[Heard 14th Feb.—Judgment 25*th April*, 1845.]

ADAM FORREST, one of the Macers of the Court of Session, *Appellant.*

JOHN HARVEY, Solicitor, Leith, *Respondent.*

Jurisdiction.—Held, that Magistrates of a burgh, acting as Justices under 6 Geo. IV., ch. 48, had no jurisdiction to entertain an application under the Statute, the warrant of citation having been signed not by the Justice of Peace Clerk, as required by the Statute, but by the Clerk to the Magistrates.

Jurisdiction—Homologation.—Held, that a defect in Jurisdiction, occasioned by the warrant of citation on an application under the Small Debt Act, 6 Geo. IV., c. 48, not having been signed by the proper officer, was not cured by the party cited having appeared and pleaded.

THE 2nd sect. of 6 Geo. IV., cap. 48, enacts, that it shall be lawful for two or more justices of the peace to hear and try causes for debts not exceeding 5*l.*, "in a summary way, as more "particularly hereafter mentioned." The 3rd sect. enacts, that "such causes "shall proceed upon complaint agreeable to the "form in schedule (A) subjoined,"—"and the Clerk of the "Peace, or any deputy by him appointed, shall adject to the "said complaint, and on the said paper a warrant signed by him "agreeable to the form in schedule (A)."

The Schedule gives a form of Petition to "His Majesty's "Justice of the Peace for the Shire of," &c., and of a warrant by "the Clerk of the Peace for the Shire of," &c. for compearance "before the Justices of the Peace for the said Shire."

The 14th sect., which will be found *infra*, p. 217, declares, that the decree of the Justices "in any case competent to them," shall not be subject to advocation or suspension except on consignation, nor to reduction unless for malice or oppression.

The appellant presented an application against the respondent, under the Statute addressed to "The Magistrates of Leith,

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" Justices of Peace for the Town of Leith and Liberties," and obtained a warrant for citation, which set out with these words, " The Clerk of the Court grants warrant," &c., and was signed " Alexr. Hay, Dep. Clerk." Alexander Hay was the depute town clerk of Leith, under Anderson, the principal town clerk, who was appointed by the magistrates and council, but was in use to sign the documents issued by the magistrates who were of the commission of the peace for the city of Edinburgh and liberties, when sitting as justices. The respondent declined the jurisdiction, upon the ground that the magistrates had none in a summary form *qua* magistrates, and that they had no power to hold a court as justices of the peace. The magistrates disregarded the declinature and decerned for payment, and ordained instant execution by arrestment and poinding, as in cases of small debts. The respondent complained, (by suspension and also by reduction,) to the Court of Session, and pleaded the following pleas in law, embracing a repetition of his objection before the magistrates:

" 1. The magistrates had, on the grounds stated, no compe-
" tency or jurisdiction to determine the matter of the action
" brought before them, especially by summary forms of proce-
" dure, and in the form and manner herein set forth.

" 2. In particular, the magistrates were not entitled to dis-
" regard the statutory form prescribed by the Act of 6 Geo. IV.,
" cap. 120, and Act of Sederunt, 12th November, 1825, in
" actions brought before them as Bailies of Leith, and they were
" not entitled to hold courts in the *pretended* capacity of being
" justices of the peace; and under the Statute 6 Geo. IV., c. 48,
" passed in regard to the counties and stewartries, the provisions
" of which Statute were not intended, and are not conceived in
" terms, to apply to them, the said magistrates were not entitled
" to do so under any other Statute, or by the common law, and
" they were not entitled, of their own will and determination, to
" create and assume a jurisdiction depriving the community of
" the protection of recognised forms of legal procedure.

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"3. Supposing the magistrates *had* been entitled to hold "courts as justices of the peace under the Statute 6 Geo. IV., "c. 48, they did not conform themselves to the requirements "therein enacted, and are not within the jurisdiction and pro- "tective clauses therein embodied, in respect, among other "grounds set forth, (1.) That the complaint was not addressed "to the bailies as justices of the peace of any *county* or *shire*, "as required by section 3d and Schedule A of the Act. (2.) "That the complainer was cited to appear *before the magistrates* "*of Leith* and *not* before the justices of any county or shire, as "is required by the said Section and Schedule. (3.) That the "person who signs the warrant of citation was not the clerk of "the peace of the county of Edinburgh, or a *deputy* by him "appointed, as is *required* by the said section, or a clerk ap- "pointed by *section* 21. (4.) That the copy citation did not "bear that the complaint and warrant had been served upon "the complainer; and (*lastly*), That the judgment pronounced "does not bear to be by one of the justices of the peace of any "*shire* or *county*, as is required by the said section 3 and "schedule."

The appellant pleaded the following among other pleas:

"1. The present suspension is barred by the complainer's "joining issue with the respondent on the merits of the claim "before the magistrates *qua* justices, without objecting *in limine* "to the jurisdiction, or to the regularity of the citation and "execution thereof.

