should have accepted a contract for carriage of cargo or permitted the vessel afloat.

LORD HALSBURY was sitting to constitute a quorum at the judgment, but had not been present at the hearing.

Their Lordships reversed, with expenses, the order appealed from.

Counsel for Respondents (Pursuers and Respondents)—Murray, K.C.—G. C. Rankin. Agents—Beveridge, Sutherland, & Smith, S.S.C., Leith—Botterell & Roche, London.

Counsel for Appellants (Defenders and Reclaimers)—Horne, K.C.—Lippe. Agents—Boyd, Jameson, & Young, W.S., Edinburgh—W. A. Crump & Son, London.

COURT OF SESSION.

Saturday, January 28.

FIRST DIVISION.

[Lord Dewar, Ordinary.

JACK *v.* BLACK.

Reparation—Wrongous Use of Diligence—Landlord and Tenant—Warrant to Carry Back for Sequestration and Sale for Rent—Warrant Obtained without Notice.

In an action of damages for wrongous use of diligence in obtaining a warrant to carry back a tenant's furniture to premises vacated by him, by minute endorsed on a Small Debt summons of sequestration for past-due rent before service, where there was no effective notice, no exceptional circumstances, and no reasons assigned—*held* that the warrant was obtained *periculo petentis*, and issue ordered for the trial of the cause.

Observations (*per* the Lord President) upon circumstances in which such a warrant might be obtained without wrongous use of diligence.

Sheriff—Landlord and Tenant—Small Debt—Finality—Warrant to Carry Back Furniture—Small Debt (Scotland) Act 1837 (7 *Will. IV and* 1 *Vict. cap.* 41), *sec.* 30.

The Small Debt Act 1837 enacts—Section 30—"No decree given by any Sheriff in any cause or prosecution decided under the authority of this Act shall be subject to reduction . . . or any other form of review or stay of execution other than provided by this Act, either on account of any omission or irregularity or informality in the citation or proceedings, or on the merits, or on any ground or reason whatever."

Warrant having been granted to carry back a tenant's furniture to premises vacated by him, on an *ex parte* statement, and prior to service of a Small Debt summons for sequestration for past-due rent, *held* that an action of damages for wrongous use of diligence was not excluded by the above section of the Small Debt Act.

James Jack, butcher, Gartmore, brought an action of damages for illegal and oppressive use of diligence against William Skene Black, Main Street, Thornhill, the pursuer having been for twenty-seven years prior to Whitsunday 1910 the defender's tenant in premises in Thornhill at a yearly rent of £12, 10s.

The following *narrative* is from the opinion of the Lord Ordinary—"On 28th May 1910 the pursuer removed his furniture and effects from Thornhill to new premises at Gartmore, a village four or five miles distant. The pursuer avers that the defender knew that he was leaving, and the removal was conducted openly and in broad daylight. At the date of his removal he had not paid the last half-year's rent (£6, 5s.) on account of a dispute as to whether he was entitled to an abatement of £2, 5s. On 30th May the pursuer avers that he met the defender and offered to pay the rent less the abatement; that the defender knew that the furniture and effects had been removed and made no objection. On 6th June 1910 the defender's law-agent wrote (*v. infra*) to the pursuer demanding payment of the rent, together with £3 in respect of alleged damage caused by the removal, and stating that if the amount was not paid by the 9th June the defender would raise an action to have the pursuer's effects carried back to Thornhill and there sequestrated. The pursuer consulted his solicitor, who replied (*v. infra*) to the defender's solicitor on 9th June offering to pay the rent subject to deduction, and intimating that if the defender did not accept this offer they (the solicitors) would accept service of the summons on behalf of the pursuer and would consign the full amount of the rent claimed. No reply was received to this letter; but on 10th June (after the defender's solicitor had received the pursuer's solicitors' letter) a summons of sequestration was taken out by the defender against the pursuer in the Dunblane Sheriff Court. This summons was not served on the pursuer or sent to his agent for acceptance of service. On the same day (10th June), without any notice to, or communication with, the pursuer or his agents, the defender made application to the Sheriff for a warrant to carry back the pursuer's furniture from Gartmore to Thornhill. The warrant was granted, and on the same date (10th June) a sheriff-officer appeared at the pursuer's premises at Gartmore, took possession of his furniture and effects to the value of £48, 10s., and removed them to the public road at the Cross of Gartmore, where they remained uncovered and exposed to the weather and public view until next morning. When the sheriff-officer arrived at Gartmore the pursuer's wife telegraphed to his solicitors, who at once telegraphed to the sheriff-officer giving their personal guarantee to consign the rent and expenses. They also communicated with the defender's agent,

