my opinion the natural meaning of the tender of 23rd July 1901 is that it includes all the pursuer's claims, including interest up to that date.

Now, assuming that the principal sum awarded, viz., £1265, is correct, interest upon that sum at 5 per cent. for three years would bring the total amount of the sums to which the pursuer was entitled on 23rd July 1901 above the tender made by the Railway Company; and that I think is sufficient for the decision of the case without reference to the interest which accrued between the date of the tender and the date of the award.

LORD JUSTICE-CLERK—That is my opinion also; and LORD YOUNG (who was present at the hearing but absent at the advising) requested me to say that he concurred.

The Court adhered.

Counsel for the Pursuer and Respondent —Jameson, K.C.—Guy. Agents — Wylie & Robertson, W.S.

Counsel for the Defenders and Reclaimers — Campbell, K.C. — Graham Stewart. Agents—Clark & Macdonald, S.S.C.

Thursday, February 18.

FIRST DIVISION.

[Sheriff of Lanarkshire at Glasgow.

LODIJENSKY *v.* DUNCAN.

Sheriff—Jurisdiction—Foreigner Resident Abroad—Lease—Sequestration for Rent.

Held that the Sheriff within whose territory the subjects let are situated has jurisdiction to deal with an action of sequestration and sale in enforcement of the landlord's hypothec against a foreigner resident abroad.

Process — Forum — Sheriff — Sequestration for Rent.

Opinions that an action of sequestration for rent must be brought in the Sheriff Court, and was incompetent in the Court of Session.

Mrs Ellen Black or Duncan, residing at 16 Royal Terrace, Glasgow, with the consent of her husband Alexander Black, also residing there, presented a petition in the Sheriff Court of Lanarkshire at Glasgow against John Nicolaievich Lodijensky, Wassilevosky Ostror 2, Line 25, St Petersburg, and carrying on business at 500 Sauchiehall, Street, Glasgow. The petitioner prayed the Court to sequestrate and to grant warrant to officers of Court to inventory and secure the whole stock, fittings, furniture, goods, and other effects so far as subject to the pursuer's hypothec, which were or had been in the premises occupied by the defender at No. 500 Sauchiehall Street, Glasgow, since Whitsunday 1902, in security and for payment to the pursuer of certain sums of rent then due or to become due for the said premises, with conclusions for sale and for payment to the pursuer. The petition also included a conclusion for a decree against the defender for the rents when due, interest and expenses, in the event of no sale taking place, or for such balance as might remain due after sequestration and sale and payment of expenses, and all preferable claims, but this conclusion was subsequently deleted by minute of restriction. The condescendence annexed to the petition narrated that the pursuer had let by lease, dated 12th and 17th May 1902, certain premises at 500 Sauchiehall Street, Glasgow, to the defender for a term of ten years, with entry at Whitsunday 1902, at a rent of £400 per annum for the first five years, and £450 for the next five; and that certain sums, being a quarter's rent, had become due or were about to become due, and had not been paid.

On 11th August 1903 the Sheriff-Substitute (MACKENZIE) granted warrant to cite the defender on four days' *inducice* by serving him with a copy of the petition. The defender appeared and lodged answers, in which he averred that he was a Russian having no domicile in Scotland, and that he had not been there since the lease was signed.

He pleaded—"(1) No jurisdiction."

On 23rd October 1903 the Sheriff-Substitute (BALFOUR) repelled the defences as irrelevant and granted warrant for sale.

Note.—. . . "The question is, whether this Court has jurisdiction over the defender. For the sake of brevity I may refer to the *Saucel Brewery Company* v. *Barret*, 12 Sheriff Court Reports, 164, where the very same question was raised and decided. The rubric of that case is that an action of sequestration and sale in enforcement of a landlord's hypothec, and containing no personal conclusions, was competent in the Sheriff Court within whose jurisdiction the premises let were situated, though the tenant was a foreigner and was not personally cited within the sheriffdom.

"I agree with the judgment of Sheriff Cheyne in that case, and hold that this action is a real one, and that the only competent *forum* of first instance is the court of the judge of the bounds where the *invecta et illata* are situated, and that a foreigner by taking a lease of premises and placing his property in them must be held as consenting to his property being dealt with according to the ordinary law of Scotland. It has to be noted that, although the petition contains personal conclusions against the defender for payment of the rents and expenses, the pursuers have by minute withdrawn these conclusions.

"The case of *M'Bey* v. *Knight*, 7 R. 255, was founded on by the defender, but that case was of a purely personal character, and concluded for the price of a horse, and the Court held that the defender, being resident abroad, was not subject to the jurisdiction of the Sheriff Court either in respect of having heritable property in the county or of being the joint-tenant of a farm therein. This case, however, is en-

tirely different, and relates to proceedings taken against a tenant who has under a formal lease signed by him occupied premises within this jurisdiction and placed his property in the premises, and warrant is sought by the landlords to sell the property. Lord Gifford, in delivering judgment in *M'Bey* v. *Knight*, drew a distinction between mere joint tenancy of a farm and the carrying on of business with a place of business." . . .

