I have, at least as at present advised, difficulty in holding that the appeal under the one statute is of wider scope than under the other. I observe that the point was raised in the year 1872 (case of *Glass*, No. 87, 11 Macph. 988), but, so far as appears, was not decided. Nor does it appear to have been decided or raised in any subsequent case, although no doubt in at least two cases it might have been so, if the parties or the Court had had their attention drawn to it.

I therefore wish to reserve entire my opinion on the competency of such appeals, until a case occurs in which the question is raised and argued. I may add that when the question comes to be raised, attention will probably be directed to the cognate provisions of the statutes with respect to "complaints" by third parties. The statute of 1854 (sec. 13) allowed such complaints to be made to the magistrates or commissioners of supply, but only on the matter of value. The Statute of 1879, sec. 6, extended this right of complaint to matters other than value, but it expressly provided that there should be no right of appeal to the Judges. Reference may also be made to the opinions of the Judges in the case of *Lord Abinger*, 1883, 10 R. 502.

The Court were of opinion that the determination of the Valuation Committee was right.

Counsel for the Appellant — P. Blair. Agents—Strathern & Blair, W.S.

Counsel for the Assessor — Pitman. Agents—Webster, Will, & Ritchie, S.S.C.

HOUSE OF LORDS.

Thursday, May 16.

MACKENZIE *v.* MACKENZIE.

(*Ante*, vol. xxx. p. 276, and 20 R. 636).

Husband and Wife—Divorce for Desertion—Act 1573, *cap.* 55—*Conjugal Rights Act* 1861 (24 *and* 25 *Vict. cap.* 86), *sec.* 11.

Evidence on which, in an action of divorce for desertion brought by a husband, it was *held* (in *aff.* judgment of Second Division) that the wife had proved *sævitia* on the part of the husband such as would have entitled her to a decree of separation, and therefore that the husband was not entitled to decree of divorce.

Opinion by Lord Watson, that section 11 of the Conjugal Rights Act of 1861, which provides "that it shall not be necessary, prior to any action for divorce, to institute against the defender any action of adherence," was not intended to alter the substance of the older statute law, but merely to simplify procedure, and that "reasonable cause" in the sense of the Act 1573, cap. 55, was simply such cause as would have afforded a good answer to an action for adherence.

Question, whether there might not be circumstances affording a sufficient defence to an action for adherence which yet would not establish the right to a decree of separation.

Process—Expenses—Husband and Wife—Divorce—Appeal to House of Lords—Taxation.

A husband having appealed unsuccessfully to the House of Lords against an interlocutor of the Court of Session assoilzieing his wife from the conclusions of an action of divorce for desertion which he had brought against her, the wife, although having separate estate, was allowed costs, to be *taxed* as between agent and client.

Reported *ante*, vol. xxx. p. 276, and 20 R. 636.

The pursuer appealed.

At delivering judgment—

LORD CHANCELLOR—My Lords, the appellant seeks a divorce from his wife. He claims it upon the ground that she deserted him for four years without any reasonable cause. His claim is founded on the Divorce Act of 1573. That Act made it sufficient cause of divorce if either spouse "divertis fra utheris companie without any reasonabill cause alledgeit or deducit befoir ane judge and remanis in their malicious obstinacie be the space of four yeiris." The remedy could, however, only be obtained by means of an action for due adherence. It was necessary that the defender should be charged to adhere, and that the spiritual jurisdiction should be invoked to admonish the defender so to do.

By the Conjugal Rights Amendment (Scotland) Act 1861, it was enacted that "it should not be necessary, prior to any action for divorce, to institute against the defender any action of adherence, nor to charge the defender to adhere to the pursuer, nor to denounce the defender, nor to apply to the presbytery of the bounds, or any other judicature, to admonish the defender to adhere." An action of divorce may therefore now be raised without any preliminary proceedings at the expiration of four years' desertion.

It was contended on behalf of the appellant that the object of the Act of 1861 was only to simplify the procedure, and not to alter the matrimonial law. It was also contended that under the law, as it existed prior to 1861, no circumstances could afford "reasonable cause" under the statute of 1573, which would not have been an answer to an action for adherence.

It is not necessary to decide the point, but I so far concur with this view that I think if a decree of adherence had been obtained it would not have been competent for the spouse to rely on any circumstances existing prior to the action of adherence as a reasonable ground for desertion, and if for a period of four years, during which the spouses were apart, an action for adherence might at any time have been successfully

maintained, I do not think it would be possible to establish that there was reasonable cause for desertion. At the same time it appears to me that it would be essential for the party suing for a divorce to show that he or she had during that time used every reasonable endeavour to induce the other to adhere, and been ready and willing to discharge on his or her part all marital duties.

The appellant further contended that nothing could be a defence to an action for adherence which would not establish the right to a decree of separation. The only foundation for such a decree, it was said, is a matrimonial offence, adultery or *sævitia;* and therefore, unless one or other of these could be proved, the right to a divorce by the party deserted was, after four years' desertion, inevitably established.

My Lords, I am not prepared, without further consideration, to assent to the proposition that a spouse who seeks a decree of adherence is in all cases entitled to obtain it unless a case can be established by the defender which will justify a decree of separation. It will be seen that in the view which I take it is not necessary to determine the point in the present case, but I think it right to state the grounds upon which I desire to reserve my judgment upon it.

I admit that there is authority for the proposition contended for on behalf of the appellant, but it has never yet, so far as I am aware, been canvassed either in a Court of Appeal or in this House. It seems to me open to question whether the Courts ought in all cases to disregard the conduct of the party who invokes their aid in an action for adherence, and to decree it in all cases where a matrimonial offence cannot be established by the defender. It is certain that a spouse may, without having committed an offence which would justify a decree of separation, have so acted as to deserve the reprobation of all right-minded members of the community. Take the case of a husband who has heaped insults upon his wife, but has just stopped short of that which the law regards as *sævitia* or cruelty: Can he, when his own misconduct has led his wife to separate herself from him, come into Court, and avowing his misdeeds, insist that it is bound to grant him a decree of adherence?

