money on Power's credit, it would appear to me to be a violation of principle and good faith to infer an obligation to pay this £250 from their acting as agents, after the notification made by them. They gave distinct intimation before acting, that their advance would be made with a view to reimbursement only; and having acted on a condition clearly expressed, it is said that the owner may avail himself of the acting, and shake himself free of the condition. His master gets £250 on the faith of an assignment to freight, and on that footing only. It seems to me that an attempt to fix personal liability from acts distinctly done on a different footing is inequitable.

The advances were made under circumstances under which the owner would be liable in repayment, because necessary advances for his ship. The master would be entitled to contract on the footing of the personal obligation of his owners, or he might pledge the ship and freight. But for the supposed specialty as to agency, no question as to this could well be raised.

I have entertained some difficulty as to the form of the action, whether it is not framed on the footing of personal liability for the debt, which was contracted not on the faith of the personal credit of the owner, but on the faith of a payment out of freight to be received at Greenock; but as the owner, Mr Porret, has received that freight, the objection in point of form is too unimportant to defeat a claim otherwise, as I consider, well founded.

Matters might have been complicated, but I do not see how the money could have been got without pledging the credit of the owners or pledging the ship or freight.

When the master, who had no private purpose to serve, agreed to give the obligation, so far as I can see he must be held to have acted fairly and reasonably. I cannot infer against him that he could have got the money on less onerous terms. I see no *compulsitor* at his command and no motive to hold out, sufficient to induce any one to advance the money on the credit of Mr Power; that Mr Power's agents declined to do so seems to exclude the probability of any one else doing so.

It is to be regretted that we should be compelled to decide this case without light being thrown on it by the evidence of the parties concerned in the transaction, and it would have been much more satisfactory had we had the benefit of such evidence; but we must, in the absence of such proof, decide upon the facts before us.

The result will substantially be that the obligation shall be given effect to, and decree given in favour of Benn & Co.

Lord Cowan dissented. He concurred in the result arrived at by the Sheriffs, and the reasons given by them.

Lord Benholme concurred with the Lord Justice-Clerk. It could not be denied that the advances were made for the benefit of the owner. The stipulation in the charter-party was not personally binding on the charterer's agents. There were two contracts with separate obligations. One was the charter party to which the owner and charterer were parties, and the agents were not parties; the other was the contract of agency betwixt the charterer and his agents, to which the shipowner was no party. It was impossible to hold that Benn and Co. were bound by a contract to which they were not parties. It was said they had accepted the agency of Power, but how could that circumstance make them liable in his obligations under another contract? The contract of agency which they made with him distinctly stipulated that they should not be required to make advances except on receiving security for their repayment. They had no funds belonging to Power in their possession, and it was no part of an agent's duty to make advances for his principal. They were entitled to make the stipulation with Power which they did make. It was said they were bound to refuse the agency altogether if they did not intend to fulfil all the conditions of the charter party. There was no reason for saying so. They were not bound to the owner at all, and had no duty to discharge to him. His Lordship concluded by saying that the present case was clearly distinguishable from the case of the *North Western Bank* v. *Bjornstrom*, 5 Macph. 24, which was founded on by the defenders, because in that case the agents had in their possession funds belonging to their principal, which it was held they were bound to apply in fulfilment of his obligations under the charter party.

Lord Neaves concurred with the majority.

The interlocutors advocated were accordingly recalled, and decree pronounced in favour of the advocators against both defenders in terms of the conclusions of the summons, with expenses.

Agents for Advocators and Pursuers—M'Ewen and Carment, W.S.

Agent for Respondents and Defenders—W. B. Glen, S.S.C.

Wednesday, March 4.

FIRST DIVISION.

CHALMERS *v.* CHALMERS.

Husband and Wife—Desertion—Reasonable Cause—Conjugal Rights Act, 1861—*Offer by Husband to take back his Wife—Order for Protection.*—A wife applied for an order for protection under the Conjugal Rights Act. *Held*, on the proof (Lord Curriehill *diss.*), that the husband had deserted his wife without reasonable cause, and that an offer made by him to take her back was not a *bona fide* offer, and order granted. Observations as to meaning of *reasonable cause* in the sense of the Act. *Opinion, per* Lord President, that, as a general rule, desertion was only excusable on grounds which would found an action of divorce or form a defence to an action of adherence, these grounds being adultery and *sævitia*. *Opinion, per* Lord Curriehill, that, assuming judicial separation to be attainable only on these two grounds, it was not necessary to establish so much in order to prove reasonable cause for desertion in the sense of the Act.

