THE APPELLATE JURISDICTION OF THE HOUSE OF LORDS IN SCOTCH CAUSES

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NORMAN MACPHERSON

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HOUSE OF LORDS IN SCOTCH CAUSES

ILLUSTRATED BY THE LITIGATION RELATING TO

THE CUSTODY OF THE MARQUIS OF BUTE.

BY

NORMAN MACPHERSON, A.M.,

ADVOCATE.

Prætor jus reddere dicitur, etiam cum iniqua decernit.—D., l. 1., t. 1., l. 11

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THE APPELLATE JURISDICTION

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By the constitution of the Court of Session, it was originally intended to be a permanent Court of supreme jurisdiction, without appeal to Parliament, and in practice for a long time it was so. Whether in a turbulent country, such as Scotland then was, the Court was so constituted as to form a safe depositary for the interests committed to it, in cases where any of the parties were connected with the politics of the period, we need not inquire. The difficulty seems to have been avoided rather than grappled with; for many questions, which we should now regard as more suitable for courts of law, were taken up and dealt with directly by Parliament.

In 1675, however, the question of the right of appeal to Parliament rose into importance, the Lords of Session refusing to allow it, the Faculty of Advocates insisting upon it. Charles II. supported the Bench, and banished the recusant bar twelve miles from Edinburgh, and they retired to Linlithgow rather than give up the right. Ultimately the right of appeal was fully established.

The Articles of Union with England are silent on the subject, and, it is understood, that they are so framed of design. Still, from the Union to the present time, the House of Lords has, without challenge, exercised an appellate jurisdiction in Scotch cases, and, upon the whole, it has undoubtedly been exercised in such a manner as to give satisfaction to the lawyers as well as to the people of Scotland. Nor, so far as we are aware, has it ever occurred to any public body that it would be desirable that the right of appeal should be abolished, although Parliament has from time to time thought it necessary to provide against the

abuse of the right by excluding it in trifling causes. On the other hand, that there have been miscarriages, no one familiar with our law can doubt,—miscarriages arising sometimes from misapplication of admitted principles of the law of Scotland; sometimes from the introduction of principles foreign to that law, and which did not naturally blend with it; and sometimes from misapprehension as to our practice and forms of procedure. The subject was fully discussed in a pamphlet understood to proceed from the pen of a counsel of eminence.[1] But we refrain from quoting it, lest a Scotch lawyer should not be looked upon as an impartial witness. We may, however, refer to the speech delivered by the late Lord Campbell in the House of Lords in 1858, on the appellate jurisdiction of the House :—

" Certainly there have been times when Scotland has had great reason to complain. Generally those who have presided here have been well acquainted with Scotch law, as they now are; but there have been instances in which Scottish appeals have been referred to those who were entirely ignorant of Scottish law. I do not see the noble Earl[2] here who has contended for Scottish privileges, but I myself should have been ready almost to raise the standard of rebellion when I have read of the manner in which the judicial business has sometimes been transacted. My Lords, I do trust that there is no danger, however, that such times will again occur, but that we shall have a Judicial Committee from which we shall select proper Judges for every case as it may occur, and that in this manner our jurisdiction will remain and be usefully exercised." [3]

The shape that recent complaints against the appellate jurisdiction have taken, has always been that of suggestions for such a constitution of the Appellate Court as would secure in the Judges an adequate knowledge of the law of Scotland, and the removal of the anomaly of men sitting as the supreme administrators of a law, which it never has been their professional duty to study. Unfortunately no such committee as Lord Campbell pointed at has been established. Lord Brougham,

[1] The Appellate Jurisdiction. Scotch Appeals. Edinr. 1851. We may refer also to the Report of the Committee of the House of Lords, 20th May 1856.

[2] Lord Eglinton.

[3] M'Q. Rep. vol. ii. p. 620.

who was himself educated for the bar of Scotland, has not been taking so active a part in the judicial business of the House as formerly; and we may say, without offence, that among the recent very eminent additions to the judicial staff of the House of Lords, few had at the bar any very large amount of experience in arguing Scotch appeals. It is probably owing to this that we have of late years seen collisions with each Division of the Court of Session, of a kind which could not but be offensive to them, and which have called forth remonstrance from each [1]—denunciations of our forms of procedure as "disgraceful," where they rested (probably unknown to the denouncer) on recent legislative enactment [2]—and opinions thrown out that a practice was quite erroneous, which, a short time before, had been lauded as admirable, and far preferable to the English rule in the same matter.[3] Recently we have even seen a cause remitted for farther procedure with two of the law Lords differing from other two, as to what it would be competent for the Scotch Court to do when the cause was proceeded in.[4]

The question thus becomes a very serious one, Are the judgments of the House of Lords to have any weight except in the cause decided? Where is the law which is to guide the Scotch Courts to be discovered? Is it in the orders of the House, or in the opinions of successive Chancellors, or in the conflicting *dicta* of the Judges, who may agree to reverse or affirm interlocutors, but on principles totally irreconcileable? This difficulty we believe to have been aggravated by the addition to the number of the law Lords, and the consequently decreased sense of individual responsibility, in dealing with a foreign system, which in the ordinary course of human nature has followed therefrom. The judgment in which these defects

[1] Baird v. Fortune, 13th June 1861, xxiii. D.; Donald v. Donald, 20th June 1861, xxiii. D.; see also App. No. IV. It is no part of our present object to examine the language which the House of Lords have lately thought fit to use in regard to the conduct and motives of our Scottish Judges; but it certainly tends to provoke a license of commentary and suggestion which has never yet been adopted in criticising the proceedings of the Appellate Court.

[2] Ritchie v. Rickets, H. of L., 16th April 1861.

[3] Morgan v. Morris, 16th July 1858, S. Jurist, vol. xxx. p. 686; Househill Co. v. Neilson, March 6, 1843, 2 Bell's App. p. 24.

[4] Johnstone v. Johnstone, Feb. 10, 1860, 3 M'Q. p. 619.