ment that the respondent should work as a pit bottomer, and that the appellants should pay him wages, and for seven years that agreement was acted on. Now it seems to me, applying the ordinary rules of fair dealing between man and man, that it is plain that the respondent can claim no additional compensation for that period of seven years. Having taken the employment and accepted the wages he cannot claim compensation in addition.

That is sufficient for the disposal of the case, but there was a second question which was argued to us, and on which it is desirable that we should express our opinion. In the case it is put in this way—"Could the arbitrator in awarding compensation in a lump sum of one hundred pounds to the said Alexander Dempster rightly have regard to his diminished weekly earnings during the period between 21st May 1900 and 1st April 1907." Now it is plain that the learned Sheriff-Substitute assumes that in acting as arbitrator he is entitled to award compensation in a lump sum. I think it is clear that he has no power to do anything of the sort. The statute gives him power to award compensation in the shape of weekly payments. What the Sheriff-Substitute has done is to put himself in the position of a jury assessing a claim for damages. It is quite plain that that is incompetent, and it is equally plain that the Sheriff has no power to pronounce a decree for a lump sum.

The question was also argued to us, supposing that the respondent had a claim, what was the proper way of arriving at the amount? It was argued that the amount should be arrived at by taking an average of the respondent's weekly wages during the period of seven years, as compared with his earnings prior to the accident. On that point I wish to express no opinion, as it is not necessary for the decision of this case.

LORD ARDWALL—I concur, but I should like to make one observation, because if this case should be reported, it would appear on one matter to be inconsistent with the previously reported part of the same case. I find that the rubric in that case (1908 S.C. 722) correctly sets forth that it was held "that there was no subsisting agreement between the parties, and that consequently arbitration proceedings were competent." I was rather surprised to find it stated in the present case that there was a subsisting agreement at the time the arbitration proceedings were raised. This, of course, is totally incorrect. I suppose that the Sheriff-Substitute by what he states must mean, not that there was an agreement in the ordinary legal sense, but merely that the appellants offered the respondent work at a wage which was larger than the amount of the compensation he was receiving up to 21st May 1900, and that the respondent accepted the work and no compensation was paid to him for nearly seven years. That is what was done, and that is enough to raise a plea of personal bar against the workman, because if he accepted employment and received wages from the parties who otherwise would have been paying him compensation, that implied that he was claiming nothing more than these wages for the period in question. I think that the respondent here is barred from going back on the period during which he accepted wages from the appellants without reservation, these wages, be it observed, being larger than the sum he had been receiving as compensation for his injury.

LORD DUNDAS concurred.

LORD LOW—With reference to the previous case, I should like to add that in that case it was stated as a fact that William Baird & Company refused to pay compensation from 21st May 1900. That is inconsistent with the statement now made as to the third agreement, but it justifies the manner in which the former case was disposed of.

The LORD JUSTICE-CLERK was absent.

The Court answered the first question of law in the affirmative and the second in the negative.

Counsel for the Appellants—Hunter, K.C. —Horne. Agents—M. J. Brown, Son, & Company, S.S.C.

Counsel for the Respondent—Watt, K.C. —Spens. Agent—Jas. A. Kessen, S.S.C.

Thursday, November 19.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

HUTCHISON *v.* HUTCHISON.

(See also 45 S.L.R. 783, 1908, S.C. 1001.)

Husband and Wife—Divorce—Desertion—Privy Remonstrance—Conjugal Rights (Scotland) Act 1861 (24 *and* 25 *Vict. cap.* 86), *sec.* 11.

There cannot be desertion by a spouse whom the other spouse does not wish to return; but if in a process of separation a formal offer is made by the husband to take back the wife, that by itself is enough—unless something else follows—to show that her absence is not approved of by him. The effect, however, of that offer may be got over either by showing that the offer was not genuine, or by showing that notwithstanding that offer there had afterwards been a change of disposition on the part of the husband, *i.e.*, that the offer did not remain a standing offer.

John Patterson Hutchison, sometime photographer, 47 High Street, Hawick, then residing at 150 Dundee Street, Edinburgh, raised an action of divorce for desertion against Mrs Agnes Forrest Stevenson or Hutchison, his wife, residing at 11 West Campbell Street, Glasgow.

The *facts* appear sufficiently from the opinion of the Lord Ordinary (GUTHRIE), who, on 26th May 1908, after a proof, assoilzied the defender.

