the master could deduct wages for the eleven weeks' absence. He had taken the servant back, and the Court held that he must stand by the bargain. Lord Fraser says it is hardly to be followed as an authority, but I do not know, and perhaps if the same question were to arise the same decision might be given. The second case of *MacLean* v. *Fyffe* is important for Lord Meadowbank's *dictum*, quoted by the Sheriff-Substitute. It is not right for a master to act on every case of a servant's sickness, but where it is absolutely indispensable to have a successor absence is a breach of contract.

Lord Craighill—I agree with your Lordship's view of the facts and of the law of the case. The important question doubtless is, whether or not the pursuer's absence amounted to a breach of the contract to remain in the defender's service. It is another question altogether whether or not the pursuer was entitled to such notice of the termination of his contract as a yearly servant in ordinary circumstances is entitled to. If our view of the facts is correct then there is no need to consider it.

Lord Kinnear concurred.

Lord Young and Lord Rutherfurd Clark were absent.

The Court dismissed the appeal and affirmed the judgment of the Sheriff-Substitute.

Counsel for Pursuer—A. J. Young—Orr. Agents—W. Adam & Winchester, S.S.C.

Counsel for Defender—Dickson—Shennan. Agents—Nisbet & Mathison, S.S.C.

Saturday, June 13.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

LOGAN'S TRUSTEES *v.* REID.

Agent and Client—Gift by Client to Agent—Private Box at Theatre—Confirmation after Relationship Ceased.

Held (*diss.* Lord Justice-Clerk) that a gift of a private box at a theatre by a client to his law-agent while that relationship was subsisting, was reducible by the heirs of the donor as a gift between agent and client, notwithstanding that the gift had been enjoyed by the donee for five years after the relationship had ceased, without the donor making any challenge of it.

In 1874 William Reid, W.S., was employed by William Hugh Logan, Edinburgh, as his law-agent, and continued his agent till 1877, when the agency ceased. In 1874 Mr Logan acquired the Theatre Royal, Edinburgh, which he sold to the Edinburgh Theatre Royal Company (Limited), under a reservation to himself of two private boxes in the theatre for his sole and exclusive use. On the 4th February 1876 he assigned to Mr Reid, and his heirs, successors and assignees, the sole and exclusive right of admission to one of these private boxes. The deed was prepared by Mr Reid, no other agent being consulted in the matter, and no value (apart from Mr Reid's past services) was given therefor. It bore to be granted "for certain good causes and considerations." While Mr Reid was Mr Logan's agent, other agents occasionally acted for him in particular matters. Mr Reid's successor as Logan's agent was Mr Officer, S.S.C., who acted till Mr Logan's death. Mr Logan was aware that he had power to revoke the gift, and from time to time expressed to various persons, Mr Officer amongst the number, his intention to do so. He never expressed to Mr Reid any intention of revoking the gift, and Mr Reid by himself and his friends used the box till Logan's death in December 1882, and thereafter until the then existing theatre was burned in June 1884. Logan attended the theatre and took part in its business as joint-lessee with Mr J. B. Howard up to within three weeks of his death, and he saw Mr Reid using the box. The gift was never challenged till November 1884, when Logan's trustees executed a deed of revocation recalling the gift. Thereafter they brought this action to reduce the assignation.

It was admitted that the box had a substantial value, but the parties differed as to the precise or approximate amount thereof.

The pursuers explained the grounds on which Logan himself took no steps to reduce the gift, notwithstanding his intention to do so, to be, (1) financial difficulties, (2) that his health was feeble, (3) that his mind was much occupied with a litigation in which he was engaged (and in which another agent acted), and with a dissolution of partnership with a co-lessee.

They pleaded—"(1) The said gift having been made by a client to his law-agent while that relationship subsisted between them, the same is null and void, and the pursuers are entitled to decree as concluded for. (2) The said William Hugh Logan was not precluded from recalling the said gift during his lifetime, in respect (1st) that it was null and void *ab initio*, and could be recalled by him at any time; and (2d) that there was not, in the circumstances, any acquiescence on his part, or any confirmation by him of the rights thereby conferred on the defender. (3) The said assignation being null and void and revocable, the pursuers are entitled to decree in terms of the summons."