"2. The magistrates of Leith having been admittedly in the "actual and uninterrupted exercise of the powers and juris- "diction of justices of the peace under the Small Debt Acts "for a long period of years, and it not being disputed that the "case decided by them was a case which fell under the juris- "diction of the justices of the complainer's *forum*, the present sus- "pension, on the alleged ground that the magistrates are not "validly invested with the character of justices, is incompetent,

" especially as no reduction has been brought of the commisions, " or other warrants or authority under which the magistrates " have so acted and are acting.

" 3. At all events, as the magistrates of Leith were legally " invested with the jurisdiction of justices of the peace as exer- " cised by them, the present suspension is incompetent under " the Statute 6th Geo. IV., cap. 48, section 14.

" 4. Any alleged irregularity in the appointment of the " clerk to the magistrates *qua* justices, would not render the " present suspension competent, nor void the procedure before " the magistrates. Neither could that ground of challenge be " entertained, except in a proper action directed against the clerk " and his constituents, or at all events in an action to which " they were made parties. There being, however, no irregularity " in the appointment of the clerk, this ground of suspension is, " in any view, inapplicable.

" 5. In like manner irregularities in the form of procedure " would not void the procedure, or render the present suspension " competent. At all events, no irregularity which could have " this effect is alleged to have existed, or did exist; on the " contrary, the action, claim, and decree, and whole relative " procedure, were in all respects just, legal, and regular, and " therefore the present suspension is in every view both incom- " petent and unfounded."

The Lord Ordinary (*Cockburn*) on 8th July, 1840, after hearing counsel, pronounced the following interlocutor, adding the subjoined note:

" The Lord Ordinary having heard parties, and considered " the process, sustains the respondent's plea that the suspension " is incompetent; dismisses it, and decerns: Finds the suspender " liable in expenses; appoints an account thereof to be given in, " and, when lodged, remits to the auditor to tax and to report.

" NOTE.—The suspender insists that the Justice Small Debt " Statute, and even its schedules, though these last be given as

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" mere examples of forms, shall receive the most literal and " judaical construction—a construction so rigid as to render " the Act worse than useless. For example, the Statute directs " the citation and the service of the complaint to be by a '*con-* " '*stable or peace officer.*' It was done in the present instance " by an *officer*, but because the schedule happens to say 'A B. " 'constable,' and the officer here was not a *constable*, it is main- " tained that this vitiates the whole proceedings. Some encou- " ragement has perhaps been given to this hypercriticism by one " or two judgments, but though the Statute no doubt must be " interpreted fairly and legally, quibbles which destroy the prac- " tical usefulness are entitled to no favour.

" The Lord Ordinary is of opinion that the magistrates had " jurisdiction to decide the cause as justices; that the objections " taken to the regularity of the proceedings are all groundless; " and that, with one exception, they are all frivolous.

" This exception, which forms the only difficulty in the case, " relates to the clerk.

" The Statute provides that the warrant to cite and the " judgment shall be signed by '*the clerk of the peace*, or any " 'deputy by him appointed.' Considering that the object of " the Act is to give cheap and speedy justice to poor people, " in poor causes, it would not have been unreasonable to hold " that these suitors were entitled to rely that the clerk *de facto* " was the clerk *de jure*; and that if they found a person in the " office, and recognised by the public and the justices as entitled " to be so, they were safe in dealing with him, especially where " there was nobody else to whom they could resort as more truly " the clerk. But in the case of Cumming, 19th November, " 1833, the Court found that a secret flaw in the appointment of " the acting clerk nullified the whole proceedings. This deci- " sion seems to have made the history of the clerk's appoint- " ment, with the view to discover a blot in it, a subject of " inquiry with all parties seeking for grounds for suspending

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" small debt decrees. There is another case of the kind before " the Lord Ordinary.

" The objection taken here is, that those who appointed the " clerk had no authority to do so: and the facts are that the " magistrates, as justices, had appointed Mr. Anderson, and that " Anderson had given a deputation to Mr. Hay, by whom the " papers in this case were signed. Now, it is said that the " '*clerk of the peace*' means the ordinary justice of peace clerk " for the county, or at least a clerk who can only be named by " the Crown.

" If this be correct—and if it be true that the magistrates, " acting as justices, cannot appoint their own clerk to officiate " within their own town—then the Lord Ordinary does not see " how his judgment on this point can be maintained. But it " appears to him that the magistrates can make such nomina- " tions, and he believes that they have been in the general and " inveterate practice of doing so. The case of Edinburgh is " disputed by the parties, but it does not seem to be disputed " that this has been the practice at Leith, since ever the magis- " trates there acted as justices.

" All that the suspender says about the case of Mabon, 15th " November, 1836, and about the constitution of the Burgh " Court at Leith, is inapplicable to anything that occurs here. " The magistrates of Leith are in the commission of the peace, " and they have not decided beyond 5*l.*, and therefore we have " nothing to do with their magisterial history or constitution, or " any alleged extension of jurisdiction."

The respondent reclaimed to the Court, who ordered minutes of debate, and upon advising these pronounced the following interlocutor.

