[*27th August* 1835.]

The Honourable Dame ANNE BOSCAWEN or WARRENDER, Appellant.—*Attorney General* (*Campbell*)—*Dr. Adams.*

The Right Honourable Sir GEORGE WARRENDER, Respondent.—*Sir William Follett*—*Dr. Lushington.*

Husband and Wife—Jurisdiction—Foreign.—An action of divorce was brought in the Court of Session by a domiciled Scotchman against his wife, who was an Englishwoman, to whom he had been married in England, and who was resident abroad in virtue of a contract of separation, which bore to be irrevocable, unless by joint consent—Held (affirming the judgment of the Court of Session), 1. That the domicile of the husband was the domicile of the wife, and that the action was competently instituted in the Scotch courts,—the contract of separation being considered to be revocable, and to be virtually revoked by the execution of the summons.—2. That the wife was sufficiently cited by an edictal citation and personal intimation, without leaving a copy of the summons for her at her husband's dwelling place in Scotland.—3. That the marriage, although contracted in England according to the rites of the English church, and therefore indissoluble by the courts of that country, might be dissolved by the Scotch courts on the ground of adultery committed abroad.

FIRST DIVISION. Ld. Fullerton.

SIR George Warrender, a native of Scotland, descended of Scotch parents, succeeded to and possessed the family estates of Lochend in the county of East Lothian, and likewise purchased landed property in several counties in Scotland to a considerable extent. Having succeeded in the year 1820, on the death of his cousin, to the estate of Bruntsfield, in the immediate vicinity of Edinburgh, he soon afterwards made considerable addi-

tions to the mansion-house on it, and fitted it up as a residence for himself at a great expense; and since that period he made it his principal residence, and was residing there at the time the present proceedings were commenced.

At an early period in life he obtained a commission in the Berwickshire regiment of militia, with which he did duty both in Scotland and in England, and he holds the lieutenant-colonelcy of the regiment.

In 1807 he was returned to Parliament for the Haddington district of burghs, and at a subsequent period represented in Parliament several boroughs in England. About the end of the year 1812 he was appointed to a seat at the Board of Admiralty, and there being an official residence attached to it, he soon afterwards took possession of it, and continued to occupy it till the month of April 1822. Until his appointment to this office he had no house in London, or elsewhere in England; he kept no establishment there, but he lived sometimes in hotels, at other times in furnished lodgings, when his parliamentary duties required his attendance in London. During the time that he held the situation of one of the Lords of the Admiralty it became necessary for him to spend the greater part of his time in London, and even then he was in the practice of returning to Scotland every year when the duties of his office permitted.

In the month of October 1810 he was married to the appellant. The marriage ceremony was performed in London, and the appellant was an English lady, both by birth and connections. Marriage articles after the English form were entered into, and the provisions settled upon the appellant as his wife were contained in an ante-nuptial contract of marriage, executed

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in the Scotch form, simul et semel with the English articles, and were secured over his heritable property in Scotland.

It was provided by the ante-nuptial contract that the appellant should be secured in a jointure of 1,000*l.* a year, partly over the estate of Lochend, and partly over the lands of Goodspeed, both situated in the county of Haddington. The deed narrated, "That the said "Sir George Warrender and Anne Boscawen, having "conceived a mutual love and affection for each other, "do hereby, with consent foresaid, accept of each other "for lawful spouses, and promise to accomplish and "solemnize their marriage without delay;" and that he had covenanted and agreed to "settle one "thousand pounds sterling a year upon her as her join-"ture, to be secured on his real estates in Scotland; "and in regard that by the settlements of the estate of "Lochend, the heirs of entail and provision succeeding "thereto are empowered to provide their ladies in a "competent life-rent provision by way of locality, out "of the said estate, not exceeding the third part of the "real rent thereof for the time; therefore the said "Sir George Warrender, as a security to the said Anne "Boscawen, his future spouse, of an annuity of 580*l.* "sterling, part of the said jointure or annuity of 1,000*l.*, "covenanted to be paid to her as aforesaid, hereby "binds and obliges himself, and his heirs of entail and "provision, and his successors and representatives "whatever, legally and sufficiently to infeft and seise "the said Anne Boscawen, his future spouse in life-rent, "during all the days of her life, after his decease, in "case she shall happen to survive him; but always "with and under the reservations, conditions, and pro-

" visions after written, in all and sundry the lands and " others specified (the rent whereof is within a third " part of the rent of the said lands and estate of " Lochend,) viz. the lands and grounds of Lochend."

It farther provided, that besides the foresaid provision " by way of locality to the said Anne Boscawen, for " securing to her the foresaid annuity of 580*l.* sterling, " part of the said jointure or annuity of 1,000*l.* agreed " to be secured to her upon the said Sir George War- " render's real estates in Scotland, he hereby, in com- " plete fulfilment of his engagement to settle and " secure to her the said jointure of 1,000*l.*, binds and " obliges himself, and his heirs, executors, successors, " and representatives whatsoever, to pay to the said " Anne Boscawen, during all the days of her lifetime " after his decease, in case she shall survive him only, " an annuity of 420*l.* sterling, free from all burdens " and deductions whatever, at two terms in the year, " Whitsunday and Martinmas, by equal portions, with " 42*l.* sterling of penalty for each term's failure in pay- " ment of the said annuity, and the legal interest of the " said annuity from the respective terms of payment " thereof during the not-payment of the same; and " beginning the first term's payment of the said annuity " at the first term of Whitsunday or Martinmas next " after the death of the said Sir George Warrender " for the half year preceding, and so forth half yearly " and termly thereafter during her life; and for fur- " ther security and more sure payment to the said " Anne Boscawen of the said annuity the said Sir " George Warrender binds and obliges himself and his " foresaids, upon his own charges, legally and suffi- " ciently to infeft and seise the said Anne Boscawen in

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" the said annuity of 420*l.* sterling, free of all bur
" dens and deductions whatever, to be uplifted at the
" said two terms in the year, Whitsunday and Martin-
" mas, by equal portions, and beginning the first term's
" payment thereof at the first of these terms next after
" the decease of the said Sir George Warrender, with
" 42*l.* sterling of penalty for each term's failure, and
" the legal interest of the said annuity from the re-
" spective terms of payment thereof, during the not-
" payment of the same, furth of all and whole the lands
" and farm of Goodspeed, presently occupied by John
" Tait as tenant thereof, and the lands and farm of
" Myreside, presently occupied by Alexander Sawers,
" as tenant thereof, with the teinds of the said lands,
" and whole parts, pendicles, privileges, and pertinents
" of the same, lying within the parish of Dunbar, and
" constabulary of Haddington, within the sheriffdom of
" Edinburgh, as more particularly described in the
" rights and investitures thereof."

This deed contained besides all the clauses customary in such instruments, a clause empowering the lady to enter into possession of the lands in the event of her jointure not being regularly paid—an assignation to the maills and duties, precept of sasine, &c.

In virtue of the precept of sasine she was infeft in the lands of Lochend, and in the lands of Goodspeed and others.

There were also other provisions in the marriage contract, amounting in certain events to 30,000*l.*, which were in like manner secured over the heritable property in Scotland.

Immediately after the marriage in October 1810 the parties returned to Scotland, where they remained till

the month of May following. When his duties as member of parliament requiring his attendance in London, they passed a few months at a hotel there, and immediately afterwards returned to his paternal residence at Lochend, where they resided for a considerable time.

In consequence of differences which took place between them it was proposed, on the part of the lady and her relatives, that there should be a separation between them. This proposal was at first opposed by Sir George, who was at last induced to accede to their wishes. The articles of agreement contained an express condition,

" that if the said Sir George Warrender shall in any
" one year be obliged to pay, and shall pay any debt
" or debts of the said Dame Anne Warrender, here-
" after contracted, to the amount in the whole of up-
" wards of 1,010*l.*, then and thenceforth the covenants
" of the said Sir George Warrender herein-before
" contained shall cease and be void."

A clause was also inserted declaring, " that if the said
" Sir George Warrender and Dame Anne his wife
" shall jointly be desirous of annulling these presents,
" and the agreements and provisions therein contained,
" and shall signify such desire by writing indorsed on
" these presents, or on a duplicate thereof of such writ-
" ing to be under their joint hands, and attested by two
" credible witnesses, then and from thenceforth these
" presents and every article, matter, and thing herein
" contained shall cease, determine, and be null and
" void, any thing herein contained to the contrary."

The articles contained no clauses expressly empowering the lady to reside wherever she pleased, and debarring Sir George from suing for restitution of conjugal rights; but it was arranged that he should grant to her

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brothers, Lord Falmouth and the honourable Mr. Boscawen, the following letter:—"My Lord and Sir,—"Although I have objected to have any clauses "inserted in the articles of separation between Lady "Warrender and myself which should contain a "permission from me to her to go and reside where "she pleases, or which should preclude me from suing "her in the Ecclesiastical Court for restitution of con-"jugal rights, I hereby pledge myself that Lady "Warrender shall be at liberty during our separation "to go and reside where she pleases, and that I will not "institute any suit against her for the purpose above "mentioned. I am," &c.

After the separation had been arranged on this footing the lady went to the continent; and, with the exception of a few months when she made a visit to London, she resided there ever since, sometimes in France, and at other times in Switzerland and Italy, changing her place of abode from time to time, without having any fixed or permanent residence; she was on the continent when Sir George determined on instituting the present action of divorce in the Scotch courts.

The summons was served against her edictally in common form, and a full copy of it was also delivered to her personally at Versailles, where she happened at the time to be resident.

On the summons being called appearance was entered for her, and she lodged defences objecting to the jurisdiction of the Court, and denying the charges.

The Lord Ordinary appointed the question of jurisdiction to be argued in cases, and these having been laid before their lordships of the First Division of the

Court, they pronounced this interlocutor:—"28 June "1834, The Lords having advised the cases for the "parties, they repel the preliminary defences, and remit "to the Lord Ordinary to proceed in the cause."[1]

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Lady Warrender appealed.

Appellant.—1. The appellant is not subject to the jurisdiction of the Court of Session.

She was born in England—of English parents—has no Scotch property—was never voluntarily in Scotland in her life, and has not been there, even involuntarily, for a single moment, since the year 1812. She has not and never had the slightest vestige of connexion with Scotland, except such as arose from her having married the respondent. Had nothing passed between them to affect their conjugal rights, his residence would, by construction of the law, have been hers. But in the year 1819 the contract of separation was executed between them, by which, holding the relative letter to be a part of it, she was expressly allowed to choose her own dwelling place; and, availing herself of this privilege she has never since been in Scotland. It would be idle to enter into any discussion of what the effect of any attempt to recall or set aside this contract might be, because no such attempt has been made. No suit having this object has ever been instituted.

The Court below has decided upon two grounds that it has jurisdiction over the appellant.

In the first place, it was stated that the appellant was

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[1] 12. S. D. & B. p. 468, new edition, where the opinions of the judges will be found.

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the owner of a real estate in Scotland. But the only fact on which this assertion rested was, that an eventual jointure, to which she would be entitled if she were to survive her husband, was secured over one of his Scotch properties. She is seised in security of her provision under her English contract of marriage, like any other conditional creditor in an estate belonging to her debtor in Scotland. It is impossible that this security can make her personally amenable to the tribunals of the country where the debtor's property is situate. The effect of this would be, that every person who happens to be the creditor in an obligation which is secured over a Scotch estate would make himself by that one fact subject, not only in relation to that matter, but universally to the jurisdiction of the Scotch courts. So, if an English landed proprietor were to lend his money in Scotland on heritable security, and provide for his wife over the subject matter of that security, the validity of their marriage might be tried in the Scotch courts, or an action brought to dissolve the marriage by reason of adultery, though neither the one nor the other had ever been in Scotland in the whole course of their lives. But the consequences of such a principle do not stop at this conclusion, however untenable; for if the respondent had happened to have estates scattered all over the world, and had given his wife the security of them all in protection of her provision, would it be seriously maintained that this single circumstance made her subject, even in questions touching her rights as an English married woman, to the control of all the various courts where these properties lay, though she herself had never been out of England?

In the second place, it was argued and held, that the appellant was subject to the jurisdiction of the Court of Session, because he, being a domiciled Scotchman, was subject to that jurisdiction, and that the residence of the husband was in law the residence of the wife.

In support of this view there was a very unnecessary reference to principle and authority, in order to show that in the general case a wife, whatever the fact may be, must be held to be living with her husband, and that she can never escape from the consequences of this presumption by violating her duty and deserting her family. The appellant concedes most freely that the husband has a right to insist upon the society of the wife, and that to whatever place she may choose criminally to withdraw herself, he is entitled to deal with her in law as if she were performing her duty by being in his house. But the question that occurs here is, how far this general rule applies to the circumstances of this particular case, where the husband has himself chosen to liberate her from the obligation of living with him, and has conceded to her the privilege of which she has practically availed herself, of residing in a different country, and where the husband has never got this arrangement judicially destroyed.

Two observations were made with a view to show that the contract of separation could not be brought into operation here at all. One of these was, that the permission to the appellant to choose her residence was not contained in the articles of separation, but only in a relative letter; the other, that the mere execution of the summons of divorce in this action was itself a virtual recall of that agreement. Now these are plainly both points of English law, and therefore it was

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premature and irregular in the Court of Session to dispose of them without proper inquiry. The constitution and extinction of an English contract of separation were matters of fact to a Scotch Court, and ought to have been established in the usual way in which such facts are proved. If the opinion of English counsel had been obtained, it is (to say the least of it) possible that these pleas would have been abandoned, or that the Court would have been instructed to disregard them. The privilege of residing where she pleases, though only expressed in the letter, is clearly a part of the contract; and the execution of a summons of divorce in Scotland is not a proceeding which the law of England can recognise as sufficient for the recall of an English deed of separation. It does indeed appear to be a very extraordinary mode of dissolving a contract, whereby the parties have agreed or are empowered to live separately, to institute an action to dissolve their marriage, and altogether prevent them from ever living together again.

Assuming the contract to subsist, the appellant has need only to refer to the doctrine of Lord Eldon, who, in disposing of Lindsay v. Toovey, brought by appeal before the House of Lords from the Court of Session, in which also there had been an agreement exactly the same with the present one, lays it down that, with regard to the deed of separation, even "if "the fiction or rule of law were admitted, that the "forum of the wife followed that of her husband, so as "to give jurisdiction to the Scotch courts in this case, "the effect of the deed must be to put an end to that "rule or fiction till the deed was recalled. He himself "had agreed that their forum should be different, if

" his wife so pleased, and then he endeavoured by this " process to get rid of the effect of his own agreement."

