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FORM OF PROCEDURE

IN THE

HOUSE OF LORDS,

UPON

APPEALS FROM SCOTLAND;

COMPRISING

THE FORMS AND REGULATIONS TO BE OBSERVED BY THE SCOTTISH AGENTS.

WITH AN

APPENDIX,

CONTAINING

THE STANDING ORDERS OF THE HOUSE,

A TABLE OF FEES,

AND THE

CLAUSES OF THE ACT OF PARLIAMENT REGARDING APPEALS.

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ADVERTISEMENT.

THE importance of the Scottish Causes which are carried by Appeal to the House of Lords, might of itself, perhaps, render an account of the procedure before that Supreme Tribunal a subject of some interest; but the frequency of Appeals having now, in a great degree, assimilated the House of Lords to a Scottish Court of Law, in which the procedure is continued under forms and regulations very little known in Scotland, an account of these forms and regulations becomes almost necessary, in order to complete the detail of procedure in a Scottish cause.

There is reason, moreover, to believe, that among the practitioners in Edinburgh, who have had occasion to enter Appeals, difficulties upon points of form have arisen, which have left them in uncertainty as to the correctness of their proceedings. To

remove these difficulties, in as far as a statement of the Orders of the House of Lords, and of the practical application of these Orders, will have that effect, is the chief object of the present publication: The Orders themselves, together with the legislative enactments regarding Appeals, will be found in the Appendix; and the modifications introduced in practice, either by the circumstances of particular cases, or by the courtesy of the House, are invariably supported by references to the cases in which they have been sanctioned.

Appeals from the Court of Session are necessarily those to which the author's attention has been chiefly directed; and for the comparatively slight notice of the other Supreme Courts of Scotland, he hopes that their minor importance will be a sufficient ground of apology. For the imperfections and deficiencies in that part which he has been most anxious to render complete, it is to the indulgence of the profession to which his publication is dedicated, that he must look for an apology, and he is sensible that upon that indulgence he must rely in no inconsiderable degree.

WESTMINSTER,
December 1820.

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OF THE COURTS

FROM WHICH

IT IS COMPETENT TO APPEAL.

The Standing Orders of the House of Lords, by which its judicial practice is regulated, refer in general terms to Appeals from "the Decrees or "Sentences of any of the Courts in Scotland," without specifying the courts from which such Appeals may be brought. The general principle that the Court of last resort is open to all who may think themselves aggrieved by the judgments of inferior tribunals, is thus amply recognised, while the power of deciding upon the application of the principle to the judgments of particular courts, is left entire by the House itself, the only authority which can be supposed capable of restraining it.

Of the three supreme jurisdictions of Scotland, the Court of Session, Court of Justiciary, and Court of Exchequer,—and of the Commission of Teinds, and the Jury Court, the sentences are final and conclusive, and must consequently be held to be primarily comprehended in the words of the Standing Orders. The sentences of the Ad-

miralty, Commissary, Sheriff, and other courts of Scotland,[1] are all subject to the review of one or other of the Supreme Courts; and there being no instance on record of an Appeal from any inferior court of Scotland direct to the House of Lords, it may be safely concluded, that their sentences cannot be appealed from, except through the medium of the superior courts, to the review of which they are severally amenable. There is no probability of there ever being an opportunity for a decision of the House to this effect; but should an appeal from an inferior court be upon any pretence attempted, there can hardly be a doubt, that the House would at once reject it, not only as unprecedented, but upon the obvious ground of the House of Lords being the *last resort*, and upon the plain analogy of Writs of Error from inferior courts in England, which by law are not returnable in Parliament, till after passing through all intermediary tribunals.

[1] The Lyon King at Arms, on 31st January 1733, presented an appeal in his own name against David Areskine from a judgment of the Court of Session. *Lords' Journals.*

FORM OF PROCEDURE

IN THE

HOUSE OF LORDS,

UPON

APPEALS FROM SCOTLAND.

PART I.

APPEALS FROM THE COURT OF SESSION.

THE origin of the power of the British House of Peers to review the sentences of the Court of Session, being involved in some obscurity, and there being reason to think that it was founded upon a similar power having existed, or having been assumed to have existed, in the Scottish Parliament, of the exercise of which power, it has been doubted if there is any satisfactory evidence, a brief account of the right of Appeal to Parliament, before the Union, and of the institution of Appeals from the Court of Session to the British House of Peers, is in some degree necessary in

this treatise, and cannot at any rate, it is hoped, be deemed out of place.

The right of Appeal from the Court of Session to the British House of Peers, firmly established as it now is, was not stipulated by the Treaty of Union, nor created under the reserved general power in that Treaty, by any subsequent Act of the Legislature. In the printed minutes of the proceedings of the Commissioners for the Union, there is no notice whatever taken of the subject, although the question of Appeals from the Court of Admiralty is stated to have been discussed, and the result of the discussion appears in the 19th article of the Treaty. In the debates which followed in the Scottish Parliament, the omission seems to have been overlooked; and were the right of less importance, it might be concluded, in the absence of other testimony, that the question had never been mooted in the deliberations of the period. But so far from this having been the case, it appears, by Sir George Mackenzie's account of the proposed Union in 1670, that "the *second* considerable point which did suffer "debate amongst the Commissioners was, Whether Appeals should be received from the Judicatories of either nation to the Parliament of Great "Britain? And albeit this debate was not determined by the Commissioners, but was waved "till the constitution of the Parliament should be "first settled, yet the Commissioners who represented Scotland seemed to contend, with much "justice, that Appeals should not be admitted

"from these Judicatures which were supreme "in that nation, to the common Parliament."[1] Sir George then states, under five heads, the arguments which he supposes were used by the Scottish Commissioners against allowing Appeals; the first of which arguments sets out with the principle, that, "by the law of Scotland, Appeals were "not admitted from the Supreme Judicature there "to the Parliament."

In the observations on the Act of the Scottish Parliament 1457, cap. 62, which declares that causes "perteining to the knawledge of the Lords "of the Session, sall be utterly decided and deter-"mined be them; but ony remeid of appellation to "the King or the Parliament," Sir George takes occasion to remark, that "there is likewise no Ap-"peals from the Session as presently constituted, be-"cause they are invested in all the privileges the "former Session had;" and cites the case of Sir T. Hamilton *v.* Alrud, in 1661, when the Parliament, in a letter to the King, declared that there could be no Appeal from the Lords of the Session. He farther alludes to the debate in 1674, between the Court of Session and the Advocates, upon the competency of such Appeals, when it was decided by a letter from the King "that they were not to "be allowed."

Of this memorable "debate," the particulars will be found in the Act of Sederunt, 25th Janu-

[1] Vol. II. p. 665.

ary 1676, and in the letter to the Court from King Charles the Second, of the 19th of May 1674, entered in the books of Sederunt. It originated in an Appeal presented by the Lord Almond from an interlocutor of the Lords in a cause between him and the Earl of Dunfermline ;[1] and the Court having declared that they would proceed in the cause notwithstanding the Appeal, and would represent the whole matter to the King, his Majesty, upon such representation, wrote the above-mentioned letter, requiring the advocates, who insisted on the right, "solemnly to disowne these Ap-"peals, and all other Appeals and Protestations," upon pain of being debarred the exercise of their functions as advocates. "The Lords," says the reporter of Lord Almond's appealed case, "all being present, found that there was never "an Appeal from the Lords given in in writt."—There is nevertheless a passage in Balfour's Practics to the following effect; "C. ix. It is leasum "to appeall fra the Lordis of Sessioun to the "Parliament. Gif ony man thinkis him heavilie "hurt by the Lordis of Sessioun in pronun-"cing of ane decreit aganis him, he may protest "for remeid of law, and appeall to Parliament. "18th January 1532–3, Cunynghame contra "the Vicar of N., 1. T. C. 502:"[2]—and there

[1] Morison's Dictionary, Vol. i. p. 579.

[2] It is stated in the preface, that the references are to a record which is lost.

is an Act of Parliament, 1535, cap. 32, deciding a point not indeed appealed from the Lords of Session, but "referred" by them to the Parliament for decision; and parties and their procurators were heard upon the interpretation of the point of law in question. Whether these precedents were stated by the advocates in reply to the finding of the Lords, in Lord Almond's cause, cannot now be ascertained; but Sir George Mackenzie mentions, that it was urged, "That by "an Act of Sederunt, anno 1567, protestations "for remede of law were excepted in the Act "discharging murmuration against the Lords; "and that Lethington, *Balfour*, and Hope, in "their practiques, Tit. *Lords of the Session*, do "express these as allowable, nor are they dis-"charged expressly by these Acts."[1]

The advocates having refused to disown their allegations, four of them were debarred their functions; and forty more having in consequence deserted the Court, they were also debarred, till his Majesty having declared that those who did not, before a given day, apply for re-entry, should "never be re-admitted to their functions," they were, after some debating, restored.[2] It is singular that Sir George Mackenzie is among the first-named of the "outted" advocates on this occasion, but it appears in his Life, that it was through

[1] Vol. i. p. 198.

[2] Morison's Dictionary, Vol. i. p. 345.

his endeavours that the Court and the Faculty were reconciled.[1]

These proceedings seem to have settled till 1689, that no Appeal lay from the Court of Session to the Parliament. In the Claim of Rights, however, made on the 11th of April in that year, the Estates of Parliament declare, "That it is the "right and privilege of the subjects to protest "for remeid of law to the King and Parliament, "against sentences pronounced by the Lords of "Session, providing the same do not stop execu- "tion of these sentences." Accordingly, the right of Appeal seems almost immediately to have been resumed. Lord Stair, the most strenuous opposer of the principle of Appeals, mentions, that since that declaration many had both appealed and protested; and it appears that on the 6th of July 1690, a cause was reheard in Parliament from the Court of Session, in which the decree was altered: and between that period and the Union, there appear to have been several other causes appealed from the Court of Session, and adjudged by the Parliament.

It was about this time (1690–93) that the second edition of Lord Stair's Institutes was published; and his Lordship has devoted the greater part of the first title of his 4th book to a consideration of the expediency of Appeals to Parliament.

[1] See his Speech to the Court, in the account of his Life, at the beginning of his Works.

He mentions that some few Appeals having been entered, the subject was taken notice of in the Claim of Right, "whereby *Appeals were disclaim-* "*ed*, yet protestations for remeid of law from the "Session to the Parliament were claimed, and very justly."[1] The distinction between these two proceedings, he afterwards states to be this; "That "in Appeals sometimes the Judge appealed from, "sisted, but was not obliged to sist, unless the "case had been at least dubious, whereas protes- "tation doth not sist process or execution in any "case."[2] It is difficult now to discover in the Claim of Right that the Estates "did particularly "declare *against* Appeals from the Session;"[3] though it is to be presumed that his Lordship rests that opinion upon the reservation as to protests, "providing the same do not stop execution "of these sentences:" But it would seem that even in Appeals there was no compulsion on the Judge to sist execution, so that the distinction is certainly not very palpable: And farther, it is impossible not to notice the apparent inconsistency of particularly distinguishing and explaining proceedings, which, from one part of his Lordship's work, it might be inferred had been unknown to the law: and it is really impossible to reconcile his assertion in section 52, that "there is no custom for "bringing causes unto the Parliament on such

[1] Institutes, Book IV. tit. i. § 1.
[2] Book IV. tit. i. § 61.
[3] Ibid. § 56.

" protestations," with his own opinion of their legality and propriety, and the instances of their being practised, " both against the interlocutors " and definitive sentences of the Lords," which he himself has collected.

It has been mentioned that the question of Appeals does not appear on the printed minutes of the Commissioners for the Union in 1707; and the reasons for suppressing its open discussion, may have arisen from the recollection of a violent dispute in March 1704–5, between the Lords and Commons House in England, regarding the right of the former to hear Writs of Error in certain cases, where it was alleged the privileges of the Commons were involved. In the course of this dispute, the Commons reminded the House of Lords, not in the most courtly terms, of their resolution of the 28th May 1675, " that there lay " no appeal to the Judicature of the Lords from " Courts of Equity;"[1] and added, that they could not but see " how your Lordships are contriving " to bring the determination of liberty and pro- " perty into the bottomless and insatiable gulf of " your Lordships' Judicature."[2] In De Foe's Observations on the Proceedings of the Commis-

[1] *Vide* Commons' Journals, 28th May 1675. It is somewhat remarkable that it was about this time that the dispute in Scotland above mentioned was in full vigour, between the King and the Session on the one side, and the advocates on the other.

[2] Commons' Journals, 6th March 1704-5.

sioners for the Union, on 14th June 1706, it is stated, " that there had like to have happened a " difficulty about Appeals in causes of private " right in Scotland. Before the Union, Appeals " in law lay from the Lords of Session to the " Parliament; and the House of Peers of Great " Britain being now to be the Sovereign Judica- " ture of Great Britain, there could be no Appeals " but to them in Parliament."[1] He then proceeds to state the difficulties that occurred in the arrangement of this point, and gives a copy of a " Scheme," which was handed about, for remedying the evils anticipated to the Scots, from the distance of the seat of Parliament, &c. The scheme was to erect a Court in Scotland, " dele- " gated from the Peers of Britain assembled in " Parliament, to be named annually or triennial- " ly, or every Session, or otherwise, as in the " Treaty of Union should be agreed." In this scheme, the principle that " the Scots have now " an Appeal from the Lords of Session, which " right of Appeal must not die," was clearly laid down, and seems to have been the chief ground upon which the Commissioners deemed the subject entitled to consideration; " but," the historian concludes, " *there were reasons* why the pro- " posal was not farther entered upon, though " both sides approved of the method." And here the matter drops, till the entry of an Appeal

[1] History of the Union, p. 158, *et seq.*

to the British House of Lords, on 16th February 1707–8, by the Earl of Roseberrie, from a decree of the Court of Session, pronounced on the 1st February 1695.[1] Lord Roseberrie, it is to be observed, was one of the Scottish Commissioners for the Union, and one of the elected Peers; and the Appeal was presented when twelve of the sixteen (Lord Roseberrie among the number) were present. The proceedings which followed upon this Appeal seem to have been taken merely for the purpose of regulating future proceedings in similar cases. The respondent was ordered to have a copy of the Appeal, and to put in his answer within four weeks (on 15th March), as in English Appeals. On the 6th of March following, the appellant applied by petition for an order on the keeper of the records, to deliver to his agent extracts of depositions, &c. in the Court below. The order was thereupon granted, and the extracts signed by the Lord Clerk Register, or his deputy, were declared to be good evidence at the hearing of the cause. The respondent having failed to lodge his answer on the day appointed, a motion

[1] Lord Fountainhall reports an application of Lord Roseberrie on this Appeal, "showing he had obtained a warrant from the "House of Peers in England to cite Sir John Inglis of Cramond to "give in his answers on the Appeal against him, anent his fishing "in that water, and advising the Lords to authorise their clerks to "send up their principal depositions of the witnesses to London, "for verifying his Appeal. The Lords delayed giving any such "order, till they saw a warrant from the House of Peers to that "effect." Vol. II. p. 438.

was made on the 24th of March on behalf of Lord Roseberrie, "That the House would ap-"point a peremptory day for Sir John Inglis (the "respondent), to put in an answer to the Appeal;" and a Committee was appointed "to consider of "the motion, and of a petition of Sir John Inglis "relating to that matter,[1] and to report to the "House their opinion in this case." The report of this Committee, three days afterwards, is in the following terms:—"That it is the opinion of the "Committee, that the respondents, in this and all "other cases of Appeals from Scotland, do put in "their answers as respondents do in cases of Ap-"peals from the courts in England, within the "time appointed by the House; and that the "Clerk Register and his deputies, the principal "Clerks of Session, shall give authentic copies of "the proofs and extracts of the proceedings to ei-"ther party that shall require them, at his proper "charge, to be made use of at the bar of the "House." An order to this effect was thereupon made; and upon this order the House acted on the 14th of December thereafter, in the case of Gray *v.* The Duke of Hamilton, the next Appeal presented, and has acted ever since. No farther proceeding whatever was taken in Lord Roseberrie's Appeal, and it may be reasonably concluded, from the decree appealed from having been

[1] The purport of this petition does not appear on the Journals.

twelve years pronounced,[1] and from the other circumstances above stated, that it was brought for the sole purpose of settling the competency, and regulating the procedure of Appeals from the Court of Session in Scotland to the British House of Peers.[2]

The Standing Orders of the House then in force regarding Appeals, were now, with an extension of time, made to include Scotland; and upon the next Appeal after the Union, which was that of Sir Alexander Brand, from a decree of the Lords of Treasury and Exchequer, entered on the 10th February 1708–9, an order was made on 19th April 1709, "That after an Appeal shall be received by this House from any sentence or decree given or pronounced in any court in Scotland, and an order made by this House for the respondent to answer the said Appeal, and notice of such order duly served on the respondent, the sentence or decree so appealed against, from such time, ought not to be carried on into execution by any process whatsoever."

Appeals from Scotland soon became very numerous, and the effects of the above order were in many cases of a pernicious nature. Parties en-

[1] The Standing Order, limiting the time for bringing Appeals to five years from the extracting of the decree appealed from, had not then been made.

[2] The Appeal was dismissed, with a great number of others, for want of prosecution, by order of an Appeal Committee, 29th March 1720.

tered Appeals for no other purpose than to delay execution, and, as the time for hearing approached, they withdrew them at the small sacrifice of payment of the respondent's costs.[1] The notoriety of the practice, and the accumulation of these Appeals, drew the attention of the Court of Session; and their Lordships represented the matter to the Legislature in 1807;[2] and this representation, with other circumstances, led to the very important alteration in the law regarding Appeals, effected by the Scottish Judicature Act of 1808.

[1] By a return to an order of the Lords for an account of the number of Appeals from England, Scotland, and Ireland, from 1801 to 1808 inclusive, it appears, that of a total of 281 Appeals from Scotland, presented during these years, 79 only had been heard. Of these 79, 54 were affirmed, 13 reversed, and 12 remitted with instructions. The number of Appeals from England, during the same period, was 27; of which number, 9 were heard; and of these 9, 6 were affirmed, and 3 reversed.

[2] Answers of the Lord President and ten of the Judges, to questions put to them at the bar of the House of Lords, on 23d April 1807, dated 14th April 1808. Printed by order of both Houses.

OF THE JUDGMENTS FROM WHICH IT IS COMPETENT TO APPEAL.

BEFORE the passing of the act of the 48 George III. cap. 151, the competency of Appeals from the Court of Session was seldom questioned upon any ground arising out of the nature of the judgment appealed from. There are, however, instances of Appeals being dismissed as premature; where, for example, the appellant had reclaimed against part of the interlocutor appealed from, and the respondent had answered his reclaiming petition;[1] or where mutual reclaiming petitions against separate parts of the interlocutor appealed from had been presented,[2] and under other circumstances. Appeals from interlocutors of the Lord Ordinary, not reviewed by the Court, were also presented.

