in other words, was the defender cited on the 3rd of March? The execution shows sufficiently what took place on the 3rd of March. A post-letter containing the summons and all the other particulars required by the statute, to which I am about to refer, was posted on that day by the pursuer's agent. Now, the 3rd section of the Citation Amendment Act of 1882 provides that the summons, warrant of citation, or of service, or judicial intimation, may be served as at present; or there is the alternative, that service may be made by sending "a registered letter by post containing a copy of the summons or petition or other document required by law in the particular case to be served with the proper citation or notice subjoined thereto, or containing such other citation or notice as may be required in the circumstances, and such posting shall constitute a legal and valid citation unless the person cited shall prove that such letter was not left or tendered at his known residence or place of business, or at his last known address if it continues to be his legal domicile or proper place of citation."

It does not appear to me that these words are in any way ambiguous. They distinctly imply that the posting of a letter with the contents here described shall constitute a legal and valid citation.

Now, in order to give the fair effect to the meaning of these words, I cannot resist the conclusion that this defender was cited upon the 3rd of March. The posting of a letter is not an ambiguous term. It is to put the letter into the post-office, and so putting it out of the power of the writer to recal or withdraw it, because as soon as it passes under the control of the Postmaster-General it cannot under any circumstances be recalled. Therefore the posting of this letter —that is to say, the putting it into the post-office out of the hands of the writer—constitutes in itself a legal and valid citation, and that this is so is fully borne out by the terms of the first schedule appended to the statute. The only answer which was made to this—and it seems to have been an answer which satisfied the Lord Ordinary—is founded upon the 4th section of the statute and the 2nd sub-section, which provides that the *inducia* or period of notice in the case of citation by posting, is to be reckoned from twenty-four hours after the time of the posting of the letter, and the Lord Ordinary seems to think that this is inconsistent with the notion that the posting or putting the letter into the post-office constitutes in itself a legal and valid citation. It does not, however, appear to me that there is any inconsistency between these two things. The one section—the 3rd—says that the posting shall constitute a legal and valid citation; the 4th section, sub-section 2, says that the *inducia* shall not commence to run, as in the ordinary case, from the date of the citation, but from twenty-four hours after the date of citation. I think therefore that the two sections are quite in harmony with one another, as the whole object of the latter provision is to make the *inducia* longer where the defender is cited by means of a post-letter.

I am therefore of opinion that the view of the Lord Ordinary upon this point is erroneous, and that the defender was well cited within the period prescribed by the Act of Parliament.

Lords Mure and Adam concurred.

Lord Shand was absent.

The Court recalled the Lord Ordinary's interlocutor, repelled, *inter alia*, the second plea-in-law for the defender, and remitted the cause to the Lord Ordinary.

Counsel for the Pursuer—Darling—G. W Burnet. Agent—R. Elmslie, S.S.C.

Counsel for the Defender—Guy. Agent—F. J. Martin, W.S.

Friday, November 18.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

SINCLAIR *v.* M'EWAN.

Contract—Sale—Rejection—Conform to Contract —Timeous Rejection.

A furniture dealer sold to the proprietor of an hotel several lots of bedroom furniture at a fixed price for each lot, and the articles were delivered on or before 12th July. Each lot included a straw palliasse. About the beginning of August it was found that these palliasses were swarming with minute insects, which had spread to other portions of the furniture. Intimation was made to the seller, who on 11th August removed the palliasses and supplied others in their stead; he also sent a man in his employment to remove the insects from the rest of the furniture, which was successfully done by the end of November. The purchaser, on 24th January 1887, after an action had been raised for payment of the price, rejected the furniture on the ground that the insects might return. *Held*, on the evidence that the furniture, with the exception of the palliasses, was, when delivered, conform to contract, and that the spreading of the insects was not a sufficient ground for rejection.

Opinions that there had not been timeous rejection.

This was an action at the instance of Alexander M'Ewan, timber merchant, Wick, against Alexander Sinclair, auctioneer, Wick, for payment of £454, 1s., the amount of an account for furniture supplied by the pursuer to the defender.

