a security, and that it is a matter of inquiry whether it is a security or not. I think that is wrong. An *ex facie* disposition is not a security. The right conveyed by an absolute disposition is an absolute right of property. But whether it is security or not, I think it is not a security in the technical mode of constituting securities. It may be reduced to that level by being qualified in various ways, but as a matter of conveyance—as a matter of law—it is not a security. It may in the end be no better than a security, but it is a perversion of terms to call it so." Now, Lord Ivory referred to what the Lord President said with approval. He says—"Your Lordship has well observed that it is inconsistent to say that an absolute disposition is a mere form of security. Why is an absolute disposition resorted to. The intention was to get rid of the very puzzles which a creditor would have been subjected by the ordinary forms of securities when the debt due to him is of a fluctuating character. The law did not allow securities for after debts, and so this shape was taken. A special statute was passed to establish securities for cash-credits. It was a statute which *per expressum* authorised this nature of the transaction by which contingent and variable balances should be made the subject of such security. But here we have an absolute disposition, and nothing by which it is affected can be qualified. There may have been an understanding that on repayment of the advance the subject was to be reconveyed. But is not every substantial interest of the party who says 'I am debtor in this subject' answered by the offer to grant a reconveyance when payment is made. But he cannot ask for a reconveyance until payment is made. It is impossible to lend countenance to a declarator by which a party seeks to cripple one whom he has already kept so long out of his right. I think the interlocutor ought to be adhered to on the ground taken by your Lordship, namely, the absolute right acquired by him under the disposition." Lord Robertson in the opinion he gave expressed the same views—"I never saw a pursuer so entirely in the wrong. He does not seem to be in a condition to avail himself of the remedy he seeks, for he does not appear to be in the situation to repay this advance. He wants it to be declared that the defender held the subject in security, and is bound to reconvey when he (the pursuer) is ready to pay, which he is not. That is most unreasonable. We must examine, however strictly, whether he is entitled to this remedy, which he admits he is not in a position to avail himself of. But there is no proof that the defender ever held in security."

Now, then, assume that this £2500, which according to the form of the transaction parties entered into was the price of this vessel on the stocks, was a loan of so much money, what was it that the lender stipulated for, and which the borrower agreed to give under the terms of the contract of sale, legal and enforcible. Under that contract, if the case of *Duncanson* is good, he could have got delivery of the ship. I am of opinion that the case of *Duncanson* is well decided, and that under the formal contract which was agreed upon between the parties the respondents are entitled to delivery of the ship. How far equity will interfere in restraining the use of it when they get it is another matter. I think it probable, perhaps certain, upon the grounds which your Lordship has indicated, although it is unnecessary for us to determine that question, that Wallace & Company would be ordered to retransfer the ship upon payment of £2550, with interest; but we do not need to determine that here, any more than the Court had to determine it in the case of *Leckie*—for the money is offered. Wallace & Company say—"Give us what the contract which was agreed upon between us confers upon us. Execute that contract. Give us the ship. Assume that we advance the money on the security of having that. Give us that. It was a valid contract between the parties. Equity may restrain us from speculating as the owners of the ship, that is, by profiting by any advance of price upon a re-sale. We meet you there, and avoid all litigation about that matter. We wanted to secure the money we have paid." I think that which the Court held to be reasonable in the case of *Leckie* is reasonable here. The cases are very much on all fours; and we cannot permit a trustee in bankruptcy to interfere to prevent an *ex facie* lawful and enforcible contract of the parties.

I therefore entirely concur with your Lordship, and think this interlocutor ought to be recalled, and the reasons of suspension disallowed.

Lord Craighill—I concur in the result at which both your Lordships have arrived; and as the grounds of Lord Young's opinion are precisely the grounds on which I rest my judgment, I need scarcely say anything in explanation of the views by which I am influenced.

The Court recalled the interlocutor of the Lord Ordinary, repelled the reasons of suspension, and refused the note of suspension and interdict.

Counsel for Reclaimers and Respondents—Guthrie Smith—V. Campbell. Agent—William Archibald, S.S.C.

Counsel for Respondent and Complainer—Dean of Faculty (Fraser, Q.C.)—Rhind. Agent—William Officer, S.S.C.

Thursday, January 13.

SECOND DIVISION.

[Lord Adam, Ordinary.

RALSTON *v.* RALSTON.

Husband and Wife — Divorce — Condonation—Whether Condonation can be Proved by Letter, and the Knowledge of the Adultery without Cohabitation.