I cannot better illustrate my meaning than by referring to the case of *Paterson* v. *Russell,* which was relied on by the appellant. It was determined in this House, reversing the decree of the Court of Session, that the wife was not entitled to a separation; could the husband have insisted upon a decree of adherence? Might not the Court refuse its aid to one who had so acted, and regard his conduct as a bar to his claim to relief?

It is not a notion strange to our law that the Court should refuse its aid to one who does not come into it with clean hands, and when the question arises for decision I think it may well be considered whether the Court would be bound to entertain an action and grant relief at the suit of one whose misconduct, though falling short of a matrimonial offence, has been the primary cause of the difficulty, and has led to the refusal to adhere.

My Lords, I turn now to the facts of the present case. It is one of a painful character, and I have no desire to discuss them in greater detail than is absolutely necessary. The parties were married in June 1877. Differences appear to have arisen between them at an early period in their married life. I need not dwell upon the cause of these differences. There were no doubt faults on both sides, but I am satisfied those of the appellant were (to say the least) quite as serious as those of the respondent.

On 4th August 1880 the respondent left her husband's house, and has not since resided or cohabited with him. The incidents which led to this act on her part are all-important, and I pass at once to a consideration of them. There is some conflict of evidence as to the facts, but in its broad features the story told by the appellant himself does not widely differ from that of the respondent. The Lord Ordinary, who saw and heard the witnesses, accepted the respondent's story as substantially accurate, and as regards the extent of the violence used, it is, as I shall show, corroborated by witnesses of credit, who speak to facts about which they cannot be mistaken. It appears that the appellant on the morning in question directed that the only child of the marriage should be brought (as had been usual) to the dining-room where he was breakfasting. The infant was at that time with her mother, who was breakfasting in bed. The appellant came to the door and said, "Give up baby, I want her at once." The nurse, who entered the room about that time, said, "Oh, baby has not finished her breakfast; won't you leave her?" To which the respondent added, "If you leave her here a few minutes she will have done, and she can go." The appellant replied, "I will have her. It is nonsense. I will have her at once. Give her up." Lady Mackenzie, the appellant's mother, then came in. She took hold of one of the respondent's hands, the appellant gripped the other with considerable force, and while the respondent was thus held the nurse took the child away.

The appellant alleged that the violence employed by him on the occasion had been exaggerated, and sought to excuse his act as an endeavour to rescue the child from a position of peril. I concur with the Lord Ordinary in rejecting this allegation and excuse, and in the conclusion that the child was taken by force from the respondent, and that considerable violence was used. About this I think there can be no real doubt; the marks left upon the respondent's wrist by the appellant's grip were seen by Sir Kenneth and Lady Mackenzie, his brother and sister-in-law, by Sir John Moss, the respondent's brother, and by her maid, and were visible for several days.

The appellant did not use actual violence to his wife on any other occasion, and

although the violence was considerable, it did not result in any serious consequences. Now, there are no doubt cases in which a single act of violence would not afford sufficient ground for a decree of separation; if the assault did not cause any serious injury, if it were the result of sudden passion, and were repented of as soon as committed, and above all, if there were no reason to anticipate its repetition, the Court might not regard it as amounting to *sævitia* or cruelty. On the other hand, a single act of violence has been regarded as sufficient to warrant a decree of separation where there was reason to anticipate that it might be repeated. The occurrences of 4th August cannot, therefore, be regarded by themselves as if they constituted a solitary incident detached from all that had gone before or that followed; one is compelled to consider the previous conduct of the appellant towards his wife, and to judge what prospect was before her if she had remained an inmate of her husband's house, or had consented to return and make it her home.

For a considerable time after the birth of the child (which took place in February 1879) the respondent was very ill. She returned with her husband to Ross-shire in the summer of that year. On their way they spent a night at Edinburgh. The appellant took advantage of this opportunity to consult his legal adviser as to his rights with respect to the child. As the result of the interview, he informed his wife that he had consulted Mr Adam, and that now it was across the Tweed, his power over the child was quite absolute, and that he could stop her seeing it if he chose. He seems to have been extremely anxious to ascertain his legal rights; and determined, when he had ascertained them, to assert them by whatever means he thought necessary. This seems the clue to much of his conduct; it was for him to maintain to the uttermost the rights which he deemed the law allowed him; it was for her to submit without question to their assertion.

My Lords, I may take this opportunity of saying that I quite believe the appellant acted throughout under the conviction that he was justified (nay, even bound) to maintain all his legal rights with regard to wife and child whatever mental pain might be inflicted, and that it was her part dutifully to bow to his assertion of them, to bend her will to his, and to submit her inclinations absolutely to his wishes. Much as I think his conduct misguided and censurable, I do not doubt that he was persuaded that he was always in the right, and, indeed, could scarcely be in the wrong; and I think this conviction dominated him throughout, and is an explanation of the course which he pursued.

In the autumn of 1879 the respondent was seriously out of health. She was suffering among other things from dyspepsia, and one symptom of her illness was great depression of spirits. Her husband in November of that year described her condition in a letter to her father thus—"Minna is just about the same—not worse, I think, but still very weak and with very little appetite. . . . Pray do not alarm yourself about her, she is not dangerously ill, only very weak." In December he again wrote thus—"I am very very anxious about her as she is no better. She certainly gets up every day, but she is becoming so thin and weak, and eats nothing. She is always in very low spirits—never speaks when I come into the room."

The doctors advised a change to the south as desirable, if not essential, for her restoration to health, and the appellant himself wrote to her that "for the sake of her health her going south appeared to be a duty and a necessity." She was naturally desirous of taking her daughter, who was then only a few months old, with her. This her husband absolutely refused to permit. He was willing that she should herself visit her parents, who lived in the neighbourhood of Liverpool, but resolved that if she did so she should go alone, and that the child should remain with him. She refused to comply with this, I think, unreasonable condition. Whatever his legal rights, his conduct in refusing to permit her to be accompanied by her infant child when she was so far from well was harsh in the extreme. The reason which he alleged was the apprehension that the child's health might suffer from a journey to the south during the winter, and from its residence at Otterspool in air less pure than that of Ross-shire. I do not say that this was altogether a pretence, but I am of opinion that the more guiding motive is disclosed in his letter to Sir J. E. Moss of 5th January, where he says—"The season of the year, the long journey, and teething, and not having been weaned, are the reasons I give to the world for not letting the child go south at present. But though I consider these quite sufficient reasons in themselves, I have other reasons for not letting baby go, and of which I think it right to let you and Lady Moss know. As long as Minna continues to act towards me unlike a wife (I may say unlike a Christian), I cannot, and will not, trust the child with her and away from myself. A wife who cannot behave properly to her husband is not fit to be trusted by him with his child; and unless Minna turns over an entirely new leaf, expresses sorrow for the past, and promises amendment for the future, the child must remain here."