The facts of the case were these—Sinclair, the defender, was the proprietor of an hotel in Wick, of which a person named Bruce was tenant. The pursuer submitted estimates for supplying the hotel with furniture, and these estimates were accepted by the defender. The estimate for each lot was separate, and was separately accepted. The defender admitted liability for the price of certain lots of the furniture, but denied liability for the sum of £223, 11s. 6d., the price of eight lots of bedroom furniture, on the ground that the articles were unfit for the purpose for which they were supplied. Each of these lots included, among other articles, a straw palliasse or mattress. The furniture was delivered to the defender between 5th June and 12th July 1886.

On 6th August the defender was informed by his tenant that something had gone wrong with the furniture, and on examination he found the beds in all the eight bedrooms swarming with small insects like mites, which had spread over the rest of the furniture. On 9th August he informed the pursuer of the circumstances, who admitted that the insects must have come out of the straw in the straw palliasses. On 11th August the palliasses were removed, and spring mattresses were sent instead. A question was raised with regard to the price of these spring mattresses, which is dealt with by the Lord Ordinary in his note, *infra*. There was a conflict of evidence as to the terms upon which the defender consented to keep the rest of the bedroom furniture, which is also dealt with by the Lord Ordinary. M'Ewan subsequently sent a man in his employment to the hotel to clean the furniture; he continued his visits until the end of November, by which time the mites had disappeared The defender retained the furniture until this action for payment was raised, and then, towards the end of January 1887, he rejected it. The pursuer refused to take it, and it was delivered into a store.

The pursuer pleaded—"(3) The furnishings supplied to the defender being merchantable in quality and condition, he was not entitled to reject them. (4) *Separatim*—The defender not having timeously rejected the said furnishings is bound to pay the price thereof."

The defender pleaded—"(2) The pursuer having in breach of his implied warranty as a manufacturer of and dealer in the class of furnishings ordered from him by the defender, supplied articles unmerchantable in quality and condition, the defender is entitled to reject the same, and having timeously done so, should be assoilzied with expenses. (4) The said defective furnishings having been sold for the specified and particular purpose condescended on, and being unfit for such purpose, the defender is entitled to reject them."

The Lord Ordinary (KINNEAR), after a proof, on 26th April 1887 repelled the defences, and decerned against the defender in terms of the conclusions of the summons, with expenses.

"*Opinion.*—This is an action for the price of the furniture of an hotel sold and delivered by the pursuer to the defender. The defender admits his liability to pay for a part of the furniture, but he alleges that the furniture supplied for the bedrooms of the hotel was unfit for the purpose for which it was sold; and that he accordingly rejected it. The questions in controversy are, whether the bedroom furniture was in fact disconform to contract, and if so, whether it has been rejected timeously?

"The whole of the furniture, with the exception of certain spring mattresses, as to which a different question arises, was delivered at the defender's hotel between the 5th of June and the 12th of July 1886. About the end of July or beginning of August it was found that the bedsteads and bedding in several of the rooms were covered with swarms of minute insects resembling mites; and it is not disputed that these insects came from certain straw palliasses supplied by the pursuer. The insects increased rapidly, and spread to other portions of the furniture; the pursuer was informed of what had occurred on the 9th of August, and on the 11th he removed the straw palliasses.

"I am of opinion that in these circumstance the defender was entitled to reject the palliasses. I do not think that he proved his averment that their condition was owing to any want of care or skill on the part of the pursuer. It appears from the evidence of the experts who have been examined for the pursuer—and there is no contrary evidence for the defender—that these insects occasionlly appear in straw that has been properly treated, and that experienced upholsterers know of no precautions which can be relied upon for preventing their appearance. The palliasses in question were apparently in good order when they were delivered; and the result of the evidence appears to me to be that the pursuers had no reason to suppose that the straw of which they were made had been improperly treated, or that it was in any respect unfit for use. But there can be no doubt that the palliasses were in fact altogether unfit to be used as bedding; and the defender was therefore in my opinion entitled to reject them, because that was the sole purpose for which they were bought and sold. I do not think it material that their unfitness was not made manifest until a few days after delivery. The case is not that of the purchase of a specific article where a buyer relies upon his own inspection. But the defender ordered goods from the pursuer as manufacturer, upon whose skill and judgment he relied, and who undertook by his contract to supply, among other things, palliasses fit to be used as bedding.

