existing action or proceeding the real question in controversy between the parties." But then it appears to me that in order to ascertain what is the "real question in controversy" we must look to the conclusions of the summons. It will not do to say that the real question is, after all, what is my right in the lands in question?—whatever may have been the claim at first put forward — and that because the question raised by the amendment is connected with the same property that is sufficient to justify the amendment. If that were so, it would be possible to substitute for what was originally a claim to a right-of-way over lands a claim to the lands themselves. I think that we must look to the conclusions of the action and see whether the proposed amendments do enlarge and make so essentially different the original conclusions as to subject to the adjudication of the Court a different right to that which was originally specified in the summons. I agree with Lord Kinnear that the proposed amendments would have that effect.

LORD PRESIDENT—I think the conclusion your Lordships have come to is sound. I do not think the proposed amendments can be justified, unless we hold that so long as the lands are identical it is competent to substitute one dispute about the lands for another.

LORD M'LAREN was absent.

The Court recalled the Lord Ordinary's interlocutor and held that the amendment was incompetent.

Counsel for the Pursuers and Respondents—H. Johnston — Wilson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defenders and Reclaimers —Rankine — Dickson. Agents — Morton, Smart, & Macdonald, W.S.

Tuesday, March 20.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

TENNENT *v.* COMMISSIONERS AND MAGISTRATES OF BURGH OF PARTICK.

Process—Declarator—Construction of Act of Parliament—Competency.

After the passing of the Burgh Police (Scotland) Act 1892 the magistrates of a police burgh claimed the power of granting and refusing certificates under the Public-Houses Acts for premises within the burgh. This power had previously been exercised by the justices of the district within which the burgh was situated, and was still claimed by them. The holder of a certificate granted by the justices for premises within the burgh brought an action against the magistrates for declarator that they had no right to act as the licensing authority within the burgh.

Held that the action was *competent.*

Burgh — Police Burgh — Public-House — Certificate—Licensing Authority—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 38.

Held (*aff.* judgment of Lord Stormonth Darling) that the power of granting and refusing public-house certificates for premises within a police burgh is not transferred by section 38 of the Burgh Police Act 1892 from the justices of the district within which the burgh is situated to the magistrates of the burgh.

Prior to 1862 the right of granting and renewing licences for the sale of exciseable liquors was vested in two sets of authorities only, viz., the justices of the peace for the counties and districts, and the magistrates of royal burghs. By the Public-Houses Acts Amendment (Scotland) Act 1862 the right to grant licences was extended to the magistrates of parliamentary burghs.

By section 38 of the Burgh Police (Scotland) Act 1892 it is provided that "The magistrates and commissioners elected in virtue of this Act shall, within the limits of the burgh, for the purposes of this Act, possess such and the like rights, powers, authorities, and jurisdiction as are possessed by the magistrates and council of royal and parliamentary burghs in Scotland."

On 9th June 1893 the Justices of the Lower Ward of Lanark, within which the police burgh of Partick is situated, held a general meeting, at which they resolved "that this Quarter Sessions are of opinion that the granting of publicans' certificates within the Lower Ward of the county, exclusive of the burghs of Glasgow and Rutherglen, remains with the Justices, and that their jurisdiction in this respect has neither been taken away nor interfered with in any way." This resolution was intimated to the holders of certificates granted by the Justices within the police burghs of the Lower Ward, and among others to Hugh Tennent, who held a public-house certificate for premises in Partick, which had been renewed by the Justices in April 1893 for the year from May 15th 1893.

On 17th June Tennent received a circular notifying, "in terms of the Lord Advocate's opinion, the Magistrates of Partick claim under the Burgh Police (Scotland) Act 1892 to be the licensing authority, and as such will, from this date, deal with the granting of licenses, transfer of licenses, &c., within the burgh."

On 22nd August 1893 the Magistrates held a meeting under the said Act of 1892, at which they granted transfers to certain new tenants for the current year.