intimating that the rent and expenses would be consigned next morning, as it was past business hours and consignation could not be made that night. The defender's solicitor refused to accept this assurance. Next morning the rent and expenses were consigned in the name of the sheriff-clerk. The sheriff-officer thereupon returned the furniture from the public road to the pursuer's house. The pursuer avers that the defender knew that he was able and willing to pay the rent and used the process in a nimious and oppressive manner; that in making application for the warrant he did not give the pursuer notice or afford him any opportunity of being heard; that he did not fully disclose the whole circumstances to the Sheriff, and, in particular, that he did not inform the Sheriff of the pursuer's solicitors' letter of 9th June offering to consign the rent. In these circumstances the pursuer avers that he has suffered serious loss and damage to his property and reputation, and sues the defender for £500."

The letter of the defender's agent to the pursuer's, of 6th June 1910, was—

"*Dunblane, 6th June* 1910.

"Dear Sir—I have been consulted by Mr William S. Black, Thornhill, with reference to your failure to pay to him the half-year's rent, amounting to £6, 5s., due at the term of Whitsunday last. . . . Mr Black has also informed me that you have caused considerable damage to the house. . . . He estimates the cost of repairing the damage at £3. I have to request that you will let me have payment of these two sums, amounting together to £9, 5s., on or before Thursday first, failing which I shall proceed, following upon the notice hereby given you, with an action in Court to have your furniture and effects carried back to Thornhill, and there sequestrated for the rent due by you, and also a further action for the amount of damage done by you to the house.—Yours truly,

"WILL. ALEXANDER."

In his letter of 9th June the pursuer's agent wrote to the defender's as follows —"Without prejudice we will advise our client to make an offer of £4 in settlement of your claim for the half-year's rent, but failing his acceptance we shall accept service of the summons and consign the amount in the hands of the Clerk of Court."

The Small Debt summons was served on the pursuer on 14th June, and decree with warrant to sell was granted on 6th July 1910.

The defender, *inter alia*, pleaded—"(1) The defender having obtained a Small-Debt decree for the whole rent claimed by him in the sequestration proceedings complained of, the action is excluded by section 30 of the Small Debt Act 1837. (2) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed, with expenses."

On 2nd November 1910 the Lord Ordinary (DEWAR) repelled the first and second pleas-in-law for the defender and approved of an issue for the trial of the cause.

Opinion.—[*After narrating the facts as noted above*]—"The defender maintains that the pursuer is not entitled to an issue, in respect that the action is excluded by section 30 of the Small Debt Act 1837.

"I am of opinion that this plea is not well founded. The 30th section provides—'No decree by the sheriff in any cause or prosecution decided under the authority of this Act shall be subject to review in any form'; and it is settled by authority that this also protects all the steps by which a decree is reached. But the Sheriff granted the warrant on an *ex parte* statement, and in doing so did not decide anything within the meaning of this section (*M'Donald* v. *Grant* (1903), 11 S.L.T. 575). What the Sheriff did decide was that the pursuer was not entitled to an abatement from his rent. The granting of the warrant was not a step by which this decision was reached, and the question now raised will not directly or indirectly involve a review of the Sheriff's decree. The meaning and purpose of the section is to protect the Sheriff's decree. It was not intended to protect, and I do not think it does protect, a litigant who applies for and obtains a warrant on an *ex parte* statement without notice to, and to the injury of, his opponent. 'Every warrant of this kind is sought for *periculo petentis*, and if an action for damages is brought against the person who obtains the warrant upon the ground that it has been improperly asked for, the person who got the warrant will require to justify what he did' (*per* Lord Trayner in *M'Laughlan* v. *Reilly*, 20 R. p. 45).

