tees *per incuriam* recorded the deed in place of producing it. They then presented a note asking for approval of the extract deed, but the Court *held* that the original deed must be produced, as it was necessary that they should not only see what its terms were, but also that it was duly executed and that there were no erasures, and they accordingly ordered that the Deputy Keeper of the Records, or one of his clerks, should attend and exhibit it.

Counsel for Petitioner—Kinnear. Agents—Murray, Beith, & Murray, W.S.

Thursday, December 13.

FIRST DIVISION.

COWAN, OFFICIAL LIQUIDATOR OF THE EDINBURGH THEATRE COMPANY, PETITIONER—GOWANS' CASE.

Public Company—Responsibility of Directors.

Terms of an undertaking by directors of a limited company, (in issuing the remaining unsubscribed-for portion of their capital stock to the public) to double their own holdings of stock—which were *held* to be conditional on the total amount of remaining stock being subscribed for, and to import no obligation against them in the event, which happened, of that condition not being purified.

This was a petition by Mr Cowan, C.A., official liquidator of the Edinburgh Theatre Company (Limited) to settle a list of contributories. The question at issue arose with Mr Gowans, who was a large shareholder of the company, and also a creditor, as contractor for the company's buildings. Among other objections taken by Mr Gowans to the list of contributories proposed by the liquidator was this, viz., that the directors had bound themselves to double their original holdings of stock, and that the official liquidator had failed to give effect to this obligation on the part of the directors.

The alleged undertaking was said to be contained in various minutes of meetings of directors, a circular to the shareholders of the company, and a statement issued by the directors to the public. All these documents had reference to the conditions under which the directors proposed to issue to the public that part of their capital stock not originally issued. They sent in the first place a private circular and statement of their position to the shareholders of the company, that they might have an opportunity of themselves subscribing for the remainder of the stock, or inducing their friends to do so. They afterwards issued the statement to the public, with this announcement at the head of it, and printed in italics—"No shares will be allotted until the whole remaining stock has been applied for." The circular and statement both announced that the directors had resolved to double their original holdings of stock. The terms of the circulars and of the minutes of meetings of directors are quoted at length in the opinion of the Lord President. The required amount was not subscribed, and accordingly no additional shares were issued.

The contention of Mr Gowans was that the directors had intended, and had induced the public to believe that they intended, to double their holdings. The directors answered that their undertaking was plainly conditional, depending on whether or not the rest of the capital was subscribed. Till it was there was no liability upon them.

At advising—

LORD PRESIDENT—The question here is raised by a gentleman who stands in the position of being both a member of the company and a creditor, and his objection to the list of contributories is—"That it does not give effect to an agreement and undertaking on the part of the directors of the company as individuals, whereby they agreed and undertook to take each of them additional shares in the company, so as to double the amounts of their respective holdings." He avers that this agreement was "duly made at a meeting or meetings of directors, held shortly prior to 3d April 1876, and the same was embodied in and intimated to the shareholders and the public by a circular or prospectus issued by the directors, dated 3d April 1876;" and to that he has added in argument that this resolution was embodied in a minute of the directors, dated 10th April 1876.

In the outset of his argument Mr Gowans' counsel attached most importance to this last consideration, but it is obvious that so far from this being the constitution of an undertaking by the directors, it refers to that undertaking as something that has gone before, and for its terms we must therefore refer to the documents by which it was constituted. The minute of 10th April says—"The meeting resolved that as the financial success of the undertaking depends entirely on its completion, and as that cannot be accomplished unless the whole remaining capital stock be now applied for, the directors, besides each subscribing for at least as much more stock as they originally held, will each make this week a personal application to his own friends and acquaintances to take shares." But as regards their undertaking to double their own interest in the company, that is plainly referred to in the resolution as a thing already undertaken. Now, the first document that it is necessary to refer to in order to see what the undertaking was, is a private circular by the directors, dated 29th March 1876, which is said to have been sent to the existing shareholders of the company only. Of that I think there is sufficient evidence in the body of the circular. The shareholders' attention is called to a statement which the directors propose to issue, and in this statement the directors say that they are to show their confidence in the undertaking by doubling their original holdings of stock. But they say they are desirous to know before they issue that statement "what additional capital the other shareholders are prepared to subscribe in the event of sufficient capital being otherwise got for the completion of the undertaking." This statement was afterwards issued in conformity with a minute by the directors, dated 3th April 1876, which bears—"The financial statement by the directors having been adjusted, it was ordered to be issued."

