inexpediency of the rule. If your Lordships were to affirm the contention of the appellant, a woman might, for a long period of years subsequent to her conditional pardon, enjoy the position and privileges of a wife, might become the mother of a numerous family, and then all at once be stripped of her matrimonial status, because in some moment of folly or weakness she happened to violate the condition upon which that status had been made dependent.

Having come to the conclusion (for the reasons which I have endeavoured to explain) that the judgment of the Court below is in accordance with Scotch law, I shall not take it upon me to criticise in detail the English decisions which were referred to and founded on for the appellant. Undoubtedly there are to be found in these cases judicial *dicta* which seem to favour his contention. But it does not occur to me that those *dicta* can be regarded as of authority in a case like the present, which are referable to a time when the remedy of divorce *a vinculo* could not be obtained in an English Court. And since the unloosing of the bonds of matrimony by judicial decree has been sanctioned by statute, it has never, so far as I am aware, been made matter of actual decision in England that a condoned offence can be founded on in a divorce suit, except in cases where the forgiven spouse was afterwards guilty of a substantive matrimonial offence constituting in itself one of the grounds of divorce *a vinculo*. Even supposing that the present question had never been settled in Scotland, and that in England decisions had gone the full length of these *dicta*, it would still have been necessary in my opinion to consider very carefully the material discrepancies which exist between the laws of the two countries affecting the rights of the innocent as in a question with the offending spouse before introducing the English rule into the law of Scotland. That the differences between the two systems of law may give rise to very different considerations of policy was forcibly illustrated by the argument of Mr Searle who pointed out to your Lordships certain deplorable consequences which according to the law of England, might follow from the affirmance of the judgments under appeal, whereas it was very obvious that no such consequences could occur according to the law of Scotland.

I am accordingly of opinion that the interlocutor appealed from ought to be affirmed.

Lord Chancellor—As I entirely agree with the opinions which have been delivered in this case, I think it unnecessary to add anything beyond this—that I do not understand any English decision to have determined that in England married parties can make their condonation of a matrimonial offence revocable in the event of the non-performance of a condition conventionally agreed upon between themselves which is not in law a sufficient reason for a decree of divorce or of dissolution of marriage.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Counsel for Appellant (Pursuer)—Sol.-Gen. Asher, Q.C.—Searle—Inderwick, Q.C. Agents—Newman, Stretton, & Hilliard.

Counsel for Respondent—Sol.-Gen. Sir F. Herschell, Q.C.—J. P. B. Robertson. Agents—Grahames, Currey, & Spens—J. & J. Ross, W.S.

Monday, March 17.

(Before the Lord Chancellor, Lord Blackburn, and Lord Watson.)

BIRRELL AND OTHERS *v.* DRYER AND OTHERS.

(*Ante*, vol. xx. p. 385, and 10 R. 585.)

Insurance—Marine Insurance—Time Policy—Warranty—"No St Lawrence"—Construction of Warranty.

A ship was insured under a time policy which contained the warranty "No St Lawrence between 1st October and 1st April." Between these dates she called at ports within the Gulf but not within the river St Lawrence, and she was subsequently lost within the period for which the policy was current. *Held* (*rev.* judgment of Second Division) that the warranty imported, according to its natural meaning, that the ship would not during the currency of the policy enter either the river or the Gulf, that no custom of trade limiting the meaning of the words to the river was established, and therefore that the warranty having been broken, the assured was not entitled to recover.

This case is reported in the Court of Session of date 8th February 1883, *ante*, vol. xx. p. 385, and 10 R. 585.

The defenders appealed to the House of Lords.

At delivering judgment—

Lord Chancellor—The question on this appeal is, whether the words "warranted no St Lawrence between the 1st of October and the 1st of April," in a time policy on the respondents' ship "L. de V. Chipman," effected with underwriters at Glasgow on the 8th of June 1878 (for the twelve months from the 29th of May 1878 to the 28th of May 1879), include the Gulf of St Lawrence, or are confined to the river of that name?

Many witnesses were examined on both sides to show in what sense they understood these words, and thought that others ought to understand them; but none of those witnesses proved that they bore either the one sense or the other, according to any local or general usage; nor were they able to refer to any instances in which the question had practically arisen and had been practically determined. Conflicting opinions of individuals as to the proper interpretation of words in a written contract would be entitled to no weight, even if it were clear that they were admissible.

