[*22nd May*, 1846.]

THOMAS SCOTT, risiding in Edinburgh, *Appellant*.

JOHN LETHAM, Baker, in Edinburgh, *Respondent*.

Jurisdiction.—Sheriff.—Small Debt Act, 1st Vict. cap. 41.—*Execution.*—The Sheriff at Common Law has power to grant a warrant of open doors, and the Small Debt Act, although in prescribing the forms by which its provisions are to be carried into effect, it omits the form of such a warrant, does not impair the original jurisdiction to grant the warrant.

Diligence.—Execution.—A return by a Sheriff Officer that he is unable to execute a poinding by reason of lock-fast places, is not an execution within the meaning of the Act 1686, cap. 4, and does not require to be signed by witnesses.

THE respondent obtained from the Sheriff of Edinburgh a summons, under the Small Debt Act, 1 Vict. cap. 41, against the appellant, for payment of *7l.* 15*s.* 4*d.* The appellant not appearing on expiry of the diet of compearance, a decree in absence was issued against him, finding him liable in the sum sued for, and giving warrant for execution in these terms:—"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 a charge of ten "free days."

This decree was put into the hands of a sheriff officer, who gave the appellant a charge for payment. The charge having been disobeyed, the officer was instructed to execute a poinding of the appellant's effects. For this purpose he proceeded to the dwelling-house of the appellant, but was unable to obtain admittance. The officer then indorsed and signed upon the decree the following application:—

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"*2d March*, 1842.—Having proceeded to the premises "occupied by the within designed Thomas Scott, Scotland "Street, Edinburgh, for the purpose of effecting a poinding by "virtue of the within decreet, but could not get access therein "on account of lockfast doors,

"May it therefore please your Lordship to grant warrant of "open doors and lockfast places.

"(Signed) WM. ROBB, Sh.-Officer."

The Sheriff granted the warrant asked by a fiat in these terms:—

"*Eo. die.*—Warrant granted as craved. G. TAIT."

Under the authority of this warrant, the officer forced and entered the dwelling-house of the appellant, but not finding goods sufficient to satisfy the debt and costs, he did not execute any poinding.

Thereafter the appellant brought an action against the respondent before the Court of Session, concluding for reduction of the warrant of open doors granted by the Sheriff upon these grounds, that the Sheriff had no jurisdiction under the 1st of Vict. to grant it, and that the warrant itself was illegal, because the return of the officer upon which it had been obtained, was not tested.

The respondent pleaded in defence, a denial of the Sheriff's want of jurisdiction, and admitted "that the application for the "warrant must be held to have been made to the Sheriff acting "under the Small Debt Statute, but without prejudice to the "defender's plea as to such an application having been unne-"cessary."

The Lord Ordinary (*Wood*) ordered minutes of debate to be boxed to the Court, and upon advising these, and hearing counsel, the Court, on the 20th March, 1844, sustained the defence of sufficient jurisdiction in the Sheriff to grant the warrant challenged and assoilzied.

The appeal was against this interlocutor.

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Mr. Moncrieff for the Appellant.—It is admitted that the jurisdiction which was exercised by the Sheriff, was exercised under the Small Debt Act. This was a new statutable jurisdiction, not an extension of an already existing ordinary jurisdiction. Every power, therefore, not expressly given must be taken to have been withheld by the legislature. Where a peculiar jurisdiction is given by statute, the statute is strictly construed, and the jurisdiction is not extended beyond what its terms warrant. No clause of the statute gives any authority for granting the warrant which was issued here; and in the schedule to the statute, there are specific forms for every step of procedure for enforcing its provisions; nothing, therefore, is left to implication in regard to the mode in which the jurisdiction conferred is to be explicated, every form is the subject of express enactment, but in no part of the schedule is there any form of a warrant of open doors. The statute not only defines the cases in which the jurisdiction is to be exercised, but the procedure by which it is to be enforced. It is as little competent, therefore, to deviate from the one as from the other.

