reduction of available capital. Reference was made to *in re Phœbe Gold Mining Company*, 1900, Weekly Notes 182.

LORD STORMONTH DARLING—In this case we have the benefit of a very careful report by Mr Winchester, and we have also had the advantage of a fair and candid statement by Mr Morton. He says that the shareholders would prefer to have the first alternative resolution confirmed. But the reporter is of opinion that we ought not to confirm the first alternative resolution, and that we ought to confirm the second, which has this at least to be said for it, that it is literally and plainly a resolution for "reduction of capital." I agree with Mr Winchester. He does not say that any existing creditor will be prejudiced by the one proposal more than the other. But he says that a resolution to "convert" and "reallocate capital" is not in terms or in reality a proposal to "reduce" capital. Therefore the first alternative resolution is not strictly within the words of the statute. Mr Morton says that he has searched for and has failed to find any case which would be a precedent for doing what he asks the Court to do here. In the absence of such a case I think the safer course will be to walk by the strict words of the statute and confirm the second alternative resolution.

LORD LOW—I concur, but with considerable regret. I recognise, however, that the first of the alternative resolutions, although for practical purposes it amounts to very much the same thing as the second, does not in fact reduce the capital, which is the only matter which the statute empowers the Court to deal with.

LORD ARDWALL—I concur. I am of opinion that no reasons of expediency can justify the Court in departing by a hair's-breadth from the provisions of the statutes under which alone they have jurisdiction to make alterations in the capital of a company that has been incorporated under the Companies Acts.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor—

"The Lords having resumed consideration of the petition and proceedings, together with the report by Mr W. G. L. Winchester, Approve of said report; of new settle the list of creditors entitled to object to the proposed reduction of capital: Find that they have all consented to the proposed reduction of capital: Confirm the reduction of capital resolved on by the alternative resolution set forth in the petition: Approve of the minute alternatively set forth in the petition: Direct the registration of this confirmation order and of the said minute by the Registrar of Joint Stock Companies, and on this order and the said minute being registered as aforesaid, direct notice of such registration to be given by advertisement once in the *Edinburgh Gazette*; and dispense altogether with the words 'and reduced' as part of the name of the company; and decern."

Counsel for the Petitioners — Morton. Agent—John N. Rae, S.S.C.

Saturday, November 16.

EXTRA DIVISION.

(Before Lords M'Laren, Pearson, and Ardwall.)

[Lord Salvesen, Ordinary.

WHITEHOUSE *v.* R. & W. PICKETT.

Innkeeper—Liability beyond £30—Negligence — Onus Probandi — Deposit Expressly for Safe Custody—Innkeepers' Liability Act 1863 (26 *and* 27 *Vict. cap.* 41).

A commercial traveller in the employment of a manufacturing jeweller, on arriving at an hotel, which he was in use to visit, was met by the "boots" of the hotel, who received from him his sample bag and placed it in the office (which was also the bar) of the hotel. This office was the safest place in the hotel for the custody of the bag, the safe not being large enough, and by a notice exhibited in the hotel the proprietors (who also managed the hotel) intimated that they would not be responsible for valuables left in bedrooms, but would take charge of them in this office. The "boots" knew that the bag was used for the purpose of carrying jewellery, but he was not on this occasion informed that it did contain jewellery, and he placed it in the office without any request or instruction from the traveller, and without being apprised that the bag was to be treated as deposited for safe custody. The proprietors of the hotel were not told that the bag had been placed in the office until after its disappearance. On the evening of the day of his arrival the traveller asked for his bag in order to take it to his bedroom, when it was found that his bag was gone and that a bag of similar appearance had been left in its place. Admittedly the circumstances pointed to the bag having been stolen by professional thieves, but there was no evidence as to how or when it had been taken.

In an action by the traveller's employer against the hotel proprietors for the value of the bag and its contents, *held* that they were not liable in more than the sum of £30, in respect (1) that the *onus* of proving that the loss had occurred through the wilful act, default, or neglect of the innkeeper or his servant, under section 1 (1), of the Innkeepers' Liability Act 1863, was on the pursuer, and that he had failed to discharge the *onus*, the circumstance that the door of the office

was not invariably locked when the office was not occupied or under supervision not being such failure of duty on the part of the hotel proprietors as to render them liable; and (2) that the placing of the bag in the office was not a deposit for safe custody in the sense of section 1 (2) of the Act, seeing that it was not brought to the notice of the hotel proprietors that they were charged with responsibility for the safe custody of the bag.

The Innkeepers' Liability Act 1863 (26 and 27 Vict. cap. 41), sec. 1, enacts—"No innkeeper shall, after the passing of this Act, be liable to make good to any guest of such innkeeper any loss of, or injury to, goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than the sum of thirty pounds, except in the following cases—that is to say—(1) Where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ. (2) Where such goods or property shall have been deposited expressly for safe custody with such innkeeper. Provided always that in the case of such deposit it shall be lawful for such innkeeper, if he thinks fit, to require, as a condition of his liability, that such goods or property shall be deposited in a box or other receptacle, fastened and sealed by the person depositing the same."

In this action G. W. Whitehouse, manufacturing jeweller and diamond mounter, Birmingham, sued R. & W. Pickett, hotelkeepers, Edinburgh, for payment of the sum of £1996, 5s. 6d., being the value of a bag and its contents belonging to him, which formed part of the luggage of one of his commercial travellers, and which was lost while the traveller was a guest in the defenders' hotel. The defenders denied that they were liable, but tendered £30 in full of the conclusions of the summons.

