assumption that it was competently before the Sheriff on appeal from the Sheriff-Substitute, of which I have great doubt, I do not think an appeal to this Court is now competent to those creditors who did not appear in the Sheriff Court.

Lord Rutherfurd Clark—I also share some doubts on the question of the competency of the appeal to the Sheriff But certain parties now seek to be sisted as appellants who did not appear before the interlocutor dismissing the petition for *cessio* was pronounced in the Sheriff Court. The question is, are they entitled to come here and complain of that interlocutor? We have here two sets of creditors—one of which appears in the Sheriff Court but does not seek to appear here, and another which did not appear there and now seek to do so here. I think as far as the latter are concerned they have by not appearing in the Sheriff Court put themselves out of Court, and that we should dismiss the appeal.

Lord Young was absent.

The Court dismissed the appeal, and of new ordained the Sheriff-Clerk to pay to the defender the sum of £11, 7s. 11d. consigned in his hands.

Counsel for Pursuer and Appellants—Campbell Smith—Rhind. Agent for Pursuer (Appellant) —Archibald Menzies, S.S.C. Agents for other Appellants—David Murray, L.A.—Parties.

Counsel for Defender (Respondent) — Comrie Thomson—Lang. Agent—Robert Broatch, L.A.

HOUSE OF LORDS.

Monday, February 18.

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

COLLINS *v.* COLLINS.

(*Ante*, vol. xx. p. 175; 10 R. 250.)

Husband and Wife—Divorce—Adultery — Condonation—Whether Condonation can be Conditional.

Held (*aff.* decision of Second Division) that condonation of adultery is by the law of Scotland absolute, and cannot be made conditional by paction, and that therefore condoned adultery cannot, by reason of breach of a condition attached to the condonation by the forgiving spouse, be afterwards proved as a ground of divorce.

Proof—Evidence of Adultery.

In an action of divorce brought on allegations of renewed adultery by the guilty spouse with the paramour, adultery which has been condoned may be proved, for the purpose of explaining the relations existing between them, and throwing light on the facts tending to prove the renewed adultery.

Observations (*per* Lord Watson) on the extent to which the canon law is adopted into the marriage law of Scotland.

Condonation—Nature of Condonation.

Condonation of adultery consists in the renewed cohabitation of the spouses as husband and wife in the knowledge by the condoning spouse of the guilt of the other, and the rule laid down by the institutional writers that the marriage thereafter continues in full force is traceable to the effect of cohabitation as man and wife as evidencing marriage.

This case is reported in the Court of Session, *ante*, vol. xx. p. 175, and 10 R. 250, December 1, 1882.

The interlocutor of the Second Division appealed against was:—". . . Find that the pursuer has failed to prove that the defender committed adultery with the co-defender on the 26th January 1882 as libelled: Find that the pursuer cannot found on the previous acts of adultery alleged by him, in respect that such acts were condoned by him, and that such condonation is by law absolute: Therefore of new assoilzie the defender from the conclusions of the action for divorce: As regards the co-defender, find that in the circumstances of the case he is not liable in damages as concluded for: Find no expenses due to him: With regard to the conclusions of the summons as to the custody of the children of the pursuer and defender, find it unnecessary *in hoc statu*, to pronounce any deliverance, but reserve power to either party to make application to the Court with reference thereto in this process in the event of the pursuer and defender not again cohabiting as husband and wife, and decern."

The pursuer Mr Collins appealed to the House of Lords.

In the argument the appellant did not maintain it to be proved that the defender had committed adultery with the co-defender (Eayres) on 26th January 1882, or on other days in that month, and in the previous month, as maintained in the Court of Session, but argued (1) that the proof showed that he attached a condition to his forgiveness of the adultery committed in 1881, and discovered by him later in the same year, that condition being that the defender should never write or speak to the co-defender again; (2) that the meetings which admittedly took place between the defender and co-defender in December 1881 and January 1882 were a breach of that condition, and were for an immoral purpose, even though that purpose were foiled by their having been watched. The condition was reasonable, and the breach of it revived the condoned adultery, unless, as the Second Division held, (1) condonation of adultery was absolute in all cases at common law, and (2) it was impossible specially to make a condition as to it. Neither of these propositions was sound or supported by Scottish authority. They were against English authority.

At delivering judgment—

Lord Blackburn—The interlocutor appealed against does not pronounce any deliverance as to the custody of the children, but "reserves power to either party to make application to the Court with reference thereto in this process in the event of the pursuer and defender not again cohabiting as husband and wife." Should such an application be made, it may be necessary to inquire further as to a fact as to which the Lord Ordinary and the Lord Justice-Clerk are not agreed. If the object and intention with which the wife,

as is admitted, made appointments against her husband's wish, and as she supposed, without his knowledge, was what the Lord Ordinary believes, her conduct was, I think, very reprehensible. If it was with the object and purpose which the Lord Justice-Clerk believes, it was very much more reprehensible. I do not think it proper now to express any opinion either one way or the other on a question not by this appeal brought before this House, and which may be raised hereafter.

It is admitted, both on the record and on the evidence, that there was repeated adultery, and it is not doubted that by the law of Scotland the injured spouse had a right to obtain a divorce for adultery. It is also admitted, both on the record and on the evidence, that the injured husband condoned that adultery—that is, with full knowledge of the previous acts of adultery, chose not to enforce his right to divorce his wife, but freely elected, as he had a right to do, to forgive her, and resumed conjugal intercourse, or rather never ceased to live with her and treat her as his wife; it is not doubted that, having done so, he could not after such condonation apply for a divorce against her unless there was some subsequent misconduct by the wife, and as, in this case, from July 1881 to the month of November 1881 no fresh misconduct of any kind is imputed to her, there was a period of some months during which no action for a divorce could have been successfully maintained, the condonation being a complete bar to such action.

It was alleged by the pursuer that there was fresh adultery committed on the 26th of January 1882, and it was not doubted that if this had been proved the previous condonation of previous adultery would have been no bar to an action for a divorce for that fresh adultery. But all the Judges in the Court below were of opinion that this fresh adultery, as laid, was not proved, and the counsel for the appellant at your Lordships' bar did not ask your Lordships to find that such adultery was proved. But it was contended that though adultery was not proved, yet that misconduct subsequent to the condonation was proved, and that, it was contended, was sufficient to prevent the condonation from being a bar. It was said that condonation was always conditional, and that when a release was subject to a condition resolutive, the condition being broken the release was no longer operative. The interlocutor appealed against lays it down that by the law of Scotland a condonation—that is, I take it, a condonation of adultery such as I have already defined it—is by law absolute.

