On the case being called, the defender argued that it should be remitted to the Sheriff Court for proof, on the ground that the sole question now remaining was the amount of damages, and that all the witnesses would be Glasgow men—*Bethune* v. *Denham*, March 20, 1886, 13 R. 882, 23 S.L.R. 456; *Mitchell* v. *Sutherland*, January 23, 1886, reported as a note to *Bethune*, and 23 S.L.R. 317; *Nicol* v. *Picken*, January 24, 1893, 20 R. 288, 30 S.L.R. 342; *Pollock* v. *Mair*, January 10, 1901, 3 F. 332, 38 S.L.R. 250.

Argued for the pursuer—The case should go to a jury. Appeals under the Judicature Act were in the same position as cases instituted in the Court of Session in a question of proof or jury trial—*Crabb* v. *Fraser*, March 8, 1892, 19 R. 580, 29 S.L.R. 445; *Willison* v. *Petherbridge*, July 15, 1893, 20 R. 976, 30 S.L.R. 851; *Donnachie* v. *Thom*, December 15, 1892, 20 R. 210, 30 S.L.R. 201; *Rhind* v. *Kemp & Co.*, December 13, 1893, 21 R. 275, 31 S.L.R. 223; *M'Intosh* v. *Commissioners of Lochgelly*, November 3, 1897, 25 R. 32, 35 S.L.R. 50; *Jamieson* v. *Hartil*, February 5, 1898, 25 R. 551, 35 S.L.R. 450. The only ground here suggested for trial in the Sheriff Court was that the witnesses would all be local, but that had never been held to be a sufficient ground for refusing jury trial—*Tosh* v. *Ferguson*, October 27, 1896, 24 R. 54; *Walker* v. *Knowles & Son*, January 8, 1902, 4 F. 403, 39 S.L.R. 291; *Dunn* v. *Cuninghame*, July 9, 1902, 4 F. 977, 39 S.L.R. 755. The question at issue—the amount of damages—was eminently suited for jury trial.

At the close of the argument the case was continued to allow the defender to put in a tender. He tendered £60, which was refused.

At advising—

LORD PRESIDENT—On considering this case I do not think there is any specialty which should prevent it following the ordinary course of trial by jury.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court ordered issues, and found the respondent liable in expenses, modified at £3, 3s.

Counsel for the Pursuer and Appellant—Watt, K.C.—Munro. Agents—Patrick & James, S.S.C.

Counsel for the Defender and Respondent—R. S. Horne. Agents—Webster, Will, & Company, S.S.C.

Friday, February 20.

SECOND DIVISION.

[Lord Pearson, Ordinary.

BOYD *v.* HYSLOP.

Expenses—Compearing Defender Held not Liable for Expenses Caused by Calling non-Compearing Defenders.

In an action brought by a hotelkeeper complaining of certain deliverances of Petty and Quarter Sessions at meetings for granting and renewing certificates, the pursuer concluded for reduction of the deliverances and of the certificate issued to him, and for delivery of a renewal certificate, or alternatively for decree ordaining the justices to hold such meetings and do such things as should be necessary for the determination of the matter. He called not only the justices present at the meetings, but also the whole justices of the county. Defences were lodged by two justices only, one of whom had been present at the Petty Sessions and the other at the Quarter Sessions. The pursuer obtained decree under his first alternative conclusion. He did not take decree in absence under his alternative conclusion. *Held* (*rev.* Lord Pearson, Ordinary) that the compearing defenders were not liable for the expense of citing the whole justices of the county—*per* Lord Justice-Clerk and Lord Trayner, on the ground that in the circumstances such citation was not necessary; and *per* Lord Moncreiff, on the ground that the pursuer concluded for expenses against those of the defenders only who should appear, and thus deprived the compearing defenders of any claim of relief against the non-compearing defenders.

This was an action at the instance of Robert Boyd, hotelkeeper, in which the pursuer complained of certain proceedings at meetings of justices for granting and renewing certificates.

The only question decided by the Inner House was one as to the liability of the compearing defenders, who were unsuccessful, for the expense of calling certain other defenders who did not appear.

The pursuer had been the keeper of a licensed hotel at Sorn in Ayrshire. On 16th April 1901 he applied to the half-yearly meeting of justices held at Cumnock for a renewal of his hotel certificate. The justices granted the renewal "for six days' licence only," notwithstanding the pursuer had not applied to them for such a certificate. The pursuer having appealed to a meeting of Quarter Sessions held on 28th May 1901, that meeting, without sustaining the appeal, resolved that the pursuer's hotel certificate be reduced to a public-house certificate, and granted him a public-house certificate accordingly.

