Saturday, June 26.

SECOND DIVISION.

[Lord Blackburn, Ordinary.

FARROW *v.* FARROW.

Husband and Wife—Divorce—Desertion—Willingness of Pursuer to Adhere—Offer by Pursuer to Receive back Made in Defence to Previous Action for Aliment.

By a mutual contract of separation a husband and wife agreed to live apart, and the husband undertook to pay the wife £1 per week as aliment for herself and the child of the marriage. For some years the husband paid the aliment at the agreed-on rate, but then reduced the payments to 12s. per week on the ground that the child, a son, had reached an age when he was able to contribute to his mother's household expenses. The wife sued the husband for aliment at the agreed-on rate of £1 per week and the defender was assoilzied. In the action the husband made an offer on record to receive back the wife to live with him, but she did not accept the offer. Six years later the husband brought an action of divorce against the wife on the ground of desertion. *Circumstances* under which the Court assoilzied the defender, *holding* that the pursuer had failed to prove that he had sincerely desired the defender to return to cohabitation and had "used all reasonable means" to induce her to do so.

Hutchison v. *Hutchison*, 1909 S.C. 148, 46 S.L.R. 122, *distinguished.*

On February 19, 1919, Charles Morris Farrow, cycle agent, Glasgow, *pursuer*, brought an action of divorce for desertion against his wife Mrs Annie Brodie or Farrow, *defender.*

The pursuer *pleaded* — "The defender having been in wilful and malicious desertion of the pursuer for the space of more than four years, decree of divorce should be granted as concluded for."

The defender *pleaded* — "1. The averments of the pursuer so far as material being unfounded in fact, the defender should be assoilzied. 2. The defender not having been in wilful and malicious desertion of the pursuer for the space of more than four years, should be assoilzied. 3. The defender having been prevented by the pursuer from adhering, the pursuer is not entitled to decree of divorce as concluded for. 4. The pursuer's offer to take back the defender not having been made in *bona fide* he is not entitled to decree as concluded for. 5. The pursuer having failed to make any privy remonstrance or effort to induce the defender to return, is not entitled to decree of divorce as concluded for."

The following narrative of the *facts* is taken from the opinion of Lord Ormidale, *infra*—"The parties to this action were married in 1885. They separated by mutual consent in 1905. The terms on which they agreed to separate are to be found in the deed of separation. One of these was that the husband should pay to the wife aliment for herself and her son at the rate of £1 per week. An attempt to come together again was made in 1910 but proved abortive owing, so far as appears from the evidence in this case, to no fault of the wife, who was apparently at that date not unwilling to resume cohabitation with her husband. The present action has now been raised by the husband to obtain divorce from his wife on the ground of desertion, and the date when her desertion commenced is said by him to have been in 1912, when in an action at the present defender's instance, in which she claimed aliment at the agreed-on rate of £1 per week he averred that he was willing that the pursuer should live with him and offered to receive her into his house. No plea is founded on that averment. In that action the defender (the present pursuer) pleaded, *inter alia*—'2. The action is incompetent. 3. The pursuer not being entitled to aliment at the rate of £1 per week but at the rate of 12s. per week, which the defender has offered to pay, the defender should be assoilzied with expenses. 4. The defender having paid a reasonable sum as aliment to the pursuer, and being prepared to continue the payment thereof, should be assoilzied with expenses.' The Sheriff sustained the second plea for the defender and dismissed the action. No proof was allowed with regard to the offer made by the husband to take his wife back, an offer which she alleged was not a *bona fide* offer. The reason why the wife raised the action was because the husband in May 1911, in respect that the child of the marriage had ceased to be any charge on her, had reduced his weekly payment from £1 to 12s. In intimating the reduction he made no proposal or request to his wife that she should return to his society. I have referred to the pleas-in-law because they are not only silent as to the offer made by the husband but indicate very clearly that the view he entertained was that so long as he provided a reasonable aliment for his wife he had fulfilled his whole duty towards her. The action was dismissed in November 1912, and thereafter the husband continued to pay a weekly sum of 12s. to his wife for several months. He then reduced the amount to 10s. per week. In December 1913 his wife raised a second action against him, claiming arrears of aliment which she alleged were due to her under the agreement of separation of 1905. In his defences to this action the husband averred that he had in September 1912 invited the pursuer back to his house to live with him. Again I quote from his pleas-in-law—'5. The deed of separation having been revoked by the defender previous to the reduction of aliment, absolvitor should be granted with costs. . . . 8. The defender having paid the pursuer a reasonable sum of aliment, and being prepared to continue the payment thereof, should be assoilzied with expenses.' On 5th June 1914 the Sheriff-Substitute, *inter alia*, found in fact that in the previous action the defender had judicially offered to receive the pursuer as his wife; that the pursuer did not accept the offer; found in fact and law that the pursuer had no ground for refusing the offer

