to his loss, injury, and damage?" The case was set down for trial, but was compromised on the day of trial. This issue settles that the party being appointed *ad vitam aut culpam*, it was enough if he could establish that he was wrongously dismissed. The notice of malice being necessary is new to me. No law, I think, would hold malice to be necessary to give redress against such a breach of contract. There is no trace of malice in the issue in *Sime's* case, or in the other cases. It is whether the session wrongfully dismissed him from his said office, or wrongfully prevented him from discharging his duties. If he is prevented from discharging his duties, that is a substantive claim according to this issue. And so in the matter of damages, which were claimed, not against the whole kirk-session, who were quite rightly called in the reduction, but only against those who did the wrong. There is no doubt as to the law applicable here. I think there is no flaw but in procedure, and that of the narrowest possible description. If it were not for your Lordships' opinions, I should not have held that there was any flaw at all. For although in *Sime, ob majorem cautelam*, all the parties were called in the reduction, it does not follow that an action of damages may not lie against those who did the wrong, without calling the whole kirk-session. It may be the most expedient form of process to embody both claims. The proper action would have been to reduce or declare void that resolution, and to claim to be allowed to exercise his office in public, and to claim damages against those doing the wrong for breach of contract. I am not prepared to dissent from the judgment to be pronounced, but I come to take that view entirely on the ground of the form of procedure, and accordingly I thought it necessary to state my view of the general law.

Lord Ardmillan—In many of the observations made by Lord Deas I entirely concur, and I rest my opinion on the ground that the pursuer has not taken his appropriate remedy. This action is directed against the minister and kirk-session. It is settled law that a session-clerk is an officer of the kirk-session appointed by them, and that his office is not *ad vitam aut culpam* unless it is so stipulated. But the pursuer alleges that he was appointed *ad vitam aut culpam*, and it is probable that he was so appointed. If he had brought an action here alleging that he was dismissed from an office which he held *ad vitam aut culpam*, and concluded for reduction of the sentence of dismissal, that would have been an appropriate form of action, and he might have made a claim in that action for damages during the time he was unlawfully kept out of office. Or he might have brought an action of declarator, with declaratory conclusions to the effect that the defenders had irregularly, or at least without proof of *culpa*, dismissed, and that it should be declared that he was still session-clerk. Or he might have brought a action on the alternative ground that he never was dismissed, and that the defenders had filled a vacancy which they had not created, and he might have applied for an interdict on the footing that he was still session-clerk. To such conclusions he might have added a conclusion for damages in respect of loss of office during the time that another man had been put into his place. These remedies were open to him, and I say nothing against his right to obtain them. But my difficulty is, that he comes into Court in this action saying—either I have been dismissed by a judgment which I don't seek to reduce, or I have not been dismissed, but I claim damages. The pursuer, who does not know whether he is in office or out of it, claims damages against these two gentlemen. I think this action cannot be maintained as his only, or as his appropriate remedy. I think that, for the sake of preserving regularity of procedure, the action ought to be dismissed, leaving the pursuer to seek the appropriate remedy which the law provides.

Agents for Pursuer—Ferguson & Junner, W.S.
Agent for Defenders—Wm. Mitchell, S.S.C.

Tuesday, March 3.

SECOND DIVISION.

BENN & CO. *v.* PORRET & SEALY.

Ship—Charter-Party—Charterer's Agent—Advances for Necessaries—Power of Master. A charterer of a ship having bound himself that his agents abroad would advance a sum to pay the ship's disbursements to account of freight, and the agents, who had no funds belonging to the charterer, having declined to make advances except on receiving an obligation from the master that they would be repaid out of the freight earned, which obligation the master granted, *held*, that the agents were entitled to take the obligation and the master was entitled to grant it; that the agents were not bound by the conditions of the charter-party to which they were not parties, and that they were entitled to recover their advances from the owner, who had received payment of the freight.

Process—Advocation—Competency. Decree of absolvitor with expenses was pronounced by a Sheriff, and an advocation presented by the pursuers of the action, which they failed to proceed with, in consequence of which the defenders obtained decree of protestation, and the pursuers thereafter paid the inferior court expenses found due. They then presented a second advocation. *Held* that it was competent, as it could not be inferred from what had taken place that the pursuers acquiesced in the judgment on the merits.