Even if it should be held that the statute did not create a new jurisdiction, but merely enacted a new mode of exercising an already existing jurisdiction; there is no authority for saying that the Sheriff, by the common law of Scotland, has any power to grant letters of open doors; such a power is not necessarily inherent in any Court.

In ancient times as may be seen in *Ross's* Lectures, vol. i. p. 447, there was no power anywhere to grant such a warrant, unless in the case of crimes committed; and although he admits Sheriffs have been in use to grant this warrant, he treats this as an usurpation of jurisdiction; and *Bell*, in his *Com.* vol. iii. p. 9, lays down that under a Sheriff's decree, there was no power to break open lockfast places until the late Diligence Statute directed that a warrant to that effect should be inserted in the Sheriff's warrant of poinding. Till then, he says, if

such a warrant was desired, application to the Court of Session in the Bill Chamber was necessary. There is room, therefore, for the gravest doubts, whether the Sheriff, even in his ordinary jurisdiction at common law, had any power to grant this warrant.

If that be so the House will be slow to import such a doubtful power into a specific statutory jurisdiction, which is silent upon the subject; into a jurisdiction which by the summary mode of its procedure, is restrictive of the debtor's rights at common law, and which ought not, therefore, to be extended. In Wallace *v.* Hume, 13 *S. & D.* 1036, the Court below held that as the summary proceeding authorized by the statute, was contrary to the common law, everything done must be strictly within the statute.

Not only is there no form in the statute for the warrant which was granted, but the mode in which it was granted was inconsistent with the course of procedure laid down by the statute. All that the Sheriff is authorized to sign, is the book of causes contaïning the entries of the decrees made, which he is to do on Small Debt Court days. The steps of procedure in each case are to be signed, not by the Sheriff, but by the clerk; but here, the Sheriff, not the clerk, signed the warrant, and he did so, not on a Small Debt Court day, the only day on which, under the statute, he had jurisdiction.

II. But, admitting power in the Sheriff to grant the warrant, this could only be done upon the return of a formal execution of lock-fast doors. Even in the execution of a poinding under the authority of the Court of Session, this would be necessary. The execution so returned must be subscribed by witnesses, as required by the Act 1686, cap. 4, in regard to all executions. In practice, this statute has been always held to be applicable to such executions. Accordingly, in *Fraser's* "Office of a messenger," a form of the execution is given with the attestation of witnesses, and a similar form is also given in the office of a sheriff

officer. And in the Small Debt Act itself, the different forms of execution, with the exception of the execution of citation, contain attestations by witnesses. But in the present case, the execution returned by the officer was not signed by any witness.

Mr. Anderson for the Respondent.—It has been the inveterate practice of Sheriffs to grant such warrants as the one complained of, in order to enforce their own warrants of poinding, and every Court necessarily must have such power.—*Ross* in his Lectures, vol. i. p. 447, another passage than that cited for the appellant, shows from *Durie*, that magistrates of burghs had, from ancient times, exercised this power, and that Sheriffs had done so since the beginning of the last century; and *Tait*, in his *Justice of Peace*, p. 269, confirms this doctrine, which is further confirmed by the case A. *v.* B. *Mor.* 8231, where it was decided, that letters of open doors could not be granted by the Court of Session upon the decree of a baron, where the Sheriff had not interponed his authority to it.

Moreover, the power of the Sheriff to grant the warrant is assumed by the legislature in the Statute 1 & 2 Vict. cap. 114, which does not give any power to grant it, but merely directs that it shall always be inserted in the extracts of the Sheriff's decrees.