A proof in the action was taken, and the facts proved are set forth in the opinions of the Court. The evidence given by the traveller, John Buckley, as to the disposal of the bag in question on his arrival at the hotel was as follows—"On 17th February last I arrived at the Waverley Station at a quarter to two, and went as usual to the hotel. I was carrying my own luggage—one portmanteau and my bag of valuables. I met the boots at the foot of the stairs—a man called James Sim—and he carried my two bags up. Sim has been in the hotel for six or seven years. He recognised me. He simply carried my bags up, and Mr Reginald Pickett (commonly called Harry) came forward and gave me a number. He was sitting in the inner room at dinner. I stopped in front of the window opening into the bar, and he came forward to the window and said there were two friends of mine sitting in the commercial room at dinner. He came out of the office, walked into the commercial room, and said to these gentlemen—'Here's Mr Buckley.' I then went into what is marked coffee-room on the plan produced—No. 50—and sat down to read the papers. Sim put my portmanteau on the top of the stair while he got my number, and he carried the other bag into the bar and put it at the back of the partition. He went into the bar by the door from the landing, close beside the service window. I saw where he deposited the bag at the time. It was at the back of the partition that is just by the desk in the office. As you look in at the service window, it is in the corner to the left at the side of an ice chest. The spot where he deposited the bag is marked by a cross in red on the plan. I had given him no special instructions as to what he was to do with my luggage, or where he was to deposit it, because he knew I had been staying there so many years that there was no need for me to explain anything. On coming out of the bar and getting my room number he took my portmanteau upstairs, and I found it there afterwards. Mr Pickett gave him no instructions in my hearing as to what he was to do with my luggage. He dealt with my luggage on that occasion in the way in which it was usual for him to do on my visits to the hotel; but, as I say, sometimes I asked if I could go through and place it myself in the inner room. The bag had frequently been deposited in the same place upon previous visits. (Q) What was your custom, in visiting the hotel, as to dealing with looking after your bag?—(A) To put it in their charge till I went to bed, and then I went and fetched it and took it up to my bedroom with me. I always took it up to my bedroom when I went to bed. . . . On the occasion in question nothing was said to any person about the bag at all." The evidence of the defenders and Sim was in agreement with Buckley's on this point.

The pursuer pleaded, *inter alia*—"(1) The said goods being lost to the pursuer while in the custody of the defenders as part of the luggage of the pursuer's said traveller, while he was a guest residing at the defenders' hotel, the defenders are, under the edict *Nautæ, Caupones*, &c., bound to compensate the pursuer for said loss as concluded for. (2) The said goods having been deposited with the defenders for safe custody as libelled, they are bound to indemnify the pursuer for the loss thereof. (3) The said goods having been stolen through the default or neglect of the defenders or their servants, the defenders are liable in reparation to the pursuer as concluded for."

The defenders pleaded, *inter alia*—"(3) The bag referred to not having been deposited with the defenders expressly for safe custody, they are not responsible for its value to the pursuer. (4) The pursuer not having suffered any loss or damage through the fault or negligence of the defenders, or of those for whom they are responsible, the defenders should be assoilzied. (5) The defenders having complied with the provisions of the Act 26 and 27 Vict. cap. 41, are not liable to the pursuers in more than the sum of £30."

On 23rd November 1906 the Lord Ordinary

(SALVESEN) decerned against the defenders for payment of the sum of £1790, 3s. 6d. with interest.

Opinion. — "The facts in this case as they have been disclosed in the proof are comparatively simple, and so far as material admit of brief statement. The pursuer's traveller, John Buckley, who has been in the same employment for sixteen or seventeen years, arrived at the Imperial Hotel belonging to the defenders on 17th February 1906, in the course of one of his regular journeys on the pursuer's business. Outside the hotel he was met by James Sim, the boots or hotel porter, who relieved him of two bags which he was carrying. One of these was a stock or sample bag, in which Mr Buckley was in the habit of carrying the jewels belonging to his employer which he sold to retail dealers. Sim knew Buckley as an old customer. He also knew his occupation and the fact that one of the bags contained valuable articles of jewellery. On reaching the first floor, accordingly, Sim carried this bag straight into the office, and deposited it in a dark corner between an ice chest and the wall. He then obtained from Mr Reginald Pickett (who is for some unexplained reason called 'Harry' throughout the proof) the key of Mr Buckley's bedroom, and carried the other bag, which contained the latter's personal effects, up to the bedroom. Mr Pickett accompanied Mr Buckley into the coffee-room, where there was an acquaintance of his, and left him there.

"It being Saturday afternoon Mr Buckley had no occasion to display any of the contents of his bag. It was his practice, however, when he retired to rest to carry the bag with him up to the bedroom, and accordingly he inquired for it about 11·30 the same evening. He was handed a bag which somewhat resembled his own, but which he at once discovered was not his. Sim had left for the night but was sent for, and at first thought that the bag was Mr Buckley's. The defenders, however, being satisfied that it was not, sent for the police, who on opening discovered that it contained only a wooden frame, a piece of sheet zinc, and some other articles, the contents being so arranged as to give the bag the appearance of being full.

"Suspicion was at once thrown upon three persons who had been guests in the hotel, one of them who gave the name of 'Hall' having occupied a bedroom since the Wednesday previous. These men disappeared the same evening without having paid their bill, and leaving behind them some effects, including a skeleton key and a pair of diamond scales, which left little doubt as to the profession to which they belonged. The police bill which was issued with a view to capturing the three persons in question published a minute description of all the articles which could give a clue to the thieves; but although Mr Buckley's bag contained nearly 1600 articles of small jewellery, principally rings, many of them being marked with the initials of the pursuer, none of the property has been traced, nor have the thieves been captured.

"The only other piece of evidence bearing on the theft is that about 6·30 P.M. one of the suspected individuals handed to Mr R. Pickett the brown leather bag which was left instead of Mr Buckley's, and asked him to take charge of it. Mr Pickett did so, placing it in the same recess as that in which Mr Buckley's bag was placed. How the theft was committed remains unexplained, but as Mr Buckley's bag was not handed to any of the three men in mistake, it must have been removed by one of them without the knowledge or consent of the defenders or their servants.

