United Kingdom House of Lords Decisions

SCOTTISH_HoL_JURY_COURT

(1840) 1 Rob 1

CASES DECIDED IN THE HOUSE OF LORDS, ON APPEAL FROM THE COURTS OF SCOTLAND. 1840.

2 D DIVISION.

(No. 1.)

ALEXANDER CAMPBELL, Appellant [1]

v.

DUNCAN CAMPBELL, Respondent

[13th February 1840.]

Counsel: [Attorney General (Campbell) — *James Anderson*.]
[Lord Advocate (Rutherfurd) — *G. Graham Bell*.]

Subject_**Pactum illicitum — Practice — Pleading — Costs. —**

1. A cause was remitted de plano to the jury roll, a record was made up, the parties went to trial, and a verdict was returned for the pursuer:— Held, (affirming the judgment of the Court of Session, which decerned in terms of the libel,) that the defender could not obtain a new trial, or arrest judgment upon the verdict, on the ground that he had not previously had an opportunity of taking advantage of an alleged plea in bar, which he had originally put upon record.

2. A verdict is taken by consent in a prosecution in Exchequer under the statute 1 Geo. 4. c. 74., for a sum agreed on less than the penalties: one of the defendants

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[1] *Sequel of cause decided last session. See Maclean and Robinson, House of Lords Reports (1839), p. 387.*

overpays his share of said sum, and raises an action in the Court of Session against the others for contribution: Q. Whether the illegality of the original act can, in the circumstances, be pleaded in bar.

3. A summons concluded against several defenders conjunctly and severally; a verdict was returned finding them liable for the sum claimed, and interest, as libelled; the Court of Session decerned against the defenders conjunctly and severally: In the course of an appeal against the judgment an objection raised on the ground of discrepancy between the verdict and judgment held to be untenable.

4. Costs awarded against an appellant held not to include the costs of discussing the competency of the appeal, on the ground that the costs had not been reserved in the judgment sustaining the competency. (See p. 14.)

Lord Ordinary Fullerton.

Statement.

A PROSECUTION was raised in the Exchequer under the statute 1 Geo. 4. c. 74., against the appellant and respondent and two other persons of the name of M'Andrew, partners in a distillery company, which resulted in an arrangement, whereby it was agreed, that a verdict should be taken by consent for the sum of 3,000 *l*. (a sum considerably under the amount o penalties sued for). The respondent, Duncan Campbell, paid the amount, and afterwards recovered part of it from the company's effects. He then raised an action in the Court of Session for the balance against the appellant, and the two other persons above named, concluding that they should be decerned and ordained, conjunctly and severally, to pay him a proportionate part of said balance. Separate defences were given in, and each defender put in a plea, founded in substance on the illegality of the original transaction, though not precisely in similar terms. The cause was remitted to the jury roll, and a record made up, in which the plea

of illegality was repeated. Issues were then settled and approved of in an alternative form, as follows; viz. "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 expences? and, whether the defenders, or any of them, are indebted 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 expences? OR whether the said contravention of the said laws was with the knowledge of the pursuer?" Upon these issues the parties went to trial, in the course of which evidence was adduced on both sides. 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 to the pursuer in the sum of 1,059 *l*. 5 *s*. 1 *d*., with interest, as libelled."

4th July 1834.

The appellant then moved for a new trial, inter alia, on the ground that the established rules of the Court precluded him from urging his plea of illegality at a previous stage

of the cause, and as the plea was a complete bar to the action, the verdict must necessarily be set aside; the Court, however, refused to grant a new trial. A motion was then made to apply the verdict,

which, as alleged by the appellant, was resisted by him, in respect he was entitled to have the judgment arrested, upon the same ground on which he had unsuccessfully founded his motion for a new trial. The Court, however, pronounced the following interlocutor:—

> "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 incurred in this action, appoint an account thereof to be lodged, and remit to the auditor to tax the same, and to report."

The defender, Alexander Campbell, appealed. [1]

The cause having been put down for hearing on the merits:—

Appellant's Argument.

