

the proceedings. In the case before us Barnett had not an *ex facie* title, and objection was taken before the trial proceeded. I accordingly agree that the conviction must be quashed.

The Court passed the bill and suspended the conviction.

Counsel for the Complainer—A. S. D. Thomson. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondent—Guy. Agents—Clark & Macdonald, S.S.C.

Saturday, June 9.

(Before the Lord Justice-Clerk, Lord M'Laren, and Lord Kincairney.)

CLARK v. LOWE.

*Justiciary Cases—Appeal—Competency—Action of Sequestration for Rent in Small Debt Court—Refusal of Warrant for Sale—Small Debt Act 1837 (1 Vict. c. 41), secs. 5 and 31, and Schedules B and G.*

The Small Debt Act 1837, section 5, enacts that the Sheriff, on hearing applications for sequestration for rent, "may either recal the sequestration in whole or in part, or pronounce decree for the rent found due, and grant warrant for the sale of the sequestered effects."

In an action of sequestration for rent raised in the Small Debt Court the usual warrant was granted to sequester the goods on the premises, and thereafter the Sheriff pronounced decree for the rent, but while not recalling the sequestration he refused to grant warrant for the sale of the sequestered effects.

In an appeal, *held (dub.* Lord Kincairney) that the refusal to grant a warrant of sale was a "deviation in point of form from the statutory enactment" in sec. 5 of the Small Debt Act, which "prevented substantial justice from having been done," within the meaning of section 31 of the Small Debt Act 1837, and that the appeal must consequently be *sustained*.

This was an appeal at the instance of Janet Lindsay Clark and William Stephens Clark under section 31 of the Small Debt Act 1837. The appellants, being proprietors of certain heritable subjects in Auchtermuchty, brought an action of sequestration for rent in the Small Debt Court of the County of Fife at Cupar. The action for sequestration and sale concluded for £8 due as rent, and the summons, following the form of Schedule B of the Small Debt Act 1837, contained the usual warrant to sequester the goods upon or within the said premises. The warrant of sequestration was duly executed in ordinary course.

Proof was led in the action on 15th November 1899, and after hearing parties the Sheriff-Substitute (ARMOUR) on 1st March 1900 pronounced decree for the rent

claimed but refused warrant of sale of the sequestered effects. The Sheriff's interdictor was in these terms—"Decree for £8, 4s., with £1, 6s. 11d. of expenses: Refuses motion for warrant of sale of sequestered effects, and diligence to be done by ordinary poiding and arrestment, and decerns."

The pursuers appealed to the High Court of Justiciary, and argued—The refusal of the warrant of sale meant that the appellants were deprived of their lawful remedy. Under sec. 5 of the Small Debt Act the Sheriff might at the hearing recal the sequestration in whole or in part, but if he pronounced decree for the rent, allowing the sequestration to stand, he had no alternative but to grant warrant for the sale of the sequestered effects. The refusal to grant warrant of sale was a deviation in point of form from the statutory enactment in section 5, which prevented substantial justice from having been done within the meaning of section 31 of the Small Debt Act, so that the appeal was competent. Under the sequestration following on their hypothec the appellants had a preference, whereas under a mere ordinary poiding and sale they would have no preference.

Argued for the respondents—Section 5 of the Small Debt Act was not imperative that the Sheriff must either recal the sequestration or pronounce decree and grant warrant of sale. The word used was "may," not "shall." Even if it was the effect of the section that the Sheriff must either recal the sequestration or grant warrant of sale, yet substantial justice had not been prevented in this case, so that the appeal to the High Court was not competent under section 31 of the Small Debt Act. To make an appeal competent there must, in addition to deviation from the statutory requirement, be substantial injustice—*Paterson & Sons v. Scott-Moncrieff* (1895), 1 Adam 576, 32 S.L.R. 627; *Paterson v. Mackay*, 1872, 2 Coup. 327. Here the appellants had the remedy of poiding and sale by which they might have recovered this rent if they had chosen to try.

