[*3d June* 1839.]

(Appeal from the Court of Session, Scotland.)

ALEXANDER CAMPBELL, Appellant.[1]— *Attorney General (Sir John Campbell)* — *Bagley.* (No 11.)

DUNCAN CAMPBELL, Respondent. — *Dr. Lushington.*

Appeal — Practice — Stat. 55 *Geo.* 3. *c.* 42. *s.* 4. 6. *&* 8. — *Stat.* 59 *Geo.* 3. *c.* 35. *s.* 16.—The partners of a distillery were convicted in penalties, which were levied from the appellant and respondent respectively: the appellant sued the respondent for his share of certain cash advances made by him for behoof of the company; the respondent brought an action against the partners for indemnity from the said penalties, on the ground of nonparticipation in the offence: the appellant, among other defences to such action, pleaded, that, the partners having been all involved in the same delict, there was no ground for contribution or indemnity by one against the other. The judgment of the Lord Ordinary or of the Court was not taken on that defence; and the Lord Ordinary sent the cause for trial by a jury. The judge at the trial gave no direction as to said defence, and no exception was tendered: and a verdict was returned for the respondent. The Court, upon motion with notice by appellant for a rule to show cause why the verdict should not be set aside and a new trial granted, refused to grant a rule to show cause why the verdict should not be set aside; thereafter the Court applied the verdict, and decerned for the sum found due, with costs, which were also subsequently decerned for: Held, that an appeal against such judgment, applying the verdict and decerning, was competent.

IN 1820 the appellant and the respondent, and two individuals of the name of Macandrew, became partners

2D DIVISION.

Lord Ordinary Fullerton.

[1] 12 S. D. & B., 573. 870. 923.

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of the Easdale Distillery Company. This company carried on business from February 1820 till August 1822, and was dissolved in December thereafter.

In consequence of alleged misconduct by those in charge of the operative department of the concern, illicit spirits had been mixed up with the produce of the distillery, and a prosecution for penalties to the amount of 10,500*l.* was instituted at the suit of the Crown in the Scotch Court of Exchequer, where the practice of the English Courts prevails.

The defendants (the present appellant, the respondent, and the Macandrews,) put in a joint plea of not guilty, and tendered evidence at the trial in Exchequer, which took place on the 17th of December 1823, and ended in a verdict of conviction against all of them, and in a judgment for the full amount of penalties. The defendants thereafter got the penalties modified to 3,000*l.* A writ of extent was issued, and their several proportions of the above mitigated penalties were levied from the appellant and respondent respectively.

In 1824 the appellant, who had made considerable advances in purchasing grain and other materials for the company's use, to the extent of upwards of 1,500*l.*, raised an action in the Court of Session against the respondent, concluding for payment of 559*l.* 1*s.* 10*d.*, being his share of this debt of 1,500*l.*, and for any deficiency that might arise from the insolvency of the other partners.

In 1827 the respondent instituted an action in the Court of Session against the appellant and the two Macandrews, and one Hunter, a servant in the establishment, averring his own ignorance, and their knowledge, of the illicit practices carried on at the distillery,

and concluding for a total indemnity, at the hands of the appellant and of the other defenders, of the whole modified penalties in which they had been condemned. To this action the appellant pleaded in defence, — 1. that the action was irrelevant; that the respondent being involved in the same delict with the appellant, by the verdict and judgment following thereon, could not legally sue to have the whole consequences of that delict thrown on the appellant, and himself relieved of them; and that no action lay at his instance against the appellant. 2. He denied, in point of fact, that he ever knew, or was in the slightest degree accessory to, the improper practices alluded to.