Appellant.—1. The objection to the action, as being at the instance of one wrong-doer against others involved in the same delict, is in law well founded. In England it is settled that there can be no contribution among wrong-doers [2], and such also is the rule in Scotland. [3] [**Lord Chancellor**.—Have you any case where a defender, after appearing and consenting to a verdict against himself and others, refused to pay his share in

_____ Footnote _____

[1] *See discussion on the competency of the appeal, which was sustained as an appeal against a final judgment of the Court applying the verdict, and decerning for a certain sum with interest, ante, p. 1.*

[2] *Phillips v. Biggs, Hardres, 164; Merryweather v. Nixan, 8 T. R. 186; Farebrother v. Ansley, 1 Camp. 343; Wilson v. Milner, 2 Camp. 452; Colburn v. Patmore, I Cro., Mees., & Rose., 73.*

[3] *Gibson v. Stewart, 6 Sh. & Dun. 733; M'Ghie v. Butter, 7 S. & D. 797; 1 Bell Com. 236.*

the face of his admission that the verdict was taken of consent, as stated on page 15, appellant's case? In the cases cited it was proved to the jury that the party was a wrong-doer. Here the respondent was not aware of the wrong done.] The rule is of universal application. Besides, stat. 1 Geo. 4. c. 74. imposes penalties on parties "knowingly" offending, whereas other excise statutes authorize conviction whether the party is cognizant or not. The party cannot, in the face of the conviction, allege innocence; the rule applies à fortiori, in a conviction obtained of consent.

2. There was no opportunity of taking the objection before verdict. It was imperative on the Lord Ordinary to remit the cause to the jury roll; the appellant could not reclaim against such remit. [1] This is not one of those collateral points of law which are sometimes disposed of before trial, but a plea to exclude the action. The points of law which the statute provides for the disposal of are points arising during the progress of the cause towards an issue; but the plea under consideration strikes at the subsistence of the cause. It cannot be discussed by sending the cause from one roll to another. Its effect, if valid, is to prevent the cause being in the roll from which it is sent. It should be discussed in limine, but that is prevented by the words of the statute. There is an omission in the statute, by which a wrong is effected, which can only be remedied by arresting the judgment. The issues were as to mere matter of fact, viz., to the amount of a debt; not whether there was a debt; therefore matter for exception

Footnote

[1] *Montgomerie v. Boswell, M'L. & Rob. Rep. 163; Stat. 55 Geo. 3. c. 42. s. 4.; 59 Geo. 3. c. 35. ss. 2. 3. 6. and 15.*

could not arise. [1] It is open to question the materiality of the verdict when judgment is moved. [2] Although the defence be preliminary, or in bar of the action, the party is not precluded from discussing it, if reserved [3]; and even although not reserved, if the plea is repeated on the record, it has been held equivalent to a reservation. [4] [**Lord Chancellor**.—You put it in your case that you did take the objection. You now say it was reserved.] The verdict proceeded on an issue that ought never to have been granted. It was immaterial, hence, non obstante veredicto, judgment should have been given in favour of the appellant.

3. The conclusion of the summons was against the defenders as "conjunctly and severally" liable; the verdict only found the defenders "indebted and resting owing to the pursuer the sum of 1,059 *l.* 5 *s.*1 *d.*, with interest as libelled," which infers a rateable, not a several, liability. The judgment against the defenders "conjunctly and severally" was therefore not warranted by the verdict. [5] [**Lord Chancellor**.—Do not the words "as libelled" cover the whole.] That only means "interest as libelled," there being a separate calculation of interest.

Respondent's Argument.

Respondent.—1. The rule of law as to actions among wrong-doers has no application here. The ground of action is the compromise; not a conviction.

2. The appellant might regularly have urged his objection at different stages of the cause. He could have

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[1] *M'Kenzie v. Ross, 2 Murr. 20; M'Farlane, 3 Murr. 408.*

[2] *Clark, 1 Murr. 185; S. C. in Fac. Coll.*

[3] *Dickie v. Gutzmer, 6 S. & D. 637; and Hopkirk, in foot note, S. C. in 6 S. & D. 639.*

[4] *Johnstone v. Arnotts. 8 S. & D. 383.*

[5] *Clark, ut sup.; Bell's Dig. 537.*

asked the Lord Ordinary to dispose of it as preliminary matter; he might have raised it before the issue clerks [1], or when the issues came to be approved; or he might have availed himself of the ten days allowed to submit the Lord Ordinary's interlocutor approving of the issues to review. But none of those remedies was adopted. The cause was remitted to the issue clerks on the motion of the appellant, who took the second or alternative issue, under which it was open to him to have insisted that the verdict in exchequer was probatio probata of the respondent's guilt. He might have asked the judge at the trial to give a direction in point of law disposing of his plea, and so made it matter of exception; and thus the question would have come under the notice of the Court. But instead of that he proceeded by the incompetent method of a motion for a

new trial, which was refused [2], on the express ground that the appellant should have taken his remedy at the proper time.

