Monday, June 19.

FIRST DIVISION.

HAGLUND *v.* RUSSELL AND ANOTHER.

Process — Title to Sue — Condition-Precedent — Statute—Act 17 *and* 18 *Vict. c.* 104 (*Merchant Shipping Act* 1854), *sec.* 512.

The Merchant Shipping Act 1854 exacts that "no person shall be entitled to bring any action or institute any suit or other legal proceeding until" the completion of an inquiry by the Board of Trade, or until the Board shall have either refused an inquiry or shall, by reason of its silence for one month after notice of intention to bring an action had been served upon it, be held to have refused one. *Held* that the inquiry or refusal was a condition-precedent, and that an action brought without any such notice being given until a month after it had been so brought was incompetent.

Observed that the case would have been otherwise if the statute had said "shall not be maintainable."

The Merchant Shipping Act 1854, Statute 17 and 18 Vict. c. 104, is divided into eleven parts, of which Part VIII. is declared to be applicable "to wrecks, casualties, and salvage," while Part IX. is declared to be applicable to "liability of shipowners."

Part VIII., *inter alia*, enacts, by section 432 and subsequent sections, that when any ship is abandoned or materially damaged on or near the coasts of the United Kingdom, or when any ship causes loss or material damage to another ship on or near such coasts, or whenever by reason of any casualty to or on board any ship on or near such coasts loss of life ensues, it shall be lawful for the inspecting-officer of coastguard, or the principal officer of Customs residing at or near the place where such loss, abandonment, damage, or casualty occurred, to make inquiry regarding such loss, abandonment, damage, or casualty. Further, where a formal inquiry seems to him to be needed, he may apply to any two Justices or a Stipendiary Magistrate to hear the case, and these Justices or Magistrate shall have the assistance, on application to the Board of Trade, of a nautical assessor. In Scotland any such investigation may be remitted by the Board of Trade to the Lord Advocate, to be prosecuted as he shall direct, and (if he so requires) with the assistance of a nautical assessor. This court of inquiry may, by section 438, require delivery by any master or mate whose conduct is called or is likely to be called in question during the inquiry, of any certificate of competency, to be retained till the close of the inquiry, and then to be returned or to be forwarded to the Board of Trade along with the report of the inquiry, to be dealt with according to the powers of the Board of Trade which are conferred by Part III. of the Act. Part VIII. of the Act then makes provision for the appointment of Receivers of Wreck, defines their duties, and provides for the payment of salvage, and for the ascertainment of the amount of salvage in any case in which such amount is disputed.

Part IX., which is concerned with the liability of shipowners, provides by section 507 that in cases of alleged liability in respect of loss of life or personal injury, the Board of Trade may, in its discretion, after due notice to the person who is to be made defender, require the Sheriff having jurisdiction over the place where the inquiry is to be held, to summon a jury of 24 persons qualified as jurymen in the superior courts, for the purpose of determining "the number, names, and description of all persons killed or injured by reason of any wrongful act, neglect, or default." Either party may, under section 508, have the question tried by a special jury.

By sections 509 and 510 regulations are made for the conduct of such inquiries as are contemplated by the two preceding sections. In particular, it is provided that the empanelling of the jury and the attendance of witnesses shall (in Scotland) be enforced in the manner provided by the Lands Clauses Consolidation (Scotland) Act 1845, and that the Board of Trade may make any compromise it may think fit as to the damages payable in respect of personal injury or of death; (sec. 510) that damages payable in each case of death or injury shall be assessed at £30, and shall be the first charge on the aggregate amount for which the owner is liable. By section 511 it is provided that if any person injured, or the executor of any person deceased, is dissatisfied with the statutory amount of damages, or with the amount accepted as a compromise by the Board of Trade in any case of injury or death, he shall be at liberty to bring an action himself as if no power of instituting an inquiry had been given by the Board of Trade, subject to certain provisions which need not be here set forth.

Section 512 is to the following effect—"In cases where loss of life or personal injury has occurred by any accident in respect of which the owner of such ship as aforesaid is or is alleged to be liable in damages, no person shall be entitled to bring any action or institute any suit or other legal proceeding in the United Kingdom until the completion of the inquiry (if any) instituted by the Board of Trade, or until the Board of Trade has refused to institute the same; and the Board of Trade shall, for the purpose of entitling any person to bring an action or institute a suit or other legal proceeding, be deemed to have refused to institute such inquiry whenever notice has been served on it by any person of his desire to bring such action or institute such suit or other legal proceeding, and no inquiry is instituted by the Board of Trade in respect of the subject-matter of such intended action, suit, or proceeding for the space of one month after the service of such notice."