In November 1893 Tennent raised an action against the Commissioners and Magistrates of Partick, and also against

the Clerk of the Peace of the Lower Ward of Lanarkshire, as representing the Justices of the Lower Ward, for any interest competent to them, in which he sought to have it declared that the Magistrates of the burgh had no right to act as the licensing authority of the burgh, in so far as regarded the granting, refusing, renewing, or transferring of certificates for licensed premises, and in particular had no right to assert or exercise any such jurisdiction for the premises occupied by the pursuer, and to have them interdicted from asserting or exercising such jurisdiction.

The pursuer pleaded—"The pursuer is entitled to decree of declarator and interdict, with expenses, as concluded for, in respect that the defenders, the Magistrates of the said burgh of Partick, have unwarrantably asserted and exercised jurisdiction as regards the granting, refusing, renewing, and transferring of certificates under the Public-Houses Acts for premises situated in the burgh of Partick, and in particular for the licensed premises in the said burgh occupied by the pursuer."

The defenders, the Commissioners and Magistrates of Partick, lodged defences. They founded specially upon the 38th section of the Burgh Police (Scotland) Act 1892, and pleaded, *inter alia*—"(1) The action is irrelevant. (2) On a just and sound construction of the provisions of the Burgh Police (Scotland) Act 1892, the right of granting, refusing, renewing, and transferring certificates under the Public-House Acts for premises within the burgh of Partick at meetings of the licensing authority held subsequent to 15th May 1893, and the right of imposing punishment for the breach of said or existing certificates, or for other contraventions of said Acts, have been conferred on these defenders."

On 13th February 1894 the Lord Ordinary (STORMONTH DARLING) pronounced this interlocutor:—"Finds, decerns, and declares, and interdicts, prohibits, discharges, and decerns in terms of the conclusions of the summons: Finds the pursuer entitled to expenses, &c.

"*Opinion.*—Previous to the passing of the Public-Houses Acts Amendment (Scotland) Act 1862 the right of granting and renewing certificates for the sale of excisable liquors in Scotland was vested in two sets of authorities, and two only, viz., the justices of the peace for counties and districts, and the magistrates of royal burghs. By the Act of 1862 an additional body was invested with licensing authority, viz., the magistrates of parliamentary burghs. The question here is whether that authority has been extended by the Burgh Police Act of 1892 to the magistrates of police burghs, present and to come.

"Admittedly, in all the 518 clauses of which the Act consists, there is no mention of the Public-Houses Acts except in secs. 501 and 515, which relate to offences against these Acts. But it cannot be said that the right to try offences against these Acts implies the right to grant certificates under them, because during the thirty years from 1862 to 1892 the magistrates of police burghs possessed the first of these rights and not the second. If, therefore, the right of licensing in burghs which are neither royal nor parliamentary has been taken away from the justices and conferred on the magistrates, it must be by implication from some general clause. I state the question as one of transfer from the one body to the other, because the notion of a concurrent jurisdiction is quite inadmissible. No such thing has ever existed in licensing law, and the objections to it are too obvious to require argument. (See *Booth* v. *Lang*, 5 Irv. 371.)

"The first observation which occurs to one is that an existing jurisdiction is not usually taken away except by clear and precise words. The defenders endeavour to meet that difficulty by pointing to the Public-Houses Amendment Act of 1862, in which the divestiture of the justices, and the investiture of the magistrates in parliamentary burghs with the power of licensing is accomplished mainly by the interpretation clause, which defines 'burgh' as including any royal or parliamentary burgh. But the whole tenor of the Act makes it plain, that in the limited class of parliamentary burghs the justices are no longer to exercise their former jurisdiction. The provisions as to meetings and procedure, the forms of applications and certificates, the reference in sections 6 and 10 to the 'respective jurisdictions' of the justices and magistrates, all show conclusively that the Legislature intended to substitute the one authority for the other. Above all, there is, in sec. 32, a careful provision for protecting the vested interests which would be damaged by the transference. I refer to the provision that the town-clerks of parliamentary burghs should pay to existing clerks of the peace, during their tenure of office, one-half of the fees received by them in connection with licensing business. The Act of 1862, therefore, affords no aid to the argument that a transfer of jurisdiction may be accomplished by mere implication.