I have had the great advantage of perusing in print Lord Watson's opinion, which collects all that is to be found in the Scotch law authorities. I think that, as the law of Scotland is greatly founded on the old canon law, that canon law itself and the law of other countries, such as England, which have with more or less modification adopted the canon law, are not to be rejected as authorities as to the law of Scotland. I do not think them, however, of equal weight with the Scotch authorities. I would refer to what I said in this House in *Mackonochie* v. *Penzance*, 6 App. Cas. 446, where I re-stated what I thought had been the view of Lord Stowell in *Dalrymple* v. *Dalrymple*, 2 Hagg. Cons. Rep. 81, as to the weight of authorities.

I think it is important to remember that there was a great alteration made in the sixteenth century in the Scotch law, not only as to the mode of administering the marriage law, but also in one very important point in its substance.

Before the Reformation, in Scotland, and I may say throughout Europe, the marriage tie was considered indissoluble. The Ecclesiastical Courts exercised and enforced by ecclesiastical censures a jurisdiction to compel a spouse, whether husband or wife, to live with and treat with matrimonial kindness his or her spouse, and also relieved an innocent spouse from any obligation to live with a spouse guilty of conduct such as to make it right so to relieve the innocent spouse. This was regulated by the canon law, but no conduct, however bad, relieved the innocent spouse from the matrimonial tie, or enabled him or her to marry again as if the guilty spouse were dead.

But the law of Scotland was, by various Acts which are mentioned in Lord Watson's opinion, changed in this respect. There was a power given by process of law to obtain in a proper case a divorce so as to entitle the party obtaining it to live single or marry as if the marriage had never been, or as if the other spouse were naturally dead. This could be done when the divorced spouse had committed adultery so as to forfeit all his or her rights, interest, or privileges as the lawful spouse of the pursuer.

I should perhaps mention that there was also a power introduced to get a dissolution of a marriage in case of wilful and persistent desertion, but that has no bearing on the question now before this House. With that exception divorce *a vinculo* was granted only in case of adultery, which was viewed by a strong religious party in the Scotch reformed clergy as a very great crime. The Act of 1563, c. 19, cited by Lord Watson, shows that the Scotch Legislature was willing to go far in complying with this view, and it also shows that "the right of any party to pursue for divorcement for the crime of adultery before committed, conformable to the law," was established as part of the law of Scotland as early as 1563. There was no such power in England until an analogous power was created by the Statute 20 and 21 Vict. c. 85, secs. 27-29, A.D. 1857.

All jurisdiction which (before the Reformation) was exercised by the Ecclesiastical Courts was in Scotland transferred to Commissaries, who acted under the control of the Court of Session. If any matrimonial wrong other than adultery was done, for which it was thought right to retain a remedy, the lay Court gave the appropriate redress, whatever it might be; in general, the extent of redress would be much dependent on the gravity of the offence proved. In no case could it amount to divorce from the matrimonial tie. It seems now settled that in case of adultery the injured spouse is not confined to the new remedy of divorce *a vinculo*, but may sue as of old for separation.

In England, until the 20 and 21 Vict. c. 85, the remedy was still to be sought in the Ecclesiastical Courts, who gave the proper redress. In neither country, however great the amount of cruelty was with which one spouse (whether husband or wife) treated the other, could either the lay Court in Scotland, or the Ecclesiastical Courts in England, dissolve the marriage and give leave to the maltreated spouse to marry. In Scotland

adultery was a *sine qua non;* in England, even with adultery, there could not till the recent Act be such a divorce, and there never was such a power at all under the old canon law.

It is therefore to the law of Scotland that we must look to see what the right was, first created about the time of the Reformation, and worked into its existing shape during the course of more than three centuries. I do not doubt that, as Lord Stair says (Institutes, book 1, title 1, s. 14), the canon law was so deeply rooted that even in such a matter as this, in which the canon law was totally departed from, consideration was from the beginning given to the canon law, "as containing many equitable and profitable laws which, because of their weighty matter and their being once received, may more fitly be retained than rejected." Even now, if any principle to be found in the canon law has been worked out in modern English jurisprudence, or any foreign jurisprudence founded on the canon law, so as to come to an approved result, I think it is not to be too hastily assumed that the result has been rejected by the Scotch law. The same considerations which have led to its being retained and adopted in the English or foreign jurisprudence may show that it ought to have been retained in Scotch law, and if it be not clear on the Scotch authorities that it has been before now rejected, it may be proper even now to adopt it. But where the course of Scotch precedent and authority is such as to show that during centuries the Scotch law has rejected any such doctrine, it is not, I think, competent for this House to change that existing law, even if convinced that the change would be beneficial.

The doctrine of condonation was one of those which the law of Scotland did retain from the canon law. It is in itself obviously both just and politic that a spouse (whether male or female) who has become fully aware of the misconduct of the other spouse, and has elected to forgive it, should not be permitted to treat the other as a spouse and to live together and yet to reserve a power to fall back upon the bygone forgiven offence as a substantive ground for redress. I think it is clear, on principle, that such a condonation, accompanied by cohabitation, ought to have the effect of being a complete release and be a bar to any action in respect of that wrong which has been forgiven, and therefore that no action can be brought except in respect of some wrong either subsequent to that condoned or, what comes to the same thing, not known to the condoning spouse, and neither intended to be nor reasonably supposed by the forgiven spouse to be included in the release. But it seems equally clear, on principle and authority, that there may be redress given in respect of such subsequent wrong.

The Lord Ordinary states the canon law to be, that not only did such a condonation amount to a complete bar to the right to seek for a remedy for the condoned wrong, which I think the authorities fully bear out, but that it "completely extinguished" the condoned offence, and that it could not be referred to for any purpose whatever. He treats it as if at the time of the reconciliation a new marriage had been entered into and the old offences not only forgiven and released but entirely extinguished, and as if they had never been. Though, as Maule, J., said in *Mayor of Berwick* v. *Oswald*, 3 E and B. 670—"It is beyond the power of the Courts, or of an Act of Parliament, to recall a day that has passed, or make a thing that has happened not have happened;" it is not beyond them to say that the condoning party shall be precluded from, for any purpose whatever, saying that they had ever been; and the Lord Ordinary thinks that the canon law has done this. This is a very artificial doctrine, not, I think, borne out by the passages which he quotes from the canonists, and the Judges of the Second Division did not assent to it. They decided by their judgment of the 16th of May 1882 that it was perfectly competent for the parties to bring before the Court the whole conduct of the spouse and her alleged paramour before condonation to enable the Court to determine what was the extent of their misconduct after condonation. This judgment on the 16th of May 1882 has not been brought up on appeal, but if it had been brought up, I see no ground on either principle or authority for questioning it.

That judgment did not determine what amount or kind of subsequent misconduct was necessary to justify a divorce *a vinculo*. The interlocutor now appealed from determines that it must be subsequent adultery and no less.

