

The Court remitted to the Lord Ordinary to sanction the loan on his being satisfied of the sufficiency of the security.

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## SECOND DIVISION.

YUILLE v. RUSHBURY AND OTHERS.

*Patent—Royal Letters-Patent—Theatre—Assignment—Patrimonial Estate.*

The proprietor of a theatre in Glasgow obtained royal letters-patent to himself, "his executors, administrators, and assigns," for the performance of plays in his theatre or in any other to be built within the city. On the lands on which the theatre was built being acquired for other purposes, he became tenant of another theatre. On this theatre being sold he assigned to the purchaser the letters-patent. The purchaser, in security of an advance, executed in favour of the lenders a bond and disposition in security over the theatre, conveying it with the "parts, pertinents, and privileges" thereof, but without reference to the assignation of the letters-patent. The debt being unpaid the bondholders entered into possession of the theatre and let it. In an action at the instance of their debtor in the bond to interdict them and their lessee from using the letters-patent of which he claimed to be sole assignee, the Court *dismissed* the action.

The Lord Justice-Clerk was of opinion that the pursuer had no title to sue in respect the letters-patent had reference alone to the carrying on of the business of the theatre, which had passed to the defenders; Lord Young was of opinion that the letters-patent were not patrimonial estate separable from the theatre and capable of being retained as a separate rent-yielding subject, but had passed under the bond to the bondholders; and Lord Rutherford Clark was of opinion (1) that under the clause of "parts, pertinents, and privileges" the letters-patent were assigned to the defenders, and (2) that apart from this clause the defenders were entitled to use them, as without them the beneficial use of the security subjects could not be enjoyed.

On 24th June 1868 William Glover, proprietor of the Theatre Royal, Dunlop Street, Glasgow, obtained royal letters-patent under the Acts 43 Geo. III. cap. 142, and 6 and 7 Vict. cap. 68, for the performance of plays for the period of twenty-one years in that theatre, "or within any other theatre built or to be built at any other suitable place within the city of Glasgow, the suburbs or neighbourhood thereof, instead of the said theatre in Dunlop Street." The letters were in favour of William Glover, "his executors, administrators, and assigns."

The Act of Geo. III. enacts as follows—"Whereas a licensed play-house in the city of Glasgow would be of convenience to the said city, and to persons resorting there, may it please your Majesty that it be enacted that it shall and may be lawful to His Majesty, his heirs and successors, to grant letters-patent for establishing a theatre or play-house in the city of Glasgow, suburbs, or neighbourhood thereof, subject to such restrictions as to the number of persons to be interested therein, and in the profits thereof, and with such privileges and under such provisions and regulations for the due and orderly conducting and managing the same as to His Majesty shall seem fit: Provided always, and be it enacted, that the said theatre or play-house, and management thereof, shall be under and subject to the control and inspection of the Lord Provost, Bailies, Dean of Guild, and Deacon Convener of the Trades and City of Glasgow, and of the Sheriff-Depute of the county of Lanark for the time being."

The Act 6 and 7 Vict. cap. 68, enacts by sec. 2, that "it shall not be lawful for any person to have or keep any house or other place of public resort in Great Britain for the public performance of stage plays without authority by virtue of letters-patent from Her Majesty, her heirs and successors, or predecessors, or without licence from the Lord Chamberlain of Her Majesty's Household, for the time being, or from the justices of the peace as hereinafter provided." The letters-patent contained a clause declaring "that these our letters-patent shall be revocable by us, our heirs and successors, at our and their pleasure, and without any cause given, and that thenceforth the right of the said William Glover, his executors, administrators, and assigns, shall cease and determine."

In 1869 the theatre in Dunlop Street was acquired by the Union Railway Company, and Glover leased a theatre in Hope Street, Cowcaddens, which became known as the Theatre Royal, and to which the letters-patent applied.

By conveyance dated 31st July 1878 and duly recorded, Mr Andrew Yuille and a Mr Rae purchased the theatre. Mr Glover on 10th May 1878, in consideration of the sum of £400, assigned the letters-patent to them, "their heirs and assignees." Twelve days later, on 23rd May, in security of an advance of £13,000 obtained from a Mrs Anderson, Messrs Yuille and Rae granted a bond and disposition in security over the property. This deed contained no reference to the assignation of the letters-patent, and bore merely to convey the property by description, with the whole houses and buildings erected or to be erected thereon, "parts, pertinents, and privileges thereof, and free ish and entry thereto," in security of the sum lent. The theatre was burnt down in 1879, and rebuilt in 1879-80. In July 1881 Mrs Anderson's trustees entered into possession of the theatre under the bond and disposition in security. From them the property passed to the marriage-contract trustees of a Mr and Mrs Richmond. On 20th August 1887 William Thomas Rushbury became lessee under them of the theatre.

