defender and respondent moved the Court to refuse the appeal as incompetent, on the grounds (1) that the print should have been deposited with the Clerk before 1 p.m. on 15th April, *i.e.*, before the Clerk's office closed for business on the fourteenth day after the process had been received by him —C.A.S. 1913, A ii, 2 and D iii, 2; *M'Lauchlan* v. *Chalmers*, 1913 2 S.L.T. 85; and (2) that the type used in printing was smaller than that directed by C.A.S. 1913, A iii, 3.

Counsel for the pursuer and appellant moved that the appeal be sent to the roll, and argued—(1) The print had been deposited timeously. Fourteen days were allowed, and the print had been deposited with the Clerk on the fourteenth, which did not expire till 12 midnight. C.A.S., 1913, A, iii, 16 provided that papers were to be refused by the Clerk "after the lapse of the day on which" they were receivable, and these words must mean after twelve midnight. *M'Lauchlan* v. *Chalmers* (*cit.*) was distinguishable, as there the prints were not deposited with the Clerk, but left on his desk in his absence. It was a common practice that the Clerk should receive prints at the Register House after office hours. (2) A mistake had been made in regard to the type by the printer in Glasgow who did the work. The mistake had been discovered too late for correction. If the Court would allow it, correctly printed copies would be put in.

LORD PRESIDENT—Two objections have been taken to the competency of this appeal on the ground of non-compliance with the Act of Sederunt. Both of them in my opinion are well founded, but neither of them in the circumstances fatal.

The first objection was this, that the note of appeal, record, interlocutors, and proof were not deposited with the Clerk of Court within the prescribed time, namely, fourteen days after the process had been received by the Clerk. That objection, I think, is well founded, because we were informed that the note of appeal and so forth were not handed to the Clerk on the fourteenth day during office hours, but at some period when the office was not open, and not at the office at all. In my opinion the Act of Sederunt which prescribes that the note of appeal, &c., are to be deposited with the Clerk means that they are to be deposited with the Clerk at his office and within the hours prescribed by the Act of Sederunt as business hours, and not anywhere else or at any other time; and accordingly I hold that there was a failure to comply with the Act of Sederunt in the case before us.

It was represented to us that a certain laxity of practice had arisen during several years past, and that it was frequently arranged between the agent in the cause and the Clerk of Court that the document should be received outwith office hours and outwith the appropriate place where the document should be deposited. Of the practice I—and I understand your Lordships—entirely disapprove, and I desire it to be understood that it will not be in the future recognised by this Division of the Court as adequate compliance with the Act of Sederunt, either in connection with lodging papers in process or in connection with boxing prints to the Court. As the practice had certainly grown up and been followed I do not think that in the present case we can visit failure to comply with the Act of Sederunt with the appropriate consequence, namely, by directing retransmission of the process.

The second ground of objection was that the document in question was not printed in the appropriate type prescribed by Act of Sederunt. That objection is also well founded, but it was explained to us that the employment of improper type was only a mistake made by a printer in Glasgow—an innocent mistake I assume—and counsel for the appellant undertook that the document should be reprinted in the appropriate type before we were asked to hear the cause, and further, in answer to a suggestion from the Bench by one of your Lordships, counsel for the appellant undertook that the expenses of reprinting of the document should not be charged against the client in the case. On that undertaking—exclusively so far as I am concerned—I propose to your Lordships that in this case we should dispense with strict compliance with the Act of Sederunt, and accordingly that the case should now be sent to the roll.

LORD JOHNSTON, LORD MACKENZIE, and LORD SKERRINGTON concurred.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the objections for the defender and respondent to the competency of the appeal, in respect of the undertaking by counsel at the Bar that the record, &c., would be reprinted in terms of the C.A.S., A, iii 3, and that the appellant personally would not be charged with the expense thereof, repel such objections; allow the record which was tendered on 15th April last to be received; and appoint the cause to be put to the roll."

Counsel for Pursuer and Appellant—Aitchison. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for Defender and Respondent—W. T. Watson. Agents—Gordon, Falconer, & Fairweather, W.S.

Friday, May 14.