The defender pleaded—"(1) The statements of the pursuer are irrelevant and insufficient in law to support the conclusions of the summons. (3) *Separatim*, The said assignation having been acquiesced in, and acknowledged and confirmed by Mr Logan during the period after the relation of agent had ceased between him and the defender, and remaining unrevoked at his death, the present pursuers have no right to revoke the same, and the defender should be assoilzied."

The Lord Ordinary (M'Laren), after the facts already stated had been established by proof and admission in a joint-minute, pronounced this interlocutor—"Finds that the assignation libelled was a gift by the deceased William Hugh Logan to his agent, the defender, during the subsistence of the relation of agent and client, and that the same was not confirmed by the granter after the termination of such relation: Therefore reduces, decerns, and declares conform to the first conclusion of the summons.

"*Note.*—This action is instituted by the testa-

mentary trustees of the deceased Mr Logan, sometime proprietor of the Theatre Royal, Edinburgh, against Mr Reid, Writer to the Signet, for the reduction of a gift by Mr Logan to Mr Reid of the perpetual right to the use of a private box in that theatre.

"Mr Logan on 23rd November 1875 sold the theatre to a limited company, under reservation of the exclusive right to two private boxes. On 4th February 1876 Mr Reid, without any valuable consideration, acquired one of these private boxes from Mr Logan. By the first article of the minute of admissions it is ascertained that the relation of agent and client existed at the time of the gift, and I therefore find that the assignation libelled is reducible as a gift by a client to his agent during the subsistence of that relation. In a recent case I gave reasons for the opinion that all such gifts are reducible, and that the objection is not to be overcome by evidence that the gift was unsolicited. The case was taken to the Inner House, and the judgment affirmed. I therefore do not enter further on this topic.

"In the present case the defender contends that the case ought to be regarded as one in which the gift was confirmed after the relation of agent and client had ceased. It appears that the defender ceased to act as the agent for Mr Logan individually in August 1877, but continued to act for the company to which Mr Logan sold the theatre, and in which he retained a small interest.

"The defender in 1877 rendered some trifling services to Mr Logan as law-agent, but in this question I think these services should be left out of account. There is thus an interval of five years from the cessation of the individual agency to Mr Logan's death on 22d December 1882. This is an element so far favourable to the defender's contention. But in my opinion the mere lapse of time does not amount to confirmation so as to bar the right of challenge of the gift. I do not think that express confirmation by deed or writing is necessary to raise such a bar. There may be virtual confirmation by acts which are inconsistent with the supposition that the granter stood upon his right of challenge. In the present case, however, there are no such acts except that Mr Logan was in the habit of going to the theatre, where he saw the defender or his friends occupying the box in question. The defender thinks that Mr Logan was pleased to see him making use of the privilege, but appearances are some times deceptive, and according to the evidence of Mr Mair, Mr Logan all the time entertained the design of reducing his gift as soon as his affairs were in a prosperous condition. Ultimately his health was such as to indispose him for engaging in litigation, but he never expressed any different opinion as to the defender's right to the box from that which he had indicated to Mr Mair. In these circumstances I am of opinion that Mr Logan's representatives are entitled to exercise his right to rescind."

[The decision referred to by his Lordship in the foregoing note was that in *Anderson* v. *Turner*, July 16, 1884 (not reported), in which his Lordship stated the law as follows—"I think there are very strong reasons for maintaining and strictly applying the rule that disables a solicitor from accepting a gift from his client while the relation of agent and client subsists. According to the settled current of authority in England such a gift is void under all circumstances, and the agent will not, as in the case of a purchase of the client's estate, be allowed to support the gift by evidence that the gift was obtained without fraud or improper solicitation. It is not very clear on the authorities whether the rule has been accepted in Scotland in so absolute a sense. The authorities are, as I apprehend, not opposed to the acceptance of the rule as established in England, and on such a subject I should certainly not be disposed to assist in introducing a new distinction between the doctrines of the English and Scottish Courts. For this reason, and because the rule appears to me to be well founded, I am prepared to hold that the assignation and back-letter in question are null on the sole ground that these writings constitute a gift to an agent while the relation of agent and client was subsisting. I think it very much better for solicitors themselves that all such gifts should be cut down by the operation of a uniform rule than that each case should be considered on its merits. In the case of a purchase by a solicitor from a client it may very well be that the transaction is advantageous to both parties—the one party wants money, the other wants an investment—and what the Court inquires into is the fairness of the transaction. But a gift can never be advanvantageous to the donor (in the legal sense), and one cannot predicate fairness or unfairness regarding it. There is therefore no true analogy between the case of a gift and that of a purchase to which the defender naturally seeks to assimilate his case." In that action the Second Division on 16th July 1884 adhered to the interlocutor of the Lord Ordinary reducing the transaction there in question as a gift of the client to the agent while the relationship was subsisting.]