This was an advocation from Renfrewshire. The pursuers were Benn & Co., merchants in Bahia, and the defenders were owner and master respectively of a ship named the Cereal. The action was raised for payment of £258, 0s. 3d., being cash advanced by the pursuers to or on the order of the master for necessaries to the vessel when she lay at Bahia in 1865. The defence was that the pursuers were not entitled to recover, because, by the terms of the charter-party under which the ship had been chartered, they were bound, as charterers' agents, to make the advances which they made, as a payment to account of freight.

It appeared that in March 1865, the Cereal, which was then in Liverpool, and about to proceed to Bahia with a cargo for her owner's benefit, was chartered by a Mr Power, of Liverpool, for the homeward voyage, with a cargo of sugar. Freight was to be paid by the charterer at the rate of 40s. per ton, and the charterer had the option of shipping any other produce than sugar, he paying the ship a lump sum of £920; but the master was to sign bills of lading at any rate of freight the char-

terer or his agents might require, but without prejudice to the charter-party. There was the following provision as to the mode of payment of the freight:—"The freight to be paid as follows:—What cash the master may require for the ordinary disbursements of the vessel, not exceeding £250, to be advanced by the charterers' agents at the port of loading, at the current rate of exchange, subject to insurance only, and the balance on final and true delivery of the cargo at final port of discharge by good and approved bills payable in London, or in cash, equal to three months from date of delivery."

The charterer wrote to the pursuers on 7th April 1865, with a copy of the charter-party, and of three others, and on 12th May 1865 the pursuers replied to Mr Power:—"We observe that all these ships are entitled to get money here for their disbursements free of interest or commission, but of course it is understood that the captains will give the usual bonds for such amounts, subject to insurance, and on those terms we are willing to advance the money." Mr Power thereupon sent out to the pursuers a form of receipt usually taken for money advanced to ship captains on account of disbursements which he said would effectually protect them, and be a sufficient guarantee for the repayment of their advances.

The Cereal arrived at Bahia in June, and the captain having reported his arrival to the pursuers, they immediately wrote to him a letter in which they said—"We duly received your written notice of 27th inst. declaring that your lay days would count from this time, and hereby acknowledge the same on behalf of Mr Alfred M. Power, of Liverpool. We have not yet been able to meet with any cargo, but will do our best to procure it; and as regards the disbursements of your vessel, we are willing to provide you with cash for the same against your bond on the ship before you leave this port." Thereafter the advances sued for were made to the captain, who granted the following acknowledgment therefor, which was made out precisely in the form sent to the pursuers by Mr Power:—

"Bahia, 5th August 1865.

"I, undersigned, master of the British barque Cereal, acknowledge that I have received from Messrs Benn & Co. of this place, the amount of two hundred and fifty-eight pounds and threepence, necessary for port charges and disbursements of said vessel on present voyage to the channel and port for orders, which I engage myself to reimburse on arrival at port of discharge out of the freight earned, to order of Messrs Benn & Co.

"In witness whereof, I signed the present bond in triplicate, valid for one.

"Henry Charles Seally."

On 3d August 1865, the captain at the request of the pursuers, acting as agents for the charterer, granted bills of lading for a cargo of sugar, "shipped by Hoffman, Laporte, & Co., of Bahia, which he bound himself to deliver on being paid freight at the rate of 25s. per ton, being 15s. per ton less than the freight stipulated in the charter-party. The ship arrived at Greenock in October 1865, and received freight from the consignees of the cargo to the amount of £491, 0s. 6d.; but the defenders refused to pay the pursuers' advances on the ground already mentioned.

The Sheriff-substitute (Tennent) assoilzied the defenders, except in regard to a sum of £26, 12s. 7d. for commission and insurance which was admitted; and the Sheriff (Fraser) adhered. The following is Sheriff Fraser's note:—

"The contract between the owner and the charterer of the vessal was in this case very special in regard to the mode in which funds were to be provided for the captain at the foreign port. The charterer's agents were to supply the requisite monies. It is admitted, and is proved by the documents in process, that the pursuers did act as the charterer's agents, and it is also admitted that they advanced to the captain the sum now sued for. It is also admitted that the sum advanced was for necessaries.