SECOND DIVISION.

DAVIDSON *v.* SCOTT.

Process—Reclaiming Note—Competency—Record not Appended to Principal Note—Boxing—Judicature Act 1825 (6 *Geo. IV, cap.* 120), *sec.* 18—*C. A. S., D, i,* 2.

Printed copies of a reclaiming note and of the record were duly boxed, and six copies of the boxed record were sent to the respondent's agent, but the principal note was lodged with and received by the Clerk of Court without

a copy of the record appended to it. At the hearing in the Short Roll the attention of the Court having been directed to the omission, and thereupon objection having been taken by the respondent to the competency of the reclaiming note, the Court *held* (*dub.* Lord Dundas) that the objection should not be sustained.

M'Lachlan v. *Nelson & Company, Limited*, January 29, 1904, 6 F. 338, 41 S.L.R. 213, *followed.*

Blackwood v. *Summers, Oxenford, & Company*, May 18, 1899, 1 F. 868, 36 S.L.R. 651, *disapproved.*

M'Evoy v. *Brae's Trustees*, January 16, 1891, 18 R. 417, 28 S.L.R. 276, *distinguished.*

The Judicature Act 1825 (6 Geo. IV, cap. 120), section 18, enacts—"When any interlocutor shall have been pronounced by the Lord Ordinary, either of the parties dissatisfied therewith shall be entitled to apply for a review of it to the Inner House of the Division to which the Lord Ordinary belongs, provided that such party shall, within twenty-one days from the date of the interlocutor, print and put into the boxes appointed for receiving the papers to be perused by the Judges a note reciting the Lord Ordinary's interlocutor and praying the Court to alter the same in whole or in part . . . and if the interlocutor has been pronounced without cases, the party so applying shall, along with his note as above directed, put into the boxes printed copies of the record authenticated as before, and shall at the same time give notice of his application for review, by delivery of six copies of the note to the known agent of the opposite party. . . ."

The Codifying Act of Sederunt, D, i, 2, enacts that reclaiming notes shall first be moved as Single Bills and then sent to the roll, "Provided always that such notes, if reclaiming against an Outer House interlocutor, shall not be received unless there be appended thereto copies of the papers authenticated as the record in terms of the statute if the record has been closed."

Donald Davidson, Grantown-on-Spey, *pursuer*, brought an action of maills and duties against Miss Jessie Scott, Braidwood, Lanarkshire, *defender*, in which the Lord Ordinary (HUNTER) on 26th February 1915 assoilzied the defender.

The pursuer lodged a reclaiming note in the First Division, but failed to append to it a copy of the record, and the Clerk of Court received the note. The pursuer also boxed printed copies of the reclaiming note, with the record appended to it, and sent six copies of it to the agent of the defender.

At the hearing in the Short Roll of the Second Division, to which the case had been transferred from the First Division, the Clerk of Court drew attention to the fact that the reclaiming note had been lodged without a copy of the record having been appended to it, whereupon the respondent objected to its competency.

Argued for the reclaimer—The reclaiming note was competent. The only omission here was to append a copy of the record, which was in process, to the principal reclaiming note. But the provision which the reclaimer had failed to comply with was contained in an Act of Sederunt and not in an Act of Parliament, and it was directory and not imperative—*M'Lachlan* v. *Nelson & Company, Limited*, January 12, 1904, 6 F. 338, 41 S.L.R. 213. Even the breach of a statutory provision did not necessarily render a reclaiming note incompetent—*Hutchison* v. *Hutchison*, 1908 S.C. 1001, 45 S.L.R. 783; *Burroughes & Watts, Limited* v. *Watson*, 1910 S.C. 727, 47 S.L.R. 638; *Trinity House of Leith* v. *Clark*, 1910 S.C. 746, 47 S.L.R. 673; *Henderson* v. *D. & W. Henderson*, 1912 S.C. 171, 49 S.L.R. 101. *M'Evoy* v. *Brae's Trustees*, January 16, 1891, 18 R. 417, 28 S.L.R. 276; *Wallace* v. *Braid*, February 16, 1899, 1 F. 575, 36 S.L.R. 419; *Tough* v. *Macdonald*, November 24, 1904, 7 F. 324, 42 S.L.R. 180, were distinguishable. These were cases of a breach of a statutory requirement. *Blackwood* v. *Summers, Oxenford, & Company*, May 19, 1899, 1 F. 868, 36 S.L.R. 651, was wrong, because in that case the Court had followed *M'Evoy* v. *Brae's Trustees, cit.*, but *M'Evoy* v. *Brae's Trustees, cit.*, was the case of the breach of a statutory provision, whereas *Blackwood* v. *Summers, Oxenford, & Company, cit.*, was the case of the breach of a provision contained in an Act of Sederunt.