Her health, be it observed, rendered a visit to the south necessary, and yet in spite of her condition she was to be deprived of her infant child unless she expressed sorrow for the past and promised amendment for the future. The child was to be retained by the husband in order to secure her submission.

It appears that the appellant whilst residing in the same house with the respondent was in the habit of communicating with her by letter rather than by word of mouth. On 16th January following he wrote to her stating that as long as she continued to act as she was doing the child should not leave its home. The letter con-

tinued thus:— "Our child is very young at present, but not long hence, if God spares her, she will be of an age to be readily affected by the example of those around her, and more especially by the example of her mother. I could hardly imagine a worse example to a child than yours is at present. If you do not amend your ways (sad though it would be) I may see it my duty to arrange that my child be not brought up under such bad influence and example." The behaviour of which he complained in this letter was, that she showed utter indifference to him, and treated his advice and wishes with scorn. I see little evidence of any kindly advances on his part, to say nothing of any generous allowance for her state of health. He selected a period of illness and depression, not only for refusing to permit her child to accompany her, but for threatening a more permanent separation, with a view to removing the child from her bad influence and example if she did not mend her ways. It is not to be wondered at that such a letter should have seriously irritated the respondent, and led her to use an expression towards her husband which is to be regretted, though not, perhaps, to be much wondered at. The appellant wrote on the following day to the respondent's father to complain that she had said to him "You brute!" and he added these words: 'What I should have done then was to have put her under lock and key, and certainly if she ever attempts the like again I shall do so."

I think this throws a strong light upon the incident of 4th August. The appellant in the previous January evidently regretted that he had not placed his wife in durance, and threatened that he would do so in future in like circumstances. He was manifestly acting under the belief that he was entitled to use physical means in order to subdue her will and to reduce it to absolute submission to his own. He carried this conviction into practice when he removed the child from her arms by force. That this was his state of mind, and that he intended to give his convictions effect, is, I think, proved by the history of the case since the respondent left the appellant's house on 4th August. He has never expressed any real regret for his conduct on that day. Even at the trial of this action he sought to justify it.

In 1884 some correspondence took place between the parties with a view to a reconciliation, and to the return of the respondent to the appellant's home. In May of that year the appellant wrote that he was very willing to receive any proposal coming from her which would express contrition and a hearty desire to become thenceforward a dutiful wife, and that deep and heartfelt repentance on her part should always be met by kindness and forgiveness by him. But neither in that letter, nor in those which followed it, is is there any trace of repentance or contrition on his part for the outrage he committed on the 4th August, to say nothing of the physical pain she had then to endure. There is not the faintest expression of regret—not a symptom of consciousness that his own conduct had been in any respect blameworthy, or that some change was necessary in himself as well as in her if they were to live together in peace. He required solemn written assurances that she would not leave his place of abode without his consent or by the advice of his family doctor, and that she would not associate in the parish of Gairloch with those with whom he could not be on friendly terms, meaning, as I understand, that she was to be debarred the society of all her relations and of his own brother and sister-in-law.

The respondent in reply expressed what I think was a very reasonable doubt whether one-sided assurances would be likely to conduce to their future happiness: "When quarrels arise," she said, "there are generally some faults on both sides, and it is usually the wisest course for both parties to forgive, and, so far as is possible, to forget. This is what I am anxious to do, and it will be a great help and encouragement to me if I find you willing to meet me half way." And in a subsequent letter she says, "It is my sincere desire to return and to remain permanently with you in your house as your wife, and to discharge all my duties as such faithfully and to the best of my power." What was his response? That "neither in words nor in the tone of these three letters is there any blaming of yourself nor expression of sorrow for the seven sad years during which you have so embittered my days. How can I be hopeful for the future without I am assured of your heartfelt repentance for your conduct in the past?"

The appellant, in November 1884, wrote that he would be willing to receive her without the written assurances he had required, but he said, "I most emphatically warn you that, as your husband and head of the family, I feel I shall be obliged to enforce the terms of the assurances I asked for, and I shall require you never again to enter Pool House or its grounds, never to associate with persons in this parish of Gairloch who are not on friendly terms with me, without my especial permission, nor leave me for short or long intervals without my consent, or by the advice of my medical man." And on 18th December, while purporting to make *an unconditional* offer for her return he adds in a postscript. "You refer to my regulations; my earnest desire would be that they might never require to be put in force, but that would entirely depend upon yourself and your conduct." This, it seems to me, can have but one interpretation—that the regulations he had laid down were to be binding upon her, and would be put in force if requisite. There is, to my mind, no doubt that the means intended to be used were physical, that is to say, such restraint or force as were found necessary.

My Lords, I have dwelt at some length on the attitude of the appellant during the years succeeding the separation and upon this correspondence, because it satisfies me that the respondent could not have returned

to his house without apprehension that the unjustifiable violence he had used might be repeated. I think the anticipation of further violence well founded, and not an unreasonable or fanciful idea. After considering carefully the whole of the evidence and giving full weight to the able arguments of the learned counsel for the appellant, I can entertain no doubt that circumstances existed which justified the respondent in quitting the appellant's home and refusing to return, and afforded ample ground for a decree of separation.

It is true that in 1887 the appellant again invited the respondent to return, and that the letter he wrote was couched in very different terms, and displayed an altered tone. The circumstances, however, under which it was addressed to her were peculiar. Proceedings were pending in the Court of Session with a view to secure that the child should live with the respondent during a portion of each year, and the appellant no doubt dreaded any considerable separation from his child. Accordingly, in a letter of 16th September 1887, he said "If you come, I shall (as I have said before) be anxious to let bygones be bygones, and begin our married life anew." But this letter was written for the purposes of the legal proceedings then pending, and was intended to influence the mind of the Court. It was boxed in Court before it ever came to the hands of the respondent. It is admitted that its terms were actually settled by counsel. I cannot think that it indicated any real change of mind, or that the respondent's return would have been the occasion for any alteration in his conduct or in his conviction that absolute submission on her part was a right to be enforced by him by physical means, if necessary.