"The pursuer accordingly now sues the defenders for the sum of £1996, 5s. 6d., as the value of the articles of jewellery contained in the stolen bag. The pleadings disclose alternative grounds of liability; but the case mainly insisted in was that the goods having been put into the defenders' custody for safe keeping, and having been stolen through the negligence of the defenders or their servants, they are liable to compensate the pursuer for his loss. This ground of action may still be insisted in notwithstanding the Act 26 and 27 Vict. cap. 41, which limits the liability of innkeepers. It is admitted, however, that the effect of that Act was to throw the *onus* upon the guest, whose property had disappeared in the innkeeper's custody, to prove that it had so disappeared through the default or negligence of the innkeeper or his servants, failing which proof the liability is limited to the sum of £30. As might be expected, however, there is no direct evidence of negligence; but the pursuer says that it must be inferred from the disappearance of the goods coupled with the facts disclosed in the proof, which he says instruct both a laxity in the system adopted by the defenders in storing their customers' property, and negligence on the part of those in charge.

"I have already described the place where the bag was deposited by Sim, and which is called a bar on the plan, but was also used as an office. There is a service window in this room and a door at the side of it. Opposite this door at the other end is a glass door, which gives admission to a private room used by the defenders as their own sitting-room, and this again has a door marked 'Private' opening into the lobby. There being at that time no strong room in the hotel (although one has since been added) the place where Buckley's bag was put was undoubtedly the safest place in the hotel for the purpose. There is usually some person either in the bar or in the private room, and it is said that when the bar is left vacant the door is generally snibbed, and ought invariably to be so. If that were done no access could be obtained to the bar except through the private room, and so long as there was any person in the private room no unauthorised person could remove any property from the bar without his observing it. I am satisfied, however, that the defenders or their servants did not always adopt the precaution of snibbing the door to the bar. It was not snibbed when Sim took Buckley's

bag and deposited it in the recess, nor was it snibbed in the evening when Mr Buckley went in to take it up to his own bedroom. On both occasions there was no doubt some person in the private room who could more or less watch the bar, but the efficiency of this would depend upon the position that he occupied at the time. From many parts of the private room only a very small portion of the bar could be seen, and judging from the plan, if the bar door were open, a person might easily reach the recess without being observed by those in charge of the adjoining room. Similarly if the private room itself was untenanted there was nothing to prevent anyone going from the lobby through the two doors into the bar, even if there was a person in attendance there, and being unobserved if that person was occupied at the service window with his back towards the recess. The safety of a guest's property in the apartment depended therefore, when all the doors were left unfastened, entirely on the vigilance of those who were inside.

"As Mr Buckley's bag was removed without any person observing it, it follows either that there was nobody in the two rooms at the time or that the person there was not attending to his duties, one of which undoubtedly was the protection of property left in the office. On this point it is not without importance that the defenders exhibited a notice in various parts of the hotel 'that they would not be responsible for any valuables left in bedrooms, but would take charge of same in the office.' That was an invitation to guests in the hotel to leave valuables in the office, and imposed upon the defenders a duty of taking charge of them there. The place selected by Sim, therefore, for the deposit of the pursuer's bag was the recognised place, according to the rules of the hotel, for storing such property, and it is immaterial whether on other occasions Mr Buckley had left his bag under the sideboard in the private room, which was no doubt an equally good place, provided there was somebody in attendance there.

"Mr Watt, for the defenders, pressed upon me that there was no evidence of negligence at all, and that the bag might have been removed consistently with no negligence being attributable to the defenders or their servants. I do not agree. The negligence may have been slight because of the dexterity of the thieves, but I am unable to see how without negligence the theft could have been committed. Perhaps the fact that no theft had ever been committed from the hotel before may have lulled the defenders and their servants into a false confidence. Perhaps the exigencies of business (there were two dinners going on at the hotel that evening) may have temporarily absorbed the whole staff and left the private room and bar untenanted and unlocked. Whatever the reason may have been, I cannot doubt that the thief entered the apartment either by the bar door or the door of the private room, and found no obstacle to his removing the bag. The other bag had no doubt been left in the same place in order to afford the excuse, if the thief were intercepted with the bag in his hand, that he had mistaken Mr Buckley's bag for his own.

"I am therefore prepared to affirm on the evidence that the bag in question was stolen, and that it could not have been stolen but for the negligence of the defenders or their servants. A defence of contributory negligence by Mr Buckley is indicated on record, but it came to nothing. After the theft had been committed Buckley remembered that he had met a man called Hall at other hotels with a bag very similar to the one which had been left, and he jumped to the conclusion that this man had in all probability been shadowing him for some time before. He had, however, at the time no suspicion of Hall, and his appearance was not such as to excite any remark.

"Parties were agreed upon the law applicable to this case, and it is shortly stated at pages 127-8 of 1 Smith's Leading Cases as deduced from *Medawar*, 1891, 2 Q.B. 11.

"On the view which I reach that the pursuer has sufficiently established negligence on the part of the defenders, it is not necessary to consider a separate point based on the alleged failure to exhibit a notice of the provisions of the Act in a conspicuous place. If I had to decide this point my decision would be against the pursuer. I think it is proved that the notice was exhibited on the staircase leading from the entrance hall to the first floor, and at such a height that it could be read by any person who stopped on the stairs for that purpose. The place selected may not have been the best, but I think it was conspicuous enough to satisfy the statute.

"The only other matter with which I have to deal is the value of the property which was stolen." [*His Lordship proceeded to examine the evidence on this point, and came to the conclusion that the value was* £1790, 3s. 6d.]

