agreement of the vendors to take their price, or part thereof, in paid-up shares, was an inducement to the general public to contribute, and it is somewhat difficult to see in what the inducement consisted if not in this, that the vendors had such confidence in the company that they were willing to run a greater risk than the ordinary partners.

While, however, I cannot help entertaining these difficulties, the point seems so nearly foreclosed by the cases cited that I defer to the opinion of your Lordship.

LORDS NEAVES and ORMIDALE concurred.

The Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the petition, with the answers thereto, Ordain George Macfarlane and James Hutton, the liquidators, to make a call of as much per share upon all the shareholders of the Company who have not paid more than 10s. per share as will, with the funds in the hands of the liquidators, be sufficient to equalise the contributions of the shareholders, and thereafter to proceed in terms of the statute with the adjustment of the rights of the contributories among themselves, and decern: Find the expenses of both parties payable out of the first of the funds, and remit to the Auditor to tax the same, and to report."

Counsel for the Petitioner—Dean of Faculty (Clark), Q.C., and Maclean. Agent—John Wright.

Counsel for Respondents—Guthrie-Smith and Harper. Agents—Mitchell & Baxter, W.S.

ERRATUM.—Page 320, left column, eighteen and twenty-one lines from foot, *for* £4, 15s. *read* 4:15; line nineteen, *for* £8, 15s. *read* 8:15.

FIRST DIVISION.

THE GLASGOW ROYAL BOTANIC INSTITUTION *v.* KIBBLE.*

Agreement, construction of.

The proprietor of a conservatory presented it to the Royal Botanic Institution of Glasgow, to be erected in the Botanic Gardens there, on terms set forth in a deed of agreement between the parties. In article 8 of the deed of agreement it was, *inter alia*, provided that "all parties having right of admission to the gardens shall, every lawful day, have equal access to the conservatory during garden hours, except when the conservatory is required for the concerts and entertainments after-mentioned." In article 9 of the agreement it was *inter alia* provided that the proprietor of the conservatory should have right "to use, on lawful days, the conservatory for concerts and other entertainments." *Held* that these provisions, taken in connection with the whole circumstances of the case, entitled the proprietor of the conservatory to give entertainments therein every evening during the summer season, and that the Botanic Institution was not entitled to limit such use to three evenings in the week.

* This case was advised on December 12, 1874.

This was a note of suspension and interdict brought by the Glasgow Royal Botanic Institution against John Kibble, Esquire of Coulport, Dumbartonshire, to have the respondent interdicted from "using the conservatory in the complainers' Botanic Gardens at Kelvinside, Glasgow, for the purpose of holding concerts or other entertainments, or for any other purpose, every lawful evening, to the exclusion of the proprietors of, or subscribers to, the said gardens, or persons otherwise lawfully entitled to have access thereto, unless upon the condition of the said proprietors, subscribers, or other persons making payments of money to the respondent or others in his behalf, and to interdict, prohibit, and discharge the respondent from using the said conservatory for the said purposes, or any other purposes, to the exclusion of the said proprietors, subscribers, or other persons foresaid, unless upon the condition foresaid, upon any greater number of lawful evenings in each week than three, or such other number of evenings as shall be fixed by your Lordships; or at all events to interdict, prohibit, and discharge the respondent from using the said conservatory for the purposes foresaid, or any other purposes, to the exclusion of the said proprietors, subscribers, and other persons foresaid, unless upon the condition above specified, on every lawful evening, or on any greater number of evenings than three in each week, or such other number of evenings in each week as your Lordships shall fix, unless and until the respondent shall obtain authority for such use on every lawful evening from the joint-committee constituted under minute of agreement entered into between the respondent, on the first part, and the complainers, the Glasgow Royal Botanic Institution, of the second part, dated 13th, 16th, and 17th October 1871, or unless and until he shall establish his right to such use on every lawful evening by an award of the arbiter or arbiters appointed under the said agreement, or by decree of declarator, or otherwise."