"But the straw palliasses were removed by the pursuer as soon as he was made aware of their condition, and the question in this action is, whether the defender is entitled to reject the remainder of the bedroom furniture. The contract is separable, so that the purchaser might reject a particular article as defective or disconform to contract without rejecting the whole furniture supplied, or the whole furniture of the bedroom for which the defective article was intended. The bedroom furniture which is now in question was admittedly in good condition and conform to contract, and the defender has no complaint to make of it, except that it became infested with the mites coming from the straw palliasses. The evidence as to the extent of the mischief is conflicting. But it is unnecessary to examine it in detail, because in the most unfavourable view for the pursuer which can reasonably be taken, it is still clear enough that no permanent damage has been done. Some parts of the furniture were covered with mites from the straw, and it was impossible to get rid of the nuisance without the expenditure of a good deal of time and trouble. But the work was done by men in the pursuer's employment, and by his orders, and it appears to have been successfully accomplished. It is true that the defender says he is not satisfied that the insects might not return as the season advances. But he says that but for that apprehension he would not have rejected the furniture in the condition in which it now is, and he admits that there was nothing wrong with it, 'except with regard to the insects. It was otherwise perfectly satisfactory.'

"It appears to me to be at least very doubtful whether the defender had a sufficient ground in law for rejecting any part of the furniture ex-

cepting the straw palliasses. But assuming that he might have done so if the rejection had been timeously made, I think he is barred by delay from maintaining that the goods, for which the pursuer now demands payment were in any respect disconform to contract. The goods have remained in his possession and under his control from the middle of July 1886 until the end of January 1887; and in my view of the evidence it was not until the 24th of January, and after the present action had been raised, that he intimated an intention to reject them. The law is perfectly well settled that a buyer who retains goods in his possession for such a length of time must be held to have retained them in conformity with the contract, and is bound to make payment of the contract price.

"The defender avers an agreement between him and the pursuer that 'he should meanwhile retain the bedroom furniture in his hotel, and that his right to reject the same should not be prejudiced while the pursuer was testing' a certain alleged process for getting rid of the insects. The burden of proving this agreement lies on the defender, and he has failed to prove it. Assuming his account of the interview on the 13th of August to be precisely accurate, it does not appear to me to import an agreement to the effect alleged. It comes to this, that the defender threatened to return the furniture, and the pursuer assured him that with the efforts they were using it would be put all right, whereupon he agreed to keep it. This does not necessarily imply any departure by the pursuer from his legal right, or any admission that the furniture was not conformable to contract. But the pursuer gives an entirely different account of what passed, and I see no reason to doubt that his statement is in accordance with his recollection and belief. Without imputing any intentional misstatement to either party, I think the agreement is not proved. It is to be observed, however, that the correspondence contains no reference to an agreement, such as might have been expected if the parties had distinctly understood that the furniture was left in the defender's possession on other conditions than those arising from the contract, and also that the defender's conduct in the matter is not quite consistent with his own account of his understanding. For if the defender understood that the pursuer had agreed to the alleged conditions, he appears upon his own statement to have failed in his duty to the seller, because he says that when the pursuer's men ceased in November to come regularly to the hotel for the purpose of cleaning the furniture he was dissatisfied with its condition, and that he then made up his mind to reject it. If that were so, he was bound at once to intimate to the pursuer that he rejected the furniture, and either to return it, or at least to intimate that it lay in the hotel at the pursuer's risk. But he continued to retain it, and allowed his tenant to make use of it in the hotel until the end of January, more than two months after he had made up his mind to reject it, and nearly three weeks after the action for payment had been raised. This is quite inconsistent with an agreement that his right to reject or accept should depend upon the success of the pursuer's efforts to clean the furniture, and quite inconsistent also with the obligation which the law lays upon a purchaser to return goods at once to the seller if he does not intend to accept them.

