

tion of lunatics required by the district board. Nor is it said that they are refusing to perform their duty within the scope of their authority. I think there is no doubt that they have exercised that judgment, and that the case is within the rule, and we should not interfere.

LORDS CRAIGHILL and RUTHERFURD.—CLARK concurred.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Mackintosh—Pearson. Agent—John Gill, S.S.C.

Counsel for Defenders the Glasgow District Board of Lunacy (Respondents)—Trayner—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defenders the General Board of Lunacy (Respondents)—Mackay—Jameson. Agents—Henderson & Clark, W.S.

Friday, December 1.

SECOND DIVISION.

[Lord Fraser, Ordinary.]

COLLINS v. COLLINS AND EAYRES.

(*Ante*, May 16, 1882, vol. xix. p. 596, and 9 R. p. 785).

Husband and Wife—Divorce—Adultery—Evidence of Adultery.

A husband having become aware of certain acts of adultery on the part of his wife, condoned her adultery on condition that she should never again speak or write to her paramour. Having become aware that several meetings had taken place between them, and that on one occasion they had been together after dark in a lonely place, he raised an action of divorce, alleging that on this occasion an act of adultery had again taken place. *Held*, on a proof, that no adultery had taken place at this meeting, and therefore that no adultery which could be founded on for the purpose of obtaining divorce had been proved.

Condonation—Whether Condonation can be Conditional.

Condonation by the law of Scotland is absolute in its nature, and it cannot be made conditional by paction. Where, therefore, adultery has been condoned, though it may be proved in an action of divorce brought on allegations of subsequent adultery by the guilty parties in order to throw light on the relations subsisting between them, it cannot itself be made the ground of divorce in consequence of the breach of any condition attached to the condonation.

Condonation—Conduct not amounting to Condonation.

A husband having received from a detective whom he had employed to watch his wife information which led him to suspect that an act of adultery had been committed by her, submitted the evidence he had procured to a lawyer with a view of obtaining an opinion as to whether any steps ought to be taken to

procure a divorce. Meantime he continued matrimonial cohabitation with his wife till such opinion should be obtained. *Held* that he had not thereby condoned the act of adultery in question, assuming it to have been committed.

On 4th February 1882 Alexander Glen Collins raised an action of divorce against his wife on the ground of adultery, calling as co-defender William Henry Eayres, against whom the summons contained a conclusion for damages. The adultery founded on was (Cond. VI.) said to have been committed after dark on the evening of 26th January 1882 in or near an unfinished or unoccupied house described in the condescendence, or in or near a masons' shed adjoining thereto. The pursuer also averred a previous course of adulterous intercourse between his wife and the co-defender (after detailing certain specific acts of adultery) in February, May, and June 1881, but as to this he stated:—“(Cond. III.) The defender admitted to the pursuer that she on several occasions in the previous part of that year, and particularly in the months of February, March, May and June, had been criminally intimate and had committed adultery with the co-defender. This conduct on her part, however, was forgiven by the pursuer for the sake of his children, on the express condition, undertaken by the defender at the time as the condition of the condonation, that she should never again speak or write to the co-defender. The said condition has been broken by the defender as after mentioned,” that is to say, by her having held various communications and interviews with the co-defender, and by the alleged act of adultery on 26th January 1882. The summons contained a conclusion that the pursuer ought to be found entitled to the custody of the children of the marriage.

Both the defender and co-defender denied the alleged adultery in January 1882, but both admitted having in that month met and spoken to each other several times in the street. The defender also averred that the pursuer knew, on or before 28th January, of her previous meetings with the co-defender, and notwithstanding continued to cohabit with her down to 2d February 1882.

The defender pleaded—“(2) The averments in article III. of the condescendence are not relevant to be admitted to probation, and *separatim*, they cannot form ground of a decree of divorce against the defender. (3) The pursuer having continued matrimonial cohabitation with the defender in the knowledge and belief aforesaid, he cannot found to any effect upon the acts alleged in Cond. III.; and *separatim*, he cannot obtain decree of divorce on the ground thereof.” The co-defender repeated, *inter alia*, substantially the defender's second plea.

The Lord Ordinary, after hearing parties in the procedure roll, allowed the parties a proof of their averments, and to the pursuer a conjunct probation, on the ground that the condonation admitted by the pursuer was alleged by him to be conditional, but expressing the opinion that but for that condition the acts condoned could not competently be admitted to proof. On a reclaiming note for the defender the Second Division adhered to this interlocutor, reserving the effect of proof of the alleged prior acts of adultery should they be established, and remitted to the

Lord Ordinary to proceed (*ante*, vol. xix. p. 596). Proof was then led at considerable length of the whole averments.

The pursuer produced a letter of confession from his wife, in which she acknowledged the commission of the acts of adultery which had been condoned as above stated; several of these acts were established by innkeepers and servants in the hotels where they took place. It appears that the pursuer first became aware of these acts of adultery in July 1881, when he was on a yachting excursion with his wife in the West Highlands. Circumstances then occurred which led to the confession by her of her adulterous intercourse with the co-defender. The letter of confession just referred to was then given to him by the defender. The pursuer deposed with reference to the condonation which admittedly followed on the disclosure thus made that he told the defender that for her children's sake and her own sake, on condition that she never again spoke or wrote to the co-defender, he would forgive her. The defender in her evidence stated that the forgiveness of her husband was extended to her fully and freely, and without any such condition whatever. After this disclosure the parties cohabited as man and wife till the events occurred which led to this action being raised. The defender with her husband's knowledge wrote to the co-defender telling him of the confession she had made, intimating that all relation between them must cease, and requesting the return of her letters to him, and of a ring which she had given him. The evidence bearing upon the defender's confession and what followed thereon is fully reviewed in the opinion of the Lord Ordinary, *infra*.

In December 1881 and January 1882 the co-defender was a member of an orchestra which was performing in Glasgow. The defender knew he was in Glasgow, having purchased a copy of a programme of concerts which contained his name; the pursuer also knew he was to be in Glasgow, and in consequence he proposed to the defender that she should go to the South of England. She objected, on the ground that she did not wish to leave her children, and on his saying she might take them with her, and offering to go with her himself, she still declined to go.

It was proved that while the co-defender was in Glasgow the defender was seen to go to the music hall at which he was engaged at hours when rehearsals were going on. On one occasion she rang the hall-keeper's bell and entered the hall for a minute or two; on other occasions she waited about the neighbouring streets through which the co-defender was likely to pass. They met and spoke on several occasions; on one occasion he was observed to avoid her. On 26th January 1882 the events occurred which led to the raising of the present action. The defender and co-defender had arranged to meet on that day, the meeting being arranged by the daughter of the person in whose house the latter lodged while in Glasgow. The meeting was at first wished by Mrs Collins to be in the South Side Park at 3 o'clock, but in consequence of the fact that Eayres was not to return from a professional visit to Dundee before that hour it was fixed for 5 o'clock, the place being the Great Western Road. It took place as arranged, and it was watched by a private detective and his wife, who were, and for some time had been, employed by the pursuer

to observe the movements of the defender and co-defender. These persons deposed that they saw a signal given by the co-defender, after which he crossed the street to the defender, and taking her arm walked away with her, turning after a little into a new road along which houses were still in course of being erected. Close to one of these unfinished houses the defender and co-defender disappeared from sight through an aperture between heaps of building material, and were out of sight, according to the detective and his wife, for ten minutes. There was a masons' shed at the house in question, which was open in front and was littered with stones and rubbish. The detective and his wife followed them through the opening just mentioned, and saw them walking on in front of them. They followed them back to the more crowded streets, where they saw them separate. The detective and his wife saw no reason to think that the defender and co-defender knew that they were being watched on this occasion. During the forenoon of the next day (27th January) the defender drove up to the door of a shop in which the co-defender was and motioned him to speak with her. He entered the cab and drove a short distance with her, returning to the person with whom he had previously been within a very few minutes.