Opinion.—"The parties were married in 1883. Two children of the marriage survive—a daughter born in 1884, who resides with the defender, and a son born in 1887, who resides with the pursuer. The defender left the pursuer's house on 18th January 1888, and the parties have not cohabited since. In August 1888 an action of separation and aliment was raised by the present defender against the present pursuer, in which, after proof, the present pursuer was assoilzied by Lord Fraser in November 1888. In his defences and in the proof in that action the present pursuer offered to receive back the present defender.

"The present action was raised on 2nd January 1908, between nineteen and twenty years after the judgment in the separation case. In these circumstances two questions arise—*first*, whether, without further expressions of willingness on the part of the pursuer to receive his wife back to cohabitation than were expressed in the separation action, he can now obtain divorce on the ground of the defender's 'wilful and malicious non-adherence to and desertion of the pursuer for the space of four years'; and *second*, whether if this question be answered in the negative, there is sufficient evidence of the following averment in condescendence 8, namely—'Since the judgment in the case referred to in the last condescendence was given on 16th November 1888, the pursuer has repeatedly asked the defender to return to his society, fellowship, and company, and he has intimated to her that his home was still open for her; but, notwithstanding said invitations, she wilfully persisted, and still persists, to remain separate from him, and in consequence thereof, the present action has been rendered necessary.'

"I answer the first question in the negative. The authorities show that the necessity for, and requisite extent of, 'privy remonstrance' on the part of the innocent spouse is a question of circumstances. Here, when the separation proceedings terminated, it appears to me that the circumstances had so altered that the pursuer was bound, if he *bona fide* desired his wife's return, to let her know in clear terms that, notwithstanding all that had passed, he was prepared to resume cohabitation. It is familiar knowledge that an offer to adhere by a husband, defender in an action of separation and aliment, is often a mere strategical move, made in the expectation that it will not be accepted, rather than the expression of a real willingness, not to say desire, to resume cohabitation.

"If so, the second question arises for decision. If the averment quoted from condescendence 8 be proved, then it is admitted that the pursuer is entitled to decree. The defender has not established any sufficient ground in law for remaining apart from her husband. . . .

[*His Lordship then examined the evidence, and came to the conclusion that the pursuer had not proved the averments in condescendence* 8.] . . ."

The pursuer reclaimed, and argued—(1) Intention to stay away and desert appeared, *inter alia*, from the wife's abduction of their child and concealment of its address—*Hutchison* v. *Hutchison*, December 13, 1890, 18 R. 237, 28 S.L.R. 190. (2) Whether privy remonstrance was necessary was a question of circumstances—it was not a solemnity—*Mackenzie* v. *Mackenzie*, May 16, 1895, 22 R. (H.L.) 32, Lord Watson at p. 40, 32 S.L.R. 455; *Watson* v. *Watson*, March 20, 1890, 17 R. 736, 27 S.L.R. 598; *Willey* v. *Willey*, May 17, 1884, 11 R. 815, 21 S.L.R. 542; *Gould* v. *Gould*, December 22, 1887, 15 R. 229, 25 S.L.R. 188; *Auld* v. *Barrie*, November 23, 1882, 10 R. 208, 20 S.L.R. 147; *M'Ewan* v. *M'Ewan*, July 17, 1908, 45 S.L.R. 923. Here the husband by his formal offer on record, in the separation action, to receive his wife back—an offer which, it appeared from Lord Fraser's judgment, was repeated at the proof therein—discharged any duty of remonstrance that lay on him. The fact that twenty years had now elapsed since the desertion did not create any bar to divorce—*Mackenzie* v. *Mackenzie*, June 13, 1883, 11 R. 105. It did not even raise any presumption that the husband had not remained willing to receive back his wife. To justify such an inference there must occur subsequently to the offer some positive act on the husband's part—*cf. Thomson* v. *Thomson*, 1907 S.C. 179, Lord President at 185, 45 S.L.R. 95. (3) In any case, the proof established that there had been further remonstrance.

Argued for the defender (respondent)—(1) They admitted that the wife had gone away without legal excuse and had no intention of returning. (2) They further conceded that privy remonstrance was not a solemnity, but where it was absent the Court would look with suspicion on an offer to adhere. There must be willingness on the part of the husband during the period of desertion to receive back his wife, and in this respect *Willey* v. *Willey* (*cit. sup*) was disapproved in *Watson* v. *Watson* (*cit. sup.*). The mere offer in the separation action was not conclusive of the husband's willingness to receive back his wife, especially in view of the facts (*a*) that he was aware that the cause of her leaving him was misunderstanding mainly occasioned through her mental state, and (*b*) that for twenty years the husband had made no further offers but apparently acquiesced in the separation. (3) The evidence showed that the husband had not wished his wife to return.