A husband, who was aware of one act of adultery on the part of his wife, but not of a prior act of which she had also been guilty, wrote to her during his absence from the country several affectionate letters expressing his desire to meet her again, in one of which he assured her of his "full forgiveness for what had happened." *Held* that assuming the adultery of which he was aware

to be condoned by his letters, he was entitled to decree of divorce on the ground of the adultery of which he was not aware.

Question—Whether mere expressions of forgiveness in a letter without subsequent cohabitation will amount in law to condonation?

Opinion per Lord Young that they will not.

Process—Divorce—Appearance of Lord Advocate in Consistorial Causes—Conjugal Rights Act 1861 (24 *and* 25 *Vict. cap.* 86), *sec.* 8.

The defender in an action of divorce having pleaded condonation and subsequently withdrawn from the process, the Lord Ordinary appointed intimation of the process to the Lord Advocate under sec. 8 of the Conjugal Rights Act 1861. The Lord Advocate appeared and took up the defence of condonation.

Question—Whether the Lord Advocate is entitled at common law, or under the abovementioned statute, to plead condonation when it is not insisted in by the spouse entitled to plead it?

Opinion per Lord Young that he is not, condonation being personal to the spouse entitled to plead it.

William Ralston, a master mariner, brought an action for divorce against his wife Catherine Smith or Ralston, on the ground of her adultery "with David Langwell, formerly mate of the sailing ship 'Lochlong' of Glasgow, and with a person or persons whose names or designations are to the pursuer unknown." Mrs Ralston defended the action and denied the adultery charged, except in one instance in which the adultery was admitted, but with regard to which she stated that "the pursuer has, in the full knowledge of the facts, so far as they are facts set forth in the condescendence, cohabited with the defender, and has had connection with her as her husband," and pleaded condonation. In support of this plea she produced and founded on the two letters quoted below, written to her by her husband while in the knowledge of the act of adultery which she admitted. Before the date fixed for the proof the defender abandoned her defence, and the Lord Ordinary (ADAM), in consequence of the statements relating to the pursuer's alleged condonation, appointed the process to be laid before the Lord Advocate, in terms of the 8th section of the Conjugal Rights Amendment Act of 1861 (24 and 25 Vict. cap 86). The section provides that "it shall be competent to the Lord Advocate to enter appearance as a party in any action of declarator of nullity of marriage or of divorce; and it shall be competent to him to lead such proof and maintain such pleas as he may consider warranted by the circumstances of the case; and the Court shall, whenever they consider it necessary for the proper disposal of any action of declarator or nullity of marriage or of divorce, direct that it be laid before the Lord Advocate, in order that he may determine whether he should enter appearance therein." The Lord Advocate entered appearance and was represented by counsel at the proof.

The facts of the case as admitted or proved were as follows:—It was not disputed that the pursuer arrived in Britain in April 1879 from a voyage of a duration of twenty months, during which the defender had lived continuously in Scotland, and that on his arrival the defender, for whom he had telegraphed, joined him at Newport, Monmouthshire, at which port he was to take command of a ship. Within a few hours after her arrival at Newport the defender informed the pursuer that she was then in an advanced state of pregnancy, and a week after her arrival she gave birth to a child. During that week the pursuer and defender and the mother of the defender lived in the same lodgings, but the pursuer and defender did not occupy the same bed, nor did he at any time subsequently live with her as his wife. Immediately after the birth of the child he sailed on his voyage, and the evidence of condonation founded on by the defender was contained in the following letters written by the pursuer while absent on this voyage:—

"*Ship 'Selene,' Zanzibar, August 22d.*

"My dear Wife,—I write you a few lines to let you know that I am well, and hopeing these few lines will find you all enjoying the same blessing. I received your two kind letters of the 16th and 24th of July; and, dear Kate, you remember that I told you that I told Captain Clink that £5 would do; and I hope, dear Kate, you will try and make that do until we meet, if it is God's will, for I am wearying very much for to see you once more; and, dear Kate, as for any of them watching you, never distress yourself about it, for they can all kiss my backside. I want nothing to do with any of them, and so keep up your heart; it is you and me for it, and never you mind what they say or think; as long as you do right for the future towards me you need care for no one. Dear Kate, I am all discharged, and will sail in two or three days more, and this is a very bad time of the year in the Bay of Bengal, and if anything should happen to me you will know that you will have my full forgiveness for what has happened; and I hope you will sometimes think of me, for I often think of you; but, dear Kate, with God's help all will go well, and we will meet and be happy yet I hope. As I told you, I answered my father's letter, but gave them no news, only that I was well; so, dear Kate, don't let that distress you. Give my best respects to mother and all your sisters, and with my kind love to yourself and Willie, I remain, Your affectionate husband," &c. The "Willie" here referred to was a child of the marriage.