The defender and co-defender both appeared as witnesses. Neither defender nor co-defender disputed the adultery in 1881 which had been condoned. They deposed with regard to the meetings which took place between them in January 1882 that no guilty familiarity took place. Their account of these meetings was that they were sought by the defender for the purpose of trying to get back the letters and ring which she had given the co-defender during the period of their intimacy, and which had not been returned, the co-defender, according to his account, having told the defender that the letters were destroyed, and that he had not the ring in Glasgow. They both deposed that on 26th January they knew that they were being followed, and that Mrs Collins was much agitated by that fact. They denied that they had ever gone into the masons' shed or the unfinished house, and stated that they had simply walked on after making their way past the obstruction caused by the piled up building material, and returned to the Great Western Road by another road. Neither the wife of the detective, who observed the defender carefully, nor a servant who assisted her on that evening to change her dress before going out to dinner with her husband, observed any white mark or stain upon her dress. It was proved that the defender knew for some time that she was being watched, and also proved that she had spoken to her husband on the subject, and that he had endeavoured to allay her fears on that subject.

On the 27th January Knowles, the detective, informed the pursuer of the events of the previous day. The pursuer continued to reside in his own house, and slept with his wife until the 29th January. During that time he was taking a legal opinion from a writer in Glasgow as to the probability of his obtaining a divorce in consequence of the events of the 26th January, taken along with the previous relations of the parties. On the 29th he left home, and shortly thereafter obtained the legal advice which he had been seek-

ing, and did not again cohabit with his wife, but immediately took steps to raise this action. The other facts of the case are fully detailed in the opinions of the Lord Ordinary and Lord Young.

The Lord Ordinary having considered the proof, found that the defender had committed adultery with the co-defender on various occasions (specified in his interlocutor) in 1881, but found that these acts had been condoned by the pursuer. The remainder of the interlocutor was as follows:—“Finds that the defender has not been guilty of such conjugal misconduct since said condonation as would entitle the pursuer to declare the said condonation revoked, so as to enable him to found upon these acts of adultery as a ground of divorce: In particular, finds it not proved that the defender, on or about the 26th of January 1882, committed adultery with the co-defender in or near an unfinished and unoccupied house in Eglinton Drive, Kelvinside, Glasgow, or in or near a masons' shed adjoining: Therefore assoilzies the defender from the conclusions of the action for divorce; finds her entitled to expenses from the pursuer: . . . As regards the co-defender, finds in the circumstances of this case that he is not liable in damages as concluded for; finds no expenses due to the co-defender: With regard to the conclusion of the summons as to the custody and keeping of the children of the pursuer and defender, finds it unnecessary, *in hoc statu*, to pronounce any deliverance thereon, but reserves to either party to make application in this process to the Court in reference thereto in the event of the pursuer and defender not again cohabiting as husband and wife, and decerns.”

“*Opinion.*—The pursuer and defender were married in the year 1872, and four children have been born of the marriage. The defender was slightly acquainted with the co-defender before her marriage, but down to the year 1881 this acquaintanceship had fallen into abeyance. In that year, however, the co-defender came to Glasgow in his professional capacity as one of the members of an orchestra engaged in giving musical concerts in Glasgow. It does not very clearly appear how the dropped acquaintanceship was renewed, but the defender took the opportunity of the co-defender's presence when in Glasgow of obtaining from him music lessons at his lodgings. The occasion was seized by the co-defender of engaging the affections of his pupil, and the result was a fall upon her part as sudden as it was complete. In her penitential letter to her husband after the discovery of her guilt she says that ‘the man whom you know I was acquainted with before our marriage met me on the 11th of January in Glasgow for the first time since 1870. I do not know what evil spirit took possession of me, but he influenced some uncontrollable influence over me, and made me do what he chose.’ Whether this be true or not, at all events the facts are proved that the defender resigned herself entirely into the hands of Eayres, corresponded with him in terms which cannot be reprobated too severely, if her letters (none of which have been produced) were couched in the same strain as a letter by the co-defender to her, addressed under a false name to Tobermory, and which the pursuer recovered from the post-office there.

“1. It was while the pursuer's yacht was lying in Ardnornish Bay that he made the discovery of his wife's intercourse with the co-defender. This

was on the 27th of July 1881. Going into the cabin he found his wife writing a letter, which on seeing him she hastily pushed up her sleeve. She immediately afterwards left the cabin, tore up the letter, and threw the fragments into the sea, and these having, on the lowering of a boat, been recovered, an explanation was inevitable. This explanation was the confession of the various acts of adultery which the Lord Ordinary has found to be proved. The defender appealed for mercy to her husband, and she did not appeal in vain. He did what very few men in the circumstances would have done. He forgave her, and took her back again as if she had never dishonoured him. The terms upon which this condonation was given have been represented differently by him and her. There is a direct conflict between them, and this on a most material point. The Lord Ordinary believes the statement which the pursuer has made on this point, and in doing so he does not mean to say that the defender was consciously uttering an untruth in so far as her account of their interview differs from his. But in consequence of this conflict of evidence it will be necessary to consider the case in the view of the pursuer's account of the terms of the condonation not being held to be sufficiently proved. This will be done hereafter.

“The pursuer's statement is, that ‘I told her that for her children's sake and her own sake, on condition that she never spoke to or wrote to the man again, I should forgive her. I think those are the very words I used.’ At a subsequent part of his examination he amplifies this. ‘She agreed to what I expressed. She repeated the words after me, that she would never speak or write to the man again, and never would dishonour me again.’ These latter words are important with reference to the construction to be put upon the condition, assuming it to be proved. The defender's account of this matter is that nothing was said as to her not speaking to or seeing Eayres thereafter. The Lord Ordinary adopts the account given of this interview by the husband, because, in the *first* place, although he must have been agitated by the discovery he had made, he could not have been so agitated as the defender, who had to make so melancholy a confession, and therefore he is more likely to have remembered what was said. In the *second* place, it was natural and reasonable that the pursuer should exact a promise from the defender of entire and absolute severance between her and the co-defender; and in the *third* place, in the letter which she wrote, disclosing the facts connected with her intercourse with Eayres, she says, ‘But, oh, dear Alick, if you but forgive me all this, I promise never again to dishonour you or myself again.’ It is quite plain that the pursuer did require from his wife a promise of absolute abstinence from her seducer, and that her remembrance of what took place between them is not to be trusted to. She was too agitated to know what she said or what she heard, and was willing to agree to anything, provided only she should not be driven an outcast from her husband's house. What the effect in law of this conditional condonation, or what was the meaning of the condition, will be considered immediately.