It is said that in her letter of 13th October 1887 she refers to her realisation of what her feelings towards him were, and not to any fear of his conduct in case she should return. I cannot agree with this. She alludes to the general treatment she had received at his hands, and to the fact that his letters up to 13th June, let alone his conduct, spoke for themselves as to his feelings towards her, and she further indicates then, as she had done in a previous letter, doubts, which I think were well founded, of his sincerity in making that offer.

Having arrived at the conclusion that it is well established that there was *sævitia* on the part of the husband within the meaning of the law of Scotland, such as to justify a separation, it follows that, in my opinion, the interlocutor must be affirmed. But, I may add, that I am not satisfied that the appellant during the time of the separation was honestly desirous that the respondent should adhere, and used reasonable endeavours to that end. The Lord Ordinary took this view, and called attention to the important bearing on this part of the case of the evidence given by Mr Dixon, and to the significant fact that the appellant did not enter the witness-box to contradict it.

I move your Lordships that the interlocutor appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON—My Lords, the appellant, a landed proprietor in the west of Rossshire, and domiciled there, was married in June 1877 to the respondent, who was an English lady. One child, a daughter, was born of the marriage on the 1st of March 1879. On the 4th August 1880, the respondent left the appellant's house and has ever since declined to resume cohabitation.

The present action was brought by the appellant in November 1891, under the provisions of the old Scots Act 1573, cap. 55, as modified by the 11th section of the Conjugal Rights (Scotland) Amendment Act 1861. It concludes (1) for declarator that the respondent had been guilty of wilful and malicious non-adherence to and desertion of the respondent for the statutory period of four years; (2) for decree of divorce *a vinculo;* and (3) for declarator to the effect that the appellant was free to marry again, and that the respondent had forfeited all the privileges of a lawful wife, including her claims as a widow, whether legal or conventional. The effect of a decree in these terms would be to give to the appellant in immediate possession the same interests in the estate of the respondent which he would have taken had the marriage been dissolved by her predecease.

A voluminous proof, oral and documentary, was led by both parties, which gives a very minute account of their married life from the date of their union until the time of their separation in August 1880. The evidence applicable to the seven years which immediately followed the separation mainly consists of correspondence between the spouses or their law agents, and proceedings taken by the respondent for the purpose of obtaining access to her child. It was not until the month of June 1887 that the appellant made the offer to receive back the respondent, upon which he relies as constituting the commencement of the statutory period of her non-adherence.

The Lord Ordinary (WELLWOOD) assoilzied the respondent. On a reclaiming-note his decision was adhered to by a majority of the Second Division, consisting of the Lord Justice-Clerk, Lord Young, and Lord Trayner. Lord Rutherfurd Clark dissented, being of opinion that the respondent had failed to prove facts and circumstances which would have entitled her to a judicial separation, and that the appellant was therefore entitled to decree.

In the Court below two questions of some importance to the law were raised in argument, and were discussed by the learned Judges. The first of these was whether the words "reasonable cause" occurring in the Act of 1573 signify some lesser occasion for a wife's leaving her husband's house than would be accepted as a good answer to an action of adherence; and the second, whether in an action of adherence a wife can successfully defend herself upon any other grounds than would be required in order to sustain an action at her instance for separation and aliment.

Lord Young, in whose reasoning the

Lord Justice-Clerk expressed his concurrence, answers the first question in the affirmative. His Lordship says "that it is no criterion of the validity of a defence to an action of divorce on the Act 1573, cap. 55, to inquire whether or not it would have been a good defence to an action of adherence at the common law." Lord Trayner appears to have entertained the same opinion. He says—"What is 'reasonable cause' in the sense of the statute? The language is in no sense technical. It means exactly what the words in their ordinary sense import, and no more. The spouse justifying his or her absence must satisfy the tribunal before whom the question may depend, that the cause of his or her separation from or desertion of the other was reasonable, and therefore sufficient." The Lord Ordinary expresses the same view in this note.

I am not prepared to accept the proposition thus clearly stated, which, if adopted, might afford an easy solution of this case. The Courts of Scotland have never attempted to enforce a decree of adherence by means of civil process. The only remedy provided by Scotch law, where the offending spouse persists in avoiding cohabitation after decree, is to be found in the Act of 1573. Decree of divorce under that Act is, in my opinion, nothing else than a penalty for obstinate non-adherence. Accordingly, the older statute requires, as the first step towards obtaining the remedy, that the deserted spouse shall raise and obtain decree in an action of adherence, the decree to be followed by a charge of horning; and, as the second step, that application shall be made to the ecclesiastical Court for the admonition, and if that be not obeyed, for the excommunication of the offender, who, if he or she failed to resume cohabitation within the period allowed by the Act after these preliminaries had been observed, could not resist a decree of divorce. A suit for adherence was an old and well-known process, and was not the creature of the Act. I do not think that the words "reasonable cause" in the first part of the Act were intended to override or alter the law previously administered by the Judge Ordinary, when a process of adherence was brought before him. He, according to the Act, is the Judge who must decide whether "sufficient cause" has been alleged and proved by the defender; but in determining what was sufficient cause he was left to the guidance of the usual rules of his Court.

After the final establishment of presbyterianism, the ecclesiastical procedure enjoined by the Act became, in course of time, a mere formality, because the Church courts generally, if not invariably, declined either to admonish or to excommunicate. The Civil courts ceased in consequence to regard admonition and excommunication as an essential preliminary. In *Maclachlan* v. *Maclachlan*, December 21, 1838, 1 Sess. Cas. 2nd Series, 294, it was held that a husband's offer to adhere came too late when his wife had obtained a decree of adherence, and had thereafter presented a petition to the Presbytery, which was refused. Then came the Act of 1861, which provides "that it shall not be necessary prior to any action for divorce to institute against the defender any action of adherence, nor to charge the defender to adhere to the pursuer, nor to denounce the defender, nor to apply to the Presbytery of the bounds, nor to any other judicature, to admonish the defender to adhere." In my opinion, the object of that enactment is not to alter the substance of the older statute by giving any new right of action to the pursuer, or any new ground of excuse to the defender, but to simplify procedure by allowing the pursuer to prove non-adherence in his suit for divorce, and dispensing with the necessity for a separate action of adherence and all other preliminaries.