Argued for the respondent—The reclaiming note was incompetent. The result of the omission was that properly speaking there was no reclaiming note before the Court at all, and since the reclaimer had shown no good excuse for the omission, the reclaiming note was incompetent—*Blackwood* v. *Summers, Oxenford, & Company (cit.)*; *Henderson* v. *D. & W. Henderson (cit.)*; *Creighton* v. *Wylie & Lochhead, Limited*, 1915 S.C. 305, 52 S.L.R. 281. *Blackwood* v. *Summers, Oxenford, & Company (cit.)*, had assimilated the rule as to printing and boxing.

LORD SALVESEN—This technical objection to the competency of the reclaiming note is stated very late in the day, after the case has come out for hearing. It was not noticed by the agent for the respondent that any mistake in procedure had occurred but our attention was directed to the matter by the Clerk of Court. But for his vigilance the fact that this record was not stitched up with the reclaiming note might have wholly escaped your Lordships, and we should have had a full-dress argument and pronounced a decision upon a reclaiming note, which, it is now maintained, after the mistake has been discovered, was entirely incompetent. Having had our attention directed to the mistake, it is, of course, necessary to consider how far it affects the competency of the proceedings; and we have now had a citation of all the authorities bearing upon this particular question, and also as to the authority in general of Acts of Sederunt.

It is necessary to state the facts. This reclaiming note was instructed to be boxed in the ordinary way. It was found by the

agent's clerk that the printer had only printed the reclaiming note and had commenced to box it without stitching up the record along with it as directed by the Judicature Act. The agent's clerk thereupon directed the printer to comply with the Act by stitching the record to the reclaiming note, and thereafter to box the reclaiming note, and to send six copies of the boxed reclaiming note to the agent of the opposite side. All that was duly done in compliance with the Act. The agent's clerk or the agent himself thereafter took a print of the reclaiming note, printed on blue paper as is customary for the process copy, to the Clerk of Court with a view to lodging it. He omitted to observe that the printer had failed to comply with his instructions as regards this particular print, and had not stitched to it a copy of the record; and the Clerk also failed to notice the omission.

This omission on the agent's part was no doubt a fault, but I am very far from thinking it was a serious one. Of course it should not have been committed, and if he had looked at the paper he would have found that it did not have appended to it a copy of the record. But the Clerk made the same mistake. A duty is put by the Act of Sederunt upon the Clerk not to receive a reclaiming note unless the record is stitched up along with it. The Clerk did receive it, and we, I am afraid, must take some responsibility for the actions of our officials. At all events, the Clerk of Court made the same mistake—a very venial one as it seems to me, and one which did not in any way prejudice the opposite party—in receiving a document which it was his duty not to receive. If the Clerk of Court had pointed out the omission at the time there would not have been the smallest difficulty in the agent complying with the exact terms of the Act of Sederunt.

We are asked to hold that this reclaiming note has not been competently presented because of that omission. If there had been a current of authority which had settled this point adversely to the reclaimer I should have followed it, although I confess I should have done so with the very greatest reluctance. I think it would be regrettable that a right of appeal which a person has against a judgment of which he complains as doing him an injustice, should be taken away from him because of some non-compliance with a technical rule which does not in any way prejudice the opponent. We must have rules, and in general we must see that they are complied with; but I think it would be a proper thing that we should reconsider the whole policy of similar Acts of Sederunt and come to some determination as to whether the penalty for non-compliance with their provisions should be imposed on the innocent client as is now done, or should not rather be visited on the negligent agent, or printer who has failed to carry out his instructions. I believe that we should have very much more complete compliance with our rules if the agent were subjected to a fine in every case where he made a mistake in procedure of this kind. Such a penalty would, moreover, be appropriate to the offence, which the penalty of refusing the reclaiming note is not.

