LORD CHANCELLOR.—It is not a case for costs on either side. It involves a question of great importance; and there is a variation made in the interlocutor. I therefore move your Lordships that there be no costs.

Interlocutor affirmed, with variation.

First Division.—Deans and Rogers, *Appellant's Solicitors.*—Grahame, Weems, & Grahame, *Respondents' Solicitors.*

NOVEMBER 30, 1852.

JOHN EDWARD GEILS, *Appellant*, *v.* MRS. FRANCES DICKINSON or GEILS, *Respondent.* (NO. 2.)

Husband and Wife—Divorce—Domicile—Foreign—Personal Bar—Res Judicata—Lis Alibi—*A domiciled Scotsman married an English lady in Berkshire, and, in consequence of the lady having left his society and gone to England, he instituted a suit against her, in the Arches Court of Canterbury, for restitution of conjugal rights. The wife, in defence, lodged, as it is there termed, a responsive allegation, averring adultery committed by him in Scotland, and praying for divorce, or separation* a mensâ et toro, *the highest remedy afforded in the circumstances by the English Law Courts. The proceedings resulted in the judgment prayed for by the wife.*

HELD (affirming judgment), *that though the procedure by the wife might be viewed as substantially, if not in form, of the nature of a direct suit to obtain such remedy as was competent to the English Law Courts, yet as the parties were to be held, as well from the state of the record as from the principle of* Warrender *v.* Warrender, *subject to the jurisdiction of the Scotch Courts, she was not barred from insisting in an action in the Court of Session for the purpose of there obtaining the larger remedy of divorce* a vinculo matrimonii, *for acts of adultery alleged to be committed in Scotland.*

A wife who has in Scotland obtained a decree of divorce a mensâ et toro *may afterwards apply for decree* a vinculo.

The defender, a Scotchman by birth, was the eldest son of the late Lieutenant-Colonel Geils of Dumbuck, in the county of Dumbarton, succeeded to the estate on his father's death in 1843. The pursuer was an Englishwoman, and was the only child and heir of the late Charles Dickinson of Farley Hill, in the parish of Shinfield-cum-Swallowfield, in the county of Berks. The defender entered the army in the year 1834, and returned from India in the course of the year 1837. He then took up his residence in the mansion house of Dumbuck. In September 1838, he made a temporary visit to England, and married the pursuer there in the course of the following month. Within fourteen days from the date of the marriage, he returned with his wife to Scotland, where they resided, continuously, with the exception of occasional absences in England, till Sept. 1845. In the course of that month, the pursuer left the defender's society, and returned to England, where she resided with her own friends. In October following, the defender instituted proceedings against her in the Arches Court of Canterbury, to whose jurisdiction she was then subject,—the object being to obtain restitution of conjugal rights.

The pursuer appeared as a defendant in that suit. Her pleadings contained what is technically called a "responsive allegation," setting forth various acts of adultery and cruelty by her husband, in respect of which she prayed the Court to grant her a divorce *a mensâ et toro.* She ultimately succeeded in obtaining a decree to that effect. The acts of adultery and cruelty were alleged to have taken place in Scotland. The pursuer then raised in the Court of Session the present action of divorce *a vinculo matrimonii*, on the ground of the same acts of adultery as those set forth in the responsive allegation in the Court of Arches.

The First Division held that the pursuer was not barred from maintaining the action. Thereafter the appellant presented the present appeal, praying that the above judgments might be reversed. The respondent, on the other hand, presented a petition to have the appeal (of the husband) dismissed as incompetent; but the House of Lords, after hearing one counsel of a side, on 8th May 1851, dismissed the respondent's petition, reserving the costs until the hearing of the appeal itself.—(See *ante*, p. 1).

The appeal now came on for decision. The grounds on which, in his *printed case*, the appellant sought to have the interlocutors of the Court of Session reversed, were as follows:—1.

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[1] See ante, p. 1, also previous report, 13 D. 321; 23 Sc. Jur. 137, 435. S. C. 1 Macq. Ap. 255: 25 Sc. Jur. 88.

Because the judgments were incompetently pronounced without any record having been made up and closed in terms of the statute. 2. Because the respondent having obtained a decree of divorce *a mensâ et toro* in England on the same alleged adulteries as were made the foundation of the summons in the present case, was barred from maintaining the present action. 3. Because, under all the circumstances the Court of Session ought to have sustained the appellant's second defence, and assoilzied him from the conclusions of the summons; or, at least, the Court ought to have dismissed the action.

The *respondent*, who maintained that the appeal could only be held to embrace the interlocutor of Lord Wood of 20th July 1850, and that of the Court following on it, supported them in her *printed case* on the following grounds:—1. The judgments were well founded in so far as they repelled the plea of the appellant to the effect that the respondent was barred from maintaining the present action,—seeing that she had neither done nor consented to any act capable in law of inferring that result. 2. That they were also well founded in so far as they reserved the plea of the appellant resting on an alleged *remissio injuriarum*,—inasmuch as the plea was not prejudicial, but was one which ought to be remitted to probation only in the event of the adulterous acts which constitute the action, being either proved or admitted.

Bethell Q.C., and *Anderson* Q.C., for appellant.—1. The record was not closed. The Court below dealt with this as a dilatory defence, which could be disposed of without the record being made up, but this House decided (*Geils* v. *Geils*, 1 Macq. 36) that this was a peremptory defence, therefore the Judicature Act applies, and it is imperative—*Doig* v. *Fenton*, 5 S. 533; Bell's Dict. "Record," 824. 2. As to the main question:—Mrs. Geils, in pleading cruelty and adultery to the suit for restitution, and praying for a decree *a mensâ et toro*, thereby became, to all intents and purposes, the plaintiff or actor, as much as if she had herself commenced the suit. It was like commencing a cross action. Formerly it was the practice in the Ecclesiastical Court for the wife to commence a cross suit, though that practice has ceased, and she now brings in a responsive allegation, the effect of which, however, is precisely the same—*Best* v. *Best*, 1 Add. 411. The *onus probandi* becomes thereby shifted upon her, and accordingly it was she who led proof of the acts of adultery in this case. When, therefore, a decree *a mensâ et toro* was pronounced, it was at her instance, and being at her instance, it became a *res judicata* barring further redress. All the circumstances had been made once the subject of complaint—the judicial mind had acted on them, and they could not therefore again be agitated in a court of justice. Suppose the Judge of the English Court had decreed an absolvitor to the husband, could the wife have thereafter gone to Scotland to renew her suit? If she could not, then the Court of Session, in fact, had no jurisdiction to entertain this action at all.

[LORD CHANCELLOR.—We must assume the Court had jurisdiction, for you have not appealed against the interlocutor repelling the plea to the jurisdiction. Of course, if that interlocutor were wrong, there would be an end of this question; but we must now assume the jurisdiction of the Court below, and you must argue on that basis.]

Then would your Lordships allow us to amend our appeal, so that we may open up that question? It would be more satisfactory.

[*Mr. Moncreiff.*—We object to this application.]

[LORD TRURO.—I don't think it is necessary; besides, it would be somewhat irregular to allow the amendment. The question, as I understand it, is simply this—assuming the Court below had power to dissolve the marriage, is what is here alleged a good defence? This is quite distinct from the question, whether, in fact, the Court below properly assumed jurisdiction.]

[LORD CHANCELLOR.—I think the House will feel great difficulty in granting the application to amend, for Warrender's case—a solemn decision of this House—seems *primâ facie* to have conclusively settled the matter.]

The second plea in fact involves the question, whether this was a Scotch or an English contract of marriage. In order, therefore, to shew that the English Court had jurisdiction, we want to shew that this was an English contract entirely, and could not be dissolved in Scotland—*Lolly* v. *Sugden*, Russ. & Ry. 237; *M'Carthy* v. *De Caix*, 2 Cl. & Fin. 568; *Beazley* v. *Beazley*, 3 Hagg. 639. Now that point is involved in the second plea.

[LORD CHANCELLOR.—We cannot allow any amendment at present. The better plan will be for you to proceed on the assumption that the Court below had jurisdiction, and if the House finds afterwards that the justice of the case requires that point to be re-opened, then perhaps the amendment may be allowed.]