so made, and found in law that the effect of the offer was to revoke the contract of separation and to relieve the defender from further liability thereunder. He assoilzied the defender. On appeal the Sheriff adhered to this interlocutor."

On 6th January 1920 Lord Ordinary (BLACKBURN), assoilzied the defender.

Opinion. — ". . . [*After a narrative of the facts*] . . . The fact that the parties separated of mutual consent and that the pursuer has continued to aliment the defender voluntarily up to the eve of raising the action requires a careful scrutiny of the evidence to ascertain whether 'he used all reasonable means to induce the wife to return to cohabitation, and that he sincerely took all honest steps to win her back'—*Mackenzie* v. *Mackenzie*, 22 R. (H.L.) 32.

"Before proceeding to consider the endeavours which the pursuer alleges that he made to induce his wife to return to him, it is necessary to deal with the circumstances under which he was living." [*His Lordship then considered the evidence.*]

"I do not think that any offer proved in the case to have been made by the pursuer to his wife could be characterised as a reasonable and honest attempt to induce her to return to him which she maliciously and obstinately refuses to accept. I do not think that the offers were made with any intention that they should be accepted. That there have been differences between the spouses, for which probably both are to blame, is clear from the fact that they separated by mutual agreement, but so far I do not think there has been any *bona fide* effort on the pursuer's part to heal the breach. I am by no means satisfied that the defender is not more willing to return than the pursuer is to have her back. I shall accordingly assoilzie her from the conclusions of the action, with expenses."

The pursuer reclaimed, and argued—The pursuer's willingness to adhere was shown by the offer which he made in his defence to the action of 1912 to receive back the defender into his house—*Hutchison* v. *Hutchison*, 1909 S.C. 148, 46 S.L.R. 122. The offer must be presumed to be genuine until its genuineness was disproved—*Hutchison* v. *Hutchison*, *cit.*, *per* Lord President (Dunedin), at 1909 S.C. 151, 46 S.L.R. 124. The *onus* was on the defender to disprove the genuineness of the offer, and she had failed to discharge the *onus*. The fact that the pursuer had been paying aliment to the defender did not affect the quality of the desertion. The sums of aliment which he paid her were not a sufficient inducement to cause her to absent herself. She absented herself in spite of these small payments. *A* v. *B*, (1905) 13 S.L.T. 532; *Stair* v. *Stair*, (1905) 12 S.L.T. 788; *Mackenzie* v. *Mackenzie*, (1895) 22 R. (H.L.) 32, 32 S.L.R. 455; *Watson* v. *Watson*, (1890) 17 R. 736, 27 S.L.R. 598; Fraser, Husband and Wife (2nd ed.), vol. ii, p. 1209, were also referred to.

Argued for the respondent—The pursuer had failed to prove his willingness to adhere. The offer which he made in his defence to the action of 1912 was not a *bona fide* offer to take back the defender to live with him as his wife. It was merely an offer to pay her money for board so as to avoid liability for her claim for aliment. The pursuer had imposed a condition that the defender must return to a particular house and submit to the presence of a woman whom she objected to. That showed that the offer was not *bona fide*. The pursuer had not fulfilled the duty incumbent upon him of trying to win back the defender—*Stair* v. *Stair*; *Mackenzie* v. *Mackenzie*; *Watson* v. *Watson*, *cit.*, *per* Lord President (Inglis) at 17 R. 740, 27 S.L.R. 600, Lord Justice-Clerk (Macdonald) at 17 R. 742, 27 S.L.R. 601, and Lord Shand at 17 R. 743, 27 S.L.R. 602. *Hutchison* v. *Hutchison* was distinguishable. In that case the defender was originally in desertion.

