

is carried on, and that it was not the intention of the Legislature that the meaning of the expression should be further extended. If the section is so confined in its application, I think it may be very useful and convenient.

As for the contention that by the term "person" the framers of section 46 had in contemplation merely persons who are capable of being personally served, I do not think that the section is to be so limited. Therefore, in my view, either personal service or service at the place of business would be sufficient compliance with the terms of the section. But even if there were more in the argument, I think it admits of another answer, for I do not doubt that an incorporated company is capable of being personally cited. That was decided in the case of *Stewart v. Scottish Midland Junction Railway Company*, 14 D. 594. In that case the only warrant was to cite the defenders personally or at their dwelling-house, and the citation was by delivery to the secretary personally, which is just the mode recognised by the Companies Clauses Act and the Railway Clauses Act, and the citation was held to be good. Therefore I come to the conclusion that if this company has a principal place of business in Lanarkshire then they can be personally served in Lanarkshire.

Any little inconvenience which might arise is sufficiently met, I think, by the last part of section 46, which allows the Sheriff, "upon sufficient cause shown, to remit any such action to the Court of the defenders' domicile in another sheriffdom."

LORD SHAND—I am of the same opinion, and in the present instance I think that the case admits of very easy decision.

It is conceded that the defenders have a principal place of business in Lanarkshire, and I have no doubt that in such a case the 46th section of the statute clearly applies. Possibly we may hereafter have to decide a case as to a place of business of less importance, and with regard to that I should wish to reserve my opinion, for one can see that there is room for maintaining that the section applies to stations of less importance where the company is carrying on business.

But there can be no doubt that it was the intention of the Legislature that the statute should apply to this case. I do not think there is any difficulty with regard to the provision that the defender shall be cited personally. That just means that if you are dealing with a person, then the citation is to be personal, and if you are dealing with a company, then the citation is to be at the company's place of business, or personally on their secretary, or one of the directors. No doubt "personal" citation is more directly applicable to persons, but it does not follow that companies are to be struck out of the section, because when one turns to the interpretation it is seen that the term "person" includes "company, corporation, and firm."

LORD MURE and **LORD ADAM** concurred.

The Court repelled the objection to the jurisdiction of the Sheriff, and ordered issues.

Counsel for Pursuer (Appellant)—Ure. Agents—Dove & Lockhart, S.S.C.

Counsel for Defenders (Respondents)—Lord Advocate Balfour, Q.C.—Graham Murray. Agents—Millar, Robson, & Innes, S.S.C.

Tuesday, June 2.

FIRST DIVISION.

[Lord Kinnear, Ordinary.]

BROWN v. THE NATIONAL FIRE INSURANCE COMPANY.

Insurance—Defence of Fraud—Relevancy—Specification—Issue.

Averments of fraud on the part of a person assured, which, in an action by him on his policy, were held relevant to support a counter-issue of fraud on the part of the assurance company. Forms of issues adjusted for the trial of the cause.

William G. Brown, hotel-keeper, Uddingston, Lanarkshire, raised this action against the National Fire Insurance Corporation, Limited, concluding for payment of £1602, 18s., or otherwise that it ought and should be found that under the policy of insurance over his furniture and other effects the defenders were bound to concur in referring to arbitration the amount of damage occasioned thereto by a fire in his hotel at Baillieston in July 1884.

The pursuer averred (Cond. 2)—"On or about the 3rd day of May 1882 the defenders granted to pursuer a policy of insurance against loss by fire to the amount of £1850 over the following property, then situated in the premises occupied by pursuer in Baillieston as a hotel, &c., viz.—

1. On household goods, linen, wearing apparel, printed books, plate-glass, and earthenware, including looking-glasses, jewels, watches, and trinkets, musical instruments and printed music, pictures, prints, and drawings, no one picture, print, or drawing, in case of loss, to be valued at more than £10 in the insured's hotel, situated as above . . . £1000 0 0
 2. On stock-in-trade therein, including a cellar in sunk flat . . . 450 0 0
 3. On upfittings and utensils, the property of the insured therein . . . 150 0 0
 4. On horses (no one of which to be valued at more than £35 in case of loss), harness, stable utensils, and fodder in stable, situated in yard at rear of hotel . . . 125 0 0
 5. On carriages in the coach-house situated in said yard . . . 125 0 0
- Amounting in all to the sum of . . . £1850 0 0"