"Now, what are the words by which the transfer is said to be effected? They are to be found in sec. 38, by which it is enacted that 'The magistrates and commissioners elected in virtue of this Act shall within the limits of the burgh, for the purposes of this Act, possess such and the like rights, powers, authorities, and jurisdiction as are possessed by the magistrates and council of royal and parliamentary burghs in Scotland.' The defenders' argument is that as licensing is one of the rights, powers, authorities, and jurisdictions, possessed by the magistrates of royal and parliamentary burghs, it is conferred on the magistrates of police burghs by this clause.

"The first answer made by the pursuer to this argument—and I confess I think it a formidable one—is that the clause professes to deal with the rights, powers, authorities and jurisdictions, not of the magistrates, but of the magistrates and council, of royal and parliamentary burghs, and similarly that it confers these, not on the magistrates, but on the magistrates and commissioners of police burghs. If this be

sound, it is conclusive of the question, because the right of licensing was never vested in the magistrates and council of any burgh. Licensing is a discretionary power to be exercised judicially—*Sharp* v. *Wakefield*, 1891, App. Cas., *per* Lord Chancellor, 179—and it belongs to the magisterial office, as distinguished from the deliberative functions of the council. The defenders say that the clause ought to be read distributively. I do not know what warrant there is for this, in the absence of any distributive phrase like 'or either of them' or 'respectively.' Without such words I think it would be a very loose reading of the clause to apply it to powers which the magistrates possess apart from the council. And I am confirmed in this view by finding in the Act another section (the 454th) by which it is declared, *inter alia*, that the magistrates of a police burgh 'shall have the like jurisdiction within the burgh as any magistrate of a royal burgh, or any dean of guild of a royal burgh has by the law of Scotland.' It is conceded by the defenders that this clause truly refers to police offences, and does not help their case in the question of licensing. But if sec. 38 had been intended to have the wide effect for which they contend, there was no need for any other words assimilating the jurisdiction of the magistrates of police burghs to that of the magistrates of royal burghs. If they are right, the thing had been done already.

"The second answer made by the pursuer to the defenders' argument on sec. 38 is that the assimilation of powers thereby enacted is controlled by the words 'for the purposes of this Act.' The commas inserted by the Queen's printer rather look as if these words referred merely to the limits of the burgh, and that is what the defenders say they do refer to. But there is no punctuation in the rolls of Parliament, and therefore courts of law are not bound by the punctuation in the printed copies—see C-J. Cockburn's opinion in *Stephenson*, 1 Best & Smith, at p. 106, and Lord Romilly's in *Barrow*, 24 Beav., at p. 327. I am disposed to regard the words in question as governing the whole clause. The Dean of Faculty referred to some other sections, particularly secs. 8, 11, and 13, in which the words clearly refer to the boundaries of the burgh. But these are sections dealing exclusively with boundaries, and therefore the words could not refer to anything else. Here, on the other hand, the subject-matter of the clause is the powers of the magistrates and commisioners, and it seems natural to refer the restrictive words to the matter in hand. In the other clause relating to jurisdiction (the 454th) the words 'within the burgh' are not followed by the words 'for the purposes of this Act,' shewing that the words 'within the burgh' were thought sufficient to describe the area within which jurisdiction was to be exercised, and therefore that the words 'for the purposes of this Act' where they do occur, ought to receive a wider application. Admittedly the assimilation of powers in the 38th section is not a complete or universal assimilation, for one of the rights of the magistrates and council of a royal burgh is to return a representative to the Convention, and it cannot be pretended that that right is conferred on police burghs. If the rights and powers (whatever they may be) are conferred only for the purposes of this Act, the clause is perfectly intelligible, and (as I shall presently show) harmonious with the rest of the Act, and with the previous Acts on the same subject. So read, its effect is simply to invest the municipal authority of police burghs with such rights and powers, not otherwise conferred, as had been found useful in the older class of burghs in enabling the corresponding authorities to perform their functions. That, I think, is the true meaning of the clause, but it is a meaning entirely inconsistent with the notion that the clause has the effect of sweeping in a kind of jurisdiction which is not to be found among the declared purposes of the Act.