"I accordingly repel the first and second pleas-in-law for the defender, and approve the issue."

The defender reclaimed, and argued—After sequestration had been obtained in a Small Debt action no question could be considered as to steps leading up to the decree—Small Debt (Scotland) Act 1837 (7 Will. IV and 1 Vict. cap. 41), section 30; *Crombie* v. *M'Ewan*, January 17, 1861, 23 D. 333; *Gray* v. *Smart*, March 18, 1892, 19 R. 692, 29 S.L.R. 589; *M'Lellan* v. *Graham*, June 30, 1841, 16 F.C. 1209, Lord Medwyn at p. 1215. Warrant to carry back was essential to sequestration, and was therefore a step in the sequestration process. A landlord's right to sequestrate for rent past due was absolute, there being no offer of payment of rent and expenses—*Pollock* v. *Goodwin's Trustees*, June 24, 1898, 25 R. 1051, 35 S.L.R. 821; *Alexander* v. *Campbell's Trustees*, March 7, 1903, 5 F. 634, 40 S.L.R. 453; *M'Kechnie* v. *Duke of Montrose*, March 29, 1853, 15 D. 623. Cases in which diligence had been used without previous notice, *currente termino*, did not apply to such a case as the present—*Gray* v. *Weir*, October 28, 1891, 19 R. 25, 29 S.L.R. 58; *M'Laughlan* v. *Reilly*, November 16, 1892, 20 R. 41, 30 S.L.R. 81; *Johnston* v. *Young*, October 27, 1890, 18 R. (J.C.) 6, 28 S.L.R. 30. Cases in which warrants had been improperly obtained were to be contrasted with

the present—Rankine on Leases (2nd ed.) 374. Proceedings accessory to sequestration proceedings were always regarded as protected by the Small Debt Act—*Brown* v. *Halley*, June 1, 1895, 3 S.L.T. 22. Only if the pursuer had paid his rent when he offered to consign it would the present action have been competent—*Mackenzie* v. *Paul*, July 6, 1895, 3 S.L.T. 71.

Argued for the pursuer (respondent)—Warrant to carry back was a diligence obtained *periculo petentis*; it was no part of the proceedings in a Small Debt action; it proceeded on the landlord's hypothec, and might be obtained before any such action was raised. In the present case the warrant had been obtained before any Small Debt proceedings existed. A warrant to carry back was not a "decree," and involved nothing "decided under the authority of" the Small Debt Act 1837, and was not protected by section 30 of that Act. That section, in referring to "proceedings," referred to proceedings following citation. Proceedings in a Small Debt action were not initiated until service of summons. The warrant had been obtained by the defender on a false statement of the facts, inasmuch as the letter of the pursuer's agent of 9th June had not been brought to the notice of the Sheriff, who could not have granted decree in knowledge thereof — *M'Laughlan* v. *Reilly*, *cit. sup.*, *Gray* v. *Weir*, *cit. sup.*, *Johnston* v. *Young*, *cit. sup.* Even if warrant had been necessary and proper, the execution would still have been unnecessary, as there was no need to carry back to Thornhill. Gartmore being in the same jurisdiction, the steps taken by the defender were illegal and oppressive—Ersk. ii, vi, 58-60; *Christie* v. *Macpherson*, December 14, 1814, F.C. The cases of *Pollock* v. *Goodwin's Trustees*, *Alexander* v. *Campbell's Trustees*, *Brown* v. *Halley*, and *Mackenzie* v. *Paul*, relied on by the defender, differed from the present case.

At advising—

LORD JOHNSTON—The pursuer was for many years tenant of premises, which the defender bought with entry at Martinmas 1909. The pursuer removed from the subjects at Whitsunday 1910, and took his plenishing with him.