This action was raised by Yuille, Rae being dead, to have Rushbury interdicted "from producing stage plays in the buildings known as the Theatre Royal, Hope Street, Glasgow, in virtue of the licence and authority contained in the royal letters-

patent for the performance of stage plays in a theatre in Glasgow granted to William Glover, artist and theatrical manager in Glasgow, in the year 1868, to remain in force for the period of twenty-one years from the date thereof, and from using the said royal letters-patent in any manner of way without permission from the pursuer, or from interfering with the pursuer in any way in his use and enjoyment thereof."

The pursuer averred that the letters-patent were not sealed to the Theatre Royal buildings, but were acquired and held on a title distinct therefrom, and could be used in any other suitable building in Glasgow or suburbs. He further averred—"The pursuer has learned that stage plays are now being produced and performed in the Theatre Royal buildings by the defender in virtue of the licence and authority of the said royal letters-patent without having obtained the consent of the late Mr Rae's trustees or of the pursuer, and that the defender is unwarrantably taking advantage of the other rights and privileges pertaining to the proprietors of the said letters-patent. The defender while advertising the said performances as being given under the said letters-patent is contravening the terms thereof, and endangering the continuance of the same by his reducing the charge for admission below the prescribed rates."

In answer the defenders averred that by the bond and disposition in security the pursuer had divested himself of his whole interest in the letters-patent.

The pursuer pleaded—" (1) The defender having interfered with and used the rights and property of the pursuer as libelled, the pursuer is entitled to protection against such interference and use being repeated. (2) The pursuer is, in virtue of his titles, entitled to claim the protection of the Court against the acts of the defender complained of."

The defenders pleaded—" (1) No title to sue. (3) The pursuer having been divested of any right he may have had in the letters-patent, cannot enforce his present claim."

The trustees of Mr and Mrs Richmond sisted themselves as defenders in the capacity of bondholders in possession of the theatre.

The Sheriff-Substitute (LEES) on 26th November 1887 sustained the first plea stated for the defenders, dismissed the action and decerned.

On appeal the Sheriff (BERRY) on 13th February 1888 adhered.

The pursuer appealed, and argued—When he purchased the theatre and granted the bond and disposition in security he did not assign to the bondholders any rights in the letters-patent. These were not sealed to the Theatre Royal, but were acquired by him from Glover, and held on a title perfectly distinct from the theatre, and could be used in connection with any other theatre in Glasgow. The right to them was assignable by the pursuer if he chose to assign. Granted that the theatre passed to the bondholders with its pertinents and privileges, it was an unwarrantable straining of the terms of the bond to apply it to a separate, distinct and valuable right like that contained in the letters-patent. He was entitled to interdict against use of the letters-patent.

The defenders replied—The pursuer had no title to sue. He had been divested of all right to the letters-patent by the bond and disposition in security. That deed conveyed them to the

defenders' authors under the word "privileges." The word was one peculiarly applicable to those rights. But even without that word they passed to the defenders as the pursuer's creditors. It was impossible to hold that their debtor should hand them over the theatre without giving them the accessory letters-patent, which clearly rendered the subjects valuable. The rights under the letters-patent were not assignable nor separate from the theatre. The Act of George III. authorised the Crown to licence the theatre in Glasgow, and the letters-patent showed merely that a franchise of opening a particular theatre was conferred on the licensee, and not, as the pursuer alleged, that a right assignable by him had been conferred upon him.

At advising—

LORD JUSTICE-CLERK—It may turn out to be true, and we have heard a very able argument to that effect that the present proprietors or occupants of this theatre are not entitled to the benefit of these letters-patent, but I do not think that in the position in which the parties now stand the remedy of interdict is open to the pursuer. It appears to me that the whole question resolves itself into this. Is it proved that the pursuer has by assignment a right to these letters-patent for the purposes for which they were granted? I think he has, but I apprehend for no other purposes whatever. If the nature of the letters-patent is to confer the benefit of them on the person who is in the act of carrying on the business of the theatre, I do not see that the grantee of the letters-patent may not assign them for that purpose if he pleases, but unless he carries on the business of the theatre himself, or assigns the letters-patent to another for the purpose of producing stage plays at the theatre, I think he cannot have any right effectual in his own person apart from the business of the theatre. That appears to me to be the necessary result, and consequently I think that for the pursuer to ask us to interdict the defenders from taking upon themselves to say that they were entitled to use the letters-patent, of which the pursuer himself can make no use except to withhold them from the defenders, is not within the right of the pursuer. It may quite well be that he is entitled to assign these letters-patent to the defenders if he chooses, and for any consideration which he pleases. That is a totally different matter. But apart from the right to use these letters-patent himself or to assign them to some one else for the purpose of producing stage plays at the theatre, the pursuer has I think no right at all in the letters-patent. I am of opinion therefore that he is not entitled to succeed in this application.

