[HIGH COURT OF AUSTRALIA.]

WINSLOW AND OTHERS . . . . APPELLANTS;
PLAINTIFFS,

AND

WILSON AND ANOTHER . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Mar.* 13.

SYDNEY, *April* 29.

Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.

Landlord and Tenant—Goods or chattels on leased premises—Execution—Warrant of distress, Whether "execution"—Rent due to landlord—Non-payment of rent before removal of goods—Landlord's prior claim to rent—Landlord and Tenant Act 1928 (*Vict.*) (*No.* 3710), *secs.* 12*, 13* (*cf.* 8 *Anne c.* 14, *sec.* 1).

Sec. 12 of the *Landlord and Tenant Act* 1928 (Vict.), which requires payment to the landlord of rent due (not exeeeding one year's rent), before removing goods taken in execution, applies to an execution under a warrant of distress issued pursuant to an order of a Court of Petty Sessions for the recovery of a civil debt.

Decision of the Supreme Court of Victoria (Full Court): *Winslow* v. *Wilson*, (1936) V.L.R. 52, reversed.

* The *Landlord and Tenant Act* 1928 (Vict.), provides :—

"12. No goods or chattels whatsoever lying or being in or upon any messuage lands or tenements which are leased for life or lives term of years at will or otherwise shall be liable to be taken by virtue of any execution on any pretence whatsoever; unless the party at whose suit the said execution is issued out before the removal of such goods from off the said premises by virtue of such execution pays to the landlord of the said premises or his bailiff all such sum or sums of money not exceeding or amounting to more than one year's rent as are due for rent for the said premises at the time of the taking of such goods or chattels by virtue of such execution. 13. In case the said arrears exceed one year's rent, then the party at whose suit such execution is sued out paying the said landlord or his bailiff one year's rent may proceed to execute his judgment as he might have done before the commencement of this Act. And the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money."

APPEAL from the Supreme Court of Victoria.

An action was commenced in the County Court at Melbourne by Frederick Daniel Winslow and others, the trustees for the time being of the Manchester Unity Independent Order of Oddfellows in Victoria, claiming damages against Constables Wilson and Springfield for the wrongful removal of certain goods and chattels from premises leased by the plaintiffs under a warrant of distress issued out of the Court of Petty Sessions at Melbourne, without payment to the plaintiffs as landlords of the premises of the amount then due for rent contrary to sec. 12 of the *Landlord and Tenant Act* 1928. The defendants joined as third parties the person on whose behalf the warrant of distress was issued and his solicitor on an indemnity given to the defendants to indemnify them against any personal liability in any proceeding arising from the sale of the goods in question.

The County Court Judge stated a case for the opinion of the Full Court of the Supreme Court on the issue between the plaintiffs and the defendants, which is the only question material to this report. A case was also stated on the issue between the defendants and one of the third parties, but that question was not debated in the Full Court at this stage or in the High Court.

The facts as found by the County Court Judge, so far as material to this report, were substantially as follows :—

(1) On 29th May 1934 the plaintiffs granted to one Florence Lascelles a lease of rooms numbered 204 and 205 at Manchester Unity Building, corner of Swanston and Collins Streets, Melbourne, for the term of five years. The lease was subsisting and in full force and effect up to and including 24th April 1935.

(2) On 16th April 1935 the defendants executed a warrant of distress issued out of the Court of Petty Sessions at Melbourne and seized thereunder the goods and chattels of one Florence Lascelles at the rooms numbered 204 and 205. The warrant of distress was issued on an order of the Court of Petty Sessions at Melbourne in the case of Solis Mitchell Edward Love Cantor (who is identical with the third party Cantor) against Florence Lazelle trading as Florence Lascelles (who is identical with the tenant of the premises above referred to).

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(3) On 17th April 1935 the plaintiffs, being unaware of the execution of the warrant of distress, caused a warrant to distrain under the *Landlord and Tenant Act* 1928 to be executed by the plaintiff's bailiff on the goods and chattels of Florence Lascelles at the said rooms for rent due in respect thereof.

(4) At about 11 o'clock in the morning of 24th April 1935 the third party, Cantor, through his solicitor informed the defendants that the plaintiffs had distrained through their bailiff on the goods and chattels of Florence Lascelles for rent on 17th April 1935. The defendants then became aware that the plaintiffs had claimed against Florence Lascelles for rent due by her to them. The defendants thereupon asked the third party, Cantor, through his solicitor for his instructions. The third party, Cantor, through his solicitor informed the defendants that the plaintiffs' seizure was illegal and verbally instructed them to remove the goods and chattels from the rooms to Russell Street and to proceed with their sale.

