not satisfied that there has been any irregularity, or that the parties have so acted as to withdraw the cause from the ordinary jurisdiction of the Sheriff.

LORD ADAM—I am of the same opinion. It is quite true that if parties deliberately agree to go out of the ordinary *cursus curiae* they may deprive themselves of the right of appeal. But then in many instances parties may go out of the ordinary *cursus curiæ* by mistake, and to say that an error in procedure of that nature makes the Sheriff an arbiter is to my mind altogether out of the question.

LORD M'LAREN—If it were necessary to consider the legal question which Mr Salvesen raised, I should be disposed to hold that in order to displace the right of review it is not enough to say that there had been a deviation from the course of procedure prescribed by statute. That might be the very thing complained of in the appeal or reclaiming-note. If deviation is shown to have been the act of the parties to the case, assented to by the Judge, then only do the proceedings become a proper arbitration.

In this case I do not think that there has been any deviation from the procedure prescribed by statute. The Act provides—[*quotes section.*]

I take that to mean that if the respondent moves the Sheriff for leave to lodge answers the Sheriff cannot refuse the motion. But then the application is to be dealt with in the same manner as summary causes, and it is a matter of ordinary practice that in summary causes a party to whom intimation has been made is entitled to be heard without the necessity of first lodging answers. If the question is merely as to the amount of caution, or again if it is merely as to the choice of a particular individual for the office, *e.g.*, of judicial factor, answers are not necessary. When, on the other hand, the party contends that the application is incompetent or ill-founded on the merits it is proper that answers should be ordered.

LORD KINNEAR — I agree. I am not satisfied that there has been any departure from the regular course of procedure, and indeed Mr Salvesen admitted, very properly, that if a respondent does not take advantage of the order of the Sheriff allowing him to lodge answers, that does not put him out of Court, but leaves the Sheriff to proceed upon the statement of such answers as may be given orally. The procedure in the Sheriff Court therefore was regular, but I agree also with what has been said by Lord M'Laren that a mere deviation from the ordinary course of procedure is not equivalent to a submission of the questions in dispute to a judge as an arbiter where it proceeds upon a mere error or slip in the conduct of a case, and not upon any agreement to make such a departure.

The Court sent the case to the Summar Roll.

Counsel for the Pursuer — Salvesen. Agents—Gill & Pringle, W.S.

Counsel for the Defenders—A. J. Young. Agent—L. M'Intosh, S.S.C.

Thursday, May 13.

FIRST DIVISION.

[Sheriff of the Lothians.

BELL *v.* BELL.

Process—Appeal from Sheriff—Competency—A.S. 10th March 1870, *sec.* 3—*Omission to Print.*

Where, in an appeal from the Sheriff, the appellant, though printing the note of appeal, record, and interlocutors, had omitted to print the proof, in compliance with the A.S. 10th March 1870, sec. 3, and where he admitted that the omission was not due to inadvertence, *held* that the appeal was incompetent.

This was an appeal from a judgment of the Sheriff-Substitute of the Lothians (HAMILTON), pronounced after a proof, dismissing an action of accounting and payment brought by Harold Fraser Bell against John Munro Bell.

The appeal was lodged with the Sheriff-Clerk on 22nd March 1897, and the process was transmitted to and received by the Clerk of Court on 24th March.

The appellant duly printed the appeal, record, and interlocutors, but did not print the proof.

In the Single Bills the respondent objected to the competency of the appeal, on the ground that the appellant, having failed to comply with the provisions of the A.S. 10th March 1870, sec. 3, must be held to have abandoned it.

The appellant explained at the bar that an action had been raised in the Court of Session covering the whole subject-matter of which the Sheriff Court action touched a part. He had accordingly intended when the appeal came up to move the Court to remit it *ob contingentiam* to the Lord Ordinary before whom the Court of Session action depended. He had therefore not printed the proof, but he had since been advised that such a motion would be incompetent, and he now proposed to proceed with the appeal in ordinary course.

