ROBIN ET AL., MAGISTRATES OF RENFREW, ... } APPELLANTS.
HOBY ET AL., ... RESPONDENTS.

1856. *June* 10*th* and 12*th*.

Appeal against a Judgment obtained out of the common course of the Court.—Circumstances in which an appeal was deemed irregular and incompetent by reason of the Court having been put by consent of parties to do that which the jury ought to have done.

Jury Trial.—Remarks by the Lord Chancellor as to the mode of proceeding where it is found that a jury are called upon not to find facts, but to deduce inferences from facts.

Craig v. *Duffus* and *Dudgeon* v. *Thomson.*—Comments on these cases by the Lord Chancellor.

Appeal Committee.—Reference to it as to costs.

The Appellants presented their Appeal on the 11th July 1854, and the usual order to answer was served on the Respondents, who presented a petition, stating that, by agreement entered into between the parties at the trial, the cause was withdrawn from trial, as a jury cause, and from the jurisdiction of the Court of Session, and was referred to the Judges of the Second Division, as arbitrators chosen by the parties, that the interlocutor appealed against was not pronounced by the Court in the course of their ordinary jurisdiction; and that the Appeal was therefore irregular and incompetent, and should be dismissed with costs.

The Appeal and the Respondents' Petition were both referred to the Appeal Committee, who, having heard the agents on the 9th August 1855, reported their opinion to the House, that the question raised by the Respondents' petition ought to be argued at the bar, by one Counsel of a side; both parties to have liberty

to lodge a printed Case "confined to the competency of the appeal."

Both parties availing themselves of this liberty, the usual complement of "Cases," that is to say, 500 or 600 copies, being one for each Peer of Parliament, was deposited in the House for their Lordships' perusal; all this being entirely without prejudice to another set of Cases, of equal number, upon the merits of the suit, —to follow in the event of the Appeal being sustained (*a*).

Mr. *Rolt* for the Respondents, in support of the objection to the competency of the Appeal: The Appeal is irregular, on the principle of *Dudgeon* v. *Thomson* (*b*), and the earlier case of *Craig* v. *Duffus* (*c*). In this case, a trial by jury had been ordered. An interlocutor, approving of issues, had been signed. That interlocutor was unalterable. The case, consequently, became emphatically a jury case, and the Jury Court was from thenceforth the only tribunal competent to decide it. At the trial, after sundry witnesses had been examined, the presiding Judge (*d*) suggested that no fact was disputed, and that the real question was one of law; and his Lordship thereupon made the following entry in his notes:—

> "In respect that at this stage of the trial both parties concurred in the view that there was no proper question of fact which the jury could be called upon to decide, the Lord Justice Clerk, with the consent, and at the desire of the parties, discharged the jury without a verdict; and *in order that the cause might be decided by the Court upon the notes, each party being entitled to raise any question of law which the notes and record suggest.*"

Where is any substantial or discernible difference between this and what took place in *Dudgeon* v. *Thomson*? Here the Judge, "with the consent and

(*a*) For the constitution of the Appeal Committee, see *Marianski* v. *Cairns*, *suprà*, vol. i. p. 766.

(*b*) 1 Macq. 714. (*c*) 6 Bell, 308.

(*d*) The Lord Justice Clerk Hope.

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at the desire of the parties," discharged the jury; the parties agreeing that the ultimate decision should be limited to what appeared on his notes.

The *Solicitor-General* (*a*), Mr. *Anderson* being with him, for the Appellants: *Craig* v. *Duffus* has produced lamentable consequences. The House there, to avoid the immediate expenditure of judicial attention, raised a technical objection, which excluded the Appeal. It was a surprise to the one party—the successful party; and a fraud upon the other party—the losing party. This question is extremely important,—Shall these agreements, made in the face of the Court, and at the instigation of the Court, made for very useful purposes, to save unnecessary delay and expense,—shall these have an effect so disastrous, as well as so utterly startling and unexpected?

It was competent to remit the case back to the Division from which it had emanated; "it shall be competent to the Jury Court to remit back," &c. The parties might, by agreement, abandon the order sending the case to a jury. This was *in* the *cursus*, not *out* of the *cursus*, *curiæ*. The principle of *Craig* v. *Duffus* is clearly erroneous and most unfortunate.

