

Thursday, July 7.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

MORDELL v. MACANDREW &  
JENKINS.

*Process—Failure to Lodge Prints of Closed Record—Duty of Clerk to the Process to Delete Case from Procedure Roll—Act of Sederunt November 2, 1872, sec. 4.*

In an action the record was closed and the case sent to the procedure roll, but printed copies of the closed record were not lodged with the clerk to the process within four days from the date of the interlocutor closing the record, as prescribed by section 4 of the Act of Sederunt, November 2, 1872. The clerk to the process did not record the failure to lodge the prints, and the case was not deleted from the procedure roll. No printed copies of the record having been lodged within twenty-one days from the date of the closing of the record, the defenders, after the expiry of the twenty-one days, moved the Lord Ordinary to dismiss the action. The Lord Ordinary refused the motion.

In a reclaiming-note, *held* (1) that it was the statutory duty of the clerk to the process to delete the case from the procedure roll upon the failure of the pursuers' agent to lodge printed copies of the record within four days from the date of the interlocutor closing the record, but (2) that as the clerk of the process had not in fact deleted the case from the procedure roll, the case should be allowed to proceed as it stood in the procedure roll, and reclaiming-note *refused*.

The Act of Sederunt to regulate proceedings in the Outer House, November 2, 1872, enacts—sec. 4—"Within four days from the date of the interlocutor closing the record the agent for the pursuer, or for the party appointed to print the record, shall lodge with the clerk to the process two printed copies of the record as finally adjusted and closed, one of which shall be marked by the clerk as the process copy, and the other shall be appropriated to the use of the Lord Ordinary. And failing the said agent lodging such copies within the prescribed period the clerk shall record such failure by a note on the interlocutor sheet, and the said agents' fee for the trouble connected with the closing of the record shall be disallowed by the Auditor to the extent of one-half in taxing his account. . . . But failing the two copies of the printed record being lodged as aforesaid, the case shall be deleted from the debate or procedure roll, as the case may be and shall be restored to the roll only on motion made to the Lord Ordinary by any party to the cause lodging the said two printed copies as aforesaid: Provided that if none of the parties to the cause move the Lord Ordinary to restore the same

to the roll, and lodge the two printed copies as aforesaid within twenty-one days of the date of the interlocutor closing the record, the Lord Ordinary shall pronounce an interlocutor dismissing the action, . . . which shall not be recalled by the Lord Ordinary of consent, but may be recalled only in the manner and on the conditions foresaid."

In an action brought by William Mordell, 18 Finborough Road, South Kensington, London, against Macandrew & Jenkins, solicitors, Inverness, the Lord Ordinary (KINCAIRNEY) on May 31st 1904 closed the record, and appointed the cause to be put to the procedure roll.

Printed copies of the record were not lodged with the clerk to the process within four days as prescribed by the Act of Sederunt 1872.

The clerk did not record on the interlocutor sheet the failure to lodge the prints, and the cause was not deleted from the procedure roll.

No printed copies of the record were lodged within twenty-one days of the date of the closing of the record, and on June 23rd 1904 the agents for the defenders wrote to the clerk of the process calling his attention to the fact that they had requested that the cause should be deleted from the roll.

On June 28th the defenders moved the Lord Ordinary to dismiss the action.

The Lord Ordinary refused the motion.

The defenders reclaimed, and argued—The provisions of the Act of Sederunt, November 2, 1872, sec. 4, were imperative, and it was the duty of the clerk to the process to delete the case from the procedure roll on the failure of the pursuer to lodge prints within the prescribed time. While it was admitted that if the case had been deleted and the action dismissed it would have been competent for the pursuer to move the Lord Ordinary to be reponed, the failure of the clerk to the process to comply with the provisions of the Act of Sederunt should not prejudice the defenders' right to have the case dismissed.

Argued for the respondent—The duty of determining whether a case should be deleted from the roll in respect of a failure to lodge prints lay with the Lord Ordinary. It was the part of the defender, if he wished to take advantage of the provisions of the Act of Sederunt, to move the Lord Ordinary to delete the cause, and the defenders here had not done this. The decisions and practice of the Outer House were all in favour of this mode of interpreting the Act—*M'Lintock v. Stubbs*, February 28, 1902, 9 S.L.T. 383; *Brown v. Brown*, January 8, 1897, 4 S.L.T. 324; *Dickson v. Orr*, December 18, 1884, 12 R. 345, 22 S.L.R. 198.

