of the North Eastern Railway Company, but may be considered along with the other circumstances of the case in disposing of that application, and decern: And remit the application, with the proof and whole proceedings, to the Commissioners to proceed as shall be just: Find the North Eastern Company entitled to the expenses of the appeal," &c.

Counsel for North Eastern Company—Lord Advocate, Graham Murray, Q.C.—Guthrie, Q.C.—A. O. Mackenzie. Agents—Cowan & Dalmahoy, W.S.

Counsel for North British Company—Dean of Faculty, Asher, Q.C.—Sol.-Gen. Dickson, Q.C.—Grierson. Agent—James Watson, S.S.C.

Wednesday, December 15.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

RATTRAY *v.* RATTRAY.

Proof—Written Evidence—Admissibility—Letter Taken from the Post Office contrary to the Post Office (Offences) Act—Post Office (Offences) Act 1837 (7 *Will. IV. and* 1 *Vict. cap.* 36), *secs.* 28 *and* 29.

The pursuer in an action of divorce for adultery obtained possession of a letter from the defender to the co-defender by illegally obtaining possession of it from a post office official. No objection was taken at the proof to this letter being put in evidence as against the defender, and it was deponed to by her in her examination.

It was suggested from the Bench in the Inner House that the letter could not be used by the pursuer as evidence in respect he had obtained it by means of a crime.

Held (*diss.* Lord Young) that the letter was admissible as evidence against the defender.

Proof—Divorce for Adultery—Letter Despatched by Defender to Co-Defender, but not Received by him.

Opinion (*per* Lord Trayner) in an action of divorce for adultery that a letter despatched by the defender to the co-defender, but intercepted, and consequently not received by him, is not evidence against the co-defender.

Opinion reserved by Lord Moncreiff.

This was an action of divorce for adultery at the instance of Alexander Wellwood Rattray of Fellowhills, Associate of the Royal Scottish Academy, residing in Glasgow, against his wife Mrs Jemima Douglas or Rattray, and Robert Darby Anderson, stock and share broker, as co-defender.

The pursuer went to the post office at Skipness, and by representing that he wanted to get back a letter which he said had been posted by mistake, induced the postmistress to show him the letters which had been posted there that day. Among these letters he discovered one which had been written by his wife to the co-defender. This letter he took from among the letters in the post office and retained in his own possession. It was consequently never received by the co-defender. This letter was as follows:—"My Dearest,—Just a hurried line to say Winnie, Jessie, and I leave here on Thursday first by 'Columba;' the others are to follow on Monday, so perhaps you could meet us at the station, dear—of course no one need know but what it is by accident. I have not been to Skipness since my return, so could not post a letter to you. Wellwood does not know we were in the house when I was up, so you understand. Trusting to seeing *you* very soon.—Ever your own, MINA. We leave for Loch Lomond on Friday, the fourth."

The defender obtained a diligence to recover documents, which covered the letter in question, and thereupon the pursuer lodged it in process. No objection was taken before the Lord Ordinary to this letter being put in evidence against the defender, and it was put to and its terms were deponed to by her in her examination. It was maintained, however, that it was not evidence against the co-defender, as it had never been received by him.

By interlocutor dated 15th June 1897 the Lord Ordinary (Stormonth Darling) found facts, circumstances, and qualifications proven relevant to infer the defender's guilt of adultery with the co-defender, found the defender guilty of adultery with the co-defender accordingly, and pronounced decree of divorce with expenses against the co-defender.

Opinion.—[*After stating the facts and reviewing the evidence*]—"So far as the case against the defender is concerned, the strongest colour of all—and a colour affecting the whole evidence—is afforded by the letter No. 12 of process. I am utterly unable to accept her explanation of its terms, and it seems to me fatal to her case.

"But it was strongly urged by counsel for the co-defender that the letter was no evidence against him, because he never received it. It is certainly true that the confessions of a defender are not evidence against a co-defender. Whether that rule applies with equal force to a letter actually despatched by the one to the other, though intercepted before its receipt, I am not quite sure. I do not require to solve that question, for I think there is sufficient evidence against the co-defender apart from the letter. I shall therefore condemn him in costs, both the pursuer's own and those he has to pay for his wife. I shall not, however, award any damages to the pursuer, for in my opinion he deserves none."

The defender and the co-defender reclaimed.

Between the date of the Lord Ordinary's interlocutor and the date of the hearing in the Inner House the pursuer was tried and

convicted of an offence under the Post Office (Offences) Acts and was sentenced to seven days' imprisonment.