It certainly is no necessary part of the appellant's argument, that a wife who deserts her husband illegally is entitled to derive any legal advantage from this offence. Wherever she ought to be living with her husband, she may be liable to be treated judicially as if she actually were so. But how does this apply to the case in which the husband has himself permitted her, by a regular contract, to live apart from him, and in which, therefore, her separation is not an act of criminal desertion, but the exercise of a right; which right, however it may be discountenanced by law, and whatever facilities and encouragement may be afforded to the parties to annul it, must nevertheless be recognised, at least in any question between them, till it actually be annulled? Besides, it is certainly not to be assumed that, because the parties live separately, and the residence of the one may not, therefore, be necessarily the residence of the other, no remedy for either of their delinquencies is attainable. The husband may undoubtedly live wherever he pleases, or, in other words, it is always open to him to select for his residence a country where the wife may meet with no favour, or with no facility in the vindication of her rights. By the law of Scotland the remedy of divorce is as competent to her as to the husband, yet it has never been considered as a formidable evil that the husband's power of selecting his residence might enable him to commit adultery with impunity.

No satisfactory answer can be made to the plain and simple objection taken by the appellant. She maintains that, in order to give the Court jurisdiction over her,

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residence, either actual or constructive, within Scotland, was necessary upon her part; that there was confessedly no actual residence; and that, so long as the contract of separation subsists, there was no presumptive Scottish residence.[1]

2. The citation of the appellant, even upon the respondent's own principle, is defective. If, as he says, his residence was hers, then she ought to have been summoned as if she had been actually living with him; but, instead of this, she is only called into court by what is termed an edictal citation, as a person beyond Scotland; so that she is first treated as beyond Scotland, and then as within it, but in neither case gets the full benefit of the fact. The only defence of this has been, 1st, That the summons was intimated to her personally at Versailles; and, 2dly, That edictal citation is the proper form, wherever a defender is out of the kingdom. But the mere intimation of the summons surely does not supersede the necessity of judicially citing any intended defender. Telling the appellant that such an action was in existence was a mere insult, if she was not formally called into court; and, no doubt, the edictal citation was the correct course with a party who was abroad; but the respondent states, and must state, that the appellant was at home. His only ground for subjecting her to the jurisdiction of the Court of Session was, that she could be considered as having no residence except that of her husband.

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[1] Rose v. Ross, 4 Wilson and Shaw's Appeal Cases, p. 289; Brunsdone v. Sir Thomas Wallace, 9th Feb. 1799, Mor. 4784; Pirie v. Lunan, 8th March 1796, Mor. 4594; Pedie v. Grant, 1 Wilson and Shaw's Appeal Cases, p. 716; Sharpe v. Ord, 14th Nov. 1829; Scruton v. Gray, 1st Dec. 1772, Mor. 4822; Lindsay v. Toovey, 26th Jan. 1807, Dow, vol. i. p. 138.

' But, if the appellant is to be held as resident with her husband, it plainly follows that the summons should have been executed against her at the house of her husband. There is a manifest absurdity in citing the appellant as furth of Scotland, when it is maintained that, fictione juris, she is resident in Scotland, and when it is that fiction alone which renders the action competent.

There is therefore a plain inconsistency in the proceedings on the part of the respondent; for while he rests his whole case upon a legal fiction, he, in the very important ceremony of executing his summons, rejects that fiction altogether. In short, the execution which he produces demonstrates the incompetency of the action.

This objection is not by any means new. It occurred to the Court in deciding the case of French v. Pilcher, where it was observed on the bench, that " the defen- " der should have been cited both at market-cross, and " pier and shore, and at the house of her husband."[1]

3. Even if the appellant were subject to the jurisdiction of a Scotch court, it is incompetent for that court to dissolve a marriage contracted in England with an English party, and celebrated according to the rites of the English church.

The conclusion of the summons is, that " the pursuer " is entitled to marry any person he pleases, sicklike " and in the same manner as if he had never been " married, or she, the defender, were naturally dead, " conform to the laws and practice of Scotland." The appellant stated in defence, that as a decree of divorce was the only thing that was sought, the action was instituted for an object, which the Court could not legally

[1] 13th June 1800. Fac. Col. xii. 420. No. 183.

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accomplish, viz. the dissolution by divorce of an English marriage; and as she held that the mere announcement of the defence ought instantly to have quashed the proceedings, she did not merely state it as a defence; that could only be taken up after the facts were ascertained, but as one so preliminary that no inquiry into the facts was necessary. The respondent was perfectly aware that the only effect of his obtaining a favourable judgment upon this point would be that there must be an instant appeal to your lordships, and therefore his object was chiefly confined to an attempt to induce the Court not to decide it at all. His plea was, that "the preliminary defence founded on the indissolubility "of an English marriage is a defence truly involved "in the merits. The consideration of it, therefore, "ought to be reserved;" and it would have been perfectly agreeable to the practice of the Court to have made such a reservation. But in place of doing so, the Court has repelled all the preliminary defences, including the one in question.

The principle involved in this decision is, that an English marriage is liable to be dissolved by the Court of Session. The respondent in the present case happened to be a Scotchman; but this was a mere accident, and the decision is by no means confined in its operation to the cases in which one of the parties is subject, by birth or property, to the jurisdiction of this Court. Any person whatever, male or female, by a residence within Scotland for forty days, is entitled to raise or liable to be sued in an action in any Scotch court; and divorce for adultery is the right of the wife as well as the husband in Scotland. Therefore the import of the decision is, that every English marriage, without exception, may be

dissolved by the Court of Session, provided the one party has committed adultery, and provided the other chooses to live on the north side of the Tweed for forty days.

Nor is this an imaginary case. For the judges of the Second Division of the Court have, by a recent decision, actually entertained an action for dissolving a marriage contracted in England by English parties, on no other ground of jurisdiction, so far as concerned the domicile, than a temporary residence in Scotland for upwards of forty days[1]; and it is remarkable that no reference appears to have been made, either in the argument or in the opinions of the learned judges, to the opinions and decisions in England, of a directly opposite tendency on this very point, as to the power of the courts in Scotland to dissolve English marriages.

This is a doctrine which ought to be put down authoritatively and without delay; because, if it be competent for a Scotch tribunal to set aside an English marriage on account of adultery, it is equally competent for the tribunals of all other countries to terminate these marriages whenever they happen to be

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[1] See Oldacre or Goldney against her husband, Feb. 20, 1834, in which, on looking into the opinions of the judges, it will be observed that the chief point of consideration was, whether there was a sufficient domicile; and that although an attempt had been made to prove a permanent domicile in Scotland, or at least an intention to establish such a domicile, that proof had entirely failed, and the following opinions were delivered under that concession:—

"*The Lord Justice Clerk* said, The only point before the Court is that of "domicile; and upon considering the cases referred to by the pursuer, I "cannot have a doubt, whatever may be the rule of the law of England, "that we must sustain our jurisdiction. The alleged intention on the "part of the defender of permanently residing in Edinburgh is not con-"firmed by the proof; but this was not necessary.

"*Lord Glenlee*, although his opinion was different from that of the "majority of the Court in the cases referred to, held that those decisions "settled the matter.

"*Lord Mackenzie.*—I am of the same opinion, that our decisions are "sufficient to settle the point here, whatever may be the law of England."

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struck at by an objection which, however frivolous in the law of England, is fatal to the continuance of the union by the laws of these countries. The Court of Session, for example, may dissolve for non-adherence, and a court in some other country for incompatibility of temper. The principle is, that an English marriage is subject to all the causes of legal dissolution that operate wherever the party bringing the action may happen to reside.

The considerations upon which this opinion prevailed in the Court below all resolve into these three:—

In the first place it was denied that there was any thing in the legal character of an English marriage which made it incapable of being dissolved by the sentence of a court of law. This denial formed in particular the basis of the opinion delivered by the head of the Court. Now the appellant cannot help lamenting, that upon this question also of English law the Court did not take the ordinary means to get itself duly instructed. If these means had been adopted it may be considered as absolutely certain that the bar of England could not have furnished a single counsel who would have set his name to the opinion, that judicial indissolubility was not a legal quality of every English marriage; but no opportunity was afforded to the appellant of proving this fact. It is sufficient for her to refer to the decision of the twelve judges in the case of Lolly, followed, as it has been, both in the Consistorial Court and in the House of Lords, on this part of her case.

In the second place it was stated, that, assuming marriage to be by the law of England a contract indissoluble except by death, nevertheless the power of the

Court of Session in Scotland to dissolve the contract for adultery had already been solemnly decided; and it is unquestionably true that judgments proceeding upon and intended to announce this principle have been delivered more than once after the fullest deliberation by that Court. Not only so, but so confident has the Court of Session been in its own view, that such decisions have been pronounced even after the House of Lords had expressed the greatest doubts in the case of Lindsay against Toovey, and after the twelve judges had sanctioned a sentence of transportation against Lolly for acting on the assumption that these judgments were correct. This very confidence on the part of the Scottish court renders it the more necessary, since Lolly's example has proved insufficient, that the strength of the English law by which parties unite themselves in wedlock should be declared. It is equally impossible not to perceive that in considering this question there mingled with strictly judicial discussion some infusion of that spirit of resistance which every court is apt to feel against any attempt to limit its jurisdiction, and some of that pride which courts, when put into competition with each other, experience in maintaining the superior wisdom of their respective systems.

There is one circumstance, however, which distinguisnes the present from those cases. In every one of them the adultery was set forth as having been committed within Scotland. Here it is declared to have been committed on the continent. Now it is no doubt true, that in a proper Scotch case the remedy of divorce is given wherever the crime may have been perpetrated. But, in considering the competency of extending this remedy to an English case, a great deal was, in nearly all the

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cases alluded to, unquestionably rested on the locus delicti. It was argued, that adultery being a crime, it was contrary to public policy and morality that the offence should not be checked like any other delinquency committed within the sphere of the criminal law of the country; and had divorce been a criminal and not a merely civil remedy, the reasoning would have been entitled to much weight. But the argument which prevailed overlooked, or rather evaded, this distinction. It was held that divorce was not merely a civil remedy given to a private party for a personal wrong, but that it was a punishment for a public delict, and that therefore our criminal law could not more withhold this result than it could refuse to apply the ordinary penalty to any other act, which, however innocent elsewhere, was a crime within Scotland. Now the present case is altogether free of this peculiarity. The Court of Session was certainly not called upon to preserve the purity of Scotch morals by punishing adultery said to have been committed by an English lady in France.

But while the appellant suggests this as a circumstance which may distinguish the present case, she has not the slightest objection to let it be considered as in all respects identical with those on which the respondent founds; on the contrary, the greater the number of judgments pronounced by any foreign court, to the effect that English marriages are liable to be judicially dissolved, the more necessary it is for this House to correct and check these determinations.

In the third place, the respondent maintained, that in principle, even assuming judicial indissolubility to be a condition of every English marriage, they might

nevertheless be lawfully dissolved by the Court of Session. The principle on which this argument was rested was, that that quality only attached to the conjugal relation within England, that the obligations and rights arising from the marriage must always be judged of according to the law of the country where they are sought to be enforced; and that therefore divorce, which is the consequence of adultery by the law of Scotland, cannot be withheld, when demanded in this country, merely because the marriage happened to be contracted in a place where no such consequence attached to that offence.

It seems unnecessary to enter into any formal refutation of a principle which implies that there is no consequence whatever which attaches to any marriage universally, but that every thing arising from it must depend on the legal doctrines prevalent in all the various countries on the earth, where its obligations may happen to be attempted to be enforced. The cases which were lodged in the Court below show that there was scarcely any discussion on this subject, but that the parties were content with referring to the proceedings in the former questions. On that occasion much argument was employed, much principle brought forward, and much metaphysical speculation indulged in, to establish the principle. Although the opposite argument was unsuccessful in the Court below, the ground on which it rested was extremely simple, being merely this, that every contract must be enforced according to the law of the country where it was entered into; that is, according to its own intent and meaning, particularly when its conditions are not the mere creation of private arrangement,

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but are established by law upon grounds of public policy. The subjects of England might just as well attempt to be freed by a foreign court from their allegiance as from the perpetuity of the marriage relation. It is in vain to say that the law of every country has a right to prevent the commission of crimes within its own jurisdiction. Divorce is not granted as a punishment for adultery, and it operates rather as an encouragement to it. There are many acts, such as taking above five per cent. of interest, which, though criminal by the law of one country, lose their guilt even within that country, because they are sanctioned by the law of the place where that contract was made.[1]

Respondent.—1. In the outset of the argument it is important to keep in view that the point now to be discussed relates to the question of jurisdiction, without

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[1] *Appellant's Authorities.*—Lolly v. Sugden, Russel and Ryan's Crown Cases, 237; Bezely v. Bezely, 3 Haggard's Reports, p. 339; M'Carthy v. De Caix, 9th May 1831.

The following extract from the opinion of the Lord Chancellor will explain sufficiently the circumstances of the latter case; it is copied from one of the appeal cases:—"The case, in point of fact, was shortly "this:—A gentleman of the name of Tuite contracted a marriage "in this country, a marriage legally solemnized in England. He "was himself a Dane by birth and by domicile. He removed his "wife, the person whom he made his wife, from this country, the "locus contractus with which he appears to have had no further con-"nexion than so far as he was married to an Englishwoman. He "removed her immediately to his own country, where his domicile con-"tinued, and in that country the marriage was dissolved by a valid "Danish decree—dissolved as far as the Danish law, or any proceedings "under the Danish law, could dissolve it; but which I may observe in "passing, and in my view of the case, is not at all immaterial; which "divorce could not by the law of this land, as it is fully established by "the solemn opinion of all the twelve judges, in a fully argued and most "maturely considered case, that a Danish divorce could not operate "to dissolve or in any manner be made to affect an English marriage.

any reference to the dissolubility or indissolubility of an English marriage by a Scotch court. The defence under consideration involves merely the question, How

" What was Lolly's case? It was the strongest that can be imagined; " peculiar, no doubt, in its facts, but the strongest that can possibly be " imagined in favour of the doctrine laid down, as it was not a question " of a civil right, but a conviction of a felony in having contracted a " second marriage, standing the first. Lolly, for whom I was counsel, " and argued his case before the twelve judges, Mr. Justice Littledale " being on the other side—Lolly had, you may say, acted bonâ fide; but " the statute of James I. does not make any difference, whether a man " does it with an innocent ignorance or a guilty knowledge, and says, if " A. B. shall marry C. D. when his former wife E. F. is alive, he is " guilty of felony, there being no exception except the proviso of being " absent seven years abroad, which is one exception, and a divorce at " Doctors' Commons is another. Lolly, in a perfect belief that a Scotch " divorce, which all the Scotch lawyers told him, and which many of the " Scotch lawyers still hold to be the law in Scotland, notwithstanding " Lolly's case, he in his perfect belief, induced by the Scotch lawyers, " thought the first marriage was perfectly and validly dissolved, and inter- " married in England with a second wife. He was tried at Lancaster " and was convicted, the point being saved for the opinion of the twelve " judges, and the point was argued before the twelve judges, including " some of the most learned judges of our day—my Lord Ellenborough, " Lord Chief Justice Gibbs, Chief Baron Thomson, and several others, " Mr. Justice Bayley, Mr. Baron Wood, and Mr. Justice Le Blanc, " some of the most eminent and able lawyers that I have ever known in " Westminster Hall, after hearing this case argued during term, and at " Sergeant's Inn after term, they gave a clear, decided, and well weighed " opinion, all in one voice finding that no divorce, or proceeding in the " nature of a divorce, or tending towards a divorce, had in any foreign " country (Scotland included), could dissolve the vinculum matrimonii, " a contract of marriage in England; and they sentenced Lolly—(and " here is another mistake into which the noble and learned judge has " fallen, as if there was so much doubt that they did not carry the " sentence into execution)—he was sentenced to seven years' transporta- " tion, and sent to the hulks for one or two years, and, as very often " happens, after being at the hulks one or two years, instead of going to " Botany Bay, in mercy the residue of the sentence was remitted; but " only observe, I took the liberty of saying at that time, perhaps feeling " the prejudice of a counsel in favour of his client, that he ought not " to have gone to the hulks because he acted optimâ fide—that he really " believed what to this day many of the Scotch lawyers, and at that day " all the Scotch lawyers said was the law in Scotland, that a Scotch " divorce could dissolve an English marriage, and upon that he acted; " and many other men of high rank in this country had acted in the

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far, in an action of divorce, the undoubted forum of the husband is to be held the proper forum of the wife?