The defenders called by the pursuer in the present action were (first) William Hyslop of Bank, New Cumnock, and others, being the Justices of the Peace for the county of Ayr who attended and acted at the district half-yearly licensing meet-

ing held at Cumnock on 16th April 1901; (second) Thomas Andrews, solicitor, Cumnock and Ayr, the Depute-Clerk for the Cumnock licensing district and the clerk to said meeting; (third) William Hamilton Dunlop of Doonside, Ayr, and others, the Justices of the Peace of the county of Ayr, who attended and acted at an alleged meeting of the Quarter Sessions of the Peace for that county, held at Ayr on 28th May 1901; (fourth), David W. Shaw, Solicitor, Ayr, the Clerk of the Peace of the county and Clerk to the meeting of the Quarter Sessions, as such clerk and as representing the remaining justices; and (fifth) the whole Justices of the Peace for the county of Ayr, 497 in number.

The summons concluded for reduction of "(first) a deliverance or judgment of the said defenders first above called, pronounced at the general half-yearly meeting of the Justices of the Peace for the Cumnock district in the county of Ayr for granting and renewing certificates, held at Cumnock on 16th April 1901, on the pursuer's application for renewal of his certificate under the Licensing (Scotland) Acts 1828 to 1897, to keep an inn and hotel at Sorn, Mauchline, and county aforesaid, for the year from Whitsunday 1901, in these terms 'granted for six days' licence only;' (second) a deliverance or judgment of the defenders third above called, pronounced at an alleged meeting of the Quarter Sessions of the Peace for the county of Ayr, held at Ayr on 28th May 1901, and purporting, *inter alia*, to grant to the pursuer a public-house certificate for his said premises at Sorn aforesaid; and (third) the public-house certificate for premises at Sorn aforesaid, issued by the defender David W. Shaw to the pursuer in consequence of the deliverance or judgment of the said defenders third above called," either (1) wholly, or (2) alternatively in so far as the said deliverance of the defenders first above called bore to grant the renewal "for six days' licence only;" for declarator that all these steps of procedure were *ultra vires;* and for a decree ordaining the defenders second or fourth called, or one or other of them, to make out and deliver to him a renewal of his former hotel certificate in terms of his application; or otherwise for a decree ordaining the defenders called in the fifth place to hold such meetings and do such things as should be necessary for the determination of the matter according to law.

The conclusion for expenses was in the following terms:—"And such, if any, of the defenders as may appear and oppose any of the conclusions hereof ought and should be decerned and ordained by decree foresaid to pay to the pursuer the sum of £100," &c.

Defences to the action were lodged by William Hyslop and William Hamilton Dunlop only. They pleaded—"(1) The averments of the pursuer are irrelevant and insufficient to support the petitory conclusions of the summons. (2) The proceedings of the justices at the licensing court at Cumnock not having been timeously challenged, the action, so far as founded on these proceedings, should be dismissed."

On 8th March 1902 the Lord Ordinary (PEARSON) pronounced the following interlocutor:—"Repels the defences: Reduces, decerns, and declares as follows, namely, so far as regards the writ first libelled in the summons, in terms of the second alternative of the reductive conclusion thereanent; so far as regards the writ second libelled, in terms of the first alternative of the reductive conclusion thereanent; and so far as regards the writ third libelled, in terms of the reductive conclusion thereanent: Further, finds and declares that in pronouncing the deliverance or judgment first specified in the summons with the condition 'for six days' licence only,' the justices, being the defenders first called, acted *ultra vires*, irregularly, and illegally, and that the condition 'for six days' licence only' adjected by the defenders first called to the said judgment or deliverance is to be treated as *pro non scripto* and of no avail and effect; and that the defenders third called in pronouncing the deliverance or judgment second specified in the summons, and the defender David W. Shaw in issuing said certificate upon said last-mentioned deliverance, also acted *ultra vires*, irregularly, and illegally; and decerns: Supersedes consideration of the remaining conclusions of the summons to give the pursuer an opportunity of obtaining such decree as may be competent in the undefended roll against the non-compearing defenders, or any of them: Finds the non-compearing defenders liable to the pursuer in expenses; allows an account thereof to be lodged, and remits the same to the Auditor to tax and report."

Thereafter the pursuer asked for decree against the defender second called in terms of the declaratory conclusions of the summons, and ordaining him to deliver to the pursuer a certificate in terms of his application. On 12th March 1902 the Lord Ordinary, in absence of the said defender, gave decree to that effect.

The pursuer did not take decree in absence against the defenders fifth called.

The pursuer lodged his account of expenses with the Auditor. On 27th May 1902 the Auditor disallowed and taxed off the account the sum of £74, 14s. 5d., being the expense of citing the whole of the Justices of the Peace for Ayrshire as defenders called in the fifth place.

The pursuer lodged a note of objections to the Auditor's report in respect of the disallowance of these expenses.

