgeon are liable to fulfil and implement the transaction themselves? and, *Thirdly*, whether Mr. Dudgeon undertook to the pursuers to become security for the payment of the price?

Now the Court of Session have in these cases a discretion whether they will try the matter by an issue, or whether they will try it of themselves without an issue; and I agree in thinking that this was not a very discreet case to send to an issue, because the whole question turns out (whether they knew it at the time I know not) to depend, not upon oral testimony, but upon the construction to be put upon an enormous mass of correspondence, a great portion of which, as I take it, has as little to do with the real merits of this case as with the case which was last before your Lordships, or the next that shall be heard. But still there was an enormous mass of correspondence, some of it, no doubt, bearing upon the question in dispute, and a jury trial having been directed, all these documents were put in evidence. When the parties got to the end of the evidence, it was suggested—This is a very absurd case to leave to a jury, and instead of that, therefore, this entry was made:—"In respect 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 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." There had been an arrangement beforehand that the question of damage should be settled in another mode. The matter then came back to the Court upon that agreement, and 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 "find, *separatim*, on the third issue, (as to the caution,) 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." It is in substance against that and the preceding interlocutors which directed the trial, that the appeal is now presented to your Lordships.

Is it competent to your Lordships to hear that appeal? I am distinctly of opinion, for the reason which I have hinted at already, that it is not competent, and that if your Lordships were to proceed to hear that appeal, you would be undoing and reversing that which upon very great deliberation you decided five years ago. The ground is this:—There lies an appeal to your Lordships' House, *primâ facie*, from everything which is done by the Court of Session in the course of their ordinary jurisdiction. Certain matters are taken away by statute, but, *primâ facie*, there is a right to appeal from everything which they do. But then, what your Lordships have said is this, that it must be something which they do in the ordinary course of their jurisdiction. If, for instance, while they were sitting, some persons were to walk into the Parliament House, and to say—"Will your Lordships have the goodness to decide this for us? We have got such and such a question, and we want to know what to do;" and their Lordships were to say—"We think that you are entitled to so and so," the parties could not bring that to this House, because the Judges would not be acting as the Court of Session—they would be acting merely as arbitrators. Now what your Lordships have decided is this, that in a Court much more like a decision of the Court of Session than the present case, as I will shew to your Lordships, you had no jurisdiction, because what the Court of Session did was not in the ordinary course of their procedure, but it was something which was referred, as it were, to them, and in which they were acting in the character of arbitrators.

My Lords, the case to which I allude is the case of *Craig* v. *Duffus*, in 1849, 6 Bell's Ap. 308. I am quite at a loss to distinguish that case from this, except that that case was not nearly so easy to deal with as the present case would be, upon the subject of the right to appeal. There, as here, there had been an interlocutor directing an issue, and before it was tried, at the suggestion

of the Judge, that from the nature of the case and the evidence the rights of the parties would be more satisfactorily ascertained by a commission, this minute was made:—"Of consent, remits these cases to the Court of Session, that a proof may be there taken on commission, and the cases there disposed of"—that is to say, before the trial came on, before any evidence was heard, the Judge said to the parties—"Really this is not a case which can properly be tried by a jury—the jury will not understand it—it had much better go back to the Court, and be treated as if there had not been any jury trial directed,"—to which the parties agreed. It did go back, and the Court of Session proceeded then to ascertain the facts of the case, in a mode in which it was perfectly competent for them originally to have done, as if there had been no jury trial directed—that is to say, they remitted themselves, as it were, to one mode of investigating the facts, instead of pursuing that which had been thought to be an inconvenient mode. They decided the facts in one way or another, no matter which way, and the parties being dissatisfied brought the case by appeal here. Now, had they originally taken that course—had they not directed a jury trial, but investigated it from the first, upon their own authority, by proof, in the ordinary way, without a jury, and had the parties been dissatisfied with their decision, no doubt it could have come here by way of appeal. But what said your Lordships when it came under those circumstances? You said there was no jurisdiction to remit this back; for, look to the Jury Acts, and you will find that when once a matter has been referred to trial by jury, there is no power in any party to get rid of that trial by jury. In some cases the statute says it shall be tried by a jury, and in no other mode; in other cases it says it may be tried in either way, but when once the election has been made that it shall be tried by a jury, then when it has gone to the jury, it is just the same as if it were one of the statutable cases in which the act of the Legislature has said that it shall be tried by a jury. That having been said, when the parties choose to arrange for themselves that the case should not be proceeded with on the direction to the jury, but that it should go back and be tried by the Court, as if there had been no direction for it to be sent to a jury, it was in truth constituting the Court arbitrators to decide the matter. And this House, your Lordships said, ought not to entertain an appeal from that which was in truth the decision of arbitrators.