"There is yet a third answer made by the pursuer to the defenders' construction of the clause, which is to my mind conclusive in itself. It is this, that the defenders' construction is inconsistent both with the other parts of the statute and with prior statutes on the same subject.

"Taking first the statute itself, we find in section 431 an express provision that the magistrates shall be the local authority for the purposes of the Weights and Measures Acts, 1878 and 1889, and that the word 'burgh' in these Acts 'shall include any burgh under this Act.' Now, if the defenders' argument be sound, that provision was entirely unnecessary, for the Weights and Measures Act of 1878 (by section 50 and Schedule 4) provided that the local authority should be the magistrates of a burgh, and burgh was defined (by section 74) as including royal and parliamentary burghs. According to the defenders, then, the framers of the Act ought to have been content with the sweeping effect of section 38, which had already conferred on the magistrates of police burghs all the rights, powers, authorities, and jurisdiction of the magistrates of royal and parliamentary burghs. Again, by section 432 it is enacted that the commissioners of any burgh under this Act shall be the local authority under the Sale of Food and Drugs Act 1875. Why take the trouble to say that, if by section 38 (reading it distributively as the defenders say it ought to be read) all the rights and powers of the councils of royal and parliamentary burghs had already been conferred on the commissioners of police burghs, seeing that among these rights and powers the power of acting as local authority under the Food and Drugs Act had been included by sections 10 and 33 of the Act itself? I mention these as instances which have resulted from my own examination of this voluminous statute, but I daresay there are others.

"It is, however, when we come to consider the effect of clauses almost identical that we realise the full difficulty of attributing to it the meaning for which the

defenders contend. The genesis of the clause is to be found in the Act 3 and 4 Will. IV. cap. 77, which gave a municipal constitution to the parliamentary burghs which were not royal. By section 30 of that Act it was enacted that 'the magistrates and town council to be elected for the said burghs or towns under the authority of this Act shall have such and the like rights, powers, authorities, and jurisdiction as is or are possessed by the magistrates and counsel of any royal burgh in Scotland.' So far the two clauses are in substance identical, and the clause in the Act of 1833 would have been just as good for conferring jurisdiction in licensing matters on the magistrates of parliamentary burghs as the clause in the Act of 1892 can possibly be for conferring it on the magistrates of police burghs. Yet we know that the magistrates of parliamentary burghs had no such jurisdiction until it was conferred upon them by the Public House Act of 1862. It is said by the defenders that the only thing which prevented that result was the proviso at the end of the section. Now, the proviso bears that 'the rights, power, authorities, and jurisdiction hereby conferred shall in no case be exclusive of the authority and jurisdiction of any Admiralty Court or Dean of Guild Court now lawfully established, or of the sheriff or justices of the peace of the county over the territory within the boundaries of such burghs or towns respectively.' I read that proviso as meaning that the jurisdiction of the justices with regard to police offences within the burgh was to subsist concurrently with the jurisdiction thereby conferred. So far as police offences were concerned, it might so subsist without inconvenience. But it could not mean that there was to be a concurrent jurisdiction as regards licensing, for in section 32 of the Public-Houses Amendment Act, passed twenty-nine years later, there was an express statutory declaration that the magistrates of parliamentary burghs, at the date of its passing, were not authorised to grant certificates. Still less could the proviso be read as meaning that the jurisdiction of the justices as regards licensing was to remain an exclusive jurisdiction. That, no doubt, was the effect of the statute as a whole, but it was not by virtue of the proviso; it was because no human being interpreted section 30 as referring to licensing jurisdiction at all. I know of no better guide to the interpretation of a doubtful clause in an Act of Parliament than that which is afforded by the construction put by common consent and by the Legislature itself upon similar words in a previous Act relating to the same subject.

