"On 28th March 1907 the Sheriff-Substitute, without further hearing or attendance of parties, issued the following interlocutor, viz.—'Continues till 15th April next in Court for delivery as craved on payment of £7, 0s. 10d. to the defender,' the summons being marked by him on the back thus—'Sustains the defence, pursuers to have delivery on payment of £7, 0s. 10d. to the defender.'

"On 15th April 1907, when the case was again called in Court, pursuers' agent renewed his objections stated at the first calling to the competency of the counter-claim, p. £7, 0s. 10d., and also objected to the competency of the interlocutor superseding decree for delivery till payment of the counter-claim, and craved decree of delivery *de plano* with expenses. He also tendered a formal minute covering said objections. The Sheriff-Substitute declined to receive same, and, as moved by the respondent's agent, granted the defender absolvitor with expenses, for which he decerned against the pursuers."

The appellants stated the following grounds on which the appeal should be sustained—"(1st) Because the said defence was absolutely incompetent, being an attempt to counterclaim money against delivery of moveables. (2nd) Because the Sheriff-Substitute (apart from the incompetency of the defence) acted contrary to the express terms of section 11 of the Small Debt (Scotland) Act 1837, in admitting the counter-claim for £7, 0s. 10d., no counter-claim having been served on pursuers in terms thereof. (3rd) Because the Sheriff-Substitute in so admitting evidence for and entertaining said defence acted with malice and oppression in the sense of section 31 of the said Small Debt (Scotland) Act 1837, and that he also wilfully deviated in point of form from the statutory enactments, causing substantial injustice to the pursuers."

Counsel for the appellants maintained that the appeal should be sustained, and cited *Taylor* v. *Ormond*, February 28, 1906, 5 Adam 52, 8 F. (J.) 76, 43 S.L.R. 652.

Counsel for the respondent maintained (1) that a counter-claim was not necessary here and that the Sheriff-Substitute was right, but (2) that in any event the Sheriff-Substitute had erred in law only, and an appeal was thus incompetent—*Buchanan* v. *Glasgow Corporation Waterworks Commissioners*, September 19, 1862, 4 Irv. 225.

LORD MACKENZIE—I have come to be of opinion that this is a case where a counter-claim should have been served. It is no doubt true that when section 11 of the Small Debt Act was drafted there was no provision for action for delivery of corporeal moveables. Such provision, however, was made by section 2 of the Small Debt Amendment Act 1889. But it appears to me that when an action for delivery is brought and the defence stated is "You are not entitled to delivery because I have a claim against you for a certain pecuniary amount," that in effect was just a demand under section 11 of the Small Debt Act 1837, and that was just the position taken up by the pursuers' agent. He objected to there not having been a counter-claim served upon him under section 11. He appears to have taken part in the proof, but I do not think he was thereby prejudiced. He repeated his objection after the proof, and again at the continued diet on 15th April, when he lodged the formal minute. Therefore I think there was a deviation in point of form on the part of the Sheriff-Substitute, and I think that in result the deviation has prevented substantial justice being done, because as matters stand the defender has been assoilzied from the demand for delivery of the policies although they were apparently the property of the pursuers, while the defender's claim is unaffected. The right to demand payment is entirely reserved by section 11. Therefore anything I do will not prejudice or prejudge the defender's right to get payment of any moneys he may have expended on the policies. But I think there was deviation resulting in such substantial injustice as to bring the case within the principle in *Taylor* v. *Ormond*, although no doubt the circumstances there were somewhat different.

The Court sustained the appeal.

Counsel for the Appellants — Munro. Agent — Archibald Hamilton, Solicitor, Glasgow.

Counsel for the Respondent — Trotter. Agent—David Cook, Writer, Glasgow.

COURT OF SESSION.

Thursday, June 13.

SECOND DIVISION.

[Sheriff Court at Stirling.

SINCLAIR *v.* TOD.

Master and Servant—Landlord and Tenant — Ejection — Reparation — Action of Damages for Ejection without Warrant — No Averment of Title to Possess — Relevancy.

A shepherd, who as part of his remuneration had the use of a house, was, on 30th July, or at any rate prior to the termination of his contract of service on 2nd August, dismissed by his master. On 11th August, in the absence of the shepherd, who was attending an action brought by him against his master for payment of wages, his furniture was removed from the house by his master and placed on the ground outside, and the house was shut up. The shepherd raised an action of damages, averring that the furniture had been damaged by exposure to the weather, *held* that the action was irrelevant, the pursuer having set forth no title to possess. *Macdonald* v. *Duchess of*

Leeds, May 16, 1860, 22 D. 1075; *Macdonald* v. *Watson*, July 4, 1883, 10 R. 1079, 20 S.L.R. 727, *followed*.