The defenders reclaimed, and argued—The defenders did not dispute the Lord Ordinary's decision on the question of the value of the bag and its contents and on the question of Buckley's contributory negligence, and they accepted as correct the statements of the facts given in the Lord Ordinary's opinion. But the Lord Ordinary was in error in the inference which he drew from these facts. In order to render the defenders liable it was necessary under the Innkeepers Act 1863 that the pursuer should prove that there was negligence on the part of the defenders or that the bag had been deposited for safe custody. (1) Under section 1 (1) of the Act the *onus* of proving that the goods were lost "through the wilful act, default, or neglect" of the innkeeper was on the pursuer—*Medawar* v. *Grand Hotel Co.*, [1891] 2 Q.B. 11; *O'Connor* v. *Grand International Hotel Co.*, [1898] 2 Ir. Rep. 92; *Moss* v. *Russell*, 1884, 1 Times L.R. 13; *Marchioness of Huntly* v. *Bedford Hotel Company, Limited*, 56 J.P. 53. But in this case there was no proof of negligence on the part of the defenders, and, accordingly, the pur-

suer had not discharged the *onus*. (2) With reference to the case made on section 1 (2) of the Act, it could not be held that goods were deposited expressly for safe custody if the deposit and its purpose were not brought to the personal knowledge of the innkeeper—*O'Connor* v. *Grand International Hotel Co.* and *Moss* v. *Russell*, *supra cit.* Accordingly, the subsection did not apply in this case because Buckley gave no instructions as to the deposit of the bag, and it was proved that the defenders were not aware that the bag had been placed in the office.

Argued for the respondent—(1) On the question of negligence, at common law an innkeeper, unless he limited his responsibility by contract, express or implied, was regarded as insuring the goods of a guest, and in order to make him liable for the loss of goods the only facts that need be proved were that the goods were taken to the inn and that they were lost—Bell's Comm. (7th ed.), vol. i, p. 495, note 4. The only change made on the common law by the Innkeepers Act was that as regards liability beyond £30 what was a *presumptio juris* became a *presumptio facti*; and the innkeeper was enabled to escape liability by proving that he had not been in fault. The *onus probandi*, however, still rested on the innkeeper, and an analogy might be found in the law as to carriers—Bell's Prin. (10th ed.), secs. 164, 167, and 170; and the Lord President's opinion in *Watson* v. *North British Railway Company*, March 18, 1876, 3 R. 637. This result was in accordance with the general rule of law that the *onus* of proving a fact which was specially within the knowledge of one of the parties to a case was on that party—Taylor on Evidence (10th ed.), sec. 376 A; and as a guest could not know what had become of his goods after they were entrusted to the innkeeper it fell on the latter to prove that the loss had not been occasioned by his negligence. Even assuming, as the Lord Ordinary had assumed, that under sec. 1 (1) of the Innkeepers Act the *onus* was placed on the pursuer, that *onus* was discharged by evidence which showed that the defenders had been negligent. If the defenders knew that the bag had been placed in the office they were at fault either in not having a place sufficiently secure for guarding valuables or in not having on this particular occasion seen that the doors of the office were kept locked; and on the other hand, if the defenders did not know that the bag had been placed in the office Sim was negligent in failing to inform them of this, and they were liable in respect of his negligence. (2) The evidence proved that the goods had been deposited for safe custody. The office had been selected by the defenders as the safest place for the custody of valuables, and by the notice exhibited in the hotel they had stated that they would take charge of such goods in the office. Buckley was in the habit of visiting the hotel, and acting on the invitation implied in the notice was accustomed to place the bag in the office. Hence when Sim placed the bag, which as he was aware usually contained valuables, he must have known that Buckley intended to deposit it for safe custody, and these facts were sufficient to satisfy the requirements of sec. 1 (2) of the Act.

LORD M'LAREN—The pursuer in this case, who is a manufacturing jeweller in Birmingham, employed Mr Buckley as a traveller to assist in the sale of his goods, and the claim is made against an innkeeper in Edinburgh, with whom the traveller lodged, in respect of the loss of a bag containing jewellery to the value of about £1900. The traveller had been in the habit of resorting to this hotel on his visits to Edinburgh, and seems to have been known to the proprietors of the hotel, the Messrs Pickett, as well as to some of their servants. This bag (containing samples of jewellery) was of a different description and pattern from the ordinary tourist's bag, and was easily recognised as a receptacle used for trade purposes. On the day in question the traveller on arriving at the hotel was met by the porter, who took the bag out of his hand along with another bag in which he carried his personal effects. At the same time one of the Messrs Pickett, who was in attendance in the bar-room—there was a bar-room and a private sitting room with inter-communication—came forward to book a room for the traveller, telling him at the same time that he would find two of his friends in the coffee-room. While this colloquy was proceeding the porter deposited the bag in the bar-room, not exactly in the spot where the traveller had been in use to put it on former visits, but substantially in the same position and with the same protection from interference by outside persons. The traveller went out in the course of the afternoon and returned again, and after spending some time in the smoking-room he purposed retiring to rest, but before doing so he came to the bar-room and asked for his bag, because he thought it would be safer to have it in his bedroom. The bag was then found to be missing. I think it is common ground that the theft was committed by three professional thieves who had taken up their quarters as visitors at the hotel, apparently with some knowledge about the jeweller's traveller and with the intention of appropriating his bag. The bag may have been taken during the absence of the Messrs Pickett from the bar-room where it was left, although their rule was that the office should never be left unoccupied, or it might be while the proprietor in charge was engaged in conversation by one of the confederates while another slipped round behind his back and walked off with the bag. The Act of Parliament limits the liability of innkeepers to the sum of £30 except under two conditions. One of the exceptions is that negligence is proved, and the other exception is where such goods or property shall have been deposited expressly for safe custody with such innkeeper.