The circumstances in which the note was brought were as follows—The complainers were proprietors of the Botanic Gardens in Glasgow, to which shareholders or proprietors in the Institution, as well as subscribers to the gardens, and certain persons authorised by shareholders or proprietors, were admitted. The respondent had a large conservatory at his residence at Coulport, containing a number of rare shrubs and plants, and also a number of statues of considerable value. In 1871 the respondent presented this conservatory to the Glasgow Royal Botanic Institution on certain conditions set forth in the following deed of agreement:—

"This agreement, entered into and executed by and between John Kibble, Esquire of Coulport, on the one and first part, and the Royal Botanic Institution of Glasgow on the other and second part, witnesseth, that the first party having given, as he hereby gives, to the second parties as a free, absolute and irrevocable gift, his conservatory at Coulport and the contents thereof, and both parties having agreed upon the stipulations underwritten in reference thereto, they do hereby bind themselves to each other as follows, that is to say:—

"*First*, The first party binds himself at his own expense forthwith to remove from Coulport the said conservatory and the contents thereof to the Botanic Gardens in Glasgow, and to erect the said conservatory on the piece of ground, part of the Royal Botanic Gardens, and presently occupied by the herbaceous collection and curling pond, which piece

of ground lies to the south-east of these gardens, and contains two acres and twenty-eight poles imperial standard measure or thereby, and is bounded on the south-south-east by Hamilton Drive and a strip of ground belonging to John Bell, merchant in Glasgow; on the east by the property of the said John Bell; on the north by a line three feet south of and parallel to the south side of a walk separating the said herbaceous collection from the rest of the garden ground; and on the west by the east side of a private cart road, leading south, and continuation thereof to Hamilton Drive, all as delineated on a plan thereof endorsed hereon, which piece of ground is hereby fixed as the present site of the said conservatory and its extensions and accessories; the contents of the said conservatory, and particularly the statuary therein, shall be arranged to the satisfaction of the joint-committee after referred to; this joint-committee shall have power to remove the conservatory and the contents thereof to another part of the gardens, if after reasonable experience of the present proposed site they come to the unanimous opinion that such removal will be beneficial, but such removal shall be at the sole expense of the second parties.

"*Second*, The first party farther binds himself, at his own expense, forthwith to enlarge the said conservatory by increasing the diameter of the larger dome thereof to at least 146 feet, and by extending the front to at least 140 feet, and by making the length of the passage connecting the first and second domes at least 36 feet, and by erecting a hall on each side of the passage in architectural harmony with the other buildings, and not less than 30 feet in length each; the whole of which operations, and all other operations connected with the erection of the said conservatory and its accessories, shall be carried out at the risk and under the sole direction of the said first party.

"*Third*, The said first party farther binds himself forthwith to pay to the second parties the sum of £250 towards the expense of removing the said herbaceous collection.

"*Fourth*, The first party further binds himself to maintain and uphold the said conservatory and contents thereof, with any extensions or additions that may be made thereto within the said piece of ground, all in good condition, for the period of twenty-one years from and after the erection of the said conservatory in the Botanic Gardens, in its present proposed site.

"*Fifth*, The second parties agree that the conservatory and contents thereof are and shall be subject to the right of the first party and his heirs and assignees, during the said period of twenty-one years, to the uses specified in article ninth, and to the share of annual revenue of the gardens and conservatory specified in article sixth.

"*Sixth*—The gardens shall continue to be under the exclusive management of the gardens committee of the second parties, who shall regulate the hours and rates of admission thereto and to the conservatory, subject to the provisions in articles 8th, 9th, and 10th, and the revenue to be derived during the foresaid period from the gardens and conservatory shall be divided between the first and second parties as follows, viz.—In the first place, there shall be paid to the second parties, as a preferential charge thereon, the sum of £930 per annum, in lieu and in place of the present annual revenue derived by the second parties from the gardens alone in the form of annual subscriptions, subscriptions for office tickets, and payments at the gate for admissions. In the second place, after payment to the second parties out of the revenue from the gardens and conservatory of the foresaid sum of £930 per annum, there shall be paid to the first party or his foresaids, out of the surplus, if any, the sum of £300 per annum, during the said period; and, in the third place, the balance of the said revenues, if any, shall during the said period be divided equally between the first and second parties, it being always understood and declared that, in case in any year the foresaid revenue shall be insufficient to pay the second parties the whole of the foresaid sum of £930, or to pay the first party the whole of the foresaid sum of £300, the deficiencies of that year shall not form a burden upon the revenue of any subsequent year; and it being further understood and declared that the whole revenue derived or to be derived by the second parties from other sources than annual subscriptions, subscriptions for office tickets, and payments at the gate for admissions, and in particular, the revenue derived or to be derived from feu-duties and sale of plants, shall continue to be the exclusive property of the second parties, as at present.