" same way, except that they had taken the precaution of contracting " the second marriage in Scotland; but if they had gone across the Tweed, " and contracted a marriage in England, their conduct would have been " just the same as this, because it would have been an English marriage " which they had in formâ legis contracted; but notwithstanding he " had so far acted bonâ fide he was sent,—in order to show clearly that " the judges were confident of the law they laid down; they laid down " the law, they stuck by the law, and sent him to the hulks for a " year. So never was there a greater mistake than to suppose that the " remission of the sentence in Lolly's case showed the least doubt on " the part of the learned judges who decided it of the finding on which " that judgment rested. The reason it was remitted was, that he had " suffered enough, even if he deserved to go to Botany Bay, for a year " or two in the hulks is worse than seven years in Botany Bay. If " the sentence was partly remitted, it must have been on account of the " peculiarity of the case, and that he acted with no felonious intent, " and in ignorance of the law, which is no excuse in point of law, but " which is every thing in respect of mercy. I hold it therefore to be " perfectly clear that that decision in Lolly's case, when I look at the " case itself, and the circumstances preceding, accompanying, and fol- " lowing it, stands as the law in Westminster Hall to this day. It is " still more the law when I remind you of another matter which the " noble and learned judge forgot at the time he decided the case, and " threw some doubt on Lolly's case, which he had looked at as if it had " never been recognized in subsequent cases. It has been uniformly " recognized in Westminster Hall; but, above all, it has come over and " over again in discussion before the same noble and learned judge " himself in the case of P——— and L——— and T———, " two cases the very year after argued at great length by Mr. Justice " Hollroyd on one side, and myself on the other, before Lord Eldon, " and to which he paid most exemplary attention, and where he took " a note of the very words in which Lolly's case was decided. Lord " Eldon had that before him, and he followed it in deciding those two " cases. He might have expressed some doubt, I don't say he did not; " he said, I think we shall most likely hear more of it afterwards, but " he considered he was bound by it to the extent of following it in " those cases. Now therefore Lolly's case lays down these two points— " that no foreign proceeding in the nature of a divorce can affect an " English marriage; and, secondly, that a Scotch divorce in the Con- " sistorial Court of that country is not such a proceeding in an English " Court as to bring the case within the provisoes in the Polygamy Act, " namely, a sentence dissolving an English marriage; and nothing but a " sentence in the English Court says, that judgment dissolving a " mensâ et thoro can bring the party within the exception, even as " regards felony."

This is not the case of a fictitious or presumptive domicile, acquired by a residence of forty days in Scotland. The domicile of the respondent is real— by birth, by residence, by possession of property, and by every other circumstance which can give efficacy to those rules of law by which domicile is fixed. His proper and unquestionable domicile is Scotland.

All difficulties as to the nature of the domicile of the respondent being removed, it is a clear proposition in law, that until there is a separation a vinculo matrimonii, the appellant, as the respondent's wife, is subject to the jurisdiction of the Scotch courts in all questions between husband and wife, without reference to the place of her present residence.

The rule of law that the forum of the husband is the forum of the wife, founded as it is on the peculiar nature of the connexion subsisting between married parties, seems to be admitted in the municipal code of all civilized nations.

The union of parties by marriage not only implies the closest communion of rights and interests, but, proceeding on the acknowledged superiority of the husband, confers on him certain powers over the wife, both in her person and estate. By entering into the marriage contract the wife leaves her own family, and comes under an obligation to follow the fortunes of her husband, in whom the law invests a curatorial power over her. Hence the separate interests of the wife merge by marriage in those of her husband, and hence she has no persona standi separate from her husband. Hence, too, it is implied that the domicile of a woman before marriage is changed for that of her husband, if he is domiciled in a different country; and this arises,

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not from the change in her own residence, for she is not capable during her marriage of retaining her original or acquiring a separate domicile, but it results from the peculiar relationship which subsists between husband and wife, whereby the separate character or persona standi of the wife is lost by the very act of marriage.

This rule of law was acknowledged by the civilians. Thus it is laid down in the code: "Mulieres honore "maritorum erigimus, et genere nobilitamus, et forum "ex eorum persona statuimus, et domicilium muta-"mus."—Voet adopts the same views:—"Effectus "nuptiarum, recte contractarum plures sunt, etenim "mulier sequitur mariti dignitatem, eamque retinet "dum vidua est, sed et forum viri, denique et domum "seu domicilium ejus;" and in another place,—"Cum "vero uxor per matrimonium transeat in viri domi-"cilium, atque insuper in potestate viri sit, quæ mari-"talis potestas in variis tutoria potentior est ex hodierno "jure vix dubium esse potest, quin marito migrante "uxoris quoque intuitu domicilium debeat censeri "translatum."[1]

This principle seems to have been recognized at an early period in the law of Scotland. Lord Stair, in treating of the rights arising from marriage, and more especially of the conjugal powers of the husband, thus lays down the law:—"Yet, by this power, the husband "may still contain the wife within the compass of the "conjugal society, and her abode and domicile fol-"loweth his; and he hath right to recover her person "from any that would withdraw or withhold her from "him, except in the case of an allowed separation

[1] Lib. 10. tit. 39. sec. 9.; lib. 23. tit. 2. sec. 40.; lib. 5. tit. 1. sec. 101.

" for his injuries and atrocities, for which she might " not be with him in security and safety."[1]

So little doubt seems to have been entertained of the soundness of this principle, that, though acted on uniformly from the earliest period in the practice of the Consistorial Court, it does not appear to have occurred for decision in any contested case for a very considerable time, till an occasion occurred in the case of French v. Pilcher, in which the commissaries dismissed the action, "in respect the defender was not cited " within Scotland, nor in any shape amenable to the " courts of this country." In this way it will be observed the point was fairly raised. The defender in the action was by birth a native of England, and was resident there at the date of the action; but the Court, altering the judgment of the inferior Court, remitted to the commissaries, with instructions to sustain their jurisdiction.[2]

In Gosson v. Blake, 6th July 1826, the Lord President laid it down as settled law:—" It is no doubt true " that the husband's domicile is that of the wife; but " where both have formerly been domiciled abroad, if " he comes to Scotland, leaving her abroad, he is " bound to give her notice personally of the process by " a notary public, or in such way that she could not " have pleaded ignorance."[3]

2. The defence founded on the informality of the citation is somewhat extraordinary. It is said that the appellant ought not to have been cited edictally as furth of Scotland, but by citation at the respondent's

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[1] B. i., tit. 4. sec. 9.

[2] 13th June 1800, Dict. voce Forum competens. App.

[3] 6 S. & D. p. 804. new edition.

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own dwelling house. This defence was so untenable, that though not actually abandoned in the Court below it was hardly attempted to be supported.

The perplexity which the appellant has endeavoured to create has arisen from not observing the distinction between the rules applicable to domicile and to citation. A Scotchman having an heritable estate in Scotland is liable to be sued in the courts of that country in respect of his domicile; but if he has been absent for more than forty days, the citation against him may be edictal as furth of the kingdom. This is a matter of every day practice, but the rule applies with equal force to the case of the appellant. Although her legal domicile is Scotland, yet she has been absent for upwards of forty days. She was therefore properly cited edictally. As a measure of precaution, however, and for the purpose of communicating full notice of the suit, the summons was served on her personally, so that there is nothing as to the sufficiency or form of the notice which she can complain of.

Edictal citation is regulated by act of sederunt, 14th December 1805, sect. 1. by which it is enacted, "That "it shall in time coming be held and presumed that a "person, after forty days' absence from his usual place "of residence, but not sooner, is forth of the kingdom "of Scotland, and therefore that within the said forty "days the citation or charge may be at his late "dwelling place, but after that period must be at the "market cross of Edinburgh, and pier and shore of "Leith, unless he is personally found, or prior to the "execution shall have taken up some other known and "fixed residence within Scotland." And by the statute 6 of Geo. IV. c. 120. sect. 53., it is "provided

" and declared, that where a person not having a " dwelling-house in Scotland occupied by his family " or servants shall have left his usual place of resi- " dence, and have been therefrom absent during the " space of forty days, without having left notice where " he is to be found within Scotland, he shall be held " to be absent from Scotland, and be charged or cited " according to the forms herein prescribed."

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Now although by legal construction, the domicile of the husband is held to be also the domicile of the wife, to the effect of subjecting her to the jurisdiction of the courts of the country where he resides, yet where, as in the present case, the appellant resided forth of the kingdom, it certainly was incumbent on the respondent to call her into court according to the forms prescribed for the citation of persons residing abroad; and had he adopted the course stated in the defences as the proper one, of leaving a copy at his own residence in Scotland, he would have been following a course which the court have repeatedly condemned as insufficient. Edictal citation, accompanied with personal notice, was the proper course to observe.

3. The third defence is founded on the indissolubility of an English marriage, and involves the only point of law on which the whole merits depend; and yet this House is called upon to dispose of it upon the averments of the respondent as to the conjugal infidelity of the appellant, which are broadly and unqualifiedly denied in other parts of the defences. There is an obvious impropriety in deciding an abstract question of law until the facts which raise it are either proved or admitted; and least of all ought the Court to be required to pronounce any hypothetical finding upon

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what the appellant herself maintains to be a very difficult question of international law, until a proof of her adultery be taken, and the facts established to the satisfaction of the Court. That the question of the dissolubility of an English marriage by a Scotch court is the only one which can be raised on the merits, cannot be disputed by the appellant.

It is not, therefore, properly before this House; but as it has been fully discussed by the appellant, the respondent shall advert to it.

In his treatise on Consistorial Law (p. 8) Mr. Ferguson states the result of the cases on this subject in these terms: —"According to these precedents, the municipal law of "Scotland is also now applied by the Consistorial Judica- "ture in all cases of divorce without distinction, whether "the parties are foreign or domiciled subjects and citizens "of this kingdom; whether, when foreign, the law of their "own country affords the same remedy or not, and "whether they have contracted their marriage within "this realm or in any other; provided only, that they "have become properly amenable to the jurisdicion in "this forum. None of these last-mentioned cases, nor "indeed any other from Scotland, in which a question "of international law could be raised for trial, and "judgment, having hitherto been appealed, the rule "has for a period of more than ten years stood as fixed "by them, and the subsequent practice has furnished "additional instances of its application."[1]

The appellant, by marrying a Scotchman, virtually consented to adopt his domicile, and to abandon her

[1] See Edmonstone v. Edmonstone, 1st June 1816, Fac. Coll. xix. 139. No. 54; Duntse v. Levit, 1st June 1816, Fac. Coll. 139. No. 54; Kibblewhite v. Rowland, 21st December 1816, Fac. Coll. xix. 245. No. 85.

own. She consented to adopt Scotland as her permanent abode, so long as the respondent continued to make it the place of his residence. Hence both parties must be presumed to have had reference to Scotland as the country where all the duties arising out of the matrimonial engagement were to be fulfilled, and where, in the event of their being neglected, they might be enforced, or redress granted for the violation of them. It was contemplated as the scene of their future life; the marriage was entered into on that understanding, and with that intention. And it would be illogical to say, that the duties should be enforced, or the violation of them punished, by the laws of a different country from that where they were intended to be fulfilled.

Hence, it will be seen that the lex loci contractus, on which the appellant's case is exclusively rested, if properly understood, does not entitle her to claim the benefit of the English law. There is here no question as to the efficacy of the ceremony; the solemnization of the marriage is not disputed; its constitution (which alone is regulated by English law) is fixed. But the point arises out of the fulfilment of its duties; and, on the authority of the civilians, as well as from the reason of the thing, it is confidently submitted that, with reference to all the consequences springing from their relation to each other, as husband and wife, the contract must be dealt with as a Scotch contract, and all its obligations construed and enforced by the law of Scotland, where they were intended to be performed.[1]

Viewing it in this light, it seems to follow that it ought to be restricted in its effects to those residing within its own territory. There is no reason for hold-

[1] Ulpan, D. lib. 5. tit. 1. sect. 65; Huber, De Conflictu Legum, sect. 10; Paul Voet, Treat. de Stat., cap. 2. ss. 5, 9.

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ing that a domiciled Scotchman like the respondent having his permanent residence in Scotland, should be bound by it in consequence merely of the celebration of the marriage ceremony in England. The redress which he seeks arises out of the violation of duties which it was the understanding of all parties, at the date of the marriage, were to be fulfilled in Scotland. As little does he claim this redress in a court of England; but he claims it in the courts of his own domicile, and consequently is entitled to the full measure of redress allowed by the laws of his own country without suffering any interference from the municipal regulations of the law of England. Nor does it make any difference upon the argument, that the appellant has for a long time been resident in France. The forum of the husband is the forum of the wife; and although the appellant has thought proper to withdraw herself from the society of the respondent, and to live abroad, changing her residence from one country to another, as inclination prompted, there is no reason why the respondent, who has still retained his domicile in his native country, should be deprived of the privilege of claiming the benefit of its laws, or why he should be precluded from doing so by the influence of any municipal rule of the English code, which, on the ordinary principles of international law, must be restricted to those residing within its territory.