[The *Lord Chancellor* (*b*): It had the concurrence of Lord *Cottenham*, Lord *Brougham*, and Lord *Campbell*.]

Lord *Campbell*, in *Craig* v. *Duffus*, said the "order should have been discharged." But what better discharge could there be than the "Court by consent remitting the case back?" *Dudgeon* v. *Thomson* is the child of *Craig* v. *Duffus*. There conclusions of fact were to be drawn from the notes of the Judge. But here the words are different, and do not warrant the same deduction in point of fact. The Court could

(*a*) Sir R. Bethell. (*b*) Lord Cranworth.

not try the issues except by consent. Therefore we have no reason to impeach the decision in *Dudgeon* v. *Thomson*. Here each party was left at liberty "to raise any question of law," but not any question of fact; and the Court was to decide *proprio vigore*, and not in virtue of any authority from the parties. The function performed by the Court in the case at bar was properly reserved at the trial. If, then, neither *Craig* v. *Duffus* nor *Thomson* v. *Dudgeon* bind the House, what do earlier cases say? We submit that there are several precedents which will warrant the reception of this Appeal (*a*).

The LORD CHANCELLOR:

Lord Chancellor's opinion.

My Lords, I do not think it necessary to take any further time before I state the course which I recommend your Lordships to adopt, namely, to declare this Appeal incompetent. Further consideration I deem unnecessary, because the question was very fully considered by me the year before last, in the case of *Dudgeon* v. *Thomson*, which appears to me to be undistinguishable from the present, and which, I think, therefore, ought to govern your Lordships' conduct now, even if I entertained, which I do not, any doubts as to the propriety of that decision. I will say a word or two about the other case of *Craig* v. *Duffus*, but the present is so exactly like the case of *Dudgeon* v. *Thomson*, that unless I were to hold that case to have been wrongly decided, I could

(*a*) Here the learned Solicitor-General cited several authorities anterior to *Craig* v. *Duffus*. These are referred to in the printed Cases, and cited in *Craig* v. *Duffus* and *Thomson* v. *Dudgeon*. But the Lord Chancellor observed, that they were either perfectly reconcileable with *Craig* v. *Duffus* and *Thomson* v. *Dudgeon*, or, if not so, must now be considered as having been decided *per incuriam* or as now overruled, see *infrà*, p. 490, but see *suprà*, vol. i., p. 791, as to the House overruling its own decisions, or erring in any respect, both being there treated as things impossible.

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not with propriety express any doubt about the present case.

My Lords, in the case of *Dudgeon* v. *Thomson*, the Pursuer sought to make the Respondent liable for the purchase of an estate, because, having purchased it as agent for another, or being alleged to have purchased it as agent for another, either it ought to be considered that he really was purchasing it for himself; or, secondly, that if that were not so he was purchasing it as agent for a man whom he knew to be insolvent, which fact he ought to have disclosed to the vendors; or, thirdly, that he purchased in circumstances which placed him in the position of a guarantee, or security for the solvency of the purchaser. In order to decide those questions of fact, three issues were directed raising these distinct points:—First, whether he purchased for his own benefit, because then, of course, he would be responsible for the purchase money; secondly, if he did not purchase for his own benefit, but purchased as agent for another, whether that other person was known to him to be an insolvent person; and, thirdly, whether in the course of the transactions connected with that purchase, he did make himself liable as guarantee or surety for the purchaser. Those three issues were directed. I have not the book in which that case is reported actually under my eye at the present moment, but I am sure that I am stating with substantial accuracy the points then directed to be tried (*a*).

