to two persons named, upon a certain Sunday, in contravention of his certificate. The Sheriff-Substitute (BUNTINE) assoilzied the respondent, and the Procurator-Fiscal took a Case for the opinion of the High Court of Justiciary.

The material facts as stated in the Case by the Sheriff-Substitute were—"On Sunday the 11th April 1886, Stewart personally served Bain and Callum, designed in the complaint, with one gill of whisky and two pints of beer, which they consumed in his hotel at Bucklyvie. He knew Bain and Callum, and was aware that they lived a distance from Bucklyvie of more than four miles by the nearest road. As they left the hotel, they purchased from the respondent two quart bottles of whisky, paying him three shillings and sixpence for each bottle. Thereafter they went to the house of a friend in Bucklyvie, and there they, along with others who joined them, drank most of this whisky."

The question of law for the opinion of the High Court of Justiciary is:—"Does the proviso in the certificate, empowering a hotel-keeper to sell or give out liquor on Sunday for the accommodation of travellers, extend to the case of the respondent supplying the travellers with two quart bottles of whisky to carry away and consume elsewhere, in addition to the liquor consumed by them on the premises, or does such conduct infer the breach of his certificate charged in the complaint?"

Argued for appellant—The words "giving out" in the Public-Houses Acts Amendment Act 1862, Schedule A, No. 1, had been held to bear construction—*Hogarth* v. *M'Dougall*, 1878, 6 R. (J.C.) 2. The same canon should be applied here, although from the opposite point of view to the word "accommodation." This meant refreshment.

Argued for respondent—The men being admittedly *bona fide* travellers, the prosecution had no case. The amount of liquor was only important as showing whether the landlord really thought them to be *bona fide* travellers. He might supply them with as much liquor on Sunday, as he was bound to supply them with on other days.

At advising—

LORD CRAIGHILL—Stated in the most general terms, the question which arises here is, whether in giving two bottles of whisky to two men, *bona fide* travellers, a publican has contravened his licence? It is not disputed that he may give out liquor on Sunday; but if he gives out more than is reasonable and necessary in the circumstances, there is a controversy. And the question is, has he here so acted? When the case came before the Sheriff evidence was led, and the Sheriff thought that a contravention had not been established. It is a question of some nicety, and it is a question of circumstances. That which the publican was entitled to do was that which was reasonable. Now, I think the Sheriff-Substitute, who heard all the evidence, was better situated than I am to decide this question. He knew what was reasonable and necessary, and he assoilzied the defender. I am not able to come to a different conclusion.

LORD M'LAREN—It is not contended by the respondent that under his certificate a hotel proprietor would be entitled to give out on Sundays a quantity of liquor to be taken away and consumed at home, and still less to sell it to persons so that they might re-sell it to others. Of course neither of these propositions could be maintained. In the present case the liquor was supplied for the consumption of the travellers who made the purchase, and we are asked whether in supplying these persons as he did the hotel-keeper contravened his licence. If I were to consider the whole case as the Sheriff-Substitute was able to do, I might doubt whether supplying two bottles of whisky to two men was reasonable. I am of opinion that the word "accommodation" in the certificate means refreshment, and refers to the supply of reasonable wants. That question, however, is not before us. The question is whether an innkeeper is entitled to supply liquor to be consumed out of the premises in the manner in which the respondent did? It seems to me to be sufficient if the parties are supplied for refreshment.

The LORD JUSTICE-CLERK concurred.

The Court answered the question in the negative.

Counsel for Appellant—Graham Murray. Agent—Morton, Neilson, & Smart, W.S.

Counsel for Respondent—Wilson. Agent—W. Duncan, S.S.C.

COURT OF SESSION.

Thursday, April 8.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

MASON *v.* QUEEN.

Trade-Name—Goodwill—Sale.

Where a business has been carried on under a particular title, the right to the exclusive use of this title is not an independent right, remaining in and capable of being transferred by the person who carried on business under it after he has given up the business and sold the house in which he carried it on.

C. kept a hotel which became known as the "Waverley." He sold the premises to a railway company (who took the ground for the purposes of their undertaking but did not require to use the buildings therefor), receiving a price, a sum for loss of business, and a sum for disturbance. Thereafter he executed a deed purporting to transfer the goodwill of his business and the right to use the name "Waverley" to a hotel-keeper in another part of the same town. The railway company let the old premises as a hotel, and their tenant used the name "Waverley." *Held*, in a question with C.'s transferee, that he was entitled to do so.