On appeal, the Sheriff (GUTHRIE), by interlocutor of 23rd December, adhered.

Note.— . . . "Neither do the cases cited as to jurisdiction apply to the process of sequestration for rent, which is a diligence against moveables situated in the territory of this Court. It cannot be that a foreign lessee is exempt from the landlord's usual remedy for rent. If that were so this defender would not have got his lease."

The defender appealed, and argued—The defender was a Russian subject who had signed the lease in St Petersburg and had never been here since. It was therefore clear that he was a foreigner against whom this action could not be competent in the Sheriff Court but only in the Supreme Court. While no authority could be cited for an action of this kind being brought in the Supreme Court, it was equally true that there was no authority that such an action was incompetent there, and there seemed no reason why it should be incompetent—Ersk. i. 2 (18) (19); *Burn* v. *Purvis*, December 13, 1828, 7 S. 194; *Harvey, Hall, & Co.*, v. *Black & Son*, June 21, 1831, 9 S. 785; *North British Railway Company* v. *M'Arthur*, November 5, 1889, 17 R. 30, 27 S.L.R. 34; *Wightman* v. *Wilson*, March 9, 1858, 20 D. 779; *M'Bey* v. *Knight*, November 12, 1879, 7 R. 255, 17 S.L.R. 130; *Commissioners of Pollokshaws* v. *M'Lean*, November 17, 1899, 2 F. 96, 37 S.L.R. 76; *Maxwell* v. *Horwood's Trustees*, January 30, 1902, 4 F. 489, 39 S.L.R. 341; *Morley* v. *Jackson*, November 19, 1888, 16 R. 78, 26 S.L.R. 52; Sheriff Courts (Scotland) Act 1877 (40 and 41 Vict. c. 50), sec. 8.

Counsel for the respondent was not called upon.

LORD M'LAREN—The purpose of this appeal is to bring under review concurring decisions of the Sheriff-Substitute and the Sheriff upon two pleas in bar of this action, the first of which is "No jurisdiction," and the second is that there has been no valid citation.

[*His Lordship dealt with the question of citation.*]

The plea to the jurisdiction raises a more substantial question. A foreigner is not to be discouraged from stating objections which he thinks he has to the jurisdiction, and any such objection will always receive fair and attentive consideration. But this is not so imperative when the question is only as to the particular Court in this country to whose jurisdiction the foreigner is liable, and it is not maintained that none of the King's Courts have jurisdiction over him. The first of these questions is rather a question of process than a question of jurisdiction in the proper sense.

Now, the learned counsel was not able to refer us to any authority in support of his contention that an action of sequestration for rent was competent in the Court of Session. I assume that there is no such authority. I never heard of an action of sequestration for rent being brought in the Court of Session. In the institutional writers reference is made to a class of actions in which the judge ordinary of the bounds has privative jurisdiction. It is hardly necessary to give instances, but there is a class of cases which are only competent in the Sheriff Court, and in which an action brought in the Court of Session would be dismissed as incompetent. The general character of such cases is that they relate to questions as to property within the sheriffdom, in which there is a necessity for immediate decision, such, for example, as warrants for the sale of a pledge or the sale of perishable articles when the right of possession is disputed. There can be no doubt that cases between the landlord and tenant of property situated within the Sheriff's territory have always been regarded as specially suited for decision in the Sheriff Court. I should be rather surprised if an action were brought in the Supreme Court under the Act of Sederunt for removing. On this question of process I should consider the negative experience of the present generation of lawyers was a sufficient ground for holding that this Court would not exercise jurisdiction in an action of sequestration for rent. It follows, therefore, if there is jurisdiction in the larger sense against this Russian subject, the Sheriff Court is the appropriate Court for enforcing his obligation to pay rent by the sequestration and sale of his property within the premises which were let to him.

It was made an objection to the jurisdiction that this was an action relating to heritable property, and that it does not fall within the provisions of the Act of 1877, which enlarged the Sheriff's powers with regard to heritage. No doubt the Sheriff Court Act of 1877 does not apply. But Sheriffs have always exercised jurisdiction in questions between landlord and tenant, and have always had power to sequestrate for rent, and this is the first time I ever heard that the non-residence in Scotland of the tenant made a difference.