The act above mentioned settled the judgments from which Appeals should thenceforth be allowed, in these words:—

"And be it enacted, That hereafter no Appeal "to the House of Lords shall be allowed from in- "terlocutory judgments; but such Appeals shall "be allowed only from judgments or decrees on

[1] Corbet *v.* Crosbie, 25th April 1759. *Lords' Journals.*
[2] Wemyss *v.* Mackay, 23d May 1751. *Ib*

"the whole merits of the cause, except with the "leave of the Division of the Judges pronoun- "cing such interlocutory judgments; or except "in cases where there is a difference of opinion "among the Judges of the said Division; nor "shall any Appeal to the House of Lords be al- "lowed from interlocutors or decrees of Lords "Ordinary, which have not been reviewed by the "Judges sitting in the Division to which such "Lords Ordinary belong; provided, that when a "judgment or decree is appealed from, it shall "be competent to either party to Appeal to the "House of Lords, from all or any of the inter- "locutors that may have been pronounced in the "cause, so that the whole, as far as it is neces- "sary, may be brought under the review of the "House o f Lords."[1]

The judgments referred to in this clause are of three kinds—Final Judgments of the Court of Session—Interlocutory Judgments—and Judgments of the Lord Ordinary. Of these in their order.

I. *Final Judgments of the Court of Session.*

WITH regard to judgments pronounced by either Division of the Court, upon the whole merits of a cause, that is, judgments which, if allowed to become final, would put an end to all

[1] 48 Geo. III. cap. 157, § 15.

the points of difference between the parties, there can be no doubt of the competency of appealing. But 1. In certain cases of judgments upon points of difference, which arise after a final judgment on the merits, Appeals are expressly prohibited by the Act of 1808, already quoted, which, after empowering the Court of Session to make regulations as to interim possession, execution, &c. pending an Appeal, enacts, § 18, "That it "shall not be competent, by Appeal to the House "of Lords, touching the regulations so made, as "to such *interim possession, execution,* and *pay-* "*ment of expenses or costs,* to stop the execu- "tion of such regulations as shall have been so "made as aforesaid, regarding the same."[1]

2. Appeals are also prohibited by Acts of the Legislature,[2] from judgments upon points of difference, arising out of the line of procedure ordered to be adopted in the cause, as judgments granting or refusing a trial by Jury, or granting or refusing a new trial.

3. The following clause in the Bankrupt Act, although it contains no express prohibition of Appeal, has nevertheless given rise to doubts upon the competency of Appeals from orders of the Court, in such cases, made after Appeal. "And be it "further enacted, That if any Appeal shall be taken

[1] See the case of Stein *v.* Lady Hadinton, 20th Nov. 1811. Fac. Coll. Vol. xv. No. 106.

[2] 55 Geo. III. cap. 42, § 4 and 6, and 59 Geo. III. cap. 35, § 15, 16, and 17.

"against any order or interlocutor of the Court of "Session, or against any order of the Lord Ordi- "nary upon the Bills, in the execution of this "Act, it shall be lawful and competent to the said "Court in time of Session, and to the Lord Ordi- "nary on the Bills in time of Vacation, or during "any recess, notwithstanding such Appeal, to make "such orders, and direct such proceedings, as shall "appear to be necessary for preventing the estate "of the debtor from being embezzled, secreted, "damaged, or delapidated, while the Appeal is "pendent; and every step may, in the meantime, "be taken in the recovery of the bankrupt estate, "and the distribution thereof, that is not repug- "nant or injurious to the interest which the party "appealing by the Appeal insists upon."[1] The confusion to which Appeals from such orders might lead, seems a strong argument against their expediency; but there is no decision of the House of Lords upon the question. There is, however, at present before the Appeal Committee, a petition of the trustee on a bankrupt estate, against the competency of such Appeal; and the decision upon that petition will settle the point.

4. In cases arising out of private or local acts, where all right of Appeal from judgments of any court, upon the effect of the Act, or the procedure under it, is expressly and totally taken away by the Act itself, Appeals from judgments of the

[1] 54 Geo. III. cap. 137, § 67.

Court of Session finding in terms of such Act, may be presumed to be incompetent. The same presumption will hold in cases where, *natura rei*, the right is taken away by inference, as in judgments of the Court of Session upon Acts for selling entailed property, or exchanging entailed for unentailed property, and the like; under which description of Acts, the Court of Session sit less in a judicial than in a parliamentary capacity, as Commissioners for a specific purpose. In the Appeal of Mrs. Fullarton and Mrs. Mackay (1816), from an interlocutor declaratory of a private Act of Parliament being fulfilled, and certain properties vested in terms thereof, Sir Hew Dalrymple Hamilton, the respondent, petitioned the House against its competency, upon the ground of the Act having declared, that upon certain measures being completed, the property in question should, "from thenceforth, "*be vested*" in him, which declaration was entirely legislative, and consequently unquestionable in any court whatever. The Appeal Committee, to which Sir Hew's petition was referred, reported to the House, that the Appeal ought not to be received, and it was accordingly dismissed.[1]

The decision upon this case (and it is believed to be the only one since 1808) cannot, however, it is conceived, be considered as barring all Appeal from a judgment pronounced by the Court of Session, either in contradiction to the orders given, or

[1] *Lords' Journals.* 12th March 1816.

exceeding the powers conferred on them by the Act in dispute; but were the competency of such Appeal questioned, it would, it is to be supposed, be incumbent on the appellant to show, *ex facie*, that his Appeal was grounded upon such contradiction or excess of power.

II. *Interlocutory Judgments.*

THE House of Lords, by Standing Order of the 9th April 1812,[1] has required that the leave given to Appeal,[2] or the difference of opinion among the Judges upon interlocutory judgments, shall be certified by counsel upon the petition of Appeal.

Prior to the date of this order, it was usual to state in the petition, that such leave had been given or difference of opinion had existed; but in the beginning of Session 1812, there having been some Appeals from interlocutory judgments, without either of these requisites,[3] and a dispute having arisen between parties in the case of Sundius *v.* Sheriff, as to the difference of opinion among the Judges, the House found it necessary to di-

[1] See Appendix.

[2] In a very recent case the leave was prayed for in a petition to the Court, to which answers were ordered, and an interlocutor pronounced, granting leave to Appeal. The time for appealing in the current Session of Parliament had necessarily elapsed; but upon a petition from the appellant, stating the cause of the delay, his Appeal was allowed to be received, though beyond the time limited. *Arbuthnot v. Gibson*, presented 22d July 1820.

[3] Fraser *v.* Macdonnell. Masterton *v.* Meiklejohn. *Lords' Journals.*

rect the facts to be certified as above stated. In Sundius's case, the point appealed related to the admissibility of certain evidence which had been *unanimously* rejected by the Court, on 26th November 1811. Upon advising a reclaiming petition of the appellant, on 19th December thereafter, two of the Judges stated, that as the cause might go to Appeal, it might be proper to take an answer, but the majority of the Court did not think an answer necessary. Sundius, the appellant, presented a petition, praying for leave to Appeal from these judgments, and in the meantime entered an Appeal, upon the ground of there having been a difference of opinion among the Judges. The Court, on the 23d of January 1812, *unanimously* refused his petition for leave to Appeal; and the respondent, Sheriff, thereupon petitioned the House of Lords, stating in what the alleged difference of opinion consisted, and founding upon the implied admission of the appellant, that it could not entitle him to Appeal, he having thought it necessary to crave leave to do so; and he produced certified copies of the appellant's petition for that purpose, and of the interlocutor unanimously refusing it. The respondent's petition was referred to a Committee then sitting upon similar Appeal matters, and the case was considered on the 20th of February 1812: The appellant tendered certificates of two counsel, that there had been a difference of opinion among the Judges, and also notes of what had been said by their Lordships on the

occasion: But without the Committee having come to a decision upon that particular case, it was upon the 25th of March 1812 moved in the House and ordered, "That in all Appeals now depending in this "House, from any interlocutory judgment of any "Division of the Lords of Session in Scotland, the "counsel who severally signed the said Appeals do "certify to this House, that leave was given by the "Division of the Judges pronouncing such inter-"locutory judgments, to the appellant or appel-"lants, to present such petition of Appeal, or "that there was a difference of opinion amongst "the Judges of the said Division, pronouncing "such interlocutory judgment." The appellant now petitioned the House, stating his having tendered certificates of counsel as above mentioned, and offering, in addition, the affidavit of the solicitor in the Court below, that difference of opinion had existed. The House, after hearing the agents on 8th April 1812, "Ordered, that "the said Appeal be deemed regularly brought, "on production of a certificate of two counsel in "the Court below;" and the next day the Standing Order above referred to was made.[1]

Cases have since occurred in which the counsel upon each side have not been agreed as to what was difference of opinion among the Judges. The Earl of Cassilis' Appeal against Sir J. Maxwell, 12th February 1819,[2] was certified by his

[1] *Lords' Journals.* [2] *Ibid.*

counsel, as from an interlocutory judgment upon which there had been such difference of opinion. The respondent petitioned the House to dismiss the Appeal, and produced a counter-certificate of three counsel that the Court had been unanimous at pronouncing the last interlocutory judgment appealed from. The fact was, that on pronouncing an interlocutory judgment of the 23d of May 1818, Lord Bannatyne had dissented; but at a second advising of the cause on the 9th of July, his Lordship was absent from indisposition, and the Court adhered. There was produced with the respondent's petition, an extract from the Sederunt-book of Court, certified by one of the principal Clerks of Session, that Lord Bannatyne had been on the day of pronouncing the interlocutor last appealed from, excused on account of indisposition. The Appeal Committee, to which the petition was referred, reported to the House, that in their opinion, the Court of Session should be desired to certify the state of the fact, and it was so ordered: but, before the certificate was returned, the appellant prayed for leave to withdraw his Appeal as irregular, and it was withdrawn.

In a case at present in dependence, the respondent states, that the certificate of the appellant's counsel, of the difference of opinion among the Judges, is grounded upon the expression by one of their Lordships, of a wish to see an answer to a petition, which was ultimately refused unanimously without answers. Should the case go on before

the Committee, it seems probable that a method of ascertaining the real state of the opinions of the Court, similar to that adopted in the above case of Earl Cassilis, will be resorted to.

III. *Judgments of the Lord Ordinary.*

WHEN a final sentence upon the merits of a cause has been pronounced by either Division of the Court, it is not unusual to return the cause to the Lord Ordinary before whom it depended, for the purpose of settling the expenses, ordering possession or restitution as found by the judgment of the Court; and from the interlocutor of the Lord Ordinary upon the returned cause, it is not, as it is believed, usual to reclaim. This mode of procedure in the Court has led to an infringement of the *letter* of the statute, in appealing from interlocutors of Lords Ordinary, although the permission in practice of such infringement is decisive of the intent and spirit of the law in that particular.

The section of the statute above quoted makes no distinction of interlocutors of Lords Ordinary, pronounced under any circumstances; "Nor shall "any Appeal to the House of Lords be allowed "from interlocutors or decrees of Lords Ordinary, "*which have not been reviewed by the Judges* "*sitting in the Division to which such Lords* "*Ordinary belong*." Nevertheless, since the passing of the Act, interlocutors of Lords Ordi-

nary, decerning for expenses, approving of the auditors' report, &c. *not reviewed by the Court,* are almost daily appealed from, and the time for appealing reckoned from the date of such unreviewed interlocutors. Indeed, there is a case of an application of an appellant, to be allowed to add to his Appeal an interlocutor of this description, pronounced after presenting his petition, "and "otherwise to include the same in the *gravamen* "of his Appeal;" and this application was reported to the House by an Appeal Committee as fit to be granted, and the interlocutor was added accordingly.[1]

It is important, however, to notice, that during this practice, there cannot be found, after search, any instance of an application by a respondent to have an Appeal dismissed as incompetent, on the ground of its being brought from an unreviewed interlocutor of a Lord Ordinary on *the point of expenses*;[2] and that in one instance of an application by a respondent, on the ground that the Appeal was from such an interlocutor on the points of "*rendering an account of rents, delivering* "*titles, and ceding possession,*" the Appeal was dismissed the House. In this case the respondents

[1] Bruce *v.* M'Leod, 12th February 1819. *Lords' Journals.*

[2] Suppose the case of expenses being given to the party losing the suit (as in Grieve *v.* Cunningham, Mor. Dict. 28th November 1807), and the interlocutor to this effect being pronounced by the Lord Ordinary upon a remit, an Appeal direct from the Lord Ordinary by the party gaining the suit could surely not be held to be competent.

stated in their petition (20th March 1809), that they had on the 26th of January obtained a final decree in their favour in the cause between them and the appellants, who on the 20th of February thereafter entered their Appeal; but in order to bring such entry within the time limited by the Standing Orders for bringing Appeals, the appellants had included in their Appeal two subsequent interlocutors of the Lord Ordinary, of the 2d and 12th of February, "whereby they were directed "to render an account of rents, deliver titles, and "cede possession;" which interlocutors had not been reviewed by the Division to which the Lord Ordinary belonged, and were consequently, by the Act of Parliament quoted, not competent to be brought before the House of Lords by Appeal. The Committee to whom the petition was referred, after hearing the agents for both parties, reported on 19th June 1809, that the Appeal was not regularly brought; and their report was agreed to.[1]

In the case of Barclay, Perkins, & Company, *v.* Finlayson, (16th November 1814), the respondent petitioned against the Appeal nearly on the same grounds; but the interlocutors of the Lord Ordinary, which were alleged not to have been reviewed, were in point of fact not appealed from, as they were virtually in favour of the appellants; and the Appeal was brought from interlocutors of

[1] Ogilvy and Graham *v.* Ogilvy and Wedderburn, *Lords' Journals,* 20th February 1809. Case not reported.

the Court, declaring the appellants precluded from reclaiming against an Inner-House interlocutor: Besides, the Lord Ordinary's interlocutors had been reviewed and altered, though allowed to become final *quoad* the appellants. This case was compromised before the Appeal Committee reported upon the petition.

OF THE TIME LIMITED FOR BRINGING APPEALS.

Standing Order, 13th July 1678.

AN Appeal to the House of Lords from a decree of the Court of Session, pronounced during the sitting of Parliament, may be brought within twenty days after the date of such decree; if pronounced during the recess, within fourteen days after the first day of the meeting of the succeeding Session of Parliament. The right of Appeal during the first fifteen days of a Session of Parliament lasts for five years, and fifteen days of the Session following these five years. This period is to be reckoned, not from the date, but from the extracting of the decree to be appealed from; and in cases where the person entitled to such right of Appeal is under the age of twenty-one years, or covert, *non compos mentis*, imprisoned, or out of Great Britain or Ireland, the period, so reckoned, is extended to "five years next

Standing Order, 24th Mar. 1725.

"after his full age, discoverture, coming of sound "mind, enlargement out of prison, or coming into "Great Britain or Ireland, and fourteen days to "be accounted from and after the first day of the "Session or meeting of Parliament next ensuing "the said five years, but not afterwards or other-"wise."[1]

A practice prevailed for some time in the Court of Session, of presenting a bill of suspension of a threatened charge upon a decree, within a short time of the expiration of the twenty days from the date of such decree, thereby renewing the right of Appeal in the current Session of Parliament, for twenty days after the date of the interlocutor refusing the bill of suspension; but the decision of the Court in the case of Sharp and Mackenzie *v.* Bickerdike and Company,[2] put an end to that practice, which was held to be a mere device to evade the Standing Order of the House of Lords, and the application was accordingly avoided by rejection, without any written deliverance.[3] It was stated by one of the Judges, that he had adopted a similar method in a case of Macdonnell of Glengary; so that any evasion of the Standing Order of the House of Lords in this respect, by offering an incompetent representation,

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[1] See Appendix.

[2] Faculty Collection, Vol. xv. No. 230. 5th June 1810.

[3] The Lord Ordinary had refused the bill in writing; but an appeal from his interlocutor, before being reviewed, was incompetent. See *Supra*.

petition, or bill of suspension, with the view of obtaining an interlocutor of refusal, is thus rendered impracticable.

OF INTIMATION.

Standing Order, 9th April 1812.

THE first step to be taken by the agent of a party intending to Appeal, is to give notice to the agent of the opposite party of such intention, and of the time when his Appeal is intended to be presented. A simple written notice to this effect, made in the usual form of Court of Session intimations, is sufficient, the Standing Order directing merely, that "a notice shall be given." "And the day on which such notice was given, "or caused to be given, shall be indorsed by the "agent or agents for the petitioner, on the back "of the said Appeal." Of this indorsement, called the Certificate of Intimation, the following is a form:—

"I, G H, writer to the signet, agent of the petitioner in the within Appeal, do hereby certify, that upon the day of , I gave "notice to M M, the known agent in the Court "of Session of C D (the respondent), that a petition of Appeal against the interlocutors within "complained of, was intended to be presented to "the House of Lords on the day of "instant, or as soon thereafter as conveniently "may be.

"G H."

OF THE PETITION OF APPEAL.

THE petition ought to state briefly the grounds of the action, and the procedure in it down to the last interlocutor appealed from. It is not necessary to enter into the merits of the question at issue: The dates of the various proceedings and interlocutors ought to be given, and the interlocutors complained of must be inserted and particularised by date on the margin as the first, second, and third interlocutor of the Lord Ordinary, or of the Court of Session, appealed from.

It frequently happens, that some of the prior interlocutors in a cause have been favourable to an appellant, and also that parts only of interlocutors are unfavourable to him; in such cases care must be taken in framing the petition, to state in the narrative that parts only are appealed from, and in the summing up, to specify the particular findings against which the Appeal is brought: And this being a branch of the subject upon which the agent in London cannot, owing to his previous ignorance of the cause appealed, have any certain rule to observe in revising the petition, the following style of an Appeal in a supposed cause, in which the findings are made somewhat complicated, is given as a guide to the Scottish agent, for a case of the

description in question, and it will serve also as a general form for every case.

To the Right Honourable the LORDS SPIRITUAL and TEMPORAL in Parliament assembled,

The HUMBLE PETITION and APPEAL of A B, Merchant in Edinburgh;

Sheweth,

THAT upon the 16th of June 1812, an action was raised before the Court of Session in Scotland, at the instance of C D, against E F and your petitioner, concluding for exhibition and reduction of a disposition granted by the said C D to your petitioner, of certain houses in Edinburgh, also of a disposition thereof by your petitioner to the said E F, and of the respective sasines on the said dispositions, and also for restitution of the property thereby conveyed, and rents thereof, to the said C D; at least, that your petitioner should be decerned and ordained to grant to the said C D a bond of annuity for £80, payable to the said C D, during all the days of his life, with interest of the termly payments of the same after they should become due, as the alleged consideration for which the said property was sold to your petitioner, and also to pay to the said C D the sum of £ sterling, being the amount of said annuity and interest, from the time when the said bond should have been granted, to the term of Martin-

mas next, after the date of citation, and in time coming till the same should be paid, together with £ sterling of damages, besides expenses of process.