In this process of suspension and interdict Mrs Mary Cranston or Mason of the Waverley Temperance Hotel, Sauchiehall Street, Glasgow,

sought (with consent and concurrence of her husband) interdict against William Queen, hotel-keeper, 194 Buchanan Street there, and formerly a waiter in the employment of the complainer's father, Robert Cranston, of the Waverley Temperance Hotels in Edinburgh, using the name "The Waverley Hotel" or "The Old Waverley Hotel" as the designation of his hotel in Buchanan Street, Glasgow. She also sought to have him ordained to remove the name "The Waverley Hotel" or "The Old Waverley Hotel" from the front of his hotel.

In 1861 the complainer's father acquired the premises in Buchanan Street which the respondent occupied at the date of this case. They were called by him "The Waverley Hotel," and advertised widely as such, and became well known as such for the next 23 years or thereby.

In 1884 the Glasgow City and District Railway Company acquired the premises from Cranston under the powers conferred by their Special Act, and in an arbitration to fix the value, paid him £20,500 for the hotel and a shop then in the building, £1800 for injury to business, and £825 as an allowance for expenses on removal and consequent on disturbance. The disposition conveyed the ground as described in the existing titles without reference to the purpose for which the buildings had been used.

When his property was thus acquired by the railway company Cranston gave up the business in Glasgow, and agreed to transfer the goodwill of his business and the right to use the name "Waverley Hotel" to his daughter, the complainer, who had been for some years carrying on business as a temperance hotel-keeper in her premises in Sauchiehall Street, Glasgow, under the name "Washington Temperance Hotel," and she changed the name "Washington," hitherto applied to her premises, to "Waverley." The deed bearing to effect this transfer was dated 13th January 1885.

The company took possession of the hotel in Buchanan Street in May 1884, and for a time a notice was placed outside it that the hotel business was removed to the complainer's premises in Sauchiehall Street. This notice was after a time taken away, but on the complainer's application replaced, and remained till September 1884. For a considerable period after May 1884 the premises were closed as a hotel owing to the construction of the railway tunnel underneath.

In September 1885 the respondent took the premises in Buchanan Street from the railway company as a temperance hotel, and began business therein under the name "The Old Waverley Hotel."

The complainer averred that this conduct "is intended and calculated to mislead the public and divert custom from the complainer's hotel, and is a fraudulent infringement of the complainer's right to the exclusive use in Glasgow of the designation of 'The Waverley Hotel' in connection with her business. The addition of the word 'old' is merely a colourable and deceptive variation, and a device to cover the respondent's assumption of the designation, to the complainer's loss and injury. The two hotels in Edinburgh belonging to the complainer's father, the said R. Cranston, are designated 'The Old Waverley' and 'The New Waverley,' and these houses are and have been extensively advertised along with the name of the complainer's hotel in the same advertisement. The similarity of name assumed by the respondent is thus made more effectively misleading."

She pleaded that she had right to the exclusive use of the designation "The Waverley" in Glasgow, and that the respondent's use of it was an invasion of her rights.

The respondent stated that "Waverley" was a common name for hotels in various towns mentioned by him on record, with which hotels the Cranstons had no connection, and that by the price paid for it by the railway company, whose tenant he was, the company had acquired the hotel with all the advantages attaching to its situation and name; that Cranston's business was then wound up and ceased, and there was not in fact any transfer of business or of a hotel to the complainer; that her use of the word as applying to her premises was a misrepresentation, and that his hotel had been advertised by the railway company as "The Waverley Hotel." He explained that he did not rely on Cranston's influence or goodwill, but had prefixed "Old" to the "Waverley" to mark the change which had occurred, and that his hotel was the only "Waverley" in Glasgow till the complainer took the name.

He pleaded (1) that the complainer's statement was irrelevant; (2) that the pretended transfer to her of the name was invalid in itself, and *separatim* was invalid in competition with the railway company, whose tenant he was.

After a discussion on the relevancy the Lord Ordinary (KINNEAR) allowed a proof.

The respondent reclaimed. The nature of the argument appears below. The First Division adhered to the Lord Ordinary's interlocutor, and remitted the case to his Lordship to take the proof.

