been since 1879 in James Scott, and subsequently in the defenders. The back-letter granted to Paterson has never been recorded. Therefore, so far as the form of the title is concerned, Paterson's assistance and concurrence is not required. The only question is, whether the defender Mackinnon, Paterson's trustee, has power to bind Paterson to the effect practically of renouncing the personal right evidenced by the back-letter to demand a reconveyance of the lands on payment of the debt due to Scott's trustees.

"The main ground on which it is maintained that Mackinnon has not full power to assent to this sale is that although he is given full powers of sale under the trust-disposition from Paterson, he can, it is said, only exercise those powers with the advice and concurrence of a committee of creditors. The defenders' answer to this is that no committee of creditors was ever appointed. Now, the appointment of the original committee lay with the truster, the power of the creditors in this matter being confined to appointing persons in room of the parties originally appointed. It appears to me that by failing to appoint a committee, and by allowing the trust to be acted on for ten years, Paterson is barred from objecting to the actings of his trustee in this matter. Under the trust-deed the advice and concurrence of the committee of creditors would seem to be required by the trustee in the exercise of all or any of the powers conferred upon him, and therefore the trust has been from the first incomplete and invalid if the view of the trustee's powers presented by the pursuer is correct.

"I am therefore of opinion that the pursuer is in safety, and is bound to accept the disposition offered, although I think he was justified in presenting the point for the decision of the Court."

Counsel for the Pursuer—Ure. Agent—John Pairman, S.S.C.

Counsel for the Defenders—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

---

*Tuesday, May* 28.

## SECOND DIVISION.

### WILLIAMS *v.* WATT & WILSON.

*Process—Appeal—Competency—Judicature Act* 1825 (*6 Geo. IV. c.* 120), *sec.* 40—*Act of Sederunt, 11th July* 1828, *sec.* 5.

*Held* (following the cases of *Kinnes* v. *Fleming*, January 15, 1881, 8 R. 386, and *Duff* v. *Steuart*, October 20, 1881, 9 R. 17) that an appeal to the Court of Session for jury trial, which was not taken within fifteen days of the interlocutor allowing proof, was incompetent.

*Question*—Whether to prevent hardship the Court could have admitted the appeal notwithstanding the terms of the Act of Sederunt.

Case of *Boyd, Gilmour, & Company* v. *Glasgow and South-Western Railway Company*, November 16, 1888, 16 R. 104, *commented upon and distinguished.*

Mrs Margaret Cuthbertson or Williams, widow, 38 Dempster Street, Greenock, brought a petition in the Sheriff Court there against Messrs Watt & Wilson, railway contractors, Chapel Street, Greenock, to recover damages for the loss of her son who was killed while in their employment.

On 8th February 1889 the Sheriff-Substitute (NICOLSON) repelled a preliminary plea for the defenders, and ordered a proof, to be taken on 26th February.

The defenders appealed to the Sheriff (PEARSON), who on 5th April dismissed the appeal and remitted the cause to the Sheriff-Substitute of new, to fix a diet of proof.

On 17th April 1889 the Sheriff-Substitute, on the pursuer's motion, assigned the 9th May as a new diet of proof.

On 24th April the pursuer appealed to the Court of Session for jury trial.

When the case came before the Court for the adjustment of issues it was objected for the defenders that the appeal was incompetent as it had not been taken within the fifteen days specified in the Act of Sederunt of 11th July 1828.

The said Act of Sederunt by section 5 provides, "Whereas it is enacted by sec. 40" (of the Judicature Act) "that in all cases originating in the inferior courts in which the claim is in amount above £40, as soon as an order or interlocutor allowing a proof shall be pronounced . . . it shall be competent to advocate such cause to the Court of Session, . . . and it is further enacted and declared that if neither party, within fifteen days in the ordinary case, and in causes before the courts of Orkney and Shetland within thirty days, after the date of such interlocutor allowing a proof, shall intimate in the inferior court the passing of a bill of advocation, such proof may immediately thereafter effectually proceed in the inferior court, . . . and if, within these periods respectively, no intimation shall be made of any such bill of advocation the proofs shall then proceed, and the bill, if such have been presented, together with the passing thereof, shall be held to fall as if such bill had never been presented."

Argued for respondent—The appeal was incompetent because it was too late of being taken. The fifteen days must be counted from the date of the interlocutor allowing proof, which in this case was that pronounced by the Sheriff on 5th April—*Kinnes* v. *Fleming*, January 15, 1881, 8 R. 386; *Duff* v. *Steuart*, October 20, 1881, 9 R. 17.