(5) At about 12 o'clock noon on 24th April 1935 the goods and chattels were removed by the defendants from the rooms 204 and 205 aforesaid.

(6) The goods and chattels were sold by the defendants at about 2 o'clock in the afternoon of 24th April 1935.

(7) On 24th April there was rent not exceeding one year's rent due to the plaintiffs by Florence Lascelles for the premises.

(8) No portion of the rent due by Florence Lascelles to the plaintiffs was paid by the defendants to the plaintiffs prior to the removal of the goods and chattels from the premises or prior to the sale of the goods and chattels or at all.

(9) Prior to the removal of the goods and chattels the defendants had notice that rent was due by Florence Lascelles to the plaintiffs and of the amount claimed by the plaintiffs in respect thereof.

(10) Prior to and at the time of the removal of the goods and chattels as aforesaid, the defendants were aware of the provisions of sec. 12 of the *Landlord and Tenant Act* 1928.

(11) The net value of the goods and chattels sold by the defendants after allowing for all charges is £33 6s. 6d.

(12) Rent in excess of the amount of £33 6s. 6d. was due by Florence Lascelles to the plaintiffs in respect of the premises on

16th April 1935, and no payment in reduction of such rent has since been made.

(13) Any breach or omission of the provisions of sec. 12 of the *Landlord and Tenant Act* 1928 by the defendants was wilful.

(14) Where goods are seized under a warrant of distress issued out of a Court of Petty Sessions and a claim is made by a landlord in respect of rent due for the premises on which the goods are seized, it is the custom of the police to require instructions or an indemnity from the person issuing the warrant of distress before proceeding with the distress.

(15) No interpleader summons was taken out by the defendants in respect of the plaintiff's claim for rent.

The question reserved for the opinion of the Supreme Court between the plaintiffs and the defendants was :—

> Does sec. 12 of the *Landlord and Tenant Act* 1928 apply to persons removing goods under or pursuant to warrants of distress issued out of Courts of Petty Sessions ?

The Supreme Court answered this question in the negative: *Winslow* v. *Wilson* (1).

From this decision the plaintiffs now by special leave appealed to the High Court.

Wiseman, for the appellants. A warrant of distress issued out of a Court of Petty Sessions is an " execution " within the meaning of sec. 12 of the *Landlord and Tenant Act* 1928. The expression " sheriff or other officer " in sec. 13 of that Act should be given the same meaning throughout Part II. of the Act. *Bank of New Zealand* v. *Curtis* (2) was wrongly decided. Secs. 113 and 114 of the *Justices Act* 1928 contemplate a claim by a landlord under sec. 12 of the *Landlord and Tenant Act* in cases where there has been a seizure of a tenant's goods under a warrant of distress. Although sec. 113 does not refer to a claim for rent, sec. 114, which is to be read with sec. 113, provides what procedure is to be followed " in the case of a claim for rent " by a landlord in an interpleader summons under sec. 113. Such a claim for rent can only arise out of the provisions of sec. 12 of the *Landlord and Tenant Act*. Sec.

(1) (1936) V.L.R. 52.

(2) (1925) 31 A.L.R. (C.N.) 13.

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68 of 7 & 8 Vict. c. 96, which is the origin of sec. 113 of the *Justices Act*, refers to a claim made to or in respect of goods "taken in execution under the process of any Court for the recovery of small debts . . . by any landlord for rent." Courts for the recovery of small debts had been established throughout England with jurisdiction up to 40s. They gave judgments and awarded execution thereon against the goods and chattels of those against whom they made an order. They were not Courts of record and were presided over by commissioners who had no power to fine or imprison for contempt. The first such Court was established in the reign of Henry VIII. in London and received legislative recognition by 3 Jac. I. c. 15. In the time of George II. a modified form of such Court was established throughout England with the characteristics above described. A list of such Courts is set out in the schedule to the *County Court Act* 1846. Sec. 68 of 7 & 8 Vict. c. 96 is a legislative recognition that sec. 12 of the *Landlord and Tenant Act* 1928 (8 Anne c. 14, sec. 1) applied in the case of executions under the judgments of such Courts, which were the prototypes of the Victorian Courts of Petty Sessions. These Courts were supplanted by the County Courts established throughout England by the *County Court Act* 1846 (9 & 10 Vict. c. 95). The provision contained in the *County Court Act* 1846, sec. 107, and repeated in sec. 160 of the *County Court Act* 1888 (51 & 52 Vict. c. 43), providing a substituted process in the case of a landlord's claim for rent, was not adopted in Victoria. The civil jurisdiction of justices in Courts of Petty Sessions in England has never been as extensive as that granted to them in Victoria. In England their jurisdiction was mainly confined to criminal matters (11 & 12 Vict. c. 43; 42 & 43 Vict. c. 49; *Halsbury, Laws of England*, 1st ed., vol. 19, p. 571). "Execution" in sec. 12 of the *Landlord and Tenant Act* simply means the enforcement of a curial act (*Halsbury, Laws of England*, 2nd ed., vol. 14, p. 3). The section is to be read liberally (*Henchett* v. *Kimpson* (1)), i.e., in favour of landlords (*Woodfall's Law of Landlord and Tenant*, 23rd ed. (1934), p. 634). It applies where the goods are seized under a sequestration in Chancery (*Dixon* v. *Smith* (2)). It does not

