

I have already said, I think that this denial will avail him nothing. Nor do I think it of any importance that the pursuers did not answer this communication, and did not for some months press their demand on the defender. They say very reasonably that they thought it necessary to make inquiries at Money before taking further steps. Although failure to answer a letter may often, in the course of business transactions, imply an answer in the affirmative, yet, after a legal liability had been established, the mere circumstance that denial of liability is not answered will not necessarily imply an acquiescence in that denial. The delay for a few months to enforce a legal claim will not infer a forfeiture of that claim.

There is a great deal more difficulty about the transaction engaged in between the pursuers and Money on 21st December 1868, when they agreed to take Money's promissory-notes for the debt now sued for. If the defender had been a party to the proceeding, a very formidable plea in defence would have arisen out of this transaction. As it stands, I think the transaction is not such as to afford the defender liberation. Mr Deacon very reasonably explains that, going on Mr Money's statements as to what had happened, they agreed to take him as debtor in the debt; but that they immediately after found that Money had deceived them, and had defrauded them also in other transactions. In consequence of this, and before the promissory-notes were granted, they wrote to Money, intimating that they would make no arrangement with him. They did so on 28th December, only seven days after they had agreed to take his notes. Things then remained entire. The defender, who was no party to the transaction, and knew nothing about it, cannot say that the suggestion of this arrangement, or the lapse of the seven days during which it was pendent, did him any injury. Whatever might have been the case in other circumstances, I do not think the defender's liability is affected by this contemplated but never completed arrangement.

The Court sustained the appeal.  
Agent for Pursuers—Alexander Cassels, W.S.  
Agent for Defender—George Begg, S.S.C.

Friday, December 23.

A. v. B.

*Divorce—Adultery—Condonation—Process—Expenses.* Circumstances in which, the adultery having been committed during the husband's absence abroad, and he having returned home during his wife's pregnancy, the plea of condonation was stated and repelled, and divorce pronounced, though the husband had, during the last three months and a-half of his wife's pregnancy, cohabited with her and slept in the same bed, once every fortnight at least, and generally once every week, and had done so three days previously to her confinement; and although other people were aware of his wife's condition during the whole of this period, the child having come to its full time—the Court being of opinion that both his conduct and his wife's showed that he was not aware of her pregnancy.

Held that the wife was only entitled to recover from the pursuer the amount of her agent's outlays.

This was an action of divorce at the instance of A against B, his wife. The summons concluded that their Lordships "ought and should find facts, circumstances, and qualifications proven relevant to infer the defender's guilt of adultery with a person whose name, occupation, and place of residence is unknown to the pursuer, and therefore find her guilty of adultery with him accordingly: and our said Lords ought and should divorce and separate the defender from the pursuer's society, fellowship, and company," &c.

The statements of the pursuer were that he and the defender were lawfully married on 17th January 1848: That he is a sailmaker, and had been in use to be employed as such on board foreign-going ships. His dwelling-house, in which he resided with his wife and family when he was at home, was in ———: That on 27th January 1869 he entered at Sunderland on board the ship 'Coral Nymph' of London, for a voyage to China. The ship was wrecked in Gasper Straits on or about 22d May 1869. The crew, including himself, succeeded in reaching Singapore by means of boats, and the pursuer there received his certificate of discharge, which is dated 17th June 1869: That on the 30th of June 1869 he was engaged at Singapore for a voyage to Liverpool, on board the ship 'Nyassa' of Glasgow. The ship reached Liverpool, and he was there discharged on 15th November 1869: That he returned home to ——— on or about 22d November 1869, having been absent from this country for a period of ten months, during which he had not, and had not the opportunity of having, any sexual intercourse with the defender, his wife, who had during the said period been resident, as she had been since their marriage, in ———: That on or about the 8th day of March 1870, the defender gave birth to a full-grown but still-born child. Of this child the pursuer was not the father, and could not be, the birth having taken place within three months and a-half of the pursuer's return home as above mentioned: That he was not aware of the pregnancy of the defender, and was in Leith at his work when he received the news of the birth of the said child. He thereupon ceased to reside with the defender, and has not since cohabited, or had any sexual intercourse with her: That the said child is the fruit of an adulterous connection between the defender and some person, whose name, occupation, and place of residence were unknown to the pursuer, but who is now represented by the defender to be C D, shoemaker in ——— during the months of May, June, or July, or some other time during the period foresaid of the pursuer's absence from this country, the particular date or dates thereof being to the pursuer unknown.