Argued for appellant—Admittedly the appeal was not taken within fifteen days of April 5th, but (1) the date from which the fifteen days were to be reckoned was the 17th April when the diet of proof was fixed, and (2) it was within the discretion of the Court to allow the appeal to proceed. It would be hard to deprive the pursuer of the benefit of a jury trial, and where such a hardship would arise the Court had it in their discretion to dispense with a strict adherence to the rules of an Act of Sederunt, which was intended to guide and not to fetter them—*Boyd, Gilmour, & Company* v. *Glasgow and South-Western Railway Company*, November 16, 1888, 16 R. 104.

At advising—

Lord Justice-Clerk—In any case under an Act of Sederunt in which omission to comply with its provisions without doing prejudice to anybody would shut out a party from carrying on his case altogether, we always show our sympathy with such party by looking narrowly to see if we must enforce the Act of Sederunt. In a recent case where prints were through inadvertence lodged after the time specified in an Act of Sederunt, and there was no interest in anyone to have them lodged early, we held with difficulty, but after consulting the Judges of the other Division, that we were not bound to enforce the Act of Sederunt. In that case had we sustained the objection to the competency of the appeal the Sheriff-Substitute's judgment would have became final, but here the pursuer does not lose the power of prosecuting her case by the appeal being held incompetent. The only difference will be that she will lose her right to come here and get a jury trial, but she may proceed in the Court in which she raised her action. She will suffer no real prejudice. She may prefer a trial by jury, but she can still proceed, and after trial before the Sheriff-Substitute may appeal to the Sheriff, and eventually to this Court. She will therefore get her case fairly heard and disposed of, and I do not look with any favour on this case as one of hardship.

The Sheriff-Substitute pronounced an interlocutor allowing a proof, which was appealed to the Sheriff, who dismissed the appeal. Thereby the Sheriff-Substitute's interlocutor allowing proof became final, and from that date the pursuer had fifteen days to intimate an appeal to this Court. She did not during the fifteen days lodge such an appeal, but went to the Sheriff-Substitute and asked him to fix a diet for proof. He by interlocutor fixed a day, but that was not an interlocutor disposing of any question between the parties. It was merely an interlocutor as to when the proof should be taken.

I should have held, apart from the authorities, that the date of the interlocutor allowing proof is the date from which the fifteen days must run, because after that it is fixed there is to be a proof, and the mere question of when is of no material interest to the parties. If I had had any hesitation in the matter I could have had none after the cases of *Kinnes* and of *Duff*, which are on all fours with the present one. They have fixed that the fifteen days are to be counted from the date of the interlocutor allowing proof, or from the date of such interlocutor becoming final by an appeal from it being refused. I am therefore for holding the appeal incompetent.

Lord Young—This is an interesting matter, and that must be my excuse for saying what I am about to say. The meaning of this Act of Sederunt has been determined, and we cannot go back upon that. The date from which the fifteen days run is the date of the interlocutor allowing proof, but I am and have always been of opinion that wherever considerations of good sense and of justice require that we should give relief from the terms of an Act of Sederunt, and wherever such relief may be given to one party without hardship to the other we may give it, and that is quite settled by the case of *Boyd, Gilmour & Company*. In that case there was a miscalculation as to the proper date for lodging prints, and if the appeal had been refused as incompetent the Sheriff-Substitute's judgment would have became final in a specimen case brought to try important questions, and which it was intended to take to the House of Lords. To have held in such a case that this Court could not give the relief sought for would have been to hold an Act of Sederunt the most ridiculously powerful of all things, and that rules which we have made for our own guidance bind us even to refrain from doing what we may think good sense and justice require us to do.

I am therefore of opinion that we may give relief here if there are grounds for doing so, but I think that there are no grounds here for it, and that the Act of Sederunt should be enforced except where there are strong grounds for not doing so.

It is a great indulgence to give a pursuer the right to come here for jury trial, to remove a case he has brought in the Sheriff Court, and therefore a limited time is set within which he must avail himself of the privilege or the case will go on in the Court of his own selection. Here the pursuer had an opportunity given to her of appealing for jury trial on the 8th February last, but she allowed the case to go on by her adversary's appeal to the Sheriff, and even when that was disposed of on the 5th April she did not think of removing the cause, but went to the Sheriff-Substitute to get a diet of proof fixed. There is no case here for departing from the rule laid down by the Act of Sederunt, for there are clearly no circumstances to demand or even to warrant it.

Lord Rutherfurd Clark—I think the appeal is incompetent under the Act of Sederunt, and that we are bound to follow the decisions referred to. Into the question whether we could give relief I do not wish to enter. I would only like to say I think it very doubtful if we could.

Lord Lee—I concur with Lord Rutherfurd Clark, and I would only like to add that the case of *Boyd* in which the dispensing power was sustained was different. This is a case of appealing. That was a case of lodging prints.

The Court refused the appeal as incompetent.

Counsel for the Appellant—Younger. Agent—J. Murray Lawson, S.S.C.

Counsel for the Respondent—A. S. D. Thomson. Agent—