expressed a view of its meaning which would certainly not aid the pursuer in this case; while Lord Cranworth, after giving the ground of his judgment, said—"His Lordship told the jury that if the directors put forth in their report important statements which they had no reasonable ground to believe to be true, that would be misrepresentation and deceit, and in the estimation of the law would amount to fraud. I confess that my opinion was that in what his Lordship thus stated he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs which they *bona fide* believe to be true, I cannot think they can be represented as guilty of fraud because other persons think, or the Court thinks, or your Lordship thinks, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence, not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true." The view thus stated by Lord Cranworth is in accordance not only with much previous authority, but, in my humble judgment, with much sound principle; and in that state of opinion in the case of *Addie* it cannot be accepted as settled that a statement or representation may be held to be fraudulent because false in fact, if made upon what some persons would regard as insufficient grounds, although made in an honest belief in its truth. There is much weighty authority, and in my opinion conclusive reasoning, to an opposite effect in the leading case of *Evans* v. *Collins*, 5 Q. B. 804, 13 L.J., Q.B. 180; and the subsequent cases of *Ormrod* v. *Huth*, 5 Q.B. 820; *Barley* v. *Walford*, 9 Q. B. 197, 15 L.J., Q.B. 369; and *Wilde* v. *Gibson*, 1 H. of L. 633.

Supposing, however, it were necessary to go into the question whether the defenders' agent who carried through the sale of the property had reasonable grounds for the belief which he honestly entertained that the superiority of the lands belonged to the Crown, I am further of opinion that the pursuer's case fails. I think he had reasonable grounds for his belief or opinion, and after all it was a matter of opinion to be formed on the titles and in the circumstances of the parties. In the first place, after the letter intimating the claim of the Rossmore trustees, the person who made that claim acquiesced in the decree of forfeiture and claimed a money payment on the footing that the right of superiority could no longer be vindicated. That circumstance, coupled with the decree of forfeiture itself, was I think sufficient as a reasonable ground for Mr Carment's belief that the Crown and not the Rossmore trustees had the right of superiority. In the next place, the alleged superiority title had been latent for seventy years, and had only then been mentioned for the first time. Again, even if the Rossmore trustees had the personal right which had never entered the record, the proceedings in the action of forfeiture had been taken against the heir of line of the person who had held the superiority *ex facie* of the records. Mr Carment was of opinion that in any view this was the proper course, and that the decree was effectual under the statute. Opinions might differ on that subject, and I am not prepared to say there were not reasonable grounds for the view which Mr Carment held. But beyond all this, the pursuer was himself so much of opinion that this view was in itself reasonable that he maintained its soundness before the Lord Ordinary, and again before this Division of the Court in the former case, and the full argument submitted was sufficient to show that the question was attended with difficulty. How in the face of all these facts it can be reasonably maintained that Mr Carment was without reasonable grounds for believing that the Crown had the right of superiority to the lands I am at a loss to understand.

The LORD PRESIDENT concurred.

The Court adhered to the Lord Ordinary's interlocutor.

Counsel for Pursuer (Reclaimer)—M'Laren—Jameson. Agent—John Martin, W.S.

Counsel for Defenders (Respondents)—Asher—Guthrie. Agent—John Carment, S.S.C.

Tuesday, July 16.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

CHARPENTIER & BEDEX *v.* DUNN & SONS.

Shipping Law—Charter-Party—Breach of Charter-Party when Port of Loading such that Full Cargo could not be taken in.

A ship was chartered for a voyage abroad and home, the home cargo to be loaded at a port to be named abroad. A sub-charter was arranged at the outward port, in which a place was named where a full cargo could not be loaded owing to the ship's draught of water and inability to cross the bar. The charterer's agent, while requiring that the ship should proceed to that port, maintained that there could be no claim for dead freight. Thereupon the master of the ship got other employment for her. *Held* that the owners had a good action of damages for breach of contract against the charterers, and damages assessed accordingly.

This action was raised at the instance of Messrs Charpentier & Bedex, joint-owners of the barque "Perseverant," of France, against Messrs Dunn & Sons, shipowners in Glasgow, for payment of £398, 8s. 10d. in respect of a breach of charter-party entered into between the pursuers and the defenders on September 16, 1875.

By that charter-party the pursuers undertook that their barque should load a cargo of gunpowder at Glasgow, and proceed therewith to Rio or Santos, in Brazil, and that after discharging that cargo the barque should, at the port of discharge, or at one port in Brazil not south of Santos nor north of Maranham, load a cargo of sugar or other lawful produce, and thence proceed to Cowes, &c., for orders. The freight was to be

65s. per ton on the homeward cargo, with 5s. extra if the port of loading was shifted. This was to be the sole remuneration for the outward and inward voyages. The outward cargo was duly loaded, and was thereafter discharged at Santos. At that port a sub-charter was furnished to the master of the vessel, by which he was required to take his ship to Estancia and load there a cargo of sugar. This sub-charter-party was entered into between Watson & Co., the defenders' agents at Rio, and Joas Magolhaes, as agents for Moreira, Irmao, & Co. who were to ship the cargo.