Peter Sinclair, shepherd, sometime at the Binns, near Denny, afterwards at Kirkliston, raised an action of damages against John Tod, farmer, the Binns, near Denny.

The action as originally laid concluded for payment of (1) £32, 1s. 6d. on the ground of damage done to the pursuer's furniture in the circumstances narrated below, and (2) £50 for "loss, trouble, and inconvenience" caused the pursuer and his family, who had "suffered much in their feelings and reputation" owing to their ejection as narrated below.

The second head of damage was, however, abandoned in the Court of Session.

The following narrative of the *facts*, as appearing from the pursuer's averments, and from his averments in a previous action against the defender in the Small Debt Court, is taken from the opinion of Lord Ardwall — "The facts of the case are shortly these. The pursuer and his wife were in the service of the defender, and as part of the remuneration for their services they were entitled to the occupation of a house free of rent. On account of a dispute between the pursuer's wife and the defender's wife on 30th July 1905, the defender dismissed the pursuer's wife from his employment. It seems to be uncertain at what point of time the pursuer was dismissed, but there is no doubt that the pursuer's contract of service came to an end on or before the 2nd August 1905. On 2nd August 1905 the pursuer raised an action in the Small Debt Court at Stirling for £53, 11s., restricted to £12, one of the items claimed being the rent of the said house till Whitsunday 1906. The pursuer's wife also raised an action against the defender for £11, 6s. 6d. on the same date. The pursuer and his wife attended the calling of these small debt actions in the Sheriff Court at Stirling on 11th August 1905, and, taking the opportunity of their being absent from home, the defender removed the pursuer's whole furniture and effects out of the said house, and placed them on the ground outside.

"The pursuer alleges that he and his wife and family have suffered in their feelings and reputation, and have been put to considerable loss and trouble, and that their furniture has been damaged, and the present action is brought to recover that damage.

"It may be mentioned that the small debt actions were compromised by a payment of £6 paid before decree."

The defender pleaded—"(8) The action as raised being irrelevant and incompetent, the defender ought to be assoilzied with expenses."

On 15th May 1906 the Sheriff-Substitute (BUNTINE) sustained this plea and dismissed the action.

The Sheriff (LEES), on 11th June 1906, adhered to his Substitute's interlocutor.

Note.—"On a careful consideration of the pursuer's averments and of the authorities, I am afraid the pursuer has no valid claim against the defender for the injuries to his repute and to his furniture that the somewhat unusual course taken by the defender is said to have caused.

"It is plain that if a servant's period of service has come to an end he has no claim to receive remuneration thereafter. Now, the right to occupy the house was part of the remuneration given to the pursuer, and after his dismissal he had no more claim to the house than he had to further wages. No doubt, if the defender had taken the usual course of applying to the Court for re-instatement in his rights, the Court would have given the pursuer a reasonable interval to find a house and remove his family and his furniture, and an employer cannot by taking the law into his own hands deprive his servant of this necessary time. But here the defender left the pursuer in possession for about twelve days, and the pursuer does not say that the defender agreed to allow him to continue to occupy the house, or that he was unable to get a house, or that there was any illness or other cause that prevented him from removing. Then as regards the furniture, he does not aver that it was roughly used, or that he was unable to take it away, or that the defender could have put it in any outhouse to save it from the weather. His sole ground of claim, as far as I can find from his condescendence, is that the defender took the unusual course of ejecting the pursuer at his own hands and without any warrant.

"But then the Supreme Court has, on several occasions, held or observed that where a servant's right of occupation has ceased, and he refuses to remove, his employer may put him out of the premises; and if he brings an action for this ejectment, he is excluded from any claim, as he had no title to possess. The authorities are all collected and commented on by Mr Sheriff Begg in his admirable judgment in the case of *Wallace* v. *Hamiltons*, 9 Sheriff Court Reports, 130, to which I may for brevity refer.

"There are thus no special grounds presented by the pursuer in this action which would justify me in giving him a redress which the Supreme Court has held in other actions must be refused. In deference therefore to these authorities I think I am bound to affirm the judgment of the Sheriff-Substitute."

The pursuer appealed, and argued—The turning out of pursuer's furniture without notice to remove by a certain day was not merely high-handed and "unusual" but illegal—Stair, iv, 28, 1 and 2; Ersk. Inst., iii, 7, 16, iv, 1, 15; *Scougal* v. *Crawford*, March 13, 1819, 2 Mur. 110; *Hally* v. *Lang*, June 26, 1867, 5 Macph, 951; *Scottish Property Investment Company* v. *Horne*, May 31, 1881, 8 R. 737, 18 S.L.R. 525. The defender ought to have applied for a warrant to eject, which would only have been granted after pursuer had had reasonable time to find another house. Even assuming that that was not the only competent course, at any rate sufficient notice, and

notice that the house was required by a definite day, should have been given. This want of definite notice distinguished the present from the three cases cited by the defender.