3. If the appellant be liable at all, he is clearly liable for the whole sum concluded for. It is not necessary in a verdict or issues to use the words, “conjunctly and severally;” and these words are not mentioned in the forms of issues by the late Lord Chief Commissioner Adam, in his work on jury trial. There is no material discrepancy between the verdict and judgment; on the contrary, the judgment follows directly from the verdict. [**Lord Chancellor**.—There is nothing in the verdict to exclude a several liability.]

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[1] *M'Farlane, Jury Trial, p. 47, 55, and 56.*

[2] *12 D., B., & M., 870.*

Ld. Chancellor's Speech.

Lord Chancellor.—If the argument had been confined to what appeared on the papers, I should have thought it an abuse of your Lordships time to hear the counsel for the respondent. But, as the argument of the appellant seemed to point at a peculiarity in the law of Scotland, as distinguished from that of England, I was desirous to obtain some further information, and the result is, that I am satisfied that there is as little in that point as I was before satisfied there was with respect to the other points in the case.

The facts of the case are very short and simple. It appears that the appellant, and the respondent, and others, were engaged in a distillery; that in the course of certain illegal transactions which took place in the conduct of this distillery by Alexander Campbell and others, who had managed the business, the parties were guilty of an infraction of the revenue laws, by which the whole company (including the pursuer as a partner, though absent and ignorant,) became liable to certain penalties. It appears that a prosecution having been commenced by the law officers of the crown against the company to recover these penalties, Alexander Campbell agreed that it would be expedient to make an arrangement with the officers of the crown, and to consent to a verdict for 3,000 *l.* in order to stop prosecution, finding that they would be subject to a much larger sum if it proceeded. Thus arose a communication between the pursuer and Alexander Campbell; the appellant, therefore, was, in terms, distinctly a party to

that arrangement. It was with his concurrence and his consent that it was done, and it was a verdict by consent. The respondent states that he became subject

to pay a proportion of the sum of 3,000 *l*., and he seeks to recover from the other persons, who are those who really were guilty of the offence, an indemnity against the consequences of that verdict to which he was a party consenting.

Now it would be very strange indeed if by the law of Scotland, or the law of any other country, after such a transaction as that, a party paying the money was to be left to bear the whole burden; because the argument would equally apply to his paying the whole 3,000 *l*., and asking contribution against the others. If this objection could prevail, that because these parties were all guilty of a common offence, therefore out of such a transaction no contribution could arise, it would be an answer to him if he had paid the whole, and demanded contribution only against the other parties. But all that is entirely concluded by what has taken place in the cause, because in the progress of the cause this objection was raised by the defences, namely, that liability could arise out of this transaction.

Various opportunities occurred in the earlier stages of the cause in which the judgment of the Court might have been obtained upon this defence. Those opportunities were not taken advantage of, but ultimately an issue was directed, which embraced the whole question in the cause, the issue being, whether the defenders or any of them are indebted and resting owing to the pursuer the sum claimed, or any part thereof, with the interest thereon, as the balance of the said penalty and expences. Upon that issue the jury could not find in favour of the pursuer without at the same time finding against the defender upon this question. They could not find that the defenders were owing any sums

of money to the pursuer in respect of this transaction, without finding that the transactions were such as to give rise to their liability. It was therefore perfectly competent to the defender to raise the question before the jury, (through the intervention of the judge, it being a point of law,) whether the transaction were such as would preclude the pursuer from any title to ask, against the defenders, any contribution in respect of the sums he had paid. That would have been done by taking the opinion of the judge, and if the judge gave an opinion contrary to what the defenders conceived to be the proper state of the law, they had an opportunity of bringing that judgment before the Court by a bill of exceptions. It appears that no such course was taken, and the jury found a verdict in favour of the pursuer on both

issues, establishing the fact that the pursuer was ignorant of the transaction, and establishing the fact that the defenders were indebted to him on account of the transaction in a certain sum.

Then the appellant, one of those defenders, takes this course: he applies for a new trial. A new trial is refused; then comes an application to the Court of Session to apply the verdict; that is to say, to give judgment conformably to that which the jury had found. Then, at all events, according to the argument at the bar, it was competent to the appellant to show, that notwithstanding the verdict there were objections to the Court proceeding to give judgment to enforce the liability of the defenders to the indemnity of the pursuer. But what the appellant himself states that he did in consequence of this notice was, that he again unsuccessfully endeavoured to convince the Court that the verdict should not be applied, upon the ground

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that it was not sustainable in law. But that had already been decided upon the motion for a new trial; and if he ever had a case for questioning that decision in point of law he had not taken the opportunity to do so, because he had not called upon the judge to state any opinion upon that point. Of course that met with the same result which the motion for a new trial had met with. The Court pronounced judgment in favour of the pursuer.