"Again, in the Police and Improvement Act of 1850 (13 and 14 Vict. cap. 33) there was a clause (section 345), not indeed identical with section 38, but for the life of me I cannot see why, if the defenders' argument be sound, it should not have been read as conferring licensing jurisdiction on the magistrates of police burghs. For it provided that the magistrates should have 'all such and the like jurisdiction' within such burgh as any magistrate of a royal burgh. Yet not even the defenders allege that the magistrates of police burghs had licensing jurisdiction until the Act of 1892 came into operation. I say the same of section 408 of the Police and Improvement Act 1862.

"Both parties appealed to the general scope and tenor of the Act of 1892. The pursuer maintained that the terms of the preamble excluded the notion that it was intended to deal with licensing. I do not assent to that, for I think that the preamble is wide enough to cover it. But neither can I adopt the defenders' view that the leading purpose of the Act was to gather into one administrative body all the functions of local government within police burghs. In many police burghs county councils and district committees still exercise important powers of administration and assessment as regards roads, the police force, and other matters. There may be many reasons why licensing jurisdiction should have been conferred on police burghs so populous and important as that which the defenders represent, but there may also be some reasons why it should not have been conferred on the newer and smaller burghs. Possibly a solution might have been found in drawing a line in respect of population. But these are matters of policy with which I have nothing to do. The only question which I have to decide is whether the effect of the Act is to transfer licensing jurisdiction from the justices to the magistrates. My opinion is that, if such had been the intention, there ought to have been, and there would have been, a careful enactment making the provisions of the Licensing Acts of 1828 to 1887 (which were fully in view of the framers of the Act, for they are mentioned in section 501) applicable to the new regime. I take the words of Lord Halsbury in *Sharp* v. *Wakefield*, 182 of App. Cas., 1891, and I say, 'In a matter so constantly before the Legislature as the licensing laws, I cannot but think that if it was intended to alter the law in this respect it would have been done in plain and unambiguous language.'

"For these reasons I have come to the conclusion (I confess without any hesitation) that the right of granting and renewing certificates remains unaffected by the Act, and that the pursuer is entitled to decree as concluded for."

The defenders reclaimed, and after the case was in the Inner House the Justices of the Lower Ward of Lanarkshire were of consent sisted as additional pursuers. At the hearing, doubts were expressed from the Bench as to the competency of the action, and the pursuer was called upon to submit argument on this point. The defenders did not seek to maintain that the action was incompetent.

Argued for the pursuer on the question of competency—The action was competent in its original form. The sisting of the Justices did not make it more competent than it was before. It was proposed to

argue the case as if it lay solely between the pursuer and the Magistrates. The summons contained declaratory conclusions, but these were followed by operative conclusions, and the summons was not, therefore, a mere abstract declarator. The defenders asserted a right to exercise powers which affected the rights of the pursuer as a licence-holder, and had intimated an intention to exercise these powers. What the Court were asked to do was to control an inferior judicatory in the exercise of its jurisdiction. The authorities bearing on the question of competency might be divided into two branches. (1) It was established that this Court had power to force inferior judicatories to exercise their jurisdiction, and to restrain them from exceeding it. This right had been recognised with regard to presbyteries, inspectors of poor, commissioners of supply, magistrates, and arbiters—*Heritors of Corstorphine* v. *Ramsay*, March 10, 1812, F.C.; *Edinburgh and Glasgow Railway Company* v. *Meek*, November 23, 1849, 12 D. 153; *Lord Advocate* v. *Commissioners of Supply for County of Edinburgh*, June 5, 1861, 23 D. 933; *Ashley* v. *Magistrates of Rothesay*, June 20, 1873, 11 Macph. 708, per Lord President 716; *Forbes* v. *Underwood*, January 22, 1886, 13 R. 465. The pursuer had a right to bring the action in order to be relieved from threats of prosecution for having no licence, and from the necessity of having to apply for a licence to a body which he believed had no power to grant it. (2) It had been frequently recognised that where a party had patrimonial rights which were in danger, it was competent for him to bring an action of declarator for their vindication—*Gifford* v. *Trail*, July 8, 1829, 7 S. 854; *Morton* v. *Gardner*, February 24, 1874, 9 Macph. 548; *Edinburgh Street Tramway Company* v. *Torbain*, May 18, 1876, 3 R. 655; *Hogg* v. *Parochial Board of Auchtermuchty*, June 22, 1880, 7 R. 986; *Glasgow City and District Railway Company* v. *Magistrates of Glasgow*, July 18, 1884, 11 R. 1110; *Morton, Whitehead, and Greig* v. *Smith*, November 7, 1864, 3 Macph. 29.