The Post Office (Offences) Act 1837 (7 Will. IV. and 1 Vict. cap. 36) enacts as follows:—Section 28. "Every person who shall steal a post letter bag, or a post letter from a post letter bag, or shall steal a post letter from a post office, or from an officer of the Post Office or from a mail, or shall stop a mail with intent to rob or search the same, shall . . . be guilty . . . in Scotland of a high crime and offence, and shall be transported beyond the seas for life." Section 29. "Every person who shall steal or unlawfully take away a post letter bag sent by a Post Office packet, or who shall steal or unlawfully take a letter out of any such bag, or shall unlawfully open any such bag, shall . . . be guilty . . . in Scotland of a high crime and offence, and shall be transported beyond the seas for any term not exceeding fourteen years."

In the course of the discussion in the Inner House, Lord Young intimated a doubt whether the Court were entitled to look at a letter which it was admitted the pursuer had obtained by means of a crime.

Argued for the defender—On grounds of public policy the pursuer ought not to be allowed to take benefit from his own crime by using what he obtained possession of through crime, as evidence to prove his case against his wife. Even if by inadvertence of parties, or the Lord Ordinary, the letter had been allowed to be used in evidence in the Outer House, it was *pars judicis* to refuse to consider it now, looking to the way it had been obtained. This would hold good even if the objection had been waived by parties. The *labes realis* of theft attached to the letter, and the Court was bound of its own motion to refuse to consider it. If the Court allowed the pursuer to use this letter in evidence, it was directly encouraging the commission of such crimes. No doubt the general rule was that all evidence which would lead to the ascertainment of the truth should be admitted. But this rule was not absolute, and in many cases was disregarded on grounds of public policy, *e.g.*, in the case of confidential communications, and documents belonging to public departments—*Arthur* v. *Lindsay*, March 8, 1895, 22 R. 417; *Little* v. *Smith*, February 17, 1847, 9 D. 737. The cases quoted for the pursuer were not in point. In *Robertson* v. *Thom*, *infra*, the objection omitted to be taken was to a mere informality in the execution of the deed, and in the other cases the parties did not choose to take timeous advantage of a privilege which the law had given them. It had been held that in such circumstances the parties could not afterwards state the objections which they had omitted to put forward at the proper time. The defender was not concerned to dispute the law as laid down in these cases. The argument here was that the Court ought from regard to the public interest to refuse to consider evidence obtained by one of the parties through crime, and especially such a crime as was committed here. (2) Even if the letter was admissible, it was not evidence that adultery took place between the defender and the co-defender. At most it was only evidence that the defender was willing to commit adultery. It did not prove that the co-defender was also willing, still less that adultery took place—Fraser, Husband and Wife, vol. ii. 1172. Apart from the letter there was no evidence that the defender and co-defender had been guilty of adultery.

Argued for the co-defender—(1) The co-defender submitted that the letter ought not to be considered at all, and that it was not evidence of adultery having taken place between the defender and the co-defender, and upon this branch of the case he adopted the argument for the defender. (2) Apart from that, however, the letter was not evidence against the co-defender, for he had never received it—Fraser, Husband and Wife, vol. ii. 1173. He had no opportunity for reply or expostulation, and he might have done many things which would have rebutted any inference against him from its terms. The letter did not even prove that the co-defender was willing to commit adultery with the defender. (3) The state of the evidence might be such that the defender was proved to have been guilty of the adultery libelled, but that the case as against the co-defender was not proved. When that was the case it was quite competent and proper to find the defender guilty, but to assoilzie the co-defender—Fraser, Husband and Wife, vol. ii. 1173—*Robinson* v. *Robinson* (1859) 1 Sw. and T. 362, 29 L.J. (Mat.) 178; *Stone* v. *Stone* (1864) 3 Sw. and T. 608; *Crawford* v. *Crawford* (1886), 11 P.D. 150.

