if she is satisfied with what she is getting then the pursuer is satisfied also, and she need not come back. There is nothing to support the view that the pursuer continued the allowance of 10s. per week merely because he did not wish to see her left destitute. He certainly does not say so himself, and it cannot be reasonably inferred from the rest of the evidence. A desire to save expense was at the bottom of any anxiety he felt for his wife's return. And he operated his offer to take her back for that limited purpose. Accordingly when it had served its purpose and his wife's demand for an increase of aliment had been silenced by it, the offer fell away into the background, and a life apart was without remonstrance of any kind acquiesced in by the pursuer.

I come to the conclusion therefore that the plea-in-law for the pursuer should be repelled, the third plea-in-law for the defender sustained, and the defender assoilzied.

LORD SALVESEN was not present.

The Court adhered.

Counsel for the Reclaimer (Pursuer)—Mitchell, K.C.—J. Stevenson. Agents—Mackenzie & Dunn, S.S.C.

Counsel for the Respondent (Defender)—Maclaren—Burnet. Agent—J. M. Langlands, S.S.C.

Tuesday, July 20.

SECOND DIVISION.

[Lord Anderson, Ordinary.

ROTHFIELD *v.* NORTH BRITISH RAILWAY COMPANY.

Reparation—Innkeeper—Hotel—Obligation to Lodge Traveller—Reasonable Excuse for Refusal—Act 1424, *cap.* 25.

An innkeeper while under an obligation to receive travellers has a discretion as to rejecting guests that are not suitable to the character of his establishment, subject to the proviso that he must not exercise his discretion capriciously or maliciously. *Held* (1) (*sus.* judgment of Lord Anderson, Ordinary) that a railway station hotel belonging to a railway company, which issued a general invitation to the travelling public to resort thereto, was subject to the obligations imposed by the law on "common inns," including the obligation to provide accommodation for travellers resorting thereto; but (2) (*rev.* judgment of Lord Anderson, Ordinary) that the owners of such an hotel were justified in refusing accommodation to a Jewish money-lender who had been pilloried in the public press without taking action to vindicate his character, who by his conduct in the hotel had attracted attention, whose presence in the hotel, at the time largely frequented by young officers some of whom he entertained there, had been the occasion of complaint at the instance of guests in the hotel.

Authorities examined.

Process—Declarator—Competency—General Declarator.

A traveller who averred that he had been unwarrantably refused accommodation at a hotel in Edinburgh brought an action of declarator in which he craved the Court to find that when in the course of travelling he found it necessary to stay in Edinburgh he was "entitled as a *bona fide* traveller to be received, entertained, and lodged by the defenders and their servants as a guest in their . . . hotel . . ., and that at bed and board, on the same terms and conditions as other travellers are received, entertained, and lodged . . ., provided the defenders have sufficient room and accommodation . . . at such times as he as a *bona fide* traveller applies to the defenders and their servants and requires to be received, entertained, and lodged." *Held* (*rev.* judgment of Lord Anderson, Ordinary) that the declarator was too vague and general to be competent.

Henry Rothfield, financial agent, 201 Buchanan Street, Glasgow, *pursuer*, brought an action against the North British Railway Company, 23 Waterloo Place, Edinburgh, *defenders*, in which *in the first place* he sought to have it found and declared "that when the pursuer in the course of travelling finds it necessary to stay in Edinburgh he is entitled as a *bona fide* traveller to be received, entertained, and lodged by the defenders and their servants as a guest in their Station Hotel in Edinburgh, and that at bed and board, on the same terms and conditions as other travellers are received, entertained, and lodged by the defenders and their servants at said hotel, provided the defenders have sufficient room and accommodation in said hotel for *bona fide* travellers so to receive, entertain, and lodge the pursuer at such times as he as a *bona fide* traveller applies to the defenders and their servants and requires to be received, entertained, and lodged as aforesaid," and *in the second place*, whether or not declarator should be granted in terms of the preceding conclusion, he sued for £105 damages.

The pursuer *pleaded, inter alia*—"1. The pursuer, having right as a traveller to be received and lodged in defenders' said hotel provided accommodation therein be available, and the defenders having repudiated his right, is entitled to decree in terms of the declaratory conclusions of the summons. 2. The pursuer having suffered loss and damage through the illegal and unwarrantable actions of the defenders, or of those for whom they are responsible, is entitled to reparation therefor as concluded for."

The defenders pleaded, *inter alia*—"2. The pursuer not having the rights claimed and the defenders' actions having been legal, the defenders are entitled to absolvitor. 3. The pursuer being, in the opinion of the defenders, unsuitable as a guest in their hotel, they are entitled to exclude him, and

to absolvitor. 4. The pursuer being unsuitable and objectionable as a guest in the defenders' hotel, they are entitled to exclude him, and to absolvitor. 5. The defenders' hotel not being an ordinary inn, and the pursuer not being an ordinary traveller, the pursuer has no such rights as are claimed, and the defenders are entitled to absolvitor."

The *facts* and *import of evidence* will be found *infra* in the opinions of the Lord Ordinary (ANDERSON).

On 8th November 1918 the Lord Ordinary found and declared in terms of the declaratory conclusion of the summons, and found the pursuer entitled to damages, which he assessed at the sum of one guinea.

Opinion.—"This is an important and interesting case. The pursuer is a moneylender whose residence is at 57 Fern Avenue, Newcastle-upon-Tyne. He carries on his money-lending business in London, Newcastle, Edinburgh, and Glasgow, his registered address being at 201 Buchanan Street, Glasgow. For the purpose of conducting this business the pursuer has frequently to travel. In doing so he uses the defenders' railway system, and holds a first class contract railway ticket which entitles him to travel on the defenders' trains between London, Edinburgh, and Glasgow.

"The defenders are the proprietors of the North British Station Hotel, Princes Street, Edinburgh, and the business of the hotel is conducted under their management and control. For the past four or five years the pursuer has been in the habit of residing in the defenders' hotel for two or three or more nights weekly. Prior to January last the pursuer usually kept on his bedroom in the hotel until his return on his next visit, and he paid his accounts monthly. On 17th January last the hotel manager, being aware that pursuer was leaving the hotel next day, informed him by a letter of that date that he must give up his room, and requested him to discontinue coming to the hotel. This sudden and complete change of relations between the parties compels me to surmise that there is more in this case than meets the eye in the pleadings. The changed attitude on the part of the hotel officials can only be accounted for, it seems to me, by their having suspicions of objectionable conduct on the part of the pursuer in his use of the hotel. Nothing, however, to this effect has been averred by the defenders, perchance because they are satisfied that such averments could not be proved, and I must decide the case on the pleadings which have been formulated.

"After the pursuer had received the hotel manager's letter of 17th January he placed the matter in the hands of his solicitors, and the course of subsequent negotiations may be traced in the letters which were referred to at the debate. The letter of pursuer's solicitors of 2nd April makes it plain that the pursuer was not maintaining a right to have a bedroom permanently reserved for his use as in the past, but merely that he should receive accommodation in the hotel when he required it on arriving in Edinburgh as a traveller. The attitude of the hotel management as to this claim made on behalf of the pursuer was brought to a test on 8th April, when the pursuer purposing to be in Edinburgh as a traveller telegraphed to the hotel manager, 'Arriving Wednesday. Will you provide accommodation?' I construe this as a request for the accommodation needed by a traveller. This is all that had been demanded by the letter of the pursuer's solicitors of 2nd April, and I have no doubt that the hotel manager understood that the telegram made no wider request. The reply, telegraphed on the same day, was, 'Your telegram. Must decline.' The defenders frankly state in their pleadings that their attitude to the pursuer is this—that they 'desire that he shall not come to the hotel, and to refuse him as a guest if he should come.'

"In these circumstances the pursuer has raised the present action with the object of vindicating what he maintains are his legal rights to the use of the defenders' hotel. His summons has two conclusions—(1) a declaratory conclusion to the effect that when he is in Edinburgh as a traveller he is entitled to use the hotel as a guest if there is accommodation available, and on condition of paying the usual tariff charges; and (2) a petitory conclusion craving payment of damages from the defenders in respect of their refusal to receive him in said hotel as a guest on 8th April 1918.

"The legal contention of the pursuer, in support of the declaratory conclusion of the summons as formulated in his first plea-in-law, is that a traveller is as matter of right entitled to demand and receive entertainment as a guest in an hotel if there is accommodation available. It is implied in this plea, although the averment is not specifically made, that the North British Station Hotel is a common inn.

"The defences to the action, apart from criticisms of the language of the declaratory conclusion and of the relevancy of the pursuer's pleadings, are these—(1) That the defenders are entitled to exclude the pursuer from the hotel without cause existing or assigned (plea 3); (2) that cause does exist which justifies this exclusion of the pursuer (plea 4); and (3) that the said hotel is not a common inn (plea 5).

"I propose in the first place to consider what is the legal status or character of an hotel, and what are the obligations owed to the public by its proprietors.

"It is plain that the Licensing Act of 1903 referred to on record has no bearing on this question. The object of the Licensing Act was to regulate the sale of intoxicating liquor in certain authorised premises to members of the public resorting there for the purpose of consuming or procuring liquor. Under the provisions of the Act of 1903 the North British Railway Hotel is just a public-house in so far as intoxicating drink is sold within its precincts. As in the case of other public houses the hotel officials are entitled, without cause existing or assigned, to refuse to supply drink within the hotel to a member of the public, not enjoying the privileges of a traveller, who demands to be supplied. But the law appealed to by the pursuer as the basis of

his legal demand was settled long before the first licensing statute was enacted. That law is not dependent upon or affected by the fact that the hotel is licensed to sell drink. It applies to all establishments of the nature of an hostelry, whether licensed or not, such as temperance hotels, coffee-houses, and hydropathics.

"There is more authority on the subject in the law of England than in Scotland, but in my opinion the law is to the same effect in both countries. In England it is authoritatively settled that the keeper of a common inn or hotel who holds himself out for the lodging and entertainment of travellers for reasonable remuneration is bound to entertain travellers and wayfarers if he has accommodation—*Lane* v. *Cotton*, 1691, 12 Mod. Rep. 484; *Calye's Case*, 8 Co. Rep. 32; *Thompson* v. *Lacy*, 3 B. & A. 283; *Howell*, 6 C. & P. 725; *Rex* v. *Ivens*, 7 C. & P. 213; *Hawthorn*, 1 C. & K. 404; *Reg* v. *Sprague*, 63 J.P. 233; *Reg* v *Smith*, 65 J.P. 521; Montgomery's Licensing Practice, 497, 502, 508. In the case of *Lane* Mr Justice Holt finds the legal principle upon which this general obligation of an inn-keeper is based in the common law doctrine of 'public trust.' He considers that an inn-keeper is fixed with the discharge of a public duty in the conduct of his inn to members of the travelling public. He assimilates the legal position of an inn-keeper to that of a common carrier who is bound to carry the goods, provided they are of the description he professes to carry, of any person offering to pay his hire.

"In the case of *Thompson* v. *Lacy* Mr Justice Best at p. 287 said—'An inn is a house the owner of which holds out that he will receive all travellers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received.' In the case of *Ivens* Mr Justice Coleridge referred to inn-keepers as 'public servants' and laid it down that an inn-keeper is not entitled to select his guests. In more recent English cases the law is declared to the same effect. Thus in *Medawar*, 1891, 2 Q.B. 11, I find that Lord Esher, M.R., said this—'An hotel-keeper, by opening his house as an hotel, offers it to the use of the public as such, and thereupon the common law of England imposes on him certain duties and gives him certain rights. He has no right to refuse to take into his house any one of the public who offers himself as a guest if he has room for him in his house; and in return for this obligation which it imposes on him the common law gives him a lien for his charges upon the goods of the guest which are in the house.' In the same case Bowen, L.J., at p. 25, said—'We start with this, that a man who comes to an hotel, if there is an unoccupied room, has a right to use that room.' Again, in the case of *Browne*, 1902, 1 K.B. 696, Lord Alverstone, C.J., said at p. 698—'The true view is, in my opinion, that an inn-keeper may not pick and choose his guests; he must give the accommodation he has to persons who come to the inn as travellers for rest and refreshment.'

"The law of England regarded this obligation upon inn-keepers to provide accommodation for travellers as so well settled and imperative in character that breach of it could competently be dealt with by way of indictment against the offending inn-keeper—*Rex* v. *Luellin*, 12 Mod. Rep. 445; Bullen and Leake's Precedents and Pleadings, 339.