That this action having come to depend before Lord —— Ordinary, defences were lodged for your petitioner, stating, that he was ready and willing to implement what he had undertaken, but that the property, which the pursuer was bound to deliver unincumbered to your petitioner, was found to be charged with an heritable debt of £110 to J K, and there were also several inhibitions against the pursuer for debts, amounting to £190 sterling, all prior to the date of your petitioner's purchase; and that, moreover, arrestments had been used in your petitioner's hands, at the instance of creditors of the said C D.

That the Lord Ordinary, upon hearing parties procurators, on the 26th of February 1813, pronounced an interlocutor sustaining the defences for E F, and assoilzieing him from the action, and sustaining the defences for your petitioner, against the reductive conclusions of the libel, finding the pursuer and your petitioner mutually bound to implement their agreement, and appointing the pursuer to give in a condescendence of what he claimed.

That a condescendence was accordingly lodged for the said C D, which was followed by answers for your petitioner, and these with replies and duplies; and, of this date, the following interlocu- 12 May 1814.

First interlocutor of the Lord Ordinary in part appealed from.

tor was pronounced:—"The Lord Ordinary having considered this condescendence, answers, replies, duplies, and whole process, Finds, that by a disposition, dated day of , the pursuer disponed to the defender certain subjects in Edinburgh; that by missive letter of same date, the defender became bound to grant to the pursuer (as the price of the subjects) a bond of annuity for £80, payable half-yearly during his life, and to pay a sum of £50 heritably secured upon the subjects: finds that the defender entered into possession soon after, completed his title, and sold the subjects to E F: finds that the defender has not yet implemented his part of the bargain, and that the delay has been occasioned by the pursuer not having recorded discharges of certain inhibitions executed against him prior to the sale: finds that the defender is bound to grant to the pursuer a bond of annuity for £80 within six months; and that he must account to him for the said sum and interest yearly, as from Whitsunday 180 , the pursuer being always bound to pay to the defender the difference between the sum of £50, and the sum actually paid by the defender to the heritable creditor as due to him at Martinmas 18 , and to discharge all other incumbrances affecting the said subjects, and decerns: finds the defender liable in expenses, allows an account thereof to be given in, and remits the

same to the Auditor of the Court to tax and to report."

That your petitioner having represented against this interlocutor, the Lord Ordinary, upon advising the representation, with answers, was pleased, of this date, to pronounce the following interlocutor:—"The Lord Ordinary having considered this representation and answers, allows J K to be examined as a witness in the cause, and grants warrant for letters of incident diligence at the pursuer's instance against him, and in the mean time decerns against the representer for £200 sterling, payable on 25th December next; and if not then paid, allows an interim-decree to go out for the same, and decerns for expense of extract."

22 Nov. 1815. Second interlocutor of the Lord Ordinary appealed from.

That your petitioner lodged a short representation against this interlocutor, which was appointed to be answered at the bar; and the following interlocutor was then pronounced:—"The Lord Ordinary having heard parties procurators, allows the examination of J K to proceed; but appoints his deposition to lie *in retentis*, subject to the future review of the Lord Ordinary or the Court, and, in so far, refuses this representation." The said J K was accordingly examined, and his evidence sealed up: and the Lord Ordinary, of this date, refused the short representation so far as concerned the interim payment.

16 Dec. 1815. Third interlocutor of the Lord Ordinary in part appealed from.

That your petitioner now lodged a full representation against the interlocutor of 22d Novem-

31 Jan. 1816. Fourth interlocutor of the Lord Ordinary appealed from.

ber and 16th December 1815, in so far as these allowed the examination of J K, and stated that he would pay the £200 decerned for; and his representation being answered, the following interlocutor was, of this date, pronounced by the Lord Ordinary:—"Having considered this representa- "tion, and answers thereto, refuses the desire of "the representation, and adheres to the interlocu- "tor complained of."

14 May 1816. Fifth interlocutor of the Lord Ordinary appealed from.

That your petitioner paid the £200, but submitted the Lord Ordinary's judgment to the review of the Second Division of the Court by petition; upon advising which, their Lordships, of this date, pronounced this interlocutor:—"The "Lords having heard this petition, refuse the de- "sire thereof, and adhere to the interlocutor re- "claimed against."

14 June 1816. Sixth interlocutor—of the Court, appealed from.

Thereafter, this interlocutor was pronounced by the Lord Ordinary:—"The Lord Ordinary cir- "cumduces the term for proving, allows the depo- "sition of J K to be opened, and makes avizan- "dum therewith, and with the whole process." And, of this date, his Lordship pronounced the following interlocutor:—"The Lord Ordinary "having considered the examination of J K, and "having resumed consideration of the full repre- "sentation for the defender, and of the answers "thereto, refuses the desire of the representation, "and adheres to the former interlocutor."

6 July 1816. Seventh interlocutor—of the Lord Ordinary, appealed from.

12 Nov. 1816. Eighth interlocutor—of the Lord Ordinary, appealed from.

That another representation having been lodged, and appointed to be answered, the Lord Ordinary,

on consideration thereof, pronounced an interlocutor in these terms:—"The Lord Ordinary having "considered this representation, answers, and "whole process, Finds, that in consequence of the "defender having made payment to the pursuer "of the sum of £200, under an interim decree, "and in consequence of the examination of J K, "the interlocutors of the 12th May 1814 and "12th November 1816 are no longer applicable "to the present state of the process; therefore re- "cals these interlocutors, and of new finds, *in ter- "minis* of the said interlocutor of the 12th May "1814; excepting that, from the sum thereby or- "dained to be accounted for by the defender to "the pursuer, the sum of £200 now paid shall be "deducted, the pursuer being always bound to pay "to the defender the difference between £50 and "the sum actually paid by the defender to the he- "ritable creditor, as due to him at Martinmas "18 ; and to discharge all other real incum- "brances affecting the subjects, and decerns: finds "the defender liable in expenses hitherto incurred; "allows an account thereof to be given in, and re- "mits the same to the Auditor of Court to tax "and report."

23 Jan. 1817. Ninth interlocutor—of the Lord Ordinary, in part appealed from.

That your petitioner presented a petition to the Court against this interlocutor; and his petition being appointed to be answered, the Lords, upon resuming consideration thereof, "adhered to the "interlocutor complained of, and refused the de- "sire of the petition." Your petitioner reclaimed,

18 Dec. 1817. Tenth interlocutor—of the

Court appealed from.

12 May 1818. Eleventh interlocutor—of the Court appealed from.

and the Court appointed the petition to be answered; and, upon advising it with answers, pronounced the following interlocutor:—"The Lords "having resumed consideration of this petition, "with the answers thereto, refuse the desire of "the petition, and adhere to the interlocutor re-"claimed against."

That your petitioner is advised, and humbly conceives that the foresaid interlocutor of the Lord Ordinary of the 12th May 1814, excepting in so far as it finds the respondent bound to pay to your petitioner the difference between £50 and the sum actually paid by your petitioner to the heritable creditor, as due to him at Martinmas 18 , and to discharge all other real incumbrances affecting the subjects; the foresaid interlocutors of the Lord Ordinary, of the 22d November and 16th December 1815, so far as the latter allows the examination of J K; of the 31st of January and 14th May 1816; the interlocutors of the Lords of the Second Division, of the 14th June 1816, and the interlocutors of the Lord Ordinary, of the 6th July and 12th November 1816, and of the 23d January 1817, excepting in so far as the latter recals such parts of the interlocutor of the 12th May 1814 as are appealed from, and as it recals the said interlocutor of the 12th November 1816; and excepting in so far as it finds the respondent bound to pay to your petitioner the difference between £50 and the sum actually paid by your petitioner to the heritable creditor, as due to him at Martinmas

18 , and to discharge all other real incumbrances affecting the subjects; the said interlocutors of the said Lords of the Second Division, of the 18th December 1817 and 12th May 1818, are erroneous, and contrary to law and equity; and your petitioner being thereby aggrieved, humbly Appeals from the same to your Lordships, and prays,

That your Lordships will be pleased to reverse, vary, or alter the said interlocutors, so far as complained of, and grant warrant for the usual summons upon the said C D, to answer to the premises; and that service of your Lordships' order upon him, or upon any one of his known agents in the Court of Session in Scotland, may be deemed good service; or otherwise, that your Lordships will give your petitioner such relief in the premises as to your Lordships, in your great wisdom, shall seem meet.

And your petitioner will ever pray,

(Signed by two Counsel,) { "T. T. "L. F."

OF THE CERTIFICATE OF COUNSEL.

Standing Order, 3 March 1697.

THE two counsel who sign the petition must have been counsel in the cause,[1] and must add a certificate that there is, in their opinion, reason-

[1] The Standing Order allows the petition and certificate to be signed by two counsel, "who shall attend as counsel at the bar of

able grounds of Appeal; which certificate may be in the following or similar terms:—

"We who were of counsel for the petitioner "in the Court of Session in this cause, do hereby "certify, that there is, in our opinion, reasonable "cause of Appeal from the interlocutors complain-"ed of." [*If the Appeal is from an interlocutory judgment, add*] "And that leave was given "to Appeal, by the Judges pronouncing the same;" *or*, "that there was a difference of opinion among "the Judges pronouncing the same," [*as the case may be.*]

"T. T.
"L. F."

The agent in Edinburgh then indorses the certificate of intimation already mentioned, and transmits the petition to the agent in London. The petition is written upon unstamped paper, in the common form, and is engrossed upon parchment by the agent in London, who then gets it presented to the House.

"this House, when the said Appeal shall come on to be heard," but this is seldom necessary in Scottish Appeals. In the case of Sundius *v.* Sheriff, already quoted, the petition was signed by English counsel, and the certificate of difference of opinion among the Judges was signed by the counsel in the cause in the Court of Session. If counsel have been consulted upon the propriety of appealing, without having been previously in the cause, the certificate may be made to meet the intention of the House of Lords by expressing it, "We who are of counsel for the petitioner in this cause," &c.

OF THE ORDER OF SERVICE.

WHEN the petition is presented at the bar of the House, it is read (or understood to be read) by the Clerk; and an order of service, as craved, is, as a matter of course, immediately issued. The following is a form of the order:—

"Die Lunæ, 2do Junii 1820.

"UPON reading the Petition and Appeal of A "B, of , complaining of three inter-"locutors of the Lord Ordinary in Scotland, of "the day of 1819, "day of , and day of "1820, and also of two interlocutors of the Lords "of Session there, of the First Division, of the " day of , and day "of 1820, and praying that the same "may be reversed, varied, or altered, or that the "appellants may have such other relief in the "premises, as to this House, in their Lordships' "great wisdom, shall seem meet; and that C D, "of , may be required to answer "the said Appeal, It is ordered by the Lords "Spiritual and Temporal in Parliament assem-"bled, that the said C D may have a copy of the "said Appeal, and do put in his answer there-

" unto in writing, on or before the
" day of next; and ser-
" vice of this order upon the said respondent, or
" upon any of his known counsel, or agents, in
" the Court of Session in Scotland, shall be
" deemed good service.

" E. F. Cler. Parliamentar."

This order, which generally can be procured in time to be sent from London on the day of presenting the petition, is served on the respondent, by delivering a copy thereof to his known agent in the Court of Session, and showing him at the same time the original. The person who so serves the order must then make affidavit of the fact, before a Justice of the Peace, and return the order along with such affidavit, (which may be written on the back of the order,) to the agent in London. The following form of affidavit may be used:—

" G H, of the city of Edinburgh, writer to the
" signet, maketh oath and saith, that he did duly
" serve the foregoing order upon M M, of the
" said city, writer to the signet, the known agent
" of the respondent in the Court of Session, by
" delivering to the said M M a full copy of the
" said order, and at the same time showing him
" the original order. And this the deponent did
" at Edinburgh aforesaid, the day of

" , in the year one thousand eight hun-
" dred and twenty.[1]

" G H."

" Sworn at Edinburgh, this day
" of 1820, before me, one of
" his Majesty's Justices of Peace for
" the county of Edinburgh,

" L L, *J. P.*"

The order and affidavit are not afterwards used during the progress of the Appeal, unless the respondent, by delaying to answer, shall render it necessary to apply for a peremptory order on him to do so, as after specified.

OF RECOGNIZANCE.

By Standing Order of the 27th January 1710 (amended by order 6th August 1807),[2] it is ordered, that in all Appeals " the party or parties
" appellant shall, *within eight days* after such
" Appeal received, give security to the Clerk of
" the Parliaments, by recognizance to be entered
" in to his Majesty, of the penalty of £400, con-
" ditioned to pay such costs to the defendant or

[1] In the case of Stirling *v.* Lord A. Hamilton, 1817, a petition by the appellant, praying that notice served upon the respondent himself, in London, should be allowed to stand good, was granted.

[2] See Appendix.

" defendants in such Appeals, as this Court shall " appoint, in case the decree or judgment appealed " from shall be affirmed; and if the appellant or " appellants shall neglect or refuse to give such se- " curity within the time aforesaid, that then the " Clerk of the Parliaments shall inform the House " thereof, and the Appeal from thenceforth to be " dismissed."

If the appellant be in London when the Appeal is presented, his own recognizance to the effect required by this order, will be sufficient; but if he lives at a distance, it must be entered into within the time limited, by some person in London in his behalf. This responsibility is generally undertaken by the London agent who is to conduct the Appeal: In transmitting the petition, therefore, it is desirable that some account of the circumstances of the appellant should be sent to the London agent, or that the Scottish agent should undertake to secure him against all loss which may arise from entering into engagements for the appellant to such an amount. A neglect of this precaution, where the appellant or his agent happens to be beyond the distance of Edinburgh, may eventually cause the Appeal to be dismissed for the current Session of Parliament, as the agent in London cannot be expected to become surety for a person of whose ability to secure him against loss he has no knowledge.

The recognizance is effected by the following motion, drawn by the agent, and understood to be

moved by a Peer, but in practice, put into the hands of the Clerk of the Journals:—

" A B,.....*Appellant.*
" C D,.....*Respondent.*
" May it please your Lordship to move,
" That E F of may have leave to " enter into recognizance to answer costs for the " appellant in this Appeal, he living in Scotland."

The recognizance is thereafter prepared by the copying Clerk of the House, and signed in presence of the Clerk of the Parliaments, or his deputy. It is in the following words:—

" MEMORANDUM quod die Jovis 4to Maii " Millesimo Octingentesimo Vigesimo, Annoq. " Regni Supremi Domini nostri Georgii Quarti " Dei gratia Britanniarum Regis fidei defensoris " primo, E F de in domo procerum re- " cognovit debere eidem Domino Regi, quadrin- " gentas libras bonæ et legalis monetæ magnæ " Britanniæ, levari de bonis, catallis, terris et " tenementis suis, ad usum dicti Regis sub con- " ditione infra scripto, videlicit:
" The condition of this recognizance is such, " THAT WHEREAS, A B, of , brought " his Appeal before the Right Honourable the " Lords Spiritual and Temporal in Parliament " assembled, against ten interlocutors of the Lord " Ordinary in Scotland, of date the day " of [*the dates are inserted*], and of

" two interlocutors of the Lords of Session, of " the First Division, of date the day of " , and day of : If, therefore, " the appellant, his heirs, executors, or adminis- " trators, shall well and truly pay, or cause to " be paid to C D, the respondent to the said Appeal, his heirs, executors, or administra- " tors, all such costs as the said Lords in Par- " liament shall appoint, then this recognizance " to be void and of none effect, or else to stand " in full force and virtue.

" E F."

" Per Ordinationem Dominor. " tam Spiritualium quam Tem- " poralium in Parliamento con- " gregatorum.

" Capt. Coram Me.

" — — Dep. Cler. Parliamentar."

The recognizance used to be written upon stamped parchment; but by order of 22d March 1725, the stamp was done away, and there are now no stamps whatever required by the House of Lords to any of the proceedings in an Appeal.

OF THE CASE.

Standing Order, 12th July 1811.

THE Cases on both sides[1] are ordered to be printed and delivered to the Clerk of the Parliaments,

[1] *Vide postea*, p. 60.

within a fortnight after the time appointed for the respondent putting in his answer, that is, within six weeks after the date of the order of service on the petition; and the appellant's neglect of this order causes the Appeal to be dismissed from the last day allowed for complying with it.

Standing Order, 19th April, 1698.

The Case is generally drawn by the counsel in the Court of Session; it is ordered to be signed by one or more of the counsel who attended at the hearing of the cause in the Court below, or who shall be of counsel at the hearing in the House of Lords. The draft thus signed ought to be transmitted in MS. to the agent in London, along with four sets of the printed papers on both sides of the cause, and directions as to the counsel to be retained, if the appellant should wish to make a selection. If notes of the opinions of the Judges, at advising the cause, have been taken, copies should be sent along with the other papers. As to the transmission of any original documents, the agent in London will in due time acquaint his correspondent whether it will be necessary.

The agent in London being responsible to the House for a due observance of all its orders, revises the MS. Case, in the view of correcting errors, if there be any, in point of form, examines the quotations with the papers and books referred to, and lays the MS., or a letter-press proof, before counsel, to be " settled and signed." It is thus evident, that in causes of a difficult and complex nature, the appellant ought not to lose a moment after present-

ing his petition, in getting his Case prepared and sent to London, as some considerable time is required after the draft is received, to revise, amend, and print it off, according to the regulations of the House.[1]

When there are two or more Appeals turning upon the same points of difference, between one appellant and several respondents, (the interest in each Appeal being distinct), as, for example, where several freehold qualifications are challenged by one freeholder upon the same grounds,—or where there are several causes between the same parties, the decision of one of which must settle the rest, it is not necessary to prepare a *full* Case, detailing the same arguments in the different matters at issue in each cause; but a Case must be prepared and printed, containing the names of parties, and a clear reference to the full Case given in in the principal leading cause. Upon this short Case the same orders must be observed, the same *office* fees paid,[2] and throughout the Appeal the same forms fol-

[1] The Case is sometimes printed in Scotland, and the whole impression sent to London, without the revision either of the London agent or counsel, although the name of the latter is printed at the end. Besides the irregularity and consequent danger of this practice, it deprives parties of the benefit of the suggestions of English counsel, for which the fee for settling and signing (whether the case is previously laid before him or not) is paid. There is an instance on the Journals of an agent having been taken into the custody of the Usher of the Black Rod, for having put the names (as it appeared from misunderstanding) of two counsel to a printed case without their privity.—Colquhoun *v.* Corbet, 2d June 1786. *Lords' Journals.*

[2] Except the *bar fee,* which is not payable unless the Appeal comes before the House.

lowed in all respects, as upon one unconnected Appeal; but, of course, parties are in no way barred from agreeing between themselves, that one Appeal shall rule the whole causes upon similar points of law between them.