"*Seventh*—Both parties agree to be at the joint and equal expense of forming a new entrance to the gardens and conservatory, under the direction of the joint-committee after mentioned.

"*Eighth*—The parties agree that all parties having right of admission to the gardens shall, every lawful day, have equal access to the conservatory during garden hours, except when the conservatory is required for the concerts and entertainments after mentioned, on which occasions such right of access shall cease at five o'clock P.M., or earlier, if approved by the joint-committee after mentioned.

"*Ninth*, The parties agree that, subject to the right of admission specified in article 8th, the first party or his foresaids shall be entitled and have right to manage and regulate the said conservatory during the foresaid period, and in particular to use, on lawful days, the conservatory for concerts and other entertainments of such a nature as shall be approved of by the said committee, the first party and his foresaids being at the sole expense of such concerts and entertainments, and being entitled to the whole proceeds thereof.

"*Tenth*, The said parties agree that on such occasions as are referred to in article 9th, the said first party or his foresaids shall be entitled to sell or to authorise the sale of refreshments, including wine and beer, if he shall obtain a license therefor, which he shall be at liberty to apply for on such occasions, although he shall not be entitled to apply for a permanent license.

"*Eleventh*, The joint-committee hereinbefore referred to shall consist of six members—three to be nominated annually by the first party or his foresaids, and three by the second party, and four to be a quorum; any vacancies occurring in the course of any year shall be filled up by the party whose nominee has caused the vacancy. All meetings of the joint-committee shall be convened on not less than forty-eight hours' written or printed notice, specifying the particular business to be transacted.

"*Twelfth*, In case the parties shall differ upon any point not left to the joint-committee, or in case the joint-committee shall be equally divided in opinion upon any point left to them, the parties

agree that such differences shall be, and the same are hereby, referred to the final decision of any uneven number to be selected by the joint-committee of the following parties as arbiter or arbiters, viz., any one or more of the Sheriffs of the county of Lanark, any one or more of the Professors of the University of Glasgow, or any one or more of the Directors or special council of the second party, and both parties bind themselves to abide by and implement the awards or decreets-arbitral, interim or final, of such arbiter or arbiters, it being hereby declared that if the arbiters shall be more than one, and shall differ in opinion, the decision of the majority of their number shall be equally binding and conclusive as if it had been their unanimous decision.

"*Thirteenth*, In order to vest in the first party and his foresaids a real right in the premises, in so far as reserved to him, the second parties do hereby set and in tack and assedation let to the first party and his foresaids for the foresaid period of 21 years, with all the rights and privileges herein conferred, and subject to all the obligations and conditions hereby imposed, All and Whole the foresaid piece of ground fixed upon as the present site of the said conservatory, together with the said conservatory to be erected thereon, and the extensions or additions or accessories to be made thereto as aforesaid, and the contents of the same, and any altered site which, in terms of article first, may hereafter be fixed upon therefor; and further, on the request of either party, and at mutual expense, both parties bind and oblige themselves to make, execute, and deliver a separate contract of lease, in terms of these presents; and both parties consent to the registration of these presents, and of said awards or decreets-arbitral, for preservation and execution: In witness whereof," &c.

In terms of this agreement the conservatory was removed, with its contents, to the Botanic Gardens in Glasgow, a joint-committee was nominated in terms of article 11 of the agreement, and a certain class of entertainments to be given in the conservatory was approved of by them.

In the beginning of April 1874 the respondent published advertisements that "The Kibble Crystal Art Palace would open for the season on Monday, 13th April," with "Grand Promenade Concerts every evening;" and "Doors open at 7 P.M. Concert commence at 8. Carriages may be ordered at 9.45. Admission, one shilling." It was in consequence of the respondent insisting in giving entertainments in the conservatory every evening during the summer season that the present action was brought.

The complainers pleaded—"(1) Upon a sound construction of the said minute of agreement the respondent is not entitled to use the said conservatory for the purpose of holding concerts, or otherwise, to the exclusion of the proprietors or subscribers to the gardens, on every lawful evening, or upon a greater number of evenings in each week than three. (2) At all events, the respondent is not entitled to use the said conservatory for the said purposes every lawful evening without the authority of the joint committee, or unless he shall establish a right to do so by an award of the arbiters provided by the 12th article of the said minute of agreement, or by decree of declarator, or otherwise. (3) The acts complained of being wrongful, illegal, and unauthorised, as well as to the detriment of the complainers, they are entitled to interdict as craved."

