CASES

TRIED IN

THE JURY COURT.

PRESENT,

THE THREE LORDS COMMISSIONERS.

ALLAN *v.* THOMSON.

1822.
Jan. 21.

Damages for defamation.

DAMAGES for defamation.

DEFENCE.—The defender mentioned to an individual a report he had heard, and afterwards contradicted it. The pursuer afterwards, in the defender's house, assaulted and defamed him.

On the 8th February 1821, a motion was made to send the case back to the Court of Session, to consider objections to the relevancy of the pursuer's condescendence.

A point of law, unless it ought to be decided *previous* to a trial, is no ground for remitting a case to the Court of Session.

ALLAN
v.
THOMSON.

Clerk.—We might state this as a case of *compensatio injuriarum*, as the pursuer called the defender liar, and challenged him to fight, which is a bar to the action. The pursuer does not come so pure as to entitle him to maintain his action.

Cockburn.—This motion is incompetent. The plea now stated ought to have been in the defences. We deny the fact, or that it is a bar, but admit that it may be proved at the trial.

LORD CHIEF COMMISSIONER.—The only point properly before us at present is, Whether there is in the pleadings in this case a point of law which ought to be decided previous to the trial?

The statute enacts, that it shall be competent and lawful for us to remit questions of law or relevancy; but the ground upon which we are to do so is, that the question ought to be *previously* decided. The case was sent to this Court on the summons and defences, and the statement in the defences is not sufficient to raise the question now insisted on. Even in the condescendence and answers there is nothing said of a challenge to fight; but the assertion is now made, and a motion founded

ALLAN
v.
THOMSON.

upon it. This assertion is denied; and, therefore, the facts must be proved. A question of law may then arise, but at present there does not appear to be sufficient ground stated for remitting the case. To found this motion, the question of law must appear on the face of the issue. But the point now raised is more properly, Whether the issues try the question between the parties, which is not *hujus loci?* In the issue, the pursuer is put to proof of the libel; and the question is, Whether the assault is a bar, or whether it can be proved in mitigation? If the assault goes in mitigation, and the pursuer is aware of the defence, it is not fit to have it in the issue. It is denied that a challenge was given, and it is denied to be a bar. If the fact is made out, the defender may ultimately be in the right, but I cannot compel the pursuer to admit the fact; and, therefore, this is not a point which ought to be decided previous to the trial.

Feb. 28, 1821.

The defender moved for a commission, for the purpose of referring certain points to the oath of the pursuer.*

Quære, Whether the Jury Court have power to take the oath of a party on a reference?

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* In the case of Bell *v.* Dobie, an application was made by both parties on the 7th July 1820, to have the case retransmitted to the Court of Session, for the purpose of referring to oath certain points in the cause.

LORD CHIEF COMMISSIONER.—This question is not entire-

ALLAN
v.
THOMSON.

Jeffrey.—An oath upon reference is not evidence, but a judicial contract, which cannot be laid before a Jury, and the statute does not give the Court power to take the oath.

This question could only be discussed during Term, and is not a question of law, or any point upon which power is given to retransmit a case.

Clerk.—A party has a right, at any time, to refer the whole, or any part of his cause. We cannot be cut out of this by the circumstance, that the issues were prepared on the last day of Term. There is no authority for saying that this is not evidence, and as the Jury are empowered to judge of all evidence, the Court must have power to take this oath, which is the best of all evidence.

LORD CHIEF COMMISSIONER.—As this is an important question, and I feel, at present, much difficulty in granting the order, we shall

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ly new to me, as it was under consideration at the time the act of Parliament passed. But it was understood that it was too important a point of law to be touched. As this is transmitted on the application of both parties, it does not preclude the consideration of how the oath is to be dealt with in any future case; or if this cause should come here again, the oath, I suppose, will be laid before the Jury as a deposition, but the facts stated in it must be taken as true.

ALLAN v. THOMSON.

not decide it at present. The clause in the act states distinctly what may, or may not, be done during Term; but as this issue was settled on the last day of Term, there may be grounds for making this application now.

If this is evidence, it may be such as the Jury Court must receive, but if it is a judicial contract, as Erskine and others state it to be, there may be difficulty in our taking the oath. It may be competent for a Jury to hear this evidence, but how are they to deal with it? In other evidence, the credit is to be weighed, here it is not. Upon the oath, the question may be, Whether the party should not be held as confessed?