Those issues came on to be tried, and a great deal of documentary evidence was offered, consisting of letters and other papers that had passed between the parties, tending, as the Pursuer alleged, to prove the affirmative of those issues, but not leading to that con-

(*a*) His Lordship's statement, though from memory, is quite correct; and *suprà*, vol. i. p. 714.

clusion, as the Defender contended. It was not a case in which there was any conflict of credibility of witnesses, because it was all dependent upon the construction fairly to be put, or rather, the inferences fairly to be deduced from those letters and documents. And, therefore, after the evidence of the Pursuer had all been given, it was agreed, at the suggestion of the Judge, that the whole matter should be withdrawn from the jury and submitted to the Court, and that the Court should find that which it would have been the duty of the jury to find but for that agreement. It was then remitted back to the Court, and the Court found upon those issues, if I remember rightly, for the Defender upon the first of those issues, and for the Pursuer upon both the others; however, certainly they found for the Pursuer upon the last issue, namely, that the Defender had made himself liable to guarantee the solvency of the purchaser. Of course no other question then arose, because, as he had done so, he was bound to pay the money, and that was the result.

This matter having been brought before your Lordships' House by way of appeal, what was attempted was this, to show that the Court had arrived at an erroneous conclusion in point of fact, and that they ought not to have found the issues as they had found them. My Lords, in addressing the House as to the decision to be come to in that case, I certainly stated with very great confidence that that was a course that could not be taken. If it had been left to the jury to decide, there would have been no means of calling their decision in question before this House. There might have been a motion before the Court for a new trial, upon the ground of the verdict being unsatisfactory or contrary to evidence. That, of course, is excluded when you find that the verdict is one found by the Court. But the question of fact never could have

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been brought by way of appeal before the House of Lords. It was in truth an agreement by the parties to substitute the Court for the jury, and when the Court, in pursuance of that delegated authority, found the issues, they were *functi officio.* The finding upon the issues was considered just as if it had been given by a jury, and no Appeal was competent.

On the propriety of the course which your Lordships ook upon that occasion, whether I look at the matter upon technical views, or upon views of substantial justice, I do not entertain any doubt. That technically it was right no person can doubt. That it was in consistency with principles of substantial justice appears to me to be equally clear, because nothing is less conducive to substantial justice than encouraging litigation and appeals upon questions of fact which have been submitted to a jury, who have heard the witnesses, and who therefore had the best means of forming a judgment. I think, therefore, that the recommendation which I ventured to give to your Lordships, and which your Lordships followed upon that occasion, was perfectly correct.

Now, looking at this case, it appears to me that it is in exactly the same position. In this case the town authorities of Renfrew claim that they were entitled, under an old charter of the year 1703, to certain dues to be levied upon goods imported into that town. That was denied by the Defenders, shipbuilders and other persons residing at Renfrew; and the question turning entirely upon how far there had been a levying of tolls in conformity to this admitted charter, an issue was directed for the purpose of having that question properly tried.

The issue was this:—"It being admitted that a Royal Charter was granted in the year 1703, con-

ferring certain rights, powers, and privileges upon the magistrates and burgh of Renfrew, and in particular conferring on said magistrates and burgh a right of harbour within the limits or boundaries expressed in the charter," the question was, "Whether the Magistrates and Town Council of Renfrew, by themselves or their tacksmen, have, under the said charter, levied a duty of twopence per ton upon goods loaded or landed within the bounds of the said grant of harbour, excepting coals, dung, or lime for manure, to or for the use of residing burgesses; and as to these articles to the extent of one half of the said dues, and that for upwards of forty years prior to June 1851."

That issue came on to be tried; some documentary evidence was put in; and then four witnesses were examined, who were inhabitants of Renfrew. One, I think, was merely a gentleman who had made a plan of the harbour, and the three other witnesses were residents in Renfrew, who gave evidence tending to show, as the Pursuers contended, that these dues had been levied, and that they had been levied in conformity with the charter. There was no dispute that the dues had been levied, but the real question was whether the evidence did not show that they had been levied *alio intuitu*, not by reason of a right conferred by that charter, but from some other cause which would not entitle the Pursuers to that for which they were contending.