On 10th July 1902 the Lord Ordinary sustained the pursuer's objections to the Auditor's report and decerned against the defenders for payment to the pursuer of £155, 5s., being the taxed amount of the pursuer's account after adding the £74, 14s. 5d.

"*Note.*—The important question raised by the pursuer's objections is, whether the Auditor has acted rightly in disallowing the extra expense caused by the citation of all the county justices as defenders. This turns upon whether the pursuer acted

reasonably in calling them as defenders, and whether he could safely have left them out. Now, the practical remedy which he sought against an admitted illegality was stated alternatively: either to obtain an amended certificate from the clerk, or to get an order upon the justices to meet and take the proper steps to restore the pursuer against the illegality. In point of fact, the remedy was worked out upon the first alternative. But the second alternative being in the summons, the pursuer had to consider whether he was not bound to call all the justices as defenders upon that issue. According to recent practice, I think he was, and if he had not done so the compearing defenders would probably have met him with a plea of 'all interested not called.' If, indeed, it could be shown that the second alternative was on the face of it incompetent or inept as a remedy, I might have taken account of that in the matter of the expenses caused by that alternative. But so far from that being the case, I am informed that the Court has in more than one instance ordered a meeting of justices to be held in order to restore a pursuer against an injustice of which he complained. And I cannot affirm that the pursuer was so clearly entitled to work out his remedy on his first alternative, and so clearly disentitled to do so on his second alternative, as to make it unreasonable on his part to present both alternatives in his summons. I therefore sustain the pursuer's objections down to 1st August 1901 inclusive, with a consequential alteration on one of the later items of taxation."

The defenders reclaimed, and argued—There was no necessity in this case to call all the Justices of the Peace for Ayrshire. This plainly appeared from the fact that the pursuer had got the remedy he desired without taking decree in absence against these defenders. Further, no defender should be found liable for expenses which had not been caused by his appearance as a defender—*Young* v. *Jolly*, May 28, 1830, 8 S. 833.

Argued for the pursuer and respondent—Where it was proposed to reduce the deliverance of the justices of a county, it was right in principle to call all the members of that body, even although they were not all present when what was complained of had been done. All the justices had an interest in the matter. Where a body were unincorporated all the members must be called in a summons. In *Ashley* v. *Magistrates of Rothesay*, June 20, 1873, 11 Macph. 708, April 17, 1874, 1 R. (H.L.) 14, all the magistrates had been called as defenders, and not only those who had passed the resolution complained of. The defenders must take the consequences of putting forward untenable defences in an action of this kind—*Glasgow Feuing and Building Co., Limited* v. *Watson's Trustees*, May 18, 1887, 14 R. 718, 24 S.L.R. 513.

At advising—

LORD JUSTICE-CLERK—I am unable to agree with the judgment of the Lord Ordinary upon the question of expenses in this case. The pursuer having a ground of reduction against the Justices' proceedings at a Court held at Cumnock, raised his action against the Justices who sat at the Sessions, and against the Clerk to the Justices. But he also summoned all the other justices of the county, to the number of several hundreds. In his prayer as regards expenses he limited himself to asking a decree only "against such, if any, of the defenders as may appear and oppose any of the conclusions of the summons."

A very small number of the justices appeared to defend. The case was decided in favour of the pursuer, and the defenders who had litigated were found liable in expenses. In his account the pursuer entered a sum of about £70 for the expense of summoning the whole justices of the county. This part of the account was disallowed by the Auditor, but the Lord Ordinary sustains the pursuer's objections.

I see no ground for holding that the case raised by the pursuer could not be dealt with without calling into Court several hundred justices who had nothing to do with the proceedings which were complained of, and I think it would be most unjust to saddle the litigating defenders with that expense, which was quite unnecessary. It is to me inconceivable that if a plea had been raised that all parties had not been called, and that no such case could proceed without the whole Justices of the county being summoned, that any such plea could have been sustained. The pursuer has obtained a judgment on grounds which have no application to the mass of the defenders. No decree was taken except against those who appeared. Even were it otherwise, if any such objection were held good the other parties could be called, and the objectors would be responsible then. And it seems to me that it would be in the highest degree inequitable to subject the compearing defenders in the expenses of summoning a crowd of defenders who have not appeared, and whose appearance was quite unnecessary to the working out of the pursuer's remedy against the wrong he was complaining of.

LORD YOUNG concurred.

