unless they can prove facts which entitle them to total exemption in terms of proviso i or proviso ii of head (*c*) of sub-section (1), or to contribution in terms of proviso iii.

The Court holding that the appellant was not barred by the discharge recalled *hoc statu* the arbitrator's determination and remitted to him to proceed.

Counsel for the Appellant — Constable, K.C. — MacRobert. Agents — Simpson & Marwick, W.S.

Counsel for the Respondents — Horne, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Friday, January 8.

FIRST DIVISION.

[Sheriff Court at Glasgow.

CREIGHTON *v.* WYLIE & LOCHHEAD, LIMITED.

Process — Appeal — Competency — Printing and Boxing—Reponing against Failure to Deposit Print Timeously—Motion not Made Timeously—Power of Court to Dispense with Observance of Act of Sederunt —Codifying Act of Sederunt 1913, *D III,* 2 *and* 3.

In an appeal from the Sheriff Court the appellant failed to deposit the print with the Clerk of Court within fourteen days after the process had been received by him, as required by the C.A.S. 1913, D III, 2. The appellant moved the Court to repone her in terms of the C.A.S. 1913, D III, 3, on the ground that the failure to deposit the print was due to an oversight. The motion was not made within the eight days prescribed by C.A.S. 1913, D III, 3. The Court *refused* the motion—on the ground, *per* the Lord President, that the Court could not dispense with the observation of the provisions of the Act of Sederunt, and even if it could no cause had been shown; *per* Lords Johnston and Skerrington that the appellant was entitled to no indulgence from the Court supposing the Court had power.

Observations per Lord Johnston on the power of the Court to relax the rules prescribed by the Act of Sederunt.

Boyd, Gilmour, & Company v. *Glasgow and South-Western Railway Company*, November 16, 1888, 16 R. 104, 26 S.L.R. 84; *Taylor* v. *Macilwain*, October 18, 1900, 3 F. 1, 38 S.L.R. 1; and *Bennie* v. *Cross & Company*, March 8, 1904, 6 F. 538, 41 S.L.R. 381, *commented on per* the Lord President.

The Codifying Act of Sederunt 1913, D III, provides—"2. *Printing and Boxing During Vacation.*—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 . . . 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 on being reponed, as hereinafter provided. 3. *Reponing.*—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 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 the Lord Ordinary shall seem just."

Mrs Ellen Creighton, *pursuer*, brought an action against Wylie & Lochhead, Limited, *defenders*, in the Sheriff Court at Glasgow for £250 as damages for personal injury sustained by her through the alleged fault of the defenders. On 4th December 1914 the Sheriff-Substitute (A. S. D. THOMSON) allowed a proof. On 9th December 1914 the pursuer required the cause to be remitted to the First Division of the Court of Session, and on 12th December 1914 the process was received by the Clerk of Court. The print of the note of appeal, record, and interlocutors was deposited with the Clerk of Court, and the prints were boxed, on 31st December 1914. The print, in terms of the Act of Sederunt, should have been deposited with the Clerk of Court on or before 26th December 1914. 31st December 1914 was the box day next following the 26th December 1914, and 5th January 1915 was the first sederunt day thereafter.

In Single Bills on 5th January 1915 counsel for the pursuer moved the Court to repone the pursuer on the ground that the failure to deposit the print with the Clerk on or before 26th December 1914 was due to an oversight.

The defenders opposed the motion, and argued—The motion to repone was too late. It should have been made before the Lord Ordinary on the Bills within eight days from 26th December 1914—C.A.S. 1913, D III, 3. This was the tenth day. The Court had no power to dispense with the observance of the provisions of the Act of Sederunt—*Taylor* v. *Macilwain*, October 18, 1900, 3 F. 1, 38 S.L.R. 1, and *Bennie* v. *Cross & Company*, March 8, 1904 6 F. 538, 41 S.L.R. 381, overruling *Boyd, Gilmour, & Company* v. *Glasgow and South-Western Railway Company*, November 16, 1888, 16 R. 104, 26 S.L.R. 84. In any event no cause had been shown why the pursuer should be reponed.