Upon this state of the pleadings, the Lord Ordinary gave no judgment upon the objection to the relevancy of the action; but the cause being a proper one for trial by jury his Lordship remitted the case to the jury roll, and the parties went to trial on the following issues as settled by the Lord Ordinary:—

" It being admitted that the pursuer and defenders, " Alexander Campbell and Donald Macandrew, and the " the late John Macandrew, were partners of a com- " pany for the purpose of distilling spirits at Easdale, " and that the defender, Robert Hunter, was brewer " or distiller to the said company; and that on the " 17th day of December 1823 the said company were " found liable in a penalty of 3,000*l.*, as being guilty " of contravening the revenue laws:—

" Whether the defenders, or any of them, were guilty " of the said contravention of the said laws, whereby " the said company were subjected in the said penalty, " and obliged to pay certain expenses? And whether " the defenders, or any of them, are indebted and rest-

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" ing owing to the pursuer in the sum of 1,171*l.* 5*s.* 1*d.*,
" or any part thereof, with interest thereon, as the
" balance of the said penalty and expenses? Or whe-
" ther the said contravention of the said laws was with
" the knowledge of the pursuer?"

The Judge who presided at the trial left the case to the jury, upon the evidence.

The jury returned a verdict in the following terms:—
" At Edinburgh, the 22d, 24th, and 25th days of March
" 1834. Before the Right Honourable David Boyle,
" Lord President of the Second Division of the Court
" of Session, compeared the said pursuer and the said
" defenders by their respective counsel and agents, and
" a jury having been impannelled and sworn to try the
" said issues between the said parties, say upon their
" oath, that in respect of the matters proven before
" them, they find for the pursuer on both issues; and
" that the defenders are indebted and resting owing
" to the pursuer in the sum of 1,059*l.* 5*s.* 1*d.*, with
" interest, as libelled."

The appellant gave " notice of a motion for a rule to
" show cause why the verdict should not be set aside, and
" a new trial granted."

In discussing the motion " to set aside the verdict," the appellant insisted on his preliminary defence, and on the judgment and verdict in Exchequer, produced in evidence on the trial, as sufficient to quash the verdict as contrary to evidence; but he was met with the objection in point of form, that in hoc statu, on a motion arising out of the trial, the Court could only judge of the law so far as it applied to the direction given at the trial, and that no direction was given or required at the trial, nor exception taken upon this preliminary matter; and

that the ground on which the motion was made resolved into a plea which should have been taken at the trial, and stated by way of exception, and not by a motion for a new trial; and that as the verdict must stand, a motion for a new trial was incompetent. The Court thereupon made the following order (1st July 1834):—"The Lords refuse to grant a rule "to show cause why the verdict in this case should not "be set aside."

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Thereafter the verdict, and the Judges report of what had passed at the trial, were laid before the Court of Session; and the respondent gave the following notice of motion to enter up judgment:—"Take notice, that "on the 4th current, Duncan Campbell esq., the pur-"suer, will move the Honourable Court to apply the "verdict of the jury in this case, to decern in terms "thereof, and to find the defenders liable in the ex-"penses incurred by the pursuer, and to remit the "account thereof to the auditor to tax and to report. "Dated at Edinburgh this 2d day of July 1834." The appellant opposed this motion, but the Court ordered the whole cause to the roll, when their Lordships pronounced the following judgment:—"In respect of the "verdict found by the jury on the issues in this cause, "the Lords decern against the defenders, conjunctly "and severally, for payment to the pursuer of the sum "of 1,059*l.* 5*s.* 1*d.*, with interest as libelled; find the "defenders liable to the pursuer in the expenses in-"curred by him in this action; appoint an account "thereof to be lodged, and remit to the auditor to tax "the same, and to report."

Judgment of Court, 4th July 1834.

Thereafter their Lordships pronounced the following interlocutor:—"The Lords allow the decree pro-

Judgment of Court, 11th July 1834.

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"nounced in this case for the principal sum of "1,059*l.* 5*s.* 1*d.*, and interest thereon as libelled, to be "extracted ad interim."

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Against these several interlocutors Alexander Campbell appealed.

