

directors, that this gives the partners privileges in a question of this kind which a private company would not have. It appears to me that within a year, in ordinary circumstances, or at all events in the course of a second year, the demand must be made, so that the respondent may preserve any rights of relief, or rights to demand repayment of the dividends from any persons liable, and may also have the option of taking over the securities if he think fit, admitting his liability. It is not necessary, however, to decide this question taken by itself—for besides the lapse of time already mentioned before the liquidation, nearly two years elapsed after the liquidation began before the ordinary action was raised, and in the meantime the liquidators had parted with all the bank's securities in exchange for others, which others they had realised at a considerable loss on the whole account. I may say here that I do not think that this realisation can be taken as giving the means of ascertaining the true value of the bank's securities acquired under the Mitchell agreement. But apart from this, taking the realisation into view with the delay that occurred in making the present claim, it seems to me that the company is barred from maintaining this application. I do not doubt that the liquidators acted rightly in realising as and when they did, seeing that it was necessary for them to convert the assets of the bank into cash without delay to enable them to pay the demands of creditors. But I am equally satisfied that with time—it might be a year or more—for negotiation, and if necessary legal proceedings in America, a result considerably more favourable would in all probability have been obtained; and I refer especially to the stock of the Western Union Railway Company, for which, although large offers for it had been previously rejected by the bank, a trifling sum only was realised, as has been explained by my brother Lord Mure. The respondent was, I think, entitled to an opportunity of taking over the whole securities, which he might have done on much more favourable terms than the bank realised, and even on such terms as might possibly have induced him, in order to avoid litigation, to have made some settlement of the liquidators' claims. I do not think it is any sufficient answer to Mr Mackinnon's plea on that point to say that the liquidators had not when they realised the securities resolved to insist in a claim against him. The hardship to him of sustaining the claim, after all the securities have been realised at a considerable loss, which might have been possibly avoided, would be all the same. I am of opinion that the delay and proceedings of the company up to 1878, combined with the proceedings of the liquidators before they made a claim against Mr Mackinnon, form a complete bar to the present application.

The Lords refused the prayer of the note, with expenses.

Counsel for Liquidators—Dean of Faculty (Kinnear, Q.C.)—Solicitor-General (Balfour, Q.C.)—Asher—Lorimer. Agents—Davidson & Syme, W.S.

Counsel for Respondent—Dean of Faculty (Fraser, Q.C.)—Mackintosh—Robertson—W. G. Smith. Agents—Murray, Beith, & Murray, W.S.

Tuesday, December 20.

FIRST DIVISION.

[Sheriff of the Lothians.]

ANDERSON v. LATTIMER.

Process—Appeal—Competency—Where Proof not duly Boxed—Act of Sederunt March 10, 1870, sec. 3, sub-sec. 1.

Where an appellant duly boxed the note of appeal, record, and interlocutors in terms of the Act of Sederunt March 10, 1870, sec. 3, sub-sec. 1, but, through the mistake of his agent, omitted timeously to box the proof, the Court *repelled* an objection to the competency of the appeal, but found the appellant liable in modified expenses.

This was an appeal from the Sheriff of the Lothians. When the case appeared in the Single Bills the respondent objected to the competency of the appeal, on the ground that the appellant had not complied with section 3, sub-section 1, of the Act of Sederunt 10th March 1870, which provided that "the appellant shall, during session, within fourteen days after the process has been received by the Clerk of Court, print and box the note of appeal, record, interlocutors, and proof, if any," unless the Court should have dispensed with printing, and if the appellant should fail within the said period of fourteen days to print and box the papers required as aforesaid it was further provided that he was to be held to have abandoned his appeal, and not entitled to insist therein except upon being reponed, as provided by the 3d sub-section of the same section. The process in the present case was received by the Clerk of the First Division on December 2, and the note of appeal, record, and interlocutors were duly boxed thereafter in terms of the above provision of the Act of Sederunt. But there was a proof, which the appellant omitted to box within the prescribed period, owing, as he averred, to the mistake of one of his agent's clerks, and he endeavoured to comply with the Act of Sederunt by printing and boxing the proof as soon as the omission was noticed.

The appellant cited *Young v. Brown*, February 19, 1875, 2 R. 456; *Walker v. Reid*, May 12, 1877, 4 R. 714; *Muir v. Mackenzie*, October 15, 1881, 19 Scot. Law Rep. 3.

The respondent cited *Robertson v. Barclay*, November 27, 1877, 5 R. 257.

At advising—

LORD PRESIDENT—I think that this case falls within the principle of *Young v. Brown* rather than that of *Robertson v. Barclay*. In the case of *Robertson v. Barclay* there was an entire failure to print. The appellant had taken no step—he had not even attempted to take any step—to print and box the appeal, and it was there held that he had no excuse at all, except an obviously trivial attempt to palliate his default on the ground of some verbal and half-hearted communications between the parties with a view to a settlement. In the case of *Young v. Brown*, on the other hand, there was a failure to print a part merely of what is required by the Act of Sederunt, no doubt a part of less importance in the discussion of the case than what has been omitted here;

but I do not think that the relative importance of the part which has been omitted makes any difference on the question whether the Act of Sederunt has been violated or not. The Act equally requires both the note of appeal and the proof to be printed, and if the omission here is fatal it must equally be fatal whatever the omitted portion may be. The circumstance that one part is of more use in the ultimate discussion of the case makes no difference, for the note of appeal must be here just as much as the proof before the Court can consider the case.