Proof was then taken. The facts fully appear from the foregoing narrative and from the opinion of Lord Kinnear.

The complainer argued — Cranston was the founder of the Glasgow business, and he gave the name to the hotel. He had a right to all the advantages which the use of the name could give him. It was the complainer's view that in getting the name she got the business. The railway company did not get a right to use the name, and the respondent had no right as from them. Besides, after Cranston's business had been made over to his daughter, the railway company did not carry on business as hotel-keepers in the premises for at least sixteen months, and during that time the complainer used the name in connection with her hotel. That in itself was a ground for pleading her exclusive right to the name—*Churton* v. *Douglas*, 28 L.J. Ch. 841. Where there was a specialised name such as this was, it must be an invasion if another used it—*Howard* v. *Henriques*, Cox's Trade-Mark Cases, 129; *Woodward* v. *Lazar*, *ibid.*, 300; *M'Cardel*, *ibid.* 312. The respondent represented by his use of the name that he was carrying on the business to which the complainer had the exclusive right — *De Boulay*, 2 L.R., P.C. Appeals, 430, 431. The name was not attached to the house but was fanciful, and capable of being used in another—*Churton* v. *Douglas*, 28 L.J., Ch. 841; *Ginesi*, L.R., 14 Ch. Div. 596; *King*, 17

Weekly Rep. 113; *Liebig*, Weekly Notes, 1882, 147; *Charleson* v. *Campbell*, Nov. 17, 1876, 4 R. 149; *Stuart* v. *Val de Travers Co.*, 23 S.L.R. 11; *Labouchere*, 13 L.R., Eq. 322.

The respondent argued—The first question was—What was transferred to the railway company by Cranston's disposition? It was the house as it stood, and that was "The Waverley Hotel." The name was part and pertinent of the house which passed to the purchaser under the dispositive clause—*Banks* v. *Gibson*, 34 Beav. 566; *Booth* v. *Jarret*, 52 How. Pr. 169; *Mossop* v. *Mason*, 18 Grant Ap. Ca., Ch. 453. There was no restrictive agreement between the parties forbidding the respondent to use the name of "Waverley" when Cranston wound up his business in Glasgow—*Woods* v. *Sand*, Sebastian's Digest, 467. The complainer pretended that Cranston transferred the right of using the name "Waverley" to her, but unless she could show that Cranston had a personal privilege or special right to prevent anyone using the name "Waverley" the complainer had no case. Her position must be that Cranston had a personal right to give the name "Waverley" to any premises independently of any business. But Cranston had no personal right to the mere name, *e.g.*, a man might open a "Waverley Hotel" in any town where Cranston was not, and in fact many such hotels existed throughout the country. Besides, Cranston was not a party to the case. The complainer only claimed as his assignee, and was vested by him in nothing but a name. Now, in the law of trade-mark, if any analogy could be drawn therefrom at all, the mere name could not be transferred without the invention or thing to which it applied, *i.e.*, here without the house—*Cotton* v. *Gillard*, 44 L.J., Ch. 90; *Leather Cloth Company*, 33 L.J., Ch. 86; *Siegert* v. *Abbot*, Amer. Rep., 48, 101; *Punnet*, 16 L.R., Ch. Div. 226; *Cooper* v. *Metropolitan Board of Works*, 53 L.J., Ch. 109; *Levy* v. *Walker*, L.R., 10 Ch. Div. 436; *Shipwright* v. *Clements*, 19 W.R. 599. The railway company was grantee prior to the complainer, and the respondent by the lease acquired the rights of the railway company. The house was got as an implement of business, and it was *de facto* known as "Waverley" for 20 years, and when the house was sold the name went with it. So far was this the case that if Cranston after the sale had attempted to carry on business in premises called "The Waverley Hotel," the railway company would have been entitled to stop him. So far as the house was increased in value by the name "Waverley" the respondent was entitled to that value. The respondent had no sufficient interest to entitle her to interdict. It did not appear from the proof that the advantages which the respondent got by the sale were derived from the name "Waverley." There were proved to be advantages of situation and accommodation in connection with the hotel. The respondent was in no way pretending that he was Cranston or continuing Cranston's business. Cranston and the complainer had taken the utmost care in their advertisements to make it clear that the respondent had none of Cranston's personal influence or connection. The respondent accepted this position, and there was no well founded suggestion of fraudulent attempt on his part to take advantage of anything belonging to Cranston. On the contrary, it was the complainer who was trying to misrepresent her business as that of Cranston. Besides, there was in any view sufficient distinctive variation in the respondent's use of the word "Old" before the words "Waverley Hotel." — *Lochgelly Iron Co.*, January 15, 1879, 6 R. 482; *Dunnachie* v. *Young*, May 22, 1883, 10 R. 874; *Singer Co.*, 8 App. Ca. 15; *Wotherspoon*, 2 Macph. 38.