At the close of the pursuer's argument the Lord President intimated that the Court were satisfied that the pursuer Tennent had a sufficient title to sue, and parties were then heard on the merits.

Argued for the defenders—Up to the year 1862 only magistrates of royal burghs had the power to punish for breaches of certificates. After the Public-Houses Acts Amendment Act of that year was passed, the position of matters was that magistrates of royal burghs could grant licences and punish for breaches of certificate; magistrates of parliamentary burghs could grant but could not punish—section 30; and the magistrates of police burghs could do neither. Now, the 408th section of the General Police Act of 1862 was held to have conferred upon the magistrates of burghs which adopted that Act the power to punish for breach of certificate—*Johnston* v. *Laing*, March 25, 1876, 3 Couper, 250. That section, however, contained no provision expressly providing for the transference of this particular jurisdiction, but the jurisdiction was held to be transferred by implication. Further, that section was practically identical with section 345 of the Police and Improvement Act of 1850, and so the decision in the case of *Johnston* was pronounced after a long interval, during which no change in practice had followed upon the enactment. Seeing that the Police Acts without express words transferred the *quasi* criminal jurisdiction in the matter of licences from the justices to the magistrates, it was a reasonable inference that a like transference of the power to grant licences was effected by the general provision contained in section 38 of the Police Act 1892. This inference was supported by a reference to section 395, whereby the power to license theatres was conferred upon the magistrates, for there was no provision expressly taking away that power from the justices. The case of *Booth* v. *Lang*, April 27, 1867, 5 Irv. 371, really tended in the same direction, for there it was held that the power of granting licences being given to the magistrates, that excluded the powers of the justices. In section 38 of the Act of 1892 the words "for the purposes of the Act" were to be read as qualifying "burgh," and the section was so punctuated in the Queen's printers' edition. With regard to the argument which the Lord Ordinary founded upon sections 431 and 432 of the Act of 1892, the point he made was a fair one as regarded the Weights and Measures Act, but not in respect to the other three Acts mentioned in these sections, for as regards the latter Acts the provisions in these sections were unnecessary to vest the magistrates with jurisdiction to try offences under the latter Acts. The whole tenor of the Act of 1892 supported the defenders' contention. The plain intention and object of that Act was to vest the authority within the burgh with the whole functions of local government. Such an aim was entirely in accordance with the current of recent legislation.

Argued for the pursuer—For two hundred years the magistrates of royal burghs and the justices of the peace were the only authorities recognised in the matter of granting licences. Looking to the character of the power exercised, and the frequent attention which the Legislature gave to the licensing laws, it was extremely improbable that the power to grant licensing was taken away from one body and given to another without express words providing for such transference—*Sharp* v. *Wakefield*, L.R., 22 Q.B.D. 239, and L.R. 1891, App. Cas. 173. Such a change could never have been intended to be effected by a general provision in terms almost identical with provisions in prior statutes which had had no such effect. If the change had been intended, there would have been express words providing that it should take place—*Greaves* v. *Tofield*, 1880, L.R., 14 Ch. Div. 563, *per* Lord Justice James, pp. 571-2; *Gallsworthy*, 8 W.R. 594, *per* Lord Romilly. An examination of the

Statute of 1892 supported the view that no such transference was effected by section 38. The powers conferred by section 38 were those exercised by the magistrates and council of royal and parliamentary burghs, but the right of licensing was never vested in the magistrates and council. If the defenders' contention as to the effect of section 38 were correct, a number of the other sections of the Act were unnecessary, *e.g.*, sections 21, 44, 204, and 287. The fourth part of the Act conferred powers of lighting, cleansing, paving, &c., and this was done because all previous Police Acts were repealed, and these powers of administration had to be provided for by fresh enactments.

