the sequestration was not in existence, the trustee was discharged, and there was no one to represent the creditors, and that being so we held that the radical right of the pursuer had revived on the discharge of the trustee, but simply for the reason that there was no trustee and no existing sequestration. Since then the sequestration has been revived, a trustee appointed, and he has put in a minute in this action. Accordingly, just as we held that the pursuer's radical right had revived because there was no trustee, it follows now that there is a trustee that his radical right is extinguished. The right to sue cannot be both in the trustee and the bankrupt at the same time, and I have no hesitation in saying now that it is in the trustee. If the present position of matters had existed formerly we would never have recognised any right in the pursuer's person. This again is, I think, enough for the decision of the case.

It is, I think, clear that the pursuer makes a mistake in thinking that if he could get the reduction craved the estate would revert to him. If the sale were reduced the only effect would be that the estate would fall into the hands of the trustee in the sequestration and be dealt with by him. The only and entire interest in the matter is the creditors, whose actions the bankrupt has no right or title to interfere with. If the pursuer could have said that he was prepared to show that if these subjects were to fall back into the sequestration and be again sold the price to be got for them would be so exceptionally large that after paying the creditors 20s. in the £ there would be a surplus for his benefit; if there were anything to show that that was a possible state of affairs, the pursuer would, I think, be entitled to sue. We have, however, the minutes of the proceedings in the sequestration, and I find it set forth in the minute of 21st May 1884 that—"The claims as ranked by the trustee upon the estate amounted to £28,176, 2s. 9½d., and a dividend thereon at the rate of one penny and an eighth would require £132, 1s. 6d. The commissioners accordingly authorised the sum of £132, 1s. 6d. to be divided among the creditors in terms of the statute." This it appears was the last and final dividend, and as it further appears that the only previous dividend had been 6d. in the £, we have only 7⅛d. as the total dividend paid on this estate, we have claims ranked to the amount of £28,000 and only about £800 to meet them. How then is it possible to say in such circumstances that the pursuer could show that the estate could be sold for a sum giving him a reversion?

On these grounds accordingly I have no hesitation in saying that the Lord Ordinary has come to a right conclusion.

Of the many objections made to the sale there is one dealt with by the Lord Ordinary with regard to which I do not wish to express any opinion. The objection, though the record is nearly unintelligible on the point, is that one of the commissioners on the pursuer's sequestrated estate was the manager of the Investment Company who purchased the subjects. The Lord Ordinary, as I have said, has expressed his opinion upon the matter. I do not think, however, that it is desirable that we should decide this question in a case where the pursuer has no title, and therefore I reserve my opinion on the point.

LORD M'LAREN and the LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Rhind—Party. Agent—J. D. Macaulay, S.S.C.

Counsel for the Defender and Respondent—G. W. Burnet. Agents—Boyd, Jameson, & Kelly, W.S.

Wednesday, June 11.

SECOND DIVISION.

[Lord Trayner, Ordinary.

HENDERSON & SONS *v.* DOWLING.

Principal and Agent—Contract—Construction—Dismissal—Reasonable Notice.

A firm of merchants engaged an agent to sell their goods, and agreed to pay him "monthly at the rate of £200 per annum," and to allow him in addition "5 per cent. on all sales above £300 per month, this to be calculated on the whole year at the end of the first year, and according to arrangement thereafter." Two months thereafter the employers gave a month's notice of dismissal to the agent, who replied that the engagement was for a year. The merchants did not repudiate this construction of the contract, but about a month thereafter they again gave the agent a month's notice of dismissal. In an action at his instance, *held* that from the terms of the contract and the actings of the parties the period of employment contemplated and agreed to was a year, and that the pursuer was entitled to damages for breach of contract.

Upon 26th February 1889 James Thompson Dowling, commission-agent, Dundela Villa, Shettleston, wrote to Simon Henderson & Sons, Grove Biscuit Factory, Edinburgh, offering his services as agent in Glasgow for the sale of their biscuits. He stated that he had several other commissions in kindred trades, and had an established reliable connection. Upon 13th March Simon Henderson & Sons appointed him agent under the following agreement:—. . . . "1. We agree to pay you monthly at the rate of £200 per annum, and to allow you 5 per cent. on all sales of biscuits (tins, &c., not included) above £300 per month, this to be calculated on the whole year, at the end of the first year, and according to arrangement thereafter. 2. Twenty per cent. to be the maximum discount to be

allowed by you. Less than this to be allowed to smaller buyers, and wherever practicable. 3. Accounts monthly. 4. You to be responsible for 10 per cent. of bad debts. 5. You also to lift and forward empties. 6. While holding our agency you will not sell biscuits for any other firm. . . . We are prepared to make a start with you on Monday 1st April."