On 9th November 1879 the pursuer wrote another letter, in which he addressed the defender as "my dear wife," and concluded with the words "from your loveing husband." In a third letter he said—"hopeing to have a happier meeting next time, the best we ever had. Dear Kate, aa I have plenty of time and I expect to get your other letters before the mail sails for home, so this letter will be an answer to all that I have received from you—that is, if the mail come up to time. Dear Kate, you may be sure that I will be as quick as ever I can, as I am wearying to see you; and as long as a mast stands above the 'Selene's' deck she will catch it. I will astonish some of them that thinks Bill Ralston a fool; but never mind, dear Kate, it is you and I for it, and let all others climb a tree as they like—I care for none of them. You can tell Willie that I have

a nice little monkey for him, if it only lives to see Old England, and some very small and neat ornaments for you. Dear Kate, owing to a steamer leaving here to-night I send this of; you will get it in ten days sooner than the regular mail. I am trying to get away next week. You will get a letter ten days after this, so you will be all right. No more at present,—From your loveing husband," &c.

In explanation of these letters the pursuer deponed as follows in answer to the Lord Ordinary—"(Q) You said you wrote these letters for the purpose of deceiving her? (A) Yes. (Q) Did you deceive her from the first, while she was staying in Newport? (A) Yes. (Q) Did you treat her kindly there? (A) No; we had frequent quarrels. (Q) Then you had not forgiven her, or led her to believe that you had forgiven her, before you left Newport? (A) No. (Q) What were your quarrels about? (A) About her coming to me in the state she was in, and the scandal. (Q) Did you leave her in the belief that you had not forgiven her? (A) Yes; I told her so on leaving. (Q) Was the letter of 22d August the first you wrote her after that? (A) Yes. (Q) And did you leave her from the end of April till 22d August 1879 in the belief that you were not going to forgive her, and had not forgiven her? (A) I did. (Q) What did you suppose she would do with the furniture and the child? (A) I thought she would sell the furniture and go out of the country and take the boy with her. (Q) When did that idea occur to you? (A) While I was in Newport. (Q) And you thought it would be in time to stop that if you wrote to her on 22d August a letter which she would get a month or six weeks afterwards? (A) Yes, but she was getting money every month. (Q) Don't you think one of these affectionate letters would have been enough to deceive her, or did you think it better to go on in a course of deceit with her? (A) I thought it better to do that. (Q) To go on deceiving her? (A) Yes. (Q) Did you think it was necessary to write in such strong terms of affection in order to deceive her? (A) I did. (Q) In one letter you say, 'This is a very bad time of the year in the Bay of Bengal.' Did you mean that it was a dangerous time for seamen? (A) Yes. (Q) And that your life might be lost at anytime? (A) Yes. (Q) And immediately after you say, "And if anything should happen to me you will know that you have my full forgiveness for what has happened;" In that frame of mind you wrote her a lie of that sort? (A) I did."

In addition to proof of the birth of the child, evidence was led to establish that the defender had been guilty of adultery with David Langwell, mentioned on record, in October 1877, being eighteen months before the child was born. There was no proof that the pursuer knew of this adultery when he wrote the letters above quoted. Evidence was also led to prove that the defender had in 1876 committed adultery with a man named Newlands.

The Lord Ordinary pronounced this interlocutor:—"Finds it proved that the defender Catherine Smith or Ralston committed adultery with David Langwell, mentioned on record, and was delivered of an illegitimate child on or about the 29th April 1879; finds it not proved that the defender committed adultery with any other person; finds that the pursuer, in the knowledge that the defender had committed adultery, condoned the same; therefore assoilzies the defender from the conclusions of the action, and decerns."

He added this note—"The pursuer met the defender in Newport in the end of April 1879. He had been at sea continuously for about twenty months before this time. The defender was then pregnant of a child, which was born a few days after their meeting. The pursuer could not possibly be the father of this child, and knew beyond doubt that his wife had committed adultery in his absence.

"After remaining about eight days with his wife at Newport the pursuer again went to sea. The letters to his wife founded on on record were written during this voyage.