The respondent having objected to the competency of this appeal before the appeal committee, their Lordships reported to the House that, on account of its importance in practice, the question of competency should be argued at the bar of the House by one counsel of a side; and on the 12th August 1834, the cause having been called on, the competency of the appeal (which then embraced the previous interlocutor of the Court on a motion for a new trial) was discussed.

Appellant's Argument.

Appellant.—The pleas on the merits which bore materially on the competency were shortly these:—1st, The action by the respondent is incompetent, in respect that he himself, as well as his copartners, being by the verdict in Exchequer found guilty of the offences charged, and condemned by the Court in the statutory penalties, no action can lie at the suit of either against his associates for relief or indemnity of these penalties; and no one of the co-partners can be permitted to recover in an action founding on the above-mentioned verdict and judgment, and at the same time asserting his own innocence of the charge of which, by these very proceedings, he stands legally convicted; and, 2d, he had urged the Lord Ordinary to dispose of the preliminary defences before trial, at every step of the cause.

Some smuggled spirits had been received upon the premises of this company, and certain violations

of the excise laws were committed by the company, in respect of which His Majesty's Advocate commenced a criminal prosecution for penalties, to the amount of 10,000*l.*, in the Scotch Court of Exchequer. Instead of resisting this prosecution, it was resolved to effect an arrangement with a view to mitigation of penalties. By a practice which occurs in Scotland, and which was also of frequent occurrence in England, the verdict in Exchequer was taken by consent, against all the parties, for penalties afterwards restricted to 3,000*l.* The present respondent, Duncan Campbell, was afterwards advised to raise an action, in the Court of Session, against his copartners, concluding to be relieved from the consequences of the verdict in Exchequer. Now, no such thing was known in the law of England, nor in the law of any other country, as an action for contribution among wrongdoers. That had been clearly settled in the well known case of Merewether and Nixon[1], and also in the more recent case of Colburn and Patmore[2] in the Court of Exchequer. [LORD CHANCELLOR BROUGHAM stated, that it appeared to his Lordship that this was an action brought at the instance of one accomplice against his co-associates in crime. Such a thing was perfectly wild.] Such is precisely the case here; nevertheless, it would appear that a different view of this matter had been taken by the Court of Session, for instead of giving the defenders the benefit of the pleas which they had taken, an issue was prepared and ordered to be tried by a jury. Now the defenders had no alternative but to go to trial upon this issue, for the act of the 55 Geo. 3. c. 42. s. 4. enacts, "that it shall

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[1] 4 Term. Rep. 180.

[2] 1 Cro. Mee. & Ros. 72; S. C. 4 Tyrw. 677.

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"not be competent, either by reclaiming petition or "appeal to the House of Lords, to question any inter- "locutor granting or refusing such trial by jury." [LORD BROUGHAM, C.:—Is the plea set forth in the record?] The conviction in Exchequer was set forth on the record, and formed the subject of substantive pleas in law. [LORD BROUGHAM, C.:—Did you take a defence upon the conviction in Exchequer? I want to see the summons and defences.] There was no doubt of the fact that the plea in question had been brought out distinctly and broadly on the record in the Court below. In this state of matters, being, as their Lordships would perceive from the section of the act to which they were referred, compelled to go to trial, the case came before a jury, and a verdict was returned in favour of the pursuer (respondent). The defender (appellant) thereafter moved the Court to have the verdict set aside, in respect of the conviction in Exchequer. A motion was made in arrest of judgment. The Court below refused the rule, and they afterwards pronounced judgment, proceeding upon the verdict, ordaining the defenders to pay the pursuer the amount prayed for in the summons, viz. 1,059*l.* 5*s.* 1*d.*, with interest and costs. Against this latter judgment the present appeal was entered. The respondent has presented his petition, praying that the appeal may be dismissed as incompetent. The appeal is said to be incompetent under the act 55 Geo. 3. c. 42. ss. 6. and 8., and also by the 59 Geo. 3. c. 35. s. 16. Now the argument of the appellant was, that by interlocutors appealed from no point of law is decided; the interlocutor of the 1st of July being merely a refusal to set aside the verdict, and the interlocutors of 4th and 11th July being merely to apply and give effect to the verdict

[LORD BROUGHAM, C.:—Had you a demurrer in the Court below upon the plea?] My Lord, I am not aware that they have in Scotland any form of plea in the nature of a demurrer. [LORD BROUGHAM, C.:—Was the plea made a preliminary defence? I am anxious to have a copy of the defence; and the better way perhaps is to allow this action to stand over until I shall have had an opportunity of perusing the summons and defence.]