At Santos the master of the "Perseverant" was informed by a ship's captain who had been at Estancia that the vessel would not be able to cross the bar at that port when loaded. He could not get a clearance there for Estancia, but he got one for Bahia, and set out for that port on his way to Estancia. He anchored at the Roads of Bahia, and went ashore to get a clearance for Estancia and a pilot. When so engaged he found that there would be great difficulty, if not impossibility, for a vessel of the size of the "Perseverant" in going to Estancia, and he put himself in communication with the sub-charterers, who carried on business at Bahia. He had both personal interviews and correspondence with them. The result was that they intimated to him that they would not load a cargo at Estancia unless the "Perseverant" drew no more than 10½ feet of water, or on the condition that he should load no more cargo than would enable her to cross the bar, and that he would give up all claim for dead-freight. The "Perseverant" when loaded drew about 14 feet.

The master communicated with Watson & Co. at Rio, and they insisted that he should proceed to Estancia, and maintained that the obligations of the charter-party were satisfied if he received a cargo which he could carry over the bar, although the ship was not full. They denied the right of the master to take instructions from Moreira & Co., but they did not undertake to provide any cargo other than that which Moreira & Co. were bound to provide.

In consequence the master sought other employment for the ship, and obtained a homeward cargo from other shippers at Bahia, and he now sued for damages for the breach of the charter-party.

The Lord Ordinary (Rutherfurd Clark) issued an interlocutor decerning for payment of £70 in name of expenses.

The note to the interlocutor, after narrating the facts as given above, proceeded—"In the opinion of the Lord Ordinary the action is well founded.

"1. By the charter-party the defenders had the right of naming the port at which the inward cargo was to be loaded. But they were bound to have regard to the size of the vessel, and to name a port to which she could go with safety. In the opinion of the Lord Ordinary the evidence shows that Estancia was not a suitable or safe port for a vessel of the size of the "Perseverant."

"2. Again, the defenders were not, in the opinion of the Lord Ordinary, entitled to name a port at which a full cargo could not be loaded, except on the condition that they were to pay dead freight. To hold otherwise would be to hold that they were entitled to deprive the pursuers of a material part of the earnings of the ship. For by the charter-party the freight was payable on the sugar actually delivered.

"If the difficulty had occurred in such a way that the pursuers had no means of communication with the defenders, they might have been bound to go to Estancia, and after loading what cargo the ship could carry, to claim for dead freight. But the agents for the defenders, while requiring the master to go to Estancia, maintained that the ship would have no claim for dead freight—a claim which was maintained in the course of the argument in this case.

"It was said that the ship might have been filled up from lighters outside the bar, but there is no evidence that this is the customary manner of loading ships, or even that it could be done.

"Further, the defenders contended that the master was bound to have objected to Estancia as a port of loading when he was at Santos. It is true that while there he had, in the course of a casual conversation, heard that Estancia was not a suitable port for his ship. But it is thought that he was entitled to rely on the agents for the defenders exercising their power with due discretion and after due inquiry, and to put aside in their favour what was after all no more than a vague rumour.

"3. No cargo was provided at Estancia, and none could be provided except on conditions to which it is thought the master was not bound to submit. It may be true that the master was not entitled to take his instructions from Moreira & Company alone. But he communicated with the agents for the defenders, and they did not undertake to provide any cargo except through Moreira & Company, and they approved of the conditions which that company sought to attach.

"There only remains the amount of damages. The parties were not at variance on the principle on which the damages should be assessed. But the amount cannot be accurately ascertained, as it depends on the amount of the sugar which would have been delivered if a full cargo had been loaded in cases. On the whole, the Lord Ordinary thinks that he will do substantial justice by assessing the damages at £70."

The defenders reclaimed.