"The question as to the defender's liability to pay for the spring beds depends upon different considerations, but as to this matter also there is an unfortunate conflict of evidence. The result, however, appears to me to be that they were sent on approbation and retained by the purchaser. When the straw palliasses were removed it was necessary that some other mattresses should be substituted, and the pursuer proposed to send spring mattresses, as he says, 'on approbation,' and he did so accordingly. The defender does not appear to have known that spring mattresses had been supplied until he was asked to pay for them, but when he did come to know of it he did not reject them. He says that he did not know that the pursuer had applied to the tenant Bruce to have them returned, and that Bruce had refused. But he says that 'if they had been asked back he would not have been prepared to give them. If Bruce had refused to give them back he would have been acting just as I would have desired him to do.' In these circumstances he must be held to have accepted the spring mattresses, and I am unable to see on what understanding he can have done so, except upon the footing that he was to pay for them at a fair price. There is no suggestion that the price is other than reasonable."

The defender reclaimed, and argued—Even if the bedroom furniture, other than the palliasses, was delivered in good condition, the mites had spread from the palliasses on to the other furniture, and that was a good reason for rejecting the whole furniture, which was thus made unfit for use—*Randall* v. *Newson*, January 22, 1877, 2 L.R., Q.B.D. 102. As regarded the question of timeous rejection, the practice now was to take each case on its merits. There was no absolute rule laid down as to the time within which the rejection must be made, and the defender here had rejected timeously—*Chapman* v. *Couston, Thomson, & Company*, March 10, 1871, 9 Macph. 675.

Argued for the respondent—If the palliasses were disconform to contract, as was admitted, that did not permit the defender to return the whole of the articles, which when delivered were conform to contract. All he could do was to return the palliasses, and these the pursuer had removed. Even if the articles were disconform to contract, the defender had barred himself by delay from rejecting them. They were in the hotel and in use for nearly six months after the defect had become patent.

At advising—

Lord Young—This action is one at the instance of a timber merchant at Wick, who seems to supply furniture, and is directed against the proprietor of a hotel for the price of certain articles of furniture supplied to him. There is no doubt that the furniture was supplied and retained, and the defence is that the furniture supplied was not conform to contract. The Lord Ordinary has decided the case on the ground that the defender retained the furniture so long that he had no right to return it, even if there had been good grounds for his doing so at first.

The facts are these—The contract was for furnishing nearly the whole of the hotel, but the

articles of furniture for the several rooms were contracted for according to priced lists. All the goods so contracted for were delivered to the defender, and were admittedly according to contract, except some straw palliasses of small value in themselves. But in these palliasses were certain germs, which resulted later in the appearance of a kind of vermin, called in the evidence "Scots Greys," which spread themselves over the furniture of the hotel. It appears that this calamity of the appearance of these vermin had occurred previous to this occasion, and is known to upholsterers, and they are on their guard against it. It is known that they make their appearance in certain states of the atmosphere, and that the efforts to get rid of them are not always successful. When the vermin appeared, the upholsterer (the pursuer) was communicated with, and he undertook to remove the consequences of their appearance. He knew that they had been removed in other cases, so he took away the palliasses, and undertook to remove the vermin from the furniture. I think that he was doing his duty, and that he did it with success. In my opinion the goods delivered were according to contract, so that no question is raised as to undue delay in the return of goods not according to contract. There is no question about the price of the goods, and if it be admitted that all the goods were according to contract and of good quality, and the only complaint against them was that the straw palliasses began the dissemination of the germs, I do not think that that renders goods otherwise right disconform to contract. We do not require to decide the question whether these palliasses were disconform to contract or not, as they were removed. It was a novel proposition to me that where there was any risk of infection from some harmless but annoying thing, such as these insects, or even of disease being brought into a house, in which case we know it may spread all over it, an action of damages could be brought for the loss suffered. I do not comprehend the idea of such an action except upon the allegation of special *culpa*. In my opinion we should decide that this occurrence of the development of insects from the palliasses did not render the other articles of furniture disconform to contract. My conclusion is, that the goods supplied—the price of which is sued for—were conform to contract, and that the defender had no right to return them.