“The co-defender was engaged to play the violin at orchestral concerts in Glasgow in December 1881 and January 1882. His name as one

of the violinists was published in the programme, and a copy of this programme was bought by the defender in a shop in Buchanan Street, Glasgow. The pursuer also learned that the co-defender was to be in Glasgow. With a kindly consideration for her that deserves all commendation, he proposed to the defender that she should leave Glasgow and go to the South while Eayres was in the city. He feared her firmness, or he anticipated that the co-defender might make himself disagreeable by renewal of his acquaintanceship with her. To the pursuer's suggestion of her going away to the South, out of Scotland altogether, she offered various objections; 'she did not wish to leave her children,' to which the prompt reply was given by her husband that he would allow her to take them with her. She still demurred, and he offered to go with her himself. But all was of no avail; she would not go, and he declined to force her.

"Now, considering the relations that had previously subsisted between Mrs Collins and Eayres, this conduct on her part naturally excited suspicion in her husband's mind. He wished to save her from herself if he could. His anxiety was to help her. There can be no doubt whatever that at that moment she determined to see Eayres again; and if the Lord Ordinary could have held that this determination was with a guilty intent, then would have arisen the questions whether the condonation was or was not repealed, and, looking to the subsequent meetings between the parties, whether divorce ought to be granted for the adulteries that had been condoned, even although that of the 26th of January 1882 had not been proved.

"But the Lord Ordinary is unable to come to the conclusion that the defender's determination to see and her seeing Eayres no less than five times in Glasgow was with any guilty intent. This woman had got frantic at the idea of an exposure being made by Eayres, or by his wife, of her previous intercourse with the former. She had been told that Eayres' wife was coming to Glasgow, and she became alarmed. Her husband had previously endeavoured to get from Eayres the defender's letters, but in vain. Eayres stated, at one of the five interviews that he had with her in Glasgow, that they were destroyed; but she did not believe him. She had also given him a ring, which she wished to get back. He told her that the ring was in Glasgow, according to her account; but according to his, he said to her that it was in London. The Lord Ordinary believes the statement of the defender as regards what Eayres said, and that she was under the belief that he could deliver the ring to her in Glasgow. Having a husband so generous as to have forgiven her for what was past, one would have supposed that she would have taken him into her confidence in her endeavour to obtain from Eayres her letters and her ring. But it was not so. She thought her own way the best; and so she undertook, by appeals to Eayres himself, to recover from him the means which he had, under her own hand, of exposing her, and thereby extorting hush money. Her standing at the ends of closes near the music-hall where Eayres was at rehearsal, her following him through the streets, her requests for meetings through the school girl Annie Elphick, were all in the Lord Ordinary's opinion for one and only one purpose—the re-

covering of those damaging letters and ring then in the possession of Eayres. This man showed himself characteristically bad to the last. He tormented the woman by falsehoods as to the place where the ring was, and he no doubt told a falsehood—at all events she thought so—as to the letters being destroyed. If he had given her up her letters and her ring there would have been no walk round the Eglinton Drive, and this action would not have been instituted.

"2. With regard to the 26th of January 1882, the Lord Ordinary is of opinion that adultery is not proved to have taken place on that evening. The first proposal for a meeting upon that day was that it should take place at three o'clock in the South Side Park. It was therefore to have been in broad daylight, and in a public park, where no sexual intercourse could have taken place between the parties without public observation. The proposal for a meeting came from the defender, and she says that her one object, as it was at all her interviews, was to get back her letters and her ring. In consequence of the defender being in Dundee on the 26th, and not returning to Glasgow till three o'clock, the hour of meeting was changed to five o'clock, and the Great Western Road was substituted for the South Side Park as the place of meeting. The defender and co-defender met accordingly at (as nearly as can be made out from the evidence) a quarter-past five o'clock on the Great Western Road. They went up the Kirklee Road, which was lighted, and then along the Eglinton Drive, which was not lighted, and at the end of this drive they crossed through a path between unfinished buildings, which led into the Crossloan Road, and from thence got into the Great Western Road. The defender reached home at ten minutes to six. During the whole of this walk they were followed by the detective Knowles and his wife. The defender and the co-defender say that when they entered the Kirklee Road they were perfectly conscious that they were followed, and their whole talk was about their pursuers; and further, that the defender was so agitated that she could not speak about anything but the pursuit. The Lord Ordinary believes this. The pursuer, who had laid on the detective at the beginning of January, was spoken to by his wife several times during that month as to her being followed. Long before the 26th of January she knew that a watch was kept upon her proceedings, and she indicated this very clearly by her nervous and excited manner of turning round upon this occasion, as she had on previous days, to observe her followers. Now, the case for the pursuer as to adultery on the 26th of January is, that in the masons' shed, or near it, adultery must have been committed, and committed by persons who knew that there were two other persons following them not fifty yards behind. It is not credible that under such circumstances the defender and co-defender could have had sexual intercourse there; and still less is this credible when the character of the masons' shed is considered. It was open in front, and it was open on the side next to Glasgow. The floor of it was covered with chips of stones and dust. There were only bunkers on which lay the stones at which the masons had been working. There was no form, nor truss of hay, nor any other thing upon which a person could sit or lie. Mrs

Knowles discovered no white marks upon the back of the defender's dress, although she looked carefully at it when she came up to her on the Great Western Road; nor did the defender's maid, who took her dress off when she arrived at home. Opportunity, no doubt, will be held conclusive of guilt if the opportunity be such as can be reasonably supposed persons would and could have taken advantage of. Looking to the antecedents of the defender and co-defender, it would have been held proved that adultery had taken place if they had been traced to any place where it could be rationally supposed that sexual intercourse could have been had. If they had been traced to a house where there was a bed or a sofa, or even traced to the defender's own house, then the adultery might fairly be presumed, looking to what had already taken place between the defender and co-defender, and to the promise which had been given by the defender to the pursuer not to see the co-defender again. But as the facts have come out it is quite impossible to hold that the defender and co-defender turned into the masons' shed and there had connection.

"The time, moreover, between a quarter-past five and ten minutes to six does not allow, as Knowles says, ten minutes for their being together near the shed after they disappeared from the Eglinton Drive. There may have been ten minutes between the time when Knowles and his wife lost sight of the couple and the time when they afterwards made up to them at the great Western Road. But if any fact be more clearly proved than another in this case, it is that the defender and co-defender passed through the way from the Eglinton Drive to the Crossloan Road without stopping until they arrived at the great Western Road, when the defender, exhausted by terror and fatigue, leant for two or three minutes against the railing to recover herself. Her subsequent adventures that evening in going by a tramway car, away from her home, and hiding in the shady sides of the streets, in order to evade the people whom she thought were following her, were explained by herself quite distinctly, and the Lord Ordinary was impressed with the conviction that she was telling the truth.

