

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-

ments he had received no vouchers. All the sums so alleged to have been paid were less in amount than £8, 6s. 8d.

The pursuer pleaded, *inter alia*—“(4) The application of the payments otherwise than as credited, and the alleged payments beyond those credited, can only be proved by the pursuer's writ or oath.”

By the Bills of Exchange Act 1880, section 100, it is provided:—“In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory-note, which is relevant to any question of liability thereon, may be proved by parole evidence.”

On 30th March 1900 the Sheriff-Substitute (HAMILTON) pronounced the following interlocutor:—“Finds that the defender has failed to set forth a relevant averment of payments to account of the sum sued for beyond those credited in the prayer of the petition: Therefore repels the defences in so far as not already dealt with, and decerns against the defender for payment to the pursuer of twenty pounds, five shillings and sixpence, being the sum brought out in the statement No. 16 of process, with interest thereon at the rate of £5 *per centum per annum* from the date of citation till payment: Finds the pursuer entitled to expenses, modified to Two pounds, two shillings, and decerns against the defender for payment thereof to the pursuer.”

On appeal the Sheriff (RUTHERFORD) adhered to the interlocutor of the Sheriff-Substitute and dismissed the appeal.

The defender appealed to the Court of Session, and argued that under section 100 of the Bills of Exchange Act 1880 (quoted *supra*) he was entitled to a proof of his averment that he had made payments which were not credited in the account.

Argued for the respondent.—It was clear that at common law payment of a debt constituted by writ could not be proved by parole—Dickson on Evidence, sec. 610. This rule had not been altered by sec. 100 of the Bills of Exchange Act. The terms of that section had been interpreted and limited by decisions—*National Bank of Australia v. Turnbull & Co.*, March 5, 1891, 13 R. 629; *Gibson's Trustees v. Galloway*, January 22, 1896, 23 R. 414.

LORD ADAM—At this stage in the case the first question is, whether in ascertaining the balance due, certain payments set forth in the answer, and alleged to have been made, are to be included. According to the arguments before us, these payments are not vouched by any writ, but it is maintained, in the first place, that as the payments in question are each of them under £100 Scots or £8, 6s. 8d., they may be proved by parole. In answer to this, Mr M'Lennan maintained that according to the law of Scotland payments of an obligation constituted by writing can only be proved by writ or oath, no matter how small the payments may be, and for this he cited authorities. In this I think Mr M'Lennan is right. But then the other side maintains that even if that be true in

the ordinary case, in this case, when the obligation is founded on a bill of exchange, the rule is modified by section 100 of the Bills of Exchange Act 1882. In my opinion it was not the intention of that section to alter the rules of the law of Scotland as to the modes in which payment of a debt may be proved. By the ordinary rule of the law of Scotland payment of a debt constituted in writing cannot be proved by parole, and I do not think that section 100 was intended to alter that rule.

[His Lordship proceeded to deal with the question of the interest charged.]

LORD M'LAREN—I concur with Lord Adam. I should have preferred not to give an opinion in a case of this kind, on the construction of section 100 of the Bills of Exchange Act 1882—a section which has already given rise to difficulties, and which may come before us again for construction. This much I may say, that a defence of payment would not usually or properly be described as a “fact relating to a bill of exchange” relevant to a question of liability thereon. If that is so, I think section 100 does not apply to the present case. I agree as to the necessity of enforcing the rule that, subject to known exceptions, payment in pursuance of a written obligation must be proved by the writ or oath of the creditor.

The LORD PRESIDENT and LORD KINNEAR concurred.

The Court dismissed the appeal.

Counsel for the Appellant—J. C. Watt.
Agent—J. B. W. Lee, S.S.C.

Counsel for the Respondent—M'Lennan.
Agent—Robert Broatch, Solicitor.

Saturday, October 20.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

FISKEN v. FISKEN.

Process—Reclaiming-Note—Competency—Printing—Omission from Print Appended to Reclaiming-Note of Interlocutor Closing Record—Court of Session Act 1825 (6 Geo. IV. c. 120) (Judicature Act), sec. 18—A. S. 11th July 1828, sec. 77—Court of Session Act 1850 (13 and 14 Vict. c. 36), sec. 5.

A claimer boxed along with and appended to his reclaiming-note prints containing the record as finally closed, and all the interlocutors pronounced in the cause, with the exception of the interlocutor pronounced by the Lord Ordinary closing the record.

Held that his omission to print this interlocutor did not render the reclaiming-note incompetent, in respect that, although he was bound to print the record as authenticated, he was not bound to print the interlocutor which was the proof of such authentication.