(1) (1762) 2 Wils. K.B. 140; 95 E.R. 731.

(2) (1818) 1 Swans. 457; 36 E.R. 464.

apply in such a case as *Brandling* v. *Barrington* (1), as in that case the goods were seized merely to enforce an appearance and no judgment at all was entered. The expression " sheriff or other officer " in sec. 13 of the *Landlord and Tenant Act* does not mean " sheriff or other officer of the Court," as is suggested by the Full Court. The sheriff is not an officer of the Court but is appointed as an independent officer (*Supreme Court Act* 1928, sec. 196). Even if he were, the expression " other officer " would include a police constable executing a warrant of distress (*Supreme Court Act* 1928, secs. 204, 207-218 ; *Police Regulation Act* 1928, secs. 18-20 ; *County Court Act* 1928, secs. 23 (2), 24 ; *County Court Rules* 1930, Order XXIX., rule 2 (*b*) ; Order XLVI., rule 16). A Court of Petty Sessions is a Court of record (*Cooper & Sons* v. *Dawson* (2)).

Mulvaney, for the respondents. Secs. 12 and 13 of the *Landlord and Tenant Act* should be construed together, and it is necessary to ascertain the meaning of the terms there employed as understood when the sections were first enacted in 8 Anne c. 14, sec. 1. Then it must be considered whether any modification has to be made in that meaning as a result of local legislation. The Court should not presume the existence of the landlord's right to be paid by the executing creditor, unless it comes expressly within the statutory provisions. Certain provisions have been retained by 8 Anne c. 14, which cannot apply to execution under the *Justices Act* 1928. In order to come within secs. 12 and 13 there must be a judgment that is the common law type of judgment that was enforced by one of the usual writs executed by the sheriff. The words " execution is sued out " in sec. 12 of the *Landlord and Tenant Act* are appropriate to the issue of execution at common law, but not to the enforcement of warrants of distress under the *Justices Act*. " Judgment " in sec. 13 means a judgment of a superior Court, or of a Court set up by statute, whose adjudications are described by the statute as " judgments." In the same section " sheriff or other officer " must be read as sheriff or other officer *ejusdem generis* with " sheriff," and must be an officer of the Court out of which the execution issues

(1) (1827) 6 B. & C. 467 ; 108 E.R. 523. (2) (1916) V.L.R. 381 ; 38 A.L.T. 17.

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(*Brandling* v. *Barrington* (1); *Lee* v. *Lopes* (2); *Ex parte Warren*; *In re Holland* (3)). The test is: Can the Court say that orders of Courts of Petty Sessions are "judgments" within the meaning of secs. 12 and 13 of the *Landlord and Tenant Act*? Orders of Courts of Petty Sessions are not enforced in the same way as judgments of superior Courts (*Justices Act* 1928, secs. 103-115). The only sections in which the word "judgment" is used in the *Justices Act* 1928 are secs. 143 and 144, which deal with appeals to General Sessions in criminal and quasi-criminal proceedings. Sec. 112 (2) provides the procedure to be followed on the execution of warrants of distress. In sec. 114 of the *Justices Act* 1915 the words "execution" and "execution creditor" appeared for the first time, and by the *Statute Law Revision Act* 1916 these words were changed to "warrant of distress" and "party obtaining such warrant," thus showing an intention of avoiding any possibility of the process by way of warrant of distress in Petty Sessions being regarded as identical with or analogous to execution on a judgment. The reference in sec. 114 of the *Justices Act* 1928 to "a claim for rent" by a landlord does not throw any light on the meaning of sec. 113 as sec. 114 was taken direct from the rules under the *County Court Act* under which a landlord could claim for rent due. The omission of the word "judgment" from the provisions of Division 3, subdivision 2, of the *Justices Act* 1928 dealing with adjudications of Courts of Petty Sessions is deliberate. The officer who executes a warrant of distress under sec. 110 of the *Justices Act* 1928 has only the specific powers given to him by that section, whereas secs. 12 and 13 of the *Landlord and Tenant Act* 1928 contemplate that, in the event of the executing officer finding there is rent due to the landlord, his obligation is to pay that rent and then levy for that amount and the amount of the judgment (*Justices Act* 1928, sec. 112 (2) (*a*), (*h*) and (*i*)). Sec. 12 of the *Landlord and Tenant Act* 1928 has been re-enacted unaltered since the decision in *Bank of New Zealand* v. *Curtis* (4) and the meaning attributed to it in that case must be intended to be retained by the Legislature (*Craies* on *Statute Law*, 3rd ed. (1923), p. 157; *Mackay* v. *Davies* (5)).