"In Scotland there is not, as there is in England, express decision that an inn-keeper is bound to entertain every traveller who demands rest and refreshment, but there is the highest authority in the shape of *obiter dicta* of Lord President Inglis to the effect that this is the law of Scotland. The case of *Ewing*, 5 R. 230, decided that under a prohibition in a feu-charter against building on the lands feued anything except dwelling-houses, and also against the vassal allowing to be kept upon the feu 'any public-house or tavern,' the vassal was not entitled to erect an inn or hotel containing sleeping apartments for the accommodation of travellers; or a hydropathic establishment, even though the latter was not licensed for the sale of exciseable liquors. In that case the Lord President said, at p. 233—'But it is said, further, that the hydropathic establishment proposed to be erected is not to have a licence. A hotel, however, does not cease to be a hotel because it has no licence. A temperance hotel-keeper is under the same law as any other hotel-keeper. The edict *Nautæ caupones* applies to both equally. A temperance hotel-keeper is just as much bound to receive every traveller who presents himself, provided he have a room in his hotel and there is no good personal objection to the particular traveller. He is the servant of the public and bound to receive every decently behaved member of the public unless his house is full, and if he does not he is liable to an action of damages. This applies just as much to the keeper of a hydropathic establishment.' The origin in Scotland of the general obligation of an inn-keeper to travellers is doubtless to be found, as in England, in the common law principle of 'public trust' or 'public duty.' It is also, I think, traceable to certain enactments of the old Parliaments of Scotland. These statutes were passed primarily with the object of protecting private individuals from the exactions of bands of 'ridaris and gangaris throu the cuntre.' Thus the Act 1424, cap. 25, 'ordainyt that in all burowis townys of the realme and thruthfaris quhar common passagis are, that thar be ordanyt hostilaris and resetteris, haifande stabillis and chawmeris to ridaris and gangaris, and at men fynde with thame brede and aile, and all uthir fuyde, alsueille to horse as men, for resonable price eftir as the chapis of the cuntre standis.' This was followed by the Act 1425, cap. 11, which provided that no traveller on horse or on foot should lodge in any other place than hostelries, excepting those who travelled with a large retinue, who were allowed to lodge with their friends if they sent their horses and followers to the hostelry. Burgesses were forbidden under penalty of a fine

to receive such travellers. By the Act 1427, cap. 3, the King ordained all his burgesses in the realm 'quod faciant fieri hostellaria seu hospicia publica in burgis honesta et competencia more aliorum regnorum ad recipiendos omnes et singulos hospites tam pedestres quam equestres per regnum laborantes sub pena.' By the Act 1535, cap. 23, the former Acts were approved, and further provision was made for securing that proper accommodation should be made for travellers, to be sold 'apoun ane competent price and as siclike stuff is saulde commonlie in the cuntre abouut quhare sik ostillaris duellis.'

"It is plain that although these statutes do not expressly confer on travellers a right to demand the accommodation which innkeepers are taken bound to supply, the existence of this right is necessarily implied in the statutory enactments.

"If, then, this general obligation upon inn-keepers to accommodate all travellers is a well-settled doctrine of the law of Scotland, an examination of certain other authorities which establish that the obligation is not universal and absolute will enable me to formulate in the shape of a series of propositions, and to do so with some approach to exactitude, the law which regulates the duties of inn-keepers to the travelling public. The classical statement, in the law of Scotland on this point is the opinion of Lord President Inglis in the case of *The Strathearn Hydropathic Company, Limited*, 8 R. 798, at p. 800. 'It is said that the officials — by which, of course, are meant the persons who under the company are carrying on this business—have power to refuse admission and to send away such as they judge unsuitable—and that those "suffering from infectious diseases or intoxication cannot be received or allowed to remain in the establishment." It does not appear to me that that, properly construed, would enable the keepers of this establishment to refuse guests capriciously or maliciously; and every hotel-keeper must have a certain power of selecting his guests, or perhaps, to speak more precisely, of rejecting certain guests. He is bound to attend to the decency and order of his establishment. That is one of his obligations, and that would be inconsistent with admitting certain classes of guests. He is bound also to attend to the health of his guests and salubrity of his house, and that would lead to his rejecting certain guests. He is bound also, I think, to exercise a discretion as to the class of people whom he will admit to his hotel. A man who is carrying on business as a hotel-keeper in a first-class establishment is not bound to admit to his hotel persons in every rank and condition of life. Sometimes persons in the condition of working men become for the time very rich and extravagant. We have heard tales of navvies drinking up all the champagne and eating all the spring chickens of a whole neighbourhood; and if any of that class of people presented themto a hotel-keeper of the character we are supposing, I cannot doubt that he would have a discretion to reject them because their manners and habits are not suitable to the class of people whom he receives.'

"The law then on this matter, as it has been authoritatively settled, may in my opinion be stated in these propositions— (1) There is a general obligation on all innkeepers to receive as guests all members of the travelling public. (2) It matters not how the traveller arrives at the hotel, whether by road or rail, and in cases like the present, whether he has travelled to Edinburgh by the defenders' system or that of the Caledonian Railway Company. (3) The inn-keeper is bound to take in not only the traveller but his luggage; and luggage is not confined to personal luggage, but extends to whatever the traveller may bring with him provided it is not exceptional or dangerous, such as a tiger or a package of dynamite, illustrations suggested by the Master of the Rolls in *Robins & Company*, [1895] 2 Q.B. 501, or a piano (*Broadwood*, 10 Ex. 417). (4) The obligation of the inn-keeper extends to the provision of sleeping accommodation and food and drink, a traveller being entitled to demand and receive alcoholic liquor as part of his refreshment during his stay in the hotel (*Oliver* 23 R. (J.C.) 34).

"On the other hand an inn-keeper is not bound to receive a traveller—(*a*) If on request he gives no security to pay his bill (*Fell*, 8 M. & W. 276). (*b*) If the traveller is accompanied by an animal, such as a dog, tending to cause alarm to other guests (*Rymer*, (1877) 2 Q.B.D. 236). (*c*) If the person claiming accommodation is not a traveller *in itinere* (*Lamond*, [1897] 1 Q.B. 541; *Rymer, supra*). The right of a traveller to receive accommodation in an inn is determined when he ceases to be *in itinere*. No one can successfully claim to make his home in an inn, and an inn-keeper is not bound to provide residence to anyone. (*d*) An inn-keeper is not bound to receive a traveller into his inn if there is no available accommodation (*Browne, supra*). (*e*) An inn-keeper may refuse accommodation to a traveller who refuses to pay the ordinary tariff charges of the inn (per Mr Justice Best in *Thompson, supra*). (*f*) An innkeeper is not bound to receive in his inn an undesirable character. This means anyone whose presence in the inn would, for physical reasons, be disagreeable (*Pidgeon*, 21 J.P. 743) or dangerous, as in the case of a leper, to the other guests, or whose moral character would be objectionable to the other residents and prejudicial to the innkeeper's business.

"If the views I have expressed up to this point are sound they enable me to reject the defenders' contention that they have a discretion, without cause existing or assigned, to exclude the pursuer from their hotel. But the defenders maintained that this law of inn-keepers and common inns which I have been endeavouring to expound does not apply to the North British Railway Hotel, in respect that it is not a common inn.

"If the defenders' hotel had been situated within the boundaries of the Waverley Station this might have been a material

circumstance in a question with the general public, although it would not have affected the pursuer, who travelled by the defenders' trains and arrived at the station which the hotel adjoins. But the hotel is outwith the station boundaries, and it does not, in my opinion, differentiate it from other hotels that it has been erected by means of funds belonging to railway shareholders and that it is conducted by railway directors. The hotel is an ordinary trade venture, aiming at the acquisition of gain, and appealing to and desiring the patronage of the general public. The doors of the hotel open on Princes Street and the North Bridge, and the general public are thereby invited to patronise the hotel.

"It was contended that the rules of law which impose obligations with reference to travellers upon common inn-keepers do not apply to modern times and present day hotels. I am unable to assent to this argument. Nowadays journeys are not made on horseback or in stage coaches but by train or car. But people still travel, and travellers still require shelter and rest and refreshment. In the case of *Rymer, supra,* Mr Justice Denman said that the 'principles laid down in *Burgess* v. *Clements* (4 M. & S. 306) show that the object of the law upon the subject of an inn-keeper's liability is merely to secure that travellers shall not while upon their journeys be deprived of necessary food and lodging.' This object under modern conditions of life and travel still requires to be fulfilled, and in my opinion the defenders are bound when called upon to provide the means of fulfilment.

"The only countenance which this contention of the defenders receives, that modern hotels are not common inns, consists in a statement made by Lord Esher in the case of *Lamond, supra,* where he said—'I think it is open to argument that the large London hotels do not hold themselves out as receiving customers according to the custom in England—at any rate such a matter would be a question of fact.' If this means that hotels such as the Ritz, Savoy, or Gordon Hotels in Northumberland Avenue are not bound to entertain travellers when requested to do so, I find myself unable to subscribe to the opinion of Lord Esher, and whatever be the case as to hotels in London such as those I have mentioned, I have no difficulty in holding that the defenders impliedly invite travellers, and in particular those arriving at the Waverley Station, to demand accommodation at their hotel.

"This argument of the defenders, moreover, is negatived by the later decisions I have referred to, both English and Scottish, which are applicable to modern times, and in which there is to be found no hint that certain classes of hotels are not subject to the general obligation affecting common inns.

"I have no doubt that an hotel-keeper might limit his obligations under the rule of law to which I have referred. An hotel, for example, might offer to cater solely for ladies, or for officers in the services. In such cases the hotel-keeper would be entitled to exclude, in the one case males, and in the other civilians and members of the services who did not hold the King's commission. But in the case of the defenders' hotel it is not suggested that there has been any express limitation of invitation, and I hold that no such limitation can be implied. All travellers against whom proper objection cannot be taken and who are willing to pay the defenders' tariff charges are as matter of legal right entitled to demand and receive accommodation in the hotel so long as they are *in itinere.*

"It was suggested that as the pursuer might have obtained accommodation at another hotel in Edinburgh he was not entitled to insist on obtaining it at the defenders' hotel. I do not agree. A traveller is, in my opinion, entitled to choose the hotel at which he desires to be a guest, and the defenders are not entitled to put a traveller desiring to use their hotel to the trouble and expense of finding another hotel.

"I therefore reach the conclusion that the defenders' hotel is a common inn, and as such is affected by the rules of law I have alluded to, which impose on the keepers of common inns the duty of providing accommodation for travellers.

"If the defenders have no discretion to exclude the pursuer from their hotel his exclusion by them can only be justified if they had sufficient cause for doing so. Have the defenders averred a justifying cause of exclusion? They allege that the pursuer is a German Jew and a money-lender. The pursuer admits that he is a Jew and a money-lender, but denies that he is of German origin. He was born in Great Britain in 1884, and has resided and carried on business in this country ever since. He conducts a business which is a lawful occupation. Nothing else is alleged against the pursuer on record, and it is manifest that what is averred against him did not justify the defenders in excluding him from their hotel. It is doubtful if a single one of the thousands of guests who come and go to and from the defenders' hotel had any knowledge of the ancestry or religion or business pursuits of the pursuer. The defenders were specifically called upon to furnish the names of any guests who objected to the pursuer on any of these grounds, or on any ground, and they have not adduced a single name. The pursuer is a man of presentable appearance, and I must assume in the absence of allegation to the contrary that he behaved as a gentleman when he resided in the defenders' hotel. I must also assume that if he had been allowed to go back to the hotel his behaviour there would have continued to be irreproachable. I therefore am of opinion that the defenders have failed to aver a justifiable cause for the exclusion of the pursuer from their hotel.

"I now proceed to consider certain criticisms which were made by the defenders' counsel as to (1) the terms of the declarator sought; and (2) the relevancy of the pursuer's averments on which his declaratory conclusion is based. These criticisms were

urged with great earnestness and insistence by both of the defenders' counsel, and therefore, as I have reached the conclusion without much difficulty that there is no substance in any of them, I have an uneasy impression that I may have failed to appreciate the defenders' contentions on this part of the case. I shall, however, deal *seriatim* with the points taken as I understood them, and state why I hold them to be untenable.

"I. As to the form of the declaratory conclusion :—(1) It was maintained that this conclusion was fundamentally bad as it referred solely to the future. Its basis, however, is the defenders' refusal of 8th April to receive the pursuer into the hotel. The Lord Advocate conceded that (on the assumption that the hotel was a common inn) the pursuer might, on proper averments, have brought a declarator to the effect that he had been wronged by this refusal. It follows that a similar declarator would be open to him on every other occasion on which admittance to the hotel was refused. Now it seems to me that the present declarator will have the effect, by its general declaration as to the future, of being equivalent to and of superseding an indefinite succession of declarators *ex post facto*. A declarator in general is regulative of the future, and I see no reason for holding that on this ground the declarator sought is incompetent. (2) It was urged that the declarator sought was bad because it refers to an hypothetical series of events in the future. The Court, it was said, cannot *ab ante* make a declarator as to a set of circumstances without knowing exactly what those circumstances are. I am unable to accept this view. What the declarator in effect sets forth is that in a given set of circumstances certain consequences in law will follow. The given circumstances are (*a*) that the pursuer claims entertainment as a traveller; (*b*) that he claims to be entertained only so long as he is a traveller; (*c*) that he pays the recognised tariff charges; and (*d*) that the hotel retains in the future its present character of a common inn. The declarator will only apply if the supposed circumstances occur, and if they should happen I see nothing incompetent in declaring *ab ante* what the legal rights and obligations of the parties will be in the events contemplated. (3) It was argued that the declarator sought could not be granted because it laid on the defenders the burden, said to be intolerable, of determining (*a*) whether on any given occasion the pursuer was a traveller; and (*b*) when he ceased to have that character and might therefore be asked to leave the hotel. But that is just the burden which the defenders have to endure under present circumstances, and the declarator sought will lay no additional responsibility upon them. (4) It was contended that what the pursuer was really asking by his declarator, and what he would get if it were granted, was a right to *reside* in the hotel. I do not so interpret the terms of the summons and I do not think that they necessarily or naturally have that signification. The only support this contention receives from the terms of the summons is the use of the word 'stay,' but this term is explained by the context, which clearly shows that the pursuer only claims right to 'stay' in the hotel while he possesses the qualifications of a traveller. (5) Finally it was urged that the declarator was bad because it assumes that the pursuer will always be a traveller and the hotel a common inn. But it is just in those two assumptions that the pursuer finds the legal justification for the decree which he craves. If he demands admission to the hotel when he is not a traveller, or if the hotel has ceased to be a common inn when the pursuer's demand is made, the declaratory decree will be inapplicable.