The Lord Ordinary (KINNEAR) refused the note.

"*Opinion.*—The complainer's case was rested in argument on two separate grounds. It was maintained in the first place that she has acquired an exclusive right to the use of the name of 'Waverley,' and is therefore entitled to protection by interdict against the assumption of that name by any other hotelkeeper, or at least by the keeper of any other temperance hotel in Glasgow, irrespective of any misrepresentation which may be involved in the application of the name to other premises than hers; and secondly, that even if she has no absolute right of property in the name 'Waverley,' the respondent's use of it in connection with his hotel in Buchanan Street amounts to a representation that he now carries on the business formerly conducted in that hotel by Mr Cranston, the complainer's father, to the injury of the complainer, who has acquired the goodwill of her father's business in Glasgow, and is alone entitled to represent herself as his successor in that business.

"The first of these views appears to me to be entirely unsupported either by principle or by authority. But the second requires more consideration. It has never been decided in Scotland that the proprietor of an hotel which is known by a particular name has a right to prevent another hotelkeeper in the same town from adopting the same name. But I see no reason to doubt that an hotelkeeper, like any other tradesman, will be entitled to prevent his rivals in trade from deceiving his customers by personating his business; and if such fraudulent personation can be shown to have been effected by taking a name which has been appropriated by use to a particular hotel, it would appear to me that upon the ordinary rules applicable to trade names and trade marks, the party injured would be entitled to protection. The question therefore comes to be—Whether in fact the respondent's use of the name 'Waverley' involves a misrepresentation of this kind injurious to the complainer? I think it involves no representation which the respondent is not perfectly entitled to make, and no violation of any legal right in the complainer.

"It appears that from 1860 to 1884 the complainer's father Mr Cranston conducted the business of a temperance hotelkeeper in the premises in Buchanan Street now occupied by the respondent. Mr Cranston has also an hotel in Edinburgh and an hotel in London; he called all three by the name 'Waverley,' and there can be no doubt that in 1884 he had established a valuable business and reputation for 'The Waverley Hotel' in Glasgow.

"In 1884 the house in Glasgow in which he carries on this business, and which, as the complainer says, had by that time become widely known as 'The Waverley Hotel,' was taken in the exercise of compulsory powers by the Glasgow City and District Railway Company. The price

and compensation payable by the railway company to Mr Cranston was fixed by arbitration, and the arbiters by their award allowed £20,500 for the heritable property, £1800 for a 'claim for business carried on by Mr Cranston in the said property, being two years' profits thereof,' and £825 for expenses consequent on disturbance of business. The railway company have thus bought the hotel from Mr Cranston, and in addition to the price of the subjects purchased, and to compensation for the temporary disturbance of his business involved in removal, they have paid him a sum equal to two years' profits, as compensation for the business which he is assumed to have lost by the taking of his hotel. The operations of the railway company did not imply either the demolition or the occupation of the building for railway purposes, and after they were completed it was let to the respondent, and re-opened by him as a temperance hotel.

"In these circumstances I should have great difficulty in holding that Mr Cranston himself could have any right to complain of the use of the name 'Waverley' by the railway company or its tenants, either with or without the distinctive epithet which the respondent has adopted. There can be no question that the company was quite entitled to let the subjects for the purpose of a temperance hotel, with all the advantages that are inseparable from the previous use of the building for that purpose for a long period of years. These are among the advantages which were taken into account in fixing the compensation payable by Mr Cranston, and must therefore be supposed to have been bought and paid for by the railway company. The respondent is in fact carrying on the business of a temperance hotel in the house known since 1861 as 'The Waverley Hotel;' and he is quite entitled to represent to the customers of the house and to the public that he is doing so. What he is not entitled to do is to represent that Mr Cranston has any interest in the business conducted by him, that he is in any way connected with the business still conducted by Mr Cranston, or that he is carrying on Mr Cranston's former business in any other sense than that he is now occupant of the house in Buchanan Street, Glasgow, known as 'The Waverley Hotel.' But it does not appear to me that any of these representations are involved in his continuing to call his hotel by its old name; and if Mr Cranston had been still carrying on business in Glasgow I think it would have been difficult for him to show that the respondent's use of the name was in any respect an invasion of his legal rights.

