The declaration signed by the defender is—"I declare that the above questions have been answered correctly and fully to the best of my knowledge and belief; and I agree that this declaration and the answers above given will be the basis of contract between me and the company, and I agree to accept a policy subject to the usual conditions prescribed by the company, and to be endorsed on the policy." The answer was untrue in fact, but if it had been made to the best of the defender's knowledge and belief that would have been a good defence.

The defender, however, is not in a position to plead that that answer was true "to the best of his knowledge and belief," for two reasons—*first*, his case is that he did not write or dictate that answer, and that it was not read over to him; *secondly*, if he had read the query and returned that answer it would not have been "true to the best of his knowledge and belief," because he admittedly knew that he had in his possession and in use at least one vehicle and one horse in connection with which accidents had occurred—a *factum proprium et recens*.

As to the attempt to throw the blame on the pursuers' canvasser, no such case is made on record.

Besides, in filling up the paper Wylie acted for the defender, who says that he had no time to attend to it.

The result is that the defender must be held to have known the contents of the paper which he signed, and to be bound by the answer.

The LORD JUSTICE-CLERK intimated that LORD YOUNG, who was present at the hearing but absent at the advising, concurred.

The Court adhered.

Counsel for the Pursuers and Respondents—Guthrie, K.C.—Grainger Stewart. Agents—Menzies, Black, & Menzies, W.S.

Counsel for the Defender and Reclaimer—G. Watt, K.C.—Munro. Agents—St Clair Swanson & Manson, W.S.

Saturday, February 20.

SECOND DIVISION.

[Lord Pearson, Ordinary.

RIDDELL *v.* LANARKSHIRE AND AYRSHIRE RAILWAY COMPANY.

Railway—Compulsory Taking of Land—Expenses of Arbitration — Tender — Lands Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 19).

A railway company served on a landowner a notice to treat for six acres of his land, and on 9th August 1898 entered on possession of the land, undertaking by written agreement to pay interest at 5 per cent. from that date "on the amount of his compensation when ascertained or agreed on."

On 23rd July 1901 the company made a formal tender to the landowner of £1300 "in full of all his claims of every description in respect of his right and interest" in the land taken. This offer was not accepted, the arbitration was proceeded with, and by award dated 21st March 1902 the oversman fixed the compensation at £1265, with interest at 5 per cent. "from the 9th day of August 1898, the date agreed upon by the parties."

Held that the sum in the tender included the interest which the railway company undertook to pay in the agreement of 1898, and that therefore the amount of the award, consisting of the principal sum and the interest thereon to the date of the tender being in excess of the sum tendered, the landowner was entitled to the expenses of the arbitration.

In this action David Riddell of Auchenback, Paisley, sued the Lanarkshire and Ayrshire Railway Company for, *inter alia*, £595, 10s. 7d., being his expenses in a statutory arbitration by which the defenders had acquired about six acres of his land for the purposes of their railway.

The defenders pleaded that they were not liable in the expenses of the reference, in respect that the sum tendered by them to the pursuer exceeded the sum awarded by the oversman.

The facts leading up to the action were as follows:—On 8th July 1898 the defenders served on the pursuer a notice to treat for the purchase of his land. On 9th August they entered upon the land, and by written agreement dated 31st August they undertook to "pay interest at 5 per cent. per annum on the amount of his compensation when ascertained or agreed on from the date when possession was taken."

While parties were arranging for the arbitration the defenders, by tender dated 23rd July 1901, offered to the pursuer's agents £1300 sterling "in full of all your client's claims of every description in respect of his right and interest as proprietor in the land . . . taken from him by this Railway Company." On 26th July the pursuers' agents acknowledged receipt of the tender, and made a counter proposal stating the pursuer's willingness to accept £1500 "in full of his claims against your company for ground acquired by them, interest at 5 per cent. to be paid on said sum from the date of the service of the notice to treat, my client to be relieved of the whole expenses incurred by him from the inception of this matter until its final settlement," and on a certain understanding as to accommodation works."

As nothing resulted from these negotiations arbiters were nominated and an oversman appointed. In the arbitration the pursuer claimed "the sum of £2500, with interest thereon at the rate of £5 per centum per annum from the 8th day of July 1898 till paid." Proof was led in December 1901, and, the arbiters having differed, the

oversman signed his award on 21st March 1902 fixing the compensation at £1265, with interest at 5 per cent. "from the 9th day of August 1898, the date agreed upon by the parties." The award was silent on the matter of expenses.