"I therefore am of opinion that none of the criticisms pointed at the form of the declarator is well founded.

"II. As to the arguments directed to the relevancy of the pursuer's pleadings, these were two in number:—(1) It was complained that the pursuer had not defined 'traveller.' In my opinion it was unnecessary to do so. That word, in this department of the law, is a term of art. I must take it that the term is used by the pursuer in the signification which attaches to it in the decided cases. It was suggested that the proper term to employ was 'wayfarer.' But 'traveller' is used in the cases as often as 'wayfarer,' and has exactly the same meaning. This objection is therefore bad. (2) It was objected that the pursuer had not averred that the defenders' hotel is a common inn. In my opinion it was unnecessary to do so, as that is implied in the averment that the defenders' establishment is an hotel. As I understand the law, every hotel whose business is not expressly or by clear implication limited in extent is a common inn, because by keeping open door it impliedly invites the public generally to use it as an inn. This objection to the relevancy is accordingly also untenable.

"As to the procedure which has been followed, I propose to dispose of the action without taking a proof. I was asked to do this by the pursuer's counsel, who maintained that the defences were irrelevant. The defenders' counsel moved for a proof, but in my judgment the averments of the defenders are not relevant to be remitted to probation. The essential facts on which a judgment falls to be based are admitted. The only disputed matter of fact which has an appearance of being material is the allegation of the defenders, denied by the pursuer, that he has a residence in this city. But, assuming that the defenders are right on this point, it would not affect the pursuer's right to get the declarator which he seeks. The defenders do not justify their refusal of admission of 8th April on the ground that the pursuer had a residence in Edinburgh to which he could have resorted. If he has such a residence he may at any time give it up, or on any particular occasion it may be locked up. He would then be entitled to demand and receive from the defenders accommodation as a traveller. I therefore consider it unnecessary to have this disputed question as to 18 Polwarth Gardens determined by inquiry.

"On the whole matter, so far as the declaratory conclusion is concerned, I propose to repel the defences and grant decree in the terms concluded for.

"As to the conclusion of the summons directed to damages, I find myself in a position to dispose of it also at this stage. The pursuer has made no averment of special damage which requires to be remitted to probation. His claim is based on *solatium* for inconvenience and annoyance. The pursuer's counsel assumed that the principle of *solatium*, familiar in cases of slander, abuse of civil or criminal process, of damages in respect of personal injury or the death of a near relative, for assault, seduction, or breach of promise of marriage, is equally applicable to a case of this sort. I am of opinion that in the present case no claim of damages based solely on *solatium* is open to the pursuer. But the pursuer has been subjected to a legal wrong, and a legal wrong always carries with it a right to some damages—"*The Mediana*," [1900] A.C. 113. In the absence of averments supporting a claim to real or special damages, the damages awarded in such a case will be merely nominal damages. In the case I have just referred to the Lord Chancellor (Halsbury), at p. 116, observed as to 'nominal damages' that this 'is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term "nominal damages" does not mean small damages.' The Lord Chancellor plainly means that that phrase does not *necessarily* import small damages. Here it does, because no real damage has been sustained. I assume, because nothing to the contrary has been averred, that the pursuer when he got the telegram of 8th April either did not come to Edinburgh, or if he did he went to another hotel without going near that of the defenders. He cannot therefore recover anything from the defenders in name of damages beyond a sum which is *de facto* as well as verbally 'nominal.' I assess the damages due at the sum of £1, 1s."

The defenders reclaimed, and on 25th February 1919 the First Division (LORD PRESIDENT (STRATHCLYDE), LORDS MACKENZIE, CULLEN, and BLACKBURN), without delivering opinions, recalled the Lord Ordinary's interlocutor, before answer allowed the parties a proof of their respective averments and to the pursuer a conjunct probation, and remitted to the Lord Ordinary to proceed.

On 27th June 1919 the Lord Ordinary, after proof, of new found and declared in terms of the declaratory conclusion of the summons, and found the pursuer entitled to damages, which he assessed at the sum of one guinea.

Opinion.—"I refer to my former opinion for a statement of the law which, in my opinion, falls to be applied to the facts of this case. I see no reason, in the light of the evidence which has been led, for altering or modifying any of the legal propositions or conclusions which I formerly enunciated.

"The proof and the arguments which were advanced at the hearing on evidence were directed to three points—(1) Whether it had been made out that 'the defenders' hotel is a common inn. (2) Whether the pursuer had requested accommodation when a traveller *in itinere*, and whether this had been refused by the defenders; and (3) Whether the defenders were justified in refusing the pursuer accommodation as a traveller in their hotel. 1. Is the defenders' hotel a common inn? As was pointed out in the case of *Lamond*, [1897] 1 Q.B. 541, the question whether or not an hotel is a common inn is one of fact—the test being, as laid down by Esher, M.R., at p. 545—whether 'the proprietors of the hotel held it out to the public as an inn that would take in any traveller who came, provided there was room to do so.' Now, as regards the defenders' hotel, what has been proved is that by signboards, by advertisement and guide books, by the presence of a porter at railway trains, and by the implied invitation of the open door, members of the public, without exception, and especially travellers arriving at the Waverley Station are invited to the hotel. No limitation or restriction has been proved by the defenders as to those whom they invite. Their invitation is to the public generally, and this necessarily includes the travelling public. The evidence, moreover, as to what takes place at the Waverley Station on the arrival of trains shows that travellers by the North British route are specially invited to the hotel. The view I take of the matter is this, that where, in the case of any hotel, a general invitation to the public is proved or falls to be presumed, the *onus probandi* in a question of this sort is transferred to the hotelkeeper to establish that he is not affected by the common law obligation to provide refreshment and accommodation for travellers *in itinere*.

"If the question is considered historically it will appear that the primary function of an inn is to provide accommodation for travellers *in itinere*. Those functions which at the present time seem to predominate, to wit, to accommodate boarders or lodgers, and to provide refreshment and entertainment for those who are merely or mainly in pursuit of pleasure, are of comparatively recent development. Any historical treatment in the course of a judicial opinion must be of the most cursory character, but what follows seems to me to establish that inns were originally established for the entertainment of travellers and that this object has all along constituted and still constitutes their primary function.

"The inn is one of the most ancient institutions known to history. In Biblical and pre-Biblical times khans and caravanserais were erected on frequented routes for the accommodation of travellers. There were inns and innkeepers among the Greeks, but both were held in low repute by that fastidious race. In the Roman Empire something akin to the modern inn was estab

lished. The brethren from Rome met Paul at 'The Three Taverns' (Acts 28, *v.* 15). In Horace's interesting account of his journey from Rome to Brundisium he refers to the inns he slept at in the course of that journey—Sat. i, 5.

"In the Middle Ages the traveller could look for necessary accommodation in three directions—(1) to the hospitality of those whose dwellings he passed in the course of his journey. It will be remembered that in 'Ivanhoe' the Templar, the Prior, the Jew, and the Palmer all obtained accommodation for the night from Cedric the Saxon. (2) To the monasteries. Quentin Durward and his charges and treacherous guide were entertained in a Franciscan monastery in the course of the journey from Plessis-les-Tours to Liege. (3) To the common inns of the country. These were busily employed in times when the custom prevailed of making pilgrimages to holy places. The most celebrated of all pilgrimages was that described by Chaucer, where the pilgrims started from the Tabard Inn at Southwark, personally conducted by Harry Baily, the host, and put up at the 'Checquers of the Hope' in Mercery Lane, Canterbury.

"In the 15th and 16th centuries a secondary function becomes noticeable in connection with inns. They begin to be frequented for the purposes of toping and conviviality. Falstaff, the Prince, Poins, Doll Tearsheet, and the rest met for these purposes at 'The Boar's Head,' Eastcheap. In Elizabeth's reign 'The Mermaid' in Bread Street, London, was a favourite haunt of Shakespeare, Johnson, Beaumont, and other poets.

"But all along, both in this country and on the Continent, the leading function of the inn was to provide rest and refreshment for travellers on their journeys.

"The writings of Le Sage and Cervantes as to Spanish inns, of Boccaccio as to Italian, and of Dumas as to French inns make this quite clear.

"With the establishment of stage coaches in later times, and increase in the numbers of the travelling public, the discharge of his primary function in accommodating travellers became more manifestly the main business of the inn-keeper. The writings of Fielding and Smollett show how this was done both in England and Scotland. Dickens, too, again and again refers to the wayside inn and makes it clear what was its chief function. It will be remembered that Mr Pickwick and his friends were travellers *in itinere* from Birmingham to London when they put up for the night at 'The Saracen's Head,' Towcester, and witnessed the historic combat between the rival journalists of Eatanswill. Long before this a subsidiary function had been established in connection with those inns which were situated in populous places. They were used as meeting places by local residenters who were socially inclined. In 'Barnaby Rudge' the parish clerk and his cronies met in the evenings at 'The Maypole' to drink their ale and smoke churchwarden pipes. It was this feature of inn life which attracted Dr Johnson to 'The Mitre' and Robert Burns to 'Poosie Nancie's' and other taverns.

"In my former opinion I pointed out that the Scots Act, 1425, cap. 11, authorised travellers with a large retinue to lodge with their friends if they sent their horses and followers to the adjacent hostelry. I have no doubt that Sir Walter Scott had this statute in mind when in 'Waverley' he made the guests of Bradwardine leave their horses at Luckie Macleary's change house in the village. Again, in 'Rob Roy,' when the convivial party of Highlanders attempted to exclude Bailie Nicol Jarvie and his friends from the inn at the Clachan of Aberfoyle, Frank Osbaldistone's position was absolutely sound in law when he said, 'I am yet to learn how three persons should be entitled to exclude all other travellers from the only place of shelter and refreshment for miles around.'

"The advent of railways and motor cars did not affect the primary function of an inn. Indeed, inasmuch as these means of locomotion greatly increased the numbers of travellers, the performance of this primary function was thereby rendered more essential. I endeavoured to show in my former opinion that at an early date the law laid it upon the innkeeper to perform this primary function as a matter of obligation. In some of the cases the underlying principle of the decisions which established this rule of law is said to be 'public trust' or 'public duty.' I have no doubt, however, that the considerations on which the decisions are based are just these—travellers ought not to be compelled to sleep on the highways or in the fields. Private hospitality might fail them. There might be no private house available or the occupier might be churlish. The monastery might be fully occupied. There remained the inn — the public house — which had originated in a purpose of entertaining travellers. This was obviously the institution in which a traveller should have the right of demanding necessary accommodation.

"I am not called upon in this action to determine the precise extent of this obligation which affects innkeepers, or of the counterpart which falls to be performed by the traveller. Generally speaking, however, the innkeeper is under obligation to furnish a traveller *in itinere* (*a*) with necessary refreshment and (*b*) with necessary sleeping accommodation. The traveller who calls in the daytime is entitled to obtain at a common inn what he requires in the shape of food and drink. If he desires to stay overnight he must also be provided with a bed. The defender's manager, Mr Ryan, suggested that the legal obligation of a common innkeeper in the matter of accommodation of a traveller is fully discharged if he provides him with a bed for one night. There does not seem to be any authority for this suggestion. On the contrary, it is in conflict with what was laid down in *Lamond*, where Chitty, L.J., at p. 548, says—'It may be a difficult question to determine in any case when the character of traveller ceases and that of lodger or boarder begins.'

"In return for the provision of refresh-

ment and accommodation the traveller is bound to pay a reasonable price. It is not necessary for the decision of this case to determine what is a reasonable price, and I do not propose to attempt to do so. It is certainly not that price which the traveller considers reasonable, nor that which may be demanded by the innkeeper. In cases of dispute it would be for a court of law to decide whether the charges made were or were not reasonable. It seems, however, to be settled by such cases as *Thompson* v. *Lacy* that a traveller is liable to pay the ordinary tariff charges of the inn. If the charge is adequate to the sort of accommodation provided, and if it is similar to that exacted by other inns of the same class, then probably it could not successfully be resisted as being unreasonable.

