the offer and acceptance contain some inconsistencies, I am willing to take the two together as constituting the contract between these parties. As to the particular objection before us, then, it is plain enough that the gable did sink, and one of two mistakes must have been made—either the builder did not go far enough down with his foundation, or he did not use large enough stones for it. However he did what he was directed by the inspector, and he did moreover more than he had contracted to do. The result shows that the inspector was mistaken, but that was no fault of the builder. Now, the latter not only went down farther than he was bound to do, but he made no extra charge for doing so, in consequence of the above-mentioned clause in the acceptance—similarly he makes no extra charge for several other items of extra work. Of course, a fair and reasonable construction must be put upon such a clause. It does not follow that because it exists in the contract, that therefore everything which is extra work is not to be charged for, but only everything which comes fairly under the original contract, and was omitted from the specification, either accidentally or of necessity, as for instance the renewing or replacing of the broken lintels, which, whether they broke from the subsidence of the gable, or from intrinsic fault, or partly from both, the Sheriff was quite right in requiring the builder under the contract to repair. The Sheriff-Substitute has been, I think, perfectly consistent throughout in this matter, and I think him right, not only in this more important objection to the gable wall, but also in his disposal of the other and minor objections.

LORDS ARDMILLAN and KINLOCH concurred.

Agent for the Appellant—James Webster, S.S.C.
Agent for the Respondent—G. Roy, S.S.C.

Thursday, December 22.

GASKELL, DEACON & CO. *v.* MACKAY.

Sale—Agent and Principal—Mora—*Delegation.* An agent intimated to G. D. & Co., his principals, a sale of goods to M. Thereupon G. D. & Co. confirmed the sale by sending a contract note to the agent, to be handed to M. The contract note bore that the goods would be delivered from time to time during three months. M. having received the contract note, returned it to the agent, denying that he had ordered the goods. The agent failed to communicate with G. D. & Co.; and about a month after M. received the invoice of the first instalment. Though it was obvious that the agent had failed in his duty; and although M. was otherwise aware of his untrustworthy character, he was nevertheless induced by him to sign a delivery order for the goods in the agent's favour, on the representation that they would be stored by him for G. D. & Co's. behoof. The successive cargoes, as they arrived, were dealt with in the same manner. The agent took possession of the goods without communicating with G. D. & Co.; sold them and appropriated the price. About three months after the transmission of the contract note, G. D. & Co. sent M. an account for the first two cargoes; in answer to which he wrote a letter expressing surprise, and withholding all information by which the goods could be traced. *Held* that though M. might not have given an order for the goods, he had nevertheless by his conduct incurred the liabilities of a purchaser.

Farther, *held* that this liability was not discharged, though G. D. & Co. made no claim on M. till nearly five months after the date of the last mentioned letter, by which time the agent had become insolvent; and though at one time they seemed disposed to take the agent as their debtor, they having been mislead by M's. letter, as well by the agent; and at its date having been unacquainted with certain previous dealings of M. with their agent, which afterwards came to their knowledge, and which threw a strong light on the present transaction.

This was an appeal from the Sheriff-court of Glasgow. Gaskell, Deacon & Co., manufacturing chemists, near Warrington, sued Alexander Mackay, muslin manufacturer, Glasgow, for the sum of about £443, as the price of certain quantities of bicarbonate of soda, furnished by them to Mackay during the months of July, August, and September 1868.

For the sale of their goods in Glasgow, Gaskell, Deacon & Co. employed an agent named Money. On the 11th June 1868 Money, apparently without consulting Mackay, ordered 1000 kegs of bicarbonate of soda in his name from his principals, Gaskell, Deacon & Co. The latter immediately sent a contract note to Money, to be handed to Mackay. The note was in the following terms:—

"*Alkali Works, Widnes,*
"*near Warrington, 12th June* 1868.

"Alex. Mackay, Esq., Glasgow.