On the morning of 5th February 1880 the Norwegian brig "Fram," then on a voyage from South Carolina to Glasgow, was run down off Lamlash by a steamship believed to be the "Hestia" of Greenock, of which the owners were Robert and Charles Russell, of County Down, Ireland. All the crew were drowned. This was an action raised on 29th December 1881 by Louise M. Haglund, widow of the second mate of the "Fram," concluding for £800 as damages for the loss of her husband by the collision. She alleged that the collision was caused by the "Hestia," and that it was due to the careless management of that vessel by her officers. She used arrestments against the defenders *ad fundandam jurisdictionem*.

The defenders admitted only that on the morning in question the "Hestia" was in collision with a vessel unknown. The collision, they averred,

was due to unavoidable accident. They referred to the sections of the Merchant Shipping Act of 1854 above referred to, and averred that no inquiry had been instituted or refused by the Board of Trade, and no notice had been served upon the Board of Trade by the pursuer of her desire to bring the action. They pleaded that in consequence the arrestments used by the pursuer were bad, and that the Court had no jurisdiction to entertain the action; and they further pleaded—"(3) The action is incompetent, and should be dismissed, in respect of the terms of section 512 of the Merchant Shipping Act 1854."

It appeared from the documents produced that on 26th February 1880, three weeks after the collision, Mr Leitke, Vice-Consul for Norway and Sweden in Glasgow, instructed Messrs Wright, Johnston, & Mackenzie, writers, Glasgow, to communicate with the Board of Trade regarding the collision. Accordingly they wrote to the Board of Trade quoting an account of the collision from the *Shipping Gazette*, and giving particulars relating to the finding of the wreck of the "Fram." This letter concluded thus—"In these circumstances Mr Leitke submits to you whether an inquiry should not be held to ascertain the facts of the collision, and whether those in charge of the 'Hestia' did all they could to avoid loss of life." This answer was returned by the Board of Trade:—"*Casualties.*—Gentlemen,—In reply to your letter of the 26th ultimo, I am directed by the Board of Trade to inform you that they do not, as at present advised, intend to institute a formal inquiry into the supposed sinking of the Norwegian brig 'Fram' by collision with the steamship 'Hestia' of Greenock. I am, however, to state that depositions have been made by the master, mate, engineer, and one A.-B. of the 'Hestia' before the Receiver of Wreck at Dublin, from whom copies can be obtained on payment of the usual copying charges."

On 18th January the Board of Trade, in answer to an application from the defenders' solicitors for information as to whether notice had been given them of the desire of the pursuer to bring any legal proceeding, wrote thus:—"*Casualties.*—Gentlemen,—In reply to your letter of the 12th inst. relating to the collision between the 'Hestia' and the 'Fram,' asking whether any notice of a legal proceeding in the case, such as is required by section 512 of the Merchant Shipping Act 1854, has ever been given to the Board of Trade, and if so, when, I am directed by the Board of Trade to inform you that they have received no such notice."

On 8th February 1882, more than a month after the raising of the action, Messrs Boyd, Macdonald, & Jameson, W.S., wrote to the Board of Trade giving formal notice that it was desired to sue the owners of the "Hestia," and desiring to know, in terms of the 512th section of the Merchant Shipping Act, whether the Board of Trade intended to institute any inquiry into the subject-matter of the action. This notice bore to be without prejudice to all or any prior notices or notice given to the Board on the subject. The Board replied that they did not "intend to institute any inquiry under the IX. part of the Merchant Shipping Act 1854, in respect of the loss of life resulting from a collision which occurred between the 'Hestia' and the 'Fram' in the month of February 1880."

The Lord Ordinary (FRASER) repelled the defenders' pleas of want of jurisdiction and of the incompetency of the action above referred to, and ordered the cause to be put to the roll for further procedure.