"Looking to the time occupied by these wanderings of hers, and by the length of the round that the two parties had made, it is plain that Knowles and his wife are in error when they say that the defender and the co-defender stayed ten minutes at or near the masons' shed.

"3. But then comes the question, that supposing adultery not to have been proved as having taken place on the 26th of January, is the pursuer entitled,—in consequence of the conduct of the defender in violating the condition of never speaking to Eayres again,—to demand divorce because of the previous adulteries that had been condoned.

"The doctrine of condonation of adultery is derived in Scotland from the canon law, which was the law administered in this country in this class of cases (except in so far as altered by statute) both before the Reformation and ever since. That law was simply this, that if one spouse condoned the adultery of another, the offence was entirely extinguished. It could not be referred to, notwithstanding the subsequent misconduct of the erring spouse. The case was the same as if a new marriage had been entered

into. It was a matter entirely within the power of the innocent spouse to condone the offence, or to insist for the remedy which the law allowed—separation or divorce; and being entirely within his right, the Lord Ordinary is of opinion that he was entitled to adjudge any reasonable condition to his condonation. He was not, of course, entitled to adjudge absurd or fantastical conditions. But the matter being for him to forgive or to refuse forgiveness, it does not seem to be unreasonable for him to stipulate that the condonation should only have effect on the condition that intercourse with the paramour should for ever cease. This question in regard to express conditions attached to the condonation was considered by Dr Lushington in the case of *Bramwell v. Bramwell* (3 Hag. Eccl. Rep. 618). He refers to the matter as follows—'Condonation, however, has been set up; but this condonation is not only conditional in the eye of the law, as all condonations are, but it is specially so. . . . Assuming that the condonation was complete, and extended to all the previous adultery, under what circumstances and on what conditions was it given, and what was the duty of the husband, and what was his conduct afterwards? He solemnly engaged to separate himself entirely from this woman, and if possible not to carry on the least correspondence with her; yet shortly after this Mr and Mrs Bramwell go to Epsom, and he clandestinely returns with Jeffrey to Tunbridge Wells. . . . Can it be contended that this was conduct in conformity with Bramwell's solemn engagement? Here was not a solitary meeting, but meetings frequent for a length of time, and purposely concealed from his wife. Is the Court to believe from the ingenious suggestions of counsel, or from the asseverations of the party, that these meetings were merely to settle accounts? It is true Wiles states that she did see them engaged about accounts; but was it not Mr Bramwell's duty to have been specially cautious that such interviews should not occur without information to Mrs Bramwell, and should take place only in the presence of a third party? It is too much to ask of the credulity of the Court not to infer from this conduct a criminal attachment.' The Lord Ordinary has held it proved that the secret interviews which the defender had with the co-defender in the month of January were not with a guilty intent, and therefore he cannot reach the conclusion to which Dr Lushington pointed, namely, that the breach of the condition on which condonation was given revived the right of divorce.

"Mr Fergusson, who was long a consistorial judge, refers to this matter of condonation in his treatise on Consistorial Law (p. 178)—'As it is optional either to claim redress or to abstain from suing for divorce, a train of conduct fairly implying a renunciation of the right to prosecute, which in all cases may be renounced at pleasure, not less than a particular agreement or express pardon (the *condonatio* of the canon law), justly excludes the party from retracting. It is likewise to be remembered that acquiescence under the wrong is always accompanied either with retention and enjoyment afterwards of the conjugal privileges, or at least with power to use them as before.'

"Now, then, what was the meaning of the 'particular agreement' between the parties when

the defender made the confession of her guilt at Ardnornish Bay? It must be construed with reference to the purpose that the pursuer naturally must have had in his mind at the time. According to the pursuer himself, he exacted from his wife a promise that she would not 'dishonour' him again. Without putting too strict a meaning upon that word, it may be held that the pursuer required, and the defender promised, that there should not be any intercourse of an intimate character,—not merely sexual intercourse,—but intercourse such as is had by ordinary acquaintances, between the defender and co-defender at any future time, and that she should never voluntarily meet him or speak to him, if circumstances did not render that necessary. But it did not infer a breach of the condonation if there had been an accidental interview between them, or an interview for a purpose other than a renewal of the old intimacy. Now, so far from the defender and co-defender wishing to renew that intimacy in the month of January, it is plain that this was against the desire of both. Eayres, no doubt with a view in all probability to purposes of future extortion of money, refused to part with the letters and the ring, and kept the woman in constant excitement and agitation, till she seems to have lost all sense of prudence, in her endeavours to extract from him the evidence of her guilt. But the Lord Ordinary cannot hold that the express condition upon which the condonation was given has been broken; and consequently the right to sue for divorce for the condoned adulteries is not revived.

"4. But now to take the other view of this case, viz. that in the face of the defender's denial the condition cannot be held proved. Does the law imply a condition the breach of which would revive the condoned adulteries as grounds of divorce? It was contended by the pursuer that, apart altogether from the express condition, and holding it not to be proved, the law implied a condition that unseemly, suspicious, and compromising conduct on the part of the defender, such as took place in January 1882, was such misconduct as revoked the condonation. To this view of the law of Scotland the Lord Ordinary cannot subscribe. In England it would appear that conjugal misconduct subsequent to the condoned adultery—even though not *ejusdem generis*, such as cruelty—will operate as a revocation of the condonation. Sir John Nicholl in the case of *Durant v. Durant* (1 Hag. Eccl. Rep. p. 773) thus stated the law of England on the subject—'If nothing but clear proof of actual adultery will do away condonation of adultery, the rule of revival becomes nearly useless, for the revival is unnecessary. The only possible way in which the former adultery could bear would be in possibly inducing the Court to give some slight additional alimony; but it could not bear even in that way when the suit is brought by the husband, in which case, of course, there would be no question of permanent alimony. It appears, therefore, hardly to be consistent with common sense that clear proof of an actual fact of subsequent adultery should be necessary to remove the bar; something short would be sufficient, and it seemed almost admitted, though no direct authority was adduced in support of the position, that solicitation of chastity would remove the effect of condonation of adultery; but still it was main-

tained that it must be "an injury *ejusdem generis*." It is difficult to accede to the good sense even of that principle, or to suppose that the implied condition upon which the forgiveness takes place could be, "You may treat me with every degree of insult and harshness,—nay, with actual cruelty, and I bar myself from all remedy for your profligate adultery,—only do not again commit adultery, or anything tending to adultery;" the result of the argument is, that this must be supposed to be the condition implied when condonation of adultery takes place. The plainer reason and the good sense of the implied condition is, that "You shall not only abstain from adultery, but shall in future treat me—in every respect treat me (to use the words of the law)—with conjugal kindness; on this condition I will overlook the past injuries you have done me." This principle, however, does not rest wholly on its own apparent good sense, but the Court has authority to support it. It has been held that cruelty will revive adultery.'

"If adultery subsequent to the condonation were proved, there would be no necessity for founding upon the adulteries that had been condoned; but the proposition is that something less will revive the former adulteries. It seems to be the English law that the condition of the condonation is, that the injured party shall thereafter be treated with conjugal kindness, and that unless this were carried out divorce or separation could be obtained for the condoned adultery.