Your Lordships have therefore to consider whether the ordinary rules and principles of construction do or do not enable you to ascertain the subject to which these words apply, having regard to those extrinsic facts which are either within your judicial cognizance or sufficiently established by the evidence.

The facts of which, I think, your Lordships are entitled to take judicial notice, independently

of evidence, are these. The great river which discharges the waters of the North American lakes, and the Gulf into which it flows, both bear the name of St Lawrence. There is a "Cape St Lawrence" at the main southern entrance into the Gulf. The river below Quebec expands into a broad estuary, passing, on each side of the island of Anticosti, into the Gulf. The river and the Gulf are thus naturally and immediately connected with each other; the access to, and the outlet from, the river being through the Gulf, which is a large water space, land locked between the west coast of Newfoundland and the southern, eastern, and northern shores of Canada, New Brunswick, and Nova Scotia, having within it the considerable islands of Anticosti, Prince Edward's Island, and Cape Breton, and connected with the Atlantic Ocean by several channels, of which all but one are narrow. If the words "St Lawrence" were preceded by the definite article, a noun substantive in the singular number must be understood, which (I think) could only be the river; and it would not, in my opinion, be consistent either with the popular or with the geographical use of the word "estuary" (which means the tidal part of a river), to regard the whole waters of the Gulf as forming part of the estuary, properly so called, of the river St Lawrence. Here, however, the words are not "the St Lawrence;" they are negative, "no St Lawrence."

The other material facts (established by the evidence) are these. The navigation of the river St Lawrence is open, and generally safe, from about the beginning of April till October, after which it becomes dangerous, chiefly from its liability to be impeded by frost, which often sets in suddenly and rapidly. After the middle of November vessels cannot remain there, except at the risk of being frozen in for the winter; and from the beginning of December till about April the river navigation is (in ordinary seasons) entirely closed. At the end of March or the beginning of April the ice breaks up, and descends into the Gulf.

The navigation of the Gulf is never absolutely closed, but the harbours and narrow waters around its shores, on the south side as well as elsewhere, are often blocked up or much impeded in the winter by ice. Ships with grain and other cargoes continue to sail from the Bay of Chaleur, from Miramichi, and from Prince Edward's Island, for some time after the river is closed, and sealing vessels visit the Gulf during the winter. "As a general rule" (according to the book called "the St Lawrence Pilot," quoted by the appellants' witness Lees), "the navigation is not considered safe, even in the southern part of the Gulf, after the first week in December, or before the 15th of April." From about January (according to the evidence of Mr Robert Grieve, one of the respondents' Glasgow witnesses), the Gulf is "practically closed;" by which I understand, closed to vessels of any considerable burden engaged in the ordinary trade of those parts. During this winter season the Gulf is dangerous (though most of the witnesses consider its dangers to be less than those of the river), chiefly from fogs and from snowstorms, which are very dense and frequent. These dangers are enhanced to ships engaged in the usual trade of that region by the nature of their cargoes, lumber, and more especially grain; and though the same kind of weather is also met with in the same season outside upon the banks of Newfoundland, the danger in the Gulf is greater, because there is less sea-room there. Besides this, the Anticosti lights are all put out in the middle of December, and as the winter advances, the Belle Isle light, and all others of any consequence in the Gulf, except some small local lights and that of St Paul's (twelve or thirteen miles from Cape North) are also extinguished.

As to the risks of this navigation, from an insurer's point of view, there is a general consent among the witnesses on both sides. I will refer only to what is said by some of the respondents' witnesses.

Mr W. R. Grieve (one of those from Newfoundland) said that it was the invariable practice to pay extra premiums for vessels going to the Gulf of St Lawrence from the 1st of October to the 1st of April; that "both localities" (*i.e.*, the river and the Gulf) were "objectionable," but one more than the other; that the percentage of vessels lost in the Gulf was very high; and that during the proscribed period it was "shunned by underwriters."

Mr Cooper (a London insurance broker and underwriter) considered the dangers in the river and the Gulf "which the warranty was required to guard against," to be "about the same," both being "especially dangerous in the winter;" in his opinion equally dangerous.