LORD BROUGHAM, C., addressing Dr. Lushington:—Pray is this not a motion for an arrest of judgment, non obstante veredicto. There can be no objection to that; it is matter of familiar practice. But at any rate, do you mean to say that there is any clause in these statutes which shuts out the party from an appeal to this House? You cannot cut off the right of appeal by implication. The right of appeal does not stand upon any act of parliament. There is no act of parliament giving a right of appeal. That right is the constitutional privilege of all the King's subjects.

DR. LUSHINGTON:—My argument is, that trial by jury in Scotland being entirely a matter of statutory introduction and regulation, there is no appeal, except where the statutes allow it.

Here the Lord Chancellor rose, and stated that he had now no difficulty whatever in recommending to their Lordships to sustain the competency of this appeal. Let the respondent's petition, therefore, be dismissed. Ordered accordingly.

On the following day (13th Aug. 1834) the cause was again brought under the notice of their Lordships by the respondent's counsel, ex parte, who stated, that since the matter was last before the House there had been furnished a copy of the notice of motion for a rule to show cause.

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Appellant's Argument.

LORD BROUGHAM, C.:—I am not certain that there cannot be an appeal from the judgment, because they have entered up judgment.

The appeal subsequently dropped from the cause list, by default of the appellant in lodging prints of his case; but he having afterwards presented a new appeal, differing from the former in so far as he did not appeal against the order refusing the rule to show cause, &c., the respondent petitioned against this second appeal, on the ground of incompetency; and the matter having been referred to the Appeal Committee, their Lordships reported that the point should be argued, by one counsel of a side, at their Lordships bar; which argument accordingly took place in session 1837.

The cause having stood over, was this day (3d June 1839) called on.

Ld. Chancellor's Speech.

LORD CHANCELLOR:—My Lords, this is a case which was heard at your Lordships bar some time ago, and which had, in fact, escaped my recollection. The suit was for the purpose of recovering a contribution from one of several partners, towards the payment of the amount of a verdict which had been found at the suit of the Crown against all the partners for a breach of the excise laws. The jury having found in favour of the pursuer, an application was made to the Court of Session for a new trial, which was refused; upon which the judgment of the Court was pronounced in these terms:—

"In respect of the verdict found by the jury on the issues "in this cause, the Lords decern against the defenders, "conjointly and severally, for payment to the pursuer "of the sum of 1,059*l.* 5*s.* 1*d.*, with interest as libelled."

An appeal was presented to your Lordships house against that decree of the Court of Session, and against

the order refusing a new trial; that took place in the year 1834. That appeal was met by a petition for dismissal upon the ground of incompetency; and to the extent of the order of the Court of Session refusing a new trial, there can be no doubt the appeal was incompetent, inasmuch as the act[1] prohibits parties from coming to this House, upon orders of the Court below upon applications for new trials. The present petition of appeal was then presented, which left out the order refusing a new trial, and appealed against the order I have just read, and another order of subsequent date consequential upon it.

The question now is, whether that can be dealt with as an incompetent appeal, being against the final interlocutor of the Court of Session. The order is for the payment of the money. There is nothing, undoubtedly, in the act which prohibits such an appeal. Your Lordships will not fail to observe under what difficult circumstances the appellant comes here. His real and substantial defence is this; that the penalties under the excise laws being, by the verdict of a jury, on behalf of the Crown, found against all the partners, that one partner cannot recover, in a civil action against the others, a contribution for that which is a liability incurred by a wrong.