He pronounced this opinion:—"The two pleas which are now repelled are based upon the 512th section of the Merchant Shipping Act 1854 (17 and 18 Vict. cap. 104). This section provides that no person shall be entitled to bring an action or other legal proceeding until the completion of an inquiry by the Board of Trade (which that Board is authorised to institute) as to the number, names, and descriptions of all persons killed or injured by reason of any wrongful act, neglect, or default, or until the Board of Trade has refused to institute that inquiry. The 507th section states the mode by which the Board may carry out such inquiry. If the Board of Trade refuse to institute any inquiry, then the person injured, or those in his right, may bring the action or other legal proceeding.

"About three weeks after the collision which is complained of, and which resulted in the loss of life for which damages are claimed, the agents for the Vice-Consul for Norway and Sweden (of one of which countries the pursuer's husband was a native) wrote to the Board of Trade a letter requesting them to make an inquiry into the circumstances attending the collision, and they received from that Board a letter refusing to make any inquiry whatever. The writer of that letter says—'I am directed by the Board of Trade to inform you that they do not, as at present advised, intend to institute a formal inquiry into the supposed sinking of the Norwegian brig "Fram" by collision with the steamship "Hestia" of Greenock.'

"This refusal of the Board took off the prohibition against an action being raised. Anyone injured, or those in his right, was thereupon entitled to proceed at once with an action for damages. When the Board refused to inquire into the matter of the sinking of the vessel, they refused in like manner to require the Sheriff under section 507 to summon a jury to determine the number, names, and descriptions of all persons killed or injured, and it is of no consequence that their letter intimating this resolution was not addressed to the pursuer, but to the agents for the Vice-Consul of the pursuer's nation at Glasgow.

"But further, even supposing that this intimation of the Board of Trade's resolution were not sufficient, the letter received from the Board after this action was in Court, to the effect that the Board did not intend to institute any inquiry, would be enough to satisfy the statute. There are precedents for holding that although no action may be taken or thing done without the consent of some third party, subsequent consent will be sufficient; and the refusal intimated by the Board of Trade after the action was in Court removed the technical objection stated to the competency of the action. For illustrations of this reference can be made to many cases.—See *Hepburn* v. *Blair*, M. 6047; *Borthwick* v. *Urquhart or Grant*, February 17, 1829, 7 S. 420; *Lyle* v. *Mackay*, January 23, 1849, 11 D. 404; *Wellwood* v. *Boswell*, June 21, 1851, 13 D. 1211."

The defenders reclaimed, and argued—The action was clearly incompetent at the date when

it was brought. The Vice-Consul's letter was not a notice under Part IX., but a request for an inquiry under Part VIII. There was thus a want of what was a condition-precedent to the action. The cases cited by the Lord Ordinary were cases where a defect in the instance had been remedied by the concurrence of the person having the requisite title, or where there was an irritancy which might be purged—*Mackay* v. *Allan*, decided by Lord Mure in Outer House, February 19, 1868, 40 S.J. 221. Similar cases were familiar under the Poor Law Act, sec. 86—See *Ferguson* v. *M'Ewen*, February 7, 1852, 14 D. 457.

Argued for pursuer—(1) The letter of the Vice-Consul was good as a notice. It requested information as to the intention of the Board of Trade on the subject of the collision. It was sent by a person bound *ex officio* to attend to the interests, pecuniary and otherwise, of the crew of the "Fram" and their relatives. (2) In any event, the notice given after the action was raised would, as the Lord Ordinary held, avail to the pursuer. It cured any defect there might be, and would obviate the hardship of denying the pursuer a remedy in consequence of a plea founded on provisions in the Act of 1854 which were never carried into practice.

The Lords made avizandum.