I think that it may be taken as common ground that the reason of the pursuer leaving was that he could no longer use the premises in Thornhill for his business of flesher, because in August 1909 the local authority had withdrawn the licence to slaughter, whether from intrinsic defect in the premises or the pursuer's fault is disputed but not material. In respect of this loss of licence the pursuer seems to have thought himself entitled to an abatement of rent, and for the present purpose he must be assumed in *bona fide* to have maintained this position to the point of judgment in the Sheriff Small Debt Court action to be immediately mentioned. And the defender must equally be assumed as from 3rd June to have known that this was the position taken by the pursuer, for he admits that on that day the pursuer claimed a deduction from the rent in respect of loss of slaughtering accommodation, which he, the defender, refused to allow. But on his own showing, on 28th May 1910, without having paid his half-year's rent, the pursuer removed his furniture from the Thornhill premises to Gartmore, conducting the flitting, as he avers, in broad daylight. His averment may be intended to represent that this removing was in the knowledge of the defender but is not sufficiently specific.

In these circumstances the defender raised a Small Debt summons of sequestration, and in respect that the pursuer's furniture had already been removed obtained a separate warrant from the Sheriff to carry it back for the purpose of bringing it under sequestration. For wrongously obtaining and executing this warrant the pursuer brings the present action of damages. Whether that action is relevantly laid depends on the circumstances.

It is quite settled that there is a distinction between the case of a landlord applying for sequestration for rent unpaid or in security of rent becoming due (*cf. Pollok* v. *Goodwin*, 25 R. 1051; *Alexander* v. *Campbell's Trustees*, 5 Fr. 634), and the case of a landlord, with a view to sequestrating for rent, applying for warrant to bring back furniture already removed. The former is an ordinary, the latter an extraordinary remedy. The former is obtained as matter of right, the latter *periculo petentis* (*cf. Johnston* v. *Young*, 18 R. (J.C.) 6; and *Gray* v. *Weir*, 19 R. 25).

Although the Court in *Johnston* v. *Young*, *supra*, did not lay down any absolute rule, I think that it is fairly to be deduced from the judgment that such warrant can only be granted after notice to the opposite party or in exceptional circumstances, and in either case with reasons assigned.

Now the circumstances in which the warrant was granted are these—premising the pursuer's claim to an abatement of rent and the defender's knowledge thereof as at 3rd June—on 6th June the defender's solicitor in Dunblane wrote to the pursuer demanding payment of £6, 5s., being the half-year's rent, and of £3, being cost of repairing damages to premises, and intimating that failing payment on or before Thursday first (9th June) "I shall proceed, following upon the notice hereby given, with an action in Court, to have your furniture and effects carried back to Thornhill, and there sequestrated for the rent due by you, and also a further action for the amount of damage done by you to the house."

In answer the pursuer's solicitor in Stirling replied to the defender's solicitor on 9th June, after indicating the grounds of the pursuer's objection to pay the full rent—"Without prejudice we will advise our client to make an offer of £4 in settlement of your claim for the half-year's rent, but failing his acceptance we shall accept service of the summons, and consign the amount in the hands of the Clerk of Court." What is meant by "*the amount*" is matter

of construction. I think that it meant the amount of the half-year's rent. But this is a matter of impression, and certainly was not so clear as to require the pursuer's solicitor to assume that the offer meant anything more than consignment of the £4 offered in settlement.

Without replying to this letter the defender's agent on 10th June took out a Small Debt summons of sequestration for past-due rent in the Sheriff Court at Dunblane, and having done so, and before serving it, he applied by separate minute endorsed on the summons for warrant to carry back the pursuer's furniture to the premises at Thornhill in order that it might be sequestrated. This minute proceeds on the narrative that the pursuer had without the defender's consent and in order to defeat the defender's hypothec removed his plenishing, which was subject to said hypothec for half-year's rent due at Whitsunday 1910, from the house at Thornhill to other premises at Gartmore, "and further, in respect that intimation had been given to the defender by the pursuer of his intention to apply for warrant to carry or take back the said furniture and other effects and to sequestrate the same for the said half-year's rent," craved warrant to officers of Court to search for and carry back accordingly to Thornhill, "there to be inventoried and sequestrated and secured in terms of the warrant" in the summons.

