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

with the said bank, for the purpose of being applied by and subject to the disposition and control of the Court of Session, all in terms of the Lands Clauses Consolidation (Scotland) Act 1845.

Section 67 of the Lands Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 19) enacts that money so consigned in bank shall be applied, *inter alia*, "in payment to any party becoming absolutely entitled to such money."

On 7th February 1903 Lord Hamilton of Dalzell, the heir of entail in possession of the said entailed estates of Dalzell and Jerviston, presented a petition under the Lands Clauses Consolidation (Scotland) Act 1845 for authority to uplift and acquire the consigned money.

In the petition the petitioner, *inter alia*, stated as follows:—"That if the said Caledonian Railway Company had not required the said seams of coal to be left unworked, the petitioner, through his said mineral tenant, would have worked out the said seams prior to the date hereof, and the lordships for said seams would thus have been due and payable to the petitioner. The compensation deposited by the said Railway Company, as above mentioned, comes in lieu and place of the said lordships, and the petitioner is thus entitled to uplift the same, and to acquire it for his own use and behoof, and he makes this application for warrant and authority to do so in terms of the said 67th section of the Lands Clauses Consolidation (Scotland) Act 1845.

"That the only heir of entail in existence entitled to succeed to the said estates after the petitioner is his younger brother, the Honourable Leslie d'Henin Hamilton, captain in the Coldstream Guards, residing at No. 5A Mount Street, London.

"That in terms of section 79 of the said Lands Clauses Consolidation (Scotland) Act the petitioner is entitled to recover from the said Caledonian Railway Company the expense of this application, and the charges and expenses incident thereto."

The prayer of the petition contained a crave for service on the said Leslie d'Henin Hamilton, and that the said Caledonian Railway Company should be found liable in the expenses of the petition and of the charges and expenses incident thereto.

The petition was duly intimated and served, and after a remit to Mr George Dunlop, W.S., and Mr John Gemmell, M.E., and reports by them, the Lord Ordinary officiating on the Bills (KYLLACHY) on 28th March 1903 granted the prayer of the petition, found the Caledonian Railway Company liable in the expenses of the petition and the charges and expenses incidental thereto, and remitted the accounts thereof to the Auditor to tax and report.

Thereafter the petitioner lodged a note of objections to the Auditor's report on his account of expenses, in so far as he had disallowed the charges of and connected with the service of the petition upon the next heir of entail.

Section 79 of the Lands Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 19) enacts—"In all cases of monies deposited in the bank under the provisions of this or the Special Act . . . it shall be lawful for the Court of Session to order the expenses of the following matters, including therein all reasonable charges and expences incident thereto, to be paid by the promoters of the undertaking, that is to say, the expence of the purchase or taking of the lands, or which shall have been incurred in consequence thereof, other than such expenses as are herein otherwise provided for, and the expense of the investment of such monies in Government or real securities, and of the reinvestment thereof in the purchase of other lands, and of re-entailing any of such lands, and incident thereto, and also the expense of obtaining the proper orders for any of the purposes aforesaid, and of the orders for the payment of the dividends and interest of the securities upon which such monies shall be invested, and for the payment of the principal of such monies or of the securities whereon the same shall be invested, and of all proceedings relating thereto." . . .

Counsel for the Railway Company relied on the case of *Lady Willoughby de Eresby*, 13 R. 70, 23 S.L.R. 48.

The Lord Ordinary (PEARSON), after making avizandum, sustained the petitioner's objections to the Auditor's report, and delivered the following opinion:—

Opinion—"In this petition to uplift and acquire consigned money the Auditor has taxed off, in a question with the Railway Company, the charges of and connected with the service of the petition upon the next heir of entail, amounting to £1, 8s. 8d. The petitioner objects to the Auditor's report in this particular, and seeks to have these charges allowed.

"In my opinion the objection must be sustained. The petition was presented under sec. 67 of the Lands Clauses Act, on the ground that the petitioner had become absolutely entitled to the consigned money. It is presented under that Act alone; and from beginning to end it does not found upon or mention any of the entail Acts. The question therefore arises solely on the Lands Clauses Act, and in particular on sec. 79, by which the Court may order the expenses of obtaining the proper orders for the payment of consigned moneys, including all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking. I hold that the charges now in question fall within that description. It is true that service upon the next heir is not prescribed expressly by the Lands Clauses Act. But it is prescribed by inveterate practice ever since the case of *Gammell* (1847, 10 D. 45), where the Court took notice of the petitioner's omission to pray for intimation to the next heir of entail and ordered it to be made. The expense of this seems to me to be a reasonable charge incident to the obtaining an order for payment of the money. An instance of such charges being allowed, in a petition to uplift consigned money on the ground that the petitioner had become absolutely entitled thereto, is to be found in the case