Then we say that the rule of universal law is clear, that where a court of justice has once adjudicated upon a dispute, that dispute cannot be again entertained where the parties are the same, the circumstances are the same, the subject matter of complaint is the same, and of the same extent, and where the right is the same.—Vinn. Com. in Just. IV. 13, § 6. All the conditions mentioned in Vinnius concur in this case. The objection, that the English Court does not give the same extent of redress, is clearly unfounded; for if a plaintiff convene his adversary in the court of one country, by the policy of which a certain measure of redress, it matters not how small, is awarded, the moment this election is made, the *causa petendi* is absorbed, and the

result is a *res judicata*. Thus, if a dispute arises in England on a contract, which is of such a nature that a Court of Equity will enforce specific performance, can a plaintiff first apply to a Court of Equity to compel specific performance, and thereafter go to a Court of Law, and there recover damages for a breach of the same contract? Or let us suppose the husband had commenced an action of adherence in Scotland, and the same result had followed as in this case, would the decree in that case not be a bar to a future action for a divorce *a vinculo?* Again, take the case of a breach of contract. In England, the damages are estimated as the value of the article at the time of the breach; but, in Scotland, as the increased value which the article might have fetched if the contract had not been broken—*Dunlop* v. *Higgins*, 6 Bell's App. C. 197. Could the plaintiff, in such a case, first sue in England, and then go to Scotland and repeat his action, in order to get the larger redress? It is a common case in Scotland, when a person has been tried for an assault, that he cannot be thereafter tried for murder when the wounded person dies, because the *species facti* are the same. So here the identical acts of adultery on which the decree in England was founded, became again the subject of litigation in Scotland. This plea setting forth that fact, is in every view, therefore, a plea in law.—Ersk. 4, 3, 4; Story's Conflict (last ed.), 162. The Judges below say, that if the wife had been an actor in England, the case would have been different—and they rest their decision on the view, that she acted strictly on the defensive. That is quite an erroneous view. But whether she was an actor or not, it is enough for us to say, that the subject-matter of complaint has already been disposed of by a competent Court, and the redress is exhausted. The wife's proper course would have been, instead of praying for a divorce *a mensâ* as she did, to have simply defended the suit, and commenced immediately her action of divorce in Scotland, in which event the former suit might have been stayed till the latter was disposed of. This case is distinguishable from *Warrender* v. *Warrender*, 2 S. & M'L. 154 (8 Sc. Jur. 56), for Warrender was a domiciled Scotsman by choice and actual residence; here Geils was a young Scotsman, who had never chosen any domicile, for his constructive *domicilium originis* can scarcely be called such. Besides, the decree in England had the effect of severing the domicile of the wife, and giving her one of her own. She therefore went to Scotland as one having an English domicile. This case comes nearer *Tovey* v. *Lindsay*, 1 Dow, 118; and Lords Eldon and Redesdale strongly disapproved of Scotch Courts entertaining such an action as this. But the case which entirely settles the present is *Allison* v. *Catley*, 1 D. 1025, where all the Judges expressly held, that a decree *a mensâ et toro* previously obtained in England, was a bar to an action of divorce *a vinculo* in Scotland. If, therefore, that case is law, the present judgment of the Court below is wrong.

Dr. Addams and *Moncreiff* for respondent.—1. It is said the record was not closed, but the answer is, that this is not a judgment on the merits. Both parties treated this in the Court below as a dilatory defence, and it would upset the long-established practice in Scotland if it were to be held, that in a plea of this kind, the record must be closed. In *Warrender's case*, the plea to jurisdiction was raised exactly as it was here, and in many similar cases the same course is followed—*Hawkins* v. *Wedderburn*, 4 D. 924; *Gray* v. *Polhill*, 9 D. 1146. Moreover, the appellant was entitled to waive this right as to closing the record, and he did so. But, at all events, we hold that this is no plea in bar at all. 2. As to the main question:—The appellant was in all respects a domiciled Scotsman. Scotland was the domicile of the marriage, and the parties intended to settle in Scotland immediately after. This was therefore clearly a Scotch marriage, and the Court of Session had jurisdiction to dissolve the marriage—*Warrender's case*, *supra*. This is a much stronger case than Warrender's, for there the residence of the husband was occasional, while here it was continuous. Then, when the husband sued his wife for restitution of conjugal rights in England, she acted strictly on the defensive. She could not decline the jurisdiction; and it was absurd to suppose she could ask for a dismissal of the suit. And even if she had done so, the Court would nevertheless have granted a divorce the moment adultery was proved.

[LORD CHANCELLOR.—Do you mean to say, whether she prayed for a divorce or not, provided she had pleaded adultery, the Court would make her take a divorce?]

Yes. There are numberless cases where the wife would gladly have taken a dismissal if she could have got it, but the Court would not permit it: There is in fact no such thing as a sentence of dismissal of a suit for restitution, when the wife pleads adultery. The Court has a well-founded repugnance to allowing such a state of things, and there is no case on record which shews it was ever done.

[LORD CHANCELLOR.—But the opinion of the counsel on which the Court of Session acted, is contrary to yours. They say, "Perhaps the wife might defend the suit without praying for divorce." Now, the Court below, treating this as foreign law, took the usual course, and consulted counsel, and acted on the result. You say that opinion was wrong; but we are sitting as a Scotch court, and I fear we are bound to accept the opinion as it stands.]

We have now at the bar all the original proceedings in a case where such a point occurred; it is not reported on that point. And why? Because the Court would not allow it even to be

argued. The Court always tenders a divorce when adultery is proved. It won't stay its hand merely, as was shewn in a remarkable case recently—*Connelly* v. *Connelly*, 7 Notes on Eccl. C. 444. In fact, a suit concluding for a decree *a mensâ* is not a matrimonial suit at all—it does not affect the relation of marriage—it merely suspends one of the duties incidental to marriage—viz. the duty of cohabitation. The respondent here, therefore, being shut up to plead as she did, and to accept a decree, how is she barred from asking in Scotland the larger redress she is entitled to? In *Allison* v. *Catley*, the circumstances were *toto cælo* opposite. The wife had never been in Scotland; nor the husband either, except for forty days. It is said the decree in England severed the domicile of Mrs. Geils; but that can make no difference, for she was still entitled to seek the defender's forum, which was in Scotland. We say, therefore, that this is a bad plea, because—1. what was obtained in England was not obtained at our primary instance; 2. the remedy in England was not the same as that sought for in Scotland. Thus, if a person prosecutes for an assault in Scotland, he may at the same time commence an action of damages for the same injuries which formed the subject of the prosecution. So, if one pleads compensation in an action, and afterwards brings an action for the amount so pleaded, the former decision is no *res judicata* in the subsequent action. But what is still nearer the point is this, that if the appellant had here brought his action of adherence first in Scotland, and the respondent had set up adultery, she would not afterwards be barred from bringing an action of divorce. It is competent for a married party to apply, in the first instance, either for a decree *a mensâ et toro*, or *a vinculo;* or, having already got the former, to apply for the latter, though no fresh crime has been committed. At least there is no case against this doctrine—Bell's Pr. § 1540; *Duke of Gordon* v. *Duchess*, M. 5902; *Seton* v. *Seton*, Ferg. Cons. R. 428; *Lessly* v. *Nairn*, 4 Br. Supp. 882; *Letham* v. *Provan*, 2 S. 284. The true criterion is, whether, in the second action, the plaintiff was in a position to sue for the same remedy as in the former.

Bethell replied.—1. It is imperative to close the record before a peremptory defence can be disposed of.

[LORD CHANCELLOR.—You did not require the record to be closed.]

No; because the other side and the Court below insisted on treating this as a dilatory defence, but this House decided it was peremptory. In *Warrender's case*, there was a special agreement between the parties to hold certain facts as admitted, so as to enable the Court to deal with the plea on the merits,—thereby shewing, that without that special case being agreed on, the record must have been regularly closed. Now, we are told this is a Scotch marriage, and that the respondent acted entirely on the defensive in England; but both these facts are contradicted in our defences, and hence the importance of having a record made up, for at present we are at issue on the fundamental facts.

[LORD CHANCELLOR.—I don't see that you dispute as to facts; it is rather as to points of law arising out of those facts.]

We contend, then, that the subject-matter has been already adjudicated upon.

[LORD TRURO.—Suppose a case where the law of Scotland allowed interest to be recovered, and the law of England allowed none. If the plaintiff first brought his action in England, could he thereafter commence an action in Scotland in order to get the interest? Would he be barred from suing in Scotland?]

Certainly he would, simply because he chose to avail himself of the remedy, such as it was, of the first court. He took that remedy for better and for worse, and he must abide by it; and we say the same as to the wife's remedy in England in this case. It is said that a decree *a mensâ et toro* in Scotland is no bar to a decree *a vinculo*. This we deny, unless some subsequent crime has been committed.

LORD CHANCELLOR ST. LEONARDS.—My Lords, this is the case of a marriage by a person who was a Scotchman, domiciled in Scotland, with an English lady of landed property in this country. The parties went to live in Scotland. I think, if it were now material to go into that question, there would be no difficulty in establishing that the domicile was originally, on the part of the husband, in Scotland, and that it remains a Scotch domicile. The residence was, in fact, in Scotland; the visits were to England.

The result of the proceedings shews, that after a considerable time, and after several children were born of the marriage, a separation in fact took place between the husband and the wife. The wife separated herself from her husband. A settlement had been made. I think he had no property at that time in his possession, but there seems to have been a jointure secured upon the Scotch estates for the lady, and the husband had £1200 a-year secured to him on her English property, which consisted of an estate of between £3000 and £4000 a-year.

The husband, in consequence of the wife separating herself from him, instituted proceedings in the Arches Court in England, praying for a restitution of conjugal rights. In answer to that demand, the wife set up a case of adultery and cruelty, and a suit for a divorce was instituted in the Court in Scotland. I must pray your Lordships throughout this case to bear in mind, that we are now sitting as in a Scotch Court, and that we are bound to decide according to Scotch law; and although, in some parts of the case, it may appear that a real conflict would exist

between that law and the law of England, yet we are here bound to disregard the English law, and to adhere to the law of Scotland.

My Lords, it appears that the nature of the defence in England must have been that which this lady set up to the suit for the restitution of conjugal rights. She had not a variety of defences, but a single defence, and that was the case of adultery. I need not go into the allegations of cruelty, and the other matters. The consequence of the adultery being proved would of course be, that the husband would not succeed in his suit. But it appears clearly enough from the case of *Best* v. *Best*, *supra*, that formerly a cross suit was necessary by the wife, if she desired her defence to be followed up by a decree in her own favour, divorcing the husband and herself *a mensâ et toro*. That form, however, has long since been deemed unnecessary, and very properly so. A wife may frame her defence generally, and may rest upon her defence alone, without praying for a divorce *a mensâ et toro*. If she did not pray for it in her defence, she might pray for it at the hearing, and that would be equally good. The result is, that there is no case, I believe, to be found, in which a wife has rested simply upon her defence, and has not coupled that defence with a prayer for a divorce from bed and board.