Argued for the pursuer—The letter was admissible in evidence. If it were inadmissible, it could only be as the result of some arbitrary rule which one would expect to be established either by statute or some well-recognised and settled rule of practice. There was no such statute or well-settled rule of practice. There was no general rule that a document obtained by crime could not be used in evidence by the person who had so obtained it. The result of obtaining evidence in such a way was (1) that it affected the credibility of the person committing the crime; (2) that the document could not be used in any way without admitting its having been stolen; (3) that the person committing the crime became liable to punishment. The interests of public policy were sufficiently conserved by these consequences. In the absence of some arbitrary rule which prevented the letter being looked at it must be received. The fact that it had been obtained by crime did not affect in any way its value as evidence. But apart from any general question in this case the objection came too late. The letter was produced, put to witnesses, and put in evidence without objection at the proof, and it was too late now to object to its being considered—*Robertson* v. *Thom*, December 29, 1848, 11 D. 353. When a

proof at large has been allowed and led without objection, it was too late to take the objection that proof should have been limited to writ or oath when the case came before the Inner House, and the Court in such circumstances must consider the whole proof as led—*Simpson* v. *Stewart*, May 14, 1875, 2 R. 673; *Kerr's Trustees* v. *Ker*, November 16, 1883, 11 R. 108. Inadmissible evidence if admitted in the Court of first instance could not be disregarded by the Court of Appeal, which was bound to consider the case as the parties had seen fit to present it to the Court of first instance. The case of *Arthur* v. *Lindsay*, *cit.*, merely decided that the Crown could not be compelled to produce certain documents against its will. It did not decide that such documents if produced could not be considered by the Court. That case therefore had no bearing on the present. Letters stolen from the Post Office were as regards this question in the same position as letters stolen from anyone. (2) The pursuer did not maintain that this letter was evidence against the co-defender.

At advising—

LORD TRAYNER—Before adverting to the proof, there is a preliminary question to be considered, and that is, whether the letter produced by the pursuer, written by the defender to the co-defender, can competently be used by the pursuer as evidence at all. That letter (posted by the defender) was obtained by the pursuer from the post office where it had been posted under a false pretence. For doing so he was convicted as guilty of an offence under the Post Office Statutes, and received a sentence of imprisonment for a short period. It is put against him that he obtained the letter in question through the commission of a crime, and that no document so obtained can be used in evidence to his own advantage by the committer of the crime. I am not disposed to decide that very general question, and opinions may differ as to how it should be decided. I think the pursuer's act can scarcely be regarded as a crime in the ordinary sense of the word. He committed a statutory offence unquestionably, but so does the man who refuses to have his child vaccinated, or the man who gives false information to the registrar of births. These, like the pursuer, may on conviction be sentenced to imprisonment, and imprisonment is the punishment attaching to most crimes. But none of these offences are regarded as "crime" in its popular sense. I think the pursuer intercepted a letter, not his own, in the hands of the Post Office authorities, for which under the Post Office Statutes he was subject to an arbitrary punishment, but I cannot regard that as the same case or leading to the same consequences as that of a man (the case was figured in the course of the debate) who breaks into his neighbour's desk or safe and abstracts documents therefrom. The illegal interception of the letter does not, in my opinion, exclude the pursuer from using it. I ventured to put to the counsel for the defender the case of a husband intercepting in the hands of his wife's maid or messenger a letter addressed by her to another man—in such a case would not the letter be admissible in evidence? I understood this to be conceded. I am sure I have seen such evidence used in more cases than one without objection being suggested that it was inadmissible. I think such evidence is not open to objection. That I take to be the case here. The difference between intercepting a letter posted and a letter in the hands of a private messenger, of course, involves that in the one case a statutory offence is committed and in the other not. The interception in the one case is punished, in the other not. But after all it is only the interception of a letter that is the thing done, and I am not prepared to call that crime. The mode in which the letter is obtained does not alter the letter in any way; the letter was written by the defender admittedly, and what it may or can prove is not affected to her prejudice by the manner in which it was got. Nor am I moved by the consideration urged by the defender that by admitting this letter as evidence I am acting contrary to good policy and giving an encouragement to crime. The policy of the law in later years (and I think a good policy) has been to admit almost all evidence which will throw light on disputed facts and enable justice to be done; and as to the encouragement of crime, it is not much encouragement to a man to possess himself unlawfully of a letter, if while being told that he may use the letter in evidence, he is also told that he must go to prison for what he has done to get possession of it. Encouragement of that kind is not likely to be largely acted on. I am therefore of opinion that there is no good ground for excluding that letter from our consideration as part of the pursuer's proof. But I qualify that by saying that it is admissible in evidence only against the defender. It is not, in my opinion, evidence against the co-defender, who never received it, and the pursuer's counsel conceded that it could not be used against the co-defender. After what I have said it is unnecessary to consider the further question argued by the pursuer, whether, if objectionable, the objection should not have been stated when the letter was first tendered in evidence, and that the objection is too late when only stated after the proof is concluded and judgment given upon it. There is considerable authority for that view. The result of no objection being stated to the admissibility of the letter is that we have the material facts of it incorporated by quotation and otherwise in the proof before us. Even, therefore, if we declined to look at the letter, I think we could not refuse to consider what appears as part of the parole proof.