"Although the evidence is meagre, the Lord Ordinary thinks it sufficiently proved that the defender committed adultery with David Langwell in the previous October, which would account for the birth of the child.

"It is also attempted to prove that she committed adultery in October or November 1876 with a person of the name of Newlands, but the Lord Ordinary does not think this is sufficiently proved.

"In these circumstances the question arises, whether the pursuer condoned the defender's adultery? The Lord Ordinary thinks that no one can read the pursuer's letters to his wife without being satisfied that he had fully forgiven the act or acts of adultery which led to the birth of the child. The pursuer swears that he never forgave his wife, but that the letters were written for the purpose of deceiving her into the belief that he had, in case that she should in his absence sell their furniture and go away with their child. The Lord Ordinary does not believe a word of this. For reasons which do not appear, the pursuer seems to have changed his mind since his return from his last voyage. But that cannot take off the effect of his previous forgiveness of his wife's offence.

"Had the Lord Ordinary thought that the alleged adultery with Newlands had been proved, a question would have arisen how far the condonation would have applied to that act; but in the view the Lord Ordinary takes of the case it is not necessary to consider it."

The pursuer reclaimed, and argued—The Lord Advocate had no title or right to intervene. It was true that the Conjugal Rights Act 1861 by section 8 provided that "it shall be competent to the Lord Advocate to enter appearance as a party in any action of declarator of nullity of marriage and of divorce." But in cases of divorce his intervention was always in cases where there was reason to suspect collusion. It was not intended that he should take up a plea personal to a spouse, and which that spouse had abandoned, and it was not for the public interest that he should do so. On the merits of the case the Lord Ordinary had plainly erred in holding that the defender had committed adultery with Langwell in 1878, and that he was the father of the child born in 1879, since there was no proof of any adultery with Langwell except in 1877, which could not have been the adultery of which the child was the fruit. The pursuer never condoned the adultery with Langwell, for he never cohabited with his wife after he knew of it. He forgave the adultery which led to the birth of the child, but even

that adultery he never in the legal sense "condoned." Condonation cannot be inferred because the injured spouse says to the guilty spouse "I forgive you." It can only be inferred from conjugal cohabitation in the knowledge of the adultery committed—*Keats* v. *Keats*, Feb. 5, 1859, 28 L.J., Mat. Cases, 57; Ersk. i. 6, 45, was to the same effect. Here there was no such cohabitation. But assuming mere forgiveness to be condonation, it must be confined to the one act forgiven, and would not be extended to prior acts unknown at the time—*D'Aguilar* v. *D'Aguilar*, 1794; 1 Haggard, Ecclesiastical Cases, 773; Fraser on Husband and Wife, 1182.

Argued for the Lord Advocate—The right of the Lord Advocate to appear as a defender in all suits of declarator of nullity of marriage and divorce was expressed by section 8 of the Conjugal Rights Act 1861 in the most ample and explicit terms. The reason it was so given was that the public had an interest in the status of each member of it, and that no decree of divorce should go out which was really obtained by consent. Besides, the Lord Advocate had for a very long period, quite independently of that statute, been in use to intervene in such cases. In the Consistorial Court the Procurator-Fiscal of Court has been in use to intervene in order to aid the Court in any cases of divorce—Fraser, Husband & Wife, 1141; Riddell, 1002. It was entirely in the discretion of the Lord Advocate to enter appearance or not, and he was as much entitled to plead condonation as collusion. In regard to what constituted condonation, in law the consistorial law of Scotland differed from that laid down in the case of *Keats*, *supra*. The common law which was adopted in the Scotch Consistorial Courts allowed the plea when there was express forgiveness, verbal or by letter, without subsequent conjugal cohabitation. Thus Bankton, i. 5. 129, says conjugal cohabitation in the knowledge of the offence "imparts a full reconciliation in the same manner as if the injured party had expressly forgiven the offender or remitted the injury"—See Fraser, Husband and Wife, 1176, and authorities there cited.