The defender reclaimed, and argued—The Lord Ordinary was wrong in holding that such a gift as the present was an absolute nullity. It was only revocable in the option of the donor. Here the donor knew that he had a power of revocation, but he never exercised it. After the relationship of agent and client had ceased he showed his "fixed, deliberate, and unbiassed determination"—*Wright* v. *Vanderplank*, March 1856, 8 De Jex, Macnaughton & Gordon's Rep. 133—that he meant to abide by the gift. He saw the donee constantly using the box, and never made the smallest intimation to the latter that he intended to revoke the gift. This lasted for five years from the cessation of the agency till the donor's death. In *Mitchell and Another* v. *Humfray*, March 22, 1881, L.R., 8 Q.B. Div. 587, it was held that though a gift to a person in a confidential relation to the donor, *e.g.*, to a physician from his patient, may be voidable, yet if after the confidential relation has ceased to exist the donor elects to abide by the gift, and does so, it cannot be impeached after his death if it is not proved that the donor was aware that the gift was voidable at his election. In *Long* v. *Taylor*, June 8, 1821, 1 S. 57 (N.E.) 59, there was the element of fraud. That element also existed in *Anstruther* v. *Wilkie*, Jan. 31, 1856, 18 D. 405. See also *York Buildings Company* v. *Taylor*, 1 S. 57, *aff.* 2 Sh. Ap. 252. Here there was no fraud whatever.

The pursuers replied—It was settled in the law

of Scotland, as in that of England, that all such gifts were absolutely null and void as being contrary to public policy—Snell's Equity, 480; *Tomson* v. *Judge*, June 1855, 3 Drewry's Rep. 306; *Anstruther* v. *Wilkie, supra.* It was true that lapse of time without challenge might be favourable to the idea of confirmation and to a plea in bar of reduction of the gift, but it might be explained —*Walmersley* v. *Booth*, June 29, 1739, 2 Aikin's Rep. 25; *Morse* v. *Royal*, March 1806, 12 Vesey's Rep. 355; *Gresley* v. *Mousley*, April 1859, 4 De Jex & Jones' Rep. 78 (L.J. Turner, 78); *Champion* v. *Rigby*, May 20, 1830, 1 Russell & Mylne, 539. Here the donor expressed his intention repeatedly to revoke the gift, and had he lived longer he would have done so.

At advising—

Lord Craighill—The pursuers of this action are the testamentary trustees of the late William Hugh Logan, sometime proprietor of the Theatre Royal, Edinburgh, who died in September 1882. The defender is Mr William Reid, Writer to the Signet, Edinburgh.

What has given rise to this action is an assignation or conveyance to the defender by Mr Logan on 4th February 1876 of a private box in the Theatre Royal. When this conveyance was granted Mr Reid was the law-agent of Mr Logan. He had been so from June 1874, and he so continued till November 1877. At the latter date the connection of agent and client between them came to an end and never was renewed.

The box of the theatre so conveyed to Mr Reid has been used by him, and by friends of his upon his order, from the time when the right referred to was acquired till the institution of the present action, and there never was in that period any intimation made to Mr Reid that the assignation which had been granted was to be challenged. The present action, however, has been instituted to set it aside, on the ground that it was a gift or donation by a client to his law-agent when the relationship of agent and client existed between the parties to the transaction, and upon this ground the deed by which the gift or donation was effected has been reduced by the Lord Ordinary.