Five hundred copies of the Case, upon folio sized paper, are required, nearly four hundred of which number are given to the door-keepers of the House, to be distributed among the Peers.

The form of the title of the Case, is—

"IN THE HOUSE OF LORDS.

"A B,.....*Appellant.*
"C D,.....*Respondent.*

"THE APPELLANT'S CASE."

And to this form, on the back, is added, "*To "be heard at the bar of the House of Lords on "the day of* 182 ."

An Appeal Case is well known to be a statement of the grounds, procedure, evidence, and arguments of the cause appealed, as far as such statement is necessary for a thorough comprehension of its merits, and no farther; it is impossible to give a rule, and difficult to give a correct suggestion upon the general limits within which a Case should be confined: When it is considered, that a set of the printed papers are given to the

Lord Chancellor, and that counsel are heard very fully upon every part of the question appealed, a prolix recapitulation of all the grounds, evidence, and arguments founded on in the Court below, certainly does not appear necessary, and probably is not advantageous. A brief history of the action and its facts, an introduction, merely, of the arguments, leaving them to be enforced and amplified at the bar, and as clear and concise a refutation as possible, of the grounds of the judgment appealed from, seem, under the circumstances stated, sufficient for almost any case that can occur.

Standing Order, 24 Feb. 1813.

It is ordered, that the Case shall contain a copy of so much of the proofs taken in the Courts below, as the parties intend respectively to rely on at the hearing of the cause, together with references to the documents. This order is fulfilled by printing the evidence and documents intended to be relied on, as an Appendix to the Case; but if the Case itself, from circumstances, contains copies of all evidence that the party means to plead, an Appendix may not perhaps be necessary, and the order is not imperative to give the copies as an Appendix.

OF SETTING THE CAUSE DOWN FOR HEARING.

If the respondent puts in his answer within the time limited by the order of service, he usually follows it with a motion in the following form:—

" A B,.....*Appellant.*
" C D,.....*Respondent.*

" The respondent having put in his answer to " this Appeal,

" May it please your Lordship to move,

" That the cause may be set down for hearing " after those already appointed."

The cause is accordingly forthwith added to the general list of the House;—but if the time for answering has expired without an answer being lodged, the appellant is entitled to move the House to appoint a peremptory day for the respondent to answer. This is done by producing the original order and affidavit of service, with a motion indorsed, to the following effect:—

Standing Order, 19 Jan. 1719.

" A B,.....*Appellant.*
" C D,.....*Respondent.*

" The respondent not having put in his answer " to this Appeal,

" May it please your Lordship to move,

" That the respondent may be peremptorily or- " dered to put in his answer thereto in one week."

An order is thereupon made by the House upon the respondent, to put in his answer in one week, without farther service; and in default of its being then put in, the appellant may move for, and obtain an order to set the cause down for hearing *ex parte*. The motion for this purpose is,

" The respondent not having put in his answer " to this Appeal, although peremptorily ordered " so to do,

" May it please your Lordship to move,

" That the cause may be set down for hearing " *ex parte*, after those already appointed."

Standing Order, 28 March 1735.

When the Session of Parliament has closed before the expiration of the time limited for answering, and no answer has been given in, service of the original order upon the respondent or his agent, five weeks before the first day of the next Session, will entitle the appellant to apply to the House for a peremptory day for putting in the answer, in case the same shall not be put in within three days after the meeting of the Session of Parliament. The adoption of such a measure is seldom necessary, but it is stated here as being a power given by a Standing Order of the House.

If the answer has been lodged, but no motion made by the respondent to set the cause down for hearing, it becomes the duty of the appellant to make the motion for that purpose; and if he allows the first nine days of the Session following that in which his petition was presented, to expire without such motion either from himself or from the respondent, his Appeal " shall stand dismissed." And the same order declares, that if an answer has not been lodged, and if no application for a peremptory day for its being lodged, is made during the first nine days of the new Session, the Appeal shall stand dismissed.

Standing Order, 5 April 1720.

OF THE CERTIFIED COPY OF PROCEEDINGS.

It is enacted by the Act of the 50 Geo. III. cap. 112, § 11, " That where an Appeal shall " be taken to the House of Lords, a full copy of " the printed papers given in to the Court of Ses- " sion, certified by one of the principal Clerks of " Session, together with copies so certified of such " interlocutors and minutes of the Court, as shall " have been pronounced or framed, subsequent to " the date of the last of these printed papers, shall " and may be received in evidence in such and the " like manner, as extracts of the whole proceed- " ings are at present." The copy thus certified, is obtained by the appellant at his sole expense, and must be transmitted to London as soon as prepared, in order to be taken to the bar of the House, at the hearing of the cause.

OF THE RESPONDENT.

It is enacted, by the 17th Section of the Act of the 48 Geo. III. chap. 151, "That when "any Appeal is lodged in the House of Lords, a "copy of the petition of Appeal shall be laid by "the respondent or respondents, before the Judges "of the Division to which the cause belongs, "and the said Division, or any four of the "Judges thereof, shall have power to regulate all "matters relative to interim possession or execu-"tion, and payment of costs and expenses already "incurred, according to their sound discretion, hav-"ing a just regard to the interests of the parties, "as they may be affected by the affirmance or re-"versal of the judgment or decree appealed from."[1]

When the agent of a respondent, therefore, receives notice of the intention to Appeal, if he wishes to make immediate application for execution of the decree appealed from, his first step should be to inform his correspondent in London, of the day on which the notice states that the petition is to be presented, in order that a copy may be procured and sent to him, for the purpose mentioned

[1] A clause in the Bankrupt Act, 53 Geo. III. cap. 137, gives the Court a power somewhat similar in Appeals, arising out of bankruptcy questions. *Vide antea*, page 18.

in the Act. The Court of Session having held the word "lodged," in the clause above quoted, to mean "moved in the House and served upon the "respondent,"[1] it seems to be unnecessary for the respondent to apply to the Court, till the order of the House on the appellant's petition is actually served upon him. In a subsequent case, however, the Court found that an Appeal having been referred to a committee of the House, to consider of the competency, and notice to the respondent of that reference being ordered, stopped procedure in the inferior courts.[2]

The copy of the petition, ordered by the Act to be laid before the Court, must be taken from the original in the Parliament Office, and certified by the writing Clerk of Parliament. By the practice of the Court of Session, it is given in along with a printed petition by the respondent, praying for execution, possession, or other implement of the decree, pending Appeal, and to this pe-

[1] Case of Sibbald and others,—Faculty Collection, Vol. xiv. No. 142, 17th November 1809; A petition was transmitted to London, but did not arrive in time to be presented before the rising of Parliament. The clerk of the Journals gave a certificate that the Appeal had been presented at Parliament Office, and would be presented to the House the first day of the next Session. The Court found that no notice could be taken of such a proceeding.

[2] Lindsay *v.* Lindsay, Fac. Coll. Vol. xv. No. 102, 11th July 1811. The Appeal was from an interlocutory judgment, sustaining the jurisdiction of the Commissaries. The respondent attempted to continue the cause before them. The appellant *advocated*, and to stay procedure, pleaded the Appeal. The Court of Session sustained the plea.

tition the Appeal is printed as an appendix. The judgment of the Court of Session upon this application cannot be appealed from upon any pretence whatever.[1]

OF IRREGULAR APPEALS.

If the respondent's agent has reason to believe that upon any of the grounds already stated, or upon any ground whatever, the Appeal is incompetent or irregular, it becomes his duty to acquaint the agent in London with all the circumstances under which the judgments appealed from were pronounced, and to send him all the information, by papers and otherwise, necessary to enable him to draw a petition to the House, praying that the Appeal may be dismissed. The agent in London gives two days notice to the appellant's agent, of his intention to present this petition; and both agents attend at the bar when it is presented. Except when the respondent's petition states some flagrant breach of the Standing Orders of the House, or of any positive enactment, which is manifest on the face of the Appeal (in which case it will be dismissed at the bar), the question is referred to an Appeal Committee, before which parties are allowed to be heard for their respective interests, by counsel or agents.

[1] *Vide antea*, page 18.

When the plea of incompetency is grounded upon the infringement of any order of the House, or legislative enactment, the respondent will be prepared to point out such order or enactment, and to show that it is infringed by the Appeal: For example, if he alleges that the time for appealing has expired, he will produce a certificate, by one of the principal clerks of Session, of the true date of the interlocutor appealed from, or of the time of extracting the decree; if the alleged incompetency arises upon an interlocutory judgment, he will produce a counter-certificate of counsel, that the Judges were unanimous;[1] or if he means to found upon the obvious meaning of the House, or of the Legislature, in any Order or Act of Parliament, he will endeavour to show, by precedent, analogy, and argument, that his opponent's Appeal is inexpedient and inequitable; and, in general, will be prepared, with every means of evidence and argument applicable to his case, and corroborative of the allegations of his petition. The appellant is heard in answer to the respondent's pleas, which, of course, he is allowed to rebut by counter-evidence and argument: and, upon consideration of the whole case, the Committee report to the House their opinion, which is invariably adopted.

When the repondent succeeds in procuring the Appeal to be dismissed, the interlocutor or decree

[1] *Vide antea*, pages 23 and 24.

appealed from is, in all respects, revived in the same force as if no Appeal had been entered, and the respondent may have a certificate from the Clerk of the Journals, that the Appeal has been dismissed. The 20th section of the Act of the 48 Geo. III. cap. 151, provides for the case of an Appeal "*dismissed for want of prosecu-*" *tion*;" that "it shall be lawful for any re-" spondent in such Appeal, to apply by petition " to that Division of the Court to which such " cause shall belong; and it shall be compe-" tent to the Judges of the said Division, upon " such petition, to decree payment of interest, " simple or compound, by the appellant to such " respondent, in such manner as the said Division, " in its sound discretion, shall think meet, toge-" ther with the costs or expenses which have been " incurred in consequence of such Appeal."

How far the Court of Session would feel themselves justified in extending the power thus conferred upon them, to applications upon Appeals dismissed as incompetent, has not yet been ascertained; but if the expenses of opposing an incompetent Appeal have been heavy, the House of Lords will, upon the application of the respondent to be allowed these expenses, make such order as the equity of the case may require.

OF THE ANSWER.

THE time limited for answering, the extension of that time in practice, and the effects of mea-

sures to enforce the lodging of an answer, have been already stated. The answer is prepared from the petition of Appeal, and as the following form will show, is a mere matter of style:—

" The Answer of A B, of
" To the Petition and Appeal of C D.

" The respondent not confessing or acknowledg-" ing all or any of the matters and things in the " said Petition and Appeal mentioned, to be true, " as the same are therein set forth, and reserving " to himself all benefit and advantage by reason " of the errors, defects, and imperfections of the " said Appeal, and by reason of the forms, mat-" ters, and things of and in the said Appeal con-" tained, for answer thereunto, saith, That he " doth admit the Court of Session in Scotland " did make and pronounce such interlocutors as in " the said Petition and Appeal are mentioned " and complained of; but as to the dates and " contents of such interlocutors, the respondent " doth, for greater certainty, refer to the interlo-" cutors themselves, when certified copies thereof " shall be produced; but the respondent is ad-" vised and humbly apprehends, that the interlo-" cutors complained of are agreeable to law, equi-" ty, and justice, and therefore humbly hopes the " same will be affirmed, and the Appeal dismiss-" ed, with costs."

[Signed by the Respondent's Agent.]

OF THE RESPONDENT'S CASE.

Standing Order, 12 July 1811.

THE time allowed to the respondent to lodge his Case is the same as that allowed to the appellant; but as the neglect of this order by the respondent subjects him only to the danger of having the cause set down *ex parte*, which he can remove by compliance with the order infringed, the respondent may delay lodging his Case beyond the timer equired by the order; but it will be kept in view, that if he is not prepared to lay copies on the table of the House four days before the hearing, he incurs great danger of not being allowed to lodge them at all. Where, however, it is intended to appear in the Appeal, it is absolutely necessary that the respondent's Case should be printed long before the hearing, to enable his agent in London to exchange copies with the agent of the appellant, in order that each party may lay his opponent's Case before his counsel, along with his own. No alteration, in consequence of this exchange, is allowed upon either side; and it is totally irregular to make any kind of reference or allusion in the printed Case of one side to that of the other, although, of course, the arguments used in the Court below by the opponent, may be stated and combated.

The respondent's agent in Scotland will be prepared with four sets of the printed papers in the

cause on both sides, Judges' opinions, and notes, &c. for his agent in London; all which it is desirable that he should transmit, along with the draft of the Appeal Case, to enable the London agent to make himself master of the whole cause, before the Case is finally thrown off.

OF CROSS APPEALS.

Standing Order, 8 March 1763.

A CROSS Appeal must be presented by a respondent within one week after his answer is put in to the original Appeal. The term explains that it is only in causes where the findings of the Court below have been in favour of and against each party, that a Cross Appeal can be brought. The form of the petition varies from the original petition in nothing but the title, which states it to be, "The "Humble Petition and *Cross* Appeal." It specifies the parts of the judgments which are adverse to the petitioner's interest, in the same terms as in an original Appeal. It is presented, and an order made, as upon the appellant's petition. Recognizance is not required: and the order may be served or not upon the appellant or his agent, but the latter generally files his answer without such service. No additional Case is required from either party on account of a Cross Appeal, the words "*Et è contra*" in the title and on the back, being sufficient to show that such Appeal is brought.

OF COUNSEL.

THE Cases of both parties being lodged in the Parliament Office, and exchanged, there are no steps intermediate to the hearing, and the duty of the agents of appellant and respondent becomes in all respects the same: the chief part of that duty is the preparation of counsel for the hearing. The number to be retained is usually two on each side; but this point must be regulated by the magnitude and importance of the cause, and by the wishes of the parties.[1] There are laid before each counsel the printed Case of each party, a set of the printed papers in the Court of Session, the Judges' opinions, a copy of the petition of Appeal, and any notes or observations of Scottish counsel or agents, or any other papers which may be deemed necessary; and the consultation follows the perusal of these documents, within a day or two of the hearing.[2]

OF THE HEARING.

THE accumulation of Appeals already on the general list of the House, renders it impossible to

[1] There is an old order, (20th November 1680,) "That no person "retain above three counsel to open or speak in his cause;" but it is not enforced.

[2] By an order of 8th December 1690, counsel not attending at the day appointed for hearing, are not permitted afterwards to appear.

calculate with certainty, at the time an Appeal is entered, in what Session of Parliament it may be heard; and the various lengths of the pleadings, the abatement and revival of causes, the intervention of holidays and court days, render it likewise impossible to calculate upon what day of a current Session it will be heard.

The days appointed for hearings are Wednesdays, Fridays, and Mondays. The Lord Chancellor and the Clerk of the Parliament begin the judicial business of the Session on the Wednesday in the first week after the meeting, at the cause first on the general list, and place it, with the two following causes, upon the paper of the House for a day certain, when they are heard in their order, and the three following on the general list, appointed for the next cause day.[1] The first cause frequently occupies the House the whole day and part of another; and parties in the remaining causes, must in consequence give refreshing fees to counsel, for the next and every subsequent day on which their cause is on the paper of the House, although the hearing of it has not commenced. Standing Order, 8 June 1749.

The order of hearing is regulated as follows:— "One of the counsel for the appellants shall open "the cause, then the evidence on their side shall Standing Order, 2 March 1727.

[1] By Standing Order of 22d December 1703, the day for Hearing cannot be altered except upon petition, of which two days notice must be proved to have been given to the adverse party. *See Appendix.*

" be read; which done, the other counsel for the " appellants may make observations on the evi- " dence; then one of the counsel for the respon- " dent shall be heard, and the evidence on their " side to be read; after which the other counsel " for the respondents shall be heard, and one coun- " sel only for the appellants to reply." In practice it is the senior counsel who opens and replies.

OF JUDGMENT.

THE instances are not uncommon in which the House, upon a full hearing of a cause, finding that its ultimate judgment will be formed according to the intent, construction, or meaning of some particular act, deed, or phrase, upon which the dispute hinges,[1] remits to the Court of Session to determine the point referred, and to review the whole cause; and frequently the House makes a declaratory judgment upon a particular point of fact or law, and without otherwise touching the judgments appealed from, remits the cause to the Court of Session with such declaration, and with directions to proceed farther as shall be just, under the altered view of the case which

[1] It sometimes happens that a discovery of an important fact has been made at the hearing; in such cases the House remits to the Court of Session to consider and decide upon the effect of new matter;—Duke of Hamilton *v.* Lord Selkirk and W. Douglas, 29th March 1779.—*Lords' Journals.*

the finding of the House may have caused. There are not wanting instances also, of judgments being given with consent of parties, in cases where a previous judgment upon a similar question has rendered such a settlement advisable, in order to save expense of hearing and otherwise; and there is one remarkable instance of a party appearing at the bar, after the hearing, and stating, that he was willing to forego a part of his claim, upon condition of the remainder being given him upon certain stipulated terms, by a judgment of the House; and his proposition was agreed to and granted accordingly.[1]

[1] Charters *v.* the Earl of Hyndford, 23d March 1723-4.—The mode of settlement in this case, voluntarily proposed by the appellant, the notorious Colonel Francis Charters, is so very dissimilar to all that is alleged of him living and dead, that a statement of it may not be altogether uninteresting. The cause originated in an agreement between the parties for a sale of South Sea Stock. Colonel Charters agreed to sell £5000 of that stock to Lord Hyndford, at the rate of 410 *per cent.*, and to take an heritable bond over Lord H.'s estates in Scotland for the price, £20,500 sterling. The bond was granted, payable in a year after the date of the transaction, and £5000 South Sea Stock was thereupon transferred to Lord Hyndford. When the bond became due, the value of South Sea Stock had fallen very low, and Charters was compelled to use arrestments of Lord Hyndford's rents, to secure payment of his bond. Lord Hyndford raised an action of reduction of the bond on the head of usury; and the Court of Session sustained the reduction, chiefly on the ground, as it would seem, of Lord H.'s allegations, that 410 *per cent.* was 90 *per cent.* above the current price of the day, though Colonel Charters proved that there could be no " current price of the day," as in the interval between the Saturday and Monday, in the week preceding that in which his bargain with Lord Hyndford

When the judgment is to be a simple affirmance or reversal, the Lord Chancellor generally states the case and his opinion very fully to the House, and parties are allowed to have a short-hand-writer at their mutual expense, to take down the Lord Chancellor's observations. His Lordship then puts the question, "Whether the interlocutors "complained of in this Appeal shall be reversed?"[1] and declares it to be found as his opinion inclined, unless any of the Peers signify dissent, in which case the House is divided upon the question.[2]

was made, South Sea stock had risen 95 *per cent.*, and for some time after his transfer to Lord H. did continue to rise. After hearing counsel at the bar of the House of Lords, it being clear that the judgments of the Court of Session could not stand, the appellant's counsel stated, that the appellant, out of the regard he had for the respondent, and in consideration of the losses lately sustained by him, was willing to restrict the amount of the bond to £11,000, and interest payable at the next term of Martinmas, with £2000 penalty, (in lieu of £5000 stipulated), upon condition of the bond being found good, and a judgment given to that effect. The House first reversed the judgment of the Court of Session, and then, in respect of the consent of the appellant, who appeared personally at the bar, ordered and adjudged as required.

