

tell if the conditions of the compromise have been fulfilled. Again, in some cases discharges were granted on condition of certain things to be done in the future, as when a sum was to be paid by instalments, and so it becomes essential for the Assets Company to obtain possession of the documents or they will not be in a position to know how far these conditions have been fulfilled. The discharges became the property of the Assets Company, and all the papers necessary to complete or verify these discharges necessarily passed also, and I am therefore of opinion that the documents here sought for fall under section 5, and not under section 21. The 21st section embraces "books, vouchers, &c., belonging to the bank in custody of the liquidators, whether relating to the business of the bank prior or subsequent to the commencement of the liquidation." The one essential is that they be documents relating to the business of the bank. Now, such documents as are here desired do not appear to me to fall into this category at all. But under section 5 all that can affect the estate transferred is mentioned. It is in these terms—[his Lordship here read the 5th section above quoted]. Now, it appears to me that under this section the Assets Company are entitled to the documents which they here claim, and besides it is absolutely necessary that if any suspicion of fraud or concealment of assets on the part of contributories arises, the Company should have the means of inquiring into the conditions of the compromise, and of ascertaining if these conditions have been carried out. It does not appear to me that the documents sought for are of any great value, as nothing but a case of fraud would induce the Court to go back upon these discharges; still, of whatever value they may be, the Assets Company are, in my opinion, entitled to them, in terms of section 5 of this Act.

LORD DEAS—I agree with your Lordship in the construction which you have put upon this Act of Parliament, and especially on your Lordship's construction of section 5. I am clearly of opinion that it would require fraud to be proved in order to set aside these discharges, and I think it would be an erroneous construction of section 5 of this Act to imagine that any case of mere innocent error would be sufficient to cause these discharges to be set aside. With this remark I concur in the opinion of your Lordship.

LORD MURE—I am of the same opinion. I think that your Lordships have proceeded upon a sound construction of this Act of Parliament, and that no discretion is left to us in this matter. The documents claimed by the Assets Company are clearly embraced under section 5, and I further concur with your Lordships in thinking that the Company should have the means of verifying any allegations of fraud which may be made against any of the contributories who have made compromises with the liquidators and have received their discharges on the footing of these compromises.

LORD SHAND—I think that we may be satisfied that these discharges were granted by the liquidators after due consideration, and that the present question has arisen from no suggestion that the Assets Company propose in any way to set aside these discharges. The arrangements we know were made after great care and deliberation,

and the materials upon which the liquidators proceeded were fully laid before the Court. It would indeed be difficult for the Assets Company to go back upon these discharges, or to attempt to get behind them, unless indeed the Company could bring home a case of fraud to any of the parties so discharged. I have no hesitation in thinking along with your Lordships that the documents here asked for by the Assets Company are really parts of the discharges. The Company are bound by these discharges, and on that account I think that they are entitled to get the grounds of the discharges in order to see that any conditions there stipulated for have been complied with. I therefore agree with your Lordships in thinking that the documents here claimed should be given up.

The Court, in respect that the Assets Company had right under the Act to the documents in question, directed the liquidators to hand them over to the Company.

Counsel for Liquidators—Lorimer. Agents—Davidson & Syme, W.S.

Counsel for Assets Company—Gloag. Agents—Davidson & Syme, W.S.

Tuesday, February 27.

SECOND DIVISION.

[Sheriff of the Lothians.

THOMSON v. BARCLAY.

Process—Appeal—Competency—Value of Cause—Sheriff Court Act (16 and 17 Vict. c. 80), sec. 22.

A landlord of a dwelling-house presented a petition for sequestration for rent to come due, amounting to £13, and warrant to inventory and if necessary to sell the tenant's furniture; to have the tenant ordained, in the event of a deficiency, to supply furniture so as to give security for the rent, or to find caution for the same, and failing his doing so, to grant warrant for summarily removing him. *Held* that an appeal to the Court of Session was *competent*, in respect (1) the sequestration if granted would entitle the respondent to seize goods which might exceed £25 in value; and (2) because it contained conclusions for caution and for removing.

Landlord and Tenant—Removal Terms (Scotland) Act 1881 (44 and 45 Vict. cap. 39), sec. 3—Term of Entry—Sequestration for Rent current termino.

A landlord of a dwelling-house within burgh renewed a previously existing lease of the house to his tenant, "from Whitsunday 1882 to Whitsunday 1883." On the 24th May 1882 the tenant removed part of his furniture to another house. In an action raised by the landlord for warrant to carry back the furniture as subject to his hypothec for the rent to come due at Martinmas 1882 and Whitsunday 1883—*held* that the term of entry being, in the absence of express stipulation to the contrary, the 28th May, and the furniture in question not having been at or after that date on the premises, it was not liable to the pursuer's hypothec,

and warrant to bring it back to the premises refused.