" The Lords having resumed consideration of the reclaiming " note for the suspender, with the whole proceedings and minutes " of debate, alter the interlocutor complained of: find that the " proceedings in the Small Debt Court, held by the magistrates

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" of Leith, as justices of the peace, must be regulated by and " in conformity to the provisions of the statute 6 Geo. IV., c. 48: " find that the warrant for summoning the reclaimer, John " Harvey, to appear in the action raised at the instance of the " respondent Adam Forrest, in the justice of the peace Small " Debt Court, held at Leith, and also the decree in said action " of which suspension is sought, were signed by Alexander Hay, " the depute town clerk of Leith, acting as under the character " of clerk to the said Justice of Peace Court, in respect of his " office as town clerk of Leith, or the depute of said town " clerk: find that the town clerk of Leith or his depute is not " entitled, under the above-mentioned statute, to act as clerk to " the said Justice of Peace Court, and cannot be taken to " be, in terms of the said statute, the clerk of the peace or " depute clerk of the peace: find, that the proceedings com- " plained of were therefore incompetent and invalid, and of no force " or effect in law; suspend the letters *simpliciter*, and decern."

The appeal was against this interlocutor.

Mr. Turner and *Mr. Anderson* for the Appellant.—It has been found by the Court below, and is not now disputed, that the Court of the magistrates was competent, as a Court of Justices, to try the question which was brought before them, and that the question was competently entertained, unless in so far as the warrant of citation was not signed by the proper officer. The Court below has treated the objection on this score as one to the jurisdiction, but it is truly to the regularity of the process, and in that view it was not competent to inquire by suspension into the regularity of the process, inasmuch as the statute 6 Geo. IV., cap. 48, declares in the 14th section, that the decrees of the Justices, " in any case competent to them," shall not be subject to advocation, suspension, appeal, or other stay of execution. Brodie *v.* Smith, 14 *S.* & *D.*, 983; McEwan *v.* Harrison, 16 *S.* & *D.* 923; Rankine *v.* Lang, 6 *B.* & *M.* 183.

But assuming the suspension to be competent, the magistrates of Edinburgh, like all magistrates of Royal Burghs, are *ex officio* justices of the peace. And the magistrates of Leith have by 39 Geo. III., cap. 44, all the powers which the magistrates of Edinburgh have. If the magistrates of Leith, then, were justices of the peace within the meaning of the statute, their clerk must be clerk of the peace *quoad hoc.* Though the power to nominate the clerk of the peace was by the Act 1686, cap. 35, declared to belong to the Secretary of State that, both by the terms of the statute and the usage following upon it, applied only to justices holding by commission and not to magistrates of burghs being as such justices, and having power as magistrates to appoint their own clerk. Anderson had been appointed by the magistrates to be the town clerk, with power to appoint a deputy, and he had always been in use, as his predecessors before him had been, to act as the clerk of the magistrates, when sitting as a Court of Justices; if, therefore, he was not *de jure* justice of peace clerk, he was so *de facto*, and the lieges were entitled to rely upon all documents signed by him, in that character, or by Hay, who was his deputy, as being signed by the proper officer. Learmonth *v.* Gordon, *Mor.* 3096; *Stair* IV. 42, s. 2; *Ersk.* I. 4, 33, and IV. 2, 6. The mere general appointment of town clerk has been recognised as giving the office of clerk to the magistrates in the other jurisdictions which they exercise, Dowie *v.* Douglas, 1 *Sh.* App. 125; Carse *v.* Kelly, 1 *Sh.* 178.

It is no doubt true, that the form of warrant in the schedule to the Act 6 Geo. IV., is so expressed as to be by the clerk of the peace "for the shire," &c., but if that is sufficient to shew that the warrant must in every case be issued by the clerk of the peace for the county, the subsequent part of the form which is for a compearance "before the justices of peace for the shire," &c., will go to show that the magistrates, as such, had no jurisdiction, which nevertheless it has been found they had, as was

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also found in regard to other statutes in Mackay, Skirving and Co., *v.* Bond, 17 *F.C.* 453.

The provisions of the statute, coupled with the schedule to which they bear reference, are merely directory as to the mode of proceeding. The duty imposed on the officer is purely ministerial. No trust or confidence is reposed in him, he is a mere conduit pipe through whom the party is to be brought into Court: the Judges and officers are informed by what means, and by whom the provisions of the Act are to be carried out, but no nullity of the proceedings is declared, if these particulars should not be complied with, and none can be inferred by the Court. In Harris *v.* Jayes, *Cro. Eliz.*, 699, a grant by copy made by one not Steward of right, but sitting in Court as such, was held to be good, "for the law favours acts of one in reputed authority." In Knight *v.* Corporation of Wells, *Lutw.*, 188, it was held that a bond by the Mayor of a Corporation not duly elected was good, because he was Mayor *de facto*, and his acts merely ministerial, were good. So in Margate Pier *v.* Hanham, 2 *Bar. & Ad.*, 266, an act by justices not duly qualified, was held good that the public might not suffer.

