

Saturday, March 7.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

ALEXANDER v. CAMPBELL'S
TRUSTEES.

Reparation—Wrongous Use of Diligence—Sequestration and Sale for Rent—Counter Claim by Tenant—Rent Consigned with Sheriff-Clerk before Sequestration Proceedings Instituted—Small Debt Act 1837 (1 Vict. cap. 41), section 5.

The tenant in certain subjects, when a half-year's rent became due, consigned the rent in the hands of the sheriff clerk pending the settlement of a counter claim by the tenant against the landlord for damages in respect of alleged defective condition of the subjects, the consignment receipt being for the sum due "for which an action for sequestration . . . is threatened." Thereafter the landlord raised an action in the Small Debt Court for sequestration and payment of the rent, and in virtue of the warrant contained in the summons caused the tenant's furniture to be sequestrated and inventoried by a sheriff officer. The tenant entered appearance and served a counter claim, which was sustained to the extent of the rent due. The tenant then raised an action of damages for wrongous use of diligence. *Held* that the landlord had acted within his legal rights, the consignment not having been made in the process of sequestration in the manner prescribed by section 5 of the Small Debt (Scotland) Act 1837, and action dismissed.

This was an action of damages for wrongous use of diligence brought in the Sheriff-Court at Glasgow by Mrs Maggie Alexander, 122 North Frederick Street, Glasgow, against James Dodds, commission agent, 27 Union Street, Glasgow, and another, as trustees of the late Thomas Campbell, warehouseman, Glasgow, the landlords of a house occupied by the pursuer as tenant.

The Small Debt (Scotland) Act 1837 (1 Vict. cap. 41), section 5, makes provision for the summary disposal of actions of sequestration and sale for payment of rent within the statutory limit as to amount, and enacts—"And if after sequestration the tenant shall pay the rent claimed, with the expenses, to the pursuers, or consign the rent, with £2 sterling to cover expenses, in the hands of the Clerk of Court, the sequestration shall *ipso facto* be recalled; in case of payment, on the clerk writing and signing on the back of the summons or warrant the words 'payment made,' which, on evidence being produced to him of payment of the rents claimed, with expenses, he is hereby required to do; and in case of consignment, after the clerk shall in like manner have written and signed the words 'consignment made,' on the same being intimated by an officer of Court to the sequestrating creditor."

The pursuer averred—" (Cond. 2) During the half-year prior to Whitsunday 1902 a series of fires broke out in the pursuer's house owing to a defect in one of the chimneys, whereby the pursuer sustained loss and damage to her clothes, furniture, and effects. (Cond. 3) The pursuer through her agents duly intimated a claim of damage to the defenders' factors, and as they declined to entertain the claim she consigned her rent, amounting to £8, 10s., due at Whitsunday 1902, with the clerk of court, and intimated to them that she had done so."

The consignment receipt was in the following terms;—"Glasgow, 15th May 1902.—You have this day . . . consigned in my hands the sum of £8, 10s. to meet half-year's rent of premises at 122 North Frederick Street, aforesaid, due to-day, for which an action of sequestration at the instance of" the defenders "is threatened.—Yours truly,

JNO. WOOD, S.C.D."

The pursuer further averred—" (Cond. 6) The defenders, notwithstanding the intimation made to them of the consignment of said rent and of pursuer's willingness to have her liability and counter claim determined by an action for payment in the Small Debt Court, on the 7th of June 1902 raised an action in the Small Debt Court at Glasgow for sequestration and payment of the rent of said house due at Whitsunday 1902. (Cond. 7) By virtue of the warrant contained in the said summons the defenders illegally and wrongfully and oppressively caused the pursuer's furniture to be sequestrated and inventoried by a sheriff officer. (Cond. 8) The pursuer entered appearance in the said action of sequestration and payment and served a counter claim for £17, 1s. 6d. on the said defenders for the loss and damage sustained by her by said fires in said house, alleging that the same had occurred through the carelessness of the defenders or their factors. On 7th July 1902 the Sheriff-Substitute sustained the pursuer's counter claim to the extent of £8, 10s., being the amount of the sum sued for in the action, and assuozied the present pursuer, with £1, 11s. of expenses. (Cond. 10) The fact that the pursuer's furniture and effects were sequestrated by the defenders became known in the tenement in which she resides, and it was currently reported among her neighbours and among the tradesmen with whom she dealt that she was unable to pay her rent, and her credit was in that way seriously affected."

The defenders pleaded—" (2) The pursuer's averments are irrelevant, and insufficient to support the conclusions of the petition."

On 26th December 1902 the Sheriff-Substitute (STRACHAN) allowed a proof before answer.

The pursuer appealed to the Court of Session for jury trial.

