

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 multiplepounding 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 ORMDALE, 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 RENTALERS 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 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 Ormdale)* 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 of 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 disposed with and under the real burden of payment of a perpetual annuity of two pounds sterling to each of the shareholders or

rentallers of said theatre, whose names were inserted in a list signed as relative thereto (but under the declaration and reservation after mentioned), and to the successors or assignees of the said shareholders or rentallers to whom the annuities may be transferred, in manner after mentioned, and to such other person or persons as may establish their right as shareholder or shareholders; . . . and which annuities are by said disposition constituted real burdens affecting the subjects and others above described, in favour of them, the said Robert Rubens Jefferiss, James Maidment, William Muir, Thomas Scott, David Smith, Peter Scott Fraser, John Ross, and James Neilson, and the acceptors or acceptor of them, And also further providing and declaring that each of said shareholders or rentallers, or the assignee or successor of such shareholder or rentaller, should at all times be entitled to free admission to the audience department of said theatre, other than the present private boxes and the box then set apart for them, the first and second parties thereto, as trustees foresaid, and which box should continue to be set aside for the sole use of them, the said first and second parties, as trustees foresaid, and their successors in office; but declaring that said right of free admission should be personal to each shareholder or rentaller, and that such shareholder or rentaller should not be entitled to substitute anyone in his or her right to admission to whom the share itself should not have been transferred in manner before expressed; and further, in the event of a share being acquired by more than one individual, only one of such individuals shall be entitled in virtue thereof to free admission to said theatre as aforesaid; and also providing and declaring that the said John Brown and his foresaids should not be entitled, without the consent of the said shareholders or rentallers and their foresaids, to convert the said theatre and opera house to any other use or purpose than a theatre or opera house; and also providing and declaring that the said theatre and opera house should be kept open for performance during at least six months in each year; and in the event of the said John Brown or his foresaids letting the said theatre or opera house to the lessee or tenant for the time being of the Theatre Royal, Edinburgh, he should take such lessee or tenant bound, so long as he also continued tenant or lessee of said Theatre Royal, to give the shareholders or rentallers of the said Queen's Theatre and Opera House free admission to the said Theatre Royal during the time the former is not kept open for performance." Mr Brown died uninfert in July 1858 leaving a trust-disposition and settlement by which he conveyed to William Shaw Soutar, writer in Blairgowrie, his whole means and estate. The latter completed his title to the theatre by instrument of sasine in his own favour in the Particular Register of Sasines on the 5th August 1858.

In 1865 the theatre was destroyed by fire, and Mr Soutar, acting under legal advice, rebuilt the theatre at a cost of £17,000, and opened it in 1866 as the Theatre Royal. In June 1874 Mr Soutar sold the new theatre to the present defender Mr Logan for £11,000, with entry at Martinmas 1874, but before the price was paid and before any conveyance was delivered the theatre was again entirely destroyed by fire on the 6th February 1875. A dispute took place as to the application

of a sum of £12,000 for which the building had been insured, and after some delay the disposition was delivered, and Mr Logan was infert on 27th April 1875. In this disposition the subjects were disposed to Mr Logan, his heirs and assignees, subject to all burdens and privileges contained in the disposition of 1858. While in course of erection he however sold the theatre to the present defenders, the Edinburgh Theatre Royal Company (Limited), by disposition dated 25th September 1875. This conveyance was made, *inter alia*, "with and under the real burdens, conditions, provisions, declarations, and others," specified in the foresaid instrument of sasine in favour of Mr Soutar in 1858, and 'with and under and subject to the whole burdens and others incurred on me, the said William Hugh Logan, under the titles of said subjects, from and after the term of Whitsunday 1875, being the term of entry of The Edinburgh Theatre Royal Company (Limited), as after mentioned, and specially, without prejudice to the said generality, the said company shall thenceforth pay the annual sums or annuities due to the rentallers or shareholders whose names are enumerated in a schedule hereto annexed, and signed as relative hereto, and to the successors or assignees of the said rentallers or shareholders, and to such other person or persons as may establish their right as shareholder or shareholders, and allow these parties the privileges to which they are entitled; and in respect that no annuities and privileges have been asked on several shares for many years, the said Edinburgh Theatre Royal Company (Limited), shall be bound to take, as by acceptance hereof they do hereby take, on themselves and their foresaids, all liability or responsibilities now incumbent on me in respect of such shares, or of all arrears of annuities claimable in respect of these, and that whether the same may become payable before the said term of entry, or may become payable thereafter, subject always to the right of the said The Edinburgh Theatre Royal Company (Limited), and their foresaids, to plead all objections competent to me to any claim on the said shares by any party.' The names of the shareholders or rentallers, to the number of 104, are contained in a schedule appended to the disposition, and signed as relative thereto."

The Edinburgh Theatre Royal Company (Limited) were incorporated under the Companies Acts 1862 and 1867, and in the prospectus of the proposed company it was stated that one of the principal burdens on the property was the annual burden of £2 per share to each of 82 rentallers, who were also entitled to a single free admission.