Wiseman, in reply.

Cur. adv. vult.

(1) (1827) 6 B. & C. 467; 108 E.R. 523.
(2) (1812) 15 East. 229, at p. 231; 104 E.R. 831, at p. 832.
(3) (1885) 15 Q.B.D. 48.
(4) (1925) 31 A.L.R. (C.N.) 13.
(5) (1904) 1 C.L.R. 483, at p. 491.

The following written judgments were delivered :—

LATHAM C.J. Sec. 12 of the *Landlord and Tenant Act* 1928 provides that no goods or chattels upon any leased land shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit such execution is sued out before the removal of such goods from the premises by virtue of the execution pays to the landlord such amount as is due for rent not exceeding more than one year's rent.

Sec. 13 provides that if the arrears exceed one year's rent then if the party at whose suit the execution is sued out pays the landlord one year's rent he may proceed to execute his judgment. This section concludes with a provision that " the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money."

The question which arises is whether these sections apply in favour of the landlord in the case of a police constable acting under a warrant of distress issued for the purpose of enforcing an order made by a Court of Petty Sessions upon a complaint under the *Justices Act*. It is contended that within the meaning of the section an order of a Court of Petty Sessions made upon a complaint is not a judgment, that a warrant of distress is not an execution and that a police constable is not included under the phrase " sheriff or other officer." Further it is submitted that sec. 112 of the *Justices Act* relating to the execution of distress warrants in the enforcement of orders made by Courts of Petty Sessions provides a complete procedure involving the payment of the whole proceeds of a sale under the warrant to the Clerk of Petty Sessions. This procedure, it is said, excludes the possible application of the sections of the *Landlord and Tenant Act* which authorizes the payment to the plaintiff of " as well the money so paid for rent as the execution money."

This argument begins with the fact that secs. 12 and 13 of the Act are a re-enactment of the *Landlord and Tenant Act* 1709, 8 Anne c. 14, sec. 1. When the Act of Anne was passed there were no Courts of Petty Sessions and accordingly there were no " judgments " of Courts of Petty Sessions or " executions " thereunder. It is true that in 1709 these provisions in their natural meaning applied to

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executions levied to enforce final judgments of the Courts of common law and not in the case of orders of inferior Courts which were not then enforceable by seizure and sale of goods. But it may be noted that, after the civil jurisdiction of the sheriff in England had been superseded by the establishment of the modern County Courts in 1846, it was considered necessary to provide in express terms that the statute of Anne should not apply to goods taken in execution under the warrant of a County Court—see 9 & 10 Vict. c. 95, sec. 107 :—" And it be enacted, That so much of an Act passed in the Eighth Year of the Reign of Queen *Anne*, intituled *An Act for the better Security of Rents, and to prevent Frauds committed by Tenants*, as relates to the liability of Goods taken by virtue of any Execution, shall not be deemed to apply to goods taken in execution under the Process of any Court holden under this Act."

Such a provision would have been quite unnecessary and out of place if the statute of Anne would not otherwise have applied to executions levied by the High Bailiff (not the sheriff) of the County Court. It is clear that Parliament acted upon the view that the statute of 1709 would apply (or at least might be held to apply) where goods could be taken in execution under a judgment of any Court, even though that Court did not exist in 1709. This circumstance, however, is not conclusive. The provision may have been inserted *ex abundanti cautela*.