I think, on principle, a reconciliation being entered into with full knowledge of the guilt and with the free deliberate intention to forgive it, where that reconciliation is followed up by cohabitation and living together as man and wife, the status of the couple ought to be the same and not more precarious than if there was a new marriage entered into; and if so, then it would, I think, follow that where the redress sought is a divorce as if the erring spouse were dead, it must be necessary to prove adultery subsequent to the condonation which has the effect of a new marriage. I have had the very great advantage of reading the opinion of Lord Watson, and I think that the effect of the Scotch authorities he cites is that the status of a couple after condonation and cohabitation is the same as if there was then for the first time a marriage. I think the result is, as he says, that the authorities which he cites establish that for at least two centuries the effect attributed by the law of Scotland to full condonation of adultery is that it affords an absolute bar to any action of divorce founded on the condoned acts of adultery. If there was proof of adultery after the condonation, that, like proof of adultery after a new marriage at the date of the condonation, would no doubt have supported the pursuer's case; but I am considering the case on the hypothesis that no actual adultery was proved subsequent to the condonation, which is admitted, in July 1881.

The Lord Ordinary says:—"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." On this I have already remarked. He goes on:—"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 adject any reasonable condition to his condonation. He was not of course entitled to adject 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." It is true that he finds as a fact that no such condition was by paction added to this *quasi* new marriage; but I cannot think a condition that the status of the condoned spouse should be more precarious than that of an ordinary spouse could be valid or effectual. I do not see how it could be consistent with the relation of married persons that there should be a power to divorce for any other cause but that one which the law allows, viz., adultery.

I am not satisfied, either on principle or on authority, that the law of condonation is the same with respect to all matrimonial offences as it is as to adultery. Adultery is a positive fact; either there is adultery or there is not. If there is, subject to any question that may be raised as to condonation, connivance, recrimination, or any other answer, there is an absolute right to a divorce.

Where the remedy which the law allows is not divorce, but at most separation, an action for a subsequent wrong which would give rise to the same remedy is clearly not barred by the previous forgiveness. And as the question whether there ought to be a separation in general depends upon the amount and degree of the offence proved, and not merely on its species, I do not see that there is any obvious reason why the previous conduct of the parties before the condonation should not be taken into account in order to determine what is the gravity of the offence proved. It seems to me not unreasonable to say that, if there has been forbearance and forgiveness, and after that the erring spouse commits any breach of duty (whether adultery or a less grave offence), the offence is more aggravated than when committed against a spouse who has not the additional claim on the duty arising from such forbearance. That consideration cannot convert cruelty into adultery; nor even convert solicitation of chastity into adultery; but it might reasonably enough justify the spouse who had already forgiven so much in refusing to forgive more, and make it fit in an ecclesiastical judge who acted *pro salute animæ*, to abandon all attempts to reconcile the parties, though the acts proved subsequent to the condonation were not in themselves (but for what had gone before) such as to render a separation necessary.

Where separation is sought for cruelty this is decided. In *Macfarlane* v. *Macfarlane*, 11 Court Sess. Cas. 2d Series, 533, at p. 541, the decision was that when a husband had repeatedly beaten and ill-used his wife, and she had fled from him, and been persuaded to return and live with him again as his wife, she was not, on his again ill-treating her, confined, when seeking for a separation, to those acts of cruelty which were subsequent to her not living with him. It is put on the ground that condonation effaced, as grounds of action, all previous breaches of the marriage vow, or, in other words, was an absolute release to an action for divorce for adultery, but that, "in an action like the present, a return to domestic society, has no such effect. It is in its nature conditional, and dependent on the permanent forbearance from those acts of violence by the party who had formerly been guilty of them."

In *Graham* v. *Graham*, 5 Court Sess. Cas. 4th Series, at p. 1095, the Lord President says—"It is quite true that the wife condoned these acts of violence by coming back to him. But I am not sure that 'condone' is a very happy expression, because it leads one to think of the kind of condonation applicable to divorce for adultery. When an act of adultery has been condoned it is wiped out, and can never be referred to again, just as if it had never taken place; but it is not so in an action of separation on the ground of violence. When a wife comes into Court to complain that she cannot live with her husband because of acts of violence to her, and of a course of conduct that has placed her life or health in danger, she thereby opens up an inquiry into the whole history of her married life. Although acts of violence committed at an earlier period, and which have not prevented her from living with him, or going back to him after they have been separated, cannot be made the sole foundation of an action of separation, they may form the subject of investigation and proof, with a view to determine what is the true issue in the case, whether the wife can with safety to person and health live with him now."

This is a different, and I cannot but think a more solid, ground than the fiction of a condition. It comes, however, to the same result.

No Scotch authority was cited for the appellant, who relied entirely on English decisions. Most of those cited were in the English Ecclesiastical Courts, which could not have at all considered the question whether it was right to make the status of married persons living together after condonation more precarious, more subject to be dissolved, than it was before; for, according to the law which the Ecclesiastical Courts of England administered, there could not be a divorce *a vinculo* for any cause whatever.

It is true that in several cases which have been cited, the Court not only acted on the ground that where the cause for which a separation was sought was subsequent to condoned adultery, it was much graver than if there had not been such forgiven adultery, but have expressed as their reason for it that condonation was conditional, and that a breach of the condition revived the adultery. And in *Durant* v. *Durant*, 1 Hagg. Ecc. 733, at p. 761, Sir John Nicholl, after saying that it was unnecessary to decide upon the point, as he was satisfied that adultery subsequent to the established condonation was proved, expresses an opinion which is, no doubt, a weighty authority, though not a decision. He went very far in his language. He says:—"If nothing but clear proof of actual adultery will do away with 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 maintained 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." The cases of *Worsley* v. *Worsley*, 1 Hagg. Ecc. Cas. pp. 734, 764; and *D'Aguilar* v. *D'Aguilar*, 1 Cons. Rep. 134, are referred to.

If this language is to be taken without qualification, and followed to its logical result, it would follow that, however long a spouse had, after condoned adultery, lived chastely and in full performance of all that a spouse should do, any lapse, however slight and venial in itself, from duty, revived the old adultery, and obliged, or at least enabled, the Court to decree a separation. This does not seem to me either just or expedient; I doubt if it was meant. No case in the Ecclesiastical Courts was cited in which the ground of complaint was not one which was, from its nature, capable of being aggravated by the previous though condoned adultery, and in most, if not all, it was so grave that it might well be a ground for separation, even if not so aggravated; and in *Dent* v. *Dent*, 34 L.J. (P. M. & Ad.) 118, 4 Sw. & Tr. 105, to be noticed later, it was such cruelty as without adultery would have entitled the petitioner to a divorce *a mensa et thoro*.