Argued for the respondents—The rent having been admittedly past due, the respondents were within their legal rights in resorting to the remedy of sequestration,

and there was no irregularity in the procedure, and no special circumstance that could be held to exclude sequestration. The only special circumstance founded on by the appellant was the consignment of the rent in the hands of the Sheriff Clerk Depute, but that was not such consignment as was prescribed by section 5 of the Small Debt Act; the granting of the receipt was a mere ultroneous proceeding on the part of the Sheriff Clerk, and its terms gave the respondents no security. The respondents had omitted nothing that was necessary to make the sequestration regular—*Pollock v. Goodwin's Trustees*, June 24, 1898, 25 R. 1051, 35 S.L.R. 821. The sequestration proceedings were justified, and even harshness in the use of diligence did not make it wrongful—*Robertson v. Galbraith*, July 16, 1857, 19 D. 1016. An illiquid claim of damages was no answer to a demand for payment of rent. The action was irrelevant.

Argued for the appellant—In the circumstances the rent was no more a liquid debt than the counter claim, and after consignment sequestration was unjustifiable and without cause. The pursuer was entitled to an issue—*Oswald v. Graeme*, June 26, 1851, 13 D. 1229; *M'Leod v. M'Leod*, February 11, 1829, 7 S. 396; *Munro v. M'Geoghs*, November 15, 1888, 16 R. 93, 26 S.L.R. 60.

LORD TRAYNER—The pursuer of this action claims damages from the defenders on the ground that the defenders executed a sequestration of her furniture, which she says was illegal, wrongful, and oppressive. The facts are, that the pursuer, who was the defenders' tenant, was due a half-year's rent at Whitsunday 1902. This she refused to pay, alleging certain counter claims against the defenders. The defenders in June 1902, not having been paid the rent due, raised an action of sequestration against the pursuer in the Small Debt Court, and sequestrated her furniture. *Prima facie*, the defenders only exercised their legal right in sequestrating, the pursuer not being entitled to retain or refuse payment of her rent on the allegation of an illiquid counter claim. But the pursuer says that the defenders' proceedings were illegal and oppressive because on 15th May, when the rent became due, she consigned the amount thereof with the Sheriff-Clerk to meet the defenders' claim. I am of opinion that such consignment was no bar to the defenders proceeding with their sequestration. In the first place, the Sheriff-Clerk had no right or authority for receiving such consignment; and in the second place, the consignment was not made on such terms as gave the defenders any right to claim the consigned money. It was not consigned under any arrangement with them, but in face of their refusal to take anything except payment of their rent. It is true that when decree was asked for the amount of the rent the Sheriff sustained the pursuer's counter claim to an extent which sopited the rent. But this was done in July 1902, and did not affect the legality of the defenders' proceedings

more than a month before. In short it comes to this, in June the defenders sequestrated for rent then due. The pursuer's counter claims were not then constituted, and afforded her no answer to the defenders' claim; the defenders' proceedings were when taken quite within their right, and consequently were neither illegal nor oppressive. I think there is here no relevant statement of any wrong for which the pursuer can claim damages. The action is not only irrelevant but without substance of any kind, and ought, I think, to be dismissed.

LORD MONCREIFF—I have come to be of the same opinion, although at one time I had some doubt. I thought that it might be possible to hold that the so-called consignment of £8, 10s. with the Sheriff-Clerk-Depute was sufficient. I have come to the conclusion that this is not so. The rent, amounting to £8, 10s. was due on 15th May, and it was a liquid debt. Against that the tenant sought to put a claim of damages, but that was an illiquid debt. If there had been nothing more than an intimation of this claim of damages on behalf of the tenant there was nothing to prevent the landlord from using sequestration for the rent then due. The only way of stopping that proceeding was either for the tenant to pay the rent and bring her action, or to consign the amount of the rent in the hands of the Clerk of Court in the process of sequestration, with £2 to cover expenses. The tenant here took neither of these courses, and therefore I think that she has no ground for bringing the present action.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court recalled the interlocutor appealed against, sustained the second plea-in-law for the defenders, and dismissed the action.

Counsel for the Pursuer and Appellant—Guy—Irvine. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defenders and Respondents—Salvesen, K.C.—A. Moncreiff. Agent—James Skinner, S.S.C.

Tuesday, March 10.

FIRST DIVISION.

HEALY, PETITIONER.

Company—Register of Joint-Stock Companies—Restoration of Name of Company Struck off Register—Petition of Contributory for Restoration—Companies Act 1880 (43 and 44 Vict. cap. 19), sec. 7 (5)—Companies Act 1900 (63 and 64 Vict. cap. 48), sec. 26 (2).

A contributory of a company which had been struck off the register of joint-stock companies under section 7 of the