At advising—

LORD JUSTICE-CLERK (SCOTT-DICKSON)—This is an action for divorce on the ground of desertion. Lord President Inglis said more than twenty years ago that this remedy is peculiar to Scotland, that it involves questions of great importance both to the morality and social wellbeing of the community, and that the greatest care must be taken that it shall not be extended to cases to which by law it is not strictly applicable. These observations are entitled to at least as great weight now as when they were originally made, and require the greatest care in the administration and application of this statutory law. Divorce for desertion remains to this day regulated by the Statute of 1573 as amended by the Conjugal Rights Act 1861, subject to such authoritative judicial interpretations as have been pronounced from time to time. The statutes are directed against the spouse who "divertis frae ithers company" without a reasonable cause, and remains in malicious obstinacy for four years, and in the meantime refuses all privy admonition.

How far do the statutes require admonition or remonstrance on the part of the deserted spouse is a question which has been considered more than once. In the case of *Chalmers*, 6 Macph. 547, at p. 549 (5 S.L.R. 357, at 358), Lord President Inglis said—"Nothing but wilful desertion, persisted in notwithstanding remonstrance, is sufficient to found an action for divorce." Later on he said if an offer by the husband to resume the society of his wife "were made in good faith, with a sincere desire of being reunited to her, and of fulfilling to her the duties of a husband, it would be difficult to refuse to give effect to it." In the later case of *Watson* ((1890) 17 R. 736, 27 S.L.R. 598) the same Judge (at p. 739) said that to come within the statute there must be an injured party "who does not condone the offence, but, on the contrary, . . . desires and requires the offender to return to conjugal cohabitation not as a statutory solemnity or matter of form but as a substantive fact." He then remarked that the statute requires not only "obstinate non-adherence on the one side" but "a manifested desire for adherence on the other," and again referred to the importance of

"remonstrance," and specially refers to the case of *Barrie*, 10 R. 208, 20 S.L.R. 147.

In *Barrie's* case the same Judge repeated that he thought it was quite clear, "as I ventured to say in the case of *Chalmers*, that 'nothing but wilful desertion persisted in notwithstanding remonstrance is sufficient.'" With reference to the particular case he was dealing with, he did not think there had been malicious obstinacy on the part of the defender, and observed "that the conduct of the husband was anything but that of a man who was remonstrating against his wife's desertion."

Lord President Dunedin in *Hutchison* (1909 S.C. 148) referred to Lord President Inglis' judgment in *Watson's* case as at that time being the "last word" upon the law in such cases, to which he had nothing to add, and he dealt with the case on its own special circumstances.

In the case of *Mackenzie* ((1895) 22 R. (H.L.) 32) Lord Chancellor Herschell said that it appeared to him "that it would be essential for the party suing for a divorce to show that he or she had during that time (four years) used every reasonable endeavour to induce the other to adhere, and been ready and willing to discharge on his or her part all marital duties." In the same case Lord Watson said he was not satisfied that the appellant (the husband, who was the pursuer) "ever entertained an honest desire to resume cohabitation with the respondent, and if he really did so I am satisfied that, instead of taking reasonable means to convince the respondent of his sincerity, he proceeded in a way calculated to throw doubt upon it." The Lord Ordinary has quoted a pregnant sentence from Lord Ashbourne's judgment in the same case.

I have referred with some detail to these judicial utterances—and others of the same import might be quoted—because I accept them as correctly stating the law, and I agree that the application of the statute must depend on the special facts of the case. In my opinion the circumstances of the present case are not such as to justify us in pronouncing decree of divorce.

