

quence has not been assessed as a ratepayer nor paid rates in respect of them. It is enough to dispose of that objection to point out that there is no provision of the statute upon which the claim is based which requires any of these things to be done. The second objection is of a somewhat different kind—that another person being the present tenant under a long lease of the subjects was already entered upon the register as proprietor *qua* leaseholder. Now, it is a condition of the right conferred by the 11th section that the proprietor infest in the subjects should be also the “true owner,” and if it could be said in this case that the respondent had entirely divested himself by any instrument in the form of a long lease of all right and beneficial interest in the subjects, I could have understood that a question might be raised. But we have the lease in this case before us, and it shows that the respondent's predecessor granted the lease for ninety-nine years, but that he granted it for a rent of material amount, subject to certain conditions, which certainly show that the grantor remained and intended to remain the owner. Restrictions are placed on the use of the ground, and a right is reserved to resume possession for a special purpose on six months' notice. I have therefore no doubt that the respondent is the true owner. But then it was argued that he and his tenant could not both be upon the register as owners. Now, it does not appear to me that there is any question before us as to the right of the tenant to be entered upon the register. He is on the register without objection. We must therefore assume that he is rightly on. But whether that be so or not, it cannot in any way affect the right of the owner to be placed on the register in accordance with the provisions of the statute. If the tenant be rightly on, it must be by virtue of a right which does not conflict with the owner's right. If he be not rightly on, the error in putting him on cannot exclude the true owner, who is in no way answerable for the mistake. I am therefore of opinion that the Sheriff's deliverance is right, and that the appeal should be dismissed.

LORD TRAYNER—The respondent in this appeal is the “true owner” of the subjects in respect of which he claims to be registered as a voter. He is therefore entitled to be so registered under the provisions of the Act of 1832, which, so far as bearing upon the present question, has not been repealed. There is no question here as to whether any other person, and if so, how many, may be entitled to registration as voters in respect of rights in the same property. However that may be, the “true owner” is certainly entitled to registration in respect of his right, and that the respondent is the “true owner” of the subjects in question is proved by his titles.

LORD KINCAIRNEY—I am of the same opinion. The case is of an exceptional kind, because it is anomalous that two voters should be entered as proprietors of

the same subject. But I do not think any sufficient objection has been stated to this claim. I agree with what your Lordship has said as to the rates. I think that the bare fact that someone else is on the roll as proprietor is irrelevant. We have nothing to do with that entry. If he had been entered as a joint owner the case might have been different. We have nothing to consider except the claim of the respondent. He produces his title, and as he has been resident within the statutory limit for the statutory period, I think there can be no question as to his right, unless it can be affirmed that he is not owner. I think that he must be held to be owner, and am at a loss to see what his relation to the subject can be except that of an owner. He is neither superior nor tenant, and he is paid a rent of sufficient amount for a qualification just because he is owner.

The Court dismissed the appeal.

Counsel for the Appellant—Young—Macaulay Smith. Agents—Campbell & Irons, S.S.C.

Counsel for the Respondent—W. C. Smith. Agent—Marcus J. Brown, S.S.C.

COURT OF SESSION.

Wednesday, November 16.

SECOND DIVISION.

[Sheriff of the Lothians.

M'LAUGHLAN v. REILLY.

Landlord and Tenant—Diligence—Rent—Sequestration for Rent—Warrant to Bring Back Removed Furniture—Damages.

A tenant who had a claim of damages against his landlord for injury done to the house in which he lived, removed his furniture a fortnight before the term to a house which he had taken in another part of the town, without making any arrangements as to payment of the rent. The landlord took out a small-debt sequestration in security of the rent, and when the officer charged with the execution of the complaint reported that he had been unable to do his duty because the goods and effects subject to hypothec had been removed, the Sheriff, without notice to the tenant, granted warrant to carry the goods back to the house from which they had been removed. This was done. The tenant brought an action for damages and *solatium* against his landlord.

Held (1) that the landlord was entitled to use sequestration for his whole rent, as the tenant's claim for damages was illiquid and not exigible; (2) that the use of the sequestration and warrant thereon had not been so oppressive as to subject the landlord in damages.

Observed that it was desirable that

Sheriffs in granting such summary warrants should when possible give notice to the respondent, or have the facts before them for consideration—*Johnston v. Young*, October 27, 1890, 18 R. (J.C.) 6, referred to.

