altogether, namely, the Magistrates of Edinburgh; but the tithe fish of St. Cuthbert's was in Lord Holyroodhouse as titular, and conveyed by him, as a distinct right, to the North Leith parish. It is therefore illegal to exact tithe twice, or to exact teind on fish merely imported for the purpose of export.

After hearing counsel, the

LORD CHANCELLOR said:

"My Lords,

"There are two points which the Court below have determined, namely, 1st, That the minister of North Leith had no right to the tithe of fish brought into Leith which were meant to be again exported. 2d, Nor to the tithe of fish which had been paid at the place where caught, and, after considering the case maturely, I move your Lordships that the interlocutor be affirmed upon the first point, but reversed on the second point; resting my judgment upon the proof brought, of the practice of so drawing the teind in the latter case.

It was ordered and adjudged that the interlocutors of the (Lord Ordinary) 23d July, 29th November, and 16th December 1777, complained of be *reversed;* and that in the interlocutors of the (Court) 18th November 1780, and 5th December adhering thereto, after the words "into the port of Leith," the words "for exportation," be inserted: And that so much of the said interlocutors as find that "neither are they (viz. the pursuers) entitled to draw from the defenders any teind of any fish which, from a certificate of the minister of the parish where caught, or their titular having right to draw the teind thereof, shall appear to have paid teind elsewhere," *be reversed.*

For the Appellants, *Henry Dundas, Tho. Erskine.*
For the Respondents, *Dav. Rae, John Maclaurin.*

JAMES BYWATER, - - - - *Appellant;*
THE CROWN, - - - - - *Respondent.*

House of Lords, 1*st May* 1781.

COURT OF JUSTICIARY — JURISDICTION — APPEAL. — Competency of an appeal to the House of Lords from the sentence of

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the High Court of Justiciary in Scotland. Held such an appeal incompetent.

A petition and appeal was presented by the appellant, a criminal under sentence of death, against the sentence of the High Court of Justiciary in Scotland, condemning him, preferred to the House of Lords, on the ground that, in the list, or copy of the panel, delivered to the prisoner at the time of his trial, there was a misnomer of one of the names of the panel; and though he had made objections to any verdict being pronounced, yet the Court repelled the objection, and praying a reversal of the sentence.

LORD LOUGHBOROUGH,

" My Lords,—I have in my hand a petition and appeal of James Bywater, from a judgment of the Court of Justiciary in Scotland, on a capital conviction, and the question is, how far is it or is not to be received ?"

LORD MANSFIELD,

" My Lords,—" This is a petition in the nature of an appeal, from a sentence of the Court of Justiciary in Scotland, by which the petitioner is adjudged to suffer death. The error that is assigned is not an error appearing upon the record, or upon any of the proceedings; but it is a complaint of an irregularity during the trial, which is of this sort. By law, a copy of the panel of the jury is to be given to the prisoner. At the trial, the jurors are called over, and the prisoner is asked, one by one, whether he has any objection to them; if he has any objection, he makes it, and the Court judge immediately of it. If the objection is allowed, they go on, and call another juror as they stand in the panel. It seems this juror's name was spelt differently by a letter or two from the real way of spelling it. At the trial he is called by the true spelling. He is called by the true spelling in the process, and the prisoner is asked, whether he has any objection to him; he says he has no objection at all, and consents to his being sworn? If he had made an objection, as I have said, it would only have concluded with calling another juror. The misspelling was in his knowledge, and was not in the knowledge of the prosecutor,—this is the error assigned. An appeal in a capital case most undoubtedly, upon such an error as this, you will not allow: for it is really no error, and no objection can now be made; it must be taken advantage of at the trial or not at all, and here it is expressly waved; but I only mention that, to shew how trifling the objection is; but the object now for your Lordships' consideration is not upon the merits on either side, but Whether, be the error what it may, this House has any jurisdiction on the subject? and as the matter has passed since I had the honour to sit in this House several times, I have, as at present advised, formed an opinion that the ap-