[1] This form of putting the question was fixed by an order of the House of the 7th of December 1691. It was singularly fatal to the interests of the appellant in the case of Alexander *v.* Montgomery, decided 19th February 1773. The question was put as usual, "Whether the interlocutors complained of shall be reversed?" And the votes being reckoned, there were four upon each side. "Whereupon, according to the ancient rule in the law, "*semper presumitur pro negante*, it was determined in the negative." And the judgments appealed from were consequently affirmed. *Lords' Journals.*

[2] In the decision of the famous Douglas cause, 27th February 1769, a protest, with reasons of dissent from the judgment of re-

An order, in terms of the judgment given, is then entered on the Journals of the House; and a copy, signed by the Clerk of the Parliament, is taken out by the party in whose favour it is given; and upon the authority of this copy, the Court of Session proceed in the after disposal of the cause.

The style of an ordinary judgment is as follows:

"Die Veneris 4to. Maii, 1820.

"After hearing counsel as well on Wednesday "the 2d day of May inst. as this day, upon the "Petition and Appeal of A B of , "complaining of two interlocutors of the Lord Ordinary in Scotland, of the 10th July and 16th "November 1818, and of two interlocutors of the "Lords of Session there, of the First Division, of "the 19th of February and 7th of June 1819; "and praying that the same may be reversed, varied, or altered, or that the appellant may have "such relief in the premises as to this House, in "their Lordships' great wisdom, should seem "meet: as also, upon the answer of C D of " , put in to the said Appeal, and "due consideration had of all that was offered on "either side in the cause; IT IS ORDERED AND "ADJUDGED by the Lords Spiritual and Temporal in Parliament assembled, that the interlocutors complained of in the said Appeal be, and "the same are hereby REVERSED."

versal, is entered on the Journals, by the Duke of Bedford, Lords Bristol, Sandwich, Dunmore, and Milton.

OF THE APPLICATION OF JUDGMENT.

THE application of judgment, which is obtained by petitioning the Court of Session, has sometimes occasioned considerable litigation after Appeal; and the terms of the judgment have not unfrequently created some difficulty in the Court below in disposing of the cause. It has been held, that the words of the judgment must be strictly and nakedly applied, although it may be evident that in framing it, the House of Lords has not had under its immediate view, the consequences of the words used, or has, if the phrase will be permitted, overstepped its jurisdiction. Thus, in the case of Scott *v.* Brodie,[1] the dispute having originated in a tenant's claim to an away-going crop, and the landlord having presented a bill of suspension and interdict against him, which was refused, the landlord, Scott, appealed from the judgment of refusal: The House of Lords[2] found in these words:—"After hearing counsel, &c. It is "declared by the Lords Spiritual and Temporal "in Parliament assembled, That in this case the "tenant will not be entitled to an away-going "crop; and it is therefore ordered and adjudged, "that, with this declaration, the cause be remit-

[1] Faculty Collection, Vol. xiii. No. 92, 2d March 1803.
[2] 10th March 1802. *Lords' Journals.*

"ted back to the Court of Session, to review the "interlocutors complained of."

This was evidently a step beyond the subject matter before the House; and its effect was to bring into the Court of Session, the merits of a cause, and a judgment upon the merits, before the cause itself had come to their Lordships by any form of Court, or otherwise. It was nevertheless held in the Court of Session, that the judgment of the House of Lords could not be touched; and the whole cause was therefore decided in favour of the appellant, the Court unanimously declaring that an error had crept into the proceedings.

A similar judgment in the Appeal, Geddes *v.* Wilkie and others,[1] led to a similar decision. The House of Lords in that case reversed the judgment, which was a refusal of a bill of suspension of an Admiralty decree, and added these words to the order of reversal:—"And it is far-"ther ordered and adjudged, that the defences in "the action brought at the instance of the pur-"suer, be sustained, and that the defenders be as-"soilzied, *and decern.*" The Court again decided the whole cause in terms of the judgment, although the case had not come regularly before them. The appellant in this case also applied for his expenses, both in the previous litigation, and in the Appeal, and pleaded the equity of his

[1] Fac. Coll. Vol. xviii. No. 34, 16th November 1816.

claim: It was answered, and correctly and successfully answered, that when the House of Lords intend to give expenses to either party, it is distinctly so expressed in the judgment.[1] In the Appeals, Douglas *v.* Dalrymple's Trustees,[2] and Ross *v.* Macdowall,[3] the House ordered the Court to ordain the respondents to pay the appellant's costs in the Court below; and in the case of Pringle *v.* Tod's Legatees,[4] reversed on Appeal, the Court refused expenses to the appellant, because the judgment did not allow them, although in the latter case, the defence which had been set up was virtually found by the House of Lords, to have been maintained *pessima fide*, there being fraud and circumvention established against the defender.[5]

[1] The respondents also maintained that it was notorious that the House *never* gave an appellant costs of an Appeal. This assertion is not strictly correct. In the case of Hamilton of Dalziel *v.* The University of Glasgow, decided 9th May 1716, the House gave the appellant costs both of Appeal and of previous process before Appeal.

[2] 29th December 1797. *Lords' Journals.*

[3] 5th January 1798. *Ibid.*

[4] Fac. Coll. Vol. xii. No. 117, 6th March 1799.

[5] See in Morison's Dictionary, the Titles, *Appeal,* and *Summary Application,* and chiefly the cases of Lyon *v.* Aboyne, Home Campbell, p. 14966, and Kennedy *v.* Cummings, p. 14968, in which last there was some procedure in the House of Lords, ulterior to the decision there reported: for example, a petition, complaining to the House of a contempt of their order by the Court of Session, upon which petition the sum of £100, ordered to be paid to the petitioner, was declared not subject to an alleged attachment; and an address was moved and presented to her Majesty, on the subject of the office which was the matter of dispute between the parties.

OF INCIDENTAL PROCEDURE.

THE circumstances which most frequently occasion any procedure in the House in a regular Appeal, besides that already detailed, are, chiefly, a compromise of the dispute under Appeal—the abatement of the Appeal by the death of a party—the discovery of any error or omission in the Appeal—the relation of one Appeal to another, though not standing together on the list—and the privilege of the Appeal from the nature of the matter in dispute.—The ends which these circumstances render necessary to be attained are withdrawing, reviving, and amending the Appeal—getting it set down for hearing after the cause to which it bears relation—and securing any privilege to which it is entitled;—and all these ends are attained by the agent of the party petitioning the House.

1. *Withdrawing an Appeal.*—It is competent to apply for leave to withdraw at any time before hearing, and upon any terms upon which parties can previously agree. The petition is from the appellant, and may be in the following form:—

" A B,.....*Appellant.*
" C D,.....*Respondent.*

" To the Right Honourable the LORDS SPIRITUAL and TEMPORAL in Parliament assembled,

" The HUMBLE PETITION of the Appellant,

" *Sheweth,*

" THAT your petitioner entered his Appeal to " your Lordships on the day of last, " complaining of certain interlocutors of the Court " of Session in Scotland, pronounced in an action " between him and the respondent; but your petitioner and the respondent having now come " to an agreement concerning the matters in question under the said Appeal, and your petitioner " having paid the respondent's costs" *(if it has been so agreed,)* " your petitioner therefore,

" Humbly prays that your Lordships will be " pleased to order that the said Petition and " Appeal may be dismissed [*or*, " that he " may have leave to withdraw the said Appeal,"] the agent for the respondent consenting thereto,

" And your petitioner will ever pray," &c.

" E F, Agent of the petitioner,

" G F, Agent of the respondent, consents."

An Appeal may also be withdrawn upon the petition of an appellant, on the ground of his being advised of its inexpediency or incompetency, or on any other ground, the respondent consenting; and in case of his not consenting, the application may contain an offer to pay the respondent's costs, and leave the settlement to the House.

2. *Reviving an abated Appeal.*—The petition for this purpose is necessarily from the heir or other legal representative of the party deceasing, and must be accompanied by the retour, confirmation, or other title under which the petitioner has right to claim the place of the deceased. The opposite party consents to this measure also. The following form of petition may be adopted by an appellant:—

" To the Right Honourable the LORDS SPIRITUAL " and TEMPORAL in Parliament assembled,

" The HUMBLE PETITION of C D,

" *Sheweth,*

" That the Appeal lately brought before your " Lordships, by A B, your petitioner's father, now " deceased, against E F, respondent, from certain " interlocutors of the Court of Session in Scot- " land, and the proceedings had upon the said " Appeal in your petitioner's father's lifetime, are " by his death abated.

" Your petitioner, therefore, humbly prays, that
" your Lordships will be pleased to order
" that the said Appeal may stand revived in
" your petitioner's name, as in place and
" stead of the said A B, his father, in respect
" of this cause, and that your petitioner may
" have the same benefit of the said Appeal,
" as his said father might have had, if in life,
" And your petitioner will ever pray," &c.
" G H, Agent of the petitioner,
" J K, Agent of the respondent, consents."

The heir of a respondent also may make a similar application, and in case of his failing to do so, the appellant may proceed in the Appeal *ex parte;* or if he is desirous that the respondent's heir should appear, he may apply for and obtain an order of service upon him for that purpose. When the heir or representative is under age, the petition must be from his tutors or curators in his behalf; and, in that case, an office copy of their appointment will be required to be exhibited along with the petition.

3. *Amending an Appeal.*—The petition to amend merely states the discovery of the error, and prays permission to correct it, the appellant amending the respondent's copy. The most common, and the most dangerous error in Appeals, is that of complaining of interlocutors, or parts of interlocutors, which are favourable to the appellant; and

if such an error is not amended before judgment, the appellant runs the risk, in the event of a total reversal of the interlocutors appealed from, of losing a great part of the benefit of the reversal. A petition to correct an error of this kind may be in the following form:—

" A B,.....*Appellant.*
" C D,.....*Respondent.*

" To the Right Honourable the LORDS SPIRITUAL and TEMPORAL in Parliament assembled,

" The HUMBLE PETITION of the Appellant,

" *Sheweth,*

" That your petitioner has discovered an error " in his petition of Appeal in this cause, in com- " plaining of part of one of the interlocutors of the " Lords of Council and Session in Scotland, viz. " an interlocutor of the said Lords, dated the " day of 1819, which finds, that your " petitioner was an onerous holder of the bill in " question: That the said error will be corrected " by the addition, after the specification of the said " interlocutor in the petition, of the words, ' ex- " cept in so far as the same finds that your peti- " tioner was an onerous indorsee of the said bill;' " and by the addition in the prayer, after the " words, ' reverse, vary, or alter the said interlo- " cutors,' of the words, ' in so far as complained of,'

" Your petitioner therefore humbly prays, that
" your Lordships will order, that he may
" have leave to amend his Appeal to the above
" effect, he amending the respondent's copy,
" And your petitioner will ever pray.
" E F, Agent of the petitioner."

The respondent's agent cannot object to this measure, and he, in general, either signs the petition as above, or consents personally at the bar; and the alteration is thereafter made, upon the Order of the House to that effect. These applications are almost invariably granted, although they are, in some instances, referred to an Appeal Committee before being decided on.

4. *Setting down the cause for hearing at a particular place of the list.*—Under this head may also be classed applications by one of the parties, or by both, for an early day for hearing, upon some ground peculiar to the case. When one cause bears that clear relation to another which will occasion a repetition of the same evidence and arguments, an application to have the latter cause set down for hearing immediately after that to which it bears relation, is granted almost as a matter of course. But it is different with regard to applications for an early day for hearing: the House is not easily prevailed upon, in the present state of the Appeal list, to grant this favour; and, unless the circumstances are very urgent indeed, experience has shown that such applications are now almost entirely unavailing. Of the form of the petition to be used, it is unnecessary to say more, than that it should state, as strongly as possible, the grounds upon which the favour is craved.

5. *Securing privilege.*—The privilege here alluded to, is that of an early day for hearing, allowed by the courtesy of the House, to Appeals from decisions upon the validity of freehold qualifications, or upon any questions in which the election of a Member of Parliament is involved. There is no order or enactment to this effect; but it is presumed to have originated in the summary hearings to which the Petitions and Complaints, &c. in such causes, are entitled in the Court of Session, by the Act of the 16 Geo. II. cap. 11, regarding the election of Members of Parliament for Scotland. The petition for this early hearing states briefly, that the case arises out of a Petition and Complaint, upon a decision of a court of freeholders, or whatever other decision may have occasioned the cause; and in reference to the above Act, prays for the usual preference as to hearing usually given by the House to such Appeals.

As the other circumstances which give rise to incidental procedure, necessarily depend upon the situations of parties and the nature of the subject matter of Appeal, it is impossible to enumerate them, or to state with certainty how applications arising out of them would be disposed of. It is

sufficient to say of the duty of the agent in Scotland, that he has only to communicate his client's wishes to the agent in London, in order to insure their being complied with, as far as the practice of the House will allow; and of the duty of the agent in London, that the House is always open to petitions, and disposed to grant every indulgence consistent with its own dignity, and the legal and equitable rights of parties.

OF APPLICATIONS FOR DISPENSATION FROM THE ORDERS, &c.

It need hardly be remarked that the House of Lords, being the Supreme Tribunal of law and equity in the kingdom, cannot, like subordinate judicatories, be *bound down* to any fixed or determinate rules of proceeding, but may act upon the expediency of each particular case, whether such expediency be strictly conformable or not to its orders. The House, therefore, will, upon a petition stating good reasons for non-observance of these orders, give leave to the applicant either to observe them after the expiration of the time limited for such observance (where that is the order infringed), or exempt him from their observance altogether, and acquit him from the penalties of having neglected them. It is obvious, however, that such indulgences ought never to be reckoned upon; and they certainly will not be granted in any case where the necessity of the application could have been avoided.

In regard to such applications, therefore, it may perhaps be stated as a general rule, that where there is a fair and express reason for them, they may be made with every certainty of success. For example, in a cause of magnitude or peculiar difficulty, it is sometimes impossible that the counsel who is to prepare the appellant's Case, can do it

justice in the time to which he is restricted by the Standing Order. An application by the appellant's agent, for three weeks or a month's longer time to lodge the Case, will, upon stating the above reason, be in all probability granted; or if the counsel who is to draw the Case should be occupied in London, or on the circuit, or if some important documents are for the time missing, or any other *bona fide* impediment stands in the way of complying with the order, the time is almost always extended upon the petition of the party.

The applications under this head are, it may be supposed, innumerable: Among them are petitions to receive an Appeal after expiration of the twenty days limited for bringing it, upon cause shown for the delay—to receive an Appeal, though defective in some requisite, such as the certificate of counsel, or intimation, upon assurance of the deficiency being supplied—to receive the Cases, though beyond the six weeks allowed for lodging them;—the decision upon all such applications must depend upon the circumstances of each particular case. The most singular decisions perhaps are, the dispensation for a whole Session with the Standing Order of 5th April 1720, regarding the prosecution of Appeals;[1] the allowing an agent, who was ignorant that an Appeal stood dismissed from neglect of that order, to get the Appeal

[1] 8th August 1721. *Lords' Journals.*

reponed upon a new petition, he having first stated his ignorance upon oath;[1] the allowing recognizance to be entered into after expiration of the time for so doing;[2] and the allowing an answer which had been omitted to be filed, to be put in *after the hearing of the cause.*[3]

[1] Dowager Lady Forbes *v.* Lord Forbes, 19th January 1764. *Lords' Journals.*

[2] Cust and Company *v.* Carron Company, 21st December 1774. *Ibid.*

[3] Shepherd *v.* Harvey. 25th March 1817. *Ibid.*

OF APPEALS *in forma pauperis.*

PARTIES are admitted to plead *in forma pauperis* in the House of Lords, upon a petition setting forth their poverty, accompanied by an affidavit thereof, and a certificate from the minister and two elders of the parish where they reside. The following are forms of these documents:—

PETITION.

"To the Right Honourable the LORDS SPIRITUAL and TEMPORAL, in Parliament assembled,

"The HUMBLE PETITION of A B,

"*Sheweth,*

"THAT your petitioner has presented his Appeal to your Lordships against certain interlocutors pronounced by the Court of Session in Scotland, in an action lately depending there between C D and your petitioner; but your petitioner being very poor, as by the annexed affidavit and certificate appears, is, by reason of such his poverty, unable to prosecute his Appeal, unless he is by your Lordships ordered to be admitted so to do *in forma pauperis.*

"Your petitioner, therefore, most humbly prays, that your Lordships will be pleased to order him to be admitted to appear as appellant in this cause *in forma pauperis*, and to assign him for his counsel Mr. G H and Mr. J K, and for his solicitor E F,

"And your petitioner will ever pray, &c.

"A B."

AFFIDAVIT.

"A B,.....*Appellant.*
"C D,.....*Respondent,*

"THE Appellant maketh oath, that he is not worth, in all the world, the sum of five pounds, in lands, tenements, goods, or chattels, his wearing apparel and the matters of this cause only excepted.

"A B."

"Sworn at this day of 182 , before me, one of his Majesty's Justices of the Peace for the county of

"J B, *J P.*"

CERTIFICATE.

"These are to certify all whom it may concern, that A B is a very poor man.

"R S, minister of the parish of , in the county of

"P T, elder; W J, elder."

These forms will, of course, vary where the petitioner is respondent in the Appeal. The order is granted by the House as craved, and the cause proceeds in all respects like any other cause; the fees of office and all other *fees* being avoided by the order.

FORM OF PROCEDURE

IN THE

HOUSE OF LORDS,

UPON

APPEALS FROM SCOTLAND.

PART II.

OF APPEALS FROM THE COURT OF JUSTICIARY.