If the Sheriff Court is the only Court where this jurisdiction can be exercised, the Sheriff must have authority to deal with the matter whether one of the parties is resident or not. A sequestration for rent is no doubt an action *in rem*, but an action *in rem* may apply to personal estate, and in this case the subject of adjudication is the goods of the tenant that are affected by the landlord's hypothec. Is it to be supposed that a tenant can discharge the landlord's right of hypothec by leaving the country? If this defence is effectual in the case of a foreigner who has never resided in Scotland, it must also be effectual in the case of a Scotsman leaving the country and taking up a new domicile. Once the

right of hypothec has been established, it must stand until it is discharged by the landlord; and it would be a reproach to the law if, standing the right of hypothec, that right could not be made effectual by the sale of the tenant's goods. It seems to me that the pursuer was entirely within his rights in making his hypothec effectual by obtaining a warrant of sequestration for rent in the Sheriff Court.

LORD KINNEAR—I agree. I think this is a very clear case, which has only been confused by the attempt to bring it within the scope of principles of jurisdiction which have no application to the circumstances. I see no reason to doubt any of the legal propositions that Mr Gunn deduced from the authorities which he very properly cited. There can be no doubt that when a foreigner resident abroad is sued in a personal action in this country he must be convened in the Supreme Court. But then this is not a personal action. As it is before us now it is a real action, or rather a real diligence. It is a process for attaching goods which are on the landlord's ground and selling them in payment of rent. Now, that is neither a personal action at all, nor in my opinion an action regarding heritable property. It is a process of diligence for the purpose of enforcing the landlord's right of hypothec over the tenant's goods which have been brought upon the premises let. When the action first came into Court it contained personal conclusions against the defender for payment, but these have now been withdrawn, and in my opinion competently and properly withdrawn, and now all that the pursuer asks is that she should have a warrant of the Sheriff to make good her right of hypothec. Had the personal conclusions remained in the petition a different question might have been raised before us, but in my view these two conclusions are distinct and separable, and could be and have been competently separated by a restriction which seems to me to have just the same effect as if the Sheriff had rejected the personal conclusions and granted warrant for the real diligence. Now, this is the ordinary remedy of a landlord, and according to the established practice the method of putting it in force is by means of a warrant from the Sheriff for sequestration and sale, and it has not been shown to us that it can be obtained in any other way. I see no reason why this remedy should not be enforceable against a foreigner. When a foreigner takes a lease of heritable subjects in Scotland he necessarily subjects himself not only to the general law of Scotland as to heritable property, but also to the remedies competent to a landlord for the recovery of his rent and to the methods for enforcing them. He cannot exempt himself from the law in general nor in particular from the effects of the landlord's right of hypothec. This is a right which cannot be enforced by any courts except the Courts of Scotland, because it is a remedy *in rem* which can only be put in operation within the territory where the subjects affected by it are situated But if the jurisdiction for putting this real remedy in force is in the Scottish Courts, then the question whether it is be enforced in the Supreme Court or in the Sheriff Court is a question of practice, and that practice has been so long settled that I do not think we can be asked to alter it now. Mr Gunn admitted that he could find no instance of any such process being instituted in the Court of Session, but he went on to say that he could see no reason why it should not be carried through in that Court. I think that the inveterate practice of centuries is a perfectly sufficient reason.

LORD ADAM—I agree with your Lordships. No one will dispute the proposition that a foreigner is only subject to the Supreme Court, that a purely personal action against him must be brought in the Supreme Court, and that he is not liable in such an action to be cited in any Sheriff Court. But then I agree in holding that we have not here a personal action. This is a proceeding peculiar and privative to the judge ordinary of the bounds. It is based on no personal ground, but proceeds on the existence of a debt heritably constituted by the lease produced. It partakes of the nature of a remedy, and is not really an action at all; but if it had been, it would have been a real action, to make effectual the right of the pursuer against the goods situated on his property and within the territory of the Sheriff. It was said that there was no reason why an action for sequestration for rent should not be competent in the Court of Session. The procedure, however, in such cases is all marked out and provided for in the Sheriff Court, and such a proceeding in the Supreme Court I have never heard of and do not think could now be maintained. If the plea to jurisdiction in this case were to be sustained, the result would therefore be that this remedy of the pursuer would not be possible in the Supreme Court, and in circumstances similar to the present would not be open to him in the Sheriff Court. The proceeding, however, is really a diligence, and I accordingly agree with the Sheriff-Substitute when he says that he holds this action to be a real one, and that the only competent *forum* of first instance is the court of the judge of the bounds, where the *invecta et illata* are situated, and that a foreigner by taking a lease of premises and placing his property in them must be held as consenting to his property being dealt with according to the ordinary law of Scotland. That seems to me to be a perfectly sound statement. I therefore agree with your Lordships that this appeal should be dismissed.

The LORD PRESIDENT was absent.

The Court dismissed the appeal.

Counsel for the Appellant—A. J. Young—Gunn. Agent—Louis H. Gow, Solicitor.

Counsel for the Respondent—Clyde, K.C.—Hunter Agents—Dove, Lockhart, & Smart, S.S.C.