holders—"that allocation is ineffectual." Perhaps it is the less necessary that I should notice it—although I am noticing it for the reason I have indicated—seeing that the counsel for the appellants abandoned it as altogether untenable. But the Sheriff-Substitute seems to have proceeded upon the view that this action was directed against the ground. It has nothing to do with the ground. The Sheriff-Substitute says—"One of the superior's rights for security and recovery of his feu-duties is, that it affects every part of the ground feued, and that the vassal in sub-dividing the feu cannot without his consent relieve any part of the ground from that burden. What Mr Renton does by his memorandum of allocation subsequent to the pursuers' recorded right is to relieve part of the ground from the burden of the feu-duty—the very thing that is prohibited in the clause quoted—"Clearly, therefore, in a question with the pursuers, that allocation is ineffectual." Now, as I have said, we have nothing to do with the ground. The action is laid on the personal obligation which the defender undertook to pay the feu-duty. The remedies against the ground, if he fails to implement his personal obligation, are not here at all, and could not be brought here at the instance of the present pursuer, who has no title enabling him to do so. I have only thought it necessary in making these remarks to guard against the notion of that view meeting with any countenance or approbation, because in all that your Lordship has said, and in the grounds of your Lordship's opinion, I entirely concur.

I have nothing more to add.

LORD ADAM concurred.

The Court therefore dismissed the appeal.

Counsel for Appellants—D.-F. Kinnear, Q.C.—Keir. Agents—Crombie & Bell, W.S.

Counsel for Respondent—Mackintosh—Dickson. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Thursday, November 3.

SECOND DIVISION.

[Lord Adam, Ordinary.

MUIR *v.* MORE NISBETT AND ANOTHER.

Sheriff—Process—Sheriff Court Act 1876, *sec.* 8—*Dispensing with* Inducíæ.

Circumstances in which the Court sustained the appointment of a judicial factor under the provisions of the Sheriff Court Act 1876, sec. 8, made *de plano* without service or intimation.

William Muir brought an action against Mr More Nisbett, his landlord, concluding for reduction of an interlocutor of the Sheriff-Substitute of Lanarkshire at Airdrie (MAIR) in a petition at Mr More Nisbett's instance, under the Sheriff Court Act 1876, to have a factor appointed to take charge of the farm of Moss-side, of which the pursuer was tenant. In that process it was averred by Mr More Nisbett that the pursuer had deserted his farm and was absent without leaving anyone in charge and without having left information as to his whereabouts. On these statements, and on the day the petition was presented, the Sheriff-Substitute, without ordering any service of the petition, appointed William Robb judicial factor on the farm. Robb was called in the present action for his interest. The Sheriff Court Act 1876 (39 and 40 Vict. cap. 70) provides by sec. 8 that the *inducíæ* in all petitions where the defender is within Scotland shall be seven days, and fourteen days where he is furth of Scotland. By sub-sec. 2 it is provided that the Sheriff may "shorten the warning or *inducíæ* as he shall see fit in any case which he considers to require special despatch." The Act of Sederunt anent removings of 14th December 1756 provides by the 5th section for the removing of a tenant "who . . . shall desert his possession or leave it unlaboured at the usual time of labouring." The pursuer maintained that the statements of the defender in the petition above referred to were unfounded in fact, and that he had not deserted his farm, and that in any case the proceedings in the petition were incompetent in respect that there had been no intimation of its being presented, and no inquiry into the necessity of making the appointment.

The facts disclosed on a proof taken by the Lord Ordinary were that the pursuer had left the county to avoid his creditors, and had when he left no intention of returning at any particular time, but was looking out for a suitable opening in America. Further, it was proved that no damage had resulted from the appointment of the factor, and that his appointment had been made with the approval of the tenant's wife, who had been left upon the farm without money to carry it on or to meet the rent.

The Court in these circumstances refused to entertain the objections to the competency of the petition, and assoilzied the defenders.

Counsel for Pursuer—Scott—Lang. Agent—William Paterson, L.A.

Counsel for Defenders—Dundas. Agents—Dundas & Wilson, C.S.

Friday, November 4.

SECOND DIVISION.

[Sheriff-Substitute of Midlothian.

NORTH BRITISH RAILWAY COMPANY *v.* WHITE AND OTHERS

Process—Multiplepoinding—Competency.

Creditors of S., who was notour bankrupt, and who was alleged to have made a pretended sale of his household furniture to R., his brother-in-law, who resided in Dublin, arrested the furniture in the hands of a railway company with whom the brother-in-law had placed it for conveyance to his address in Dublin. The creditors having raised a multiplepoinding in the Sheriff Court to have the right to the furniture determined, R.

objected to the competency of the action, on the ground that the furniture was his under a contract of sale which must stand unless reduced in the Supreme Court, and that as it must be held by the Sheriff to be his until such reduction, the arrestments were inept, and there was no double distress. *Held* that the multiplepoinding was competent.