In this state of the facts it is maintained for the pursuer (1) that the placing his bag in the bar-room was equivalent to a deposit of the bag expressly for safe custody, and (2) alternatively that the bag was stolen in consequence of the negligence of the innkeeper. I am not satisfied that either of these grounds of liability is made out.

As to the first ground of action I think that we must ascribe some definite meaning to the word "expressly." Without elaborating the suggested distinction it may suffice to say that the statute contemplates that the innkeeper is to be liable for loss if it is made clear to him when the property is deposited that he is charged with the duty of safe custody—a duty which the innkeeper is not at liberty to decline if he is invited to undertake it. I think the statute also contemplates that there may be a deposit of property which is not for the express purpose of safe keeping or safe custody, and that in such a case, if the property is lost or stolen without fault on the part of the innkeeper, his liability would be limited to the sum of £30. If my second proposition is disputed, and if the liability of the innkeeper is to be just the same whether the purpose of safekeeping is or is not expressed, that is equivalent to saying that the word "expressly" has no definite meaning—is in other words a mere expletive. But I am not prepared to treat the word "expressly" when used in a statute as a redundant expression—first, because this would be contrary to what I think is a sound principle of construction, that in general every word in a statute must receive its ordinary meaning; and secondly, because I think it may very well have been in the view of the Legislature that a guest might be content to leave his property in the charge of the innkeeper trusting that he would take reasonable care of it, without seeking to put the innkeeper under the special responsibility that follows from a deposit for the express purpose of safe custody. In this connection I may point out that under the statute if the innkeeper is charged with safe custody he may request the guest to put his property in a box which the guest is to lock and seal. This might not be convenient to the guest; and if the guest is a commercial traveller who wants his bag three or four times in the course of a day, it may very well be that rather than be at the trouble of having his bag locked and sealed every time he returns from a visit, he would be content to leave it in the office without going through these formalities, believing that his bag was secure against all probable risks in the innkeeper's hands.

On the facts of the case it is plain enough that the bag was put into the bar-room by the hotel porter without anything being said by word or sign as to the purpose for which it was left there; and Mr Reginald Pickett, the partner in attendance, who seems not to have observed the placing of the bag in the bar-room, had no opportunity of requiring that the bag should be put into a box and locked and sealed. I am therefore of opinion that the pursuer did not take the necessary step for bringing himself within the second exception of the statute, because he did not bring to the notice of Mr Pickett that he meant to charge him with responsibility for the safe custody of the bag. The fact that Mr Buckley went to the office for his bag late on Saturday night, in order, as he says, to take it to his bedroom, is, as I think, absolutely inconsistent with his case under this head. He did not need the bag until Monday morning, and if he understood that he had deposited it in terms of the statute, he had no occasion to take it to his bedroom, and I can only explain his doing so on the supposition that Mr Buckley considered the bag was lying in the office at his own risk, barring such negligence as would make the innkeeper liable in compensation. This was also the view of the other party, because neither of the Messrs Pickett knew that the bag was there, and cannot therefore be supposed to have entered into an express contract of safe custody regarding it.

Passing to the first exception of the statute, which I consider in the second place, I, of course, assume in this branch of the case that the bag was not expressly deposited for safe custody, but was simply put into a room which was under the control of the partners. This does not relieve the defenders from the obligation of taking all reasonable care of the property entrusted to them. The question then is, whether reasonable care was taken, or whether the property was stolen through the "default or neglect" of the innkeeper. The Lord Ordinary observes that the effect of the Act of Parliament was "to throw the *onus* upon the guest, whose property had disappeared in the innkeeper's custody, to prove that it had disappeared through the default or negligence of the innkeeper or his servants," failing which proof the liability is limited to the sum of £30.

To this statement of the law I give my unqualified adhesion. But then if this statement is anything more than an unmeaning generality it means this, that you do not fix responsibility on the innkeeper by proving that under the ordinary condition of hotel business the property disappeared.

If the guest, as a condition of recovering damages, undertakes the *onus* of proving negligence, he must be able to say in what the negligence consisted—what is the duty to him which the innkeeper failed to perform. If he can only say, as the Lord Ordinary has said, in his review of the facts, "that the bag in question was stolen, and that it could not have been stolen but for the negligence of the defenders or their servants," this appears to be only another way of saying that the *onus* of proving reasonable care lies on the defenders, and that in the absence of evidence as to the cause of the disappearance of the property negligence is to be presumed. I cannot help thinking that in formulating the ground of judgment which I have just

quoted, the Lord Ordinary had lost sight of the sounder statement of the criterion of responsibility which he developed in the first part of his opinion. It is common ground that the bag was stolen by persons who had obtained admission to the hotel as guests, and I am not prepared to affirm that the fact that property left in the innkeeper's apartments was stolen is conclusive evidence of negligence on the part of the innkeeper.

It was argued to us that there was positive evidence of negligence, because the door of the bar-room was occasionally left unlocked, and only closed by the latch. Now I think the care which an innkeeper is required to take of the property of his guest will depend on the part of the house in which the property is left.