The first question in a case like the present is, Was the right given as a gift or donation? The assignation challenged does not so describe the transaction. What it says is that the conveyance was given for certain good causes and considerations, the nature or number of these not being explained. All difficulty, however, on this head has been obviated by an admission on the part of the defender to the effect that what he got was given and received as a gift or donation, for which no consideration of any kind was ever rendered to Mr Logan. The value of the gift is uncertain, for the views of parties on that subject are not in harmony, but both, as the minute of admission shows, are agreed that "the box has a substantial value."

Things being as I have now related, I concur with the Lord Ordinary in holding that the conveyance was a nullity. By this I do not mean that it could not be set up by conduct on the part of the donor subsequent to the time when the relationship of client and agent between him and Mr Reid was closed. What I mean is that the deed by itself will not support the gift, and must be held to be ineffectual, unless the defender shall show that it was validated by something which occurred subsequent to the time when Mr Reid ceased to be the agent of Mr Logan. Has this been shown? The Lord Ordinary has found the contrary. For his interlocutor bears that the assignation was not confirmed by the granter after the termination of such relations, and I agree in this also with the Lord Ordinary. All that can be referred to by the defender to support his contention is really the mere lapse of time without challenge, which no doubt was very considerable, extending from November 1877 to December 1882. But lapse of time is not enough by itself in a case like the present. The question is not one as to limitation or presumption or personal bar, but is one as to confirmation, and proof of intention to confirm is required. For this there must be something of a deliberate and positive kind, and such as makes what is said to be confirmation substantially equivalent to an iteration of the gift conferred by the deed. The reason is obvious. A transaction of this kind is contrary to public policy, and consequently was one regarding which the Court is not entitled to be astute in finding excuses upon which the gift may be sustained. The deed in question, when granted, ought not to have been taken, and by itself it carried no right, and if the thing which was gifted was to become the property of the donee, that must result from something by which the assignation was validated after the agency came to an end. There is nothing of this kind which has been established, and therefore the defence must fail.

The title of the pursuers on the assumption that there was no confirmation has not been disputed. On the contrary, the condition of the argument presented to the Court was, that if Mr Logan did not confirm the gift, his testamentary trustees were entitled to reduce it after his death, as he himself might previously have done.

For these reasons I think that the judgment of the Lord Ordinary ought to be affirmed.

Lord Kinnear—I am of the same opinion. I am not sure that I should concur with the Lord Ordinary in describing this assignation as a nullity, because if that were so I do not see how that could be set up by mere confirmation. And it is obvious that third parties acquiring rights under the donee in ignorance of the defect in his title, would, if the transaction were absolutely null, be unable to maintain those rights against the donor and his representatives. And therefore I should prefer to say that a conveyance or contract obtained by undue influence, whether the undue influence is proved to have been actually exercised, or whether it is only presumed by law (as in such a case as this is), is in precisely the same position as a conveyance or contract obtained by actual fraud—that is to say, it is not void but voidable at the option of the donor or the person coming in his place, and is valid until rescinded. I do not know that that distinction is of much practical importance, however, in this case, because it appears to me that the real question in either view is precisely the same, viz., whether the acts and conduct of the donor afford sufficient evidence of a fixed and deliberate intention that the transaction shall not be impeached?

It will be observed that the question arises in an action in which the donor's representatives exercise an option, which undoubtedly has been transmitted to them, to void the transaction; and the only answer made to them is the answer which would have been made to the donor himself had he exercised an option during his lifetime—that he is precluded from impeaching it by conduct evincing a deliberate intention to confirm it during his lifetime. Now I entirely agree with what Lord Craighill has said as to the evidence upon that point. It is not, I think, maintained that lapse of time would in itself be an absolute bar to the rescission of such a conveyance. It is very good evidence tending to instruct the intention of the donor to confirm, but in itself it is not conclusive evidence of that intention. I think all the evidence we have here is consistent with an intention on the part of the donor to set aside the transaction. It is equally consistent to leave it standing. But the result of that is, that there is no evidence of any deliberate intention on the part of the donor that the transaction shall not be challenged. I think, further, that in estimating the weight that ought to be given to evidence in such a case the nature of the property may be very material; and having regard to the peculiar nature of the right which is conveyed by the assignation under challenge, I think it impossible to hold that the mere abstinence for several years —four or five years in this case—on the part of the donor to make any direct challenge of the use which the donee so made of the right necessarily infers an intention to leave him in the enjoyment of a permanent right. The donor might be very well content that the privilege should be exercised for a time without having finally made up his mind, after he was in a position to make his election between voiding and confirming the transaction, that it should not be impeached. But without saying more, I am on the whole matter of the same opinion as the Lord Ordinary.