The facts as established by the proof in this case, oral and documentary, lie within a very small compass. The separation began twenty years after the marriage by mutual contract of separation in 1905. The only child of the marriage, who was at that date about fifteen or sixteen, went with his mother and remained with her, the husband agreeing to pay for the aliment of his wife and child £1 a-week. This sum he reduced to 12s. and then to 10s. as the son grew older, and this latter payment he continued almost down to raising the present action. There were two actions for aliment at the instance of the wife, one in 1912 and the other in 1914. The first was dismissed by the Sheriff as incompetent, and in the other the husband was assoilzied by both Sheriffs. In these actions the husband in his defences, in my opinion, showed that he would rather take his wife back to live with him than pay her £1 per week. But, on the other hand, I think they also showed that he was quite willing that his wife should continue to live apart from him if he had only to pay her 12s. or 10s. per week, and the correspondence seems to me to indicate his adherence to this attitude. In February 1919 the present action was raised.

It is difficult, I think, to say when if ever this separation of the spouses, which began by mutual consent, assumed the character of obstinate non-adherence or malicious obstinacy on the part of the wife. I cannot find anything that I can regard as remonstrance or any manifested or sincere desire on his part that his wife should cohabit with him. He was most anxious to pay her no more than 12s. or 10s., and so long as she was content with that allowance by way of aliment he was, in my opinion, also quite content that the state of separation should continue, and I think he showed this quite plainly to his wife. Except as a means of reducing what he had to pay by way of aliment, or avoiding any increase in what he had to pay, I do not find any sufficient evidence to show that the husband desired his wife to return. His solicitor says in his evidence—"I cannot say that her husband was very anxious that she should return to him, but at the same time he was willing that she should return to him."

There is nothing which, in my opinion, can be regarded as "remonstrance" on the part of the husband, or as evincing that state of mind which a husband requires to possess and to manifest to his wife in order to convert separation, mutually agreed on at its inception and for several years, into malicious and obstinate desertion on the part of the wife of a husband who sincerely desired to be reunited to her.

I am therefore of opinion that this reclaiming note should be refused.

LORD DUNDAS—In my opinion the conclusion reached by the Lord Ordinary is right. The pursuer seeks to divorce the defender, his wife, on the ground that she has without reasonable cause obstinately and continuously withdrawn herself from his society, and has wilfully and maliciously persisted in her desertion of him for a period of more than four years. The remedy sought is a peculiar one, and the Court will not grant it except upon satisfactory proof of the existence of certain well-defined conditions in fact. These the pursuer has in my judgment failed to establish.

The import and effect of the old Act of 1573, as "reformed" by the more recent Act of 1861, were carefully explained by Lord President Inglis in the Whole Court case of *Watson*, 1890, 17 R. 736, at p. 739—see also Lord Watson's opinion in the later case of *Mackenzie*, 22 R. (H.L.) 32, at p. 40. In the passage cited Lord President Inglis pointed out that it is clear that to meet the statutory requirements "there must not only be an offender against the conjugal obligation and duty of adherence, but also an injured party who does not condone the offence but, on the contrary, remains faithful to the marriage vows, and desires and requires the offender to return to conjugal cohabitation, not as a statutory solemnity or matter of form but as a substantive fact," and

that the statute "requires as the condition of its application obstinate non-adherence on the one side and a manifested desire for adherence on the other." In the same case the Lord Justice-Clerk stated that it is not enough for the pursuer to sit with folded hands and, after the lapse of the statutory period, to raise action for divorce and say that he has all along been quite willing to receive his wife back to live with him. "He must be free not only from the imputation of unwillingness to receive her back, but also from the imputation of having been practically a consenting party to her absence, tacitly encouraging her in breaking up the conjugal relation. His position must be that, contrary to his sincere desire and honest effort in furtherance of his desire to restore the family unity, there has been refusal to yield to his active endeavour. He must show not merely continuance of the disruption but resistance to admonition for reunion actively urged. Mere continuance of the absence of one spouse from the society of the other may be evidence on the question of the malicious character of the absence, but it cannot of itself imply the malicious and obstinate defection which the statute requires." Similar doctrine was laid down by the House of Lords in the *Mackenzie* case, *e.g.*, by Lord Ashbourne, who stated (at p. 48) that "even if the wife has no reasonable cause for going away and for remaining away, the husband must still show that he has come into Court with clean hands—that he himself was not only willing to adhere but that he used all reasonable means to induce the wife to return to cohabitation, and that he sincerely took all honest steps to win her back."