peal is not competent, and that this House has no jurisdiction in any appeal in a capital case; for there is no occasion to go further than the question before your Lordships calls upon me to do. By the articles of Union, the Court of Session, and the Court of Justiciary, are, to all intents and purposes, with all rights, forms, customs, manners, privileges, &c., to remain just as they were before. At the time of the Union, it was clear established law that there lay an appeal from the Court of Session to the Parliament of Scotland, and therefore that jurisdiction devolved upon this House, from the moment of the Union down to this day, as your Lordships well know, and it has been very beneficial to that part of the kingdom. Appeals have regularly been brought and adjudged of from the Court of Session. At the revolution, the bill of rights expressly claims as a right, the privilege of appealing from the sentences of the Court of Session, but, with regard to criminal cases, there never existed an idea of an appeal from the Court of Justiciary before the Union. They in express words say, there lies no appeal. There is not a single book that says there does lie one. The bill of rights, which claims a right of appealing in civil cases from the Court of Session, does not say a word of criminal cases, or of the Court of Justiciary, and, agreeable to this, there has not existed an instance of an appeal to this House, in a criminal and capital case, from the Court of Justiciary in Scotland, since the Union, and yet men have been hanged every day, and they have made objections below, which objections below have not availed them."

"There never yet has existed an appeal here, (I shall state to your Lordships by and by the only case that is alleged to the contrary), and so it went on to the year 1766; and in that year a very extraordinary case, for the atrocity of the crime, and for the starting of this objection, happened. A lady of family and birth was so far seduced, either by her own wicked inclinations, or by the brother of her husband, that they two, with an adulterous incest between them, ended it by the murder of the husband. Being persons of rank and fortune, they litigated their trial, and they had very able counsel to assist them. They were sentenced to death, a punishment which was not too severe for their crimes. She pleaded pregnancy. She was found to be pregnant, her sentence was respited till her delivery. It entered into no man's head that there lay an appeal to the House of Lords that would suspend the execution, so the brother was executed, not having thought that an appeal lay to your Lordships. By the time the lady was delivered, an experiment was suggested. It was during the recess of Parliament, and opinions (as they were called) were taken of counsel below; opinions were taken of counsel here. Indeed, I cannot call them opinions that were given, they were dissertations, and the dissertations concluded to try the experiment; and they saw no reason why an appeal should not lie in a criminal as well as civil case, and that it would be terrible if it did not, for the Court of Justiciary might try and execute men who had

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been guilty of no crime, and there would be no redress. The scheme was tried, but the Parliament not being then sitting, the execution would have proceeded, therefore they petitioned the king (not in council) to grant reprieve, to permit the party to bring an appeal to the House of Lords; and they lodged with the Secretary of State the opinions they had taken, that seemed to be of that side of the question. There was an opinion of a gentleman at the bar here in England, who, most certainly, by his opinion, never heard a word of the laws of Scotland, or had an idea of what they were. Upon this petition a reprieve was granted,—it was temporary only. The then Lord Advocate (Sir Thomas Miller) was wrote to, to give an opinion upon the appeal. There is from him upon this subject as able, clear, decisive, and learned an opinion, as there is upon any one subject or point of real history or law, and it is impossible for any man who reads that report to doubt; for he says, 'I have directed searches to be made into all the records of Parliament; I have directed searches into the records of the Court of Justiciary; I have looked into the records of council; I have looked into the law books; the law books (particularly Lord Stair) say expressly, there is no appeal in a criminal case. There is no book to be found that ever said there was. There is no instance of an appeal to the House of Lords since the Union. Besides, great inconveniences would arise, if there was liberty for every criminal to appeal from a sentence of condemnation.' My Lords, upon full consideration of this report, and likewise upon what they call opinions on the other side, his Majesty took the opinions of all the Lords of the Cabinet Council. The question had been well considered, and they were unanimously of opinion, and the noble Lord who then sat upon the woolsack was one, I was another, who, upon full conviction, (and I have never changed my opinion since, but have grown stronger and stronger in it), advised his Majesty, that as the crime could not call for mercy, (it being of the most flagrant and atrocious nature), that there was no right to appeal to the House of Lords; but if there had been, they certainly had no right to call upon the king to grant a reprieve. They could not stop the execution by an appeal. That argument affords a demonstration that the law did not give them a right to appeal. Where the execution can never be remedied, it is a stay of proceedings; they cannot proceed where a writ of error is allowed, to execute the man in the meantime; but there is no way of staying the execution by a right to appeal to a jurisdiction that does not always sit; the man is hanged before that jurisdiction can hear of it, and therefore, an application to the king for a reprieve in aid of the jurisdiction of the House of Lords, showed there could not exist such a jurisdiction, and therefore, the reprieve was suffered to expire. The lady made her escape. I do not know what became of her afterwards. In the year 1768, there was an application by a gentleman at the bar, who was prosecuted for bribery at an election; he was a Member of Par-