Dowling entered upon his business on 1st April as arranged. Upon 1st June 1889 Henderson & Sons wrote to him as follows:— . . . "We are much disappointed that your sales have been so small, and so far short of what you led us to understand you could sell, and on the strength of which we guaranteed you commission on sales of £300 per month. In the circumstances we find it necessary to give you notice that we cannot continue the guarantee after the end of the month begun to-day." Dowling replied on 3rd June—"I cannot accept your interpretation of my agreement with you. There is a distinct understanding between us that the term is to be one year, and I may say at once, and it is nothing more than I keenly feel, that not for twenty times the value of your agreement with me would I have my name associated with any firm for such a short time." Upon 6th July Messrs Henderson repeated some of the complaints which they had already made to Dowling as regarded his way of doing business, and the amount of sales he had effected, and ended their letter thus—"In view of this, and all the circumstances of the case, we hereby give you notice that after the end of the present month your services will not be further required."

Dowling raised this action against Henderson & Sons, concluding for £16, 13s. 4d. as a month's salary due to him, and also £300 as damages for the breach of contract. He averred that his appointment was for a year from 1st April 1889.

The defenders admitted that the month's salary was due. They stated—"The pursuer represented to the defenders that he had had considerable experience in the biscuit trade, and that he had an established reliable connection in the Glasgow district; that he was selling over £300 a-month there for his then employers. These representations were false. He also represented that if appointed he would undertake to sell from £300 to £400 per months of the defenders' biscuits according to their priced list. Relying on these representations, the defenders appointed him agent for their biscuits in the Glasgow district, with salary at the rate of £200 a-year, payable monthly, and commission at the rate of 5 per cent. on all sales above £300 per month. They also stipulated that 20 per cent. was to be the maximum discount allowed, and that only to large buyers. The said agency was terminable by a month's notice, which is the general usage of trade in such agencies." "The defenders, soon after the pursuer's agency began, discovered that the pursuer had neither experience in the business nor any established connection. His sales of biscuits in terms of price list amounted to only £20, 4s. 4d. in April, £30, 6s. 6d. in May, £59 in June, and £31, 15s. in July. Further, the pursuer took and persisted in taking orders for cheap inferior biscuits of a class not in defenders' line, and at prices which resulted in a loss to them notwithstanding the defenders' express and repeated orders not to do so. He also broke the condition of his employment by allowing the maximum discount to buyers generally, the usual trade discount being only 10 per cent."

The pursuer pleaded—"(2) The defenders having illegally and unwarrantably dismissed the pursuer from their employment are liable to him in damages, and the sum sued for being fair and reasonable, decree should be granted as concluded for."

The defenders pleaded—"(3) The dismissal of the pursuer not having been illegal or unwarrantable, the defenders are entitled to absolvitor, with expenses, from the second conclusion of the summons. (4) The pursuer having induced the defenders to appoint him agent by false representations, and having thereafter contravened their express orders and the conditions of his agency to their loss, the defenders were entitled to terminate the same."

A proof was allowed, the import of which sufficiently appears from the opinion of the Lord Ordinary, who pronounced this interlocutor upon 8th January 1890:—"Finds the defenders liable in payment to the pursuer of the sum of £150 sterling, with interest as concluded for: *Quoad ultra* assoilzies the defenders and decerns: Finds the defenders liable in expenses, &c.

"*Opinion.*—The first question to be determined is whether the agreement between the parties was one for the period of a year, or whether it was terminable sooner by either party on a month's or other reasonable notice. The agreement itself does not provide for any specific period of duration, and therefore the answer to this question must be ascertained by a consideration of the terms of the agreement, taken along with its general character and the circumstances under which it was made. The defenders recently became biscuit bakers, and having no commercial connection with Glasgow, they engaged the pursuer as their servant or agent to sell their biscuits in that city, the pursuer having a large connection there with shopkeepers and others who deal in such biscuits. The terms of the agreement between the parties are set forth in a letter dated 13th March 1889, addressed by the defenders to the pursuer, in which they agree to pay him 'monthly at the rate of £200 per annum,' and to allow him in addition 'five per cent. on all sales of biscuits (tins, &c. not included), above £300 per month, this to be calculated on the whole year, at the end of the first year, and according to arrangement thereafter.'