[*His Lordship then reviewed the evidence.*]

I think it is not proved that the co-defender committed adultery with the defender. But there is one item of evidence against the defender which does not affect the co-defender. It is the intercepted letter.

Now, that letter indicates—it evidences, if one is pleased to put it so—a state of mind on the part of the defender which might have led to the commission of adultery if the co-defender had been of the same mind and had desired to take advantage of what I shall call the defender's advances. But there is nothing in it—no allusion or hint that anything improper had then taken place. It is affectionate in its terms—blameably so—but I think that is all that can be said against it. The defender might wish to meet the co-defender (did he choose to go) on her arrival in Glasgow, and represent as merely accidental what was pre-arranged, without being or having been an adulteress. In like manner she might well ask the co-defender not to mention that they had been at the house in Nelson Terrace, knowing that her husband's orders had thereby been disobeyed, without its being inferred that they had been there for a guilty purpose. Still, the letter is a very awkward piece of evidence against the defender, and might have proved sufficient if the other evidence in the case had been stronger. But when I come to the conclusion that it is not proved that the co-defender committed adultery with the defender, it follows of logical necessity that it is not proved that the defender committed adultery with the co-defender.

To put the case at its lowest for the defenders, it is not established beyond reasonable doubt that they committed the acts charged. If there is a reasonable doubt, and the difference of opinion in regard to the case rather shows that there is, the defenders are entitled to the benefit of it, and should therefore be assoilzied.

LORD YOUNG—I concur in thinking that adultery is not proved, and I agree generally in Lord Trayner's observations on the evidence. I need not make any further observations on my own part. But there is a question of law which, I think, was suggested by myself at the hearing, and which is of general importance, though it is not likely to be of very frequent occurrence, and as far as I know this is the first case in which it has been presented for decision. Upon it I have the misfortune to differ from Lord Trayner. I refer to the production and use in evidence of the letter from the defender addressed to the co-defender, obtained by the pursuer from the post office at Skipness.

In considering a question relating to the public purposes served by the Post Office we must attend to the statutes which have been passed to protect and preserve the interest of the public in letters entrusted to that department. It is of infinite public consequence that letters committed to it should be kept safe, and should be delivered to those to whom they are addressed. It is therefore made not a crime only, but "a high crime and offence," to steal a post letter, that is, a letter put into a post office for transmission. After being posted, it is in the custody and is the property of the Postmaster-General, and one who steals it might at one time be transported, and is now liable to penal servitude. It so happens that the pursuer took, and has been convicted of that crime of stealing, a letter posted by the defender addressed to the co-defender. I confess it is with some surprise that I find that this letter, which must have been in the hands of the Crown authorities, should have been returned for the use of the pursuer in this process. The letter is before me. It was addressed to the co-defender and posted. It was therefore in the custody of the Post Office. The Post Office officials were not entitled to deliver it to anybody else, and were bound to deliver it to him as his letter; and I should have expected that, when its purpose in the criminal charge was served, it should have been returned to the postal authorities and delivered to the co-defender. Has anything occurred to excuse the delivery of it according to their duty? Mr Anderson did not get it. I have heard no reason why it should be so. I do not think, on the proof, that I am entitled to suspect him of an intrigue with the defender. But if that had been so, and he had handed it back to the husband for his use, it would have required strong language to express my contempt for him. He was then entitled to delivery of the letter, and is so now, and I think that it cannot be used in the process on behalf of the person who stole it.

I think that the Court is bound to take notice of the statute law enacting that the pursuer's conduct was a crime (though with a discretion to the judge as to the sentence), and to reject as evidence anything obtained by a violation of the law, and still held by the pursuer who did that act. I have thought fit to express my opinion upon that general question. But even with the contents of the letter, assuming them to have been admitted, I should have reached the same conclusion.

LORD MONCREIFF—I am of opinion with the Lord Ordinary that adultery is proved. [*His Lordship then reviewed the evidence.*] In what I have said I have left out of view the letter No. 12 of process, except to this extent—that the defender's explanations of how she came to write it affect her credibility as a witness. I will only add that I think it is good evidence against her; and if so used it is conclusive against her. I agree generally with Lord Trayner as to its admissibility. It has been argued that the letter, written and posted by the defender to the co-defender on or about 25th August 1896, cannot be looked at to any effect, because the pursuer became possessed of it by crime, viz., by a Post Office theft. I think it is a sufficient answer to this objection—which was first suggested from the Bench in the Inner House—that neither the defender nor the co-defender have till now made any objection to the letter being produced and founded on beyond this—that the co-defender maintains that it cannot be used in evidence against him because he never received it. He does not claim it; on the contrary, he repudiates it. If he re-

ceived and kept it, it might be used against him; and I cannot agree that it is incumbent on the Court *proprio motu* to reject it as evidence, notwithstanding that the parties to the suit have allowed the proof to proceed from first to last on the footing that it was properly put in process and in evidence.