"It is suggested by the defenders' counsel that a traveller *in itinere*, claiming and receiving refreshment and accommodation as such, is not entitled to 'the run of the hotel' which the ordinary guest enjoys. If, however, the ordinary charges are exacted, it is difficult to assent to this suggestion. When the defenders charge a guest 6s. or 7s. for a table d'hôte dinner the guest is paying for something beyond the value of the actual food consumed. He is paying for the privilege of eating food which is well cooked and well served in a sumptuously furnished room. He is paying for the privilege of enjoying the postprandial cigar and coffee in a comfortable lounge or smoke-room. If then the traveller *in itinere* is asked to pay the ordinary charges, it would seem to be difficult to resist a claim to enjoy the ordinary privileges of the inn. The case would be different if the traveller were offered special fare at a special rate.

"The defenders resisted the contention that their hotel is a common inn on the following grounds — (1) They maintained that they did not invite travellers *in itinere* to enter the hotel. I have already dealt with this point by holding that, where the public are invited indiscriminately, the class of travellers *in itinere* is impliedly included. I do not suppose that the Hotel Metropole in Brighton issued a special invitation to travellers, and yet it was held to be a common inn. (2) The defenders maintained that their invitation to the public is to come to the hotel and make terms—to come in and buy at the defenders' price; that in every case there was a special contract entered into, and that this mode of doing business excluded the inference that they were subject to the obligation laid on keepers of a common inn. This does not appear to me to be an accurate statement of the manner in which the defenders conduct their business. I am of opinion that the defenders' business is conducted in exactly the same way as in other first-class hotels. Certain classes, *e.g.*, commercial travellers, Cook's tourists, families, conferences, members of the Motor Union and Automobile Association are given special terms. Again, a guest may request and obtain inclusive or *en pension* terms, and any visitor may make with the manager a special contract regulating the terms on which the use of the hotel is to be obtained. In the ordinary case, however, a guest entering the hotel does so on the footing that the usual tariff charges will be made. These charges are revised from time to time, in accordance with the rise and fall of prices, but at any given time they are fixed. The visitor desiring to sleep in the hotel obtains at the booking-office of the hotel a card with the number of a bedroom thereon, and a nightly price fixed therefor, depending as to amount on the situation of the room. If table d'hôte meals are taken the guest knows that he will be charged so much for breakfast, so much for lunch, and so much for dinner. The defenders' contention that their business is by way of special contract and not by way of legal duty or obligation comes to no more than this, that the question of their duty to a traveller *in itinere* has never been raised before now. The defenders have never previously had occasion to consider their relationship to travellers *in itinere*. Thus while on the one hand this class has never been specially invited to enter the hotel, it has on the other hand never been specially excluded therefrom. Mr Ryan, the defenders' manager, really conceded this first point in the case by certain admissions which he made in cross-examination at the proof. If the concession made by Mr Ryan at the proof had been made and acted upon in the Spring of 1918, the pursuer, it seems to me, would have had no basis for the action which he is now prosecuting.

"I therefore hold, on this first point in the case, that it has been proved that the defenders' hotel is a common inn, and as such bound to supply travellers *in itinere* with necessary refreshment and accommodation at reasonable prices.

"2. The next point debated was whether it had been made out (*a*) that the pursuer was a traveller *in itinere* when he asked and was refused accommodation in the defenders' hotel; (*b*) that the defenders had refused him what he was entitled to as a traveller *in itinere*; and (*c*) that by his declaratory conclusion the pursuer only demands what as a traveller *in itinere* he is entitled to.

"Whether or not an individual is at any given time a traveller *in itinere* is a question of fact (*Lamond*, *supra*). Prior to January 1918 the pursuer had been a lodger or boarder in the hotel. The defenders were entitled at any time and without any excuse to terminate this relationship. They did so by their manager's letter of 17th January 1918. But this letter does something more. The concluding paragraph is an intimation to the pursuer to choose another hotel when in Edinburgh. The pursuer thereafter consulted his solicitor, and evidence was given by the pursuer and his law agent to the effect that in or about the end of January or beginning of February 1918 the pursuer when he was *de facto* a traveller *in itinere* asked for and was refused accommodation in the defenders' hotel. I have no reason to doubt that this request was made. It was not neces-

sary for the success of his case that the pursuer should invent this incident, and I do not think it was invented. Thereafter the pursuer's agents wrote the letter of 2nd April, claiming for their client as matter of right the accommodation and entertainment due to 'a member of the travelling public.' Before this letter was considered by the defenders and answered, the pursuer on 8th April sent the telegram of that date and received the reply. The defenders point out that the pursuer's telegram was a request to reserve a room two days after receipt of the telegram, and that they were within their rights in refusing to reserve accommodation. I agree. But the reply is an absolute declinature to provide accommodation. There is no invitation to the pursuer to appear personally on the Wednesday and take his chance of obtaining a vacant room. The defenders replied to the letter of 2nd April on the 13th of that month, and in that letter the manager wrote—'I cannot, therefore, come to any arrangement such as you indicate.' This was a specific declinature to recognise any rights the pursuer may have as 'a member of the travelling public.'

"Finally, there is no offer on record to recognise any rights which the pursuer may have as a traveller. On the contrary, the averments of the defenders on record, and the evidence of the two directors who appeared in the witness-box, satisfied me that the defenders had resolved that they would not allow the pursuer to enter the hotel unless they were compelled to do so.

"I therefore hold it proved that the pursuer when a traveller *in itinere* asked and was refused the accommodation due to a traveller by a common inn, and that his action is accordingly justified.

"It was said, however, for the defenders that the declarator which he craves cannot be granted in the terms libelled. The part of the declarator objected to is the crave that the pursuer should be entertained 'on the same terms and conditions as other travellers.' It is to be noted that the phrase used is 'other travellers,' not 'other guests.' Had the latter term been employed the criticism of the defenders' counsel, to the effect that the pursuer was demanding the same terms as the most favoured visitor, would have been justified. But I read this clause of the declarator as a demand for similar treatment as is accorded to other travellers *in itinere* — that is to say, it is nothing more than a periphrastic mode of craving accommodation at 'reasonable prices.' Construed in this sense, which I think is the reasonable construction, the clause seems to me to be unobjectionable.

"(3) The only remaining matter to be considered is the question of justification. If the defenders' hotel is a common inn as to which the pursuer has certain legal rights when *in itinere*, it is plain that he cannot be deprived of these rights at the pleasure of the defenders. He can only be excluded from the hotel when possessed of the privileges of a traveller on grounds sufficient in law to justify exclusion. The defenders' third plea-in-law must therefore be repelled.

"Have the defenders proved that the pursuer is so unsuitable and objectionable a guest as to entitle them to refuse him for all time the privileges of a traveller *in itinere?* "This part of the case has two branches — (*a*) the grounds of justification averred on record, and (*b*) the grounds as to which no notice has been given in the pleadings, but with reference to which evidence has been led and recorded under reservation of its competency.

"I have already to some extent expressed my opinion as to the averments on record. It is obvious that the defenders are not entitled to exclude the pursuer from their hotel because he is a Jew; and it would have made no difference in my opinion had it been proved that he is a Jew of German origin An individual is not responsible, and ought not to be made responsible, for his ancestry. But the proof shows that the progenitors of the pursuer were Poles and not Germans, and he himself was born and has all along lived in Great Britain. Nor is it a sufficient ground of exclusion that the pursuer is a money-lender. That is a lawful occupation, and therefore money-lenders are entitled to all privileges enjoyed by other members of the State, including the right of being entertained in the common inns of the country. The pursuer necessarily associates with other money-lenders and borrowers or applicants for loans and advertises in newspapers in order to conduct his business, and his doing so does not make him an unsuitable guest in an hotel.

"With reference to the general averment of adverse press comment on the pursuer's mode of doing business, the defenders produced a copy of *Truth* of date 29th July 1914, which contains on pp. 268 and 269 a paragraph which refers to the pursuer, and alleges that he had violated section 2 of the Money-lenders Act by sending out a circular that 'a private gentleman' was prepared to advance money at a certain address. There is no evidence that the pursuer, if the paragraph applies to him, had not registered at the address mentioned in the circular, and if he had so registered it is a moot point whether he was in breach of the terms of the Act by refraining from giving in the circular the name under which he had registered. But this occurrence in 1914 is obviously stale, and in view of the long residence of the pursuer thereafter in the defenders' hotel it had plainly no effect in 1918 in determining the defenders to exclude him from their house.

"The two other copies of *Truth* produced by the defenders are dated respectively 28th November 1917 and 24th April 1918, and refer, *inter alia*, to the pursuer's association with Hyman Cohen, to which I shall subsequently allude. There is also a reference to a money-lending transaction in which the borrower had been charged what the writer describes as 'exorbitant interest.' Now for many years the editor of *Truth* has waged a crusade against money-lenders, and I for one recognise that in doing so — in warning foolish people who are in financial difficulties to avoid money-lenders—*Truth* has been performing a valuable public ser-

vice. But money-lenders take great risks, and for their own protection they impose onerous terms on borrowers, and as regards the pursuer nothing more is said by *Truth* regarding him than that like most of his fraternity his conditions of lending are somewhat unconscionable. If this were to be held as justification of the defenders, then very few money-lenders would be entitled to enter a common inn. I am unable to hold that the defenders on this ground have established their defence of justification. This disposes of the grounds of exclusion averred on record.

"But the defenders led evidence to establish justification in respect of certain circumstances which are not referred to on record. The Dean of Faculty, for the pursuer contended that the evidence was incompetent on the ground of want of notice and argued that it should be ignored. It seems to me that that contention is well founded. On this part of the case the defenders are really pursuers. They have the burden of proving that they were justified in refusing the pursuer what I have held to be his legal rights. They were therefore bound to disclose by way of averment the facts which they relied on and which they proposed to prove, and their duty was to disclose the whole of those facts. As, however, the evidence has been recorded, I shall state the conclusions I have reached upon it, on the assumption that it is competent.

"Evidence was led as to a somewhat discreditable occurrence which took place in April 1916. The pursuer had been entertaining guests at dinner; the guests got the worse of drink and made a disturbance in the hotel. No complaint is made as to the pursuer's conduct on that occasion, but it is plain that a person who brings objectionable friends to an hotel may himself be justifiably excluded as undesirable. The incident however was isolated. The guests who had then offended were entertained by the pursuer on subsequent occasions and apparently never again misconducted themselves. The matter was amicably arranged and ended, and I am satisfied that the occurrence had no effect two years later on the defenders' attitude towards the pursuer. If it had, I should have expected that it would have been founded on in the pleadings.

"In the Autumn of 1917 Hyman Cohen was convicted and sentenced for fraud in connection with recruiting for the army. He had been apprehended on this charge in July 1917. The pursuer was then a partner of Cohen in a money-lending business. There is no suggestion that the pursuer was privy to the crime of which Cohen was convicted. If he had been he would also have been prosecuted. On Cohen's conviction the pursuer severed his connection with him, and a litigation between the quondam partners is at present pending in this Court. It would manifestly be unjust to ostracise the pursuer or deprive him of his legal rights because a former partner fell into crime, and I am not prepared to hold that this occurrence afforded any justification for the defenders' actings.

"There was some evidence as to an incident in connection with obtaining a room in the hotel for a friend of the pursuer named Hurwitz, a money-lender, but I did not understand the Lord Advocate to lay any stress on this occurrence, and in my opinion it does not afford any aid to the defenders on this part of the case.

"Evidence was led as to the pursuer's demeanour in the hotel. It was thought that he attempted to attract attention to himself—to make himself conspicuous. I am not prepared to hold that an hotel guest who, through vanity or eccentricity, attracts public attention to himself is an unsuitable or objectable guest.

"There remains for consideration the evidence given by the directors, Mr Gray and Mr Younger. I need hardly say that I was impressed by the testimony of these gentlemen, and have given their evidence most careful consideration. Assuming the competency of their testimony, I may say that it is the only part of the proof which has had a tendency to make me reach a different judgment than that which I have already pronounced.

"Their evidence consists of two branches —(*a*) what was reported to them by way of complaint by visitors to the hotel; and (*b*) what they themselves saw.

"As to complaints by visitors, no guest had been adduced to depone to the matter of complaint. The directors themselves put it no higher than this, that the complaining guests objected to the pursuer being received in the hotel solely because he was a money-lender. No one complained that he had been carrying on or attempting to carry on his business in the hotel. It is plain from what I have already said that the pursuer's occupation is not a reason sufficient in law for debarring him from his privileges as a traveller. In the case of *Lamond* what seems to me to be a stronger case for exclusion was negatived by the County Court Judge. It was maintained in defence in that action that the plaintiff was under the delusion that enemies were seeking to injure her, and that complaints had been made by other visitors to the hotel; but it was expressly found by the County Court Judge that the condition and conduct of the plaintiff were not such as to justify the defendant in refusing her accommodation. The pursuer, as evidence of his suitability as a guest in an hotel of the standing of the defenders', produced a letter from the manager of the Caledonian Station Hotel showing that he had a room there at the time of the proof. After the proof had been closed and I had taken the case to avizandum, the defenders asked me to authorise them to lodge in process a letter which it was stated would show that influence had been brought to bear on the manager of the Caledonian Station Hotel to induce him to accept the pursuer as a guest. I considered that at the stage when this motion was made I was precluded from granting it.