On the pursuers asking the defenders for the expenses of the arbitration, the defenders refused to pay them on the ground that their tender of 23rd July 1901 did not include the interest specified in their undertaking of 31st August 1898, and that the amount of the tender was therefore greater than the amount awarded.

The pursuer thereupon raised the present action.

On 17th August 1903 the Lord Ordinary (PEARSON) pronounced the following interlocutor—"Finds that the sum awarded by the oversman in the arbitration referred to on record exceeds the sum tendered by the defenders, and the pursuer so requiring, remits to the Auditor of Court to tax the account No. 7 of process under section 37 of the Act 30 and 31 Vict. cap. 126, and section 32 of the Land Clauses Consolidation (Scotland) Act 1845," &c.

Opinion.—. . . "In regard to the question whether the award here exceeds the tender, that depends on whether the tender of £1300 made on 23rd July 1901 is to be taken as carrying interest at 5 per cent. from 9th August 1898, when the company took possession. I think that is a narrow and difficult question. One element which might have affected the decision is not present, namely, the amount and ingredients of the sum claimed at and prior to that date (23rd July 1901) by the pursuer, though possibly if ascertained it would not tell either way. The materials for decision are mainly these—(1) The company's undertaking of 31st August 1898 was that the company 'will pay interest at 5 per cent. per annum on the amount of his compensation when ascertained or agreed on from the date when possession was taken if the works are allowed to proceed.' Of course a tender, if accepted, results (in a sense) in agreed compensation, and the company here contend that if the £1300 tender as made had been accepted it would have related back to this undertaking and would have carried interest. But (2) this depends mainly upon the terms in which the tender is expressed. Here it is '£1300 sterling in full of all your client's claims of every description in respect of his right and interest as proprietor in the land . . . taken from him by the railway company, and extending to 6·242 acres or thereby imperial measure.' Now, this is ambiguous, and while it is quite possible that the company meant it to carry interest, I think that *prima facie* it does not. If the tender had been accepted I think the company would have had a strong case for contending that an additional claim for interest was excluded, the tender bearing expressly to be 'in full of all your client's claims of every description in respect of his right and interest as proprietor in the land.' The arbitration was not yet on foot, so that we cannot resort to that for the measure of the 'claims' referred to, though even if it be referred to it will be found that interest was expressly claimed. But the words of the tender are words chosen by the Railway Company; it was for them to make clear what they meant in an important step such as they were taking, and (as I have said) I think the *prima facie* sense of the words used is against them. If they had meant the tender to be 'with 5 per cent. interest,' they should have said so. Further (3) this consideration derives force from the next letter that passed between the parties. Three days later, on 26th July, the tender was acknowledged, and a counter proposal was made stating the pursuer's willingness to accept £1500 'in full of his claims against your company for ground acquired by them, interest at 5 per cent. to be paid on said sum from the date of the service of the notice to treat, my client to be relieved of the whole expenses incurred by him from the inception of this matter until its final settlement,' and on a certain understanding as to accommodation works. Here the question of interest is brought conspicuously forward, and, in my opinion, a perusal of this letter should have led the company, if they had desired the thing to be made clear on the lines of their present contention, to have replied that when they said the £1300 was to be paid 'in full of all his claims of every description in respect of his right and interest as proprietor' they did not mean it to be in full of his claim for interest. As I have said, my opinion is, on the whole, in favour of the pursuer on this matter. I hold on the documents before me (and neither party suggested any further inquiry or production) that the tender must be read as in full of all claims, including interest, and that the award is above the tender. I shall find accordingly, and as the pursuer so requires under the Act of 1867 I propose to remit the account to the Auditor for taxation in terms of the statute. The parties will then consider whether anything further remains for the oversman to do in the way of 'settling' it."

The defenders reclaimed, and argued—All that was referred to the arbiter was the question of compensation. That was the only thing in dispute. The matter of interest had been already settled by the parties and did not fall within the scope of the reference. It was questionable whether an arbiter had power to deal with interest on the sum awarded—Deas and Ferguson on Railways, 365. The matter of interest was quite distinct from that of compensation. Under the Lands Clauses Act a railway company could not enter into possession of lands without granting a bond which bore interest. The parties in the present case had by agreement dispensed with a bond, but the interest nevertheless ran, and by agreement this interest had been fixed at 5 per cent. on the compensation agreed on or awarded from the date of entry. The sum tendered by the defenders on 23rd July 1901 only referred to the matter which came before the arbiter, viz., the amount of compensation. It did not include interest, a matter which had already been

fixed by agreement. The amount in the tender therefore exceeded the amount awarded, and the pursuers were not entitled to the expenses of the arbitration.