But by the recent legislation, 20 and 21 Vict. c. 85, the powers of the Ecclesiastical Court are transferred to a lay Court, which by sect. 22, in "proceedings other than proceedings to dissolve any marriage," is to act on the principles of the Ecclesiastical Courts. By sect. 27 a proceeding totally new in England is created. It shall be lawful for any husband to present a petition to the said Court praying that his marriage may be dissolved on the ground that his wife has since the celebration thereof been guilty of adultery; and it shall be lawful for any wife to present a petition to the said Court, praying that her marriage may be dissolved on the ground that since the celebration thereof her husband has been guilty *inter alia* of adultery, coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*, or of adultery coupled with desertion without reasonable excuse for two years or upwards.

By the 29th and 30th sections, upon any such petition for the dissolution of marriage, it shall be the duty of the Court to inquire whether the petitioner has been "in any manner accessory to or conniving at the adultery or has condoned the same," and this applies to husband and wife alike. There is no provision at all as to condonation of the cruelty or desertion which require to be coupled with the adultery in order to entitle the wife to a dissolution of the marriage; whether the law as to condonation is or is not by the canon law, as acted on in England, the same as to cruelty as to adultery, it is not made so by the recent statute.

In *Palmer* v. *Palmer*, 29 L.J. (P. M. & Ad.) 124, 2 Sw. & Tr. 61, the Judge Ordinary refused to strike out a paragraph in which the wife, to a plea of condonation, replied "that if she had condoned the respondent's cruelty, such condonation was cancelled, and her right to complain of such cruelty was revived by the respondent's subsequent adultery." And some of the observations reported to have been made, like those of the Court in *Durant* v. *Durant*, 1 Hagg. Ecc. 733, at p. 761, already cited, are authorities for the doctrine of conditionality of all condonations, whether of adultery or of cruelty, though the decision did not require them.

In *Dent* v. *Dent*, 34 L.J. (P. M. & Ad.) 118, 4 Sw. & Tr. at p. 106, the wife petitioned on account of adultery and cruelty. The husband pleaded condonation of the adultery. On the trial it was admitted that there had been adultery in 1861, that it had been condoned in 1861, the parties lived together and had had children. The Judge Ordinary, Lord Penzance, in summing up, is reported to have directed the jury that the rule of law was that all condonation was conditional, and the condition is, "In future you shall treat me as a husband ought to treat his wife; and if you hereafter break your matrimonial obligations, and are guilty of adultery or cruelty, the condoned offence is revived. The question for you is, whether there was any subsequent cruelty which did away with that pardoning or condonation. The pardoning having taken place in 1861, there is evidence that in 1864 the husband was guilty of cruelty. If you are satisfied of that fact, you will find that though the wife did pardon the husband's adultery there was subsequent cruelty committed which revived that adultery. The cruelty must have been, within the 27th section, 'such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*."

This is, I think, the only case reported in which the doctrine of revival has been made the ground on which a divorce *a vinculo* has been granted, and the strong objection arising from its varying the status of married persons does not seem to have been brought to the notice of the learned Judge.

In *Blandford* v. *Blandford*, 8 L. R., P. & D. 19, there had been adultery and desertion; there had been a forgiveness of both that adultery and of the desertion, and a resumption of conjugal intercourse for a few months; after which the adultery with the same person was resumed; there was no condonation of that latter adultery, and the question was whether it could be coupled with

the previous desertion, though that desertion had ceased before the adultery complained of was committed. This seems to me a very different question from that raised in *Dent* v. *Dent*, 34 L.J. (P. M. & Ad.) 118, 4 Sw. & Tr. 106. But it is to be observed that the Judge Ordinary, Sir James Hannen, seems to express approbation of the doctrine laid down in the *dictum* in *Durant* v. *Durant*, 1 Hagg. Ecc. 733, at p. 761.

But assuming it to be now established English law that any matrimonial offence, though forgiven, may be revived by any other matrimonial offence of which the Court take cognisance, it is a very modern law, and not, I think, so obviously just and expedient that we ought to infer, contrary to all the Scotch authorities for the last three centuries, that it either was or ought to have been introduced into the law of Scotland in the 16th century.

Lord Young said in this case—"But if it is fitting that I should consider the reason and policy or public utility of our rule as we have heretofore regarded 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 is 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 forward when the continuance of it has rendered it no longer condonable."

This exactly expresses my own opinion. I will not attempt to improve upon the language in which it is expressed. This being so, I advise your Lordships to affirm the interlocutor appealed against and to dismiss the appeal, and as it is by a husband against his wife, with costs as between agent and client.

Lord Watson—The appellant was married to the respondent Mrs Collins on the 18th of June 1872, and four children were born of the marriage prior to July 1881. In the course of that month the respondent confessed to the appellant that she had in the year 1881 been guilty of repeated acts of adultery with the other respondent William Henry Eayres. The appellant forgave these offences, and continued to cohabit with his wife at bed and board until the 29th of January 1882, when he withdrew from her society, and thenceforth ceased to have any intercourse with her. So far the facts of the case are not in dispute.

The action of divorce in which the present appeal is taken was instituted by the appellant on the 4th February 1882 The only acts of adultery now relied on by the appellant are those of which he was fully informed by his wife in July 1881, and which were then condoned by him; but the appellant alleges that he resumed conjugal intercourse at that time in pursuance of a verbal pardon, which was qualified by the express condition that his right to dissolve the marriage in respect of her previous acts of adultery with Mr Eayres was to revive in the event of her either speaking or writing to that person. He also alleges that the respondent repeatedly violated that condition in the month of January 1882, by correspondence with Mr Eayres, and by personal interviews with him, in circumstances which, if insufficient to warrant the inference that they actually committed adultery, were at least inconsistent with the possibility of the respondent's having been actuated by any legitimate or chaste motive.

The respondent, on the other hand, asserts that no condition whatever was attached to his forgiveness of her matrimonial offences; and she likewise maintains that such a condition, adjected to a conventional pardon, becomes wholly inoperative should the two parties thereafter live together as husband and wife. She also maintains that in point of fact her communications with Mr Eayres in January 1882, however injudicious, were free from any taint of impurity, and consequently that she cannot be held to have violated the condition—assuming it to be proved and also legally binding.

The respondent has been assoilzied from the conclusions of the action, in the first instance by the Lord Ordinary (Fraser), and thereafter by the unanimous judgment of the Second Division.