The respondents pleaded—"(1) The statements of the complainers are not relevant or sufficient to warrant their present demands, and the note should be refused, and the complainers found liable in expenses. (2) Upon a sound construction of the minute of agreement founded on, the respondent is entitled to use the conservatory in the way complained of, and the suspension should therefore be refused, with expenses. (3) There being no grounds, either in fact or law, to warrant the present proceedings, the suspension should be refused, and the complainers found liable in expenses."

Lord Young refused the note, but the First Division, on a reclaiming note, continued interim interdict granted in the Bill Chamber, and remitted to the Lord Ordinary, in order to allow parties to amend their averments.

The Lord Ordinary pronounced the following interlocutor:—

"21*st May* 1874.—The Lord Ordinary having heard counsel for the complainers, and considered the note of suspension and interdict, answers thereto, and productions—Refuses the note: Finds the complainers liable in expenses, and remits the account thereof when lodged to the Auditor to tax and to report."

His Lordship gave the following Opinion:—"The complainers seek to have the respondent interdicted from holding concerts in the conservatory erected by him in their gardens under the minute of agreement founded on, to the exclusion (except on consideration of payment) of persons having right of access to the gardens, on more than three days in each week. When the case was in the Bill Chamber it was conceded by the counsel for the complainers that the questions between the parties depended on the true construction of the minute of agreement, and that the complainers had not made and were unable to make any averment in fact by which the construction could be ligitimately affected. My opinion on the construction of the agreement being favourable to the respondent and adverse to the complainers, I refused the note.

"In pursuance of the interlocutor pronounced by the First Division of the Court on 13th June, a record has since been made up and closed, and the case again argued before me on the part of the complainers, and with this result, that I retain the opinion to which I gave effect in the Bill Chamber when I refused the note on 21st May. As my judgment, which is simply a repetition of that which I formerly pronounced, probably differs from the opinion or impression which prevailed with the Judges of the First Division when they recalled my interlocutor and ordered a record, it is proper that I should mention the course of the discussion before me, and state the grounds of my judgment at greater length than I did formerly, although necessarily to the same effect, my opinion as then expressed having undergone no change.

"When the case was moved in the Procedure Roll the complainers asked to be allowed a proof at large, but to this request I was not prepared to accede without having pointed out to me the disputed statements of fact, which being proved, the complainers contended would or might influence or aid the construction of the minute of agreement, and the case was, at the request of the complainers' counsel, continued that this might be done after full consideration. I requested that the plea founded on the reference clause of the agreement, which, though stated as a subordinate and alter-

native, was really a prejudicial plea, should also be considered.

"On the case being again called, the complainers' counsel stated as the result of the consideration which had been given to the case,—1st, That, in the view of the complainers the rights of the parties depended on the legal construction of the minute of agreement; 2d, That the construction was for the Court, whose jurisdiction was not ousted by the reference clause, the plea founded on which they no longer maintained; 3d, That the only averment on record bearing on the construction of the agreement, and of which a proof was desired, was that contained in the last two sentences of the 21st statement, to the effect that the conservatory and its contents, being an agreeable and instructive feature of the gardens, the exclusion of subscribers therefrom, as proposed by the respondent, would discourage subscriptions, and so prejudice the interests of the gardens, and had in fact done so.

"The case, as thus presented, was narrowed to the construction of the minute of agreement on which I had heard and decided the case in the Bill Chamber, *plus* the question, whether the construction of it could be legitimately aided or influenced by proof of the averment in article 21, referred to.

"The argument then proceeded on the assumption that the only disputed fact alleged to be material was to be taken as the complainers averred it. So taken, it seemed to amount to no more than this, that it would be more advantageous to the garden revenues if subscribers, and others entitled to frequent the garden, were admitted to the conservatory without extra charge on some nights of the week, whether there were concerts on those nights or not, but, of course, more advantageous if there were concerts on those nights. I thought it of the nature of a self-evident proposition, which might very well have been extended by adding that free admission for the garden subscribers, not merely to some, but to all of the concerts, would probably increase the garden receipts. But I must confess my inability to find any aid from this fact in construing the agreement, which certainly contemplates and provides for the exclusion of the garden subscribers from all the concerts which the respondent is entitled to give, except on the condition of payment. This indeed is the material beneficial provision in his favour, which he purchased by the grant of the conservatory for the free use and enjoyment of the garden subscribers except during his entertainments while his privilege subsists (21 years), and absolutely thereafter.