Such being the powers of the Sheriff at common law, the Statute of 1 Vict. cap. 41, made no alteration upon his jurisdiction in this respect. That statute does not create in him a new jurisdiction, but merely regulates an already existing one, neither does it deprive him of any of the powers he possessed in exercise of his ancient jurisdiction; all that it does is to empower him in causes where the sum in question is small, to exercise his jurisdiction in a more compendious way. If this were doubtful otherwise, it is made clear by the 6th clause in the statute, which authorizes the Sheriff to transfer from the roll of causes in his ordinary jurisdiction, to the roll of Small Debt causes, causes in which the sum in dispute has by interim decrees been reduced below 8*l.* 6*s.* 8*d.*

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The statute, therefore, does in fact authorize the granting of the warrant in question, for the 13th section empowers the Sheriff to enforce his decrees by poinding and imprisonment. Either of these proceedings would be wholly ineffectual, unless the judge had the further power to enforce them, by granting warrant of open doors. There is nothing in the statute showing an intention to deprive the Sheriff, in Small Debt cases, of this latter power, which he enjoys for the explication of his ordinary jurisdiction; and in the absence of any enactment to that effect, it must be presumed, that with the jurisdiction given by the statute was given every power necessary for its explication. In this view the power to open lock-fast places may be implied to exist in the warrant to imprison and poind, and an application for a warrant to that effect may be argued to have been unnecessary.

But, however this may be, the officer did not, in the present instance, execute any implied warrant; he made a specific application for an express warrant, and it was under such express warrant that the appellant's premises were forced. If it were inferred, from the absence of any express power in the statute to grant the warrant, and of any form of it in the schedule, that the power which, as already observed, the Sheriff exercises in his ordinary jurisdiction, was withheld, this would lead to the further necessary inference, that in the comparatively insignificant cases contemplated by the statute, the party must apply to the Court of Session for the warrant, which in more important cases, not under the statute, he can obtain from the Sheriff. This is a construction which would be neither reasonable nor convenient.

But it is said further, that the execution of the messenger, upon which the warrant of open doors was applied for, was not subscribed by witnesses, as required by the Act 1686, cap. 4. That statute requires, that "all executions of letters of horning "and inhibition, and others whatsoever," that is, executions

ejusdem generis, "should be subscribed by witnesses." But the return of the messenger, in the present instance, was not an execution at all, in any sense of the word. On the contrary, it was a return or certificate that he could not make the execution. There is no authority for saying that such a document requires to be attested; and in Dick *v.* Sands, 7 Dec., 1630, *Durie*, it appears that a warrant of open doors, granted without any return by the messenger at all, was sustained as good.

LORD CAMPBELL.—My Lords, I am glad at last to come to the conclusion which I do very satisfactorily to my own mind, that the interlocutor appealed against ought to be affirmed. I do not think there is anything in the answer which was given under the 30th section which Mr. Crawford was excused from replying upon, because the 30th section merely says, that no decree given by a Sheriff in any case decided under the authority of this Act, shall be subject to reduction, or to any other form of process provided by this Act, on account of any irregularity, or for any informality, or for any reason whatever. But, my Lords, it is impossible to say that this is a decree. This is not an appeal against a decree. This is a question as to the regularity of the process of execution, which cannot with any propriety be denominated a decree.

Well, then, we now come to consider whether this interlocutor can be supported upon the merits. Now, it seems to me that an execution, by breaking open doors, would not be justified under the original decree, because it would appear quite satisfactorily to be the law—that, although upon its being made to appear to a court of competent jurisdiction, that, after the process of poinding, the doors are locked and the goods cannot be poinded, there may be a process granted for breaking open the doors; yet by the common law of Scotland that cannot be part of the original decree, and it is only where under the statute power is given to make it part of the original

decree that that can be done. Therefore, what was done here could not be done under the original decree pronounced on the 10th of November, 1841; and that brings us to consider what is the effect of the warrant for breaking open doors that was granted on the 2nd of March, 1842.

