necessity at all for legacies to the children. And even if it may have been an intention on the part of the testator in 1893 that there should be equality of division, I know of nothing to show that that was his intention at his death, and a will is, speaking generally, to be read as of the date of the testator's death. I know of nothing which can lead me to the conclusion that he then intended an equal division of his estate among his children, and that anything he might give to his daughters for their dress, or to his son to enable him to travel or the like, should be taken into account so as to produce that equality.

But the will contains a special clause which informs us as to how the intention of the testator as to gifts to his children in his lifetime is to be reached. This clause is as follows:—"But declaring that any advances which I have made or may hereafter make to any of my children (excepting said sums of £1000 each presented to my daughters), and which are entered in my private books or memoranda to their debit, or are so acknowledged by receipt under their hands, shall be treated by my trustees as debts due by such children respectively to my estate free of interest, and shall be taken into account in settling with my children for their respective shares of residue." This clause does not apply universally to all payments to the children during the testator's lifetime. It applies only to those which have been entered by the testator to their debit, and for which receipts have been taken. The gift in question to the son was not entered to his debit in the testator's books, and no receipt was taken from him. There is therefore in the clause quoted no expression of intention on the part of the testator that it is to be taken into account in arriving at an equal division.

I have therefore arrived at a different conclusion from your Lordships with considerable misgivings, having regard to the opinions which your Lordships have expressed. I have expressed myself as I have done because I think it is important that my views on ademption should be known.

The Court adhered.

Counsel for Pursuer—Guthrie, Q.C.—Graham Stewart. Agents—Cairns, M'Intosh, & Morton, W.S.

Counsel for Defenders—Campbell, Q.C.—Gray. Agent—Thomas Liddle, S.S.C.

Tuesday, December 13.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

CORSTORPHINE *v.* KASTEN.

Process—Citation—Foreigner—Citation of Foreigner at Dwelling-House within Forty Days of Departure—Act 1540, *cap.* 75—*A.S.* 14*th December* 1805—*Judicature Act* 1825 (6 *Geo. IV. cap.* 120), *sec.* 53.

Jurisdiction which has been acquired over a foreigner by forty days' residence in Scotland, ceases on the foreigner leaving without retaining a residence, and citation within a period of forty days thereafter at what was his residence during his stay in Scotland, under the Act 1540, c. 75, is invalid, and is not cured by using arrestments *jurisdictionis fundandæ causa.*

Judgment of the Lord Ordinary in *International Exhibition.* v. *Bapty*, 1891, 18 R. 843, *overruled.*

Process—Citation—Foreigner—Objection to Citation by Party Appearing in Action—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 21.

Section 21 of the Court of Session Act of 1868 provides that no party appearing in an action in the Court of Session shall be entitled to state any objection "to the regularity of the execution or service as against himself of the summons."

A foreigner who had resided temporarily in Scotland, but had quitted the country, was improperly cited on seven days' induciæ at the dwelling-house he had occupied in Scotland, instead of being cited edictally on fourteen days' induciæ. He defended the action and objected to its competency on the ground of these errors in procedure.

Held that the defender's objections fell within those excluded by the statutory provision.

By the Act 1540, cap. 75, it was provided that the officer must go to the "principal dwelling-place" where the person to be summoned "dwells, and has their actual residence for the time," and if he cannot find him personally he is to show his precept to a servant and leave a copy with the servant. Failing his getting entrance, the officer is to fix a copy at the door, which is to be "sufficient summoning and delivering of the copy."

By A.S. 14th December 1805 it is provided "that where any person against whom legal diligence is meant to be executed, or who is to be cited as a party in any judicial proceeding, has left the ordinary place of his residence, which may render it doubtful whether he is within the kingdom of Scotland or not, and consequently whether the citation against him ought to be executed at his dwelling-house or at the market cross of Edinburgh and pier and shore of Leith, when he is not per-

sonally found, it shall in time coming be held and presumed that the said person after forty days' absence from his usual place of absence, but not sooner, is furth of the kingdom of Scotland, and therefore that within the said forty days the citation or charge may be at his late dwelling-house, but after that period must be at the market cross of Edinburgh and pier and shore of Leith, unless he be personally found, or prior to the execution shall have taken up some other known and fixed residence within Scotland."