Without intimation of this application to the pursuer, the Sheriff-Substitute granted warrant to carry back for the purpose of being inventoried and sequestrated. On the following day, 11th June, however, on consignation of the full rent with the £2 of expenses required by, though not in the precise circumstances contemplated by, the Small Debt Act 1837, sec. 5, the sequestrated effects were forthwith restored and the sequestration was not further proceeded with. Indeed the Small Debt summons for sequestration had not been served and was not served upon the pursuer until the 14th of June, when, after proof, the pursuer's defence and demand for an abatement of rent was repelled as unfounded, and decree was on 6th July pronounced for the half-year's rent with expenses of process.

I think that the warrant of 10th June, on which the officers proceeded to bring back the pursuer's plenishing, was obtained from the Sheriff without any effective notice to the pursuer. When the Court in the case to which I have referred speak of notice to the tenant, I think that they mean such notice as will give the tenant an opportunity of appearing to explain his action, and to oppose the application, and if necessary to find security. A mere general intimation of intention to apply places the tenant in no better position than if no intimation had been given at all, if the actual application is to be made at the time chosen by the landlord and to be granted *de plano* in chambers, unless indeed there is any similar system, of which there is no suggestion, of receiving a caveat in the Sheriff Court in such cases, to that which prevails in the Bill Chamber. I think therefore that the Sheriff on the facts as stated, assuming them correct, erred in failing to ascertain what was meant by the statement that intimation had been given of intention to apply for warrant. Had he done so, there must have been produced to him the letter by defender's agent of 6th June, when he would have seen that the intimation was quite general, and he would have in natural course asked to see the reply. On seeing the reply of 9th June he would have at once become aware that there was a question between the parties as to the amount of rent due in respect of the abatement claimed. He would also have been aware of the offer by responsible agents to consign on acceptance of service of the summons. Had the Sheriff been made aware of the circumstances which I have just stated, I think it probable, indeed I can hardly doubt, that he would not have granted warrant without giving the pursuer an opportunity of appearing and explaining himself, and in particular of clearing up what he meant by consignation of "the amount." If I have deduced from the record and the documents founded on, the correct and full state of the circumstances, I am prepared to hold that the Sheriff ought not to have granted such warrant *de plano*. There was, I think, all the more reason for his staying his hand in that the Small Debt summons had not yet been served.

Accordingly I think that as in the circumstances there was no effective notice, no exceptional circumstances in favour of the application, but rather the reverse, and no reasons assigned, the pursuer has made out a relevant case.

A further defence was founded upon the 30th section of the Small Debt Act 1837, which it was maintained excluded the action. This plea was not, I think, seriously maintained by the defender under his reclaiming note, but in any view falls to be repelled for the reasons stated by the Lord Ordinary to which I do not think it necessary to add anything. And as no objection was stated to the form of issue adjusted by the Lord Ordinary for the trial of the case, the reclaiming note falls to be refused.

LORD PRESIDENT—I agree with the opinion just delivered. I think it as well, in view of what we were told as to the practice in Sheriff Courts in this matter, to remind learned Sheriffs of what was said by Lord Rutherfurd Clark in the case of *Johnstone* v. *Young* (18 R. (J.C.) 6), which I think very succinctly and correctly states the law of this matter. Speaking of a warrant to carry back goods and effects he says—"I do not say that in no circumstances should a warrant such as this be granted without notice to the opposite party, but I think it should never be granted without such notice save in exceptional circumstances and with reasons assigned."

I quite agree with that. Of course there are obvious instances where notice would

really defeat the purpose of getting the warrant, but there are many instances where it would not; and I would add one word upon the distinction which has been referred to by your Lordship between diligences which are said to be of right and those which are said to be *periculo petentis*. A warrant to bring back furniture such as this is, I think, in one sense obtained *periculo petentis*, but in another it might not be. If notice had been given, and if the respondent had been heard upon the propriety or not of granting the warrant, and after discussion the Sheriff had granted it, then, with the possible exception of its being shown afterwards that an absolutely untrue statement was made to the Sheriff, which misled him, I do not think it would be possible to say that that diligence was wrongous, even although circumstances which afterwards emerged might show that it need not have been granted. But if a person chooses to take such a *festinum remedium* as necessitates his getting a warrant of this sort without any notice being given to the opposite party, then I think the diligence is *periculo petentis*.