We are thus brought to the financial statement, which was issued not only to the shareholders but to the public, for the purpose of raising a sum of £22,310, being the amount of shares hitherto unallotted. At the beginning of this financial statement we have a passage printed in italics, so that special attention might be called to it. That seems to me to be a passage of great importance —"No shares will be allotted until the whole remaining stock has been applied for." The meaning of that, I take it, is that no one who shall subscribe to enable the undertaking to go on is to be held liable unless the directors and existing shareholders succeed in getting the whole amount subscribed for. In so far as the applicants for shares are concerned, these words give them a guarantee that unless the whole remaining stock is taken up they will not be called on to take up what they have subscribed for. The part of the circular referring to the undertaking by the directors is this—"The directors show their own confidence in the undertaking by each subscribing for at least as much more stock as they originally held; and they offer the remaining capital to the public as an investment likely to be profitable, and certain to be of great benefit to the citizens of Edinburgh and its visitors." Is the meaning of this that they, as part of their personal endeavour to raise the additional capital, will double their holding on the same terms as those on which they ask the public to take it up? I see no reason to suppose that the directors were to take shares on any other terms than those on which they asked others to take them up. I think it is not very reasonable to ask them to take them up on any other conditions.

Now, if that be so, on the face of this statement is there anything else to show any intention on the part of the directors, or any desire to make other people think it was their intention, to take up these additional shares whether this capital stock was fully subscribed for or not? There are two passages in a report by the directors, of date 20th April 1876, bearing on this point. The first is this—"Your directors regret to state that after circulating very extensively the statement referred to, and using personal influence to back it, the result is that only 151 shares have been applied for—70 by present shareholders, and 81 by the public—and these of course cannot be allotted until the remaining capital is subscribed. Debentures to the amount of only £1130 have been applied for since the statement was issued.

"It is evident from this result that the undertaking does not command the confidence of the public, and your directors take this opportunity of explaining the course followed by them since their appointment for the purpose of promoting the interests of the shareholders."

Here the failure of the attempt is distinctly announced. Then, after some details, which are not before us, they conclude in this way:—"Your directors feel that in these circumstances only three alternatives are open to the company—

"1. To endeavour still to get the remaining capital subscribed, for which purpose, being satisfied that it affords the only chance of rendering the undertaking financially successful, your directors are prepared each to subscribe for at least as much more stock as they originally held.

"2. To let the theatre at such a rent as will at least meet the charges on the undertaking.

"3. To resolve on the liquidation of the company."

Now, the first alternative explains very clearly what seems to have been the intention of the directors throughout, viz., that they would help to raise the additional capital required on the same terms as other people were invited to do, but that attempt they say has failed. The second alternative does not seem very hopeful in the circumstances. The third alternative is liquidation. If Mr Gowans' reading of this report is correct, this is what is meant—he represents the directors as saying "we have failed in our undertaking, and therefore we, the directors, are going to make a present of £1900 to the company to go into liquidation." A more unreasonable contention I never heard of. I think that the directors acted all along in perfect good faith. They were willing to help in the work of raising the additional capital, but on the same terms as other people. The proposition to put the directors now on the register for double the number of shares that they originally held is quite out of the question.

Lord Deas—Mr Gowans, besides being a creditor of the company, was a shareholder to a large amount. In these two capacities he raises this question. His interest to do so is clear enough. He founds his case on three documents, of date respectively 3d, 10th, and 20th April 1876. The question is—Do these documents import an absolute undertaking on the part of the directors to double the number of their shares?

I find myself compelled to take the same view of the case as your Lordship has done, viz., that these documents import not an absolute obligation, but a conditional one, the condition being that the total amount of the capital required should be obtained from members of the public and the shareholders, along with that subscription which the directors were prepared to give. The document of the 3d April contains this important passage—"No shares will be allotted until the whole remaining stock has been applied for." Reading the documents of the 10th and 20th April, so far as bearing on this matter, the rest of the stock is offered to the public in general, and the friends of the shareholders in particular, and a considerable number of applications for new shares are obtained, but it is not disputed that these shares were applied for on the condition that the whole of the capital should be subscribed. These applications therefore admittedly dropped, and the question is, whether the directors are to be held bound by their statement that they would take double the number of shares they had before?

I think they are only bound on the condition that the whole stock was taken, and therefore I come to the conclusion that their conditional obligation dropped too. The directors say that they have "now completed the Edinburgh Theatre on a scale, as regards size and elegance, worthy of the Scottish Metropolis." That was done by Mr Gowans and not by the directors. He, and not the directors, created the theatre. If I could find any ground for giving Mr Gowans relief against them I would not be sorry to do so, but the terms of the documents forbid it.