THE first opportunity that occurred of judicially considering the competency of an Appeal from the Court of Justiciary, was upon occasion of the condemnation of Lieutenant Patrick Ogilvie in 1765. He applied to the King for a respite until the meeting of Parliament, that he might present a Petition of Appeal against the sentence of condemnation; the respite was granted, and in the interval, the Attorney-General of England, and the Lord Advocate of Scotland, (Miller, afterwards Lord Justice Clerk and Lord President,) were desired to give their opinions upon the competency

of such Appeal. The Attorney-General's opinion was, "That according to his knowledge of the "Scotch law, no Appeals from the Court of Justi- "ciary lay by the law of Scotland to the Parlia- "ment of Scotland, upon the merits of a capital "offence, before the Union; and that since the "Union, it had never been thought of any more "than it had been allowed in England."[1] The Lord Advocate's opinion was to the same effect; but his Lordship having heard counsel for Lieutenant Ogilvie, and examined records and law books, detailed the grounds of his opinion more fully and satisfactorily than the Attorney-General. His Lordship asserts, that there is not in any one book of authority in our law, the least hint or insinuation that any Appeal lay from the Court of Justiciary to the Parliament of Scotland; and that after a diligent search in the Records of that Parliament, as far back as they are extant, no instance of an Appeal against the sentences or judgments of the Justiciary is to be found. He then alludes to the only case which at that time had given rise to any doubt upon the matter, viz. the Magistrates of Elgin and Mr. David Blair *v.* the Procurator of the Church of Scotland and the Lord Advocate, 17th April 1713, in which a question of Civil Right having been referred

[1] An Appeal, nevertheless, from this Court, had been presented on 26th November 1724, and an order made upon the respondents to answer it, though it was not farther prosecuted. Forbes of Culloden and others *v.* Bayne and others. *Lords' Journals.*

by the Court of Justiciary to the Court of Session, and decided there against the Magistrates, they appealed to the House of Lords; and the Court of Justiciary having, during the pendency of that Appeal, fined the Magistrates in £20 sterling to the Queen, and £30 costs to the Procurator for the Kirk, the Magistrates appealed against that sentence also, and the Appeal was received. The judgment of the House of Lords on 3d July 1713, distinctly refers to the decrees of both Courts, which are *reversed*, and the respondents ordered to repay the fine and costs "adjudged by the "said Lords of Justiciary to the said respon- "dents."

Upon this case, the Lord Advocate remarks, "This case is not a precedent for Appeals in such "questions as the present (Ogilvie's); for the ori- "ginal Appeal to the House of Peers was from the "Court of Session upon a point of Civil Right; "and though the Court of Justiciary, pend- "ing that Appeal, proceeded in the criminal ac- "tion, and decreed damages and a fine against "the appellants, on the footing of the interlocutor "of the Court of Session appealed from; yet, "when the House of Peers reversed the interlo- "cutor of the Court of Session upon the point of "Civil Right, it behoved them necessarily, for the "sake of justice, and for explicating their own "jurisdiction, likewise to reverse the sentence of "the Court of Justiciary, founded on the inter- "locutor of the Court of Session. And, accord-

" ingly, this judgment of the House of Peers has " not been considered by the subjects of Scotland " as a precedent for appealing from any sentence " of death, or other criminal sentence of the Court " of Justiciary." His Lordship concludes, " Such " Appeals would be most embarrassing to the " Court of Justiciary, and necessarily force them " upon the study of a new system of criminal law " and forms which they have had no occasion to " know and consider; and if such Appeals be " competent to the criminal convicted, they must " also be competent to the private prosecutor, or " the King's Advocate. Many other difficulties " must arise which would render this new juris- " diction of the House of Peers inextricable, and " hurtful to the due course of criminal jurisdiction, " in which the public safety is so much interest- " ed."[1]

In consequence of these opinions, Lieutenant Ogilvie's Appeal was not presented, and he was executed pursuant to his sentence.

The next case of Appeal from the Court of Justiciary, was on 20th January 1768, by Robert Geddie and Robert Macintosh, junior, from an interlocutor, finding that that Court could not issue a warrant to apprehend George Dempster, a Member of Parliament, during the sitting of Parliament, nor compel him to find bail to appear

[1] See the opinion at length in Maclaurin's Criminal Cases, p. 585, *et seq.*

and stand trial. This Appeal was received, in the first instance, by the House, and the usual order was made upon it, the respondents being ordered to have a copy of the Appeal, and to put in their answer in writing on the 17th of February following; and service of the order upon the agents in the " said *Court of Session*,"[1] was declared to be good service. It was on 25th January referred to a Committee, to consider whether it was properly brought. Recognizance was entered into by the appellants' agent, and the appellants were allowed to be heard by counsel upon the competency. The Committee reported on the 7th March 1768, upon which the following order was made by the House:—

" Die Lunæ, 7mo Martis, 1768.

" UPON reading the report from the Lords' Com- " mittees, to whom it was referred to consider whe- " ther the Appeal, wherein Robert Geddie, junior, " merchant, is appellant, and George Dempster, " Esq. and Christianus Adamson, are respondents, " being an Appeal from two interlocutors of a Court " of Justiciary in Edinburgh, of the 7th of Decem- " ber 1767, be properly brought; It is ordered, " that the petitioners be directed, by themselves " or agents, to attend the Court of Justiciary on " Monday next, being the day to which the diet " is continued by their second interlocutor, bear-

[1] Sic in Ordin.

"ing date the 7th of December last; and in case "the declaration in their first interlocutor, bearing "date the same day, should be pleaded as a bar "to the due course of justice, that then the peti- "tioners do apply to the said Court, to reconsider "whether they were authorised by the common "or statute law of the land to take cognizance of "the subject matter, and to make such declara- "tion. And it is also ordered, That the said "Court be at liberty to proceed, notwithstanding "the said Appeal."

It will be observed, that this order cautiously avoids the question of competency, although its effect, indirectly, is to reverse the interlocutors appealed from. Mr. Dempster having waved the plea of privilege, which the interlocutor of the Court of Justiciary appealed from had sustained, the next interlocutor found, in respect thereof, "That there is no place to reconsider the ground "of the said interlocutor; but in respect of the "said judgment of the House of Peers, they de- "clare, that the said interlocutor shall be no "precedent to any future case of the like na- "ture."

The Lord Advocate, apprehensive that afterwards, when the peculiar circumstances of this Appeal were forgotten, the interlocutor of the Court, styling the above order of the House a "judgment," might be cited as a precedent of an Appeal from the Justiciary having been received and "*judged*," stated to the Court that he had

attended the Committee when the order was made, and that the same was "of purpose to "avoid the determination of the question, as to "the competency of an Appeal from this Court." The Court declared, "That their having used the "term 'judgment' in the above interlocutor, pro- "ceeded from their not adverting that there was "any material difference betwixt the words 'or- "der' and 'judgment,' and that they there intend- "ed no more by the word "judgment' than by that "of 'order.'" Another Appeal was, on 24th January 1770, entered in this cause, but never prosecuted.

The decision of the House, however, upon the Appeal of Mungo Campbell, two years afterwards, set the question at rest, as far at least as regards interlocutory judgments. Mr. Campbell appealed on the 22d January 1770, from an interlocutor of the Justiciary, sustaining their jurisdiction to try him for the murder of the Earl of Eglintoun. The petition of Appeal was, as usual, referred to a Committee, to consider whether the same was properly brought. Afterwards, the appellant's agent being asked if he was ready to go on, and having answered in the negative, the Appeal was dismissed. Upon the 7th of February thereafter, Mr. Campbell presented another petition from an interlocutor sustaining the relevancy of the libel; and the agent in London was ready to proceed to the discussion, in case the Appeal should be received; but Lord Mansfield hav-

ing declared against its competency, and the Peer who presented it having seconded Lord Mansfield's motion for its rejection, it was dismissed the House in the following anxiously decisive terms:—

"Die Mercurii, 7mo Februarii, 1770.

"Upon reading the petition, purporting to be "in the nature of an Appeal of Mungo Campbell, "late officer of excise at Saltcoats, now prisoner "in the tolbooth of Edinburgh, complaining of "two interlocutory sentences of the Court of Jus-"ticiary in Scotland, of the 22d day of December "1769, and 22d of January last, and praying "that the same may be reversed, varied, or alter-"ed, or that the petitioner may have such relief "in the premises, as to this House, in their Lord-"ships' great wisdom, shall seem meet; to which "petition Archibald Earl of Eglintoun and "James Montgomery, Esquire, for his Majesty's "interest, are named as in the nature of respon-"dents; and also, upon hearing the agent of the "petitioner at the bar, it is ordered, That the "said petition be rejected."

At last the case of Murdison and Miller, condemned for sheep stealing in 1773, afforded an opportunity of solemnly deciding the whole question. Upon occasion of their Appeal, which was from the sentence of condemnation, counsel were heard in their behalf. They cited cases of Appeals

which had been received from sentences arising out of trials for treason, and other offences against the State. No regard was paid to them, and the Appeal of Murdison and Miller was dismissed.

After these decisions, it might be supposed that no future attempt to enter an Appeal from this Court would have been made. Nevertheless, on the 1st May 1780, a petition was presented on behalf of James Bywater, a sailor, condemned to death. The Journals of the House of Lords bear simply, that upon reading the said Appeal, it was moved "That the said Appeal be rejected. The "same was agreed to, and ordered accordingly."

The last case was that of James Robertson and Walter Berry, on 1st May 1793, condemned to imprisonment for printing and publishing a seditious libel. Their Appeal was referred to a Committee, "to consider and report whether the same "ought to be entertained;" and the petitioners were allowed to be heard by counsel before that Committee, upon notice being given to the Lord Advocate. The counsel attempted to establish that the precedents above cited, being cases of felony, did not apply to their offence, which was merely a misdemeanour; but the Committee, on the 8th of May 1793, reported that the petition of Appeal ought not to be received, and the report was agreed to.

An Appeal to the House of Lords from a sentence of the Court of Justiciary, whether proceeding on the verdict of a Jury or not, is thus by these

decisions declared to be utterly incompetent. How far this is reconcileable with the precedent quoted of the Magistrates of Elgin, or with the dictates of sound judicial policy, this is not the place to inquire. The opinions, however, of certain Scottish-law writers upon this important question may be noticed.

The Lord Advocate Miller, in the opinion above quoted, says, that there is not in one book of authority the least hint or insinuation that any Appeal lay from the Court of Justiciary to the Parliament of Scotland, and seems thence to infer, that the same may be said of Appeals to the British House of Lords. Maclaurin remarks upon this assertion of his Lordship, that he takes no notice of a passage in Lord Kames's Law Tracts to the following effect:—"The House of Lords "is undoubtedly a Court of Appeal, with respect "to the *three* Sovereign Courts in this country. "There are Appeals daily from the Court of Ses- "sion. Appeals from the Court of Justiciary have "hitherto been rare,[1] and probably will never be- "come frequent: the proceedings of this Court "being brought under precise rules, afford little "matter for an Appeal; which, at the same time, "would be but a partial remedy, as the verdict of "a Jury can never be called in question. *An "Appeal, however, from this Court, is com- "petent, as well as from the Session*, of which

[1] The Law Tracts were first published in 1758.

"there is one noted instance."[1] His Lordship then states the case of the Magistrates of Elgin. To Maclaurin's remarks may be added, that the Lord Advocate seems also to have overlooked the authority of Professor Forbes, who, in speaking of the Court of Justiciary, distinctly asserts, that "*Appeals lie from the sentences of this Court "to the House of Peers in Parliament.*"[2] And he states, in his preface, that "he has advan- "ced nothing but what he can vouch and make "good by sufficient authorities." Maclaurin's own observations upon the question are copious, and there cannot, probably, be a more safe opinion formed upon it than his, that, "to allow "Appeals in every case would put an end to cri- "minal jurisdiction in this country, but to reject "them in every case seems to be dangerous."

Mr. Erskine inclines to the competency of Appeals from the Court of Justiciary to the House of Lords, in cases where "the proceedings of the "Judges or Court upon any point of relevancy, "inability of witnesses, degree of punishment to "be inflicted on the pannel, &c. may be liable to "exception; for that House, as the Sovereign "Court of Appeals, seems to have an inherent "right of reviewing the sentences of all other "Judges, except in so far as they may have been "limited by an order of their own, which has never "been done."[3]

[1] Historical Law Tracts, p. 298. Vol. II. p. 224.
[3] Erskine's Institutes, Book I. tit. iii. § 24.

Mr. Arnot states, in a note, p. 106, of his "Criminal Trials," that he is decidedly of opinion, not only that an Appeal from this Court is competent, but that "law and expediency both require it;" and in allusion to such of the above cases as had been decided when he wrote, he says that he intended to publish an argument to show that such Appeal was competent. He had previously discussed the question very fully in his History of Edinburgh;[1] and it is difficult to conceive what farther "argument" the subject admits of, than is there stated.

Lastly, Mr. Hume[2] adopts *in toto* the opinion of Lord Advocate Miller, the grounds of which, he says, appear to him sound and sufficient.

[1] History of Edinburgh, p. 480, *et seq.*
[2] Criminal Law, Vol. II. p. 401.

FORM OF PROCEDURE

IN THE

HOUSE OF LORDS,

UPON

APPEALS FROM SCOTLAND.

PART III.

OF APPEALS FROM THE COURT OF EXCHEQUER.

By the Act of the 6th of Queen Anne, cap. 26, establishing the Court of Exchequer in Scotland, it is enacted, Section 12, "That it shall and may "be lawful to and for any person or persons, bo-"dies politic or corporate, party or parties to any "judgment which shall be given in the said Court "of Exchequer in Scotland, his, her, or their heirs, "executors, or administrators, or such other per-"son or persons, bodies politic or corporate, who "shall be privy to, and are affected by such judg-"ment, and who, by law, is or are entitled to "bring and maintain a Writ or Writs of Error

" thereupon, to sue and prosecute out of the " Court of Chancery in England, a Writ or Writs " of Error, to be made in usual manner, upon any " such judgment, returnable in the Parliament of " Great Britain; and such and the like securities, " matters, and things, way and method of pro- " ceedings, shall and may be had therein and " thereupon and relating thereunto, as have " been, are, or may be used and practised upon " or concerning Writs of Error returnable in Par- " liament, upon any judgment in any of the " Courts in England, and upon or relating to the " affirming or reversal of such judgments, and the " proceedings thereupon in like cases; and every " person or persons against whom any orders or " decrees in English causes shall be made in the " said Court of Exchequer in Scotland, shall and " may have and pursue such and the like relief " and redress therein, as any person or persons, " against whom any orders or decrees in the Court " of Exchequer in England have been, or shall " be made, may have and pursue in the like " cases."

Appeals, strictly so called, from the Court of Exchequer, are of very rare occurrence, its definitive sentences on the verdict of a Jury being brought under review of the House of Lords by Writ of Error, as enacted in the above section of the statute. The latter method of submitting the sentences of this Court to review is also of

rare occurrence;[1] and the proceedings in the House of Lords, upon causes from the Scottish Exchequer, are necessarily of a very general nature, and do not admit of the same minuteness of detail as those from the Court of Session.

The general jurisdiction of the Court of Exchequer in Scotland, comprises the revenues of customs and excise, and other revenues, debts, and duties belonging to the Crown, and all Royal hereditaments, rents, and casualties, personal estates, forfeitures, and penalties accruing to the Crown in Scotland; and from its judgments upon all of these branches of jurisdiction, it is competent to Appeal to the House of Lords. It is, however, only from the interlocutory decrees, or sentences of this Court, pronounced upon what is in England called the equity side of the Court, that the remedy for an alleged aggrieving judgment is sought through the form of a Petition of Appeal. It has already been observed, that the Standing Orders of the House of Lords refer generally to all Courts from which Appeals are allowed, and consequently these Orders apply in all respects to Appeals from judgments of the Court of Exchequer: It is sufficient, therefore, to refer to the detail of the procedure in Appeals from the Court of Session, for information regarding the

[1] There was not a Writ of Error from the Scottish Exchequer sued out while the late Attorney-General was in office, and there has not been one since the appointment of his successor.

procedure in Appeals from this Court, with the following additional notices :—

1. That the judgment appealed from must have been pronounced in a cause in which the Judges act solely *ex officio*, as umpires between parties, and not in any parliamentary capacity, as Commissioners of the Legislature under an Act of Parliament.[1]

2. That there is no precedent of an Appeal from judgments of this Court in the exercise of the exclusive power of receiving resignations of lands, passing signatures, gifts, tutories, &c. which is conferred upon it by the Act of Queen Anne.

3. That the sections of the Act of the 48 Geo. III. cap. 151,[2] regarding execution pending Appeal, apply only to the decrees of the Court of Session ; and,

Lastly, That the section of the 50 Geo. III. cap. 112, regarding certified copies of proceedings, also refers only to Appeals from the Court of Session; and in Exchequer Causes, the production at the Bar of the House of Lords, of authentic copies of evidence, &c. by parties, is regulated under the order of 27th March 1708 ; an exemplified copy signed by the proper officer of the Court of Exchequer, and delivered on oath, being admitted as evidence.

[1] Haldane *v.* Keith—dismissed as incompetent, upon the ground of the Barons acting in a parliamentary capacity, 26th March 1778. *Lords' Journals.*

[2] *Vide antea*, p. 54.

OF WRITS OF ERROR.

A WRIT of Error is in substance very like the letters of advocation of the Court of Session. It is defined, "A commission to Judges of a Superior Court, by which they are authorised to examine the record upon which a judgment was given in an Inferior Court, and, on such examination, to affirm or reverse the same according to law."[1]

This Writ is issued from the Cursitor's office in London. In order to procure it, a certificate of counsel in the cause in the Court of Exchequer, that, in their opinion, error has intervened, is laid before the Attorney-General, who thereupon grants his *fiat* that a Writ of Error may issue. The agent in London of the plaintiff in error lodges this *fiat* in the Cursitor's office, along with the names of the parties in the cause, and asks that a

[1] Bacon's Abridgment, *voce* Writ of Error. For the law and practice of England upon Writs of Error, which forms a very intricate branch of legal knowledge, Blackstone and other Commentators may be consulted. The Act 27 Eliz. cap. 8, declares all such writs in causes to which the Crown is party, to be returnable in Parliament alone. The 10 and 11 William III. cap. 14, limits the time within which they may be brought to 20 years after judgment; and the 3 James I. cap. 8; 13 Charles II. stat. 2, cap. 2; 16 and 17 Charles II. cap. 8, and 4 Anne, cap. 16, severally regulate the "securities, matters, and things" alluded to in the Scottish Exchequer Act.