The defender admitted the fact of adultery, and that the said C D was the father of the said child born on 8th March 1870. But she averred that both before and after the birth the pursuer was well aware of the paternity. That "notwithstanding this knowledge, the pursuer has been and continues to be, on terms of great intimacy with the said C D. That the pursuer returned home about 22d November 1869. He lived and cohabited and had sexual intercourse with the defender until the beginning of January last, when he went to Leith, where he procured employment, retaining his house in ———, where the defender and the family continued to reside. After he went to Leith he returned

weekly or fortnightly to his house in —, and lived in family with the defender, and had sexual intercourse with her up to and including Saturday and Sunday, the 5th and 6th of March, two days prior to the birth of the child. During the whole of this period, from November to March, the pursuer was quite well aware of the defender's pregnancy, which was quite apparent, had been observed by the neighbours, and was a matter of current report among them. That, after being informed of the birth of the child, the pursuer visited the defender on the 13th and 14th days of the said month of March, and treated her with kindness as his wife, giving instructions to call in medical aid if required, and ordering provisions and spirits for her use. On the 14th the pursuer took dinner and tea in the house with the defender, and shook hands with her before leaving for his work at Leith. The pursuer has also twice visited the defender during the month of May last, on which, as on the former occasions, he treated the defender with kindness, conversed with her in his ordinary manner, and acted in such a way as to show that he condoned the offence.

She pleaded—“(1) The defender not having been guilty of adultery with a person whose name, occupation, and place of residence is unknown to the pursuer, she is entitled to absolvitor. (2) The pursuer having condoned the offence, is not entitled to sue for divorce. (3) In the circumstances, the defender is entitled to absolvitor, with expenses.”

The more important parts of the proof were as follows:—The pursuer's averments as to his absence from the country and his return in November 1869 were either admitted or substantiated. The eldest daughter of the pursuer and defender, deposed—“I remember my father coming home in November last. He lived for some weeks with my mother and the rest of us. My father and mother occupied the same bed at night. In two or three weeks after he came home he went to work at Leith; but he came over on the Saturdays and went away on the Sunday nights, generally every week, and sometimes once a fortnight. On these occasions, when he stayed over the Saturday nights, he and my mother slept in the same bed as usual. I remember him being over on Saturday, 5th March, when they slept together in the same way. My mother had a child on 8th March.” This was corroborated by her sister. They further concurred in stating that they had both been aware, from their own observation, of their mother's condition, even before their father's return in November, but that they had always asserted to strangers that they knew nothing about it until after the birth of the child. Their mother did not say anything to them about it, or tell them who was the father until after the birth. They also stated that their father had come over on the Sunday after the child's birth, and had spent some time on that and the following day in the house, but that he had not slept there. On leaving, he said that if their mother needed a doctor they were to go for one, and he would pay the expense. He also said that they were to send for him if she turned worse. On leaving, they stated that he shook hands with the defender, and spoke kindly to her; but the elder admitted, on cross-examination, that when her mother asked forgiveness for what she had done, her father replied that he hoped the Lord would forgive her, but that he never would. He was in the house

once or twice afterwards, but only to look after his furniture and things. Little passed between him and his wife on these occasions, and he never slept there. There was also evidence of one or two neighbours who had been some time previously aware of the defender's condition from her general appearance. For the pursuer, one witness, who was constantly in the house up to the date of the child's birth, denied having been aware of the defender's condition till called in by her just before her delivery. Her evidence, which is important, will be found in the Lord President's opinion. The other evidence of the pursuer related to his conduct upon receiving intelligence of the child's birth while at work at Leith, and, if true, was negative of any previous knowledge on his part.

The Lord Ordinary (JERVISWOODE) pronounced the following interlocutor:—

“Edinburgh, 20th July 1870.—The Lord Ordinary having considered the Summons, with the proof adduced, productions, and whole process,—Finds facts, circumstances, and qualifications proved relevant and sufficient to instruct that the defender was guilty of adultery, at a time or times, during the absence of the pursuer from this country, between the 27th January and 22nd November 1869, and during which absence the pursuer had not, and could not, have sexual intercourse with the defender: Finds the defender guilty of adultery accordingly: Further finds that she has failed to prove facts and circumstances relevant and sufficient to support the allegations made on her behalf on the record, to the effect that the pursuer had condoned the offence: Therefore, with reference to these findings, divorces and separates: Finds, decerns, and declares in terms of the conclusions of the Summons.”

The defender reclaimed.

D. CRICHTON for her.

STRACHAN for the respondent.

At advising—

LORD PRESIDENT—With regard to the objections to this interlocutor and to the case of the pursuer generally, that the adultery is libelled as having been committed with a person unknown to the pursuer, while in fact he did know, I do not think this a good objection. The pursuer had himself no knowledge of who the person was. He was absent from the country at the time of conception, and had no means of knowing anything about it. The only information he got came from the defender; and he certainly was not bound to act on that, for it might have been given for the express purpose of misleading him.