It may be remarked, too, that even if the Scotch courts had granted a divorce a vinculo matrimonii, there would, in the special circumstances of the case, have been no interference with English rules of law, which the courts of England could have complained of. If, indeed, both parties had continued to reside in England, subject to the authority of its laws, it might have

been argued, that while they continued to take the protection of its laws on the one hand, they could not evade the force of them on the other, by means of a temporary residence in another country. But here the respondent, who is seeking redress, was, at the date of the marriage, and still continues to be, domiciled in Scotland. He is not endeavouring to evade the laws of England. He entered into the marriage with the full intention of making Scotland his principal place of abode, and finding that the appellant has violated her duty of fidelity, it infers no violation of the laws of England for him to ask, or for the Court to grant, a divorce in the manner allowed by the law of Scotland in similar cases.

The position which the appellant has to maintain is an arduous one. She has to maintain, that the English law is to prevail merely because England was the place of celebration, and that, too, although it is opposed to the law of the country where the obligations were to be performed, and the law of the domicile.

The principle of indissolubility, which is alleged to be inherent in all English marriages, cannot be allowed to control ex comitate gentium the redress granted by the Scotch courts in consequence of a violation of the matrimonial engagement.

The municipal laws of one country are allowed in some instances to receive effect in another ex comitate. This has been done by consent of all civilized nations, and is founded on the mutual advantage derived from the certainty with which the inhabitants of one country may be entitled to rely on the contracts entered into in another. Thus, if a contract be executed with all the formalities required by the law of the country where it is granted, or if a discharge, or any other deed equiva-

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lent to a discharge of an obligation, be in like manner legally completed, the courts of any other country will give effect to such obligation or discharge, although differing materially in the mode of execution from the forms observed in their own.

But the application of this principle of comitas admits of certain exceptions which are as important in observance and as universally acknowledged as the principle itself. These are, 1st, That the municipal law of a foreign state shall only receive effect as regards deeds executed or acts done within that territory, or as regards contracts entered into with reference to performance there; and, 2d, That no concession is to be made to foreign rules, where they are supposed to be prejudicial to the interest of its own subjects, or to affect the order or well-being of society. The line of distinction is well pointed out by Mr. Fergusson, in his Consistorial Cases (p. 182), in stating the grounds of the opinion of two of the judges in the Consistorial Court, in the case of Edmonstone v. Lockhart, &c.

The principle of indissolubility cannot be admitted in the general and unqualified terms contended for by the appellant. Technically speaking, it may be true that an English marriage is indissoluble; but the rules of international law have no concern whatever with technical niceties. They refer to the great points of justice or expediency that are due by one nation to the public institutions of another, and to the policy or safety of giving effect to these institutions. Now, in this view, what does it signify that a marriage cannot be dissolved a vinculo in the Consistorial or other courts of England? It may unquestionably be dissolved by an act of the legislature; but if Parliament

acts as a court of justice, entertaining complaints and granting divorces for adultery, every part of the proceeding resembling the proceedings in a law-suit, and if such acts of the legislature be of ordinary occurrence, it never can be said that the contract is indissoluble.

In a question of international law, distinctions of that kind are not to be attended to; for if the legislature, taking upon itself the proper duties of a court of justice, grant divorces, the courts of other countries are not bound to recognise the niceties in the mode of granting them; but seeing that marriages may be dissolved before a competent tribunal in England, they are warranted in holding that similar relief may be given before the competent tribunals in their own country. The Scotch Consistorial Courts are vested with as ample powers, relative to divorces, as Parliament itself. And, as the respondent is a domiciled Scotchman, any judgment by the Scotch court in his favour, releasing him from his conjugal engagement, would not be barred by the plea of indissolubility, founded on the marriage having been celebrated in England, but that the divorce would be as binding and effectual, to all intents and purposes, as if it had been carried through by an act of the legislature.

The appellant founds on her English marriage, and says to the Scotch courts, "Whatever violations of my "marriage contract I may have committed, you shall "not divorce me, because, by the inherent condition "of the contract, such violation gave the other con- "tracting party no right to claim liberation from the "contract, for the contract is, suâ naturâ, by the para- "mount rule of English law, wholly indissoluble." And yet the same wrong pleaded in England does

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give rise to the same remedy, that of dissolution of the contract, not at the instance of a public prosecutor prosecuting the offence as a crime, but on the application of the injured party. When the indissolubility is pleaded in Scotland, what sort of ground is it for the courts of Scotland, or of any separate country, refusing to act according to their own forms, that in England, in each case, the party gets an act of Parliament to dissolve the marriage, because the courts of law are not intrusted with such powers? The fact remains, that the contract is dissolved in respect of adultery, that the injured party is relieved from the society and burden of the offending wife, that the grievance of indissolubility is acknowledged to be intolerable, and a moral atrocity, and that divorce is granted. How or in what manner this is done, whether the legislature in England has thought fit not to intrust her courts of justice with the power of pronouncing for the divorce, but has reserved to itself the right (as the source of all jurisdiction) of dissolving the marriage in each case, on the ground that the legislature will act more certainly on judicial grounds than the courts of law; or whether, in the municipal law of England, after the Reformation, it was omitted to bestow the requisite powers on the courts of law, and hence the parties must come to Parliament in each case; whatever may be the explanation of all this, or in whatever way or form the redress is given, the fact is, that in England marriage is dissolved on account of adultery. Hence, in the only sense in which the marriage can be pleaded to be indissoluble, the plea fails. Indissolubility, if such is the quality and character of the contract, must mean that the condition of the contract bars divorce in respect of adultery, and that

the marriage cannot be dissolved on that ground. If it is de facto dissolved on that ground, then indissoluble it is not, and cannot legally, morally, or logically be so described.[1]

LORD BROUGHAM.—Sir George Warrender, a Scotch baronet, possessed of large hereditary estates in Scotland,—born and educated in that country, and having there his capital mansion, where he resided the greater part of the year, except when he held office, or was attending his parliamentary duties in England — intermarried in London in 1810 with the daughter of the Viscount Falmouth, Anne Boscawen, who was born and educated in England, and never had been in Scotland previous to the marriage. After that event, she was twice there with her husband, but subsequently he resided for the most part in London, to discharge the duties of Lord of the Admiralty and Commissioner of East India affairs,—offices which he held from 1812 to 1819, inclusive. In the latter year, at the end of much domestic dissension, a separation was determined upon, and an agreement executed by the parties, in which, after setting forth, by way of recital only, their having

[1] Lothian's Consistorial Law, p. 136; Lauder v. Vaughent, 27th Feb. 1692; Gordon v. Eaglesgraaf, 9th June 1699; Chichester v. Donegal, Addams's Ecclesiastical Reports, Vol. i. p. 19; Huber, Treatise de conflictu Legum, sec. 10; Roper's Husband and Wife, Vol. ii. p. 285; Worall v. Jacob, 3 Merivale's Reports, 255; Wilkes v. Wilkes, 2 Dicken's Reports, 791; 3 Merivale's Reports, 263; St. John v. St. John, 11 Vesey junior's Reports, 529; Beechy v. Beechy, Haggard's Consistory Cases, Vol. i. p. 142; Sullivan v. Sullivan, Addams's Ecclesiastical Reports, Vol. ii. p. 299; Marshall v. Rutton, Durnford and East's Reports, Vol. viii. p. 545; Ringstead v. Lady Laneborough, and Barwell v. Brooks, Cooke's B. L. 28–31; Huber, de conflictu Legum, sec. 5; Ecclesiastical Law, Vol. ii. p. 503; Reformatio Legum, De Adulteris et Devortiis, cap. 5. p. 49.

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agreed to live separate, Sir George binds himself to allow Dame Anne Warrender a certain annuity; and it is further agreed that the agreement shall only be rescinded by common consent, and in a certain specified manner. A letter was written by Sir George, bearing equal date with the agreement, and addressed to the trustees under the marriage settlement. In this he states that he had refused to insert any provision for her being allowed to live apart, in order that he might not be precluded from suing, if he chose, for restitution of conjugal rights, but also stating that it was not his intention ever to do so, or to interfere with or molest her in the choice of a residence. The marriage settlement had secured her a jointure upon the Scotch real estates, upon which fact it is now admitted that nothing can turn, except that it may serve the better to show the connexion of the parties and the contract with Scotland.

These are the facts, and the undisputed facts of this case. I say undisputed, for the attempt occasionally made in the course of the appellant's argument to create some doubt as to Sir George Warrender's Scotch residence and domicile cannot be considered as persisted in with such a degree of firmness or uniformity as to require a discussion and a decision of the point in order to clear the way for the very important legal question which arises upon these plain and undeniable statements.

In 1834, after the parties had lived separate for fifteen years, Sir George's residence being, during the latter part of the time, almost constantly on his Scotch estates, and Lady Warrender's varying from one country to another — a few months in England, generally in France, and occasionally in Italy—Sir George brought

his suit in the Court of Session, (exercising, under the recent statute, the consistorial jurisdiction formerly vested in the commissaries) for divorce by reason of adultery alleged to have been committed by his wife. Lady Warrender took preliminary objections to the competency of the suit, under three heads,—first, that the summons of divorce was not served on her at her husband's residence, so as to give her a regular citation; secondly, that the Court had no jurisdiction, inasmuch as the wife's domicile was no longer her husband's after the separation; thirdly, that even if the service had been regular, and the two domiciles one and the same, and that domicile Scotland, yet the marriage having been contracted in England, and one of the parties being English, no sentence of a Scotch court could dissolve the contract. To these several points I propose to address myself in their order, and the first needs not detain us long.

1. For it is clear, that if the wife's domicile is not in Scotland, her being cited or not cited at the mansion is wholly immaterial, and the minor objection of irregularity merges in the exception to the jurisdiction; and if the wife's domicile was in Scotland, it must be her husband's, which, indeed, the objection supposes, and then the argument amounts to this,—that Sir George should have served himself with a notice, by way of regularly serving his wife. Surely it is unnecessary to show that such a proceeding would have been nugatory, not to say ridiculous, and that the omission of it can work nothing against the validity of the notice. Lady Warrender had, it is admitted on all hands, personal service and full notice of the proceeding against her, nor was any reliance placed upon her domicile in contem-

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plation of law, that is, her husband's domicile, being sufficient to exclude the necessity of bringing notice in point of fact home to her. If the preliminary objection to the service is good for any thing, it is good to show that the pursuer might have served a notice on her whom he knew to be some hundreds of miles distant, by leaving it for her in his own house, and then have considered this as good and sufficient service without personally notifying his intended suit to her, or serving her with the summons which he had filed. We may, therefore, come at once to the serious and more substantial exceptions taken against the jurisdiction,—the first of which arises upon the domicile, as affected by the articles of separation.

2. It is admitted on all hands that, in the ordinary case, the husband's domicile is the wife's also; that, consequently, had Lady Warrender been either residing really and in fact with her husband, or been accidentally absent for any length of time, or even been by some family arrangement, without more, in the habit of never going to Scotland, which was not her native country, while he lived generally there, no question could have been raised upon the competency of the action, as excluded by her non-residence. For actual residence — residence in point of fact — signifies nothing in the case of a married woman, and shall not, in ordinary circumstances, be set up against the presumption of law, that she resides with her husband. Had she been absent for her health, or in attendance upon a sick relation, or for economical reasons, how long soever this separation de facto might have lasted, her domicile could never have been changed. Nay, had the parties lived in different places, from a mutual understanding which prevailed between

them, the case would still be the same. The law could take no notice of the fact, but must proceed upon its own conclusive presumption, and hold her domiciled where she ought to be, and where, in all ordinary circumstances, she would be,—with her husband. Does the execution of a formal instrument recognizing such an understanding make any difference in the case? This is all we have here, for there is no agreement to live separate. The "letter" has indeed been imported into the agreement, and argued upon as a part of it. Now, not to mention that the instrument in which parties finally state their intentions, and mutually stipulate and bind themselves, is always to be regarded as their only contract; and that no separate or subsequent agreement is to be taken into the account, unless it contains some coliateral agreement—admitting that we have a right to look at the letter at all, either as part of one transaction with the agreement, or as providing for something left unsettled in the principal instrument, and so collateral in some sort to the contract itself, it does not appear that the tenor of the letter aids the appellant's contention. For the letter sets out with expressly saying, that Sir George has refused to insert in the agreement a leave to live apart, in order to preclude all objection against his suing for restitution of conjugal rights. Is not this sufficient to deprive the letter of all binding force in law, whatever else it may contain? In truth, the words which follow this preliminary statement amount only to an honorary pledge in no legal view obligatory, even had they stood alone; but, taken in connexion with the preceding statement, they plainly exclude all possibility of construing the letter as a legal obligation. It therefore appears impossible to consider the parties in this

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case as living apart under a contract of separation. The agreement, by its obvious construction, only imports an obligation upon Sir George Warrender to pay so much a year to Lady Warrender as long as she should live apart from him. But let us suppose it to be an ordinary deed of separation; that it contained a covenant on the husband's part to permit the wife to live apart from him and to choose her own residence; and let us consider what difference this would make, and whether or not this would be sufficient to determine the legal presumption of domicile.

First of all, it must be admitted that, even if the execution of such a deed gave the wife a power of choosing a residence, and if that residence once chosen were to be deemed her separate domicile, still this would only give her a power; and unless she had executed the power by choosing a residence, no new domicile could be acquired by her. The domicile which she had before marriage was for ever destroyed by that change in her condition. The dissolution of the marriage by divorce, or by the husband's decease, never could remit her to her original or maiden domicile: much less could this be effected by any such deed as we are supposing—for that, by the utmost possible stretch of the supposition, could only give her the option of taking a new domicile, other than her husband's; and until she did exercise this option, her married or marital domicile would not be changed. Now there is no evidence here of Lady Warrender having ever acquired any domicile after 1819, other than the one she had before the separation, that is to say, her husband's; and this proof clearly lay upon her, for she sets up the separation to exclude the legal presumption that she is domiciled with her husband; and the sepa-

ration only conveying to her a power of choosing a domicile, and the production of the articles only proving that power to have been conferred upon her, unless she goes further, and also proves the exercise of the power by acquiring a new domicile, she proves nothing. She only shows, and all the ample admissions we are, for the sake of argument, making, confess that she had obtained the power or possibility of gaining a domicile other than her husband's, but not at all that she had actually gained such separate domicile. The evidence in the cause is nothing to this purpose. It is, indeed, rather against than for the appellant's argument; it rather shows that she had done nothing like gaining a new domicile, for she was living chiefly abroad, and in different places. But there is at any rate, no evidence in the cause of her acquiring a separate domicile, and the proof lying upon her, it follows that, for all the purposes of the present question, her husband's Scotch domicile is her own. But suppose we pass over this fundamental difficulty in her case, and which appears to me decisive of the exception with which I am now dealing, I am of opinion that there is nothing in the separation, supposing it had been ever so formal, and ever so full in its provisions, which can by law displace the presumption of domicile raised by the marriage, and subsisting in full force as long as the marriage endures.

