

ADAM HUNTER, Appellant.

No. 61.

Right Hon. ELIZABETH HUNTER of Polmood, and HUSBAND,
Respondents.—*Gifford—Forbes.*

Service.—Held, ex parte, (affirming the judgment of the Court of Session,) That a service founded on by the appellant was null, being unsupported by evidence.

THE appellant Adam Hunter, tenant in Alterstane, having obtained himself served heir-male and heir-of-line of Robert Hunter of Polmood, raised an action of reduction of the titles under which the respondents held that estate. On the other hand, they brought a reduction of his service; and this being considered the prejudicial process, and entitled to take the lead, the other action was sisted. The case then resolved into a matter of evidence, and the Court, on the report of the Lord Ordinary, on the 18th of January 1814, reduced the service, and assoilzied the respondents.

June 9. 1823.

2^D DIVISION.
Lord Robert-
son.

Hunter then entered an appeal, but he lodged no Case; and the respondents having put in a Case, the House of Lords ‘ordered and adjudged, that the said petition and appeal be, and is hereby dismissed this House; and that the said interlocutors therein complained of be, and the same are hereby affirmed.’

SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No. 15.*)

SIR WILLIAM RAE and Others, Petitioners.—*Gifford.*

No. 62.

JAMES GIBSON-CRAIG, Esq. Respondent.—*Brougham.*

Jury Court—*Stat. 55th Geo. III. c. 42.*—*59th Geo. III. c. 35.*—*Appeal.*—Held incompetent, under the above statutes, to appeal against an order of the Jury Court to frame issues, and refusing to remit the case to the Court of Session on a point of law arising subsequent to a remit from that Court.

SIR WILLIAM RAE, Lord Advocate, Mr. Solicitor-General Wedderburn, and several other gentlemen, subscribed a bond for a cash-credit in favour of a newspaper published in Edinburgh called *The Beacon*, which was printed by Duncan Stevenson, printer there, and was ostensibly conducted by one Nimmo, but of which Mr. Douglas Cheape was alleged to be the editor. In that newspaper repeated attacks of a personal nature had been made on Mr. Gibson-Craig, W. S., who, conceiving them to be of a libellous character, raised an action of damages against Mr. Stevenson as the printer, and Mr. Cheape as the author of them.

June 20. 1823.

JURY COURT.

June 20. 1823.

At the same time, and on the same ground on which this action was instituted, Mr. Gibson-Craig raised a separate summons against the Lord Advocate and the other gentlemen who had subscribed the bond. He there stated, that although Stevenson and Nimmo were the apparent conductors of the newspaper, ‘ yet persons of another ‘ description had been engaged in it as after mentioned, secretly ‘ combining, by contributions in money and otherwise, to support ‘ the said newspaper in its most wicked and nefarious attacks upon ‘ the pursuer: that in consequence of this combination, and ‘ immediately after or about the time of the publication of the first ‘ number of the foresaid newspaper, a bond of credit, for the express ‘ purpose of supporting and encouraging the Beacon, including the ‘ numbers of that publication in which the pursuer was libelled, ‘ was signed and lodged by the defenders: that in consequence of ‘ these facts, and of their general connexion with the foresaid ‘ Beacon, these persons have all and each, or one or other of them, ‘ made themselves responsible to the pursuer for the gross injury ‘ and insult that has been inflicted on him as aforesaid by the ‘ paper thus set up, encouraged and paid for by them;’ and the summons therefore concluded against them for damages on account of those libels, on which damages were also demanded from Messrs. Stevenson and Cheape. The Lord Ordinary having remitted the case to the Jury Court, the defenders reclaimed; but the Court, on the 5th of February 1822, refused their petition as incompetent. * On the case being transmitted to the Jury Court, Mr. Gibson-Craig was appointed to lodge a condescence of what he averred in support of his action, and the defenders to give in answers. A condescence was accordingly lodged; but the defenders failed to give in their answers within the time prescribed.

In the mean while Mr. Cheape had compromised the action against him and Stevenson, so far as regarded himself, by paying costs; and a verdict was recovered against Stevenson for £500. The defenders in the other action then made a motion in the Jury Court, that as Mr. Gibson-Craig had recovered damages for the same injuries on which he founded in the action against them, he was not entitled also to obtain damages from them; and therefore that the action should be dismissed; or, at all events, it should be remitted back to the Court of Session to decide that point of law. Mr. Gibson-Craig at the same time moved that the clerks be directed forthwith to frame issues. The Jury Court, on the 28th of May 1823, pronounced this order:—‘ In respect the de-

* See 1. Shaw and Ball. No. 331.