The evidence having all been gone into, that was done which is, substantially, exactly the same as what was done in the case of *Dudgeon* v. *Thomson*. The note says, "At this stage of the trial both parties concurred in the view that there was no proper question of fact which the jury could be called upon to decide." Not, I must observe, a very accurate way of putting the matter: it ought to have been said that it was

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not a question upon which the jury would have to decide the facts properly so called, but that they would have to decide what was the rational inference from the facts that were proved. But, however, putting it so, "the *Lord Justice Clerk*, with the consent and at the desire of the parties, discharged the jury without a verdict, and in order that the cause might be decided by the Court upon the notes, each party being entitled to raise any question of law which the notes and record suggest.

It comes back, and is argued before the Court upon that evidence; and then the Court being, by the consent of the parties, put by them to find that which, but for what they were so doing, the jury would have been bound to find, comes to this conclusion, "Having heard parties procurators on the questions of law" (as they call them, though truly they are questions of fact) "raised by them on the notes of the evidence taken at the trial and reserved for the Court;—Find that the levy proved of twopence per ton on goods loaded or landed on the course of the Canal of Renfrew, being goods exported from or brought into the said Burgh by means of the said Canal, or thereby sent into or brought from the River Clyde, was not in law a levy of proper harbour dues by the Burgh of Renfrew, in virtue of the Charter of 1703, giving them a grant of free harbour and seaport on the Clyde, and authorizing them to levy" them, "and therefore, find that such levy cannot form any warrant for the exaction."

Now, my Lords, the only distinction that is attempted to be made between this case and that of *Dudgeon* v. *Thomson* is, that the learned Judges in their finding say, that they find that in point of law. If the jury had said, We find, in point of law, that it was not a levy in pursuance of the charter,

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that would not have made it less in truth a finding in point of fact and not of law. It is not a question of law at all. The question to be decided was one of fact, whether in pursuance of the charter the dues had been levied. That being the matter to be decided by the jury, the parties agreed that it should be submitted to the Judges. The Judges found that the dues were not levied in pursuance of the charter, and then no doubt all matter of law is reserved. What would be the consequence of those tolls having been levied, if not in pursuance of the charter, is an open question; but the question, Whether the Judges properly came to that conclusion? is a question which is not open, but which must be taken to have been found by the jury, although not found by the jury but the Judges. It was only so found by the Judges because the parties agreed to substitute them for the jury. I am, therefore, of opinion that this case comes within the decision in *Dudgeon* v. *Thomson*, and that it would be most mischievous to admit appeals of such a character as the present.

That being so, I might feel myself absolved from saying anything more upon the subject. But I admit, with the learned *Solicitor-General*, that the question is one of considerable importance; and I do not at all regret that it has been fully canvassed at the bar. The learned *Solicitor-General* has very much questioned the propriety of a decision which occurred seven or eight years ago, in the year 1849, in the case of *Craig* v. *Duffus*. That case differed from the present case and the case of *Dudgeon* v. *Thomson* in this respect, that the parties did not leave the Judges, as it were, to be put in the place of the jury to find upon evidence that had been submitted to the jury what the verdict ought to be. But before any evidence was given, and when the matter came on for

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trial, they agreed that instead of it being tried by a jury, the jury should be discharged, and that the whole question should be gone into in the ordinary mode of investigating matters of fact before the Court of Session, where jury trial is not resorted to. A most laborious and protracted investigation took place accordingly, and the Court came to a decision. And what this House determined was, that although if there had been no question about a jury at all, if from the first that investigation had been made—as eventually it was made—by a commission and other modes of trial, the finding in that case would have been a finding that was capable of being brought by review, yet that, in truth, the course in which the matter had been conducted had constituted the Court, not a Court deciding *secundum cursum curiæ*, but deciding in the character of arbitrators. If this House was right in that conclusion, it followed as a matter of course that that which the arbitrators had found as fact could not be subject to be canvassed by any Court of Appeal afterwards. The parties had made their own tribunal, and by the decision of that tribunal they must be bound.

