

## SUMMER SESSION, 1915.

### COURT OF SESSION.

Wednesday, May 12.

#### FIRST DIVISION.

[Sheriff Court at Glasgow.

BURRELL v. VAN T' HOFF.

*Process—Appeal—Competency—Printing and Boxing—Failure to Deposit Print Timeously—C.A.S. 1913, A ii, 2 (as Amended by A.S., 20th June 1913) and D iii, 2.*

In an appeal from the Sheriff Court the appellant, in terms of C.A.S. 1913, D iii, 2, should have deposited a print of the note of appeal, record, interlocutors, and proof with the Clerk of Court within fourteen days after the process had been received by the Clerk. The print was deposited on the fourteenth day, but after office hours as defined by C.A.S. 1913, A ii, 2, as amended by A.S. 20th June 1913, the Clerk of Court attending at the Register House to receive it by arrangement with the appellant's agents. This was stated to be a common practice.

Held that C.A.S. 1913, D iii, 2, had not been complied with, but in view of the alleged practice non-compliance excused, and the appeal put to the roll.

Observed *per curiam* that the practice of receiving papers outwith office hours and outwith the appropriate place where the document should be deposited would not in the future be recognised by the Court.

*Process—Printing—Type—C.A.S. 1913, A iii, 3.*

Prints were deposited with the Clerk of Court printed in type smaller than that required by C.A.S. 1913, A iii, 3. *Circumstances* in which the appellant's agents were allowed to substitute correct prints.

The Codifying Act of Sederunt 1913 provides—A ii, 2 (as amended by A.S., 20th June 1913). "*Attendance at Register House*—The Inner House ordinary clerks and Outer House assistant clerks shall attend at the Register House and keep their offices open for the

performance of their official duties during the following hours, viz. . . . In time of vacation and recess, from 11 o'clock forenoon till 1 o'clock afternoon on Monday, Tuesday, Thursday and Friday in each week, and also on any Wednesday or Saturday which shall be within three days after any box day; and further, in vacation on the week-day following the day on which the Court rises." A iii, 3.—"*Printing, Type, and Marginal Letters*—All papers printed for the use of the Court shall be printed in type not smaller than that known as 'English.' . . ." D iii, 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 upon being reponed, as hereinafter provided."

Henry Burrell, *pursuer*, brought an action against Cornelis Van t' Hoff, *defender*, in the Sheriff Court at Glasgow. On 6th November 1914 the Sheriff - Substitute (FYFE), after hearing proof, dismissed the action. The pursuer appealed to the Sheriff (MILLAR), who on 16th February 1915 recalled the interlocutor of 6th November 1914 and assoilzied the defender. On 29th March 1915 the pursuer appealed to the First Division of the Court of Session. The process was received by the Clerk of Court on 1st April. On 15th April a print of the note of appeal, record, interlocutors, and proof was deposited with the Clerk of Court—the Ordinary Clerk of the Division attending at the Register House, by arrangement with appellant's agents, to receive it at 6 p.m.

In Single Bills, on 12th May, counsel for the

defender and respondent moved the Court to refuse the appeal as incompetent, on the grounds (1) that the print should have been deposited with the Clerk before 1 p.m. on 15th April, *i.e.*, before the Clerk's office closed for business on the fourteenth day after the process had been received by him—C.A.S. 1913, A ii, 2 and D iii, 2; *M'Lauchlan v. Chalmers*, 1913 2 S.L.T. 85; and (2) that the type used in printing was smaller than that directed by C.A.S. 1913, A iii, 3.

Counsel for the pursuer and appellant moved that the appeal be sent to the roll, and argued—(1) The print had been deposited timeously. Fourteen days were allowed, and the print had been deposited with the Clerk on the fourteenth, which did not expire till 12 midnight. C.A.S., 1913, A, iii, 16 provided that papers were to be refused by the Clerk "after the lapse of the day on which" they were receivable, and these words must mean after twelve midnight. *M'Lauchlan v. Chalmers* (*cit.*) was distinguishable, as there the prints were not deposited with the Clerk, but left on his desk in his absence. It was a common practice that the Clerk should receive prints at the Register House after office hours. (2) A mistake had been made in regard to the type by the printer in Glasgow who did the work. The mistake had been discovered too late for correction. If the Court would allow it, correctly printed copies would be put in.

LORD PRESIDENT—Two objections have been taken to the competency of this appeal on the ground of non-compliance with the Act of Sederunt. Both of them in my opinion are well founded, but neither of them in the circumstances fatal.

The first objection was this, that the note of appeal, record, interlocutors, and proof were not deposited with the Clerk of Court within the prescribed time, namely, fourteen days after the process had been received by the Clerk. That objection, I think, is well founded, because we were informed that the note of appeal and so forth were not handed to the Clerk on the fourteenth day during office hours, but at some period when the office was not open, and not at the office at all. In my opinion the Act of Sederunt which prescribes that the note of appeal, &c., are to be deposited with the Clerk means that they are to be deposited with the Clerk at his office and within the hours prescribed by the Act of Sederunt as business hours, and not anywhere else or at any other time; and accordingly I hold that there was a failure to comply with the Act of Sederunt in the case before us.

It was represented to us that a certain laxity of practice had arisen during several years past, and that it was frequently arranged between the agent in the cause and the Clerk of Court that the document should be received outwith office hours and outwith the appropriate place where the document should be deposited. Of the practice I—and I understand your Lordships—entirely disapprove, and I desire it to be understood that it will not be in the future recognised by this Division of the Court as

adequate compliance with the Act of Sederunt, either in connection with lodging papers in process or in connection with boxing prints to the Court. As the practice had certainly grown up and been followed I do not think that in the present case we can visit failure to comply with the Act of Sederunt with the appropriate consequence, namely, by directing retransmission of the process.

The second ground of objection was that the document in question was not printed in the appropriate type prescribed by Act of Sederunt. That objection is also well founded, but it was explained to us that the employment of improper type was only a mistake made by a printer in Glasgow—an innocent mistake I assume—and counsel for the appellant undertook that the document should be reprinted in the appropriate type before we were asked to hear the cause, and further, in answer to a suggestion from the Bench by one of your Lordships, counsel for the appellant undertook that the expenses of reprinting of the document should not be charged against the client in the case. On that undertaking—exclusively so far as I am concerned—I propose to your Lordships that in this case we should dispense with strict compliance with the Act of Sederunt, and accordingly that the case should now be sent to the roll.

LORD JOHNSTON, LORD MACKENZIE, and LORD SKERRINGTON concurred.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the objections for the competency of the appeal, in respect of the undertaking by counsel at the Bar that the record, &c., would be reprinted in terms of the C.A.S., A, iii 3, and that the appellant personally would not be charged with the expense thereof, repel such objections; allow the record which was tendered on 15th April last to be received; and appoint the cause to be put to the roll."

Counsel for Pursuer and Appellant—Aitchison. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for Defender and Respondent—W. T. Watson. Agents—Gordon, Falconer, & Fairweather, W.S.

Friday, May 14.

## SECOND DIVISION.

### DAVIDSON v. SCOTT.

*Process—Reclaiming Note—Competency—Record not Appended to Principal Note—Boxing—Judicature Act 1825 (6 Geo. IV, cap. 120), sec. 18—C. A. S., D, i, 2.*

Printed copies of a reclaiming note and of the record were duly boxed, and six copies of the boxed record were sent to the respondent's agent, but the principal note was lodged with and received by the Clerk of Court without