Upon advising the complaint, with answers, &c. " the LORDS find, in respect the family of Ulbster have been in possession of approving the leets of Provost and Bailies for the burgh of Wick, that the election of the respondent John Sutherland as Provost of Wick is void and null; and find, that James Sinclair of Harpsdale was duly elected Provost of the said burgh; and decern accordingly." And, upon a recluiming petition and answers, " adhered." No 28.

Act. *Sol. General, J. Boswell.* Alt. *Ilay Campbell, M'Laurin, Crosbie.* Clerk, *Pringle.*
Fol. Dic. v. 4. *p.* 86. *Fac. Col. No* 57. *p.* 142.

1777. *February* 7. CARNEGIE *against* MAGISTRATES of MONTROSE.

FULLARTON of Kinnaber, in 1663, let in lease to the town of Montrose 'the 'salmon-fishings on the sands and sea-shore from the mouth of the water of 'South Esk, northward till it came opposite a march-stone on the links, for 19 'years, for payment of two shillings Scots, if required.' And the town possessed the said fishings from that period, letting them in lease by public roup, &c. without paying themselves any tack-duty. Carnegie having acquired the land of Kinnaber, pursued a removing against the town from these fishings; and it was *urged* in defence, That by charter from David II. the town held right to '*piscaria infra aquas de Northesk et Southesk.*' And as the fishings in question were clearly comprehended under that description, so the immemorial possession which the town had enjoyed, must be ascribed to that ancient grant, and not to a lease which had proceeded on some mistaken idea of a right in the lessor; but which they had never acknowledged by the payment of any rent. *Answered* for Carnegie, That his authors stood infeft in this fishing *per expressum* under charters from the Crown as far back as 1592; and that the acceptance of the lease by the town of those specific fishings contained in his charters, was conclusive evidence against the present plea. They had possessed on that lease ever since it was granted, and cannot now ascribe their possession to any other title. THE LORDS decerned in the removing. *See* APPENDIX. No 29.

Fol. Dic. v. 4. *p.* 87.

1793. *February* 26.
The CREDITORS of John Jackson, and HARRIET PYE ESTEN, *against* STEPHEN KEMBLE.

BY 10th Geo. II. chap. 28. § 5. it is enacted, 'That no person shall be authorised 'by letters-patent from his Majesty, or the licence of the Lord Chamber-'lain,' to exhibit theatrical entertainments, except within the liberties of Westminster, or the actual residence of his Majesty. No 30.
Prima facie evidence of right to an exclusive privilege, held

No 30.
sufficient to authorise an interdict *retinendæ possessionis.*

See in this case, discussion relative to the Great Seal.

By 7th Geo. III. chap. 27. § 19. this statute is so far repealed as to allow his Majesty to establish by letters-patent a theatre in Edinburgh, to have the same privileges, and to be subjected to the same regulations as any other in Great Britain.

In 1769, a patent was obtained in name of Mr Davidson, solicitor at London, and by him conveyed to Mr Ross of the Theatre Royal Covent-Garden.

This patent passed under the Seal of Great Britain. Mr Ross in consequence erected a theatre, partly at his own expense, and partly by subscription.

In 1785 he conveyed his interest in the patent, bulding, and furniture of the theatre, to Mr Jackson.

The patent expired in 1788, and a new one was granted in favour of the Duke of Hamilton and the Right Honourable Henry Dundas, and their assignees. This patent, like the former, passed the Seal of Great Britain.

Mr Jackson continued to be manager of the theatre, but without either an express lease or assignment from the patentees, till Summer 1790, when he became bankrupt, and his interest in the theatre passed into the hands of his creditors.

His creditors allowed him to continue manager for the first year after his bankruptcy; but they resolved to let the Theatre for the next season to the highest bidder, provided he was approved of by the Lord Advocate, the Lord Provost of Edinburgh, and the Dean of Faculty of Advocates; a condition added, in order to secure the consent of the patentees, which was now applied for.

Mr Dundas approved of this measure; the other patentee returned no answer to the application.

Mr Kemble was the highest bidder at the auction in November 1791; but though the lease was extended alone in his name, it was understood betwixt him and Mr Jackson that they should have a joint interest in it, and the approbation of Mr Dundas, through the medium of the gentlemen above mentioned, was obtained jointly for both.

In November 1792, the creditors let the Theatre to Mrs Esten for the ensuing year, and her appointment was approved of by the Duke of Hamilton.

Mr Kemble, trusting to the patronage of the other patentee, whose consent he afterwards obtained; and being perhaps advised, that the patent could not confer an exclusive privilege, took a lease of the building called the Circus, which he fitted up as a theatre.

A few days before the new theatre was to be opened, mutual bills of suspension were presented by Mr Kemble, and Mr Jackson's creditors and their lessee. The former craved, that the other party might be prohibited from disturbing him in his acting, the latter craved an interdict against the opening of the new theatre. Both were reported from the bill-chamber, when the points at issue

came to be, the validity of the patent, the competency of entering into that discussion *hoc statu*, and which of the parties was entitled to possession under it. No 30.

On the two first, Mr Kemble

Pleaded; To guard the Crown from the attempts of interested individuals, it has wisely been provided, that all grants should be examined by persons skilled in the law, and in high responsible situations; Blackst. v. 2. p. 346; and as evidence of its having undergone that examination, it has become essential in point of solemnity, that every grant should have the proper seal appended to it; Blackst. v. 2. p. 348. A grant without such seal is like a bond destitute of the legal solemnities, the ommission of which no evidence can supply.

By the 24th article of the Union, one seal was appointed to be used for authenticating all public national acts, in which the whole united kingdom is concerned, and matters of private right relating solely to England, and another to be kept in Scotland, for authenticating all deeds which only concern 'offices, 'grants, commissions, and private rights within that kingdom.'