Argued for the defender — Though it might be usual it was not necessary to apply for a legal warrant of ejection. The time elapsing between the pursuer's dismissal and the ejection was sufficient and reasonable to enable him to find other quarters. A person who had no title to possess, and averred none, could not maintain an action of damages for ejection. *Macdonald* v. *Duchess of Leeds* (*Macdonald* v. *Chisholm*), May 16, 1860, 22 D. 1075; *Macdonald* v. *Watson*, July 4, 1883, 10 R. 1079, 20 S.L.R. 727; *Scott* v. *M'Murdo*, February 4, 1869, 6 S.L.R. 301; Fraser on Master and Servant, p. 332.

At advising—

LORD STORMONTH DARLING—The pursuer here, who was a shepherd on a farm near Denny in Stirlingshire, with a free house on the farm as part of his remuneration, complains of a rather high-handed proceeding on the part of his master, the defender, by which the defender on 11th August 1905, without any legal form of process, entered the pursuer's house and turned his whole furniture and effects into the road outside the house. For this he claims damages, which he estimates at £32, 1s. 6d.

The defender admits the removal of the furniture, and justifies it on the ground that the pursuer had been dismissed from the defender's service on 29th July, and that the pursuer had no right to occupy the house after that date.

This action was called on 20th March 1906, and the Sheriff-Substitute on 15th May sustained a plea of irrelevancy stated for the defender on the ground that the pursuer had no title to occupy the house at the time in question, and dismissed the action. The Sheriff, on appeal, as I gather from his note, rather reluctantly adhered, for he called the course taken by the defender, in not first applying for a legal warrant of ejection, a "somewhat unusual" course.

Now, I agree with the Sheriff there, for such a warrant would undoubtedly have been granted, but only, according to the practice of the Sheriff Court, on some short but reasonable notice, which would probably have enabled the pursuer to remove the furniture himself, and could at least have given him time to make arrangements for its disposal. I cannot therefore commend the action of the defender in proceeding to remove the furniture at his own hand, though he may have had considerable provocation from the pursuer.

But it is one thing to express approval of the defender's action, and it is another thing to say that the pursuer has a right to claim damages for the removal of the furniture. That can only arise if the defender's conduct was illegal, or, in other words, if the defender on his part had no right to do what he did.

Now, looking to the cases (which are not many but fairly recent on this branch of the law) I cannot say that the defender was not entitled to act as he did. After dismissal the pursuer's title of possession had come to an end, and although I do not think that the defender would have been justified in turning him out the very next day, I cannot say that he had no right to turn him out in twelve days, which was what he actually did. The case of *Macdonald* v. *Duchess of Leeds* in 1860 (22 D. 1075) and *Macdonald* v. *Watson* in 1883 (10 R. 1079) are both to the effect that a pursuer who complains of ejection without a warrant must set forth a title to possess, and that in the absence of such a title ejection without a warrant is, in the words of Lord President Inglis, "a perfectly legal proceeding." To the same effect is a passage in Lord Fraser's book on Master and Servant, p. 332.

I therefore think that we must affirm the judgments of the Sheriffs.

LORD LOW—I have carefully considered the argument in this case, because when a party has taken the law into his own hands it is incumbent upon the Court to scrutinise the circumstances closely. The conclusion at which I have arrived is that the learned Sheriffs have rightly decided the case, and upon the proper ground.

The question seems to me to be whether the pursuer has averred any legal title to possess the house at the time when the defender removed the furniture from it. In the third article of the condescendence the pursuer makes a somewhat curious averment. He says that his wife, who was also in the defender's employment, had a dispute on 30th July 1905 with the defender's wife, and that on account of that dispute "the defender dismissed her" (the pursuer's wife) "from his employment, but expressed his willingness at the time to retain the pursuer in his employment." The pursuer does not say what answer he gave to that proposal, but immediately proceeds to refer to an action which he brought against the defender on 2nd August in the Small Debt Court.

I suppose that the averment in regard to the alleged offer of the defender to retain the pursuer in his employment was intended to suggest at all events that the pursuer had not been ordered to leave the house. The action in the Small Debt Court, however, to which the pursuer refers, at once disposes of any such suggestion, because in the claim annexed to the summons the pursuer averred that the defender on 30th July, without previous notice and without cause, dismissed him from his service, and also insisted upon his leaving the dwelling-house, and the pursuer, *inter alia*, claimed £6 as rent of dwelling-house up to the following term of Whitsunday.

