illicitum. Further, he did not think the circumstances warranted reduction of the deed. Gilbert had not surrendered so much as was contended; and, on the other hand, he had his debts paid, and impending bankruptcy averted, and he was also to have a chance of reponement, with an alternative of £35,000 or £40,000. Hugh and Charles had also benefited by the deed. They were to be saved from the creditors of the man who had violated the deed of 1855. It might be the conditions were somewhat hard, but he knew what they were. He wished an absolute right to be reponed, but this would have destroyed the whole object of the deed. His Lordship said that, on the whole, he could not hold that there was undue pressure in the case; and as to the statement that the deed was unreal and not acted on, it was acted on in its most important particulars, and he therefore concurred in the judgment.

Appeal dismissed with costs.

Agents for Appellant—Adam Morrison, S.S.C.; and Upton, Johnson & Upton, London.

Agents for Respondents—Maitland & Lyon, W.S., and Campbell & Smith, S.S.C.; and Grahames & Wardlaw, London.

COURT OF SESSION.

Tuesday, March 15.

FIRST DIVISION.

SPECIAL CASE—BROWN *v.* SOUTAR.

Trust—Entailer's Debt—Charges against Capital or Income—Administration of Trustee. A died leaving a trust-disposition and settlement by which he directed his trustees, "after the payment of my said debts are all clear and discharged, then and in that case my said trustee or trustees, in their order as aforesaid, shall be bound and obliged . . . to execute a strict entail of my whole property, including all lands to be acquired as aforesaid." With other heritable property he died possessed of the Theatre Royal, subject to certain burdens, including a payment of an annuity to 104 shareholders and their successors, and an obligation to keep the theatre open during six months in the year as a theatre or opera-house. The trustee increased the sum of insurance very considerably, paying the premiums out of the income of the estate, which belonged under the deed to the heir of entail. The theatre was burnt down; and with the money derived from insurance, and £2000 taken from the income of the estate, and with the consent of the heir of entail, it was rebuilt. A claim by the heir of entail for repayment out of the capital of the sums expended in premiums of insurance, and of the £2000 advanced to rebuild the theatre, as being entailer's debts, and proper charges against capital, and not against income, *repelled*, on the ground (1) that the premiums were a proper charge against income, and (2) that the heir of entail had consented to the expending of the £2000 in rebuilding the theatre.

This was a Special Case presented for the opinion and judgment of the Court in the following circumstances. John Brown of Marlee died in 1858, leaving a trust-disposition and settlement, in which he nominated several trustees, of whom Mr W. S. Soutar is the only survivor, and to them he bequeathed all his property, real and personal, in trust for certain purposes. *Inter alia*, he directed —"But declaring always that these presents are granted in trust for the uses and purposes aftermentioned, viz.:—In the first place, my said trustee or trustees, in their order, shall, from the produce of my means and estate, pay all my just and lawful debts; secondly, and in respect that I owe considerable debts, my said trustee or trustees, in their order, shall out of the produce of my said estates, and the excess of the same, as the same shall be realised, pay the said debts; and so soon as these are paid, and the balance remaining shall be ascertained, then and in that case my said trustee or trustees, in their order as aforesaid, shall be expressly bound and obliged, as by acceptation hereof he or they bind and oblige themselves and their foresaids, to purchase and acquire lands to the extent of the balance of moveable property so recovered, to purchase and acquire lands in the county of Perth, as near to my properties in the parishes of Blairgowrie and Kinloch and Lethendy as may be, and to settle and secure the lands so to be purchased, together with my whole other property held by me heritably, wherever situated; and that my said trustee or trustees, in their order as aforesaid, shall take the rights and infeftments thereof, in the first place, in favour of him or them, as trustees, in their order as aforesaid: And after the payment of my said debts are all clear and discharged, then and in that case my said trustee or trustees, in their order as aforesaid, shall be bound and obliged, as he or they are hereby expressly taken bound, to execute a strict entail of my whole property, including all lands to be acquired as aforesaid, conform to the law of Scotland, containing all clauses irritand and resolutive, and particularly against selling or altering the order of succession; which said entail shall be made in favour of Allan Maclaren Brown, my nearest male relation by my father's side. In the third place, declaring that my said trustee or trustees shall hold my said properties, in their order, till the whole of my said debts are cleared and paid, and until the said Allan Maclaren Brown or John Brown shall attain the full age of twenty-five years complete." After the date of this deed, and shortly before his death, Mr Brown became proprietor of the Theatre Royal, Edinburgh, subject to a number of conditions. He acquired this property from the trustees for the shareholders of the original edifice, and he became bound to pay to each of the shareholders (104 in number) a perpetual annuity of £2 per annum, and to give each free admission to all parts of the theatre except the private boxes. There were also the following conditions:—"And also providing and declaring that the said John Brown and his foresaids shall not be entitled, without the consent of the said shareholders or rentallers and their foresaids, to convert the said theatre and opera-house to any other use or purpose than a theatre and opera-house; and also providing and declaring that the said theatre and opera-house shall be kept open for performance during at least six months in each year; and in the event of the said John Brown or his foresaids letting the said theatre and opera-house to the lessee or tenant for the time being of the Theatre Royal, Edinburgh, he shall take such lessee or tenant bound, so long