LORD GILLIES.—It is important that we should be aware of the situation in which we stand. We are limited by the 10th section of the act of sederunt, and have no power to do any act except what it authorizes.

Act of Sederunt, 9th Dec. 1815, § 10. See Rules and Regulations for the Jury Court, 3d July 1823.

The only question before us is, Whether this commission should be granted? and as it is not a commission for the examination of a witness, which is the case stated in the act, perhaps this is a sufficient ground for refusing the application.

If this oath is to be taken, I cannot conceive why it should not be, as all other evidence is,

ALLAN
v.
THOMSON.

before the Jury. But as the application is not for the examination of a witness, and as the defender is not in a situation to ask this commission, I am for refusing it, whether we have power to take the oath or not. This is not the proper time to move to put off the trial, which, however, may be found competent.

LORD PITMILLY.—This is an application for a commission, and the objection to it is insuperable. But refusing this does not get us out of the difficulty, for we may be called on, at the trial, to receive this evidence, and then we must grapple with the difficulty, and decide the point. The question is a most important one, and it is desirable that it should be most deliberately considered.

So far as I know, there is not a single case where an oath of this sort has been submitted to a Jury, though there are many where a Court, acting with a Jury, have received such oaths.

We are not at present to give an opinion upon this point, but to meet the difficulty which has occurred, and probably the best course will be to delay the case, that the question may be considered during Term.

LORD CHIEF COMMISSIONER.—I am much confirmed by the clause referred to by Lord

Gillies; and if this is to be treated as the evidence of a witness, we cannot grant the commission. Mr Allan is not in the condition which requires his being examined by commission; and in all cases, where possible, testimony should be *viva voce*. But if this is delayed till the day of trial, and we should then be of opinion that it is incompetent for us to take the oath, all the expence and trouble will be useless. The best way is, to delay, till counsel can move to have the case put off.

Clerk.—If I am not to be subjected in expences, I will move the delay.

LORD GILLIES.—At present I am of opinion, that what has occurred is a sufficient ground for putting off the trial. It seems to be thought that moving to put off the trial will subject the party in expences; but I am of opinion, that this will not be the case, provided sufficient reason is shown. As it is an important point of law, Whether the Jury Court have power to take an oath of reference, the question might be brought before us on a motion to remit the case to the Court of Session, on that point. Such a motion made during Term will open the question of the competency of examining a party; and this appears

ALLAN
v.
THOMSON.

to me such a point of law, as is sufficient ground for transmitting the case back to the Court of Session.

LORD CHIEF COMMISSIONER.—This must be matter of arrangement; but it does not appear to me, that the question can come by any other means before the Court in Term. If the oath is to be treated as evidence, the objection must be taken at the trial, otherwise the point can never be got before the Court. It can only come on the question, whether the oath is admissible or not.

May 29, 1821.

Of consent, the oath of a party taken by a Judge in the Jury Court.

It was moved by the defender, that the case be transmitted to the Court of Session, for the purpose of having certain points referred to the pursuer's oath; but, of consent, the order was granted for the pursuer's attendance before one of the Judges of the Jury Court to depone.

LORD PITMILLY.—It is necessary again to repeat, that this is not to be held a decision, but is done entirely of consent.

LORD CHIEF COMMISSIONER.—When the oath is afterwards produced, it must be dealt with as an admitted contract between the parties; and if it requires explanation, the Judge must ex-

plain it. So far as at present advised, I am of opinion, that there is nothing in the institution of this Court which alters the law of Scotland in respect to the oath of a party.

HAY v. BOYD.

The pursuer afterwards appeared at Chambers and deponed; and, on the 21st January 1822, when the case was called on for trial, mutual apologies being made, and read in Court, the case was settled extrajudicially.

Jeffrey and *Cockburn*, for the Pursuer.
Clerk and , for the Defender.
(Agents, *Wm. Robertson*, w. s. and *Campbell & Arnott*, w. s.)

PRESENT,

LORD CHIEF COMMISSIONER.

HAY v. BOYD.

1822. Feb. 13.

SUSPENSION of a charge on a bill of exchange, on the ground of forgery. To which the charger answered, That the defender had promised to pay the bill.

Found that a person had acknowledged that he had accepted a bill of exchange.

ISSUE.

" Whether at Perth, in the house or shop of