tion to be raised in the appeal is, whether our judgment was right? The defender says the title has been reduced on the ground of fraud, but that he had two titles, and possessed on both of them, and ought not to be turned out until it has been finally decided that he is not entitled to remain in possession upon that footing. We were unanimous in our judgment, but that is the reason why leave is required to appeal. There have been unanimous judgments where we have been held to be wrong. There are considerations of expediency both for and against the granting the application. But if the conditions which your Lordship has named are complied with, the specialties urged by the pursuers as objections will be removed, and I think we may grant leave to appeal.

Lords Mure and Shand concurred.

The following interlocutor was pronounced:—

"The Lords having heard the counsel for the parties, in respect of caution for violent profits having now been found, in terms of bond, No. 27 of process, Grant leave to the petitioner James Gardner to appeal to the House of Lords against the interlocutor of this Court of 13th June 1877, as prayed for, on condition of the petition of appeal being presented and an order of service obtained thereon within eight days from this date."

Counsel for Petitioner (Defender)—Kinnear—Lorimer. Agents—Adamson & Gulland, W.S.

Counsel for Respondents (Pursuers)—Balfour—J. P. B. Robertson. Agents—Tods, Murray, & Jamieson, W.S.

Wednesday, June 27.

FIRST DIVISION.

[Sheriff of Lanarkshire.

KEITH *v.* OUTRAM & CO.

Process—Amendment of Record—Court of Session Act (31 and 32 Vict. cap. 100) sec. 29.

The defenders in an action of damages for newspaper libel appealed it from the Sheriff Court for jury trial. An issue was adjusted and notice of trial given, and the defenders thereafter craved to be allowed to amend the record and issues to the effect of pleading *veritas convicii*, thereby raising a new ground of defence. Leave *granted*, but expenses found due to the pursuer since the date when defences were lodged.

In an action of damages in the Sheriff Court against newspaper proprietors for slander and libel contained in an article published in their newspaper, the defenders pleaded, *inter alia*, (1) that they were justified in publishing the article complained of, as it was merely a report of charges made in a criminal court, which were matters of notoriety; (2) that there was no malice on their part.

The record was closed, and a proof had been allowed by the Sheriff, when the defenders appealed to the Court of Session for jury trial under the Act 6 Geo. IV. c. 120.

Issues were then adjusted, and notice of trial given for the ensuing sittings. The defenders thereafter put in a print stating that they proposed to amend their statement of facts and pleas in law, and craved the Court to open up the record that they might aver that the statements in the article were true, and that they might put in a counter issue of *veritas*.

They quoted the cases of *Gelot* v. *Stewart*, Mar. 4, 1870, 8 Macph. 649, and *Arnott and Others* v. *Burt*, Nov. 14, 1872, 11 Macph. 62.

At advising—

Lord President—We are all of opinion that this amendment is competent, but it is necessary that an issue should be put in. That should be done when the amendment is lodged.

But there are some important conditions on which alone we can allow the amendment. Like all other defences, it ought to have been stated when the defenders came into Court. That is the rule both in this Court and in the Inferior Courts. I can conceive that amendments may be added to the record by a defender at a late stage which do not involve any great hardship to the pursuer, and where no great award of expenses would be necessary as a condition to their being allowed. But this defence belongs to a class of a different kind. It should have been stated when appearance was entered for the defenders in the Inferior Court. It would then have been for the pursuer to consider whether he would go on with the case, and that will now be a matter for his consideration. It is the duty of the Court, when an amendment is allowed, to place a pursuer in the same position as if the defence had been stated at the proper time. The only expense then incurred was the expense of bringing the action into Court, and he might have abandoned the action then on paying the defenders' expenses. All that he has since done may be thrown away if he is now induced to abandon the action.

This rule is not confined to this defence, but to all defences which put it upon the pursuer to consider whether or not he will go on with his action. When we allow such an amendment the payment of all expenses incurred since the defence ought to have been stated must be imposed upon the defender. At the same time, the particular circumstances of any case will always fall to be taken into consideration.

Lord Deas, Lord Mure, and Lord Shand concurred.

The following interlocutor was pronounced:—

"The Lords having heard counsel for the parties on the competency of the proposed amendment of defences (No. 18 of process) on condition of the defenders paying to the pursuer the whole expenses incurred by him in both Courts since 17th January last, Allow the defences No. 6 of process to be amended in terms of the said proposed amendment, and the counter issue, also now proposed by the defenders, to be added to the issue for the pursuer, adjusted and settled on the 3d March last, No. 13 of process: Appoint the said issue for the pursuer, and counter issue for the defenders, to be

the issues for the trial of the cause: Of consent, appoint the cause to be tried at the ensuing sittings of this Division of the Court; and remit to the Auditor to tax the account of the foresaid expenses incurred by the pursuer, and to report."