At advising—

LORD PRESIDENT — The Magistrates of Partick maintain that by section 38 of the Burgh Police (Scotland) Act 1892 the Justices of the Peace for the Lower Ward of Lanarkshire have been divested of the power and duty of granting certificates for licences to sell exciseable liquors within the police burgh of Partick, and that that power and duty is now vested in themselves. I agree with the Lord Ordinary that the idea of a concurrent jurisdiction in granting licences is impossible; and the defenders' argument necessarily involves the idea of transfer from the county magistrates.

Now, I shall assume throughout this opinion that the effect of the section is, for the purposes of the Act, to give to the magistrates of police burghs such powers as the magistrates of royal and parliamentary burghs possess. The grant of powers, however, is qualified by those words "for the purposes of this Act" (for it is impossible to hold them confined to the words "limits of the burgh"). Now, the proper and professed function of a clause like section 38 is to effectuate the other provisions of the Act; it is executive of the purposes of the Act; for those purposes it gives the magistrates the powers which certain other magistrates possess. Accordingly, section 38 is not a self-contained section; it bids us look outside its own terms for its scope; and points to the other sections of the Act for information as to what its purposes are. I shall briefly state the result of my examination of the statute.

First of all, the preamble of the Act is legitimately referred to for ascertaining the purposes of the Act. The laws which are to be amended are the laws relating to the police and sanitary administration of towns and populous places. Now, I do not think that even if the word "police" receive a very wide construction it would necessarily or probably be expected to include the licensing of public-houses, especially when we find historically that changes in the licensing bodies have been effected, not in Police Acts, but in Acts relating directly to the liquor laws.

Another part of the Act which bears on this general question of its purposes is the 5th section. There the Act is said to supersede and come in place of local Police Acts —treating, therefore presumably, of the same or similar matters.

When we go on to examine the very numerous specific enactments contained in this statute the antecedent impression which one derives from those initial passages to which I have referred is entirely confirmed. The Act is very busy with a vast number of things, and has plenty to say about the *minutiæ* of all that it interests itself in. If so distinct a branch of magisterial duty as the licensing of public-houses were in its view, it would certainly have said something about it, more especially as there was an existing licensing body to oust. And yet the subject of granting licences is never so much as named. This is the more striking that the liquor laws are mentioned in sections 501 and 515 for the purpose of seeing that the magistrates deal with prosecutions for offences against them. Again, the string of sections about licensing theatres is in marked contrast to the blank about licensing public-houses, although the omitted subject is of at least equal importance. Those sections in explicit terms authorise magistrates to grant licences to theatres.

On a review of the whole statute I can find no indication that the amendment of the law relating to the licensing of public-houses is one of the purposes of the Act. There are in the Act no specific provisions on this particular subject; it is not necessarily or naturally within the general terms employed as descriptive of the purposes of the Act; and the scheme of the Act makes the conclusion to my thinking irresistible that the reason why it is not specifically provided for is, that it was not in contemplation.

I may add that it cannot be said that if we hold the granting of licences to be within the Act it has rendered the police burghs entirely autonomous; the smaller burghs are not allowed to establish police forces—that is done by the county—and in one or two other matters the county authorities still regulate.

I have said that I assume that the 38th section deals with the magistrates and the commissioners distributively. I say so for this reason, that looking to the interpretation clause, *voce* "Commissioners," to section 55, to the immense series of sections in which the expression "the Commissioners" is used, and to the absence of any (other than that in dispute) in which the phrase the magistrates and commissioners occurs as equivalent to the commissioners, I am not convinced of the soundness of the argument that section 38 gives no separate power to the magistrates as distinguished from the commissioners. With that reservation I agree with the Lord Ordinary, and I am for adhering to his Lordship's interlocutor.