If the objection be to the process and not to the jurisdiction, there is no authority for holding that it nullifies the proceedings. In Cumming *v.* Munro, 12 *S. D. & B.*, 61, the proceeding was founded on a common-law writ, and if the writ was bad, no doubt the whole proceeding fell, but here the foundation of the proceeding was the petition and complaint, as to which no objection is raised. In Maben *v.* Walker, 15 *S. & D.*, 1087, there was an excess of jurisdiction. At all events, the party by appearing and pleading, waived the objection whether to the process or to the jurisdiction.

The *Lord Advocate* and *Mr. A. Mc Neill* appeared for the respondent. Their arguments appear sufficiently in what fell from the Peers who delivered judgment for affirmance.

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LORD BROUGHAM.—My Lords, in this case, which was heard about a fortnight or three weeks ago, there was a great controversy in the Court below, which was continued here, and the case was argued certainly on either side with great ability and learning; and the importance of the question, (as a question of jurisdiction always is important,) required particular attention to be paid to it; and your Lordships therefore took time to consider, with a view to see your way through the difficulties with which the case was admitted, both in the Court below and here, to have been surrounded.

Now, the two objections which were taken on the part of the present respondents, one of which alone prevailed in the Court below, are, First, that the Magistrates of Leith had not the jurisdiction conveyed by the statute as a Small Debt Court, and could not act as justices under the Act of the 6th George IV., cap. 48, as a Small Debt Court. And, secondly, that although they might have that jurisdiction, still the warrant was illegally issued by a party who was only town clerk, or rather the deputy, of Anderson the town clerk, and who was not the person designated by the statute, namely, the clerk of the peace or his deputy.

Upon the first of these grounds, it would in my opinion have been vain to contend, as was attempted, that though the magistrates might not have jurisdiction, nevertheless that objection had in this case been cured by the party answering to the summons, entering into the litigation before them, joining issue before them, as it were, and allowing the cause to proceed to its conclusion, taking the beneficial chance of a judgment in his favour, and not objecting to the jurisdiction, but reserving that objection till the moment when it should be found that he had failed in his expectation of obtaining the judgment, and a decree went forth against him. If the magistrates had no jurisdiction in the subject-matter, that argument is of no avail. No parties can convey to a Court jurisdiction which does not belong to it. If parties were ever so

consenting to the Court of Chancery for example, in this country, exercising jurisdiction as a Court of Probate, granting probate of a will, that would not prorogate, as the civilians term it, the jurisdiction of the Court of Chancery. That consent on the part of the parties would not convert the Court of Chancery into a Court of Probate. So if the Court of Queen's Bench or Common Pleas were to assume jurisdiction to deal with questions of prize which do not belong to a Court of Common Law, which at one time there was great controversy about, but it was long since determined in the old case of Mitchell, &c. *v.* Rodney, 2 *Bro. P. C.* 423, (the Reporter believes) a very well known case, that they have no jurisdiction in such a case, in the event of the parties consenting ever so explicitly and ever so formally, even if they entered into a rule of Court upon the subject, it would not convert a Court of Common Law into a Court of Prize, and would not prorogate its jurisdiction. Therefore if the magistrates of Leith had not the jurisdiction, which was a creature of statute entirely created by that Act, the consent of the parties appearing there and not taking the objection, and taking the benefit of the chance of a judgment for them, and only objecting to the jurisdiction should the judgment go against them, would not be even a topic in argument to show, that the Court below had jurisdiction by the statute.

I dwell the more upon this view of the case, for I am of opinion, (and I believe upon that we are all agreed,) that the Court below was right in holding the first ground of objection to be invalid, and in considering that the magistrates had the jurisdiction; but I dwell the more upon this topic for the reason which will immediately appear under the second head to which I am now about to address myself. I agree that the magistrates here, (for reasons which it is unnecessary to trouble your Lordships with, because they can hardly be said to be any longer in dispute in this case,) had jurisdiction, that they were within the provisions of the statute, and that they, acting as justices, had

a small debt jurisdiction. I agree,—it is needless to state why, because it is most distinctly and lucidly stated in what my Lord Moncrieff calls in his most able judgment, (with the first branch of which I entirely concur,) a deduction,—I agree that the magistrates had jurisdiction.

So far, therefore, we are agreed as to the jurisdiction of the Court below, and the next question that arises, and the only question now really before your Lordships is this, whether that jurisdiction did exist in the manner in which it was explicated, I mean by the warrant, not issued by the clerk of the peace, or his deputy, but by the town clerk, or the clerk of the justices. Now, though agreeing with Lord Moncrieff that the case is not free from all difficulty, yet I am, on considering it very clearly, of opinion that the warrant was not duly issued, that it was not issued so as to give jurisdiction to the Court, because it was not issued by the clerk of the peace, or his deputy, who are the only persons authorized by the statute to issue that warrant; which warrant is the foundation of the whole proceeding, absolutely essential to the proceeding, from which the proceeding takes its rise and spring, which existing the jurisdiction exists, which failing the jurisdiction too fails, and consequently if I am right in my view of the statute, and of the warrant, and of the whole proceeding, we are brought round to that first and cardinal view of the subject, which for this reason therefore I have dwelt upon already, viz., that the jurisdiction which was exercised, depends upon the jurisdiction existing, and that although the magistrates might have had jurisdiction if it had been exercised according to the statutable provisions, that is wanting in this case, without which they had not that jurisdiction, namely, the origin and substratum of the whole proceeding, a warrant duly issued by the clerk of the peace.