"The period during which the respondent may give concerts in the conservatory on the terms prescribed is distinctly limited to twenty-one years, and the question is, whether the number of nights in each week on which he may have the use of the conservatory for the purpose is also limited, either expressly or by reference to any rule or principle from which a limitation may be satisfactorily implied, or the matter subjected to any other judgment or discretion than that of the respondent himself?

"The head of the agreement which directly bears on the subject is the 9th, whereby it is provided that the respondent shall be entitled 'to use on lawful days the conservatory for concerts,' &c. The argument of the complainers was, that as the adjective 'all' does not occur before some 'lawful days,' the Court ought, by construction, to insert 'some' as probably in accordance with the intention of the parties, and that if this were done three days in each week would be a reasonable number to pitch upon for the purpose of satisfying the respondent's right. I could not entertain this argument for a moment. The word 'occasions,' which occurs with reference to the entertainments in the 8th and 10th heads of the agreement, was founded on as indicating that the parties did not contemplate their occurrence every evening. But the word seems to me altogether appropriate to entertainments which could not occur till after a specified hour in the evening, and might occur or not, and more or less frequently, at different times and seasons during the currency of the agreement, without the possibility of anticipating the frequency with any certainty before hand. It happens, indeed, that the respondent, finding that his entertainments are popular, and therefore profitable, at present proposes in the meantime to give them every evening. How long this may continue no one can tell. The popular taste may, and probably will, vary greatly, or the public be carried elsewhere by greater attractions, with certain effect on the frequency of the respondent's concerts in the course of the twenty-one years which the agreement embraces. The parties must necessarily have contemplated that this would or might be the case, it is so likely, and so much according to experience. It is not merely possible, but by no means improbable, that there may be no entertainments in the conservatory for weeks, months, or even years together. I therefore think that the word 'occasions' is appropriate, consistently with the respondent's construction of the agreement, which in my opinion is the true construction, viz., that he is at liberty to exercise his own judgment, and consult his own interest, as to the frequency of his entertainments, and is not limited to three nights in the week.

"I have already noticed that the complainers' plea on the reference clause was abandoned as untenable. It was not contended that the garden committee had any power in the matter; indeed it seems clear that their authority is confined to a control with respect to the nature of the entertainments, as to which not only is there no objection stated, but it was expressly admitted that there was no ground for any. Indeed, the aim of the complainers is not to reform the entertainments, but to procure gratuitous admission to their subscribers to some of them: and it is noticable that they seek to limit the number to three in the week only if the respondent shall refuse the free admission asked for subscribers to those in excess of that number.

"It will be observed that the few statements added by the complainers on revisal relate to the plea founded on the reference clause, which was not maintained, but, on the contrary, at once abandoned as untenable. It was not suggested, and did not occur to me, that any of the respondent's statements were material in any view that could be taken of the case, and the complainers' argument was stated without reference to them, and on the footing that they were unimportant."

The complainers reclaimed, and argued — The conservatory was to be made part of the gardens, and the idea in the agreement was that although Mr Kibble was to have certain rights in the conservatory, yet all subscribers tot he garden should

have free entry. The contract was one in favour of the subscribers with an exception in favour of Mr Kibble, and the question was whether he was entitled to exclude the subscribers from the conservatory after five o'clock for the whole summer. Such a use of his right by Mr Kibble was clearly at variance with the intention of parties, being a use which would exclude the right of other parties altogether.

The respondent argued—In point of fact he was tenant for 21 years of the land upon which the conservatory was erected. There was no limitation of the number of nights on which the respondent might give concerts, and as tenant he was entitled to give them as often as it appeared to him desirable to do so.

At advising—

LORD PRESIDENT—The Lord Ordinary seems to have been under a misapprehension in thinking that when we remitted to him to pass this note in the month of June last we had formed an impression adverse to the rights of Mr Kibble under this agreement. That was not the impression on my mind at all. On the contrary, my impression at that time was in favour of Mr Kibble, but I thought it was very desirable, before disposing of the case, that there should be an opportunity given to the complainers of answering Mr Kibble's statements in point of fact. Now that we have the record completed by the complainers' answers to the respondent's statements of fact, my mind is still clearer than it was before in favour of Mr Kibble.