LORD ADAM—It appears to me that the decision of this case is primarily, almost altogether, dependent on the proper construction of section 38 of the Act. It was said to us that the effect of that clause was to confer on the magistrates and commis-

sioners elected by virtue of the new Act all the powers, authorities, and jurisdictions of whatever kind conferred upon the magistrates and council of royal burghs. If that had been the proper construction of the Act, it might, and in fact would have conferred upon the Magistrates and Commissioners of Partick as the licensing authority the right of issuing licences and so on. The other view which was presented to us was that that was not the true construction of the clause, but that it was limited by the words "for the purposes of this Act." That is why we require to go to the other clauses of the Act to see what the purposes of the Act are. If we do not find within the purview of the Act words set forth authorising and empowering the magistrates of new burghs to issue licences, then it appears to me that such power is not set forth within this 38th section. I concur with your Lordship in the construction of this clause. I think that the intention of the clause is to confer on magistrates and commissioners elected in virtue of the new Act the like rights which were possessed by the magistrates of royal and parliamentary burghs "for the purposes of this Act" and not otherwise. I think that is the only possible construction, and in my view it is the right construction. That being so, I have gone to the Act to find what the purposes of the Act are, and I agree with your Lordship that when we look to the 500 or 600 sections of this Act we find that its purpose is to confer upon the new magistrates the powers which the old magistrates of royal and parliamentary burghs had. I think that the rights, powers, and so on conferred by the Act are given for the purpose of effectuating and carrying out the purposes of the Act. That is to say, if there was conferred upon the old magistrates a power of dealing with licences, it confers upon the new magistrates for that purpose all powers and authorities necessary. That is the kind of authority which is conferred by the Act. Therefore I agree with your Lordship that the Lord Ordinary's interlocutor should be adhered to.

LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuer Tennent—C. S. Dickson — Ure. Agent — James Purves, S.S.C.

Counsel for the Additional Pursuers, the Justices of the Lower Ward of Lanarkshire —Wilson. Agent—James Purves, S.S.C.

Counsel for the Defenders—Lees—Dundas. Agents—Simpson & Marwick, W.S.

Saturday, November 18, 1893.

OUTER HOUSE.

[Lord Stormonth Darling.

LIQUIDATORS OF THE EDINBURGH EMPLOYERS LIABILITY AND GENERAL ASSURANCE COMPANY *v.* SMITH AND OTHERS.

(See *ante*, March 4, 1892, vol. xxix., p. 518.)

Company—Liquidation—Division of Surplus in Liquidator's Hands—Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 109.

Section 109 of the Companies Act 1862 provides—"The Court shall adjust the rights of the contributories amongst themselves, and distribute any surplus that may remain amongst the parties entitled thereto."

A company offered at a premium and succeeded in allotting a new issue of shares. Sometime later the directors informed the new shareholders that they had discovered that the prospectus for new shares contained material misrepresentations. In the course of the liquidation proceedings the Court settled the new shareholders on the list of contributories.

Calls were made upon all the shareholders, both "old" and "new," equally, which proved to be excessive, and a considerable surplus remained in the hands of the liquidators for distribution.

The "new" shareholders claimed to be repaid out of the surplus the price of their shares and the amount of the calls made upon them preferably to the "old" shareholders, on the ground that the "old" shareholders were not entitled to retain benefit from the fraud of their agents, the directors of the company.

Held that the section above quoted did not warrant the preference claimed.

For the previous stages of the liquidation proceedings, *vide The Liquidators of the Edinburgh Employers and General Assurance Company* v. *Griffiths and Others*, reported March 4, 1892, vol. xxix., p. 518.

The liquidators of the company called up the remaining fifteen shillings per share from the holders of both "old" shares, *i.e.*, shares issued prior to December 1890, and "new" shares, *i.e.*, shares issued in that month. After paying all claims there remained a surplus in the hands of the liquidators of £8036.

On 2nd June 1893 the liquidators presented a note to the Lord Ordinary praying for "audit of their accounts, direction as to the return of capital, and dissolution of the said company." No answers were lodged to the note; but a minute was lodged on 27th June by the Rev. John Anderson Smith, Free Church Manse, Newcastleton, who held four hundred shares of the new issue. The minuter was ordered to lodge a condescendence, which was answered by the liquidators