In this view it is not necessary to consider the question whether, assuming that the co-defender had claimed the letter, the pursuer would have been entitled to lodge it in process against his will, or if it had been restored to the co-defender, to recover it under a diligence and use it in evidence. My present opinion is that the fact that the pursuer has committed a crime against the Post Office Acts in order to obtain possession of the letter does not affect his right, if he otherwise has it, to found upon the letter, assuming that its contents establish or go to establish the existence of adulterous relations between the defender and the co-defender. The case is precisely the same, in my opinion, as if the pursuer had intercepted the letter in the hands of a private messenger; or, perhaps, to come nearer the case, as if he had found the letter—after it had been delivered—lying on the co-defender's desk, and opened it. In both these cases, strictly speaking, a crime would have been committed.

On obvious grounds of public policy any interference with the transit of letters through the Post Office is visited with punishment of exemplary severity; and any injured husband who attempts to possess himself of a letter in that way will render himself liable to the statutory penalties.

But I know of no case, and we have been referred to none, where the Court have refused to look at a document which instructed crime simply because it had been obtained without legal warrant.

The pursuer's counsel did not argue that the letter is evidence against the co-defender. I do not propose to say anything upon that subject at present, because I am prepared to decide against the co-defender on the footing that the letter is not evidence against him. But I should like to guard myself by saying that I am not satisfied that an intercepted letter may not, in the absence of collusion, be in some circumstances competent evidence against the person to whom it is addressed. It is not a confession made to a third party outwith the presence of the co-defender; it is intended for the eye of the person to whom it is addressed alone. Again, it is not a mere expression of the writer's thoughts committed to paper and kept to herself; she has put them beyond her own control by posting the letter or delivering it to the co-defender's messenger. If, for instance, it were proved that a clandestine correspondence had gone on between a married woman and a man not her husband, and that all the previous letters had been destroyed, I do not at present see why an intercepted letter, the only letter remaining, should not be some evidence against the person to whom it was addressed, subject, of course to any explanations which he might make, such as that he never received a letter couched in such terms from the lady before.

LORD JUSTICE-CLERK—I have anxiously considered this case, and with the advantage of consultation with your Lordships. I do not say what my judgment might have been without that consultation. But I have come to think, after hearing the opinions of your Lordships, that the proof is not so clear as to warrant my holding that adultery is conclusively proved. I concur, therefore, that the judgment should be recalled, and decree of absolvitor pronounced.

The Court recalled the interlocutor reclaimed against, and assoilzied the defender and the co-defender from the conclusions of the action, finding the pursuer liable to the defender and the co-defender in expenses.

Counsel for the Pursuer—Ure, Q.C.—Salvesen. Agents—Reid & Guild, W.S.

Counsel for the Defender—Shaw, Q.C.—W. Campbell. Agent—J. Gordon Mason, S.S.C.

Counsel for the Co-Defender—Jameson, Q.C. — J. J. Cook. Agents — Simpson & Marwick, W.S.

Friday, December 17.

SECOND DIVISION.

STEWART'S TRUSTEES *v.* STEWART.

Succession — Trust—Repugnancy—Gift of Vested Right of Fee in Residue, with Direction to Trustees not to Sell or Assign Part of Residue to Beneficiaries for Fifty Years.

A testator by his trust-disposition and settlement, "subject to the said several provisions and bequests and the declarations after mentioned," appointed his trustees, "when convenient, to divide, pay, assign, and dispone the residue of my estate, heritable and moveable . . . into five shares, corresponding to the number of my children, one of which shares they shall pay, assign, and dispone" to each of his four elder children; and he appointed his trustees to hold the remaining share during the life of his fifth child, "and on his death to pay, assign, and dispone the said share to the children" of his fifth child "equally between them, share and share alike, on their respectively attaining twenty-six years of age," but that no payment of principal should be made during the lifetime of their father. It was provided and declared that the issue of any of the testator's children who should predecease the testator should take their deceased parent's share, and that the share of children predeceasing the