‘ fenders do not now ask time to give in their answers, it is or- June 20. 1823.
 ‘ dered that the clerks do proceed to frame the issues on the first
 ‘ day of the next term, with or without answers; and that the
 ‘ motion on the part of the defenders is dismissed.’ The de-
 fenders then presented a petition of appeal, which Mr. Gibson-
 Craig objected to as incompetent, on the ground that such an
 appeal was prohibited by the 55th Geo. III. c. 42, and 59th
 Geo. III. c. 35.

The House of Lords dismissed the petition as incompetent. *

LORD CHANCELLOR.—My Lords, in this case your Lordships have before you a petition of several persons, who are joined in one action, which was raised in October 1821 in the Court of Session in Scotland. In order that your Lordships may see what points are, and what are not before you, it seems to me it may be right to state from the petition itself what is the nature of the gravamen complained of in this appeal; because it is not a question with respect at all to the conduct of the parties—it is simply a question, I apprehend, whether, according to the true intent and meaning of acts of Parliament which were made in the 55th and 59th of the late King, there is any appeal to this House from certain proceedings which have taken place in the Jury Court in Scotland;—and your Lordships, therefore, may lay aside (as I am sure you will) the effect of every observation which has been made that furnishes any other view of the case.

The petition states, ‘ That in the month of October 1821 an action
 ‘ was raised in the Court of Session in Scotland.’ That action was raised in the usual manner by a summons; and with respect to that summons it is only necessary to observe, that a summons in an action of damages is no more like a declaration in the Courts in England than any thing else which can be stated: ‘ Against these several appellants, that they
 ‘ ought and should be decerned and ordained, conjunctly and severally,
 ‘ by decree of the Lords of Council and Session, to make payment to
 ‘ the pursuer of the sum of £10,000 sterling, or such other sum, less or
 ‘ more, as should be modified by the said Lords, in name of damages,
 ‘ solatium, or compensation to the pursuer, for the injury he had sus-
 ‘ tained or might sustain in his reputation, feelings, and interest, by and
 ‘ through certain false, scandalous, malicious, and unprovoked aspersions
 ‘ and calumnies therein set forth and contained in a weekly newspaper
 ‘ called the Beacon, and assisted, supported, and maintained by the ap-
 ‘ pellants by secret pecuniary contributions and otherwise, in manner
 ‘ mentioned in the pursuer’s summons; and also concluding that the
 ‘ appellants ought and should be decerned and ordained, by decree fore-
 ‘ said, to make payment to the pursuer of the sum of £500 sterling, or
 ‘ such other sum, less or more, as should be found by the said Lords to-

* No printed papers.

June 20. 1823.

‘ be the expenses of the process to follow thereon, over and above the
 ‘ dues of extracting the decree to be pronounced therein ;—which sum-
 ‘ mons having come in the course of the rolls before Lord Alloway, Or-
 ‘ dinary, his Lordship, after hearing parties, pronounced this interlocu-
 ‘ tor :—‘ Having heard parties’ procurators, remits this process to the
 ‘ Jury Court.’ That the appellants presented a petition to the First
 ‘ Division of the Court of Session against the above interlocutor ; upon
 ‘ advising which, with answers, they find the petition incompetent, and
 ‘ refuse the same. That prior thereto it was ordered by the Jury Court
 ‘ that the pursuer should lodge a condescendence of the grounds of his
 ‘ action, in terms of the act of sederunt, and of the facts he averred and
 ‘ offered to prove,’—a proceeding very proper on the part of the Jury
 Court, in order that that Court, with such assistance as it has, may frame
 an issue or issues calculated directly to do justice in the case. The
 Court is empowered to order a condescendence of the grounds of the
 action, in order to see what the issue ought to be,—a proceeding highly
 desirable, considering the extreme looseness with which actions are
 brought into the Court of Session. And I should rather wish that ob-
 servation should be confined to the present case, than considered as an
 observation generally applying to summonses ; for, having read the sum-
 mons in this case, it does appear to me it will be extremely necessary
 you should have some explanation what were the transactions which that
 summons really meant to state.