This Act of Sederunt was passed with relation to the Bankruptcy Act of 1793 (33 Geo. III. cap. 74), which expired in 1814.

Section 53 of the Judicature Act (6 Geo. IV. cap. 120) provides that "where a person not having a dwelling-house in Scotland occupied by his family or servants, shall have left his usual place of residence, and have been absent therefrom during the space of forty days without having left notice where he is to be found in Scotland, he shall be held to be absent from Scotland, and be charged or cited according to the forms herein prescribed," *i.e.*, by edictal citation.

Section 21 of the Court of Session Act 1868 (31 and 32 Vict. cap. 100) provides that "No party appearing in any action or proceeding in the Court of Session shall be entitled to state any objection to the regularity of the execution or service as against himself of the summons or other pleading or writ whereby he is concerned."

An action of damages for alleged breach of contract was raised on 23rd October 1897 by Mr John Edward Corstorphine, Edinburgh, against Mr John Ben Kasten, described in the summons as "residing at No. 14 Claremont Terrace, Edinburgh." The defender was a foreigner, not residing in Scotland, who came to Edinburgh to conduct experiments in connection with the contract in question, and resided at the above address from the beginning of July to 2nd October 1897, when he went to Berlin, and did not return to Scotland. The defender was cited by service executed on 5th November at 14 Claremont Terrace, the summons containing a warrant for seven days' induciæ, and was not cited edictally. Jurisdiction was founded against him by arrestment *ad fundandam jurisdictionem*.

The pursuer maintained that the defender had a domicile of citation at 14 Claremont Terrace, where he had been cited within forty days of leaving Scotland.

The defender averred that at the date of citation he had left that address without any intention of returning, and that it was not his domicile.

He pleaded — "(1) No citation. (2) No jurisdiction."

On 16th October an action arising out of the same transaction was raised against Mr Kasten by Mr Matthew, Edinburgh. The defender was cited in the same way as in the other action, and advanced the same pleas in defence.

The Lord Ordinary (KINCAIRNEY) on 8th June 1898 repelled the defender's first and second pleas in the action at the instance of Mr Corstorphine and allowed a proof.

Opinion.—"In this case the defender pleads—'(1) No citation, and (2) no jurisdiction.' I assume that he is not a Scotchman, although he does not say what his nationality is. The defender was cited at 14 Claremont Terrace, Edinburgh, on seven days' induciæ. His objection is that he should have been cited edictally on fourteen days' induciæ. The pursuer maintains that this objection is met by the 21st section of the Court of Session Act (31 and 32 Vict. c. 100), which provides that 'no party appearing in any action or proceeding in the Court of Session shall be entitled to state any objection to the regularity of the execution or service as against himself of the summons or other pleading or writ whereby he is convened.' I have been informed that there are no reported decisions about this section. But if the defender be right in saying that he ought to have been cited edictally, then I doubt whether the substitution for an edictal service of a service not edictal can be said to be merely an irregularity in the service. There was nothing irregular in the service considered as a non-edictal service. I am not prepared to decide that the defender cannot state this objection. But I am of opinion that the objection is bad, and that the citation was right, and that it should not have been edictal. The pursuer avers that the defender resided at 14 Claremont Terrace from the beginning of July until 2nd October—that is, about ninety days—and that averment is not denied. The execution annexed to the summons shows that it was served at 14 Claremont Terrace on 5th November—that is, within forty days of the day on which the defender left it. The pursuer's proposition is that when a man resides continuously in Scotland for forty days he may be cited at his place of residence, not only when he is still there, but for forty days after he has left it. I am of opinion that that proposition is sound, and that it is a just inference from the 53rd section of the Act 6 Geo. IV. c. 120. I was referred to the opinion of Lord Stormonth Darling in the case of *Bapty*, May 26, 1891, 18 R. 843, which is to that effect, and in which I concur. His Lordship's judgment was taken to review, and was affirmed, although on a different ground. But no dissent from his views was indicated. I have carefully considered his opinion and the authorities to which he refers, and I need say no more than that I adopt it. I therefore repel the plea of 'no citation.' The plea of 'no jurisdiction' is met by arrestments *jurisdictionis fundandæ causa*, against which nothing is alleged, and that plea must also be repelled. The result is that the action must be entertained, and I suppose that there must be inquiry."