"Sir,—We have this day agreed to deliver to you, through our agent William Money, Esq., 1000 1¼ kegs bicarbonate of soda at £11, 5s. p. ton. F.O.B. at Liverpool, for delivery in equal monthly quantities during July, August, and September. Terms, cash in one month, less 2½ per cent.—and on the following conditions—During this contract, whenever the works or manufactory of either party, or the pits, mines, or quarries, whence they usually obtain their fuel or raw material, are entirely or partially stopped by fire or accident, or by any strike of work-people, this contract, during such stoppage, is to be in abeyance to the same extent as the stoppage.—Yours respectfully,

"(Signed) GASKELL, DEACON, & Co.,
"*p.* JNO. HOWARD."

Mackay having received the note from Money, took it back to him, marking in pencil on it, "This is a mistake, this is not for me. I never ordered it." Money did not communicate this rejection to his principals, and soon after they forwarded to Mackay an invoice for 200 kegs as a first consignment of the soda. Mackay took the invoice to Money, and asked for an explanation. The conversation that passed between them is given by Mackay as follows:—"I went to Money with the invoice, and asked him what was the meaning of that coming to me. Before he had time to answer me, I said I would return the goods. He said I could not do so, as it would incur additional freight and other charges. I still insisted that I would return them. He said he would not allow it, and that he could put the goods in store with other goods he had of Gaskell & Deacon's, and would write to Gaskell & Deacon, and explain that he had received them."

Mackay soon afterwards received a notice from

the owners of the vessel by which the 200 kegs were sent, in the following terms:—

"*Broomielaw, Glasgow, 11th July* 1868.

"Mr A. Mackay.

"The steam-ship 'Penguin' has arrived from Liverpool, having on board the following goods for you, which you will please send for immediately, as we are not responsible for their safety, in any way, after being landed. G. & J. BURNS."

On this he endorsed a delivery order in favour of Money, who took possession of the goods, and, as it afterwards appeared, sold them, and misappropriated the price. A second, third, and fourth invoice followed with relative shipping documents. In each case Mackay endorsed on the shipping document a delivery order in favour of Money, who dealt with the goods in the same manner. Money's affairs became embarrassed, and by the end of 1868 he was hopelessly insolvent, and was shortly after sequestrated. The shipping notices were dated respectively 3d August, 24th August, and 5th September. Meanwhile Gaskell, Deacon, & Co. had been kept in complete ignorance of their agent's proceedings, and believing that Mackay had taken delivery of the soda in ordinary course, they sent him an account for the first two consignments, dated 1st September. In reply Mackay addressed the following letter to Gaskell, Deacon, & Co.:—

"113 *Virginia Place, Glasgow,*
"*4th September* 1868.

"Messrs Gaskell and Deacon.

"Dear Sirs,—I was surprised to receive an account from you on Wednesday last, which I have handed to your agent here, Mr Money, being ignorant of its contents; and I at present am not owing you any money. There has been an invoice or two also, which I have likewise handed to your agent, the contents not being for me.—Yours respectfully, ALEXANDER MACKAY,

"*pr.* J. MACKAY."

This letter was enclosed by the pursuers to their agent Money, who, in reply, promised to come to Warrington and give an explanation. The matter seems to have been allowed to drop for three months. Money did not come to Warrington as he promised, and soon after the 4th September, Mr Deacon, the acting partner of the pursuers, fell ill. At last, on the 21st December, Money came to Warrington, and told the pursuers that there had been no sale to Mackay, that he was ashamed to report it, because they (the pursuers) had so many reasons to find fault with his behaviour; that he had intercepted the goods; that they had never been delivered at all to Mackay; and that he intended to sell them, and the market having gone down, make up the difference out of his own pocket, and that he had sold them, and misappropriated the money. The pursuers, on the footing that this was a full disclosure of his actings, granted Money the following letter:—

"*Alkali Works, Widnes,*
"*near Warrington, 21st Dec.* 1868.

"W. Money, Esq., Glasgow.