Now, if your Lordships will consider for a moment, you will see that it could not in the nature of things be otherwise. We are now speaking of matters of substance, and not of form. If the husband instituted a suit against the wife for the restitution of conjugal rights, what must be her defence, she living then, of course, separate from him, otherwise there could be no reason to institute such a suit? Her defence must be, that, in consequence of his criminal conduct, (and it is only that particular conduct that will enable her to do so,) she ought to be absolved from her obligations to live with him, and that bed and board should be separate between them. If she were to rest simply upon the defensive, and then the husband's process were dismissed, the right would remain in the husband, although the remedy might be imperfect; but she would have no decree absolving her from her liability as a wife to consort with her husband, and give him all the privileges and rights of a husband. It is of necessity, therefore, that the defence upon this ground should be coupled with that which so naturally and necessarily follows from it, viz. the right to continue in that situation in which she is found at the moment that the proceedings were instituted, living as a wife apart from her husband, and insisting upon her right to continue to do so. If you look at the rights of a husband, and the way in which they may be exercised, and suppose there were to be no decree of divorce, you will observe how defenceless the woman must be; and therefore it appears to me to be a necessary portion of the defence, that she should have the relief of a sentence of divorce. The question remains to be considered, what the consequence of having that relief is. That is a totally different question. But I must here, before I proceed farther, draw your Lordships' attention to the nature of the case, as regards the jurisdiction of the Courts in Scotland. The jurisdiction of the Courts in Scotland has been assumed to rest, independently of any general reasoning, upon the fact, that this lady was a Scotch spouse. She is equally an English wife. The marriage is both an English and a Scotch marriage. As the husband was a domiciled Scotchman when he married, there is no doubt that, by the marriage, the wife's domicile followed that of her husband, and she became therefore a Scotch spouse. There is no question about that.

It is said that the divorce here got rid of the husband's domicile. But supposing that to be so —upon which I would rather not give any opinion—yet that would not create any difficulty in this case as to the jurisdiction of the Scotch Courts; because, supposing in other respects the proceedings which the wife instituted there to be right according to the law of Scotland, the husband being domiciled in Scotland, and being a Scotchman, the crime itself having been committed in Scotland, there can be no question that the lady was entitled, as far as jurisdiction goes, to take her remedy against the husband;—no question could be raised upon that point. As far, therefore, as depends upon the simple question of jurisdiction, I think the case is free from all possibility of doubt. What the effect of the proceeding is, is another question.

Against this proceeding, instituted by the wife for a divorce *a vinculo matrimonii*, the husband pleaded several pleas. He pleaded, first of all, want of jurisdiction. The Lord Ordinary repelled that defence as far back as Nov. 1849, and that interlocutor was affirmed by the First Division of the Court in Dec. 1849; and there appears to have been no appeal from that interlocutor. Now, it was said at your Lordships' bar, as I understand, that not appealing against that interlocutor was an oversight, and that the great foundation of the appellant's argument must rest upon the fact of the want of jurisdiction, and that it was open to your Lordships, and that you would think it right to allow the appellant to appeal from that interlocutor; and I ventured to state, on the part of your Lordships, that if it were found that it was a slip, and it was material, probably your Lordships might be induced, if a strong case were made out, to give the appellant that liberty. But, my Lords, it is quite clear that the parties were perfectly well advised in not appealing from that interlocutor. The point was so clearly settled, beyond the possibility of doubt, in *Warrender's case*, in this House, that it would have been hopeless to have attempted to establish the point, which was overruled by that interlocutor.

And therefore it was not on account of any slip, but evidently on mature advice and consideration, that the appellant did not appeal from that interlocutor.

Sir George Warrender's case, which was decided in this House, was the case of a Scotchman who had married here an English lady, but whose domicile was held to have remained in Scotland under circumstances infinitely more difficult than any to be found in this case; indeed, there is no difficulty whatever in this case. Sir George Warrender had been a Lord of the Admiralty, and had for years resided in England, and there were circumstances which rendered the domicile open to considerable question. During the absence of his wife abroad, adultery was committed by her abroad; and he sued in the Courts in Scotland to have a divorce. That divorce he obtained, and this House established the divorce so obtained.

Dr. Addams.—I beg your Lordship's pardon. The divorce was not obtained. The suit proceeded in Scotland, but failed. Sir George Warrender did not obtain his divorce.

LORD CHANCELLOR ST. LEONARDS.—It is not very usual to interrupt their Lordships, but I am quite open to correction; but it is utterly immaterial whether the divorce was actually obtained or not—that is not the point for which I refer to the case. The point is, whether the suit was properly maintainable or not. It was a question of jurisdiction, and not a question with respect to the divorce afterwards; because it came to this House, as I am perfectly aware, before the case was disposed of finally. I was not interrupting myself with the consideration, whether the suit had succeeded or not. It is perfectly clear from the decision in this House, that if the facts had been proved, and if the divorce had been obtained, which would have depended upon subsequent proceedings, that divorce would have been maintained by this House. In short, the decision of this House in *Warrender's case* was this,—that that being the marriage of a Scotchman, though in England, to an Englishwoman, the domicile remaining, the fact of the adultery being committed abroad was sufficient ground to give to the Courts in Scotland the power of decreeing a divorce. That was the point decided; and whether or not a divorce was actually obtained upon the facts proved, is wholly immaterial.

Now, my Lords, the result of that case clearly proves that it was not intended to appeal against this interlocutor, and yet in point of fact, both in the argument at your Lordships' bar, and in the printed papers, you will find that they still rest their case upon the want of jurisdiction. And Mr. Bethell, who argued this case for the appellant, fairly stated, that it was exceedingly difficult to maintain his argument without constantly referring to the question of jurisdiction,—and relying upon want of jurisdiction in this case.

Now, my Lords, there is this very material difference to be considered between the law of Scotland and the law of England. By the law of Scotland, you may obtain a decree for separate maintenance, or a decree for separation according as circumstances may be proved,—that is, in effect you may obtain a divorce *a mensâ et toro.* Or you may also obtain in Scotland, from the Courts there, what you cannot obtain here — that is, you may obtain a divorce *a vinculo matrimonii.* Here you can do no such thing. It is necessary, by our law, to resort to parliament in order to obtain that latter relief. And here that very relief cannot be obtained, speaking generally, (there may be exceptions to that,) unless the husband has obtained a divorce *a mensâ et toro* in the Ecclesiastical Court before he comes to this House for that relief. The first step, therefore, so far from being inconsistent with this claim to have the knot untied, the first step in loosening the knot is considered to assist this House in absolutely untying it. What is done by parliament is considered to be in aid and furtherance of that relief which has been obtained in the Court below. In the Courts in Scotland, no such remedy is to be had; and no such remedy is necessary, because the Courts there can, either as a second step or as a first step, altogether dissolve the marriage. My Lords, there is one other distinction to which I must call your Lordships' attention,—which is, that in England, speaking generally, a woman cannot obtain a divorce, but a man can. In Scotland, the woman's rights and the man's rights are equal. The woman can maintain the same action in Scotland and avail herself of the same process for relief against the husband, as her husband could maintain against her.

Keeping these distinctions in view, I think your Lordships will be able, without difficulty, to apprehend what the point of law is in this case. The point now before your Lordships depends upon the second plea—(reads it.) Now, in my view, in the first place, I should say that plea is founded upon a false allegation. I do not admit that the pursuer in this case did institute a suit against the defender in the Arches Court in England. The husband instituted a suit. The wife took a defence which, by the forms of the Court, amounted to a counter process no doubt; and as she had to prove her case—for of course she had to prove the defence she set up—she became an actor beyond all question. But that does not justify the statement in this plea, that she instituted a suit against the defender. She instituted no suit. She entered a defence which, by the rules of the Court, also enabled her — and of which she availed herself —to raise a counter demand. That is, not only to sustain her defence as against his immediate demand, but to sustain her defence for all time to come, till they are reconciled. The husband says—"Restore to me conjugal rights." The wife says—"I have a perfect

defence, but it will not do for me to rest upon that defence just for this hour, and for the husband to come again," (as may possibly be the case, upon which I give no opinion,) he not being estopped from all the rights which he would possess as her husband. She says—"I mean as far as I can to defend myself. And how am I to defend myself? Not simply by disposing of your immediate demand for restitution of conjugal rights, but by the Court stating now, in the way in which my defence has raised the question, that you are not to have those rights restored to you at any future time, unless we become reconciled." That is a perfect defence. Why it should not be a good defence I cannot see. It is admitted sensibly enough as a defence. It is a perfect defence. They say, the lady is an actor. To be sure she is. Suppose, in any personal attack, one man strikes another: The man who was first struck, knocks the other down: No doubt he is an actor; but is not that action a defence? Why did he knock the other man down? —Simply because he had been assaulted. It was in defence; and, therefore, to say that such a man is an actor, is saying nothing but that it is necessary to his defence that he should assume the part of an aggressor; but it is simply a defence, for he did not begin the attack. Nobody can say that it was the beginning of the attack, any more than you can say here, in my apprehension, that this was the institution of a suit by the wife. It is strictly and simply a defence with the allegation which enables her to obtain the remedy she sought, and it cannot be considered, I think, as the institution of a suit. The appellant, in his case, takes care in another passage to represent it as if the wife were the person who had commenced this proceeding, which she certainly was not.