LORD PRESIDENT—This case has got rather out of shape, but I should be sorry if any injustice was caused owing to a mistake or oversight in failing to apply the provisions of the Act of Sederunt of 2nd November 1872. By section 5 of that Act of Sederunt it is provided that "within

four days from the date of the interlocutor closing the record the agent for the pursuer, or for the party appointed to print the record, shall lodge with the clerk to the process two printed copies of the record as finally adjusted and closed, one of which shall be marked by the clerk as the process copy and the other shall be appropriated to the use of the Lord Ordinary." This direction appears to me to be imperative, and requiring to be obeyed in terms. The next provision, which states the consequence of a failure to lodge such copies, is also, in my judgment, imperative. It declares that "failing the said agent lodging such copies within the prescribed period, the clerk shall record such failure by a note on the interlocutor sheet, and the said agent's fee for trouble connected with the closing of the record shall be disallowed by the Auditor to the extent of one-half in taxing his account either between party and party or between agent and client, unless the Auditor be satisfied that the said agent's failure has arisen from unavoidable accident." It is quite plain that the duty of lodging prints is imperative, and the penalty for failure is clearly stated. It is, however, with the next provision that we have more particularly here to deal. It is as follows:—"And failing the two copies of the printed record being lodged as aforesaid, the cause shall be deleted from the debate or procedure roll, as the case may be." The person who knows whether the prints have or have not been lodged is the clerk, and he is the person by whom the deletion of the case from the debate or procedure roll would naturally be made. It is, in my judgment, his duty to delete the case from the roll if the prints have not been lodged. But there is a provision that the deletion may not be final, because it is provided by the Act of Sederunt that the case may be and shall be restored to the roll only "on motion made to the Lord Ordinary by any party to the cause lodging the said two printed copies as aforesaid." A case which has been deleted from the roll can only get back on motion to the Lord Ordinary. Then the final provision is:—"Provided that, if none of the parties to the cause move the Lord Ordinary to restore the same to the roll and lodge the two printed copies as aforesaid within twenty-one days of the date of the interlocutor closing the record, the Lord Ordinary shall pronounce an interlocutor dismissing the action, and finding neither party entitled to expenses, which shall not be recalled by the Lord Ordinary of consent, but may be recalled only in the manner and on the conditions foresaid." It would seem this direction to the Lord Ordinary should have been carried out in this case, but there seems to have been a difference of practice in the Outer House in this matter, and in these circumstances I should be unwilling that a party to the cause should suffer hardship. I think the proper course is to send the case back to the Lord Ordinary to proceed as may be just.

LORD ADAM—I am substantially of the same opinion. It seems to me that the regulations laid down in the Act of Sederunt ought to be followed. The terms of the Act of Sederunt are quite clear. The pursuer's agent must lodge within four days two prints of the record. If he do not fulfil that duty there is a certain penalty, viz., the disallowance of his fee in connection with the closing of the record to the extent of one-half. But further, there is a duty laid on the clerk of court, in the event of the agent failing to lodge the prints within the prescribed time, viz., the deletion of the cause from the debate or procedure roll, as the case may be. It is to be struck out of the roll. Who is to strike it out? The keeper of the roll, *i.e.*, the clerk of court. But then any party to the case, on lodging the prints, is to be allowed to have the case restored to the roll by motion to the Lord Ordinary. Nothing is said as to the terms on which the case is to be restored to the roll. It will be observed that the first mention of the Lord Ordinary is when we come to the motion for restoration to the roll. If none of the parties move the Lord Ordinary to restore the case, and the prints are not lodged within twenty-one days, the clerk of court has to lay the case before the Lord Ordinary, and the Lord Ordinary will, in obedience to the Act of Sederunt, pronounce an interlocutor dismissing the action.

What are we to do in the present case, where there has been a failure by the clerk of court to delete the case from the roll in compliance with the provisions of the Act of Sederunt. I agree with the Lord Ordinary that the case cannot now be deleted from the roll, as it should have been before the miscarriage, and therefore cannot be dismissed. The case must be sent back to the Lord Ordinary to take it up and proceed to hear it.

LORD M'LAREN—I think that this reclaiming-note must be refused. The Lord Ordinary was right in refusing the motion made to him because the case was not in the position provided for by the Act of Sederunt. But with regard to the proper execution of the Act of Sederunt, I agree that it is the duty of the clerk in such circumstances to delete the case from the roll. I only add that if the clerk has any doubt as to the execution of his administrative duties, it is always in his power to consult the Lord Ordinary, who will either direct him what to do, or will put out the case for argument by counsel if there is any question of real difficulty. It must be admitted that four days is a very short time for the adjustment of a complicated record, especially in view of the fact that the adjustments of each side have to be shown to the other. But it is always in the power of either party to go to the Lord Ordinary within twenty-one days and have the case restored to the roll. Here there was a mistake. The twenty-one days were allowed to expire without any action being taken by either party, and the provisions of the Act of Sederunt are exhausted.