He alleged that the premiums were duly paid, and that the policy was in force on 15th July 1884; that a fire occurred in the premises on that date, by which the buildings and their contents were entirely destroyed, two horses and the carriages and some harness being alone saved; that the value of the furniture, &c., was greatly in excess of the amount insured under the policy, but that the sums claimed were restricted to the amount insured.

The sum sued for was thus made up:—

On household goods . . .	£1000 0 0
On stock-in-trade . . .	450 0 0
On upfittings and utensils . . .	150 0 0
On harness . . .	2 18 0
	£1602 18 0

The pursuer averred—“(Cond. 5) In terms of the printed conditions of said policy the pursuer gave a due notice to the defenders, and delivered to them a particular account of the several articles destroyed by said fire, with the estimated value of each article, together with all the documents and vouchers in his possession or procurable, and with full explanations and particulars of the goods, &c., destroyed, and he offered further to establish by proof the value of the said goods, &c. He also furnished the defenders with a statutory declaration of the truth of the account furnished by him. With reference to defenders’ statement, it is explained that the defenders have declined to accept pursuer’s offer of parole proof, and that the pursuer has given to defenders all other proofs, and all vouchers and explanations as can reasonably be required by them. Reference is made to next article. The defenders’ allegation that the pursuer’s claim is false and fraudulent, or wilfully and fraudulently overstated, is denied, and the defenders are called upon forthwith to withdraw the same.” “(Cond. 6) Shortly after the said fire the defenders, under their powers to that effect contained in said policy, took possession of the premises, including the stables and salvage. They further, however, most unreasonably and unwarrantably stopped the business of the posting establishment carried on by pursuer, and refused to allow him to interfere with or carry on the same. Further, having obtained access to and possession of the premises as before mentioned, they most unwarrantably and unjustifiably refused to cede possession of the same to the pursuer; and, on the contrary, in spite of the warnings and protests of the pursuer, they retained possession until 5th November 1884, when they gave pursuer intimation that they did not intend longer to retain possession. The pursuer was thus wholly prevented from resuming possession of the premises, and having the same rebuilt, and the business therein resumed. The pursuer’s claim for damages thereby caused is specially reserved.”

The pursuer further averred that the defenders had not paid any part of his losses; that in the course of much correspondence and of many meetings he had furnished all the information as to the value, &c., of the furniture in his power, but that all vouchers, receipts, and accounts had been destroyed in the fire. He alleged that he was ready, and had frequently offered, to refer the matters in dispute to arbitration.

The defenders averred—“(Stat. 1) By the 5th article of the conditions of the said policy it is provided that on the occurrence of any loss by fire to the property thereby insured, the insured is forthwith to give notice in writing thereof to the defenders, and within fifteen days to deliver to them a particular account of the articles so damaged or destroyed, and ‘in support thereof to give all such vouchers, proofs, and explanations, and other evidence as may be reasonably required by or on behalf of the corporation, together with (if required) a statutory declaration of the truth of the account, and in default thereof, no claim in respect of such loss or damage shall be payable or sustainable unless and until such notice, account, proofs, and explanations, or evidence respectively shall have been given and produced, and such statutory declaration (if

required) shall have been made.’ The 6th article of said conditions specially provides that if the claim be in any respect fraudulent, or if any false statutory declaration be made or used in support thereof, or if the fire be occasioned by or through the procurement or connivance of the insured, all benefit under this policy is forfeited.”