"Dear Sir,—In reply to your note of to-day respecting bicarb. invoiced to Messrs Whyte & Hunter, and A. Mackay, Esq., and not accounted for to us, we regret very much to notice so great an irregularity. Regarding it however as an error of judgment, and looking at it only from this point of view, we will take your promissory-notes for the amount. We reserve to ourselves entirely the right of presenting any or all of such notes at any time. Our wish to deal leniently must be governed by circumstances, and the time of our presenting these promissory-notes must remain altogether in our discretion.—Yours truly,

"GASKELL, DEACON, & Co."

Immediately afterwards the pursuers discovered that Money had deceived them with regard to other matters. This shook their belief in his statement, and they wrote to him on the 28th December, threatening criminal proceedings. In accordance with this they did not take his promissory-notes referred to in the letter of 21st December, and sent a managing clerk to Glasgow to make further investigations. Some previous transactions between Money and Mackay now came to light, which had an important bearing on the present case. Mackay had on several occasions authorised Money to order goods in his (Mackay's) name from various houses for whom Money acted as agent, there being an understanding between them that Money should have a share in the transactions, and that he should get the goods upon the best terms as sales by his constituents direct to Mackay. Money acted nominally as broker; the invoices and shipping documents were transferred by Mackay to Money, who got delivery, and sold the goods for the joint benefit of himself and Mackay. In particular, it appeared that Mackay and Money had a joint transaction of this nature in the beginning of the year 1868 with reference to bicarbonate of soda furnished by the pursuers. In consequence of this information, the pursuers instructed Messrs Black & Honeyman, Glasgow, to demand payment of the price of the soda from Mackay. On his refusal the present action was raised.

The Sheriff-Substitute (ERSKINE MURRAY) decerned in terms of the conclusions of the summons. After findings in fact, his interlocutor proceeds:—"Finds on the whole case, and in law (1), that although the original order for the soda in question may not have been given by the defender, he so acted in regard thereto, in various particulars above narrated, and more especially by acting as proprietor thereof, in granting delivery orders in favour of Money, that he must be held, so far as the pursuers are concerned, to have acquiesced in and homologated the order, and to have sanctioned Money's proceedings. (2) That the delay of four and a-half months between the defender's repudiation of the bargain and the pursuers finally insisting on the claim, cannot, in the circumstances, be considered as *mora* shutting out their claim, as they were at the time ignorant of material facts as to the relations of Money and the defender, and even as to the transaction in question; and also because the defender himself, in his letter of 1st September to them, professed entire ignorance of the matter, which could hardly have been done *bona fide*, and necessarily threw them off their guard; and because, in addition, both the pursuers' managing partner and Money were ill during the most of the time. (3) That the agreement contained in the letter of 21st December to Money not being communicated to the defender, and never being acted on at all, but being substantially cancelled in a week, cannot be pleaded by the defender."

The Sheriff (GLASSFORD BELL) altered, and assoilzied the defender. After findings in fact his interlocutor proceeds:—"Finds in point of law, *first*, that the defender having received the contract note through Money without any direct communication from the pursuers, and the said note bear-

ing that the goods were to be delivered 'through him,' said defender was not called upon to do more than return it to Money; and, in like manner, as the invoices all bore that the goods thereby invoiced had been bought '*per* W. Money,' the defender was entitled to believe that his responsibility was at an end on Money agreeing to take back the invoice, and to receive the goods on the pursuers' account; *second*, that as the defender never bought or agreed to buy the soda in question, and as it was only at the urgent request, and in consequence of the representations of the pursuers' agent that said defender, as nominal consignee, authorised the delivery to him of the portion which came forward, and of which he took delivery accordingly, and disposed of the goods, and received the proceeds, the defender is not liable for the price to the pursuers; and, *third*, that even if the pursuers might have had some claim against the defender had they instantly pressed it on receipt of the letter of 4th September, they lost all right to such claim by not only tacitly acquiescing for nearly five months in the repudiation of the contract contained in said letter, but by actually entering into a new transaction regarding the goods, and accepting of a new debtor: Therefore sustains the defences, and assoilzies the defender: But in respect said defender ought to have suspected that there was something wrong in Money's mode of dealing with his principals, and omitted to take the prudent precaution of letting them know directly that he had not purchased their goods, and was not receiving them, finds no expense due to or by either party, and decerns.