The said theatre, which continued to be called the Theatre Royal, was opened for public performances on 27th January 1876, and the defenders James B. Howard and William Hugh Logan became the lessees under a lease from the Theatre Royal Company (Limited), dated 24th December 1875, in which the lessees were placed under the obligation of keeping the theatre open as a place for the performance of dramatic and theatrical entertainments for a period of not less than six calendar months in each year during the currency of the lease, and under the special provision and declaration that the rentallers should be entitled to all rights of admission to which they were entitled under the provisions contained

in the disposition by Dr Jefferiss and others to Mr Brown in 1858.

After the re-erection of the existing theatre, Mr Howard, the lessee, complained that the trustees were abusing their privileges by introducing into their box large numbers of friends, and with a view to an amicable settlement of the dispute a meeting was held on 13th February 1877 between Mr Howard and the trustees, under which certain concessions were made by the latter, to subsist as long as Mr Howard should remain lessee of the theatre. Mr Logan on hearing of this maintained that Mr Howard as one of two co-lessees had no power to make such an arrangement. On 17th November 1879 the co-lessees refused to allow the rentallers to book seats in the theatre as formerly, only consenting to booking in the audience department other than the private boxes and the first three rows of the dress circle, and as they insisted in this demand the rentallers brought this action against them, and the Edinburgh Theatre Royal Company (Limited) as nominal defenders, seeking to have it declared that (1) they were entitled to free admission to any part of the theatre except certain of the private boxes, and to book and secure the places beforehand on all occasions on which the privilege is awarded to the public; (2) they had the sole and exclusive right to use the private box set apart for them, and to occupy the same by themselves or others to whom they may give permission to occupy it.

They pleaded—“(1) The pursuers are entitled to decree in terms of the declaratory conclusions of the summons, in respect—(1st) that on a sound construction of the disposition of 1858, and *separatim*, by virtue of the said deed, and of the usage which has followed upon it, the pursuers, and the other shareholders or rentallers of the Theatre Royal, have a right of free admission to all parts of the audience department of the said theatre, except the boxes corresponding to the private boxes and trustees' box as then existing, and to book or secure seats beforehand, on equal terms with the public; and (2d) that on a sound construction of the said disposition, and *separatim*, by virtue thereof, and of the usage which has followed upon it, the pursuers, as trustees foresaid, are entitled to the sole use of the box known as the trustees' box, and to occupy the same by themselves or others.”

The defenders on the other hand pleaded—“(1) No title to sue. (2) The right of free admission conferred upon rentallers by the disposition to Mr Brown applied only to the Queen's Theatre and Opera House, and ceased and lapsed by the destruction of that building by fire. (3) As the said disposition contained no obligation upon the disponees to rebuild the theatre which it expressly conveyed, and to which exclusively its clauses and conditions applied, no right can be held as existing in rentallers to free admission to a theatre erected on its site after its destruction. (4) The destruction of the Queen's Theatre and Opera House equally extinguished the right to the use of a theatre box, conferred by the said disposition upon the trustees therein mentioned. (5) In any view, the right to the use of a theatre box is, under the said disposition, made personal to the trustees, and is not communicable by them to their friends.”

The parties to the case put in a joint minute

of admissions admitting that “the rentallers of the theatre have had free admission to all parts of the theatre other than the private boxes, and that they have been in use to book and secure seats therein beforehand without payment from the year 1857 to 1865, when the theatre was burned down, and from the time the new theatre was thereafter built, until the year 1875, when it was burned down, and since January 1876, when the present theatre was opened, down to 2d December 1879.”

The Lord Ordinary (CURRIE HILL) found for the pursuers, subject to the qualifications (1) that none of the shareholders or rentallers of the Theatre Royal were entitled to free admission to any of the private boxes; and (2) that no trustee was on any one night entitled both to introduce friends into the trustees' box, and himself personally to have free admission to any other part of the theatre; and further, that they had the sole and exclusive right to use the private box set apart for them, subject to the qualification that not more than four persons should on any one night occupy the said box. In the note which he subjoined to his interlocutor, after narrating the history of the theatre, he added—“The rentallers or shareholders of the old Adelphi Theatre claim—and their claim has hitherto been acceded to—not only payment of their annuities of £2 per share, but the right to obtain free admission to the theatre, and to secure or book their seats beforehand on equal terms with the public. Their trustees also claim, and they have hitherto continuously exercised, the privilege of exclusive occupancy of the private box set apart for them. The defenders Messrs Howard & Logan, who are lessees of the theatre under a lease from The Edinburgh Theatre Royal Company (Limited)—to the terms of which I shall afterwards have occasion to advert—now maintain that the whole of these privileges are at an end, that the rentallers have right to nothing more than their annuities of £2 per annum each, that they are not entitled to free admission, at all events until after the rest of the public are served, and in particular that they are not entitled to secure their places by booking beforehand. It is also maintained that the trustees have no right to a private box, and that at all events, if any such right exists, it is personal to the trustees, and cannot be communicated by them to third persons.

