for general damages.

"The view of these authorities seems to me to be that if there was any injury to the servant beyond the dismissal, of the character of a tort, that must be made the subject of a separate action—a course which would be very inconvenient as giving rise to additional litigation. There seems no good reason why the whole matter should not be disposed of in one action. But in the present case it is unnecessary to consider whether this is competent or not, because there is no ground whatever for alleging any further injury sustained by the pursuer than his dismissal. In the most express terms, the defender by his letter of 9th June 1884, quoted in the record, stated that he was anxious that it should be clearly known that the pursuer was leaving for no fault of his. 'Everyone will understand that the complete change of circumstances is the only reason, and although I named the term, I do not wish to hasten your departure inconveniently for yourself, and therefore you must not hesitate to tell me if a month or two longer would facilitate your arrangements.' This letter leaves the case to be decided upon the simple ground of dismissal without any aggravating circumstances.

"The Lord Ordinary has considered the case on the footing that damages are due to the pursuer, and the question merely is, what amount can be claimed? Is the offer of the defender of a year's salary and allowances till Whitsunday 1885 sufficient compensation? The Lord Ordinary is of opinion that it is. This would be enough for the decision of the case, because the defender still adheres to his offer, although he maintains, further, that the notice that he gave was ample, and that no damages could in strict law be claimed. The terms of the contract between the parties must here be kept in view. It was only to remain in full force till it was recalled by a writing under the defender's hands. This means that at any time the defender could exercise his power of recal without reference to terms of Whitsunday or Martinmas, Lammas, or Candlemas. The engagement of the pursuer as factor had no reference to these terms. Of course, the pursuer, before the power of recal could be exercised, was entitled to receive reasonable notice but nothing more, and what is reasonable notice is always a question of circumstances. Three months is a reasonable notice, and here the pursuer received four months' notice, subsequently extended for two months by the letter of 9th June. In this view of the case the defender has dealt very liberally when he made the offer that he has done, and the Lord Ordinary thinks that there is enough appearing upon this record to entitle him to pronounce judgment without further procedure, and this although the pursuer declines to accept the offer which has been made to him. Of course if he will not take the money the defender may keep it."

Counsel for Pursuer — Brand. Agent — R. Ainslie Brown, S.S.C.

Counsel for Defender—Mackay. Agent—Horne & Lyell, W.S.

Thursday, January 22.

OUTER HOUSE.

[Lord Kinnear, Lord Ordinary on the Bills.

BELL, RANNIE, & COMPANY *v.* SMITH (WHITE'S TRUSTEE).

Sale — Suspensive Condition — Bankruptcy — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 104.

Wines were forwarded to a hotel-keeper for use in his business, the wine merchant retaining, according to the verbal agreement of the parties, the property of the wine, and having access from time to time to the cellars in order to take stock. The hotel-keeper, on stock being thus taken, paid for what had been used. The hotel-keeper having been (after a number of years' dealing on this footing) sequestrated, *held* (by Lord Kinnear) that the wines then in his cellars, and sent there under this course of dealing, did not fall under the sequestration.

The estates of Henry White, hotel-keeper, London Hotel, Edinburgh, were sequestrated in June 1884.

This was a petition by Bell, Rannie, & Company, wine merchants, to declare to be their property certain wines mentioned in the petition, not part of the sequestrated estate, and which were in the hotel cellars at the date of sequestration.

The Bankruptcy Act 1856 provides by sec. 104 — "Any person claiming right to any estate included in the sequestration may present a petition to the Lord Ordinary praying to have such estate taken out of the sequestration, and the Lord Ordinary shall order the trustee to answer within a certain time, and on expiration of such time he shall proceed to dispose of the application."

The petitioners alleged an agreement entered into in 1874 whereby wines were to be supplied to the hotel by them, but not to be White's property or be invoiced to him, but to remain in the hotel cellars their property and at their risk, White to be entitled to take from the cellar such wines as were required and when required for his business, stock to be taken monthly, the wines consumed to be paid for, and the prices to be fixed when the wines were sent. They set forth that such contracts were customary in the trade.

The trustee did not admit these averments, and opposed the petition.

A proof was led. The import of it was that no written contract had been made between the parties, but that the bankrupt had arranged with the petitioners' manager that they would supply him with wines to be paid for as consumed, the number of bottles had being determined on a monthly stock-taking. The price was fixed by the notice sent with the wines, but the petitioners on several occasions gave notice of a change of price after the wine was in the bankrupt's cellars. The bankrupt had full control over the wines. Both the manager and the bankrupt deponed that it was understood at the time that the wine was to remain the property of the petitioners, but neither could say there was any particular stipulation to that effect.

The proof of custom of the trade was objected to and disallowed.

The Lord Ordinary gave decree in terms of the prayer of the petition.