The second and only other plea for the defence is condonation. It is said to be proved, or rather to arise from the circumstance of the pursuer having cohabited with his wife after he knew she was pregnant. Now it is proved that after he came home in November to March following, the pursuer occasionally slept in the same bed with his wife. That is the ground in point of fact. There is some discrepancy between the witnesses as to the effect on the appearance of the defender. Some witnesses say it was quite observable to the eye that she was pregnant, while a witness for the pursuer says, although she frequently saw the defender, and was sometimes three times a-day in her house, she never suspected anything wrong. Most certainly it is possible that the parties might cohabit—at least sleep in the same bed—without the man being aware of the

pregnancy. If that were alleged to be an impossibility it would require to be proved. The other evidence in the case really takes away all ground of dispute. The conduct of the defender herself when her confinement was imminent, as proved by the above-mentioned witness, it is impossible to reconcile with the idea that the husband was aware of the pregnancy. This witness says defender asked her to come up, "I asked her, why are you so dull?" She shook her head and said, "I will be put to the door." . . . I also said to her, "how in the name of peace did you manage that, when your husband was here on the Saturday and stayed till the Sunday night?" She said, "he is not a jealous man, and he never suspected anything of the kind." I said that was very singular to me; and she said it was the truth." It is clear that the defender was aware that her husband never suspected anything wrong. Then observe this witness' account of what took place after the confinement. "On the Saturday one of the daughters went over to Leith, and her father came across with her on the Sunday night. I was in the house shortly after he came. One of the children came up for me, and when I went down I found the defender in a kind of nervous state about her husband having come. She said to me, 'Oh! if I was only out of this.' . . . The pursuer was then in the room looking in a very distressed way. . . . I was once in the house on the Monday. The pursuer was then packing up his chest, and he was a very distressed man. He said to me 'you have seen my chest packed up often; but never in such a case as this.'" Now if all this is true, the whole conduct of both parties is utterly inconsistent with the notion that the husband knew of his wife's condition. The woman herself confesses that he did not. If the husband had such knowledge, he must have been an accomplished actor to have acted as he did before the witness. Therefore one is led to think that the defender's own account is the truth, viz.: that the pursuer was not a jealous or observant man, and that he was not aware of his wife's condition. I must say that I am satisfied, not only that condonation is not proved, but that it is proved by reliable evidence that there was nothing of the kind.

**LORD DEAS**—There is no doubt that the defender committed adultery. The whole case turns on condonation. I presume that if a man cohabits with his wife after he knows of the adultery there is no doubt but that is condonation; and that in this case, if the man cohabited after he knew the wife was in a state of pregnancy, there is just as little room for doubt here. There is no doubt of the fact that the pursuer did cohabit after the pregnancy, and within two or three days of the birth of the child. The only thing on which there can be a doubt is, whether he was aware that she was in a state of pregnancy. I do not remember ever seeing so narrow a case on evidence as we have here. I do not think much stress is to be laid on the personal appearance of the woman. One witness who was intimate in the house, says she never observed it and had no suspicion of it. Several other witnesses say they did observe it and had no doubt about it. But still it is not by any means so very remarkable a thing that an individual, even the husband himself, should not observe it, merely from the wife's appearance. The fact that the witness above mentioned did not notice it

would probably be enough on that point. The difficulty arises from his sleeping with his wife from November till within two or three days of the birth on the 8th March. He does that and yet says he was ignorant that she was pregnant. The natural and reasonable presumption is that he was not and could not be ignorant. If that stood alone, I do not know that more proof would be necessary. I think there would be reasonable evidence that he knew. The main thing on the other side consists in the statements which the wife made just before the birth of the child; and certainly she says that she believed the pursuer had no suspicion. That does not come to much; for in most cases the wife is a very favourable witness for her husband, and that has been observed even where the husband has attempted to murder her. Besides, at the time she made these statements she does not appear to have given up the idea that he would forgive her. Coupling these two circumstances, that makes it not so satisfactory as if it had been proved by other evidence. But I agree with your Lordship that any evidence we have in addition goes in the same direction, because I quite agree that the behaviour of the man goes to confirm the notion that he did not know. But taking all that, the case is very narrow. If this had occurred in a higher rank of life, it would not have been very easy to take the man's story off his hand without something more. I would have required evidence of men of skill and experience, as to whether it was possible for such a thing to happen as is here averred. We have had occasion to know from our judicial reading that such a thing is possible. The only difficulty is that it is a very rare and peculiar case; and it occurs where there is no change in the appearance of the woman externally, and where the woman does not know herself. If we knew that this was one of those cases that would have been satisfactory. Taking all the circumstances into account, without making this a rule for other cases I am not prepared to dissent from the decision your Lordship has arrived at.

**LORD ARDMILLAN** and **LORD KINLOCH** concurred with the **LORD PRESIDENT**.

**CRICHTON** for the defender moved for expenses.

The Court refused to allow anything more than the agents' outlay.

Agents for Reclaimer and Defender—**D. Crawford & J. Y. Guthrie, S.S.C.**

Agent for Respondent and Pursuer—**James S. Mack, S.S.C.**

*Friday, December 23.*

**SCOTT, PETITIONER.**

*Pupil—Allowance to Father for Maintenance.* Circumstances under which a further allowance to a father out of the estate of his pupil son, for the son's maintenance and education, was refused.

It having been one of the conditions of the disentail of the estate of Malleny, of which Major Scott of the 42d Highlanders, the present petitioner, became fee simple proprietor, that a provision of £18,000 should be secured upon the estate for his eldest son, Carteret Cunninghame Scott, then a pupil, a factor *loco tutoris* was in 1866 appointed by the Court to manage the said fund