JOHN EDWARD GEILS, Esq.,
HUSBAND OF FRANCES GEILS, } APPELLANT.

FRANCES GEILS,
HIS WIFE, } RESPONDENT.

1851.
8th May.

Upon a suit in Doctors' Commons, by the husband against the wife, for restitution of conjugal rights, she puts in a responsive allegation charging him with adultery, and praying sentence of divorce *à mensâ et thoro*. Such sentence accordingly pronounced by the Court of Arches. She then institutes proceedings in the Court of Session in Scotland for divorce *à vinculo*. Plea in bar, that she has already obtained redress. This plea repelled by the Court below, and leave to appeal not given. Appeal taken nevertheless. Objected to as incompetent, under the 6 Geo. IV. c. 120, s. 5. Right of appeal allowed.

A defence which extinguishes a demand, or puts an end to the cause of action, though it may be preliminary, is not dilatory, but peremptory.

When it is ordered that counsel be heard on a question as to the regularity of an appeal, the party objecting has the right to begin.

In October 1845, Mr. Geils commenced proceedings against his wife in Doctors' Commons for restitution of conjugal rights. Mrs. Geils, not content with simply defending herself, carried in a responsive allegation charging Mr. Geils with certain acts of adultery, and praying divorce *à mensâ et thoro*. The husband's suit failed. The wife's proved successful. In April 1848, the sentence sought by her was awarded by the Arches Court of Canterbury.

On the 17th May, 1849, Mrs. Geils brought an action in the Court of Session in Scotland against her husband for divorce *à vinculo matrimonii*, founded on the same acts of adultery which had formed the basis of the sentence previously had in the Court of Arches.

Mr. Geils resisted this proceeding in Scotland on divers grounds, *inter alia*, on the ground (which he advanced as a plea in bar) that his wife had already sought and had obtained redress from a Court of competent jurisdiction (*a*).

The *Lord Ordinary* (Lord *Wood*) repelled Mr. Geils' defence; and to this decision the First Division of the Court of Session by a majority adhered. Mr. Geils then tendered an appeal to the House of Lords.

(*a*) The plea was as follows: "That the Pursuer (Mrs. Geils) having instituted a suit against the Defender (Mr. Geils) in the Arches Court of England, founded on the acts of adultery, which are libelled on in the present action, and having in that process obtained, in April 1848, a regular sentence of separation *à mensâ et thoro*, is barred from maintaining the present action in this Court."

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Mrs. Geils, instead of answering the appeal, presented a petition to have it dismissed as irregular and incompetent, under the 6 Geo. IV. c. 120. Mrs. Geils' petition was referred to the Appeal Committee, who reported that the matter was fit to be argued at the Bar of the House by one counsel of a side. Printed cases were accordingly lodged, and the cause was put in the paper for hearing on the question of competency.

Mr. *Anderson*, as counsel for Mr. Geils, was proceeding to address the House when he was interrupted by

The Lord Advocate *Moncreiff*, who, on behalf of Mrs. Geils, claimed the right to open the case.

When it is ordered that counsel be heard on a question as to the regularity of an appeal, the party objecting has the right to begin.

Lord Chancellor TRURO: The party who objects should begin. We are not now sitting to hear the appeal on the merits, but the preliminary objection to its competency (*a*).

The *Lord Advocate*, in support of the objection, contended that the appeal was irregular and incompetent under the 5th section of the 6 Geo. IV. c. 120, which enacted that "where the Lord Ordinary repelled a *dilatory* defence, an appeal to the House of Lords against such interlocutory decision could only be by leave of the Court below." The plea here advanced was a dilatory defence (*b*), and leave to appeal against its rejection had been refused by the Court below.

Mr. *Anderson*, for Mr. Geils: The defence, though

(*a*) See *Gray* v. *Forbes*, 5 Cla. & Fin. 363, where Lord Chancellor Cottenham said "The objectors to the right of appeal must be first heard." S. C. McL. & Rob. 543. See also *Bald* v. *Kerr*, Shaw & McL. 47.