Now, my Lords, it seems to me without any doubt, that, by the common law of Scotland, the Sheriff, having granted a warrant for poinding, when it is made to appear to him that the doors are locked, he may grant a warrant to break open the doors. It has been said that that was not formerly done; but it is clear that it has been done for above a century without any question being made; and, although new authorities have not been conferred on the Sheriff, there is abundant evidence that the Sheriff at common law possesses that power. Well, then, as the Sheriff generally possesses that power, why does he not possess it when he is executing this statute, called the Small Debts Act, which does not confer any additional jurisdiction upon him, but merely regulates the mode of proceeding, and gives certain forms that are to be adopted; and, as at common law he might have granted a warrant for breaking open doors, it being made to appear to him that the doors were locked, there is nothing in the statute to deprive him of that power.

Then comes the objection that when the officer made the application for the warrant to break open doors, it was not witnessed. The burden of showing that that objection is well founded, clearly rests upon the appellant. The appellant does not say that by the common law of Scotland such a return must be witnessed; but he relies entirely on the Statute of 1686, and if he brings himself within this statute, it appears to me that there is nothing subsequent which the legislature has enacted that would relax what this statute introduces.

Now, this statute is merely in these words:—"that all cita-" tions before the Lords in Session and citations before any other " judges, civil or criminal, which by law or custom used to be in

" writ, and all executions,"—(your Lordships will be pleased to observe the word 'executions,'—" and all executions of letters " of horning inhibition, and others whatsoever," (that is, other executions whatsoever,) " be subscribed by the executor thereof " and the witnesses, otherwise to be null and void."

The question will be, is this an " execution?" Now I think it is not an execution; an execution must mean something done in executing a writ, and unless this writ be executed, there is no execution. Now this is an excuse for not having executed the writ, the writ still remaining in full force. Mr. Crawford very properly admits that the writ was not exhausted, that even after the officer had made the return, if he had gone on his way back, and found the door open, he might have entered and seized the clock, or the bed, or the chairs, or the table, and realized the sum of money that was to be levied. And if he could have done that, the writ was not executed, but remained to be executed. I should apprehend that the Act of Parliament applies only to cases where the writ has been executed, that is, where something has been done which exhausts the force of the writ; and when that has been done, and when the officer is *functus officio*, he is to report to the Court, and the report is to appear in the proper manner—but this being an application to the Court, to enable the party to execute in an effectual manner the writ, which was still remaining in full force, what has been done cannot be called an execution.

Mr. Crawford very properly referred to the 21st section; but that section says, that in all charges, and arrestments, and executions of charges and arrestments, one witness shall be sufficient. That shows that in all charges, or arrestments, or execution of arrestments, one witness is necessary; but this is neither a charge, nor an arrestment, nor an execution of an arrestment.

That being so, it seems to me that the objection is unten-

able; that the Sheriff was perfectly justified in granting this warrant; and that the ground on which the appellant seeks that it should be reduced, cannot be supported.

No doubt the objection is abundantly well raised upon the record, because the summons expressly states, as one of the reasons of reduction, that there was no competent application for the warrant; that the return by the officer was not tested, and was not a proper execution of lock-fast doors. Then we have the return itself. This clearly is sufficient to raise the question; but the objection being raised, I think the objection is untenable, and that the interlocutor ought to be affirmed. I therefore move your Lordships that in this case the interlocutor be affirmed, and I suppose it ought to be with costs.

[*Lord Brougham.*—No, no costs at all in a pauper case.]

Lord Campbell.—Then we must regret exceedingly the hard fate of the respondent, that the law of Scotland is to be settled at his cost; but taking a general view of things, it is right that an appellant may appear in *forma pauperis*, and that when he does so, he should not be liable to costs. There was once a very harsh law in England, that when a person suing in *forma pauperis* failed, he was liable to be whipped. The humanity of modern times has changed that law; but still I am sure there will be forbearance in certifying in such cases, because it certainly does lead to great hardship. I do not say it was improper to certify here, because the questions are of great magnitude.