"*Note.*—There is nothing in the evidence to show that the defender was acting collusively with Money, who has substantially admitted throughout that he gave the order without the defender's authority, his object no doubt being to obtain the control of the goods. The fact of there having been previous joint purchases by Money and the defender may have afforded the former facilities for deceiving the pursuers, but cannot otherwise affect the present case, in which a fraud was committed on the pursuers solely by their own agent. The defender naturally believed that when Money, as such agent, and with apparently ample powers, acknowledged there was no contract, the pursuers could not insist in one. But, in any view, all difficulty is removed by the course adopted by the pursuers after they knew that the defender denied liability. By their silent acquiescence for so long a period in that denial, and their agreement to take Money as their debtor, they not only prevented the defender from timeously operating his relief against Money, but they substantially gave up the pretended original contract, and liberated the defender, if he was ever bound."

The pursuers appealed to the First Division of the Court of Session.

SHAND and R. V. CAMPBELL for the pursuers.

SOLICITOR-GENERAL and WATSON for the defender.

At advising—

LORD PRESIDENT—This is an action for the price of goods furnished. The defences are various. First, that the goods were never bought. Second, that the goods were not received, but put into the possession of the pursuers' agent. Third, that the pursuers have taken their agent as debtor in the transaction, and so discharged the defender. Fourth, that the claim is barred by *mora* on the part of the pursuers.

The case turns on questions of fact rather than of law, and though it is not free from difficulty, I have come to the same conclusion as the Sheriff-Substitute.

The first document of importance in the case is the note of 11 June 1868, sent by Money to his principals. On receipt of this they sent a contract note to Money to be handed to Mackay, and it was so handed. Mackay brings back the note personally to Money with a pencil marking, and so the matter stood for some time. Up to this time I think there was nothing to implicate the defender, nor was there even anything irregular in his conduct. As it turned out, it might have been better to return the contract note direct to the pursuers. But as they had sent it through their agent, Mackay was quite entitled to return it by the same channel. It now became Money's duty to communicate with his principals and forbid the goods. When Mackay received the first invoice, he was well entitled to be surprised, as he says he was. At this point of time his conduct became very irregular. In the first place, seeing that Money had obviously not communicated with his principals, Mackay was bound to be very cautious with him. He goes to Money with the invoice, and here it is right to take his own words. "I went to Money with the invoice, and asked him what was the meaning of that coming to me. Before he had time to answer me, I said I would return the goods. He said I could not do so, as it would incur additional freight and other charges. I still insisted that I would return them. He said he would not allow it, and that he could put the goods in store with other goods he had of Gaskell & Deacon's, and would write to Gaskell & Deacon, and explain that he had received them." Money gives no explanation whatever as to how the goods came to be sent. Mackay next endorses a delivery order on the shipping document in favour of Money. The shipowners would not have delivered the goods to any one without an order from Mackay, and thus it was by the intervention of Mackay that the goods were put in possession of Money. This was an irregularity on the part of Mackay. He was not entitled to write that delivery order if he did not mean to receive the goods. No doubt it was putting the goods in possession of another, but in point of legal effect he took possession of them himself. However, the case would not have been so strong if it had stopped here. But unfortunately for Mackay, this is followed by other invoices, which he deals with in the same manner. When the second invoice came, he goes again to Money, and asks him why it had come. The explanation he gets is most unsatisfactory. Money tells him, according to Mackay's own account, that "he had written to Gaskell, Deacon, & Co., and that they said the soda was being made, and it was just to come forward, and he assured me in the most positive terms he had then orders to store it for them." If Money had orders to store, these must have been in writing. Why did Mackay not ask for a sight of this special mandate? Why did he deliver the goods to an agent who required a special mandate to enable him to act as he did? The third and fourth invoice followed, and no explanation is given except that "the stuff was being made and was just to come forward." Even if the matter stopped here,