Upon the second question the learned Judges of the Second Division, with the exception of Lord Rutherfurd Clark, were of opinion that, according to the law of Scotland, a lesser excuse will afford a good defence by a wife to an action of adherence than would be sufficient to entitle her to decree in an action for separation and aliment. There can be no doubt that the contrary was decided by the Second Division more than forty years ago in *A B* v. *C D*, December 3, 1853, 16 Sess. Cas., 2nd Series, 111, which was an action of adherence against a wife. In that case the Court inserted in their interlocutor an express finding to the effect that the action can only be resisted on the ground that the pursuer so maltreated her at and prior to the date of the contract that she would at said time have been entitled to a judicial separation, and is therefore not now bound to adhere. The contract referred to was one of voluntary separation, under which the spouses had been living apart; and it had been previously held—*A B* v. *C D*, February 5, 1853, 15 Sess. Cas., 2nd Series, 372—that the wife was entitled to the benefit of the contract unless and until her husband should obtain a decree of adherence. So far as concerned its facts, the case was regarded by the Court as one of nicety; and their decision on the merits is, I think, fairly open to many of observations which have been made upon it by Lord Young, but their decision upon the point of law which is embodied in their decree does not appear to have been treated with the consideration which it deserved. No case was cited in argument which has the remotest bearing upon it. In the opinions delivered, two of the four learned Judges refer indirectly to the point, but cite no authority; the others take no notice of it. I am unable, in these circumstances, to regard the case of *A B* v. *C D* as an authority of weight; and my impression is not diminished by the fact that the appellant's counsel, although invited to do so, were unable to refer your Lordships to a single previous decision in which its doctrine was recognised. On the other hand, there are previous decisions which might possibly admit of an opposite construction.

The late Lord Fraser, in the last edition

of his treatise upon Husband and Wife, vol. ii., p. 873, states that "there are defences pleadable against an action of adherence which would not in themselves have been the ground of an action of separation." Substituting for an action of adherence an action for the restitution of conjugal rights, the doctrine laid down by the learned author does not appear to have been accepted in England, but there is no authoritative decision on the point by a Court of Appeal or by this House. In Scotland, with the exception of the single case I have referred to, there is no clear authority for affirming that the grounds open to a wife in a suit against her for adherence and in a suit for separation at her instance are necessarily identical. Upon both sides of the question there are considerations requiring to be carefully weighed; and its decision is, in my opinion, unnecessary for the purposes of this appeal, because I agree with your Lordships in thinking that the circumstances of the case are such as would have entitled the respondent to a decree of separation.

I shall not attempt a detailed examination of the evidence, of which a complete analysis is to be found in the able and exhaustive note of the learned Judge before whom it was led. I do not suggest that any of the details noticed by the Lord Ordinary are without bearing upon the point which your Lordships have to decide; but it is unnecessary that I should rehearse them. I find sufficient materials for disposing of this appeal in the circumstances which occurred during the winter of 1879-80, whilst the respondent was residing in her husband's house at Inverewe, and subsequently in August 1880, when the spouses were living at Tournaig, the residence of the Dowager Lady Mackenzie, the appellant's mother.

It appears from the evidence on both sides that from an early period of their married life the relations between these spouses became strained; and that as time rolled on the tension was not diminished. There were probably faults on both sides, but, in my opinion, it has now become a matter of very little moment to consider in what respect and to what extent either spouse was to blame for the absence of a more cordial understanding between them. One source of disagreement was undoubtedly the appellant's mother, who was deeply attached to him, and for whom he entertained, and with good cause, the greatest affection. She had given him the estate of Inverewe, which was her own property, and had also, in order to enable him to marry, made over to him two-thirds of her remaining income. However praiseworthy such filial attachment may be, it is, I apprehend, an undoubted fact that it may be exhibited in such a way as to create dispeace in a son's married home. Unfortunately, it appears that the respondent entertained towards the Dowager feelings of suspicion and dislike, which were fully reciprocated. Before marriage the respondent had indicated her apprehension of the Dowager's interference in her domestic affairs, and in order to remove these apprehensions, the appellant had given an honourable assurance that any risk of his mother's interference would be carefully avoided. Making all due allowance for the appellant's situation, it can hardly be said that the compact was observed by him. But that cause of complaint, though as might be expected, it caused irritation, could not in the most favourable view which could be taken for the respondent, have afforded a legal justification for separating from her husband.

The respondent gave birth to her child in the Lancashire residence of her father, with whom the spouses had lived during the preceding winter. She suffered greatly from her confinement, and her recovery was very protracted. From her father's house she went to Buxton in the beginning of June 1879, by the advice of Dr Kirkpatrick, who had attended her during her confinement. At the end of June the appellant joined the respondent at Buxton, and shortly afterwards, as soon as she was able to travel, they went north together, taking the child and its nurse with them, to Inverewe, where they all remained until the month of February 1880.

The respondent's health did not improve in Ross-shire, as had been anticipated. In December 1879 the appellant wrote to her father, "I am very anxious about her, as she is no better. She certainly gets up every day, but she is becoming so thin and weak and eats nothing." And on the 30th of the same month he again wrote, "Poor Minna is no better. If you cannot persuade her to let me bring her south with me, then I think Lady G. M." (*i.e.* her mother) "should endeavour to come north to her." There is no doubt that at this time the appellant desired his wife to pay a visit to her relations in the south, and that the change was advisable for the sake of her health; but there is as little doubt that he coupled with his otherwise proper recommendation the intimation that her child would not be permitted to accompany her. He states in his evidence, "In consequence of my refusal to let the child go my wife refused to go to England. I then endeavoured to get her mother, or her brother, or her sister, to come and stay with us at Inverewe for the purpose of trying to rouse her and give her happiness." On the 5th January 1880 he called in Dr William Bruce of Dingwall, a medical gentleman of high repute, who found the respondent "suffering from acute dyspepsia," which, the doctor adds, "is a complaint which is markedly accompanied by depression." From him the appellant tried to obtain an opinion to the effect that the respondent ought to go south alone, and that the child ought to remain in Ross-shire. He did so by making representations as to the respondent's habitual indulgence in strong liquors and opiates, which he vainly endeavoured to justify in the witness-box, and which his counsel were constrained to admit had no foundation in fact, and also by representing what

he must have known to be false, that the respondent was not desirous that the child should accompany her. Accordingly, when Dr Bruce was examined as a witness, he said, as one would naturally have expected, "If I had known that the defender was eagerly attached to the baby, and greatly felt separation from it, that certainly would have altered my opinion, and I would not have forbidden the child to go. . . . If I had known that the separation was preying upon the mind of the defender, and would be acutely felt by her, I would clearly have advised that the child should go with the mother. It was a healthy, thriving child. Travelling with every comfort there would have been no particular risk to the child."