A party relying on the lex loci contractus, in construing the import and tracing the consequences of the marriage contract, cannot well be heard to deny that the same lex loci must regulate the construction and the consequences of any deed of separation between the married pair. Nor do I understand the appellant as repudiating the English law in regard to the import of the

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separation in this case. Then what is the legal value or force of this kind of agreement in our law? Absolutely none whatever—in any court whatever—for any purpose whatever, save and except one only—the obligation contracted by the husband with trustees to pay certain sums to the wife, the cestui que trust. In no other point of view is any effect given by our jurisprudence, either at law or in equity, to such a contract. No damages can be recovered for its breach—no specific performance of its articles can be decreed. No court, civil or consistorial, can take notice of its existence. So far has the legal presumption of co-habitation been carried by the common law courts, that the most formal separation can only be given in mitigation of damages, and not at all as an answer to an action for criminal conversation, the ground of which is the alleged loss of comfort in the wife's society; and all the evidence that can be adduced of the fact of living apart, and all the instruments that can be produced binding the husband to suffer the separate residence of his wife—nay, even where he has for himself stipulated for her living apart, and laid her under conditions that she should never come near him—all is utterly insufficient to repel the claim which he makes for the loss of her society without doing any act either in court or in pais, to determine the separation or annul the agreement. In other words, no fact and no contract, no matter in pais and no deed executed, can rebut the overruling presumption of the law that the married persons live together, or, which is the same thing, that they have one residence—one domicile. In the contemplation of the common law, then, they live together and have the same domicile. That the Consistorial Courts regard the

matter in the same light is manifest from the strong decision given upon the 4 Geo. 4, as applicable to a case where the parties had never been near one another for ten years before it passed; yet this case was held within the provision of the statute which gives the benefit of confirmation of the marriage to all parties who have been living together at and before the passing of the act. But we need not resort to such extreme cases, or seek support from such strong decisions. It is admitted on all hands, that the Consistorial Courts never regard a separation, how formal soever, as of any avail at all against either party, nor require any person suing for his rights under the marriage, and standing on the marriage, to do any act for annulling the separation. Either party has a clear and undenied right to pass it by entirely, and proceed, whether in bringing or in defending a suit, exactly as if the separation articles had no existence.

3. We are therefore, in every view that can be taken of the question, bound to regard Lady Warrender's domicile as identical with her husband's; and thus the case becomes divested of all special circumstances, and is that of a marriage had in England between a domiciled Scotchman and an English woman, sought to be dissolved by reason of the wife's adultery, through a suit in the courts in Scotland, the residence or domicile of the husband being bonâ fide Scotch; and as the determination at which we have arrived upon the question of domicile makes the forum originis of the wife quite immaterial, the question is in truth the general one, Whether or not a Scotch divorce can dissolve a marriage contracted by a domiciled Scotchman in England, the parties to that marriage being bonâ fide, and not

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collusively for the purposes of the suit, domiciled in Scotland. The importance of this question to the parties, and, considering the constant and fortunate intercourse between the two countries, to the law which governs each, cannot be denied; at the same time it is of considerably less interest than it would have been had the domicile not been bonâ fide Scotch, because then the more absolute question would have been raised as to the validity of a Scotch divorce generally, to dissolve an English marriage. Possibly the decisions upon the validity of Scotch marriages generally and without regard to the fraud upon the English law, practised by the parties to them, may seem to make the distinction to which I have just adverted less material and substantial; nevertheless I think it right and convenient to make it, and to keep it in view.

The general principle is denied by no one that the lex loci is to be the governing rule in deciding upon the validity or invalidity of all personal contracts. This is sometimes expressed, and I take leave to say inaccurately expressed, by saying that there is a comitas shown by the tribunals of one country towards the laws of the other country. Such a thing as comitas or courtesy may be said to exist in certain cases, as where the French courts inquire how our law would deal with a Frenchman in similar or parallel circumstances, and, upon proof of it, so deal with an Englishman in those circumstances. This is truly a comitas, and can be explained upon no other ground; and I must be permitted to say, with all respect for the usage, it is not easily reconcileable to any sound reason. But when the courts of one country consider the laws of another in which any contract has been made, or is alleged to have been made, in construing its

meaning, or ascertaining its existence, they can hardly be said to act from courtesy, ex comitate, for it is of the essence of the subject matter to ascertain the meaning of the parties, and that they did solemnly bind themselves; and it is clear that you must presume them to have intended what the law of the country sanctions or supposes; and equally clear that their adopting the forms and solemnities which that law prescribes shows their intention to bind themselves, nay, more, is the only safe criterion of their having entertained such an intention. Therefore the courts of the country where the question arises resort to the law of the country where the contract was made, not ex comitate, but ex debito justitiæ; and in order to explicate their own jurisdiction by discovering that which they are in quest of, and which alone they are in quest of, namely, the meaning and intent of the parties.

But whatever may be the foundation of the principle, its acceptance in all systems of jurisprudence is unquestionable. Thus a marriage good by the laws of one country is held good in all others where the question of its validity may arise. For why, the question always must be, did the parties intend to contract marriage? And if they did what in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely, be considered otherwise than as intending a marriage contract. The laws of each nation lay down the forms and solemnities, a compliance with which shall be deemed the only criterion of the intention to enter into the contract. If those laws annex certain disqualifications to parties circumstanced in a particular way, or if they impose certain conditions precedent on certain parties, this falls exactly within the same rule;

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for the presumption of law is in the one case that the parties are absolutely incapable of the consent required to make the contract, and, in the other case, that they are incapable until they have complied with the conditions imposed. I shall only stop here to remark, that the English jurisprudence, while it adopts this principle in words, would not perhaps, in certain cases which may be put, be found very willing to act upon it throughout. Thus we should expect that the Spanish and Portuguese courts would hold an English marriage avoidable between uncle and niece, or brother and sister-in-law, though solemnized under papal dispensation, because it would clearly be avoidable in this country. But I strongly incline to think that our courts would refuse to sanction, and would avoid by sentence, a marriage between those relatives contracted in the Peninsula, under dispensation, although beyond all doubt such a marriage would there be valid by the lex loci contractus, and incapable of being set aside by any proceedings in that country.

But the rule extends, I apprehend, no further than to the ascertaining of the validity of the contract, and the meaning of the parties, that is, the existence of the contract and its construction. If indeed there go two things under one and the same name in different countries — if that which is called marriage is of a different nature in each — there may be some room for holding that we are to consider the thing to which the parties have bound themselves, according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe, that we

regard it as a wholly different thing, a different status, from Turkish or other marriages among infidel nations, because we clearly never should recognize the plurality of wives, and consequent validity of second marriages standing the first, which second marriages the laws of those countries authorize and validate. This cannot be put upon any rational ground except our holding the infidel marriage to be something different from the Christian, and our also holding Christian marriage to be the same every where. Therefore all that the courts of one country have to determine is, whether or not the thing called marriage,—that known relation of persons, that relation which those courts are acquainted with, and know how to deal with,—has been validly contracted in the other country where the parties professed to bind themselves. If the question is answered in the affirmative, a marriage has been had; the relation has been constituted; and those courts will deal with the rights of the parties under it according to the principles of the municipal law which they administer.

But it is said that what is called the essence of the contract must also be judged of according to the lex loci; and as this is a somewhat vague, and for its vagueness a somewhat suspicious proposition, it is rendered more certain by adding, that dissolubility or indissolubility is of the essence of the contract. Now I take this to be really petitio principii. It is putting the very question under discussion into another form of words, and giving the answer in one way. There are many other things which may just as well be reckoned of the essence as this. If it is said that the parties marrying in England must be taken all the world over to have

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bound themselves to live until death or an act of parliament them "do part," why shall it not also be said that they have bound themselves to live together on such terms, and with such mutual personal rights and duties as the English law recognizes and enforces? Those rights and duties are just as much of the essence as dissolubility or indissolubility; and yet all admit, all must admit, that persons married in England and settled in Scotland will be entitled only to the personal rights which the Scotch law sanctions, and will only be liable to perform the duties which the Scotch law imposes. Indeed if we are to regard the nature of the contract in this respect as defined by the lex loci, it is difficult to see why we may not import from Turkey into England a marriage of such a nature as that it is capable of being followed by and subsisting with another, polygamy being there of the essence of the contract.

The fallacy of the argument, "that indissolubility is "of the essence," appears plainly to be this; it confounds incidents with essence; it makes the rights under a contract, or flowing from and arising out of it, parcel of the contract; it makes the mode in which judicatures deal with those rights, and with the contract itself, part of the contract; instead of considering, as in all soundness of principle we ought, that the contract and all its incidents, and the rights of the parties to it, and the wrongs committed by them respecting it, must be dealt with by the courts of the country where the parties reside, and where the contract is to be carried into execution.

But at all events this is clear, and it seems decisive of the point, that if, on some such ground as this, a mar-

riage indissoluble by the lex loci is to be held indissoluble every where, so, conversely, a marriage dissoluble by the lex loci must be held every where dissoluble. The one proposition is in truth identical with the other. Now it would follow from hence, or rather it is the same proposition, that a marriage contracted in Scotland where it is dissoluble by reason of adultery, or of non-adherence, is dissoluble in England, and that at the suit of either party. Therefore a wife married in Scotland might sue her husband in our courts for adultery, or for absenting himself four years, and ought to obtain a divorce a vinculo matrimonii. Nay, if the marriage had been solemnized in Prussia, either party might obtain a divorce on the ground of incompatibility of temper; and if it had been solemnized in France during the earlier period of the revolution, the mere consent of the parties ought to suffice for dissolving it here. Indeed another consequence would follow from this doctrine of confounding with the nature of the contract that which is only a matter touching the jurisdiction of the courts, and their power of dealing with the rights and duties of the parties to it. If there were a country in which marriage could be dissolved without any judicial proceeding at all, merely by the parties agreeing in pais to separate, every other country ought to sanction a separation had in pais there, and uphold a second marriage contracted after such a separation. It may safely be asserted that so absurd a proposition never could for a moment be entertained; and yet it is not like, but identical with the proposition upon which the main body of the appellant's argument rests, that the question of indissoluble or dissoluble must be decided in all cases by the lex loci.

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Hitherto we have been considering the contract as to its nature and solemnities, and examining how far, being English, and entered into with reference only to England, it could be dissolved by a Scotch sentence of divorce. But the circumstance of parties belonging to one country marrying in another (which is the case at bar) presents the question in another light. In personal contracts much depends upon the parties having regard to the country where it is to be acted under, and to receive its execution — upon their making the contract, with a view to its execution in that country. The marriage contract is emphatically one which parties make with an immediate view to the usual place of their residence. An Englishman marrying in Turkey contracts a marriage of an English kind, that is, excluding plurality of wives, because he is an Englishman, and only residing in Turkey and under the Mahometan law accidentally and temporarily, and because he marries with a view of being a married man and having a wife in England, and for English purposes; consequently the incidents and effects, nay, the very nature and essence (to use the language of the appellant's argument), must be ascertained by the English, and not by the Turkish law. So of an Englishman marrying in Prussia, where incompatible temper, that is disagreement, may dissolve the contract. As he marries with a view to English domicile, his contract will be judged by English law, and he cannot apply for a divorce here upon the ground of incompatible tempers. In like manner a domiciled Scotchman may be said to contract not an English but a Scotch marriage, though the consent wherein it consists may be testified by English solemnities. The Scotch parties looking to residence

and rights in Scotland, may be held to regard the nature and incidents and consequences of the contract according to the law of that country, their home; a connection formed for cohabitation, for mutual comfort, protection, and endearment, appears to be a contract having a most peculiar reference to the contemplated residence of the wedded pair; the home where they are to fulfil their mutual promises and perform those duties which were the objects of their union; in a word, their domicile; the place so beautifully described by the civilian —" locus ubi quisque larem suum posuit sedem- " que fortunarum suarum, unde cum proficiscitur pere- " grinare videtur, quo cum revertitur redire domum." It certainly may well be urged, both with a view to the general question of lex loci, and especially in answering the argument of the alleged essential quality of indissolubility, that the parties to a contract like this must be held emphatically to enter into it with a reference to their own domicile and its laws; that the contract assumes, as it were, a local aspect, but that at any rate, if we infer the nature of any mutual obligation from the presumed intentions of the parties, and if we presume those intentions from supposing that the parties had a particular system of laws in their eye, (the only foundation of the argument for the appellant,) there is fully more reason to suppose they had the law of their own home in their view, where they purposed to live, than the law of the stranger, under which they happened for the moment to be.

Suppose we now take another but a very obvious and intelligible view of the subject, and regard the divorce not as a remedy given to the injured party by freeing

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him from the chain that binds him to a guilty partner, but as a punishment inflicted upon crime, for the purpose of preventing its repetition, and thus keeping public morals pure. The language of the Scotch acts plainly countenances this view of the matter, and we may observe how strongly it bears upon the present question. No one can doubt that every state has the right to visit offences with such penalties as to its legislative wisdom shall seem meet. At one time adultery was punishable capitally in England; it is so in certain cases still by the letter of the Scotch law. Whoever committed it must have suffered that punishment had the law been enforced, and without regard to the marriage of which he had violated the duties having been contracted abroad. Indeed in executing such statutes, no one ever heard of a question being raised as to where the contract had been made. Suppose again, that the proposition frequently made in modern times were adopted, and adultery were declared to be a misdemeanour—could any one tried for it either here or in Scotland set up in his defence, that to the law of the country where he was married there was no such offence known? In like manner if a disruption of the marriage tie is the punishment denounced against the adulterer for disregarding its duties, no one can pretend that the tie being declared indissoluble by the laws of the country where it was knit, could afford the least defence against the execution of the law declaring its dissolution to be the penalty of the crime. Whoever maintains that the Scotch courts are to take cognizance of the English law of indissolubility when called upon to inflict the penalty of divorce, must likewise be prepared to hold that, in

punishing any other offence, the same courts are to regard the laws of the state where the culprit was born, or where part of the transaction passed; that, for example, a forgery being committed on a foreign bill of exchange, the punishment awarded by the foreign law is to regulate the visitation of the offence under the law of Scotland. It may safely be asserted, that no instance whatever can be given of the criminal law of any country being made to bend to that of any other in any part of its administration. When the Roman citizen carried abroad with him his rights of citizenship, and boasted that he could plead in all the courts of the world "civis "Romanus sum," his boast was founded not on any legal principle, but upon the fact that his barbarian countrymen had overrun the world with their arms, reduced all laws to silence, and annihilated the independence of foreign legislatures. Their orators regarded this very plea as the badge of universal slavery which their warriors had fixed upon mankind. But if any foreigner had come to Rome, and committed a crime punishable with loss of civil rights, he would in vain have pleaded in bar of the capitis diminutio, that citizenship was indelible and indestructible in the country of his birth. The lex loci must needs govern all criminal jurisdiction, from the nature of the thing and the purpose of that jurisdiction. How then can we say that when the Scotch law pronounces the dissolution of a marriage to be the punishment of adultery, the Scotch courts can be justified in importing an exception in favour of those who had contracted an English marriage—an exception created by the English law, and to the Scotch law unknown?