A judgment in its strictest sense is said to be the sentence that the law pronounces by the Court upon the matter contained in the record (*Co. Litt.* 39 a). In some contexts the term judgment does not include an order, for example, where a distinction is drawn between final judgments and other orders made by a Court (*Ex parte Chinery* (1)). But though the *Justices Act* generally refers to an adjudication of a Court of Petty Sessions as an order, the term " judgment " is used in relation to such adjudications in secs. 143 and 144 of that Act. An order of the Court made as a decision upon a complaint is a determination of the rights of the parties in relation to the subject matter of the complaint. Such an order possesses all the essential characteristics of a judgment as distinct from an adjudication which, while made in the course of a legal

(1) (1884) 12 Q.B.D. 342.

proceeding, does not determine the rights of the parties with respect to the subject matter of the proceeding. If, as held by *Madden* C.J. in *Cooper & Sons* v. *Dawson* (1), a Court of Petty Sessions is a Court of record, it is hardly arguable that an order of such a Court determining the subject matter of a complaint between parties is not a judgment. But apart from this consideration, the character of such an order as I have described it, and the use of the term "judgment" in the *Justices Act*, are sufficient to satisfy me that such an order is a judgment within the meaning of the sections of the *Landlord and Tenant Act*.

"Execution" and grammatically allied terms are used in many places in secs. 112, 113, and 114 of the *Justices Act* 1928 for the purpose of describing action under a distress warrant issued out of a Court of Petty Sessions. The process under a distress warrant is identical in all substantial particulars with the process under an execution issued out of a higher Court. The goods upon which a distress is levied are sold for the purpose of raising money to satisfy a liability to pay a sum declared to be payable by the decision of a Court. When in this substantial manner the procedure is identical with execution under judgments given in other jurisdictions, and when the very term execution is used in the *Justices Act* to describe the process, there appears to me to be no reason for denying that "execution" in the *Landlord and Tenant Act* includes process under a warrant of distress issued under the *Justices Act*.

Another objection is based upon the words "sheriff or other officer." I can see no reason for limiting the words "or other officer" to the sheriff's officers, that is, to persons acting in the place of the sheriff. Nor am I able to accept the argument that the words "other officer" mean "other officer of the Court." The sheriff was a royal officer, not an officer of any Court (*Pollock and Maitland, History of English Law*, 2nd ed. (1898), vol. 1, pp. 533-534; *Blackstone*, 21st ed. (1844), vol. 1, p. 339; *Anson, Law and Custom of the Constitution*, 4th ed. (1935), vol. II., Part II., pp. 37-38; *Encyclopædia of Laws of England*, 2nd ed., vol. 13, p. 375). If a sheriff was not an officer of the Court there is no ground for construing the words "or other officer" as meaning "or other officer of the Court."

(1) (1916) V.L.R. 381; 38 A.L.T. 17.

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Another argument is based upon sec. 112 of the *Justices Act* which requires the constable executing a distress warrant to pay the proceeds of sale under a warrant to the clerk of Petty Sessions. Sec. 112 (2) (*h*) then provides that the clerk of Petty Sessions may deduct out of the amount realized by the sale the costs and charges actually incurred in effecting such sale and that he shall render to the owner of the goods on demand the surplus (if any) after retaining the amount for which the warrant was issued and the costs and charges of execution. It is contended that it is impossible to follow this procedure and at the same time to obey the directions of the *Landlord and Tenant Act* which require that the amount to be levied shall be increased by the amount of rent (up to one year's arrears) which is due and which has been paid to the landlord, and that that amount shall be paid to the plaintiff suing out the execution. I can see no serious difficulty in the constable obeying both directions. The *Justices Act* authorizes the constable to levy the amount of the judgment with costs and charges and directs him to deal with the money so levied in a particular way. The *Landlord and Tenant Act* authorizes him to levy also another sum for rent and expressly authorizes him to pay that sum to the person suing out the execution. Thus the constable can levy the larger amount, pay the amount of the rent direct to the plaintiff by virtue of the *Landlord and Tenant Act*, and then follow the directions of sec. 112 of the *Justices Act*. The payment of the execution money to the clerk of Petty Sessions is a payment to him for "the plaintiff."

