or principally in their work. The leading object was trawling on behalf of the owner and others interested, and it was a mere incident of the particular voyage that the Fishery Board had a right to get a small portion of the fish.

If we compare the present case with the case of *Rourke* v. *The White Moss Colliery Company*, 1877, L.R., 2 C.P.D. 205, it is easy to see the broad distinction between the two cases. In *Rourke* the injured man was in the service of a pit-sinker. While the pit-sinking was going on no other work in the colliery was going on. The only work which was being carried on at the time and place when the accident happened was pit-sinking and not working coal. The pit-sinker was a contractor entirely independent of the colliery owners, and although they provided the plant and an engine and engineer they gave over the whole control thereof to the pit-sinker, or in other words lent both engine and engineer to the pit-sinker. It was accordingly held that the colliery owners were not liable for the injuries caused to the plaintiff by the fault of the engineer.

2. With regard to the question as to whether at the time of the wreck the vessel was under the control of the Fishery Board or their servant the deceased John Burgoyne, the evidence is I think clear to the effect that the control exercised by the deceased or the Fishery Board was of a very limited description. It is proved that the deceased was entitled to direct and did direct the master as to the parts of Aberdeen Bay he should trawl over, but he had truly no control, in the real sense of that term, over the master. For instance, if the master had thought that from any cause there was risk to the vessel in going where the deceased wished him to go, he had an absolute right to refuse to go, and the whole navigation and control of the ship as to steering, speed, engines, and everything else was in the master's hands as representing the defender and responsible to him. I am therefore unable to hold that it can be said in this case, as was said in others, that the defender had parted with the control of the vessel and its master and crew to the Fishery Board or its official.

[*His Lordship then dealt with the question of fault, coming to the same conclusion as the Sheriff.*]

LORD STORMONTH DARLING was absent.

The Court dismissed the appeal, affirmed the interlocutor appealed against, and found in fact and in law in terms of the findings in fact and in law in said interlocutor.

Counsel for the Pursuer (Respondent)—Kennedy, K.C.—A. M. Mackay. Agent—D. Hill Murray, S.S.C.

Counsel for the Defender (Appellant)—Dean of Faculty (Campbell, K.C.)—Murray. Agents—Alex. Morison & Company, W.S.

Friday, December 13.

FIRST DIVISION.

[Lord Dundas, Ordinary.

STEWART *v.* M'DOUGALL.

Diligence — Reparation — Sheriff — Small Debt Decree ad factum præstandum—Imprisonment on Failure to Implement Charge—"All Lawful Execution hereon"—Small Debt Amendment (Scotland) Act 1889 (52 *and* 53 *Vict. c.* 26), *secs.* 1, 2, *and Sched. B.*

In a small debt action *ad factum præstandum*, brought under section 2 of the Small Debt Amendment (Scotland) Act 1889, decree was given against the defender. The extract decree concluded by granting "warrant for all lawful execution hereon." The defender having disregarded the charge thereon was forthwith arrested and imprisoned. He brought an action of damages on the ground of illegal imprisonment.

Held that the extract decree being in terms of the statute, authorised, without further application to the Sheriff, imprisonment on failure to implement the charge, and consequently that the pursuer's averments were irrelevant and the defender fell to be *assoilzied.*

The Small Debt Amendment (Scotland) Act 1889 (52 and 53 Vict. cap. 26) enacts:—Section 1—"This Act . . . shall be construed as one with the recited Acts 1 Vict. cap. 41, and 16 and 17 Vict. cap. 80, so far as consistent with the tenor of these Acts respectively, and these Acts together may be cited as the Small Debt (Scotland) Acts 1837 to 1889."

Section 2—"Where a party claims to be owner, or to be entitled to the possession of any corporeal moveables, the value of which shall be proved to the satisfaction of the Sheriff not to exceed twelve pounds, and which are wrongfully withheld from him, he may apply in the Small Debt Court for an order for delivery thereof, and the Sheriff may grant such order accordingly; and the application therefor and the extract of the decree, if granted, to follow thereon shall be as nearly as may be in the forms of Schedules A and B respectively, but in other respects the procedure shall be conform as nearly as may be to the provisions of the first recited Act (*i.e.*, 1 *Vict. cap.* 41) so far as agreeable hereto: Provided always, that if delivery of any of the subjects sued for shall have become impossible, or if their value be alternatively concluded for, the Sheriff may give decree for their value to an amount not exceeding twelve pounds."

Schedule B—"At the day of One thousand eight hundred and the Sheriff of the shire of decerns and ordains the within designed , defender, to deliver to the pursuer [the subjects within referred to, *or state to what extent the order for delivery is granted*]; and finds the said defender liable to the pursuer in [the sum of, *any sum*

decerned for in lieu of others of the subjects that cannot be delivered, with [ ] of expenses; and grants warrant for all lawful execution hereon. G. H., Sheriff Clerk."