"The defenders maintain that under this agreement the pursuer became their agent, and that under a contract of agency the principal may withdraw or cancel the agent's mandate at pleasure. But in my opinion the contract between the parties

was not mere agency. I think it was rather a contract of service. A fixed salary is not a usual feature of agency—the agent is paid by a commission on the business which he does. Here, however, the principal remuneration stipulated to be paid to the pursuer was a fixed salary; the addition of a commission on business transacted beyond a certain amount being a bonus on his success or an inducement to greater exertion. But whether the relation between the parties was that of principal and agent, or that of master and servant, I think it was not intended and not agreed that that relationship should be put an end to at the pleasure of either party on a short notice. It was plainly contemplated that the relationship between them was to be of some duration, and in my opinion, on a fair reading of the agreement, the period contemplated and agreed to was a year at least. (1) The purpose for which the pursuer was employed was that he might make for the defenders a business connection with Glasgow, and introduce their manufacture to the Glasgow market. It is obvious that this could not be accomplished in a month or two; it required not only exertion on the pursuer's part but time. (2) The salary to be paid to the pursuer was to be at the rate of £200 per annum, and this points to a year's engagement rather than an engagement for a shorter period. I do not, however, put so much weight on this consideration as on those which follow. (3) The commission to be paid the pursuer on his transactions exceeding the value of £300 per month was to be calculated on the 'whole year at the end of the first year.' This language, I think, is inconsistent with the idea that the engagement was to terminate before the lapse of a year, The 'first year' can only mean the first year of the engagement, during which the pursuer was earning or endeavouring to earn his commission, and it would have been impossible for the parties to calculate that commission on the 'whole year' if the engagement terminated before the whole year had run. I suppose there can be no doubt that the meaning of the agreement as regards commission is this, that the pursuer was only to receive commission on all sales exceeding £300 per month, one month taken with another. In other words, the pursuer was to receive commission (in addition to his fixed salary) only if his sales exceeded £3600 a year. If the pursuer had sold £2000 worth of biscuits in the first three months he would have had no claim for commission then, because the sales of the following nine months might have been such as to reduce the average monthly sales below £300. If this is the meaning of the agreement, then it becomes plain that the parties contemplated that the agreement would endure for one year. (4) The agreement as made, however (so far as concerned the commission), contemplated that it might be changed. It was to be 'according to arrangement thereafter.' After what? I think, clearly, after the 'first year.'

"These considerations lead me to the conclusion that the agreement in question was intended to be and was an agreement for a year. The views expressed by the Court in deciding the case of *Moffat* v. *Shedden*, 1 D. 468, appear to me to support the view I have taken.

"There remains the question, whether the defenders (assuming the agreement to have been for a year), were justified in terminating the agreement as they did at the end of the fourth month. The defenders justify their action on three grounds—(1) That they were induced to enter into the agreement by the false representations of the pursuer; (2) That the pursuer gave a discount to customers beyond that which he was authorised to give; and (3) That the pursuer persisted in the sale of a certain cheap biscuit, contrary to defenders' orders, and to their loss.

[*The Lord Ordinary here examined the evidence on these points in detail.*]

"I am of opinion that the defenders have failed to justify the dismissal of the pursuer on any of the grounds now put forward by them. I shall therefore find the pursuer entitled to one year's salary, less the amount already paid to him. This is not so hard upon the defenders as it might seem to be. They are now canvassing and obtaining orders from the tradesmen to whom they and their manufacture were introduced by the pursuer."

The defenders reclaimed, and argued—The Lord Ordinary had taken a wrong view on the matters of fact in the case. The pursuer had repeatedly disobeyed their orders in regard to the sales of biscuits he made, and had also given a false representation of his position and ability to make the large amount of sales he claimed, and the defenders were entitled to dismiss him on those grounds.. This was not an engagement for a year, but was terminable by either of the parties at pleasure after reasonable notice, and which had been given. A commercial agency was terminable by either party on such notice. The arrangement that the salary would be paid in a lump sum and not at so much a week or month was no indication that the engagement was for a year—*Robson* v. *Overend*, November 21, 1878, 6 R. 213. In this agreement payment was to be made monthly at the "rate of £200 per annum." These words showed that the ordinary rule was to be followed, and the pursuer had not discharged the *onus* which lay on him of showing that another rule was to prevail—*Fergusson*, November 13, 1850, 13 D. 51; *Dunn* v. *Sayles*, February 9, 1844, 13 L.J., Q.B. 159; *Moffat* v. *Shedden*, February 8, 1839, 1 D. 468; Fraser's Master and Servant, 51; *Nicol* v. *Graves*, May 30, 1864, 23 L.J., C.P. 259; *Hoey* v. *M'Ewan & Auld*, June 4, 1867, 5 Macph. 814.