"The Lord Ordinary is not aware of any authority in the law of Scotland for this doctrine. Unfortunately until recent years the consistorial jurisdiction was exercised by a Court whose decisions are unreported; but the Lord Ordinary has had occasion to examine the manuscript records of the Commissary Court, and never found any case where there was a suggestion of this doctrine. The Scottish law on the subject is, as already said, derived from the canon law, wherein no such rule as to the revocation of condonation is to be found. Sanchez, the best and most learned expounder of that law, explains it when he says that the first adultery is by the *remissio* extinct, and can never be referred to again (Lib. 10, Disp. 5., sec. 19).

"In enumerating the cases where divorce will not be granted though there may have been adultery, his last head is as follows:—'Ultimus casus est, quando conjux innocens alteri condonat adulterium, et sic conciliantur. Cum enim divortium sit in favorem innocentis, potest innocens cedere jure suo, delictumque condonare et sic cessabit jus divortii. Hæc autem remissio est duplex, quædam expressa, quando, scilicet verbis expressis innocens conjux adulterum sibi reconciliat, condonans delictum. De qua reconciliatone loquitur, *l. si maritus 25, sec. si negaverint. Dig. ad l. Juliam de adulter*, probans ex tunc minime audiendum esse maritum de adulteris accusantem. Non tamen satis esset remissio mente retenta, nec signo aliquo externo conjugi nocenti expressa. Quia propositum mente retentum in his contractibus inter homines initis, nullius effiacei est. Deinde, quia cum remissio illa sit velut quædam juris divortii et accusandi donatio, oportet ut firma sit, eam parti, cui fit, intimari.'

"After thus dealing with the law as to the effect of condonation, he proceeds to the question whether subsequent adultery will revoke it (sec. 21). The canonist commentator, John Lupus,

maintained that it did; and he is thus disposed of:—'Imo Joan Lupus, eo cap. per vestras in princ. sec. 9, num. 22, ait posse forsan attentari, ut conjux ille reconciliatus relapsus in adulterium possit etiam de adulterio condonato accusari. Sed merito illum improbant Covarruvias, Barbosa, Azebedo, Surdus. Quoniam primum illud adulterium jam est remissione extinctum. At crimen, semel transactione aut indulgentia accusatoris extinctum, non potest amplius ab eodem in judicium deduci.' This is the law of Scotland.

'To the same effect is Voet, who says that divorce will be granted if adultery be proved (24, 2, 5):—'Nisi post adulterium perpetratum reconciliatio intercesserit, sive illa consensu aperto conjugis insontis, sive rebus ipsis et factis per concubitus ad adulterii scientiam subsecutum declararetur, cum cuique liceat juri suo renunciare, ac injuriam ei remittere, a quo eam passus est. Quoad vero alibi dicuntur mariti crimen lenocinii contrahere, qui deprehensam in adulterio uxorem in matrimonio retinuerunt.'

'All the authors referred to by Sanchez and Voet speak of the prior adultery as being totally extinguished. One of them, Sande, the President of the Supreme Court of Friesland, while he lays down the doctrine in the same terms as Voet and Sanchez, illustrates it by a decision of the Court of which he was President—Decisiones Frisicæ, book ii. tit. 6, def. 2:—'Hæc ita, nisi reconciliatio intervenierit, quæ intervenisse præsumitur, si vir sciens uxorem esse adulteram, ipsam cognoverit, vel mulier viro notorie adultero debitum conjugale exsolverit; tunc enim ejus mores approbasse, sique agnovisse censetur. Ac adeo crimen adulterii isthac reconciliacione extinctum est; ut si postea maritus vel uxor in idem crimen relabatur, prius illud amplius in judicium deduci nequeat, sed posterioris adulterii nomine tantum agendum sit. Hinc mulier agens nomine adulterii a marito commissi, ad dissolutionem matrimonii, declarata fuit (ut in foro loquuntur) non receptibilis, quia fatebatur se post admissum crimen diu marito cohabitasse, et ab ipso cognitam fuisse. Nec movit Senatam, quod, aliquo modo probabatur, virum, pendente lite, denuo adulterium admisisse; id enim novo processu ac novo instantia persequendum videbatur.'

'The law as laid down by Pothier (Traité du Mariage, art. 520) was to the same effect:—'Lorsqu'il a éclaté un commencement de rupture entre un mari et une femme, qui a été suivi d'une réconciliation, les faits de mauvais traitements qui ont précédé ce commencement de rupture, sont couverts par la réconciliation, qui rend la femme non recevable à s'en plaindre. C'est pourquoi la femme ne doit pas par la suite être écoutée dans une demand en séparation, si ce n'est pour des faits nouveaux qui se soient passés depuis la réconciliation.'

'This rule was altered in France by the Code Civil. From 1803 down to 1816 divorce *a vinculo* was allowed in France for adultery, and the provision of the Code Civil in regard to *remissio injuriæ* is contained in articles 272, 273, and 274. Article 272 is as follows:—'L'action en divorce sera éteinte par la réconciliation des époux, survenue soit depuis les faits qui auraient pu autoriser cette action, soit depuis la demande en divorce.' Then the next article, 273, for the first time allowed a reference to condoned adultery—'Dans l'un et l'autre cas, le demandeur sera dé-

claré non recevable dans son action; il pourra néanmoins en intenter une nouvelle pour cause survenue depuis la réconciliation, et alors faire usage des anciennes causes pour appuyer sa nouvelle demande.'

'These articles have no longer operation in France except in regard to actions of separation, which is the sole reparation given to an injured spouse. The reference to the earlier wrongs was thus introduced by the special legislation of the Code, and the mode in which this has been interpreted by the French Courts is thus stated by M. Demolombe in his treatise on the Code Civil (vol. ii. p. 532)—'L'article 273, en permettant de faire revivre les anciens faits, n'accorderait à l'époux qu'une faculté illusoire, s'il était même alors nécessaire que les faits nouveaux fussent par eux-mêmes, et par eux seuls, assez graves pour faire prononcer la séparation. Aussi cette condition n'est-elle pas nécessaire; les faits anciens et le pardon même qui les avait suivis, peuvent primer aux faits nouveaux la gravité qui leur manquerait sans cela. Peu importe, d'ailleurs, que les faits nouveaux soient de même ou de différente nature que les faits anciens et d'abord pardonnés. Le texte (Art. 273) et la raison n'exigent aucune condition de ce genre. Des excès, des injures pourraient donc faire revivre une cause résultant de l'adultère, et réciproquement.'

'Thus the French law has been made almost identical with the law of England, but only through the action of the Legislature. In the absence of any legislation on the subject as regards Scotland it must be held that the law of Scotland has not advanced to this extent, and the case of *Lockhart v. Lockhart*, Mor. App. v. Adultery, No. 1, is an authority against it. The reason for the rule of the canon law, followed in Scotland, has been well stated by Chief-Justice Parsons—the Chief-Justice of Massachusetts, thus—'It would be injustice to the wife, and immoral in the husband, to claim and enjoy as his peculiar marital rights the society of his wife after a knowledge of her offence, and afterwards to cast her off for that same offence.'