"What the directors themselves saw was that the pursuer occasionally entertained

young officers to dinner, and at times conversed with naval and military men in the lounge. From this the directors suspected that the pursuer was doing or attempting to do money-lending business with these officers.

"I have no difficulty in disposing, adversely to the pursuer, of a contention which was advanced by the Dean of Faculty as to this part of the case. The Dean contended that even if it had been established that the pursuer had conducted money-lending business in the hotel, or had attempted to do so, the defenders would not have been justified on that ground in excluding him from the hotel. He assimilated such action on the pursuer's part to that of a tradesman—the Dean instanced the case of a brewer—taking a room in the hotel with the object and in the hope of doing business with the hotel manager. This analogy seems to be false in two respects—(*a*) the suggestion is that the pursuer did business, or attempted to do so, not with the hotel manager, but with guests; and (*b*) in the case suggested the conduct of the supposititious tradesman would be legitimate, while what is alleged against the pursuer would not. It would in his case be a breach of the second section of the Money-lenders Act of 1900, which authorises money-lending transactions to be entered into only at the money-lender's registered address. In short, it would amount to a crime or an attempt to commit a crime, and if this had been proved against the pursuer I should have had no difficulty in holding that the defenders were justified in excluding him from their hotel, so long at all events as he continued to be a money-lender.

"The Lord Advocate contended that on the evidence of the two directors the defenders had probable cause for excluding the pursuer, and that this sufficed as complete justification. I do not agree. The defence of probable cause in a case of this kind would perchance protect the defenders as to the past, and is an additional ground for supporting the nominal award of damages which I formerly made. But when the question raised is as to the relations of parties in the future, then the probable cause alleged must be probed in order to ascertain whether it is a real cause and sufficient in law to justify exclusion.

"The question, then, comes to be whether the defenders have proved that the pursuer either conducted money-lending business in the hotel or attempted to do so. Were the suspicions of Mr Gray and Mr Younger well founded? I am unable to hold that they were. It was certainly not a necessary inference from what they saw to conclude that the pursuer was trying to prosecute his business. I do not think the inference was even justifiable or reasonable. The pursuer had relatives in the army, one of whom gave evidence on his behalf, and his motives in entertaining and conversing with British officers were probably entirely different from those suggested. No officer has been brought to prove that the directors' suspicions were well founded. I quite appreciate the defenders' difficulty in obtaining such evidence; but it is for them to prove this part of the case, and the conclusion I reach is that they have failed to do so. The pursuer must therefore get the declarator which he seeks.

"No complaint was made by either side as to the award of damages formerly made.

"The result of the whole matter is that I shall of new pronounce decree in terms similar to that of 8th November 1918."

The defenders reclaimed, and argued—This was a declarator *de futuro*, of an abstract proposition of law, did not arise out of any practical concrete question, and was therefore incompetent. The pursuer asked a general declarator of the law as to innkeepers, followed by a crave of damages for breach of duty. The declarator, however, was treated as an isolated thing and not as the preface to the claim of damages. A mere dispute as to the law between two individuals would not entitle one of them to come to the Court to have the law declared. There must be some immediate practical interest concerned—*North British Railway Company* v. *Birrell's Trustees*, 1918 S.C. (H.L.) 33, *per* Lord Dunedin at p. 47, 55 S.L.R. 102; *Callender's Cable and Construction Company, Limited* v. *Corporation of Glasgow*, 1900, 2 F. 397, *per* Lord President Kinross at p. 399, 37 S.L.R. 301. That applied here because the dispute concerned the complete rights of the pursuer as a member of the travelling public. The single incident founded on was not proved. The telegram would not serve as the foundation of such a declarator because there was no obligation on an innkeeper to reserve accommodation *ab ante*. A concrete case further could not be created by correspondence. The pursuer really asked the Court to codify the law as to innkeepers, but the proposition of law formulated by the declarator was not well founded. The declarator did not state the law accurately and fully. Even assuming that the declaratory conclusion was well founded, it would not avail the pursuer, because he had neither averred nor proved that the North British Station Hotel was a common inn, *i.e.*, one of those places to which the legal incidents of an inn attached. The defenders were not bound to define these incidents. If the defenders had elected to attach to their hotel a certain character, viz., that of an inn, their exclusive rights would suffer certain abatements, but not more than were necessary to subserve the public purpose. The public purpose was, however, something different from what it was in the old days. It was bed and board or the equivalent of protection from the weather for those who were travelling, but this did not mean that in a hotel in a large town the traveller was entitled to all the privileges of the hotel—*Lamond* v. *Richard and the Gordon Hotels, Limited*, [1897] 1 Q.B. 541. The pursuer assumed that every traveller was entitled to equal treatment, but there was no such duty on innkeepers; the standard was reasonable not equal treatment. On the duties of innkeepers reference was made to *Great Western Railway Company* v. *Sut-*

ton, L.R., 4 E. & I. App. 226, *per* Blackburn, J., at p. 237; *Reg.* v. *Sprague*, 1899, 63 Justice of the Peace, p. 233; *Pidgeon* v. *Legge*, 1857, 21 J.P. 743; *Thompson* v. *Lacy*, 1820, 3 B. & Ald. 283, *per* Bayley, J., at p. 286, and Best, J., at p. 287; *Rex* v. *Ivens*, 1835, 7 C. & P. 213; *Lane* v. *Cotton*, 12 Mod. Reports, 473 at 484; Bankton, book i, tit. xvi (vol. i, pp. 378 and 382); Hutchison's Justice of the Peace Law, 3rd ed., vol. ii, pp. 165, 508-511. As regarded equal treatment the position of an innkeeper was equivalent to that of a carrier, and the statement of the law given by Holt, C.J., in *Lane* v. *Cotton*, *supra*, had been accepted as authoritative in subsequent cases—Smith's Leading Cases (vol. i, p. 136), referring to *Burgess* v. *Clements*, 1815, 4 M. & S. 306, *per* Lord Ellenborough at p. 310. Of the old Scots Acts relating to innkeepers the only one still in force was that of 1424, cap. 27, and this did not support the pursuer's contention. While the purpose of the obligation on the innkeeper was to give lodging and board to a benighted traveller, traveller must be construed in the strictest sense. A person to be a traveller must be on his way—Stroud's Judicial Dictionary, 2nd ed., p. 2093, *voce* "Traveller," head 4; *Cairns* v. *Todd*, 1910 S.C. (J.) 17, 47 S.L.R. 165. Further, a traveller's rights as against an innkeeper were always subject to a right of exclusion on reasonable cause shown—*Strathearn Hydropathic Company, Limited* v. *Inland Revenue*, 1881, 8 R. 798, 18 S.L.R. 564; *Queen* v. *Rymer*, 1877, 2 Q.B.D. 136, *per* Kelly, C.B., at p. 140. In the present case there were reasonable grounds for refusal in respect that the pursuer was a notorious money-lender who had been pilloried and held up to contempt in the public press and who had made no attempt to vindicate his character, who had been associated in business with a person convicted of fraud, who had on one occasion entertained guests at the hotel who had got drunk and been expelled, and who there was grave ground to suspect was utilising the opportunities which the hotel afforded to further his money-lending business more especially with regard to young officers. It was further a relevant consideration that complaints had been received by the management from guests in the hotel as to his presence therein.

Argued for the respondents—The declarator was competent and was competently expressed. The pursuer asked the Court to declare a particular right which had been invaded, and his right was not confined to an emergency—Ersk. iv, 1, 46; Stair, iv, 3, 47; *Hogg* v. *Parochial Board of Auchtermuchty*, 1880, 7 R. 986, 17 S.L.R. 687; *Fleming* v. *M'Lagan*, 1879, 6 R. 588, *per* Lord Young at p. 598, 16 S.L.R. 316. In any event the Court was entitled to modify the terms of the declarator—*Assets Company* v. *Ogilvie*, 1897, 24 R. 400, 34 S.L.R. 195. The defenders as owners of the North British Station Hotel were innkeepers. It was a railway hotel extensively advertised, without limitation, with invitation to all and sundry, with an open door on the street. In Scots law as distinguished from English law there was no mention of the expression "common inn;" the only term considered was "innkeepers." Both in *Strathearn Hydropathic Company, Limited* v. *Inland Revenue, cit. sup.*, and in *Ewing* v. *Campbell*, 1877, 5 R. 230, 15 S.L.R. 145, the question was considered as affecting innkeepers, hotelkeepers, and hydrokeepers indifferently. No difference was created by the fact that the defenders made terms with their guests, because all innkeepers did that. If reference was made to the law of England it would be seen that the same law was applied there to hotels of the same character—*Gordon* v. *Silber*, 1890, 25 Q.B.D. 491. In these circumstances the pursuer as a member of the travelling public was entitled to reasonable accommodation for a reasonable length of time, not limited to one night, the time being dependent on the circumstances of the case—*Oliver* v. *Loudon*, 1896, 23 R. (J.) 34, *per* Lord M'Laren at p. 38, 33 S.L.R. 274; Halsbury's Laws of England, vol. xvii, p. 309, *voce* Inns and Innkeepers; Story on Bailments, 4 ed., pp. 473, 486, and 487; Purves' Scottish Licensing Laws, p. 157. In the present case there was an absolute declinature on the part of the defenders to give any accommodation, and this not merely in answer to a written request but also to a personal call by the pursuer which was established by the evidence. There was nowhere an offer of even limited accommodation. This formed a sufficient foundation for the action of declarator. The hotelkeeper was bound to receive travellers even though they might be convicted criminals, though he might be entitled to segregate them for good reasons. In the present case mere comment in the public press would not justify segregation and certainly not exclusion. There was no authority in the law of Scotland for the segregation of merely unwelcome, apart from objectionable, guests—Macdonald's Criminal Law, p. 162 (hamesucken *qua* inns); Bell's Dictionary (Watson ed.), p. 534. An innkeeper was bound to receive every decently behaved member of the public—*Strathearn Hydropathic Company, Limited* v. *Inland Revenue, cit. sup.* There was no justification either in the averments made on record or in the facts proved for the attitude adopted by the defenders to the pursuer. No outside witness was adduced to speak to damage to the hotel. On the question of damages if a legal right was invaded the pursuer was entitled to damages even though they were merely nominal—*Webster & Company* v. *Cramond Iron Company*, 1875, 2 R. 752, 12 S.L.R. 496; Mayne on Damages, chap. ii, pp. 4 and 5; *Owners of Steamship "Mediana"* v. *Owners, Master, and Crew of Lightship "Comet,"* [1900] A.C. 113.

At advising—

LORD JUSTICE-CLERK (SCOTT DICKSON)—This case raises questions depending on the liability which the law imposes on a hotelkeeper as to providing accommodation to members of the travelling public.

The pursuer alleges that for some time prior to 1918, when he was in Edinburgh on

business, he was accommodated in defenders' Station Hotel there as a guest, but that early in 1918 he was told that he could no longer be received, and that he was refused by the defenders the accommodation to which as a traveller he was legally entitled. He therefore raised the present action to have his rights declared and for damages. This reclaiming note has been brought against an interlocutor by the Lord Ordinary granting decree of declarator as craved, and awarding the pursuer £1, 1s. of damages with expenses. The pursuer is satisfied with that interlocutor. The defenders and reclaimers maintained that they should be assoilzied. While I am in agreement with the Lord Ordinary on several important points, I have come to be of opinion that the defenders' contention is sound in one determining matter.

The origin and development of this branch of the law have been different in England and Scotland. In England it is apparently based on the "custom of England" and has been the subject of many judicial determinations. In Scotland it had its origin in statutory provisions in the fifteenth century, and has received little elucidation by judicial utterances so far as the question raised is concerned. Indeed these latter may be said to be confined to two pronouncements by Lord President Inglis in the cases of *Ewing* (5 R. 230) and *Strathearn Hydropathic Company* (8 R. 798), both of which are more or less obiter. I accept these, however, as accurately setting forth the law of Scotland on the subject, so far as is necessary for the decision of this case. But if I may take the judgment of Lord Alverstone in *Brown* v. *Brandt* ([1902] 1 K.B. 696) as correctly stating the law of England, there does not appear to be much, if any, difference in the result between the laws of England and of Scotland on this subject.

The Lord Ordinary was of opinion that he was able to decide this case without any inquiry into the facts, and he accordingly on 2nd November 1918 gave judgment in favour of the pursuer. But on a reclaiming note the First Division on 25th February 1919 recalled the Lord Ordinary's interlocutor of 2nd November 1918, and before answer allowed parties a proof of their averments. That proof having been taken, the Lord Ordinary on 27th June 1919 repeated his original interlocutor, and it was against that interlocutor that the present reclaiming note was presented. The hearing on this reclaiming note has been delayed owing, as was stated, to causes for which the Court is not responsible.

The Lord Ordinary comments adversely in some respects both on the defenders' record and on their proof. There is in my opinion to some extent ground for the views which the Lord Ordinary has expressed on these matters, though the defenders were in a somewhat difficult position, and seem to have been anxious not to overstate their case. The Lord Ordinary states the three questions which in his opinion fall to be determined thus—(1) Whether it had been made out that the defenders' hotel is a common inn? (2) Whether the pursuer had requested accommodation when a traveller *in itinere*, and whether this had been refused by the defenders? (3) Whether the defenders were justified in refusing the pursuer accommodation as a traveller in their hotel?

