security which he holds over the bankrupt's estate; and it is provided that the trustee shall be entitled to a conveyance of such security on payment of the value specified out of the part of the common fund, "or to reserve to such creditor the full benefit of such security, and in either case the creditor shall be ranked for and receive a dividend in the said balance and no more without prejudice to the amount of his debt in other respects."

The defenders state that their claim was for £8513, 15s. 4d., and that their securities were valued at £6667, 1s. 11d., which left a balance of £1846, 13s. 5d. for ranking. There are averments about other claims between the parties which it is not necessary here to notice, but which apparently resulted in reducing this balance. The defenders state that the valuations put on the securities were ultimately adjusted and accepted by the trustee. The record is not quite distinct on the point, but I understand that the trustee did not demand any assignation of these securities and that none were granted, but that the defenders were ranked for the balance only.

The same dividend was paid also to the other creditors, and in accordance with provisions in the trust-deed to which the Lord Ordinary refers, the trustee, as authorised by the trust-deed, granted a certificate whereby the pursuers were discharged of their debts and the claims of the creditors were satisfied and discharged. It appears to me that the position of matters then was that the trustee had a formal title to the securities in question, but that the whole of the pursuers' estates except the shares held in security had been divided. The trustee could not divide these shares which he had not purchased. The question in this case is therefore who had right to these shares. There is no question here with the trustee, but I think it clear that the trustee has no right to these securities. He might have had them when they were valued if he had chosen, and he might have demanded an assignation of them, but if he did so he would (under section 65) have required to pay the value put on them by the defenders; not having done so it is impossible that he could claim them now, as indeed he does not.

Failing an assignation demanded and paid for, the provision in the sixty-fifth section, that the full benefit of the securities tendered by the creditor is reserved to the creditor, appears to apply, and that accordingly the benefit of these securities is reserved to the present defenders, but the nature of their right to the shares is not altered, their right is only reserved. It was a right in security, and remains so—nothing happened which could alter its quality. But the salient and proprietary right being neither in the trustee nor in the creditor must of necessity remain as it always was, in the debtor.

This case is only an accounting, and on the accounts various questions may arise, but I agree with the Lord Ordinary in holding that the defenders' pleas to title must be disallowed.

The pursuer might have called the trustee as a defender in this action or taken means to have it declared that the trust in the trustee having been fulfilled the radical proprietary right reverted to him subject to the defenders' security, but I agree that proceedings with that object were not necessary.

LORD JUSTICE-CLERK—I have perused the Lord Ordinary's note more than once, and I so entirely concur in the result at which he has arrived and in the reasons which he has given for it, that I feel that I cannot add anything with usefulness. I therefore confine myself to expressing my concurrence with your Lordships in the judgment proposed.

LORD YOUNG and LORD MONCREIFF were absent.

The Court adhered.

Counsel for the Pursuers and Respondents—Macfarlane, K.C.—Chree. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Defenders and Reclaimers—Campbell, K.C.—M'Clure. Agents—Forrester & Davidson, W.S.

Tuesday, March 8.

SECOND DIVISION.

[Sheriff Court at Glasgow.

BENNIE *v.* CROSS & COMPANY.

Process—Appeal—Competency—Failure to Box Prints—Power of Court to Dispense with Observance of Act of Sederunt—Reponing of Appellant—A.S., 10th March 1870, *sec.* 3 (1) *and* (3).

In an appeal from the Sheriff Court the appellant omitted to box prints within fourteen days after the process had been received by the Clerk of Court as required by the A.S., 10th March 1870, section 3 (1). The omission was alleged to be due to an error on the part of the appellant's country agent in thinking that prints could not be boxed on a Monday.

The Court *sustained* the respondents' objection to the competency of the appeal, and thereafter *refused* the appellant's motion to be reponed.

Opinions per Lord Trayner and Lord Moncreiff that the Court had no power to dispense with the observance of the provisions of the section.

Boyd, Gilmour, & Company v. *Glasgow and South-Western Railway Company*, November 16, 1888, 16 R. 104, 26 S.L.R. 84, and *Taylor* v. *Macilwain*, October 18, 1900, 3 F. 1, 38 S.L.R. 1, *commented on.*

The Act of Sederunt, 10th March 1870, provides—"3 . . . (1) 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 . . . and if the appellant shall fail within the said period of fourteen days to print and box . . . the papers required as aforesaid, he shall be held to have abandoned his appeal, and shall not be entitled to insist therein except upon being reponed as hereinafter provided. . . . (3) 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 . . . to repone him to the effect of entitling him to insist in the appeal, which motion shall not be granted by the Court . . . except upon cause shown, and upon such conditions as to printing and payment of expenses to the respondent or otherwise as to the Court . . . shall seem just."