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But it may be said that the offence being committed abroad, and not within the Scotch territory, prevents the application to it of the Scotch criminal law. To this it may however be answered, that where a person has his domicile in a given country, the laws of that country to which he owes allegiance may visit even criminally offences committed by him out of its territory. Of this we have many instances in our own jurisprudence. Murder and treason committed by Englishmen abroad are triable in England and punishable here. Nay, by the bill which I introduced in 1811, and which is constantly acted upon, British subjects are liable to be convicted of felony for slave-trading in whatever part of the world committed by them.

It would no doubt be going far to hold the wife criminally answerable to the law of Scotland in respect of her legal domicile being Scotch. But we are here not so much arguing to the merits of this case, which has abundant other ground to rest upon, as to the general principle; and at any rate the argument would apply to the case most frequently mooted, of English married parties living temporarily in Scotland, and adultery being there committed by one of them. To such a state of facts the whole argument now adduced is applicable in its full force; and without admitting that application, I do not well see how we can hold that the Scotch legislature ever possessed that supreme power which is absolutely essential to the very nature and existence of a legislature. If we deny this application, we truly admit that the Scottish Parliament had no right to punish the offence of adultery by the penalty of divorce. Nay we hold that English parties

had a right to violate the Scotch criminal law with perfect impunity in one essential particular; for suppose no other penalty had been provided by the Scotch law except divorce, all English offenders against that law must go unpunished. Nay, worse still, all Scotch parties who chose to avoid the punishment had only to marry in England, and then the law, the criminal law, of their own country became inoperative. The gross absurdity of this strikes me as bearing directly upon the argument, and as greater than that of any consequences which I remember to have seen deduced from almost any disputed position. It may further be remarked that this argument applies equally to the case, if we admit that the Scotch divorce is invalid out of Scotland, and consequently that it stands well with even the principles of Lolly's case.

In order to dispose of the present question, it is not at all necessary on the one side to support, or on the other to impeach, the authority of Lolly's case, or of any other which may have been determined in England upon that authority. This ought to be steadily borne in mind. The resolution in Lolly's case was that an English marriage could not be dissolved by any proceeding in the courts of any other country, for English purposes; in other words, that the courts of this country will not recognize the validity of a Scotch divorce, but will hold the divorced wife dowable of an English estate, the divorced husband tenant thereof by the courtesy, and either party guilty of felony by contracting a second marriage in England. Upon the force and effect of such divorce in Scotland, and for Scotch purposes, the Judges gave, and indeed could give, no opinion; and as there would be nothing legally impossible in a marriage being good in one country which was prohibited by the

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law of another, so if the conflict of the Scotch and English law be complete and irreconcilable, there is nothing legally impossible in a divorce being valid in the one country, which the courts of the other may hold to be a nullity. Lolly's case therefore cannot be held to decide the present, perhaps not even to affect it in principle. In another point of view it is inapplicable; for, though the decision was not put upon any special circumstance, yet in fairly considering its application, we cannot lay out of view that the parties were not only married, but really domiciled, in England, and had resorted to Scotland for the manifest purpose of obtaining a temporary and fictitious domicile there, in order to give the Scotch courts jurisdiction over them, and enable them to dissolve their marriage; whereas here the domicile of the parties is Scotch, and the proceeding is bonâ fide taken by the husband in the courts of his own country, to which he is amenable, and ought to have free access, and no fraud upon the law of any other country is practised by the suit. It must be added that, in Lolly's case, the English marriage had been contracted by English parties, without any view to the execution of the contract at any time in Scotland; whereas the marriage now in question was had by a Scotchman and a woman whom the contract made Scotch, and therefore may be held to have contemplated its execution and effects in Scotland.

But although, for these reasons, the support of my opinion does not require that I should dispute the law in Lolly's case, I should not be dealing fairly with this important question, if I were to avoid touching upon that subject; and as no decision of this House has ever adopted that rule, or assumed its principle for sound,

and acted upon it, I am entitled here to express the difficulty which I feel in acceding to that doctrine—a difficulty which much deliberation and frequent discussion with the greatest lawyers of the age—I might say both of this and of the last age—has not been able to remove from my mind.

If no decision had ever been pronounced in this country, recognizing the validity of Scotch marriages between English parties going to Scotland with the purpose of escaping from the authority of the English law, I should have felt it much easier to acquiesce in the decision of which I am speaking. For then it might have been said consistently enough, that whatever may be the Scotch marriage law among its own subjects, and for the government of Scotch questions, ours is in irreconcilable conflict with it, and we cannot permit the positive enactments of our statute book, and the principles of our municipal law to be violated or eluded by merely crossing a river or an ideal boundary line. Nor could any thing have been more obvious than the consistency of those who, holding that no unmarried parties incapable of marrying here, can, in fraud of our law, contract a valid marriage in Scotland, by going there for an hour, should also hold the cognate doctrine, that no married parties can dissolve an English marriage, indissoluble here, by repairing thither for six weeks. But upon this firm ground, the decisions of all the English courts have long since prevented us from taking our stand. They have held, both the consistorial judges in Compton v. Bearcroft[1], and those of the common law in

[1] 1 Dec. 1768, and briefly stated in Bull. N. P. 113, and in 2 Haggard's Reports, 443, 444.

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Ilderton v. Ilderton[1], the doctrine uniformly recognized in all subsequent cases, and acted upon daily by the English people, that a Scotch marriage contracted by English parties in the face and in fraud of the English law, is valid to all intents and purposes, and carries all the real and all the personal rights of an English marriage, affecting, in its consequences, land, and honours, and duties, and privileges, precisely as does the most lawful and solemn matrimonial contract entered into among ourselves, in our own churches, according to our own ritual, and under our own statutes.

It is quite impossible, after this, to say that we can draw the line, and hold a foreign law, which we acknowledge all-powerful for making the binding contract, to be utterly impotent to dissolve it. Were a sentence of the Scotch court in a declarator of marriage to be given in evidence here, it would be conclusive that the parties were man and wife, and no exception could be taken to the admissibility or the effect of the foreign evidence upon the ground of the parties having been English, and having repaired to Scotland for the purpose of escaping the provisions of the English law. A similar sentence of the same court, declaring the marriage to be dissolved by the same law of Scotland, is now supposed to be given in evidence between parties who had married in England. Can it, in any consistency of reason, be objected to the reception or to the force of this sentence, that the contract had been made, and the parties had resided here? In what other contract of a nature merely personal—in what other transaction between men—is such a rule ever applied—such an arbitrary and gratuitous distinction made—such an exception raised to the universal position,

[1] 2 Henry Blackstone's Reports, C. P. 145.

that things are to be dissolved by the same process whereby they are bound together, or rather, that the tie is to be loosened by reversing the operation which knit it, but reversing the operation according to the same rules? What gave force to the ligament? If a contract for sale of a chattel is made, or an obligation of debt is incurred, or a chattel is pledged in one country, the sale may be annulled, the debt released, and the pledge redeemed by the law, and by the forms of another country, in which the parties happen to reside, and in whose courts their rights and obligations come in question, unless there was an express stipulation in the contract itself against such avoidance, release, or redemption. But at any rate this is certain, that if the laws of one country and its courts recognize and give effect to those of another in respect of the constitution of any contract, they must give the like recognition and effect to those same foreign laws when they declare the same kind of contract dissolved. Suppose a party forbidden to purchase from another by our equity, as administered in the courts of this country, (and we have some restraints upon certain parties which come very near prohibition,) and suppose a sale of chattels by one to another party standing in this relation towards each other should be effected in Scotland, and that our courts here should (whether right or wrong) recognize such a sale, because the Scotch law would affirm it—surely it would follow that our courts must equally recognize a rescission of the contract of sale in Scotland by any act which the Scotch law regards as valid to rescind it, although our own law may not regard it as sufficient. Suppose a question to arise in the courts of England respecting the execution of a contract thus made in this country, and that the

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objection of its invalidity were waived for some reason; if the party resisting its execution were to produce either a sentence of a Scotch court declaring it rescinded by a Scotch matter done in pais, or were merely to produce evidence of the thing so done, and proof of its amounting by the Scotch law to a rescission of the contract — I apprehend that the party relying on the contract could never be heard to say "The contract is English, "and the Scotch proceeding is impotent to dissolve it." The reply would be — "Our English Courts have "(whether right or wrong) recognized the validity of a "Scotch proceeding to complete the obligation, and can "no longer deny the validity of a similar but reverse "proceeding to dissolve it — unumquodque dissolvitur "eodem modo quo colligatur."

Suppose, for another example (which is the case), that the law of this country precluded an infant or a married woman from borrowing money in any way, or from binding themselves by deed, and that in another country those obligations could be validly incurred, it is probable that our law and our courts would recognize the validity of such foreign obligations. But suppose a feme covert had executed a power, and conveyed an interest under it to another feme covert in England, could it be endured that where the donee of the power produced a release under seal from the feme covert in the same foreign country, a distinction should be taken, and the Court here should hold that party incapable of releasing the obligation? Would it not be said that our courts, having decided the contract of a feme covert to be binding when executed abroad, must, by parity of reason, hold the discharge or release of the feme covert to be valid, if it be valid in the same foreign country?

Nor can any attempt succeed, in this argument, which rests upon distinctions taken between marriage and other contracts, on the ground that its effects govern the enjoyment of real rights in England, and that the English law alone can regulate the rights of landed property. For not to mention that a Scotch marriage between English parties gives English honours and estates to its issue, which would have been bastard had the parties married or pretended to marry in England; all personal obligations may in their consequences affect real rights in England. Nor does a Scotch divorce, by depriving a widow of dower or arrears of pin money charged on English property, more immediately affect real estates here, than a bond or a judgment released in Scotland, according to Scotch forms, discharges real estate of a lien, or than a bond executed, or indeed a simple contract debt incurred in Scotland, eventually and consequentially charges English real estate.

It appears to me quite certain that those who decided Lolly's case did not look sufficiently to the difficulty of following up the principle of the rule which they laid down. At first sight, on a cursory survey of the question, there seems no great impediment in the way of a Judge who would keep the English marriage contract indissoluble in Scotland, and yet allow a Scotch marriage to have validity in England; for it does not immediately appear how the dissolution and the constitution of the contract should come in conflict, though diametrically opposite principles are applied to each. But only mark how that conflict arises, and how, in fact and in practice, it must needs arise as long as the diversity of the rules applied is maintained. When English parties

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are divorced in Scotland, it seems easy to say, "We "give no validity to this proceeding in England, leaving "the Scotch law to deal with it in that country; and "with its awards we do not in anywise interfere." But the time speedily arrives when we can no longer refuse to interfere, and then see the inextricable confusion that at once arises and involves the whole subject. The English parties are divorced—they return to England, and one of them marries again: that party is met by Lolly's case, and treated as a felon. So far all is smooth. But what if the second marriage is contracted in Scotland? and what if the issue of that marriage claims an English real estate by descent, or if a widow demands her dower? Lolly's case will no longer serve the purpose of deciding the rights of the parties—for Lolly's case is confined to the effects of the Scotch divorce in England, and professes not to touch, as indeed, they who decided it had no authority to touch, the validity of that divorce in Scotland. Then the marriage being Scotch, the lex loci must prevail by the cases of Compton v. Bearcroft, and Ilderton v. Ilderton. All its consequences to the wife and issue must be dealt with by the English courts; and the same Judge who, sitting under a commission of gaol delivery, has in the morning sent Mr. Lolly to the hulks for felony because he re-married in England, and the divorce was insufficient, sitting at Nisi Prius in the afternoon, must give the issue of Mrs. Lolly's second marriage an estate in Yorkshire, because she re-married in Scotland, and must give it on the precise ground that the divorce was effectual. Thus the divorce is both valid and nugatory, not according to its own nature, or the law of any one state, but according to the accident whether a transaction which follows

upon it, and does not necessarily occur at all, chanced to take place in one part of the island or in the other; and yet the felony of the husband depended entirely upon his not having been divorced validly in Scotland, and not at all upon his not being divorced validly in England; and the title of the wife's issue to the succession, or of herself to dower, depends wholly upon the same husband having been validly divorced in that same country of Scotland.

Nor will it avail to contend that the parties marrying in Scotland after a Scotch divorce is in fraud of the English rule as laid down in that celebrated case. It may be so—but it is not more in fraudem legis Anglicanæ, than the marriage was in Compton v. Bearcroft, which yet has been held good in all our courts. Neither will it avail to argue that the indissoluble nature of the English marriage prevents those parties from marrying again in Scotland as well as in England; for the rule in Lolly's case has no greater force in disqualifying parties from marrying in Scotland, where that is not the rule of law, than the English marriage act has in disqualifying infants from marrying without banns published, and yet these may, by the law of England, go and marry validly in Scotland. Indeed if there be any purely personal disqualification or incapacity caused by the law, and which more than any other, may be said to travel about with the party, it is that which the law raises upon a natural status, as that of infancy, and infixes on those who, by the order of nature itself, are in that condition, and unable to shake it off, or by an hour to accelerate its termination.

If, in a matter confessedly not clear, and very far from being unincumbered with doubt and difficulty, we find

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that manifest and serious inconvenience is sure to result from one view, and very little in comparison from adopting the opposite course, nothing can be a stronger reason for taking the latter. Now surely it strikes every one that the greatest hardships must occur to parties, the greatest embarrassment to their rights, and the utmost inconvenience to the courts of justice in both countries, by the rule being maintained as laid down in Lolly's case: the greatest hardship to parties—for what can be a greater grievance than that parties living bonâ fide in England, though temporarily, should either not be allowed to marry at all during their residence here, or if they do, and afterwards return to their own country, however great its distance, that they must be deprived of all remedy in case of misconduct, however aggravated, unless they undertake a voyage back to England, aye, and unless they can comply with the parliamentary forms in serving notices?—the greatest embarrassment to their rights—for what can be more embarrassing than that a person's status should be involved in uncertainty, and should be subject to change its nature as he goes from place to place; that he should be married in one country, and single, if not a felon, in another; bastard here, and legitimate there?—the utmost inconvenience to the courts—for what inconvenience can be greater than that they should have to regard a person as married for one purpose and not for another; single and a felon if he marries a few yards to the southward—lawfully married if the ceremony be performed a few yards to the north; a bastard when he claims land—legitimate when he sues for personal succession; widow when she demands the chattels of her husband—his concubine when she counts as dowable of his land?