This was a petition presented by a wife, under section 1 of the Conjugal Rights Act 1861. The petitioner alleged that she had been deserted by her husband in 1857, and she now craved an order of Court to protect property which she acquired, or may acquire, or succeed to, after the desertion, against the husband or any one claiming right through him. The husband denied the desertion. He admitted that he and his wife had lived separately for some years, but alleged that that was in consequence of his wife's improper conduct, and he now offered to take her back. A proof was taken, from which it appeared that previous to 1857 the

petitioner had led a somewhat intemperate and dissolute life, and that the husband had left her, and had gone to reside with his daughter by a former marriage. From that time he had never contributed to her support. The wife, in the meantime, supported herself by her own industry, and gave up her former dissolute mode of life. She lately met with a railway accident, for which she claimed compensation, but the railway company declined to pay except on a proper receipt by her husband. This petition was then presented, and then followed the offer on the part of the husband to take back his wife. The Lord Ordinary (Mure) granted the order craved.

The respondent reclaimed.

MACLEAN (FRASER with him), for reclaimer, contended that this was not a case of desertion without reasonable cause, as required by the Statute, inasmuch as he was justified in leaving his wife, looking to the intemperate and dissolute conduct of which she had been guilty; and he contended further that, having now made a *bona fide* offer to take her back, the order for protection could not be granted.

ADAM in reply.

LORD PRESIDENT—From the commencement of the discussion I had a strong impression that the interlocutor of the Lord Ordinary was well founded, and that impression has been confirmed on further consideration of the case. I think the grounds of his Lordship's judgment are clearly and ably stated in the note to his interlocutor, and I should have hardly thought it worth while doing more than expressing my concurrence, but for the argument we have heard on the leading clause of the Act of Parliament. That unquestionably, though not attended with much difficulty, deals with a matter of considerable delicacy in the law of husband and wife, and I shall express as shortly as I can my reasons for not adopting the view of the clause which was presented to us by the reclaimer.

The clause provides that a wife deserted by her husband may at any time after such desertion apply by petition to the Lord Ordinary for an order for protection; and the procedure is then described. Now the term *desertion* is perfectly well known, and its meaning is well fixed in the law of Scotland. It is quite true that nothing but wilful desertion, persisted in notwithstanding remonstrance, is sufficient to found an action for divorce; but desertion, apart from the quality of being wilful, is nothing but this, that a husband leaves his wife without providing for her maintenance, and without any reasonable cause for his absence; and that is the meaning of the word in this Act. A wife in these circumstances is entitled to the remedy here sought. The clause goes on to say that the Lord Ordinary, after intimation of the petition, shall require evidence of such desertion, and, if satisfied thereof, shall pronounce an interlocutor granting protection. Again, if the husband does appear, the Lord Ordinary may, after considering the answer to the petition, and hearing parties, allow a proof, "and if satisfied, after proof, of the fact of such desertion, and that the same was without reasonable cause, he shall pronounce an interlocutor giving to the wife protection as aforesaid." It is the introduction of these words in the last part of the clause, *reasonable cause*, that gives rise to the argument of the respondent. It seemed to be contended that if the husband could show that his desertion was in any sense excusable, the wife was not entitled to the remedy of the Statute. I cannot adopt that view of the Statute. As I said, desertion, apart from the quality of wilfulness, is leaving a wife without providing for her maintenance, and without reasonable cause of absence. What such reasonable cause may be, it would not be in all circumstances easy to define. The necessities of trade or business may carry a man away from home so suddenly that he may have to leave at an hour's or a moment's notice, without time to provide for his wife before starting, but that would not be desertion without reasonable cause. But when you come to consider reasonable cause from the conduct of the wife, that is a more delicate matter. I am not clear that it can be affirmed that any conduct on the part of a wife will justify desertion by the husband that would not ground an action of separation, or form a defence to an action of adherence. It is difficult to one's mind to the idea that desertion can reconcile be excused on any other ground, for our law has provided that a man may not separate himself from his wife except for adultery or *sævitia*. His duty is to remain and make the best of it, and endeavour to reform her as far as possible. It is not necessary to pronounce that no case could arise under this Statute where the circumstances might not afford reasonable ground for a husband remaining away from his wife short of what I have mentioned. I shall only say that it is difficult to reconcile with legal principle any other construction than that which I have indicated. And my reason for not laying down any doctrine absolutely is, that the circumstances do not require it. Taking the milder and less strict construction of these words, there is nothing here in the conduct of the wife to justify what was done by the husband. It is said that she was loose in her conduct and in her conversation with other men, and that her habits were intemperate. I am afraid that in that rank of life these are not uncommon faults. In conducting proof on such a matter, these faults will be exaggerated by the witnesses on the one side, and reduced to a minimum by the witnesses on the other, and it is only by striking an average that one can reach the truth. Proceeding on that plan, I find nothing to justify the husband. In March 1857 he left his wife in the house which had been inhabited by them in Greenock, and went to live with his daughter by a former marriage, in another house, leaving his son, a youth of sixteen, in the house with his wife. From that time down to the present time he has not provided one shilling for her maintenance. Again, if her conduct was loose and intemperate, it is certain that in recent years it has become different. For shortly after his desertion, her character seems to have undergone a salutary change, which has continued down to the present time. That was known to the husband. He was aware that she was earning a livelihood by honest industry, and yet during ten years he never proposed that she should return to his house, or gave anything for her support. That is desertion in the fullest sense of the term.