On 1st September 1906 Dionitius Stewart, commercial traveller, Aberdeen, brought an action against John M'Dougall, grain merchant, Aberdeen, to recover £500 damages for alleged imprisonment without legal warrant.

The facts, as averred, are given in the opinion (*infra*) of the Lord Ordinary (DUNDAS), who on 16th March 1907 pronounced an interlocutor finding that the pursuer had failed relevantly to aver that the defender, without any warrant, caused him to be apprehended and imprisoned, and assoilzieing the defender, with expenses.

Opinion.—"The pursuer seeks by this action to recover £500 in name of damages, upon the ground that the defender 'without any warrant caused the pursuer to be apprehended and imprisoned.' On referring to the condescendence one finds a somewhat involved history of a small debt action at Aberdeen, in which the defender sued the pursuer for delivery of a railway ticket, and obtained decree, with expenses, on 21st June 1906. The pursuer's counsel admitted that he could not now re-open, or ask review of, the proceedings in the small debt case; but he maintained that the manner in which the decree therein obtained was put into execution was injurious to him and illegal. What actually happened was as follows. On 21st June 1906 the Sheriff-Substitute (Reid) made entry in the Small Debt Court book, as applicable to the said case, 'Decerns within seven days; agent's fee 5s. J.R.' On the same day the Sheriff-Clerk-Depute issued an extract, which bore that the Sheriff decerned and ordained the present pursuer (Mr Stewart) to deliver to the present defender (Mr M'Dougall) a certain railway ticket, awarded 10s. 1d. sterling of expenses, 'and grants warrant for all lawful execution hereon.' On 2nd July 1906 the present pursuer was charged 'to implement the decree of which, and of the complaint whereon the same proceeded, the within is a copy, within ten days from this date under pain of imprisonment, so far as regards the delivery, and poinding and sale for the expenses, without further notice.' The charge was duly signed by a sheriff officer. The pursuer says that he 'disregarded the said irregular and incompetent proceedings,' and that on 17th July 1906 he was, upon the defender's instructions, 'forcibly, illegally, and without lawful warrant, apprehended' by a sheriff officer, and conveyed to the prison of Aberdeen, where he was detained 'for several hours.' The question raised upon these averments seems to be whether or not the defender's actings were 'lawful execution' of the decree of 21st June 1906. It becomes necessary, therefore, to investigate the terms of the Small Debt Acts, by which the diligence following upon such actions is regulated. The leading Act is 7 Will. IV, and 1 Vict. c. 41 (1837). That Act provides by section 13 that the Sheriff's decree, stating the amount of expenses (if any) found due to any party, and containing warrant for arrestment, and for poinding and imprisonment when competent, shall be annexed to the summons or complaint, and on the same paper with it, agreeably to the form in Schedule (A) annexed to the Act, or to the like effect, 'which decree and warrant, being signed by the clerk, shall be a sufficient authority for instant arrestment, and also for poinding and sale and imprisonment, where competent, after the lapse of ten free days from the date of the decree. . . .' The form in Schedule A (No. 7), *inter alia*, 'decerns and ordains instant execution by arrestment, and also execution to pass hereon by poinding and sale and imprisonment, if the same be competent, after . . . free days.' It appears, therefore, that under the principal Act of 1837 a defender who had failed to pay a civil debt (not less in amount than £8, 6s. 8d.—see 5 and 6 Will. IV, c. 70), might after the expiry of the prescribed charge, be imprisoned without further procedure. The Debtors (Scotland) Act 1880 (43 and 44 Vict. c. 34) abolished imprisonment for debt, but section 4 provided, *inter alia*, that nothing contained in the Act should affect or prevent the apprehension or imprisonment of any person under any decree or obligation *ad factum præstandum.* The reason for this provision is, in the words of Lord President Inglis in *Mackenzie*, July 12, 1883, 10 R. 1147, at p. 1151, 20 S.L.R. 757, 'very clear, and it is simply this, that if the right to imprison were abolished in such circumstances, no other method of enforcing such decrees would remain.' Then in 1889 the Small Debt Amendment (Scotland) Act (52 and 53 Vict. c. 26) became law. Section 1 provided that the Act should be construed as one with the recited Acts, viz., the principal Act of 1837, and the Sheriff Courts (Scotland) Act 1853, so far as consistent with the tenor of these Acts respectively. By section 2 a new jurisdiction was conferred upon the Small Debt Court. Provision was thereby made for an action for delivery of corporeal moveables up to the value of £12; 'and the application therefor, and the extract of the decree, if granted, to follow thereon shall be as nearly as may be in the form of Schedules A and B respectively; but in other respects the procedure shall be conform, as nearly as may be, to the provisions of the said first recited Act, so far as agreeable hereto.' The form of Schedule B, ordaining delivery, concludes with the words, 'and grants warrant for all lawful execution hereon.' The small debt action between the present parties was, as already explained, one for delivery of a railway ticket, in virtue of section 2 of the Act of 1889, and the extract decree admittedly followed the form prescribed by Schedule B. The pursuer's counsel founded upon the difference of the language as to execution contained in Schedule A (No. 7) of the Act of 1837, and Schedule B of the Act of 1889. They strenuously urged that (as is the case) the earlier schedule was applic-

