the locality is of the essence of the offence, and in a charge of loitering in a close the complaint must set forth that the offence was committed in a common close, which is the only species of close to which the statute applies.

Here then we have a complaint which sets forth that the illegal loitering occurred at three different places, and as to one of them the complaint so describes it as not necessarily to bring it within the statutory definition at all. It is true that the Magistrate refrained from convicting upon that head of the complaint. But he repelled an objection to the relevancy of it, and proceeded to hear evidence upon all three charges, including the irrelevant one, and the question is whether the conviction can stand as regards the other two. Now that must to a certain extent depend on the circumstances of the case, the test being whether in the circumstances the Court is satisfied that no substantial injustice has been done. In a jury case it would always be risky to submit evidence on a relevant and an irrelevant charge together, however separable the charges were in point of date and locality. In a trial before a Magistrate it is not so risky, if the charges are separable, and a Court of Review might possibly find that the charges had been kept so separate in the evidence adduced that there was practically no risk of injustice. But here the offence libelled was a continuous offence, and the irrelevant charge is sandwiched in between the two relevant charges both in point of time and place. I cannot resist the conclusion that it is (to say the least) very probable that the evidence which applied to the irrelevant charge had its effect on the mind of the Magistrate in convicting on the other two charges, more especially as he had already sustained the relevancy of all three charges. On that ground I hold that the conviction cannot stand, and I see no necessity for sending the case back for further information.

In the view I take it is not necessary to consider the other objection raised by the complainer, namely, that another Magistrate, who had not been present when the relevancy was discussed, was admitted to the consultation which was held by the presiding Magistrate and his legal assessor before the case was decided. That is always of doubtful expediency, but in the present case I express no opinion, and indeed I have formed none, as to whether what is said to have taken place in that particular would afford a sufficient ground for challenging the conviction.

LORD ARDWALL — I agree with Lord Pearson's opinion. I may add that I think that an appropriate method of libelling the *locus* in a complaint under the Street Betting Act 1906 would be that the prosecutor, after setting forth by their ordinary names, or if necessary by description, the streets, roads, closes, or other places where the crime is alleged to have been committed, should add in the case of streets, roads, or closes the words "said places being streets within the meaning of the Street Betting Act 1906," or in case of other public places not being streets, the words "said places being public places within the meaning of the Street Betting Act 1906."

LORD JUSTICE-CLERK — The whole case turns upon the question whether "close" is a sufficient description in the complaint, under a statute which does not strike at acts done in "closes," but only at acts done in "common closes." I agree with your Lordships that such a statement of the character of the *locus* is not permissible. It is true that under recent legislation adjectival qualifications may be omitted, and are held to be implied. But that is where these relate to the quality of an act said to have been done, the words of criminal quality being implied. But this sort of permitted abbreviation can never apply where in naming a *locus* of an offence, it describes it in such a manner as is consistent with its being a *locus* which does not fall within any class of place to which the statute has attached a sanction against its being used as a place for doing certain prohibited acts. The charge must have such specification as to make it plain that it is such a place, and so to exclude the prosecutor from obtaining a conviction unless he undertakes to prove and does prove that the acts were done in such a place as gives a quality to the act which it would not have at common law.

I therefore agree that this conviction must be quashed.

The Court quashed the conviction.

Counsel for the Complainer—Crabb Watt, K.C.—Spens. Agents—Bryson & Grant, S.S.C.

Counsel for the Respondent—Orr Deas—J. M. Hunter. Agents—Simpson & Marwick, W.S.

COURT OF SESSION.

Wednesday, February 3.

FIRST DIVISION.

[Lord Johnston, Ordinary.

WADE *v.* WALDON, *et e contra.*

Contract — Construction — Condition - Precedent — Engagement to Perform in Theatre — Stipulation that Artiste will Give Notice and Send Bill Matter—Right to Rescind.

A entered into an agreement with B to perform in the following year in certain theatres in Glasgow at a salary of £350 per week, "subject to the rules of the establishment printed on the back hereof." Rule 6 provided—"All artistes engaged . . . must give fourteen days' notice prior to such engagement, such notice to be accompanied with bill matter." A having failed to

comply with rule 6, B cancelled the contract. Cross actions were raised at the instance of A and B respectively for breach of contract.

Held (1) that rule 6 was not a condition-precedent, breach of which by A would entitle B to rescind the contract, but that it was merely an incidental stipulation for the breach of which B might claim damages; and (2) that as B was himself in breach in rescinding the contract he was barred from claiming damages for breach of the contract from A.