The Inner House Judges and the Lord Ordinary were all of opinion that the condonation which the law infers from the resumption of conjugal intercourse by a husband or wife who is in the full knowledge of the other spouse's guilt is absolute and unconditional, and that the acts of adultery condoned can never thereafter be made the grounds of an action of divorce. The Lord Ordinary was of opinion that the spouses may set aside the inference which the law derives from cohabitation renewed in these circumstances, by stipulating that the condoning spouse shall have the right to have a divorce for the adultery condoned in the event of the offending spouse committing some act reasonably entitling him or her to that remedy, although that act should of itself afford no ground of divorce. His Lordship held that the condition alleged by the appellant was lawful, and was established by the proof; and he would have granted decree of

divorce had he been of opinion that the subsequent communications between the respondent and Mr Eayres were attributable to *malus animus*, such as a desire to renew their illicit intercourse. His Lordship, however, came to the conclusion, upon the evidence led before him, that the sole object of the respondent was to get back from Mr Eayres her letters and a ring which she had given him, in order to prevent these being made the occasion of future trouble or scandal; and he accordingly held that the condition had not been in substance violated. The learned Judges of the Second Division were unanimously of opinion that condonation of adultery (cohabitation following) cannot be made conditional by the parties; and they accordingly held that the character of the respondent's communications with Mr Eayres in 1882 was immaterial unless these were such as to imply that the crime of adultery had been committed.

On behalf of the appellant these four propositions were maintained—(1) That by the law of Scotland condonation is always subject to the implied condition that the right to found upon the condoned adultery revives whenever the offending spouse subsequently commits a similar offence or acts of impropriety, although these do not amount to adultery; (2) That assuming no such condition to be implied at common law, it may be lawfully adjected, by mutual consent of the spouses, to remission of adultery, though followed by the renewal of conjugal intercourse; (3) That the appellant did attach the condition which he alleges to his forgiveness of the respondent's acts of adultery with Mr Eayres prior to July 1881; and (4) That the respondent in January 1882, without going the length of actual adultery, did violate, not only the letter, but the spirit and substance of the condition.

The third and fourth of these propositions relate to matters of fact, which need not be considered, unless both or one or other of the antecedent propositions, which involve purely legal questions, be affirmed. Being of opinion that the legal propositions maintained by the appellant are not in accordance with the law of Scotland, I have not found it to be necessary to deal with these matters of fact.

I concur in the Lord Ordinary's observation that "the doctrine of condonation of adultery is derived in Scotland from the canon law;" and also in the statement made by Lord Young, "that no Scottish lawyer has ever regarded condonation for adultery as other than absolute by our law, exactly as it is by the canon law." Scottish Judges and Scottish lawyers have frequently expressed their belief that the marriage law of Scotland, both as regards the constitution and the dissolution of the nuptial tie, rests upon the basis of the canon law; and I shall endeavour to indicate the considerations which appear to me to justify that belief.

Before the Reformation all jurisdiction in matrimonial causes belonged to the Bishops' Courts, from which an appeal lay, not to the Civil Courts of Scotland, but to Rome. By a charter, dated the 8th of February 1563, printed in Balfour's Practicks, 670, Queen Mary, with the advice of the Lords of her Secret Council, in order to provide a remedy for the lapse of ecclesiastical jurisdiction, appointed four principal Commissaries at Edinburgh, to have an original and privative jurisdiction in all marriage, divorce, and bastardy causes, subject to the review of the Court of Session only. In the year 1592, that appointment was ratified by the Scottish Parliament, Act 1592, c. 64, 3 Thomson's Acts, 574. The Act narrates that "the jurisdiction ecclesiasticall belonging to the officiallis of auld is and wes divolvit in the commissaries chosin and nominat be our soverane Lord's dearest mother;" and then proceeds to ratify and approve the institution of the commissaries, and the jurisdiction devolved upon them; and finally declares "the said jurisdictioun to be als ample of the same force and authorite with the jurisdiction of the saidis officiallis to quhome thai succeedit."

Considerable changes were made upon the matrimonial law previously administered in the Ecclesiastical Courts by the legislation of the Reformation period. Under the canon law, from the Council of Trent until the Reformation, the marriage tie was universally regarded as indissoluble, and *separatio thori* was the only remedy given for adultery in the Courts of the Church. The Act 1573, c. 55, established in Scotland the remedy of divorce *a vinculo* for desertion. Divorce *a vinculo* for adultery, which Lord Stair traces to the direct authority of Scripture (Inst. i, 4, 7), seems to have been previously adopted by the new Consistorial Courts, in compliance with legislation for the establishment of the reformed religion, such as is to be found in the well-known statutes of 1560 and 1567, 2 Thomson's Acts, p. 526 *et seq.*, and 3 Thomson's Acts, p. 14 *et seq.* By these Acts the Scottish Parliament not only abolished the jurisdiction of the Pope and his bishops, but affirmed in general terms the authority of the Scriptures, and, *inter alia*, enacted that the sovereigns by their coronation oath should make faithful promise "to reule the pepill committit to their charge according to the will and command of God, revelit in his foresaid Word, and according to the lawis and constitutionis ressaivit in this realme, nawyse repugnant to the said Word." The new remedy of divorce for adultery very early received statutory recognition. The Act 1563, c. 74 (the Act anents Adulterie), which made notour adultery punishable by death, also declares that its provisions shall in no wise prejudice any party "to persew for divorcement for the crymes of adulterie before committed, conforme to the law."

The Commissaries had no rule to guide them in the administration of matrimonial suits except the canon law, so far as it remained unaltered by express statute or by legislative recognition of the reformed faith. Lord Stair, who entertained little respect either for those who framed or for those who before the Reformation administered the canon law, says—"So deep hath this canon law been rooted, that, even where the Pope's authority is rejected, yet consideration must be had to these laws, not only as those by which church benefices have been erected and ordered, but likewise as containing many equitable and profitable laws, which because of their weighty matter and their being once received, may more fitly be retained than rejected." (Inst. i. 2, 14; see also Lanc. Inst. Jur. can. 2, 16, 11, *et seq*). Bankton (i. 1, 42) states that the canon law has no authority in

matters of faith; "but is much respected with us in what relates to ecclesiastical rights established upon the Reformation, and in consistorial cases it still predomines." In saying that the commissaries looked for guidance to the canon law, I of course refer not merely to the *corpus juris canonici*, but also to the writings of eminent jurists in those countries where after the Reformation it had become lawful to grant divorce *a vinculo* for adultery.

The appellant's counsel hardly ventured to dispute that according to the canonists the effect of condoning adultery was to extinguish the offence condoned, so that it could not be brought into judgment against the offender at any future time. The texts cited by the Lord Ordinary, in the opinion which accompanies his interlocutor of the 27th of June 1882, *ante*, vol. xx. at p. 177, from jurists who have always been esteemed in Scotland of the highest authority as interpreters of the canon law, fully establish that point. According to these learned writers, acts of adultery condoned, expressly or impliedly, by resumption of conjugal intercourse, in the full knowledge of the spouse's guilt, cannot thereafter be set up as constituting a substantive matrimonial offence, entitling the spouse who forgave them to the remedy of divorce. At the same time these condoned acts, though incapable of being made the grounds of divorce, might be proved in so far as they tended to throw light upon charges of adultery posterior to the condonation.