Now again, at your Lordships bar, (all the opportunities of raising the questions, if the questions were at all sustainable, having been omitted at the proper period in the course of the proceedings in the Court of Session,) the same argument is again raised. I do not say that the parties would be absolutely precluded yet, if the record came here in a state which would allow the question to be raised. But your Lordships are now called upon to deal with a record, of which the verdict of a jury forms part, taken under circumstances which preclude the defenders from questioning it. The question, therefore, is, not whether there is before this House any ground upon which the Court of Session ought to have refused to give effect to that verdict, but whether that verdict is now to be set aside altogether,—the whole matter having come before the jury, the jury having found a verdict, and the appellant having been in a situation in which he cannot question the finding of that verdict. It is therefore quite unnecessary to consider whether there be a distinction in the law of Scotland, as compared with the law of England, upon that subject, because after that which has taken place no question can arise. The case here is, not that the parties, having been jointly guilty of the offence, a joint liability is

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endeavoured to be raised out of those transactions, but it is that the partnership having agreed among themselves to pay a certain sum to relieve themselves from that liability, upon that contract between themselves one party seeks for contribution and indemnity against the others. It is unnecessary to go into that question, because I consider it to have been entirely precluded by the course adopted below.

That exhausts the whole of the appellant's case, as it appears in the printed papers. But then it is said, that although that might be so, yet there is an inconsistency between the judgment which the Court pronounced and the verdict which the jury returned, inasmuch as the jury found that the defenders are indebted and resting owing to the pursuer a certain sum, with interest thereon as libelled; whereas the judgment was that they were jointly and severally liable. I do not make any observations upon that which is not before your Lordships, namely, upon a case which might possibly have occurred, in which the judgment might have appeared to be inconsistent with the verdict. There is no inconsistency, in the way in which I construe the language, between the judgment and the verdict; and I think your Lordships will not be very astute, in construing the terms of the verdict, to find out expressions, and to give effect to expressions out of their natural meaning, for the purpose of defeating the obvious justice of the case. The summons claimed against these defenders jointly and severally, that they owed a certain sum with interest. The jury find that the defenders are indebted and resting owing to the pursuer the sum 1,059 *l*. 5 *s*. 1 *d*., with interest as libelled. Now, if the words as libelled applied to the whole of the finding,

there can be no inconsistency between the verdict and the judgment, because as libelled it was a joint and several liability, and instead of repeating those words in the terms of the finding the verdict of the jury had reference to the terms of the libel in which the joint and several liability is claimed.

But it is not necessary entirely to rest the case upon that, because when the jury find that the defenders are liable, is it inconsistent to say they are jointly and severally liable? are they less liable because they are severally liable ? The verdict is, that they are liable. It remained for the Court to adjudicate upon the extent of the liability as ascertained by the verdict. Supposing the words “as libelled” not to apply to the whole, the sentence would find them liable, but would not discriminate whether they were liable jointly, or whether they were liable jointly and severally. When the case comes before the Court, the Court has this fact found by the jury, namely, that there is a liability. The Court then looks at the case as made in the pleadings, and awards judgment in the terms of the libel, namely, that they are severally as well as jointly liable. Now who is it that objects to it? Why Alexander Campbell himself, the author of the mischief, because he was the very party who agreed that a verdict should be

given to the Crown for the sum of 3,000 *l*. Yet he is the party now heard to object that he ought not to be individually liable to repay to the respondent that which the jury found the respondent is entitled to receive. There is nothing in the facts of the case that would call upon the Court to confine the liability of Alexander Campbell to a joint liability with the others. I see nothing in the terms of the verdict inconsistent with that which the

Court have done, and what they have done is entirely consistent with the terms in which the relief was asked by the summons. I apprehend, therefore, there is nothing in this latter objection, and that upon the facts of the case it is beyond all doubt that this is an appeal which ought never to have been brought to your Lordships bar. I therefore propose to your Lordships to dismiss this appeal with costs.

Mr. ANDERSON, for the appellant, submitted that costs ought not to include the costs of the two petitions by the respondent against the competency of the appeal, which had been refused. [1]

Lord Advocate.—Costs of unsuccessfully resisting as incompetent an appeal afterwards dismissed on the merits had been allowed in Gray v. Forbes, House of Lords, 13th June 1839 [2], but in that case, no doubt, there had been a reservation of the question of costs in discussing the competency, which had been overlooked.

Lord Chancellor.—Unless there be a reservation of the question of costs the House never allows costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and the same is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant:

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[1] *M'L. & Rob. 387.*

[2] *Ibid. 530, 546.*

And it is further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

Solicitors: W. S. Grubbe— MacDougall and Upton, Solicitors.

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