Mandatory — Foreigner claiming in Multiplepoinding.

Opinions that in the circumstances R. was not bound to sist a mandatory to enable him to claim in the multiplepoinding.

Charles Seton, who resided at 35 Lorne Street, Leith Walk, Edinburgh, having in March 1881 gone over to Dublin, granted while there, to David R. Roberts, his brother-in-law, a receipt dated Dublin, 19th March, 1881, and bearing to be for £135, 10s., as the amount agreed upon to be accepted by him for the whole furniture and plenishing in his house 35 Lorne Street, Leith Walk, which furniture and plenishing were thereby declared to be sold to Roberts, with full power to him to remove them when it might suit him. He bound himself also to relieve Roberts of all liability with regard to the half-year's rent of the house then coming due. On 14th April 1881, Robert White, grocer, Leith, obtained decree against Seton in the Sheriff Court of Midlothian for a sum due by Seton to him, with interest and expenses. On 2d May the furniture was delivered by Roberts to the North British Railway Co. at Edinburgh, consigned to himself at Dublin, and a receipt was granted to him therefor. On the same date the furniture was arrested in the hands of the railway company as belonging to Seton by White in respect of the decree he held against Seton, and by William Massie and David Wilson on the dependence of actions they had raised against Seton, and in which they subsequently obtained decree. On 14th May a further arrestment was laid on the furniture by G. & J. Walker, in virtue of a bill of which Seton was acceptor, and which had been protested for non-payment and duly registered. On 12th May White raised this action of multiplepoinding in name of the railway company to have the right to the furniture determined. Roberts was not called in this action, but was sisted as a defender by minute, and objected to the competency of the multiplepoinding. He averred that the furniture was his, and had been taken delivery of by him, and was held for him by the railway company, and that none of the arresters had any claim against him. He therefore pleaded that the arrestments were inept, and that there was no double distress. The real raiser averred in answer that there was no *bona fide* transaction between Seton and Roberts, who was his brother-in-law, and a conjunct and confident person; that Seton was insolvent at the date of the alleged sale, and was now notour bankrupt, and that the pretended sale was an attempt to defeat the diligence of his creditors. He also pleaded that Roberts being a foreigner was bound to sist a mandatory. Claims were also lodged for the other arresting creditors of Seton. The Sheriff-Substitute (Hallard) on 1st July found the multiplepoinding competent, and ordained Roberts to sist a mandatory, and on appeal the Sheriff adhered. Roberts then, without prejudice to his previous defences, lodged a claim to the whole furniture as being his property. He did not sist a mandatory. On 7th October the Sheriff-Substitute, in respect of his failure to sist a mandatory, disallowed his claim.

Roberts appealed to the Second Division, and argued—The furniture being his, the arrestments used on the footing that it was Seton's were null. If this sale were reducible, as the arresting creditors of Seton alleged, it must be first reduced in the Court of Session, the only Court competent to such a reduction, before the arresting creditors could claim it as Seton's. In such a process he would not have to sist a mandatory. The process could not go on before the Sheriff till that question was settled.

The respondents argued—The multiplepoinding was quite competent. The cases of *Craig* v. *Thomson*, January 13, 1847, 9 D. 409; *Mathew* v. *Fawns*, May 21, 1842, 4 D. 242; *Metzenburgh* v. *Highland Railway Company*, June 25, 1869, 7 Macph. 922—settled that in such circumstances the railway company was entitled to bring a multiplepoinding. They were willing that the process should go on before the Sheriff without a mandatory being sisted.

At advising—

Lord Justice-Clerk—The sort of question raised here in many circumstances becomes very perplexing and troublesome, especially when one of the parties is out of the jurisdiction of the Court, but this, I think, is not a very difficult instance. The transference of this furniture to the claimant Roberts, who, it appears, is the brother-in-law of Seton, the original owner of it, is alleged to have taken place in March, and Roberts endeavours to prove his title to the goods by means of a receipt granted to him by Seton for the price.

The furniture having been entrusted to the railway company for conveyance to Dublin, certain of Seton's creditors used arrestments in the hands of the company, and in order to try the question as to whom the furniture is to be given up this multiplepoinding has been brought.

The first question is, whether Roberts being resident in Ireland, is to be compelled to find a mandatory before he can insist in his claim? I think that would be a great hardship. With respect to the question of title, it may be that his title may require to be reduced, but that does not affect the competency of the action of multiplepoinding.

On the whole matter, I think we should find the multiplepoinding competent, and recal that portion of the interlocutor rendering it compulsory on Roberts to sist a mandatory at this stage.