If a bag is left by the guest in the coffee-room, the innkeeper is responsible for the reputed honesty of his servants, but as these servants must occasionally leave the room, it would be hard on the innkeeper to say that he is to be responsible if the bag is stolen while the room is unguarded. In the case of goods left in a bedroom or in a private sitting-room, perhaps some higher degree of care may be exigible, but in no case can the care required by law be greater in degree than is consistent with the management of a hotel in the ordinary course of business. The bar-room, and Messrs Pickett's parlour which opened into it, were probably the safest places in the hotel for leaving valuables (assuming that it was not intended that they should be put into the hotel safe), because it was their practice not to leave these rooms unoccupied. But it is one question to consider what was the usual practice, and quite another question—what did the innkeeper bind himself to do in order to keep his guests' property safe? I cannot accept the suggestion that by merely receiving the pursuer's bag Messrs Pickett undertook as a duty to the pursuer that so long as he remained in the hotel they would never for one instant leave these apartments unguarded. I do not see how the business of a hotel could be carried on under such conditions, and if such a condition had been proposed to them I think the defenders would have replied—"We cannot bind ourselves that one of the family shall always be in these rooms, but if you wish to be absolutely secure we will put your jewellery into the safe and undertake responsibility in terms of the statute."

On this part of the case my opinion is that the defenders, by receiving the bag without express instructions, only undertook to take such care of it as was consistent with the primary purposes to which these rooms were appropriated, viz., for the administrative business of the hotel, and I see no evidence of neglect on their part. They had no reason to suspect dishonesty on the part of the inmates of the hotel, and the fact that a gang of thieves, who were watching their opportunity to steal the bag, succeeded in purloining it when the innkeeper was either engaged at the bar or momentarily out of the room, does not in my judgment amount to evidence of negligent performance of the innkeeper's duty to his guests. I have not commented on the authorities which were cited, but I consider that the judgment I propose is consistent with the judgment of the Appeal Court in *Medawar* v. *Grand Hotel*, 1891, 2 Q.B. 11, because in that case the judgment was for the defendant when the alleged negligence was only inferential and not supported by positive proof.

I am of opinion that the interlocutor under review should be recalled and the defenders found liable in damages to the extent of £30, and *quoad ultra* assoilzied.

LORD PEARSON—The Innkeepers' Liability Act of 1863 altered the common law by restricting their liability for the property of their guests to £30, except in two cases—namely (1) where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ; (2) where such goods or property shall have been deposited expressly for safe custody with such innkeeper.

In these two cases the liability of the innkeeper is still a total liability.

I am not sure that the Lord Ordinary has sufficiently distinguished these two cases, for he says—"the case mainly insisted in was that the goods having been put into the defenders' custody for safe keeping, and having been stolen through the negligence of the defenders or their servants, they are liable to compensate the pursuer for his loss." But clearly they are separate grounds of liability, and must be considered separately.

I take first the second case, under which the question is, whether the jewellery was deposited expressly for safe custody with the innkeeper, because if such express contract is made out the total liability of the defenders must be affirmed whether there was negligence on their part or not. In my opinion the evidence does not establish any such deposit within the meaning of the Act. The parole evidence, taken by itself, is, I think, quite insufficient. Nor do I think the pursuer is more successful in making out a special undertaking to that effect founded on the notice which was exhibited throughout the hotel, bearing that the proprietors would not be responsible for any valuables left in bedrooms, but would "take charge of same in office," and adding a reference to the statute. That may well be construed as an invitation to make such a deposit expressly for safe custody as the Act contemplates, but it does not in my opinion import that the placing of the goods in the office has of itself that effect.

It remains to consider the other case mentioned in the statute, namely, where the goods are stolen, lost, or injured through the wilful act, default, or neglect of the innkeeper or his servant. It was argued for the pursuer that the burden of proof under this head of liability lies upon the innkeeper, and that it rests with him to show that he took all due care to prevent

the loss of the goods. I do not think that this view is sound. The burden of proof may shift in the course of the inquiry, but in the first instance it lies upon the pursuer to establish the "wilful act, default, or neglect" on which he founds. Here the goods were in the office, having been put there by the defender's servant with the cognisance and approval of the guest, and I take it to be established by the evidence that they were stolen from the office by three very expert thieves acting in concert, in one or other of the methods suggested in the argument. The Lord Ordinary holds—and I agree with him, that there is no direct evidence of negligence. But the ground of his judgment is that on the evidence the bag in question could not have been stolen but for the negligence of the defenders or their servants. I cannot assent to that view. On the contrary I think by far the most probable explanation of the theft, upon the evidence as it stands, is that the thieves—who, be it remembered, were at that time accepted and treated by all concerned as honest guests in the hotel—cheated the hotel officials into a false security by some of the tricks of their trade. This being so, I think the proof of negligence fails.

LORD ARDWALL—This case raises questions of some difficulty in the interpretation of the Act 26 and 27 Vict. chap. 41, and its application to the special circumstances which have been established by the proof.

The action has been raised for the purpose of recovering from the defenders, who are hotel-keepers at the Imperial Hotel, Edinburgh, the value of a bag of jewellery belonging to the pursuer which was stolen from the office of the hotel, where it had been deposited by the pursuer's traveller on 17th February 1906. The Lord Ordinary has found that the defenders were guilty of negligence, and has given judgment against them for £1790, 3s. 6d. I am of opinion that the judgment ought to be recalled.

The pursuer's traveller, Mr Buckley, who was well known to the defenders, and had been a frequent guest at their hotel over a period of eighteen years, had been accustomed, and was known by the defenders to be accustomed, to carry with him in addition to his ordinary personal luggage a bag of valuables consisting of samples of jewellery and precious stones for exhibition or sale to the pursuer's customers.

The usual notice as to innkeepers' liability in terms of the Act of 1863 was hung up in the hall of the hotel, but there was another notice exhibited on the wall of the corridor of the first flat of the Imperial Hotel, and it would appear also in some of the bedrooms, to the following effect—"The proprietors of this hotel respectfully beg to intimate that they will not be responsible for any valuables left in bedrooms, but will take charge of same in office. (See extract from Act of Parliment, chap. 41, Vict. 26 and 27, in entrance hall.)"