The result is that the case must proceed as if there had been no delay in lodging the printed record.

LORD KINNEAR— I entirely agree with the exposition of the Act of Sederunt given by Lord Adam. I only add to what his Lordship has said that when the different clauses of the 5th section of the Act of Sederunt are read in connection with one another it will be found that one of them at least involves an appeal to judicial discretion, and that others allow of no such appeal. It is obvious that there is no appeal to judicial or quasi-judicial discretion when the clerk is ordered to record the failure to lodge prints by a note on the interlocutor sheet, and just as little when it is directed that the cause shall be deleted from the roll. The words are distinct and imperative. The only question that can be raised is as to whom they are addressed, but whoever it is that is to carry out that direction, the direction itself is imperative. I agree, however, with your Lordships that the Act of Sederunt requires the deletion to be made by the clerk to the process, because it is a purely ministerial act which cannot be performed by anybody else. The Act of Sederunt has not been carried out. I think it is clear that this was due to no failure of duty on the part of the clerk, because he has only followed decisions and practice in the Outer House. Nevertheless, though it was no fault of his, his statutory duty has not been performed. It follows that the opportunity which the Act gives to the party who has been put out of Court by the agents' failure to lodge prints has not arisen. He cannot ask the case to be restored since it has not been struck out, and therefore the condition on which the Lord Ordinary is required to dismiss the case does not exist.

As we are all of one opinion as to the construction of the Act of Sederunt, the only question which arises is, whether we are now to treat the pursuer as being in default, and recal the Lord Ordinary's interlocutor and dismiss the action, or whether we are to adhere to the Lord Ordinary's interlocutor and allow the action to proceed. If there had been any just ground for blaming the party or his agent for the default there might have been difficulty. But Mr Clark candidly conceded that if the cause had been deleted from the roll and the action dismissed it would have been right to repon the pursuer. That being so, the only question is whether the circuitous procedure should be followed out of dismissing the action and reponing, or whether we should allow the case just to proceed as it stands in the procedure roll.

The Court refused the reclaiming-note and remitted to the Lord Ordinary to proceed with the cause.

Counsel for the Defenders and Reclaimers — James Clark. Agents — Strathern & Blair, W.S.

Counsel for the Pursuer and Respondent — J. B. Young. Agents—M'Nab & M'Hardy, S.S.C.

## HOUSE OF LORDS.

Monday, August 1.

(Before the Lord Chancellor (Halsbury), Lords Macnaghten, Davey, Robertson, Lindley, James of Hereford, and the Lord Chief Justice (Alverstone.)

GENERAL ASSEMBLY OF THE FREE CHURCH AND OTHERS *v.* LORD OVERTOUN AND OTHERS.

YOUNG AND OTHERS *v.* MACALISTER AND OTHERS.

(In the Court of Session July 4, 1900, 4 F. 1083 and 1117, 39 S.L.R. 793.)

*Church — Dissenting Church — Trust — Power to Alter Doctrine — Union with Other Church—Declaratory Act 1892 — Uniting Act 1900.*

Property held by, or by trustees for, a body of persons associated as an independent and unincorporated church, is, in the absence of any express power to alter the doctrine or the constitution of the church or any special provisions in any particular trust-deed, destined for the benefit of persons maintaining the doctrines professed by the Church at its inception, so far as these doctrines are fundamental and essential. In the event of a schism in the Church, arising through a majority adopting new standards of doctrine, or ceasing to maintain as part of the standards of the Church any essential or fundamental doctrine, the property remains with the minority, and the majority forfeit all beneficial interest therein.

Documentary evidence on which held (*rev. judgment of the Second Division of the Court of Session—diss.* Lords Macnaghten and Lindley) that the maintenance of the principle of Establishment, *i.e.*, of the right and duty of the State to maintain and support the establishment of religion, was an essential and fundamental principle in the Free Church of Scotland, and that the majority of that Church by uniting with the United Presbyterian Church to form the United Free Church on terms which left that principle an open question had violated the conditions on which the property of the Free Church was held, and had forfeited all right thereto.

*Question—* Whether the terms of the Declaratory Act passed by the Free Church in 1892 in reference to the doctrine of predestination amounted to a departure from the original standard of that Church as contained in the West-