On 16th April 1908 George Edward Wade, 70 Finchley Road, London, professionally known as "George Robey," comedian, brought an action against Richard Waldon, proprietor and manager of the Palace Theatre, Glasgow, in which he concluded for £300 damages for breach of contract. Counter actions at the instance of (1) the said Richard Waldon, and (2) the Pavilion Theatre (Glasgow), Limited (of which Waldon was a director), were raised against Wade, in which the pursuers sued respectively for £500 damages on the ground that Wade had himself broken the contract in question through his failure to comply with one of the conditions thereof.

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (JOHNSTON), who, on 12th January 1909, allowed the pursuer (Wade) a proof of his averments limited to the question of damages, and dismissed both of the cross actions.

Opinion.—"George Edward Wade, a professional comedian or music hall performer, acting under the name of 'George Robey,' was, on 20th March 1907, engaged by Richard Waldon, who is sole proprietor and manager of the Palace Theatre, Glasgow, and also a director of the Pavilion Theatre, Glasgow, Limited, to give performances at both these theatres nightly for one week, commencing Monday, 16th March 1908, at a salary of £350 for the week.

"It will be observed that the contract was made twelve months, all but four days, before the engagement was to commence.

"In consequence of Wade's failure to comply with an alleged condition of the contract, Waldon held him in breach, and when the time came refused to employ him, though, subject to his failure, if failure there was, to comply with the said alleged condition, he was willing to fulfil his engagement.

"The question to be determined is whether the condition in question was a condition-precedent, a breach of which by Wade forfeited his right to enforce the contract, and exposed him to a claim of damages, or was an incidental stipulation only, a breach of which only exposed him merely to a claim of damages, leaving the main contract standing. On a consideration of the contract I am of opinion that it was the latter only.

"Referring to the memorandum of agreement, I find in the first place that it bears to be entered into between Richard Waldon, sole proprietor and manager of the Palace Theatre, Glasgow, of the one part, and George Edward Wade, under his stage name of 'George Robey,' of the other part. Waldon is therefore the sole contracting party. The Pavilion Theatre, Glasgow, Limited, may have a *jus quæsitum* under the contract, but they are not directly parties to it, and therefore Wade has rightly sued Waldon as above liable to him.

"The agreement then bears that the said Richard Waldon 'agrees to engage, and the said artiste to accept and perform, an engagement as comedian at a salary of £350 per week, two performances nightly if required, also matinees if required, such engagement to be performed at the Palace Theatre, Glasgow, and Pavilion Theatre, Glasgow, at such times as shall be arranged by the manager, and to commence on Monday, 16th March 1908, for the period of a week.

"'Subject to the rules of the establishment, printed on the back hereof, which the undersigned herewith acknowledges to have read, understood, and agreed to before signing this contract.

"'The said artiste or artistes agree not to appear at any other place of entertainment during the period of this engagement without special permission of the manager.

"'All artistes must attend rehearsals each Monday at 12 o'clock.

"'The said artiste agrees to give the performances herein arranged to be given to the best of his ability, and hereby agrees to pay to the said Richard Waldon ascertained and liquidate damages should the said artiste fail to fulfil this engagement from any cause, illness excepted.'

"The rules and regulations, and they are twenty-three in number, which were endorsed on the back of the contract, which was a document partly printed, had, I think, with two or three possible exceptions, entirely to do with the management of the theatre and the personal conduct of the performers.

"The particular rule or regulation which has occasioned the present question is—'6. All artistes engaged at the Palace Theatre, Glasgow, must give fourteen days' notice prior to such engagement, such notice to be accompanied with bill matter.'

"What happened was this—Wade, who was at the time performing at the Empire Theatre, Bristol, neglected to give the fourteen days' notice required by rule 6, or to supply the 'bill matter,' which should have accompanied such notice if the rule was to be literally complied with. Consequently in the week preceding 16th March 1908 Wade was not 'billed to appear' at the Palace and Pavilion Theatres, Glasgow, and observing the omission in the advertisements inserted in the papers of his profession, he telegraphed to the managers both of the Pavilion and of the Palace Theatres, Glasgow, as follows:—'Name not in call for Monday; presume mistake,—to which he received the reply from the manager of the Palace Theatre—'You never sent bill matter or notification, consequently contract broken; see rule 6 of contract,' and from the manager of the

Pavilion Theatre — 'Call in order; your name does not appear; will not play you owing to breach of contract.'