There was a plea on record, which set forth, to a certain extent, what was sufficient to raise the matter in issue coupled with something else. There was a plea raising that defence, but upon that plea no judgment of the Court was asked before it was sent to a jury; and the issues referring the matter to a jury were in these words:—"It being admitted that the pursuer

[1] 55 Geo. 3. c. 42. sec. 4.

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" and defenders were partners of a company for the " purpose of distilling spirits, and that the defender, " Robert Hunter, was brewer or distiller to the said " company; and that, on the 17th of December 1823, " the said company were found liable in a penalty of " 3,000*l.*, as being guilty of contravening the revenue " laws; whether the defenders, or any of them, were " guilty of the said contravention of the said laws, " whereby the said company were subjected in the " said penalty, and obliged to pay certain expenses? " and whether the defenders, or any of them, are in- " debted and resting owing to the pursuer in the sum " of 1,171*l.* 5*s.* 1*d.*, or any part thereof, with interest " thereon, as the balance of the said penalty and ex- " penses? or whether the said contravention of the said " laws was with the knowledge of the pursuer?"

Now the jury found this verdict. They say, " That " in respect of the matters proven before them, they " find for the pursuer on both issues, and that the " defenders are indebted and resting owing to the " pursuer in the sum of 1,059*l.* 5*s.* 1*d.*, with interest as " libelled." Now that finding involves a question of law as well as a question of fact, because, if there was an illegality in the original transaction which prevented one party recovering a contribution against the other, the defenders could not be indebted and resting owing to the pursuer. It was a point of law, therefore, arising at the trial, which must either have been assumed or decided before the jury could come to their conclusions.

Now it is said that the Learned Judge who presided at the trial did not explain to the jury what the law was. If he had been applied to at the trial to do so,

he would undoubtedly have given an opinion to the jury, as to whether the pursuer could recover with reference to that question. But it does not appear that any such application was made[1]; so that neither in the first instance upon the interlocutor directing the issue, nor in the second instance when the issue was at trial, did the defender take the course which was clearly open to him, of asking the opinion of the Court, or the opinion of the Judge, as to the illegalityof the transaction being an answer to the demand against him.

Under these circumstances the finding of the jury is one that cannot now be disturbed, inasmuch as an application was made to the Court of Session for a new trial, and the Court of Session refused a new trial, and against that interlocutor refusing a new trial no appeal can be presented to your Lordships house. The present appeal is against the interlocutor giving effect to the verdict of the jury; that is to say, the jury having found that the defenders are indebted and resting owing to the pursuer in a certain sum. The interlocutor decreed that payment should be made. It is for the appellant to consider how far, in prosecuting this appeal, he is likely to succeed. But that is not now the question before your Lordships for decision. The question for your Lordships decision now is, whether this appeal be incompetent. I find that it is an appeal against a final order of the Court of Session for payment, and I do not find any thing in the statute which raises any doubt as to its being competent to a party to come here for the purpose of asking your Lordships whether that interlocutor can be supported or not.

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[1] See 12 S., D., & B., 573.

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Now the ground of the appeal is, that the verdict does not exhaust the whole merits of the question. Whether it does or does not exhaust the whole merits of the question is a matter about which your Lordships may be very well able to form your opinion on looking at the pleadings, but it is not a matter before your Lordships for decision. The question is, as to whether the appellant shall be sent away from your Lordships bar upon the ground of having brought an appeal which it is incompetent to him to bring. It appears to me that there is no incompetency; whatever may be the result of the appeal itself is matter for the consideration of the appellant; but I think that the petition, praying that the appeal may be dismissed as incompetent, must be refused.

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Respondent's petition to dismiss appeal as incompetent considered, and dismissed; and the appeal sustained.

W. S. GRUBBE—A. H. MACDOUGALL, Solicitors.