Lord Justice-Clerk—I have had very great difficulty in this case, and I have listened very attentively to the opinions your Lordships have delivered, and I regret to say that those difficulties have not been removed. But I shall only content myself with explaining very shortly the direction in which they point.

I quite accede to the general principle upon which the proposed judgment proceeds. Our law is exactly the same as the law of England in the foundation of it on that matter, but it is a remarkable fact, not to be lost sight of in a juridical point of view, that the cases on this head, as regards the relation of agent and client, which have been decided are with us very few indeed, while in England they have been very numerous. Where there is a paucity of decision I think that is a fact not without its importance, and what I should deduce from it would be this, that while the principle is the same, it does not follow that all the *dicta* that have been recorded by the English Judges are necessarily for our guidance. But this is a very peculiar case. It is not the case of an agent obtaining from his client a landed estate, or a large sum of money, or stocks, or shares, or anything of that kind. It is a gift—the donation—of a means of recreation and enjoyment, not for gain, but for the purpose, as I say, of recreation of the donee and his friends, and the proposition that is maintained, as I understand to its full extent, is that that never can be done when the relation between the parties is that of agent and client. I should hesitate to affirm that as an abstract proposition. Suppose an agent is presented with a season-ticket for an exhibition by the party who has the right to the exhibition, or even that a pass to a cricket ground is given by the members of a cricket club to a gentleman, their solicitor, who may have pulled them through some difficulty on a former occasion, or that a landed proprietor gives his solicitor the right to drive through his grounds—himself and his family—as long as he resides in a particular place. Hundreds of other cases of the same kind might be instanced, all of which would fall under the rule. There would be no escape from it. Now, I should have no sympathy with challenges of that kind, and I doubt if the law can be stretched and extended to such a point as that. But in the present case that is not all, for it goes a little further. The granter of the right was the lessee of the theatre, and he conveys away absolutely one of the boxes to his law-agent. There is no confirmation of the gift, and as to value, while to the donee there was probably more value in it from the fact that it was not done for gain, the right conferred is said to be not without value, although value is not the prominent part of it. The main feature of it is its use for the purposes of recreation by the grantee and his friends. No other use has been suggested. It was said that the grantee might let it to the public, but I think a serious question might have arisen there whether that was within the true import of the grant.

I have made these observations on the nature of the case, but to tell the truth I have no sympathy with it at all. It is not upon that that my main difficulty rests, because I can see that the logic of the matter might come to the conclusion at which your Lordships have arrived. But I think that the subsequent actings of the donor really preclude him and his representatives from this challenge. I think it has not been fully described as a lapse of time. It is not the lapse of time, which truly has nothing to do with it, but the material elements—I think they have been rather overlooked—are, first, that the grantee has continued to use the grant in the knowledge of the granter, and secondly, that the relation of agent and client has ceased to exist, and ceased to exist for five years during which use has been made of the grant. That is not lapse of time. It is not a matter of time at all. It is *rei interventus* in the knowledge of the granter, and *rei interventus* after all bar had been removed by the cessation of the relation of agent and client. In my apprehension, even upon the strictest view of the authorities that have been quoted to us, the five years that elapsed after Mr Reid ceased to be Mr Logan's agent amounted to a confirmation, and could amount to nothing else, of the grant that had been given. So far from thinking that the conversations between Mr Logan and his friends go against that view, my strong impression is that they give it the strongest confirmation. For if he was pressed by Mr Mair and the members of his own family to undo this grant—which he did not—and allowed it to go on to the end of his days without any challenge to the

recipient of this peculiar gift, I do not think the confirmation could have been stronger.

I have thought it right to the parties to express my views.

Your Lordships adhere to the interlocutor.

Lords Young and Rutherfurd Clark were absent.

The Court adhered.

Counsel for Pursuers — Strachan — Rhind. Agent—William Officer, S.S.C.

Counsel for Defender — Mackintosh — Lang. Agents—Drummond & Reid, W.S.