At advising—

LORD PRESIDENT—An objection which I consider to be well founded has been taken to the competency of this appeal on the

ground of failure on the part of the appellant to comply with the provisions of the Act of Sederunt which regulates appeals from inferior courts. These provisions, so far as applicable to this case, will be found in Book D, chapter 3, sections 2 and 3, of the Codifying Act. The process in the case was received by the Clerk of Court on 12th December 1914, and within fourteen days from that date—that is to say, on or before 26th December 1914—the appellant was required by the Act of Sederunt to deposit with the Clerk of Court a print of the note of appeal, record, and interlocutors. She failed to do so. In terms of the Act of Sederunt the consequence of failure was that she was held to have abandoned her appeal, and is not entitled to insist in it unless she be reponed. The motion for reponing was made to this Division of the Court on the 5th January 1915, ten days after the date when the appellant was held to have abandoned her appeal. The remedy of reponing is given by the Act of Sederunt, provided the motion is made within eight days after the date when the appeal is held to have been abandoned. This motion was made ten days after that date. Accordingly it came too late, and I am of opinion that we ought not to entertain it.

The appellant's counsel urged us to disregard the terms of the Act of Sederunt and to grant the motion for reponing. I am of opinion that we have no power to dispense with the provisions of the Act of Sederunt. In support of that view I refer to the case of *Taylor* v. *Macilwain*, decided in this Division of the Court so far back as 1900, and to the opinions of the Judges therein expressed. That case is directly in point. It was followed in the other Division of the Court three years later in the case of *Bennie* v. *Cross & Company*, which is also directly in point. The authority of these two decisions has not since been called in question, and I have ascertained that the practice of the Court has been in conformity with the views there expressed. The decision in the case of *Boyd, Gilmour, & Company* v. *Glasgow and South-Western Railway Company*, to which our attention was called, can in my opinion no longer be regarded as authoritative. It was, I think, overruled by the two decisions I have just mentioned, and the doubts therein expressed by Lord Rutherfurd Clark and Lord Lee have now become certainties.

If I am wrong in the view which I have expressed, and if, contrary to my opinion, this Court is entitled to play fast and loose with the Acts of Sederunt, then I should have refused to grant the remedy sought in this case, for I observe that it can only be granted "on cause shown," and no cause whatever has been shown for the failure of the appellant to deposit a print within the fourteen days, or to apply for the remedy provided by the Act of Sederunt within eight days.

LORD JOHNSTON—I agree with your Lordship that this application must be dismissed. And I do so on the ground that even if we had power under the Codifying A.S., D III, 3, to which your Lordship has referred, I should not be prepared to exercise that discretion in favour of the appellant. She has had her opportunity twice over of coming here. And what is she coming here for? It is not on a matter vital to the case; it is merely on the question whether the case is to go to proof before the Sheriff or is to go to a jury in this Court. And as the appellant has neglected her opportunity of making her option effectual, I do not think that this Court would be justified, even if they had power to interpose, in relieving her of the result of the mistake or neglect of her agent or of her agent's clerk. It is a matter between her and her agent.

But I desire to take this opportunity of saying one or two words upon the larger question. Personally I have for some time felt that the question of the true effect of an Act of Sederunt is not in a satisfactory position—when I say of the true effect, I should rather say of the obligation on a Division, or on a Judge, of the Court to enforce literally, or of their discretion to relax, what the Court as a whole has laid down in an Act of Sederunt. And in this matter there may be some distinction between Acts of Sederunt. We have had the question raised from time to time with regard to various Acts of Sederunt, and even with regard to the provisions of Procedure statutes, as in *Macarthur* v. *Mackay*, 1914 S.C. 547, 51 S.L.R. 466. I am not satisfied that the Court has come to a sufficiently determinate and comprehensive conclusion as to the proper course to take in such cases. To advert to the particular question before us—what appeals to me as the important thing is this—when I go back to the Act of Parliament—the Court of Session Act 1868, section 71—I find that Parliament, in the matter of appeals from inferior courts, did not contemplate that there was to be any such drastic application of foreclosure, as is contended for here, in the event of omission timeously to take a statutory step of procedure. On the contrary it provided that the Court should discriminate according to circumstances.

Consider the variety of situation in which an appellant is placed in a case of this sort. In this case it does not really much matter how the case is tried, whether by proof in the Inferior Court or by a jury in this Court: the choice is not vital to the appellant's interest. Under the 71st section the Court would have been justified in discriminating and in saying, "We will not do anything to relieve you of your agent's delay, and to enable you to proceed with this appeal. Go back to the Sheriff." But I can very well conceive in another class of case—where there has been a final or even an important interlocutory judgment—that to deal with such on the same footing without discrimination would be to run the risk of doing very grave injustice, because it would be to foreclose the appellant from ever obtaining review of an important, and may be a final, judgment of the Inferior Court.