My Lords, there is another reason why the wife should be allowed to take that defence, which is, that she gets a permanent alimony by it. Of course she would be left without provision unless she were permitted to take that defence.

My Lords, the objection, which is taken partly in the pleadings, and partly at your Lordships' bar, assumes this shape:—Independently of the question, which I shall presently consider more at large, namely, the effect of this divorce *a mensâ et toro*, it is objected upon the pleadings, and also in argument at your Lordships' bar, that if there had been no proceeding by the wife, as they call it, in the Arches Court in this country, still she could not have sued in Scotland as the law stands there. Now, as I understand that point—which was partly argued, though not so much at large as it is stated in the papers—it depends upon two or three authorities. One of them is the case of *M'Carthy* v. *De Caix*, which was before Lord Brougham in the Court of Chancery, in which I was counsel; and the other case is *Lolly* v. *Sugden*, which was also in this country. In *M'Carthy* v. *De Caix*, the question arose between the representatives after the death of the wife, upon the right to certain property which had belonged to her, and that involved the question, whether the marriage had or had not been properly dissolved by the authorities in Denmark. That depended upon this: The husband was a domiciled Dane—he married an English lady—they went to Denmark, and the husband there obtained an absolute divorce dissolving the marriage; and upon certain letters which had been written, the question arose, whether he had or had not waived the right which, as husband, he might have had to a certain portion of the wife's property. I stated that I was counsel in the case only for this reason—and I think my recollection enables me to say that the question of the effect of the divorce was not argued in that case, and I see no trace of it in the report; on the contrary, the inference is the other way; and my strong impression is, that that point was not argued in that case; but the Lord Chancellor took up the point, and upon *Lolly's case* he held, that an English marriage could not be dissolved by a Danish Court—that our law could not recognize such a dissolution.

Now *Lolly's case* was of this nature:—An English man and an English woman were married in England. The man married twice in England, the first wife being alive. He was tried for bigamy. His excuse was, that the first wife had committed adultery in England, and that he had obtained a divorce in Scotland. All the Judges were of opinion that the marriage was not dissolved by the law of England. He was convicted of bigamy, sentenced, and punished by imprisonment for a very considerable period, and afterwards pardoned. That has been considered, no doubt, a solemn decision by the Judges of England upon the effect of such a divorce. But, in the first place, it does not touch this case, because that was a case of English subjects with an English domicile, the crime being committed in England, with a residence of above forty days by the husband in Scotland. It was an undefended cause on the part of the wife, I believe; but whether that was so or not, the whole object there really was to evade the law of England, and I think that is proved pretty clearly by this fact, that the husband seems to have married again in England, as I collect from the dates, almost immediately after the dissolution of the marriage in Scotland.

Now, taking that to be so, I am not here to advise your Lordships to dispute that law, nor to enter into it; but what does it lead to? It leads to that which we know does exist, namely, an actual conflict between the laws of Scotland and England. That is very much to be deprecated; but there is at this moment an actual conflict of laws between the two countries. What then? We have, my Lords, no power by the constitution, sitting here to decide in a Scotch case, against the law of Scotland, merely because there is a conflict with the law of England. Scotland has

a right to her laws, and to have them administered according to the law of Scotland, just as much as England would claim to have her rights established according to the law of England. But does that conflict affect a case of this sort, where you are sitting as in a Scotch Court, and have to decide what is the Scotch law? I will shew to your Lordships what was the opinion of the noble and learned Lord who decided the case of *M'Carthy* v. *De Caix*, and who relied so much upon *Lolly's case*, when the same argument was pressed upon him in *Warrender's case*. It could not be more pressed than it was there. His own opinion was constantly referred to, and pressed upon him, and it was said—how can you decide in favour of the jurisdiction in Scotland after the opinion you have expressed, that an English marriage could not be dissolved in Denmark, and after saying that you thought *Lolly's case* could be supported? In answer to that, the noble and learned Lord closes with this observation:—"I think that this judgment does not break in on *Lolly's case*. This is a decision in reference to the law of Scotland, a judgment founded on which, we now, as a Court of Appeal, confirm. *Lolly's case* refers to the law of England. The note of what I said in Chancery in *M'Carthy* v. *De Caix*, read from the printed case by my noble and learned friend, may or may not be correct. I did not correct this note, nor did I know of it until I saw it in these papers. Whatever opinion I may have entertained of *Lolly's case* in the Court of Chancery, or privately, cannot affect my judicial opinion in this House, sitting as a member of a Court of Appeal on a case from Scotland." Whatever opinion my noble and learned friend may have entertained as to the law established by those cases, he was clearly of opinion, in which I entirely concur with him, that it could not be made the ground of an objection, sitting in appeal, as we are now, upon cases from Scotland.

I shall therefore dismiss those cases altogether from my consideration, and I shall assume, as I am entitled to do, that the jurisdiction in this case was perfect, and that the only question is—has the wife lost her right to go to the Courts of Scotland for further relief, in consequence of the relief which she has obtained in the Courts of this country?

My Lords, the principal case which was relied upon in support of that doctrine, (indeed it is, I may say, the only case,) was the case of *Allison* v. *Catley*, *supra*. That was a case in which a marriage was contracted in England between two parties who were English by birth and domicile. The husband going to Scotland, as is usual in these cases, and residing there upwards of forty days, commences an action of divorce in Scotland, alleging his wife to have committed acts of adultery in England. She was not present, but she was served at his residence or domicile, still being with him. The Courts at that time were very much embarrassed upon the question as to irregular marriages in Scotland, which, it was supposed, would have led to a conflict between the laws of that country and the laws of this country. We are perfectly agreed, I think, in England, to admit the validity of what may be called irregular marriages, if they are properly constituted marriages by the law of Scotland,—although, certainly, it is impossible to shut one's eyes to the fact, that they are marriages which are celebrated there for the purpose of evading the law of England. This country, however, has admitted that those are legal marriages. The question of the dissolution of a marriage is altogether a different question, and to that I must call your Lordships' attention. In the course of the discussion in this undefended case, it appeared that the husband had a proceeding pending in the Consistory Court in England, and that he had obtained, pending the proceedings in Scotland, a divorce *a mensâ et toro* here. It did not appear when it was that he commenced those proceedings. The Judges saw the great difficulty which arose, as appears from the Judges' opinions in the case before your Lordships, knowing, as they could not but know, that it was a case in which it was intended to evade the law of England,—it being the case of English subjects domiciled in England—the alleged adultery being committed in England—the husband going to reside a short time in Scotland for the mere purpose of giving him a right, in respect of domicile, to commence proceedings there. The wife not appearing, the Court, of course, saw that it was a mere attempt to make use of the Scottish jurisdiction in order to evade the law of England, to which the parties were subject. Now, upon the point to which I have just called your Lordships' attention, the Judges make this observation,—"But we rest our opinion chiefly on the more comprehensive and clearer ground, that the pursuer having already obtained all the reparation which the wisdom of the law of his own country has thought due and sufficient for the wrong he has suffered, cannot afterwards insist for any additional reparation from the law of another country, though he may have qualified himself, by forty days' residence, to sue in its Courts. The sentence he has obtained in the Consistory Court of England is truly a sentence of divorce upon proof of adultery. This, we observe, is the name it receives in the books of that law, as well as of the canon law. Though it is not *divortium a vinculo matrimonii:* its proper character and denomination is *divortium a mensâ et toro*. It is still a divorce, and the only divorce known to that law under which both parties have always lived—under which their marriage was contracted—and in the territory of which the marriage vow is said to have been broken." Now, my Lords, I can only say I entirely concur in that view. I think it is not only a legal, but a wholesome view, and that it prevents that which it is so desirable to prevent, a resort first to the law of England, by which the parties are clearly bound, and then a

resort, in order to obtain relief which the law of this country does not give, and cannot give, to a foreign country, which Scotland is for this purpose, in evasion of that rule of law, the benefit of which the parties take here as far as they can obtain it.

But, my Lords, you will find that my Lord Fullerton thinks that the same rule applies to the wife. "Accordingly," he says, "I should think, that if a wife, whether generally domiciled in Scotland or not, does, during a residence of the married parties in England, resort to the English Courts for redress on the score of adultery, and obtains that redress, she would be barred, according to the principle of the case of *Allison* v. *Catley*, from raising a new action, on the same grounds, in the Courts of Scotland." How far the Courts of Scotland may hold that, looking to their own jurisdiction, I will not venture to say; but it so far harmonizes with that case, and as it is not a point now before your Lordships, I certainly shall not enter any farther into the discussion of that question.

The Lord Ordinary enters into the question in a very elaborate paper—(reads parts of Lord Ordinary's note.) I think, my Lords, that those opinions go very far to remove any danger which might be apprehended from an abuse by any party, if such should be attempted, of a resort to the jurisdiction of the Courts in Scotland.

The Lord President expresses the opinion, that the lady might have gone into a Court in Scotland even if the suit had ended adversely to her in England. He says,—"Had decree been given against her in that suit, could it have deprived her of her right to sue here for a total divorce? I apprehend not." Now that is going, of course, a great deal farther than your Lordships are called upon to go, in order to sustain the decision of the Court below in this case.