'But taking it that the law of Scotland is otherwise, and that the English rule is that of this country, did the wife violate the condition of treating the pursuer with conjugal kindness by her conduct in January 1882? What has been already said as to the breach of the express condition on which condonation was granted—assuming it to be proved—is applicable to the alleged breach of this implied condition. Imprudent the defender undoubtedly was, and foolish, in having secret interviews with a man like Eayres. Her conduct exposed her to suspicion, and thereby necessarily compromised the good name of her husband. His anger when he heard of it was aroused and was justifiable, and the suspicions which it gave birth to in his mind must have been the cause to him of much pain. Granting all this, still when it is found that the wife had no guilty purpose, but was intent merely to get destroyed that which embittered her existence—the evidence of her former offence—it cannot be held that she violated any implied condition—taking it in the widest sense in which the English cases have regarded it—on which her pardon was granted.'

'5. In regard to this matter of condonation there was a proposition submitted by the defen-

der which the Lord Ordinary cannot adopt. It is proved that the pursuer obtained information from Knowles as to what happened on the 26th of January, and that he thereafter slept with his wife on the three following nights. This, it is said, is condonation of the adultery on the 26th of January, if that should be held to be proved. Now, in order to infer condonation from subsequent cohabitation the condoner must be proved to have had not merely knowledge of the facts, but also a reasonable probability that he will be able to prove the adultery. The pursuer had not such knowledge on the 27th, 28th, and 29th of January, and it was only after he had got the legal opinion from the Glasgow writer that he found himself in the position to break up matrimonial cohabitation.

"6. The summons contains a conclusion directed against the co-defender, in which he is asked to pay £1000 of damages. This raises another question somewhat of novelty and difficulty. The damages can only be sought on account of the adultery which has been condoned, and if the question had arisen, unattended by the specialties that exist in this case, the Lord Ordinary would have held, that although the pursuer had condoned his wife's adultery, he had not thereby barred himself from claiming damages from her seducer. It is quite compatible with forgiving a repentant wife to demand reparation from the man who has brought dishonour both upon her and upon her husband, and has diminished the happiness of both. If the pursuer had, immediately upon the condonation in July 1881, brought his action of damages against Eayres, the Lord Ordinary would have held it relevant. But the long delay which has since occurred, and the action which has been taken, not in consequence of the adulteries which were condoned, but on account of an alleged adultery which is not proved, preclude the pursuer from now insisting for damages. There is a case, unsatisfactorily reported, which has application to this point, in the following terms (*Aitken v. Macree*, February 6, 1810, F. C.)—"Found unanimously that a party had no claim to damages for adultery who continued to cohabit with his wife after he had discovered her guilt. The pursuer's wife appeared also to have been a person of loose character before the defender got acquainted with her." The grounds of this judgment do not very well appear from this short report. The latter part of it seems to imply that the judgment must have been influenced by the fact that the husband could have suffered no damage seeing that the wife was a person of loose character when the defender in the action of damages had connection with her. The Lord Ordinary would not have held himself precluded by this decision from finding the co-defender liable in damages, notwithstanding the condonation, had it not been for the specialties that have been adverted to.

"7. As regards expenses, however, which are entirely in the discretion of the Court, the matter stands upon a different footing. The whole of this miserable history has arisen out of the mean and cruel conduct of the co-defender by torturing the unfortunate woman whom he had betrayed into evil in keeping back from her the letters which gave him power over her. A man like this, who barely escapes from a demand of damages, and who has been the occasion of this

unfortunate lawsuit, is one not entitled to any favourable consideration in regard to the matter of costs.

"8. With regard to the conclusion as to the custody of the children, it is unnecessary to pronounce any judgment at present. The pursuer made a great sacrifice when he forgave his wife at Ardnornish Bay, and he may perhaps make another step in the way of forgiveness by taking his wife back again to his home. It is only in the case of a permanent separation between the husband and the wife that the Court would be called upon to interfere in regard to the custody of the children."

The pursuer reclaimed, and argued—The adultery on 26th January was proved; at least it was constructively proved, for the law of Scotland will presume guilty intent and hold adultery as committed where sufficient opportunity is shown by the guilty party with a former paramour. If the pursuer had failed to establish by sufficient evidence adultery subsequent to the condonation sufficient to found decree of divorce, he had at least shown misconduct sufficient to revoke the previous condonation and revive the prior acts of adultery. In the first place, the express condition attached by the pursuer to the condonation had been violated, and even if the law will not allow an express condition, there is an implied condition to every condonation of subsequent good conduct, and that implied condition had been broken by the defender. *Lockhart's* case decided only that adultery prior to condonation could never of itself form a ground of divorce. The question which arises here of misconduct short of adultery subsequent to condonation did not arise there. It is true that by the canon law condonation absolutely wiped out previous adultery, which could not then be revived to any effect. But the canon law was not altogether adopted in Scotland in matters consistorial—*Lockyer v. Ferryman*, June 28, 1876, 3 R. 882. Cruelty condoned by the ill-used spouse could be revived by subsequent cruelty—*Graham v. Graham*, July 19, 1878, 5 R. 1093; *Macfarlane v. Macfarlane*, February 7, 1849, 11 D. 533. In England adultery was revived by subsequent misconduct short of it—*Bramwell, Durant, supra cit.*; *Winscom v. Winscom*, 3 Sw. & Tr., 380; *Newsome v. Newsome*, 2 L.R. (Pro. and Div.) 306; *Dempster v. Dempster*, 2 Sw. & Tr. 438. The pursuer's action was not barred by his cohabitation after the 26th, for then he had no knowledge of his wife's adultery, but only had ground of great suspicion, without having been advised as to the probability of proving his case. Certain knowledge is essential, and it must be knowledge that he has the right to divorce—*Ellis v. Ellis*, 24 L.J. (P. M. and A.) 100; *Dillon v. Dillon*, 3 Curteis, 86—Lord Howell, p. 113; *Elvoes v. Elvoes*, 1 Hagg. Con. 269; *Legrand v. Stewart*, 2 Pat. App. 596; *Peacock v. Peacock*, 27 L.J. (P. and M.) 71.

The defender replied—The adultery on the 26th was not proved. It is fixed law in Scotland that no condition can be adhibited to condonation. It is *ex lege* absolute and unconditional. It is a passing from the injury—*remissio injuriæ*—and comes under the category of discharge, and is so treated by all the institutional writers—*Bell's Prin.* 1513; *Ersk. Prin.* i. 6, 23; *Watson, M.* 330; *Macfarlane, supra cit.*, Lord Fullerton, p.