Finally, in my opinion, the provisions of secs. 113 and 114 of the *Justices Act* are practically conclusive of the question raised. These sections provide for procedure by way of interpleader where, goods having been distrained under a warrant, a claim is made "to or in respect of" the goods by any person not being the party against whom the warrant is issued. It will be observed that sec. 113 refers not only to claims made "to" the goods, but also to claims made "in respect of" goods. When goods are in *custodia legis* a landlord cannot distrain upon them (*Halsbury, Laws of England*, 2nd ed. vol. 10, p. 507). He therefore cannot by distraining put himself in the position of making a claim in relation to goods after they have been seized under a distress warrant issued under the

Justices Act. But sec. 114 recognizes not only that there may be a claim " to " goods as being the property of the claimant, but also that a landlord may have a claim in relation to goods seized under a warrant of distress. Sec. 114 (1) provides " rules " " with regard to claims made " under sec. 113. Sec. 114 makes express provision for the case of a claim for rent. It provides that " in the case of a claim for rent " the claimant shall within a specified period deliver to the member of the police force charged with the execution of the warrant or leave at the office of the clerk of Petty Sessions particulars " of the demand thereof, and for what period and in respect of what premises the sum is claimed to be due." These words cannot be intended to apply to a case where the landlord has distrained and the goods are in the custody of his bailiff before a constable has seized under a distress warrant. Goods already distrained by a landlord cannot be seized under an execution (*Halsbury, Laws of England*, 2nd ed., vol. 14, p. 63). In such a case the claim of the landlord (not limited to one year's rent) would be a claim to the exclusion of the claim of the party suing out the warrant of distress in the Court of Petty Sessions. It is not necessary, in order to deal with this case, to include the particular words dealing with a landlord's claim which have been quoted from sec. 114. These words deal with the case of a landlord who cannot allege that he has a claim " to the goods " which entitles him to exclude the bailiff from possession of the goods. They deal with the case of a landlord who is making a claim for rent, such claim being a claim which, if supported, would justify the Court in making an order upon an interpleader summons in favour of the landlord and against the person suing out the warrant of distress. The words must refer to the *Landlord and Tenant Act*, secs. 12 and 13. The only alternative to this view is to hold that the words in sec. 114 to which I have referred are meaningless. Such a view should not be adopted unless no other view is possible.

For the reasons which I have given I am of opinion that secs. 12 and 13 of the *Landlord and Tenant Act* are applicable in the case of a warrant of distress issued out of a Court of Petty Sessions and that accordingly the appeal should be allowed.

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STARKE J. The *Landlord and Tenant Act* 1928 of Victoria provides, in sec. 12, that no goods or chattels lying or being upon any lands which are leased shall be liable to be taken by virtue of any execution unless the party at whose suit the execution is sued out before the removal of such goods from the premises by virtue of such execution pays to the landlord of the premises all such sum or sums of money (not exceeding or amounting to more than one year's rent) as are due for rent of the premises at the time of the taking of such goods and chattels by virtue of such execution. Substantially the section is taken from the well-known provision in the statute of 8 Anne c. 14.

The question in this case is whether the seizure of certain goods under a warrant of distress issued out of a Court of Petty Sessions in a civil proceeding was a taking of such goods by virtue of an execution within the meaning of the Act. The plain sense of the words in the statute of Anne, it has been said, is confined to executions upon judgments (*Lee* v. *Lopes* (1); *Brandling* v. *Barrington* (2)). The language of the statute of Anne—despite the provisions of the statute 7 & 8 Vict. c. 96, sec. 67—suggests that the executions there mentioned are the writs of execution known to, and proceeding according to the course of, the common law. The *County Courts Act* in England (51 & 52 Vict. c. 43) enacted that the statute of Anne should not apply to goods taken in execution under the warrant of a County Court, and made other provisions in respect of rent due to landlords. In Victoria, the *Justices Act* 1928, secs. 113, 114, provides for the adjudication of adverse claims to or in respect of goods distrained under the warrant of any justice, and requires in the case of a claim for rent that particulars shall be given of the demand thereof and of the period and premises in respect of which the same is claimed to be due. This is an explicit legislative recognition of the application of sec. 12 of the *Landlord and Tenant Act* 1928 to warrants of distress issued by justices. Similar provisions are found in the *County Court Rules* 1930, Order XXXI., rules 1, 2. In my opinion it is impossible, in the face of this legislative interpretation of the *Landlord and Tenant Act*, to exclude warrants of distress issued by justices from the scope of the word "execution" used in that Act.

The appeal should be allowed.

(1) (1812) 15 East 229; 104 E.R. 831.

(2) (1827) 6 B. & C. 467; 108 E.R. 523.

DIXON AND EVATT JJ. The question raised by this appeal is whether, under a warrant of distress for the enforcement of an order of a Court of Petty Sessions for the recovery of a civil debt, goods lying upon leased premises may be seized and removed without payment to the landlord of rent in arrear not exceeding one year's rent.