By the third section of the Removal Terms (Scotland) Act 1881 (44 and 45 Vict. cap. 39) it is enacted—"Where under any lease entered into after the passing of this Act, the term for the tenant's entry to or removal from houses within the limits of any burgh shall be one or other of the terms of Whitsunday and Martinmas (whether old or new style), the term for such entry or removal shall, in the absence of express stipulation to the contrary, be held to be at noon of one or other of the following days, to wit the twenty-eighth day of May if the term be Whitsunday, and the twenty-eighth day of November if the term be Martinmas: Provided always when any of these days shall fall upon a Sunday or legal holiday, the term of entry or removal shall be at noon of the first lawful day thereafter."

On 29th June 1882, William Thomson, proprietor of the house 25 Thornville Terrace, Leith, presented this petition in the Sheriff Court of the Lothians, against James Barclay, his tenant in that house, for sequestration, in security of the rent to come due at Martinmas 1882 and Whitsunday 1883, of such furniture and effects as were still in the house, and warrant to carry back such effects as the defender had removed, as also for warrant, if necessary, to sell as much of the sequestered effects as would make up the half-year's rent of £6, 10s.

The defender denied on record that he was tenant of the house for the period to which the action referred, but it was admitted, both in the Sheriff Court and on appeal, that having been tenant for several previous years he had verbally agreed to continue tenant from Whitsunday 1882 to Whitsunday 1883. It was admitted that on 24th May 1882 the defender had removed some of his furniture and effects to another house.

The pursuer averred that the whole furniture and effects which were or had been in said house subsequent to 15th May 1882 were subject to his right of hypothec for the rent of said dwelling-house for the year commencing that date and ending at Whitsunday 1883, and were removed from the said dwelling-house for the purpose of defeating, or at all events to the prejudice of, the pursuer's said right of hypothec.

He pleaded—“(1) The defender having become tenant of the dwelling-house No. 25 Thornville Terrace for the year from Whitsunday (15th May) 1882 to Whitsunday (15th May) 1883, at the rent above-mentioned, the pursuer, his landlord, has a right of hypothec over the whole furniture and other effects which are or have been in said dwelling-house from said first mentioned date.”

The defender pleaded that the “furniture in question having been removed from the pursuer's house before 28th May 1882, it was not in any way subject to the pursuer's right of hypothec.”

The Sheriff-Substitute (RUTHERFORD) on 29th June 1882 granted warrant for interim sequestration, and on 21st July 1882 he repelled the defences.

“*Note.*—It was conceded at the bar on behalf of both parties that by verbal agreement between them the defender was to continue tenant of the pursuer's house, No. 25 Thornville Terrace, Leith, ‘from Whitsunday 1882 to Whitsunday 1883.’ In security of the rent due *currente termino*, the pursuer seeks to sequester

furniture belonging to the defender, which was removed from the premises on 24th May. The defender maintains that as his right of occupancy under the lease did not commence until 28th May, in terms of the third section of the Removal Terms (Scotland) Act 1881 (44 and 45 Vict. cap. 39), the furniture in question was not subject to the pursuer's right of hypothec. The defender's argument would of course have been the same even if the Act referred to had not passed, for the statute merely substituted the 28th for the 25th of May, which was formerly the Whitsunday term for entry or removal to or from houses within burgh, and, as already mentioned, the furniture was removed on the 24th. But it appears to the Sheriff-Substitute that a conventional term of entry does not affect the question, which depends upon the date from which the rent begins to run. In the case of grass parks that has been held to be from the legal term of May, irrespective of the conventional term of entry (*Campbell v. Campbell*, July 18, 1849, 11 D. 1426), and the same rule applies to houses, *Binny v. Binny*, January 28, 1820, F.C.; *King v. Jeffrey*, January 24, 1828, 6 S. 422.

“In the case of *M. Intyre v. M. Nab's Trustees*, July 8, 1831, 5 W. & S. 299, it was contended for the appellant that sequestration used by the respondent was illegal, seeing that the rent was not payable till the 26th of May. The respondent, on the other hand, maintained (p. 302) that ‘although the rent was not payable till the 26th, it was due on the 15th of May, and that at all events, as the tenant had begun to remove his effects, they were entitled to have them sequestered in security of the rent for the current year.’

“In giving judgment, the Chancellor, Lord Lyndhurst, said:—‘I have stated that the sequestration issued was not merely for the purpose of securing that rent (*i.e.*, of the previous year), but the sequestration was also for another purpose—that of securing the rent for the current year. Now, it is stated at the bar that the current year had not commenced. I am of opinion that by the law of Scotland the current year commenced upon the 15th of May, and that it was not postponed till the 26th. Whitsunday is fixed by a positive Act of Parliament, an Act of the Scottish Parliament (for the purpose of getting rid of the inconvenience of moveable feasts), at a precise day, viz., the 15th of May. I am of opinion, therefore, that the rent of the previous year was payable on the 15th of May, and that the new year commenced at that period.’”

On 21st November 1882 the Sheriff-Substitute granted warrant to sell by public roup as much of the sequestered effects as would pay to the petitioner the half-year's rent due to Martinmas last.

The Sheriff dismissed an appeal taken by the defender.

“*Note.* . . . The defender now admits he was tenant from Whitsunday 1882 to Whitsunday 1883, which is a complete abandonment of his original defence, and is conclusive in favour of the pursuer.”

The defender appealed to the Court of Session.