It is said that he offers now to resume the society of his wife, and if that offer is 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. But we must be satisfied that the offer is made in good faith, and I am satisfied that it is not made in good faith, but for the purpose of securing to himself the money which she is to get from the railway company as compensation for the injuries which she has received. That being so, I am clear, on all the

grounds stated by the Lord Ordinary and on this additional ground, that we ought to grant the protection craved, and adhere to the interlocutor of the Lord Ordinary.

Lord Curriehill—This a case of considerable importance, and it is necessary to be careful of the principles which we lay down. It is important to observe the effect of this Act in the cases to which it applies on the rights of the husband and wife. The object and effect of the Act is to deprive the husband of his legal right of *jus mariti*, and to make his property in the goods in communion cease, in so far as acquired through the wife by industry or succession on her part. The effect so produced is permanent, even in cases where the cohabitation of the parties is eventually resumed. The extinction of the *jus mariti* continues, and the wife, even after the separation is at an end, retains all the property so acquired, free from the *jus mariti*. That is provided in the third section of the Act, so that the importance of the Act lies in this, that it is a permanent extinction of the husband's *jus mariti*. The question here is, whether this desertion has been shown to be without reasonable cause? What is reasonable cause? It was maintained by the petitioner that it means such cause as would entitle the husband to a judicial separation, or would be a defence against an action of adherence, and it was maintained that there are only two such causes, *sævitia* and adultery. I think that was stated a little too absolutely, for under the head of *sævitia* may be included what does not go the length of causing danger of life. Such conduct as effectually destroys the peace of one of the parties would be sufficient, but assuming that a judicial separation could not have been obtained otherwise than on these grounds, is it necessary that the same facts shall be established in order to make out reasonable cause in the sense of this Act? Your Lordship hesitates to affirm that proposition. I go farther, for I think it is not necessary. If that had been the meaning of the Act, it would have used the words *legal* cause, instead of which it says *reasonable* cause. And I am the more confirmed in this opinion because judicial separation does not destroy the husband's *jus mariti*. If he had obtained a decree of separation when he left his wife in 1857, his right would have remained. The whole proceedings in the two cases are so different in nature and effect, that there is no propriety in reasoning from the one to the other.