"The pursuers did not make the advances to the captain in payment of freight, while the charter-party distinctly stipulated that a sum not exceeding £250 was to be advanced, that is, paid as on account of freight at the port of loading by the charterer's agent. The case of *Hicks* v. *Shield* in May 1857, in the Court of Queens Bench in England, 26 L.J.Q.B. p. 205, is an authority to the effect that the word "*advanced*" in such a document does not mean *lent*, but means a payment to account. Instead of making this payment to account, the pursuers take from the captain the acknowledgment founded upon, whereby the captain undertakes to reimburse the pursuers on arrival at the port of discharge out of the freight earned.

"The rule is quite settled that a master can pledge the credit of his owners for necessaries required by him at a foreign port. Nay, that he can even do so in a home port, if the emergency be sudden, and there be difficulty of communication with his owner. It is upon this general rule that this action is founded. The Sheriff is of opinion that the specialities in the present case take it out of the general rule.

"The pursuers made it very clear to the charterer by their letter of 12th May 1865, addressed to him, that they would not advance money to the captain except upon his bond for repayment; but the misfortune is that they did not intimate this to the owner of the vessel. They no doubt, by their letter of 30th June 1865, told the captain that they would not make the advance except on this footing; and the argument for the pursuers is, that this intimation to the captain was intimation to the owner.

"The Sheriff is unable to come to this conclusion. The owner in this case was resident in England. He had entered into a contract with the charterer, containing a very distinct provision in regard to advances at the foreign port, the very object of which was to prevent the captain borrowing money there, and pledging the security of the ship, or the credit of his owner, for the loan. By this contract, very substantial advantages were conferred upon the charterer's agents. The ship is consigned to them, and the consignment commission is to be paid to them of £2, 10s. per cent. upon the amount of the charter freight. Farther, the sum advanced is to be subject to insurance at the expense of the owner, and the pursuers have charged, and obtained decree, for both the commission and the insurance. If it were a loan upon the personal credit of the owner, how could it be insurable. It has been decided that this is not an insurable interest. (See *Mansfield* v. *Maitland*, 4 B. and A. p. 582, and Lord Campbell's judgment in the above case of *Hicks*.)

"Now then, were the pursuers, who were the charterer's agents, and the persons who were named by their constituent, the charterer, as the individuals to make the advances, entitled, in the circum-

stances of this case, in the absence of all intimation to the owner, to act as the agents, and to take all the advantages secured to them under the contract, while they deliberately ignored that provision made by the absent owner, against the master pledging his credit? The Sheriff humbly thinks they were not. If they had money in their hands belonging to the charterer, they could not lend money on bottomry, or otherwise, to the captain. They were bound to satisfy the debt; and if they did so, there would be no necessity for the bond. (See the "Hebe," 2 W. Rob., p. 146.) But they are as much met by the plea of *bar*, in the special circumstances of this case. In one case, where a bottomry bond had been given to an agent of the owner, and it was objected that the agent was bound to supply the necessary funds for the disbursement of the ship without bottomry security, Lord Stowell said, "The case of necessity, which is the foundation of a bottomry bond, does not arise where there is a credit existing on which money can be obtained without resorting to the real security of the ship. At the same time, I will not take it upon myself to lay it down as an universal proposition that an agent may not, under any cirumstances, take the security of a bottomry bond. Cases may possibly arise in which an agent may be justified in so doing. It can be no part of his duty to advance money without a fair expectation of being reimbursed; and if he finds it unsafe to extend credit to his employers beyond a certain reasonable limit, he may then surely be at liberty to hold his hand, and to say, '*I give up the character of agent*,' and, as any other merchant might, to lend his money upon bond, to secure its payment with maritime interest." (The "Hero," 2 Dods, 139; the "Oriental," 7 E. & M., 476).

"It is true that in the present case the pursuers do not maintain that they have bottomry security, but the principle of the decision is the same. They ought to have given up the character of agents, and lent their money as any other merchant, in which case they would be entitled to deal with the captain upon the footing that he had power to borrow on the responsibility of his constituent.

"But besides the plea of bar, by which this action may be met, there is another ground on which it may be disposed of, viz., want of power on the part of the captain (known to the pursuers) to borrow money on his owner's credit. In treating of the captain's powers, Professor Bell says, "where a special commission is known to exist, or where its existence or any limitation of power must be supposed in the circumstances, the limits of the power must be observed" (1 Bell's Com., p. 385, sixth edition.) A captain is just simply the agent of the owner, and the power to borrow may be entirely taken from him; and if this be known to the foreign lender the money cannot be recovered from the owner. Now here the captain had authority to deal with the pursuers in regard to advances, but the power was simply to take from them £250, not as a loan, but as a payment to account of freight. In borrowing it as a loan, the captain acted without authority.