The wisdom of this enactment is evident. The public law of the two countries was from the date of the Union to be the same. In national acts, therefore, his Majesty had occasion only for one set of advisers, and one seal was sufficient for both kingdoms. But the municipal law of the two countries was to continue different, and before his Majesty could make a grant in which that of either was concerned, it was proper that it should bear *in gremio* legal evidence of its having been examined by persons skilled in the law of that particular country which was to be affected by it.

Accordingly, in practice, grants relating to private right, and patents in particular, are examined by a different set of officers, according as they are to affect the one or the other of the united kingdoms.

When a petition for a patent which is to take effect in Scotland is presented to the King, it is transmitted to the Lord Advocate; and upon his reporting that it is not inconsistent with the law of Scotland, and after going through the proper forms, it passes the Great Seal of Scotland.

In like manner, one of the first steps in the progress of an English patent is its obtaining the approbation of the Attorney and Solicitor-General; Blackst. v. 2. p. 347.

Since such was the object of keeping the seals distinct, the one cannot be substituted in place of, or be held to include the other. It might as well be maintained, that letters of horning might pass under the Great Seal of Scotland, instead of the Signet, or that a Crown-charter conveying lands in this country might pass the Seal of Great Britain upon the report of the Attorney or Solicitor-General.

The patent in question regulates a matter of private right, and as such ought to have passed the Great Seal of Scotland. There is no evidence, therefore, that it has been examined by the proper officer. The Lord Chancellor, in appending the Great Seal of Britain to it, acted *ultra vires*.

No 30.

Answered; A patent passing under the Seal of Great Britain, and authenticated by the Lord Chancellor, can be set aside only in a regular action of declarator, and not in the summary process of the bill-chamber, where the Court must necessarily proceed upon *prima facie* evidence.

And were this an action of declarator, there would be great reason to doubt, if an admitted irregularity in passing the seals would annul the patent; at least the 27th Henry VIII. c. 11. § 3, which regulates the progress of writs through the offices in England, annexes not nullity, but penalties to any deviation.

It is admitted, that the ultimate object of the practice of sealing grants is, that they may be examined by persons capable of judging of their propriety. The Theatre to be erected in Edinburgh was to have the same privileges, and to be subject to the same regulations as those in England. No person, therefore, was so well fitted to advise his Majesty as to the propriety of granting it as the Lord Chamberlain, (in whose office the patent had its origin, and who has the supreme controul of theatrical exhibitions in both countries), and the other great officers who had a share in its execution.

The extension of the revenue-laws of England to both countries, has introduced an exception from the 24th article of the Union, in the case of the Commissioners of the Excise and Customs in Scotland, who are all named in one commission, passing under the Seal of Great Britain. Upon the same principle, the patent for the Edinburgh Theatre should pass under that seal.

Replied; In a question about a corporeal subject, it is easy to consider the possession apart from the right; because a man may be *bona fide* possessor of a house or a field, without being proprietor of either. But in claims of exclusive privilege, the question of possession includes that of the right; and if there is no exclusive privilege, there can be no possession.

Mrs Esten therefore must be considered as the pursuer in this case; and unless she can shew that she has an exclusive privilege, the defender must be assoilzied; Erskine, b. 2. tit. 1. § 24. & 27.

A majority of the Court were of opinion, that *hoc statu*, and when the patentees were not in the field, it was unnecessary to examine the validity of the patent, which had sufficient *prima facie* evidence in its favour, to authorise the interdict demanded by Mrs Esten. It is executed in the same manner (it was observed) as the original patent in 1769, and ever since that period, the Edinburgh Theatre has been understood to be under the protection of the law; its legality is supported by the authority of the great officers who had a share in the execution of it, and by that of the patentees who acted under it. In these circumstances, the possession cannot be summarily inverted; Sinclair against Sutherland, No 28. p. 10610. The present question is very similar to what occurs in cases of astriction to a mill, where the process for abstractions is competent without the production of titles, the tenants being the only parties to it.

But in the declaratory action, the proprietors must be cited, and titles produced.

As to the remaining point, the decision of the Court depended upon a variety of circumstances, which it is impossible to reduce into the form of a report, and upon which a majority of the Court were of opinion, that Mrs Esten was in possession under the patent, and was entitled to continue it. No 30.

"THE LORD ORDINARY, 5th February 1793, having advised with the Lords, passed the bill (offered by Mrs Esten) on caution, and prohibited Stephen Kemble, or any person acting under him, from opening any Theatre for the performance of plays, interludes, or other entertainments of the stage, within the city of Edinburgh, or suburbs thereof, or within twenty miles of the said city, all in terms of the statute, 10th Geo. II. c. 28."

Upon advising a reclaiming petition and answers, "the LORDS adhered."

Lord Ordinary, *Swinton.* For Jackson's Creditors, &c. *Solicitor-General, Maconochie, Arch. Campbell, jun.* Alt. *Lord Advocate, Dean of Faculty, John Clerk.* Clerk, *Sinclair.*

D. D. *Fol. Dic. v.* 4. *p.* 87. *Fac. Col. No* 35. *p.* 68.

Possession cannot be inverted; see MUTUAL CONTRACT.

Must be restored, reserving every separate claim; IBIDEM.

See MOVEABLES—BREVI MANU—BASE INFEFTMENT—BONA & MALA FIDES—BONA FIDE CONSUMPTION.

See Hamilton against Ramsay, No 61. p. 7832, *voce* JUS TERTII.

See Calmack against Fraser, *voce* SEQUESTRATION.

See APPENDIX.