At advising—

Lord President—This is an action by the widow of a seaman of the Norwegian brig "Fram," which was run down by a collision with a steamer belonging to the defenders, with the result that the pursuer's husband was drowned. The widow's action of damages is met by an objection founded on sec. 512 of the Merchant Shipping Act of 1854. That section is one of a series of sections forming Part IX. of the statute, the object of which part is to limit the liability of the owners of ships in case of loss and damage occurring without their actual fault or priority, and to afford a means of trying in one proceeding all the claims that may arise out of collisions. That is to be done under the directions of the Board of Trade, and in Scotland before a Sheriff and jury, and as the inquiry to be so conducted would naturally be a very extensive one it is to be subject to many rules and conditions. Now, sec. 512 provides—"In cases where loss of life or personal injury has occurred by any accident in respect of which the owner of such ship as aforesaid is, or is alleged to be, liable in damages, no person shall be entitled to bring any action, or institute any suit or other legal proceeding, in the United Kingdom until the completion of the inquiry (if any) instituted by the Board of Trade, or until the Board of Trade has refused to institute the same; and the Board of Trade shall, for the purpose of entitling any person to bring an action, or institute a suit or other legal proceeding, be deemed to have refused to institute such inquiry whenever notice has been served on it by any person of his desire to bring such action or institute such suit or other legal proceeding, and no inquiry is instituted by the Board of Trade in respect of the subject-matter of such intended action, suit, or proceeding for the space of one month after the service of such notice." The purpose of this section is very apparent. If there is to be such a general inquiry as the previous sections of Part IX. contemplate, it is indispensable that such a rule should be established. The object of the general inquiry into the damage and the question of fault is to supersede special separate proceedings and bring the whole into one inquiry, into the facts of the case, and therefore while such inquiry is going on no other ought to be allowed. There must be the general inquiry first, and then the separate inquiry by anyone who is dissatisfied with it, or a separate inquiry may be pursued where a general inquiry has been refused. Now, sec. 572 is in very emphatic and strong terms, and the defender pleads that in this case no inquiry had been instituted by the Board of Trade, and that the Board of Trade had not previously to the action refused an inquiry, and that the pursuer did not before the action give any notice to the Board of Trade in terms of the statute. Thus, in the view presented by the defender, the case is not within the exception provided in the statute—that is, there was neither a completed inquiry nor a refusal to make an inquiry, nor notice to the Board of Trade, within the meaning of the statute. The defender therefore pleads that the action is incompetent. There was, indeed, a notice given on 8th February 1882 by the pursuer's agents, and that was received by the Board of Trade, and acknowledged by them as a good notice; for they say in reply, on 10th February:—"In reply to your letter of the 8th instant, I am directed by the Board of Trade to inform you that they do not intend to institute any inquiry under the IX. part of the Merchant Shipping Act 1854, in respect of the loss of life resulting from a collision which occurred between the 'Hestia' and the 'Fram' in the month of February 1880." That notice would have been quite in conformity with sec. 512 if it had been given and acknowledged before the raising of the action. But the action was raised on 29th December 1881, and the notice, as I have said, was not till 8th February 1882. The first question therefore is, whether this notice, which was given after the action was brought into Court, is sufficient? I am sorry to say that I have come with reluctance to the conclusion that the notice is of no use. The words of the section are explicit. They begin by saying that "no person shall be entitled to bring any action or institute any suit" until certain things are done. An action brought before these things are done is brought in direct violation of the section. These things, which must be done, are either that an inquiry shall have been made or refused by the Board of Trade, or that the pursuer shall have signified to the Board that he proposes to take proceedings, and then if no answer is returned by the Board within a month after he has done so, that is equivalent to a refusal by the Board of Trade. It is the last of these alternatives that is applicable here. But until the notice has been given, and until the month of silence has expired, sec. 512 enacts an express prohibition against the bringing of the action. The Lord Ordinary has taken the view that a notice of this kind may be well given after the case has come into Court, and he refers to certain cases as authorities for this view. I am of opinion that these cases have no bearing on the question before us. Three of them are cases in which a married woman had taken proceedings for the protection of her own separate estate

without the consent of her husband, and it was held sufficient that he should give his concurrence after the process had commenced. That is according to a well-settled rule, but all that is required or aimed at by the rule is that the married woman shall be sufficiently protected and represented by her husband in the course of the proceedings, and it is sufficient that this be done after the process is in Court. There are various other cases in which it had been held that consent being required for an act, that consent may be obtained after the proceedings have begun. You have there the substance of what the law requires. For example, in the case of *Wellwood*, to which the Lord Ordinary refers, a young lady was under a trust-deed made a beneficiary as institute of entail, and there was a provision that if she married without the consent of the trustees she should forfeit her right to the entailed estate. She married without their consent, and it was maintained by the next heir of entail that she had forfeited her right. But the trustees being judicially required to state whether or not they approved of the marriage, said that they entirely approved of it, and gave their consent to it. The principle of that case was forfeiture of the nature of irritancy of a right, and so the condition was resolutive, and the irritancy had not been incurred. But this is not a resolutive condition or anything like it. It is a suspensive condition. You cannot stir a step; you are prohibited from bringing any action till certain things have happened. That is a suspensive condition, and as it is not purified the action must be held incompetent.