They also averred that the claim the pursuer sent in a few days after the fire stated his loss at £2252, 14s. 6d., including “Money, £141, 7s. 6d.,” which was not covered by the policy in question, that this was largely in excess of the sum insured, and that they, in terms of the fifth condition of the policy, called upon the pursuer to make a statutory declaration of the truth of the same, which he did on 5th August thereafter, and which statutory declaration was produced; that on receipt of the declaration they (defenders) made out a list of the pictures enumerated by the pursuer in his said claim, and required him to furnish them with the names of the artists and subjects thereof, as well as the date and place of purchase by him, but he had paid no attention to this request. “The defenders further, through their fire assessor, Mr Langley, have repeatedly required the pursuer to furnish them with any vouchers, proofs, explanations, and other evidence of the existence and value of the other articles of property for which he claims, but have been unable to obtain such from him, except to a very small extent, and for very small amounts. With regard to the amount claimed for furniture, he has informed them that he bought from the proprietor of the Commercial Hotel, Baillieston, when he took it over from its then proprietor in 1882, furniture to the value of £138, and from Mr Quinton the furniture of his house in Uddingston for £130, and that he had also at that time furniture of his own which was then insured for £200—amounting only to a sum of £468. With respect to the item ‘stock-in-trade,’ while the pursuer has furnished vouchers for goods purchased by him for twelve months previous to the fire, he has not produced any for goods sold, and he has produced no vouchers or evidence of any kind with regard to the pictures for which he claims. On his policy over the buildings with the North British and Mercantile Insurance Company the pursuer accepted the Company’s offer to reinstate, and has since, accordingly, received the sum of £650 as for reinstatement. (Stat. 4) The defenders believe and aver that the said claim is largely in excess of the real value of the articles destroyed, and that the said claim as made is false and fraudulent, or at least wilfully and fraudulently overstated. In any event, the pursuer is bound to furnish the defenders with reasonable evidence of the existence and value of the articles in respect of which he claims under the policy, in terms of the conditions thereof, and as a condition-precendent to his recovering thereunder.”

The pursuer pleaded that he was entitled to decree for the sum concluded for under his policy, or otherwise that the defenders were bound to enter into a reference of terms of the policy of insurance.

The defenders pleaded—“(1) The pursuer having failed to fulfil and implement the conditions of his policy, is not entitled to recover. (2) The pursuer having made a false and fraudulent claim, and made and used a false statutory declar-

ation in support thereof upon the defenders in respect of the policy founded on, has forfeited all benefit thereunder. (3) The pursuer not having sustained the loss libelled, is not entitled to recover the sum sued for, and the defenders are entitled to absolvitor, with expenses."

The following was the clause of arbitration annexed to the policy:—"Where the corporation do not claim to avoid their liability under the policy on the ground of fraud, but a difference shall at any time arise between the corporation and the insured or any claimant under this policy, as to the amount of any loss or damage by fire, or as to the fulfilment of any of the conditions herein set forth, or as to any question, matter, or thing concerning or arising out of this insurance, every such difference, as and when the same arises, shall be referred to the arbitration and decision of two indifferent persons, one to be chosen by the party claiming and the other by the corporation, or in case of disagreement between them, then of an umpire to be chosen by the arbitrators before entering on the reference, and the costs of the reference shall be in the discretion of the arbitrators or umpire as the case may be, who shall award by whom and in what manner the same shall be paid, and the decision of the arbitrators or umpire, as the case may be, shall be final and binding on all parties, and this condition shall be deemed and taken to be an agreement to refer as aforesaid; and it is hereby expressly declared to be a condition of the making of this policy and part of the contract between the corporation and the insured that where the corporation do not claim to avoid their liability under the policy on the ground of fraud as aforesaid, the party insured or claimant shall not be entitled to commence or maintain any action on this policy till the amount due to the insured shall have been awarded as hereinbefore provided, and then only for the sum so awarded, and the obtaining of such award shall be a condition-*precedent* to the commencement of any action upon the policy."

The defenders obtained leave from the Lord Ordinary to add to their statement of facts after the words "articles destroyed," in article 4 quoted *supra*, "and also that it includes a considerable number of articles which were not in fact on the premises at the time of the fire;" and after the words "wilfully and fraudulently overstated," "to the knowledge of the pursuer. They also aver that the said statutory declaration, made and used by the pursuer in support thereof, was in material respects false, in the knowledge of the pursuer."