the pursuers would have had a good claim against Mackay. It appears to me that by taking possession of the goods, (as he did by signing the delivery orders) he subjected himself to the liabilities of a buyer. But when the antecedent circumstances are considered, this view is much strengthened. Mackay and Money had a joint speculation in soda in the beginning of that very year. The goods were ordered in the name of Mackay, and they were sent and invoiced in the same manner as the goods in the present question. The profits were shared between Money and Mackay. Now it is a fraud on the part of an agent to make profit on the goods of his principal, and certainly a fraud for him to represent that the whole goods are purchased by a third party, whereas he a is part-purchaser himself. Mackay must have known this well. Indeed the transaction of June is so very like this earlier transaction, except that Mackay repudiated the sale, that the suspicion arises that if the market had been favourable the goods would have been dealt with in the same way. Be this as it may, I gather from the earlier transaction that Mackay knew what sort of man he was dealing with. He knew, while the pursuers did not, that he was capable of betraying his employer's interest. The price of the first two cargoes being overdue, the pursuers at length sent their account and asked for a remittance. Mackay could keep silence no longer, and accordingly he writes the letter of 4th September. *(His Lordship then read the letter.)* It was not true that he was ignorant of the contents of the pursuers' letter. He knew that he had received delivery of the goods, and that he had re-delivered them to Money. He makes a reference to an invoice or two; he says nothing about whether the goods were put into the possession of the agent. In fact, he suppresses as much information as he could. What follows is certainly rather adverse to the pursuers' claim. Mackay's letter was most alarming, yet the pursuers ask no explanation from him, and they delay most unaccountably to call their agent to account. They indeed inclose Mackay's letter to him. But nothing followed. Money promises an explanation, but gives none. Then both Money and Mr Deacon, the pursuers' acting partner, appear to have been taken ill. At length, in December, the pursuers seem to have been satisfied of the fraudulent conduct of their agent, and they write to him on the 21st December.

This letter is founded on by Mackay in two ways. *First*, in support of his plea that the pursuers took Money for their debtor, and so discharged him. I consider this quite inconclusive. The letter was a private communication between the pursuers and their defaulting agent, with which Mackay had no concern. *Secondly*. Mackay founds on the letter as part of the general evidence of *mora*, and for this it is available so far. In the course of a week the pursuers heard of other conduct of Money, and threatened him with criminal proceedings. All this time they make no communication with Mackay, and it is not easy to find any good explanation of this delay. But, after some embarrassment, I have come to the conclusion that it is not sufficient to constitute a bar to the present claim. It is very likely that a firm like Gaskell, Deacon, & Co. would be unwilling to press matters to extremities with a customer for misconduct of their own agent. But at last they became satisfied that Mackay had not acted honestly and fairly by them, and then the reason for forbearance vanishes. I have no difficulty except as to the plea of *mora*; and on the whole matter I am of opinion that the defender's conduct has been such as to make him answerable in the character of buyer, and that the subsequent occurrences have not relieved him of that liability.

Lord Deas—There are two questions in this case. *First*, Is the defender Mackay to be held to have become the purchaser of the goods? *Second*, Has anything been done by the pursuers sufficient to relieve him of liability? With regard to the first question, it is not immaterial to observe that there had been a previous transaction between Mackay and Money, which was of the same description and carried out in the same way as that now in dispute. It is not disputed that Money had Mackay's authority in this former transaction. In the transaction with which we have now to deal we have Money's communication with the pursuers, and the contract note sent thereupon by the pursuers to be handed to defender, soon after the invoice and shipping documents are received by the defender, who grants a delivery order in favour of Money. I regard these documents as constituting a sale on the face of them. The defender could not fail to understand it so, as the former transaction was carried out in the same manner. After the price of the first and second quantities of soda is past due, the pursuers send in their account to the defender. Then the latter writes his letter of 4th September, in which he says he is surprised to get that account. Why? he knew that the goods had been sent him; he does not explain that he had put the goods into the possession of the agent. It appears, too, from a previous letter of Money's, that not even this letter comes from the defender till the price of soda has fallen.