"Where an agreement is made with an actor or singer twelve months before the date for his fulfilling his engagement, I can quite understand that it may be important that the management should be brought in touch with him by the fourteen days' notice required by rule 6 in order that they may know his whereabouts, and that he is to be counted on to fulfil his engagement. He may be dead, or dangerously ill, or abroad and out of reach, or, as here, 400 miles off; and further, having regard to the nature of the entertainments at these theatres, which are really only music halls, it may be important to the management, with a view to advertisements intended to draw the class for whom they cater, that they should know the performances, songs, &c. — in other words, the 'bill matter'—which the artiste proposes to give. But it does not follow that failure to give the fourteen days' notice 'accompanied with bill matter' is a condition-precedent which entitles the employer to refuse the services of the artiste if he offers otherwise to fulfil his engagement. It may merely render the artiste liable in damages if such can be substantiated against him. In the case of *Graves* v. *Legg*, 23 L.J., Ex. 228, it is said by Pollock, C.B. (at p. 231)—'The only question is whether the performance of the agreement was a condition-precedent or not to the defendants' contract to accept and pay for the goods. In the numerous cases on the subject, in which it has been laid down that the general rule is to construe covenants and agreements to be dependent or independent according to the intent and meaning of the parties to be collected from the instrument, and of course to the circumstances, legally admissible in evidence with reference to which it is to be construed, one particular rule well acknowledged is, that where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract, and an action might be brought for the breach of it.'

"Looking to the instrument in question, I think it must be gathered that 'the rules of the establishment' were rules and regulations with which the artiste undertook to comply, and that failure on his part so to comply might entail loss to the proprietors, which the artiste must compensate by damages. It is impossible to raise nine-tenths of these rules into anything higher than regulations for the conduct of the artistes during their engagements, breach of which could not possibly affect their contracts with the management. Found in such company it is impossible to attribute to this 6th rule any higher virtue. It is certainly precedent in this sense, that it refers to something to be done, and something which it may be greatly to the convenience and in the interest of the management should be done before the engagement commences. But no more than any of the other rules is it precedent in the sense that it must be fulfilled by the artiste in its terms antecedently to his being entitled to call upon the proprietors to avail themselves of his stipulated services and pay him the stipulated consideration. I think that, as put by Pollock, C.B., in the passage quoted above, this stipulation, taken at the highest, is an independent covenant only, for breach of which an action may be brought, and which may be compensated in damages.

"I may also refer to the very analogous case of *Bettini* v. *Gye*, L.R., 1 Q.B.D. 183.

"Consequently I must hold that Waldon was not entitled at 13th March 1908 to refuse to proceed further with the agreement which he had made in the March preceding with Wade, and that he is liable to Wade in damages for such refusal. He has accordingly no relevant answer to Wade's action, except that the damages claimed are excessive. The measure of damages has therefore to be ascertained unless it can be agreed upon.

"In the cross actions at the instance of Waldon and the Pavilion Theatre I should say that at first sight it would appear that the pursuers have a claim against Wade for breach of this independent covenant, if they can qualify any substantial damage. But then both their cross actions are laid, not on the breach of the independent covenant, but on the breach of the main agreement. The damage averred is not the incidental damage that may have arisen from breach of this independent stipulation, but damages for the breach of the principal undertaking, as Waldon, by his own breach of the agreement, rendered it impossible that the incidental damages could ever emerge. He and the theatres which he represents are barred from suing these cross actions. Their averments are relevant to the major claim, which is in law untenable. They are irrelevant to the minor claim, which is tenable.

"I shall therefore in Wade's action sustain the first plea-in-law, and allow him a proof limited to the question of damages, while the cross actions as laid will be dismissed with expenses."

The defender, Waldon, reclaimed.

[Reclaiming notes were also presented by each of the pursuers in the two counter actions. The three reclaiming notes were heard and disposed of together.]

Argued for reclaimer (Waldon) — The respondent had broken the contract by failure to comply with rule 6. That rule was part of the contract. It was a condition-precedent, breach of which by the respondent entitled the reclaimer to rescind the contract.—Bell's Prin. sec. 50; *Mackay* v. *Dick & Stevenson*, March 7, 1881, 8 R. (H.L.) 37, 18 S.L.R. 387; *Bettini* v. *Gye*, (1876), L.R., 1 Q.B.D. 183; *Poussard* v. *Spiers & Pond* (1876), L.R., 1 Q.B.D. 410; *Bowes* v. *Shand* (1877), L.R., 2 A.C. 455; *London Guarantee Company* v. *Fearnley* (1880), L.R., 5 A.C. 911.

Counsel for respondent were not called on.