In December 1903 Miss Agnes Fulton Bennie raised an action in the Sheriff Court at Glasgow against Cross & Company, oil refiners there, and Lewis Cross, the only known partner of said firm. The action concluded for £200 as solatium and damages.

By interlocutor dated 29th January 1904 the Sheriff-Substitute (FYFE) allowed a proof, and against this interlocutor the pursuer appealed to the Court of Session.

The process was received by the Clerk of Court on 15th February. The print of the note of appeal, &c., was lodged by the appellant with the Clerk of Court on Monday, 29th February, but the prints were not boxed till the following day.

On the case being called in the Single Bills, counsel for the respondents objected to the competency of the appeal in respect that the appellant had failed to comply with the provisions of sub-section (1) of section 3 of the A.S., 10th March 1870, and argued—(1) The provisions of the Act of Sederunt were absolute, and (2) even if the Court had a discretion in the matter, it would not exercise that discretion where the failure to comply with the provisions of the Act of Sederunt was due to the fault of the appellant's agent—*Taylor* v. *Macilwain*, October 18, 1900, 3 F. 1, 38 S.L.R. 1.

Argued for the appellant—The terms of the Act of Sederunt were not imperative. The agent in Glasgow had thought that prints could not be boxed on a Monday, and had not sent the Edinburgh agent instructions till Saturday, so that it was impossible for the latter to prepare the prints in time. The omission had arisen through an innocent mistake, and had caused no inconvenience to anyone. In these circumstances the Court should exercise its discretion and allow the appeal to proceed—*Boyd, Gilmour, & Company* v. *Glasgow and South-Western Railway Company*, November 16, 1888, 16 R. 104, 26 S.L.R. 84.

LORD TRAYNER—My opinion is that the appellant having failed to box the necessary papers within the time prescribed by the Act of Sederunt 10th March 1870, sec. 3, must be held to have abandoned his appeal, which accordingly falls to be dismissed. We were referred to the cases of *Taylor* and *Boyd, Gilmour, & Company*. If the decisions in these cases conflict, I prefer to follow the decision in the case of *Taylor*.

LORD MONCREIFF—I am unable to reconcile the decisions in the two cases to which we have been referred. In the conflict of authorities, if the question is open, I should be inclined to agree with the judges in the case of *Taylor*, that the terms of this Act of Sederunt exclude the discretion of the Court. But even assuming they do not, I think this is not a case in which the penalty imposed by the Act of Sederunt should be remitted. It is still open to the appellant to move to be reponed, and if he wishes to proceed with the action that is the proper course for him to follow.

LORD JUSTICE-CLERK—I am the only judge present who was also present when the case of *Boyd, Gilmour, & Company* was decided. Before deciding that case we had a consultation with the other Division of the Court, and the opinion which I then expressed was the conclusion at which we arrived after consultation, viz., that the terms of the Act of Sederunt did not prevent the Court exercising its discretion in the special circumstances of that case and refusing to impose the penalty inflicted by the Act of Sederunt. I gave the first opinion in that case and therefore had no opportunity of criticising the remarks of the judges who spoke after me. If I had had that opportunity I would have expressed myself in the words used by Lord Lee.

In the present case I see no reason why we should exercise our discretion, and therefore I am also of opinion that the defenders' objection to the competency of the appeal should be sustained.

LORD YOUNG was absent.

Thereafter the appellant presented a note to the Court praying to be reponed to the effect of entitling him to insist in his appeal, and argued that the motion should be granted in the circumstances above stated.

Counsel for the respondents was not called upon.

LORD JUSTICE-CLERK—[*After consulting with Lord Trayner and Lord Moncreiff*]. We think that no sufficient reason has been shown to the Court for reponing in this case. We therefore refuse the motion.

The Court pronounced this interlocutor:—

"Having heard counsel for the appellant on her motion to be reponed to the effect of entitling her to insist in her appeal, and having considered the appeal, refuse the motion."

Counsel for the Pursuer and Appellant—T. Trotter. Agents—J. & J. Rutherfurd, Solicitor.

Counsel for the Defenders and Respondents—Spens. Agent—Andrew H. Hogg, S.S.C.