as warranting the imposition and maintenance of such restrictive conditions upon the use of property. The Commissioners are charged with the important and responsible public duty of administering a great canal. It happens that at the place in question there are locks in the canal, and although it does not appear whether all the men inhabiting the ten cottages are lock-keepers or gatemen there must be a considerable staff of men in the employment of the Commissioners working and attending to these locks. It is plain that for the safe use of the locks by the vessels and persons passing through them, and possibly for the safety of the surrounding country, sobriety and skill on the part of the workmen in charge of them are essential; and it seems to me that it would be quite a legitimate and sufficient interest on the part of the Commissioners to maintain the restriction that it was in their judgment essential, or at all events advantageous, for securing the sobriety and efficiency of their workmen at the locks. The matter is eminently one for the Commissioners to determine in the exercise of their responsible discretion, and even if we took a view different from theirs upon the administrative question (which I certainly do not do), we would have no power to interfere. The considerations upon which the Commissioners have proceeded were in my view perfectly legitimate and proper, and I can see no reason for interfering with the decision at which they have arrived, even if we had power to do so.

There were some minor points made, but I think they are all covered by the reasons which I have now stated, and for which I think that the Lord Ordinary's interlocutor should be adhered to.

LORD ADAM—I am perfectly satisfied with the Lord Ordinary's interlocutor and opinion.

LORD M'LAREN—I have read the Lord Ordinary's opinion, and concur in it and in all his Lordship's arguments and conclusions, which I think are very clear and in accordance with the law. Your Lordships have treated this as a clear case in which it has not been necessary to call for a reply, and it would not be appropriate in such a case to enter very largely on the subject of the nature of the conditions which a superior is entitled to impose, or under what circumstances a vassal may be released from them. I shall only make one general remark, which is, that in such cases it is necessary to distinguish between conditions affecting the structure that is to be put on the feu and conditions relating to the use which is to be made of that structure, because I think it would probably be found that it is more difficult to get rid of restrictions relating to construction, determining for example the number of storeys or the height of a building, than it would be to get rid of conditions relating to use. It may very well be, and must often happen, that where a line of houses has been feued out with a view to their use for residential purposes, in the course of time the character of the locality changes—other houses in the vicinity are converted into business premises—and therefore it may be that no injury is done to the superior or to any of his feuars whose interests he is entitled to protect, if the building in question follows the course of the neighbouring property. I need hardly say that my remark has no application to the circumstances of the present case, because I am unable to say that there has been such a change in the circumstances or conditions attending the occupation of the Banavie section of the Caledonian Canal as would make it a question attended with any difficulty whether the superior is entitled to enforce the restrictions.

LORD KINNEAR — I also entirely agree with the Lord Ordinary in everything that his Lordship says in his opinion, and I also agree with what your Lordships have said.

The Court adhered.

Counsel for the Pursuer—W. Campbell, Q.C.—Cooper. Agent—Thomas B. Tweedie, Solicitor.

Counsel for the Defenders—Ure, Q.C.—C. K. Mackenzie. Agent—James Hope, W.S.

Friday, June 8.

FIRST DIVISION.

BROATCH *v.* JACKSON.

(*Ante* May 30, 1900, 37 S.L.R. 707.)

Appeal to House of Lords—Leave to Appeal—Interlocutory Judgment—Possibility of Second Appeal.

In an action at the instance of an agent concluding for payment of two sums as remuneration for professional services, the defender pleaded the triennial prescription in answer to the claim made in one of the conclusions, while with regard to the claim made in the other conclusion it was conceded by the parties that a proof was necessary. The Court having repelled the plea of prescription the defender petitioned for leave to appeal. The Court (*diss.* Lord M'Laren) *refused* the petition.

(This case is reported *ante, ut supra.*)

The defender presented a petition craving leave to appeal to the House of Lords against the interlocutor of the First Division pronounced on 30th May 1900 and the interlocutor of Lord Kincairney dated 20th February 1900, whereby the plea of prescription was repelled and the cause *quoad ultra* continued. The facts which are relevant to the present question are sufficiently narrated in the opening paragraphs of the Lord Ordinary's opinion quoted *ante* at page 708.

The grounds set out by the petitioner in support of the petition were—"That the plea of prescription contended for by the defender raises a question of importance and

difficulty upon which the authorities are divided; that the question of proof falls to be regulated by the decision of the said plea; that it would operate great hardship to the defender were the cause to proceed to proof before the final determination of the said plea; and that the pursuer, having neglected to sue upon the said accounts for fourteen years, is likely to suffer no hardship from delay incident to the proposed appeal."