(*b*) The Lord Advocate, to show that the defence was dilatory, cited Stair, B. 4, T. 39, § 13; *Milne* v. *Gauld*, 3 Session Rep. 345; *Smith* v. *Stoddart*, 12 Session Rep. 1185; and *Laidlaw* v. *Dunlop*, 9 Shaw & D. 579.

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preliminary, is not dilatory, but peremptory (*a*); for if allowed, no suit can afterwards be sustained in respect of the same cause of action. The right is determined. In *Warrender* v. *Warrender* (*b*), Sir George Warrender prayed that Lady Warrender's appeal might be dismissed as incompetent on the ground that the defence repelled in the Court below was merely dilatory, and that permission to appeal had not been granted; but the Appeal Committee of this House, Lord *Brougham* being present, held otherwise, and upon their report the appeal was received. In *Clyne* v. *Clyne* (*c*), a similar objection was discussed at the bar of the House, and was overruled;—Lord Chancellor *Cottenham* observing that the interlocutor appealed from was a judgment "upon part of the case, which in all probability would leave little or nothing to be thereafter adjudicated upon." The plea therefore goes to merits. *Perimit causam.*

The *Lord Advocate* replied.

Lord Chancellor TRURO:

Lord Chancellor's opinion.

My Lords, the question in this case arises upon the 6th of Geo. IV. c. 120. Your Lordships have heard during the argument, that by the 5th section of that statute it is enacted, "that it shall be the duty of the *Lord Ordinary*, at the first calling of the cause before him, to hear the parties on the dilatory defences, with power to reserve consideration on such dilatory defences as require probation, until the peremptory defences shall be pleaded and the record adjusted in

(*a*) Reg. Maj. c. 2, Form of Process annexed; Balfour's Practicks, 343; Stair, B. 4, T. 39, § 13, and Appendix, 56; More's Edition, 792; Forbes, Part 4, B. 1, c. 2, T. 1; Bankton, B. 4, T. 25, §§ 2, 4, 5; Erskine, B. 4, T. 1, § 66; Bell's Duty, 273; Russell's Form of Process, 53; 1 Darling's Practice, 197; 1 Shand's Practice, 317.

(*b*) 2 Shaw & McL. 154; and see *infrà*, p. 43.

(*c*) McL. & Rob. 72.

the manner hereinafter directed, and concludes by enacting, that, where the action is not dismissed, it shall not be competent to appeal to the House of Lords, unless express leave be given by the Court below; and the present appeal is contended to be incompetent, upon the ground that the interlocutor appealed against, repelled a plea which set up a dilatory defence, and which interlocutor, therefore, could only be the subject of appeal by leave of the Court; and that leave had been asked of the Court to prosecute such appeal, and refused.

The question which the case presents for your Lordships' consideration, is, whether the plea repelled by such interlocutor ought to be deemed to set up a dilatory defence or a peremptory defence? The distinction between dilatory pleas and other pleas is well understood, as well in England as in Scotland, and there are different rules applicable to the two distinct classes of pleas,—the proceedings generally being more strict and prompt in relation to dilatory pleas than to pleas in bar, or which answer the merits of the Pursuer's case.

Several authorities have been referred to at the bar, but there does not appear to be any difference in the result of them. Certain passages have been quoted which admitted of two senses, but where the words have been used in the same sense in the different authorities the same conclusions have been adopted.

There is really no difficulty in determining what ought to be deemed a dilatory defence, and what should be held to constitute a peremptory defence.

Where the defence presents no answer to the Pursuer's case, but consists merely in objecting to some irregularity, or some circumstance which may well consist with the Pursuer's being entitled to all the relief or advantage which he seeks to obtain by his suit, in some

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other form or at some other time, such a defence I conceive to be dilatory; but, where a defence is pleaded which professes to show that the plaintiff has no case which entitles him, at any time or in any form, or in any Court, to the object of his suit, such a defence I consider to be clearly peremptory. It remains, therefore, for your Lordships to consider the matter and effect of the plea which is repelled by the interlocutor appealed against. Does that plea purport to show that the Pursuer has no cause of suit or complaint which entitles her in any form to any redress?