It is said that the client might have recourse against his agent for not following his instructions, but the recourse in many cases would be of no value even if the agent were worth suing. He could not sue the agent on the assumption that he would have succeeded in his reclaiming note, He would have to show—a very difficult matter—that the tribunal before which it would have come would have reversed the judgment which was reclaimed against; or we should have to assess in some way the value of the chance of a reversal. The worthlessness of such a remedy is shown by the fact that so far as I know—and I have had occasion to consider this matter at the Bar more than once—there does not exist a single case of a client having attempted to obtain damages from an agent by whose negligence he was deprived of the chance of getting his case heard before a higher tribunal, although such cases of negligence have very frequently occurred, as is shown by the list of authorities cited, and many others where similar acts of omission have resulted in a reclaiming note being held incompetent.

Notwithstanding my views as above expressed, if there had been a consistent current of authority to the effect that the reclaiming note was incompetent, I should not have felt at liberty to take a different course. But that is not the state of the authorities. There are two, and two only, which are directly in point. The first of these is the case of *Blackwood* v. *Summers, Oxenford, & Company*, (1899) 1 F. 868, where a reclaiming note was held to be incompetent by the First Division presided over by Lord Robertson. No opinions are reported, but the decision seems to me to be deprived of its authority by the fact that the only observation that was made was that the Court were following the decision in *M'Evoy* v. *Brae's Trustees*, (1891) 18 R. 417. Now *M'Evoy's* case was totally different; it was a case of failure to box, which is a statutory requirement. Here there was boxing, and the only mistake was in not stitching up a paper, which was already in process, along with the print of the reclaiming note.

Subsequent to *Blackwood* there is a decision by the same Division in *M'Lachlan* v. *Nelson & Company, Limited*, (1904) 6 F. 338, the Division being then presided over by Lord President Kinross. It is true the case of *Blackwood* appears not to have been cited, but the Division considered the point in the light of the argument submitted, and of the previous case of *M'Evoy*, on which *Blackwood* proceeded. The unanimous decision of the First Division, all the members of which gave reasoned opinions, was that this omission did not render the reclaiming note incompetent. I think we should follow that decision here. The grounds on which the Judges proceeded commend themselves entirely to my mind: and I have no difficulty whatever in holding that a technical objection of this kind ought not to be sustained unless the words of the

Act of Sederunt or Act of Parliament on which it is founded are plainly imperative and necessarily lead to such a result.

LORD DUNDAS—I do not dissent from the conclusion indicated by Lord Salvesen, because I agree that the blunder here was not very serious, and no practical harm has come of it. At the same time there was a mistake—a piece of sheer carelessness on the part of the reclaimer's agent or those for whom he is responsible—and I have heard no special cause why it should be condoned. The fact that the Clerk also made a slip seems to me neither here nor there, because I do not see how the agent can shelter behind the Clerk, or claim to be excused because the Clerk was also in error. I have no doubt that the Clerks of Court are often exceedingly helpful to careless agents, but I think it would be going much too far to say that if the Clerk on some occasion fails to detect an error the agent is to be excused, or, as was suggested, that the Court must be bound by or must condone the error of their official.