LORD M'LAREN—The jurisdiction of this Court in appeals under the Small Debt Act of 1837 is of a strictly limited character, and success on the part of the appellant is rare. There are, however, cases in which it is expedient in the public interest that errors committed should be subject to correction. In this action of sequestration for rent the landlord's sequestration is founded on his hypothec, which gives him a preference over other creditors to the extent of the goods which he may attach under his hypothec. The Small Debt Act does not re-enact the whole law as to hypothec, but assumes that the landlord has rights under it which require to be expiscated. At common law a landlord who obtains a sequestration for rent is entitled to follow up the sequestration by a sale of the subjects attached. This right is clearly recognised, both by the enacting clause of the Small

Debt Act and by Schedules B and G. In this case the landlord raised his action of sequestration for rent, and obtained the usual warrant to sequester the goods upon the premises. At the hearing the warrant was liable to be recalled by the Sheriff in whole or in part. We have no record of the evidence, and do not know upon what grounds the Sheriff proceeded. But as the sequestration was not recalled we are bound to assume that the Sheriff thought the landlord was within his rights in getting the sequestration. But if he was entitled to sequestration, then both at common law and under the statute he was entitled to a warrant for the sale of the sequestrated effects. The Sheriff here, while giving decree for the rent which he found due, refused to grant warrant of sale. I cannot help thinking that this was a deviation from the statutory enactment.

The remaining question is, whether the deviation is such as to have prevented substantial justice being done. It is in accordance with substantial justice that when a creditor's right is affirmed his remedy must be granted. It may also be pointed out that the landlord's hypothec followed by the use of sequestration gives him a preference as against other creditors, whereas if he were left, as was suggested, to an ordinary pouncing he would have no preference. I consider that this is a case of deviation from the statutory requirements which has prevented substantial justice being done, and I think the appeal should be allowed, and that we should remit to the Sheriff to grant warrant of sale as concluded for.

LORD KINCAIRNEY—I am not prepared to differ, but I feel greater difficulty in this case than your Lordships seem to have felt. Appeals to this Court under the Small Debt Act should not be readily granted. Review is permitted only in very exceptional cases. The Act in section 5, with which we are concerned, provides that the Sheriff on hearing the application for sequestration "may either recal the sequestration in whole or in part or pronounce decree for the rent found due, and grant warrant for the sale of the sequestrated effects." The argument is, that if the sequestration is not recalled in whole or in part, the Sheriff must needs, as a matter of form, give an order for the sale of the sequestrated effects. I doubt that. That may be the usual and proper course, but the Sheriff may think that the remedy by pouncing is sufficient, and if he thinks so may he not simply pronounce decree for the rent with a power of ordinary pouncing, as was here done? I am not clear that it is a deviation from the statute for the Sheriff to refuse a warrant for the sale of the sequestrated effects if he thinks that the landlord can work out his remedy by pouncing.

Further, mere deviation in point of form from the statutory enactments does not render an appeal to this Court competent. The appellant must show that the irregularity prevented substantial justice. He must complain not of a mere formal mistake but of an injury. Now, here the

appellant got decree for his rent, and warrant for carrying that out by pouncing. By the right which the Sheriff has given him he might have recovered his rent, but he has never tried to carry out the warrant of pouncing. I do not know that in these circumstances the appellant having a remedy he has not tried to put in force can come here complaining of substantial injustice. Has he shown that any harm has been done to him? These are my difficulties, but I do not hold them so strongly as to lead me to dissent when they appear insufficient to your Lordships.

LORD JUSTICE-CLERK—I have no vote unless your Lordships differ. I think that your Lordships agree that the appellant was entitled to be granted a warrant of sale of the sequestrated effects, and therefore I only express my opinion in supplement. It is the ordinary right of a landlord who has obtained sequestration to get warrant. The Sheriff could of course have recalled the sequestration in whole or in part, but he left the sequestration standing. If he does so he must carry out the ordinary sequence of sequestration by granting warrant of sale, and if he does not do so, he, on the face of it, deviates from the statute. The deviation, I think, involves substantial injustice. It may be that the appellant here could work out his remedy by means of an ordinary pouncing. That depends upon circumstances, and I do not think that we must inquire into the circumstances here. If the deviation from the statute is one which may inflict substantial injustice, we must take it on the footing that substantial injustice has been inflicted. It is not that the appellant may not work out his right and get his rent in some other way, but that he is deprived of the high right actually his in virtue of the sequestration.

The Court sustained the appeal, and remitted the case to the Sheriff to grant warrant of sale.

Counsel for the Appellants—Guy. Agent—Andrew Clark.

Counsel for the Respondents—Munro. Agents—Douglas & Miller, W.S.

Saturday, June 9.

(Before the Lord Justice-Clerk, Lord M'Laren, and Lord Kincairney.)

COCHRAN v. WALKER.

*Justiciary Cases—Summary Procedure—Substitution of One Complaint for Another—Copy of Complaint not Served on Accused.*

A person who had been apprehended and brought before a magistrate upon a summary complaint, was remitted to the Sheriff Court, but was sent back to the Burgh Court by the procurator-