Therefore the facts must be taken to be (as indeed was not disputed) that the defender dismissed the pursuer from his service on the 30th July and ordered him to leave the house, the right to occupy which was

part of his wages, and that it was not until the 11th of August that the defender put the pursuer's furniture out of the house.

Now it was conceded that the pursuer was entitled to a reasonable time after his dismissal to make arrangements for living elsewhere. What is a reasonable time is a matter of circumstances, but *prima facie*, from the 30th of July to the 11th of August should have been ample. If the pursuer had averred that he had done his best to get another dwelling-place, but had been unable to do so, and that the defender knew that that was the case, a different question might have arisen. But the pursuer makes no averment of that sort, and for anything which he says to the contrary he may have done nothing at all in the way of looking out for another residence.

These being the circumstances, it is plain that the pursuer had on 11th August no title whatever to possess the house, and that being so, it is settled that he cannot claim damages from the defender because the latter removed his furniture from the house. The cases of *Macdonald* v. *Duchess of Leeds*, 22 D. 1075, and *Macdonald* v. *Watson*, 10 R. 1079, are directly in point—indeed the circumstances in these cases appear to me to have been more favourable to the party claiming damages than in this case. These were both considered decisions of the First Division, and, so far as I know, their soundness has never been impugned.

I am therefore of opinion that the interlocutor of the Sheriffs should be affirmed.

Lord Ardwall—This is an action for damages for wrongous ejection. The Sheriff-Substitute dismissed the case as irrelevant, and that judgment was, on appeal, adhered to by the Sheriff. I am of opinion that the judgments of the Sheriff and Sheriff-Substitute are well founded and ought to be affirmed.

The facts of the case are shortly these—[*His Lordship here gave narrative of facts above quoted*].

The defender pleads, *inter alia*, that the action is irrelevant, and this plea the Sheriffs have sustained.

The plea against the relevancy is founded on the fact that at the time the ejection complained of took place the pursuer had no title to possess the house in question or to keep his furniture there. I am of opinion that the plea is well founded in fact and law.

I am of opinion that in an action of damages for alleged wrongous ejection the tenant must set forth his title to possess the premises from which he complains he has been ejected, and further, that a landlord does not require a warrant to remove a person who has no title to possess. This, I think, is settled by the judgments in the case of *Macdonald* v. *Watson*, 10 R. 1079, following on the case of *Macdonald* v. *Duchess of Leeds*, 22 D. 1075.

In the present case there can be no doubt that the pursuer on the 11th August 1905 had no title to possess the house in question. He and his wife had been dismissed, and he had raised an action of damages in the Small Debt Court on 2nd August in which he claimed, *inter alia*, the rent of the house from that date till Whitsunday 1906. It is therefore vain to say that he had any title either as a servant or otherwise to possess the house on the 11th of August. His contract of service had come to a termination and he had accepted that situation. Lord Fraser in his work on Master and Servant, page 332, writes thus—"If a servant refuse to depart of his own accord the master is even entitled to turn him out and remove his effects from the premises without process of law." He points out that the contrary was laid down in the case of *Scougal* v. *Crawford*, 2 Mur. 110 (1819), but that that is inconsistent with the later case of *Scott* v. *M'Murdo*, 1869, 6 S.L.R. 301. I prefer, however, to rest my judgment in this case upon the two cases first cited.

While, therefore, I have no doubt upon the law applicable to the present case, I must not be taken as approving in the usual case of an ejection being carried out without process of law. With regard to a dismissed servant a summary application for removing would be competent, and I think that this is the course that it is prudent and right to follow where there are no exceptional circumstances. It is certainly the safer course for the master and fairer to the servant.

I cannot, however, say that looking at the averments of both parties in the present case it appears that the pursuer was very harshly treated. The defender says that the pursuer agreed with him to leave the house on the Thursday following the 31st of July, the defender representing that he required the house for a new servant. The defender further avers that he agreed to pay the expense of the pursuer's removal. Of course, there has been no proof on these matters, and I merely allude to them for the purpose of saying that without a proof it is not fair to hold that the defender behaved harshly or without warning of any kind in what he did. This, however, does not enter into my decision of the case, which proceeds entirely upon the ground that the pursuer, not having set forth any title to occupy the house, has stated no relevant case entitling him to damages, and it seems to me that it would be a startling proposition to affirm that a person is liable in damages for removing from a house belonging to him furniture belonging to another person who had no right to be there.

The Lord Justice-Clerk was absent.

The Court dismissed the appeal and affirmed the interlocutors appealed against, and decerned.

Counsel for the Pursuer (Appellant)—M'Lennan, K.C.—A. A. Fraser. Agent—R. F. Calder, Solicitor.

Counsel for the Respondent—Wark. Agents—Macpherson & Mackay, S.S.C.