I confess I should be exceedingly sorry that anything should be said or done by us that might lead to the view or the impression that Acts of Sederunt are not to be enforced but may be disregarded with impunity. I take it that if the terms of an Act of Sederunt are imperative we are bound to follow them. The alternative would be to repeal not to ignore its language. Here the words of the Act of Sederunt are quite clear—"Provided always that such notes, if reclaiming against an Outer House interlocutor, shall not be received unless there be appended thereto copies of the mutual cases if any and of the papers authenticated as the record in terms of the statute if the record has been closed." It is said that these words are not imperative but directory, and the case of *M'Lachlan*, 6 F. 338, appears to point in that direction. It seems to have been there held in very similar circumstances that a reclaiming note having been in fact received although no record was attached to it, the penalty of enforcing the Act of Sederunt would be too great. I think the cases on the matter are in a very unsatisfactory condition. Those of *Blackwood*, 1 F. 868, and *M'Lachlan*, will not, I take it, hold together, and the earlier case does not seem to have been quoted at the later discussion. I should myself be disposed to prefer *Blackwood* to *M'Lachlan*, but *M'Lachlan* was the later, and its result appears to commend itself to your Lordships. I think that this question might very well be reconsidered some day by a fuller Court with a view to coming to some definite conclusion in the conflicting state of the decisions and, perhaps, pursuing the idea suggested by Lord Salvesen, we should seek the true remedy in a pecuniary fine upon the agent, which seems a juster course than visiting upon an innocent client the errors of an unobservant adviser.

As I have said, I do not dissent from the course proposed, but what I have said will indicate that I cannot agree to it with enthusiasm.

LORD GUTHRIE—In this case we have to choose between two decisions of the First Division. I agree with Lord Salvesen in thinking that we ought to follow the case of *M'Lachlan*, 6 F. 338. It is unfortunate that so far as the report bears the case of *Blackwood*, 1 F. 868, does not seem to have been quoted in *M'Lachlan*, but *M'Lachlan* is the last case and necessarily overrules *Blackwood*, and it is a case in which the Judges of the First Division pronounced reasoned opinions, while *Blackwood* is not only prior in date but seems to me to have proceeded upon an erroneous assumption. The case of *M'Evoy*, 18 R. 417, was held sufficient for the decision of the case of *Blackwood*, but that was a case where the record had neither been printed, boxed, nor lodged. In *Blackwood* the record had been printed and boxed but there had been a failure to lodge along with the reclaiming note a copy of the record. It seems to me that in the present case we are not bound by *M'Evoy* for the reasons I have stated, and if we are not bound by *M'Evoy* we are not bound by *Blackwood*.

I agree with your Lordships in thinking that this is not a case of serious fault. When one looks at the Act of Sederunt it seems difficult to understand the reason for it. I asked Mr Dykes if he could suggest one, and he could not. The Act of Sederunt says that the record shall be appended to the reclaiming note—that is to say, that a document, which is necessarily before us, shall for some unknown purpose be appended to or be pasted up with the reclaiming note. Still the Act of Sederunt is there and we must give fair effect to it. Effect was given to it in the case of *M'Lachlan*, and I agree in thinking with your Lordships that we should follow that decision.

LORD JUSTICE-CLERK—There cannot be the slightest doubt that there has been a great tendency of late years to relax the strictness of rules such as that now in question, and I often feel that in some cases the Court has gone wrong in holding on some slight grounds rules made by the Court under the authority of an Act of Parliament and by order of Parliament to be merely directory. If the question here were whether the distinct terms of an Act of Parliament as to what should be the result of failure to attach a record to a reclaiming note were to be applied, I should have great difficulty in holding that they were merely directory and not imperative. But here we are dealing with an Act of Sederunt, which is a far more flexible kind of thing so far as the Court is concerned, because the Court can alter it at any time under its power to make convenient rules for procedure.

I quite concur in Lord Guthrie's remark that there is no apparent reason for an Act of Sederunt laying down that the record must be appended to the reclaiming note. But the Act of Sederunt exists, and certainly it ought not to be lightly disregarded. This case is somewhat peculiar. The thing that is forbidden by the Act of Sederunt is the receiving by the Clerk of a reclaiming note without the record being appended to it,

and if he receives it without the record being appended to it, then those from whom he receives it are practically certiorated that he is satisfied with what they have done. Therefore it is not merely a question of fault on the part of the agent. Now the fault, venial it may be and probably explainable, is still a fault, and ought not to be allowed to pass without some censure, and I agree with Lord Dundas and Lord Salvesen that a fine would be a very proper way of securing proper procedure in this matter. I cannot help thinking that if we were to frame an Act of Sederunt we might well dispense with the rule which provides for this appending of records to reclaiming notes.