There was another ground which was taken by the pursuer for the purpose of supporting the action by a notice which was actually given prior to the action. That was a notice which was sent on behalf of the Norwegian Vice-Consul to the Board of Trade inquiring whether it was intended to make any investigation into the circumstances under which the "Fram" and the lives of its crew were lost. If that had been anything like a notice under sec. 512, I should have been glad to hold it available. But it is not such a notice as is available under Part IX. It is a notice under Part VIII. of the statute, not made by a party desiring to institute an action of damages, but by the Vice-Consul of a country in the interest of an owner and seamen belonging to that country, and being a notice of a perfectly different kind from the notice required, it has no possible weight. I regret this decision very much, and the more so on this account, that the general inquiry which is the subject of Part IX. is useless, and is never resorted to, and the strong provisions of sec. 512 are really only intended for the purpose of seeing that that general inquiry should be permitted to proceed without being accompanied by separate proceedings. But the words of the statute form a distinct bar to this action.

Lord Deas—This question was very carefully considered at consultation, and, in common I think with all your Lordships, I was anxious to find grounds on which we could adhere to the interlocutor of the Lord Ordinary. But unfortunately the words of the Act of Parliament stand directly in the way. It is a maxim that an Act of Parliament can do no wrong, and though morally of course I do not adopt that maxim, yet legally I must do so. I cannot help agreeing with your Lordship. It is a hard case, but that is no reason why we should make bad law.

Lord Mure—The objection to the competency of the action is strictly technical, but after considering the express terms of sec. 512 I can see no grounds for repelling it. Under that section the completion of an inquiry by the Board of Trade, or its refusal, are conditions-precedent to an action, and these provisions cannot be got over. On that ground I concur in holding that the notice on 8th February cannot obviate the objection.

I also agree that the cases at common law referred to in the note of the Lord Ordinary are not sufficient to warrant us in disregarding the statutory condition.

I have tried to find a ground for holding that the Consul's letter of 26th February might be brought into service in the pursuer's favour; but I am satisfied that that letter, which is a request for inquiry under Part VIII. of the statute, cannot be sufficient notice under sec. 512, which contemplates a notice by the person who is about to bring an action.

Lord Shand—It is very clear that at the date the action was raised it was subject to an objection which was fatal, unless it could be cured by something subsequently done, for it is impossible to sustain the letter sent by the Consul to the Board of Trade as a notice having reference to such a proceeding as this is. The Consul's letter expresses a desire for a public inquiry. Obviously that was to be an inquiry into the conduct of the masters and crews of the vessels under Part VIII. of the statute. The inquiry contemplated under Part IX. is totally different. It is limited to an investigation whether the casualty is the result of the fault of one party, what number of persons lost their lives, and what damages ought to be apportioned, and it is to proceed before a Sheriff and jury. It is needless to say more. It is obvious that the Norwegian Consul had no idea in sending his letter of asking a jury trial for damages. The only question then is, whether the defect can be cured by anything which occurred afterwards? With regret, I agree in the result at which your Lordships have arrived. Had sec. 512 said that no action shall be "pursued," or "be maintainable," or "be prosecuted" without such notice having been made, I should have felt myself entitled to act on the notice which was afterwards given. But the statute in express and strong terms goes further than that. In language which is twice repeated it enacts that no person shall "bring" or "institute" an action without giving the notice specified. As your Lordships put it, that is a statutory condition-precedent, and can only be read as a prohibition of an action "instituted," or "brought," or "begun" without notice.

The cases cited would have borne out the view of the Lord Ordinary if the statute had been worded as I have suggested. They would then have had direct application. They are cases in which an original defect has been allowed to be supplied by the interposition of a proper consent. But in this case the language of the statute is too

strong to admit of our repelling the defence founded on the want of notice.

The Lords recalled the interlocutor of the Lord Ordinary, found the action incompetent, and dismissed it.

Counsel for Pursuer — Salvesen. Agents — Boyd, Macdonald, & Jameson, W.S.

Counsel for Defender — Burnet. Agents — Cairns, Mackintosh, & Morton, W.S.

Tuesday, June 20.

OUTER HOUSE.

[Lord Kinnear, Junior Lord Ordinary.