My Lords, that was the case of *Craig* v. *Duffus*, and the learned Solicitor General having just now referred to the report of that case in 6 Bell's App. 308, and contrasted it with the report in the *Scottish Jurist*, the accuracy of which he in some degree vouched for, having been himself counsel in the case, I must take leave to say that the two reports are identical—there is not a word of difference on this point on the subject of the right to hear the appeal; they are evidently taken from the same shorthand writer's note. It is true that the reporter here (Mr. Bell) gives only so much as relates to the right to appeal in that case, which was the legal point that was decided; whereas the report in the *Scottish Jurist* goes on to state something which was said by Lord Cottenham as to the facts of the case; but that had nothing to do with the decision, as Lord Cottenham expressly says.[1]

My Lords, if that be so, is not that a decision which must bind your Lordships in this case, unless you are prepared to say, that this question shall be for ever open from time to time, and that no decision shall be binding upon you? This is a case, as I ventured to say in the opening, *a multo fortiori*, because there being two modes originally, in either of which the Court of Session might have proceeded, namely, by a jury trial, or by proof on commission or otherwise, what was done in *Craig* v. *Duffus* was to get rid, as it were, of the jury, and to say—"Go back to the other mode of trial." But that was not the case here; here they took the evidence before the jury; and it having been heard before the jury, 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 they shall form their opinion upon the evidence, just the same as if they were the jury." It is precisely what continually happens in this country, where a verdict is taken subject to the opinion of the Court upon a case stated—that is, stating what the facts are, and a verdict is found either for the plaintiff or for the defendant, as the case may be, but subject to this—"the Court shall say, upon reading all the evidence, whether it ought to be for the one or for the other,"—continually inserting in such arrangements—"the Court to draw such inferences of fact from what is proved as the jury ought to have drawn." When that is done there is no possibility of bringing it by way of appeal under review. You have by agreement substituted the Court for the jury, and you are bound to take for better or for worse whatever may be their finding.

That being so, let us see what it is that the jury have found, for it is just the same thing. The Court find it but by arrangement—they are substituted for the jury, and the finding is just the same as if the jury had found it. I leave out the second issue, and upon the third issue it is found as a fact, "that Patrick Dudgeon undertook to the pursuers to become cautioner or

[1] His Lordship then read those parts of the judgment given in the *Scottish Jurist*, but which were omitted by Mr. Bell, and said, that the sole point decided there was not affected by the parts of the judgment in question.

security for the payment of the price of the lands." If he did so he is bound; and the estate having now been resold, and there being a deficiency of £6000, he is bound to make it good. It may be said that this is hard. We cannot help that. Courts of justice would get into the greatest inconveniences and embarrassments, if they listened to the suggestion of what is hard and what is not hard. There is a very old observation, but very trite and very true, that it is what are called hard cases which make bad laws—that is to say, that persons think that the law seems to press hardly, and therefore they try to warp the law to get out of it. A very few years only elapse in any of those cases before it is found that the warping of the law has resulted in embarrassing other people, because they do not know how to apply it. I do not see myself that it is a very great hardship, because Mr. Dudgeon was evidently mixed up with Mr. Gordon to a very great extent in all this transaction, so that for a great while it was doubtful whether it was not in truth Mr. Dudgeon's own transaction. I think it was not, but still he was very much mixed up with it; and whether it is hard or whether it is not, it is quite clear that he did take a deep interest in the matter, and the finding of the jury (I take it to be the same as the finding of a jury) is, that he did agree to be cautioner for the purchase money.