Few people would hesitate to agree with Dr Bruce's later opinion, which had the advantage of being founded on fact and not upon misrepresentation. It might be unfair to the appellant to withhold the explanation that, in enforcing the separation of mother and child, he had in view not so much the advantage of the child as the subjection of the mother to what he seems to have considered wholesome discipline. He explained his object more candidly than he thought fit to do in his evidence in a series of letters addressed by him at the time to his sister-in-law Lady Mackenzie. These communications being marked private, were burned on their receipt, but their import is thus stated by her Ladyship—"The tenor of them was that pursuer said his wife did not show sufficient deference and obedience to him, and that he must punish her to bring her to a proper frame of mind."

There can hardly be a more odious form of cruelty than a deliberate attempt to wound the feelings of a mother through her affections for her infant child. It is nevertheless true that the law of Scotland permits a married man who is so inclined to gratify his taste for that species of cruelty, subject to these conditions, that it must be practised upon his own wife, and that he must stop short of injuring her health of mind or body, or of rendering her existence intolerable. How far he can carry his experiments without exceeding the limits so prescribed, and thereby becoming guilty of legal *sævitia*, must depend very much upon the circumstances of the case, and in particular, upon the victim's capacity of endurance.

The appellant appears to have selected a very unsuitable time for experimenting upon the respondent with the view of recalling her to a sense of her conjugal duties of deference and obedience. She was physically weak, and suffering from an ailment occasioning mental depression, which reacted upon her bodily health. As the appellant himself states in one of his letters, she had not even a smile to bestow upon her child. On 16th January 1880 the appellant wrote a letter to her, which I do not quote at length, in which he says, "As long as you continue to act as you are doing at present, the child shall not leave its home;" and again, "I could hardly imagine a worse example to a child than yours at present. If you do not amend your ways (sad though it would be) I may think it my duty to arrange that my child be not brought up under such bad influence and example." That is a fair specimen, and not the only specimen, of the means by which the appellant sought to soothe the nervous depression of the respondent. I have omitted the pious expressions with which the epistle is garnished, which do not detract from its bitter tone or from the cruelty of its menaces.

The letter in question led, as might have been expected, to a warm discussion between the spouses, in the course of which the respondent, in a moment of irritation, ventured to characterise the appellant's conduct as brutal. A man would probably have employed a harsher expression, but coming from a lady, it was a strong one, and so the respondent on reflection appears to have thought, because she at once made an ample apology for the language which she had used, which was listened to by the appellant with sullen indifference. The state of his temper appears from the terms of a letter which he wrote the next day to his father-in-law, in which he says, "'You brute' was one of the many things she said. What I should have done was to put her under lock and key; and certainly if she ever attempts the like again I shall do so."

In the beginning of February the two spouses, accompanied by their child, went on a visit for a fortnight to Conan, the seat of appellant's half-brother Sir Kenneth Mackenzie, where, under the influence of kindness and attention from her hosts, the respondent's health somewhat improved. During their stay at Conan the appellant discovered, or to speak more accurately, asserted that he had discovered "the plot" about which your Lordships heard so much in the course of his counsel's argument. I do not think it necessary to notice that incident, beyond observing that it illustrates the proneness of mankind to believe only so much of the truth as will suit their own purposes. The "plot" had been suggested but had been discarded, and was never meant to be carried out. But the appellant would neither listen to reason nor explanation, probably because his distorted version of what had actually occurred appeared to him to afford some justification for separating the child from its mother, a step which he must have felt to be harsh and, in the circumstances, unwarrantable, otherwise he would hardly have stooped to mislead Dr Bruce by giving him false information.

The respondent went to England from Conan, whilst the appellant went back to Inverewe, taking the child with him. She first went to her father's house in Lancashire, where she remained until the end of April, when she accompanied the other members of her family to London, returning to Ross-shire in the beginning of July 1880.

The effect of her treatment at Inverewe was to create in the mind of the respon-

dent a nervous apprehension that she would be deprived of her personal liberty, and she communicated her fears to Lady Mackenzie on her arrival at Conan—"She was afraid after the threats that had been made that she might be locked up and not allowed to see any friends, and she did not know what accusations might be made against her in her defenceless state." There can be little reason to doubt that the respondent had good cause for entertaining these apprehensions. Their reality is demonstrated by the appellant's letter of the 17th January, which has been already referred to. It contains, besides the passages quoted already, this intimation, made in view of their intended visit to Conan—"I might as well put her under restraint at once as bring her back here from Conan in her present mood." There is about the same period a correspondence between the appellant and his uncle, the late Dr Mackenzie, which contains equally unpleasant suggestions in the same direction.