The respondent argued—The pursuer had not disobeyed any of the defenders' orders. This was an engagement for the whole year, and was not terminable at the pleasure of either party. The terms of the engagement showed that. The pursuer occupied a high position in his line in Glas-

gow, and he undertook to make the defenders' business there. That was not to be done in a short time, nor under such a dubious engagement as this would have been if it had been as the defenders suggested. There was a lump sum offered that showed the engagement was to last the whole year. In the second place, the actings of the parties showed that the contract was not terminable at pleasure. The pursuer had at once repudiated that view of the contract. The defenders had said nothing in reply to that statement, therefore they had acquiesced in the view put forward by the pursuer. The English cases were not in point, as they referred to the case of menial servants—*Campbell* v. *Fyfe*, June 5, 1851, 13 D. 1041; *Fawcett* v. *Cash*, 5 B. & A. 908; *Megton* v. *Bolton*, L.R. 3 Ex., W. H. & G. 518.

At advising—

LORD JUSTICE-CLERK—In this case we have heard a very full and able argument, but not too full, as I think the case is by no means a clear one. The question arises upon an agreement between the pursuer and defenders by which the pursuer became agent for the sale of Messrs Henderson's biscuits in Glasgow, and the defenders agreed to pay him monthly at the rate of £200 per annum, and to allow him 5 per cent. on all sales of biscuits above £300 per month, this to be calculated on the whole year at the end of the first year. There were certain other arrangements, such as the amount of discount to be allowed, &c., which I need not notice here. That engagement was accepted by the pursuer.

There was a good deal said in argument as to the exact interpretation of the words of the contract as they stand. When, however, a contract is entered into by two parties in the informal manner that this was, it is important to observe what were the actings of the parties after it is formed, because it may have great weight in our consideration of what is the true meaning of the contract if we find that a certain construction was put upon it by one party and not repudiated by the other.

Now, looking to the proof, I agree with the Lord Ordinary that the evidence of the defenders is very unsatisfactory, and the impression I have formed of it is different from that which I have formed of the pursuer's evidence, which I think to be truthful, and consistent with the correspondence we have before us, and which I agree with the Lord Ordinary should be accepted in preference to that of the defenders. When I say that the defenders' evidence is unsatisfactory I do not wish to cast any imputation upon their personal truthfulness, but I think that it shows—as the Lord Ordinary indicates—that the memory of the defenders is defective, and that what they say cannot be trusted unless supported by independent testimony.

Now, I can easily imagine that in the course of starting a new trade in a new place difficulties may arise on various points between the manufacturers and their agent. In the course of the debate several matters were brought forward as a justification for the dismissal by the defenders of the pursuer for fault committed by him in the course of his business, but I do not think that any case of fault has been proved against the pursuer.

One question between the parties related to the stoppage of the sale of a certain class of cheap biscuits, or if they were sold they should only be sold when orders for a more expensive kind of biscuits where given at the same time. But as I said before, where an agent is employed in starting a new business, there is almost certain to be disapprobation at the beginning on the part of the employer, who finds his expenses large and his return small, and pressure by the employee to induce the employer to allow his policy to be pursued. We find evidence of this in the case when we come to the question of discount. On that matter we must take the evidence of Simon Henderson, one of the partners of the firm, against himself, and he says practically that although the discounts were objected to and grumbled at, still they were in the end consented to. As regards the question of cheap biscuits, I think that matter was very much in the same position; it was grumbled at and objected to, but in the end it was assented to, and all parties hoped that the beginning of the work would be got over, and that through the sale of the cheap biscuits for a while a field would be opened for the sale of the higher class of biscuits.

Then we come to the part of the case upon which there is a real dispute between the parties. Upon the 14th May Messrs Henderson write to Dowling that they are disappointed in the amount of his sales, and that they have made up their mind that they "cannot continue the guarantee." Now, I do not think that that is the manner in which the Messrs Henderson would intimate his dismissal to one of their agents. They had agreed to guarantee him a salary of £200 per annum, and it is only their guarantee for that amount they propose to withdraw. In my opinion it was merely a feeler that the Messrs Henderson put out to find what interpretation the pursuer put upon his contract with them. In answer to that letter the pursuer at once very firmly and straightforwardly states what is his interpretation of the contract, and that is the interpretation which he now puts forward as the true one, and which the Lord Ordinary has found to be the true one. Well, matters go on on that footing from the 3rd June till 6th July, when Messrs Henderson dismiss the pursuer from his position as their agent. But all this time they have been acting in the knowledge that he considered and maintained that his engagement was a yearly one, and that they have not objected to this interpretation. I do not think that now they are entitled to take up the position that the pursuer was merely an agent whom they were entitled to dismiss at a month's notice. I think that on this point we should adhere to the Lord Ordinary's interlocutor.