Lord Craighill—I am of the same opinion. The action is one for the price of furniture supplied to an hotel which was let furnished. The hotel had been let to Mr Bruce, and furniture was provided for the different rooms at separate prices. The furniture was delivered between the 5th of June and the 12th of July, and at that time everything looked quite right; no suspicion was raised that the articles were disconform to contract. But early in August there was a very uncomfortable manifestation of these creatures spoken of in the proof, as one witness says, "like a plague." The pursuer was applied to, and he found that these animals came from the straw palliasses. These were removed, and spring mattresses sent in their stead. So far there was no difficulty; these palliasses were not fit for the service they were meant for, and the defender was entitled to send them back. When the defender came to know of this arrangement concerning the spring mattresses he did not at once repudiate it, and the Lord Ordinary has rightly held that he is bound to pay for these spring mattresses.

The question is, what of the furniture infested by these creatures which swarmed upon it, and upon which no dusting by the tenant's servants could have any effect in keeping them down? The pursuer came and allayed the defender's apprehensions by telling him that he had cleared off these animals from the furniture before now, and that the furniture would be as good as if they had never appeared upon it. It appears that the parties then forbore to enter into any discussion as to whether the goods were disconform to contract or not. I think the way that the thing was dealt with by the parties was this, that there was an arrangement entered into by which the pursuer undertook to make the furniture all right, and the defender undertook that if the furniture was made all right he would make no objection and would pay the price.

This having been the understanding, the pursuer accordingly sent men until the end of November to clear away the mites from the furniture, and with the result he had anticipated. The mischief that had been done was overcome, and the defender was bound, under the agreement, as I understand it, to retain the furniture and to pay for it. He did retain the furniture, but he did not pay the price, and when he was frequently pressed to pay he said that he was not satisfied the animals would not return, and he was bound to keep the furniture over another summer to see the result. This was not assented to, and, as he still declined to pay, the present action was raised. Even up to that time there was no proposal to return the furniture, and it was not till three weeks after the raising of the action that he intimated the rejection of the furniture, and as the pursuer refused to take it, it was delivered into a store.

In the first place, I think the defender was bound to keep and pay for the furniture according to the state in which it was in November, when it was in good condition. But apart from that, there is this which is founded on, the defender's own statement in evidence. He says that by the end of November he had made up his mind that the furniture should be rejected. But he did not then reject it; he kept it and used it. I think his repudiation in January came far too late. The evidence is that an understanding was come to that the furniture was to be cleaned and retained. I therefore concur in the result which your Lordship has reached.

Lord Rutherfurd Clark—I also think that the judgment of the Lord Ordinary is right. In my view we are not dealing with a single contract, but with a variety of contracts. It seems to me that there was a separate contract for each article or number of articles which were to be furnished, at a separate price. Each separate price made a separate contract. All the articles which were supplied were conform to contract except the straw palliasses. But these were furnished under a separate contract, and I do not think that because they were disconform to contract the defender is entitled to reject the articles which were conform to the contract

under which they were supplied, or to pay the price of them. If the insects that came from these palliasses caused loss to the defender he may recover in an action of damages.

To my mind these considerations furnish a satisfactory ground for deciding the case against the defender, but I would further wish to say that in my opinion even if the defender had the right to reject the furniture, he did not exercise his right *tempestive*.

