Lord Lee and the Lord Justice-Clerk concurred.

The Court allowed a proof before answer as to the averments of the witnesses Fairbairn.

Counsel for the Appellant—Gloag—G. W. Burnet. Agent—Robert Stewart, S.S.C.

Counsel for the Reclaimer—J. B. Balfour, Q.C. —Jameson. Agents—Stewart & Stewart, W.S.

Thursday, November 15.

SECOND DIVISION.

[Sheriff Court of Ayrshire.

THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY *v.* BOYD, GILMOUR, & COMPANY AND OTHERS.

Process—Appeal—Competency—Court of Session Act 1868, *sec.* 71—*A.S., March* 10, 1870—*Omission to Lodge Prints in Time.*

In an appeal from the Sheriff Court the appellant failed to lodge prints within fourteen days after the Clerk of Court had received the process, in terms of A.S., March 10, 1870, sec. 3 (3), the appeal having been taken by mistake to the First Division instead of the Second Division. The Court, in the circumstances, and in view of the fact that no prejudice had been suffered by the respondents, *repelled* an objection to the competency.

The Act of Sederunt of March 10, 1870, which regulates the Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 71, provides, in regard to appeals from inferior courts—"3 (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 prints 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 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. Section 3 provides for reponing on cause shown within eight days after the appeal has been held to be abandoned—"(5) On the expiry of the said period of eight days after the appeal has been held to be abandoned as aforesaid, if the appellant shall not have been reponed, and if the respondent does not insist in the appeal, the judgment or judgments complained of shall become final, and shall be treated in all respects as if no appeal had been taken against the same, and the Clerk of Court shall further re-transmit the process to the Clerk of the Inferior Court."

Upon 29th June 1887 the Sheriff-Substitute of Ayrshire at Kilmarnock (Hall) decerned in favour of the pursuers in this action.

The defenders appealed to the First Division of the Court of Session, and upon 8th March 1888 the Second Division, to which the case had been transferred, allowed the record to be amended in terms of a minute lodged for the defenders.

Upon 15th March 1888 the Court recalled *in hoc statu* the said interlocutor of the Sheriff-Substitute, and remitted the case to the Sheriff with instructions to allow the parties a proof of their respective averments under the record as amended. The Sheriff-Substitute accordingly again allowed the parties a proof, and upon 29th June 1888 he issued an interlocutor by which he "repelled the defences, and decerned against the defenders in terms of the prayer of the petition."

The defenders appealed to the First Division of the Court of Session upon 25th July 1888, and the appeal was noted as received by the acting Depute Clerk of Session on 26th July 1888. The amended record, proof, and interlocutors were not boxed to the Court until 4th September 1888. When the case was put out for hearing upon 15th November the pursuers objected to the competency of the appeal on the ground that the defenders had failed to comply with the Act of Sederunt 10th March 1870 in not boxing the prints in the appeal within fourteen days from the 26th of July.

The pursuers argued—The prints ought to have been boxed to the Court on the first box day in vacation, which fell on 17th August, and if not boxed by that time, then the defenders could have applied within the next eight days to be reponed. But they did neither of those things. When the days for reponing had elapsed, the Clerk of Court ought to have marked upon the proceedings the intimation given in the Act of Sederunt, and re-transmitted the process to the Sheriff Court. But the defenders in this case borrowed the process, and so prevented the clerk from re-transmitting the process according to his duty. The appellants must be held to have abandoned their appeal, and the judgment of the Sheriff-Substitute had become final. In the cases quoted by the defender the parties had printed and boxed some part of the necessary prints, and were consequently allowed to print others, but in no case had the parties omitted to print all the papers, and yet had been allowed to prosecute their appeal—*Park* v. *Weir*, October 15, 1874, 12 S.L.R. 11.

The defenders argued—The delay had arisen through a mistake of the country agent, who had appealed the case to the First Division when he ought to have appealed it to the Second Division, and the agents in town did not become aware of the facts in time. But the Court had a discretion in the matter, and where no delay had been occasioned the appeal would be regarded as competent, although the terms of the Act of Sederunt had not been strictly complied with. Here the prints had been boxed by 4th September, and no prejudice had resulted—*Walker* v. *Reid*, May 12, 1877, 4 R. 714; *Young* v. *Brown*, February 19, 1875, 2 R. 457; *Lattimer* v. *Anderson*, December 20, 1881, 9 R. 371; *Robertson* v. *Barclay*, November 27, 1877, 5 R. 257; *Greig* v. *Sutherland*, November 3, 1880, 8 R. 41.

At advising—

Lord Justice-Clerk—The respondents in this appeal, who hold a judgment in their favour by the Sheriff-Substitute of Ayrshire, object to the competency of the Court taking up and disposing of the appeal on its merits, maintaining that under the 3d clause of the Act of Sederunt of 1870, regulating the preliminary procedure in such appeals, this appeal has fallen, and cannot be now considered by the Court of Session.