The difficulty against the pursuer's claim is, that on receipt of this letter they did not at once investigate matters. They waited till Money came to Warrington in December; and when he did come they seemed willing to treat the transaction as a consignment of goods to him on sale and return. But this arrangement with their agent was not gone into. They had reason to suspect him in other matters, and accordingly made further investigations. They then discovered something material in regard to defender's conduct which was not known to them before. The former joint adventure with Money came out. The question arises whether, in these circumstances, they were entitled to withdraw from their proposed arrangement with Money. It is impossible to suppose that the defender could regard the previous transaction as proper or legal. The defender turns out to stand in this unfavourable condition, and the pursuers very naturally suspect that the present transaction was intended to have been of the same sort, though it became convenient in the end to repudiate it. Whether this was so intended or not, certain it is that the defender put himself in the position of being able to act on the transaction if it had suited him. On the whole matter, I think there is not sufficient to show that the pursuers have relieved the defender of his liabilities as a buyer.

Lord Ardmillan concurred.

Lord Kinloch—I am of opinion that the defender Mr Mackay is liable to the pursuers in the

price of the goods libelled; and in this respect I am in favour of the interlocutor of the Sheriff-substitute, and opposed to that of the Sheriff.

In coming to this conclusion, I do not proceed on any general principle of the law of principal and agent, nor on much consideration of the other dealings of the parties; but on the special circumstances attending the individual contract.

The order for the goods was given to the pursuers as from the defenders, on 11th June 1868, by the pursuers' agent in Glasgow, Mr William Money. I think it fairly deducible from the evidence of Money and the defender, that this order was not given under any special authority from the defender, but by Money as a joint-adventurer in several ways with the defender, on a supposed general power to purchase what might form the subject of an advantageous speculation. The defender, if nothing more had occurred, might probably have repudiated the order, and remained free of responsibility for the price.

But on 12th June 1868 the pursuers addressed direct to the defender what has been called a contract-note, bearing "we have this day agreed to deliver to you, through our agent William Money, Esq., 1000 1¼-kegs bi-carbonate of soda, at £11, 5s. per ton, F.O.B., at Liverpool, for delivery in equal monthly quantities during July, August, and September." Though the words "agreed to deliver" are here used, I think they simply mean "agreed to sell;" and that this is a common sale note, addressed by the seller to the buyer, in acceptance of an understood offer to purchase.

This contract note was transmitted to the defender through Money, and admittedly received by the defender. He says that he carried it back to Money, and left it with that gentleman, with a statement that it was a mistake, and that he declined the transaction. I think that he would have acted more correctly had he addressed himself directly to the pursuers, as they had done to him; although, as in their case, he might have transmitted his answer through Money. Admittedly he did not do so; but only went to Money with the document. I am not satisfied on the evidence that in his conversation with Money he repudiated the contract as he now says he did. On the contrary, the testimony of Money rather implies that, on second thoughts he acquiesced in the purchase. Money says—"I think I said that as the order had been sent on in his name it would not do to alter it now, but it must remain as it was. I do not remember of his answering anything. That was all." Even if matters rested here, I conceive that there might be grounds for holding that the defender had given an implied assent to the contract.