541; *Watson v. Watson*, November 18, 1874, *ante*, vol. xii. p. 78, Lord President; *Graham*, *supra cit.*; anonymous case reported in 5 Br. Supp. 863. English law might be different, but it was no safe guide, since it was not complete in its provision of remedy for adultery, not allowing it at the wife's instance for adultery alone. But in any case the alleged condition of not speaking or writing to the co-defender was not proved. There was only his evidence for it, she denying it. Though no direct decision, we have most weighty *dicta* that you cannot go back on condoned adultery except by reason of adultery. The cases of *Graham* and *Macfarlane* were inconsistent with any other view. In English law it would seem that something short of adultery will do, but it has never been so in Scotland. To draw the line would be practically an insuperable difficulty. Therefore the safer rule is to follow the Scotch *obiter dicta* rather than the English decisions. Assuming adultery on the 26th, it was condoned by subsequent cohabitation. His knowledge then was commensurate with the evidence which he had produced. He had then all the grounds for the belief which he said he had now. But even if the cohabitation were not sufficient to condone adultery, it was enough to condone misconduct short of that which the pursuer argues to be sufficient to revive the prior acts admittedly condoned. On the question of revival *Winscom* is entirely *obiter*. *Bramwell* was a case of cruelty, condonation of which is on an entirely different footing. Something short of full and certain knowledge, and of its legal bearing, will suffice to import condonation by subsequent cohabitation. Belief was enough, and given that, cohabitation for the briefest period was enough—*Ersk. i. 6, 45*. There was no question whether he intended to forgive. If he did what in law imported condonation he could not be heard to say he did not intend it—*Wemyss v. Wemyss*, March 22, 1866, 4 Macph. 660, Lord Justice-Clerk, p. 663; Bishop's Marr. and Div. sec. 44; Bankton, bk. i. tit. 5, sec. 129; *Watson*, *supra cit.*

No appearance was made for the co-defender in the Inner House.

At advising—

LORD YOUNG—This action is by a husband against his wife for divorce on the ground of adultery, and contains a conclusion for damages against her alleged paramour, who is called as co-defender. Several acts of adultery are averred to have been committed in the year 1881 prior to 27th July, on which day the defender made disclosure and confession of them to the pursuer, and “was forgiven by the pursuer for the sake of his children, on the express condition, undertaken by the defender at the time as the condition of the condonation, that she should never again speak or write to the co-defender,”—Cond. 3. The pursuer avers that this condition was broken by the defender, inasmuch as in December and January 1881 she and the co-defender “renewed their acquaintance and intimacy,” and “were in the habit frequently of walking together alone,”—Cond. 5. Lastly, the pursuer avers that on 26th January the defender committed adultery with the co-defender in a certain masons' shed—Cond. 6.

The defender on her part avers that the admitted condonation of her adultery prior to 27th

July 1881 was followed by cohabitation, or rather that her husband's cohabitation with her continued without interruption till 2d February 1882, and this is confessedly true down to 29th January 1882, when the pursuer left home. In answer to the action she pleads the condonation with respect to the adultery averred prior to 27th July 1881, and denies the act averred to have been committed on 26th January 1882. The co-defender does the same.

On 22d March last the Lord Ordinary allowed a proof generally. The defender reclaimed to this Court, maintaining that the condoned adultery ought not to be admitted to probation either as a substantive ground of action or as evidence bearing on the alleged act of 26th January 1882. We were of opinion that the previous relations and conduct to each other of the defender and co-defender might have a legitimate and natural bearing on the facts which should be proved relative to their conduct on 26th January, and that the condonation of the prior adultery was no reason for excluding evidence of it as thus bearing, which we thought it reasonably might, on the alleged subsequent adultery which was not condoned. We therefore affirmed the Lord Ordinary's interlocutor, but without determining or expressing any opinion on the question which was then plainly not ripe for judgment, whether the defender had forfeited the condonation so as to be barred from pleading it against the action so far as founded on the adultery to which it applied.

On the evidence the Lord Ordinary has found the adultery prior to 27th July 1881 proved, but in respect of the condonation has refused divorce on the ground of it. The only alleged act which was not condoned, viz., that of 26th January 1882, he has found not proved, and the result of his judgment is therefore necessarily absolutor from the action.

The argument to us related to those three questions, viz., 1st, Whether the act of adultery alleged to have been committed in a masons' shed on 26th January is proved? 2d, Whether condonation of adultery (cohabitation following) is conditional at common law, or may be made so by express paction, so that it will be forfeited by a breach of the condition? And assuming an affirmative answer on either head, then 3d, Whether the defender has forfeited the condonation by a breach of the condition legally or pactionally attached to it?

On the first question I agree with the Lord Ordinary, explaining that I have carefully considered the evidence of it in the light of the fact that the defender and co-defender were recently before paramours, and had frequently committed adultery together. I am satisfied on the evidence that the co-defender was not only not desirous of, but positively averse to, a renewal of the former relations, and with respect to the defender herself I am disposed to think with the Lord Ordinary that she did not desire to open a new chapter of sin with a man who was, I think, certainly, and as she knew, anxious to shun her, but only to close the old more completely by persuading her former paramour to return her letters, as she may have thought she might by an earnest personal appeal succeed in doing, or if they were really destroyed, that she might get from him an assurance of the fact in such terms and tones as might relieve the anxiety that I think undoubtedly disturbed and dis-

tressed her. Nor do I feel warranted in rejecting as incredible her own account of her anxiety (which in the opinion of the Lord Ordinary, who saw and heard her, is a true account), that it had made her frantic, for I do not know the terms of her letters. The return of her ring seems, and no doubt is, a less considerable matter, but with every respect to it I cannot hold her anxiety, or the effect of it on her mind, to be incredible, for it is, I rather think, true that people, and perhaps women especially, may be superstitious about promises confirmed by the pledge of a ring, and desire on repentance to dissolve the bond by its return. I am, as I have said, inclined to take the same view of this subject as the Lord Ordinary, and indeed should not feel warranted in rejecting it—for the parties were examined in his presence—except on very clear grounds indeed, for one involving such a gross revival or renewal of adulterous inclinations as might induce a woman to inveigle an unwilling man (certainly unwilling to begin with) into a filthy shed, there to gratify her passion, if that might be possible during the few minutes that they should contrive to elude the detectives whom they knew, and indeed saw, to be following them. It is said that it was a singular walk to take, and so it was undoubtedly. But of the two suggested explanations of it I prefer the Lord Ordinary's. And, indeed, if you assume the defender's frantic claim for an interview with the co-defender that she might appeal to him about the letters and ring, the direction of the walk is perhaps not so very singular. It is not, I think, singular that she did not invite him to her husband's house or go to his lodgings or appoint an inn as the place of meeting, and there were obvious enough objections to the more public streets of the town. I desire to add, that even if I could reject as a fable the story of the parties themselves, notwithstanding that the Lord Ordinary who saw and heard them believed it, I should have held that the alleged adultery in the shed was not proved, the facts and circumstances being, I think, inconsistent with any reasonable probability of its being committed even by parties inclined to avail themselves of a convenient opportunity.