At advising—

Lord Justice-Clerk—The main question raised in this case is one of considerable importance and novelty, and I do not propose to give and express opinion upon it. That question is, whether where there is an action of divorce any condonation is pleaded, being a condonation of the guilt as a plea to bar the husband's remedy, and that plea is withdrawn, it is competent or right for the Lord Advocate to take up the plea and maintain it? The words of the statute that authorise the Lord Advocate's intervention are as broad as they can possibly be, and it is a matter entirely in the discretion of the Lord Advocate under what circumstances he will or will not appear. I have not the least desire to say a word to limit that discretion. It is in good hands. But when the question does come up I wish to reserve my opinion entirely as to whether a plea of condonation which implies that the wife has been unfaithful, but that the husband has entered into a contract with her to overlook her fault, is a kind of plea which the public prosecutor—the public authority—ought to take up if the wife decline to pursue it. I do not think that tying the matrimonial knot anew under such circumstances is a matter which is of benefit to the public, nor do I see any real interest which the Lord Advocate could have to insist upon it. That is all I have to say about that matter.

In the second place, on the question whether the condonation here pleaded is a good plea, I must own that I do not think it is under the letters in question. This unfortunate sailor comes home and finds his wife very near her confinement of a child which is certainly not his. Well, he lives for eight days in the same house, the wife of course not being able to remove, and he very probably having no other place to which he can conveniently go. He then sails upon his voyage, becomes apparently soft-hearted towards his wife when he is away, and he writes those letters, but writes them under the belief that the only act of misconduct was that which led to the birth of the child of which he found she was about to be delivered. He comes home; I suppose he hears of other things, but he does not go near her, and he never cohabits with her again. And the question is, whether these letters will amount to such condonation as will prevent him from having his remedy for his wife's misconduct?

Now, there is quite enough for that without going into the question whether cohabitation is essential, on which there seems to be some difference of opinion in our law—there is none in the law of England,—but whether cohabitation be essential or not, the absence of cohabitation and the refusal to cohabit on the very first opportunity is a very material circumstance in showing how far there was any concluded intention of overlooking this offence. But the conclusive matter here—and it admits, in my opinion, of no doubt whatever—is that when these letters were written he did not know of his wife's conduct or the measure of it. He knew of one case, but he did not know about Langwell, and whether the proof of that would have been sufficient for a divorce or not it is quite plain that if he had known of that circumstance he would never have written these letters at all.

On the whole, I should have thought it a very feeble case of condonation even if the case of Langwell had not taken place the year before. The Lord Ordinary has fallen into the mistake of supposing that Langwell was the father of the child, and that therefore the pursuer did know before he came home all that there was to know. But that is not so, and on that ground I come to the opinion that as these letters were written in ignorance the husband cannot be bound by them now that he has discovered the full measure of his wife's misconduct.

I am therefore of opinion that the Lord Ordinary's interlocutor should be altered and that decree of divorce should be granted.

Lord Young—I am of the same opinion. I think the evidence does not show condonation or anything to bar the right of the pursuer to divorce. It is clear that at the time he wrote these letters the pursuer knew nothing of the adultery which the Lord Ordinary has found proved—that with Langwell in the October prior to the birth of the child. There was adultery besides that it is plain, but of that particular adultery the pursuer was ignorant when he wrote

the letter. That he meant to forgive, so far as a man by writing a letter to his wife might forgive, the adultery which led to the birth of the child is clear enough. I am not, however, of opinion that letters of the kind we have here without cohabitation will bar an action for divorce such as we have here, and even if the letters would have barred the pursuer had the only adultery been that which led to the birth of the child, evidence of adultery after that, while the child was *in utero*, which the Lord Ordinary holds to be proved, would entitle the writer of the letters to be free from any restraint which otherwise they would have put on him. He did not when he wrote the letters know of the misconduct with Langwell—whether it took place in October 1877 or in October 1878—and that is enough to entitle him to be free. But I have the greatest possible doubt, though I agree with your Lordship that it is not necessary to decide it in this case, whether mere letters, especially effusive and affectionate letters by a sailor abroad with his ship expressing his feelings affectionately towards his wife at home, will be sufficient to establish condonation which will bar an action of divorce. There is no authority for that up to this moment in Scotland, and I should be the furthest in the world from making any such authority here. It is not necessary to decide the matter here.