Counsel for Pursuer (Respondent)—Nevay. Agent—W. R. Garson, S.S.C.

Counsel for Defenders (Appellants)—Asher—Lang. Agents—Campbell & Smith, S.S.C.

Friday, June 29.

FIRST DIVISION.

[Lord Young, Ordinary.

BEATTIE OR MASON *v.* MASON.

Husband and Wife—Divorce—Desertion.

Circumstances in which *Held* (*rev.* Lord Young—*diss.* Lord Deas) that a wife whose husband had gone abroad was entitled to decree of divorce.

This was an action of divorce for desertion at the instance of Mrs Beattie or Mason against James Mason, her husband. The pursuer and defender were married in 1857, and afterwards lived together in Perth, where the defender carried on business as a shoemaker. Thereafter they went to Australia, from which, after selling their effects there, they returned into Scotland and took up house in Arbroath. The defender, who kept a hotel there, fell into dissipated habits, and in July 1869 left his home and went to Australia. He did not ask his wife to accompany him. Several of his five children were at the time seriously ill. Since that time he had left his wife and family to be supported by her friends.

The defender did not appear, but a certificate that the summons had been personally served upon him at Warrnambool, Australia, was produced. It was communicated from Australia that he did "not intend to take any action in the matter."

Two letters were produced written by the defender to the pursuer at some length, and peculiar in language and in composition. The following are extracts from them:—

"*Warrnambool, Oct. 6th* 1873.

"My Dear Wife and Family,—You will think it strange of me in not writing you sooner, But I knew air I closed my last letter to you that there was something wrong, for it is now emphatically confirmed upon my mind, for thy language now is cruel cruel to me, for you say you have pledged your word no more to dwell with me, and you say your word you will not brake. . . . You tell me now I have no home for you, and if you come to me you loss your home. But where the heart is, there is always a home. So when owr hearts and souls are thus divided, what pleasure is there now for me to live, or wheather shall I flee to rest my weary troubled mind," &c.

"*Warrnambool, Aug. 10th,* 7/74.

"My Dear Wife,—I received your letter dated Decem., and I cannot consent to any think you say in it, for though hath compleatly cut asunder thyself from me. I am going to say But little, for least said is soonest mended, so therefore you need not expect me to lift my pen again to the, for I say those that bound the to a teather may the support, for no leaving flesh would always this endure. to think each day no brighter hopes would bring when cast adrift from all I Loved, and yet you would expect me to maintain. But that I ever shall refuse to do, since this I have no home for the. its you can send my children here to me, or they will have to stay till I send for them, for I see no youce in writing longer, for it can only sorrow bring. . . . A few more observations I will make. did you not no (know) air I left the that I should not return. why then take a solom promice that you should no more cross the sea, unless it were that you did not wish to live with me, and that it was planned from first to last. . . . you talk of me comming home, But I would not if you had ten times as much, for thy home shall never shelter me. Though I were at the door I should not enter, but that you need not fear. I should sooner death then crouch to any, or enter a place that was not meant for me. As this is the last letter my hand shall ever pen to the, so I say for ever fare the well, for I may be far from here eire this your eyes behold, so adue for ever more."

In addition to proving the circumstances stated above, the pursuer further deponed at her examination—"I remonstrated with defender about his leaving. He said he was going to Australia, and would send for me in a few years. I was willing to go with him if I could have taken the children. He did not offer to take us with him. He has not sent me the means of going to him in Australia. I have been quite willing to go if he had sent me the means, and I have communicated that to him many times. My father supported me and my family till his death in 1873. I have supported myself and them since by keeping lodgers. . . . He has sent me small sums of money, but not sufficient to support myself and family. Since July 1869 he has sent me only £8 or £9 altogether. I have not heard from him nor received anything from him for my support for about four years. *By the Court.*—I am thirty-nine years old. The last money defender sent me was £2 in February or March 1873. I don't think I have the letter sending it. It just said that he sent the money, and made no promise of sending me more. . . . Defender is forty-six years old. I have received no letter from him since 1873. I wrote him immediately after receiving that letter. I have not written to him since. (*Q*) Why? (*A*) Because he told me not to inquire after him. He said so in that letter, but I have not looked at it for a long time. He did not say what he was working at. As far as I recollect, the letter said I need not inquire after him, as he never intended to come home, and might be far enough away ere the letter reached me; and that he was in better health than he had been for years. [Shewn letter dated in August 1874]—I see that I last heard from him in 1874, not in 1873. I had no quarrel with him. We were on good terms down to his leaving this country. (*Q*) In that letter he acknowledges receipt of a letter from you in December, and says, 'I cannot consent to anything you say in it;' what was that? (*A*) I asked him to come home as he had said he could not send for me. He said he had not the means to bring us to Austra-