LORD DUNDAS—I agree. I would only add that the argument proceeded on the footing that the statement in the case that "the tenant of the house has no power to sublet" is not correct, and that element accordingly falls out of the matter.

The decision of the case comes to depend on the view to be taken of its own facts, which are very peculiar. I should be slow to differ from the conclusion of an experienced Sheriff upon a matter of that sort unless I thought it was plainly wrong, but in the present case I think the Sheriff's decision is right. The question will be answered in the negative.

The Court answered the question in the case in the negative and dismissed the appeal.

Counsel for the Appellant -- Mercer. Agent—A. Thomson Clay, W.S.

Counsel for the Respondent—Macquisten. Agent—W. Traquair, W.S.

COURT OF SESSION.

Tuesday, December 12.

FIRST DIVISION.

[Lord Cullen, Ordinary.

THOMSON *v.* THE BENT COLLIERY COMPANY, LIMITED.

Removing--Summary Removing--Review—Competency—Power of Sheriff to Disallow Written Answers—Sheriff Court (Scotland) Act 1907 (7 *Edw. VII, c.* 51), *First Schedule, Rules*, 119, 121, *and* 122.

The Sheriff Court (Scotland) Act 1907, Rule 119, provides that summary removings shall be conducted in the summary manner in which proceedings are conducted under the Small Debt Act, and shall not be subject to review. Rule 121 gives power to the Sheriff to order written answers subject to certain conditions as to finding caution. Rule 122 provides that "where a defender has given in answers . . . such causes shall . . . be conducted according to the procedure in ordinary actions of removing, and shall be subject to review in common form."

In a summary removing the Sheriff refused to allow written answers, and afterwards granted decree. In a suspension at the instance of the defender, on the ground that the written answers which he had tendered had not been received, *held* that it was in the discretion of the Sheriff to allow written answers, and suspension *refused.*

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, c. 51), First Schedule, enacts with regard to "Summary Removings" —Rule 119. "Such causes shall be conducted and disposed of in the summary manner in which proceedings are conducted under the Small Debt Acts, and shall not be subject to review." 121. "The sheriff may order written answers or adjourn the hearing of such causes, but where defences cannot be instantly verified, the sheriff shall ordain the defender to find caution for violent profits, unless the sheriff shall dispense with caution, which he may do if he see fit." 122. "Where a defender has given in answers, and caution for violent profits has been found or has been dispensed with, such causes shall, as nearly as may be thereafter, be conducted according to the procedure in ordinary actions of removing, and shall be subject to review in common form."

Robert Thomson, miner, 23 Raith Place, Bothwell, brought a note of suspension and interdict against the Bent Colliery, Limited, Palace Colliery, Bothwell, in which he sought suspension of a warrant of ejection obtained against him in the Sheriff Court at Hamilton at the instance of the respondents.

The complainer averred—"(Stat. 4) On 23rd November 1910 the respondents presented in the Sheriff Court of Lanarkshire at Hamilton a petition craving that a warrant should be granted by the Court for removing and ejecting the complainer from the foresaid subjects. The said petition was served on the complainer on said 23rd November 1910. (Stat. 5) The complainer compeared before the Sheriff-Substitute upon 29th November 1910 and craved leave to lodge answers in writing conform to the provisions of section 38 of the Sheriff Courts (Scotland) Act 1907, and the rules for regulating procedure contained in the first schedule annexed to the Act. The complainer further offered to find caution for violent profits. The Sheriff-Substitute refused this application and directed the case to be tried without answers in writing. In so refusing the complainer's application the Sheriff-Substitute acted oppresively and in direct disregard of the statutory forms, whereby it is provided as follows—'Where a defender has given in answers, and caution for violent profits has been found or has been dispensed with, such causes shall, as nearly as may be thereafter, be conducted according to the procedure in ordinary actions of removing, and shall be subject to review in common form.'"

He pleaded—"(2) The complainer having at the calling of said petition craved leave to lodge written answers and offered caution for violent profits, the Sheriff-Substitute was not entitled to conduct the proceedings in the manner regulated by the Small Debt Acts, and the said decree is accordingly null and of no effect, or alternatively is subject to review in common form."

The defender pleaded, *inter alia*, (1) that the complainer's averments were irrelevant, and (2) that the note was incompetent.

On 13th June 1911 the Lord Ordinary (CULLEN) sustained the respondents' first plea-in-law and refused the note.

Opinion—"I am of opinion that the respondents' plea to the competency of this application is well founded.