On 28th June his Lordship similarly repelled the defender's first two pleas in the action at the instance of Mr Matthew.

The defender reclaimed against both interlocutors. In the course of the debate upon the reclaiming-note he added the following plea—"The defender being a for-

eigner, and furth of Scotland in the sense of sec. 14 of the Court of Session Act of 1868, the summons is incompetent, in respect it contains no warrant for an inducíæ of fourteen days, and should be dismissed."

Argued for reclaimer—1. He ought to have been cited edictally upon a fourteen days' induciæ, and it was not competent to cite him at a dwelling-house, which it was well known he had left. There was no ground for the contention that a domicile of citation endured for 40 days. The Act of 1540 had introduced citation at the dwelling-house where the person cited had his "actual residence at the time." That Act had not been extended by the decisions to embrace such a case as the present. Then the Act of Sederunt of 1805 was not, as the respondent maintained, an exposition of the common law, but referred merely to the Bankruptcy Statute of 1793, and did not extend beyond the limits of that Act, and expired with it. There was no foundation for the respondent's contention, for there was no such custom existing as he alleged was declared by it, and it would have tended to repeal the Act of 1540, which there was a presumption would not be done by an Act of Sederunt, and finally the words used, "shall be in time coming," were not appropriate as a declaration of the common law. Then section 53 of the Judicature Act clearly did not contemplate the case of foreigners who had only come to Scotland for a limited period, and then had left without intending to return. It applied only to *bona fide* Scotchmen going away for a time and leaving their "ordinary place of residence," not to a foreigner whose ordinary place of residence was elsewhere. Moreover, while it stated what was to be done at the end of the forty days, it did not prescribe what was to be done during these forty days—Shand's Practice i. 238; *Broun* v. *Blaikie*, Feb. 1, 1849, 11 D. 474. The authorities quoted to the opposite effect consisted only of recent writers, whose views were not supported by the cases. The statement of Lord Stormonth Darling in *International Exhibition* v. *Bapty*, May 26, 1891, 18 R. 843, that jurisdiction founded by forty days' residence in Scotland lasted for forty days after the termination of such residence, was founded only upon an utterance of the Lord Justice-Clerk in *Joel* v. *Gill*, June 16, 1859, 21 D. 929, at p. 939, which was *obiter*, and could not be held to establish the doctrine—*Johnston* v. *Strachan*, March 19, 1861, 23 D. 758. 2. Sec. 21 of the Court of Session Act only referred to technical irregularities of execution. Here there had not been such irregularity, but nullity, since there had been a breach of a statutory provision. A line had been drawn between the two classes—*Watt* v. *M'Intosh*, Feb. 10, 1827, 5 S. 334; *Miller*, Dec. 2, 1853, 16 D. 109; *Stephenson* v. *Dunlop*, July 9, 1840, 2 D. 1366. The section clearly did not apply to the new point raised under sec. 14 of the Act, viz., to the fact that the summons had not contained a warrant for an induciæ of fourteen days but only for seven. It assumed the summons to be unimpeachable, and merely covered the question whether it was properly served.