Mr Dale (a Liverpool underwriter) said:—"Both navigations in the winter are dangerous, but one, I think, is more dangerous than the other. The Gulf of St Lawrence is not an ordinary risk; we get a very enhanced premium for it." He himself would decline to insure for a voyage in the winter to the Gulf. "In time policies" (he said) "it is a common practice to exclude both the Gulf and the river.

Mr Robert Grieve (shipowner, of Glasgow) said:—"The reasons for excluding ships from the river St Lawrence during certain months apply to the Gulf, though in a lesser degree. I cannot speak positively as to the practice, but I should think no premium would be taken for a vessel to go into the Gulf after a certain time of the year. It is impossible then to get into the river."

Mr M'Intyre (insurance broker, of Glasgow), who negotiated the policy now in question for the respondents, said:—I suppose there is no doubt that the Gulf of St Lawrence is an extra dangerous risk in the winter season."

No evidence was given to show that any such insurance as that now in question could have been effected on similar terms (10 guineas per cent. premium) by a policy so expressed as unequivocally to leave the Gulf open to the vessel insured during the prohibited months; and it is significant (though for the present purpose not properly evidence), that two of the respondents' Newfoundland witnesses who had been in the habit of insuring in Glasgow (Mr W. R. Grieve and Mr Woods), by policies in the form now in question, which they say they interpret as prohibiting the river navigation only, have themselves since the meaning of the warranty was brought into controversy by the present action, been obliged to have their policies made out in an

altered form, expressly excluding the Gulf.

Reading this contract of insurance in the light of the relevant facts, it appears to me that there are two subjects, distinguishable from but closely connected with each other, to both of which the descriptive words "St Lawrence" may apply, and that there is nothing to confine them to one rather than the other of those subjects. The office of the negative form of expression "no St Lawrence" is not to define but is to prohibit or exclude. It occurs in a contract for the purpose and objects of which it is reasonable and probable that both the Gulf and the river should have been meant to be excluded. The reasons for such exclusion during the prohibited months are applicable to both, though in different degrees at different times during that period.

I agree, under these circumstances, with the opinion and the conclusion of the Lord Ordinary. I do not think that the evidence discloses any ambiguity or uncertainty sufficient to prevent the application to this case of the ordinary rules and principles of construction; and according to those rules and principles, the whole St Lawrence navigation, both of Gulf and river, is, in my judgment, within the fair and natural meaning of these negative words, and is therefore prohibited during the months in question. There does not appear to me to be any necessity for resorting to presumptions in favour of or against either party, whether founded on the rule *fortius contra proferentem*, or on the *onus* of proving an exception from the general affirmative terms of this contract.

It must be a satisfaction to your Lordships, if this should be your conclusion, that you are in agreement, not indeed with the majority of the Court of Session, but with two out of the five learned Judges who had to consider the question in that Court; while the opinion of another of those Judges who concurred with the majority of the Second Division was not formed without considerable doubt and hesitation. I therefore move your Lordships to reverse the interlocutor appealed from, and to restore that of the Lord Ordinary, with costs.

Lord Blackburn—I also think that the judgment of the Lord Ordinary was right. The contract is in a time policy for a year, on which is endorsed as part of the contract "Warranted no St Lawrence between the 1st of October and the 1st of April." No one can, I think, doubt that the document would, like every policy of marine insurance, be very difficult to construe if it was now for the first time brought before a Court, but there is no dispute as to the meaning and effect of the contract. The question, as the Lord Ordinary, I think very accurately, says, is not one of degree but of identification. If the ship was during the prohibited time within the district described by the word "St Lawrence," as here used, there is a defence. It is now admitted that she was within the Gulf of St Lawrence, and was not within the river of St Lawrence, and the one question is whether "no St Lawrence" means neither in the Gulf nor the river or means only not in the river.