I think there was a motion made before us that this matter should be inquired into by means of proof rather than a jury trial. If the matter really depended upon law, I should be inclined to give effect to that; but in this discussion on relevancy, taken along with the documents, we have really been forced to give a judgment upon the law of the matter, and there is but little left except the question of damages; therefore I think it ought to go to a jury.

LORD KINNEAR and LORD MACKENZIE concurred.

The Court adhered.

Counsel for the Pursuer and Respondent —Morison, K.C.—Paton. Agents—Gill & Pringle, W.S.

Counsel for the Defender and Reclaimer — M'Lennan, K.C. — Mercer. Agents — Cumming & Duff, S.S.C.

Saturday, January 28.

FIRST DIVISION.

[Sheriff Court at Edinburgh.

MIDLOTHIAN COUNTY COUNCIL *v.* BURGH OF MUSSELBURGH.

Local Government—Burgh—County—Extension of Burgh Boundaries—Inclusion of Part of County—Adjustment of Liabilities—Local Government (Scotland) Act 1889 (52 *and* 53 *Vict. c.* 50), *sec.* 50—*Burgh Police (Scotland) Act* 1903 (3 *Edw. VII, c.* 33), *sec.* 96—*Musselburgh Corporation (Extension of Boundaries, &c.) Order Confirmation Act* 1909 (9 *Edw. VII, c. xcviii*), *sec.* 18.

The Local Government (Scotland) Act 1889, sec. 50, makes provision, where there has been an alteration of boundaries between any councils or other authorities, for "an adjustment of property and liabilities"; where this cannot be effected by agreement the Sheriff acts as arbiter between a burgh and a county council under the Burgh Police (Scotland) Act 1903, sec. 96. In a case where a burgh's boundaries had been extended the county claimed such proportion of the existing debts as the valuation of the portion of territory taken bore to the whole territory for which the debts had been incurred. The Sheriff as arbiter refused the claim on the ground that it was for compensation for loss of assessable area, and he stated a case. *Held* that the arbiter had erred, and case remitted back to him to consider the various items whether they were for adjustment or not.

"Liabilities" means debt of some sort which is exigible for what has already been done, not a liability such as that for road maintenance, which, though in a sense presently existing, is really for the future. "Where you have got, first of all, an existing debt, the first thing you have to consider is in respect of what was that debt incurred? And then if you find that it was incurred in the creation of some sort of property, the next thing you have to consider is whose property is that now going to be? And according to the way in which these facts emerge, so I think would be the decision as to an adjustment of liability"—*per* the Lord President.

Caterham Urban Council v. *Godstone Rural Council*, [1904] A.C. 171, and *Inverness County Council* v. *Burgh of Inverness*, 1909 S.C. 386, 46 S.L.R. 305, *distinguished.*

Process—Local Government—Extension of Burgh—Adjustment of Financial Liabilities—Claim for Adjustment—Initial Writ—Form of Crave—Local Government (Scotland) Act 1889 (52 *and* 53 *Vict. cap.* 50), *sec.* 50.

Part of a county having been disjoined and annexed to a burgh, the county council brought an action against the magistrates of the burgh for payment of such proportion of the county debt as the rateable value of the severed area bore to the rateable value of the territory for which the debt had been incurred. The crave of the initial writ was framed as a crave for a sum due and indebted.

Held that the form of crave was inappropriate, the application being, under the Local Government (Scotland) Act 1889, sec. 50, one to the Sheriff as arbiter for an adjustment (if any) of financial liabilities, and not one for payment of a debt.

The Local Government (Scotland) Act 1889 (52 and 53 Vict. c. 50), enacts—Sec. 50—"*Adjustment of Property and Liabilities*—(1) Any councils and other authorities