Now, my Lords, in order to show this more fully, I shall refer your Lordships to the statute itself, (again remarking that the jurisdiction is a mere creature of statute,) "That all causes shall

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"proceed upon complaint agreeable to the form in schedule (A)," to which I shall presently also advert, "and the clerk of the "peace, or any deputy by him appointed, or, in case he shall fail "to appoint one, the clerk to be appointed within the district as "hereinafter provided," which is explicitly provided, "shall adject "to the same complaint, and on the same paper or warrant "signed by him agreeable to the form in schedule (A) subjoined "to the present Act." The schedules are part and parcel of the Act as if they had been positive enactments.

Now it is worth looking at the schedule in this instance to see what the nature of this warrant by the Act of Parliament is. It is really not in the nature of a common writ or common process, but it is actually a warrant for summoning the defender to appear; the clerk of the peace acts by issuing the warrant. The clerk of the peace for the shire grants a warrant to summon the defender to compeer before the justices of the peace. This warrant is at the root of the whole proceeding, and it must be issued by the clerk of the peace. Now no one can appoint a clerk of the peace in Scotland except the supreme authority of the State, that is provided by the Act of 1686, cap. 20; he must be appointed in a special manner by the Crown. There is no such appointment of the party acting in this case; he was not the deputy of the clerk of the peace any more than he was the clerk of the peace himself, consequently the warrant is wholly void.

Now I observe, that the only one of the learned judges who differs from the judgment below is my Lord Medwyn. He takes a view of the subject in which it is utterly impossible for me to concur. In order to get rid of the force of the statutary objection which I have just named, he says, that he would have adopted the same conclusion with Lord Moncrieff who had preceded him, had he not thought himself bound to go further back than the statute of the 6th of George IV., cap. 48, (which is the Act I have been referring to,) to the Act of the 39th and 40th George III., cap. 46. Therefore I, following his Lordship, go

back, (I do not feel myself bound to go back so far as he did, but still I volunteer to go back,) and that Act of Parliament I find, says nothing about the clerk of the peace, it speaks of the justice of the peace clerk. The justice of the peace clerk cannot mean the clerk of the peace. I think they cannot argue that; it means, of course, the clerk to the justices. But I observe, that the very first provision of the Act of 6th George IV., cap. 48, (and that ought to have prevented Lord Medwyn from going back to the former Act,) is to declare the former Act, to which he goes back, viz., the 39th and 40th George III., cap. 46, to be repealed. That Act is positively repealed with one exception, which does not apply here, viz., with the exception of cases pending at the time, the hearing of which cases are to be proceeded with as if the repeal had not taken place. Therefore it is in vain to go back to that first Act. We are bound by the Act of the 6th George IV., cap. 48, and that is quite sufficient for disposing of the question.

I will not detain your Lordships further therefore, especially as I concur entirely with the Court below, than to add, that for the first reason I have given in dealing with the first objection, (in which objection I do not concur, because I agree with all their Lordships in the Court below that the magistrates had the jurisdiction, but for the mal-appointment of the clerk who issued the warrant,) I go back to my observation as to whether consent is sufficient to cure the objection. If the objection is good for anything it is an objection to the jurisdiction. It is an objection, not to the form of the proceeding, but to the jurisdiction; now I am far from saying that an objection may not be waived,—I am far from saying that an irregularity may not be got over,—I am far from saying that the consent of parties may not stop them from taking exception to certain irregularities, but consent will not warrant an extension or prorogation of jurisdiction, although it will prevent the party from taking the benefit of an exception, because it will operate as a waiver, and cure informalities and

irregularities of certain kinds. For instance, if it is admitted that the clerk of the peace, or the person *de facto* clerk of the peace, or the person acting as such under the appointment of the clerk of the peace, though perhaps a person not qualified to be clerk of the peace, and whose want of qualification might expose him to a penalty for acting, or whose want of qualification might have been a good ground for seeking his removal in a competent mode of proceeding, or whose want of qualification, if it had been stated in time to the party appointing him, might have prevented his appointment, and precluded his acting as clerk of the peace; if, I say, it is admitted that that want of qualification may be cured, that that irregularity in his appointment may be got over, because he is clerk of the peace until removed, and until validly objected to in that capacity, yet it is a totally different thing when another person has been acting who does not pretend to be clerk of the peace, when a man of totally different functions, exercising an office of a totally different nature, appointed in a totally different way, when one who is not clerk of the peace either *de jure* or *de facto*, who is another clerk, the town clerk or the justices' clerk is acting. That is not a mere irregularity, —that is not an informality,—that is one person doing what another person alone by law is allowed to do, and is capable of doing, and no informality can be imputed to that. It is a want of substance, not a want of form. It is a want of the thing itself, and not an irregularity in doing the thing, and no waiver of that can take place; for the objection goes to the office, it goes to the jurisdiction in this case. Here the jurisdiction consists of the magistrates acting as justices in the Small Debt Court, and by means of the clerk of the peace issuing his warrant, which gives jurisdiction to them in each particular instance.