Lord Young—I am of the same opinion, and on the same grounds. The only observation I wish to make is, that the general rule is that a foreigner is not subject to the jurisdiction of the Inferior Courts of Scotland. That is the rule. But there are exceptions, of which this case may fairly be regarded as one. An important and large class of exceptions—larger, I think, than its authors intended—was introduced by a recent statute, the Sheriff Court Act of 1876, which statute subjects foreigners to the jurisdiction of the Sheriff Court by reason of arrestments *jurisdictionis fundandæ causa*. A

foreigner might always bring an action in the Inferior Court against a defender subject to its jurisdiction, and now it is provided that a foreigner may be sued there if arrestments have been used to found jurisdiction. Laying that provision and the old law together, the result is that where two London merchants have a dispute arising out of a contract made there, one of them, by arresting a ship belonging to the other which is lying in the Clyde, may found jurisdiction in the Sheriff Court of Lanarkshire, and the Sheriff would be bound to entertain the action. That is one extensive exception to the rule that a foreigner can only be made answerable to Scotch jurisdiction in the Supreme Court.

I think, with your Lordship, that we have another exception here where the furniture was stopped *in transitu* by an arrestment. It might equally well have been done by interdict. It is a case in which it is alleged that there has been a fraudulent removal of a debtor's furniture for the purpose of cheating his creditors. It would be the same case if the goods were alleged to be stolen goods. Such goods might be stopped in the hands of the railway company to have the question of their ownership tried here though they were consigned to someone out of Scotland. There is thus no objection in the circumstances to the stoppage of the goods, and to the question of the right to them being raised in a multiplepoinding in the Sheriff Court. I agree with your Lordship also in holding that a foreigner who comes into a Sheriff Court, as Roberts does in this case, shall be in no other position than if the allegation of fraud has been the subject of reduction in a competent process in which he was defender. I also agree that the appellant ought to be allowed to urge his claim without sisting a mandatory.

Lord Craighill concurred.

The Court pronounced this interlocutor:—

"Find the action of multiplepoinding competent: Sustain the appeal to the effect of recalling so much of the interlocutor of the 1st July last as requires the said David R. Roberts as a claimant to sist a mandatory, and so much of the interlocutor of the 7th October last as disallows the claim of the said claimant Roberts: *Quoad ultra* dismiss the appeal, and affirm the judgment appealed from, and remit to the Sheriff to proceed with the cause."

Counsel for Roberts (Appellant) — Nevay. Agent—R. Broatch, L.A.

Counsel for Other Claimants—Mackintosh—Shaw. Agent—P. Morison, S.S.C.

Saturday, November 5.

SECOND DIVISION.

[Lord Lee, Ordinary.

M'AVOY *v.* YOUNG'S PARAFFIN LIGHT AND MINERAL OIL COMPANY.

Process—Jury Trial—Causes Appropriated to Act 29 and 30 Vict. cap. 112 (Evidence Act 1866)—"Special Cause Shewn"—Act 43 and 44 Vict. cap. 42 (Employers Liability Act 1880).

It is not sufficient "special cause" to induce the Court to refuse a jury trial and allow a proof in an action on account of injury to the person, that the case is alleged to present features of difficulty in point of law as to the defenders' liability which are not special to the case itself, but belong to all cases of its class; and an action removed to the Court of Session under the provisions of the Employers Liability Act, being one of the causes appropriated by statute to jury trial, sent for trial by jury though said to raise questions of legal difficulty under the statute, and therefore to be more suited for proof than jury trial.

Question (*per* Lord Young), Whether if an action were brought in the Court of Session by a workman against his employer, and it appeared as a result of the evidence that the only ground of liability was under the Act, the action must therefore be dismissed?

This was an action of damages at the instance of the widow and children of a man named M'Avoy, in respect of his death while engaged in the employment of the defenders, through the fault, as the pursuers alleged, of the defenders or those for whom they were responsible. It appeared from the averments on record that M'Avoy was at the time of his death engaged at a working-face situated at the top of a bank or slope in the shale workings belonging to the defenders, on which there was a double line of rails, by means of one of which lines the trucks loaded with shale descended, dragging up by their weight as they did so the light waggons which required to be sent to the top. The death of M'Avoy occurred through his being struck by a piece of wood which was being sent up the working-face in one of these light waggons. The chain by which these sets of waggons were connected was passed round a horizontal wheel situated on the working-face at the top of the bank. The pursuers alleged that this wheel, and the prop by which it was supported, and also the roads on which the rails rested, were in a defective and unsafe condition, and that the death of M'Avoy was caused either through such defective condition or through the negligence of the defenders, or those in their employment who were in charge of the workings and machinery. They therefore raised this action claiming £1000 in name of damages. Alternatively, in the event of its being found that they had no claim at common law, but only under the Employers Liability Act 1880, which (sec. 3) provides that the amount of compensation recoverable thereunder "shall not exceed such sum as may be found equivalent to the estimated earnings during the three years