The agreement between the parties is apparently a very peculiar one. Indeed, I think that the whole history of this transaction is out of the common. But I do not think that any great difficulty arises from that cause. Mr Kibble was the proprietor of a very large conservatory erected at Coulport, Loch Long, and it was thought that the removal of this from his grounds there to the Glasgow Botanic Gardens would be a very good arrangement both for the Glasgow Botanic Institution and for himself. The parties entered into negotiations which issued in the agreement before us. The Lord Ordinary says, and says truly enough, that this case depends upon the construction of this agreement. But that is only true in a certain sense. We are not to consider this agreement as in an action of declarator, but as in an action for the purpose of regulating the joint possession which these parties are to have of the conservatory. And in dealing with that it is necessary to keep in view not merely the agreement, but the conduct of the parties acting under the agreement, and the causes of the present complaint. All these things must be kept in view in regulating the possession. Therefore it is not barely the construction of the agreement that we are to consider, but all these other circumstances in connection with it.

The agreement itself, however, I think is necessarily, from its peculiarity, an agreement that requires to be very carefully considered: but after reading all the parts of it I confess I do not entertain any doubt as to what was the meaning of the parties. The right which is to be in the person of Mr Kibble for twenty-one years after its date is of the nature of a right of lease, and he is to be as lessee the occupier of the conservatory. But that occupation is to a certain degree limited by the right of access to the conservatory, which is stipulated on behalf of the persons who are subscribers to the gardens, or otherwise have right of admission, and these parties are to have the same right of access to the conservatory as they have to the gardens, except when the conservatory is required for Mr Kibble's purposes—or, as it is expressed in the eight article of the agreement, they are to have "equal access to the conservatory during garden hours, except when the conservatory is required for the concerts and entertainments" mentioned in the following articles. This means that they are not to have right of access to the conservatory when it is required for these purposes.

A question, of course, arises here—Who is to determine when the conservatory is required for these purposes within the meaning of this agreement? That, I think, is made clear enough, as the agreement proceeds—"On which occasions such right of access shall cease at five o'clock P.M., or earlier if approved of by the joint committee aftermentioned." And then the parties agree (art. 9), that "subject to the right of admission specified in article 8th, the first party or his foresaids shall be entitled and have right to manage and regulate the said conservatory during the foresaid period; and, in particular, to use on lawful days the conservatory for concerts and other entertainments of such nature as shall be approved of by the said committee, the first party and his foresaids being at the sole expense of such concerts and entertainments, and being entitled to the whole proceeds thereof." Here, therefore, we see what was meant by the exception to the general right of access contained in article 8th.

There are, then, concerts and entertainments to be given by Mr Kibble on lawful days, and on these occasions he is to have the exclusive possession of the conservatory after the hour of five o'clock. And the question comes to be, whether it was contemplated by the parties that Mr Kibble should or might get possession of the conservatory for concerts and entertainments every night in the week except sundays. Now, I confess that I do not think the parties contemplated—meaning thereby that I do not think they expected—that Mr Kibble would give concerts and entertainments every night. But his right to give concerts and entertainments on as many nights in the week, and in such weeks of the year as he thinks expedient, without reference to the opinion of the other parties, is a totally different question. The concerts and entertainments are his speculation as lessee, and he must select the time when they will pay best, because the object is to make money by them, and that cannot be done unless the public pay, and that the public may pay he must suit the public convenience, and choose those days and weeks when it is most convenient for the public to resort to this place of entertainment. And accordingly, to say that he is to be restrained from giving entertainments upon more nights of each week than two or three, is practically to limit his discretion in such a way as to deprive him very much of the benefit of what was reserved to him—to deprive him, that is to say, of the benefit of using his own judgment and discretion as to the time he should give such entertainments so as to make the most money by them. Now, I do not think that that was in the contemplation of the parties at all. On the contrary, it appears to me that what they had in view was to leave Mr Kibble the discretion of choosing his own time for giving these entertainments, so as to enable him to make them as profitable to himself as