able only to decrees for civil debt, and not *ad facta prœstanda;* that (as is also the case) imprisonment for civil debt was abolished in 1880, though the Debtors Act of that year made exception in the case, *inter alia*, of decrees *ad facta prœstanda;* that the alteration in the language of Schedule B of the Act of 1889 was intentional; and that the intention of the Legislature in passing that Act was to prevent imprisonment following upon a decree for delivery under section 2 thereof, at all events without application being made to the Sheriff for a special warrant to imprison. The defender's counsel, on the other hand, contended that the words in Schedule B of the Act of 1889—'and grants warrant for all lawful execution hereon'—necessarily refer back to the language of Schedule A of the principal Act of 1837, which authorises imprisonment, without further procedure or application to the Sheriff, 'where competent'; and that, as imprisonment is the appropriate, and indeed the only, method of execution in the case of failure to implement a decree *ad factum prœstandum*, it is competent under the Act of 1889 to proceed to such execution without further procedure than that contained in and authorised by a warrant under Schedule B. I think that the defender's contention upon this summary of the matter is right, and that the pursuer's argument is wrong. The pursuer's case is, in my judgment, in no way assisted—but is indeed weakened—by a reference to the procedure, under analogous circumstances, which is authorised by the Personal Diligence Act 1838 (1 and 2 Vict. c. 114), because I do not think that that Act has any application to the Small Debt Court, the rules and regulations of which are, I apprehend, codified in the legislation specially applicable to it alone. I do not know, and may not conjecture, the reasons which led Parliament to alter the phraseology of Schedule A of the 1837 Act, when Schedule B of the 1889 Act became law. But, as matter of construction and of inference from the language used, I should suppose that the Legislature in 1889 had in view the proviso at the end of section 2 of the Act of that year, to the effect that 'if delivery of any of the subjects sued for shall have become impossible, or if their value be alternatively concluded for, the Sheriff may give decree for their value to an amount not exceeding twelve pounds.' For it seems plain enough that, on the one hand, a decree *ad factum prœstandum* for delivery could not be executed by way of poinding; and, on the other hand, that a decree for a sum of money could not be executed by way of imprisonment. The pursuer's counsel further contended that imprisonment was not a valid or legal execution of the warrant 'for all lawful execution hereon,' because neither the decree nor the charge indicate sufficiently or at all the duration of the intended imprisonment. They referred to the case of *Muir*, 1849, 11 D. 487, as an exposition of the common law of the land upon this matter. That case had a good many specialities, and I do not think that, upon the point in question, it really helps the pursuer at all. I accept the words of Lord Jeffrey that it is not 'either a safe or a tolerable practice to give the body of any subject of this realm into the hands of a jailer without any specification of the terms or conditions of the imprisonment.' But I read his Lordship's words in conjunction with those of the Lord President (Boyle) in the same case, where he says that 'the warrant of incarceration should be clear and explicit, and should contain a distinct statement of the acts on performance of which the prisoner is entitled to liberation.' Now, in the present case, I think that the jailer could have no reasonable room for doubt, upon presentation to him of the decree and charge, that the act on performance of which the prisoner was entitled to liberation was the delivery by him of the railway ticket which the Sheriff had ordained him to give up. I should here point out that the summons in this small debt action contained no alternative crave for the value of the railway ticket, and it is nowhere suggested that delivery of it had, or has, become impossible. In these circumstances the argument for the pursuer appears to me to fail entirely, because he has not, in my judgment, shown that he was apprehended and imprisoned without warrant, or that the defender's execution of his small debt decree was in any way illegal. I confess I do not consider the pursuer entitled to much sympathy as regards his incarceration. I apprehend that he might, if he considered the defender's actings to be illegal, have suspended the charge. But he preferred to 'disregard' it, hoping, I suppose, to be able to recover a handsome amount of damages if the defender should proceed to execute the decree in the manner which he clearly intimated that he intended to do.

An alternative argument was submitted on behalf of the pursuer to the effect that, in any event, the statutory procedure had not been followed out. His points were (1) that in the extract decree no express mention was made of the 'seven days' noted by the Sheriff-Substitute in the book, and (2) that the charge does not expressly say ten 'free' days from its date. It is admitted, as regards both points, that the time allowed was, in fact, ample. There is, I think, no substance in either of these points, and I shall not deal with them except to note that they were put before me.