LORD MURE and LORD SHAND concurred.

LORD DEAS was absent.

The Lords repelled the objection to the competency of the appeal, and sent the case to the roll, finding the appellant liable in three guineas of expenses.

Counsel for Appellant—Brand. Agent—D. Turner, S.L.

Counsel for Respondent—Campbell Smith. Agents—Horne, Horne, & Lyell, W.S.

Tuesday, December 20.

FIRST DIVISION.

[Lord Adam, Ordinary.

FERRAL OR M'WILLIAM AND OTHERS v. SOUTAR AND OTHERS (MILNE'S TRUSTEES.)

Process—Jury Trial—Notice for Trial—Lead.

Where a case was called in May, but issues were not adjusted till the end of November, and although the pursuers had not lost their lead, there was no mode by which, in accordance with the ordinary course of procedure, they could take advantage of it, or obtain a trial earlier than the ensuing Spring Sittings—the Court (*disc.* Lord Shand) appointed the trial to take place at these sittings, in terms of a notice given by the defenders, holding that there was nothing in the circumstances of the case to take it out of the ordinary course of procedure.

In this case, which was an action of reduction of a trust settlement, the summons was dated in May 1881, but issues were not adjusted till November 30 following. December 9 was the last day for giving notice for trial at the ensuing Christmas Sittings, but the pursuers took no step within that period, or within ten days after the adjustment of issues, which expired on December 10. The defenders then gave notice for the Spring Sittings. When this notice came before the Lord Ordinary (ADAM) on December 13, the pursuers moved the Lord Ordinary to fix a day for trial, but his Lordship was unable, owing to the state of his roll, to give a day within the three weeks specified in the 40th section of the Act of 1850, the earliest vacant day being February 21. The pursuers thereafter moved the Lord President to fix the trial to proceed before the Lord Ordinary, or before another Judge, on an earlier day than at the Spring Sittings. They stated that they had a number of witnesses of a very advanced

age, with reference to whose evidence it would be prejudicial to have the trial delayed till Spring. The defenders contended that the pursuer had lost his lead by having taken no step within ten days after the issues had been adjusted, and that in any case there was no ground for taking this case out of the ordinary course. LORD MURE referred to *M'Neill v. Caldwell and Shedden*, March 23, 1853, 15 D. 582.

At advising—

LORD PRESIDENT—In the circumstances of this case I think it is better to let it stand on the notice for the trial at the sittings.

LORD MURE—I am of the same opinion. But I do not go upon the ground that the pursuers have lost their lead. For although they did not give notice of trial till after the expiry of the ten days allowed by the Act of Sederunt for that purpose, they have, as I understand, been endeavouring to get the Lord Ordinary to fix a day for the trial under the 40th section of the Act of 1850, and that, under the rules laid down in *M'Neill v. Caldwell*, 15 D. 582, is sufficient to preserve their lead. But the difficulty is that the Lord Ordinary is not able to fix a day till the beginning of March, or even later, and the result, I am afraid, is that this case must stand over to be tried at the sittings at the close of the Winter Session under the notice of trial which has been given by the defenders. The pursuers, however, ask that it shall be appointed to be tried earlier before a Lord Ordinary other than Lord Adam, whose roll is filled up. Whether some arrangement to that effect might not be made of consent I do not give any opinion. But the provisions of the Distribution of Business Act (20 and 21 Vict. c. 56) do not seem to me to cover such a case.

The question therefore for consideration is, Whether there is anything so pressing in the circumstances of this action as to make it desirable that we should endeavour to stretch the provisions of that or of some other Act in order to have the case tried before another Lord Ordinary out of the usual course? I am unable to see anything in the position of this case to render that necessary. The parties have been in Court since the end of May, and yet the issues are not adjusted till the end of November. Notice of trial is not given for this Christmas Sittings, and the pursuers make no motion before the Lord Ordinary to have a day fixed till the 10th of December, being about the time when the defenders gave their notice for the Spring Sittings. The case therefore does not seem to me to be one in which the Court are called on to go out of the usual course, and to make some extraordinary arrangement for a particular case. For I do not see that the pursuers can in the circumstances suffer much hardship by the delay till the sittings in March, as it is quite open to them to have the evidence of the aged witnesses, whose evidence they are afraid of losing, taken upon commission.

LORD SHAND—I cannot agree in the result at which your Lordships have arrived. Indeed, I may say that I differ decidedly. Issues were adjusted on the 9th of December, and the pursuers, in asking the Lord Ordinary to fix a time of trial, might fairly expect to have the case tried within