My Lords, it was said by Lord Fullerton, upon whose opinion this appeal very much rests, that the wife was an English woman. He says,—"She would at once have declined the jurisdiction, or, at all events, have instantly raised her action in this country, and pleaded that action in defence against the English suit. I am far from saying that that objection would have been successful." Now, my Lords, I apprehend it clearly would not have been successful. The Court in this country never would have stopped its own proceeding because proceedings had been raised in a foreign country by an adverse party. The proceedings in the Ecclesiastical Court here never would have been stopped simply because the defendant had attempted to evade its jurisdiction, and had had recourse to another country. But it was said in argument at your Lordships' bar, following that up in a great measure, that she should have gone to Scotland, as I took it, concurrently with the suit here, and then the suit here would have been suspended. That is in effect the same thing, though no authority is cited for that. Such a proceeding as that would at once have produced a real conflict. The Courts of the two countries would be in opposition to each other, but I do not apprehend that the Courts of this country would have stopped a suit here, in order to see what might be the result of a suit in Scotland.

My Lords, Lord Cuninghame puts the case a great deal higher. He says—"Now, suppose it were found in our Court, in an action of mere adherence, that the complaining spouse had been guilty of adultery, and that the defender was not bound to adhere, or, in a suit for separation, that the defender had been guilty of adultery authorizing a decree of separation, would these judgments constitute any valid or reasonable defence, in our Court, against a subsequent process of divorce *a vinculo matrimonii?* They have never been so considered, and, in my view, they would form strong corroborative grounds for the ultimate remedy." Now, that is very strong, for your Lordships find here, that the learned Judge says it has never been considered, that taking the first step would be any bar to taking the higher step afterwards, but, on the contrary, in which I agree with him, it would be a strong corroborative ground for the ultimate remedy. "In such a case," he says, "there is no principle for holding, that a spouse, by taking the lesser remedy in the first instance, is precluded from the greater relief, or has abandoned his right to it. There may, indeed, often be reasons, in cases like the present, for inducing wives to refrain for a time from dissolving the marriage tie with their husbands. But when judgment of separation is pronounced on evidence of guilt found to be sufficient, there may in general be less reluctance in the injured parties to pursue for the ulterior remedy. Their right to do so has never been questioned in any case on record." And then he quotes—and, having referred to the original, I find he perfectly quotes—from a passage in Erskine: "On the contrary, Mr. Erskine, when treating of our actions of separation as distinguished from divorce *a vinculo matrimonii*, says, that "the Judge will, on proper proof, authorize a separation *a mensâ et toro*, and award a separate alimony to her, suitable to her husband's fortune, to take place from the time of the separation, and to continue till there shall be either a reconciliation between the parties, or a sentence of divorce." There, of course, he means a sentence of separation, such as would altogether untie the knot and dissolve the marriage. There is no authority to the contrary. The learned Judge says, "The right to do so has never been questioned in any case on record." No such case has been quoted at your Lordships' bar, and I think, therefore, we may safely assume it to be the law of Scotland, that the wife might first

obtain in Scotland a divorce *a mensâ et toro*, and then afterwards maintain another suit for a divorce *a vinculo matrimonii*.

Now, my Lords, if that be so, we then come to a very important question about the analogy between the law here and the law in Scotland. But, before I approach that, I will refer to an argument which was advanced at your Lordships' bar on the part of the appellant, taking, by way of illustration, the case of a contract for the purchase of land in this country. It was said truly that the party would have two remedies—one to bring an action for damages, and the other to file a bill for a specific performance;—but the learned counsel asked, Was there ever an instance of a man first bringing an action for damages, and then filing a bill for specific performance? Probably not, and for this reason, that, in point of fact, the two remedies are inconsistent. A man has the choice of two remedies;—he may either go to law for damages, and keep his estate, or he may insist upon it that the agreement ought to be executed *in specie*, and that he has a right to divest himself of the estate, which the purchaser is bound to take, paying him the whole of the purchase-money, and not leaving him to require any measure of damages. The case, therefore, does not apply. But, observe, that even that case is not entirely free from difficulty; for supposing a purchaser, in the first instance, to file a bill for specific performance, and to fail, he is left at liberty—and in many instances that liberty has been exercised with very great advantage—after having attempted to obtain a specific performance, his bill having been dismissed, to resort to law for damages, and he has often recovered very ample damages. Take the case, again, of a vendor. A vendor files a bill for specific performance, and his bill is dismissed—he may go to law for damages, and may recover damages. So that, in point of fact, the two remedies, where they are not inconsistent, may be resorted to even in the only case, which has been put by way of analogy in the law of England. If the two remedies are inconsistent, a man must take his choice of one; but if they are consistent, he may try one, and, though he may fail in that trial, he may resort to the other, and succeed upon that.

Now, my Lords, let us consider for a moment how the matter stands as regards the law of England and the law of Scotland. No man can dispute that this lady, by the law of Scotland, with which the law of England could not interfere, might have resorted to Scotland in the first instance, and have obtained a decree of divorce *a vinculo matrimonii*. That is beyond all question. It is equally clear, I think, that she might have gone to Scotland and have obtained, in the first instance, the lesser remedy of a divorce *a mensâ et toro*, and afterwards have maintained a suit for an absolute dissolution of the tie of marriage. It was said at the bar in the course of the argument, that the latter remedy could not be resorted to unless for a subsequent crime. No authority was quoted for that, and I take it to be clear that it is not the law of Scotland. Of course subsequent crime might and would entitle the aggrieved party to the remedy, but the remedy exists without subsequent crime. If the wife, by the law of Scotland, which we are bound here to administer, could obtain a release altogether from the marriage in Scotland, in the first instance, or even obtain it by steps—if the husband elects to come into the Courts of this country in the first instance, and asks for a restitution of conjugal rights, which she had refused to him, and which, therefore, naturally would lead him to suppose she would have resort to the remedies to which I have referred—for she had ceased to act as the wife of this gentleman—she had absolved herself from the marriage tie, and only wanted what was necessary to obtain a legal confirmation of an act which she herself had committed, namely, the act of separating herself from her husband, as it is alleged, with sufficient cause,—then, can the act of the husband take away from the wife the right which she has by law to the remedies to which I have referred; and if it cannot, which clearly I apprehend it cannot, the question simply is, what is the effect of the act which she herself has committed, in the suit instituted in this country? She was dragged into Court. She was compelled to go. Supposing she had taken the advice, which was not offered to her at the time, but which Lord Fullerton gave to her at a later period, and supposing she had acted upon that advice, there would have been a decree against her in her absence, and she would have been subject in this country to have had that decree enforced against her for the restitution of the conjugal rights which she had refused him. The decree would have gone against her beyond all question. Is she to submit to that when she has a defence open to her, which, as I have before stated, would make perpetual that separation which has already taken place in point of fact? Can it be asserted, then, that because she has taken the remedy which she is entitled to in the suit instituted, not by her, but by the husband—because she has taken the only defence that was open to her—for there is no other remedy open to her, (whether she was entitled to ask for a divorce *a mensâ et toro*, I^c^ do not trouble myself at this moment with considering)—the only defence which was open to her was that of cruelty and adultery,—she makes, therefore, no other defence, but upon that defence, by the course of the Court, she is entitled to the relief she obtained,—can it be insisted, that, because she took that which the Court tendered to her, because she obtained that relief which the law gave to her, she is therefore to be estopped from resorting to a higher remedy, to which she was entitled before the suit was instituted, and which she has done no

act to deprive herself of the benefit of? If we look to the operation of the law of England and the law of Scotland, we shall find, that by upholding this decision, we put them perfectly upon the same footing. The law of England differs from that of Scotland as to the right of the wife being co-equal with the right of the husband; but in other respects it stands precisely, as it appears to me, upon a similar footing, with this difference only—a difference which the law of each country itself introduces—namely, that in England you must have a divorce by parliament in order to dissolve the tie, and in Scotland the Court itself can untie the knot. But in England, as I before stated, when the husband is asking for a divorce, for the exercise of the highest power which the country can exercise, so far from its being considered an objection, that he has already obtained a divorce *a mensâ et toro*, unless he obtains that divorce in the first instance, he is not entitled to the higher remedy. Then, if the wife by the same law obtain—not herself having instituted the suit, which I do not enter now upon, as it is not before the House, and as it introduces an additional difficulty—but if she obtain that same remedy which he obtains, and if she can, in the Court in that country to which she has a right to resort, a resort which your Lordships can prevent her from having, obtain a divorce *a vinculo matrimonii*, do not the parties stand upon precisely the same footing? The administration of the laws of the two countries is different, but is there any difference in degree? Is there any difference in the remedy? She has a right to dissolve the marriage altogether. She has not lost that right, and I think, therefore, as far as these points go, I ought to recommend to your Lordships to affirm the decision of the Court below which is complained of.

My Lords, I have not hitherto mentioned one point which was raised, and I may say pleaded. It was insisted that the record was not properly closed upon the pleadings, and that, therefore, the case should be remitted. There has also been a discussion in this case upon the nature of the plea, upon which my noble and learned friend then advised the House, that this suit was maintainable, but it is now said that the proceedings were not properly closed. It does not appear to me that that objection can be maintained. Whatever be the nature of the plea, it is a plea in bar of the action. The real contest was in regard to the jurisdiction and the domicile. That was disposed of by the first plea, and then the parties took the second plea as a plea in bar of the proceedings. My own impression is, (I understand, however, that my noble and learned friend entertains a different view upon that point,) that it is not a case which falls within the provisions of the act of parliament. That might have raised a more difficult question, but I apprehend that the question does not arise in this case. Therefore, I am not disposed to agree in thinking, that it is necessary to remit this case—and that would be very little relief to the parties—indeed, it would be none. The question upon the pleas was, what was the effect of the proceedings in England; and, according to my view, in order to give the parties that benefit to which they were entitled it was necessary that they should have the power of instituting those proceedings which they instituted in Scotland.