Then the petition states, ‘ That thereafter an order was made by the
 ‘ said Court on the defenders to lodge answers thereto, and afterwards
 ‘ it was ordered by the Court that the parties in the case should revise
 ‘ their condescendence and answers ; and it was ordered by the Court
 ‘ that the answers put in by the defenders be withdrawn, and that other
 ‘ answers be lodged, in terms of the act of sederunt, on or before the 23d
 ‘ day of November 1822. That thereafter notice was given by the pur-
 ‘ suer that the Court would be moved on Friday the 16th of May 1823,
 ‘ on his part, for a remit to the clerks to prepare an issue or issues in
 ‘ the cause, without answers for the appellants to the condescendence for
 ‘ the pursuer, in consequence of the appellants having failed to put in the
 ‘ said answers in the terms and within the space appointed by the Court.
 ‘ That notice was next day given to the pursuer that the Court would
 ‘ be moved on the 16th of May, on the part of the appellants, that the
 ‘ above process should be dismissed, in respect that the pursuer had al-
 ‘ ready obtained a verdict, and recovered damages from Duncan Steven-
 ‘ son, printer in Edinburgh, in an action raised,’ as it is stated here, ‘ on
 ‘ account of the very same libel which was made the foundation of the
 ‘ action against the appellants ; or that, at all events, the said process
 ‘ should be remitted back to the Court of Session, in consequence of
 ‘ certain questions of law arising out of the recovery of the verdict and
 ‘ damages,’—that is, the verdict and damages against Stevenson. ‘ That
 ‘ the above motions were heard on the said 16th day of May last, when
 ‘ the Jury Court delayed consideration of the case. That on the 28th

‘ of May last, the Jury Court having, on the motion of the pursuer, re- June 20. 1823.
 ‘ sumed consideration of the foresaid motions made on the 16th of May,
 ‘ the following order was, of this date, (28th May,) pronounced’—Your
 Lordships will observe, that the issues were directed to be tried without
 waiting for those answers, because the answers had not been filed in due
 time. The following order was pronounced:—‘ In respect the defenders
 ‘ do not now ask time to give in their answers, it is ordered that the
 ‘ clerks do proceed to frame the issues on the first day of the next term,
 ‘ with or without answers, and that the motion on the part of the de-
 ‘ fenders is dismissed.’

Then, my Lords, this is the passage which states the gravamen that
 induces the parties to bring before your Lordships this appeal: ‘ That
 ‘ your petitioners are advised, and humbly conceive that the foresaid
 ‘ order or interlocutor of the Jury Court, dated 28th May last, is erro-
 ‘ neous, and contrary to law and equity; and your petitioners being
 ‘ thereby aggrieved, humbly appeal from the same to your Lordships.’
 Then they pray that it may be the pleasure of your Lordships ‘ to re-
 ‘ verse, vary, or alter the before-recited order or interlocutor of the Jury
 ‘ Court in Scotland complained of, and to grant the warrant for the usual
 ‘ summons upon the said James Gibson.’

My Lords, you will permit me here to observe, this is not an applica-
 tion to this House by appeal, or in any other form, complaining that the
 Court of Session remitted this to the Jury Court for trial. Whether the
 Court of Session were right or wrong in remitting this to the Jury Court,
 is not a question we have at all to deal with upon this petition; but the
 single question (if I understand the case before your Lordships) is this,
 Whether an appeal can be made to this House against the decision of the
 Jury Court, as pronounced in this interlocutor of the 28th May 1823?
 which is the only interlocutor appealed from. And the complaint which
 the petitioners allege is, that the Court did wrong in not directing the
 process to be dismissed, ‘ in respect that the pursuer had already ob-
 ‘ tained a verdict, and recovered damages from Duncan Stevenson,
 ‘ printer in Edinburgh, in an action raised on account of the very same
 ‘ libel which was made the foundation of the action against the appel-
 ‘ lants.’ That is the first gravamen.

My Lords, with respect to the merits of the motion that was so dealt
 with by the Jury Court, I do not trouble your Lordships with any ob-
 servations upon it, because it does not appear to me to be relevant at
 present before us. Nevertheless, as much conversation passed at the Bar
 upon this subject, and as it was suggested that, taking the Jury Court
 to be a Court carrying on the proceedings of the Court of Session, there
 may be circumstances between the commencement of the action and the
 time when the Jury Court is to try the question, which may put an end
 to the right of the pursuer in that action to recover any damages, I do
 not think it will be travelling much out of the way, with reference to the
 doctrine contended for by the Attorney-General, (which doctrine is re-
 sisted by Mr. Brougham,) namely, that the recovery against Stevenson is

