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

is to be received as an application of money towards repayment of expenditure upon permanent improvements, it must, it is thought, be disallowed, in respect of the decision in the case of *Shaw Stewart*, 9th June 1863 (1 Macph. 897), because the expenditure was not made by the petitioner. If the proposal is, on the other hand, to be dealt with as of the nature of an application of a consigned fund towards obtaining a renunciation by the bank of a lease affecting the entailed estate—which rather appears to the Lord Ordinary to be the true nature of the proposal, there is, in his opinion, no warrant in the 26th section of the Statute for such an application of a consigned fund."

The petitioner reclaimed.

H. Smith for reclaimer.

At advising—

Lord President—This petition by the Marquis of Huntly relates to the application of consigned money, which was derived from the railway company as compensation for damages done to the entailed estate. It was consigned under the provisions of the Land Clauses Act, and is to be applied in the way most expedient for the interest of the heir of entail and of the estate.

The particular clause on which the petitioner founds is the 26th clause of the Rutherford Act, and that part especially which authorises and empowers the laying out of such money in permanently improving the same, or in repayment of money already expended in such improvements. Now, if the petitioner relied only on the latter alternative, I should be of opinion with the Lord Ordinary that that could not be sustained, on the authority of the case of *Shaw Stewart*, because the money was not expended by the petitioner, but by a previous heir of entail. But there is another aspect of this case which requires careful consideration, and it is necessary to attend to the facts.

It seems that the late Marquis of Huntly gave a lease to the North of Scotland Banking Company for ninety-nine years, of half an acre of ground at the village of Aboyne, being a part of the entailed estate, at a rent of 10s., and it does not appear that there was anything beyond the power of the late Marquis in so doing. That was under the authority of the Montgomery Act, and the banking company came under an obligation to erect on the ground so leased a dwelling-house and offices of the value of not less than £500. That lease must be taken as a valid and subsisting lease, and as it was granted in 1858, and only ten years have run, it is a long lease still, and approaches the nature of a perpetuity. The proposal which the present heir of entail makes is, to expend the money in question in procuring a renunciation of this lease. It remains to be considered whether there would be a corresponding benefit to the estate, or whether the subsistence of this lease is, in the circumstances, so great a disadvantage that it is worth the money to get rid of it.

It seems that, instead of erecting a house of the value of £500, a house has been erected of the value of £1768, and that building belongs to the bank for a period still to run of about eighty-eight years. It is their property for that time; and though no doubt on the expiry of the lease, the building becomes the property of the heir in possession, that is a distant prospect, and it is not certain that they will be in existence to their present extent, or will be of any value. But it is said farther, that the value of these buildings to the estate at present and for the next eighty-eight years is of very great importance. It is explained, that these buildings, called Huntly Lodge, form a convenient dwelling place for the lessees of Birse Forest, and that, but for such a dwelling-house and appurtenances, Birse Forest as a sporting subject would not let. In fact this house and appurtenances were really built for the purpose of furnishing the tenant of Birse Forest with that accommodation. The late Marquis of Huntly not being able or willing to spend the money required, took this mode of granting a lease to the Banking Company and inducing them to spend the money and then to grant a lease to the tenant of Birse Forest. No doubt this was a roundabout way of providing accommodation for the tenant of Birse Forest, and it would have been more desirable if this could have been done directly. There is no doubt, in the next place, that it is very much for the benefit of the estate that this house and appurtenances should be permanently connected with Birse Forest, as tending to increase the benefit derived from this subject. But if this lease subsists, the Banking Company may do what they will with the buildings; they may employ them for themselves, and may disconnect them from Birse Forest. In these circumstances it is said that the expenditure of £1768 will be a permanent inprovement on the entailed estate; and on considering the matter I have come to the conclusion that we should be justified in so holding. It is not necessary that a permanent improvement should be something to last for ever, for all buildings, and fences, and drains, are perishable, and are yet permanent in the sense of the Act. Now this lease is not for ever. The incumbrance is not permanent in the sense of being perpetual. But permanent in this Act does not mean perpetual, and an improvement of that substantial kind that shall benefit the estate for a series of years, is sufficiently permanent to satisfy the Act. The acquisiton of this lease is, I think, of great importance to the proprietor of the estate for the time, and is calculated to increase the value of the estate in his lands, and I think the sum proposed to be applied for this purpose is, according to the evidence, not an excessive payment for such advantage. I therefore think we may authorise the application of this money in the way suggested by the petitioner, as being for the permanent benefit of the estate.

Lord Curriehill—I agree with your Lordship on the first ground. This building was erected by the late Marquis of Huntly, and the Act does not authorise money to be applied in payment of sums expended by a former proprietor. But the question is, can it be applied for prospective improvements? That is a question of great nicety, and I feel some hesitation in coming to the conclusion to which your Lordships have come. My ground of hesitation is this, that the subject is already part of the entailed estate. It is erected on that estate, and, as an accessory, it is part of the property of the future heir. This being the case, I have great difficulty in seeing how this can be brought within the category of improvement expenditure. It is true that almost all the improvements contemplated by the Montgomery Act are in their nature not perpetual, but I am afraid there is a fallacy in holding that this may be authorised as a *prospective* improvement, because the improvement has already been made. It already belongs to the heir of entail, without any legal obligation on him to pay the price of its erection. But though I have this doubt, I do not differ from the judgment to be pronounced.