LORD YOUNG—I am of the same opinion, but I must take the liberty of saying that in my opinion the case is an exceptionally clear one in several views of it. I think the legal character of the letters-patent here has not been sufficiently attended to. Letters-patent in their legal character are only the licences for a particular theatre as a place of public amusement, nothing more. Such places of public amusement may be otherwise licensed. They may be licensed by the Lord Chamberlain or by the justices of the peace, but in any case the licences are not property. It is a matter of mere police regulation for the pre-

servation of good order and decency, and I do not think that letters-patent or licences by justices of the peace, or licences of the Lord Chamberlain, can be regarded or dealt with as patrimonial estate at all. The patent here proceeded on the Act 43 Geo. III., c. 146, which proceeds on the narrative that a licensed play-house in the city of Glasgow would be of convenience to the said city, and to persons resorting thereto, and it authorises the Sovereign "to grant letters-patent for establishing a theatre or play-house in the city of Glasgow, suburbs, or neighbourhood thereof, subject to such restrictions as to the number of persons to be interested therein, and in the profits thereof, and with such privileges and under such provisions and regulations for the due and orderly conducting and managing the same as to His Majesty shall seem fit." That was the authority given to the Crown to promote the convenience of the city of Glasgow by licensing in the form of letters-patent a play-house in the said city. The letters-patent, proceeding on that, granted a licence to the then proprietor of the theatre in Dunlop Street, Glover, and his "executors, administrators, or assigns," and made the licence by letters-patent applicable not only to that but to any other theatre which might be put up in substitution therefor. On them is put the duty of regulating everything connected with the proper condition of the theatre, it being reserved to the Crown to revoke the letters-patent at any time. What we have to consider upon one view of the case is whether these letters-patent are separate from the theatre, so that they may be separate patrimonial estate, saleable in the market, and putting the owner for the time being in the position of being able to make a pecuniary exaction from any person conducting performances in the theatre. I asked during the argument whether such a thing had ever been heard of. I was told it was quite common. I must say I do not believe it, and I do not think such a thing has ever occurred. It would be quite foreign to the purpose, nature, and legal character of such letters-patent or other licences that they should be patrimonial estate, saleable or marketable property, such as would pass to a trustee in bankruptcy or could be attached by creditors. That is not their nature. However, Glover assigned the letters-patent to the purchasers of the theatre. That theatre was afterwards bought by Mr Rae and Mr Yuille, and the letters-patent could not have been retained by Glover as a separate rent-yielding subject. I therefore think that the pursuer has no estate in the letters-patent at all in virtue of which he can present this application, and that any right, privilege, or profits under them are with the respondents in virtue of the title they have to the theatre to which the letters-patent apply.

But there is another view upon which I am equally clear, and it is sufficient for the decision of the case in my opinion. I have already pointed out that according to my views letters-patent do not differ in their legal character from licences of the Lord Chamberlain or justices of the peace. They are of the same character, for the well-being of the citizens of Glasgow, and people going there, to secure orderly performances. What is the consequence to anyone acting without letters-patent or licences of the Lord Chamber-

lain or justices of the peace? It is not a matter of the law of property, but of police regulation and order. I find in the Act of Parliament that such persons are liable to prosecution. The Act of 1843 (6 and 7 Vict. cap. 68) in its 2nd clause enacts that any person carrying on a theatre without certificate by letters-patent shall be liable in a penalty. What other virtue can there be in a licence or in letters-patent except to exempt from penalties. It is said, however, that the respondents proclaim they are holders of a licence by royal letters-patent. What interest has the pursuer in that? None that I can see. It is a mere announcement that they consider they have a right to perform which letters-patent give them. It can be the interest only of those who have to prosecute for the public to inquire into that. The licence can be of no use whatever except as an answer to a prosecution for penalties. I cannot see how it concerns Mr Yuille in any way. The respondents take the risk of a prosecution in performing, and if the right exists at all, they will, if the prosecution is brought, be subject in penalties or not, according as the justices or this Court are of opinion that they are or are not duly licensed by letters-patent. I am, then, clearly of opinion that Mr Yuille has no patrimonial estate in the letters-patent at all, and no title to sue. I think the action should be dismissed.

LORD RUTHERFURD CLARK—I have come to be of the same opinion. At first I had some hesitation arising from the circumstance that the pursuer had an express assignation to the letters-patent, and from the allegation that the defenders had no right to the letters-patent at all. If it were true that the defenders had no right, it might have been maintained on plausible grounds that, whatever the character of letters-patent, the pursuer as assignee might prevent the defenders using them. But further consideration has satisfied me that the pursuer divested himself of them in favour of the defenders, the bondholders, so far as necessary, at all events to enable them to use thereafter the subjects of the security. He disposed to them the theatre with "parts, pertinents, and privileges," and I do not think a debtor so disposing to creditors could prevent them making the best use of the theatre in order to realise their debt. The contention of the defenders is that he has given a security to them as his creditors which shall not avail them to the best effect. I think the effect of the security was to enable them to use it as best they could, and that one of the ways, and indeed the only available way, was to use it as a theatre for which the licence was held by the owner. That right was fairly covered by the word "privilege." Indeed even though that word was not contained in the title, I should have come to the same conclusion.

LORD CRAIGHILL was absent.

The Court dismissed the appeal and affirmed the judgment.

Counsel for the Appellant—Watt. Agent—Party.

Counsel for the Respondents—Napier. Agents—Tait & Johnston, S.S.C.