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liament, he pleaded, in stay of any proceeding, that it was a criminal prosecution before the Court of Justiciary, and he pleaded privilege of Parliament, in stay of any further proceeding. The Court of Justiciary allowed him the privilege of Parliament, stopped further proceeding, and adjourned to a particular day. An appeal from this interlocutory order was presented to this House ; the House doubted of their jurisdiction, and referred it to a committee to examine and report whether it was competent. Before that committee, which was extremely well attended, the whole matter was gone into with wonderful pains and diligence. It was fully argued, all the records had been searched, and I have here a volume of the copies of the records that were then recited ; there were the records from the Parliament of Scotland,—from the council,—every instrument from whence any argument could be drawn ; and after hearing all the arguments, and considering of all those precedents, the Lords of the committee, and the House afterwards, were clearly of opinion that the order made by the Court of Justiciary was wrong ; but they were of opinion, that they had not jurisdiction to receive the appeal, and a middle way was taken to adjourn the consideration, whether the appeal was competent, or might be received (here his Lordship spoke so low, as not to be distinctly heard)."

" It was sent back with liberty to the parties, notwithstanding the appeal, at the day to which the cause was adjourned, to pray the Court to reconsider whether it was by the commou or statute law of Scotland upon which they founded their right to take cognizance of the subject; because there was no common law, there was no statute law, which allowed a member of Parliament a privilege against a prosecution for crimes. If they went upon the usage of Parliament, they had no right to take cognizance of that matter upon that ground, and if they went upon that, they mistook it, for there is no usage of Parliament that says that a member of Parliament shall not be prosecuted for crimes. Therefore it was sent back, with that direction perfectly well understood at the time, and no more was heard of it ; but all the precedents were fully discussed at that time, and the opinion they formed was very clear that they did not go to shew that there was any usage whatever of an appeal before the Union in criminal cases. After this there came another case before your Lordships, and that was the case of the Earl of Eglinton and one Campbell, and the Court there, upon a doubt being started, whether that murder was committed within the limits of the admiralty jurisdiction, or within the limits of their jurisdiction, determined for their own jurisdiction. Upon this Campbell petitioned the king ; his petition was referred to this House, a committee sat, and they called upon the agent for the petitioner to proceed ; they had been fully apprized of all the doctrine upon this point, and therefore they held it with so strict a rule, that the agent, not being ready

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reported to the House that the petition should be dismissed, which the House agreed to, and dismissed the petition."

"Another case happened soon after, and that was the very same prisoner upon the same prosecution. When it went back, the Court of Justiciary (as is the practice there) found the indictment relevant. Upon their finding the indictment relevant, the prisoner immediately petitioned the House of Lords. Upon that petition being read, it was objected to as not competent. The agent was called in, and asked if he could produce a single instance of an appeal to the Parliament of Scotland before the Union, or to the House of Lords since, from an interlocutory order in a criminal prosecution. The agent said he could produce none. Upon which the petition was rejected, and rejected upon this plain ground, that if there is no precedent, there can be no such jurisdiction; for it never having happened, it is decisive that it never could, because the case happens every day; but it does not rest here, and if it barely rested here, perhaps the proper method would have been to have referred this to a committee. But, I apprehend, this petition ought not to be received or countenanced so far, as to go to a committee, after the question has received so full consideration and discussion as it has done in the case of the King against Miller and Murdison, which was in the year 1773. Upon the 10th of March 1773 there was a final condemnation. The Court of Justiciary, after the verdict, overruled the objections, just as in this case, to arrest the judgment, and adjudged the prisoner to death. From this sentence he appealed to this House. Your Lordships referred it to a committee; the committee reported it, and upon that report the House resolved that the petition should be rejected, and rejected upon this ground, (there could be no other,) that it was not competent, and that the House has no jurisdiction. Thus it stands finally determined, finally adjudged, and, as I said before, the question cannot admit of a doubt. I rest my proposal to your Lordships to reject this petition upon a clear authority in point and solemn judgment. If it was proper to go into the argument, there cannot be a single doubt. What is it whether the sentences of a court, having jurisdiction, should be subject to the review of another court, and under what restrictions and limitations, is matter of positive law, and where there is no positive law it must depend upon usage, usage must decide it? It is the creature of usage—(spoke so low as not to be distinctly heard.)"