Upon the whole, therefore, my Lords, I propose to move that the interlocutors appealed against be affirmed.

LORD TRURO.—My Lords, I will occupy as short a time as possible in this case, but I think it necessary to add a few words to what has fallen from my noble and learned friend, as I am not quite sure that I have correctly followed him in some of the reasonings which he has urged. Though I concur with him in the main in the judgment which he has moved your Lordships to pronounce in this case, I should desire an opportunity of stating my own reasons for the judgment which I advise your Lordships to give, lest I should have misunderstood the argument of my noble and learned friend.

The first point, upon which I would address your Lordships, is the application to amend. The object of that amendment was to bring before your Lordships, as my noble and learned friend has stated, the question which I think was solemnly decided in *Warrender* v. *Warrender*. I agree with my noble and learned friend, that it would be scarcely possible to consider that the main point in which the parties were interested—viz. the available authority of the Courts in Scotland to annul the marriage in question—could have escaped their attention when they appealed to this House. I must therefore come to the conclusion, that the application to amend is, in truth, the result of subsequent consideration, founded upon some view or other which I think the House ought not to yield to, unless it could be shewn that those questions which are legitimately before the House, cannot be properly argued before the House, and the House put in possession of the proper materials for forming a judgment upon them, without bringing under your Lordships' consideration that interlocutor which is not appealed from. And I understood, when the application was first suggested at the bar, that it was rested upon that ground, which induced me to submit to your Lordships that it was founded upon a misapprehension, and that the question which the parties had professed to take before the House, might be properly discussed and properly decided without there being any necessity for amending the record, and raising any question with regard to the first defence. An application, therefore, upon an appeal brought before this House, raising certain distinct questions, is made to amend the record, and to raise another point, more important and more difficult than any which has been raised for your

Lordships' judgment by this appeal, that other point being one which, in truth, has been, I apprehend, so solemnly decided by this House, that I very much doubt whether even in a case legitimately coming before your Lordships in the shape of an appeal from the Scotch Courts, it would be allowed to be argued. But however that may be, inasmuch as the parties are in a condition to receive the judgment of this House upon the points which they have deliberately raised upon the record, it does not appear to me that justice at all requires that the amendment which has been asked for should be granted.

My Lords, the *second* point is the one to which my noble and learned friend last alluded. It is objected that this record has not been properly closed, and I own I have considerable difficulty upon that subject. My Lords, by 6 Geo. IV. c. 120, and by the rules and regulations of the Courts below, it is required, that before any judgment is given upon the merits involved in a cause, the parties shall be called before the Judges, and asked whether the record is in a state which they deem perfect and sufficient, in order properly to raise the questions before the Court before judgment—a most prudent and advisable course, and one which I think might very advantageously be imported into England, as it prevents surprise afterwards. I do not think, my Lords, that this case is deficient in grounds to shew the wisdom of that rule so in force. Much has been said in the course of this case below, and many observations have fallen from my noble and learned friend, which, as it appears to me, manifest the propriety of that course being taken, and present some difficulty as to whether the present case has not suffered for want of it.

My Lords, the question which has been discussed, and which has become a material incident in the decision of this case, is, what is the effect of the proceeding in the English Consistorial Court? It has been correctly said that it was foreign law to the Court in Scotland. My Lords, according to my humble apprehension, a very erroneous view is taken of the effect of these proceedings. I do not think that the error ought in any degree to affect your Lordships' judgment; but, certainly, it would be more satisfactory if it were otherwise. It is said, that according to the course of practice and of law in the Ecclesiastical Court in England, a husband or wife, who, by a responsive allegation in a suit, charges adultery, and prays a remedy upon that charge, is not the institutor and originator of the suit. My Lords, I am satisfied myself, that upon a full and correct investigation of that question, that opinion would turn out to be utterly erroneous, and that in every view, in point of law, the allegation, that the lady instituted the suit, is correct. The process of every Court has but one object, which is to bring the party before the Court to answer the matter which is to be produced against him. The complaint is to be found in the libel. If a party is engaged in a suit before a Court with a certain individual, no allegation is required to bring that party before the Court—he is there. We have a similar proceeding in England. If a man brings an action against a debtor for one cause, and he has another cause of action which cannot in point of form be joined with that which is first brought, he needs not to begin a new action, though he cannot engraft the second complaint upon the first; but without any new process to bring his debtor into Court, he having been brought into Court in the first suit, the plaintiff can, what is called, declare *by the bye* against him, and he may go on, and to all intents and purposes that is just as much a suit as if it had been preceded by a process to bring the party into Court. And it is impossible, as it appears to me, to attend to the judgment of the Court below in this case, or, I think, even to go through the cases which are cited in *Best* v. *Best*, without coming to the conclusion, that if the wife or the husband advances, in a responsive allegation, matter which may be made the foundation of a decree, that libel is in the nature of a declaration[1] in a new cause.

What said Sir Herbert Jenner Fust in this very case? Why he said,—originally a suit was commenced by the husband for the restitution of conjugal rights, but the wife, by a responsive allegation, has now charged her husband with adultery, and the cause is changed:—"This was originally a suit for restitution of conjugal rights, promoted by Mr. Geils against his wife, on whose behalf, in answer to his libel, an allegation was brought in and admitted, the purport of which is to charge" so and so, "concluding with a prayer that the Court would pronounce a sentence of separation on all the three grounds. The nature, therefore, of the original cause, has been altered and changed, and the shape it now assumes is that of a cause of separation brought by the wife." It is therefore most material, my Lords, that this case should not give rise to future litigation, by reason of an erroneous view being taken of the proceeding below, which I think a correct view of it would not justify. I think, if the wife had instituted a suit, the effect would have been, or ought to have been, the same in this case as my noble and learned friend has cited authorities to shew it would have been in the Courts of Scotland. I would say, my Lords, that it is extremely material that a correct view should be taken of these proceedings. But unfortunately, by closing the record, or rather not closing it, but doing that which by the law of

[1] Declaration in England corresponded to condescendence in Scotland; and "to declare" in an action, was tantamount to giving in a condescendence. The term is now discontinued, and the plaintiff's pleading is called his "statement of claim"; while the defendant's pleading is called his "statement of defence."

the country ought not to have been done, viz. to have given judgment on a matter of merits without the record being closed, or before it was closed—I think the Court below and the House are left without some of those materials which, if the parties had been brought before the Court before closing the record, they would have possessed; and I think it is owing to that omission, that what strikes me, with the greatest respect and submission, as being an entirely erroneous view of the effect of the proceeding in the Consistorial Court, has been arrived at.

My Lords, whether or not the parties would now derive any advantage from this case being remitted, by reason of the record having been so closed, is another question. This is not a technical defect—it arose from the circumstance—I say it with all respect to the learned Judges in Scotland, (and I say that under the authority of this House)—that a mistake was made in considering this plea of the sentence of the Consistorial Court in England as a dilatory defence. By the law and practice of the Courts, they are called on to decide upon the validity of a dilatory defence without the record being closed, and therefore they held this to be a dilatory defence. The parties therefore could make no appeal in reference to the record being closed. They were not entitled to ask for relief with reference to that judgment. They must get rid of that judgment before they could ask that. When it comes to this House upon an appeal for the purpose of getting rid of that judgment, a petition is presented that the appeal may be dismissed and disallowed upon the ground that it is a dilatory defence, and therefore that an appeal is not competent without leave of the Court. The Appeal Committee of the House of Lords thought that too grave a question to be decided there without the assistance of learned counsel, and they therefore directed that it should be argued at your Lordships' bar. The question was solemnly argued at your Lordships' bar, whether this was a dilatory defence or a defence upon the merits; and the House determined that it was a defence which might be called a defence upon merits—that is to say, a defence which went, not to postpone the decision, nor to shew some other remedy than that which had been chosen, or a remedy in a different form, but that the party had no remedy at all, and that it therefore went entirely in bar of the proceeding. The learned counsel satisfied your Lordships that this was not what could be properly called a dilatory defence, but that it went to the merits of the case, and that, if your Lordships dismissed this suit, there would be no ground for any other; and, therefore, the appeal was allowed to stand in your Lordships' paper, and has been argued. But, my Lords, supposing the House to agree in that, which I humbly conceive is the correct view of the proceedings in Doctors Commons—namely, that, in every legal point of view, and according to the practice of the Court, and upon principle, this lady was as much the originator of a suit, and as much a plaintiff in a suit, as if her proceeding had been the only one—I think that the House would arrive at precisely the same conclusion as it has now come to. Regarding it as a matter of discretion, I think it would not be the exercise of a wholesome discretion on the part of your Lordships to grant the amendment which is asked for. I am not prepared to say that it is a matter of right, but it strikes me, that if it is a matter of right, inasmuch as the amendment is a proceeding which tends to delay and expense, the application should at all events have been made at the earliest practicable opportunity. I think, before the House was called upon to decide upon the validity of the decree—before so much time was occupied, and so much learning thrown away, the application should have been forthwith made, when, if this House had held it to be a substantial defence to the merits, the case could have been remitted at once, and I think that the parties should not have waited till after the argument was heard, and, in some measure, the judgment of the House sounded upon the subject, and then made their application for a remit. My Lords, I am therefore very much disposed to concur in the conclusion, at which my noble and learned friend has arrived. I own I think it an important matter, and I am not without considerable doubt, whether this conclusion is strictly correct, but I am satisfied it answers the justice of the case. Every case before your Lordships is of quite as much importance as a precedent as in respect to the decision in the particular case, and I think that this case may hereafter be considered as an authority, that where parties are arguing questions without the record being closed according to law, this House will take into consideration, how far, in each particular case, the party has been prejudiced by a departure from that rule, which I consider ought to be inflexible, and which I regard as a very useful rule.