As to the first of these as matter of phraseology I do not think the term "common inn" has been accepted by the law of Scotland, but Lord President Inglis uses the term "hotel" as one which probably does not differ as to the legal liability which it imposes on the person who carries on the business of an hotelkeeper in Scotland from what would be imposed in England on the keeper of a common inn. On this point I agree with the Lord Ordinary in the result at which he has arrived, and for the most part in the reasoning by which he has reached that result. I would only add that I am not to be held as expressing any opinion as to whether the hotelkeeper's obligations in Scotland are confined to members of the travelling public. That question does not seem to me to arise in this case.

As to the second of the Lord Ordinary's questions, I do not think that I would have stated the question exactly as the Lord Ordinary has done, or that I could accept his reading of the declaratory conclusion, or that I could have agreed with all his views as to the effect of the proof on this branch of the case. But it has to be kept in view that the defenders maintained in the argument on the reclaiming note before us that as hotelkeepers at the hotel in question they were not subject to the liabilities attaching to the keeper of a common inn or of an hotel in the sense in which Lord President Inglis used that term in the cases before referred to, and they contended that they had an absolute right to refuse to accept any member of the travelling public if they so pleased. In my opinion that is putting their position higher than what the law would allow. But in my opinion the correspondence and conduct of the defenders, and the defence put forward by them, were sufficient to justify the pursuer in raising an action of declarator, assuming that his conclusion for declarator was framed in proper and appropriate terms. I think the defenders desired, and indeed almost invited, the pursuer to raise such an action to have this issue decided, and I am of opinion that, even if the conclusion of declarator as expressed is open to objection, as I rather think it is, the Court could probably have pronounced a limited decree of declarator sufficient for the pursuer's purpose—as was done in the case of the *Assets Company* (24 R. 400)—if the other circumstances of the case had warranted that being done. Further, if members of the public have rights as to accommodation in an hotel (interpreted as aforesaid), which I think they have, and if the keeper of an hotel is subject to the liabilities before referred to, then I am inclined to think that an action of declarator may be competently brought by a traveller who desires to establish the existence of these rights

and liabilities, against an hotelkeeper who refuses to recognise them, when the traveller legitimately and properly asks that they should be recognised and accorded to him, or in the appropriate circumstances put forward his claim to have these rights declared. I am further inclined to be of opinion that the denial of such rights and liabilities, when legitimately and properly required to be recognised and observed by an individual traveller, would justify an appropriate action of declarator and damages, though the damages awarded might of course be merely nominal. I am not satisfied that a declaratory conclusion is an essential preliminary to a conclusion for damages in such an action. In the view which I take as to the third of the Lord Ordinary's questions, it is, however, not necessary to deal finally with all the points involved in the Lord Ordinary's reasoning on the second question.

The Lord Ordinary's third question deals with what he calls justification. Lord President Inglis says in the *Strathearn* case (8 R. 798, at pp. 800 and 801) that the law allows "a pretty wide discretion in hotel-keepers as to rejecting guests that are not suitable," and he interprets suitable as having reference, *inter alia*, to the "manners and habits" of those insisting on their rights as guests; he also refers to "the class of people whom he receives." The hotel-keeper, however, must not, he says, "refuse guests capriciously or maliciously, and every hotelkeeper must have a certain power of selecting his guests, or, perhaps, to speak more precisely, of rejecting certain guests." Lord Alverstone in *Browne's* case ([1902] 1 K.B. 696 at p. 698) said "An innkeeper may not pick and choose his guests," but, he adds, "The landlord must act reasonably; he must not captiously or unreasonably refuse to receive persons when he has proper accommodation for them." The travellers' right to accommodation is in my opinion not an absolute right. The pursuer does not aver that the defenders acted capriciously or maliciously. He does say, however, that in refusing to receive him they "acted illegally, unjustly, and oppressively." But the pursuer when he did not find accommodation at the defenders' hotel was able to find other good hotels in close proximity, where he was readily received, and received, he says, as a welcome guest. I do not think the same considerations apply here as in the case of the traveller at nightfall coming to an isolated and remote Highland hotel in a snowstorm, to which reference was made in the argument.

I agree entirely with the Lord Ordinary on the matter as to the objection on the ground of the pursuer's race and nationality. I agree also to a certain extent with his views as to the objection that the pursuer is a money-lender. That objection could never in my opinion be taken as in itself sufficient to justify his exclusion. As Lord Atkinson said in *Kirkwood* v. *Gadd* ([1910] A.C. 422, at p. 431, 48 S.L.R. 689), "The money-lender's trade is in itself a lawful trade." But that the pursuer was a money-lender is a circumstance which may, I think, in connection with other facts, be legitimately taken into consideration.

Further, I agree to a large extent, and so far as they go, with the Lord Ordinary's views as to the press comments on the pursuer, but I think there is more evidence relating to this matter than the Lord Ordinary takes into account.

In my opinion the Lord Ordinary places the pursuer's rights higher—and regards them as more absolute—than the law allows, and correspondingly exaggerates the liability and the burden which lie upon the defenders.

As already stated I agree to some extent with the Lord Ordinary's criticism of the defenders' record and proof. But after making all due allowance on that ground the situation which the proof competently and legitimately establishes seems to me to be this—The pursuer was a money-lender whose methods of doing business had been very severely commented on in the public press. The pursuer himself refers to these comments and how he regarded them when in re-examination he says he took legal advice as to whether an action would lie in respect of them and was advised not to proceed. His conduct in the hotel was such as to cause other guests to ask who and what he was, and as a result his identity and business came to be known and talked about by the other guests as the person referred to in the press comments. Views as to the pursuer's presence in the hotel were expressed by other guests both to the manager and to the directors as to the kind of guest the defenders were entertaining, and expressing surprise at his being tolerated in the hotel. At the time in question the war was still in progress, and there were many officers of both services, naval and military, living in the hotel — staff officers and others, a majority of whom were young men. The pursuer was cross-examined as to his entertaining officers. He maintained that he "only entertained one officer, who was a personal friend, not a business friend," and he denied that he entertained other officers. No objection was taken to this line of cross-examination. In my opinion it is proved that the pursuer's evidence as to not entertaining other officers is untrue Ryan says the pursuer was frequently in the company of these young officers; he was a good deal in their company, and they were among the persons whom he entertained. Mr Younger speaks to the same effect, and to his entertaining different officers in the hotel at different times. The directors also saw the pursuer associating with and entertaining officers, and regarded the communications made to them by other guests as to the pursuer's presence in the hotel as of the nature of complaints against his being there. The manager considered the pursuer's presence prejudicial to the hotel, and Mr Gray gathered from the complaints made to him that the pursuer's presence in the hotel was "extremely objectionable and distasteful," and came to the conclusion with the other directors that the pursuer's presence in the hotel was involving them in a very grave responsibility if they allowed

it to continue. The defenders have not averred that the pursuer actually did money-lending business in the hotel, and there is in my opinion no proof that he did so, but I do not regard this as an essential factor in the defence. In my opinion the defenders have established that the pursuer was such an undesirable guest and so objectionable to them and to their guests, and that his presence and conduct was so prejudicial to the interests and proper conduct of the hotel, that they were justified in refusing to continue to receive and accommodate him as a guest in the hotel. The defenders have therefore in my opinion established their defence of justification. I do not think they acted unreasonably, far less capriciously or maliciously, and in my opinion they ought to be assoilzied from the conclusions of this action.

I do not regard any decree pronounced in this action as necessarily regulating "for all time," as the Lord Ordinary puts it, the position as to the pursuer's rights or the defenders' liability. The situation in its circumstances may so change that the legal position would also be altered.

LORD DUNDAS—In this interesting case I have come to the conclusion, differing from the Lord Ordinary, that the pursuer must fail.

I shall begin by noticing certain criticisms levelled by the defenders against the pursuer's summons, viewed in the light of the evidence, which appear to me to be formidable.

The pursuer concludes for £105 in name of damages. A claim of that nature must, I think, be supported by averment and proof of some actual legal wrong sustained by the pursuer for which the defenders are responsible. The defenders urged with force that we have here no such averment or proof. The pursuer depones that "about a week after 17th January 1918" he presented himself at the hotel as a traveller and was definitely refused accommodation though such was available. But not only is he, when pressed, quite uncertain as to the exact date of this occurrence, but his story, which was surely capable of easy corroboration, stands upon his own unsupported testimony; for that he may have reported to his law agent at the time something of what he now alleges to have taken place does not, of course, avail him at all as evidence that he in fact did so; and Mr Ryan's testimony is negatively hostile. I do not think there is legal proof that such an episode ever took place. The Lord Ordinary finds a basis for the conclusion for damages in the pursuer's telegram of 8th April 1918 and the defenders' reply. I cannot hold that any legal wrong is there disclosed. The pursuer asks if the defenders will provide accommodation for him on a future date and for a period unspecified. The defenders "must decline." In doing so it seems to me that they were entirely within their legal rights. Nor do I consider that a concrete instance of a wrong suffered by the pursuer can be found in the letters dated 2nd and 13th April 1918. Of the latter the Lord Ordinary observes "This was a specific declinature to recognise any rights the pursuer may have as a member of the travelling public." I do not so read the letter. A general denial of the pursuer's statement of his alleged rights does not, in my judgment, constitute the infliction of a legal wrong sounding in damages.

Be this as it may, the question next arises whether the Court can entertain the declaratory conclusion which precedes that for damages. Such a declaratory conclusion would be competent in so far as it is merely ancillary by way of preface or prelude to the demand for damages, but would fail if the latter failed. But a declarator "cannot be used for the mere purpose of declaring legal propositions where no practical question or dispute lies beneath" (*per* Lord Dunedin in *Birrell's Trustees*, 1918 S.C. (H.L.) at p. 47), and a declarator "not with reference to any particular case, but in general," is incompetent (*per* Lord Adam in *Callender*, 1900, 2 F. at p. 401). A mere abstract and general declarator will not do. The defenders urge, and I think with justice, that the declarator here asked, which the Lord Ordinary has granted, is not one which the Court could in any view properly pronounce. It is much too wide and general in its scope, and amounts to something like a declaratory exposition of the legal relations in general between inn-keepers and travellers. It contains words and phrases of more or less ambiguous import, *e.g.*, "in the course of travelling," "finds it necessary to stay," and "*bona fide* traveller," and it postulates the pursuer's right to be received and entertained "on the same terms and conditions as other travellers are received." In this last phrase, it was urged, there lies a palpable fallacy; for the defenders are not bound to treat, and do not in fact treat, all travellers equally either in the matter of tariff or as to the extent to which what was termed "the run of the house" may be accorded. The standard of obligation, it was argued, does not depend on equality, but rather on reasonableness of treatment (*cp.* opinion of Blackburn, J., and other judges on the analogy of common carriers, in *Sutton*, 1869, 4 E. & I. App. 226). It is true that this Court has power (*e.g.*, *Assets Company*, 1897, 24 R. 400) to pronounce such decree of declarator as they may think right within the limits of a too widely stated conclusion; but the pursuer's counsel did not suggest, and I am not at present able to figure, the terms of any modified declarator which we could within the limits of this conclusion usefully and properly pronounce.

If the views thus urged for the defenders are sound, as I am disposed to think they are, it would appear that the pursuer's whole action must fail. I should, however, be unwilling to decide this case upon grounds which might seem to have regard rather to procedure and form than to substance. I proceed, therefore, to deal with what appear to be the real merits of the controversy.

The question was keenly argued to us whether or not the defenders' hotel is a "common inn." In the view I take of the

case the determination of this point is not of much importance, but as it was fully argued with much citation of authority I shall state my opinion in regard to it. The phrase "common inn" is not, I think, indigenous to, nor has it been adopted into, the law of Scotland, but Mr Macmillan for the defenders was good enough, at my request, to define his contention as being that their hotel "is not a place to which the legal incidents of an inn attach." I confess that the learned counsel wholly failed to satisfy me—the burden of doing so being, in my judgment, upon him—that the defenders' hotel comes within the definition postulated. The more important question, however, is to ascertain what are by our law the legal incidents which attach to an inn. On this matter I think we find the law correctly and sufficiently laid down by Lord President Inglis in *Strathearn Hydropathic* (1881, 8 R., at p. 800), and also, though less fully, in the earlier case of *Ewing* (1877, 5 R., at p. 234). From the opinion of that great judge I learn that while inn-keepers or hotel-keepers may not "refuse guests capriciously or maliciously"—and I may here observe that the adverbs used by Lord Alverstone, L.C.-J., on the same topic were substantially similar, viz., "captiously or unreasonably" (see *Browne*, [1902] 1 K.B., at p. 698)—"every hotel-keeper must have a certain power of selecting his guests, or perhaps, to speak more precisely, of rejecting certain guests," and is bound "to exercise a discretion as to the class of people whom he will admit to his hotel." "There is a pretty wide discretion in hotel-keepers as to rejecting guests that are not suitable." A hotel-keeper may in his discretion reject persons "because their manners and habits are not suitable to the class of people whom he receives." He is not only entitled but bound to have due regard to the status and reputation of his hotel, and to the proper interests of those he receives in it.