Argued for respondent—1. Citation was a matter of practice, being regulated by it as well as by Act of Sederunt and statute, and there was a presumption that the form of citation created by the Act of 1540 was extended in any direction sanctioned by usage. The case of *Calder* v. *Wood*, Jan. 19, 1798 (F.C.), showed that a person might be held to be constructively in Scotland for forty days after leaving it, and that accordingly the form of citation used here was the right one within those forty days. That practice was formally declared as the common law by the Act of Sederunt of 1805. It was not confined to the operation of the Bankruptcy Act of 1793, and did not expire with it, but was a general provision, and was intended by the Court to avoid the difficult question which might arise as to whether a man had really left the country —Ersk. i. 2, sec. 16, note. The Judicature Act in a shorter form, but in the same substance, re-enacted the Act of Sederunt, plainly implying that a person was not to be held to have left Scotland within the forty days. On the authorities two views might be held, that jurisdiction endured for forty days after a foreigner left the country — *International Exhibition* v. *Bapty*—or alternatively that citation at the last dwelling-house was still good for that period—*Johnston* v. *Strachan*, *ante*; *Joel* v. *Gill*, *ante*. The latter view was sufficient for the respondents, and was the one preferred by them since jurisdiction had been constituted by arrestment. 2. Sec. 21 of the Court of Session Act had not hitherto been construed by the Court, because in point of practice it had been construed as meeting every possible mistake in citation. It was intended to put the pursuer in the same position as if the defender had accepted service if the latter saw fit to appear. It was not competent to draw the line between slight and important irregularities.

At advising—

Lord President — Two questions are raised under these reclaiming-notes—*first*. Has the defender been legally cited? *second*, Is the defender disentitled by the Court of Session Act 1868 to state his objection to the citation? As the defender's argument on the second question depends on the nature of his objection to the citation, it is necessary in any view to consider both questions.

Jurisdiction has been founded against the defender by arrestments *jurisdictionis fundandæ causa*. It is therefore to be borne in mind that the question we are considering is not one of jurisdiction but of citation. On the other hand, on the question of citation, it is material to remember, as the first fact in the case, that the defender is a foreigner, and that while these summonses describe him as residing at No. 14 Claremont Terrace, Edinburgh, this means no more than that, from the beginning of July he resided there till 2nd October 1897, when he left for Berlin. So

far as appears, he never was in Scotland before the first or after the last of these dates, and his visit to Scotland is said by the pursuers to have been made in connection with the contract now in dispute. The defender was not personally cited, but by a service executed at 14 Claremont Terrace, Edinburgh, on 5th November; when, admittedly, he had been furth of Scotland for thirty-four days, but the citation has been upheld by the Lord Ordinary on the theory that, by law, if a foreigner has resided for forty days in a house in Scotland and then leaves, then you have other forty days in which he may be legally cited at his former abode as if it were his dwelling-house, under the Act 1540, c. 75. The defender maintains that in such a case edictal citation is the only legal citation.

It may readily be allowed that in any law of citation there must almost necessarily be a certain amount of what is arbitrary and artificial and formal, and as the defender's thesis is that he ought to have been cited by the highly artificial method of edictal citation, his contention does not derive any unfair advantage from its practical utility. Still we must accept edictal citation as being, in the absence of personal citation, the appointed mode of citing persons furth of Scotland, and unless it can be shown that the method adopted here is in accordance with settled law, the pursuer's argument cannot legitimately be eked out by reflections on the shortcomings of edictal citation as a means of communicating with foreigners.

Now, the beginning of the argument is necessarily the Act 1540, c. 75, and it will of course be remembered that the primary and the surest mode of citation being personal citation, the object of all substitute forms is to secure knowledge of the citation by the person cited. Well, the preamble of this Act shows that its object was to regularise and condition service at the dwelling-places of the lieges; the moving cause is that the lieges under the existing system suffered inconvenience by summoning them at their dwelling-places, "and sometimes falsely and gettis never knowledge thereof." It is provided then that the officer must go to the principal dwelling-place, where the person to be summoned dwells, and has his actual residence for the time. There the officer is to try to find the person to be served, and, only if he cannot be found, the officer is then to show his precept to a servant, and leave a copy with the servant. If the officer cannot get entrance, then he is to fix a copy at the door, and so on. But the gist and essence of the system prescribed in the Act is that you are to go to the man's true abode, as being the place where you are most likely to find him. It is plain, if a man's true abode is not in Scotland, that to go and make believe to look for him at a house in Scotland which he once occupied, but to your knowledge has left, is, to say the least of it, a circuitous way of furthering the objects of the Act of 1540, c. 75.