On the occasion of Mr Buckley's visit in February 1906, when the bag was stolen, his bag of valuables was, at his sight, deposited by the "boots" in a corner of the office, and he got the number of his bedroom, and the "boots" took his other luggage up to that bedroom. But, as hereafter noticed, nothing was said or done to draw the attention of Mr Reginald Pickett, who was in the office, to the fact that the bag was deposited in the office. The evidence shows that there is always some one either in the office or in the bar parlour which adjoins it, there being a glass door between the two apartments which generally stands open. The bar parlour had, however, an entrance from the public passages of the hotel by a door which is generally unlocked. There is also a door into the office from the corridor, close to the "service" window.

On the occasion of the theft the person in the office (Mr Reginald Pickett) most probably had his attention distracted from the bag by one of the thieves while the other slipped in at the door of the bar parlour and took away the bag. Probably the bag was taken away at the time that Reginald Pickett was receiving the thief's bag at the "service" window for safe custody, and it is worthy of notice that he put it down in the very place from which Mr Buckley's bag had been removed a few seconds before. It appears from Mr Reginald Pickett's evidence that this corner in the office and the bar parlour are the safest places in the hotel for putting bags of valuables, and that indeed the defenders had no other place for depositing such a bag as Mr Buckley's, although they might have put the jewels, after being taken out of the bag, in a small safe. In these circumstances two questions arise—(*First*) are the defenders liable in respect of the second sub-section of section 1 of the said Act. An able argument was submitted by the pursuer's counsel founded on the notice above quoted, which was said to be a direction to guests in the hotel not to leave any valuables in their bedrooms, but to take them to the office, where the proprietors say they will "take charge of same." It was argued that there could be only one object in depositing the bag in question in the office, namely, to put it in safe custody, and that this was the method of putting valuables into safe custody prescribed by the proprietors of the hotel themselves, and that therefore they are barred from maintaining that valuables put into the office are not put in there expressly for safe custody, or that they are not responsible for them, as they impliedly undertake to be by the said notice. I consider there is very great force in this argument, but as matter of interpretation of the statute I cannot hold that depositing valuables in an office in pursuance of such notice as I have quoted without saying a word about them to the person in charge of the office or hotel would amount in the words of the Act to "depositing them expressly for safe custody" with the innkeeper.

(*Second*) But assuming that the pursuer cannot bring his case within sub-section 2, the question still remains whether the

defenders are not liable under sub-section 1, which is in the following terms— "Where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper, or any servant in his employ." The question under this section is whether the bag in question was stolen or lost through the default or neglect of the defenders or their servants.

According to the evidence of the defenders themselves, the only place where valuables contained in a bag of some bulk could be so deposited in their hotel was the office and bar parlour. These were the safest places in this hotel for the custody of valuables; and, further, the office was the place where the defenders invited their guests to deposit their valuables, and undertook to "take charge" of them. This being so, I am of opinion that if Mr Buckley had either handed his bag to Mr Pickett to take charge of, or after depositing it in the corner, or rather seeing it deposited there, had said to Mr Pickett, "That is a bag containing valuables, and I must ask you to take charge of it," a special duty would have been laid upon the defenders, and that in the circumstances it would have been their duty not only always to have had some person in the office, but also when there was only one person there who had various duties to discharge at the service window and otherwise, that they should have taken care to have had both the doors locked, so that persons could not slip in and make away with valuables when the single occupant of the two rooms was engaged in other ordinary and necessary duties. But the facts raise a very different case, for I hold it clearly established by the evidence alike of Mr Buckley, Mr Pickett, and the witness James Sim that the bag was deposited in the corner of the office behind an ice-chest without a word being said to Mr Pickett about the matter or his attention drawn to the bag in any way whatever. It seems that when Mr Buckley and Sim entered the office Mr Reginald Pickett was taking his dinner in the back parlour and came forward just as they were entering, looked up a book and gave a number to the "boots," and then went out with Mr Buckley to introduce him to some friend of his in the coffee-room. So little was Mr R. Pickett aware that a bag of any kind, not to say of valuables, had been deposited in the corner of the office, that when later on in the evening he went to deposit the bag, handed in by one of the thieves, in the same corner he did not know that there should have been another bag there. Then it appears from Mr Buckley's own evidence, which is corroborated by the evidence of the Picketts, that on the occasion of Mr Buckley's visits his bag of valuables was never as a rule given in charge to either of the Messrs Pickett or other person in the office, but was put at Mr Buckley's pleasure either in the corner from which it was stolen on the occasion in question, or beside the safe under the sideboard in the bar parlour, and then if Mr Buckley wished to take it out for the purpose of going his round of customers with it, he just went in and took it out as it suited himself, and finally at night when it was no longer matter of convenience for him to have the bag on the first floor, and when he could watch it himself, he walked into either the parlour or the office as the case might be and took the bag up to his bedroom without apparently saying anything about it to anyone. Indeed, it was when he wished to take the bag up to his bedroom on the occasion in question that he discovered that it had disappeared. This being the regular course of conduct on the part of Mr Buckley, it can hardly be suggested that the defenders had any special duty with regard to his bag, nor did he consider it of importance to lay any such duty upon them, which perhaps might have interfered with his having such ready access to the bag as he usually seems to have had. He chose to leave the bag in one or other of the places I have mentioned, content with the amount of security that was afforded by its being out of the view of the public, and in private rooms dedicated to the use of the managers of the hotel, and to which in the ordinary case the public had not access, although apparently privileged customers like Mr Buckley were allowed to come in and out without any locking or unlocking of the doors which led into the passages of the hotel.