DICKSON (THYNE'S *curator bonis*), PETITIONER.

Curator Bonis—*Expenses—Husband and Wife—Divorce.*

Held that the *curator bonis* on a lunatic's estate was entitled to take legal advice and make inquiries relative to a contemplated action of divorce against the wife of his ward.

The petitioner, a chartered accountant, was on 17th July 1880 appointed *curator bonis* on the estate of Matthew Tod Thyne, then a lunatic in confinement in the Edinburgh Asylum, and while in that office he employed an agent to make inquiries and take precognitions and consult counsel with a view of bringing an action of divorce against the lunatic's wife. While these inquiries were being made the ward died on 25th October 1881, and the curator to provide a voucher for the expense so caused had his agent's account of expenses taxed by the Auditor of the Court of Session, at which taxation the ward's wife was not present. When the curator presented his petition for discharge the wife lodged answers objecting to the *curator bonis* crediting himself with the money expended in making the said inquiries. The process was remitted to the Accountant of Court to examine into and report. In his report the Accountant stated that as the charges in connection with the proposed action of divorce had been taxed by the Auditor he was precluded from dealing with the question, and left it for the consideration of the Court.

Argued for the petitioner—It had been decided in England that the curator of a lunatic could bring an action of divorce. The *curator bonis* was entitled to take counsel's advice (1) on the competency of the action, and (2) whether the circumstances in this case warranted the action. For this purpose inquiries were necessary. The charges had been taxed by the Auditor as fair and reasonable, and were therefore a good charge against the estate—*Baker* v. *Baker*, L. T., 6 Macph. 1880.

Argued for the respondent—It is quite settled law in Scotland that the action of divorce is purely personal, and cannot be carried on by representatives; the charges therefore for counsel's opinion and the inquiries made were bad, and ought to be disallowed—Bell's Prin., sec. 1534; Thoms on Judicial Factors, 2d ed., 306; Fraser on Husband and Wife, 1145.

The Lord Ordinary allowed the charges objected to, on the ground that the *curator bonis* was entitled to take advice as to his duty in the circumstances, but gave no expenses in the present application against the wife, as she should have received intimation of the diet before the Auditor.

Counsel for Petitioner—Strachan. Agent—W. T. Sutherland, S.S.C.

Counsel for Respondent—Guthrie. Agent—James Gow, S.S.C.

COURT OF JUSTICIARY.

Tuesday, February 21.

GLASGOW CIRCUIT.

(Before Lords Young and Adam.)

STRANG *v.* STRANG AND OTHERS.

Process—Appeal against Small-Debt Court Decision—Incompetency and Defect of Jurisdiction—Small-Debt Act 1837 (1 *Vict. c.* 41), *sec.* 31.

An action which raises, however indirectly, a question of status is incompetent in the Small-Debt Court.

This was an appeal to the Circuit Court at Glasgow from the decision of the Sheriff-Substitute of Lanarkshire (BIRNIE) at Hamilton. The appellant James Strang, portioner, Leechlee Street, Hamilton, was in right of an alimentary annuity left him by a relative by a testamentary deed, and under arrangement with the testator's trustees (James Henderson and others) payment of this annuity was made to the appellant (who was an invalid) in sums of £2 per week. In the year 1863 his wife, Mrs Mary Donald or Strang, respondent in the present appeal, raised in the Court of Session an action of separation and aliment against him, which she abandoned after obtaining a decree for £20 as interim aliment. Founding on this decree, she in November 1881 used arrestments in the hands of the above-named trustees to attach her husband's annuity, and in consequence the trustees in December following, when a sum of £10 due to the appellant under the arrangement with him had accumulated in their hands, raised an action of multiplepoinding in the Small-Debt Court at Hamilton to have it determined to whom the £10 should be paid, and in this action they called the appellant and respondent as parties. Claims having been ordered, and the respondent having claimed under the old interim decree in her favour, the appellant produced a voucher showing that the decree had been satisfied. The Sheriff-Substitute did not, however, at once ordain the fund *in medio* to be paid over to the appellant, but permitted the respondent to lodge an amended claim. Accordingly a claim was lodged wherein the respondent set forth that she was the wife of the respondent; that during the twelve months immediately preceding he had refused, and still refused at that date, to maintain her in family with him, or to provide her with a suitable allowance for her separate maintenance and support, notwithstand-