I do not doubt that it was within the power of the commissaries, or of the Court of Session on appeal from them, to reject or modify any rule or doctrine of the canon law which appeared not to be in itself reasonable or expedient, although it might be neither contrary to express enactment nor inconsistent with any rule of Scripture, as interpreted by those who held the reformed faith. And if there were no authority to show that the plea of condonation has received the same effect in the law of Scotland as it was understood by Voet and Sanchez to have in the canon law, I as little doubt that your Lordships would now have to determine, on general principles, whether their interpretation of the law ought to be followed, or whether the doctrine of condonation in the law of Scotland ought to be understood in the sense contended for by the appellant. In the absence of any evidence or authority to the contrary, I should still be of opinion that there was a strong *a priori* probability that the doctrine received and acted on by the Consistorial Courts of Scotland was actually in accordance with the canon law as expounded by the jurists to whom I have referred. In Scotch books of law the authorities as to the legal effect of condoning adultery are not numerous, possibly because judges and counsel had the same understanding of the law; but such authority as is to be found there is either consistent with, or expressly confirms, the view taken by the learned Judges of the Court below. I have been unable to find, in the text-writers and decisions, a single sentence which favours the contention of the appellant.

The only passage in Lord Stair's Institutions bearing upon this point (Inst. i. 4, 7) is as follows:—"Adultery and desertion do not annul the marriage, but are just occasions upon which the persons injured may annul it and be free, otherwise if they please to continue the marriage remains valid."

Bankton (i. 5, 128) thus states the law—"It is likewise a most relevant defence against an action of divorce for adultery that the pursuer admitted the defender into conjugal society and embraces after she or he knew of the criminal fact; it imports a full reconciliation in the same manner as if the injured party had expressly forgiven the defender or remitted the injury."

Mr Erskine treats of condonation in terms somewhat similar. He explains (Ersk. Inst. i. 6, 43) that adultery as well as wilful desertion are merely occasions or handles which may be laid hold of in order to obtain divorce. "But if the injured party choose to live on in a married state, the marriage continues in full force." Again, in treating of collusion (Ibid. i. 5, 45) the same writer says—"Cohabitation by the injured party, after being in knowledge of acts of adultery committed by the other spouse, if it has not been constrained by force or menaces, imports a passing from or forgiveness of the prior injury, and is therefore sufficient to elide any action of divorce that may afterwards be pursued upon these injurious acts."

I shall only observe that the language of these learned authors is singularly ill chosen if they intend to express the idea that condoned acts of adultery merely lie dormant, until they again become grounds of divorce *a vinculo* by reason of the guilty spouse committing some further act, whether amounting to or falling short of adultery. If that be the true legal result of condonation, it is surely inaccurate to say with Lord Stair that the marriage "remains valid," or with Erskine, that it "continues in full force." In that case the marriage would not continue in full force after condonation, because it would thenceforth be liable to dissolution in the event of certain acts being done by one of the spouses which could not previously have been made the occasion of divorce.

There is a treatise on the Consistorial Law of Scotland by James Fergusson, Advocate, who held the office of commissary in the beginning of this century, which I may here refer to as showing what one of the Judges of the Consistorial Court then understood to be the law which he had to administer. The author says (Fergusson, 1829 ed. p. 195, see also p. 178)—"Reconciliation after knowledge of infidelity has been sustained as a bar against founding on any previous act of infidelity on the action of divorce for adultery. But, on the contrary, as to maltreatment, from its continuous and cumulative nature the rule is opposite, and it is justly held that as the suffering party ought not to break up the conjugal society while there is hope of amendment, the merit of forbearance until injuries shall become intolerable will not then weaken, but, on the contrary, will strengthen the claim to redress by separation *a mensa et thoro*, and for separate alimony supported by proof of the whole course of maltreatment."

I now pass from the text-writers to the consideration of those judicial decisions which appear to me to have a material bearing upon the main question before the House. First of all, there is a report by Lord Monboddo (Jan. 26, 1758, Brown's Supp. vol. v. p. 863) of an anonymous case decided by the Court of Session on

appeal from the Commissaries in the year 1710. A wife having instituted an action of divorce on account of adultery, the husband pleaded in defence that after the adultery was committed the pursuer cohabited with him and had a child by him. It was answered for the pursuer (1st) that she had no certainty of the adultery having been committed, though she had reasonable grounds of suspicion; (2d) that her not separating from the defender was no proof of her having forgiven him; and (3d) "supposing this to be an evidence of her being disposed to forgive, yet there was a fresh provocation alleged, viz., an attempt to poison her, which made it lawful for her *revocare ad animum* the first injury." The learned reporter adds, "but these answers the Lords did not sustain." An attempt upon the life of a spouse is a very serious matrimonial offence, for which, if proved, the law of Scotland has an appropriate remedy, yet the Court held that it could not have the effect of restoring the wife's right to have a divorce for adultery which she had previously condoned.

Then follows the case of *Leslie* v. *Nairn*, decided by the Commissaries in 1712, of which a brief report taken from the record is to be found at p. 164 of Lothian's Practice and Styles of Consistorial Actions. In that case a defender charged with a series of adulterous acts produced an express discharge by his wife in writing of all faults committed by him prior to the 15th of May 1710. The lady objected that the remission was conditional in case the defender should behave dutifully in time coming, which he had not done; but the Commissaries sustained the process "only upon facts and qualifications committed since the 15th of May, the date of the discharge and reconciliation."

The next case in point is *Lockhart* v. *Henderson*, December 7, 1799, Mor. Dic. *voce* Adultery, App. 1. Jean Lockhart brought an action of divorce for adultery against her husband John Henderson, who pleaded recrimination in defence, and also raised a counter action of divorce. The reporter falls into a curious but obvious error in stating that the husband's defence and counter action were "founded entirely on alleged acts of guilt known to him before a reconciliation between the parties in November 1793." It plainly appears from the proceedings as reported, and also from the session papers, that the husband charged his wife in general terms with a series of adulterous acts both before and after November 1793, but the only acts specially condescended on were prior to that date. In the action at the wife's instance, the Commissaries on the 15th of September 1797 "sustained the defence founded on alleged acts of adultery committed by Jean Lockhart, the pursuer, whether prior or posterior to November 1793, as sufficient, if proven, to elide the libel," and allowed a proof. The interlocutor pronounced of the same date in the counter action by the husband was in these terms—"Find it proven by the letter in process, dated November 1793, and by the pursuer's own admission, that he was reconciled to the defender and cohabited with her so late as the said date of November 1793, and in respect of such reconciliation and cohabitation dismiss the libel, so far as founded upon acts of adultery, which came to his knowledge prior to November 1793, and before further answer ordain the pursuer to give in a pointed and articulate condescendence of such acts of adultery committed by the defender posterior to November 1793, as he still avers and is willing to prove." By these two judgments the Commissaries in effect decided that whilst the husband was entitled to found upon the acts of adultery which he had condoned, as raising a personal bar against his wife's demand for a divorce, he could not be allowed to state or prove them as grounds of divorce notwithstanding his allegations that she had persevered in her adulterous conduct after condonation.