In *Uhde* v. *Walter*, 7th June 1811, 3 Camp. 16, where the ship was insured from London to "any port in the Baltic," and was lost when proceeding to Revel in the Gulf of Finland, Lord Ellenborough said—"I think it is clearly competent to the plaintiff to prove that the Baltic is *nomen generale*, comprehending in common understanding the gulfs and inlets which communicate with the sea laid down as the Baltic in geographical charts. If the Gulf of Finland is to be considered as the Baltic, the ship was sailing on the voyage insured at the time of the capture, and there can be no objection to admit evidence as to the understood limits of any particular sea." And independent of the high authority of Lord Ellenborough, I think that in applying a local description to the particular spot some evidence must be admissible.

But the evidence received here does not go further than to show that several persons, having no better means of judging than the Court, have formed an opinion one way, and several others have formed the opposite opinion. Some of the plaintiff's witnesses showed that their opinion was sincere, for they sent ships insured under a policy like this into the Gulf during the prohibited period; and if a loss had occurred, and the underwriters had, knowing where the ship had been, settled the loss, that would have been, I think, weighty evidence. Some of the defendants' witnesses showed that their opinion was unreal, for they underwrote ships at a lower premium than they would have done if they had believed the ship was to enter the Gulf during the prohibited period; and if any loss had been claimed, and on the underwriters making the objection the assured had submitted, that would have been weighty evidence. As it is, I think the evidence produced leaves the case as it was before.

Reliance was placed by some of the Judges below on the maxim "*fortius contra proferentem.*" I do not think the description of the district excluded can be considered as the words of one party more than the other. The shipowner knowing where he is likely to employ his ship, and that he does not intend to use her in some district, generally puts on the slip a description of that district in order to induce the underwriters to agree to a lower premium.

I am by no means prepared to say that in some cases where the description of the excepted district is special, it may not be right to say that these are the words of the assured. But where the discription is, like this, general, I think that the assured has a right to suppose that the underwriters understand that description as they ought to understand it. It is alike for the interest of assured and underwriters that the description should be definite; and that is attended to in the warranty "no British America between the 1st of October and the 1st of April." No one could imagine that there was a material difference in the risk between a voyage from the most northern part in the United States, and one from the most southern part of British North America or between a voyage commenced on the last day which is not prohibited, and one commenced on the first day which is prohibited. But a fixed limit is agreed on to prevent disputes.

I think that the Court should take judicial notice of the geographical position and the general names applied to such districts as this, in short, of all that we see on the Admiralty chart of this part of the sea. I do not know whether the first discoverers of America called the Gulf that of St Lawrence, and then gave the

same name to the river, or vice versa, nor do I think it material. The name has for many years been applied to both. I think, that applying the name as we find it used in charts and by geographers to a well defined district, it includes both the river and the Gulf.

Lord Watson—The appellants in their pleadings allege as matter of fact that by the general custom of merchants the words "warranted no St Lawrence" in a policy of marine insurance include both the Gulf and the river of that name. The respondents, on the other hand, aver that, according to mercantile custom, these words refer exclusively to the river St Lawrence, and also that, assuming the truth of the appellant's allegations, the "L. de V. Chipman" was not navigated within the limits of the Gulf. In the Court below the parties were allowed and led proof of their respective averments, but in the arguments addressed to the House it was admitted on both sides of the bar that the appellants and the respondents have equally failed to prove the statements which they made on record.

It must therefore be taken as an established fact that there was a breach of warranty through the vessel being navigated within the limits of the Gulf of St Lawrence during the voyage in the course of which she was lost, if it be held that the warranty applies to the Gulf. In that case it follows that the respondents cannot recover, under the policy, either the average loss accruing during the deviation, or for the total loss which subsequently occurred.

In the absence of evidence sufficient to show that a technical meaning has been attached to the words "no St Lawrence," or (it is probably more accurate to say) in consequence of its being established by the evidence that the words have no technical meaning, it becomes necessary for the Court to construe them, and in construing them I apprehend that it is perfectly legitimate to take into account such extrinsic facts as the parties themselves either had, or must be held to have had, in view when they entered into the contract of insurance. The evidence of both parties was very properly directed to the statements of fact upon which they relied in their record, to which the proof allowed was necessarily limited, and the result is, that upon various matters which it might have been of importance to investigate, we have no information. But there are certain facts, established by the respondents' as well as the appellants' evidence which appear to me to be very useful in considering what significance must be attached to the expression "no St Lawrence." These facts are—(1) That there is a gulf, well defined by the peculiar contour of its shores, into which a great navigable river debouches, and that both gulf and river bear the same name—St Lawrence; (2) that although there are ports within the Gulf to which there is a separate shipping trade, yet for many trading purposes the Gulf and the river are parts of the same navigation; and (3) that during several months of the year the navigation of both is exceptionally dangerous.