I think it is also shown by the evidence that the appellant's conduct had a malign effect upon the respondent's health, and was not only calculated to interfere with, but did in point of fact retard her recovery. The appellant must have known from Dr Bruce that the illness of the respondent was one markedly attended with great depression of spirits. At all events he did know, to use his own expression, that her ailment was "not so much that of her body as that of her mind," and the specific which he employed in order to work a cure was one which could only enhance her mental distress and aggravate her illness. It hardly required medical evidence to prove that it is an experiment fraught with risk to a mother to separate her against her will from her infant child. Dr Bruce expresses the opinion that if her child had been allowed to accompany the respondent "it would have helped her to get better." Dr Fitzpatrick, who attended the respondent in Lancashire in March and April 1880, says, "Speaking medically, I think the separation of mother and child at that age would have a very serious effect. Even in the case of a person in robust health the separation of a mother from her first child is very serious." The same gentleman attributes the depressed condition of the respondent, bodily and mental, during the period of his attendance "entirely to the child not being allowed to come south with her." After she went to London the respondent had a very severe attack of illness connected with her confinement, and was attended by Dr Andrew Fyfe and the late Dr Matthews Duncan. Dr Fyfe, in his evidence, attributes her condition at that time and her slow recovery to something upon her mind, of course he did not know what. But your Lordships can have no hesitation in believing the respondent's statement that the only thing which preyed upon her mind at that time was enforced separation from her infant.

As already stated, the respondent returned to Ross-shire in the beginning of July. Meantime, the appellant had let Inverewe House for the season, with the shootings, and had gone to reside with his mother at Tournaig, a house upon the estate which had been recently built for her accommodation. The respondent, who was still in feeble health, journeyed north under the care of her mother's maid, who was not permitted to cross the threshold of Tournaig. The appellant had previously suggested that, instead of going to Tournaig, the respondent should see her child for a few days at Loch Maree Hotel, if she did not wish to become his mother's guest, and it is clear that it was her affection for the child which induced her to go Tournaig, where she was very coldly received.

At Tournaig the respondent breakfasted in bed. The child generally got its morning meal in the nursery, and then joined its father and grandmother in the parlour. On the morning of the 4th of August the respondent was giving the child breakfast in her bed, when, before the child had finished its meal, there came a peremptory demand that it should be sent downstairs; and the respondent having delayed or declined to comply with it, the appellant and his mother at once entered her bedroom, and proceeded to hold her down by main force until the child was removed by the nurse. The dowager, who ought not to have been there, and who used, when there, irritating expressions which ought to have been left unsaid, employed her physical force with some measure of discretion. The appellant, who was white with passion, did not observe the same moderation. He left the imprint of his fingers in black and blue upon the respondent's arm, the marks being visible four or five days afterwards.

The appellant in his evidence says "it was a very unfortunate incident." I agree with the observation, but I am inclined to doubt whether he used the expression "unfortunate" in the same sense in which I assent to it. The whole tenor of his conduct and correspondence leads me to believe that he thought at the time, and is still under the impression, that the respondent was alone to blame for the incident, and that the violence shown by him to a weak woman was not exactly laudable, but in the circumstances proper aud justifiable. The respondent left his house immediately after the outrage was committed. At leaving she was allowed the privilege of kissing her child, which was held in its father's arms, and she was not permitted to embrace it.

I do not impute to the appellant that his conduct, cruel and reprehensible though it was in my estimation, was dictated by a wilful intention to injure the respondent. That he is a man capable of entertaining strong affection, his attachment to his mother and child afford ample proof. But he had some peculiarities, and amongst these was a very exalted sense of the dignity and supremacy of his position as husband, and of the absolute deference which he was entitled to exact from his partner in life. He appears to have assumed that he was justified in adopting

any means which occurred to him for the purpose of enforcing what he deemed to be his rights; and that the infliction of mental distress, even to the aggravation of her bodily ailments, physical restraint, or personal violence, were, should he think it advisable to resort to them, consequences for which the respondent was alone to blame. Add to this, that it seems never to have entered into the mind of the apellant to conceive the possibility of his being in the wrong. Accordingly, when he thought his rights had been infringed, nothing would satisfy him short of the deepest penitence and most abject contrition on the part of the respondent; whilst in instances where he was unquestionably the aggressor, the utmost stretch of magnanimity of which he was capable was to bestow his pardon upon the spouse whom he had injured.

Such was the position assumed by the appellant, and consistently maintained by him in his communications with the respondent between August 1880 and June 1887. His correspondence during that period was much better calculated to repel than invite her return to her home. The evidence shows that her return was not at that time desired by him; and it is not surprising that his counsel should have rested his charge of non-adherence upon her living apart from him during the four years which preceded the institution of this action. The appellant's letter of the 13th June 1887 is expressed in very different terms. But it would, in my opinion, have been entitled to more favourable consideration if it had been dated in the year 1880; and the circumstances in which it was written were not such as to encourage a belief in its sincerity. It was admittedly prepared by counsel, and the motive by which it appears to have been dictated was not any sudden change in his feelings towards his wife, or in his views as to the propriety of the course of conduct which had driven her from his house, but the fear that the Court of Session would deprive him of the custody of the child, unless he made a more kindly profession of his intentions towards its mother than he had done during the seven years preceding. Having regard to the previous conduct and correspondence of the appellant, extending over a period of nearly seven years, I am not satisfied that in June 1880, or subsequently, he ever entertained an honest desire to resume cohabitation with the respondent; and if he really did so, I am satisfied that, instead of taking reasonable means to convince the respondent of his sincerity, he proceeded in a way well calculated to throw doubt upon it.

I need not, however, dwell upon that point. I prefer to rest my judgment upon the grounds which I have already indicated. The circumstances which I have thought it necessary to notice, consisting in conduct on the part of the appellant creating mental distress sufficient to interfere with the respondent's restoration to health, in menaces—sufficient to create a well-founded apprehension of physical restraint, and culminating in an act of violence against her person, appear to me to afford ample grounds for holding that the respondent, after she left her house in August 1880, would have been entitled to a decree of separation if she had chosen to insist for it.

I therefore concur in the judgment which has been moved by the Lord Chancellor.

LORD ASHBOURNE—My Lords, the law sought to be applied by the husband in this case against his wife is peculiar to Scotland, and is not found in the laws of England and Ireland. It is obvious that a law which, conceding the perfect morality of the spouse, permits a divorce *a vinculo* on proof of her desertion without reasonable cause, persisted in with malicious obstinacy for the space of four years, demands the most jealous scrutiny and the most rigorous caution. Its consequences are irrevocable. It strips the wife of her name, and hands over her fortune to her husband—regarding her as dead. It is susceptible of gross abuse, it could be availed of by cool and calculating cunning, and the ties of an irksome marriage could also thus be readily dissolved by collusion. But such desertion alone will not suffice. Even if the wife had no reasonable cause for going away, and for remaining away, the husband must still show that he has come into Court with clean hands—that he himself was not only willing to adhere, but that he used all reasonable means to induce the wife to return to cohabitation, and that he sincerely took all honest steps to win her back.