LORD PRESIDENT—In 1907 George Wade, professionally known as George Robey,

entered into a contract with Richard Waldon, director and manager of certain theatres in Glasgow, whereby he agreed to perform in the year 1908, for a week from 16th March of that year, at a certain salary in theatres in Glasgow. The week before the performance was to take place, Robey, having noticed that his name was not on the bills for next week, telegraphed to Waldon in these terms—"Name not in call for Monday, presume mistake." To that telegram he got the answer—"You never sent bill matter or notification, consequently contract broken. See rule 6 of contract." He also got another telegram—"Call in order, your name does not appear, will not play you owing to breach of contract." Consequently he was not allowed to appear and did not appear. He now sues Waldon for breach of contract for not allowing him to appear at the theatre. The attitude taken up in these telegrams by the defender is perfectly clear. He says —"You are in breach of contract because you have not complied with the stipulation in rule 6." Rule 6 finds its place amongst the rules and regulations printed on the back of the contract, and is in these terms —"Artistes engaged at the Palace Theatre, Glasgow, must give fourteen days' notice prior to such engagement, such notice to be accompanied by bill matter." It is said that the pursuer did not give the fourteen days' notice therein provided for, and consequently no such notice having been given, that he did not send the appropriate bill matter. Something is said on record in explanation of the fact that no notice was given, but for the purposes of the present discussion I assume that no such notice was given.

The whole point then is, is this stipulation one of such a kind that a breach of it would entitle the defender without more ado to declare the contract at an end? It is familiar law, and quite well settled by decision, that in any contract which contains multifarious stipulations there are some which go so to the root of the contract that a breach of those stipulations entitles the party pleading the breach to declare that the contract is at an end. There are others which do not go to the root of the contract, but which are part of the contract, and which would give rise, if broken, to an action of damages. I need not cite authority upon what is trite and very well-settled law.

The only other point to which I should allude is this, that, as was pointed out by Lord Watson in the case of the *London Guarantee Company* (1880, L.R., 5 A.C. 911), quoting a sentence from Lord Blackburn's judgment in *Bettini* v. *Gye*—It is quite in the power of parties to stipulate that some particular matters, however trivial they may be, yet shall, as between them, form conditions-precedent. If they have said so, then their agreement in the matter will be given effect to, but where they have not said so in terms, as is the case here, then the Court must determine, looking to the nature of the stipulation, whether it goes to the essence of the contract or not. We were asked by the defender to allow a proof at large on this matter. That motion cannot be entertained, because nothing we could get in a proof could, in my view, at all affect the real question before us, which is one purely of interpretation. I am quite able to understand what the meaning of the stipulation is, and I quite understand the reason for its being put in, but the question of whether it is a condition-precedent or a mere stipulation which will entitle the person to get damages for a breach is a question of law upon which no evidence can possibly help me.

I am very clearly of opinion that this is a stipulation which does not go to the root of the contract. This case is scarcely distinguishable from the case of *Bettini*, and I think that the Lord Ordinary has come to a right conclusion. He has found that there was an undoubted breach of contract by the defender here in not allowing the pursuer to play, and that that breach was unjustified, inasmuch as the defender had no right to treat the non-fulfilment of this article 6 as a breach entitling him to put an end to the contract altogether. The only other question is, what is the damages, and that must be ascertained by proof.

As regards the other two actions I also think the Lord Ordinary is right. They are based upon the same theory which I have already held to be erroneous, namely, that there was an end of the contract by the notice not having been given or the bill matter delivered. Here also I think the Lord Ordinary was right.

LORD M'LAREN—I am of the same opinion. Mr Wade was in breach of contract to a limited extent in respect that he neglected to give notice within fourteen days and to send bill matter. But it is not the law, and it would be very unworkable if it were the law, that every breach of contract, however trifling, would entitle the other party to bring the contract to an end, and to get out of his bargain. The question always is whether a stipulation which has been broken is of the essence of the contract. I think the omission to send notice did not in substance amount to a breach of contract entitling the other party to rescind. It is clear that Mr Wade was in a position to fulfil, and meant to fulfil, his part of the contract, and the proof of that is that when he saw that his name was not included for the following week in the announcements in the theatrical papers, he at once telegraphed and asked the reason of this omission. I am therefore of opinion that the Lord Ordinary is clearly right.

LORD KINNEAR and LORD PEARSON concurred.

The Court adhered.

Counsel for the Pursuer (Respondent)—Aitken, K.C.—Grainger Stewart. Agent—William Green, S.S.C.

Counsel for the Defender (Reclaimer)—Cooper, K.C.—M'Kechnie. Agent—D. Hill Murray, S.S.C.