The only remaining point to be considered

is the question of damages, and although I think the Lord Ordinary has given a very ample measure under that head, still looking to all the circumstances, I do not think there has been any sufficient ground shown to us for interfering with his judgment in that matter.

LORD YOUNG—I agree that the interlocutor of the Lord Ordinary should be affirmed, but I confess I do not think the case at all a clear one or free from difficulty, but I would not differ from the Lord Ordinary's interlocutor in such a case as this without very strong reasons for doing so.

Upon the question of whether the defenders were entitled to dismiss the pursuer for disobedience to orders I agree with your Lordship there is no case. When I said that the case was not a clear one or free from difficulty, I referred to the question of the endurance of the contract. I am not clear that the parties to this contract intended it to endure for a year, or that they stipulated that it should endure for a year or indeed for any specific period, and it is necessary therefore to take into consideration the terms of the agreement. I am the more influenced in this course by the Lord Ordinary's judgment and by your Lordship's opinion, as well as by the letter of the pursuer of 3d June 1889, in which he states his understanding of the agreement —that it was to last for one year—and the failure of the defenders to repudiate that construction of the contract. I should not like to decide that there is any presumption on the one hand that a contract was intended to last for a whole year, or on the other hand, that it was terminable at the pleasure of the parties, in such a case of employment as we have here, which is simply the case of a man in Glasgow employed to sell there the biscuits of an Edinburgh biscuit manufacturer.

Looking at the contract itself I am not disposed to read into it anything more than that it implies a reasonable notice must be given, but looking to the specialities of this case, and especially to the terms of the letter to which I have referred, and the absence of any repudiation of it by the defenders, I am willing to assent to our adhering to the Lord Ordinary's interlocutor without giving my agreement to any general rule of law.

LORD RUTHERFURD CLARK—I also agree, but I do so entirely upon the specialties of this case.

LORD LEE concurred.

The Court adhered.

Counsel for the Appellant—A. J. Young—Kennedy. Agent—Alexander Campbell, S.S.C.

Counsel for the Respondent—Guthrie—Wilson. Agents—Dove & Lockhart, S.S.C.

Wednesday, June 11.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

WILLIAMSON *v.* ROBERTSON AND ANOTHER.

Reparation—Slander—Licensing Court—Agent Acting as Counsel—Absolute Privilege.

Held that an action of damages for slander will not lie against an agent in respect of statements made by him while pleading before a Licensing Court in support of a petition against the granting of a licence.

Reparation—Slander—Licensing Court—Party to Proceedings before Meeting—Privilege—Issue.

In an action of damages for slander the pursuer averred that the defender, as a party to a petition against the granting of an application by the pursuer for a licence, had written a letter to the agent for the petitioners containing the false and slanderous statement that the pursuer was addicted to drink, which statement the agent read in the Licensing Court; that the defender knew that the statement was untrue, and that it was incompetent to make it in Court, but that he maliciously and without probable cause instructed the agent to make the said statement in Court for the purpose of defaming the pursuer and defeating his application for a licence.

Held that the pursuer was entitled to an issue for trial of the cause, putting the following questions to the jury—"Whether the defender wrote the letter complained of to the agent, and maliciously instructed the said agent to read it in a Licensing Court about to be held at Lerwick; Whether the agent, acting on the instructions so maliciously given, did read the letter in the presence and hearing of certain persons named; and Whether the letter was of and concerning the pursuer, and falsely, calumniously, and maliciously represented the pursuer to be so addicted to drink as to be an unfit person to hold a grocer's licence, to his loss, injury, and damage?"

At the Licensing Court held at Lerwick on 29th October 1889, Bryden Williamson, merchant at Booth of Sand, in the county of Shetland, applied for a grocer's licence for his premises. A petition against the granting of the licence was lodged by some objectors, and Andrew John Robertson, S.S.C., appeared in support of the petition. The objections stated in the petition did not refer to the applicant's character. After speaking to the objections Mr Robertson read the following letter dated 26th October 1889 which he had received from Mr W. H. Umphray, a party to the petition—"Dear Sir,—There is an attempt on the part of the man who now has the Sand shop to obtain