My Lords, on these plain principles, and upon the plain construction of the statute, especially agreeing as I do with the great majority of the judges of the Court below, I am hardly under the necessity of citing cases; nevertheless, there are one or two

important cases, but one more particularly, in which all the points of the present case occur. I mean the very well known case of Cumming *v.* Munro. That case of Cumming *v.* Munro, which is in 12th Shaw and Dunlop 61, contains precisely the same matter, for the question there was with respect to the sheriff clerk depute, who by his commission had no power to name a substitute; no power was contained even in the commission to the principal clerk to name substitutes to his deputies. Crawford, therefore, was not a clerk of the Court to any effect; and his signature had no more force than that of any stranger, it was positively a nullity, and so it was clearly held in all the stages of that somewhat long litigation. But did nothing else occur in that case which makes the case analogous and parallel to the present? Most certainly there did; for it was said that that was homologated or affirmed by waiver, and accordingly the very title of the case shews that, "Process, Citation, Homolo-"gation." The first point said to be decided in that case, (I am reading the marginal abstract,) is this: "A summons in an in-"ferior Court, signed by the substitute of the sheriff clerk "depute, who had no power to name a substitute, held null and "incapable of being homologated." We shall see what the homologation was. It was his having, as was said, to exist here, and which was nevertheless disregarded, "given due authority to "Crawford to act as clerk of the Court in subscribing sum-"monses." This is the plea by Munro, which shews that that very point was made, and that very defence taken against the action. "And it could be proved that Crawford's acting in that "character had been recognised by all parties in the Sheriff's "Court, and particularly by Cumming, the very party com-"plaining who was a practitioner before it." A very strong case, one may say of homologation, "at any rate the objection "of Cumming was omitted at the proper season, and he was "barred from pleading it." Nevertheless, notwithstanding that, this was taken to be a sufficient ground, and the proceeding was

held absolutely null, and the summons was said to be no summons at all.

But, my Lords, there is another case of Hamilton *v.* Murray, 9 *S.* & *D.*, 143, in which the marginal abstract is "Action dismissed in respect the execution of citation was dated prior to the summons," and the objection there was held to be fatal, "although not pleaded by the party who objected to the citation on a separate ground."

And a similar view was taken in the case of Stewart *v.* McRae, in page 261 of the same volume.

I ought to mention that there is another case of which a friend of mine has endeavoured to find the original report, and has failed, but we have a full account of it in the respondent's case where no name is given, and the interlocutor is stated to have been that of a Lord Ordinary not reclaimed against, and therefore the reporter infers not reported. It is a case which fully recognised the decision of Cumming *v.* Munro, to which I have adverted, and gave effect to that decision, as it states. And it appears from the particulars of that case, that that case was decided upon precisely the same grounds. Cumming *v.* Munro being actually cited in the course of the argument.

My Lords, for these reasons, I am clearly of opinion that the judgment in the Court below is well grounded, and I move your Lordships therefore, that it be affirmed, and of course with costs.

LORD COTTENHAM.—My Lords, I entirely concur in the opinion that has been already expressed by my noble and learned friend. It is a principle of the law of this country, and equally so of the law of Scotland, that where a special authority or jurisdiction is given by Act of Parliament, the provisions of the Act shall be strictly performed. The jurisdiction is given with all the accompaniments which the Legislature thought proper to engraft upon the enactments, and those provisions are not permitted to be departed from. The one part, as well as the other, is essential to the jurisdiction given.

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My Lords, many cases have occurred in both countries, illustrating this position. In this country many cases have occurred in which the jurisdiction was perfect, except as to the form of notice. One or two of those cases I propose to refer to, for the purpose of showing how strictly analogous the decisions in the two countries are, and how clearly both are founded upon principle. In a case which is referred to in the papers an order was quashed, because it only stated that *due* notice was given, whereas the Act required fourteen days' notice, and it is accompanied with this observation of the Court, "A defective "notice is not cured by appearance." There the objection was to the form of the order. The order stated that due notice had been given.. The Act required fourteen days' notice.

Now, that is a rule which follows from the principle to which I have already adverted: the order or conviction, or whatever it may be, if the jurisdiction is specially appointed, must state upon the face of it, all that is essential to the jurisdiction which it professes to exercise. And in that case the order stating only that due notice had been given, and the Act requiring fourteen days' notice, the order was quashed because it did not state that fourteen days' notice had been given.