The pursuer opposed the application, and argued—It would be very inconvenient to allow an appeal at this stage, for there might hereafter be a second appeal. The interlocutors only dealt with part of the conclusions in the action, and it was contrary to practice to allow an appeal where the conclusions were not exhausted, and there was the possibility of another appeal. Only a small proof would be needed, and the pursuer would suffer no prejudice from the trifling delay, while if an appeal were allowed much time might be wasted, and evidence lost thereby—*Caledonian Insurance Company* v. *Gilmour*, November 10, 1891, 19 R. 64; *Edinburgh Northern Tramways Company* v. *Mann*, July 14, 1891, 18 R. 1140.

LORD PRESIDENT—It is always a matter for the discretion of the Court whether leave to appeal should be granted during the progress of a case. My understanding of the practice is in accordance with the view expressed by Lord Adam in the passage which has been read to us from his judgment in the case of the *Edinburgh Northern Tramways Company* v. *Mann* (18 R. at p. 1153). We are very far from granting leave as a matter of course at an early stage of a litigation unless the result of the appeal if successful would be to end the case, and obviate the necessity for further procedure in this Court, as, for example, if the long negative prescription was pleaded, and the effect of the plea being sustained would be to terminate the action, or as if there was some other plea the sustaining of which would obviate the necessity of a long and expensive inquiry. But it does not appear to me that any of the requisite conditions exist in this case. The defender's plea of the triennial prescription which we have repelled by the judgments which he now seeks to submit to the review of the House of Lords, would not if sustained bring the litigation to an end. It would only have the effect of limiting the modes of proof; it would not exclude inquiry. The pursuer might still prove the employment and the terms of the employment by the defender's writ or oath; the question of accounting would remain. Even if the mode of proof is not so limited, the question of employment is an exceedingly short one. It is difficult to see what other evidence than that of the two parties and their letters would be available, and the professional accounts would in any view require to be taxed by the Auditor. I can see no room for a long or complicated inquiry on any part of the case. Accordingly, there is no reason why the case should not be quickly finished here (I should think in two or three hours in so far as the proof is concerned). If the pursuer should fail to prove his case there would be an end of the matter, and if he should succeed in doing so the defender would have an opportunity of going on with his appeal. On the other hand, the appeal if allowed now could not be heard this session in the House of Lords. Evidence might be lost, and indeed as the matter must chiefly depend upon the testimony of the parties themselves, there might be a fatal loss of essential evidence by the death of either of them.

I am therefore of opinion that it would not be consistent with practice, nor with the proper conduct of judicial business, to grant leave to appeal at this stage.

LORD ADAM concurred.

LORD M'LAREN—I understand that your Lordships are all of opinion that the motion for leave to appeal should be refused, and accordingly my opinion will have no practical effect, but I think it right to say that I should be in favour of granting leave on the ground that the construction of the Triennial Prescription Act and its application to the accounts of law-agents raises a question of importance to the law suitable for decision in the House of Lords. As regards the conduct of the case and the convenience of parties, the considerations are nearly balanced. I appreciate those which were stated by your Lordship in the chair, but on the other hand it is for consideration that if we refuse an appeal at this stage, and if, on an appeal being taken at the end of the case, the plea of triennial prescription is sustained, then the proof which we have allowed will be thrown away.

LORD KINNEAR—I agree with your Lordship in the chair and with Lord Adam, and I am not moved by the consideration that the question of law involved is said to be of a suitable character for decision in the House of Lords, because on a motion of this kind we must assume that the question is of such a character, because if it were otherwise the standing orders of the House would not be satisfied.

The real question which we require to consider seems to me to be, whether in a particular case it is convenient for the true interest of the parties that the case should be taken piecemeal to the House of Lords, or whether it would not be better to follow the general rule that the case should be exhausted in this Court before an appeal is allowed. In the present case it would in my view be inconvenient to allow an appeal at this stage. The Court has decided nothing except that certain evidence should be admitted at the proof. It is very much the same case as if a Lord Ordinary having allowed a proof were to be asked for leave to reclaim against a ruling admitting certain evidence in spite of objection. It is a mere question of procedure. If the parties are reasonably expeditious in carrying out what remains of the procedure in

the case, they will get a final interlocutor, against which it will be open to the defender to appeal to the House of Lords with as good a prospect of success as he would have in an appeal presented at this stage. On the other hand, all necessity for appeal may be obviated by a judgment on the merits in favour of the party who complains of the judgment on the question of proof, or else by the production of writ which may satisfy the statute. If we granted leave now, the case might be hung up for an indefinite period, during which time evidence might be lost. Accordingly, I think that the balance of advantage is on the side of refusing leave to appeal.