As John Henderson did not move in either of these causes, his wife, in the action at her instance, obtained circumduction against him—a judicial declaration that he had by his default forfeited his right to lead the proof allowed him—and she then led a proof in absence, upon consideration of which the Commissaries granted her decree of divorce. The husband carried the case to the Court of Session by a bill of advocation craving to be reponed against the decree, and the Lord Ordinary remitted to the Commissaries to allow him a proof in defence in terms of their interlocutor of the 15th of September 1797. His wife thereupon appealed to the Court of Session against that interlocutor, and maintained, in the first place, that recrimination was no bar to a divorce, and, in the second place, that the proof ought at all events to be restricted to acts of adultery alleged to have been committed by her after November 1793. The interlocutor of the 15th of September 1797, in the counter action at the husband's instance, was not brought under review, but both spouses in their pleadings before the Court of Session in the suit at the wife's instance conceded that it was well founded. The husband, to whom it was adverse, admitted that the reconciliation had been rightly sustained in bar of prior adultery as a ground of divorce at his instance, but maintained that it had been properly refused effect in his wife's action, seeing that condonation did not remove the personal objection to an action raised by a party not herself innocent. "The Court," says the reporter, "were clearly of opinion that recrimination is no bar to divorce, though mutual guilt may affect patrimonial consequences, that on this account it can be stated only in a counter action, and that reconciliation is a complete objection on both sides to a proof of prior guilt then known to the parties." Their Lordships accordingly remitted to the Commissaries to repel the defence of recrimination as a bar to divorce, and to proceed as they should see just.

The next case is that of *Duncan* v. *Maitland*, March 9, 1809, Fac. Col. vol. xv. p. 246, the circumstances of which were somewhat peculiar. The parties were married in 1782 at Dundee, where they continued to reside, but the husband in the course of his business was often absent for long periods in England. On one of these occasions in 1795, when he was about to return to Dundee, he received information to the effect that his wife had committed adultery with a person of the name of Moncrieff. On his return home he made some inquiries about the matter, but resumed cohabitation with his wife, and lived with her for nine consecutive months. After that the husband went to reside at Huddersfield, his wife remaining in Dundee, and in July

1806 he raised an action of divorce, founded on the alleged acts of adultery with Moncrieff in 1793 and 1794, coupled with the allegation that she had ever since lived in one continued course of adultery, having for her paramours successively certain persons named other than Moncrieff. The wife pleaded that the proof of adultery ought to be limited to the period subsequent to her cohabitation with the pursuer in 1795, but the Commissaries allowed a proof at large, and thereafter granted decree of divorce, holding that her adultery with Moncrieff was proved, and that her plea of condonation had not been established. The case was carried by appeal before the Lord Ordinary, by whom it was reported to the Second Division of the Court, then consisting of seven Judges. Their Lordships were of opinion that the husband's admitted knowledge respecting the defender's guilt in 1795, his subsequent cohabitation, and the fact that there was no adequate reason for his failing to institute proceedings for 13 years afterwards, were together sufficient to sustain her plea of condonation, and accordingly they remitted to the Commissaries "to alter their interlocutor, and to assoilzie the defender." The effect of that judgment would have been to acquit the defender, not only of adultery with Moncrieff, which the Commissaries had held to be proved, and which was sufficient (apart from condonation) to sustain a decree of divorce, but also of the subsequent acts of adultery libelled. Accordingly, their Lordships in a reclaiming petition at the husband's instance, qualified their previous judgment by "reserving to him his right to be heard before the Commissaries as to any acts of adultery committed by the defender after his reconciliation with her."

It is unnecessary for the purposes of the present case to consider whether in *Duncan* v. *Maitland*, March 9, 1809, Fac. Col. vol. xv. p. 246, it was rightly held that the husband had condoned his wife's guilt prior to 1795. The Courts of Scotland in determining whether there has been *remissio injuriæ* have always attached great weight to unexplained delay on the part of the injured spouse. In the case of *A B and C D*, July 20, 1853, 15 Court Sess. Cas. 2d Series, 976, the Court appears to me to have attached even greater significance than in *Duncan* v. *Maitland* to *mora* as a circumstance implying remission. The bearing which *Duncan* v. *Maitland* has upon the present case consists in this, that the Court by their judgment distinctly affirmed the doctrine that condonation is an absolute bar to an action of divorce founded upon the injuries condoned, and that allegation or proof of subsequent adulterous conduct does not give the injured spouse any right to revert to the acts of adultery which he has remitted.

In evidence of the fact that the doctrine applied in *Duncan* v. *Maitland* has been understood by the Bench to be in strict accordance with the law and practice of the Scotch Consistorial Courts, I may refer to the *dicta* of Lord Fullerton in *Macfarlane* v. *Macfarlane*, February 7, 1849, 11 Court Sess. Cas. 2d Series, 533, at p. 541, in which an unsuccessful attempt was made by the defender in an action for separation to exclude evidence of certain acts of cruelty which it was alleged the pursuer had forgiven. His Lordship, with whom Lord Jeffrey concurred, said—"In short, this reconciliation seems to be treated as an act of condonation, like the renewal of intercourse after knowledge of adultery in a case of divorce. There is no analogy between the two cases. An act of condonation is understood in law to efface, as grounds of action, all the previous breaches of the marriage vow; and the party who afterwards complains must found that complaint exclusively on acts subsequent to the condonation. But in an action like the present, a return to domestic society has no such effect. It is in its nature conditional, and dependent on the permanent forbearance from those acts of violence by the party who had formerly been guilty of them." The Lord President (Lord President Boyle) and Lord Mackenzie expressed themselves to the same effect. These *dicta*, although *obiter* in this sense, that the case was not one of divorce *a vinculo*, were nevertheless very relevant to the point which the Court had to decide, seeing that the contention of the defender was in substance that forgiveness of cruelty ought to receive the same effect in a separation suit as condonation of adultery in an action for dissolving marriage. There are many similar expressions of judicial opinion by Judges of eminence, including the present head of the Court of Session (*vide Watson* v. *Watson*, 12 Scot. Law Rep. 78). But upon this part of the case it seems to me to be unnecessary to add to the unanimous and clear statements of the learned Judges who decided it. These are at least sufficient to show what has been rightly or wrongly understood by the Scottish Bench to be the retrospective effect of the plea of condonation in bar of an action of divorce for adultery.