Michael M'Laughlan, broker and dealer, resided and carried on business in a house in Castle Street, Dunbar. Sometime prior to Whitsunday 1891 the subjects were acquired by Martin Reilly, also a broker and dealer. He made certain alterations on the building which were attended with some inconvenience to M'Laughlan. About the end of October M'Laughlan began to remove his furniture from the house in Castle Street to another he had taken in Writers' Court, Dunbar. Reilly took out a small-debt summons of sequestration in security of the rent against him, and the execution thereof was entrusted to W. C. Miller, sheriff-officer and messenger-at-arms, Haddington. Upon 4th November the officer went to the house in Castle Street but found it closed. On applying to M'Laughlan's wife for access to the house, it was refused. Having satisfied himself that furniture had been removed, he inscribed a minute on the sequestration complaint as follows—"In respect I have been unable to execute the within warrant upon the said Michael M'Laughlan, defender, as he has removed the goods and effects subject to the pursuer's right of hypothec from the house and shop within mentioned, warrant is respectfully craved to officers of court to search for and carry back said goods and effects to the said house, there to be inventoried as sequestrated and secured in terms of said warrant." This minute was presented to the Sheriff-Clerk, and warrant thereon obtained from the Sheriff-Substitute without any previous notice thereof to M'Laughlan. Upon 10th November the officer returned to Dunbar, opened the door of the house by picking the lock, and took the furniture back to the house in Castle Street. Owing to other business he was unable to make out the inventory and appraisal until 12th November.

M'Laughlan brought an action against Reilly in the Sheriff Court at Haddington. He claimed (1) £10 for injury caused to his business during the progress of the alterations, and (2) £50 in name of damages and *solatium*. The pursuer averred that he had been willing to settle with the defender as to the rent due on the footing that reasonable abatement was to be made in respect of the first claim of damages, and reserving as to the other.

The pursuer pleaded—"(1) The sequestration and whole procedure thereon having been most unwarrantable, or without good cause, and wrongful and illegal, also nimious and oppressive, the pursuer is entitled to take exception to the same as done, especially as regards the minute and warrant to carry back, and the sequestration should accordingly be recalled, and the said procedure pronounced null and void, and of no effect. (3) The pursuer having been deprived by the defender of the peaceable occupation of the house and

shop in question, to his loss injury and damage as condescended on, the defender is liable to him in suitable reparation in the premises. (4) The sequestration and procedure thereon having been unwarrantable, or without good cause, and wrongful and illegal, and otherwise as aforesaid, and to the serious injury of the pursuer's business, also of his character or reputation and feelings, and therefore to his loss and damage, the defender is liable to him in such loss and damage, including *solatium*."

The defender pleaded—" (2) The repairs executed by the defender on the premises occupied by the pursuer were necessary, and were done in a business and tradesman-like manner, without interfering in any manner of way with the pursuer's occupation of the premises. (3) The whole sequestration proceedings being rendered necessary by the actings of the pursuer, were perfectly legal, and were carried through in a legal and regular manner. (5) The pursuer not having suffered any loss or damage through the carrying out of the sequestration proceedings, is not entitled to damages, and in any event the sum sued for is excessive.

A proof was allowed, from which the facts stated appeared.

Upon 16th June 1892 the Sheriff-Substitute (SHIRREFF) pronounced this interlocutor:—"Finds it proved that on the defender obtaining possession of the tenement part of which was occupied as a dwelling-house and shop by the pursuer, the defender proceeded to execute alterations and repairs on the property, that the work connected therewith was unduly delayed and the pursuer was thereby subjected to a greater amount of annoyance and inconvenience than he was bound to submit to: Therefore finds him entitled to the sum of £3 of damages under the first conclusion for damages in the prayer of the petition and decerns against the defender for payment of said sum: *Quoad ultra* assolizies the defender from the said claim of damages first concluded for: Sustains the defender's third plea-in-law, and assolizies him from the second conclusion for damages in the prayer of the petition.