LORD BROUGHAM.—My Lords, I entirely agree in this case that the interlocutor is right, and ought to be affirmed. It at first struck us, with our English law notions, as singular that there should be the course of law which is here stated and assumed by the learned Judges as quite a matter clear and beyond all doubt. But, looking into it, we see that it is so beyond doubt, and the defendant stands on a clearly legal

footing. It is matter of substance in England, but in Scotland it is matter of form, whether that had been done which entitled the parties to execute the process of breaking open doors, because here in England no civil process can issue by possibility to give a right to break open doors, but in Scotland it is a matter of course.

Now, my Lords, I entirely agree that the whole matter here resolves itself into a question on the provisions of the statute, the Execution Act, the Process Act. And in looking into that I entirely agree that this is not such an execution as is contemplated therein and provided for thereby. It is clearly not an execution of the writ by the party entrusted with the execution, it is not even a return, but it is a report as it were interlocutory, and in the main process of proceeding, that he cannot execute the writ without further help; that he has been provided with the writ, but a writ, which from a fact that could not be known before, namely, the lock-fast doors of the defendant's premises—he cannot execute without that which, having no such anticipation, he was not furnished with, and he therefore merely reports the fact and says, "I cannot do this." If he had executed the writ, he would have returned that he had got the man's goods and poinded them for the benefit of the pursuer; but he says, "I cannot do it, I am prevented by an unexpected obstacle;" and being prevented by an unexpected obstacle, he makes a return to the effect that he ought to be helped to get rid of that obstacle. It is not a return, it is only a report that he cannot do what the exigency of the writ requires him to do without further help. That then is not an execution. If it had been an execution the writ would have gone, and he must have had a new writ to execute. But no such thing, it is the old writ which he executes, but he executes it with new faculties given to him on the report which he made on the lock-fast doors. Therefore it is clearly a case in which the statute does not either in substance or form apply.

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I am very sorry that this unfortunate baker has got into such trouble here. Here is a poor man, on a matter of 7*l.* 10*s.*, to be at the expense of settling the law. He had much better been employed in his own lucrative trade. He will find this the least lucrative trade he ever engaged in. I am also sorry we cannot give costs to the respondent, as the other party is a pauper. But I entirely agree with my noble and learned friend, that we cannot blame the counsel for certifying, for there is a point of law, and it is fair to raise that point.

I ought to mention here what ought always to weigh very much on a matter of practice, and which fortifies me in my opinion to agree with the motion to affirm the interlocutor, that all the five learned Judges, who have applied their minds to this case, have clearly an opinion in favour of the decree. The opinion is unanimous, and the Lord Ordinary gives his opinion in a very learned and able note. Lord Moncrieff appears to be the only one who had any hesitation, and he says that hesitation was on account of the judgment being applicable to justices of the peace; but he says that Lord Medwyn has given an opinion that justices of the peace have a right to give warrants to open doors; I do not, therefore, blame the appellant, though, happily for him, by the mitigated severity of modern practice he is not liable to pay in his person. Not that that would have been much compensation to the worthy respondent.

LORD COTTENHAM.—My Lords, I am also of opinion that this interlocutor must be affirmed. It appears to me that by the original jurisdiction of the Sheriff, giving him authority to issue a warrant of poinding, he had all the jurisdiction which is necessary to carry that warrant into effect. The Small Debts Act, no doubt, did not give him jurisdiction, but regulated it and left the power untouched; it does not appear to have interfered with the jurisdiction of the Sheriff in this particular matter, it therefore remains the same as it was before the Small Debts Act,

under the common law, which gave the Sheriff power to do what he has done in this case.

With regard to the point of there being no witness, in order to bring it within the terms of the Act it must be proved to be an execution or return, and it does not appear to have been either the one or the other; and though I should have been glad to have had the opinion of the Court of Session on this point, yet, from what we have heard at the bar, and from the authorities, it appears to me that the provisions of the Act do not apply to the present case.

It is ordered and adjudged, That the said petition and appeal be, and is hereby dismissed this House; and that the said interlocutor therein complained of, be, and the same is hereby affirmed.

LAW and ANTON—C. ANDERSON, Agents.