Lord Mure concurred with the Lord President.

Lord Shand concurred with the Lord President, and remarked that the reference, so far from being informal, was constituted by a carefully drawn-up deed, which even had the formality of a testing clause.

Lord President—With respect to the remarks which have fallen from my brother Lord Deas, I wish to observe that I believe every word of the evidence given by the witnesses. That being so, I do not see why I am not as able to judge of the effect of that evidence as the Sheriff-Substitute.

The Court sustained the appeal and dismissed the action.

Counsel for Pursuer (Respondent) — Lang. Agents—Dove & Lockhart, S.S.C.

Counsel for Defender (Appellant)—Murray. Agents—Mason & Smith, S.S.C.

Tuesday, June 22.

SECOND DIVISION.

[Sheriff of Lanarkshire.

DOBBIE *v.* THOMSON AND OTHERS.

Process — Appeal from Sheriff — Competency — Value of Cause not exceeding £25—Sheriff Court Act 1853 (16 *and* 17 *Vict. c.* 80), *sec.* 22.

A landlord petitioned in a Sheriff Court for sequestration of a tenant for a sum exceeding £25. The Sheriff pronounced an interlocutor sequestrating the tenant and ordering certain effects to be sold. That interlocutor became final. The balance of the price after payment of the expenses of process was £17, 6s. 1d. It was claimed by other creditors of the tenant who claimed to be preferable to the landlord. *Held* that the competition between these creditors and the landlord was a new process, and that the cause not being of the value of £25 could not competently be appealed to the Court of Session.

Lockhart Dobbie, proprietor of the Hallcraig Mills, Airdrie, brought a process of sequestration for rent in the Sheriff Court at Airdrie against William Summerville, the tenant of these mills. Summerville's estates had been sequestrated under the Bankruptcy Statutes, but his trustees did not take up the lease nor in any way interfere with the working of the mills. The petition, as restricted by minute of 12th November 1879, concluded for sequestration for the rent due at Lammas 1879, being a sum of £53 with interest thereon, and the prayer of the petition was granted by the Sheriff-Substitute, and on appeal by the Sheriff, who on 14th November sequestrated and granted warrant to sell as much of the sequestrated effects as would pay the sum of £53. The nett proceeds of the sale amounted to £38, 17s. 7d. The taxed expenses of process amounted to £21, 11s. 6d. There was thus available to meet the £53 for which Dobbie had sequestrated a sum of £17, 6s. 1d. The pursuer craved authority to apply the nett proceeds of the sale in payment of the taxed expenses of process, and the balance of £17, 6s. 1d., in payment *pro tanto* of the £53, leaving due to him a sum of £36, 12s. 11d. The Sheriff-Substitute on 11th December 1879 pronounced this interlocutor:—"Approves of the report of sale and relative account of expenses of process and sale as taxed, in all, at £26, 17s. 6d. sterling: Allows the pursuer to apply the nett proceeds of sale, viz., £38, 17s. 7d., in extinction of the taxed expenses of process, amounting to £21, 11s. 6d.; and in respect certain claims have been lodged by creditors of the defender which require to be disposed of, appoints the balance of £17, 6s. 1d. to be consigned in the hands of the Clerk of Court subject to future orders; and appoints the case to be put to the roll on Friday first for hearing on the claims."

The claims mentioned in this interlocutor were lodged at the instance of John Thomson, David Black, and Robert Wood, workmen in the employment of the defender Summerville. They claimed £4, 8s. 9d., £4, and £4, being four weeks' wages due to them respectively. The pursuer having consigned the sum of £17, 6s. 1d. as divided, claimed the whole fund in part payment of the £53 due to him as quarter's rent. The competition was thus between the landlord for his rent and the workmen in the employment of the tenant, who founded on sec. 122 of the Bankruptcy Act of 1856, which provides that the wages of workmen, where such wages do not exceed £60 per annum, are to be entitled to the same privilege as the wages of domestic servants to the extent of a month's wages prior to the date of sequestration, and also founded on the Amending Act of 1875 (38 and 39 Vict. cap. 26), which extends the period, in the case of workmen whose wages do not exceed £50, to a period of two months before the date of sequestration.

The Sheriff-Substitute on 2d January 1880 issued an interlocutor dismissing these claims, on the ground that the statutes did not give servants any preference in a question with the landlord exercising his right of hypothec.

On appeal the Sheriff (Clark) recalled this interlocutor, found that domestic servants are preferable to the landlord's hypothec, and therefore ranked and preferred the claimants' and others in terms of their claim, and appointed the balance to be paid over to the petitioner Dobbie.

Dobbie appealed.

When the case was heard in the Second Division the Court drew attention to the fact that by the interlocutor of the Sheriff on 5th November 1879 the cause was exhausted save to the extent of £17, or rather of the £12, 8s. 9d. in dispute between the claimants. In these circumstances the Court invited argument on the question of the competency of the appeal under the Sheriff Court Act of 1853, sec. 22, which provides that it shall not be competent to appeal any cause not exceeding the value of £25.