"I mentioned to your Lordships several precedents that were laid before us. There was not from before the Union a single case of felony or misdemeanour where there could be an argument rested or drawn to support the point. There was what they called Repealing Dooms of Forfeiture. They were acts of Parliament—all these cases not in the shape of an appeal. There were two instances that were quoted, and great stress laid on, to shew that there had been at least

a notion; one of them the authority of this House, to receive an appeal from the Court of Justiciary. In the year 1713 (I lay an emphasis upon the time) the Magistrates of Elgin chose to incline to encourage those of the Episcopalian persuasion, and the Magistrates of Elgin gave to an Episcopalian minister, qualified under the Act of Toleration, a little chapel, which they said was their property. When they had given this to him, and delivered the key, and he officiated, it was taken up by the Procurator of the Kirk, and it was brought up by the then Lord Advocate (if I do not mistake) as the subject-matter of a criminal prosecution before the Court of Justiciary. A criminal prosecution! Why? Because the Magistrates, thinking the building and the ground to be their own, had given it to a minister, that was tolerated according to law, to perform divine service there; What was the charge? The charge was a civil question, that the chapel did not belong to the Magistrates, but belonging to the kirk, that they had taken the property of the kirk, and given it to a toleration minister, and the only question was, Did it belong to the kirk or the Magistrates? And was the petitioner to be restored to the possession and quietude in the enjoyment of it? Times were then warm. When it came before the Court of Justiciary they were startled a little at proceeding upon this, and they said it was a civil question, and they remitted it to the Court of Session to try Whether the matter in dispute belonged to the Magistrates or the kirk? The Court of Session tried and determined that it belonged to the kirk. This civil question is carried before the Court of Justiciary, and the Court of Justiciary, upon the foundation of the sentence of the Court of Session, ordered the key to be delivered to the Procurator for the Kirk; and, besides *that*, they imposed a fine. The Magistrates appealed to the House of Lords from the sentence of the Court of Session, and, that I might be correct, I looked at the petition before I began to trouble your Lordships. The petition is this :—'An appeal from the sentence of the Court of Session, and the proceedings of the Court of Justiciary founded thereupon.' The order of the House of Lords is reversing the sentence of the Court of Session, and annulling what was done founded thereupon, that is, the delivery of the key and the fine. There are no printed cases to be found in this cause, if they did print cases. There is no objection made in the answer here to the jurisdiction of this House, and indeed they could not. The foundation is the civil sentence of the Court of Session. And all that is built upon that must fall to the ground, when the House of Lords had reversed the sentence of the Court of Session, for then there never was such a sentence."

"There has been no attempt in a criminal case, or any application to this House till 1768, when, as I stated, there was a very similar case occurred to me, to shew it in a stronger light. By the peculiarity of the law of Scotland, the Court of Session can judge of one crime, and that is forgery; they examine by depositions, and if they

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find a man guilty, they remit him to the Court of Justiciary, to inflict the penalty of death, or a lesser punishment, and it goes upon their sentence to the Court of Justiciary. I do not take upon me to say whether the Court of Justiciary may acquit, but within this twelve months it has been determined that the Court of Justiciary can go into no evidence but what comes from the Court of Session, and the judgment of the Court of Session is the foundation for the execution of this man, if executed, because if the Court of Session had acquitted him, he never would have been sent to the Court of Justiciary. Suppose a man found guilty by the Court of Session, he appeals to the House of Lords, and the House of Lords reverse the decree of the Session; is it possible the Court of Justiciary can go on with the cause? It is impossible. The cause is taken away, therefore I have always been astonished how any stress can be laid upon this."