“It appeared to me to be desirable, before disposing of the legal questions raised, to ascertain precisely what the practice had been. The range of the inquiry was much narrowed by the defenders lodging a minute, in which they admitted that ‘the rentallers of the theatre have had free admission to all parts of the theatre other than the private boxes, and that they have been in use to book and secure seats therein beforehand without payment from the year 1857 to 1865, when the theatre was burned down, and from the time the new theatre was thereafter built until the year 1875, when it was burned down, and since January 1876, when the present theatre was opened, down to 2d December 1879.’ On this branch of the case I am of opinion that free admission to the theatre is a privilege accessory to the right of each rentaller to his annuity, and that the privilege subsists so long as the ground is occupied as a theatre, at all events by the existing theatre. Whether, in the event of the theatre

being again destroyed by fire, it would be incumbent upon the proprietors to re-erect a theatre and admit the shareholders thereto is a question on which I express no opinion. I also think that 'free admission' means free admission to any part of the audience department of the theatre except the private boxes, including the trustees' box, and to book or secure seats beforehand on the same terms as are accorded to the public. The pursuers contend that they are entitled to admission to all the private boxes except the trustees' box, and other five, being the number in the original Adelphi Theatre. This demand I think unreasonable. There is ample space in the rest of the audience department, the dress circle being much larger than in any of the previous theatres. Decree will therefore be given in terms of the first declaratory conclusions of the summons, subject to the qualifications above indicated.

"The result of the proof which has now been led as regards the trustees' box is to show that ever since 1857 the trustees have had a private box set apart for them in each of the theatres which have successively occupied the site of the old Adelphi Theatre, and that they have regularly occupied such box by themselves or by their friends, it being arranged among the trustees that each should have the use of the box for a night in rotation. It is further proved that after the re-erection of the existing theatre in 1876 Mr Howard, the lessee, complained that the trustees were abusing their right or privilege by frequently or occasionally introducing into the box large numbers of friends, sometimes as many as eight or nine. With the view of arranging matters amicably, the trustees on 13th February 1877 had a meeting with Mr Howard, which resulted in the agreement by which it was provided, *inter alia* (1) 'That the private box should be set apart for the sole use of the trustees and their friends, the occupancy of which should be limited to four persons on one night. . . . (4) That under exceptional circumstances Mr Howard should be entitled to ask the trustees to give up the use of their box for a particular occasion; and in the event of the trustees granting this request, Mr Howard should be bound to provide another equally good private box, or four of the best unlet seats together in the dress circle for that occasion, in lieu of the box so given up. This agreement bears to be a compromise by the trustees to subsist during Mr Howard's tenancy of the theatre, under express reservation of their legal rights in any question with the present proprietor or any future proprietors or lessees.

"It now turns out that at the date of this agreement the defender Mr Logan was co-lessee of the theatre with Mr Howard under the lease from the proprietors dated 24th December 1875 (to endure for fourteen years after Whitsunday 1876), by which the subjects were let to Mr Howard and Mr Logan, and the survivor of them, under an obligation to keep the theatre open as a place for the performance of dramatic and theatrical entertainments therein for a period of not less than six calendar months in each year during the currency of the lease, and under the special provision and declaration that the rentallers should be entitled to all rights of admission to which they were entitled under the provisions contained in the disposition by Dr Jefferiss and others to Mr Brown (1858). The lessees are also

taken bound 'to set apart for the sole use of the trustees of the said rentallers or shareholders, and their successors in office, in the event of the said trustees establishing their right thereto, a private box in the said Theatre Royal; and in the event of the trustees claiming right to such box, the proprietor of the theatre shall be under no obligation to challenge their right thereto; but if the lessees desire that such a right be challenged, they shall do so at their own expense, and in any proceeding which may be instituted with reference to such right they shall be entitled to use the name of the proprietors of the said theatre, they always relieving said proprietors of all expenses and liabilities that may be incurred in connection with such proceedings.' Mr Logan now maintains that Mr Howard, as one of two co-lessees, had no power to make any arrangement with the trustees as to the use of the private box without the consent of his co-lessee, but I do not think he is entitled to take up that position. Not only were the trustees not aware that Mr Logan was a co-lessee, but their ignorance was attributable to Mr Logan himself, who in the public play-bills issued at the time of the agreement allowed Mr Howard to be put forward as sole lessee of the theatre. The whole of the play-bills for the years 1876, 1877, and 1878 have been produced. In every one of them for the years 1876 and 1877 the name of Mr Howard, and of him alone, appears as lessee, and it was not until January 1878 that the play-bills bore the names of Mr Howard and Mr Logan as co-lessees. It seems to me, therefore, that the compromise made by the pursuers with Mr Howard in February 1877, and acted upon by both parties ever since, is binding upon Mr Logan, and cannot now be repudiated by him.

"These views, however, if sound, would not lead to any judgment regarding the trustees' box, which could take effect after the termination of Mr Howard's tenancy of the theatre. It is therefore necessary to deal with the broad question of right raised by the pursuers in their summons and at the proof. The question is, I admit, not free from difficulty, but my opinion is that the right of the trustees to have the exclusive use of a private box, which was undoubtedly reserved by the disposition to Mr Brown of 1858, has been transmitted with the various conveyances, and may be exercised by the trustees, at all events so long as the present theatre exists. That the continuance of the right is in the conveyance by Mr Logan to The Edinburgh Theatre Royal Company (Limited), and in the articles of association of the company, declared to be conditional on the trustees establishing their right appears to me to be immaterial to the present question. The right was a burden in the right of Mr Logan under his own title to the subjects and the previous titles, which he was not entitled to displace without the consent of the trustees. But while I think the trustees are entitled to have a private box set apart for them in the existing theatre, I also think that their use of it must be subject to regulation. On the one hand, I do not think that their use is restricted to their own personal use. I think it was all along contemplated that they might introduce friends into their box—thus, while in the conveyance to Mr Brown the privilege of free admission was declared to be personal to the rentallers, there is no such qualification of