My Lords, there is another case, the King *v.* Bagshaw, which is in 7th Term Reports, where there was an order which was quashed, because it did not state that a notice, such as the Act required had been given. And I cite this simply for what was said by the Court in disposing of the case. "Notice is the "foundation of the whole proceeding, and therefore it should have "been stated, for if no notice were given the trustees had no "jurisdiction."

My Lords, those cases proceed upon the ground, that the notice is an essential requisite to the special jurisdiction given.

Now, my Lords, what is the present case? This Act requires not only that notice shall be given, but that a particular well-known officer shall be the officer to give the notice. That being

required by the Act, if that officer does not give the notice, then the requisites of the Act are not complied with. Notice by a stranger is obviously no notice at all, and consequently the case falls within precisely the same principle as those cases to which I have already referred.

Now it is not in dispute, there seems to be no ground upon which it can be disputed, that the officer in question from whom this warrant issued, was not the officer required by the Act. The officer required by the Act is the clerk of the peace or his deputy. The officer in question was the town clerk appointed by the justices to act as clerk of the Court. But the Act says, that the officer who is to do the act as clerk of the Court, shall be clerk of the peace, a well-known officer; or in a certain case a deputy appointed by him. It is, therefore, clear that the officer who issued this warrant, was not the officer appointed by the Act, he was not the officer to whom the Act confided the duty of issuing the warrant, and there was, therefore, no warrant and no notice. There was nothing in short which was required by the Act of Parliament, in order to bring the party into Court, or to give the justices jurisdiction.

That doctrine, which has been so clearly established by the law of this country, has been the doctrine established in the cases to which my noble and learned friend has referred in the law of Scotland. And it is equally essential there as here that all the requisites of an Act, giving a special jurisdiction, should be strictly complied with. These cases, indeed, are much nearer the present than those which I have referred to, because the case of Cumming *v.* Munro is precisely the same. Whether it be one objection or another the principle is precisely the same. In that case there was an officer, but one whose appointment the Act did not sanction, that is, it did not so sanction it as to make him the proper officer: and upon that ground the proceeding was held to be null, and the jurisdiction not to exist. Now whether it be that the officer is not the proper officer under the Act, from one cause or another is perfectly immaterial, neither in

the one case nor the other was he the officer whom the Act appointed to serve the process, and therefore, in the one case and in the other there was a defect in the jurisdiction attempted to be exercised.

My Lords, the only other point would be whether the circumstances of the party not taking the objection below would give the Court jurisdiction. Now it is quite clear, that the want of jurisdiction cannot be cured by reason of the party appearing, he perhaps not knowing the objection at the time, or not thinking fit to take that opportunity of making the objection. A Court obtaining jurisdiction by an Act of Parliament, cannot exercise jurisdiction merely by the acquiescence of the parties. The parties may so contract together as to prevent them from disputing what is done, but nothing short of such a case would give a jurisdiction which professed to be exercised under the provisions of an Act of Parliament, which provisions have not been followed; I concur, therefore, in the opinion which has been given by my noble and learned friend, that there is a failure of jurisdiction in this case, which is the ground upon which the interlocutor proceeds.

LORD CAMPBELL.—My Lords, I have the misfortune to differ from my two noble and learned friends who have preceded me in respect to this case. There were two objections made to the validity of the decree of the Court of the Magistrates. One was that they had no jurisdiction at all, and the other was that that jurisdiction, if it existed, had not been properly put in motion. Now the first is overruled. It is allowed that the magistrates were a court of justice, having jurisdiction over the subject-matter; and looking to the 2nd and 3rd sections of the Act of Parliament, it is impossible to doubt that for a moment. Well, then, these magistrates are a court of justice, constituted by the statute to adjudicate in this case.

That being so, my Lords, whether a court of justice be constituted by statute, or by common law, or by royal grant, seems

to me to be wholly immaterial. Then the Court has jurisdiction over the subject-matter. This is a case competent to them by the Act of Parliament.

Such being the real objection upon the merits, let us see what is done. There are proceedings that are perfectly regular *ex facie.* There is, my Lords, a regular plaint by which a suit is regularly instituted before a Court of competent jurisdiction.

We next have the warrant; and I entirely agree with my noble and learned friend that that warrant is process. It is process to bring the other party before a tribunal constituted to decide the cause. That process is perfectly regular on the face of it.

Under this process the defender appears. He makes no objection whatever in the Court of original jurisdiction. The case is heard on its merits. He defends himself to the utmost of his power, and seeks to have a decision in his favour with costs. There is, however, a decision pronounced against him; and after the decree is finally pronounced by this Court of competent jurisdiction, when the complainer seeks to put that in force, the defender brings an action of suspension and an action of reduction, not having whispered any complaint against the jurisdiction in the Court below. Then if he is now right, this decree of the Court below is a nullity, and any officer or party acting under it who had gone and distrained upon the goods of the defender, would have been liable to an action of trespass. The question, my Lords, is, whether that decree is to be considered a nullity or not.