We were referred to the Act of Sederunt of 1805, and to the proviso of the 53rd section of the Judicature Act of 1825. Now, apart from questions about the limited scope of the Act of Sederunt of 1805, and its continuance in force, it may quite legitimately be referred to as setting forth the practice deemed to be appropriate in those days. But when this is done, the inference seems to me in no way to advance the pursuer's argument. What the Act of Sederunt says is that if a man has left his usual place of residence, and has been absent therefrom for forty days, then he shall be held to be absent from Scotland, and you cite him accordingly. The inference is that if he has left his usual place of residence, but has not been absent for so long as forty days, you may cite him at his usual place of residence. This implication is expressed in the Judicature Act, so that the rule for such cases is that within forty days you cite at the dwelling-house, and after forty days you cite edictally.

But the cases thus dealt with, both in the Act of Sederunt and in the Judicature Act are the cases of people who are originally resident in Scotland, whose usual place of residence is in Scotland, but as to whom it is doubtful whether or not they have given it up, and whether they are at home or abroad. These enactments have nothing to say to the case of a person whose usual place of abode is not in Scotland at all. They have no relation to the case of a foreigner, whose only connection with Scotland is that he lived for forty days in Scotland, but is not there now, and whose usual place of abode is elsewhere.

The main reliance of the pursuer's has been placed on the decision in *Calder* v. *Wood*, which is most fully reported in the Faculty Collection. When this case is examined, however, I do not think that it sustains their arguments. Wood, the person cited, was a Scotchman by birth; he had resided and carried on business in Scotland; when he originally left Scotland it was for military service, and the occasion of his ultimately leaving Scotland was to resume his military service in the West Indies. It is true that he had not been in Scotland for five years until the visit which led to his being cited as at his dwelling-place, but on the facts the Court held that the lodging-house where he stayed was his most ordinary place of residence, and that therefore it must be considered as his dwelling-house. The judgment may or may not have been right on the particular facts, and it is strongly supported by the fact that there was no other place suggested as his usual residence, but the basis of the judgment was that this lodging-house was his most ordinary place of residence, and therefore that he might be cited there under the Act 1540, c. 75. Accordingly this decision gives no countenance to the idea that a dwelling-place citation will do, irrespective of whether the place is or is not the usual residence of the person cited.

As the Lord Ordinary has referred to and adopted the authorities quoted in the judgment of Lord Stormonth Darling in the case of *Bapty*, I ought to refer to the two works by living writers who are named by

Lord Stormonth Darling as stating the practice. I doubt whether either writer can be held as doing more than citing *Calder* v. *Wood*, or as laying down any general practice on what is probably an uncommon case. But as writers on practice are cited, it will not do to ignore the respectable authority of the late Sir Charles Shand, who, writing in 1848, says, on this very point—"But a domicile constituted in this way (that is, by forty days' residence) only endures as long as the party is within Scotland; whenever he leaves it, a domicile constituted by forty days' residence comes to an end, and no citation afterwards left for him could be sustained."