It is in vain to remind us of the opportunity which a strict adherence to the lex loci, with respect to dissolution of the contract, would give to violators of our English marriage law. This objection comes too late. Before the validity of Scotch marriages had been supported by decisions too numerous and too old for any question, this argument ab inconvenienti might have been urged and set against those other reasons which I have adduced, drawn from the same consideration. But we have it now firmly established as the law of the land, and daily acted upon by persons of every condition, that though the law of England incapacitates certain parties from contracting marriage here, they may go for a few minutes to the Scotch border, and be married as effectually as if they had no incapacity whatever in their own country, and then return, after eluding the law, to set its prohibitions at defiance without incurring any penalty, and to obtain its aid without any difficulty in securing the enjoyment of all the rights incident to the married state. Surely there is neither sense nor consistency in complaining of the risk of infraction, or evasion arising to the English law from supporting Scotch divorces, after having thus given to Scotch marriages the power of eluding, and breaking, and defying that law for so many years.

I have now been commenting upon Lolly's case on its own principle—that is, regarding it as merely laying down a rule for England, and prescribing how a Scotch divorce shall be considered in this country, and dealt with by its courts. I have felt this the more necessary, because I do not see, for the reasons which have occasionally been adverted to in treating the other argument, how, consistently with any principle, the judges who decided the case could limit its application to Eng-

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land, and think that it did not decide also on the validity of the divorce in Scotland. They certainly could not hold the second English marriage invalid and felonious in England, without assuming that the Scotch divorce was void even in Scotland. In my view of the present question, therefore, it was fit to show that the Scotch courts have a good title to consider the principle of Lolly's case erroneous even as an English decision. This, it is true, their lordships have not done; and the judgment now under appeal is rested upon the ground of the Scotch divorce being sufficient to determine the marriage contract in Scotland only.

I must now observe, that supposing (as may fairly be concluded) Lolly's case to have decided that the divorce is void in Scotland, there can be no ground whatever for holding that it is binding upon the Scotch courts on a question of Scotch law. If the cases and the authorities of that law are against it, the learned persons who administer the system of jurisprudence are not bound to regard—nay, they are not entitled to regard—an English decision, framed by English judges upon an English case, and devoid of all authority beyond the Tweed.

Now, I have no doubt at all that the Scotch authorities are in favour of the jurisdiction, and support the decision under appeal: but I must premise that, unless it could be shown that they were the other way, my mind is made up with respect to the principle, and I should be for affirming on that ground of principle alone, if precedent or dicta did not displace the argument. The principle I hold so clear upon grounds of general law, that the proof is thrown, according to my view, upon those who would show the Scotch law to be the other way.

In approaching this branch of the question, it is most

important to remark, that there may be a very small body of judicial authority upon a point of law very well established in any country; nay, that oftentimes the less doubtful the point is the fewer cases will you find decided upon it. Thus no ones denies that the Scotch Consistorial Court had, ever since its establishment upon the Reformation, been in the practice of pronouncing sentences of divorce for adultery. The Catholic religion was abolished by the parliament of Scotland in 1560; and three years after that important event, we find a statute made, the act 1563, c. 74. in which, after a preamble expressing great and lively horror of the "abominable and filthie vice of adultery," (an opinion, perhaps, more sincere in the estates of parliament than in the Queen), it is declared to be a capital offence if "notour" (notorious), and all other adultery is to continue punishable as before, but with an express saving of the right to "pursue for divorcement for the crime of "adultery conform to (according to) the law." For above two centuries the jurisdiction thus recognized by the statute had been exercised by the Consistorial Courts. Nor was any objection whatever made to the want of jurisdiction over parties, in respect of their domicile having been foreign or the marriage contracted abroad. In truth, the view which the law took of adultery as a crime punishable with even the severest of penalties, seems almost to preclude any such exception. If a person were indicted under the statute for notour adultery committed in Scotland, he clearly never could have defended himself by showing that he had been married in England, and was only temporarily a resident in Scotland; so there seems never to have been any such distinction taken in giving the injured party the civil

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remedy against the offender by dissolving the marriage. That Englishmen temporarily residing in Scotland have been in use to sue for divorces from marriages contracted in England, ever since the intercourse of the two countries became constant by the union first of the crowns and then of the kingdoms, is a fact of much importance, and it is not disputed. The importance of it is this — that the courts, administering the law of divorce, have, with a full knowledge that they were dissolving English marriages, never inquired further than was necessary for ascertaining that the pursuers and defenders had acquired a domicile in Scotland, and have then exercised the jurisdiction without scruple, and without any hesitation. This is a clear proof that the law, the Scotch law, was always understood among its practitioners and by the judges of the country, as the present decision supposes it to be; and such a long continued and unqualified practice is a fully better proof of what that law is, than even a few occasional decisions in foro contentioso. It would be a dangerous thing to admit that generally recognized and long continued practice should go for nothing, merely because, until a few years ago, no one had brought those principles and that practice in question, and because the judicial decisions in its favour were few in number, and of a recent date. There is every reason to believe that in this, as in most other particulars, the more ancient law of England was the same with that of our northern neighbours. Between the Reformation and the latter end of Queen Elizabeth's reign, it was held that the consistorial jurisdiction extended to dissolve à vinculo for adultery. 2 Burn, Eccles. Law, 503.

It was, however, apparently not till 1789, that the

question of jurisdiction was raised in foro contentioso, by the case of Brunsdone v. Wallace, 9 February 1789.[1] But here a question was made upon the sufficiency of the forum originis to found a jurisdiction. The husband, before marriage, had left Scotland without any intention of returning, and so had the wife. The court were much divided, and the judgment was given with an express reference to the circumstances of the case, of which the absence of the defender, the husband, from Scotland, when, and long before, the suit was commenced, must be regarded as one. Nevertheless, as the majority of the court considered the forum originis of both parties sufficient to found the jurisdiction, I should have thought this a decision against the principles which I deem to be recognized by later cases had it stood untouched by these.

Pirie v. Lunan, 8 March 1796[2], is, I believe, the next case; but it was the case of a Scotch marriage between Scotch parties, and only raised the question of forum; for both were domiciled in England. The court sustained the jurisdiction ratione originis. This decision clearly proves little or nothing any way in the present question; and the same may be said of Grant v. Pedie, which occurred in 1825.[3] So French v. Pilcher, 13 June 1800[4], turned on the wife, the defender, being an Englishwoman, and resident out of Scotland, and the adultery chiefly committed abroad; and accordingly, it does not touch, and hardly even approaches, any of the points now in dispute.

In Lindsay v. Toovey 26th Jan. 1807[5], the Court of Session sustained the jurisdiction in all respects; and

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[1] Mor. 4784. [2] Mor. p. 4594. [3] 5th July 1825., 1 W. & S. 716.
[4] Fac. Coll. xii. 420. Mor. Ap. 1. Forum Comp. No. 1. Sup. vol. 3.
[5] Fac. Coll. xiii. 594. Mor. Ap. 1. Forum Comp. No. 6.

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though the parties had been living separate under a deed. It is true that your lordships, on appeal, remitted the case; and that the death of one of the parties prevented any further proceedings. The ground of the remit was two-fold—that the domicile of the husband appeared to your lordships (acting under Lord Eldon's advice) to be in England; and that Lolly's case had not been considered by the court below. Upon that case, Lord Eldon pronounced no opinion, but he certainly intimated a doubt, and I can inform your lordships (having been counsel in the cause, and having, at the argument, given his lordship a note of the judgment in Lolly's case) that he said, "It is a decision on which we probably shall hear "a good deal more."

But since Lolly's case was decided, with the doctrine there laid down fully before them, and after maturely considering it, the Scotch courts have repeatedly affirmed the jurisdiction in all its particulars. Those cases to which I particularly refer were decided in 1814, and the two or three following years. Levett v. Levett, and Kibblewhite v. Kibblewhite, both of the same date, 21st Dec. 1816[1], are those to which I shall particularly advert. In both cases the marriage was had in England; in both the parties were English by birth and by domicile; in both the suit was brought by the wife for the husband's adultery; and the only domicile in Scotland being that required to give the courts jurisdiction, the commissaries in both refused to divorce, on the ground not of the indissolubility of the English marriage, but the insufficiency of the Scotch residence; in both the Court of Session after the fullest dis-

[1] Fac. Coll. p. 245.

cussion, with one dissentient voice, and that turning upon the question of domicile, sustained the jurisdiction, and remitted to the commissaries to proceed with the divorce.

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Upon the other cases, of Edmonstone v. Edmonstone, and Butler v. Forbes[1], I need not dwell in detail. The state of the judicial authority on this question is fully given in the work of Mr. Ferguson[2], one of the most experienced of the Scotch consistorial judges. After referring to all the cases, the words of that learned person, though not to be cited as an authority, are well worthy of attention, as the testimony of a judge sitting for so many years in the Scotch Consistorial Court, and speaking to its uniform and established practice, twenty years after Lolly's case had been determined here. Mr. F. says, "According to these precedents, the muni-
"cipal law of Scotland is also now applied by the
"consistorial judicature in all cases of divorce, without
"distinction, whether the parties are foreign or domi-
"ciled subjects and citizens of this kingdom; whether,
"when foreign, the law of their own country affords
"the same remedy or not, and whether they have con-
"tracted their marriage within this realm, or in any
"other; provided only that they have become properly
"amenable to the jurisdiction in this forum. None
"of these last-mentioned cases, nor indeed any other
"from Scotland, in which a question of international
"law could be raised for trial and judgment, having
"hitherto been appealed, the rule has for a period of
"more than ten years stood as fixed by them, and the

[1] 1st June 1816. Fac. Coll. p. 139.

[2] Ferguson's Consist. Law, p. 37, et seq.

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" subsequent practice has furnished additional instances " of its application."

I think I need scarcely add, that this current of judicial authority, and still more the uniform practice of the Scotch courts, unquestioned ever since the Reformation, establishes clearly the proposition in its largest sense, that the Scotch courts have jurisdiction to divorce when a formal domicile has been acquired by a temporary residence, without regard to the native country of the parties, the place of their ordinary residence, or the country where the marriage may have been had.

But although it was necessary to complete the view which I have taken of this important question, that I should advert to the cases which bear upon it in all its extent, there is no necessity whatever for our assenting to the proposition in its more general and absolute form, for the purpose of the case now before us. That is the case of a marriage contracted in England between a man Scotch by both domicile and birth, and a woman about to become Scotch by the execution of the contract. It is, moreover, the case of a suit instituted in the Scotch courts, while the pursuer had his actual domicile in Scotland, and his wife had the same domicile by law. To term a marriage so contracted an English marriage hardly appears to be correct. I am sure it is, if not wholly a Scotch contract, at the least a contract partaking as much of the Scotch as of the English. This, in my judgment, frees the case from all doubt; but as I have also a strong opinion upon the more general question, an opinion not of yesterday, nor lightly taken up, I have deemed it fitting that I should not withhold it from your lordships, and

the parties, and the Court below, upon the present occasion.

LORD LYNDHURST.—My lords, my noble and learned friend has entered so minutely into the consideration of this question, that it will not be necessary for me, in the observations which I feel it my duty to make, to occupy much of your time.

My noble and learned friend has very justly stated that this is a question of great importance, not only to the parties immediately concerned in it, but also to the public. It is some time since it was argued at your lordships' bar. I have on different occasions directed my attention to it, and it is now my duty to communicate to your lordships the result of the opinion I have formed respecting it.

If I considered that your lordships were sitting distinctly in judgment upon Lolly's case, I should not conceive that you could with propriety proceed to a decision without requiring the advice and opinion of the judges.

The facts of that case were very shortly these: Lolly married in England, he afterwards went to Scotland, and, by the decision of a competent court in that country, obtained a sentence of divorce. He afterwards returned to England, and married a second time, his former wife being still alive. A prosecution was instituted against him, he was found guilty, and he set up, by way of defence, that the marriage with his former wife had been dissolved by a competent court in Scotland. The defence and the validity of it were submitted to the consideration of the twelve judges. They were of opinion that the sentence of divorce in Scotland

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could not, as far as England was concerned, have any effect. He was found guilty, was sentenced, and, to a certain extent, underwent punishment.

My lords, that was a decision unanimously pronounced by the twelve judges of England, by men many of them of great experience and learning; and I certainly should not have ventured to recommend your lordships to reverse a decision so sanctioned, had that been the direct question before you, unless upon grave consideration and consultation with the king's judges.

It is suggested by my noble and learned friend, that the noble earl who presided for so many years in the Court of Chancery entertained doubts as to the propriety of that decision. The expressions which I have seen attributed to that noble judge I think hardly warrant such a conclusion; and as the noble earl was at the time when the judgment was pronounced at the head of the law of the country, as he must have known of the decision, he would not, I think, had he entertained serious doubts respecting it, have suffered the party so convicted to have undergone any part of the punishment inflicted on him by the sentence.

But, my lords, the question as to the soundness of the decision in Lolly's case came before my noble and learned friend when he held the great seal. My noble and learned friend had been counsel in the case; he therefore was apprised of all the circumstances relating to it, and it is material that I should inform your lordships of what my noble and learned friend said with respect to it. In the case of M'Carthy v. De Caix, which came before my noble and learned friend in 1831, and in the elaborate judgment which he pro-

nounced on that occasion, he observed: "It is fully "established by the solemn opinion of all the twelve "judges, in a fully argued and most maturely considered "case, that a foreign divorce could not operate to dis- "solve, or in any manner be made to affect an English "marriage." My noble and learned friend proceeds thus:—"The point was argued before the twelve "judges, including some of the most learned judges of "our day, my Lord Ellenborough, Lord Chief Justice "Gibbs, Chief Baron Thomson, and several others, "Mr. Justice Bayley, Mr. Baron Wood, and Mr. Jus- "tice Le Blanc, some of the most eminent and able "lawyers that I have ever known in Westminster Hall. "After hearing this case argued during term, and at "Serjeants' Inn after term, they gave a clear, decided, "and well-weighed opinion, all in one voice, finding "that no divorce or proceeding in the nature of a "divorce, or tending towards a divorce had in any "foreign country, Scotland included, could dissolve "the vinculum matrimonii, or contract of marriage in "England, and they sentenced Lolly (and here is "another mistake into which the noble and learned "judge has fallen, as if there was so much doubt that "they did not carry the sentence into execution); he "was sentenced to seven years transportation, and sent "to the hulks for one or two years.

"I hold it therefore to be perfectly clear that that "decision in Lolly's case, when I look at the case it- "self, and the circumstances preceding, accompanying, "and following it, stands as the law in Westminster "Hall to this day. It is still more the law when I "remind you of another matter which the noble and

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" learned judge forgot at the time he decided the case, " and threw some doubt on Lolly's case, which he had " looked at, as if it had never been recognized in sub- " sequent cases. That noble and learned judge was " Lord Eldon. It has been uniformly recognized in " Westminster Hall, but above all, it has come over " and over again in discussion before the same noble " and learned judge himself,"—that is Lord Eldon, I believe. " In the case of P—— and L——, and an- " other case, in two cases, the very year after, argued " at great length by Mr. Justice Holroyd on one side, " and myself on the other, before Lord Eldon, and to " which he paid most exemplary attention, and where " he took a note of the very words in which Lolly's " case was decided, Lord Eldon had that case before " him, and he followed it on deciding those two " cases."