On the second question argued to us I am of opinion that condonation of adultery (cohabitation following) is not conditional by our common law but absolute. The language of our text writers and Judges is to this effect, and although the doctrine of such condonation has been long familiar and acted on in this country, none of our authorities suggest that it is or may be accompanied by a condition. I think this is a weighty argument, notwithstanding the fact that no actual case has been found in which conditionality was pleaded and judicially rejected or allowed—for all our judicial language, including that of our text writers, is exclusive of the notice of conditionality—absoluteness being the import of all of it. I am therefore indisposed now to regard it as an open question. That it has not hitherto been stated, and judgment asked on it, is sufficiently accounted for by the fact that no Scotch lawyer has regarded condonation for adultery as other than absolute by our law, exactly as it is by the canon law. But if it is fitting that I should consider the reason and policy or public utility of our rule as we have certainly heretofore re-

garded it, I must say that I think it is well founded on these considerations. It is, in my judgment, unfitting, on public or moral grounds, that a man should knowingly take an adulterous wife back to his bed on any other footing than absolute forgiveness of the past. I have pointed out, and indeed this case illustrates, that her past transgressions, though condoned, may be used in evidence of a subsequent transgression as throwing light on the facts relied on to prove it, but beyond this I find no reason why her forgiven offences may be brought against her judicially. Subsequent adultery may well be presumed and so held proved against her by evidence which but for her previous conduct would have been properly thought insufficient. But if with all the aid that can legitimately be taken from her past conduct the alleged subsequent adultery is not proved or disproved, I cannot assent to the proposition as reasonable or useful that she may nevertheless be divorced if the evidence which does not prove or even disproves adultery shows imprudence or levity of conduct on her part. To hold this would be to hold that a man who knowingly and forgivingly resumes cohabitation with an adulterous wife may thereafter have her divorced for imprudence or levity of conduct, that being in law the condition of their cohabitation. This result is not varied or disguised by saying that she is not divorced for the levity but for the adultery, the forgiveness of which her levity has forfeited.

I ought perhaps to observe that cruelty stands on quite another ground. Cruelty is cumulative, admitting of degrees and augmenting by addition, so that it may be condoned and even forgiven for a time and up to a certain point without any bar in sense or reason to bringing it all forward when the continuance of it has rendered it no longer condonable. The distinction between it and adultery with reference to this matter of condonation is too obvious to require that I should even point it out.

I am further of opinion that condonation of adultery cannot be made conditional by paction, and, indeed, the observations which I have made on the subject of a legally implied condition apply equally, and in some respects more strongly, to a conventional condition. There is no term of authority for admitting it, and all considerations of reason, policy, and utility are, I think, against it. When the case was formerly before us I had occasion to consider and express my dissent from the Lord Ordinary's opinion that an injured husband being free to forgive his wife or not, may attach such terms and conditions as he pleases to his forgiveness. In the note to the interlocutor now before us his Lordship repeats his opinion, with the qualification that the condition may not be "absurd or fantastical." But a money payment is neither absurd or fantastical, and I venture to ask whether a husband could adject that as a condition of condoning his wife's adultery, so that on failure of payment when the term came he should be permitted to revoke the condonation for breach of condition? The true view I think is that forgiving and resuming cohabitation with a guilty wife is not a mere private affair, but one of some public concern, and so not subject to such pactional conditions and terms as people may lawfully make in their private personal dealings. The public law of marriage and of the

marriage relation is concerned. The conventional condition here alleged is that the defender "should never again speak or write to the co-defender." I think this was a very reasonable condition to adject, and one which ought to have affected the wife's conscience and feelings whether expressed or not. That it was expressed does not in my opinion affect the legal position of the parties.

On the third question, which, according to the views which I have expressed on the second, is merely hypothetical, I do not think it necessary to enter. The inclination of my opinion on it may possibly be inferred from my observations on the first.

I ought, perhaps, to notice the fact, which was a good deal relied on by the defender, that the pursuer continued to cohabit with her and treat her as his wife in the knowledge communicated to him by the detectives whom he employed that she had met the co-defender and walked with him, and particularly in the knowledge of their walk together alone on 26th January 1882. I agree with the Lord Ordinary that no condonation of adultery on 26th January, had such been proved, could thence have been inferred. But with respect to the impropriety or levity of conduct, or the waiting with and speaking to the co-defender, relied on as forfeiting the condonation of adultery prior to 27th July 1881, the matter may stand differently. I do not pursue this topic beyond observing that the pursuer's conduct in continuing his cohabitation with the defender with the knowledge I have referred to seems to show that he at first regarded her behaviour in the same light which the Lord Ordinary has done after full investigation. It is certainly the most honourable explanation of his conduct, and therefore probably the true one.

LORD CRAIGHILL—I concur in the opinion just delivered by Lord Young, and as that covers everything which has occurred to me as involved in a reasonable judgment of the case it is unnecessary for me to do more than express my entire concurrence with it.

LORD RUTHERFURD CLARK concurred.

LORD JUSTICE-CLERK—I entirely concur in the result of Lord Young's opinion. I am of opinion, in the first place, that the alleged adultery on 26th January has not been proved, and, in the second place, I am of opinion that the former adultery, which has been condoned, cannot be founded upon in an action against the defender, on the ground stated by Lord Young, that according to our law condonation is absolute and not conditional. I should not have said any more, but that upon two of the questions alluded to by Lord Young, especially the first, I hold a strong opinion. It does not in the least influence the result of my judgment, although I regret it should have entered into his Lordship's opinion. My opinion on the first question, that the alleged adultery has not been proved, does not rest upon any of the considerations which have been urged to palliate the conduct of the defender. I am of opinion that that conduct can hardly be characterised too strongly on the part of both—the man as well as the woman. I think it was heartless. It is no

excuse for the man to say that he did not wish to renew the intimacy. As to the views suggested to palliate the conduct of the wife, they have not impressed me with their truth, but have very strongly impressed me with their want of truth. The consideration on which I come to the conclusion that adultery has not been proved is simply that I think the evidence shows that it was not committed upon that occasion. It is quite sufficient for the disposal of that part of the case. On the second question, as to condonation, I am quite of opinion with Lord Young. Having made these explanations as to why I think the judgment proposed by him should be adopted, I agree that we should adhere to the Lord Ordinary's interlocutor.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Solicitor-General (Asher, Q.C.)—Dickson—Guthrie. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for Defender (Respondent)—J. P. B. Robertson—Jameson. Agents—J. & J. Ross, W.S.

Saturday, December 2.

SECOND DIVISION.

[Lord Lee, Ordinary.

MORRISON v. BAIRD & COMPANY.

(Sequel to case reported *ante*, p. 87, Nov. 10).

Reparation—Master and Servant—Employers Liability Act 1880 (43 and 44 Vict. cap 42), sec. 8.

A "workman" in order to entitle him to sue an "employer" under the Employers Liability Act 1880 need not aver that he was under direct contract of service with the employer.

Nature of averments *held* relevant to entitle the pursuer of an action of damages under the Act to an issue against the defenders, though no direct contract of employment between them and the person injured was set out.

Observed that the Act is to be construed liberally, so as to remedy the evil of the common law.

This case is already reported *ante*, p. 87, where the averments of the pursuer are fully quoted. As there reported the pursuer's averment with regard to the manner of employment of her deceased husband, and his relation to the defenders was as follows:—" (Cond. V.) The defenders are in the habit of arranging with certain of their men to excavate one or more of the working faces of limestone in the pit, giving them a fixed rate for every ton of limestone produced at the bottom of the shaft, and authorising them to employ the necessary 'bossers,' 'benchers,' 'breakers,' and 'drawers.' Such arrangements are not made for any fixed period, and either party can bring them to an