But matters did not rest here. Early in July the pursuers sent 200 kegs of the soda to the direct address of the defender by the steam-ship 'Penguin.' On the 7th July they transmitted to the defender through the post an invoice of the kegs so sent, setting them forth in the usual way, as bought by him from the pursuers; and stating the price and amount. On the 11th July the ship-agents in Glasgow sent to the defender a written intimation that these kegs had arrived, and lay at his order. Clearly now was the time for a rejection of the goods if the defender did not intend to buy them; and for a rejection directly addressed to the pursuers, whom the defender must have now clearly seen to have not received any notice of his alleged prior repudiation. But, in place of this, what the defender did was to address to the carriers this order of delivery—"Please deliver the within-mentioned goods to Mr William Money." The goods were accordingly taken to and received by Mr Money. According to the defender's own evidence, this was just the course which he followed with a previous quantity of 1000 kegs of bi-carbonate of soda, purchased by him from the pursuers, on a joint-adventure in which Money, inconsistently with his duty as the agent of the pursuers, had engaged along with him.

On 3d August 1868 another quantity of 130 kegs came from the pursuers to the address of the defender, with an invoice, similarly stated, sent to him by post, and was dealt with by him in exactly the same way. On 24th August another quantity of 100 kegs, and on 5th September another quantity of 200 kegs, were similarly treated, —both coming in like manner with invoices, and both being made over by him to Money by similar orders of delivery. During all the time of these deliveries—running from 11th July to 5th September—the defender never addressed the pursuers repudiating the sale, though he must plainly have seen, so soon as the delivery of 11th July was made, that his now alleged repudiation had never been communicated to them by Money.

I am of opinion that in this state of things the defender clearly became liable to the pursuers as purchaser of this soda. He not merely, by his original silence to the pursuers, acquiesced in the contract note addressed to him directly as buyer in June 1868; he further took delivery of 630 out of the 1000 kegs, in four successive parcels, delivered through the months of July, August, and September, with an invoice of each parcel, and made them over to Money by an act proper to a purchaser and proprietor. He never during all this time addressed any repudiation to the pursuers, though necessarily aware that no such repudiation had been intimated by Money. I think the case is a very clear one for holding the defender bound as purchaser, if not by direct authorisation, by full adoption of the contract.

The defender has absolutely nothing to set against the weighty circumstances now alluded to, except his own statement, as a witness, that Money informed him, when the parcel of 11th July was received, that the pursuers had intimated that they would send on the soda as originally proposed, but that he, Money, was to store and sell it on their behalf. The evidence of Money by no means tallies with this statement; on the contrary, leaves the impression that the soda was to be kept and dealt with as a joint adventure like the former parcels; and I cannot exclude a strong suspicion that this was in reality the case. I cannot take the statements of a party, tendered as a witness for himself—particularly statements of a no very credible character—as sufficient to overcome the otherwise unanswerable presumptions. The question now is, not between the defender and Money, but between the defender and the pursuers; and, as regards the pursuers, I think the defender's own conduct stamps on him the character of purchaser, and infers the responsibility of such.

On 1st September 1868 the pursuers wrote to the defender requesting payment of the two first parcels of the soda. The price of soda had by this time fallen in the market. On 4th September the defender wrote for the first time to the pursuers denying liability for the price. Agreeably with what

I have already said, I think that this denial will avail him nothing. Nor do I think it of any importance that the pursuers did not answer this communication, and did not for some months press their demand on the defender. They say very reasonably that they thought it necessary to make inquiries at Money before taking further steps. Although failure to answer a letter may often, in the course of business transactions, imply an answer in the affirmative, yet, after a legal liability had been established, the mere circumstance that denial of liability is not answered will not necessarily imply an acquiescence in that denial. The delay for a few months to enforce a legal claim will not infer a forfeiture of that claim.

There is a great deal more difficulty about the transaction engaged in between the pursuers and Money on 21st December 1868, when they agreed to take Money's promissory-notes for the debt now sued for. If the defender had been a party to the proceeding, a very formidable plea in defence would have arisen out of this transaction. As it stands, I think the transaction is not such as to afford the defender liberation. Mr Deacon very reasonably explains that, going on Mr Money's statements as to what had happened, they agreed to take him as debtor in the debt; but that they immediately after found that Money had deceived them, and had defrauded them also in other transactions. In consequence of this, and before the promissory-notes were granted, they wrote to Money, intimating that they would make no arrangement with him. They did so on 28th December, only seven days after they had agreed to take his notes. Things then remained entire. The defender, who was no party to the transaction, and knew nothing about it, cannot say that the suggestion of this arrangement, or the lapse of the seven days during which it was pendent, did him any injury. Whatever might have been the case in other circumstances, I do not think the defender's liability is affected by this contemplated but never completed arrangement.