the right of the trustees to use the private box. The practice from the beginning—and there is no better exponent of a doubtful title—shows that the admission of friends was contemplated, and the agreement with Mr Howard in 1877 shows very clearly his understanding of the matter. On the other hand, the right must not be nimeously exercised, and it appears to me that the arrangement made with Mr Howard that the number of persons introduced into the box on any one night should not exceed four is a reasonable one, and should be adhered to. I also think that no trustee is entitled both to fill the box with his friends and personally occupy a seat in the dress circle or other part of the theatre on one and the same night.

“I need hardly say that the privilege of admitting friends to the box is one which the trustees are not entitled to use for gain, and I mention this merely for the purpose of saying that there is not the slightest ground for alleging or insinuating that any trustee has ever attempted so to abuse the privilege. Indeed, an averment to the effect that the privilege had been so abused was recklessly introduced into the original defences, but was withdrawn at the adjustment of the record. Decree of declarator will be pronounced in favour of the trustees in this branch of the case also, but with the qualifications expressed in the interlocutor.”

The defenders reclaimed.

The pursuers cited the case of *Finnie v. Glasgow and South-Western Railway Company*, August 3, 1857, 3 M'Queen's App. Ca. 75, in support of their plea-in-law.

At advising—

LORD GIFFORD—The foundation of the claim made for the pursuers in this case for free entrance by the rentallers to all public performances given in the Edinburgh Theatre Royal is the disposition dated 28th May 1858, granted by Robert Reubens Jefferiss and other trustees of the Queen's Theatre and Opera House, Edinburgh, in favour of the deceased John Brown of Marlie, and the various stipulations therein contained. By that deed the trustees of the building then known as the Queen's Theatre and Opera House sold that theatre to Mr Brown, with the ground upon which it stood, and whole pertinents, for certain onerous considerations. These were—First, That Mr Brown should relieve the sellers and the shareholders of certain debts affecting the subjects and the trustees thereof, which debts it was stated amounted to about £14,000; Second, The subjects were disposed under the real burden of the payment of a perpetual annuity of £2 to each of the shareholders or rentallers of the theatre, who were in number about 90; and Third, It was provided that these shareholders or rentallers, and the assignee or successor of each rentaller, should at all times be entitled to free admission to the audience department of said theatre with the exception of certain private boxes.

The Queen's Theatre and Opera House, being the building purchased by Mr Brown in 1858, was burned down in 1865 and entirely destroyed. At the time of the fire it was vested in Mr Soutar as trustee for Mr Brown, who had died some years before, and Mr Soutar in or about 1866 built upon the same site a new theatre, at a cost

of about £17,000, which theatre was called the Theatre Royal. In June 1874 Mr Soutar, as Mr Brown's trustee, sold this new theatre, called the Theatre Royal, to the present defender Mr Logan for £11,000, with entry at Martinmas 1874, but before the price was paid, and before any conveyance was delivered, the Theatre Royal was again entirely destroyed by fire on 6th February 1875. The building, however, had been insured for £12,000, and Mr Logan having received a conveyance to the subjects proceeded to re-erect a theatre upon the site. While in the course of erection, however, he sold the whole subjects to the present defenders, the Edinburgh Theatre Royal Company (Limited), who are now feudally vested with the property, and under them the defenders Messrs Howard & Logan have become lessees of the existing theatre, in terms of the lease produced.

The question now raised is, Whether the present defenders, the Edinburgh Theatre Royal Company (Limited), and their lessees Messrs Howard & Logan, are under the terms of the titles, or any of them, or in any other way, bound to give to the rentallers free admission to the said theatre whenever public performances take place therein. There is also a conclusion that the rentallers have right to book and secure seats beforehand without payment, and that the trustees for the rentallers are entitled to the sole use of a private box.

The question is a novel one, and not unattended with difficulty, but on the whole I have come to be of opinion that the privilege of free admission stipulated for in the disposition of 1858 as against Mr Brown is not now binding against the present defenders the Edinburgh Theatre Royal Company (Limited), or against their lessees, and I think the defenders are entitled to be absolved from the conclusions of the present action.

It is very important to attend to the precise terms and effects of the disposition to Mr Brown of 28th May 1858, upon which the whole question turns. In that conveyance there is a marked distinction between the area conveyed and the theatre and other subjects then erected upon it, and there is a very marked difference between the perpetual annuity of £2 per annum secured to each rentaller and the separate privilege for which the rentallers stipulate of free admission to the theatre. The deed, after conveying the area of ground upon which the then theatre (called the Queen's Theatre and Opera House) stood, proceeds specially to convey the then existing theatre itself. The words are—“together with the edifice now called the Queen's Theatre and Opera House, and the shops and others adjoining thereto or connected therewith, all erected on the area or piece of ground above described.” Reference is then made to the conditions under which the disponers were bound by the terms of their own infeftment, but these have nothing to do with the present question, and then the deed proceeds to constitute the perpetual annuity of £2 payable to each rentaller a real burden upon the whole subjects conveyed. This real burden of £2 per annum to each rentaller is well constituted a real burden, and there is no dispute relative to this. The annuity must be paid to the rentallers, into whose hands soever the subjects may come, and it is effectually secured upon the whole subjects, and upon the ground on which they stand, and will

affect as real burdens the whole property and all future erections thereon just as a feu-duty would.

