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Thursday, October 18, 1900.

FIRST DIVISION.

[Sheriff of Lanarkshire.

TAYLOR *v.* MACILWAIN.

Process — Appeal — Printing — Deposit of Print with Clerk—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *secs.* 71, 106 *—A.S., 10th March* 1870, *sec.* 3, *sub-secs.* 2 *and* 3.

By the Act of Sederunt 10th March 1870, section 3, sub-section 2, which was passed under the authority given to the Court by section 106 of the Court of Session Act 1868 to alter the provisions of that Act by Act of Sederunt, it is provided that in appeals from the Sheriff Court during vacation the appellant shall deposit with the Clerk of Court a print of the note of appeal, record, interlocutors, and proof, if any, within fourteen days after the process has been received by the said clerk, otherwise the appeal shall be held to have been abandoned. By sub-section 3 power is given to the Court to repone on application being made within eight days. In an appeal where the appellant had failed to deposit the prints until four days after the expiry of the prescribed period, and no application to be reponed had been made, the Court *refused* to entertain the appeal.

By section 106 of the Court of Session Act 1868 power is given to the Court to pass Acts of Sederunt for, *inter alia*, "altering the course of proceeding hereinbefore prescribed in respect to the matters to which this Act relates, or any of them."

The Act of Sederunt 10th March 1870, made in pursuance of the above power, enacts as follows—section 3, sub-section (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, . . . 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." Sub-section 3—"It shall be lawful for the appellant, within eight days after the appeal has been held to be abandoned as aforesaid, to move the Court during session, or the Lord Ordinary officiating on the Bills during vacation, to repone him to the effect of entitling him to insist in the appeal, which motion shall not be granted by the Court or the Lord Ordinary without cause shown, and upon such conditions as to printing and payment of expenses to the respondent or otherwise as to the Court or Lord Ordinary shall seem just."

This was an appeal from the Sheriff Court of Lanarkshire against an interlocutor of the Sheriff-Substitute (GUTHRIE) closing the record and allowing a proof. The process was received by the Clerk of Court on 4th September 1900, but the print of the note of appeal was not lodged until eighteen days thereafter. The prints were boxed on the following box-day, September 27. On the case being called in the Single Bills, counsel for the respondent objected to the competency of the appeal, in respect that the appellant had failed to comply with the provisions of sub-section 2 of section 3 of the Act of Sederunt 10th March 1870 (quoted *supra*). Counsel for the respondent admitted that he had failed to lodge the print within the fourteen days

prescribed by the sub-section, but asked for the indulgence of the Court, in respect that the omission had caused no inconvenience to the Court or the respondent. He argued that the provisions of Acts of Sederunt regulating procedure were not of the peremptory character of statutory rules, and might be relaxed by the Court. —*Young* v. *Brown*, February 10, 1875, 2 R. 456; *Boyd, Gilmour, & Company* v. *Glasgow and South-Western Railway Company*, November 16, 1888, 16 R. 104; *Dougall's Trustees* v. *Lornie*, July 4, 1900, 37 S.L.R. 855.

LORD PRESIDENT—The question argued depends upon the construction of section 3, sub-sections 2 and 3, of Act of Sederunt, 10th March 1870. That Act of Sederunt was made under the authority of 31 and 32 Vict. cap. 100, section 106, which gave power to the Court to make alterations in the statutory procedure, so that the provisions of the Act of Sederunt have very much the same imperative character as if they had occurred in the statute itself. The 2nd sub-section of sec. 3 contains an imperative direction in the following terms —[*His Lordship quoted the sub-section*].