The appellant cited the cases of *Wilson* v. *Wallace*, March 6, 1858, 20 D. 764; *Buie* v. *Steven*, December 5, 1863, 2 Macph. 208—to show that where a cause is originally of the value of £25 and upwards, the jurisdiction of the Court is not excluded by the circumstance that afterwards, but before the lodging of the appeal, the

amount in dispute had come to be less than £25. In *Wilson's* case this Court sustained its jurisdiction, though the sum in dispute was really only £6. The principle is that when the litigation in its inception is far more than £25, the case may be appealed.

The respondents argued that the competition between the landlord and themselves was really a new litigation unconnected with the original conclusions of the petition.

Authorities — *Stevens, Son, & Company* v. *Grant*, October 17, 1877, 5 R. 19; *Aberdeen* v. *Wilson*, July 16, 1872, 10 Macph. 971.

At advising—

LORD JUSTICE-CLERK—Discussion on the competency of this appeal has been invited by the Court, and I think not without reason, because it is a hard thing, without doubt, that workmen who are taking advantage of this statute, and who are claiming a sum of only about £4 each, should not only have to run the gauntlet of an appeal to the Sheriff, which is unavoidable, but should also be compelled to come here and maintain the judgment of the Sheriff in their favour, and might even have to go to the House of Lords. I must say that if this question had arisen in the original petition between the landlord and tenant, I should have had great difficulty in steering clear of the authorities on this matter in order to apply that clause of the statute of 1853 which prohibits appeals in suits of the value of less than £25. But I think that this case is out of the category of those which have been quoted. These proceedings originated in a petition to the Sheriff for sequestration at the instance of the landlord against the tenant, and that petition was ultimately granted to the extent of selling certain articles and consigning the price. The price when received appears to have been £38, 7s. 7d., and the Sheriff approved of the report of the sale and allowed the pursuer to apply that sum in extinction of the total expenses of process, amounting to £21, 11s. 6d. There the original process took end conclusively as between the original petitioner and respondent, and there was nothing more to be done. Then the interlocutor goes on to say—"and in respect certain claims have been lodged by creditors of the defender, appoints the balance of £17, 6s. 1d. to be consigned in the hands of the Clerk of Court subject to future orders." That was the beginning of a new litigation about a separate subject. It happens that it was competent for certain creditors to put in claims, but that was not the original process of sequestration. It is a claim founded on a provision in a statute for the benefit of workmen. It is, in short, a multiplepoinding of the amount so far as the workmen's claims are concerned. The whole fund then is £17, the whole claims £12, and the question is, Can the value of this, which is a separate process, be of the value of £25? I am of opinion, while adhering to all I said in the case of *Aberdeen* v. *Wilson*, that this case is out of the category of that case.

LORD ORMIDALE, LORD GIFFORD, and LORD YOUNG concurred.

The appellant moved that in respect of the objection to competency not having been taken when the case was in the Single Bills no expenses be found due.

The Court refused the motion, and dismissed the appeal as incompetent, with expenses.

Counsel for Appellant—Gloag—Low. Agents—Wilson & Dunlop, W.S.

Counsel for Respondents—Kennedy. Agent—John Walls, S.S.C.

Tuesday, June 22.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

SCOTT AND OTHERS (TRUSTEES FOR SHAREHOLDERS OR RENTALLERS OF THEATRE ROYAL, EDINBURGH) *v.* HOWARD & LOGAN (LESSEES OF SAID THEATRE), AND THE EDINBURGH THEATRE ROYAL COMPANY (LIMITED).

Property—Personal and Real—Personal Rights to Free Seats in a Theatre—Effect of Destruction of Fabric by Fire on Subsequent Transmissions.

B received a conveyance of a theatre and the ground on which it stood from the rentallers thereof, on condition, *inter alia* (1) that he should give them or their assignees a right of free admission to the audience department of the theatre; (2) that he should not convert it to any other use or purpose; and (3) that he should keep it open during at least six months of the year. Within a space of seventeen years the theatre was twice destroyed by fire and re-erected under another name. The building was during that period twice sold, and was let by the last proprietor; both the dispositions and the lease reserved to the rentallers the privileges to which they were entitled under the original disposition, and the privilege of free admission was as matter of fact enjoyed by the rentallers. On an action raised by the rentallers to enforce their privilege of free admission against the proprietor and lessee, *held* (*diss.* Lord Ormidale) that this, which was a personal privilege in the original contract, expired when the theatre was destroyed by fire; that the pursuers were not in any sense the contracting parties in any of the later deeds, the contracts in them as regards the rentallers being *res inter alios acta*; and their claim *repelled*.

On the 28th May 1858 Dr Robert Reubens Jefferiss and others, as trustees of the Queen's Theatre and Opera House, Edinburgh, which had been built on the site of the Adelphi Theatre, lately destroyed by fire, and which they held in feu off Heriot's Hospital, granted a disposition in favour of Mr John Brown of Marlie, by which they sold to him that theatre with the ground upon which it stood, and the whole pertinents, for certain onerous causes, under this express declaration—"Declaring always, as it is by the said disposition expressly provided and declared, that the subjects and others, with the pertinents above specified, were thereby disponed with and under the real burden of payment of a perpetual annuity of two pounds sterling to each of the shareholders or