Such is the statement of my noble and learned friend; I must therefore repeat that if we were called upon to overturn that decision, and to pronounce it to be erroneous, respecting which I wish to be understood as giving no opinion, your lordships would not think it right to proceed to judgment without a distinct review of that case upon argument in the presence of the judges, that we might be advised by them whether that decision is or is not agreeable to the law of England; but, my lords, we are sitting here to decide a question of Scotch, and not of English law. We are sitting here as a Scotch Court of Appeal, bound to decide according to the law of that country.

If Lolly's case, however, be law, and if the decision in the Court of Scotland, which we are now reviewing,

be also law, this consequence must follow, that after the decree of divorce is pronounced, Sir George Warrender will be able to marry again in Scotland. He would then have a wife in Scotland, and he would have a wife also in England. Such would be the state of things arising from the conflicting law of the two countries: other consequences, which my noble and learned friend has pointed out, and circumstances of an extraordinary and very inconsistent nature, would follow.

But, my lords, we must still decide the case which is before us according to the law of the country from which it comes. If the law be conflicting, it is for Parliament to interfere to remedy the mischiefs consequent on such conflict. The question, and the sole question is, whether by the law of Scotland, administered in Scotland by the judges of Scotland, this divorce be, or not, a legal divorce? We are sitting here in England, and we must be cautious not to suffer ourselves, on that account, to be influenced and governed by the principles of English law. The question is, whether the decision, pronounced in Scotland by the judges of that country, is conformable to the law of Scotland? We are a Scotch Court of Appeal as far as relates to Scotch cases, and an English Court of Appeal as far as relates to English cases; and this brings me directly and distinctly to the consideration of the question before us.

As my noble and learned friend has stated, the first point is the question of domicile; unless these parties were domiciled in Scotland, the Court had no jurisdiction. But, my lords, the question of domicile is admitted for the purpose of the present argument; it is

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admitted that Sir George Warrender, at the time of his marriage, and from that time up to the commencement of this suit, was a domiciled Scotchman. We are to take this fact as the basis of the argument. The admissions are in writing, signed by the counsel on both sides. Sir George Warrender, during the whole of this period, was a domiciled Scotchman. The consequence resulting from this is, that Lady Warrender, by the very act of marriage, became domiciled in Scotland. It cannot be disputed that the domicile of the husband becomes the domicile of the wife: but reliance is placed on the deed of separation. I apprehend that that instrument does not affect the question of domicile at all. The husband and wife cannot by any agreement between themselves vary the law as to domicile. It is a legal consequence of the marriage tie; and after all, what is the separation? My noble and learned friend very correctly, according to my view of the subject, stated, that as far as relates to the separation between the parties, it is nothing more than a mere permission to Lady Warrender to live separate. It has no binding obligation. The only things binding in this deed are those clauses which relate to the pecuniary engagements. She may sue him, or he may sue her, notwithstanding the agreement for a restitution of conjugal rights. A pledge not to institute such a suit is no legal bar to the right to institute it; and an agreement such as this is nothing more than a permission to the wife to reside where she may think proper: but this does not alter her legal domicile; though her actual residence be changed, her legal domicile remains precisely as it was.

My lords, I am aware that in the case of Toovey and

Lindsay in this House, Lord Eldon threw out some doubts as to the effect of a deed of separation on the domicile. I have attended to that doubt, and to the suggestion of that noble and learned earl, with all the attention that every thing falling from him deserves; but I am obliged at last to come to this result, that the deed of separation makes no difference at all in this case, that notwithstanding the agreement between the parties to live separate, the domicile of the wife follows the domicile of the husband; the one cannot be separated or detached from the other.

The next point for consideration is as to the place where the supposed adultery is alleged to have been committed; and what my noble and learned friend says is very true,—there is no evidence whatever to show that Lady Warrender has in any respect misconducted herself. The present is a mere preliminary question. The fact must be assumed, but assumed merely for the purpose of the argument. There is no imputation, from any thing in this case, on the character of Lady Warrender:—she may be as pure and as spotless as any woman in the world.

But it is objected, though very slightly, that the adultery, or alleged adultery, was committed abroad. It is clear, however, from all the decisions, that there is nothing in this objection. Your lordships well know that it is no answer to a civil action for damages in this country which may be equally maintained, or a proceeding had in the Ecclesiastical Court, whether the adultery be committed here or abroad; and it is precisely the same in Scotland. I mention the point, because it has been stated that reliance was placed upon

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this circumstance in some of the cases, but there is no ground for the objection.

Then, my lords, we come to the third and main point, namely, is it competent to the Courts of Scotland to pronounce a sentence of divorce between parties married in England? The Scotch Courts consider this as a question settled: marriage, they observe, is a connexion recognised in all Christian countries; and they say, and I think they say with propriety, "that they "are not prevented from pronouncing a sentence of "divorce à vinculo matrimonii in that country, if the "parties are domiciled there, merely because a remedy "to the same extent may not be given in the country "where the marriage was celebrated. It is a question "as to the remedy for a breach of the nuptial engage-"ments,—for the violation of a duty; and the law of "every country may affix such penalty as it deems pro-"per for a breach of that duty." When we wish to ascertain what is the law of a country, we look to the decisions of its courts as evidence of it; and I believe it never was questioned or doubted, till Lolly's case, by any lawyer in Scotland, that without reference to the country where the marriage was celebrated, if the parties were domiciled in Scotland, it was competent to the Court of Scotland to divorce à vinculo matrimonii.

But, if your lordships will allow me (as it is a question of great importance), I will refer very shortly to the cases on this subject. They extend over a period of more than a century, and in no instance, until the question was raised in Lolly's case, was the authority of the Courts of Scotland ever doubted in that country.

The first case to which I shall refer is the case of Gordon and Eaglesgraff in 1699; there the marriage was in Holland; adultery was charged, and the only question was as to the fact of the adultery. There was no inquiry as to the law of Holland, no question whether the parties could be divorced à vinculo matrimonii in that country or not; the sole point which the Court thought it necessary to ascertain was, whether, in fact, adultery had been committed.

The next case occurred in 1726. The parties were married in Ireland. The law of Ireland, as far as respects the present question, is the same as the law of England. A sentence of divorce was pronounced on proof of adultery. No doubt was entertained as to the authority of the Court to dissolve à vinculo matrimonii, if the adultery were proved.

The third case is that of Scott and Boucher, in 1731. There was afterwards another case in 1787, where the parties had been married at Boston in America; the law of marriage, as far as respects the present question, was at that period the same at Boston as in England; and again in a contested suit, there was a divorce upon proof of the adultery; and in none of the cases to which I have referred was any doubt expressed as to the law. It is true that some of these decisions were pronounced in absence. My noble and learned friend has already observed on this circumstance. It tends, I think, only more strongly to show that the law was considered as so settled and ascertained that no doubt existed on the subject.

Then came Brunsdone and Wallace, in 1789, where the parties had been married in London:—that was a

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case very sharply contested; the question was not raised, but it was open to the parties to have raised it; no Scotch lawyer supposed that it could be raised, or that it was tenable; the sole question agitated was as to the domicile ratione originis, whether in that case it was sufficient to sustain the jurisdiction.

In the case of the Duchess of Hamilton, in the year 1796, the parties had been married in England; the adultery had been proved, and there was a divorce. Down to this period the decisions are uniform.

Then, my lords, came the case of Lindsay and Toovey, in 1817; and before the appeal in the case of Lindsay and Toovey, Lolly's case was decided. Lindsay and Toovey was decided by the Commissaries. There was a bill of advocation to the Lord Ordinary, and he confirmed the decision of the Commissaries: there was a further appeal to the Court of Session, and that Court confirmed the previous decision of the Commissaries and the Lord Ordinary, and then the case came to this House. In the course of the discussions here Lolly's case was mentioned, it was mentioned at the bar, and some discussion took place with respect to it, but the main point was this:—where was the domicile? The pursuer was an officer domiciled originally in Scotland, but he had taken a house at Durham, and had remained there for the education of his children. Lord Eldon was inclined to think from the facts as they appeared, that Durham should be considered his domicile, and not Scotland; he thought that question had not been sufficiently considered in the Courts below, Lolly's case also having been decided after the judgment in Scotland; the point in that case had not been before the Court of

Session; and he thought, also, there was some doubt as to the operation of the deed of separation upon the question of domicile. These three points occurred to the mind of that learned judge, and to Lord Redesdale, who sat with him.

Under these circumstances, it was thought advisable that the case should be sent back to the Court of Session, in order that it might consider these questions, and see what effect they would have upon the judgment. The pursuer died a short time afterwards, and the case fell to the ground—there was no further proceeding in it. Several decisions afterwards took place, to which my noble and learned friend has referred: they are all collected in Mr. Fergusson's book, where they are stated with great accuracy. There was, among others, the case of Rogers and White, in 1811; the parties had been married in England, and there was a decree for a divorce.

There was afterwards another case, in which ultimately a decree for a divorce à vinculo matrimonii was given. The question came before Lord Meadowbank, a judge of great learning and experience, and I should recommend any person who doubts what the law of Scotland is upon the point to read his judgment in that cause. After he had reviewed the case and sent it back to the Commissaries, judgment of divorce à vinculo matrimonii was pronounced.

Then followed the case of Hilary and Hilary, of Sugden and Lolly, of Tolk and Russell Manners, of Humphrey and Wyatt in 1814, where the parties had been married in Wales; and the case of St. Aubin and Banks, in the same year.

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All these cases were decided according to what had been uniformly considered as the law of Scotland. The case of Gordon and Bye came on afterwards, and I mention it particularly, because in that case there was a division among the Commissaries. In consequence of what had occurred here respecting the decision in Lolly's case, a majority of the judges of that court were of opinion that they had no right to interfere by divorce à vinculo matrimonii with an English marriage. The case went afterwards before Lord Meadowbank, who gave an opinion upon it corresponding with his former judgment—the execution was stayed, and it was intended to carry the case before the Court of Review.

This brings me to the case of Edmonstone, which is the only further decision with which I shall trouble your lordships; the course pursued with respect to it was precisely what Lord Eldon meant to take place in the case of Toovey and Lindsay; he thought the question was of so much importance that the opinion of all the Scotch judges should be taken upon it. In the case of Edmonstone, the question was distinctly raised. The question put was this:—Is it a valid defence against an action of divorce in Scotland, on account of adultery committed there, that the marriage was celebrated in England? So that your lordships see the question was distinctly put to the judges—not the judges of one division alone—not the Lord Ordinary alone—but to both divisions, and the Lord Ordinary. The fifteen judges were unanimously of opinion that, according to the law of Scotland, and a long and uniform course of decisions, it was competent for the courts of Scotland to

pronounce a sentence of divorce à vinculo matrimonii, whatever the country in which the marriage might have taken place, and without reference to the remedies for adultery in such country. In the book to which my noble and learned friend referred your lordships, you will find the arguments of the judges of the Second Division very fully given. I have read them with attention, and they have satisfied me that such has been the uniform course of proceeding in Scotland, and such the acknowledged law of that country.

My lords, I have already observed that the decisions of the courts of a country are evidence of what the law of that country is. The decisions of the courts of Scotland are uniform. I have traced them from 1696 down to the present time. It appears, indeed, that the decision in Lolly's case did for the moment introduce a doubt in some quarters, but it was soon and I think effectually removed by the decision of the fifteen judges of Scotland in the case of Edmonstone. Looking then anxiously at the subject, and inquiring as well as I have been able from every source what the law of Scotland is, I feel that sitting here, as your lordships do, as a Scotch court of appeal from the decision of Scotch judges, I should act very inconsistently with my duty were I to advise your lordships to reverse the decision which has been come to by the Court below. I consider the question of domicile to be clear. The other question as to the citation was almost abandoned at the bar. My noble and learned friend went fully into it. I think it is free from doubt—the domicile of Sir George Warrender is admitted, and the domicile of Lady Warrender follows as a matter of course, unless

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the deed of separation makes a distinction. I am of opinion that the deed of separation makes no distinction. The domicile being then settled, the place where the supposed adultery was committed being in my judgment immaterial, and the uniform course of decision in Scotland being such as I have stated, I think it impossible that any serious doubt can be entertained with respect to this judgment. We are to decide according to the law of Scotland. Upon the decision in Lolly's case I pronounce no opinion. If it be correct, and any inconvenience should result from the conflict of the law of the two countries, the legislature must apply the remedy. These are considerations which ought not to lead you to reverse the judgment in this case, if you are satisfied of its correctness. Inconveniences arising from a want of correspondence of the law of Scotland with that of England have from time to time been remedied by the legislature. Lord Eldon mentioned his intention of bringing in some bill for the purpose of reconciling other differences between the laws of the two countries. It is the legislature alone that is competent to apply the remedy. For these reasons I humbly advise your lordships to affirm the judgment.

LORD BROUGHAM.—My lords, I agree entirely with my learned friend (as I think I stated[1]) that this question cannot break in upon Lolly's case, in whatever way it is disposed of; that it rests on grounds of its own. It is quite possible that Lolly's case may have

[1] See p. 209–10.

been decided rightly by the English law, while this case has been decided rightly according to the Scotch law; Lolly's case touching the effects in England of Scotch divorces of English parties, and this case only touching the effects in Scotland of Scotch divorces of Scotch parties. So far I agree with what my learned friend has stated. If in the Court of Chancery I said what is given in the note produced, I meant this; whatever my own opinion may be on the decision in Lolly's case I am not at liberty, sitting as a judge of one of the inferior courts, and not of the supreme court of appeal,—I am not at liberty to dispute that decision. But I now give my opinion on Lolly's case, sitting in the supreme court of appeal; however, it is not before this court, and the present case is not affected by it. I quite agree that it is for the legislature to apply an apt and efficient remedy to any inconvenience that arises from the present undeniable conflict of the laws of the two countries. That conflict may form a very fit subject for the consideration of your lordships at some other time.

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LORD LYNDHURST.—I read those passages from the printed papers, referring to the judgment of the noble and learned lord; I do not find them in any book. I do not know the source from which they are taken.

LORD BROUGHAM.—It must have been from a short-hand writer's note; but I never saw it except in this

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printed appeal case. It is manifestly very inaccurate and not very intelligible.

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The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutor therein complained of be and the same is hereby affirmed.

WILLIAMS, BROOKS, POWELL, and BRODERIP,—
SPOTTISWOODE and ROBERTSON, Solicitors.