Lord Deas—I agree with your Lordship in the chair. I think this cannot be allowed on the footing of being money expended by the former heir of entail. We have decided in many cases that the improvement must be made by the heir in possession, who makes the application. But, further, I am of opinion that we may grant the application on the ground that this is an improvement not yet made, but to be made. As to this being an improvement for the benefit of the estate, there is no room for doubt. We had the proceedings before us formerly, from which we had reason to see that this lodge is a most important improvement in the way of letting the shootings of Birse Forest. These are of great value, and bring a large rental to the estate. If this lodge is let along with the shootings, a much larger rental is paid than when they are let without it. All parties are agreed on that, and there is no doubt, therefore, of the advantage to the estate. The question is, whether the buying up of this lease is a permanent improvement in the sense of the Statute? As to the question of permanency, I agree with your Lordship. I don't know anything of this description that lasts for ever. It is a long stretch of time that entitles us to call anything permanent. Anything which is to last for the greater part of a century may fairly be called permanent in the sense of the Statute. Many improvements under the Statute will not last so long, and if the money is not got now, there is no good ground for thinking it will ever be got. It is true that the building belongs to the estate, and that the ground on which it is built will, at the end of 85 years, fall into the occupation of the proprietor; but it does not belong to the estate in the sense of the estate getting any benefit from it during all that time. Perhaps at the end of that time there may be no lodge there. The lessees are not bound to keep the building in repair, and it is possible that the building may not last that time. We don't know what may be the state of game leases at the time when this long lease expires. There may be a great change in such matters then, and it does not follow that because a great profit may be had now, there will be the same profit to be had then. What the proprietor wants is the profit at present, as to which there is no doubt. The question is, whether the use of this lodge cannot be got in any other way than by paying this money to the bank; will the payment be an improvement in the sense of the Statute? It would be taking too strict a view of the Statute—which was intended to encourage improvements on entailed estates—to say that that while you may spend money on improvements that will not last so long, you must not spend it on this improvement.

Lord Ardmillan—There cannot be any doubt that this proposed application of the consigned money is for the benefit of the estate, and the only question is whether, under the Statute, it can be sustained. Two suggestions have been made as to the footing on which this may be done—one, that it may be considered as a sum payable now for an improvement previously made. I think there is very great difficulty in giving effect to that suggestion, and I am not disposed to agree to it. The other suggestion is, that it is to be viewed as a present act of improvement. Suppose the case of there being a physical obstruction between the house and the rest of the estate which would endure for other 89 years, and that it was proposed to remove it, for example, by pulling down a wall. I think that the expenditure of money in removing that obstruction, so as to give the proprietor of the estate the use and enjoyment of the premises for the 89 years, would be a permanent improvement. Or suppose that a river intervenes between the house and the estate, and a bridge is proposed to be built—though that indeed would be more of the nature of creation of a means of access than removal of an obstruction—that would be a permanent improvement. Now, the proposal here is to connect the house with the estate for the remainder of the lease, or to remove the obstacle which prevents that from being done. I think the removal of this obstacle may fairly be held as much within the Statute as the removal of a physical obstacle would be. That is the view which I take of the case, and in that view I think the application may be sustained.

Agents for Petitioner—Henry & Shiress, S.S.C.

Friday, March 6.

MACINTYRE *v.* MACRAILD.

(5 Macph. 526, 4 Macph. 571.)

Agreement—Construction—Obligation not to Practise within certain district—Pactum illicitum—*Interdict.* An assistant to a physician undertook not to accept of the practice of the locality to the exclusion and disadvantage of his employer. In an action by the physician to enforce the agreement, *held* that the agreement was lawful; that the assistant had broken it by commencing to practise within the district, that being to the exclusion and disadvantage of the other contracting party; and perpetual interdict granted.

Duncan Macintyre, M.D., Fort-William, sought to interdict Donald Macraild, sometime surgeon, Ballachulish, from practising as a physician or surgeon at the slate quarries of Ballachulish and in the neighbouring villages. The respondent had been engaged by the complainer in August 1864 as his assistant. The complainer hearing a rumour that the respondent was endeavouring to supplant him, obtained from him a written obligation not to practise on his own account so long as his connection with the complainer should last, and not to practise at Ballachulish, or settle there at any future time, "to the complainer's exclusion and disadvantage." The engagement of the respondent as assistant ceased in October 1865. In the following month he was appointed to the post of medical practitioner there, in room of the complainer, who now brought this suspension and interdict. The Court granted interim interdict. The respondent was allowed time to substantiate a charge of forgery of the obligation founded on, by bringing, if he chose, a reduction and improbation of the document. He failed to do so, and the Lord Ordinary sustained the obligation, and made the interdict perpetual.

The respondent reclaimed.

W. N. M'Laren for reclaimer.

N. C. Campbell, for respondent, was not called on.

Lord Curriehill—This case has been before the Court already, but it is quite true, as has been said by the reclaimer's counsel, that nothing was then done to preclude the Court from coming to any decision on the case which they think right. We must look at the case apart from what took place formerly, but at the same time it is true that when the note was passed the Court