But the stipulation for free admission of the rentallers to the theatre is in a very different position. No attempt is made to constitute this a real burden affecting the subject, and indeed it is not easy to see how this could have been done. No mention of the privilege is made in the clauses constituting the real burden. The privilege of admission stands altogether apart, being really of the nature of a personal contract between the rentallers and Mr Brown, in which Mr Brown no doubt bound himself, his heirs and successors, but no real right was created in or over the subjects themselves. Now, the first question is, What was it that Mr Brown undertook to do? In the first place, he bound himself not to convert "the said theatre and opera house"—that is, the edifice actually conveyed to him—"to any other use or purpose than a theatre and opera house." He next bound himself that "the said theatre and opera house" (here again can only be meant the edifice conveyed to him) "should be kept open for performance during at least six months in each year." Then provision is made for the building being let to the lessee for the time of the then Theatre Royal, Edinburgh, which was quite a different building, and detailed provisions are made for the free admission of the rentallers and for the providing a box for their trustees, and I do not doubt that all these stipulations were binding upon Mr Brown himself and upon his successors so long as the building sold—that is, the Queen's Theatre and Opera House—existed and remained fit for the purposes to which it was dedicated.

But when that building was utterly destroyed by fire in 1865 a very different question arose. The annuity due to the rentallers being validly created, a real burden was of course secured over the ground and over anything which might be built thereon, but no such security had been created in favour of the rentallers for their privilege of free admission to the theatre. When the theatre was destroyed I think the privilege of admission to it necessarily came to an end, and they made no provision to secure the erection of another theatre or any privilege therein. I do not think that Mr Brown or his trustee was under any obligation to rebuild the theatre or to give to the rentallers any privilege whatever in any new theatre which he might erect. The new theatre was not the edifice to which alone the privilege of admission applied, and I think it would have required a very explicit and express agreement to have compelled Mr Brown to replace the theatre which was destroyed by fire in 1865. The deed of 1858 contains no such obligation, and contains no words from which such an obligation can be inferred. An obligation so serious is not to be lightly presumed, for it is nothing less (and this was not disguised by the pursuers) than an obligation to maintain a theatre upon that site for ever. I cannot think that this was the meaning of the parties, or that it is the fair reading of the deed in which they have embodied their agreement. If they really meant this, I think it is not too much to ask that they should have explicitly said so. I do not think the law will infer a covenant so onerous if the parties themselves do not choose to express it.

But it is said that whether John Brown himself

was or was not bound to rebuild the theatre, yet he having died before the fire, and his testamentary trustee (acting it is said under advice) having built another theatre upon the same site, the rentallers are entitled to the same privileges in the new building which they enjoyed in the old one. I cannot accept this conclusion. I think if Mr Brown was not bound to rebuild the theatre, and could not have been compelled to do so, then without a new contract he could not have been compelled to give the rentallers a new and, it might be, a very different privilege from that which they formerly enjoyed. The new theatre might be upon a very different scale, or it might be altogether different in nature, and if once it be held that the original personal contract only applied to the then existing building, and came to an end with the destruction of that building, the mere erection of a building devoted to similar purposes would not have the effect of making or constituting a new contract. Even supposing, then, that Mr Brown was still alive, or that his trustee was still proprietor of the Theatre Royal which he built in 1866, I think the rentallers would not succeed in enforcing their right of free admission even against Mr Brown himself or his trustee.

But the case does not stop here, for the theatre erected in 1866 was again in its turn, and after it had been sold to a singular successor, destroyed by fire in 1875. I think it plain that Mr Logan was not bound to build the theatre of 1876 or to construct any theatre merely that the rentallers might enjoy the privilege of free admission, and when the subject again changed hands and the now existing theatre was purchased by the Edinburgh Theatre Royal Company (Limited), I do not think that they, who are also onerous singular successors, are under any obligation to give the rentallers free admission to their theatre, which was only built in 1876, and had really no connection with the original Queen's Theatre and Opera House, excepting that it is the third theatre which has occupied the same site. I have therefore come to the conclusion that under the terms of the deed of 1858—and the pursuers' right I think depends solely upon that deed—the rentallers have no right to free admission to the presently existing theatre, and no right to demand free admission from the present defenders, who in no way represent the late John Brown, but who are strictly singular successors, and with whom the rentallers never had any contract.