My Lords, I think that decision was perfectly right, except that upon one point, I confess, a doubt occurs to my mind, and that arises from something that fell from Lord *Campbell* in his judgment in adverting to the rule arising from the Statutes, that there can be no appeal from an order directing a matter to be tried by a jury, that being not a matter capable of being appealed. In that case (*a*) there was an order directing a trial by jury; and consequently, that order standing, the trial must be taken to have been a trial by jury, and any divergence from it, merely a divergence in which the parties had agreed to constitute some other tribunal their Judges in the

(*a*) *Craig* v. *Duffus.*

nature of arbitrators. Lord *Campbell* says, "An order was made that the case should be sent to a jury. Under those circumstances the case stands precisely in the same position as if it had been one of the enumerated cases that must be referred to a jury. The parties might by consent have set aside that interlocutor, and have restored things to the same situation that they were in before the interlocutor was pronounced."

Now, my Lords, I confess that in the course of this argument a doubt has occurred to my mind, whether it might not have been successfully contended that what took place at the trial, or before the trial, at the opening of the intended trial, in *Craig* v. *Duffus*, might by fair implication have been held to amount to a consent by the Court and the parties that the order for the trial by jury should be discharged. And if Lord *Campbell* be correct, as I have no doubt he is, that the Court, with the consent of the parties, might discharge any prior interlocutor, then it would have laid the matter open, and it would have been a matter investigated by the Court according to its ordinary course of investigation, not embarrassed by any reference to a jury. But unless that suggestion can be adopted, not only do I not see any ground for doubting the propriety of that decision, but I think it is a decision which the House was necessarily bound to arrive at. Standing the order for reference to a jury for trial, it was impossible to take the decision of any other body as anything else than the decision of a conventional tribunal incapable of being made a subject of appeal.

My Lords, several cases prior to this of *Craig* v. *Duffus* have been referred to in the course of the argument as being calculated to cast doubt upon that case, and upon those which have followed it, namely,

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Dudgeon v. *Thomson* and the present case. With regard to *Dudgeon* v. *Thomson*, I do not think that that case, any more than the present, is at all necessarily dependent upon *Craig* v. *Duffus*, because in *Dudgeon* v. *Thomson* (and I think exactly the same argument applies in this case) there was evidently no intention whatever to discharge the order for a trial by jury. On the contrary, that order was meant to stand, and it was only meant to substitute the finding of the Court (as probably being likely to be a more rational finding than that of the jury) for the finding of the jury.

The other cases that were referred to I do not think ought to have any influence on your Lordships' minds, even if they were at variance with the subsequent cases; because if they are at variance, they have been overruled, and the later cases must prevail. (*a*) But I do not think that when those cases are carefully looked at, it is at all difficult to reconcile them with those that have been subsequently decided. Therefore, I humbly move your Lordships that this Appeal be dismissed as incompetent, and with costs.

The *Solicitor-General:* Your Lordships will not give any costs of this hearing, which was directed at the request of the Appeal Committee, for the purposeof enabling the Appeal Committee to make the proper order. If you dismiss the Appeal, therefore, you will dismiss it with costs as from the time when the matter came before the Appeal Committee, not includingth costs of this hearing.

The *Lord Chancellor:* I think we must dismiss it with costs. This was the opinion of the Committee: "Matter of Respondents' Petition as to incompetency to be argued at the bar by one Counsel of a side on

(*a*) See note *suprà*, p. 481.

an early day in next session. Appellants and Respondents at liberty to lodge a printed Case confined to matter of competency of Appeal, if they shall be so advised."

The *Solicitor-General:* That is about lodging the Case, but the Appeal Committee could not have dismissed it with costs.

Mr. *Richardson:* The Petition prays that the Appeal may be dismissed with costs.

The *Solicitor General:* What the Petition prays is an immaterial thing. The House here has been acting, as it were, merely for the purpose of assisting the Appeal Committee. You have not yet the Appeal brought to be heard by the House. You will make the order now which would have been made by the Appeal Committee.

Mr. *Richardson:* It would be very hard upon the party to be deprived of the costs.

The *Solicitor General:* Another reason for not giving the costs of this hearing is, that it is a matter of public concern.

The *Lord Chancellor:* As a matter of form the Appeal is dismissed by the House as incompetent, and the matter of costs is referred to the Appeal Committee.

Appeal dismissed as incompetent, and the question of costs referred back to the Appeal Committee.

DEANS AND ROGERS—RICHARDSON, LOCH, AND M'LAURIN.