June 20. 1823. a bar to this action, to say (and that is enough for my purpose) that nothing appears upon the face of this petition which can possibly prove that case; because, in the first place, it is stated that a verdict was recovered in an action raised on account of the very same libel, but it is not stated that it is an action raised on account of the same fact of publication of the libel, which is most material; because, if A. publishes a libel one day, and B. publishes the same libel another day,—or if A. publishes a libel in one place, and B. publishes the same libel in another place,—the publication on the one day or the other, or the publication in the one place or the other, may be under very different circumstances; and it is impossible to say, that because it happens to be a publication of the same libel, the recovering one verdict will be a bar to the action in respect of the other. I think also it will not escape your Lordships' observation, with reference to the question pressed by the Attorney-General, as to matters arising *puis darrein continuance*, how it happens, if that is intended to be insisted upon in this case, that we have not a single fact bearing upon that point brought forward; and if your Lordships will take the trouble of considering it for a moment, I will put this by way of illustration, to see how far it will operate. The summonses in the two actions are brought on the same day, but the cause of action is stated very differently in the one and in the other; and the papers that I have now in my hand are occupied in reasoning, not upon the mere injury that was done to this party by the publication by Stevenson and Cheape, (who are joined in one action,) but whether the ground of action be maintainable or not. That is a question upon which I do not presume to say a word. But the ground of action, the additional ground of action which is to be found in this other summons, is combination and conspiracy, to the extent mentioned in that summons, to do injury to this individual. There may not be one word of truth in that, or there may be a possibility of making out the assertion that there is a great deal of truth in it; but it is quite a distinct cause of action. If, therefore, we were to go into the merits, I do not see that we could by possibility pronounce it to be the same cause of action, 'or that at all events the process should be remitted back to the Court of Session, in consequence of certain questions of law arising out of the recovery of the said verdict and damages.' What those questions arising out of the recovery of the verdict and damages are, is no way explained to us; therefore we have not any certain ground on which we can proceed.

Under these circumstances another question arises, which certainly is a question of a great deal more importance,—namely, whether, in every case in which the Jury Court is conceived by parties not to have acted as it ought, the statutes have admitted of an appeal direct to the House of Lords from the decision of the Jury Court. In considering that the two acts of Parliament, 55th and 59th of the late King, have been referred to, I might here very well observe, that I do not see how it will be possible for the Jury Court to interfere in the action against Stevenson and Cheape, because the principal point that is insisted on in all these

papers, with respect to the ground of action against the present appellants, June 20. 1823. is alleged to be combination and conspiracy. Now, it is quite a different thing to make a particular publication, or by combination and confederacy procure or cause to be published generally a paper intended probably for publication. The summons does not confine itself to a particular publication, but states that there was this combination and confederacy for the general publication of this paper to injure the pursuer. Whether that is well founded or not, we have nothing at all to do with at present.

My Lords, it does, I confess, strike me that you have not conferred a very high boon on Scotland in the provisions you have made in respect of the Jury Court, if from every process before that Jury Court there is to be an appeal to this House. Taking it to be a fact—(which it is material to attend to on this petition of appeal)—taking that to be capable of being stated which has been stated at the Bar, that the Jury Court is to be considered as a Court continuing the proceedings of the Court of Session, and that for this purpose a part of it—and taking the law as it was stated at the Bar, that where an appeal is not given, you must still look at the general spirit of the acts, to see not only whether it is intended to be given, more particularly whether it be prohibited or not prohibited, and, if it is not prohibited, must consider it as being given,—the course of proceedings would, I think, appear not to be the most convenient for the administration of justice.

My Lords, the act of the 55th of the late King, after stating that either Division of the Court of Session shall be empowered to direct issues to be tried, states in the second section, ‘ That in all cases as aforesaid ‘ wherein a Lord Ordinary shall see cause for issues to be directed to be ‘ tried by a Jury, he shall take the cause verbally to report to the Divi- ‘ sion of the Court to which such Division belongs, so that the Division ‘ may determine whether such issue shall be sent to the said Court to ‘ be tried by a Jury, or shall dispose of the cause in manner and form ‘ as at present practised’ for that purpose; and the same power being given to the Judge of the Court of Admiralty, it is expressly enacted by the 4th section, ‘ That it shall not be competent, either by reclaiming ‘ petition or appeal to the House of Lords, to question any interlocutor ‘ granting or refusing such trial by Jury.’

Now, if the act had stopped there, I apprehend it would have been in vain to have argued that the Court of Session had directed issues in various cases in which perhaps your Lordships would not have directed issues, because it would have been an express prohibition to prevent any jurisdiction by way of appeal; and this having been foreseen, those who drew this act thought it necessary to advert to the cases where application was made for a new trial, and to the cases where there was question of relevancy, and where points of law might be brought before the Jury Court by bills of exception, which bills of exception, again, would be a species of conveyance, by which those points might be brought up from Scotland to this House. And accordingly the 6th section says, ‘ That in all cases in which an issue or issues shall have been directed ‘ to be tried by a Jury, it shall be lawful and competent for the party