Secs. 12 and 13 of the *Landlord and Tenant Act* 1928 (Vict.) are founded upon 8 Anne c. 14, sec. 1. The effect of the provision contained in sec. 12 is that no goods lying or being upon premises the subject of a lease shall be liable "to be taken by virtue of any execution on any pretence whatsoever" unless, before the removal of the goods, the party suing out the execution pays to the landlord the amount owing to him for rent, not exceeding one year's rent. Sec. 13 provides that upon paying such rent the party suing out the execution "may proceed to execute his judgment." It goes on: "And the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money."

The denial that these provisions apply to warrants of distress for civil debts is based upon the meanings that are placed upon certain expressions they contain and upon a suggested incongruity of procedure. The expressions are, "judgment," "execution," "sue out," "sheriff or other officer" and, perhaps, "plaintiff." The incongruity consists in a difficulty in fulfilling literally the direction given by the *Justices Act* 1928 (Vict.) as to the disposal of the proceeds of execution, if the rent is to be levied as well as the judgment.

It may be conceded that the word "judgment" once properly signified a determination of issues upon a record according to the course of the common law. In its narrow and most technical sense it aptly described determinations of the courts of common law at Westminster.

The expression "sheriff or other officer," no doubt, was used in 8 Anne c. 14 to denote particularly sheriffs, coroners, elisors and their officers, but it is evidently a general description employed without any intention of limiting the application of the provision.

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"Execution" is also a general word, although again, it may well be that writs of *fi. fa.* were prominently in the contemplation of the framers of the statute.

The expression "sue out" is appropriate to obtaining process from a Court but is not inapplicable to a procedure in which a precept or warrant is granted.

The word "plaintiff" was, of course, the proper description of the party seeking relief in a personal action or in a suit in equity.

But the choice of all these expressions arises from the conditions prevailing when the statute 8 Anne c. 14 was enacted. Inferior Courts possessing civil jurisdiction were rare and were local. Their judgments were as a rule enforced against the person. The writs commonly used to obtain satisfaction in money of a judgment debt were *fi. fa.* and *levari facias*. It was natural for the framers of the statute to speak in terms used of the judgments of the common law courts at Westminster. It was not the object of the statute to deal with mesne process, such as distringas, which did not involve the satisfaction of the debt. It is for this reason that the statute refers to the execution of a judgment and not for the purpose of differentiating between judgments and orders or decrees. Indeed, at that date, money due under a rule of court or judge's order could not be enforced by *fi. fa.* or other process against property. A decree in equity, too, was enforceable only by process against the person. Sec. 1 of 8 Anne c. 14 has always received a liberal construction. For example, notwithstanding the specific reference to "plaintiff," it has been held to apply to an execution sued out by a defendant to recover costs obtained by him on a judgment of nonsuit (*Henchett* v. *Kimpson* (1)). *Pratt* C.J. said: "The statute shall have a liberal construction; and the words 'party at whose suit the execution is sued out' &c. shall be construed to mean either plaintiff or defendant, whose judgment and execution it is." Even a sequestration to enforce a decree in equity has been considered to be within it (*Dixon* v. *Smith* (2)).

When by 7 & 8 Vict. c. 96, secs. 58-60, imprisonment for debt under £20 was restricted and process of execution against goods

(1) (1762) 2 Wils. K.B. 141; 95 E.R. 731.

(2) (1818) 1 Swans. 457; 36 E.R. 464.

was given in the case of courts of request and other inferior courts, it was taken for granted that 8 Anne c. 14 would apply. This was assumed although the statutory writ of *fi. fa.* was to be issued as a warrant to one of the bailiffs of the court and in its execution constables and other peace officers were required to lend their aid. Accordingly, by sec. 68, it was provided that, if any claim should be made to any goods or chattels taken in execution under the process of any court for the recovery of small debts, or in respect of the proceeds or value thereof, *by any landlord for rent*, or by any person not being the party against whom such process had issued, then an interpleader summons might be obtained.

When the modern County Courts were established by 9 & 10 Vict. c. 95, the High Bailiffs were put generally in the same position as sheriffs (see secs. 33, 138, and 139 of that Act). The interpleader provisions (sec. 118) recognized the applicability of 8 Anne c. 14. The amending Act of 19 & 20 Vict. c. 108, sec. 75, excluded the application of sec. 1 of 8 Anne c. 14 " to goods taken in execution under the warrant of a County Court " and provided another procedure for protecting the landlord's claim (cp. *Foulger* v. *Taylor* (1)). This special procedure was not adopted in Victoria. But rule 236 of the Victorian *County Court Rules* of 1890, which related to interpleader proceedings, included a reference to a claim for rent and required particulars of the demand therefor. In 1915 a provision based upon the County Court rule was introduced into the consolidation of the *Justices Act* of that year. The phraseology of sec. 113 of the *Justices Act* 1915 (now sec. 113 of the *Justices Act* 1928) closely resembles that of sec. 103 of the *County Court Act* 1890. These sections, although obviously based on sec. 68 of 7 & 8 Vict. c. 96, omit the words contained in that section " by any landlord for rent." But rule 236 of the *County Court Rules* 1890 sought to supply the omission. Sec. 114 of the *Justices Act*, taken from the rule, effectually does so ; for it forms part of the statute and expressly refers to the case of a claim for rent and requires " particulars of the demand thereof " to be delivered by the claimant to the member of the police force charged with the execution of the warrant of distress, or to leave it at the office of the Clerk of Petty Sessions.