The Court sustained the appeal.

Agent for Pursuers—Alexander Cassels, W.S.
Agent for Defender—George Begg, S.S.C.

Friday, December 23.

A. *v.* B.

Divorce—Adultery—Condonation—Process—Expenses. Circumstances in which, the adultery having been committed during the husband's absence abroad, and he having returned home during his wife's pregnancy, the plea of condonation was stated and repelled, and divorce pronounced, though the husband had, during the last three months and a-half of his wife's pregnancy, cohabited with her and slept in the same bed, once every fortnight at least, and generally once every week, and had done so three days previously to her confinement; and although other people were aware of his wife's condition during the whole of this period, the child having come to its full time—the Court being of opinion that both his conduct and his wife's showed that he was not aware of her pregnancy.

Held that the wife was only entitled to recover from the pursuer the amount of her agent's outlays.

This was an action of divorce at the instance of A against B, his wife. The summons concluded that their Lordships "ought and should find facts, circumstances, and qualifications proven relevant to infer the defender's guilt of adultery with a person whose name, occupation, and place of residence is unknown to the pursuer, and therefore find her guilty of adultery with him accordingly: and our said Lords ought and should divorce and separate the defender from the pursuer's society, fellowship, and company," &c.

The statements of the pursuer were that he and the defender were lawfully married on 17th January 1848: That he is a sailmaker, and had been in use to be employed as such on board foreign-going ships. His dwelling-house, in which he resided with his wife and family when he was at home, was in ———: That on 27th January 1869 he entered at Sunderland on board the ship 'Coral Nymph' of London, for a voyage to China. The ship was wrecked in Gasper Straits on or about 22d May 1869. The crew, including himself, succeeded in reaching Singapore by means of boats, and the pursuer there received his certificate of discharge, which is dated 17th June 1869: That on the 30th of June 1869 he was engaged at Singapore for a voyage to Liverpool, on board the the ship 'Nyassa' of Glasgow. The ship reached Liverpool, and he was there discharged on 15th November 1869: That he returned home to ——— on or about 22d November 1869, having been absent from this country for a period of ten months, during which he had not, and had not the opportunity of having, any sexual intercourse with the defender, his wife, who had during the said period been resident, as she had been since their marriage, in ———: That on or about the 8th day of March 1870, the defender gave birth to a full-grown but still-born child. Of this child the pursuer was not the father, and could not be, the birth having taken place within three months and a-half of the pursuer's return home as above mentioned: That he was not aware of the pregnancy of the defender, and was in Leith at his work when he received the news of the birth of the said child. He thereupon ceased to reside with the defender, and has not since cohabited, or had any sexual intercourse with her: That the said child is the fruit of an adulterous connection between the defender and some person, whose name, occupation, and place of residence were unknown to the pursuer, but who is now represented by the defender to be C D, shoemaker in ——— during the months of May, June, or July, or some other time during the period foresaid of the pursuer's absence from this country, the particular date or dates thereof being to the pursuer unknown.

The defender admitted the fact of adultery, and that the said C D was the father of the said child born on 8th March 1870. But she averred that both before and after the birth the pursuer was well aware of the paternity. That "notwithstanding this knowledge, the pursuer has been and continues to be, on terms of great intimacy with the said C D. That the pursuer returned home about 22d November 1869. He lived and cohabited and had sexual intercourse with the defender until the beginning of January last, when he went to Leith, where he procured employment, retaining his house in ——, where the defender and the family continued to reside. After he went to Leith he returned