June 20. 1823. ‘ who is dissatisfied with the verdict to apply to the Division of the Court
 ‘ of Session which directed the issue for a new trial, on the ground of
 ‘ the verdict being contrary to evidence,—on the ground of misdirection of
 ‘ the Judge,—on the ground of the undue admission or rejection of evi-
 ‘ dence,—on the ground of excess of damages, or of *res noviter veniens*
 ‘ *ad notitiam*, or for such other cause as is essential to the justice of the
 ‘ case; provided also, that such interlocutor granting or refusing a new
 ‘ trial shall not be subject to review by reclaiming petition, or by appeal
 ‘ to the House of Lords;’ so that the interlocutor with respect to grant-
 ing or refusing a new trial was not to be subject to appeal, not only to
 the House of Lords, but even by reclaiming petition to the Court of Ses-
 sion. My Lords, I may here say it would be a very singular thing, if
 the Legislature had prohibited either a reclaiming petition or an appeal to
 the House of Lords, where the Court of Session had directed a trial by
 Jury, that the moment a cause was remitted to the Jury Court, the very
 first step taken by the Jury Court, and the very first step that could be
 taken in obedience to that remit, should be separately and distinctly a
 ground of appeal to this House; and yet that appears to be involved in
 the principle contended for, that the non-prohibition is in such cases equi-
 valent to a permission.

My Lords, this section having provided for the case of a new trial,
 ‘ That such interlocutor granting or refusing a new trial shall not be sub-
 ‘ ject to review by reclaiming petition, or by appeal to the House of Lords,’
 it was seen, however, that it might happen in the course of a trial (as in-
 deed it might happen before the matter was sent to a trial) that a great
 deal of matter of law might arise; and accordingly, as to what might
 arise in the course of the trial, there is this enactment: ‘ That it shall
 ‘ be competent to the counsel for any party, at the trial of any issue or
 ‘ issues, to except to the opinion and direction of the Judge or Judges
 ‘ before whom the same shall be tried, either as to the competency of
 ‘ witnesses, the admissibility of evidence, or other matter of law arising
 ‘ at the trial, and that on such exception being taken, the same shall
 ‘ be put in writing by the counsel for the party objecting, and signed
 ‘ by the Judge or Judges; but, notwithstanding the said exception, the
 ‘ trial shall proceed, and the Jury shall give a verdict therein for the
 ‘ pursuer or defender, and assess damages when necessary; and after the
 ‘ trial of every such issue or issues, the Judge who presided shall forth-
 ‘ with present the said exception, with the order or interlocutor directing
 ‘ such issue or issues, and a copy of the verdict of the Jury indorsed
 ‘ thereon, to the Division by which the said issue or issues were directed,
 ‘ which Division shall thereupon order the said exception to be heard in
 ‘ presence on or before the fourth sederunt day thereafter; and in case
 ‘ the said Division shall allow the said exception, they shall direct another
 ‘ Jury to be summoned for the trial of the said issue or issues; or if the
 ‘ exception shall be disallowed, the verdict shall be final and conclusive,
 ‘ as herein after mentioned: Providing always’—and this proviso was
 with a view of bringing the propriety of decisions of the Court in matters
 of law (where it might be thought desirable) to this House,—the trial of a

June 20. 1823.

matter of fact being considered as final—‘ provided always, that it shall
 ‘ be competent to the party against whom any interlocutor shall be pro-
 ‘ nounced in the matter of exception to appeal from such interlocutor to
 ‘ the House of Lords, attaching a copy of exception to the petition of
 ‘ appeal certified by one of the Clerks of Session, so as such appeal shall
 ‘ be presented to the House of Lords within fourteen days after the in-
 ‘ terlocutor shall have been pronounced, if Parliament shall be then sit-
 ‘ ting, or if Parliament shall not be sitting, then within eight days after
 ‘ the commencement of the next session of Parliament, but not after-
 ‘ wards ; and so as the proceedings on such appeal do conform in all
 ‘ respects to the rules and regulations respecting appeals ; and every such
 ‘ appeal shall be appointed to be heard on or before the fourth cause-
 ‘ day after the time limited for laying the printed Cases in such appeal
 ‘ upon the table of the House of Lords ; and upon the hearing of such
 ‘ appeal, the House of Lords shall give such judgment regarding the
 ‘ further proceedings, either by directing a new trial to be had, or other-
 ‘ wise, as the case may require.’ Then it enacts, ‘ That if a new trial
 ‘ shall not be applied for, or shall be refused, or if the exception taken
 ‘ to the opinion and direction of the Judge or Judges shall be disal-
 ‘ lowed, the verdict shall be final and conclusive as to the fact or facts
 ‘ found by the Jury, and shall be so taken and considered by the Court
 ‘ of Session, or by the Judge-Admiral respectively, in pronouncing their
 ‘ judgment, and shall not be liable to be questioned any where ; pro-
 ‘ vided, that in all cases wherein the Court shall pronounce a judgment
 ‘ in point of law, as applicable to or arising out of the finding by the ver-
 ‘ dict, it shall be lawful and competent for the party dissatisfied with the
 ‘ said judgment in point of law to bring the same under review either
 ‘ by representation, or reclaiming petition, or by appeal to the House of
 ‘ Lords, or where the Judge-Admiral shall have pronounced judgment in
 ‘ point of law on the verdict, it shall be lawful and competent for the
 ‘ party or parties to bring the same under the review of the Court of
 ‘ Session as heretofore.’