In the present case the spouses parted in 1905 on a voluntary agreement of separation. The pursuer has ever since paid his wife sums of varying amount for her aliment. He contends, however, that she has been in malicious desertion since 1912, when he, in defence to a claim at her instance in the Sheriff Court for aliment, stated on record "The defender is willing that the pursuer should live with him and offers to receive her into his house," an offer which the wife then pleaded was not made *in bona fide*. That action was dismissed as incompetent by the Sheriff-Substitute for good and obvious reasons. In a second action in 1914 for arrears of aliment, raised by the wife against the husband, the Sheriff-Substitute, referring to the pleadings in the former case which I have quoted, found in fact and law (after a proof) that the wife "had no ground for refusing the said offer of adherence so made; finds in law that the effect of the said offer was to revoke the said contract of separation and to relieve the defender" (the husband) "from further liability thereunder," and assoilzied the husband. This interlocutor was affirmed on appeal by the Sheriff.

The pursuer's counsel at our bar disclaimed any argument to the effect that the interlocutors of the learned Sheriffs constituted *res judicata* as regards the action now before us. They were probably right in doing so, for though the litigating parties are the same, the issue at trial in the two cases is different. We do not know upon what facts the learned Sheriffs based their judgments, but our duty now is to decide upon the facts before us whether or not the pursuer is entitled to decree of divorce upon the ground of his wife's wilful and malicious desertion. I am of opinion that he is not.

I do not think that it is established that the defender is or ever has been in desertion. The pursuer's case rests upon her continued absence, and upon a series of alleged offers by him of adherence, in spite of which she has not in fact returned. His offer on record in the Sheriff Court in 1912 I have already quoted. On 28th May 1913, apparently in reply to a threat of proceedings in the Court of Session for separation and aliment, the pursuer wrote to his wife's agent referring to his offer on record in 1912, and adding—"She has refused to come back, and I object to paying any more than the 10s. per week so long as she refuses to come back. She left of her own accord." On 2nd June the pursuer's agent wrote to the defender's agent—"Mr Farrow's house is open to Mrs Farrow any time she likes to return to him, and he is merely continuing the allowance to her as he does not wish to see her left destitute. The present allowance being made her, however, is sufficient, with what she is able to make otherwise, to keep her in comfortable circumstances." On 10th October 1913 the pursuer's agent wrote to his wife's agent—"My client declines to pay more than he is paying at present. He has already offered to take your client back to his house, and if she is not satisfied with what she is getting the best course is for her to return to her husband's house. She has already caused my client considerable expense," &c. On 31st October 1914, a few days after the Sheriff had pronounced judgment, the pursuer wrote to his wife—"Mrs Farrow, in answer to your letter. The door is open for you whenever you are ready to return. Yours, &c., C. M. Farrow." Lastly, on 25th April 1918, in answer to an intimation that legal proceedings would be taken against him for aliment, the pursuer wrote—"I am quite agreeable for Mrs Farrow to join me in my present lodging."

It appears that the pursuer's "offers," such as they were, were each and all made by way of defence to some demand by his wife for payment of money in name of aliment. His position was that if she was not satisfied with what she was getting from him her legal remedy was to return. But no one of his offers contains an expression of desire on his part, or even of request, that she should do so, or any remonstrance against her continued absence. I find nowhere any "manifested desire for adherence" on the husband's part, no "sincere desire and honest effort in furtherance of his desire to restore the family unity," nor any refusal by the wife "to yield to his active endeavour"—still less, any "resistance to admonition for reunion actively urged." It cannot, I think, possibly be said that the pur-

suer "has used all reasonable means," or indeed any means, "to induce the wife to return to cohabitation, and that he sincerely took all honest steps to win her back." In my judgment, therefore, the pursuer has plainly failed to establish as matter of fact that these conditions exist upon which alone he would be entitled to the remedy he asks. The evidence does not in my mind disclose on the one hand a wife in obstinate and malicious desertion, and on the other hand (even assuming the wife to be in desertion) a husband desiring and requiring his wife to return, not as a statutory solemnity but as a substantive fact. I do not find it necessary to discuss a variety of topics with which the Lord Ordinary deals in his opinion; my judgment is based on the broader grounds indicated. The action must, in my opinion, fail.