But it was said that even if the defenders are not bound under the deed of 1858 to give to the present pursuers the free admission and the other privileges which they claim, still the defenders are bound so to do, in virtue of the various deeds of transmission whereby the subjects have been successively conveyed, and in virtue of the terms of the lease under which the defenders Messrs Howard & Logan are now lessees of the existing theatre. I am of opinion that this view also is ill-founded. The pursuers are not parties to any of the deeds in question. They have nothing to do with the transmissions of the subject or with the terms on which the present proprietors, who are singular successors, choose to let the subjects to the present lessees. The lessors and lessees may terminate their contract at pleasure, and the pursuers have no right to interfere therewith. They are not in any sense contracting parties in any of the deeds since 1858, and none

of the contracts since that date have been made for their behoof, directly or indirectly. They are all *res inter alios acta*. But even if the pursuers were entitled to refer to or found upon the conveyances and the lease, I think these deeds confer upon the pursuers no right whatever, and recognise no right in them. No doubt these deeds make reference to the privileges now claimed by the pursuers, but the object of the references is not to give any right to the pursuers, but merely to provide for questions of relief as between disponent and disponent, or between lessor and lessee, in case the privileges, or any of them, shall be held to exist. There is nothing to bar either the disponent or the disponent, or the lessor or the lessee, from challenging or resisting the pursuers' claims, and both proprietors and lessees now combine to do so. The mere fact that the privilege has been conceded from 1866 to 1879—a period of thirteen years—is of course insufficient to create it unless it has been otherwise constituted, and there is no ground for pleading any personal bar against the present defenders. I think, therefore, the defenders are entitled to absolvitor.

LORD YOUNG—The ground on which the Theatre Royal stands is held in feu of Heriot's Hospital by the "The Edinburgh Theatre Royal Company (Limited)." No dispute has occurred between the superiors and the vassals, and the Theatre Company's title as fee-simple proprietors is admitted to be absolute and unlimited.

The question in the case is, Whether or not the pursuers are entitled to free admission to the performances in the theatre?—the right alleged being based on an obligation (standing outside the relation of superior and vassal, and having no reference to any of the incidents of that relation) alleged to have been undertaken in their favour by the Theatre Company.

It is not doubtful that the proprietor or lessee of a theatre may bind himself to give free admission to such persons as he pleases, and that a contract with him to that effect will be valid and enforceable according to its terms. The disposition of 1858 by the original vassals (the pursuers' predecessors) to Mr Brown of Marle does contain such a contract, and it is not questioned that it was binding and enforceable. It was in fact completely implemented, and is now referred to and founded on by the pursuers only historically as an introduction to, and as affording an explanatory account of, the terms of subsequent deeds on which they rely as the ground of their claim. The granters of the deed of 1858 were the proprietors—in shares—of the then existing theatre (the Queen's Theatre and Opera House), as they had been of its predecessor the Adelphi. These shareholders had been accustomed to the privilege of free admission to the performances in the theatre—such of them as were trustees having the distinction of a private box set apart for them. It was therefore intelligible that they should bargain as they did with the purchaser from them for a continuance of their privilege, and that the trustees should be allowed to occupy free of charge the box to which they had been accustomed. Taking the bargain as limited to the existing theatre (the Queen's), it was not unreasonable, and without any concession by the pursuers on the subject I should

have thought it clear that the language employed admits of no larger construction. It was, however, candidly admitted by the pursuers' counsel that it does not, and they declined to maintain that it imported an obligation on Mr Brown and his heirs and successors to maintain a theatre on that site and keep it open six months each year to the end of time, with free admission to the pursuers and their successors, and a private box for such of them as they should name trustees and their friends. Taking the obligation laid on the purchaser in this matter as all the parties present it to us, it was completely fulfilled, and came to an end on the destruction of the theatre to which alone it applied. This occurred in 1865, when the theatre was burnt, and if the rentallors or their trustees then put forward any pretension of an obligation in their favour to rebuild it, the pretension was admittedly unfounded. It is the fact, nevertheless, that Mr Soutar (Mr Brown's testamentary trustee) was otherwise advised, and rebuilt the theatre, although whether he would have done so without the advice we do not know. The pursuers' counsel, admitting that the obligation in the pursuers' favour by the disposition of 1858 was fulfilled and at an end, and that they had no longer any right under it, did not of course contend that the matter was affected either by the advice—which they admit was erroneous—or by the building of the new theatre. They did, however, contend that Mr Soutar, being free of any obligation to the pursuers (except in regard to the annuities, which are real burdens, and are not in question), on the occasion of his sale of the premises and new theatre to Mr Logan, voluntarily conferred a gratuitous benefit on them by imposing on Mr Logan an obligation to give them free admission to the new theatre and provide a private box therein for their trustees, and in support of their contention rely on the terms of the disposition to Mr Logan (1865). I do not quote the whole of the clause referred to, but only the words specially relied on, viz., "and allow these parties (the pursuers) the privileges to which they are entitled." I think the point (and the pursuers had no other) is too obviously untenable to justify the consumption of time on it, and therefore say at once that I regard the language as merely defensive on the seller's part, and intended to provide that the buyer shall take the property subject to all burdens and privileges which may exist with respect to it, and find it quite unnecessary in order to satisfy its meaning that I should impute to the testamentary trustee who used it such remarkable and unaccountable conduct as the pursuers' view involves, viz., that in order to benefit them he wilfully sacrificed the trust estate by selling it under a heavy burden which he voluntarily created in their favour. That he had misgivings regarding the continuance of the pursuers' privileges under the deed of 1858, or even a positively wrong opinion on the subject, may, and probably does, account for his anxiety to put it on the purchaser from him to satisfy them if they existed. But his impression or opinion that they existed independent of him was assuredly no reason why he should re-create them, or for construing his language as a re-creation of them, and the idea that he so intended is inadmissible. That the interests of the trust suffered from a doubt or error regarding the pursuers' rights is

likely enough, but that it was intended in 1865 to give them anything they had not a prior and existing legal claim to is incredible.