The object of the present suit, brought by Mrs. Geils against her husband, is to obtain a divorce *à vinculo matrimonii*, upon the ground of adultery; and the plea alleges, that, in a former suit, commenced by the Appellant, in the Court of Arches in England, against the Respondent, to enforce a restitution of conjugal rights, the Respondent carried in a responsive allegation, praying a divorce *à mensâ et thoro*, upon the ground of adultery, and that a decree of divorce was accordingly pronounced; and this plea is pleaded as a peremptory defence, or as a conclusive bar to the Respondent's claim to a divorce *à vinculo matrimonii*.

It is contended, on the part of the Respondent, that the plea presents no competent defence, upon the ground that the Respondent was not the mover of the suit in England, but merely defended herself against the claim of her husband for a restitution of conjugal rights. To this it is answered, on the part of the Appellant, that the Respondent might have well defended herself against the suit in the Arches Court, upon the ground of adultery; but that, instead of so doing, the Respondent thought fit to become an actor in the suit, by carrying in a responsive allegation, and not praying to be dismissed the suit upon the ground alleged, but praying a judgment in her favour for a divorce *à mensâ et thoro*.

And that, by so doing, the Respondent placed herself in the same situation precisely as if she had been the original promoter of the suit, in order to obtain that relief and judgment which was ultimately granted to her; and it is argued, that, having obtained such judgment in that former suit, by her own election, she has obtained all the relief to which she is entitled in respect of the misconduct of the Appellant which stands admitted upon the record in this case.

The question upon the present occasion for your Lordships' decision, is, not whether the matter of the plea repelled is a valid and effectual answer to the Pursuer's claim of divorce, but whether the matter of the plea is presented by way of peremptory defence, and as an entire answer to the whole case of the Pursuer. It may turn out in the result that the plea does not present a conclusive legal answer to the Pursuer's case; but I repeat, it appears to me to be offered with that view, and that, therefore, it ought not to be deemed to plead a dilatory defence.

The learned counsel who has appeared at the bar on behalf of the Respondent, with a candour for which I think the House is indebted to him, declined to argue that the plea set forth a dilatory defence, but sought to relieve himself and the House from that question by endeavouring to support the prayer of his client's petition by resorting to another totally distinct ground, viz., that the plea had been treated by the Court of Session as a dilatory plea, and that the Appellant had conducted himself in the course of the proceedings by allowing the plea to be treated in the manner stated, so as to render himself incompetent to contend at the bar that the plea was not dilatory. But, my Lords, the petition, praying that the appeal might be dismissed, sets forth, as the ground for the prayer, that the plea was properly deemed a dilatory plea, and that, therefore, an appeal

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was not competent against the interlocutor which repelled it; and that is the question which was intended to be argued at your Lordships' bar. The learned counsel has argued very ably the question to which he directed his attention, but he has not maintained the ground set forth in the petition which he has appeared to support, and it is for your Lordships to decide if it was competent to support the petition by matter altogether foreign to its contents. It seems to me, that the only question for your Lordships' judgment is, whether, under the 5th section of the statute referred to, the plea ought to be deemed as setting up a dilatory defence; and, therefore, that the interlocutor which repelled it cannot be the subject of appeal without leave of the Court below. I humbly submit to your Lordships, that the defence set forth in the plea is not, within the meaning of that statute, a dilatory defence; and that it was competent to the Appellant to present his appeal against such interlocutor to this House. Upon the hearing of that appeal, of necessity much of what has been urged before your Lordships to-day will have to be considered. On the present occasion, I shall advise your Lordships that the petition praying that the appeal may be dismissed, as incompetent, ought to be dismissed; and I move, your Lordships, that that petition be dismissed.

Mr. *Anderson:* I hope your Lordships will give us the costs of this hearing.

LORD CHANCELLOR: They must be reserved.

Respondent's petition dismissed, and the costs reserved until the hearing of the appeal.

SMEDLEY.—GRAHAME, WEEMS, & GRAHAME.