Two at least of the three learned Judges who formed the majority of the Second Division have held that "no St Lawrence" must be applied to the river only, on the ground that the expression is ambiguous, and that the ambiguity must be solved adversely to the appellants, because "the underwriters are the *proferentes* with regard to a policy of insurance." That the underwriters may be rightly held to be the *proferentes* with regard to many conditions in a policy I do not doubt; whether they ought to be so held depends in each case upon the character and substance of the condition. In the present case there are many considerations which lead to the inference that the clause in question is not one constructed and inserted by the appellants alone, and for their own protection merely. It was, in point of fact, inserted in the contract by the agent of the respondents, and it is in form a warranty by them that their vessel will not be navigated in certain waters, a matter which it was entirely within their power to regulate. These considerations point rather to the respondents themselves being the *proferentes*, but I think the substance of the warranty must be looked to, and that in substance its authorship is attributable to both parties alike. The main object of the clause is to define the limits within which the vessel is to be kept whilst she is navigated under the policy, and that appears to me to be as much the concern of the shipowner as of the underwriters. To define the limits within which the vessel is to be navigated, for the purposes of a time policy, is, in principle, precisely the same thing as to describe the voyage for which a vessel is insured under an ordinary policy. In both cases it is a definition of the subject-matter of the insurance—a term of the contract—the settlement of which must in my opinion be regarded in a case like the present as the deliberate act of both parties.

Although the rule of construction *contra proferentem* may not apply, I think it was rightly argued for the respondents that, seeing the clause in question occurs in the shape of an exception from a leading term of the policy which gives the vessel leave to navigate in any waters, it can only receive effect in so far as it is plain and unambiguous. But I am not satisfied that there is any ambiguity, such as will avail the respondents, to be found in the clause when it is read as a whole. The ambiguity, according to the argument of the respondents, consists in this, that the words may denote either the river or both Gulf and river, and, according to the view taken by Lord Young, consists in their being applicable either to the river or to the Gulf, or to both. It is not matter of dispute that the name "St Lawrence" is applicable to the Gulf and also to the river, and that, as suggested by Lord Young, it is equally correct to designate the Gulf and river as the Gulf and river of St Lawrence; and if one could conceive a case of the words "St Lawrence" standing by themselves in a policy, without any qualifying context, they certainly would be ambiguous, if not unintelligible. But in the present case any ambiguity which might otherwise have arisen is expelled by the word "no." It is a universal negative, and in my opinion excludes all navigable waters, salt or fresh, bearing the name of St Lawrence, which can reasonably be held to have been within the contemplation of the parties to the policy. If the river had been the only navigable water in North America known as St Lawrence, and there had been elsewhere a gulf of that name, I might have hesitated to hold that the latter was within their contemplation; but the Gulf and river of

St Lawrence are so intimately connected, and the perils attendant upon their winter navigation so much akin, that I have come to the conclusion that the warranty must be held to exclude both.

Being of the same opinion with the Lord Ordinary and Lord Craighill, I agree with your Lordships that the interlocutor of the Second Division ought to be reversed, and that of the Lord Ordinary restored.

The House reversed the judgment of the Second Division and allowed the appeal with costs.

Counsel for Defenders (Appellants)—Sol.-Gen. Sir F. Herschell—Cohen, Q.C.—F. W. Hollams. Agents—Waltons, Bubb, & Walton—J. & J. Ross, W.S.

Counsel for Pursuers (Respondents) — Lord Advocate Balfour, Q.C.—J. G. Barnes. Agents—Thomas Cooper & Co.—Archibald & Cuningham, W.S.

LANDS VALUATION COURT.

Thursday, May 29.

(Before Lord Lee and Lord Fraser.)

FLEMING, REID, & COMPANY, APPELLANTS.

Valuation Cases—Water Rights—Right of Mill-owner to Use Water for Mill—Occupier.