Another matter on which I must say something is the interposition of the Lord Advocate. It will not be supposed that I would be guilty of so unbecoming an act as to say one word by way of censure of the course he has taken. That would be entirely foreign to my purpose. But we are told that there is no case in England of the interposition of the Advocate-General in order to demand consideration of a plea of condonation which is not maintained by the party, on the ground that the party entitled to maintain it is abstaining from maintaining it collusively and for some improper purpose. There is no case, then, in England where the provision is made in terms analogous to those of the Conjugal Rights Act 1861, and the Dean of Faculty informs us that there existed before that statute a power at common law to protect the Court against granting a decree obtained by an improper arrangement between the parties. Certainly, however, neither here or in England is there any case in which this plea has been stated, and when the first case occurs of anything of the importance which this has, it is incumbent on the Judges before whom the matter comes to indicate their views upon the subject, if they have any—and I do happen to have some views on this point which concur entirely with what I understand to be your Lordships'. Condonation is in its own nature very much a personal matter. It is personal forgiveness. If that personal forgiveness is followed up by the husband taking back the guilty wife to live with him, he should certainly not be at liberty thereafter to turn round upon her and say—"You shall suffer for your misconduct just as if this had not happened." And so with the innocent wife taking as her husband the husband who has transgressed. But it is very much a personal matter, because the binding nature of such forgiveness from a moral point of view—and it is that which is at the bottom of it—depends on the state of the forgiving party's knowledge and information as to the conduct of the other. Of course what he remains ignorant of with respect to the other party, and does not act upon the knowledge of, is as good for legal purposes as if it did not exist. But I am the furthest in the world from being prepared to sanction such a notion as this, that if a generous and forgiving husband has written a letter of forgiveness to his erring wife, saying—"Well, I receive your confession and your tears and repentance, and I forgive you; I will not go back upon what you have done"—she, knowing that her conduct has been infinitely worse than anything known to him when he wrote the letter—knowing of misconduct on her part which she has not communicated to him—is bound nevertheless to use that letter of forgiveness and to prove those expressions of forgiveness as a defence to any action which he may raise. I think the wife or the husband—for I think the cases are the same—is perfectly entitled to say, and is only acting with propriety and according to morality and duty in saying—"Well, I will not avail myself of this, because I know that it was written upon a generous impulse and without a full knowledge of what has taken place." Now, I am making the observation only to indicate my own opinion that this matter of condonation and forgiveness is very much of a personal affair between the parties, and if the spouse entitled to plead the forgiveness does not desire to do so, that is not a case, in the absence of any special circumstances ascertained upon a special investigation, for the Lord Advocate or the proper officer, whoever he may be, to interfere and say—"No, but you shall; this has been done, and it is irrevocable, and if your wife, in whose favour you did it, does not choose to stand upon it, I, in the public interest, stand upon it and insist that the Court shall give effect to it." I think, as no instance of that has occurred in the past, we ought not by any observation of ours to give encouragement to the repetition of it in the future.

With these observations I entirely concur in what your Lordship proposes, that the interlocutor of the Lord Ordinary should be altered and decree of divorce granted.

Lord Craighill—The case now before us is an action of divorce at the instance of a man named Ralston against his wife. The ground upon which divorce is sought is adultery, and in the condescendence the adultery is said to have been committed in 1876 with a person of the name of Newlands, in October 1877 with a person of the name of Langwell, and there are other cases with other men more indefinitely libelled—the names of those other men, as the pursuer says, being to the pursuer unknown. The defender appeared and stated defences. She denied all the instances referable to persons stated in the condescendence, but she did admit there had been adultery, because she admitted that her husband having been away for the period of twenty months, she immediately after his return gave birth to an illegitimate child, so that undoubtedly there was adultery on her part, though it does not appear from anything admitted by the defender or stated upon record that the act was one of those special cases libelled on by the pursuer. The defence, however, is no sooner stated than it is withdrawn, though the papers remain in process and are available for

the information of all concerned, including the Lord Ordinary. After a proof had been allowed the Lord Ordinary, struck by the withdrawal of the defences, yet possessed of the information on which the defences had been made, and of the importance of one of the pleas which the defender had stated, viz., the blotting out of the acts libelled by condonation, appointed intimation of the cause to be made to the Lord Advocate, that he, if he thought fit in the circumstances, might appear and take the course which he thought the interests of justice required. The Lord Advocate did appear by those whom he sent to represent him. He took part in the examination of witnesses, and he took part in the discussion which followed on the close of the proof. The result of the whole matter was that the Lord Ordinary found that there had been adultery with a person named Langwell, and that this Langwell was the father of the child to which the defender had given birth on 29th April 1879. There is no doubt, according to my view of the matter, that the Lord Ordinary decided rightly when he found that there was proof of adultery with Langwell; but I am just as clear that the Lord Ordinary inadvertently had mistaken the proof with reference to the time when this adultery was committed. The adultery with Langwell occurred, not in October 1878, as the Lord Ordinary has found, but in October 1877, and hence it is as plain as anything can be that the adultery with Langwell was not the act of adultery to which the pregnancy is to be attributed. Apart from the defence which was urged, first by the wife, and afterwards taken up by the Lord Advocate, viz., the defence of condonation, the mere matter of time would have been comparatively unimportant; but with reference to that defence time goes deep into the case, and indeed so deep that it is with reference to the date of this particular occurrence that I think there is furnished an answer to be made to the plea of condonation,