"*Opinion*.— . . . The defender can never have intended that the pursuer should remove without paying his rent, and the Sheriff-Substitute is certain that it was not understood by the pursuer when the defender said he might leave if he did not like the place. Less than a fortnight before the term of Martinmas, and long after there was anything to trouble him, he removed his furniture, which the defender was entitled to see was kept in the house as his security for the year's rent. The removal was partly during the day and partly after nightfall. There is no hint in the course of the proof that the pursuer intimated to the defender his intention to remove, or that the defender was aware of his intention. Having got a warrant to sequester, it was necessary, in order to carry it into effect, to procure a warrant to take the furniture back to Castle Street. That warrant was obtained on a craving in the usual way. Such warrants are always granted as

craved, and are granted at the risk of the party craving them. In many cases to cite a tenant to be heard on the question whether such a warrant should be granted, would only be to give him notice to have his effects put entirely beyond the reach of his landlord—see opinion of Lord Rutherford Clark in *Johnston v. Young*, October 27, 1890, 18 R. (J.C.) 6. It has always been the practice in this county to grant such warrants as craved. The Sheriff-Substitute thinks that in this case the defender was justified in applying for the warrant. The term of Martinmas was very near at hand, and the pursuer had removed his furniture without making any offer of payment of his rent. This case appears to the Sheriff-Substitute to be very different from the case of *Gray v. Weir*, October 28, 1891, 19 R. 25. The tenant in that case had spoken to the landlord of his intention to remove his effects before the term, and before applying for sequestration the landlord had not certified himself that a letter demanding payment of the rent had reached the tenant, such letter having, in fact, miscarried. The rent was paid on the officer proceeding to carry back the tenant's effects, although the warrant was executed on 26th April, some weeks prior to the term of Whitsunday 1892. That fact proving the tenant's solvency goes far to show that the taking back of the effects was not necessary in order to secure the landlord. In the present case the warrant to carry back the effects was only executed on 10th November, and if the pursuer had his rent ready he might have paid it, or if he wanted to insist on a claim of damages he might have consigned the rent. The rent was due the next day, and the amount of his claim of damages had not been ascertained. On considering the whole circumstances the Sheriff-Substitute is humbly of opinion that the sequestration *currente termino*, and the application for a warrant to carry back the furniture were fully justified."

The pursuer appealed to the Sheriff (BLAIR), who on 19th August 1892 adhered.

The pursuer appealed.

At advising—

LORD JUSTICE-CLERK—The Court in the case of *Johnston* expressed their view as to how Sheriffs should proceed in cases of granting warrants such as is complained of here, and that it was not satisfactory to proceed upon a bare statement that furniture had been removed without alleging some ground which the Sheriff could take into consideration before granting the warrant. In the same case, however, it was clearly stated that the Court did not lay down any rule that in such an application to the Sheriff it was required as a solemnity that previous notice should be given to the party against whom the warrant was asked. In this case, however, that is of no importance at all. I see the Sheriff says in his note that intimation was given to the defender in the action for sequestration, the pursuer in this case. But the question here is, it being the fact

that the Sheriff granted his warrant to bring back the articles of furniture to the place from which they had been removed, and where they could be sequestrated, can damages be given against the present defender because he acted upon that warrant? In order to decide that question we must know the facts under which the order was applied for, and if the facts show that no injury was done to the defender, and that the order in the circumstances was a proper one, then there was no injury, and there can be no claim for damages.

The facts are, that the rent of pursuer's house was just about to become due, the furniture was undoubtedly being removed, and part of it under cover of night. An order for sequestration having been granted, the officer who had to execute it reported that he could not carry it out because the house was displenished; there were no articles in it that could be appraised in the sequestration. Upon this report the Sheriff gave an order to have the furniture brought back, and it was brought back. Are damages due against the landlord for having acted as he did when he got the warrant? I do not think so, because he had ground for believing that the furniture was being removed so as to prevent him sequestrating it for his rent.

Mr M'Lennan said that his client had some claim against the landlord for damage to his business, which he set off against the claim for rent, but that does not affect the landlord's claim to have his rent paid, and his right to sequester the goods in security; therefore I think that the decision of the Sheriffs is right.

I only wish to say that I do not go back from my opinion expressed in *Johnston's* case, that the granting of such warrants *de plano* without any facts being stated for the Sheriff's consideration is not a practice to be approved of.

LORD YOUNG—The case stands thus—The relation of landlord and tenant exists between the parties. The landlord did something in the way of repairs to his own property, which occasioned damage to the tenant to the amount of £3. That is the amount of damage the Sheriff has awarded, and the pursuer does not dispute the amount. It is not a failure to fulfil his contract as landlord that is complained of, but merely a claim for damages which might have been brought against any stranger. The tenant removes his furniture to another house, and the landlord presented a petition of sequestration in security of the rent, because he knows the furniture has been removed. The officer reports that the house is displenished, and the Sheriff grants warrant to have the furniture taken back again. The conclusion for damages with which we are dealing is a conclusion that they are due for the proceedings under the sequestration and subsequent warrant. These are complained of as wrong, and it is said the wrong is actionable because the tenant had a claim for the damage done to his house against the land-

lord as liquid as the rent, and that he could set the one against the other. I cannot take that view. I have said enough to show that this is not a case of damages against a landlord for withholding the premises he had contracted to let from his tenant, but simply a case of damages for an alleged wrong done to him.