LORD PRESIDENT—In this case I cannot agree with the result at which the Lord Ordinary has arrived. I do not propose to say anything upon the law of the case. Really, I think the last word has already been said by Lord President Inglis in the case of *Watson* (17 R. 736), and I have nothing to add. In a single sentence it comes to this, that there cannot be desertion by a person whom the other spouse does not wish to return. And accordingly I agree with what the learned counsel said,

that there are always two inquiries in such a case, namely, there is an inquiry, first, whether the *de facto* absence of an absent spouse is an absence which must be attributed to an intention to stay away and desert, or an absence which is consistent with other motives. But then, having finished that inquiry and resolved it in the sense that the absence is a deserting absence, there is still the second inquiry, whether the spouse who, so to speak, stays at home is really acquiescent in agreeing in the absence of the other spouse, or is willing and anxious that he or she should return. The precise proof of that fact must vary, as proof will always vary, according to the circumstances of each case.

Now in this case, first of all, no question is raised as to the absence, and the meaning of the absence, of the wife. It is not disputed that the wife went away without excuse and had no intention of coming back; and therefore the only question is, has the husband sufficiently shown that the absence of the wife is not approved of by him? The Lord Ordinary has held that he has not, and he has put the conditions of the problem thus. He has said—"I find that in an action of separation raised at the instance of the wife there were defences put in by the husband and a formal offer by him to receive back the wife;" and then he has found, as in law, that that formal offer by itself is not sufficient—that there must be something else. And then, going to the proof of what happened between the parties afterwards, he has held that in that proof he cannot find sufficient positive evidence of the husband having intimated to the wife that he wished to receive her back.

Where I do not agree with the Lord Ordinary is in the way in which he has stated the question. It seems to me that if in a process of separation a formal offer is made by the husband to take back the wife, that by itself is enough—unless, of course, something else follows. I quite agree that the effect of that offer may be got over in one of two ways. It may, in the first place, be got over by proof showing that the offer did not represent a genuine offer; and it may, in the second place, be got over by showing that, notwithstanding that offer, there had been afterwards a change of disposition on the part of the husband—in other words, that the offer did not remain a standing offer. Now, my Lords, all I can say is that there has been no proof on one side or the other to show that this offer was not a genuine offer. The Lord Ordinary says it may have been of the nature of a strategical movement. It may have been, or it may not have been; but there does not seem to me to be any presumption that an offer made formally in the process is not a genuine offer. It seems to me that it remains a genuine offer until you show that it is not. Well, then, when you come to the proof of what happened afterwards, it is sufficient to say that there again I find no affirmative proof to show that the husband had in any way gone back on the offer that he made. Accordingly, on these grounds I think that the husband is entitled to the decree of divorce which he desires.

LORD KINNEAR—I am of the same opinion.

LORD PEARSON concurred.

LORD M'LAREN was absent.

The Court recalled the interlocutor reclaimed against and granted decree.

Counsel for the Pursuer (Reclaimer)—A. M. Anderson. Agent—W. R. Mackersy, W.S.

Counsel for the Defender and Respondent—Wark. Agent—J. & J. Galletly, S.S.C.

Friday, November 27.

SECOND DIVISION.

ALLAN'S EXECUTOR *v.* UNION BANK OF SCOTLAND.

Arrestment — Bank — Breach — Deposit-Receipt Payable to A or B — Arrestment of Funds Due to A — Payment by Arrestee to B — Knowledge and Bad Faith of Arrestee.

Arrestments upon the dependence of an action against A were used in the hands of the local agent of a bank upon a particular sum of money due by the bank to A. This sum was lying upon a deposit-receipt, which was in these terms—"Received from A and B, payable to either or survivor." The arrestor obtained decree in the original action, but during its dependence the bank paid the sum in question to B upon presentation of the deposit-receipt endorsed by B. In an action against the bank for breach of arrestment the pursuer averred that payment had been made with knowledge and in bad faith.

Held that the bank was not bound to pay to B, and that the averments of knowledge and bad faith were relevant to the action.

John Stanger Copland, solicitor in Stromness, as executor-nominate of the late Miss Catherine Allan, raised an action against the Union Bank of Scotland, Limited, in which he claimed the sum of £126, 13s. 7d., with interest thereon at deposit-receipt rates from 18th April 1901, in name of damages for breach of arrestments in the hands of the bank's agent at St Margaret's Hope.

The following *narrative* of the *facts averred* upon record is taken from the opinion of Lord Low:—"The case averred by the pursuer is as follows:—In 1897 a sum of £116 was deposited with the branch of the National Bank of Scotland at Stromness in the names of Miss Allan and Mrs