Tuesday, June 16.

SECOND DIVISION.

[Sheriff of Aberdeenshire.

REID *v.* MITCHELL.

Reparation—Personal Injury—Persons Engaged together in a Dangerous Amusement—Liability of Persons so Engaged for Injury to Other Persons.

A man while engaged in his work of building a stack was injured by another who was working with him, and who, in the course of some rough play in which the injured man was not taking part, but without any intention of injuring him, pushed him off the stack. *Held* that the person whose act caused the injury was liable in damages to the injured man.

Observed that a person who is injured in the course of a game in which he takes part by any cause ordinarily occurring in such a game is not entitled to damages therefor, but takes the risks of the game in which he joins.

James Reid, crofter, Graystone, in the parish of Skene and county of Aberdeen, raised the present action against Alexander Mitchell, crofter, Lyne of Skene, in the same parish and county, concluding for £300 for bodily injuries sustained by him. He averred that the injuries were caused by the defender having wilfully, recklessly, and carelessly seized him and pushed him off a stack of straw, which they were then engaged in building, to the ground, whereby he fell on his head and sustained the injuries libelled.

The defender stated in defence that he accidentally knocked against the pursuer and both fell off the stack to the ground. There was no intention on his part to push the pursuer off.

A proof was led at which the following facts appeared—Pursuer, defender, and two other men were engaged in building a round straw stack about twelve feet in diameter with straw from a steam threshing-machine which was being worked beside it at the time. At the time of the accident the stack was about five feet in height, at least a man could look over it. The straw was being forked up by men from the ground in large quantities, so that it occasionally came over the men and covered them. Defender began larking, and the other two men joined him by throwing each other down in the straw. Pursuer, whose duty it was to go continuously round the stack and keep the straw out to the circumference did not join in the fun, but seemed to enjoy it. According to the evidence of one of the other men on the stack, defender just put his hands on pursuer's shoulder and pursuer slipped over the side. Witness thought he did so just to keep up the fun. Pursuer deponed that he heard defender say, just before he ran at him, "I'll ca' James Reid down," but this was not heard by any of the others, and was denied by the defender. Defender said he was rising up from some straw which had been thrown over him by the forkers and could not see for it when he accidentally knocked against the pursuer. Pursuer fell on his head and sustained concussion of the brain and injury to the spinal cord. Defender also fell off the stack. It appears from the evidence of several witnesses that the frolic was no greater than was usual on such occasions.

The Sheriff-Substitute (Dove Wilson) pronounced this interlocutor—"Finds in fact that on the occasion set forth in the petition the pursuer was injured through the fault of the defender: Finds in law that the defender is liable in damages; assesses the same at the sum of fifty pounds sterling, and decerns against the defender for that sum.

"*Note.*—[*After narrating the facts*]—Unless it can be said that the injury was the result of a pure accident, the defender must be held responsible. I do not see how it can fairly be attributed to pure accident. It is undoubted that the defender had no intention to injure the pursuer, and that nobody was sorrier for what happened than he was. His conduct does not show lack of proper feeling on his part. Nevertheless, the injury could easily have been prevented had he exercised ordinary care, for in the exercise of ordinary care the defender would not have interfered with the pursuer. It seems to me, therefore, impossible to absolve the defender from the consequences of his indiscretion. A thing which ordinary care could have prevented cannot be called a pure accident. To take any other view would be to throw the whole consequences of the defender's fault upon the pursuer, and unfortunately, even though the pursuer does get such compensation as the law can award, the consequences upon him will be very serious.

"I have been somewhat reluctant to come to this conclusion, the defender having had no bad motive, and his fault not having been great, but I do not see that any other result would be equitable."

On appeal the Sheriff (Guthrie Smith) pronounced this interlocutor—"Recals the said interlocutor: Finds it proved that on the occasion libelled, while the pursuer was engaged with some others in building a stack of straw, he was unintentionally pushed off the stack and fell and injured himself, but not through the fault of the defender: Therefore assoilzies the defender from the conclusions of the action.

"*Note.*—This is a lamentable accident, arising out of the rough play which sometimes goes on in the farmyard in the building of a straw stack, but much as everyone must sympathise with the victim of the occurrence, there was plainly no