Now, before your Lordships will come to that conclusion, I must beg leave to draw your attention most particularly to the 14th section of this Act of Parliament which I submit to your Lordships, is most specially, and anxiously, and emphatically framed to obviate such a frivolous and vexatious objection. The 14th section, my Lords, is in these words:—"And be it further "enacted, that the decree given by the said justices in any case "competent to them by this Act, shall not be subject to advoca-

" tion, nor to any suspension, appeal, or other stay of execution, " excepting only in the case of consignation, as hereinbefore pro- " vided for the purpose of a rehearing before the justices, nor " shall be set aside or altered in an action of reduction before the " Court of Session on any other ground except that of malice and " oppression on the part of the justices; nor shall any such " action of reduction be at all competent, after the expiration of " one year from the date of the decree of the justices." Therefore even for malice and oppression on the part of the justices, after one year from the date of the decree, no process of advocation or reduction is to be permitted.

My Lords, the only question upon the construction of this Statute is this: Is the case in question competent to the justices? for those are the words of the Act of Parliament. " That the " decree given by the said justices in any case competent to them " by this Act, shall not be subject to advocation." Now your Lordships will be good enough to recollect that it is not said in any case where the process has begun originally, according to the directions that are pointed out in this Act of Parliament, but it is in any case " competent to the justices, that is, any case which " might be competently brought before them, and over which " they had jurisdiction by the Act of Parliament."

Now, my Lords, I cannot doubt for a moment, indeed such is the unanimous decision of the Court below, that this was a case competent to the justices. Then if that be so, are you to allow advocation? Are you to allow a process of reduction? My noble and learned friends who preceded me have truly said, that if you inquire into the fact, it turns out that Mr. Adam Hay was not either clerk of the peace, or deputy clerk of the peace. That is perfectly true, my Lords, but I say that you ought not to inquire into that. The foundation of my opinion is this, that under these circumstances, it is not competent to the party to make the objection.

My Lords, this is process. It is process to bring the party before a Court of competent jurisdiction. After the parties have appeared before the Court of competent jurisdiction, they cannot

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object to the process, however irregular. The stage for making that objection has passed by, and after the parties have been convened before the proper tribunal, and have been heard, and a decree has been pronounced, the process by which they have been brought there is not subject to any objection, upon the ground of irregularity. It is quite unnecessary to inquire into the character that Mr. Alexander Hay actually held. He did the act. He had been acting for years in this capacity. But I do not at all rest my opinion upon that ground; I rest my opinion upon this, that after the decree, after the party had been heard, having made no objection, that without even the 14th section of the Act of Parliament, he could not now be heard to make the objection; but I say that the 14th section of the Act of Parliament has been introduced on purpose to prevent any such objection being made, and that this Act of Parliament expressly excludes both advocation and an action of reduction. Surely, my Lords, it is a reasonable view that the Legislature should interpose to prevent such objections, because a most serious mischief would ensue, if after a final decree such objections could be made.

My Lords, I proceed in this case upon the grounds which I stated yesterday in the case of Cleland *v.* Paterson, which I think rests precisely upon the same foundation. The case of Cleland *v.* Paterson, was a case where there was a trial before Lord Cockburn, in which the parties appeared, and after the verdict, the losing party objected to the jurisdiction of the Court. It was admitted that there the Court might have jurisdiction. It was admitted that if the form had been gone through, that jurisdiction might have been given, but it was objected that the form had not been gone through. I say, my Lords, that after appearance, and after trial, and after verdict, it was not competent to the party to make that objection. And for the same reason, my Lords, I say that here, after the party had been heard before the justices, and after a final decree, it was not competent to him to make any objection on the ground of the regularity of the process.

My Lords, it is unnecessary for me to enter at length into

cases decided either in England or in Scotland. I think that they all may be distinguished from this case, and that there would be no difficulty in distinguishing any of the cases to which my noble and learned friends have referred. But, my Lords, it is not suggested that any such case has been brought before your Lordships, or that this House has given a sanction to any such principle. If there had been cases in the Court below, ever so much in point, not being brought before this House, I, thinking that they would be entirely contrary to principle, and in the teeth of the Act of Parliament, should not feel myself bound by them. Under these circumstances, my Lords, my opinion is that this interlocutor ought to be reversed, but of course my noble and learned friends who have preceded me, being of a contrary opinion, your Lordships will come to a different conclusion, and the motion of my noble and learned friend will have the sanction of the majority of this House.

LORD BROUGHAM.—My Lords, if my opinion had been at all altered by what has fallen from my noble and learned friend, I would at once have said so, and so I believe would my noble and learned friend near me, (*Lord Cottenham;*) but I ought to say that I by no means omitted the consideration of the 14th section of the 6th of Geo. IV., cap. 48. On the contrary, I rather think I have marked it in my copy. But it just brings the case round to the question of jurisdiction, because it says "to which jurisdic-"tion they are competent." Now, my argument is worth nothing, if they were competent to it, but in my opinion, they were not competent to it. Consequently the 14th section does not apply. It is *idem per idem.*

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed with costs.

J. ATKINS—GRAHAM, MONCRIEFF and WEEMS, Agents.