The question then comes to be one of fact—Were the circumstances such as to make it reasonable for the husband to leave his wife? I think they were, and that it was unreasonable that the husband should be bound to cohabit with his wife, for it is proved by a number of witnesses that she was a habitual drunkard, carrying her drunkenness the length of unseemly exposure. I do not say that that by itself would be enough, but we have here conduct on the wife's part in reference to a man of the name of Green, whom she kept in her house as a lodger, of a lewd and unprincipled character, and such as no man of right feeling could be expected to endure. I have seldom read a case of greater scandal than is disclosed with regard to the scenes between Green and his landlady. Farther, we have this woman exposing her husband from time to time to be fined for breach of the excise laws. That was the state of matters for a considerable time. The husband removed from the house. In my opinion that was reasonable on his part, and I think it is unreasonable to inflict on him the permanent loss of his *jus mariti* because he did not continue to live with such a wife. I do not go on the offer which he now makes to take her back. He avows properly enough that he is induced to make that offer because money has been found payable to her as compensation for a railway accident. That is his at this moment, and the object of the petition is to deprive him of his right to it. He says—I insist on my right to it, and I am willing to apply it to your support in future as well as to my own. It is right that he should do so, for it appears that the wife has given up her former habits, and has reformed in character, and the parties may in future live together, and be supported on the funds which the husband has acquired, without his being subjected to the loss of these funds or other funds acquired through the wife.

Lord Deas—I am of the opinion of your Lordship in the chair. The result at which we are to arrive depends on two questions, (1) whether there has been here desertion without reasonable cause, taking the words in the sense of the Statute; and (2) if there has been such desertion, whether there is here such a *bona fide* proposal to take back the wife, that it would be safe for us to act on it? As to the first question, we had occasion, in the case of *Turnbull* to point out what sort of desertion was contemplated by the Statute, but we had not the same occasion for pointing out what was reasonable cause. I don't think it necessary to deal closely with that question in this case either. One great element in desertion is that it is without supporting or attempting to support the wife. We have that element here, for during the last ten years this husband has given no aid whatever to his wife. We have the other element also, that he has wilfully lived apart from his wife. We have these two elements at least, whether he had reasonable cause or no. I doubt if he had reasonable cause at the outset. It is true that his wife appears to have been given to drinking, and to have been guilty of some light conduct with other men. But I think it is as clear that the husband himself was given to drinking. We don't know whether it may not have been the drunken habits of the husband, accompanied as they almost always are in that rank of life, with brutal violence, that made the wife take to drinking. I think it is difficult to say that he was entitled to leave her even at the outset. But it is not necessary to solve that question. I agree in thinking that the desertion was continuous, and that even if there had been some reasonable cause at the outset, yet for many years past there has been no such reasonable cause. Looking to the nature of his own conduct it will not do to say, now that the wife has given up her bad habits, that her being formerly addicted to them affords a good reason for deserting her so long. For nearly ten years her conduct has been unexceptionable. It is certain that for a number of years it is impossible to say that there has not been desertion on his part without reasonable cause.

The only remaining question is, whether there is such a *bona fide* offer to take her back, as we can trust to. I think there is not, otherwise, in every case a husband would only have to say, "I am willing to take back my wife." It is clear that so long as the wife had no prospect of money, he did not offer to take her back. But for the money in prospect, and which is not yet legally due to her, he would not have offered to take her back. It is said that

this money falls under the husband's *jus mariti*. It is just because the wife's whole means would so fall that the law interposes, and I cannot conceive a stronger case for it than this. When the wife has supported herself for ten years, and her power of doing so is interfered with by an accident, and she reasonably expects compensation, no more just case can be imagined for protecting her from her husband. Is this a *bona fide* offer? We can only look to probabilities. Supposing he got the money and consumed it in drinking, is it probable that he would treat his wife well after the money was done? If this is to be held a *bona fide* it will be very easy for a man in all such cases to say, I am willing to receive back my wife, and to object to protection being granted. On the whole matter I think the desertion was without reasonable cause, and that there is no *bona fide* offer upon which it would be safe for us to proceed.