Now, something has been said here with reference not so much to the right as to the expediency of the appearance of the Lord Advocate to take up and maintain such a defence as this. I confess that, supposing it were necessary for me to decide that matter, I should be disposed to think that the words of the 8th section of the Conjugal Rights Act of 1861 are so broad that the Lord Advocate might appear and take part in any action of divorce in Scotland. That being so, and this being an action of divorce, it appears to me that the Lord Advocate exercised his discretion, as he was entitled to exercise it, by appearing; and I do not think that the circumstance that there is here no evidence of collusion betwixt husband and wife ousts the right which otherwise he would possess. Because whether there is collusion or not, no one is entitled to obtain a divorce if the ground on which the divorce is sought appears upon evidence which is furnished to the Court to be a ground which has been blotted out and cannot be made the ground of any such application. Now, it appears—I am not saying there is condonation here—that when the Lord Advocate appeared he did not know the extent to which the proof would go. He was entitled to inquire into that matter, and he appears to have inquired to the extent which he thought necessary or expedient, and it is only in the end of the day, and after there has been inquiry, that the Lord Advocate is able to make up his mind and say whether, according to his view of the facts and according to his view of the law, it is his duty to take part in the discussion and maintain that the defence of condonation has been established, and that therefore the divorce should be refused.

Practically, however, as regards the decision of the case, it appears to me, in this action at anyrate, to be utterly immaterial what is the view we ought to take with reference to the rightness of the Lord Advocate's appearance, because everything that has been brought out here might have been brought out by the Lord Ordinary himself. He saw what was the plea that was stated by the defender. He saw what was the ground in point of fact on which the plea was brought forward. And the Lord Ordinary was entitled—nay, more, I think he was bound—to see what was the truth of the matter, in so far at anyrate as that could be discovered from the witnesses who were adduced for the purpose of proving the pursuer's case. Every question which was put in the course of the pursuer's cross-examination the Lord Ordinary might have put, and ought to have put, and I suppose he would have put, supposing the Lord Advocate had not been there. It is a very delicate and important duty which comes upon the Lord Ordinary when there is no appearance to defend—much more when there is an appearance and when that appearance has been withdrawn—and if in any circumstances condonation is to be looked upon as a plea by which a right to divorce is barred, then he cannot tell at the beginning of the case whether that plea can be supported or not; he can only know that at the end. And hence it is not only his privilege, but his duty, so far as opportunity is afforded him, to ascertain what is the truth as to the facts upon which that plea is put forward. It appears to me immaterial whether the thing is pleaded or not; if it comes within his knowledge he is entitled to inquire into it and give his decision according to that which upon the proof is ascertained to be the condition on which the law is to be applied. And therefore it really does not seem to me to be of materiality to the discussion of this case, the consideration of the question whether the Lord Advocate ought at the beginning to have intervened, or at the end to have put forward the plea of condonation. That plea has been put forward, and the Lord Ordinary has sustained that plea; and the question comes to be, whether or not in the circumstances that plea ought to be sustained, as it has been by the Lord Ordinary, or whether that plea ought to be overruled and decree of divorce granted?

The counsel for the Lord Advocate says that apart from this plea the pursuer is not entitled to his divorce, because the acts of adultery libelled have not been proved. As regards all of these except the adultery with Langwell I think the contention maintained by the Lord Advocate is right, and the Lord Ordinary has adopted the same view. But I am humbly of opinion that there is abundance of evidence in the case to support the charge of adultery with Langwell. The adultery was said in the condescendence to have been committed in October 1877. The proof shows, I think, that adultery was committed at that time, and there is no allegation, much less is there any proof, of adultery with Langwell at any other time.