Your Lordships will observe, that the Court of Session may or may not direct issues of fact. If they direct an issue for trial, then the Jury Court is to frame the issue, and the order of the Jury Court for the trial cannot be made the subject of appeal to this House, or even of reclaiming petition. It appears also, that when the trial has taken place, there may be an application to the Court of Session for a new trial, in consequence of the Jury having miscarried with respect to the question of fact, and the Court of Session may, if they think proper, direct or refuse a new trial. If they direct a new trial, or if they refuse a new trial, there is no appeal to this House, in as much as it was the object of this act of Parliament to make the judgment of the Jury, confirmed by the judgment of the Court, final and conclusive as to matters of fact ; but in as much as there might be in the course of the proceedings misdirection in matters of law by the Judge, the Legislature gave to the party an opportunity of bringing the question, whether the Judge had or had not misdirected the Jury,

June 20. 1823. by bill of exceptions before the Court who directed the issue to be tried, if the judgment of the Division was wished upon it, and then it gave an appeal to this House.

There is another circumstance which is necessary to be attended to, which is this : Supposing a new trial to be refused, and that the Court, in consequence of the finding, shall pronounce a judgment in point of law which that finding would not be a valid and proper foundation for, then, if the Court mistakes in matter of law, in applying that law to the facts, there is likewise an appeal to this House ; and if it stood only on this act of Parliament, it would be a very extraordinary thing to say that this act of Parliament, going through all this process from beginning to end, and which was intended to bring to conclusion a trial by Jury, meant that from every direction the Court gave with respect to the manner of bringing those issues before the Jury, there should be an appeal to this House, —that could not, I think, be the meaning of the Legislature.

Then there is likewise the 19th section, which is a material section, because it might have occurred that the issues which had been directed were issues that would not surround the whole of the case, or do justice to the case ; or it might be an issue which, on appeal brought to this House, this House itself would not approve ; and therefore, with a view to doing justice, if the demands of justice should require such a further proceeding on the part of this House, it is directed by the 19th section, ‘ That it shall be lawful for the House of Lords, in remitting to the Court of Session any cause which was or shall hereafter come before the said House by appeal from the Court of Session, to instruct the Division of the said Court of Session to which the cause is remitted, to order and direct such issue or issues as the said House shall think fit to be transmitted to the said Commissioners, for the purpose of being tried by a Jury in manner directed by this act.’ I do not think that in this long act there is any other clause which is material to be stated, and I confess I do not know how (supposing this petition to state the case more accurately and with more precision than it does) the doctrine these petitioners contend for could be maintained, so as to permit an appeal against an order practically carrying into effect the interlocutor of the Court of Session directing a trial, which the Jury Court must necessarily make, the Court of Session having a competency to direct such proceeding.

My Lords, the act of the 59th of the late King contains provisions which undoubtedly are very material on this subject, and particularly with reference to actions brought for damages. By the first section of that act it is enacted, ‘ That in all processes raised in the Outer House of the Court of Session, by ordinary action or otherwise, on account of injuries to the person, whether real or verbal, as assault or battery, libel or defamation, or on account of any injury to moveables, or to lands where the title is not in question, or on account of breach of promise of marriage; seduction, or adultery, or any action founded on delinquency of any kind, where the conclusion shall be for damages and expenses only, the Lord Ordinary of the Outer House, before whom such process

June 20. 1823.