LORD JUSTICE-CLERK—I have come to be of the same opinion, although apparently with more difficulty than your Lordships have had. The main ground on which I put my judgment is, that the length of time which elapsed between the reception of the furniture and the date of rejection is quite unexampled in a case of this kind. The goods were sent to the hotel in June, the damage was discovered shortly afterwards, but they were not sent back till the beginning of the following year. No doubt the ground of the rejection was to some degree occult—that is to say, it did not at once appear where these mites had come from, whether from the palliasses or whether they were generated in the furniture. But it is clear that when these animalculæ did appear upon the furniture, the course the defender took, although a most sensible one in the circumstances, goes far to show that this case should be decided against him. For he entered into an agreement with the pursuer that he should clear the furniture of these creatures, and that substantially meant this, that the goods should not be returned if the pursuer did what he could to prevent the infection from spreading. I think that the long delay I have referred to indicates that the return of the goods was not in accordance with the agreement of parties. As to whether an action of damages would lie at the instance of the defender against the pursuer in such circumstance as these, I do not think it necessary to say anything.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Graham Murray—M'Lennan. Agent—William Gunn, S.S.C.

Counsel for the Defender and Respondent—D.-F. Mackintosh—W. Campbell. Agents—J. & A. F. Adam, W.S.

Friday, November 18.

FIRST DIVISION.

GRANT AND OTHERS (COWE'S EXECUTORS) *v.* COWE.

Succession—Legacy—Conditional or Unconditional.

A testator left a holograph will divided into clauses, by clause D of which it was provided that in the event of his surviving his mother certain legacies therein specified were to be paid. By a subsequent codicil he left a legacy, "which is to be handed over along with or at such time as legacies mentioned in clause D of this will are paid or handed over." The testator predeceased his mother, and the bequests in clause D therefore lapsed. *Held* that the bequest in the codicil was unconditional, and that the reference to clause D had reference merely to the time of payment.

Henry Cowe died on 30th March 1881 leaving a holograph will with two codicils. The will was divided by the testator into clauses distinguished by letters and numbers.

By clause A he left the liferent of his whole property to his mother, except certain articles mentioned in clause B, which he bequeathed to special legatees.

By clause C he made certain provisions in the event of his predeceasing his mother, and by clause D he directed what was to be done in the event of his surviving his mother.

By the codicils annexed to his will the testator made various alterations upon its provisions. The second codicil revoked the special legacies in clause B. It contained the following bequest—"In addition to any legacy mentioned in this will by which he may be left any property, of whatsoever kind, to Peter Cowe, or his next-of-kind (as designated in a previous clause of this codicil), I leave the sum of Five hundred pounds sterling (£500), which is to be handed over along with or at such time as legacies mentioned in clause D of this will are paid or handed over."

The testator predeceased his mother, and the liferent of his estate was paid to her till her death.

By the testator's predecease of his mother the provisions contained in clause D lapsed.

A question having arisen whether, as the legacies in D had lapsed, this legacy to Peter Cowe did not lapse also, the present special case was presented to have the question determined. The parties of the first part were the executors-nominate acting under Henry Cowe's will; the party of the second part was Peter Cowe.

The question for the determination of the Court was—Whether the parties of the first part were bound to make payment of the said legacy of £500 as a valid and subsisting legacy?

Argued for the first parties—The legacies and provisions in clause D were expressly made conditional upon Henry Cowe surviving the mother, and as that event did not happen, all these legacies and provisions lapsed. This legacy was expressly declared to be payable at the same time as the legacies in clause D, and as they could not be paid neither could it, and must be held to have lapsed.

Replied for second party—The reference in the codicil to the legacies mentioned in clause D was merely to fix the term of payment of the legacy now in question; the gift was unconditional, and should receive effect.

At advising—

LORD PRESIDENT—This curious settlement of the late Henry Cowe is divided into four parts, distinguished by the letters A, B, C, and D. A, which is a conveyance to his mother of the liferent of his whole property, stands unrecalled, but division B has been entirely recalled; therefore the will consists of A, C, and D, which two latter are alternative wills. C is to take effect