of *Lady Stair* (1882, 19 S.L.R. 618). The estate had been disentailed since the money was consigned; and the petition to uplift was served upon the three next heirs who would have been heirs of entail in possession. The Auditor having disallowed the expense of serving the petition upon these heirs, objection was taken by the petitioner and was sustained by the Lord Ordinary (Lord Kinnear), who said—'I think this is not a petition under the Entail Amendment Acts at all, but under the Lands Clauses Act, and I do not see how it would have been possible for me to grant the prayer without ordering intimation and service on some party interested in the matter. These next heirs of entail were the proper parties for such service, being the proper contradictors of the petitioner in this particular matter. I have no doubt therefore that I should sustain these objections, without, however, in any decree interfering with the general rule that the expenses in proper entail applications of this sort would not fall on the Railway Company.' This result was arrived at notwithstanding that the petition to uplift in that case is described in the report as having been laid under the Lands Clauses Acts 'and the various Entail Acts from 1848 downwards.' Regard was had to the substance of the thing, and it being in substance a Lands Clauses Act petition the charges were allowed.

"It is said that that case was overruled in the later case of *Lady Willoughby de Eresby* (1885, 13 R. 70); that was a petition to uplift money consigned under the Lands Clauses Act and to apply it in terms of sec. 26 of the Rutherfurd Act in repayment of certain improvement expenditure which had in a previous application been found to have been expended in permanent improvements on the entailed estate. That case certainly creates some difficulty; but the Court treated it as a petition under both sets of statutes and primarily under the Rutherfurd Act. The Lord President stated the rule thus—'When a petition to uplift and apply consigned money is presented under the Entail Amendment Act, the Railway Company is to bear all the expenses they would have had to bear had the application been made under the provisions of the Lands Clauses Act.' Applying this test the Court disallowed the charges incident to the advertisement of the petition, to the service on the three next heirs, and to the appointment of a curator *ad litem* to two of them,—these being all essential and characteristic parts of entail proceedure, and following as matter of course upon a petition which bore to be founded on sec. 26 of the Entail Amendment Act. But this can have no application to a petition which is not founded on the Entail Acts at all, and which, so far as I can see, would have been a competent petition as it stands before the Rutherfurd Act was passed. I leave out of account the further questions decided in *Lady Stair's* case, and the argument of the Railway Company here that, as to these, that case cannot stand with the later decision. The only question before me is, whether in a petition by an heir of entail laid wholly upon the Lands Clauses Act, the expense of service upon the next heir is to be allowed against the Railway Company. I think it is, as being a step of procedure sanctioned by long continued practice in such a petition, and as such a reasonable charge incident to obtaining the order for payment of the consigned money."

Counsel for the Petitioner—Wilson, K.C. —Maxwell Fleming. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Railway Company—Cooper. Agents—Hope, Todd, & Kirk, W.S.

Friday, July 17.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

KROG & COMPANY *v.* BURNS & LINDEMANN.

Ship—Charter-Party—Demurrage—Lay-Days—Commencement of Lay-Days—Delay in Providing Cargo—Vacancy Out of Turn—Exception Clause in Charter-Party.

A charter-party provided that the s.s. "Avis" should proceed to Methil Dock and there load a cargo of coal from such colliery or collieries as the charterers might elect. The vessel was "to be loaded in seventy-two running hours, commencing to count when ready to receive cargo, reported at Custom-House, berthed, and written notice given to the charterers. . . . If longer detained" demurrage was to be paid at a stipulated rate per hour, "unless such delay is caused by general and colliery holidays, Sundays, . . . idle days, strikes of any description, lock-outs, idle time, or restriction of output at the colliery with which the steamer is booked to load, . . or any other cause beyond the control of charterers, whether specified herein or not, which may prevent the obtaining or providing of cargo." . . .

The "Avis" arrived in Methil Roads on Monday, July 28th. The custom of the port was that vessels were entitled to be berthed in the order of their arrival, provided a certain proportion of the cargo was ready for shipment. On the arrival of the "Avis" ten vessels were before her and all the berths were occupied. A chance vacancy occurred on July 29th, and a berth might also have been got out of her turn on July 30th in consequence of a place being vacated by a vessel whose cargo was not ready. The "Avis" finished loading on August 5th. She was unable to take advantage of these chance vacancies because a sufficient proportion of her cargo was not ready for shipment. Monday, July