As what I am now saying is at variance with the judgment of Lord Stormonth Darling in the case of *Bapty*, it is right to point out that the present pursuers have deliberately declined to support the doctrine of that learned Judge in its fulness. His Lordship's view is, that if a foreigner comes and lives 40 days in Scotland, and then leaves it, he is subject to the jurisdiction for another 40 days, and may, during the second forty days, be cited under the Act of 1540 at what was his residence during his stay in Scotland, and that then the Court will have jurisdiction over him in a personal action. I confess I am not surprised that the courage of the pursuers' counsel failed them when asked to support this doctrine. But, on the other hand, Lord Stormonth Darling's doctrine is at least logical, and the pursuers' modification of it is wholly illogical. They say that such dwelling-place citation will only be good provided there is jurisdiction constituted *aliunde*, as by arrestment *jurisdictionis fundandæ causa*. Now, I am wholly unable to see how the fact that some of his money has been arrested will ever make 14 Claremont Terrace any more the usual residence of John Ben Kasten than it was before arrestment, and unless it does this the arrestment has no relation whatever to the mode of citation, and therefore to the present question.

By abandoning the doctrine of Lord Stormonth Darling, the pursuers deprive themselves of the support which his Lordship has derived from the opinion of the Lord President in *Joel* v. *Gill*. I have read the passage referred to with special attention, and it is clear that the question we are now considering was not and could not be before the Court, for the bankrupt not only had resided in Scotland for 40 days, but was resident there at the time of the petition, and as the petition was at his own instance there was no question of citation in the case. The sentence on which Lord Stormonth Darling founds is expressed in general terms, which, when taken in their full latitude, would, I think, cover what Lord Stormonth Darling considers them to decide. But I cannot accept what is only an *obiter dictum* as decisive of a doctrine which seems to me unsupported by any other authority, and which leads to a repugnant consequence. That consequence is, that the Scotch Courts would hold to be duly convened before them persons in fact furth of Scotland and not personally cited, whose usual residence is furth of Scotland, and whose only relation to Scotland is that less than 40 days ago they were in Scotland for six weeks, and that this would be brought about by the medium of a method of citation which was instituted to ensure that citation shall be at a man's usual dwelling-place.

I have discussed this question with some fulness, because, although the matter is highly technical, yet the question is whether we are to apply to foreigners a mode of citation not intended for them and not suitable to them. The Court ought, I think, to be scrupulously careful, neither by decisions nor regulations, to make it easier than it is already to bring foreigners into our Courts as defenders. In the present case I do not think that this defender has been cited in accordance with law.

There remains, however, the question whether under the Act of 1868 the defender is disentitled to state this objection. Now, in the view which I have stated, the error made by the pursuers is a serious one, and if in matters of this kind it could be held that some errors in citation transcend in importance the epithet of "irregular," then I think this must be held to be of that graver class. I have not, however, been able to satisfy myself that any such classification is possible, or that this is anything else than what the Act of 1868 calls an objection to the regularity of the service. Accordingly, and the more readily that I know this to be your Lordships' view, I am prepared to hold that the Act of 1868 excludes the objection. It is perfectly intelligible that once a man comes into Court he should be precluded from challenging the particular method by which it was sought to convey to him information which he shows has reached him.

The defender endeavoured to represent that the fact that the summons proceeded on the wrong induciæ constituted an objection of a different quality. Again I am prepared to concur with your Lordships in rejecting this view. The summons contains the warrant for citation, but it is the service by which the defender is aggrieved.

The practical result at which I arrive is, that we should repel the new plea, and that the Lord Ordinary's interlocutor should be adhered to, although the grounds of judgment are by no means the same.

Lord Adam — The defender in this case was cited at No. 14 Claremont Terrace, Edinburgh, on seven days' induciæ, as having a domicile for citation there, whereas he alleges that he is a foreigner, having no domicile for citation in Scotland, and ought to have been cited edictally on fourteen days' induciæ.

The first question is not whether the defender is right or wrong in this contention, but whether the objection to the citation given to him is struck at by the 21st section of the Court of Session (Scotland) Act 1868. That section enacts that no party appearing in any action or proceeding in the Court of Session shall be entitled to state any objec-

tion to the regularity of the execution or service against himself of the summons or other pleading or writ whereby he is convened.