LORD TRAYNER—I am of the same opinion. The Lord Ordinary appears to have allowed the expenses now in question on the ground that the pursuer was entitled to insert in his summons a second alternative conclusion on which he might make good his claim to the remedy he sought, if it turned out that he could not obtain that remedy on his first alternative. I cannot concur in that view. If a pursuer brings an action into Court he is bound to know what remedy he seeks, and who are the proper contradictors against whom to seek it. He may, if he chooses, insert alternative conclusions in his summons, but if only one of these conclusions strikes against a compearing defender, it would be unjust to find him liable for the expenses incurred by reason of the insertion of the other conclusion, only added for the safety or benefit

of the pursuer. In the present case it was quite unnecessary to call the whole of the Ayrshire Justices of the Peace, about 300 or 400 in number; it was sufficient to call the justices who were present at the meeting at which the thing was done of which the pursuer complains, together with the Justice of Peace Clerk. If any of the compearing defenders had stated the plea that all parties were not called, I do not think he could have maintained such a plea successfully. Here it is quite apparent that the summoning as defenders of all the County Justices was unnecessary, because the pursuer got the remedy he sought without any reference to those justices, and against whom he did not think it necessary even to take a formal decree in absence.

LORD MONCREIFF—I understand that the defenders admit liability for the expenses of citing the first, second, third, and fourth parties called, but that they dispute liability for the expense of citing the remainder of the defenders. In my opinion they are not liable in the expense of citing the defenders called in the fifth place, simply on this ground, that the pursuer does not in the summons ask for expenses against any of the defenders except those who appear and oppose. I think the effect of that qualification is to limit the expenses for which those of the defenders who do appear and oppose unsuccessfully are liable to the expenses which would have been incurred by the pursuer if the compearing defenders alone had been sued, and for this reason, that by not asking or taking decree against the defenders who do not appear the pursuer deprives those defenders who do appear and are unsuccessful of any claim of relief against the non-compearing defenders. I may refer in illustration of this view to the *Magistrates of Campbeltown* v. *Galbraith*, 7 D. 828, and *Mackenzie* v. *Cameron*, 15 D. 61.

I am therefore of opinion that the Lord Ordinary's interlocutor should be recalled to that effect, and decree given on the lines which I have indicated.

The Court recalled the interlocutor reclaimed against, repelled the objections to the Auditor's report, approved of the same, and decerned against the compearing defenders fer payment of the sum of £79, 11s. 7d., the taxed amount of the pursuer's account of expenses.

Counsel for the Pursuer and Respondent—Solicitor-General (Dickson, K.C.)—Wilson, K.C.—Guy. Agent—James Purves, S.S.C.

Counsel for the Defender and Reclaimer—Salvesen, K.C.—Hunter. Agents—Webster, Will, & Co., S.S.C.

Thursday, January 28.

OUTER HOUSE.

[Junior Lord Ordinary, Lord Pearson.

LORD HAMILTON OF DALZELL, PETITIONER.

Expenses—Compulsory Powers—Consigned Money—Petition to Uplift—Expenses of Service on Next Heir of Entail—Railway—Lands Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 19), *sec.* 79—*Entail.*

A sum of money was consigned by a railway company as compensation for certain seams of coal lying under their line which formed part of an entailed estate, and had been acquired by them under the Railways Clauses Consolidation (Scotland) Act 1845. In a petition under the Lands Clauses Consolidation (Scotland) Act 1845 by the heir of entail in possession to uplift the consigned money, on the ground that he was absolutely entitled to it as the coal would have by this time been worked out and the consigned money came in lieu of the lordships he would have received, *held* (*per* Lord Pearson, Ordinary) that he was entitled against the Railway Company to the expenses of serving the petition upon the next heir of entail.

Lady Stair, Petitioner, May 20, 1882, 19 S.L.R. 618, *followed.*

Lady Willoughby de Eresby v. *Callander and Oban Railway Company*, October 24, 1885, 13 R. 70; 23 S.L.R. 48, *distinguished.*

The Caledonian Railway Company at different times acquired portions of the entailed estates of Dalzell and Jerviston, in the county of Lanark, but the minerals under the portions so acquired were reserved to the proprietor of the estates in terms of the Railways Clauses Consolidation (Scotland) Act 1845 (8 Vict. cap. 20).

On the 28th May 1898 and 9th May 1899 the Company, in virtue of the powers reserved to them by the said Railways Clauses Consolidation (Scotland) Act 1845, gave notice to Thomas Whitelaw, coalmaster, the lessee of the minerals in those portions of the entailed estates, that they desired to have left unworked certain blocks of the seams of coal. These were accordingly left unworked, and were conveyed to the company by the proprietor with the consent of the said lessee. The purchase-money or compensation for the right and interest of the proprietor was fixed by valuators in terms of the Lands Clauses Consolidation (Scotland) Act 1845 (8 Vict. cap. 19) at the sum of £756, 8s. 9d., and this sum was on 18th December 1902 deposited by the company in the Commercial Bank of Scotland, Limited, at Motherwell, and placed to the credit of the proprietor and the heirs of entail entitled to succeed to him in the said entailed estates, in account