"But the complainer is not exactly in the same position as Mr Cranston. It may be that she is entitled in a question with the respondent to say that she is the successor of Mr Cranston in business because his business has been assigned to her. But her case is that along with his business he has also transferred to her the exclusive right to the use of the name 'Waverley.' But that is a right which he himself could not possess except in connection with the business established and conducted by him in the hotel known by that name, and I know of no principle of law upon which it can be held that so peculiar and limited a right can be transferable separately from the hotel to another hotelkeeper already carrying on business in a house known by a different name. It appears that for many years before 1884 the complainer had conducted the business of a temperance hotelkeeper in an hotel called 'The Washington Hotel' in Sauchiehall Street in Glasgow. She may be quite entitled to change the name of her hotel, and call it 'The Waverley.' But it cannot be held that Mr Cranston could have given her an exclusive right to the use of the new name upon any ground which would not be effectual to support an assignation of the right by him in favour of any other person. The case therefore must be that after an hotel has been sold without any stipulation, that it shall not be used by the purchaser for the purpose of an hotel, or if so, that it shall not be called by its old name, there still remains vested in the seller an exclusive right to the name, transferable by him as a separate right, and available to the transferee as against the purchaser, and all the world. In other words, the right to the name of an hotel is a separate right of property which is not carried to a purchaser by a conveyance of the hotel itself, but must be expressly transferred in order to divest the seller. It is certain that no such right is recognised by the law of Scotland, and I am unable to see any other upon which Mr Cranston's assignation of the name as such can be sustained as effectual to the complainer.

"But it is said that the complainer has acquired the goodwill of the business, and that the respondent by calling his hotel 'The Waverley' or 'The Old Waverley' falsely represents that the goodwill belongs to him. The term goodwill, as it is generally used in such discussions, is so indefinite as to be misleading. But according to Lord Justice Lindley's definition, it means the 'benefit arising from connection and reputation, and its value is what can be got for the chance of being able to keep that connection and improve it.' And in this sense I think it impossible to say that the entire goodwill has been transferred to the complainer. It is clear from the evidence that a very material part of the goodwill in this, as in most cases where the goodwill of an hotel is concerned, is inseparable from the place of business. And this part of the goodwill has of necessity been carried with the place of business itself to the respondent, because he has not only acquired the advantages arising from local situation, but those which are necessarily attached to a house where a well conducted business has been established and carried on for a considerable period. By acquiring the house he has acquired 'the chance of being able to keep the connection and reputation' attached to the house under the management of his predecessor. But then it is said that there is also a goodwill arising from the personal reputation of Mr Cranston, and this personal goodwill is said to have been transferred to the complainer, and to be represented by the name 'Waverley.' I do not doubt that if Mr Cranston himself had continued to carry on business in Glasgow he would have retained a great portion of this goodwill, although it cannot be said that he would have retained the entire goodwill, because the assumption on which he has obtained compensation is that a goodwill, valued at two years' profits, is inseparable from the house. But it is a different question whether the advantage which he himself would have had in continuing his

business in other premises from the reputation he had acquired in 'The Waverley Hotel' in Buchanan Street can be effectually transferred to another person. The assignation to the respondent is gratuitous, and therefore affords no evidence that the cedent still possessed rights of any marketable value in the business he had discontinued. But the material question is—Whether any tangible right in Mr Cranston's business has been transferred to the complainer, so as to enable her to say that she has acquired a goodwill represented by the name to which she claims exclusive right? And it does not appear from the evidence that anything which can properly be described as a continuing business has been transferred. No subsisting contracts or debts or claims of any kind have been made over to the complainer. When the supposed goodwill which she claims comes to be analysed it appears to represent nothing except—what is no doubt a valuable advantage—Mr Cranston's recommendation to his former customers, in so far as that can be inferred from the complainer's right to represent herself as his successor in business. But it does not appear to me that this advantage, whatever be its value, carries with it any right, or at least any exclusive right, to the use of a name which is not the name of a firm or of an individual, but of a place where a business was carried on. The respondent, therefore, by continuing to call his hotel by its old name does not in my opinion make any representation to the injury of the complainer, or which is not consistent with fact, and with his legal rights.