"Rule 119 of the 1907 Act provides that summary removings shall be conducted and disposed of in the summary manner in which proceedings are conducted under the Small Debt Acts, and shall not be subject to review.

"Rule 121, however, gives power to the Sheriff to order written answers, with the proviso that where defences cannot be instantly verified the sheriff shall ordain the defender to find caution for violent profits, unless he shall dispense with such caution, which he may do if he thinks fit.

"Rule 122 goes on to provide that 'where a defender has given in answers and caution for violent profits has been found or dispensed with, such causes shall, as nearly as may be thereafter, be conducted according to the procedure in ordinary actions of removing, and shall be subject to review in common form.' I read this rule as prescribing the form of procedure, &c., in cases where the sheriff has ordered answers and dealt with the matter of caution in virtue of rule 121. In the present instance the sheriff did not order answers, and the cause therefore was not taken out of Rule 119, but remained a summary one not subject to review.

"I shall accordingly dismiss the note."

The complainer reclaimed, and argued—The Lord Ordinary was in error in holding that the Sheriff could *ex proprio motu* allow or disallow written answers. Where written answers were tendered he was bound to receive them—Sheriff Courts (Scotland) Act 1838 (1 and 2 Vict. c. 119), secs. 12 and 13. That was the recognised practice—Dove Wilson's Sheriff Court Practice, p. 483—and it had not been abrogated by any of the provisions of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, c. 51).

Argued for the respondents—The Lord Ordinary was right. It was in the discretion of the Sheriff to allow or disallow written answers—Act of 1907 (*cit. sup.*), First Schedule, secs. 119, 121, and 122. Previous practice founded on the Act of 1837 could no longer be appealed to, for the Act of 1907 was clear in its terms.

LORD PROBATIONER (WILLIAM HUNTER, K.C.)—In this case the complainer and reclaimer seeks to suspend a warrant ejecting him from premises occupied by him of which the respondents are proprietors. The ground, as I understand it, upon which he seeks to do so is that he offered to give in written defences, which were not received, and he maintains that on that account he is entitled to have the warrant of eviction suspended.

The procedure in summary applications for removal is now determined by the provisions of the Act of 1907, and solely by these provisions, the provisions which appeared in the earlier Act of 1838 being entirely repealed; and I would only say with reference to these earlier provisions, that, at all events in one or two respects, they are substantially different from the subsequent provisions. That is especially the case so far as the matter of caution is concerned. But it seems to me that the rules of the Sheriff Courts Act 1907, particularly rules 119, 121, and 122, provide completely for the disposal of all summary applications in the Sheriff Court. The ordinary rule is 119, which provides that the applications are to be dealt with summarily, and that what the Sheriff determines is not to be subject to review. Rule 121 provides—"The sheriff may order written answers or adjourn the hearing of such causes; but where defences cannot be instantly verified, the sheriff shall ordain the defender to find caution for violent profits, unless the sheriff shall dispense with caution, which he may do if he sees fit." By rule 122 a right—a limited right—of review is given. That rule comes into application, as the Lord Ordinary has held, only where certain conditions are satisfied. They are two—(1) that the defender has given in answers; and (2) that caution has been found or has been dispensed with. In this case caution, although offered, was not found and was not dispensed with. In point of fact the Sheriff, in exercise of the discretion conferred upon him under the previous rule, considered that this was not a case for written answers at all. Under these circumstances, therefore, I think that the complainer is not entitled to the redress which he seeks. I am therefore of opinion that the Court should refuse the reclaiming note and sustain the first plea for the respondents.

At the subsequent advising—

LORD PRESIDENT—In this case I agree with the opinion that was delivered by the Lord Probationer. I think the Lord Ordinary's judgment is right and that it should be sustained, and I think he has with very great succinctness given the true reasons for the judgment. I shall only say one word more. The argument that Mr Moncrieff addressed to us really turned upon this—that *in dubio* we ought to construe the rules of the Sheriff Courts Act of 1907 in the light of what he says was the practice under the Sheriff Courts Act of 1838. Now I think it is at least a doubtful question whether one is entitled, upon a question of the construction of the statute which undoubtedly rules the matter, to consider what was the practice under a repealed statute where the words used were not identical. Apart from usage there is another reason which I think excludes the construction which the complainer desires, and it is this. It is directed in both statutes that these removings shall be conducted as small-debt processes. Now under the Small Debt Acts there is no right in a defender to insist on written pleadings. In a Small Debt Court it is only with the permission of the Sheriff that written pleadings can come in. Accordingly you begin, so to speak, with an entire absence of written pleadings, and you come to rules

121 and 122 of the First Schedule to the 1907 Act, and the construction of these is clearly as the Lord Ordinary has found.