It was conceded, and is clear, that if the pursuers' privileges which expired in 1865 were not revived or new privileges created in their favour by the disposition to Logan in that year, neither is such result operated by the disposition to the Theatre Company in 1875, which is in exactly similar terms.

With respect to usage, there is clearly none of any significance or legal value. The privilege admittedly existed, and was properly enjoyed till the Queen's Theatre was destroyed in 1865, when it admittedly ceased, so that it is now at an end, unless it was subsequently revived and applied to two new theatres in succession, which I am of opinion it was not. That the pursuers erroneously—*i.e.*, without legal right—claimed free admission to these two theatres during a period of ten or twelve years, and got it, is really immaterial to the question of right now that it is brought to trial. They have for so long got what they had no right to, and could not have enforced had it been withheld. Whether this is attributable to positive error or to a desire to avoid litigation on a doubtful matter it is immaterial to inquire. The pursuers desiring only what they are legally entitled to, have brought this action to have the question of their legal right determined. They might possibly have been entitled to found on the arrangement with Mr Howard as a compromise for his time at least, and so declined to put their right to trial while it subsisted. I think they have chosen a more becoming course by bringing their right to trial at once, and declining to take advantage of an arrangement made with one of two joint lessees of the theatre, if it shall be found that they have no legal right to what that might have given them had they chosen to stand on it as a compromise.

The opinion I have expressed on these pleas perhaps renders it unnecessary for me to form or express any opinion upon the subordinate questions, whether the rentallers are entitled to have their places booked, and whether the trustees are entitled to communicate their right to their friends? It was, however, impossible for me to read the papers in the case and hear the arguments without forming an opinion on both of these questions. Either of them might have arisen under the deed of 1858 while the rights thereby granted subsisted; and I am of opinion that under that deed the rentallers, while entitled to free admission, were only entitled to it in case there was room when they presented themselves for admission, and that it was no part of the contract with them or obligation to them that they should be permitted to choose their places and secure them by booking beforehand; and that being no part of the contract with them under the deed, I think no such contract arose by the managers of the theatre for the time permitting the public who buy their places for special performances, either with or without a fee, to secure and book their places beforehand. And with respect to the trustees, I am of opinion that under the obligation of 1858 the privilege was given to them as trustees, and was incommunicable. The Lord Ordinary speaks almost with indignation of the idea of their taking money for communicating their privilege to others, but

if they are entitled to communicate the privilege to others—that is, to give or withhold admission to the theatre with the accommodation of this box—why should they not give it upon such terms as they please? There is no objection to their taking money for it. It is not simony; it is taking money for a right of admission to a theatre which a party is by the position at liberty to give or withhold. My opinion is clear that they had only the right as trustees to occupy the trustees' box, and were not entitled to damage the management for the time by granting, gratuitously or for payment, a right of admission to that box to others.

LORD ORMDALE—As the Lord Ordinary has in the note to his interlocutor reclaimed against given a full and distinct account of the circumstances connected with the theatre in question, out of which the present dispute has arisen, it is unnecessary for me to resume them.

The conclusions of the action relate only to the theatre presently existing, called the Theatre Royal, Edinburgh. They do not, as I read them, raise a question as to whether the defenders would be bound to rebuild or restore the theatre in the event of its being destroyed by fire, or as to what the rights of the pursuers might be in the restored or rebuilt theatre. Neither does the judgment of the Lord Ordinary determine any such questions. On the contrary, the Lord Ordinary in his note expressly says that "whether in the event of the theatre being again destroyed by fire it would be incumbent upon the proprietors to re-erect a theatre and admit the shareholders thereto is a question on which I express no opinion." Neither do I express any opinion on that question. And I also consider it unnecessary to express any opinion on the question whether the parties who rebuilt the theatre after it was destroyed by fire in 1865, and after it was again destroyed by fire in 1875, were under any obligation to do so. Be that as it may, the fact remains that not only was the theatre rebuilt after having been twice destroyed by fire as now referred to, but that the pursuers were admitted free of charge into the new theatre just as into that which had preceded them.

The question, therefore, which has now to be decided is, Whether the pursuers are as matter of right, entitled to the privilege of free admission to the existing theatre as claimed by them? In dealing with this question I think it must be conceded—and it was expressly conceded by the pursuers through their counsel at the debate—that the pursuers' claim to such free admission cannot be supported on the footing that it has been feudally secured to them as their annuities were. It is upon personal contract alone, if at all, that the pursuers' claim can be maintained and was maintained by them.