In these circumstances I do not think it can be held that the defenders were under any duty to take the special precautions I have above alluded to, and which I think they would have been bound to take if the bag had been in any way, however informally, put under their charge, even though not "expressly for safe custody." They gave the pursuer's bag and apparently those of other persons what might be called house-room in any part that the customers pleased of the office or bar parlour, but they came under no obligation, express or implied, to work these two rooms otherwise than they were accustomed to do in the ordinary service of the hotel, and if customers chose to take advantage of the permission to leave their bags in these rooms and at the same time to have absolute freedom of access to them whenever they pleased, but without giving warning of any kind to the hotelkeepers that they were putting valuable property under their charge, I do not think that they can impute neglect to the hotelkeepers for not taking precautions beyond those which they usually took to exclude the public from their private rooms.

I may add that it appears to me that the principal neglect in the case was on the part of Mr Buckley in not putting his bag in special charge of the hotelkeepers. It was suggested that it was the duty of James Sim, the "boots," to have done this when he took the bag into the office, and that he was negligent in not doing so. I cannot accept this view of the case. The "boots" was merely the hand of Mr Buckley in carrying in and depositing his bag,

and it was for Mr Buckley himself and not the "boots" to tell Mr Pickett that he was giving the bag into his charge.

For these reasons I am unable to hold that negligence within the meaning of the first section of the Act had been proved against the defenders. I accordingly think that the Lord Ordinary's interlocutor ought to be recalled and the defenders assoilzied with expenses.

The Court recalled the Lord Ordinary's interlocutor, and finding "(1) that the pursuer's traveller did not deposit the bag of jewellery mentioned on record with the defenders expressly for safe custody, and (2) that it is not proved that the defenders negligently failed to take proper care of the said bag and contents," gave decree for the £30 tendered on record.

Counsel for the Pursuer (Respondent) —M'Clure, K.C.—Christie. Agents—Gardiner & Macfie, S.S.C.

Counsel for the Defenders (Reclaimers) —Watt, K.C.—Munro. Agents—Cuthbert & Marchbank, S.S.C.

Saturday, November 16.

EXTRA DIVISION.

(Before Lord M'Laren, Lord Pearson, and Lord Ardwall.)

[Lord Salvesen, Ordinary.

NAIRN AND OTHERS *v.* THE UNIVERSITY COURTS OF ST ANDREWS AND EDINBURGH AND OTHERS.

Election Law — Parliamentary Election — University Franchise — Right of Woman Graduate to Vote—Representation of the People (Scotland) Act 1868 (31 *and* 32 *Vict. c.* 48), *secs.* 27 *and* 28—*The Universities Elections Amendment (Scotland) Act* 1881 (44 *and* 45 *Vict. c.* 40), *sec.* 2, (3), (10), *and* (16) — *Universities (Scotland) Act* 1889 (52 *and* 53 *Vict. c.* 55), *sec.* 14, (6).

Women, graduates of a university, are not entitled to vote for a Parliamentary representative of such university, and the registrar of the university is not bound to issue voting papers to them.

The Representation of the People (Scotland) Act 1868 (31 and 32 Vict. c. 48) enacts —Sec. 27—"*Franchise for Universities*— . . . every person whose name is for the time being on the register, made up in terms of the provisions hereinafter set forth, of the general council of such university, shall, if of full age and not subject to any legal incapacity, be entitled to vote in the election of a member to serve in any future Parliament for such university in terms of this Act."

Sec. 28—"Under the conditions as to registration hereinafter mentioned, the following persons shall be members of the general council of the respective universities, viz.—(1) All persons qualified under the 6th and 7th sections of the Act 21 and 22 Vict. c. 83. (2) All persons whom the university to which such general council belongs has after examination conferred the degree of doctor of medicine, or doctor of science, or bachelor of divinity, or bachelor of laws, or bachelor of medicine, or bachelor of science, or any other degree which may hereafter be instituted. . . . . ."

The Universities Elections Amendment (Scotland) Act 1881 (44 and 45 Vict. c. 40), sec. 2, enacts — Sub-sec. 3 — "In case of a poll the registrar of the university, as soon as he conveniently can after the day of demand for a poll, and not later than six clear days thereafter (exclusive of Sundays), shall issue simultaneously through the post a voting paper . . . to each voter to his address as entered on the register of the general council of the university, who shall appear from said address to be resident in the United Kingdom or Channel Islands. . . . . ." Sub-sec. 10—"It shall be lawful for any candidate, or the agents of the candidates who may be in attendance, to inspect any voting paper before the same shall be counted, and to object to it on one or more of the following grounds:— . . . (2) That the person giving a vote by the voting paper is not qualified to vote, . . . and the vice-chancellor or one of his pro-vice-chancellors shall have power to reject, or receive and record as objected to, any voting-papers, . . ." Sub-sec. 16— . . . "Provided always that no person subject to any legal incapacity shall be entitled to vote at any parliamentary election or exercise any other privilege as a member of the general council of any university."

The Universities (Scotland) Act 1889 (52 and 53 Vict. c. 55), sec. 14, enacts—"The Commissioners shall have power, . . . after making due inquiry, to make ordinances for all or any of the following purposes as shall to them seem expedient:— . . . (6) To enable each university to admit women to graduation in one or more faculties and to provide for their instruction."

Ordinance No. 18, dated February 22nd 1892, provides—"1. It shall be in the power of the university court of each university to admit women to graduation in such faculty or faculties as the said court may think fit."

Margaret Nairn and others, graduates of the University of Edinburgh, brought an action against the University Courts of St Andrews and Edinburgh, and the officials thereof, in which they sought declarator that—"(1) Prior to 31st December 1905, and at the date of the demand for a poll at the election of a Member of Parliament for the Universities of St Andrews and Edinburgh, the pursuers were and have since been and now are on the register of the General Council of the University of Edinburgh; (2) While and so long as the pursuers are on the said register they are entitled at the present and on the occasion of any and every future Parliamentary election for the said universities (*a*) to receive voting papers from the registrar, (*b*) to vote by duly marking the