"Another case has been quoted, which undoubtedly is not a case for an appeal, which is the case of Campbell of Barisdale in the year 1754, and that was a very particular case. In the year 1754, they say a petition of appeal was brought and given to a Lord of this House to present, but it was discouraged: Hopes were given of a pardon, and so it dropped and never was presented; now, talking of an appeal and never presenting it, is an argument the other way. I perfectly remember what happened upon that case; it was pretty singular, though it was a nice point, and might bear a discussion. The law of treason is now made the same in Scotland to all intents and purposes as it is in England. Campbell, attainted by act of Parliament, was brought for judgment, and pleaded he was not the same person. In England the identity of the person must be tried by a jury, and a jury instantly called, and the verdict of the jury decides. In Scotland, in this case, the Court of Justiciary said no. By our practice (in Scotland) the Court judges of the identity, and therefore it is established, that if a man escapes out of prison, and is brought for execution, though he is tried originally by a jury to fix his crime, he is not tried by a jury to fix his identity, and that is the law; but it was objected, you must follow the law of England, for this is a case of treason. This was a collateral point, but notwithstanding, they adjudged him to be executed, and there was a petition and an appeal brought here to be discussed, and thought of for some time; and I remember extremely well my Lord Hardwicke consulting the Duke of Argyle, the Advocate of Scotland that was then, and I believe the present President of the Session, and myself, who was then Attorney-General, upon it; and a doubt arose whether it was within the 7th of Queen Anne; and whether, if within the 7th of Queen Anne, you must follow by analogy the law of England, and try it by a jury; if it was so, then he could not bring a petition of appeal of his own head, he must apply to the Attorney-General, or something analogous to it; but upon the discussion they were of opinion, so far as then advised, that an appeal did not lie, but that it was a

collateral matter, and they were to go by their own law (law of England); and I believe Lord Hardwicke signified to whoever had the petition in his hand, that, as then advised, he thought the petition would not lie. As to the person himself, there never was an idea that an appeal would lie; for, during the late king's reign, he was only reprieved, and it is during this king's reign he is pardoned; but he is the grandson of a very great grandfather who had behaved extremely ill, and for some reason was left out of the attainder, and this lad put in by some mistake, who was only a schoolboy at the time. And the present king pardoned him. Your Lordships see the very doubt in that case admits the point, that in a case of felony by the law of Scotland, there is no appeal, because the printed arguments turn upon the 7th Anne, which necessarily embraced the question as to the right of appeal. For these reasons, I move your Lordships that this petition be rejected."

It was therefore ordered and adjudged that the appeal be dismissed.*

For Appellant, *Thomas Erskine.*
For Crown, *His Majesty's Advocate* (*Henry Dundas*).

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* NOTE.—This point came again to be considered in the case of Robertson and Berry in 1793, indicted for printing and publishing a seditious paper. The jury gave a verdict finding the printing and publishing, but said nothing about the felonious intent. Objections were stated to the verdict, but repelled; and, on appeal to the House of Lords, it was held that such an appeal was incompetent from the High Court of Justiciary in Scotland. About the same time the question was again raised in the noted cases of Muir, Palmer, Margorot, and others, tried for sedition; but without success, the Lord Chancellor and Lord Thurlow taking the lead in the discussion. Contemporaneously with these cases Mr. Adam (afterwards Lord Chief Commissioner) moved for a committee of the House of Commons, with instructions to consider the propriety of bringing in a bill to alter the law of Scotland in this respect, and assimilate it to the appeal in England by writ of error. The recent cases above mentioned, and particularly those of Muir and Palmer, entered deeply into the discussion; but, in a House partly composed of Fox, Sheridan, Wyndham, Wilberforce, Whitebread, Burke, and Sir Philip Francis, it was lost.

An appeal, however, is competent from a sentence of the Court of Session, wherever it has occasion to exercise its criminal jurisdiction in punishing forgery, or wilful falsehood and prevarication committed in any cause conducted before it. In the case of Carse (July 1784, *vide infra*) his sentence of imprisonment and the pillory, for prevarication and wilful concealment of the truth, was appealed to the House of Lords, and the objection taken by His Majesty's Advocate, that it was incompetent to appeal from such a sentence; but this objection was not sustained, and abandoned.