If the Act of Sederunt had merely directed certain things to be done within a specified time, there might have been ground for contending that the Court had power to grant some indulgence in the case of failure. But there is no room for this suggestion in the present case, because the Act of Sederunt, after directing what is to be done, specifies the consequence of failure, viz., that the appeal shall be held to be abandoned. I think that in a case where it is thus provided that the appeal shall be held to be abandoned if certain things are not done, there is no power in this Court to dispense with these things. Then sub-section 3 gives a further chance to a person who has failed to comply with the requirements of sub-section 1, providing that "it shall be lawful for the appellant, within eight days after the appeal has been held to be abandoned as aforesaid, to move the Court during session, or the Lord Ordinary on the Bills during vacation, to repone him to the effect of entitling him to insist in the appeal; which motion shall not be granted by the Court or the Lord Ordinary except upon cause shown, and upon such conditions as to printing and payment of expenses to the respondent or otherwise, as to the Court or Lord Ordinary shall seem just." These provisions seem to me to reflect light upon sub-section 2, confirming the view that that sub-section did not leave it in the power of the Court to dispense with the observance of its provisions. The Legislature (or the Court *in vice* of the Legislature) foresaw that cases of hardship might arise under the provisions of sub-section 2, and provided a remedy, but in order to prevent laxity in practice declared that that remedy should only be granted upon cause shown. The Act of Sederunt carefully regulates every stage of the procedure, and I think in these circumstances we have no power to dispense with the observance of its provisions.

LORD ADAM—I am of the same opinion. It is quite true that provisions of Acts of Sederunt have not been treated so rigidly as if they formed part of an Act of Parliament. Accordingly, in certain cases dealing with Acts of Sederunt we have dispensed with strict observance, but it does not follow that these rules and regulations are to be treated as if they had no authority at all. It is only on good cause shown that we have relieved a litigant from the consequences of non-observance of the provisions of Acts of Sederunt. Now here the section we are dealing with of the Act of Sederunt of 1870 provides that if the papers are not printed and boxed within the time specified, then, by force of the provision itself and without the intervention of the Court, the appeal shall be held to have been abandoned. But the Act itself gives a remedy where the appellant has neglected to lodge his prints, and then the intervention of the Court comes in. He may under sub-section 3 of section 3 apply within eight days to be reponed, and such application may be granted on cause shown. It would therefore have been open to us to repone the appellant if he had made his application in time. But he is too late to apply for this remedy, and has failed to observe both the sub-sections. He says now he makes no motion; he merely says we are not to hold that the action has been abandoned. Even if the matter was in our discretion, the appellant cannot by neglecting both sub-sections be in a better position than if he had applied to us under sub-section 3. But if he had done so, we could not have granted dispensation unless upon cause shown. Now there is no suggestion of any good cause why the prints were not lodged in time. It is no excuse that the agent for the appellant had neglected to box the prints by an oversight. All litigation is conducted by agents, and if they fail in their duty the client who employs them must just take the consequences.

LORD M'LAREN—I hold with your Lordships that there may be a distinction between the effect of a provision of an Act of Parliament and those of an Act of Sederunt, which is intended to regulate the procedure under an Act of Parliament, and is passed under the authority of the Act. But I agree that this appellant is not in a position to take benefit by the distinction. Where an Act of Parliament specifies the number of reclaiming days or days for an appeal, it is held that this is a condition of the right of appeal, and that after these days have expired the party no longer has a right of appeal. But where an Act of Sederunt, treating it may be the whole subject of an action in its successive stages, deals with the element of time, it would be too rigorous a construction of its provisions to hold that in the event of failure to comply with any one of them the party must lose his case. Accordingly in certain cases the Court has allowed things to be done after the prescribed time on being satisfied that the failure arose *per incuriam*. In the present case the Act of

Sederunt was passed under statutory power to amend the provisions of the Act, and the question of delay was not overlooked, because power is given to the appellant to ask within eight days to be reponed. There is no explanation given why this right was not exercised, and I think we cannot in this case allow the action to proceed unless we are prepared in every case to relax the prescribed conditions, and practically to nullify the Act of Sederunt.