The Court refused the petition.

Counsel for the Petitioner—Sandeman. Agent—W. B. Rainnie, S.S.C.

Counsel for the Respondent—M'Lennan. Agent—Party.

HIGH COURT OF JUSTICIARY.

Monday, June 4.

(Before the Lord Justice-Clerk, Lord M'Laren, and Lord Kincairney.)

DUNLOP *v.* SEMPILL.

Justiciary Cases—Burgh Prosecutor—Person Appointed by Magistrate to Conduct Trial for Burgh Prosecutor—Mode of Appointment—Verbal Appointment—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. c.* 55), *sec.* 462.

Section 462 of the Burgh Police (Scotland) Act 1892 enacts as follows—"Every proceeding or trial before the magistrate shall be conducted in the official name and at the instance of the burgh prosecutor and any other competent person appointed by the magistrate for this purpose may, in the absence of the burgh prosecutor, act in his stead and name, either at the first or any adjourned diet, and sign complaints for him." *Held*, in a suspension, (1) that the appointment by the magistrate under this section of a person to conduct a trial or proceeding before the magistrate in place and name of the burgh prosecutor must be made in writing, and must be signed by the magistrate, and consequently (2) that a conviction proceeding upon a complaint signed for the burgh prosecutor by a person verbally authorised to prosecute by the magistrate could not be sustained.

Robert Dunlop brought this suspension of a conviction obtained against him in the Police Court of Kilsyth on a charge of assault. The complaint on which Dunlop was charged bore to be the complaint of John Douglas Sempill, burgh prosecutor, and was signed "for John D. Sempill, Burgh Prosecutor, WM. BARNETT, Inspr." The case was tried before Robert Murdoch, a magistrate of Kilsyth, on 27th November 1899, when objection was taken to the complaint on Dunlop's behalf, in respect that it was not signed by the burgh prosecutor John Douglas Sempill, but was in point of fact signed by William Barnett, an inspector of police, who was not properly authorised to do so. The objection was noted and repelled by the magistrate. Evidence was led and Dunlop was convicted.

The complainer pleaded, *inter alia*—"(1) That the complaint is *funditus* null and incompetent, not having been signed by the respondent, nor by anyone properly authorised to do so."

On 16th March 1900 the Court remitted to the Sheriff of Stirling, Dumbarton, and Clackmannan (LEES) to report on the facts. The Sheriff reported, of date 2nd May 1900, *inter alia*, as follows:—'William Barnett, police inspector, Kilsyth, had no authority from the respondent to sign the complaint for him. But before signing the complaint he, as on other occasions when the respondent was detained in Stirling, and the case seemed urgent, applied to the Magistrate for authority to institute proceedings. The Magistrate verbally granted such authority on 15th November 1899, and thereon Barnett signed the complaint, and the Magistrate, in knowledge of what Barnett had signed, granted the warrant of apprehension against the accused. At the commencement of the trial on 27th November objection was taken by the agent for the accused that Barnett had signed the complaint instead of the respondent. The Magistrate repelled the objection, stating that he had authorised Barnett to sign it. The agent for the accused requested that his objection should be noted, and this was done, and the trial thereupon proceeded.

Argued for the complainer—The provision of the Burgh Police Act 1892 (55 and 56 Vict. c. 55), sec. 462 (quoted in the rubric), for the appointment by the magistrate of a person to act for the burgh prosecutor, contemplated only an appointment in writing and signed by the magistrate. By law and practice all official appointments must be written, and a mere verbal authorisation was quite ineffectual.

Argued for the respondent — Where under the Burgh Police Act 1892 it was intended that an appointment should be made in writing, there was an express provision in the Act to that effect. Thus in section 461 it was expressly enacted that the burgh prosecutor should be appointed "by writing." From the absence of these words in section 462 it was to be inferred that a written appointment was not contemplated in section 462, but that a verbal authorisation by the magistrate was sufficient under that section to enable a person to competently sign a complaint in room of the prosecutor. If, however, it was held that an appointment under section 462 must be in writing, there was writing in this case in respect of the conjunction of the magistrate's signature to the first deliverance with the signature on the complaint. Further, it was incompetent to object to the complaint on this ground after the event—*Hill* v. *Finlayson*,