as he also continues tenant or lessee of said Theatre Royal, to give the shareholders or rentallers of the said Queen's Theatre and Opera-House free admission to the said Theatre Royal during the time the former is not kept open for performance." The truster was survived by his son Allan M'Laren Brown, who was then more than twenty-five years of age, and the trustees entered into possession of the estate, and proceeded to fulfil the purposes of the trust. The theatre had been insured by Mr Brown for £3000; but Mr Soutar, having regard to the danger of fire and the value of the property, increased the insurance to £15,000, with the sanction and approval of Mr M'Laren Brown, and paid the premiums out of the income of the trust-fund. In 1865 the theatre was totally destroyed by fire, and Mr Soutar, the trustee, received the sum of £15,000 from the insurance company. He was advised by counsel that he was bound under the deed of purchase to rebuild the theatre, and accordingly, in 1866, he proceeded to do so at a cost of £17,000. The £2000 required for this purpose, along with the insurance money £15,000, was advanced from the income of the estate, with the knowledge and without objection on the part of Mr M'Laren Brown.

The question in the present case arose in this way. The purposes of the trust are completed, and the trustee is ready to execute the entail as directed, but Mr M'Laren Brown now claims payment of two sums—the one amounting to £1730, which was paid as premiums of insurance between the truster's death and the burning of the theatre, and the other of the sum of £2000 expended on the building of the new theatre. These monies were advanced out of the income of the trust-estate, and it was stated by the trustee that if they were to be repaid some of the heritable property must be sold.

The SOLICITOR-GENERAL and BALFOUR, for Mr M'Laren Brown, contended—(1) That the trustee was not entitled to insure for a larger amount than the trustee had done; (2) that if an heir of entail insured his mansion-house, the insurance money derived at its destruction would descend to his executor, and not the succeeding heir of entail; (3) at all events, the heir of entail was entitled to repayment of the sums of £1730 and £2000, which had been advanced from income, and were the entailer's debts; *Temple* v. *Gavin*, M. 15,355; and (4) that the theatre should be sold to repay these sums.

FRASER and SPENS, for the truster, replied—(1) That the truster had intended to entail the theatre along with the rest of his property, and urban property was capable of being entailed; (2) that it was the duty of the trustees to increase the insurance; *Cross* v. *Smith*, 1806 (King's Bench), 7 East. 258; *Parry* v. *Ashley*, 3 Pymon. Rep. 97; (3) and these sums were a proper charge against income.

At advising—

The LORD PRESIDENT, after detailing the clauses of the deed as given above, said that the trustee under it had power to sell any of the heritable property to pay the testator's debt; and if there was any balance of the price of lands so sold, it should be reinvested in land in Perthshire, and entailed. It was also plain that Mr M'Laren Brown was to have the income after he attained the age of twenty-five.