In dealing, then, with the pursuers' claim on the footing of its being rested on contract only, it cannot, I think, be doubted that it would be clearly well-founded under the disposition referred to, and particularly quoted in the Lord Ordinary's note, by Dr Jefferiss to Mr Brown of Marlie, in 1858, and the instrument of sasine following thereon in favour of Mr Brown's testamentary trustee Mr Soutar. It may, however, be different under the disposition by Mr Soutar in favour of Mr Logan in 1875, and the subsequent disposition by Mr Logan to the defenders the Edinburgh

Theatre Royal Company in December 1875, considering that the buildings called the theatre were not the same under the disposition by Dr Jefferiss to Mr Brown in 1858 and under the deeds of 1875. It is surely possible, however, that although the buildings were different, the claim of the pursuers may have been adopted, recognised, and referred to in such terms in the latter deeds as to continue its operative effect in reference to the existing theatre, and against the present defenders, just as it was in reference to the theatre which existed at the date of the disposition by Dr Jefferiss in favour of Mr Brown, and as against Mr Brown and his testamentary trustee Mr Soutar. Now, for my own part, after careful consideration of all the deeds so far as bearing on this question, I cannot resist the conclusion that there was such adoption, recognition, and reference. Thus, in the disposition by Mr Soutar in favour of Mr Logan in 1874 I find that the subjects, including the then existing theatre, were disposed with the express declaration that the disponent Logan "and his foresaids"—that is, "his heirs and assignees whomsoever"—shall not only pay to the rentallers or shareholders their annuities, but also "allow these parties the privileges to which they are entitled." This cannot, I think, on any fair principle of construction, be held to mean, as was contended by the defenders, merely to import a reservation of the rentallers' claim to privileges, if they any had. If that was what was meant, nothing was easier than to have so expressed it. But taking the words of the deed as we find them, I am unable to hold that they import a mere reservation of that kind, or anything else than the transmission to and upon Logan of the privileges or right of free admission to the theatre in the same way as the obligation to pay the annuities was transmitted, the only difference being that while the latter obligation to pay the annuities was feudally attached as a real burden to the ground, the privilege or right of free admission was not, but left to depend upon personal contract. In regard to the annuities, Logan is taken bound to "pay" them to the rentallers, while in regard to the privilege of entry to the theatre Logan is taken bound to "allow" them, the difference of expression being necessary in consequence of the different nature of the subject-matter to which it related, and not because in the one instance a positive obligation was undertaken, while in the other nothing more than a reservation of an obligation, if it otherwise existed, was intended to be made. That this was not so is further made plain by the manner in which the shares or interests of such of the rentallers as had not been heard of for some years are alluded to, for in regard to these all competent objections are reserved to Logan.

In regard to the disposition by Logan to the defenders the Edinburgh Theatre Royal Company, which is the only other absolute transmission of the subjects, the same reasoning is precisely applicable. And this is also so in regard to the lease in favour of the defenders Howard & Logan. Not only so, but all possible room for doubt on the disputed point appears to me to be shut out by the terms of the obligation which the lease contains in favour of the rentallers, for it is thereby "specially provided and declared" that they are to have all the rights of admission to which they are entitled under the provisions contained in the disposition by Dr Jefferiss and others

in favour of Mr Brown of Marlie in 1858. Not only, therefore, is this conclusive *quoad* the lessees Howard & Logan, but it is also very significant as showing what the Theatre Royal Company understood to be the nature of the obligation they undertook as disponents in the disposition to them by Logan, and of the obligation which had been transmitted downwards from 1858. That this was all along the understanding of the defenders the Theatre Royal Company is further made clear—beyond all doubt, I think—by the terms of the memorandum and articles of association under which they were incorporated in 1862 and 1867, and of the prospectus they had previously issued, all as referred to in the Lord Ordinary's note.

Besides the various deeds which have now been referred to, there is the evidence of usage or practice—the acting of parties—which I cannot help thinking is very material, as showing what is the true meaning and effect of the various deeds referred to as bearing on the pursuers' claims. That usage, although not extending over a very long period, covers all the time that has elapsed since the disputed right or privilege was established in 1858, and has been uniform, and so far as I can discover unobjected to by anyone ever since, down till the institution of the present action. The minute of admissions by the defenders is conclusive as to this.

It appears to me, therefore, that in so far as the present defenders and the presently existing theatre are concerned, there is a good subsisting obligation enforceable against them by the pursuers. Nor do I think that there is anything in the plea which was stated, although not as it appeared to me very seriously urged, by the defenders, to the effect that the pursuers not being parties expressly to the various deeds upon which they found, are not entitled to enforce the rights or privileges in question. In regard to this objection, which I presume was not taken before the Lord Ordinary, as he does not notice it, I think it only necessary to say that in my opinion the title of the pursuers to enforce the right or privilege in question, although they were not parties directly to the deeds referred to, is clear on the principle of *jus quaesitum tertio*, as explained by the Lord Chancellor and the other noble and learned Lords who took part in the judgment of the House of Lords in the case of *The Glasgow and South-Western Railway Company* in August 1857, 3 M'Queen's App. Ca. 75.

For these reasons I am of opinion that the Lord Ordinary's interlocutor reclaimed against is well founded, and ought to be adhered to, subject to the qualification that the trustees personally, and no other parties introduced by them, are entitled to free admission to the trustees' box.

The LORD JUSTICE-CLERK was absent.

The Court recalled the Lord Ordinary's interlocutor and assolized the defenders.

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