My Lords, I will now pass from this point to the main question in the case. The question is, is the defence contained in the pleas which have been brought under your Lordships' consideration, a sufficient answer in point of law to the libel of this lady, in which she prays for a divorce *a vinculo matrimonii*.

My Lords, it will be necessary to consider what is the nature of this first plea. Is it a plea by way of estoppel, that the party has taken a course which estops her in point of law from prosecuting the remedy which is now sought in the Scotch Courts, or is it in the nature of a plea of judgment recovered? It seems to me to partake more of the nature of a plea of judgment recovered, than of any other plea. But it is essential that your Lordships should bear in mind what my noble and learned friend has stated throughout, that you are sitting in a Scotch Court of Appeal, and that you are administering Scotch law. Care therefore must be taken as to how

far you will use authorities of English law;—they may be used to illustrate the argument—they may be used to shew that any principle you lay down is worthy of consideration, by reason of its being adopted in the law of another country. But English decisions are not binding authorities in questions of Scotch law. Now, my Lords, I am not aware precisely to what extent the law of estoppel prevails in Scotland; but all that I have been enabled to discover on the subject leads me to the conclusion, that the principle prevails there, as it does here, with very little difference. Every estoppel must be precise and distinct, and to the same point. This is an application in Scotland for a divorce *a vinculo matrimonii*. What has been done by this lady which is inconsistent with her prayer for a divorce so as to put the case upon the ground of estoppel, and to enable the husband to say—you, by your conduct, have said and done that which is inconsistent with the remedy which you are now pursuing? I am not adverting now to the effect of the plea of judgment recovered, which I will consider in a moment. The authority, which my noble and learned friend read from the Scotch text writers, stated that a divorce *a mensâ et toro*, or separate maintenance in Scotland, might be considered as ancillary to an ultimate judgment of divorce *a vinculo matrimonii*—shewing most distinctly, therefore, that in the Scotch law the two are not inconsistent, supposing that the proceeding had been in Scotland, and, in truth, nothing has been urged at the bar which at all makes the doctrine of estoppel applicable to this case, so as to lead to the conclusion, that this plea presents a good bar to the proceeding. It is more in the nature of a plea of judgment recovered.

This, I apprehend, would be found pretty much to be the law of every country, that where a man has once sought redress for a particular injury, he is not entitled to split his complaint, and, in respect of the same subject matter of complaint, to ask for one species of redress which shall be applicable to the whole subject matter of his complaint in one Court, or at one time, and a different species of redress for identically the same wrong or matter of complaint at another time. In this case, I will suppose, according to the impressions which I have presumed to state to the House, that this lady, independently of any suit on the part of the husband for restitution of conjugal rights, had commenced a suit for a divorce *a mensâ et toro* in England. Consider what her situation is. She is exposed to the coercion of her husband. She stands under the legal duty of cohabiting with him, and he possesses, independently of the interposition of the Court, a very considerable extent of power in the way of compelling her to do so, and of restraining her free will and inclination; and it is obvious much distress and uneasiness might be occasioned to a woman who, having just cause of separation from her husband, should yet omit, he desiring to continue the cohabitation, to protect herself by the authority of the law and the sentence of a Court. She is in a country where marriages are indissoluble. Remarks are made in the Court below now and then, (I am aware that it is a mere form of expression, and that the learned Judges have a perfectly correct apprehension of the true state of the facts,) that acts of parliament for the purpose of divorce are sometimes talked of as remedies. They are not remedies—they are new laws. Marriage is not the less indissoluble by the law of England, because parliament in its wisdom will now and then annul a marriage where there is a proper case for doing so. The law stands just as free from doubt or ambiguity—and it may just as correctly be pronounced to be the law of England, that marriages in England are absolutely indissoluble, although it is possible that next week a new law may be enacted, which may make a particular marriage dissoluble. It is therefore not a remedy, or at all in the nature of a remedy. Mr. Justice Story, in his excellent book on the Conflict of Laws, states, that the annulling of a marriage is to be considered, not so much in the nature of a civil remedy, as of a punishment, and as a course of proceeding tending to protect the public morals, and that the public have an interest in such dissolution of marriage on public grounds. Therefore it is no inconsistency to hold that marriages are indissoluble.

In the case before your Lordships, the woman is in England, where she has no means by any legal mode (although an act of parliament may be granted, but I should throw that out of my consideration)—she has no means of protecting herself from her husband forcing her to cohabit with him. She resorts to the law for that purpose. She states her wrong, and she prays the protection of the law, and accordingly a divorce *a mensâ et toro* is pronounced, until the parties shall be reconciled. She has come into a Court not to ask partial relief; she has not come to divide her complaint, and to endeavour to recover by instalments the redress which she desires. She states her whole complaint, and she asks all the relief which it is in the power of the Court to give; and she has not come to the same Court to ask for any other relief, for the very valid reason, that she knows that it is not in its power to afford her such relief. She goes therefore to Scotland, and we are dealing with a case in which the Scotch Courts have jurisdiction. She there prays for a divorce *a vinculo matrimonii*. What authority has been cited to shew that the remedy or protection which she has obtained by the divorce granted her in the Court of Doctors Commons, is a bar to that proceeding? I am not aware that any such authority has been cited, except the case of *Allison* v. *Catley*, which I will deal with presently. Has any principle been cited? Why, in England, persons may have two remedies for the same complaint. It is said, can a man bring an action of damages for a breach of contract, and can he also file a bill for

specific performance. I can very readily conceive that he may do both. Suppose a man has entered into a contract for the purchase of an estate—suppose he then makes a sub-contract, and that, by reason of the failure of the first party, he himself, not having the power of conveying the estate which has not been conveyed to him, is subjected to an action by the other party. He may have a right to have the contract performed—he may have a right to require that he shall be placed in that situation in which it was the object of the contract to place him, but he may also have suffered a legal injury, by which he would become entitled to a certain amount of damages. A Court of Equity may say,—we will not allow you to have the remedy of requiring a specific performance of the contract; but I apprehend, if it could be shewn that real injury had been sustained, the party might then proceed to recover damages for the loss of the estate. That is settled law, and is clear enough. This may be done, supposing a man covenants to pay you an annuity, you may bring an action of debt for the annuity, or you may bring an action of damages for the non-payment of the annuity, but you cannot split your remedy—you cannot do that which in the case of Lord Bagot was attempted to be done (*Lord Bagot* v. *Williams*, 5 Dowl. & R. 87 and 719; 3 B. & C. 235 and 772). You cannot go to a Court with an entire demand, and in that Court limit that demand below its real amount, and recover, and then go to some other Court and recover the remainder. In *Lord Bagot's case*, it was deemed expedient to go to a Court of limited jurisdiction, the object being to obtain a judgment quickly. That Court possessed jurisdiction to an amount equal to what was thought to be the amount of the defendant's property, and it was supposed, therefore, it would be of no use attempting to recover more. Lord Bagot recovered to the extent he claimed. The parties afterwards found, that the defendant had more property than they had supposed, and then they brought an action in an English Court to recover the rest. It was held that they could not do that—and so it has been held in other cases. But this is not such a case. Here the ground upon which I think, in concurrence with my noble and learned friend, that this is no bar, is, that the two remedies are collateral—they are directed to distinct objects, and have totally different effects—and therefore the circumstance of this lady pursuing a remedy for the purpose of obtaining protection against being compelled to cohabit with her husband either during a given time or an indefinite time, is quite consistent with the proceedings which she afterwards instituted ultimately to annul the marriage.

My Lords, the question which it has been desired to raise in this case, which would be in the nature of a review of a very important case decided by the Scotch law, to the effect that an English marriage might be annulled in Scotland, will in all probability arise again and be brought to your Lordships' bar, because it is obvious that the legitimate object of this lady is, by annulling the marriage under the law of Scotland, to free her estates from the heavy charge of £1200 a-year to her husband for his life, she at the same time having none of the comforts of marriage.

LORD CHANCELLOR ST. LEONARDS.—That is under the settlement.