I think it right to notice that in *Fairlie* v. *Fairlie*, July 3, 1815, 6 Paton, App. Cas. 121, at p. 129, there occur certain observations by Lord Eldon which seem to have an indirect bearing upon the question now before the House. The husband in that case, which was an action of divorce, libelled on various alleged acts of adultery by his wife in the years 1806, 1807, and 1808. The commissaries, after a preliminary proof had been led by the defender with a view to establish condonation, decided against her, and allowed the pursuer a proof of the whole facts alleged in the libel; but the Court of Session altered their judgment and sustained the wife's plea in bar. An appeal having been taken in this House, the cause was remitted for further consideration. The Lord Chancellor (Lord Eldon), after pointing out the extreme nicety and difficulty of coming to the conclusion upon such evidence as had been adduced, that the husband must have known or did believe in his wife's guilt on all the occasions libelled, went on to say—"I am quite satisfied that this case has not been sufficiently considered upon these nice points, and there is one particularly which may require a little further consideration; and that is this—supposing that it happens that a man has forgiven his wife the act of adultery committed at one time, it cannot be contended that that is to operate to all time thereafter that she pleases; and therefore the case is to be considered, not with reference to the conduct of the husband as to one act of adultery alleged to have been committed in 1806, but the case, when put on the question of *remissio injuriæ*, must be considered with reference to the years 1806, 1807, and 1808. If he did remit the injury

committed in 1806, no man will argue that he thereby gave her a license, as it were, to commit as many acts of adultery as she thought proper in the years 1807 and 1808; and therefore when in a case of this sort Judges jump to the conclusion that the husband has remitted, and do not at all establish that he was acquainted with the facts, and meant to forgive that which he knew had taken place, as contradistinguished from his being induced to believe that the fact of adultery had not taken place, and when, again, the point to which I last adverted is considered, that the *remissio injuriæ* cannot extend to a further period, I think it is fit the case should be further considered."

Lord Eldon was of opinion that the Court below had somewhat hastily inferred from the evidence that the husband had condoned all the acts of adultery libelled; and for their information and guidance he indicates two other possible inferences—the one that the conviction of his wife's guilt had never forced itself upon the mind of the husband, and the other that he knew or believed that she was guilty in the year 1806, without having knowledge or belief of her adultery in the two succeeding years. In the latter case the noble Lord points out (what does not seem to admit of dispute) that the remission of adulterous acts committed to 1806 could not have the effect of condoning similar offences committed in 1807 and 1808; and he does so in terms which appear to me to imply that such *remissio injuriæ*, though it could not extend to a further period, would yet bar the appellant from founding on acts which he had knowingly forgiven. At all events, the language of the noble Lord does not suggest that condonation of acts of adultery in 1806 would cease to be operative, in regard to these offences, if the husband should prove that in 1807 or 1808 his wife had committed adultery or had conducted herself in an unseemly manner without committing adultery.

I have dwelt, perhaps with unnecessary detail, upon the Scotch authorities, because they are ignored by the learned counsel for the appellant, who rested his case upon English decisions, and some of them were not referred to by the respondent's counsel. To my mind these authorities, which have not been trenched upon by any judgment of this House, do sufficiently establish that the effect attributed by the law of Scotland for nearly two centuries past to full condonation, by which I mean remission with the knowledge of the acts forgiven, followed by cohabitation as man and wife, is that it affords an absolute bar to any action of divorce founded on the condoned acts of adultery.

The appellant, however, maintains that although at common law there should be no implied condition making condonation revocable, in the event of the offending spouse being thereafter guilty of adulterous conduct or of impropriety other than actual adultery, the parties themselves may nevertheless adject a condition of that kind. To render such a condition valid it was argued that it is only necessary to satisfy the Court that it was, in the circumstances in which the parties were placed, a reasonable condition, even though the acts in respect of which the condoned adultery was to revive should not *per se* constitute a matrimonial offence of which the law takes cognisance in an ordinary divorce suit. To the appellant's argument upon this point I cannot assent. To give effect to it would, I venture to think, not only be to introduce a new element of uncertainty into the Scotch law of marriage, but to recognise a principle utterly inconsistent with that law.

If a husband, on coming to the knowledge that his wife had been guilty of adultery, were to say to her, "I shall not in the meantime cohabit with you, but I forgive you the past, upon the express condition that you never see or write to your paramour again," I do not, as at present advised, see any reason to suppose that if the wife violated that condition the husband would be precluded from having a divorce on the ground of her previous adultery. So long as the spouses continued to live apart, a remission in these qualified terms would not, in my opinion, constitute *plena condonatio* according to the law of Scotland. But it is a very different matter when the spouses resume cohabitation as husband and wife. In the old case of *Watson* v. *Cruikshank*, July 15, 1681, Mor. Dict. 330, which is referred to by Mr Erskine in a passage from which I have already quoted (Inst. i, 6, 43), the Lords found "that the wife's conversing with the husband as man and wife after the deeds of adultery were particularly known to her, did infer the passing from divorce on these deeds;" and that doctrine has ever since been accepted as the law of Scotland. In considering this point the conclusive effect which the law of Scotland assigns to cohabitation as man and wife, not as constituting, but as evidencing *ipsum matrimonium*, must not be lost sight of; for to that source the rule laid down by our institutional writers, that the marriage continues "in full force "whenever cohabitation is renewed by a spouse who is in the knowledge of the other's adultery, appears to me to be traceable. If effect were given to such a condition as the appellant pleads, the marriage would not continue "in full force." It would be liable to dissolution in the event of one of the spouses violating the condition by the commission of an act which the law does not recognise as a matrimonial offence or as a ground of divorce *a vinculo*.

It is, in my opinion, contrary to the policy of the matrimonial law that parties should be permitted to alter or vary, by private paction, the legal rules upon which the constitution or dissolution of marriage depends. No one would venture seriously to maintain that two persons contracting marriage could effectually stipulate that it was to be dissoluble for any cause, or upon any terms other than the law prescribes. And if I am right in holding that it is a rule of the law of Scotland that a spouse who in the full knowledge of past acts of adultery renews conjugal intercourse with the offender, thereby loses for ever his right to sue for divorce in respect of these acts, upon what principle can the spouses be permitted of mutual consent to set aside that rule?

I have hitherto spoken of the law applicable to this case as I understand it to be settled by authority in the Courts of Scotland, and in the view which I have taken I should not feel myself entitled to alter that law, even if it could be shown that the rule which has been followed by the Courts below is not the wisest or most expedient. But I think it right to say that I am not convinced either of the unwisdom or of the

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