possible. And that was by no means an unreasonable arrangement to make, because unquestionably he was under this agreement undertaking very serious liabilities. In the first place, he had contributed the great erection at his own cost, and had undertaken to remove it to the Botanic Gardens from his own grounds, and to make very large and expensive additions to it. He also undertook to contribute £250 towards the expense of removing certain herbaceous plants from one part of the gardens to another to make room for the conservatory. He also undertook the entire burden of the maintenance of the structure of the conservatory during the whole period of the twenty-one years' lease. In these circumstances, it certainly seems to me a very reasonable arrangement that if he is to gave entertainments in this building at all for his own exclusive benefit, he should be entitled to choose his own time for giving these entertainments. I do not know that we are told what number of nights in the course of the year this conservatory is at present occupied by Mr Kibble for his entertainments, but I do not think it can be said that the number of nights is too great. It is clear that there are various occasions upon which the building is otherwise occupied. Indeed, it is admitted by the complainers themselves that during summer—that is to say, what is called summer in the sense of this arrangement—in the months of April and May—the building has been left unoccupied by Mr Kibble, and has been used by the complainers for their own purposes. Therefore it it is in vain to say that he is monopolising it during the whole time. That turns out not to be the fact. If there was anything very unreasonable in Mr Kibble's position—if it could be shown that he was appropriating the conservatory every night for the whole season—if it could be shown that the use he was making of it was not necessary to give a reasonable profit—I should, in a question of possession such as this, be more inclined to listen to the complainers. But there is nothing of the kind here; there is nothing in the least unreasonable or nimious in the way in which Mr Kibble has used the rights reserved to him, and therefore I am for adhering to the Lord Ordinary's interlocutor.

LORD DEAS concurred.

LORD ARDMILLAN—It is important to keep in view that this is not an action of declarator, but merely a suspension and interdict. It is right also to add that at the previous stage of the case we neither intimated nor entertained any opinion unfavourable to the pleas of Mr Kibble, but I am of opinion that the judgment which we are now to pronounce is of a more satisfactory nature than it would have been had we decided the case on the record as previously before us in the Bill Chamber.

Mr Kibble has undoubtedly made a gift of his conservatory to the complainers under certain conditions. But it is quite clear from the agreement entered into between the parties that Mr Kibble contemplated drawing a return from the conservatory when erected in the complainer's grounds. Accordingly he was to have a lease of the conservatory for twenty-one years. Now I am of opinion that every qualification of his right as a tenant which is of the nature of a limitation or exception must be instructed. Such limitation must be proved. It is not expressed, but it is said to be implied. A fair and reasonable construction of the contract raising implication plain may suffice, but where there are words of limitation, nothing but a clear implication can limit the right of the tenant under this lease. Mr Kibble's right is to the use of the conservatory on lawful days. That right cannot be further limited except in express terms, or by plain implication. He is prohibited having a concert on a Sunday, and he does not seek it; but there is nothing expressly to exclude his concert on any other day out of the remaining six. The eighth and ninth clauses of the agreement must be read together; and I cannot find in their terms any limitation of Mr Kibble's right to three days in the week, or any particular number of days less than six. There is certainly no limitation or restraint which he can be said to have overstepped in the admitted circumstances of this case. There may be equitable considerations which the Court might apply if Mr Kibble were making a nimious and unreasonable use of his right, but no such case has here arisen for consideration. We are however only dealing with a case of suspension and interdict, and should any departure from reasonable use occur in the future I am far from saying that the question might not be raised in the form of a declarator, or declarator and interdict.

LORD MURE concurred.

The Court pronounced the following interlocutor:—

"Having heard counsel on the reclaiming note for the Glasgow Royal Botanic Institution against Lord Young's interlocutor of 17th October 1874, Recal the said interlocutor: Repel the reasons of suspension, and refuse the interdict craved, and decern: Find the complainers liable in expenses," &c.

Counsel for the Complainers—Dean of Faculty (Clark), Q.C., and Balfour. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Respondents—Solicitor-General (Watson), Q.C., and M'Lean. Agents—J. & R. D. Ross, W.S.

Thursday, February 18.

SECOND DIVISION.

[Sheriff of Stirling, &c.

LAMONT *v.* GRAHAM.

Contract of Sale—Consenting Party—Heritable and Moveable—Fixtures—Moveable Fencing—Tenant and Liferenter.

A tenant, who was also a liferenter, erected certain iron fencing, capable of being removed without injury, around the policy of his house. This fencing took the place of an old wooden fence. To a sale of the estate the liferenter was a party, signing the articles of roup and conducting the correspondence, but a year thereafter he claimed the right to the fencing he had put up.—*Held* that the iron fencing was an accessory of the estate, and that the fact of the liferenter-tenant having been a party to the sale, and not having warned the purchaser, placed him in an even worse position.