"The Sheriff has more difficulty in regard to the liability of the captain. It has been laid down in Scottish law books, that the "master is himself personally answerable for furnishings to, and repairs for, the ship by his orders, unless care be taken in the bargain to stipulate otherwise. This is contrary to the ordinary rule by which one acting as an agent is held to bind only his principal; but it is a very just and expedient exception, considering the extent of discretionary authority and power vested in him" (1 Prof. Bell, p. 387). For this doctrine, Professor Bell refers to two English decisions; but these decisions have recently been overruled or impeached in the Court of Exchequer, and the law declared to be that the creditor may sue either the owner or the master, but not both (*Priestly* v. *Ferme*, 34 Law J. Exch. 172). Now, according to the Sheriff's opinion, the owner here must be assoilzied. Why should his agent, the captain, be held bound? On the ground of *excess of authority*? The limits of his authority were perfectly known to the pursuers, who took the obligation from him. Then, if the owner be not liable on the ground that the advances were *necessary*, his agent cannot be so." P. F.

The pursuers advocated.

An objection was taken to the competency of the advocation in the following circumstances. After the Sheriff's judgment had been pronounced, the pursuers presented a note of advocation, which they failed to insist in. The defenders then obtained decree of protestation, whereupon the pursuer paid the expenses in the Inferior Court, and in this way, as was argued, acquiesced in the judgment, and implemented it, so far as that was possible. It was after this that the present advocation was brought. The pursuers replied that they had never acquiesced in the judgment on its merits and their acquiesence could not be inferred from anything they had done.

The Court unanimously repelled the objection.

CLARK and BURNET were heard for the advocators.

SOLICITOR-GENERAL and R. V. CAMPBELL for the respondents.

At advising—

LORD JUSTICE-CLERK—The facts of this case appear to be as follows;—The owner of the vessel "Cereal," Mr Porret of Sunderland, and Mr Alfred Power, merchant in Liverpool, entered, on the 17th March 1865, into an arrangement by which Mr Porret bound himself that the vessel should proceed to Bahia, and there, or at a neighbouring port in the Brazils, receive a cargo to be loaded by the factors of the charterer. The cargo which the vessel carried out to Bahia was a cargo "for owners' benefit." The cargo which was to be loaded at Bahia was deliverable at various ports in Europe and America, at rates applicable to these ports specified in the charter-party.

As to payment of this freight, it was provided that "what cash the master may require for the ordinary disbursements of the vessel, not exceeding £250, to be advanced by the charterers' agents at the port of lading, at the current rate of exchange, subject to insurance only, and the balance on final and true delivery of the cargo at final port of discharge, by good and approved bills, payable in London, or in cash, equal to three months from date of delivery."

A further stipulation was that the master should "sign bills of lading at any rate of freight the charterers or their agents may require, but without prejudice to this charter-party."

This stipulation admitted of a sub-charter being entered into by Mr Power, and of the alteration of the rates of freight; and accordingly, it appears that Mr Power, through his agents at Bahia, Messrs Benn & Co., sub-chartered the ship to carry a cargo of sugar to Greenock to Messrs Hoffman, Laporte, & Co., the rate of freight payable by Hoffman &

Co. being diminished from 40s., the sum fixed in the charter-party for that voyage, to 25s.

Benn & Co. refused to advance the £250 for the necessary disbursements of the vessel at Bahia, according to the stipulation in Mr Power's charter-party. It does not appear that they had any funds of Power's in their hands, and they had nothing to do with the freight upon the outward cargo, which was cargo on owners' account. They offered to advance the money on being secured by an obligation to be repaid out of the freight to be received on the arrival of the vessel at its port of discharge in Europe, but their tender was conditional only. The condition was acceded to. They advanced the money, getting the obligation from the master on the effect of which the obligation turns. The obligation acknowledging receipt of £250 as master of the "Cereal," "for port charges and disbursements," contained an engagement whereby the master undertook to "reimburse on arrival at port of discharge out of freight earned."