(1) (1860) 5 H. & N. 202 ; 157 E.R. 1157.

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WINSLOW v. WILSON.

Dixon J. Evatt J.

This can only refer to a claim under secs. 12 and 13 of the *Landlord and Tenant Act*.

In our opinion, this history, judicial and statutory, of the treatment of 8 Anne c. 14 in England and the analogous statutory history here establish that the provisions of sec. 1 of 8 Anne c. 14 and secs. 12 and 13 of the *Landlord and Tenant Act* 1928 should be interpreted as applying to executions for the enforcement of judgments or orders for the payment of money pronounced or made by inferior Courts, including Courts of Petty Sessions. The change in terminology in sec. 114 of the *Justices Act* 1915 made by the *Statute Law Revision Act* 1916, No. 2875, which took out of the section the expression " execution " does not appear to us to affect this conclusion. For there cannot, we think, be any doubt that a warrant of distress to enforce an order is an execution within 8 Anne c. 14. An order of a Court of Petty Sessions requiring payment of a civil debt has no characteristics which would make it wrong to describe it as a judgment in the sense of that word in which it is and has long been habitually employed. The strict and ancient sense never was inflexible. It appears to us to come fairly within the meaning of the word " judgment " as used in 8 Anne c. 14 and in sec. 13 of the *Landlord and Tenant Act*.

More difficulty appears to us to arise from the objection that the procedure prescribed by the *Justices Act* for dealing with the moneys obtained under a warrant of distress is not consistent with the application of sec. 13 of the *Landlord and Tenant Act* which requires the officer to levy and pay over to the execution creditor " as well the money so paid for rent as the execution money." Sec. 112 (*h*) directs that the amount realized by the sale of the goods seized shall be paid to the clerk of Petty Sessions who, after deducting costs and charges actually incurred in effecting such sale, shall render to the owner on demand the surplus, if any, after retaining the amount of the sum for which the warrant was issued and the proper costs and charges of the execution of the warrant. In view of sec. 114 (1), we do not think this language can be taken to exclude the operation of sec. 13 of the *Landlord and Tenant Act*, which must be understood as adding another deduction in cases in which it is invoked.

For these reasons we are unable to agree in the decision of the Supreme Court. The appeal is from the answer given by that Court to a question reserved in the form of a special case under sec. 76 of the *County Court Act* 1928. No objection was taken to the competency of the appeal and the question whether the opinion of the Supreme Court is advisory or a conclusive determination of the question was not discussed. The test laid down by Lord *Atkinson* in *Tata Iron and Steel Co. Ltd.* v. *Bombay Chief Revenue Authority* (1) may appear to occasion a little difficulty, but it must be remembered that we are here dealing with a case stated by an inferior court of law to a superior court to which an appeal lies. It is part of a course of judicial proceedings. At any rate, we are not prepared to say that the order of the Supreme Court is one from which an appeal does not lie. As, however, the point was not argued, our decision should not be taken to conclude it.

We think the appeal should be allowed ; the order of the Supreme Court should be discharged. The first question in the special case should be answered : Yes. The special case should be remitted to the Supreme Court to be further dealt with according to law. The defendants respondents should pay the costs of the proceedings in the Supreme Court up to the date of our order.

McTIERNAN J. I agree with the judgment of the Chief Justice.

Appeal allowed. Order of the Supreme Court of Victoria dated 9th December 1935 *discharged. First question in special case answered : Yes. Special Case remitted to Supreme Court to be further dealt with according to law. Costs of proceedings in Supreme Court to be dealt with at the discretion of the Supreme Court. No costs of the appeal to this Court.*

Solicitor for the appellants, *G. A. Rundle.*

Solicitor for the respondents, *F. G. Menzies*, Crown Solicitor for Victoria.

H. D. W.

(1) (1923) L.R. 50 Ind. App. 212, 225 ; 39 T.L.R. 288.