Lord Ardmillan—This petitioner was quitted by her husband in 1857. She was certainly left by him to maintain herself without aid from him, and without being looked after by him, or asked to come back, for ten years, and, so far as I can see, she would not have been looked after if she had not had the misfortune of being nearly killed by an accident. She was sent to the Infirmary at Glasgow, where she remained for nearly two months, and her husband never went near her. The Railway Company proposed to give her compensation for her injuries, and now the husband comes to claim the money. I have seldom seen a case in which I have been better pleased to find that law enables us to repel the claim. I don't say that there may not be cases in which something short of what is necessary for a separation might justify desertion. I don't know such a case, but I agree that we are not called on here to say that there may not be such a case. But undoubtedly the general rule of law is, that the vows of marriage can be dissolved only by adultery or *sævitia*. The contract of marriage is the most solemn contract into which parties can enter, and nothing would be more dangerous than to allow a severance of the marriage tie without some very strong reason. That is my opinion on the general law, and I find nothing in the present case to justify this desertion by the husband. Among the duties of married life are the duties of patience and mutual forbearance, and the husband must guide the conduct of his wife, and endeavour by the exercise of self restraint, to prevent her from going wrong. This man was not free himself from the imputation of drunkenness. It is proved that the wife, whenever she got free from the husband, behaved herself extremely well. The influence of juxtaposition must not be kept out of view, and if this woman behaved badly when with her husband, and well when she was away from him, it may fairly be presumed that he was to some extent the cause of her going wrong. There is no doubt that but for the offer made to take back his wife, the case would be clear. But the offer must be a *bona fide* one. It will not do to impose on the Court by anything else. It is not enough that he proposes to take her back. He must propose, so far as possible, to renew the vows of marriage. I cannot take this as a *bona fide* offer in any true sense. He makes an offer no doubt, but he accompanies it with vilification of his wife's character from first to last. I will take her back, he says, but she was so dissipated that I could not live with her. The Court are not bound to listen to an offer of that kind, which cannot be called a *bona fide* offer in any proper sense of the term. In the case of *Reid* (10th July 1823) a somewhat similar question was raised, and more recently we have the case of *Cattanach* (9 March 1864). In that case, which was an action for breach of promise, the defender wrote offering to marry the pursuer of the action in fulfilment of his promise, but stating that he felt no love towards her, and evidently making the the offer with the view of avoiding the consequence of breaking his engagement. But the Court, without any difficulty, held that that was not a *bona fide* offer. The Court are bound to look through any flimsy pretence of that sort. I am clearly of opinion that this petitioner is entitled to the remedy which she here seeks to obtain.

Agent for Petitioner—J. N. Forman, W.S.
Agent for Respondent—W. B. Glen, S.S.C.

Wednesday, March 4.

MARQUIS OF HUNTLY, PETITIONER.

Entail—Permanent Improvements—11 & 12 *Vict., c.* 36, *sec.* 26—*Building Lease—Renunciation—Game Lease.* An heir of entail in possession of an entailed estate gave a ninety-nine years' building lease of a portion of the estate. The lessees erected a dwelling-house and offices, which they were in use to let to game tenants on the estate, the house being conveniently situated for the shootings, and there being no other accommodation suitable for the game tenant. In a petition by the succeeding heir in possession to uplift and apply consigned money, there being still 88 years of the lease unexpired, and it being admitted that the buildings were of great advantage to the estate, and that the shootings let at a much higher rent with the buildings than without; *held*, (1) on the authority of *Shaw Stewart* (9th June 1863), that the application of the consigned money as an application of money towards repayment of the cost of erecting the buildings in question, was inadmissible, the improvement not having been executed by the heir who made the application; but (2) that the consigned money might competently be applied in procuring a renunciation of the lease. Observations on meaning of *permanent* improvement under the act.

The late Marquis of Huntly gave to the North of Scotland Banking Company a ninety-nine years' building lease of a small portion of his estate at Aboyne, the bank undertaking to build a dwelling-house and offices of value of at least £500. The bank erected a dwelling-house and offices of the value of about £1700, and let these buildings to the tenant of the Birse Forest shootings,—the buildings being erected, in point of fact, for the purpose of affording accommodation to the tenant of these shootings. The present Marquis now asked for authority to apply certain consigned money in repayment of the cost of erecting these buildings, or in procuring a renunciation of the lease.

The Lord Ordinary (Mure) disallowed the sum, adding this note to his interlocutor:—

"Upon the supposition that the proposed application of the consigned fund in repayment of the £1768 borrowed by the late Marquis of Huntly from the North of Scotland Banking Company