It is quite true that the appellant would have his remedy for neglect against his agent, but we all know that that is not a

satisfactory remedy. Few clients are in a position to know that they can take it or how to take it, because they know nothing about procedure and are so much in the hands of their agent; moreover, the case may involve large sums of money, and *quomodo constat* that the agent is good for the damages. Therefore there is, I think, reason for the discrimination which the Legislature certainly intended that the Court should have.

The original Act of Sederunt of 1870, which is now embodied in the Codifying Act under which we are now acting, proceeds by virtue of the authority conferred upon the Court by section 106 of the Court of Session Act 1868, and enacts as follows—"That the course of proceeding prescribed by the 71st section of the said statute shall be altered to the following extent and effect." The preamble is dropped in the Codifying A.S. If one turns to the 106th section one finds that it empowers the Court to make regulations for carrying into effect the purposes of the Act, viz., the Act of 1868, but also so far as may be expedient for altering the course of procedure prescribed by the Act. When I find that the Act of Sederunt with which we are concerned is an alteration of the original Act of Parliament, I think that it is open to question whether it is perfectly clear that it was intended that, having regard to the terms of the provision which was so altered, the clause with regard to reponing should be as drastically imperative as it is maintained that it is. I should not be justified in giving a decided opinion on the subject after what your Lordship has said as to the state of the authorities. But I go the length of saying this, that I do not think that the matter has received a deliberate consideration in all its bearings notwithstanding these authorities; that it ought on the first opportunity to be laid before either the two Divisions or the whole Court, not as a matter of private conference, but for discussion, as it is a matter in which the profession is concerned; and that if the result of such consideration is to determine that the Court have the power to make regulations by Acts of Sederunt which are as imperative on the Court in its judicial capacity as it is maintained this one is; and if it be the result of such consideration that the Act of Sederunt is intended to be imperative, it will become the duty of the Court to determine whether it ought not to be amended so as to provide for that discriminating discretion in the Court which is to be found in the original statutory enactment. In this matter there is, I think, involved the question both of the power and of the intention of the Court by Act of Sederunt to lay down regulations which shall be not merely directory but imperative. On this question the authorities are not, I humbly think, in a very satisfactory position.

LORD SKERRINGTON—I think it very clear that the appellant is not entitled to any indulgence from the Court, and accordingly I have not thought it necessary to form a definite opinion upon the larger questions with which your Lordships have dealt. I may say, however, that my present impression is that the Act of Sederunt with which we are concerned is quite clear and unambiguous, and that it renders the present appeal incompetent. Further, as at present advised I see no reason to doubt that that Act of Sederunt was within the power of the Court to enact.

LORD MACKENZIE was not present.

The Court refused the motion and directed the Clerk of Court to retransmit the process as an abandoned remit.

Counsel for Pursuer and Appellant—J. A. Christie. Agents — St Clair Swanson & Manson, W.S.

Counsel for Defenders and Respondents—D. Jamieson. Agents—Whigham & Macleod, S.S.C.

Friday, January 15.

EXTRA DIVISION.

COWDENBEATH BURGH *v.* COWDENBEATH GAS COMPANY, LIMITED.

Police — Rates and Assessments — Water Supply—Basis of Assessment for Burgh Water Supply—Public Health (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 101), *sec.* 89 (6)—*Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 347 (2)—*Burgh Sewerage, Drainage, and Water Supply (Scotland) Act* 1901 (1 *Edw. VII, cap.* 24), *secs.* 1, 2, 3.

A special water supply district was formed in a county in 1869 under the Public Health (Scotland) Act 1867, sec. 89, funds being borrowed, the repayment of which did not terminate till 1919. It was in its entirety included in a police burgh formed in 1890. The works of a gas company supplying the district were situated within the area, and were in 1901 being assessed for the purposes of the burgh water assessment under the proviso of the Burgh Police (Scotland) Act 1892, sec. 347 (2), on their full annual value. In 1901 the Burgh Sewerage, Drainage, and Water Supply (Scotland) Act was passed. It incorporated by reference section 347 (2) of the Burgh Police (Scotland) Act 1892. *Held* that though in section 2 of the Act of 1901 the provisions of section 347 (2) of the Act of 1892 were incorporated by reference, the proviso of the latter section, under which the works (above ground) had been assessed at their full annual value, was superseded by section 3 of the Act of 1901, and accordingly that for the purposes of the burgh water assessment these works fell to be assessed only on one-fourth of their annual value.

The Public Health (Scotland) Act 1867 (30 and 31 Vict. cap. 101), sec. 89 (6), enacts—"It shall be lawful for the local authority to borrow for the purpose of constructing, purchasing, enlarging, or reconstructing such works as are herein authorised for