LORD TRURO.—Yes; it is a settlement of £1200 a year. Now, supposing that ultimately the Scotch Courts should pronounce a divorce, and the husband should desire to bring under the consideration of the House again the question of how far this marriage is liable to be dissolved by the Scotch Courts, and he takes proceedings for that purpose under that settlement, I can readily conceive very many ways in which that question may be raised, which makes it therefore extremely important, not only what may be the ultimate judgment of this House, but that a correct view should be taken of the grounds of the judgment in the particular case. My Lords, considering the great importance of this case, I have searched very widely, and in fact made use of all the materials that were within my reach, for the purpose of seeing if I could discover any principle either in the Scotch law or in the English law which it appeared to me this House ought to adopt as applicable to this case, but I cannot find any which would go to shew, that pursuing a collateral remedy of this description, is any bar to the pursuit, either in the same Court or in another Court, of a farther remedy. The two things may well stand together, and I think that disposes of the only or the principal difficulty arising out of the case of *Allison* v. *Catley*. A great many remarks are introduced into that case, but what is the decision that was come to? The case was decided upon the ground of jurisdiction. The Court had nothing to do with what was the effect of the English divorce. It is said the man's residence in Scotland was only colourable. I am not aware that there is such a thing as colourable residence. When the law says that a man's residence in a country for a certain space of time shall place him in a certain position, I do not understand how the mode in which he resides there can have any operation in qualifying the effect of the residence. If a man resides 40 days in Scotland, he is sufficiently domiciled there to subject him to all the Courts in Scotland, and to entitle him equally to all the benefits of the Courts in Scotland. But if it was meant to say he had not a sufficient residence to give jurisdiction to the Scotch Courts, that was a solid ground for disposing of his complaint. But in that, as in many other cases, you find many remarks made which tend to destroy our sympathy with the applicant, from a suspicion, that his motives are not such as demand our approbation, but which remarks are quite insufficient as grounds for a judgment. The effect of the judgment in that case is, that a man, no matter whether he be an Englishman or a Scotchman, who sues in England and gets a divorce *a mensâ et toro*, is barred from maintaining a suit

for a divorce *a vinculo matrimonii* in Scotland. That is the judgment. It would be unfortunate indeed if, when you have to apply a judgment for the purpose of forming your own opinion upon a case, you look to the remarks which fell from the Judges in the course of delivering their judgment, and instead of considering what is the point decided, and what is the point which legitimately ought to operate upon the discussion at the time you are using it, you pick out here or there a sentence which bears upon another subject.

My Lords, six of the Scotch Judges have said distinctly, that a judgment of divorce *a mensâ et toro* is a bar in Scotland to a suit for a divorce *a vinculo matrimonii*. With the greatest possible respect to those learned Judges, though this case presents to my mind considerable difficulty, I think the view which my noble and learned friend has taken is the correct view, and not that which is embodied in that case. I think in this case the learned Judges' judgment below proceeds mainly upon the point, that this lady was not the originator of the suit. They say she was defending herself. Yes, so she was, but she was doing more. You have not closed the record—you have not given the parties an opportunity therefore of representing the case in its fulness to you. She might have been dismissed from that suit, and have reserved her remedy for Scotland, if she had taken the defence she took without adding the prayer which is contained in her defence, namely, a prayer for affirmative relief. If she had prayed for alimony, (but, being a lady of large fortune, she had no occasion to do so,) if it had been necessary for the proceeding, in order to give her a claim to alimony, that she should pay for affirmative relief, it might as well have been said, in such a case, that she was not an actor. My Lords, therefore to say that she was not an actor—to say that she is not suing for alimony, when she is asking for alimony, is to say that which the case does not warrant. The learned Judges in this case have said the contrary of that which is distinctly decided in *Allison* v. *Catley*—they have said that a judgment of divorce in the Courts in England, which is founded upon a responsive allegation by the wife, is no bar to the proceedings for a divorce in Scotland, because it is said the wife is not the originator of the suit, and is not an actor in it, inasmuch as her charge of adultery is raised merely by way of defence. I think your Lordships must not shrink from taking the correct view of *Allison* v. *Catley*, and that you must not let that case be set up hereafter, unless your Lordships think it contains good law, by reason of its being supposed to be founded upon some circumstances which may delude parties to appeal, those circumstances being in fact so different, as to give rise to important distinctions. It will be for your Lordships to say what is the correct view of that question, notwithstanding the manner in which it was dealt with on a former occasion, for that is in truth a judgment that a divorce obtained in the Courts below is a bar to the party who has obtained that divorce, and who is instituting other proceedings. I therefore, my Lords, concur in the opinion, that this plea is a bad plea—that the fact it alleges does not prevent the party obtaining that relief which she is well entitled to—not entitled to in the Court to which she first appealed, for she there stated her whole complaint, and obtained all the relief which that Court could give, but that did not debar her from going to Scotland, and there asking for an extended relief beyond what she could obtain in this country, and which extent of relief, I think, was quite consistent with, and collateral to, that which she obtained in England.

I therefore concur in the judgment which my noble and learned friend has recommended your Lordships to pronounce in this case, being satisfied that, as a matter of right, the appellant is not entitled to have this cause remitted by reason of a judgment having been given on the merits, contrary to the law of the Court, without the record being closed.

Dr. Addams.—My Lords, the costs of the argument as to the competency of the appeal were reserved. I trust your Lordships will give us those costs. It has been done in cases to which I may call the attention of your Lordships. The case of *Gray* v. *Forbes*, 3 Sh. & M'L. 400, & 1 M'L. & Rob. 545, is precisely in point. The point was there raised with reference to the competency of the appeal.

LORD CHANCELLOR.—You are not submitting anything to the House contrary to what has been decided?

Dr. Addams.—No, my Lord. The question was reserved as to the costs of the argument as to the competency of the appeal. I trust your Lordships will give the costs of that argument as well as the costs of this appeal.

LORD TRURO.—Who was the petitioner? You will be the party to pay, will you not? You are the party who turns out to be wrong.

LORD CHANCELLOR.—Were not you the appellant?

Dr. Addams.—Yes, my Lord. The costs were reserved there, and so they were in this case. The marginal note in that case is—"Costs, including those incurred by respondent in unsuccessfully opposing, on the ground of incompetency, an appeal which was afterwards dismissed on the merits, awarded against the appellant." In that case the Lord Chancellor moved, "That the interlocutor be affirmed with costs, stating, that if the appellant be right, that he has such an interest in the fund as to dispute the judgment, he cannot object to being made a party, and if properly a party, he is properly made liable with the others. Upon the merits, it was clear that the judgment of the Court was well founded—although the appellant's right to appeal had been

sustained, yet he had been recommended to consider of the propriety of pressing his appeal further, and he was clearly wrong on the merits of his appeal. The interlocutor appealed from ought to be affirmed with costs, including the respondent's costs of discussing the competency of this appeal." Here the costs were reserved. The respondent has been successful upon the merits of the appeal to your Lordships, and the case appears to me to form an important precedent for my application. The costs were reserved. I apprehend that in a clear case they would not have been reserved. The costs were reserved, as I apprehend, in order to see what became of the appeal upon the merits, and on the merits the respondent has been entirely successful, and therefore I trust your Lordships will give us those costs. This is a case between husband and wife, in which the husband is receiving £1200 a-year from the lady's property.

Mr. Anderson.—Costs were reserved in reference to this application by my client, not by the other side, but by the appellant; and I apprehend it is the settled course of this House, where costs are reserved in favour of a party, who has established the competency of an appeal, to give them. No doubt there are cases where the question involved in the competency is analogous to that involved in the merits. And the appellant, being wrong on the merits, is wrong on the competency. The House has power in that case to include the costs of the competency. But the general rule is otherwise, that, where the respondent establishes his right upon the merits, but fails in his attempt to exclude the appeal altogether, he pays for that unsuccessful attempt, though he may get the costs of hearing upon the merits. In the case of *Kerr* v. *Keith*, 1 Bell's App. C. 426, where the matter was argued at your Lordships' bar, your Lordships will find the question discussed. After some interlocutory observations, Lord Brougham, addressing himself to the respondent's counsel, said, "The decision on the competency is against the other party," that is, against the respondent, "and they must pay the costs taxed by the proper officer with respect to the question of competency, and that settles the whole question;" and the order of this House upon that point was included in the judgment:—It is ordered "that the said respondent William Keith do pay, or cause to be paid, to the said appellant in the said original appeal, the costs incurred in respect of the case, and proceedings in this House, arising out of the said petition." My learned friend has now raised this matter as a renewed application. I made the application, at the time your Lordships decided this interlocutor in my favour, that the respondent should pay to the appellant the costs of that appeal, and I believe it was in consequence of my making the application, that the House reserved the matter till they had disposed of the case upon the merits.

LORD CHANCELLOR.—My Lords, in this case, I think it is quite clear that there ought to be no costs on either side.

Interlocutors affirmed without costs.

First Division—Smedley and Rogers and Dodds and Greig, *Appellant's Solicitors.*—Grahame, Weems and Grahame, *Respondent's Solicitors.*

DECEMBER 3, 1852.

THE NORTH BRITISH BANK and CHARLES HUTCHESON, *Appellants, v.* EDWARD COLLINS, *Respondent.*

Partnership—Contract—Construction—Summons—Relevancy—Fraud—*A partner of a Joint Stock Banking Company brought an action to have it found, either that the company was* ipso facto *dissolved by force of a provision in the deed of copartnery declaring that losses to a certain extent should void the company, or that, in respect of the allegations in the action, (fraud, malversation, &c. &c., on the part of the directors,) he was entitled to have the company wound up. The defence was, that the action was irrelevant, and excluded by the terms of the contract. The Court of Session,* ante omnia, *in the circumstances and state of the record, remitted to an accountant to report as to the accuracy of the balances, and the amount of losses as at a particular period.*

HELD (affirming judgment), *that the remit and inquiry were right, and did not necessarily interfere with the company's business.*

Appeal—Competency—Remit to accountant—*An interlocutor remitting to an accountant to discover whether the losses of a company were such as to require dissolution,*

HELD *an interlocutor on the merits, and appealable.*[1]

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[1] See previous report 13 D. 349; 23 Sc. Jur. 155, 236. S. C. 1 Macq. Ap. 369; 25 Sc. Jur. 119.