‘ shall be enrolled, do remit, and he is hereby authorized and required,
 ‘ after defences are lodged, to remit the whole process and productions
 ‘ forthwith to the Jury Court in civil causes, which last-mentioned Court
 ‘ is authorized and required, according to the rules and regulations which
 ‘ the said Court and the Court of Session are herein after empowered to
 ‘ make, to settle an issue or issues, and to try the same by a Jury to be
 ‘ summoned and impannelled under the provisions now in force, as herein
 ‘ after enacted for the purpose.’ Then follows this clause: ‘ That if it
 ‘ shall appear to the parties, or either of them, that there is a question of
 ‘ law or relevancy which ought to be decided previous to the remit of the
 ‘ cause to the Jury Court, it shall be competent for them to state the
 ‘ same orally to the Lord Ordinary, who, if he thinks fit, may give judg-
 ‘ ment de plano, or order pleadings on the alleged question of law or re-
 ‘ levancy, and if he order pleadings, then the case is to be proceeded in
 ‘ according to the course of the Court of Session; and as soon as such
 ‘ question of law or relevancy shall be disposed of, if matters of fact re-
 ‘ main to be proved, the whole process and productions in the case shall
 ‘ be forthwith remitted to the Jury Court for the purposes aforesaid.’
 Your Lordships, therefore, see that there is a provision with respect to
 what is to be done where there is a question of law or relevancy, which
 it is alleged ought to be decided previous to the further proceedings of
 the Jury Court; but then, with a view of bringing the matter to an end
 if possible, the third section says, ‘ That it shall be competent for the
 ‘ Lord Ordinary, if it shall appear to him that there is no question of law
 ‘ or relevancy which ought to be decided previous to the remit of the
 ‘ cause to the Jury Court, forthwith to order such cause to be remitted
 ‘ to the said Court for the purposes aforesaid; provided always, that it
 ‘ shall also be competent for the Lord Ordinary, if he sees cause, to re-
 ‘ serve the alleged question of law for the consideration of the Court of
 ‘ Session, after the matters of fact shall have been found by a Jury.’ It
 would be saying too much for any Judge, however great his talents, to
 assert that his decision may not by possibility be wrong; but still it was
 thought for the interest of the public at large, that it was better the mat-
 ter should come to an end; and the act directs, that ‘ in all such cases,
 ‘ the interlocutor of the Lord Ordinary ordering the cause to be remitted
 ‘ to the Jury Court, whether with or without the alleged question of law,
 ‘ shall not be subject to review by representation, petition, appeal to the
 ‘ House of Lords, or otherwise.’

There is then in this act also another very material clause. Your
 Lordships see that it gives an election as to the time of taking the opinion
 of the Judges of the Court of Session upon the question of the relevancy
 or not relevancy of any matter which may be alleged. In the 12th sec-
 tion it is enacted, ‘ That it shall be competent and lawful for the Jury
 ‘ Court, when it appears to the said Court, in the course of settling an issue
 ‘ or issues, or at any time before trial in the cases remitted to them as
 ‘ aforesaid, that there is a question or questions of law or relevancy that

June 20. 1823. ' ought to be previously decided, to remit the whole process and produc-
 ' tions to the Division of the Court of Session, the Lord Ordinary, or
 ' Judge-Admiral, who remitted the same to the Jury Court, that the ques-
 ' tion or questions of law and relevancy may be considered and determined
 ' there: Provided always, that it shall be lawful to the said Division, Lord
 ' Ordinary, or Judge-Admiral, where matters of fact shall, after such con-
 ' sideration or determination, remain to be proved, again to remit the whole
 ' process, and all the productions, to the Jury Court, in order that an issue
 ' or issues may be prepared and tried as aforesaid: Provided further, that
 ' it shall be competent to the said Division and Lords Ordinary to prepare
 ' and settle an issue or issues, in manner aforesaid, for the purpose afore-
 ' said; and it shall be competent for the Jury Court, when it appears to
 ' the said Court, in the course of settling an issue or issues, that a case
 ' turns upon matter of complicated accounts, or other matter to which
 ' trial by Jury is not beneficially applicable, to remit back the whole pro-
 ' cess and productions as aforesaid, with their report thereon, in order
 ' that the Division, Lord Ordinary, or Judge-Admiral may proceed with
 ' the same in such manner as shall appear to be most expedient for the
 ' administration of justice.' So that the two clauses taken together ap-
 pear to me to prove that the parties may apply to the Lord Ordinary, or
 the Division, with a view to have matters of relevancy, and so on, settled;
 that if the Lord Ordinary shall be of opinion to send it to the Jury with-
 out deciding those matters of relevancy or law, he has the power finally
 and conclusively so to do; and that the Legislature never meant that if it
 should happen, upon due consideration in the Jury Court, that they should
 be of opinion there was some matter of law or matter of relevancy that
 ought to be considered, or ought not to be considered, the question
 whether they decided right or wrong was to be the subject of an appeal
 to this House, but that it was to be the subject of an application for a re-
 mit to the Court or the Ordinary for their decision on the question as to
 the matter of relevancy or law.

My Lords, then there is a declaration in the 15th section, ' That it shall
 ' not be competent, by representation, reclaiming petition, bill of advoca-
 ' tion, appeal to the House of Lords, or otherwise, to bring under review
 ' any interlocutor by the said Divisions, Lords Ordinary, or Judge of the
 ' Admiralty, ordering a trial by the Jury.'

Your Lordships will recollect that the 12th section admits the power
 of the Court of Session to interfere for the purposes of justice, on the ap-
 plication of the Jury Court, at any time before trial; but from the interlo-
 cutor of the Court of Session ordering a trial by Jury there is to be no
 appeal, nor from the determination on a motion for a new trial. A bill
 of exceptions may in certain cases be tendered, and from the decision
 upon that, or from a judgment in matter of law, a power of appeal is given.