"It is very possible that some inconvenience may have arisen to the complainer, and perhaps also to the respondent, by reason of their hotels being called by the same name. But that is no sufficient reason for compelling the respondent to discontinue his use of the name, if he has not invaded the legal right of the complainer.

"It is said, however, that the respondent derives an advantage from the use of the name to which he is not entitled, because he obtains in this way the benefit of Mr Cranston's reputation in connection with his hotels in London and Edinburgh. Even if this were so, the complainer would have no title to interfere. But I think there is no evidence that the respondent has taken any unfair advantage in this way either of the complainer or of Mr Cranston. He is certainly not entitled to represent that he has any connection whatever with the Waverley Hotels in Edinburgh and London. But he does not do so by calling his hotel also 'The Waverley.' I do not think it proved that by his use of that name he interferes to any material degree with the benefit which the complainer may be supposed to draw from her relationship with Mr Cranston. But at all events he does not do so by the invasion of any legal right in the complainer, for which she is entitled to protection by the interdict craved."

Counsel for Complainer—D.-F. Balfour, Q.C. —Young. Agents—J. & R. A. Robertson, S.S.C.

Counsel for Respondent—R. V. Campbell—Boyd. Agents—Millar, Robson, & Innes, S.S.C.

Friday, May 28.

FIRST DIVISION.

[Sheriff of Renfrew and Bute.

MAXTON *v.* BONE.

Process—Sheriff—Appeal—Competency—Sheriff Court Act 1853 (16 *and* 17 *Vict. cap.* 80), *sec.* 24.

Held that an interlocutor in a Sheriff Court which ordered the consignation of money in the hands of the Clerk of Court was not capable of being appealed.

This was an action in the Sheriff Court of Renfrew and Bute at Greenock, at the instance of John Maxton, part owner of the s.s. "Rebecca," against James Bone, as managing owner or ship's husband of that ship, for an accounting and payment of £212, or such other sum as might be found to be due. An account having been lodged by the defender showing the pursuer's share of profits to amount to a certain sum (apart from other questions between them), the Sheriff-Substitute (NICHOLSON) on 26th February 1886 pronounced this interlocutor—"Ordains the defender within seven days from this date to consign in the hands of the Clerk of Court the sum of £63, 17s. 9d., under certification: Further, having heard parties, before answer allows them a proof of their respective averments, and to the pursuer a conjunct probation."

On appeal the Sheriff adhered.

The defender appealed to the Court of Session.

When the case appeared in the Single Bills the pursuer objected to the competency of the appeal on the ground that the interlocutor appealed against was not an *interim* decree for payment of money, but merely an order for consignation—Sheriff Court Act 1853 (16 and 17 Vict. cap. 80), sec. 24; *Sinclair* v. *Baikie*, Jan. 11, 1884, 11 R. 413; *Mackenzie* v. *Balerno Paper Mill Company*, July 12, 1883, 10 R. 1147.

The appellant contended that this was an interlocutor which so far as its practical effect went was an order on the defender to make payment. Section 24 was not to be rigorously construed—*Bain* v. *Glendinning*, Oct. 16, 1874, 2 R. 25.

Section 24 of the Sheriff Court Act 1853 provides that it shall not be competent to take to review any interlocutor "not being an interlocutor sisting process or giving interim decree for payment of money or disposing of the whole merits of the cause."

At advising—

LORD PRESIDENT—The competency of this appeal depends on the question whether the interlocutor of the Sheriff-Substitute is an interim decree for payment of money. It is, on the face of it, an order for consignation, and as a decree for consignation is not a decree for the payment of money, I therefore think that the appeal is incompetent.

LORD MURE concurred.

LORD SHAND—I concur. I think that payment means payment out of the pocket of one man into the pocket of another.

LORD ADAM—I think that the principle of the