The first question was, Whether he was entitled to be re-paid the sum of £1730 of premiums of insurance on the theatre, which had been paid between Mr Brown's death and the destruction of the theatre, out of the income of the fund? He thought he was not so entitled. It was the duty of the trustee to increase the insurance; and, besides, he had the concurrence of Mr M'Laren Brown, had that been necessary: and it had been very much for the benefit of Mr M'Laren Brown.

But the theatre was burnt down in 1865, and Mr Soutar was advised by counsel that he was under obligation to rebuild it. Without any objection on the part of Mr M'Laren Brown he did so, at a cost of £17,000, and the odd £2000 was paid out of income. This constituted the second question in the case. Mr Brown said that this sum of £2000 was a debt due to him by the estate, and claimed repayment.

This was in a different position from the other sum claimed, because unquestionably the trustee was not entitled without the consent of Mr Brown to increase capital in this way at the expense of income. But then Mr Brown, for reasons of his own, had consented to £17,000 being expended on rebuilding, and he could not now complain.

He thought that the claim of Mr M'Laren Brown should be repelled, and that the trustee should proceed to entail the theatre and all the other property as directed by the trust-deed.

LORD DEAS—I am of the same opinion upon the two questions in this case as your Lordship. I think it clear that the premiums of insurance formed a proper charge against the income of this estate; and that the heir-at-law has no title to repayment of them from the capital. With regard to the £2000 spent in rebuilding the theatre over and above the £15,000 obtained from the insurance companies, I am of opinion that, as Mr M'Laren Brown consented at the time that it should be spent in that way for the benefit of the estate, he cannot now demand repayment.

There is thus nothing to prevent the theatre from being entailed, provided we are satisfied that it was the intention of the truster that it should be entailed. I do not think that the nature of the subject makes it incapable of being entailed. There is no doubt great peculiarity arising from the perpetual burdens which have been constituted over it, but I cannot have the least doubt that the truster intended that the theatre should be entailed along with the rest of his estate. It is true that he bought the property after the execution of the trust-deed; but he lived long enough to make any alteration had he wished to do so.

It may be that he desired to perpetuate his name, and grant a perennial boon to the inhabitants of the metropolis in this way; and he was entitled to do so if he desired it; and I have no doubt that he desired that the theatre should be entailed, and therefore I agree with your Lordship that the claim of Mr Brown to repayment of these sums of £1730 and £2000 should not be sustained.

LORD ARDMILLAN concurred.

LORD KINLOCH.—I am of opinion that, on a sound construction of the trust-settlement of the late Mr John Brown, his trustee is bound to execute a deed of entail of the Theatre Royal in favour of the series of heirs pointed out in the trust-settlement. The question is not without difficulty; for the Theatre Royal is certainly not a fitting subject for an entail, particularly burdened, as it is, with a perpetual annuity of £2 each to 104

shareholders, as well as with the obligation to devote the building to perpetual dramatic uses—an obligation which almost requires for its fulfilment that the heirs of entail also combine the character of theatrical managers. Taking into view the provisions of the deed of settlement as to clearing the estate of debt anterior to the execution of a deed of entail, and the instruction to the trustees to purchase with any surplus out of properties sold for this purpose additional lands in Perthshire to add to the entailed estates, I think it not impossible so to construe the settlement as to authorise the theatre to be sold, and the price to be employed in the purchase of such lands. But I think that so to hold would involve a somewhat strained interpretation of the words employed. And considering the very explicit direction to entail "my whole property, held by me heritably, wherever situated," I consider it to be the only safe reading of the deed to view the instruction to entail as comprehending the Theatre-Royal. When I look to the history of Mr Brown's acquisition of the theatre, I am by no means sure that he was not as desirous to send this down in the form of a family estate as any of his other properties.