"Upon the whole matter, therefore, my conclusion is that the pursuer has stated no relevant ground of damage. The defender's first plea-in-law falls to be sustained, and as the objection to the relevancy does not merely relate to defective pleading but goes to the essence of the case, I shall grant decree of absolvitor, and, of course, with expenses."

The pursuer reclaimed, and argued—The pursuer's averments were relevant. He had been illegally arrested, as there was

no proper warrant for his imprisonment. The words in the extract decree "all lawful execution" did not authorise imprisonment—Small Debt Amendment (Scotland) Act 1889 (52 and 53 Vict. cap. 26), sections 2, 7, and Schedule B; and therefore the charge following thereon was no proper warrant for imprisonment. The holder of a decree *ad factum præstandum* was not entitled at his own hand to enforce it by imprisonment; he required to apply to the Sheriff for a special warrant—Small Debt Amendment (Scotland) Act (*cit. supra*), section 2, Schedule B. The terms of Schedule B implied that imprisonment should only be competent, if at all, after an application to imprison had been made and granted. That was necessary under the Personal Diligence Act 1838 (1 and 2 Vict. cap. 114), section 6, and in analogous circumstances, and therefore necessary here.

Argued for the respondent—The Lord Ordinary was right. The procedure followed was authorised by the statutes. Small debt decrees were in a different position from ordinary decrees. The Small Debt Act of 1837 (7 Will. IV, and 1 Vict. cap. 41), read along with the Debtors (Scotland) Act 1880 (43 and 44 Vict. cap. 34) and the Small Debt Amendment (Scotland) Act 1889 (*cit. supra*), authorised imprisonment on decrees *ad factum præstandum*. That was the only way in which such decrees could be enforced, and the extract of such a decree was a sufficient warrant for imprisonment. The defender had followed the statutory procedure both in the spirit and in the letter, and the action ought therefore to be dismissed. The Personal Diligence Act 1838 (*cit. supra*) did not apply to small debt procedure. Small Debt Acts formed a code by themselves.

At advising—

LORD PRESIDENT—In this case the Lord Ordinary has given a very careful judgment, with which I entirely agree. I have very little to add except this, that it is quite clear that the provisions of the Personal Diligence Act have nothing to do with the Small Debt Acts. The Small Debt Acts form a code by themselves. When you come to consider what took place in this case it is clear that the pursuer was not left in any doubt as to the diligence to be used against him or put to any hardship, and accordingly, for the reasons which the Lord Ordinary has given, I think it is out of the question that he should be allowed to proceed in an action of damages.

LORD M'LAREN—I am of the same opinion. It is clear that the words "all lawful execution" in a case of this kind do include imprisonment, for it has been laid down by an eminent judge in expounding the Debtors Act that unless imprisonment were retained to enforce a decree *ad factum præstandum* there would be no other method of enforcing such a decree. I am therefore of opinion that the present proceedings have been quite in accordance with the Small Debt Act and the amending statutes.

LORD KINNEAR and LORD PEARSON concurred.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Morison, K.C.—A. A. Fraser. Agent—Arthur F. Frazer, S.S.C.

Counsel for the Defender (Respondent)—Scott Dickson, K.C. — Kemp. Agents—Guild & Guild, W.S.

Saturday, December 14.

SECOND DIVISION.

[Sheriff Court at Aberdeen.

ABERDEEN STEAM TRAWLING AND FISHING COMPANY, LIMITED v. GILL.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 7 (2) — *Fisherman — Remuneration by Shares in Profits or Gross Earnings.*

The Workmen's Compensation Act 1906 is by section 7 made applicable to seamen, subject to certain modifications, including the following, sub-sec. 2:—"This Act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel."

The first fisherman of a trawler was remunerated while at sea by receiving one and one-eighth share (the shares being fourteenths) of the price of the fish sold after each trip, after deduction of certain charges for current expenses, such as salesmen's commissions and harbour dues. No deductions were made in respect of wages of crew, depreciation, or interest on capital. When the vessel was in harbour he received wages at the rate of five shillings a day. He was injured while trawling at sea, and claimed compensation under the Workmen's Compensation Act 1906. *Held* that he was remunerated by a share in the "profits on the gross earnings of the working" of the trawler, and accordingly was excluded from the benefits of the Act.

Opinion (*per* Lord Ardwall) that section 7 (2) was intended to cover, by the two categories of payments there set forth, all cases where the person employed was to a greater or less extent a co-adventurer or partner in the business in which he was employed.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 7 (2) of which is quoted *supra in rubric*, between William Henry Gill, trawl fisherman, Aberdeen, and the Aberdeen Steam Trawling and Fishing Company, Limited, the Sheriff-Substitute at Aberdeen (YOUNG) awarded compensation, and at the request of the company stated a case for appeal.