"*Opinion.*—There can be no question as to the true intent and meaning of the contract between the claimants and the bankrupt. The two witnesses who alone can speak to it differ in some respects in their accounts of what passed between them when it was made. But they are quite agreed as to the understanding between them. The difference in matters of detail is not greater than might reasonably be expected in the recollection of two persons speaking, after the lapse of ten years, to a verbal bargain the import and intention of which they remember better than the words in which it was expressed. There is no imputation against their honesty, and I therefore hold it to be proved that the bargain was in fact what they say it was, viz., that the claimants should place wines in the bankrupt's cellar to be used by him for consumption in his hotel; that they should take stock once a month, and charge for what was found short in the bin; that he should pay cash for the wine consumed, not necessarily at the prices current when it was deposited in the cellar, but either at these prices or at such altered price as might in the meantime have been intimated to him by the claimants, and that he should not be liable to pay for, or in other words should not be considered as having purchased, wine which at the taking of stock was found to be still in the cellar. Both parties understood that the wine deposited in the hotel cellars still belonged to the wine merchants, and that it continued to be their property until it should be removed from the bins for consumption in the hotel. And accordingly the risk was not transferred to the hotel-keeper, but remained with the merchants, who insured the wine as their own property.

"This is a perfectly intelligible and, in my opinion, a perfectly legal contract, and I see no reason for refusing to give effect to it. It is said that delivery transfers property, but that is true only when delivery is made in execution of a contract to transfer property, or else in circumstances which bar the true owner from denying that the property has been transferred. There is nothing unintelligible or contrary to legal principle in a contract of purchase and sale which shall be qualified by a condition supensive of the sale, that it shall not take effect except on a certain contingency, although in the meantime, while the contract is still incomplete, the goods may be deposited with the proposed buyer to await the contingency on which the contract is to be complete. It is said that the agreement is either an ordinary sale or a contract of sale and return; and the respondent's counsel relied upon the doctrine as to the latter contract expounded by the Lord Justice-Clerk in *Brown* v. *Marr*, Jan. 8, 1880, 7 R. 427, and by Lord Justice Mellis in the case of *White in re Neville*, L.R., 6 Chanc. Ap. 397. But there is no analogy between the contract in question and the contract of sale and return. In the case of *Brown* v. *Marr* the Lord Justice-Clerk has shown that in the contract of sale and return the condition empowering the buyer in a certain event to return the goods is in its nature resolutive and not suspensive of the contract. But the principle, as his Lordship has explained it, is that the goods have been delivered upon a contract to transfer the property for a price which has either been paid, or which the buyer has undertaken to pay, unless he can relieve himself of that obligation by rescinding the contract and returning the goods in virtue of a condition in his favour. The Lord Justice-Clerk states the principle in words which he quotes from Pothier, and which he says express a sound and simple rule of general application, to be this, that 'by the clause of return, which is entirely in favour of the buyer, the seller undertakes to the buyer to take back the article if it does not suit the buyer, and to pay him back the price if it has been paid, or otherwise to discharge it.' But in the present case the condition is mutual, and there can be no question whether it is resolutive or suspensive of the sale if it is to receive effect at all. For the agreement was not that the buyer should return the goods or be discharged of his liability to pay the price in a certain event, but that he on the one hand should incur no liability whatever to pay the price, and that the merchants on the other should retain the property of the wine until it should be removed from the cellar for consumption in the hotel. There was therefore, in my opinion, no completed contract of sale until the hotel-keeper removed wine from the cellar for sale to his customers in the hotel, although there was an agreement that when that happened a contract of sale which till then remained in suspense should take effect.

"There are many recent examples in the decisions of the Court that property does not pass by mere delivery if the contract is that it shall not pass—*Duncanson* v. *Jeffries*, March 4, 1881, 8 R. 563; and the principle stated by Lord Rutherfurd Clark in one of these cases appears to me directly applicable, viz., that 'property cannot pass by mere possession contrary to the wish of both giver and receiver'—*Hogarth* v. *Smart's Trustee*, June 16, 1882, 9 R. 965.

"There can be no question that if the wine merchants had brought an action for payment of the price of the wines still in the cellar, averring a contract in the terms deponed to by Mr Lindsay and Mr White, they must have failed. The answer would have been conclusive that the sale was conditional, and that the condition was not purified; and it is equally clear that if the dividend payable on a claim for the price had exceeded the value of the wine, which is a possible contingency if the question is to be treated as a general one, the trustee would have rejected the claim on the ground that the wines had not been bought by the bankrupt. There is no room for the doctrine of reputed ownership, because there is no pretence that the wines were left in the possession and apparent ownership either by collusion or gross negligence of the true owner."

Counsel for Petitioners—Dickson. Agents—Mackenzie & Black, W.S.

Counsel for Respondents—Murray. Agents—Welsh & Forbes, S.S.C.