It will be observed that the statute strikes at objections not only to the regularity of the execution of the summons or other writ, but also to the regularity of the service itself.

It appears to me that the defender's objection that the summons should have been served edictally, and not at his alleged place of residence, is just an objection to the regularity of the service. The object of all citation, whether edictal or otherwise, is to bring to the knowledge of the defender the proceedings which are impending against him in order that he may have time and opportunity to take the necessary steps for the protection of his interests, and the various rules and regulations with regard to citation and service have been enacted with the view of giving effect to that object.

No doubt the Legislature thought that if the object was attained, which was sufficiently shown by the defender appearing and pleading, it was immaterial whether or not there had been irregularities in the citation and service.

It appears to me that when a defender appears and pleads, an objection to the citation founded on an allegation that one mode of service had been adopted in place of another falls clearly within the purpose of the statute. It is just an averment that the rule or regulation for service which ought to have been followed in the circumstances had not been followed. But that seems to me just saying that there had been an irregularity in the service of the summons.

In some cases, no doubt, as in the present, where it is alleged that the service ought to have been edictal but was not, the defender by appearing loses the benefit of the longer induciæ. But that does not seem to me to be material. Any prejudice which it may be supposed he might suffer thereby may be easily rectified in the future proceedings.

I therefore think that the defender's first plea-in-law should be repelled.

On the question whether the citation was good, after serious doubt I have come to agree with your Lordship for the reasons your Lordship has stated.

Lord M'Laren—The provision of the Judicature Act which has been the subject of so much argument was intended, as I think, to correct an anomaly which had crept into our procedure—I mean the practice of allowing citation at the last dwelling-house in the case of a person who had *de facto* abandoned his Scottish residence. An example of such cases is that of *Calder*, where an officer in the army, presumably domiciled in Scotland, but having no Scottish dwelling-place, being engaged in service with his regiment abroad, was held to be properly cited at the lodging which he had quitted five years before. As a matter of fact the probability that his last dwelling-house in this country was in any true sense his residence was absolutely *nil*. Service there was obviously of no use, since there was not the slightest chance of the citation reaching the person to whom it was addressed.

If a domiciled Scotsman goes abroad for a short time for business or recreation, it is reasonably certain that letters and papers left at his last known residence will be forwarded to him; accordingly this would be a proper case for leaving the citation there. The difficulty is to find a period during which this address should continue, and that is solved by the Act of Parliament, which establishes a limited period of forty days. But in the case of a foreigner on a visit to Scotland, when he quits the country he is no longer resident in it, in any sense of the word, and his last residence there is not a suitable place for making citation. Now, the Judicature Act, while it says that a person who has abandoned his last known place of residence shall after the lapse of forty days be cited edictally, does not say that the party is in all cases to be cited at his dwelling-house within that period That question must be determined according to the character of the residence, and is very different in the cases of a native and of a foreigner. Edictal citation is the necessary and sufficient mode of notifying an action to a foreigner who has not in fact retained a dwelling-place in Scotland, and I agree without any doubt or hesitation in the decision proposed on that question.

I also agree that the case falls within the provision of the 21st section of the Court of Session Act. If a defender does not get a citation, or does not choose to appear in answer to a wrong citation, and decree goes out against him, he has a remedy by reduction or suspension, but if he does appear the motive of the statutory provision is that he cannot object to the form of citation if he has received substantial notice. The irregularity may consist in the citation being made in accordance with a wrong and inappropriate rule, or it may not be in accordance with any rule. In either case the objection is to the regularity of the Act. In this case there was a *regula*, but it was wrongly applied, and that I hold to be a form of irregular citation.

Lord Kinnear concurred.

The Court repelled the defender's new plea and adhered to the interlocutor of the Lord Ordinary.

Counsel for Pursuer—H. Johnston, Q.C.—Constable. Agents — Constable & Johnstone, W.S.

Counsel for Defender—Kennedy—A. M. Anderson. Agent—John Veitch.