Another ground upon which damages are sought is, that the way in which the sequestration and warrant were used was so oppressive and unreasonable in the circumstances as to be actionable. It is not said that there was anything irregular in the way in which the proceedings were gone about; indeed, it is admitted that the procedure was quite regular, but it is said that the circumstances of the case rendered the proceeding so oppressive that they are actionable. I am willing to admit that even regularly conducted proceedings of this nature may be actionable if they are carried out in certain circumstances. For instance, if a landlord who has no fear that his rent will not be paid gets a sequestration and warrant against his tenant in quite regular form, but merely from a malignant desire to annoy his neighbour, that might be actionable. On looking at the case in this aspect, have we any such circumstances. In the Sheriff's view the case is not of that character at all; in fact, on looking at all the circumstances of the case, the Sheriffs find nothing in the actions of the landlord that is to be condemned or is actionable. I should be slow to interfere with the judgment of the Sheriff in a case of this kind unless I thought his judgment clearly wrong, but in this case I see no grounds for interference.

I am disposed to admit, with your Lordship, that where there is no reason stated to the Sheriff why he should not give notice to the party against whom the warrant is sought, that he ought not to grant warrants of this kind without giving notice. I cannot lay down the rule that it is improper for a Sheriff to grant a warrant to search for and restore goods to the place from which they have been removed without giving notice to the party. I think he may, but if there is nothing stated to him that would make it advisable for him to grant the warrant at once I think he should give notice.

LORD RUTHERFURD CLARK—I am of the same opinion. I think that the circumstances justified the issue of the warrant and if so, there can be no claim for damages.

In the case of *Johnston* I did not mean to specify the conditions on which such warrants could alone be issued. My purpose was to impress on Sheriffs the duty of being cautious in granting them.

LORD TRAYNER—In this case the pursuer has two conclusions—one for payment of £10, and the other for £50. The Sheriffs have decided in his favour to a certain extent under the first conclusion, and with that decision he is content. He appeals to us against the Sheriffs' judgment regarding

the second conclusion, which is one for damages on the ground of an alleged oppressive and malicious sequestration of his effects at the instance of the defender. He complains of the sequestration proceedings on two grounds. First, that the landlord ought not to have taken out sequestration for the full amount of the rent, because he knew that some deduction fell to be made from the rent in favour of the present pursuer for damage suffered by him, for which the defender was responsible; and second, that the landlord applied to the Sheriff for warrant to bring back certain articles of furniture which had been removed from his the pursuer's house.

As regards the first ground, I think that has been disposed of by what Lord Young has said. It is out of the question to say that a landlord is not entitled to use sequestration for his full rent because the tenant has or pretends to have an illiquid claim of damages which he wishes to set-off against his landlord's claim for rent which is liquid and exigible.

The second ground of action presents more difficulty, although in this case I have no hesitation in repelling it as a ground of action. I agree with your Lordships that Sheriffs in granting warrants of this kind would do well to exercise some discretion in making inquiry into the circumstances in which the warrant is sought before granting it.

But every warrant of this kind is sought for *periculo petentis*, and if an action for damages is brought against the person who obtained the warrant, upon the ground that the warrant had been improperly asked for, the person who got the warrant will require to justify what he did.

It is not enough in an action of damages to say that the asking for the warrant was irregular; there is no irregularity in asking for a warrant. It may be that in the circumstances of any particular case a certain warrant should not have been applied for, and a man may be answerable for his conduct in asking for a warrant when the circumstances made it improper for him to do so. But if the application for the warrant is justified, that will be a defence to the claim for damages.

In my opinion the circumstances of this case fully justified the landlord in applying for the warrant complained of. I think it was a just and proper thing in the circumstances to ask, and a just and proper thing at the time to grant.

The Court pronounced this judgment:—

"Find in fact and in law in terms of the interlocutor of the Sheriff-Substitute, and affirmed by the Sheriff: Therefore dismiss the appeal, and affirm the interlocutors appealed against," &c.

Counsel for the Appellant—M'Lennan.
Agent—Robert Broatch, L.A.

Counsel for the Respondent—Salvesen—
Deas. Agent—J. W. Deas, S.S.C.