That being the state of the case, I will just observe, for the satisfaction of the parties, in the same way as was done by Lord Cottenham—not, however, having undertaken to look into all this correspondence with the minuteness that Lord Cottenham did in the case before him—that as far as I can see upon that finding about the caution, I believe it is the finding at which, in point of fact, I should myself have arrived; because, as I have already stated, although that is not the strict construction of the letter, yet, taking the series of letters together, I think that the meaning of the parties was, that he would become personally responsible as security for the purchase money; and that he would give a bond if Mr. Patrick, when he returned to Scotland, required it; but that he thought that he would not require it; and that granting a bond would be an unnecessary expense.

My Lords, that disposes of the case, unless your Lordships should be of opinion that the whole of these proceedings have fallen to the ground as having been irrelevant—that is to say, whatever the jury have found, if there is nothing in the case to have warranted such a case to be sent to a jury, if there is nothing to have raised the point on which the verdict of the jury has been returned, then, upon all principles, (several authorities have been cited upon the subject,) it does not signify what the jury have found. If they had found, for instance, that Patrick Dudgeon had agreed to leave a large legacy to some person, what might have been said upon that is—"There is no such point raised in the pleadings, and it does not matter what the jury have found; there is nothing which warrants such a finding." The whole question, then, upon that point is—Whether or not, in this summons and condescendence, a case is made which warrants this finding that Mr. Dudgeon agreed to become cautioner?

Now, upon that subject I think there is no sort of doubt. The summons states this—"That at this adjourned sale James Campbell Tait, W.S., having appeared and offered the upset price, a competition ensued between him and Patrick Dudgeon, Esq. of East Craig, W.S., and the said J. C. Tait having offered £25,550, and the said P. Dudgeon having offered £25.600, and being the last and highest offerer at the outrunning of the sand-glass, he was preferred to the purchase, and became answerable for fulfilment of the articles: That in writing out the minute preferring him to the purchase, the said Patrick Dudgeon, of his own authority, caused a declaration to be inserted to the effect that he had made the purchase for behoof of the said Henry Gordon now Glassford, and the said P. Dudgeon thereby enacted, bound and obliged the said H. Gordon, his heirs and successors, to implement and fulfil the whole of the foresaid articles of roup and conditions thereof, so far as incumbent on the purchaser, in every respect, under the penalty therein specified; all conform to minute subscribed by the said P. Dudgeon, and by the judge of the roup, as the said articles of roup and minutes thereto annexed in themselves more fully bear: That immediately after the sale, application was made to the said Patrick Dudgeon for a note of the names of the cautioners, in order that a formal bond of caution might be prepared, and in answer to this application he, by his holograph letter, dated 28th July 1846, wrote to the agent of the trustees, expressing his desire that the expense of a formal bond of caution might be dispensed with, and stating, 'I am quite ready to grant my obligatory letter in such terms as may be wished by Mr. Patrick, if he will accept my obligation,' as the said letter in itself more fully bears: That the transaction was accordingly allowed to remain on the faith of this letter." That is the allegation. Now, it is not stated with the degree of precision which I should wish to see in all pleadings, and which, although one incurs a little obloquy as being a formalist, I am perfectly satisfied it is most advantageous for the parties should be persisted in. I should be very glad to see all these pleadings, Scotch as well as English pleadings, stated with much more precision and form. But I cannot say that this does not sufficiently warrant the pursuers in saying that the point which they raised was *inter alia* that Mr. Dudgeon had agreed to become security for the purchase money; it would be impossible not so to understand it. The allegation is a little enlarged in the condescendence, but I think not materially. It is there stated—"His" (Dudgeon's) "obligation to implement the articles was considered amply sufficient, and was accepted as such