Writ of Error may be issued thereon.[1] The Writ is accordingly made out, and is in the following form:—

"GEORGE the Fourth, by the grace of God, "of the United Kingdom of Great Britain and "Ireland, King, Defender of the Faith, to [*here "the names of the Barons of Exchequer are in-"serted*] our Barons of our Court of Exchequer "in Scotland, greeting, Whereas, in the record "and proceedings, and also in the giving of judg-"ment upon a certain information filed in our "said Court of Exchequer in Scotland, before you, "our Barons of the said Court, wherein A B, our "Advocate-General, was informant, and C D of "was claimant and defendant, as it "is said, manifest error hath intervened, to the "great damage of the said C D: And whereas, "by a statute made in the Parliament holden at "Westminster the 23d day of October, in the "sixth year of the reign of the Lady Anne, late "Queen of Great Britain, it was, among other "things, enacted, That it should and might be "lawful for any person or persons, party or parties "to any judgment which should be given in the "said Court of Exchequer in Scotland, his, her, "or their heirs, executors, or administrators, or "such other persons, bodies politic or corporate,

[1] The written request of the agent for this purpose is termed in England a *Præcipe*.

"who should be privy to, or affected by such judg-"ment, and who by law was or were entitled to "bring a Writ or Writs of Error thereupon, to "sue or prosecute out of the Court of Chancery "in England, a Writ or Writs of Error, to be "made in usual manner upon any such judgment, "returnable in the Parliament of Great Britain, "as by the said statute will more fully appear: "We, therefore, willing that the said error, if any "there be, should be corrected, and full and "speedy justice done to the parties aforesaid in "this behalf, do command you, that if judgment "be thereupon given, then, without delay, you "distinctly and plainly send under your seal the "record and proceedings aforesaid, with all things "touching the same, to us in our present Parlia-"ment, at the next Session, to be held at West-"minster the day of one thousand "eight hundred and , and this Writ, that "the record and proceedings aforesaid being in-"spected, we may cause to be done, with the as-"sent of the Lords Spiritual and Temporal in the "same Parliament, for correcting that error, what "of right ought to be done. Witness ourself, at "the day of , in the year "of our Lord 182 ."

The Writ is entirely prepared and engrossed by the Cursitor; it is sealed at the great seal, indorsed by the Attorney-General, and delivered to the party suing; and upon its being presented in

Court to the Barons by the Scottish agent, the record, certified by one of the clerks in the King's Remembrancer's office, is attached to it, and an indorsement to the following effect is made:—

"The answer of [*the Barons' names as in the "Writ*] within mentioned.

"The record and process of the information "within mentioned, with all things touching the "same, to our Lord the King in the present "Parliament, we send in a certain record to this "Writ annexed, as we are within command-"ed."

[Signed by the Barons.]

The record, with the Writ thus indorsed, is then sealed up and delivered by the Barons to the person who is to take it to London, and who must himself deliver it at the Bar of the House of Lords, upon oath that it is in the same state in which he received it from the Barons.

Standing Order, 13th Dec. 1661.

Within eight days after the bringing in of the Writ and record, the plaintiff in error must assign his errors, upon pain of losing his Writ.[1] The following is the form of an assignment of errors.

[1] See Appendix.

"IN THE HOUSE OF LORDS.

"C D,.....*Plaintiff in Error.*
"A B, Advocate-General "of our Lord the King, } *Defendant in Error.*

"AFTERWARDS, to wit, on the day of "_____, in the year of our Lord one thousand "eight hundred and _____, before our said "Lord the King, and the Peers of this realm, in "this present Parliament assembled, cometh the "said C D, by his counsel E F, and saith, That "in the record and proceedings aforesaid, and in "the giving of judgment by the said Court of "Exchequer of our said Lord the King, in that "part of the United Kingdom of Great Britain "and Ireland called Scotland, there is manifest "error in this, that by the record and proceedings "aforesaid it appears that the judgment was given "in the said Court of Exchequer for the said "A B, the Advocate-General of our Lord the "King; whereas, by the law of the land, such "judgment ought to have been given for the said "C D, against the said Advocate-General;[1] and "for other errors in the proceedings aforesaid, "the said C D prays, that the judgment, so as a-"foresaid, given in favour of the said Advocate-

[1] Here any special errors may be inserted.

" General, may be reversed, annulled, and held " entirely void, and that he may be restored to all " things which he has lost by reason of the judg- " ment aforesaid, and that the said Advocate- " General may rejoin to the errors aforesaid."

The assignment of errors is written upon parchment, signed by one of the plaintiff's counsel, and given in to the Clerk of the Journals, who attaches it to the record and writ. In English Writs of Error, by the practice upon which, the procedure on Scottish Writs is regulated, the names of the parties' attornies in the inferior court are indorsed on the Writ, and the Clerk of the Journals, or his deputies, intimate to the attorney of the defendant in error, that a Writ has been lodged, and errors assigned in the cause. The defendant accordingly puts in his plea of rejoinder,[1] which also is written upon parchment, and attached to the record and writ. It is in the following form:—

" IN THE HOUSE OF LORDS.

" C D, of , *Plaintiff in Error.*
" A B, Advocate-General } *Defendant in Error.*
" of our Lord the King, }

" And the said A B, Advocate-General of our " Lord the King, in his proper person, cometh be-

[1] There is no time limited for putting in this plea; but if it is delayed, the plaintiff may petition to get it lodged.

" fore our said Sovereign Lord the King in his said " Parliament, and saith, That neither in the re- " cord or process aforesaid, nor in the giving of judg- " ment aforesaid, is there any error, so far as alleged " by the said plaintiff; and he prays that the Court " of our said Sovereign Lord the King, in his " Parliament here, may proceed to examination as " well of the record and proceedings aforesaid, as " of the matters aforesaid assigned for error, and " that the judgment aforesaid may be affirmed; " but because the Court of Parliament is not yet " advised what judgment to give of and concerning " the premises, a day is therefore given, as well " to the said C D, as to his Majesty's said Ad- " vocate-General, until , in the " year of the reign of his present Majesty, of and " upon the premises, for that the said Court of " Parliament is not yet advised what judgment to " give thereon."

[Signed by the defendant's Agent.]

Issue being thus joined before the House of Lords, parties prepare and print their Cases as in Appeals. The time limited for lodging the Cases is a fortnight after the time limited for the plaintiff to assign errors, unless an earlier day shall be specially appointed for that purpose, in respect of the Writ being brought merely for delay. There being no penalty or forfeiture attached to neglect of this order, it is not always complied with; but the defendant in error has the power of petition-

Standing Order, 21 July 1811.

ing the House for a *non pros* of the Writ, with costs, if the plaintiff's Case is delayed much beyond the time.

After the Cases are lodged, they are exchanged, the cause is set down for hearing, heard, and judged in the manner already detailed in the procedure upon an Appeal, and the record is remitted to the Court of Exchequer, to do in the cause as directed by the judgment of the House.

FORM OF PROCEDURE

IN THE

HOUSE OF LORDS,

UPON

APPEALS FROM SCOTLAND.

PART IV.

OF APPEALS FROM THE COMMISSION OF TEINDS, AND FROM THE JURY COURT.

1. COMMISSION OF TEINDS.—The competency of Appeals from this Court was questioned in the first instance, in which an Appeal from it was entered,[1] and has been objected to several times since. The Appeals, however, were always received, and it is now settled, that an Appeal from a sentence of the Lords of Session, as Commissioners for the plantation of kirks and valuation of teinds, is competent. The procedure is

[1] Magistrates of Montrose, 15th March 1713. *Lords' Journals.*

in all respects the same as upon Appeals from the Court of Session, the title of the Commissioners for the plantation of kirks and valuation of teinds being of course substituted throughout, for the Court of Session.[1]

2. JURY COURT.—By the first Jury Court Act,[2] it is provided, § 7, "That it shall be competent "to the party against whom any interlocutor shall "be pronounced on the matter of the exception, "to appeal from such interlocutor to the House "of Lords, attaching a copy of the 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 interlocutor shall have been pro-"nounced, if Parliament shall be then sitting, or "if Parliament shall not be sitting, then within "eight days after the commencement of the next "Session of Parliament, but not afterwards; and "so as the proceedings on such Appeal do conform "in all respects to the rules and regulations es-"tablished respecting Appeals: And every such "Appeal shall be appointed to be heard on or "before the fourth cause day after the time li-

[1] See in Morison's Dictionary, p. 7479, the case of the Minister of Kirkden, which contains a list of the several Appeals and Protests for remeid of law, which had been entered down to the date of that case.

[2] 55 Geo. III. cap. 42.

"mited for laying the printed Cases in such Ap-"peal upon the table of the House of Lords; "and upon the hearing of such Appeal, the "House of Lords shall give such judgment re-"garding the further proceedings, either by di-"recting a new trial to be had, or otherwise, as "the case may require."

Under this clause an Appeal was entered on the 23d March 1819,[1] and the appellant having omitted to annex a certified copy of the exception to his Petition of Appeal, afterwards petitioned for, and obtained leave to annex it. The procedure, with the variation as to the time of presenting and hearing, provided by the above clause of the Act, was the same as on ordinary Appeals.

The next clause of the same Act (§ 8) 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 disallowed, 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-Ad-"miral respectively, in pronouncing their judg-"ment, *and shall not be liable to be questioned "any where.*"

The following is the section of the last Jury Court Act regarding Bills of Exception, upon

[1] Clark *v.* Callender. *Lords' Journals.*—The only Appeal from the Jury Court.

which alone Appeals were allowed by the previous Act already quoted :—

"XVII. And it is hereby enacted, That if "the motion for setting aside the verdict be found- "ed on the misdirection of the Judge at the trial "in matter of law, or on the undue admission or "rejection of evidence, it shall be competent to "the party, against whom judgment is given by "the Jury Court, to tender a Bill of Exceptions "to such judgment, in the same manner as at a "trial; and the proceedings on such Bills of Ex- "ceptions shall be conformable in all respects to "the provisions of the Act of the 55th year of the "reign of his present Majesty, herein before re- "cited, regarding Bills of Exception: Provided "always, that in all causes remitted by the Court "of Admiralty to the Jury Court, the Bills of "Exception shall be presented by the Judge of "the Jury Court to the Divisions of the Court of "Session alternately, beginning with the First "Division: Provided farther, that motions for "new trials on a special verdict, or special findings, "shall be made in the Division of the Court of "Session from which the proceedings were sent to "the Jury Court, in manner directed by the said "recited Act of the 55th year of the reign of his "present Majesty: Provided, nevertheless, that "the interlocutor to be pronounced *on such mo- "tions* shall be final, and shall not be subject to

"review by Petition, Representation, Appeal to "the House of Lords, or otherwise."

It will be observed, that the above clause does not in any way repeal or alter the regulations of the former Act regarding Appeals from interlocutors on the matter of an exception, and there is no other clause in the Act which refers to the subject.

APPENDIX.

No. I.

STANDING ORDERS

OF THE

HOUSE OF LORDS,

RELATIVE TO

WRITS OF ERROR AND APPEALS.

Die Veneris, 13 *Decembris* 1661.

Proceedings on Writs of Error.

FORASMUCH as upon Writs of Error returnable in this High Court of Parliament, the plaintiffs therein often desire to delay justice rather than to come to the determination of the right of the cause; It is therefore ordered by the Lords Spiritual and Temporal in Parliament assembled, That the plaintiffs in all such Writs, after the same and the records be brought in, shall speedily repair to the Clerk of the Parliaments, and prosecute the Writs of Error, and satisfy the officers of this House

their fees justly due unto them, by reason of the prosecution of the said Writs of Error, and the proceedings thereupon, and further shall assign their Errors within eight days after the bringing in of such Writs with the records, and if the plaintiffs make default so to do, then the said Clerk, if the defendant in such Writs require it, shall record that the plaintiff hath not prosecuted his Writ of Error; and that the House doth therefore award that such plaintiff shall lose his Writ, and that the defendant shall go without day, and that the record be remitted; and if any plaintiff in any Writ of Error shall alledge diminution and pray a *Certiorari*, the Clerk shall enter an award thereof accordingly; and the plaintiff may, before *In nullo est Erratum* pleaded, sue forth the Writ *Certiorari* in ordinary course, without special petition or motion to this House for the same; and if he shall not prosecute such Writ, and procure it to be returned within ten days next after his plea or diminution put into this House, then, unless he shall show some good cause to this House for the enlarging of the time for the return of such Writ, he shall lose the benefit of the same, and the defendant in the Writ of Error may proceed as if no such Writ of *Certiorari* were awarded.

Die Sabbati, 13 *Julii* 1678.

Times limited for bringing in Appeals.

ORDERED, That all persons who shall be desirous to exhibit to this House any petitions of Appeal from any Court of Equity, do present their petitions within fourteen days, to be accounted from and after the first day of every Session or Meeting of Parliament after a Recess; after which time the Lords do declare they will, during every such sitting, receive no petition of Appeal, unless upon a decree made whilst the Parliament is actually sitting; in which case the party who shall find himself aggrieved may bring his petition of Appeal, provided

he present it to this House within fourteen days after such decree is made and entered in any Court of Equity in *England* or *Wales*, twenty days in any of the Courts in *Scotland*, and forty days in any of the Courts of Equity in *Ireland*.

Die Jovis, 14 *Februarii* 1694.

Petitions for rehearing not to be read the same day offered.

ORDERED, That no petition which relates to the rehearing of any cause, or part of a cause, formerly heard in this House, shall be read the same day that it is offered, but shall lie upon the table, and a future day be appointed for reading thereof, after twelve of the clock.

Die Jovis, 3 *Martii* 1697.

Counsel signing Appeals.

WHEREAS, by the rules and orders of this House, for preventing the bringing of frivolous Appeals, all Appeals are to be signed by two counsel; It is this day ordered, That no person whatsoever do presume as counsel to sign any Appeal to be brought into this House for the future, unless such person hath been of counsel in the same cause in the Courts below, or shall attend as counsel at the bar of this House, when the said Appeal shall come on to be heard; and unless he shall certify that in his judgment there is reasonable cause of Appeal.

Emendat. per Ordin. 9 *Aprilis* 1812.

Die Martis, 19 *Aprilis* 1698.

Printed Cases to be signed by counsel.

THE House taking notice, That upon Appeals and Writs of Error, there have been of late several scandalous and frivolous printed Cases delivered to the Lords of this House; for preventing whereof for the future, It is this day ordered, That no person whatsoever do presume to deliver any printed Case or Cases to any Lord of this House, unless such Case or Cases shall be signed by one or more of the counsel who attended at the hearing

of the cause in the Courts below, or shall be of counsel at the hearing in this House.

Die Mercurii, 22 *Decembris* 1703.

Causes not to be put off without two days notice.

UPON consideration of the great inconveniences arising by motions and petitions for putting off causes, after days have been appointed for hearing thereof, It is ordered, That when a day shall be appointed for the hearing any Cause, Appeal, or Writ of Error, argued in this House, the same shall not be altered but upon petition; and that no petition shall in such case be received, unless two days notice thereof be given to the adverse party, of which notice oath shall be made at the bar of this House.

Die Sabbati, 27 *Januarii* 1710.

Recognizances on Appeals to be entered into in eight days.

WHEREAS by order of the twentieth of *November* 1680, It is ordered, That in all cases upon Appeals to be brought into this House from the Courts in *Westminster Hall*, the party or parties appellants shall, before any answer to his or their petition, give security to the Clerk of the Parliaments, by recognizance to be entered in to her Majesty in One Hundred Pounds, to pay such costs to the defendant or defendants in such Appeals, as this Court shall appoint, in case the decree or judgment appealed from shall be affirmed by this Court; It is this day ordered, That in all cases of Appeals to be brought into this House from the Courts in *Westminster Hall*, *North Britain*, or *Ireland*, the party or parties appellant shall, within eight days after such Appeal received, give security to the Clerk of the Parliaments, by recognizance to be entered in to her Majesty, of the penalty of Four Hundred Pounds, conditioned to pay such costs to the defendant or defendants in such Appeals as this Court shall appoint, in case the decree or judgment appealed from shall be affirmed; and if the appellant or appellants shall neglect or refuse to give such security within the time aforesaid, that then the Clerk of the Parliaments shall inform the House thereof, and the Appeal from thenceforth to be dismissed.

Emendat. per Ordin. 6 *Augusti* 1807.

Die Veneris, 21 *Februarii* 1717.

Certificates to be given of *Certiorari* being awarded.

ORDERED, That in all cases upon Writs of Error depending in this House, when diminution shall be at any time alleged, and a *Certiorari* prayed and awarded before *In nullo est Erratum* pleaded, the Clerk of the Parliaments shall, upon request to him made, give a certificate that diminution is so alleged, and a *Certiorari* prayed and awarded thereupon.

Die Martis, 19 *Januarii* 1719.

Peremptory days to be appointed for answering Appeals.

ORDERED, That when, upon an Appeal to this House, an order is made for the respondent to answer thereto by a time limited, and no answer is put in by that time, upon proof made of due service of such order, a peremptory day shall be appointed for putting in the answer, without any further notice to be given to the respondent.

Die Martis, 5 *Aprilis* 1720.

Appeals to be prosecuted, or stand dismissed.

ORDERED, That such Appeals as have been presented during this Session, to which answers have been or shall be put in during this Session, and for hearing whereof no day hath been or shall be appointed in this Session, and all such Appeals as shall be presented in any subsequent Session, to which answers shall be put in during the same Session, and for hearing whereof no day shall be appointed in such Session, if neither the appellant or respondent shall apply to this House within eight days,

to be accounted from and after the first day of the next Session or Meeting of Parliament, for a day of hearing, such Appeals shall stand dismissed, but without prejudice to the appellants presenting any new Appeals thereafter as they shall be advised.

Appeals not answered also to be dismissed.

Ordered, That such Appeals as have been presented during this Session, to which no answers have been or shall be put in during this Session, and all such Appeals as shall be presented in any subsequent Session, to which no answers shall be put in during the same Session; if neither the appellant within eight days, to be accounted from and after the first day of the next Session or Meeting of Parliament, shall apply to this House to appoint a peremptory day to answer, nor the respondent put in an answer within the said eight days, such Appeals shall stand dismissed, but without prejudice to the appellants presenting any new Appeals thereafter, as they shall be advised.

Answers to be indorsed.

Ordered, That when any answer to an Appeal shall be put in for the future, the Clerk to whom it shall be delivered, do immediately indorse thereon the day on which such answer is brought in; and that the names of the parties answering, and to whose Appeal such answers are put in, be the same day entered in the Journal of this House.

Die Martis, 12 *Januarii* 1724.

Printed Cases to be given to the Lords before hearing.