It appears to me to be quite clear that this money was not *de facto* paid by Benn & Co., as under the obligation in the charter-party; and it further appears that what they did was in accordance with the understanding between them and their constituent Mr Power. We have the correspondence between Power and Benn & Co., which instructs that Benn & Co. agreed to make advances for ships' disbursements only on the understanding "that the captains will give the usual bonds for such amounts," which was altered so far on the suggestion of Power as to supersede a bond of bottomry, and who proposed the form of engagement used in this case. We have a letter from Benn & Co. on the 30th June—the day from which the vessels lay days were to be counted—addressed to the master, in which they distinctly intimate that for any disbursement for the ship they were to have a bond on the ship, subsequently varied into the less onerous obligation of the master to repay the advance from freight.

The advance was actually made on the granting of the document—a proof that the money was paid on the faith of the obligation contained in it. *De facto*, therefore, the advance was made on the footing that it was to be repayable out of freight to be earned, not on the personal credit of Power, or in terms of the charter-party.

In the face of this fact, the argument, that a loan was not meant because the freight was to be insured, does not appear to me of any weight. The advance was to be made with a view to be reimbursed from freight which fell to be insured in order to secure reimbursement.

The Sheriffs have both held that the master had no power under the circumstances to grant this obligation. They hold that Benn & Co. were bound by the charter-party to pay the £250, because they were agents for the charterer. They say that, by the fact of acting as agents, they reared up against themselves a personal obligation to apply their own monies in the advance. If this were so, and if the master could have enforced an obligation against them to advance £250, the act of the master would not be justified. Assuming, as we are compelled to do upon the case as before us, that they had no funds of Power's in their hands, and that they were under no obligation to him to make the advance on his credit, but, on the contrary, were bound to advance only on getting an engagement to be repaid out of freight, there is great difficulty in seeing how any obligation to the owner to make such an advance is made out. Advances out of their own funds by agents of a charterer, are not incident to their discharge of the duty of agent. Nor is this maintained. The proposition is not that, by acting as agents, they incurred liability, but by acting as agents for a charterer under a charter-party, which stipulated prepayment of the freight to a certain amount.

I can conceive a case in which such an implied obligation might be inferred. If the agents had proceeded to act under the charter-party, and been silent on the subject of advance until matters had gone on on the footing of provision in the charter-party being acted on till, it may be, the whole transactions were about to be closed, and then the demand for a claim against the freight had been suddenly made, matters would have assumed a different aspect; but here, before anything was done by these parties, and in the very first stage, they give the notice to the master which is embodied in the letter of the 30th June. They tell him fairly that they will advance, but only on the footing on which *de facto* the advance was made, or rather on a more onerous footing subsequently modified.

Had the owner been within reach of a communication which would have enabled him to act availably upon it, the communication should have been made to him, or, if made to the master, should have been by him communicated to his owner; but with a view to the use of the vessel in carrying home a cargo, and the delays incident to a communication to this country and back, and the certain loss attending the detention of the vessel, I am unable to see that a failure to make that notification defeats the right of Benn & Co. to exact fulfilment of the obligation in respect of which alone they advanced the money.

If it were clear that the master could, on the 30th June, have compelled these parties to make the advance, his granting of the obligation would be an act gratuitously disappointing his owner of a lien over freight. If he could have got other parties to make the advance of £250 on Mr Power's credit, or if he can be held to have been in a position to have got the advance otherwise, without pledging the personal credit of the owner or pledging the ship or freight, effect should be refused to the obligation. But I am unable to see my way to any one of these conclusions. There was no ground on which, while nothing was done by them in their character of agents, they were to be held bound by a supposed obligation to pay £250 *de plano* out of their own pocket. They never bound themselves to any one, certainly not to Mr Power, and as certainly not to Mr Porret to do so. The master could not enforce an obligation which certainly at that time did not exist. He might, I think, have said, If you will not advance the £250, you shall not act as agents for the ship; but what would have followed? He could not have conferred on any one the agency for Power, and if a transfer of agency had been effected there is not the slenderest probability that he could have got the money on Power's credit. If Power's own agents would not advance the money on Power's credit, can we hold that any one else at Bahia would have done so? He, at this foreign port, could not, so far as I see, have bettered the position of his owner by any course of acting which he could have been able to follow out.

If there was no obligation on Benn & Co., on the 30th June, and no available source of getting the

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