Keeping in view, then, the law as thus indicated, we have to consider and decide whether or not the defenders were justified in the attitude which they assumed towards the pursuer in January 1918, when they requested him to remove his luggage and effects from the hotel, and intimated that they desired him to discontinue residing there, and that if in future he should have occasion to take up his residence in Edinburgh he would require to find accommodation elsewhere than in their hotel. The directors had decided, and now plead, that the pursuer was unsuitable as a guest, and their desire was and is to exclude him from the hotel so far as the law will allow them to do so. I have come to the conclusion that the defenders were justified in January 1918 in rejecting the pursuer.

The facts may, I think, be summarised as follows:—The pursuer is a Jew; he is also a money-lender. These facts by themselves, either separately or in conjunction, would not be of any significance in the case. But what is material is that it appears that during his residence in the hotel the pursuer's general behaviour in the public rooms was of a "swaggering," "conspicuous," and self-advertising character, such as to attract—in result, and apparently by intention—a good deal of notice from the other people who were there. Among the residents and the guests in the hotel during the period of the war there was a very large number of young naval and military officers. The pursuer was observed to be very much in the company of these officers, and apparently in free association with them in the hotel lounges and elsewhere; and I think it is proved that he entertained some of them to dinner, though he says that only one officer, a friend of his own, was his occasional guest. The apparent association of this somewhat incongruous person with these young officers caused considerable surprise and stir among the visitors generally; and the manager, and those of the directors who were much about the place, were made aware by frequent comments and complaints that according to current opinion the pursuer's presence was considered undesirable and unsuitable. Minor unpleasantnesses, such as the episode of the intoxicated diners in 1916 and the Hurwitz affair in 1917, are worthy of notice but need not be dwelt upon. The two directors who appeared as witnesses, having had their attention directed to the pursuer by what they observed, and by what was frequently said to them, formed the opinion that he was using the hotel as a sphere of operation for his business as a money-lender, for the exercise of which the throngs of young officers seemed to offer a congenial and promising field; and they became convinced that he was at all events "spreading his net" and "throwing his fly" in their waters. The pursuer's presence and conduct caused them increasing anxiety. But the culminating point was reached in the autumn of 1917, when the newspapers became full of the trial and sentence of one Hyman Cohen for certain odious frauds. Cohen was a Jewish money-lender and a friend of the pursuer. An article in *Truth*, which obtained currency in the hotel, not only disclosed that the pursuer had been until very recently associated in business with Cohen as his managing partner, but also referred to the pursuer himself and his business methods in scathing terms, which if untrue were beyond question grossly libellous. In regard to these the pursuer—acting as we now know on the advice of counsel—took no steps to vindicate his character. This article and the comments and complaints which it occasioned in the hotel were the things that finally caused the directors' committee to take the serious step they did take on 17th January 1918, but it was the cumulative effect of the various happenings I have sketched that led up to their instructions to the manager to write his letter.

In rejecting the pursuer as they did I think the defenders were justified and acted legally. In my judgment they took the step which was *prima facie* adverse to their own interest as hotel-keepers, without haste, caprice, or malice, and with reasonable cause. It is not proved either that the pursuer actually conducted his money-lending business

in the hotel, or that the allegations against him in *Truth* are wholly true in fact. But the defenders' case needs no such proof. They have enough, if the circumstances justified them, as I think they did, in coming honestly to the resolution that, having due regard to the decency, order, and repute of their hotel, and to the legitimate interests of those whom they received in it, the conduct and manners of the pursuer rendered him unsuitable to the class of people whom they took into their hotel. They were in my judgment entitled to reject the pursuer in the *bona fide* exercise of their discretion.

One point remains to be noticed. The Lord Ordinary puts the question, which he answers in the negative, whether the defenders have proved that the pursuer was so unsuitable and objectionable a guest as to entitle them to refuse him "for all time" the privileges of a traveller *in itinere*. I am not disposed to give any answer to the question thus put and decided by the Lord Ordinary. The defenders' counsel did not claim an affirmative answer to it, unless upon the footing, which in my judgment is unsound, that their hotel is a place to which the legal incidents of an inn do not attach. We should I think be exceedingly rash if we were to commit ourselves as to the future indefinitely. In the course of one of his learned and interesting opinions the Lord Ordinary lays down a number of legal propositions with most of which, as general statements of the law, I have no fault to find. But legal propositions are not, like mathematical axioms, necessarily true for all time and under all conditions. Their application must depend upon particular circumstances, reasonably viewed, in due perspective. The problems of the future relations, if any, between this pursuer and these defenders must in my judgment be left to solve themselves, or to be solved, in the last resort, by appeal to a court which is duly possessed of the facts and circumstances under which such appeal is made.

On the whole matter I am for recalling the interlocutor reclaimed against and granting to the defenders decree of absolvitor.

LORD SALVESEN — This case appears to raise an important general question of law as to the obligation of innkeepers to lodge and board travellers who seek accommodation when in the course of a journey. It has been so dealt with by the Lord Ordinary, who has written two elaborate judgments on the subject, but it appears to me to be capable of being disposed of on broad and simple lines.

The first question that requires consideration is whether the defenders' hotel can be assimilated to a private boarding-house, the owner of which is under no obligation to receive members of the public at all. In my opinion that question falls to be answered in the negative. The travelling public are invited to make use of the hotel, and there is no advertised limitation which can be applicable to the pursuer as distinct from the persons who ordinarily resort to the hotel and are made welcome there. The mere fact that it is understood that no visitor is ordinarily received at the hotel except on the footing of paying tariff charges (a feature which I think is characteristic of all inns and hotels throughout Scotland) does not relieve the owners of the hotel from such obligations as the law imposes. While the law of England seems to differentiate between what is called a common inn and an inn or hotel which cannot be so described, there is no trace of such a distinction in the law of Scotland. Our law primarily rests on the old statute quoted by the Lord Ordinary in his note to the interlocutor of 8th November 1918, which provides for an establishment in towns and along high roads of hostelries and places of reception (I am translating the ancient words used), and, as I read it, imposes an obligation on the keepers of such establishments to provide travellers with bread and ale and all other food at a reasonable price based upon the market price prevailing at the time. The other statutes to which the Lord Ordinary referred have all been repealed.

On this statutory foundation has been built up the common law as it now exists, and was expressed in the opinion of Lord President Inglis in the case of *Strathearn Hydropathic Company, Limited*, 8 R. 798. Coming from such a source, I regard this as an authoritative statement of the law applicable to innkeepers in Scotland who are unable to claim as in a question with the travellers who resort to their establishments the ordinary freedom of contract which the owner of a house has in relation to those who desire to be received into his house as paying boarders. Shortly stated it amounts to this, that there is a duty on the part of a hotelkeeper to supply sleeping accommodation and decent sustenance for at all events one night, if he has accommodation available, to *bona fide* travellers who demand to be received into the hotel and are willing and able to pay therefor at reasonable rates. This obligation is, however, subject to a great many qualifications, six of which are stated by the Lord Ordinary in the opinion I have already referred to. It is also subject to the qualification expressed at length by Lord President Inglis that the hotelkeeper has a certain power of rejecting certain guests, and indeed that he is bound to exercise a discretion as to the class of people whom he will admit to his hotel. In exercising this discretion he must act reasonably, and must not be guided merely by caprice or by a desire to gratify his ill-feeling against a particular traveller. In each case, as I take it, it is a question of fact for the decision of a court of law (if it is appealed to) whether on a distinct demand being made to an innkeeper for accommodation on a given occasion, which demand he refused, he acted reasonably, and this will to a large extent depend on the nature of his establishment and the class of people who are in the habit of resorting to it and are made welcome there, and on numerous other circumstances which may easily be figured. It follows that no general proposition can be laid down which will embrace all the circumstances in which a particular

demand of the travelling public may be refused, but that each case must rest on its own circumstances. Just as it is admitted in the present case that an innkeeper is not obliged to furnish a sleeping apartment for a guest who presents himself for admission to the hotel when it is full, so there might be many other circumstances which may justify a refusal to comply with a traveller's demand for accommodation on any given occasion. In my opinion it is not proved that the pursuer on any occasion made a demand for accommodation with which the defenders failed unreasonably to comply. The only matter specifically founded on by the pursuer on record has reference to a request contained in a telegram dated 8th April 1918 and the answer of same date by the manager. The telegram is in these terms— "Arriving on Wednesday will you provide accommodation?" and the answer to this was a simple declinature. It will be observed that at the time the pursuer was not a traveller, although it may be inferred that he was proposing to travel to Edinburgh. His request was in fact that they should book an apartment for him, and it is now conceded they were under no obligation to do so. The Lord Ordinary in his later opinion reads the defenders' reply to the telegram as an absolute declinature to provide accommodation under any circumstances that might afterwards emerge. I am unable so to read it. I think it was simply a declinature to accede to the pursuer's request that they would reserve accommodation for him if he arrived in Edinburgh on the day mentioned; and in their subsequent letter of 13th April the defenders, while stating that they did not desire Mr Rothfield to come to the hotel, expressly guarded themselves against such an inference as the Lord Ordinary has drawn by stating "such legal rights if any as he may have the proprietors will give effect to." The defenders were in my opinion quite justified in letting the pursuer know that they did not regard him as a desirable visitor to their hotel, and that they would not provide any accommodation for him other than what he might be legally entitled to demand if and when he presented himself at their hotel. In so telegraphing and writing I think the defenders did no legal wrong to the pursuer, and that the claim of damages so far as based on the telegram and letter in question cannot be maintained.

In the course of his evidence, however, the pursuer also stated that on another occasion he applied personally at the hotel at the time when he was in Edinburgh, and was refused admission to the hotel by a clerkess on the ground that she had instructions from the manager not to receive him. The evidence which the pursuer gives on this subject, although the Lord Ordinary accepts it, is full of contradictions, is absolutely vague where it might have been easily made specific, and is open to other objections which it is unnecessary to specify. It is sufficient to say that it is uncorroborated, for the vague recollection of the pursuer's statement to him, to which the law agent depones, is not merely no corroboration in law, but is in many respects quite inconsistent with the pursuer's account in the witness-box. I refrain, therefore, from commenting further on this alleged incident, except to say that it is entirely unproved. There is therefore no evidence upon which we are entitled judicially to proceed of the pursuer having suffered any legal wrong from which a claim of damages, however nominal, might emerge.

Even if it had been proved, however, on the evidence led for the defenders, I hold they have amply established justification for their alleged refusal. The pursuer had been a visitor at the hotel over a long period of time for about three days every week up to the 17th of January 1918, when he was told that the defenders did not consider him a desirable guest at their hotel. Their reasons for reaching this conclusion are fully explained in the evidence of the two directors and the manager. Summarising that evidence, it comes to this, that the pursuer, who is a Jew by religion and of alien extraction, bearing a thinly disguised Teutonic name and practising the unpopular profession of a money-lender, had made himself somewhat conspicuous at the hotel by his swaggering conduct and had been the subject of remark by other guests; that at the time when the country was still at war and the hotel was largely frequented by young naval and military officers, he associated a great deal with such officers and entertained several on more than one occasion; that the directors came to the *bona fide* conclusion that he was using the hotel and associating with these young men for business purposes, and that his presence at the hotel was objected to by other guests. Added to all this, the pursuer had the misfortune of being associated in business with another Jew money-lender named Cohen, who in November 1917 was convicted of a fraudulent conspiracy in connection with recruiting and received a sentence of eight months' imprisonment. In the same article in *Truth*, in which these facts were published, the pursuer himself was exposed as a money-lender who had bled one of his victims "in the most rapacious way." The full details were published of the transactions on which this charge was based, and the pursuer has taken no means to vindicate his character. The attack made in the public press upon the pursuer was brought to the directors' knowledge, and it was only then that they finally made up their minds to take definite action. The pursuer's counsel maintained that the obligations of a hotel-keeper at common law applied even to persons of notoriously bad character and persons convicted of crime whose sentences have expired. I can conceive a case where such a person being in need of shelter and food for the night, neither of which he could obtain elsewhere, might have a legal right to demand them from an inn-keeper. It is not necessary to consider such a case, for the pursuer's demand is not limited to a case of emergency. On the contrary, he claims that the defenders are bound to place at his disposal all the accommodation of the hotel which they put at the disposal

of visitors whom they welcome, and his counsel made it quite plain that nothing short of the concession of this demand would satisfy him. In my opinion there is no warrant in our statutory or common law for imposing such an obligation upon a hotel-keeper. If he receives a person into his hotel *in invitum*, whom on reasonable grounds he does not regard as a desirable inmate, the utmost extent to which his liability can be pressed is, in my opinion, that he shall provide him reasonable shelter and food in a part of the hotel where he will not come in contact with other residents.