The proprietors of a mill had a right under the feu-contract by which they acquired the ground on which their mill was built to the use of a certain supply of water from an aqueduct passing through the ground, for the purpose of driving their mill, but in such a manner as not to diminish the supply or deteriorate the quality of the water, which was passed on to works lower down the aqueduct. For these water rights the proprietors were bound to pay a certain rate or ground annual, which was declared to be a real burden on the ground. The aqueduct and the supply of water belonged to a water company, who were rated therefor. The Magistrates and Council having taken into account in the valuation of the mills the amount paid by the proprietors for the water rights—*held* by Lord Lee that their judgment was right; by Lord Fraser that it was wrong. The Judges being thus divided in opinion the valuation *stood*.

At a meeting of the Magistrates and Town Council of Greenock as a Valuation Appeal Court, Messrs Fleming, Reid, & Company appealed against the valuation of £2000 put upon the Shaws Water Worsted Mills, of which they were the owners and occupiers.

In 1827 Sir Michael Shaw Stewart of Greenock and Blackhall, Baronet, sold and in feu-farm disponed to the "Shaws Water Joint-Stock Company" a lead or aqueduct leading from a reservoir above the town of Greenock, and also thirty millsteads situated on the margin of the lead or aqueduct and of the two branches into which it divided, with power to the company to sub-feu in lots, each lot to contain one of the millsteads, with a space of ground not exceeding a certain extent. A feu-contract dated 23d September 1840 was entered into between the Shaws Water Joint-Stock Company and Messrs Neill, Fleming, & Reid. By this contract the Company disponed to Messrs Neill, Fleming, & Reid, and the members of that firm, as copartners in trust for their firm, No. 12 millstead, one of the thirty millsteads, and the ground attached thereto, consisting of 1 acre, 3 roods, and 35 falls of ground, "together with the privileges of the water fall of 29 feet 6 inches within the said lot of ground, and the benefit and use of the water allotted for the mills on the said eastern line of leads in so far as the same passes along that part of the said lead which is situated within the boundaries of the ground above feued, of which, under the regulations hereto annexed for the said eastern line of lead, the supply is declared to be 1200 cubic feet per minute for twelve hours each day during 310 working days in the year, to be fixed and ascertained in manner therein mentioned, but solely for the purpose of impelling the machinery to be erected on the said ground, or for such other purposes of the works there as shall not sensibly diminish the quantity or affect the regular and uniform passage of the water to the mills below, or deteriorate the quality thereof so as to render it unfit for washing, bleaching, and ordinary culinary purposes." A feu-duty was stipulated of £26, 5s., and further, the purchasers bound themselves to pay "the sum of £146, 0s. 6d. sterling yearly as a rate or duty or ground-annual for the use of the foresaid water fall and of the water passing the same for the purpose foresaid." This sum of £146, 0s. 6d. was declared a real burden on the subject feued.

In 1866 the property of the Shaws Water Joint-Stock Company was transferred by a private Act of Parliament to the Water Trust of Greenock. Messrs Fleming, Reid, & Company, successors of Neill, Fleming, & Reid, afterwards acquired from the Water Trust five other millsteads (Nos. 13, 14, 15, 16, 17), which were all situated above No. 12, with the privileges of the fall of water attached to them respectively. The feu-contract in each case contained conditions similar to those previously recited. The appellants, Fleming, Reid, & Co., had thus in all about 10 acres of land, but did not build upon the ground belonging to any of their millsteads except No. 12. They had also some separate land feued from Sir Michael Shaw Stewart, adjoining part of their lower millsteads, for the purpose of building houses for their workmen, as no more than a dwelling-house for a manager, and another for a watchman were allowed to be built upon the land annexed to each millstead. The whole of these several subjects were alleged by the assessor to be enclosed and occupied as one possession with exception of a portion let for grazing. The whole water-power of the various falls belonging to those various millsteads was utilised on No. 12, on which the mills were built, and was passed on to the mills and works of others below.

In 1880 it was agreed between the Water Trust and the appellants that all extra water above a certain supply be paid for at a certain rate, the amount then in use to be paid (£390) being guaranteed for eight years.

The valuation of the assessor, against which this appeal was taken, was thus made up:—