Ordered, That in all causes on Appeals or Writs of Error appointed to be heard in this House, the appellants and respondents, the plaintiffs and defendants, or their respective agents or solicitors, do for the future deliver to the Clerk of the Parliaments, or Clerk assistant, to be distributed to the Lords of this House, the printed Cases upon such Appeals or Writs of Error, at least four days before the hearing of the same; and that no other

different Cases, in any such causes, be at any time afterwards printed or delivered.

Die Jovis, 24 *Martii* 1725.

Number of years for bringing in Appeals limited.

Ordered, That no petition of Appeal from any decree or sentence of any Court of Equity in *England* or *Ireland*, or of any Court in *Scotland*, before this time signed and inrolled, or extracted, shall be received by this house after five years, to be accounted from the expiration of this present Session of Parliament, and the end of the next Session ensuing the said five years: Nor shall any petition of Appeal from any decree or sentence of any of the said Courts, to be hereafter signed and inrolled, or extracted, be received by this House after five years from the signing and inrolling, or extracting of such decree or sentence, and the end of fourteen days to be accounted from and after the first day of the Session or Meeting of Parliament next ensuing the said five years; unless the person entitled to such Appeal be within the age of one-and-twenty years, or covert, *non compos mentis*, imprisoned, or out of *Great Britain* or *Ireland*; in which case such person shall and may be at liberty to bring his Appeal for reversing any such decree or sentence, at any time within five years next after his full age, discoverture, coming of sound mind, enlargement out of prison, or coming into *Great Britain* or *Ireland*, and fourteen days to be accounted from and after the first day of the Session or Meeting of Parliament next ensuing the said five years, but not afterwards, or otherwise.

Die Sabbati, 2 *Martii* 1727.

How counsel are to proceed at hearing causes.

Upon report from the Committee of the whole House, appointed to take into consideration matters relating to the proceedings on Appeals and Writs of Error; It is

ordered, That at the hearing of causes for the future, one of the counsel for the appellants shall open the cause, then the evidence on their side shall be read; which done, the other counsel for the appellants may make observations on the evidence: Then one of the counsel for the respondents shall be heard, and the evidence on their side to be read; after which, the other counsel for the respondents shall be heard; and one counsel only for the appellants to reply.

Die Veneris, 28 *Martii* 1735.

Answering Appeals after the determination of a Session.

UPON report from the Lords Committees appointed to consider of the Standing Orders of this House in relation to the putting in of answers to Appeals; It is ordered and declared, by the Lords Spiritual and Temporal in Parliament assembled, That when, upon an Appeal to this House, an order hath been or shall be made for the respondent or respondents to answer thereto by a time limited, if the Session of Parliament wherein such order hath been or shall be made, shall determine before the time so limited for answering shall be expired, and no answer shall be put in during the same Session, service of such order upon the respondent or respondents to such Appeal by the space of five weeks at the least, before the first day of the then next Session, shall be deemed good service; and the appellant may apply to this House for a peremptory day for putting in the answer, in case the respondent or respondents shall not put in his or their answer within three days, to be computed from the first day of the next Session of Parliament.

Die Jovis, 8 *Junii* 1749.

Appeals to be heard in course in the beginning of every Session.

UPON report from the Lords Committees appointed to consider of the Standing Order of this House of the 5th

of *April* 1734, in relation to the hearing of Appeals left undetermined in a former Session, and what alterations or amendments are proper to be made therein in order to render the same more effectual; It is ordered, by the Lords Spiritual and Temporal in Parliament assembled, That all such Appeals as have been presented, for hearing whereof days have been appointed during this Session, which shall not be determined in this Session; and all such Appeals as shall be presented for hearing, whereof days shall be appointed in any subsequent Session, which shall not be determined in the same Session; shall be heard and determined in the beginning of the next Session of Parliament, in the same order and course as they stand to be heard at the end of this or any future Session, without any new application to this House to appoint a day for hearing the same; and that such of the said Appeals as shall stand first to be heard, at the end of this or any future Session of Parliament, shall stand to be heard upon the *Wednesday* in the week next after that week in which any subsequent Session of Parliament shall begin; the second upon the *Friday* following, and the third upon the *Monday* following; and from thence the rest of the said Appeals in course, upon every *Wednesday*, *Friday*, and *Monday*, until they shall be all heard and determined; and that in case any such Appeal shall not be adjourned by order of this House made before the day on which the same is hereby appointed to be heard, and the party or parties on one side shall attend by their counsel, and the party or parties on the other side shall not attend by their counsel, on the said day appointed for hearing thereof, such Appeal shall be heard *ex parte;* and in case neither of the parties to such Appeal shall attend by their counsel on the said day appointed for hearing thereof, then such Appeal shall stand absolutely dismissed; but without preju-

dice, in this last case, to the appellant or appellants presenting any new Appeal thereafter, in such manner as the said appellant or appellants might have done, in case such former Appeal had not been presented to this House, as he or they shall be advised.

Die Martis, 8 *Martii* 1763.

Time limited for bringing Cross Appeals.

ORDERED, by the Lords Spiritual and Temporal in Parliament assembled, That for the future, if the respondent or respondents to any Appeal depending in this House, shall be desirous to exhibit a Cross Appeal, they shall present the same within one week after their answer put in to the original Appeal, otherwise the same shall not be received.

Die Veneris, 12 *Julii* 1811.

Time limited for laying prints of Cases on the table of the House.

ORDERED, by the Lords Spiritual and Temporal in Parliament assembled, That when any Appeal shall be presented to this House on or after the first day of any Session or Meeting of Parliament, the appellant and respondent shall severally lay the prints of their Cases respectively upon the table of this House, or deliver the same to the Clerk of the Parliaments for that purpose, within a fortnight after the time appointed for the respondent to put in his answer to the said Appeal; and in default of so doing by the appellant, the said Appeal shall stand dismissed, but without prejudice to the appellant presenting a new Appeal within the first fourteen days of the next Session of Parliament, or within the then remainder of the time limited by the Standing Order No. 116, for presenting Appeals to this House; and in case of default on the part of the respondent, the appellant shall be at liberty forthwith to set down his cause *ex parte*.

Ordered, by the Lords Spiritual and Temporal in Parliament assembled, That when any Writ of Error

shall be brought into this House during the sitting of Parliament, the plaintiff and defendant shall severally lay the prints of their Cases upon the table of this House, or deliver the same to the Clerk of the Parliaments for that purpose, within a fortnight after the time limited by this House for the plaintiff to assign errors, unless an earlier day be specially appointed for that purpose, in respect of such Writ of Error being brought merely for delay.

Die Jovis, 9 *Aprilis* 1812.

Certificate of leave or difference of opinion to be signed by counsel on Appeals.

ORDERED, by the Lords Spiritual and Temporal in Parliament assembled, That when any Petition of Appeal shall be presented to this House from any interlocutory judgment of either Division of the Lords of Session in *Scotland*, the counsel who shall sign the said petition, or two of the counsel for the party or parties in the Court below, shall sign a certificate or declaration, stating, either that leave was given by the Division of the Judges pronouncing such interlocutory judgment to the appellant or appellants, to present such Petition of Appeal, or that there was a difference of opinion amongst the Judges of the said Division pronouncing such interlocutory judgment.

To prevent delay on part of respondents in delivering Cases on Appeals.

Ordered, by the Lords Spiritual and Temporal in Parliament assembled, That to prevent delay on the part of the respondent or respondents to any Petition of Appeal presented to this House, in delivering their printed Cases, pursuant to the Standing Orders of the same; It is ordered, That, previous to any Petition of Appeal being presented to this House, a notice shall be given to the agent or agents of the party or parties in the Court below, who shall be made respondent or respondents to the said Appeal, of the time when such Petition of Appeal is intended to be presented to this House; and the day on which such notice was given,

or caused to be given, shall be indorsed by the agent or agents for the petitioner on the back of the said Appeal.

Printed Cases to contain proofs taken in the Courts below.

Die Mercurii, 24 *Februarii* 1813.

ORDERED, by the Lords Spiritual and Temporal in Parliament assembled, That for the future the printed Cases delivered in Appeals and Writs of Error depending before this House, shall contain a copy of so much of the proofs taken in the Courts below, as the party or parties intend to rely on respectively on the hearing of the cause before this House, together with references to the documents where the same may be found.

Appendix to be printed with such proofs where Cases have been delivered in.

Die Mercurii, 8 *Decembris* 1813.

ORDERED, by the Lords Spiritual and Temporal in Parliament assembled, That in all Cases of Appeals and Writs of Error which were depending in this House, and the printed Cases in which were delivered on or before the 24th day of *February* 1813, the party or parties do respectively print an Appendix to the said Cases delivered, and do therein set forth so much of the proofs taken in the Courts below as they intend to rely on respectively on the hearing of the said causes, and which is not already set forth in the printed Cases by them so respectively delivered; and that such Appendix do contain a reference to the documents where the same may be found; and further, that the party or parties do deliver the same to the Clerk of the Parliaments, or to the Clerk assistant, to be distributed to the Lords of this House, at least four days before the hearing of the said causes.

Ordered, That the said orders be declared Standing Orders, and that they be entered upon the roll of Standing Orders of this House, and printed and published, to the end all persons concerned may the better take notice of the same.

No. II.

TABLE OF FEES.

APPELLANT.

Order of Service,	£1	1	0
(If procured on day of presenting Petition, extra,).	0	10	6
Order to enter into Recognizance,	1	1	0
Fees of Recognizance,	1	11	6
Copy of Respondent's Answer,	0	10	6
Lodging Cases,	2	2	0
Junior Clerk's Fee for laying same on Table,	1	1	0
Certified Copy of proceedings, payable in Edinburgh,*	5	0	0
Bar Fee	3	10	0
Cause List,	1	1	0
Judgment (payable by the successful party),	5	5	0
Gratuity to Doorkeeper (payable by successful party),	5	5	0
Copy of Judgment,	0	10	6

RESPONDENT.

Copy of Appellant's Petition, per folio of 72 words,	0	1	0
Additional Fee,	1	1	0
Filing Answer,	0	5	0

* This Fee is exclusive of the dues to the Clerk's Assistants for collating and comparing the papers; which dues vary according to the length of the proceedings certified.

Order to set down Cause for Hearing,.....	£1	1	0
Lodging Cases,.....	2	2	0
Junior Clerk laying same on Table,.....	1	1	0
Cause List, ...	1	1	0
Bar Fee,.....	3	10	0

BOTH PARTIES.

Retaining Fee to each Counsel,.....	2	2	0
Clerk,.....	0	7	6
Fee with Papers, to each Counsel,*.....	15	15	0
Clerk,.....	0	7	6
Consultation,.....	5	5	0
Clerk,.....	0	7	6
Fee for each day that the Cause is on the Paper of the House,.....	10	10	0
Clerk,.....	0	7	6

WRITS OF ERROR.

Fees of Writ from Cursitor's Office,.....	10	4	6
Lodging Writ and Record in Parliament,.....	4	4	0
Filing Assignment of Errors,.....	0	5	0
Filing Rejoinder, ...	0	15	6
Office Copy of Record, per folio of 72 words,....	0	1	0
Additional Fee,.....	1	1	0
Office Copy of Assignment of Errors,.....	1	1	0
Fee to Counsel to sign Rejoinder, ...	2	2	0
Clerk, ...	0	7	6
Lodging Cases,.....	3	3	0
Cause List,.....	2	2	0

The other Fees upon Writs of Error are the same as upon Appeals.

* The Fee with the Papers is of course regulated by the magnitude and difficulty of the Cause; it is seldom under what is above stated.

No. III.

CLAUSES IN THE SCOTTISH JUDICATURE ACT OF 1808, REGARDING APPEALS.

Appeals to the House of Lords.

XV. And be it enacted, That hereafter no Appeal to the House of Lords shall be allowed from interlocutory judgments, but such Appeals shall be allowed only from judgments or decrees on the whole merits of the cause, except with the leave of the Division of the Judges pronouncing such interlocutory judgments, or except in such cases where there is a difference of opinion among the Judges of the said Division; nor shall any Appeal to the House of Lords be allowed from interlocutors or decrees of Lords Ordinary, which have not been reviewed by the Judges sitting in the Division to which such Lords Ordinary belong: Provided, that when a judgment or decree is appealed from, it shall be competent for either party to Appeal to the House of Lords from all or any of the interlocutors that may have been pronounced in the cause, so that the whole, as far as it is necessary, may be brought under the review of the House of Lords.

Respecting interlocutors.

XVI. Provided always, and be it enacted, That if the reclaiming or representing days against an interlocutor of a Lord Ordinary shall, from mistake or inadvertency, have expired, it shall be competent, with the leave of the Lord Ordinary, to submit the said interlocutor by petition, to the review of the Division to which the said Lord Ordinary belongs; but declaring always, that in the event of such petition being presented, the petitioners shall be subjected in the payment of the expenses previously incurred in the process by the other party.

Copy of the Petition of Appeal to be laid before the Judges of the Division to which the cause belongs.

XVII. And be it enacted, That when any Appeal is lodged in the House of Lords, a copy of the Petition of Appeal shall be laid by the respondent or respondents before the Judges of the Division to which the cause belongs; and the said Division, or any four of the Judges thereof, shall have power to regulate all matters relative to interim possession, or execution, and payment of costs and expenses already incurred, according to their sound discretion, having a just regard to the interests of the parties, as they may be affected by the affirmance or reversal of the judgment or decree appealed from.

Regulations as to interim possession, &c. not to be stopped on account of Appeal to the House of Lords.

XVIII. And be it enacted, That it shall not be competent, by Appeal to the House of Lords, touching the regulations so made as to such interim possession, execution, and payment of expenses or costs, to stop the execution of such regulations as shall have been so made as aforesaid respecting the same: Provided that when the Appeal, touching the judgment or decree appealed from, shall be heard, it shall be competent for the House of Lords to make such order, and give such judgment respecting all matters whatsoever, which shall have been

done, or have taken place, in pursuance of, or in consequence of such regulations so made, as to interim possession, execution, and payment of expenses or costs, as the justice of the case shall appear to the said House of Lords to require.

House of Lords may adjudge payment of interest.

XIX. And be it enacted, That if, upon hearing the Appeal, it shall appear to the House of Lords to be just to decree or adjudge the payment of interest, simple or compound, by any of the parties in the cause to which such Appeal relates, it shall be competent to the said House to decree or adjudge the payment thereof, as the said House, in its sound discretion, shall think meet.

Respondents in Appeals dismissed may apply for interest to the Division to which the cause belongs.

XX. And be it enacted, That if any Appeal, presented after the passing of this Act to the House of Lords, against an interlocutor or decree of the said Court, or either of the Divisions thereof, shall be dismissed for want of prosecution, it shall be lawful for any respondent in such Appeal to apply by petition to that Division of the Court of Session to which such cause shall belong, and it shall be competent to the Judges of the said Division, upon such petition, to decree payment of interest, simple or compound, by the appellant to such respondent, in such a manner as the said Division, in its sound discretion, shall think meet, together with the costs or expenses which have been incurred in consequence of such Appeal.

THE END.

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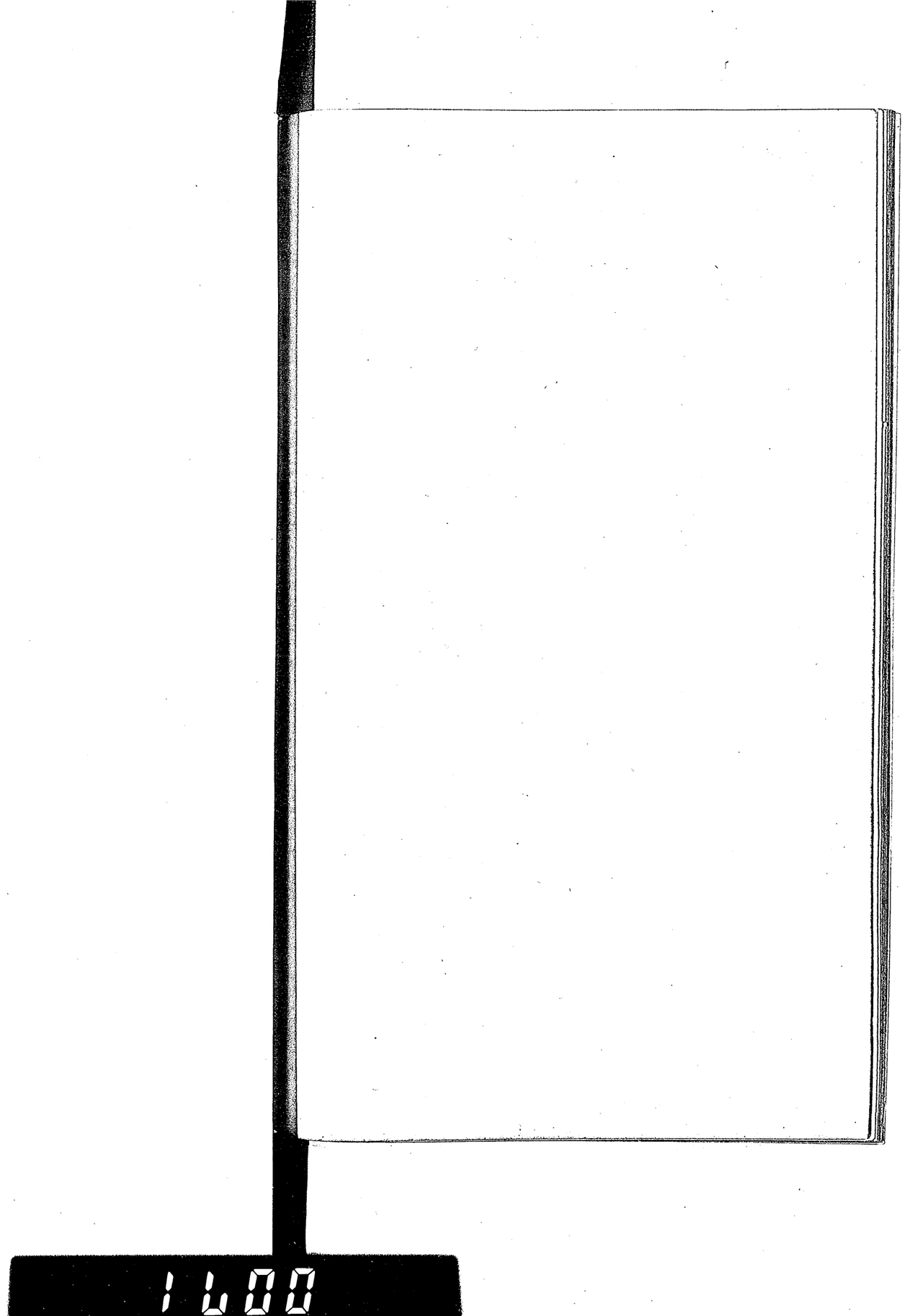
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