The Lord Ordinary adjusted the following issue and counter issues—*Pursuer's Issue*:—"It being admitted that the defender, by a policy dated 3d May 1882 which was in force in July 1884, insured the household goods, fittings, and utensils, stock-in-trade, horses, harness, carriages, and others situated in the hotel and relative offices in Bailliestown, occupied by the pursuer, to the extent of £1850 against loss by fire; and it being further admitted that on or about 15th July 1884 a fire took place in said hotel and offices, in consequence whereof the household goods, stock-in-trade, fittings, utensils, and harness therein, were destroyed or damaged in whole or in part—Whether the defenders are indebted to the pursuer under the said policy in

the sum of £1602, 18s., or any part thereof, for loss and damage sustained by the pursuer in consequence of the said fire?"

Counter Issues:—"It being admitted that the policy founded upon in the action was granted subject to the following condition, viz., 'If the claim be in any respect fraudulent, or if any false statutory declaration be made or used in support thereof, all benefit under this policy is forfeited'—(1) Whether the claim made by the pursuer for loss under the said policy is in any respect fraudulent? (2) Whether the statutory declaration made and used by the pursuer in support of his said claim was false within the knowledge of the pursuer?"

The pursuer reclaimed, and argued—The defence was irrelevant, being barred by the arbitration clause in the policy; it was also bad from want of specification. There being no relevant averment of fraud on record the counter issues could not be allowed.

The defenders argued—The pursuer had not given them the information required in terms of the policy with regard to the particulars of his loss; they were unable to specify what particular items in the pursuer's claim were not actually on the premises, and what were fraudulently overvalued; they were entitled on the 6th condition of the policy [above quoted] to a general issue of fraud; the counter issue proposed was similar to that proposed and approved by the Court in the case of *M'Kirdy v. North British Insurance Company*, Jan. 28, 1858, 20 D. 463. They also referred to the case of *Campbell v. Aberdeen Fire and Life Assurance Company*, June 12, 1841, 3 D. 1010.

The Court having expressed an opinion that the defenders ought to make their allegations of fraud much more specific, the defenders proposed to make the following addition to their statement of facts:—"The defenders believe and aver that the pursuer paid to Mr Quinton for the furniture purchased from him only £30 or £40; and the articles enumerated in the pursuer's claim (exclusive of pictures and photographs), which they have been able to identify as included in the said purchase, are valued in the said claim at over £100, and are thus grossly and, as the defenders believe and aver, fraudulently over-estimated. The defenders have been unable to identify in the said claim all the articles of furniture and fittings included in the purchase by the pursuer from the former proprietor of the Commercial Hotel. The articles which they have succeeded in identifying (exclusive of show-cards and pictures) are valued in the said claim at about £125, 9s., which the defenders believe to be greatly in excess of their real value. The defenders have further ascertained and believe that the said claim contains other and various items which were not in fact on the pursuer's premises at the date of the fire. So far as the defenders have been able to identify these, they amount in value, as stated in the said claim (but exclusive of pictures as before), to the sum of at least £200. The aggregate value of the pictures claimed by the pursuer is £331, 12s. 6d. The defenders have made every inquiry as to the actual value of the pursuer's pictures, and have failed to find the slightest evidence that he possessed anything like such an amount of property in pictures, or indeed that he possessed any valu-

able pictures at all. They believe and aver this portion of the claim to be grossly and fraudulently over-estimated to the extent of at least £300. The pursuer also claims for a considerable number of show-cards, of the value as estimated by him, of £8, 9s. 6d., which were gratuitously supplied to him by the respective traders for exhibition in his premises, and did not belong to him. The defenders herewith produce and refer to a copy of the said claim marked with respect to the foregoing classification, showing, as far as they are able to do so, the items before specified under the foregoing heads."

The Court allowed the amendment to be made, adhered to the interlocutor of the Lord Ordinary, and reserved the question of expenses in the Inner House.

Counsel for Pursuer—Shaw. Agent—J. Macpherson, W.S.