Argued for the pursuer and respondent—The compensation awarded, viz., £1265, with interest at 5 per cent. from 9th August 1898, amounted to about £1490, or if the interest was only calculated to the date of the tender, to about £1448. That sum was much in excess of £1300, the amount in the tender. An arbiter could either calculate the interest for himself and give one sum, made up of the amount of compensation and the interest, or he could give an award of a separate sum in compensation with interest from a certain period. The sum awarded being with interest greater than the amount of the tender, the pursuer was entitled to the expenses of the arbitration —*Carmichael* v. *Caledonian Railway Company*, March 26, 1868, 6 Macph. 671, 5 S.L.R. 413. The tender must be held to include interest on the amount awarded from the date of entry to the lands. The words of the tender were unreserved, and must be read according to their fair meaning. The tender included all that the pursuer was entitled to get from the Railway Company, and one of the things he was entitled to get was 5 per cent. interest on the compensation awarded from the date of the promoters entering his land—*West Highland Railway Company* v. *Place*, February 21, 1894, 21 R. 576, 31 S.L.R. 455. There was no exclusion of previous arrangements in the tender; any claims in virtue of such fell under the "all claims" mentioned in the tender.

At advising—

LORD TRAYNER—The defenders in this case entered upon possession of the pursuer's land on 9th August 1898, and agreed to pay interest at 5 per cent. from that date "on the amount of his compensation when ascertained or agreed on." The parties referred the amount of compensation to be paid the pursuer to arbitration, and the oversman on 21st March 1902 fixed the compensation at £1265, "with interest at 5 per cent. from the 9th day of August 1898, the date agreed upon by the parties." This award amounted in money value as at its date to the sum of about £1490, and in ordinary course would entitle the pursuer to the expenses of the arbitration. But the defenders maintain that the pursuer's claim to these expenses is excluded by reason of a tender made by them at an early stage in the arbitration. That tender (dated 23rd July 1901) made offer to the pursuer of £1300 sterling in full of all his claims of every description in respect of his right and interest as proprietor in the land taken by the defenders. The defenders maintain that this tender exceeds in amount the oversman's award, and that therefore the pursuer is not entitled to the expenses he claims. The Lord Ordinary has rejected that view, and I agree with him. I read the tender as meaning exactly what it says, and that is, an offer of £1300 in full of all the pursuer's claims of every description. His claim for interest at 5 per cent. on the compensation when fixed from August 1898 until payment was one of his claims, and if the pursuer had accepted the defenders' tender I have no doubt his claim for anything beyond £1300 would have been excluded. The defenders now say that their tender was meant only to refer to the compensation for the land, the interest having been separately agreed to. It is to be regretted that they did not say this in their tender. I should not have read into the tender (any more than the pursuer did) a reservation of the pursuer's right to interest, the tender being one explicitly in full of all claims of every description. Now, what the pursuer got by the arbiter's award exceeded the tender, for in addition to the £1265 for the land, he got interest thereon for more than 3½ years at 5 per cent. — £1265 plus the interest, say £225, amounts to £1490, or £190 more than was tendered. Even at the date of tender there was more due than was tendered, for at that date there was due nearly three years' interest, say £180, which, added to the compensation (£1265), gives a total of £1445, or £145 in excess of the sum tendered. I therefore agree with the Lord Ordinary, and am of opinion that the defenders are liable to the pursuer in the expenses of the arbitration.

LORD MONCREIFF — The Railway Company having given notice to treat, took possession of the pursuer's ground in August 1898. Parties could not agree as to compensation, and ultimately the compensation had to be settled by arbitration. But on 23rd July 1901, nearly three years after entry, the Railway Company made a formal tender to the pursuer "of £1300 sterling in full of all your clients' claims of every description in respect of his right and interest as proprietor in the land and property," &c.

Now, the pursuer's claims at that date consisted of compensation for the ground taken, with interest at 5 per cent. upon the sum, whatever it was, that represented compensation, from the date of entry.

That tender not having been accepted, parties went to arbitration, and the pursuer claimed "the sum of £2500, with interest thereon at the rate of £5 per centum per annum from the 8th day of July One thousand eight hundred and ninety-eight years till paid."

The arbiter awarded £1265, with interest at 5 per cent. from 9th August 1898.

The Railway Company's contention is that the sum awarded as compensation, viz., £1265, was below their tender of £1300. The pursuer replied that the award, inclusive of interest, is considerably above the tender.

If the tender had been made immediately after entry to the grounds, and before any interest had run, it might have been argued with much force that the pursuer would not have been entitled to found on the award of interest, which in that case would have been entirely due to the delay caused by his not accepting the tender. But in

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-