When we go back through the authorities, which is probably the best course the Court should follow, to see what the Court should do in any case regarding procedure, and come to an authority which is exactly apposite to the case in hand, we certainly ought not lightly to give an opposite decision. We should do so if we were to decide in this case that the fault committed could not be condoned and the case allowed to proceed, as we should be going contrary to the distinct decision in *M'Lachlan*, 6 F. 338. While I think we should follow that decision, I cannot say that I agree with Lord M'Laren when he says—"It is too severe a penalty to throw out the reclaimer's case because some one has omitted to lodge a copy of the record with the Clerk of Court." I do not think that is a good ground for dispensing with the requirement of the Act of Sederunt. The question is whether the fault is such that the Court can see ground for not enforcing the penalty stated in the Act of Sederunt, and they held in that case that it was such a fault. I see no ground for taking a course here which would imply the setting aside of that decision.

The Court repelled the objection.

Counsel for the Reclaimer — M'Lennan, K.C.—Maclaren. Agent—John Robertson, Solicitor.

Counsel for the Respondent—Macphail, K.C.—Dykes. Agent—James Scott, S.S.C.

Saturday, May 22.

FIRST DIVISION.

(SINGLE BILLS.)

DUNBAR'S TRUSTEES, PETITIONERS.

Trust — Administration — Nobile Officium of Court—Power of Trustees to Take into Own Hands and Manage Farm on Trust Estate.

The trustees under a testamentary settlement presented a petition to the *nobile officium* of the Court for authority to take one of the farms on the trust estate into their own hands and manage it, and further, to borrow a sum of money to enable them to do so. They explained that it was impossible to get the farm let, and that the settlement conferred no such power on them as was craved. *Circumstances* in which the Court *dismissed* the petition as unnecessary, since the exercise of the power proposed was merely an ordinary act of administration.

Dame Isabella Mary Dunbar, widow of the late Sir Archibald Hamilton Dunbar, of Northfield, baronet, and others, the testamentary trustees of the said Archibald Hamilton Dunbar, *petitioners*, presented a petition to the First Division of the Court of Session, in virtue of its *nobile officium* and under the Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97), for power to take into their own hands one of the farms on the trust estate of the said Sir Archibald Hamilton Dunbar, and to stock, cultivate, and manage the same for behoof of the said trust estate under their charge, until a suitable tenant be secured therefor, and further for power to borrow a sum not exceeding £1500 to enable them to execute the powers above craved.

The petition, *inter alia*, set forth "that the said Sir Archibald Hamilton Dunbar . . . conveyed . . . to and in favour of the petitioners . . . all and whole his lands and estate of Duffus or Thunderton, in the county of Elgin. . . . The petitioners, upon the death of the testator, duly accepted office, and entered upon and have continued the administration of said estate in terms of the settlement. Upon the said estate of Duffus there are a number of arable farms let to tenants upon leases of various durations, and the petitioners in the course of their administration have dealt with the said farms through their factors, and arranged for renewals of tenancies, and acted in regard thereto in the ordinary way in which such management of estates of the kind is conducted, and in accordance with the provisions of the settlement. One of the farms, viz., the farm of Crosshill, was let under lease to Mr John Masson for the space of nineteen years and crops from and after the term of Whitsunday 1905, with a break, however, in the option of either the proprietor or the tenant at Whitsunday 1915, at a rent of £138 per annum. The tenant gave the necessary notice to entitle him to receive the benefit of the break, and he leaves the farm at Whitsunday 1915, as to the houses, &c., and the land under crop at the separation of the crop from the ground. The petitioners have taken the usual steps through their factors, personally, and by advertisement, to relet the farm, but without success. . . . Only one offer was, however, received by the factors, viz., an offer dated 25th March, in terms of which there was offered for the farm a rent of £34, 16s. per annum on a lease for a period to be arranged. The offerer stated that he could not see his way to make a better offer, as the houses were not in good condition and the land seemed to be very expensive to work. The reasons stated, though to a certain extent correct, did not justify the offer of such a reduced rent. The buildings on the farm are in point of fact in fair tenantable order, though they may require a