Counsel for Defender—G. Wardlaw Burnet. Agents—J. W. & J. Mackenzie, W.S.

Tuesday, June 2.

FIRST DIVISION.

[Lord Lee, Ordinary.

KENNEDY AND OTHERS *v.* INCORPORATION OF MALTMEN OF GLASGOW AND OTHERS.

Process—Division and Sale—Competency—Trust.

The title to certain subjects in Glasgow upon which a hall known as the Trades' House was erected, was taken to two individuals as office-bearers of the Trades' House, and their successors in office, in trust for the use of the Trades' House and the fourteen corporations composing the same, their several interests being in proportion to the sums which they had contributed towards the price of the site and the cost of erecting the hall. The two persons who were feudally vested in the property, and eight of the corporations, brought an action of division and sale of the subjects, calling as defenders the other six corporations interested, averring that the pursuers were desirous that the subjects should be sold, and that the price should be divided amongst them and the defenders according to the amounts they had respectively contributed. There was no appearance for the defenders, nor did they consent to decree. The Court *dismissed* the action as incompetent, on the ground that the property was not held *pro indiviso*, but upon trust for purposes which were capable of fulfilment, and in the fulfilment of which the defenders had an interest.

In 1792 certain subjects in Glasgow were acquired by James M'Lehose and John Gardner, the then deacon-convener and collector respectively of the Trades' House, Glasgow. The title thereto was taken in favour of these persons in their official capacities as deacon-convener and collector, and their successors in office, in trust for the use and behoof of the said Trades' House of

Glasgow, and of the said incorporations composing the same, in proportion to the several sums which each of these incorporations and communities had then advanced, or should thereafter advance to the said Trades' House, towards payment of the said price, and the expense of the building of the hall then proposed to be erected on the ground.

Shortly after the purchase had been effected a hall for the use and accommodation of the various incorporations composing the Trades' House was erected on the subjects, the *cumulo* cost of the site and of erecting the hall being £13,884, 4s. 11d. This sum was contributed in various proportions by the incorporations following, viz.—the hammermen, tailors, cordiners, maltmen, weavers, bakers, skimmers, wrights, coopers, fleshers, masons, gardeners, barbers, and bonnet makers and dyers, all of Glasgow.

This was an action of division and sale of the said subjects usually known as the Trades' House, at the instance of Hugh Kennedy as deacon-convener of the trades of Glasgow, and James Thomson Tullis, as collector of the Trades' House of Glasgow, who were in their official capacities feudally vested in the subjects for behoof of the Trades' House, and of the incorporations composing the same, and eight of the fourteen corporations interested in the Trades' House against the other six corporations, who were called as defenders. The pursuers set forth in the condensation the various sums which had been contributed by the incorporations towards the payment of the price of the site, and of the cost of erecting the hall, and stated that they were desirous that the subjects should be sold, and that the price should be divided among them and the defenders according to the proportions in which they had contributed.

The pursuers pleaded—“(1) The said Trades' House and incorporations specified in the summons being joint-proprietors *pro indiviso* of the subjects and others therein described in the summons, the pursuers are entitled to insist in the present action. (2) The said subjects being incapable of division, with due regard to the just rights and interests of parties, the pursuers are entitled to a decree of sale, as also decree relative to the disposal of the price as concluded for.”

The Lord Ordinary (LEE) remitted to Mr Smellie, surveyor and valuator, for a report, and on obtaining his report (which stated, *inter alia*, that the buildings did not properly utilise the ground, which was of great value as a site for business premises, that division would not be expedient or practical, and that the subjects should rather be exposed by public roup in one lot) pronounced this interlocutor—“Appoints the pursuers to print and box to the Court the said report and the summons with this interlocutor and note, and reports the cause to the First Division of the Court.

“*Note.*—The Lord Ordinary reports this cause to the Court because it appears to him to be attended with some difficulty as regards the competency.

The action is one of division and sale, and if the title of the pursuers was a simple title to a *pro indiviso* share of the subjects, the case would be one in which, the subjects being incapable of division, the principle of the case of *Brock v.*