Accordingly on the whole matter I propose that we should refuse the reclaiming note.

LORD KINNEAR—I agree with your Lordship, and only add that I cannot think that there is any sufficient ground for construing a repealing statute by usage which may have followed upon the statute which has been repealed. It has been held that the ambiguous provisions of a statute may be construed with reference to usage which has followed on the statute itself, but even in that case the usage, as is explained in the well-known case of *The Clyde Navigation Trustees* (1883, 10 R. (H.L.) 77), is only an aid to interpretation, more or less valuable according to the circumstances, and cannot absolve the Court from the duty of determining the true construction of the statute for itself when it comes into controversy. But so far as I know it has never yet been held that usage which has followed upon one Act can construe a more recent Act which, for aught we can tell, repeals it just because of the practice that may have followed upon it. Upon the construction of the statute itself I entirely agree with your Lordship.

LORD MACKENZIE—I agree with your Lordships.

LORD JOHNSTON was sitting in the Valuation Appeal Court.

The Court adhered.

Counsel for Complainer (Reclaimer)—Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for Respondent—Horne, K.C.—M. P. Fraser. Agents—Erskine Dods & Rhind, S.S.C.

Wednesday, December 13.

SECOND DIVISION.

[Sheriff Court at Glasgow.

R. B. BALLANTYNE & COMPANY *v.* PATON & HENDRY.

Ship — Charter-Party — Construction — "Cargo to be Discharged Free of Expense to Steamer, with Use of Steamer's Winch if Required"—Liability for Damage to Steamer in Course of Discharge.

A charter-party provided — "12. Cargo to be . . . discharged free of expense to steamer, with use of steamer's winch and winchmen if required."

Held that the shipowner's common law liability for the discharge was not transferred to the charterers by the clause quoted, so as to render the latter responsible for damage caused to the vessel during the discharge.

Reparation — Ship — Damage to Ship in Course of Discharge—Liability of Charterers — Employment and Payment by Charterers of Stevedores—Relevancy.

The owners of a vessel raised an action against the charterers in respect of damage caused to the vessel in the course of discharging under the charter-party, and averred that the stevedores and owners of the crane engaged in the discharge, by whose negligence the damage was caused, were employed and paid by the charterers.

Held that these averments were not relevant to infer liability on the part of the charterers, and action *dismissed.*

R. B. Ballantyne & Company, owners of the s.s. "Bessie Barr," *pursuers*, raised an action in the Sheriff Court at Glasgow against Paton & Hendry, shipowners there, *defenders*, concluding for payment of £270 in respect of damage sustained by the "Bessie Barr."

By charter-party dated 30th March 1909, under which the pursuers chartered the "Bessie Barr" to the defenders to carry a cargo of stones from Portland to Glasgow, it was provided, *inter alia*—"12. Cargo to be loaded, stowed, and discharged free of expense to steamer, with use of steamer's winch and winchmen if required."

A cargo of stones was duly carried from Portland to Glasgow, where in the course of discharge damage was sustained by the vessel, by the falling of a large stone as it was being taken out of the hold.

The pursuers averred—"(Cond. 1) It was provided (by the charter-party) that the cargo was to be loaded, stowed, and discharged by the charterers, and free of expense to the steamer. (Cond. 3) The defenders, in carrying out the terms of the charter-party by themselves or others for whom they are responsible, employed and paid the stevedores and owners of the crane engaged in the discharge of the vessel, and they are liable for the fault of persons employed in doing such work. (Cond. 4) Said accident was due to the fault and / or negligence of those discharging the said vessel, for whom the defenders are responsible under said charter-party, in not taking precautions to see that the said stone when in course of being hoisted was kept clear of the combings, and further, that the hoisting was carried out cautiously, so that, if there was the risk of the stone catching on the combings, same should have been released and hoisting stopped before the chain had been broken."

The defenders averred—" (Ans. 1) . . . By the said charter-party it is provided that the loading, stowing, and discharging is to be done by the pursuers, but free of expense to the steamer."

The pursuers pleaded, *inter alia*—"(1) The defenders having undertaken by the terms of said charter of pursuers' vessel to discharge the cargo carried, and same having been done in such negligent manner as to cause the loss and damage claimed by the pursuers, decree should be granted therefor with interest and expenses, as craved."

The defenders pleaded, *inter alia* — "(1) The action is irrelevant."