I should perhaps add, with reference to the case of *Hutchison*, 1909 S.C. 148, upon which the pursuer's counsel placed great reliance, that it does not appear to me to aid them materially. There was there no room for doubt or dispute that the wife had deserted her husband, and the only question was, as the Lord President put it, whether the husband had sufficiently shown that her absence was not approved of by him. That was a question of fact depending upon the circumstances of the particular case. I do not think *Hutchison* v. *Hutchison* was intended to lay down, or did lay down, any general rules or principles of law to be applied under all circumstances. The husband had made a formal offer of adherence, the genuineness of which the Court saw no reason to doubt, nor was there anything to show that since making it he had changed his disposition towards her. The Court upon the evidence before them granted decree of divorce. In the present case the facts seem to be very different. The pursuer has not, in my judgment, shown that his wife deserted him; but even on a contrary assumption he has entirely failed to establish that he ever remonstrated with her in regard to her absence, or desired or required her to return, or took any steps to persuade her in that direction. On the contrary, the evidence discloses to my mind that he was not at all unwilling that his wife should stay away, though he would rather have allowed her to return than be forced to pay her more than he found convenient by way of aliment.

I am for adhering to the interlocutor reclaimed against.

LORD ORMIDALE—[*After the narrative supra.*]—On what evidence in that action the Sheriffs held that the wife had no ground for refusing the offer made in the former action we do not know. It was not, however, maintained by counsel for the pursuer in this action that the matter was *res judicata*. Their main contention rather was that the defender in this action had failed to show, in support of her fourth plea-in-law, that the pursuer's offer to take her back was not made *in bona fide*. The Lord Ordinary has held on the evidence that the offer was not a genuine offer, and has on that ground assoilzied the defender.

In my judgment, however, the first matter to be proved—and the *onus* is on the pursuer—is that the defender has been in wilful and malicious desertion of the pursuer for the space of four years. This no doubt involves the consideration of the offer made by him to take his wife back. I am inclined to think that so far as it goes the offer was genuine in the sense that he was prepared to stand by it as a last resort; but I am quite certain that it was not made with a view to inducing his wife to return to him, but only as a rejoinder to her demand for a larger aliment than he was prepared to pay, and that so long as she was content to accept the 10s. a-week to which he had reduced the aliment, and which he continued to pay down to 1918 if not later, he was quite agreeable to her remaining away from him.

The case of *Hutchison* (1909 S.C. 148) on which the pursuer's counsel so strongly relied, was very different from the present. The prior history of the spouses in that case very clearly showed that the wife had deserted her husband in the first instance, and that her absence was not only at its inception but throughout a "deserting absence," as the Lord President phrased it. The offer to take back his wife was made by Mr Hutchison in his defences to an action of separation and aliment, and it was nowhere and at no time suggested that he had ever consented to or condoned her desertion.

In the present case the spouses separated by mutual consent, and in my opinion they have remained apart by mutual consent. As I read the evidence there is nothing to show that the pursuer was desirous that his wife should resume cohabitation or that he made any reasonable effort to get her to adhere. There is nothing to suggest spontaneity in his offers to receive her back. They were always elicited by an action or by threats of an action for increased aliment. That was so as recently as April 1918. Otherwise he appears to me to have been quite agreeable to his wife living apart from him. They were residing not very far from one another. Every fortnight the wife received £1, sometimes by a messenger but generally in person. What the Lord President said in *Watson* v. *Watson* (17 R. 736, at p. 740) very aptly describes the position. "There can therefore have been nothing during the desertion complained of to prevent the husband from communicating with his wife and remonstrating with her, or expressing his desire for reconciliation and a resumption of conjugal intercourse and adherence. But if such a sentiment or desire was ever entertained by him he carefully avoided giving it expression." The relation of parties is in my opinion correctly indicated in a letter dated 10th October 1913 (*i.e.*, just before the second action at the wife's instance), from the pursuer's agent to the defender's agent—"My client has already offered to take your client back to his house, and if she is not satisfied with what she is getting the best course is for her to return to her husband's house." I read that as meaning that

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