The facts are that the defenders on 25th July noted the appeal, and the process was transmitted on 26th July to the Clerk of Session. According to the Act of Sederunt the appellants should have boxed the prints of the proceedings on the box-day in August. This they did not do. They had it in their power within eight days to apply to the Lord Ordinary on the Bills, and to show cause why they should still be allowed to box the papers. This also was not done. The papers were boxed on the 13th of September, being the second box-day, having been lodged with the Clerk on 4th September. When the eight days had expired, the next step in ordinary course would have been for the Clerk of the Court of Session to mark the process with a note that the appeal had fallen, and to re-transmit it to the Sheriff Court. This was not done either. Accordingly the appeal, which was to the First Division of the Court, came up there for hearing, when the respondents took objection to the competency of proceeding with it in respect of the facts I have stated. The First Division transferred the case to this Division, and the question on the competency is again raised.

As regards the cause of the omission, I think it must be taken to be the fact that the failure in this case to box the prints within the time prescribed was due to inadvertence—and to inadvertence only—although I cannot help saying that the circumstances suggested by the defenders as accounting for the mistake seem to me to be of the most shadowy description, the only suggestion being that the appeal was marked to the First Division, although the proof to which the appeal referred had been taken on remit from this Division. How that fact should have made any difference in the conduct of the detail business of lodging papers I have not been able to see. I presume it must have been from some practice of communication between the officials in the office and the clerks of agents, but this is by no means clear. The real question, however, is whether the penalty for the inadvertent omission must be the loss of the right to prosecute the appeal, with the result that the judgment of the Sheriff-Substitute is stamped with finality.

The pursuers maintain that this must be the result. I think Mr Asher pressed his contention so far as to argue that on the day after the expiry of the reponing days the power of the Court to take up and consider the appeal absolutely ceased, and that whether the process had been transmitted back to the Sheriff-Clerk or not it was no longer before and could not be dealt with in any way by the Court of Session.

I do not think that in view of what has already been done by the Court in previous cases any such contention can be given effect to. For in numerous cases the question has been considered on the merits, with the result that in some of them the appeal has been allowed to proceed, a result which could not have followed had the Court felt itself compelled to hold that by the mere lapse of the time prescribed by the Act of Sederunt they had ceased to have any power over the process, and could not write upon it.

I cannot therefore give effect to the very broad and sweeping view which was pressed on us in debate that the lapse of the time fixed by the Act of of Sederunt operates as a removal of the process out of the Court of Session, so that we are precluded from dealing with it whatever may be the circumstances of the case as regards the failure to box papers.

But then it is contended that the failure makes it imperative upon the Court to hold it incompetent to proceed to hear and dispose of the appeal upon the merits, and that the judgment of the Sheriff must be held to be final. At first sight there is great force in this objection when the words of the Act of Sederunt are considered, which are very distinct.

We have thought it advisable to consult the other Division of the Court, and the conclusion which I have to state is that at which we have arrived after consultation.

Had it been clear that the Court are bound to regard a provision of an Act of Sederunt as being equivalent to a statutory enactment, I should have been unable to hold otherwise than that the defenders' appeal had fallen, and that it was not in the power of the Court to replace them in the position of being able to prosecute that appeal now.

But this is not the view that has been taken in previous cases. The Court have invariably held that they were entitled to consider whether the circumstances of the case made it necessary to enforce the Act of Sederunt to the effect of precluding the party in default from proceeding with this appeal. They have thought themselves entitled to consider what was the intention in passing the Act of Sederunt, and having regard to that intention, whether there was in the particular case ground for enforcing its penal provisions. Thus the Lord President in *Taylor or Young* v. *Brown*, February 19, 1875, 2 R. 370, says—"According to the Act of Sederunt this is a good objection. But I confess to a reluctance to sustain so technical an objection if it is possible to get the better of it. Now, it is important to observe that the provision founded on occurs in the Act of Sederunt and not in the statute. The regulation is made in place of the 71st section of the statute, and it is important to observe that under section 71 this objection would not have been fatal. Therefore the objection stands on a regulation of a form of process made by the Court. When we are satisfied that under an Act of Sederunt only a formal and innocent omission has been made we may allow the thing to be rectified." And again in *Lattimer Anderson* v. *Wight*, December 20, 1881, 9 R. 370, his Lordship said—"I think this case falls within the principle of the case of *Young* v. *Brown*, rather than of *Robertson* v. *Barclay*. In the latter case there was an entire failure to print. The appellant had not even attempted to take any step to print and box the appeal, and it was held that he had no excuse. The only excuse that was offered was that there had been verbal and obviously useless attempts to settle the case, which certainly did not justify the omission to prepare the prints. In the case of *Young* v.