That being so, we then come to consider what is the foundation of this plea of condonation. The pursuer returned to this country from his twenty months voyage in the year 1879. He was joined by his wife, he having telegraphed to her his expected arrival and sent an invitation that she should meet him. She came, and then she told him that she was within a short time of her delivery of an illegitimate child. The pursuer says, as he well might say, that he was staggered at the disclosure, but what is said by the defender, and what the Lord Ordinary apparently holds to have been done by the pursuer, was this, that he heard what the defender with reference to this matter had to say, and that he forgave her the wrong which she had done to him. And what this forgiveness was is evidenced if the tenor of the letters which were written in the course of his subsequent voyage is to be looked upon as proof of condonation. Now, the question has been raised whether forgiveness and condonation are to be looked upon in the law of Scotland as one and the same thing. I think that to a large extent this is a controversy about words. Forgiveness, if it means nothing more than forgiveness of the sin which has been committed, but without a renunciation by the injured husband of the right to avail himself of the protection which the law affords in severing the tie that binds him to his wife, would obviously not be a thing which would be equivalent to condonation, because I adopt entirely the view which has been presented by the Lord Justice-Clerk, which is to this effect, that it is not the use of words by the husband towards the wife, or by the wife towards the husband; it is something which leads to a result on the part of both; and unless that can be satisfactorily established I think it is in vain to contend that forgiveness can be dealt with as equivalent to condonation.

That being so, what we have to consider here is, whether the letters are or are not evidence of forgiveness, not in the sense in which I have used the word, but of condonation, which alone would be a bar to the pursuer's right to divorce. Now, there is a great deal undoubtedly in the consideration, in ascertaining what presumably was the meaning of the pursuer in writing these letters, that when he returned the next time to this country and his wife unexpectedly came to him she did not live with him; but it is plain enough that he had altered his mind between the time these letters were written and the time his wife joined him on his arrival from Bremerhaven; for the refers in two passages of these letters—or in one passage at anyrate — to the meeting that is anticipated upon his return; and what he says is this—"Hoping to have a happier meeting next time, the best we ever had." Now, I cannot but think there is evidence there to show that the forgiveness which had been extended by him towards the defender was not a mere forgiveness to this extent, that "I will say no more about it; I am very sorry for it, and I pity you, and nothing more will be done by me;" because I think it means this—it is a forgiveness to this extent, that they should meet as husband and wife, and that the happiness they had had before, and even greater happiness, would be the result of the meeting that is anticipated. Now, if that was the forgiveness extended by pursuer towards defender, I should not like to say in the meantime that that was not all that was required for the authorities in the law of Scotland. Cohabitation is undoubtedly the best and most pregnant proof that there has been condonation, but something short of cohabitation and intercourse between the spouses may be all that is required. While I express these opinions, it does not appear to me to be necessary in this particular case that I should definitely rest my judgment upon these to the effect which has been indicated, because even if it were to be taken, as the defender desires it should be taken, viz., as forgiveness equivalent to condonation—nay, as condonation itself—it would not be a condonation applicable to that which has been proved. It is plain from that which is stated by the defender upon the record—it is even more plain from that which is stated by the pursuer in the letter dated 22d August—which may be taken as 1879—that the only offence he had forgiven was the intercourse to which the birth of the child was to be ascribed, because he says, "You have my full forgiveness for what has happened." Now, what had happened? The birth of the child and the intercourse to which that birth was to be ascribed. There is nothing else there, and it is not said this particular letter had reference to anything else. But it turns out upon the evidence that a year before this child was begotten there had been intercourse with this man Langwell; that this was a thing of which the pursuer did not know at the time this letter was written, because he did not know of it till he returned to this country at the close of the voyage; and hence this act of adultery, which is a good ground of divorce by itself, is not a thing which was in his view when the forgiveness was given. Forgiveness of that was neither given nor accepted. The defender did not communicate it, the pursuer did not know of it, and hence that offence was not in the view of either party when that which is called forgiveness and condonation took place. Now, I think it plain that this forgiveness, or, if it be condonation, this condonation, is not broad enough to cover the case which has been established. There is an act of adultery proved, and that act is not covered by the forgiveness. If that be so, I see no reason why the pursuer is not entitled to divorce, and I am satisfied, from the way in which the matter is presented by the Lord Ordinary, that he would not have pronounced the interlocutor which has been brought here on this reclaiming note if there had not been a misapprehension in his mind with reference to the time when the intercourse occurred. I entirely concur in the judgment which your Lordships have given.

The Court recalled the interlocutor of the Lord Ordinary and granted decree of divorce as craved.

Counsel for Pursuer—Dean of Faculty (Fraser, Q.C.)—Nevay. Agent—J. Watson Johns, L.A

Counsel for Lord Advocate—Rutherfurd—Omond. Agent—Crown Agent.