LORD KINNEAR—I agree that the Court has exercised a wider discretion in relaxing the rules of an Act of Sederunt which has been passed by the Court itself to regulate its own procedure than would be allowable if such rules were prescribed by an Act of Parliament. I doubt very much, however, if this distinction is applicable to the particular question before us, because the clauses of the Act of Sederunt upon which the question depends are not merely regulations of procedure for carrying out the Act of Parliament, but were passed in the exercise of a specific power to alter its provisions and to substitute new provisions for those contained in the Act itself. Accordingly, the effect of section 3 is practically to repeal that part of the 71st section of the 1868 Act which deals with the printing and boxing of appeals. The provisions of the Act of Sederunt stand in place of the provisions of that section, and are just as binding on litigants and on the Court as if they formed part of the Act of Parliament itself. If this is so, then there is an end of the question. To grant the relaxation which the appellant desires would be inconsistent with express statutory provision. It is quite consistent with this view that in construing the Act of Sederunt we have put a liberal construction on its language in deference to a known practice. In the case referred to by Mr Guy (the case of *Guthrie Lornie*) it seems to have been held that the direction to print and box documents might be read, with reference to practice, to include only those papers which had not been previously printed and boxed. When the Act of Sederunt is open to construction it is reasonable to adopt a liberal construction in determining whether it has been duly observed or not. But it is a totally different thing to dispense with observance altogether. No power to dispense is given to us, and I agree that even if we had such power there is nothing in the case to justify our exercising it in favour of this appellant. He simply says he did not observe these provisions and gives no explanation of his failure to do so, and it seems to me that we could not possibly accept this as a ground for relaxing the Act of Sederunt unless we are prepared to do away with the provision altogether.

The following interlocutor was pronounced :—

"The Lords . . . having heard counsel for the parties on the defender's objection to the competency of the appeal, Sustain said objection, and direct the Clerk to re-transmit the process to the Sheriff-Clerk in respect of the abandonment of the appeal: Find the pursuer liable to the defender in the expenses of this discussion, modify the same at £2, 2s. . . . and decern."

Counsel for the Appellant—Guy. Agents —Clark & Macdonald, S.S.C.

Counsel for the Respondent—A. S. D. Thomson. Agents — Patrick & James, S.S.C.

Friday, October 19.

FIRST DIVISION.

[Sheriff of the Lothians.

THOMSON *v.* ROBERTSON.

Bill of Exchange — Payment — Proof — Parole—Competency—Bills of Exchange Act 1880 (45 *and* 46 *Vict. cap.* 61), *sec.* 100.

Section 100 of the Bills of Exchange Act 1880 does not make it competent to prove payment of sums due under a bill by parole.

Payment—Proof of Payment—Payment of Sum less than £8, 6s. 8d.—Parole—Competency—Obligation Constituted by Writing—A. of S. 8th June, 1597.

Payment of sums less than £8, 6s. 8d. made in implement of an obligation constituted by writing cannot be proved by parole.

Andrew Robertson, accountant, Edinburgh, brought an action in the Sheriff Court at Edinburgh, against James Thomson, hairdresser there, concluding for payment of a certain sum, being the principal and interest due under a bill of exchange for £18 accepted by Thomson, subject to deduction of certain sums paid to account.

Robertson averred that on 29th December 1896 Thomson accepted a bill drawn by him for £18, and signed the following relative agreement:—"Sir,—I have this day accepted a bill drawn by you upon me for eighteen pounds —— shillings sterling (£18), payable three months after date, for value received. In the event of my failing to retire said bill at maturity, I hereby agree, and bind and oblige myself to pay by way of interest on the total amount of said bill, if not met when due, or any portion thereof remaining due, and so long as it remains due, at the rate of threepence per pound for each pound, or part of a pound, per week, and to continue to pay interest at said rate until said bill is duly retired, and it shall be in your option to apply any monies paid by me after said bill becomes due, either to account of said bill or to said interest."

A statement was lodged by the pursuer, whereby after crediting certain instalments of principal and interest, a balance of £20, 5s. 6d. was brought out as due by Thomson.

The defender averred and undertook to prove that he had made other payments besides those credited in the pursuer's account. For these alleged additional pay-