Lord Mure concurred, on the same grounds, observing that as Mr Gowans had not himself taken shares on the faith of the directors' representations, he could show no personal undertaking in the matter as regarded his own case.

Lord Shand was of opinion that the directors were entitled to have the whole minutes taken together, and that, taking them together, the obligation was only conditional, and the result was that, the condition not having been purified, the obligation flew off.

The Court accordingly repelled this contention of the respondent Gowans, in so far as it was sought to put the directors on the register for 190 additional shares.

Counsel for Gowans—Trayner—Mackintosh. Agents—Lindsay, Paterson, & Co., W.S.

Counsel for Directors — Asher — Moncrieff. Agent—John Carment, S.S.C.

HIGH COURT OF JUSTICIARY.

Friday, December 14.

GILLAN *v.* MILROY.

(Before Lord Justice-Clerk, Lord Young, and Lord Adam).

Justiciary Cases—Poaching Act, 27 *and* 28 *Vict. c.* 114.

A man when searched under the provisions of the Poaching Act was found to have in his pockets a ferret, a mesh needle, and a quantity of twine for making nets. *Held* that he was not guilty of having "nets, or engines, or articles, or things used for killing or taking game," and conviction quashed.

This was a suspension at the instance of Charles Gillan, a labourer residing at Maxwelltown, Dumfries, who was convicted by the Justices of Peace of the stewartry of Kirkcudbright, on a complaint at the instance of the respondent A. J. Milroy, Procurator-Fiscal, of an offence under the Act for the prevention of poaching, and was fined £1, and 15s. costs. Gillan was stopped on the high road leading from Maxwelltown towards Drumpark, and searched by a constable, who suspected him to be coming from land where he had been unlawfully in search of game. The constable found in one of the suspender's pockets a ferret and a mesh needle, with a quantity of twine used for making nets. On that statement of facts the Justices convicted. It was contended for the appellant that the conviction was bad, in respect it did not set forth that there were found on Gillan's person "nets, or engines, or articles, or things used for killing or taking game," or that the things found on his person were actually used for unlawfully killing or taking game.

Their Lordships quashed the conviction, and gave the appellant seven guineas of expenses.

Counsel for Appellant—Nevay.

Counsel for Respondent — Solicitor-General (Macdonald)—Burnet.

Friday, December 14.

STIRRAT *v.* LANG.

Justiciary Cases—Public-house Statutes — "Keeping Open House."

Held that the mere fact of the door of a public-house being open after hours, and of two persons coming out therefrom, was not sufficient to justify a conviction for "keeping open house" under the statute.

The appellant in this case was a wine and spirit merchant, Glasgow, who had been convicted in the South Side District Police Court, at the instance of the Procurator-Fiscal, of the statutory offence of keeping open house. From the case stated by the magistrate who convicted the appellant, it appeared that the facts on which he proceeded to convict were—that on a Saturday night, at about twenty minutes past 11 o'clock, the door of the appellant's shop was opened, and two people came out. On these facts it was contended for the appellant the conviction was clearly bad.

Authorities—*Crosby* v. *Macminn*, June 8, 1866, 4 Macph. 803; *Cates*, 1 L.T. (N.S.) 365; *Tennant*, 1 Ellis 401.

At advising—

Lord Young—I do not think that this conviction can stand. The respondent's counsel seemed to put it that the fact of the door of this public-house having been open was conclusive. Probably that is the view upon which the magistrate proceeded, but it is an erroneous one. All, in point of fact, the magistrate finds is, first, that the door was open, and second, that two persons came out. This is not sufficient to satisfy a charge of "keeping open house" under the Act.

Lord Adam—We have held lately in another case that the fact of the door of a public-house being open in the morning before the statutory hours was not in itself sufficient to ground such a charge, and I do not think there is enough here upon which it can properly be based.

Lord Justice-Clerk—The fact of the door being open is not in itself sufficient to justify a conviction. It might in some cases be enough, and in others it might not. As, therefore, there is nothing else really found as fact by the magistrate, except the exit of two persons, I am for sustaining his appeal.

The Court sustained the appeal, ordered repayment of the fine already paid by the appellant, and found him entitled to expenses, modifying the same to £7, 7s.

Counsel for Appellant—Vary Campbell.

Counsel for Respondent—Lord Advocate (Watson)—Lang.