With regard to the premiums of insurance expended in insuring the theatre against fire, and in connection with these the sum of £15,000 received from the insurance office and expended in rebuilding the theatre, I entertain no difficulty. So long as the theatre remained in the hands of the trustee, I think it was a proper, if not absolutely incumbent step on his part to insure the building against fire. And the premiums fell to be paid out of the rent derived from the theatre, as part of the expenses of management. The theatre was destroyed by fire, and the trustee, by force of payment of these premiums, received from the insurance company a sum of £15,000, which he applied in rebuilding the theatre. In this, I think, he acted rightly. It would have been, in my estimation, against duty had he acted otherwise. And I hold that the rebuilt theatre must be now considered as simply standing in place of the original fabric, to be made the subject of entail. Mr Allan M'Laren Brown will be entitled to a conveyance of the theatre, as the first person called in the entail; but this, I think, is the full measure of his rights; and no other claim appears to me to lie in his person in connection with the expenditure of the premiums, or the receipt of the money from the insurance office.

The remaining question regards the sum of £2000 advanced out of the income of the trust-estate, with consent of Mr Allan M'Laren Brown, in order to make up to £17,000 the sum laid out in the erection of the theatre. Mr M'Laren Brown contends that this must be held a loan by him to the trust-estate out of what was income belonging to him, and that he is creditor of the trust-estate for repayment. If this contention were well-founded, it would simply result in this, according to the statements of the Special Case, that the theatre could not be entailed, but must be sold for payment of this alleged debt, in direct contradiction of the very purpose for which this advance was made.

I am of opinion that this claim by Mr M'Laren Brown is untenable. I think it must be held to have been his intention, when allowing the application of this sum of £2000, to make it a contribution towards the re-erection of the theatre; with no other return in view than what lay in the increased value of the theatre, as the subject of entail in his favour. By this outlay the theatre received an additional value of £2000; and more than probably the yearly return was enhanced much beyond what would be represented by ordinary interest on this amount. I do not think that it was competent to the trustee and Mr M'Laren Brown in conjunction, the one to borrow and the other to lend a sum on the security of the theatre, to the effect of constituting a debt for repayment of which forthwith to sell the theatre. They could not lay their heads together so to control the natural course of proceedings under the trust. I do not believe they had the slightest intention of doing so. And I consider no claim to lie in Mr M'Laren Brown's favour to repayment of the sum of £2000, or to anything else than a conveyance, under the fetters of an entail, of the theatre in its condition of enhanced value.

The questions put to us must, I think, be answered in conformity with these views.

Agents for Mr Brown—W. & J. Cook, W.S.
Agents for Mr Sutar—H. & H. Tod, W.S.

Tuesday, March 15.

SECOND DIVISION.

CAMPBELL *v.* CAMPBELL.

Husband and Wife—Desertion—Saevitia—*Aliment—Separation. Held* that an action of aliment at the instance of a wife, on the ground of cruelty and desertion, was not incompetent in respect there was no conclusion in the summons for judicial separation.

A husband having offered, in answer to an action of aliment on the ground of cruelty and desertion, to receive his wife back to his house, action superseded till his offer should be tested. The wife having returned, and the husband having in consequence thereof moved for *absolvitor*, motion refused, and the action still further superseded, on the allegation by the wife that the cruelty complained of was still continued.

This is an action at the instance of a wife, concluding for aliment against her husband, on the ground that he had deserted her for upwards of twelve months, and had also treated her with cruelty, although the cruelty was not of a nature *per se* to warrant judicial separation. In his defences the husband, while he denied the desertion and cruelty, judicially offered to receive the pursuer into his house, and to maintain her as his wife. He pleaded that, in respect of this offer, the action should be dismissed, and also that the action was incompetent in respect there was no conclusion for judicial separation.

The pursuer maintained that the action was competent, on the ground of desertion, and that the offer to receive her to his house, which was made for the first time in the defences, was not a genuine *bona fide* offer, but a device resorted to by the defender to throw out the action, and to get quit of an inhibition raised on the dependence. The Lord Ordinary (JERVISWOODE), after hearing parties on the relevancy, allowed a proof before answer, and decerned against the defender for payment to the pursuer of a sum towards the expenses of process.