The respondent took objection to the competency of the appeal, in respect that the value of the cause was under £25. He relied on the case of *The Singer Manufacturing Co.*, May 14, 1881, 8 R. 695. On the merits he cited the case of

M'Intyre v. M'Nab's Trustees, July 8, 1831 (cited by the Sheriff-Substitute), and argued that the rent became due on the legal term, the 15th May, and was not postponed till the 28th. It followed, then, that the sequestration was good to attach the furniture here for rent payable at that term.

The appellant replied that though the rent for the year was only £13, the pursuer might under the sequestration seize goods which might exceed the sum of £25. The mere rent was not the test—*Shotts Iron Co. v. Kerr*, December 6, 1871, 10 Macph. 195; *Aberdeen v. Wilson*, July 16, 1862, 10 Macph. 971; *Cunningham v. Black*, January 9, 1883, 20 Scot. Law Rep. 295. (2) *On the merits*—Admitting that there was a duly concluded renewal of the lease for the year 1882–1883, his term of entry, under the 3d section of the Renewal Terms (Scotland) Act 1881, must be held to have been on the 28th of May. The furniture was removed from the dwelling-house on 24th May, and was not therefore on the premises during the period for which it had been sequestrated in security of the rent.

At advising—

LORD RUTHERFURD CLARK (who delivered the opinion of the Court)—The respondent maintained that this appeal is incompetent in respect that the value of the cause was less than £25. The ground of the objection is that the rent for which sequestration was used was £13, and that the appellant by paying this sum would be able to put an end to the process. In my opinion, however, the objection is not well founded, first, because the sequestration is said to entitle the respondent to seize goods which may exceed £25 in value; and second, because the petition contains conclusions for caution and removing.

There were other objections to the competency, but it is not necessary to notice them.

This process was raised on 29th June 1882. The material purpose the respondent had in view was to obtain a warrant to carry back to the premises certain articles of furniture which had been removed on 24th May 1882, and which as he contended were liable to be sequestrated for the rent current after that term.

The appellant had been tenant of the premises from year to year. It is alleged that in February 1882 he agreed to become tenant for another year. This allegation is denied on record, but it was conceded at the bar that the defender had agreed to become tenant for another year from Whitsunday 1882.

By the third section of the 44th and 45th Vict. c. 39, it is provided that when under any lease entered into after the passing of this Act, the term for the tenant's entry to or removal from houses within the limits of any burgh shall be one or other of the terms of Whitsunday or Martinmas, the term of such entry or removal shall, in the absence of express stipulation to the contrary, be held to be noon on the 28th May or 28th November according as entry is at Whitsunday or Martinmas. Here the premises are within burgh, and there was no stipulation to avoid the application of the Act. Hence the term of entry was 28th May 1882, and the possession in respect of which the rent was payable began on that day. But it is conceded that the articles which the respondent desires to bring within his sequestration were not in the

premises at any time after 28th May. It follows in my opinion that they were not liable to be sequestrated for rent which was exigible for a period during no part of which they were in the premises, and that not being liable to sequestration no warrant could be issued to bring this upon them.

The Court sustained the appeal, recalled the Sheriff's judgment, and assolized the defender.

Counsel for Defender—Rhind. Agent—David Forsyth, S.S.C.

Counsel for Pursuer—Salvesen. Agents—Miller & Murray, W.S.

Tuesday, February 27.

SECOND DIVISION.

[Sheriff of Lanarkshire.]

HARVEY v. SELIGMANN.

Marine Insurance—Time Policy—Misrepresentation—Concealment of Facts material to Risk—Dangerous Roadstead—Iron Cargo in Wooden Ship.

A time policy of insurance to endure six months was executed on a wooden ship by brokers acting on the instructions of the agents of her owner. The ship was lost within the time specified in the policy. In an action for the sum assured, that in the instance of the owner, the underwriters denied liability, on the ground that they had been induced to effect the policy at a low premium (1) by false and fraudulent misrepresentations made by one of the pursuer's brokers as to the voyage the ship was to take; and (2) by wilful concealment of facts material to the risk and known to the assured, viz., that the ship was to carry an exceptionally dangerous cargo for a wooden vessel to carry, and was intended to proceed to an exceptionally dangerous open roadstead. *Held*, on a proof, (1) that the alleged fraudulent representations were not proved; (2) that the port to which the vessel sailed was not one which was notoriously dangerous or of which the owner had any special knowledge; (3) that it was not proved that such a cargo as was carried was of such an exceptionally dangerous character for such a ship that its nature ought to have been disclosed to the underwriters; and therefore that the underwriters were liable under the policy.

F. E. Harvey & Company, who acted as agents for Mr Francis Henwood, the owner of a vessel called the "Eunice," employed Messrs Leitch, Gilchrist, & Aird, marine insurance brokers, Glasgow, to effect an insurance on that vessel. A policy of insurance was executed on the 23d May 1881. By it the vessel was insured for six calendar months, commencing with the 23d day of May 1881 and ending with the 22d day of November 1881, as employment might offer, in port and at sea, in docks and on ways, at all times and in all places whatsoever or wheresoever. The policy was a valued one, the vessel being valued at £2500.