Brown there was a failure to print a part of what is required by the Act of Sederunt—a part no doubt which was of less importance to the cause than that which has been omitted here—but I do not know that that fact will make any difference in the question whether the Act of Sederunt has been violated or not."

It also very clearly appears from the cases already decided that the Court have held the intention of the Act of Sederunt to be to prevent the delay in procedure, which the failure to box papers in due time tends to cause, to the detriment either of the interests of the opposing litigant, or of the despatch of the business of the Court; in short, that its penal action is directed against dilatory tactics, or, to use the word of the Lord President in *Robertson* v. *Barclay*, November 27, 1887, 5 R. 257—"One of the leading objects of all recent legislation and of the Acts of Sederunt relative to procedure is that the procedure of the Court should be expedited, and the tendency of recent legislation in this direction is very peremptory. Here the party has a certain term assigned to him for lodging his printed papers. If he does not lodge them timeously he is held to have abandoned his appeal. But this indulgence is conceded to him, that within eight days after the term has elapsed he may move the Court to repone him. But the Act of Sederunt requires that that shall not be done unless upon cause shown."

Now, this being the manner in which cases of failure to box prints have been dealt with hitherto, what is the case here? It is not suggested that the defenders did not box papers because they desired delay, or that in point of fact any delay was or could have been caused by the failure to box. It was admittedly an entirely unintentional mistake which did not delay by one day the business of the Court, or cause any inconvenience or hardship to the pursuers. The box-day was in August, the prints were lodged early in September, and the Court did not meet for business till the 15th of October. The spirit and intention of the Act of Sederunt, of which the Lord President spoke in the case of *Robertson* v. *Barclay*, were thus in no way violated by what occurred. What was done was not done in pursuance of off-putting tactics, and did not cause any delay or inconvenience whatever.

The case therefore falls to be considered in the light of those decisions under which appeals have been allowed to proceed notwithstanding the failure to box prints of parts of the process required by the Act of Sederunt to be boxed. Now, in the case of *Taylor or Young* v. *Brown* the note of appeal, which is one of the things specified, was by inadvertence not boxed. Notwithstanding this it was held that the Court could proceed to hear and dispose of the appeal, and that they were not compelled by the terms of the Act of Sederunt to hold that the appeal had lapsed. The only difference between that case and the present is that there the appellant was in default as regarded only one of the many things required by the Act of Sederunt. Does it make any difference that here the omission is not one of the prescribed things, but of all? It does not appear to me that it makes any difference in principle. Equally in both cases the omission was a substantial omission, but equally in both it was unintentional, harmless to the interests of the opposite party, and had and could have no injurious effect upon the progress of the business of the Court. I am of opinion that in these circumstances the decisions already given by the Court are authorities for holding—(1) That it is not imperative on the Court to put in force the penal provisions of the Act of Sederunt; and (2) that the circumstances of this case do not call for an infliction of these penal provisions.

I am therefore in favour of repelling the objection to the competency of the appeal.

Lord Young—The objection which has been taken to the competency of the appeal in this case is one of a most technical character. The objection comes to this, that whereas according to the provisions of the Act of Sederunt of 1870 these prints, which comprise the whole proceedings in the case, ought to have been deposited with the Clerk of Court upon the 10th August and boxed to the Court upon the 17th August, were in reality not lodged until the 4th September, and were not boxed until the 13th of that month. But the contention of the respondents is that under the imperative provisions of the Act of Sederunt we must hold that in these circumstances the appeal has been abandoned, and that the Sheriff's judgment upon the merits of the case is final; that, however just we may think it, no relief should be given to the appellant, even although no harm has resulted to the respondents. I must repeat what I have said before, that I doubt whether the Court—whether it be the whole Court or a Division of the Court—is precluded by the terms of an Act of Sederunt from doing whatever it thinks justice and equity demand should be done. I do not know whether it was conceded, or even argued, that the only remedy for hardships resulting from construing the terms of this Act of Sederunt in the way we are asked to construe them would be by the passing of another Act of Sederunt granting the relief sought. That might be the strictly technical way of doing what the Court thought the equity and justice of the case demanded. The idea of the Court in making an Act of Sederunt is to compose a rule for its own practice and procedure, and to announce to the agents practising before the Court what procedure will as a rule be generally followed, but whether that rule is such as to preclude us from doing what we think to be just and right in individual cases is a question that is not necessary to be considered here, although I have a very strong opinion upon the subject.