at the time." We are looking at the condescendence now, not with reference to whether the evidence warrants that suggestion, but to what is stated, and what is stated is, that he wrote that letter, and that his obligation was considered sufficient, and was accepted as such. Is it not relevant upon such a statement to direct an issue to inquire whether he did agree to become cautioner for the purchase money, in the terms in which the third issue is directed, "Whether the said P. Dudgeon undertook to the pursuers to become cautioner or security for payment of the price of said lands?" It appears to me to be a matter which really does not admit of controversy. Therefore, although I quite agree that, whatever be the result of the final finding, it would be open to the appellants here (the defenders below) to say that there was nothing to warrant the trial of such an issue at all, yet it would appear that here there was abundance to warrant it. And upon the short ground that on the authority of *Craig* v. *Duffus* the parties are shut out from appealing against the facts, which are, in truth, only the finding of the jury, as to which there is no appeal, and being shut out from that, the finding is conclusive, because it is a finding upon a relevant matter, I am clearly of opinion that the appeal is quite unfounded.

My Lords, before I close the case, I will just make an observation upon what is supposed to have passed before Lord Cottenham in the Court of Chancery in *Stewart* v. *Forbes*. What I understand from that case is this:—There was a question in which the parties before Vice Chancellor Shadwell desired him to decide the matter in controversy without sending it to a jury, and the order was drawn up by consent of the parties. The Vice Chancellor decided that matter himself without sending it before a jury. The parties who had so asked him to decide it were dissatisfied with his decision. They appealed to Lord Cottenham, who, in the first instance, said, upon the very principle of *Craig* v. *Duffus*—"I cannot hear this appeal, because the parties have agreed to leave the matter to the Vice Chancellor." Now, if it had been so, I confess with all due deference I should not have thought that right. 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 think, eventually meant to decide in the case was—"I will not hear it if the question is, whether it ought to have gone to a jury or not? That the parties have precluded themselves from disputing." Eventually he did hear it, because, he said—"If I am of opinion that it ought not to have gone to a jury, then the parties saying that they agree that it shall not go to a jury, is nothing at all; they only agree to that which must be agreed to, because it ought not to go to a jury; and therefore," he said, "I will hear it, because, if I think it ought not to have gone to a jury, then it is still open to see whether or not the Judge has come to a right conclusion in point of fact." His Lordship did hear it, and he eventually said—"I am quite satisfied that it ought not to have gone to a jury, therefore the agreement that it should not go to a jury is nugatory—it is merely inept—the parties have agreed that that shall not take place which, if they had not so agreed, ought not to have taken place." Then came the question—Whether the Judge had rightly decided? and I think Lord Cottenham was of opinion that he had rightly decided, but, whichever way it was, he said that it ought not to have gone to a jury, and therefore he dealt with the subject matter.

Now, if that case is supposed to have gone further, I certainly desire that nothing which I have stated here may preclude me from entertaining the question hereafter, whether the observation of the Solicitor General may not be entirely well founded? If there is a question before the Vice Chancellor which that learned Judge may, according to the course of the Court, either decide himself or send to a jury, and 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 should decide it," I should very much pause before I acceded to the notion, that the question of a wrong decision in point of fact upon that matter simply could not be heard by way of appeal, because it is only that which, if the parties had said nothing at all upon the subject, the Judge might have decided; and the course which was taken in *Forbes* v. *Stewart* eventually shews that that is a state of circumstances which is extremely likely to occur. I merely allude to this, that it may not be supposed that in adopting, which I do to its fullest extent, the doctrine of *Craig* v. *Duffus*, I necessarily assent to the conclusion, which it was argued or insinuated might be deduced from the decision in the Court of Chancery of *Stewart* v. *Forbes*. I do not think that it goes to that length, and if Lord Cottenham did mean to carry the doctrine to that extent, then I should wish, if the case ever arise, to have an opportunity of hearing it more fully argued.

With regard to the other case before Lord Cottenham, of *Church* v. *Cremer*, that was a case, in truth, in which there was a reference to an arbitrator. The arbitrator was just the same as a jury, and all that Lord Cottenham decided was, that the propriety of the finding was a matter which it was not within his province to review.

I therefore conclude by moving your Lordships that this appeal be dismissed.

Interlocutors affirmed with costs, and appeal dismissed.

Maitland and Graham, *Appellants' Solicitors.*—Richardson, Loch and Maclaurin, *Respondents' Solicitors.*