In the view that I have expressed it is unnecessary to consider the declaratory conclusions (*first*) because there were no actings of the defenders in respect of which the pursuer was entitled to invoke the aid of the Court in expiscating his rights as a member of the travelling public, and (*second*) because the declarator asked is really a declarator of the common law applicable to inn-keepers, and has no special relation to the pursuer's case. The Lord Ordinary has granted decree in terms of the declarator as framed, although he admits there are at least six qualifications which would be required to express fully the law on the subject. I entirely dissent from the view that these qualifications are to be implied and as occasion arises may be pleaded, and if established by evidence successfully pleaded. The Lord Ordinary has in my opinion entirely failed to appreciate the true purpose of a competent declarator, and the effect that such a decree of declarator has in regulating the future relations of parties when it has once been pronounced. I need not, however, delay your Lordships further on this topic, because in my opinion the declarator asked for is not merely unprecedented but wholly inadmissible. I am therefore for recalling the interlocutor of the Lord Ordinary and for dismissing the declaratory conclusion, and *quoad ultra* assoilzieing the defenders from the conclusions of the action.

LORD ORMIDALE—I concur in thinking that the defenders are entitled to absolvitor. I am satisfied on the evidence that whatever the rights of an ordinary traveller may be the defenders have shown good cause, on grounds personal to the pursuer, for refusing to admit him into their hotel.

On the question whether the defenders' hotel is a common inn I agree with what the Lord Ordinary has said as to the source of our law on the subject of inn-keepers and their obligations to the public. The expression "common inn" is not a Scots law term. "Inn," I take it, is in our law just the common inn of the English law. There is little, if any, difference between the views taken in the Courts of the two countries as to the rights and obligations of the keeper of an inn.

If he has room available he is, speaking generally, bound to receive any traveller, and to furnish him with board and lodging at a reasonable charge, the period for which he is bound to do so being commensurate with the period during which the visitor can be said to be still a traveller (*Lamond*, [1897] 1 Q.B. 541). Whether or not an innkeeper is bound to receive and entertain members of the public who are not *in itinere* is a different question. It does not arise here. It is as a member of the travelling public that the pursuer has raised the present action.

The defenders dispute that the general obligation to which I have referred applies to them. They deny that their establishment is a common inn. They describe their premises, however, as an hotel, and it is for them to show in what respect it differs from the ordinary inn. They have failed to do so. It is clear that their establishment differs in no essential feature from other inns or hotels. They call it, as I have said, an hotel, and they widely advertise it as in every way suitable for the travelling public. They do everything they can to attract the travelling public. They do not confine their invitation to any special class of travellers, and they nowhere suggest that travellers coming to their premises will only be received on conditions peculiar to their establishment and different from what are usual and customary. Being inn-keepers, therefore, they have no right arbitrarily to refuse admission to a member of the travelling public.

In this action the pursuer seeks to recover damages. He avers that he made application as a traveller for, and was refused, admission to the defenders' hotel, and so suffered a legal wrong. In my opinion he may be held on one occasion to have made such an application and to have been refused. This does not of course affect my judgment on the whole case as the defenders had good ground for their refusal, but as I do not take the same view with regard to the incident as your Lordships I may as well state my reasons.

The pursuer seeks to prove that he was refused admission on three occasions. It appears that he had lived in the hotel for a considerable time prior to 1918, occupying a room for three days every week—the same room being retained for him during his absence for the rest of the week. This arrangement was terminated on 17th January 1918, and it is not now maintained that the defenders were not entitled to terminate it although at first the pursuer was inclined to challenge their right to do so. Within a week thereafter the pursuer says he applied in person for admission to the hotel and was refused. This story as told by the pursuer in the witness-box is entirely wanting in precision and detail. He contradicts himself in the telling of it, and it is uncorroborated. I have no difficulty in rejecting it.

He founds next on the letters passing between his solicitors and the manager of the hotel, dated 2nd April and 13th April 1918. In the letter of 2nd April his solicitors in general terms state what they conceive to be the legal position and invite the defenders to come to some arrangement. The reply of the manager is that the proprietors do not desire the pursuer to come to the hotel—"Such legal rights, if any, as he

may have the proprietors will endeavour to give effect to." I am unable to read this correspondence as instructing an express refusal by the defenders or a definite request on the pursuer's part to gain admission to the hotel,

In regard, however, to the third alleged refusal, the pursuer has in my opinion established his case. It is evidenced by and depends on the construction given to the telegrams dated 8th April 1918. The pursuer's telegram, sent from London, is as follows—"Arriving Wednesday. Will you provide accommodation?" The reply is—"Must decline." It is said that the pursuer's telegram is tantamount to a request to book a room in advance for the pursuer. But the telegram must be read with reference to the circumstances existent at the time and also to what is said in the letter of 2nd April. So reading it I take the telegram to be an inquiry whether if the pursuer presents himself on the following Wednesday and asks for a room he will be given one if such is then available. That seems to me the natural reading. The right to have a room booked in advance had never been mooted by the pursuer, and he had never claimed to be admitted when the hotel was full. If my construction of the telegram is correct, then there was no occasion for the pursuer to go through the form of coming to the hotel in person and asking for accommodation when he knew that his request would be refused. Accordingly it seems to me that the pursuer did—apart from the question whether the defenders had good ground for refusing him—on this occasion suffer a legal wrong sounding in damages.

Now I concur with the views expressed by Lord Dundas as to the province of a declarator and the circumstances in which its assistance may be competently invoked. I think the incident I have referred to furnishes just such a concrete case as would supply the ground on which to introduce a conclusion declaratory of the legal right invaded as a prelude to a claim for damages—although, I may add, such a conclusion would in my opinion have been quite unnecessary. But taking it that the pursuer has, as I think he has, apart from the plea of justification, proved a concrete instance of a legal right invaded, I am unable to hold that the declarator he asks is one that can be granted. It is much too vague and general, and altogether inappropriate to the occasion. It seems to be intended to be an exposition, although in my judgment a far from complete or exhaustive exposition, of the whole law of the subject without relation to the particular circumstances of the incident complained of. It is, moreover, crowded with phrases and words of quite indefinite meaning, *e.g.*, "necessary to stay," "*bona fide* traveller," "on the same terms and conditions as other travellers." Each of these phrases would, it seems to me, itself require to be made the subject of a declarator before its exact legal import and effect could be ascertained and understood. The last of them errs also in assuming that identity of treatment, and not only reasonable treatment, is what is required of an innkeeper. Further, we know as a fact that identity of treatment is not accorded by the defenders to all classes of travellers who come to their hotel. Commercial travellers, tourists, members of the Automobile Association, and others, are all received on special terms and conditions.

It is competent for the Court, no doubt, to modify the terms of a declarator which is sought—*Assets Company, Limited* v. *Ogilvie*, 24 R. 400. Whether the present conclusion could be reformed or not I do not pause to consider, for in the view I take of the plea of justification the question is purely academic.

In my judgment the defenders were entitled to refuse to take the pursuer into their hotel. It is not disputed that the common law obligation of an inn-keeper to receive and entertain travellers suffers many exceptions or qualifications. The Lord Ordinary has referred to the more familiar of them. In our law it seems to be clear that the inn-keeper is entitled to exercise a certain discretion as to rejecting a visitor. He is bound to consider not only the party seeking admission but also the guests already lodging in his establishment. The pronouncement of Lord President Inglis on the extent and nature of this discretion and its exercise in the case of the *Strathearn Hydropathic* (8 R. 798, *cp. Ewing* v. *Campbell*, 5 R. 230) has already been referred to by your Lordships, and I do not again recite the passages from his opinion which are relevant in considering the present case. I take it that while the inn-keeper must not exercise his discretion "capriciously" or "maliciously" he may exercise it in order to conserve the decency and order of his establishment. The law of England appears to be the same. Alverstone, C.J., in *Brown* v. *Brandt* ([1902], 1 K.B. 696) puts it thus—"An inn-keeper may not pick and choose his guests . . . The landlord must act reasonably; he must not captiously or unreasonably refuse to receive persons when he has proper accommodation for them."

It must always be to a great extent a question of circumstances in each particular case. In the present case the defenders have in my judgment proved that there were grounds of objection personal to the pursuer.

The pursuer is a money-lender of foreign extraction. His principal place of business is in Newcastle. He has also an office in Glasgow. He has none in Edinburgh. When he came to Edinburgh for business purposes, as he very frequently did, he resided in the defenders' hotel, and while in residence there he was regularly advertising himself as a money-lender under his name—Henry Rothfield. He made himself very conspicuous in the hotel. He did his utmost to attract public attention to himself. The other guests quickly got to know who and what he was. And the guests expressed their surprise to one of the directors of the defenders' company and to the manager of the hotel that such a person was tolerated in the place.

Among the residents in the hotel during 1916 and 1917 were large numbers of naval

and military officers. Two of the directors who had opportunities of observing what was going on, and Mr Ryan the manager, speak to the pursuer constantly associating with the officers. This troubled the directors, who came to think that the pursuer was using the hotel for the purpose of promoting his money-lending business. Mr Younger, in answer to the question "Have you any evidence whatever that he ever did transact business?" says—"In my own mind I am absolutely confident that he did, but I have no evidence. I think myself that he threw the fly; I don't say that he landed the fish there. He would get them elsewhere." Mr Gray says—"We cannot say that business was done in the hotel in the sense of bonds made, but we felt that the net was spread." An incident involving the pursuer and another money-lender called Hurwitz, which occurred in the autumn of 1917, created a grave suspicion in the mind of Mr Gray that the two money-lenders had in connection with a money-lending transaction obtained a certain hold over one of the military guests.

In November 1917, by which time the pursuer had become the subject of comments and complaints by the guests, and the directors had become anxious with regard to the purpose for which he was using their hotel, the pursuer was pilloried by *Truth*, a paper which was current in the hotel, and held up to public ridicule and contempt. It described the rapacious way in which, along with his principal or partner Hyman Cohen, he had bled the victim of one of his money-lending transactions, and referred generally to the unconscionable way in which members of the fraternity to which he belonged fleeced those who had not strength of will to resist their exactions. The article commenced with a reference to the trial which had just before taken place of Hyman Cohen and others for fraud and conspiracy in connection with recruiting. It called attention to the business relations existing between Cohen and the pursuer, although the pursuer was not said to be in any way connected with the crime committed by his partner. The latter had pleaded guilty and been sentenced to eight months' imprisonment. Notwithstanding the scathing, and if not well founded the very gross, attack made on him, the pursuer after taking legal advice made no attempt to vindicate his character.

This attack in the public press brought matters to a climax, and the defenders resolved to get rid of the pursuer's presence in the hotel and to refuse again to admit him. He had become notorious and an object of suspicion and offence to the other guests, and according to the best judgment the directors could form he was endeavouring to use their premises for operating his business. It would not be reasonable, it seems to me, to exact from them absolute proof that their suspicions were well founded. It is enough that it clearly appears that they had reasonable grounds for thinking as they did and that they did not act rashly or capriciously, but on the contrary came to an honest conclusion only after patient and anxious consideration of the whole circumstances. On this evidence I think that their contention that they were justified in refusing to receive the pursuer into their hotel is well founded.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

Counsel for the Pursuer and Respondent—Solicitor-General (Murray, K.C.)—M. P. Fraser, K.C. — Paton. Agents — Clark & Macdonald, S.S.C.

Counsel for the Defenders and Reclaimers—Macmillan, K.C.—MacRobert, K.C.—E. O. Inglis. Agent—James Watson, S.S.C.

Tuesday, May 25.

FIRST DIVISION.

[Lord Blackburn, Ordinary.

BERTRAM, GARDNER & COMPANY'S TRUSTEE *v.* KING'S AND LORD TREASURER'S REMEMBRANCER.

Statute — Construction — "Persons having Possession of" Money before Consignation — Court of Session Consignations (Scotland) Act 1895 (58 *and* 59 *Vict. cap.* 19), *secs.* 2 *and* 16.

Prescription — Trust — Long Negative Prescription — Debt Due by Trustee for Creditors — Deposit-Receipt in Name of Trustee qua Trustee.

A trustee under a voluntary trust for creditors was due a debt to a trustee upon a sequestrated estate. The former made one payment of dividend to the latter, but when he came to make a second and final payment the latter had died and no successor had been appointed. He therefore in 1824 deposited the money in bank upon deposit-receipt which narrated the circumstances of the deposit. The money lay on deposit-receipt till 1896, the interest from time to time being marked upon it up to 1863 and thereafter in the books of the bank, and added to the principal. In 1896 the original sum deposited and the accumulated interest thereon were included in the sums paid over to the King's and Lord Treasurer's Remembrancer under the Court of Session Consignations (Scotland) Act 1895. In 1917 a new trustee was appointed upon the sequestrated estate and he brought an action against the Remembrancer for an account, claiming the sum transferred in 1896 and interest thereon. *Held* (1) that "the person or persons having possession of [the consigned money] before payment to" the defender was the trustee under the voluntary trust deed, or his representatives, and that the pursuer in terms of section 16 of the Act of 1895 had the same right to recover payment from the defender as he would have had against that trustee, and (2) that the pursuer's claim to the money upon deposit-receipt being a claim by a beneficiary upon a fund