I do not know why the first case which was cited to us should not be taken as an authority for this case. In fact, the case of *Walker* v. *Reid* seems to be on all fours with this case. I shall read the rubric—"In an appeal from the Sheriff Court the appellant omitted to lodge prints within fourteen days after the process had been received by the Clerk of Court, as required by sec. 3, sub-sec. 1, of A.S., March 10, 1870, the agent having by mistake, as the day for lodging fell in vacation, lodged them on the box day instead. An objection having been taken by the respondent to the competency, the Court in the circumstances overruled the objection, and sent the case to the roll." The mistake of the agent in that

case consisted in thinking that the term of fourteen days did not run during the vacation as well as during session, and he had an impression—a mistaken impression as it turned out—that he should lodge the prints in the case upon the first box-day, and not at the end of the fourteen days. It was a mistake, and led to the violation of the Act of Sederunt, as the prints were not lodged at the time appointed by the Act. Here the prints should have been lodged upon the 10th August, they were not lodged till the 4th September; they should have been boxed upon the 17th August, they were not boxed until the 11th September. In that case there was a mistake which led to the violation of the Act of Sederunt; in this case it was an oversight. In that case the Court granted the relief asked; they did not think that it was imperative upon them under the Act of Sederunt to hold that the appeal had been abandoned when in reality it had not been abandoned. They were pressed to say that it was abandoned under the terms of the Act, but they allowed it to proceed. In that case I was called in to make a *quorum*, as the Lord Justice-Clerk was absent, and I said—"It must always be in the power of the Court to do justice in any case of this kind, and relieve a party of so severe a penalty, following on so critical a construction of what after all is only a rule of the Court, laid down by the Court, for its own guidance, with notice to parties and practitioners. We may advantageously and wholesomely make stern regulations in order to check appeals taken merely for delay or other improper purpose, but it is a strong thing to say that by any words of ours in an Act of Sederunt we preclude ourselves from doing what we think justice in any particular case, and that the accidental and harmless delay—it may be of a day or an hour—will make judgment final which is by the law of the land subject to review." That was my opinion then, and I adhere to it now.

Now, that judgment granted relief notwithstanding the terms of the Act of Sederunt had been broken. I should be prepared to read in to every Act of Sederunt, as incidental to its terms, that notwithstanding the terms of the Act it should be within the power of the Judge who tries the cause to give the relief to any of the parties in the case which he thought justice and equity demanded. I am of that opinion here. Indeed, it is indisputable that if we have the power to give the appellant here the relief which he asks it would be wise and discreet in us to exercise it, and we have the power to grant that relief unless we have deprived ourselves of it. I think that it is in the power of either Division of the Court, or of the Lord Ordinary who is trying the case, to give such relief as may be demanded in the circumstances of each case. If it was not so, what would the result be? For example, this is said to be a test case. The whole sum in dispute here, some £800, though it might have been a great deal more, has been decerned for by the judgment of the Sheriff, and his judgment might have had to be held as a final one, because by the result of an innocent oversight of the agent of one of the parties that party was held to have abandoned the appeal. It was urged that the mistake could have been set right by a reduction of the decree. Just consider what would have been the result if that suggestion could be adopted. I should doubt if a reduction could have been brought, but suppose it could, and the whole action tried over again in that process, what results would the Act of Sederunt have brought about? The Act was passed to prevent delay and to expedite business as affording economy in the carrying on of actions in the Court of Session, and I suppose that it is in the interest of despatch and economy that an action of reduction should be necessary to enable the appellant to bring forward his case. I do not think that it could be done, but even if it could, I think it would only show the necessity of the Court having the power to render that procedure unnecessary. Could the respondent not have agreed to the case going on under the circumstances in this case, or could we not have allowed such a proceeding, but must in justice to the parties have refused to hear the case, as the process ought to have been transmitted to the Sheriff Court whenever the days of reponing had passed? I think that too much weight has been attached to Acts of Sederunt, and I am not sorry to have an opportunity to give my opinion as to their character and function in regulating the course of our procedure.

Lord Rutherfurd Clark—In this matter we have consulted the Judges of the First Division, and the prevailing view of your Lordships has been that this appeal is competent, notwithstanding the terms of the Act of Sederunt, because the mistake, on account of which the parties did not comply with the requirements of the Act, was due to the inadvertence of an agent of the parties. As this has been the judgment of the majority of your Lordships, I concur in it, but I do not think I could have reached it by my own unaided efforts.

Lord Lee—In my opinion the Act of Sederunt is binding on the Court, and we have no power to dispense with it or to avoid the results that must come from its operation. I confess to a dislike to dispensing powers, and think that the exercise of them may give rise to well-founded feelings of discontent, although no doubt the powers are always well exercised in the name of justice, or some other name, but as your Lordships, after consultation, have come to the conclusion that this appeal may be allowed I do not venture to dissent, but I cannot agree with some of the general principles that have been announced.

The Court allowed the appeal.

Counsel for the Pursuers—Asher, Q.C.—Murray. Agents—Gordon, Pringle, Dallas, & Co., W.S.

Counsel for the Defenders—Balfour, Q.C.—Guthrie. Agents—John C. Brodie & Sons, W.S.