The A.S. 10th March 1870, sec. 3, alters the course of proceeding prescribed by sec. 71 of the Court of Session Act 1868 to the following extent and effect:—"(2) The appellant shall during vacation, within fourteen days after the process has been received by the Clerk of Court, deposit with the said clerk a print of the note of appeal, record, interlocutors, and proof, if any, unless, within eight days after the process has been received by the clerk, he shall have obtained from the Lord Ordinary officiating on the bills an interlocutor dis-

pensing with printing in whole or in part, and the appellant shall, upon the box-day or sederunt-day next following the deposit of such print with the clerk, box copies of the same to the Court; and if the appellant shall fail within the said period of fourteen days to deposit with the Clerk of Court as aforesaid a print of the papers required . . . or to box or furnish the same as aforesaid on the box-day or sederunt-day next thereafter, he shall be held to have abandoned his appeal, and shall not be entitled to insist therein except upon being reponed as hereinafter provided."

Argued for the respondent—The appellant had urged no good reason for dispensing with the regulation of the Act of Sederunt. On the contrary, his explanation plainly showed that his failure to print the proof was deliberate and not due to inadvertence. That was sufficient to distinguish the case from *Boyd, Gilmour, & Company* v. *Glasgow and South-Western Railway Company*, November 16, 1888, 16 R. 104, where the decision proceeded on the ground that the omission was unintentional, and where Lord Rutherfurd Clark and Lord Lee both dissented from the principles laid down by Lord Young, upon which the appellant relied.

Argued for the appellant — *Boyd, Gilmour, & Company, ut sup.*, showed that the Court had an absolute discretion in the matter, and Lord Young's opinion was all in favour of a liberal construction of Acts of Sederunt. The objection taken to the appeal was purely technical, and no one would be prejudiced if the appeal were proceeded with. The provision of the Act of Sederunt was *ex facie* an alteration of a statutory provision (authorised by section 106 of the Court of Session Act), and should not be interpreted as strictly as if it were a section of the statute itself. It was to be observed that section 71 prescribed totally different rules as to printing from the Act of Sederunt.

LORD PRESIDENT—Even if we were to assign no greater rigidity to the Act of Sederunt than was contended for by Mr Cooper, I still think that his request must be refused.

The Act of Sederunt at least lays down what is the rule of practice, and the decision which has been cited is not an exception to the following of the rule, but merely shows that where the spirit of the rule would not be carried out by a literal compliance with it owing to exceptional circumstances it will not be misapplied.

But the case cited was a case of inadvertence, and the appellant here is constrained to admit that he did advert to this point, but he had at that time a theory, which on better consideration he is obliged to abandon, that the Court might be successfully moved not to hear the appeal in ordinary course but to send it to a Lord Ordinary. He accordingly adverted to the duty of printing, and takes his chance of not complying with it. He is now proposing to follow out the appeal in ordinary course, and he is asking us to absolve him from the consequences, not of an accidental omission, but of a deliberate and calculated contravention of the rule applicable to appeals.

LORD ADAM concurred.

LORD M'LAREN — I am of the same opinion, and I will only add that while there may be many cases in which an Act of Sederunt should be enforced in the spirit rather than according to the letter, it has been pointed out to us that this particular regulation is one which comes in place of a provision of an Act of Parliament. It is an enactment under the delegated authority of Parliament to repeal a parliamentary enactment, and to substitute for it something which experience has shown to be more suitable in practice. I must hold, then, that such a regulation should be interpreted in the same spirit as if it were in the original Act, because it is to all intents and purposes a statutory regulation.

LORD KINNEAR concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the competency of the appeal, Sustain the objections thereto, dismiss the appeal, and find the defender and respondent entitled to £5, 5s. of modified expenses," &c.

Counsel for the Appellant — Cooper. Agent—R. Ainslie Brown, S.S.C.

Counsel for the Respondent—R. Macaulay Smith. Agents—Lister, Shand, & Lindsay, S.S.C.

Friday, May 14.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

SHIELDS *v.* DALZIEL.

Reparation—Landlord and Tenant—Negligence—Insecure State of Property.

The tenant of a shop and room, who had entered into occupation thereof in November 1895 on a monthly tenancy, raised an action against the landlord to recover damages for injuries sustained by the fall of a portion of the ceiling on 14th November 1896. The pursuer averred that in February 1896 he had complained to the defender's factor that the said ceiling was in an "apparently insecure condition" and requested that it should at once be put right; that the factor undertook to put it right; and that the pursuer relied on the assurance of the factor. He further averred that, the defect not having been remedied, he again in April directed the factor's