At advising—

Lord President—I am perfectly satisfied with the judgment of the Lord Ordinary. The charter was for an outward voyage to Santos or Rio, and it was agreed that after the vessel had discharged her cargo at one of these ports she should, either at the port of discharge or at some other port in Brazil, not south of Santos nor north of Maranham, load a full cargo of sugar or other produce, and thence proceed home. The outward and homeward voyages were to be paid in one slump freight. The vessel performed the outward voyage without dispute, and the defenders' agents looked out for a cargo for the homeward voyage. At Santos they entered into a sub-charter-party, by which they undertook that the ship should proceed in ballast to Estancia, and there receive a full load of sugar. Now, it turned out that this so-called port of Estancia had a bar which it was impossible for a vessel of the size of the "Perseverant" to cross when fully loaded. It is doubtful whether the vessel could have crossed when in

ballast, but at any rate the other was an absolute impossibility. And why? Simply because the vessel was too large, and that fact appeared in the original charter-party. It is not disputed that a vessel capable of carrying 400 tons of cargo, as this one was, must have such a draught as to disable her when loaded from crossing the bar. When the defenders' agents made this sub-charter-party they committed a breach of contract with the pursuers, for under it the ship was to do an impossibility. That was not providing a homeward cargo. It put the master of the vessel in a very great difficulty. Instead of giving him a cargo they brought him into a state of contention with Moreira, Irmao, & Co., the sub-charterers, and the upshot of what they did was that Moreira & Co. say—"You may go to Estancia and load as much as you can take away over the bar, but we will allow nothing for dead freight. This was not a proposal to which the pursuers were bound to assent. They were entitled to a full cargo, and that was not provided. For it is impossible to say that a charter-party is fulfilled by providing a cargo which the ship cannot reach.

As regards the question whether the master was not bound to have stated his objection at Santos, all I can say is that I entirely agree with the view taken by the Lord Ordinary. I think the master was entitled to rely on the defenders' agents knowing the port, and when they made the sub-charter-party they must have known about the place. Charpentier was not, I think, entitled to assume that they were ignorant of the port, and to proceed on the word of a person who told him that he could not get there.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court adhered.

Counsel for Pursuers (Respondents)—Balfour—Robertson. Agents—Wright & Johnston, L.A.

Counsel for Defenders (Reclaimers)—Kinnear—Mackintosh. Agents—J. & J. Ross, W.S.

Friday, July 19.

FIRST DIVISION.

[Lord Adam, Ordinary.

GRAHAM *v.* GRAHAM.

Husband and Wife—Separation a mensa et thoro *— Violence Necessary to Justify.*

The Court will give decree of separation *a mensa et thoro* where there is reasonable apprehension from the past history of the parties that if the wife were ordered to return to her husband some serious violence might thereafter be used against her.

Husband and Wife—Cruelty of Husband—Condonation.

When a wife comes into Court complaining of her husband's violence, that opens up the history of their whole married life, and the fact that the wife, after leaving the husband some years previously on account of his violence, subsequently returned to him, does not shut out from the consideration of the Court the previous acts of violence, although these acts cannot by themselves be made the ground of an action for separation.

This was an action of separation and aliment raised by Mrs Janet Spence or Graham against her husband Thomas Graham. They had been married in 1839, and had had four children. The ground of action was cruelty, and the pursuer founded on various acts of violence, going back to within three months of their marriage, and coming down to July 21, 1877. The defender pleaded that the statements were unfounded, and further, that the pursuer having returned to the defender's society, and having been completely reconciled to him, was not entitled to found on any alleged facts prior to the date of the reconciliation.

It appeared from the proof led in the case that there had been quarrels between the parties all through their married life, and that in 1871 the pursuer had left the defender's house, accompanied by her children, in apprehension of a renewal of recent violent conduct, and raised an action of separation against her husband. But in consequence of various promises made to her she had abandoned her resolution of living apart from him, and had returned to her husband's house, giving up the action. In 1876 the defender had resumed his violent conduct, and again on a day in 1877 had used threats of serious violence to her.

The Lord Ordinary gave decree of separation as craved, and £120 a-year of aliment, adding this note to his interlocutor:—

"*Note.*—The pursuer and defender have been married for nearly thirty-nine years. They have four grown-up children. Their married life has been rendered unhappy by repeated quarrels, which have now culminated in the present proceedings.

"The defender appears to have a sincere affection for his wife, and to have been very generous to his children, but, unfortunately, he has a very irritable temper, which he cannot control, and he becomes violent when irritated. The Lord Ordinary thinks that if the pursuer, knowing the irritable temper of her husband, had shown more forbearance towards him than she did, many of their numerous quarrels might have been avoided. The result has been that on more than one occasion she has previously left his house. The last of these occasions was in January 1871, but she returned to live with him in May of that year.

"The Lord Ordinary entertains no doubt that, in consequence of his violent conduct towards her she was then justified in leaving him, and that if the proceedings which she then commenced against him had been insisted in she would have obtained a judicial separation.

"But she was then induced to return to live with him, and the question now is, whether what has since occurred is sufficient to justify the Court in pronouncing a decree of separation?

"In 1875 they went to live at the Bridge of Allan.

"Two instances of violence by the defender towards the pursuer are alleged to have occurred there—one in the summer of 1876, and the other on the 21st of July 1877—which led to the pursuer leaving the defender's house.

"On the first of these occasions there was a quarrel about a very small matter, when the defender became irritated and violent, and seized