The question, then, upon the whole, my Lords, is this—a question which
 perhaps it is not very necessary to decide upon in this appeal—it is too
 important a question to be disposed of by merely adverting to the circum-

June 20. 1823.

stances which are stated in this petition of appeal ; because, even admitting the doctrine which was so powerfully stated by the Attorney-General at the Bar, namely, that in the Court of Session, as in England, it might happen that something might have taken place between the institution of the action and the trial, and even after the plea pleaded, which might put an end to the action, here there is no such thing stated ; and if you look at the nature of the issues, which in all probability will be framed by the Jury Court, (for, by the way, no issues are yet framed by the Jury Court,) it may never be that any issue may be framed by the Jury Court which can be complained of. If no complaint can be made, except that in an action against A. there have been damages recovered against A. ; if that be stated without other circumstances than the recovery against A. for the publication of a libel—a publication of the same libel, if you please,—how can the mere statement of that be a ground for staying the proceedings in a second action which imputes a combination and conspiracy, carrying on by joining in instruments and so on, agreeing to be general publishers of a paper in which that criminal matter which was the foundation of the recovery against A. happened to be inserted ? It does not appear it is the same fact of publication ; there may be a publication of the same libel, which may afford quite a different cause of action against A. and against B. perfectly distinct. Suppose, for instance, a man published a newspaper in London, with an express prohibition of that newspaper being sent out of London by any person he employed ; if any other person thought proper to go and publish that newspaper in Liverpool and Edinburgh, and all the great towns in the country, that would be quite another cause of action, and a foundation probably for much greater damages than against the first individual. Your Lordships recollect the circumstance of a noble Lord publishing that which he had said in this House, reflecting on the character of an individual. The Court of King's Bench said they would never take notice of any thing said in this House ; but if a noble Lord chose to publish his speech in the newspaper, that, if libellous, is not protected by any privilege whatever belonging to this House. Suppose a body of men had confederated together to give circulation to this libel, is it to be contended that that is a question that is to be shut out from the consideration of a Court ? I do not say what they are to do with it ; but is it a question to be shut out of the consideration of a Court of Justice, whether a man may not complain of the damage he has received from such a combination, or, as we should call it, such a conspiracy ?

My Lords, I desire only further to say this, that the simple question before us is, Can we proceed upon this appeal from that interlocutor of the Jury Court which is referred to in the petition of appeal ? We have nothing to do with the conduct of the parties. The complaint may be justly founded, or, on the other hand, there may not be the least pretence to say there is any ground of complaint whatever ; but the true question before us is, Whether, in this petition, in which the facts are not brought

June 20. 1823. forward, in which nothing is brought before us that would enable us to argue, even if we had the power of an appeal from the interlocutor, whether this would be brought within the principles upon which a matter, arising after the last continuance, as we call it in our proceedings, could or could not be a bar to the action brought? I say there is no statement enabling us to judge of that; the single question is, Have we the right, on that which is here stated, to stop the proceedings in the Jury Court? My opinion, my Lords, is, that your Lordships have no such right, and that therefore this appeal ought to be dismissed.

No. 63.

WILLIAM WHITE, Appellant.—*Clerk—Cockburn.*
ROBERT BALLANTYNE of Phaap, Respondent.—*Warren—Abercromby.*

Facility—Fraud—Reduction.—Circumstances in which it was held, (reversing the judgment of the Court of Session,) That it was necessary to show that a deed executed by a party who was proved to have been naturally weak in intellects and facile, but who was legally capable of making a deed, fully understood it; and this not being done, that the deed was reducible.

June 20. 1823.

1ST DIVISION.
Lords Balgray
and Cringletie.

WILLIAM WHITE, the nephew and heir-at-law of the late John Dalgleish, proprietor of certain lands and heritable subjects, brought an action of reduction of a deed of settlement, which Dalgleish had executed on the 3d of February 1808, and by which he conveyed these subjects to the respondent Robert Ballantyne. The grounds on which he made this demand were,—

1. That Dalgleish, from his state of mind, was totally incapable of making such a deed: And,—

2. That, at all events, it had been obtained by gross fraud and circumvention on the part of Ballantyne.

In support of this action he stated, that John Dalgleish had, from his earliest years, been afflicted with mental imbecility, and was unfit to manage his own affairs:—that he had been originally a herd, and had at one time obtained by means of his friends a farm, but was found to be unable from mental incapacity to attend to it:—that his brother, who was a clergyman, and was possessed of considerable property, became desirous that he should be placed in a situation where he might be properly attended to, and that accordingly he was boarded in the house of Ballantyne at Dryhope:—that, by the death of his brother the clergyman, John Dalgleish succeeded to the subjects in question, and to personal funds, amounting in all to about