The facts of this case are of the highest importance. Rightly understood, they not only lead to a clear decision, but they entirely get rid of all legal controversy and difficulty. The pursuer states as his great fact that his wife, since the 4th August 1880, has not lived with him. This is true, and the occurrences of that day are of vital importance, but the circumstances of the whole of this unhappy married life, before and after that date, have to be clearly appreciated in order to realise the position of the spouses, the conduct of the husband, and the standpoint of the wife.

The pursuer is a Highland gentleman of good family, of austere mind and exacting nature. He married the defendant some eighteen years ago, she being a young lady of good position, fortune, and education. It is most sad to think that, but for the existence of his mother, the married life might possibly have been unbroken and untroubled. It had been made a mutual condition that the young wife was to be the mistress of her own new home, and that her mother-in-law was to remove. I sympathise with the deep affection which, clearly, bound together this mother and her son; but it is too plain that the condition was speedily broken or evaded—both in form and substance. The letters of Dr Mackenzie at the beginning of this life show that he foresaw "certain sorrow" in this continuance of the dowager's influence over the life and the home of her son. I

am well assured she intended no harm, but the injury she did was immense and continuous. When the defender was sick and ailing, with, it may be, the wayward fancies of an invalid, desiring to see her family and get a needed change, to take her child with her, to be a little soothed and comforted and loved, how different might it have been if the husband had had no one to take hard counsels with, no one to be constantly telling him of his wife's shortcomings and his own matchless perfection. From first to last, from the coming of the wife, from the appearance of the child, whilst the wife was absent in England, and on her return, during the wretched scene of the 4th August, in the correspondence, in the confidences, one sees with plain and painful distinctness that the son was ever sustained in his views by his mother, and that no kind or deprecating word was ever used on behalf of the young wife—away from her own people—often sick and low and wretched. This luckless influence was foreseen by the defender's father, it was foreseen by the pursuer's brother; the experience of all mankind supports the warnings given, and it would be hard to punish the wife for the results of breaking a condition on which her dead father insisted and to which she herself clung with all the short-sighted tenacity of a woman who instinctively felt that the happiness of her whole married life was at stake.

The pursuer was admonished by his uncle, that in the eyes of the law his wife was to him "an utter slave." He certainly demanded from her strict obedience and constant acknowledgment of error. His manner to his wife, from some of the evidence, would appear to have been rough, and his brother says on one occasion "bearish." The child was born on 1st March 1879, but brought no peace to the spouses. The infant was almost used as a weapon against the wife. He wrote to her father, when the child was only some ten months old, that to punish his wife he would not let her child go south with her. About the same date he wrote to the wife, "If you do not amend your ways I may see it my duty to arrange that my child be not brought up under such bad influence and example." This to a delicate sick woman about her little infant girl! It is impossible to conceive a more cruel, harsh, and unfeeling threat. Under its sting she used the strong word "You brute!" whereupon he at once wrote to her father that if she did it again he would put her under lock and key.

What were the kind of general complaints he had against her? Breakfasting in bed when not actually ill, shaking out her napkin and looking about when he was saying grace at dinner, kneeling on the seat of her chair at prayers, coming in to prayers in the morning and sitting in the drawing-room in her dressing-gown. This gentleman, so punctilious about small observances from a delicate wife, did not hesitate to send an open telegram to her father saying that the doctor had forbidden her wine and brandy—which might have led to injurious suggestions—and showed great recklessness and disregard to her feelings and those of her family.

In the midst of all this wretchedness came the painful scene of 4th August. Mrs Mackenzie was in bed in the morning, and with one hand disabled and bound. She had her infant child with her. Her husband, annoyed that his wife should have the child at the hour when he was accustomed to have her with him at breakfast, went up to the room. His mother followed him, and the nurse stood at the foot of the bed. The husband seized one arm violently and his mother seized the other, and thus dominated by superior force Mrs Mackenzie had to let go her child, who was then carried off by the nurse. I do not think that Mr Mackenzie intended any serious personal injury to his wife, but as a fact he used such force in holding her down by the arm that it was black and blue for days. This was a painful scene—one that might be forgiven but could never be forgotten—and Mrs Mackenzie left the house as soon as she could, and has never since lived with the pursuer. His conduct justified her leaving and gave her reasonable cause. That incident cannot be regarded as isolated, as strange and marvellous in the married life of this couple. It may, indeed, be the leading and principal scene in the drama of their married life, but there were other very painful scenes. It did not stand alone. His whole conduct before the 4th August 1880, during her illness, after the birth of her child, his threats to her father, his warnings to her, all showed a habit of mind toward his wife that left little room for hope of future peace or happiness. The next day she came to bid her child good-bye. He would not let the child out of his arms and said she did not deserve to be let kiss her. It never crossed his mind he had anything to regret — done anything to be forgiven. The wretched separated life dragged on. The mother was not allowed to give her child presents—a strange and unnatural restriction—harsh and indefensible. Mrs Mackenzie in 1884 made a genuine and sincere effort at reconciliation. Her letters were natural, proper, right-minded. The pursuer replied hardly and harshly, showing a desire not to meet his wife half way, or at all—a steady purpose not to be reconciled. Then a change came. Whilst the wife's application for the custody of her child was pending in June 1887 he sent her a letter—a proper letter, settled by counsel. His wife suspected the motive of the letter, did not believe in its *bona fides*, and the Judge who saw and heard the parties said she was justified in holding her suspicions. The pursuer, in truth, was thinking of divorce all through. Mr Dixon's evidence teems with the topic. Dr Mackenzie's letters are full of advice leading up to divorce—to keep a note but with appropriate entries—to be "legally kind." Regarding all the circumstances of the case I arrive at the clear conclusion that the mental torture to which she was subjected, the dread of coercion and confinement caused by her husband's threats, the violence of the 4th August

1880, would have entitled the wife to ask for a judicial separation, and therefore in any view of the law to resist a suit for adherence. The appellant has argued that the reasonable cause under the Act of 1573 must be such as would have afforded a defence to an action of adherence, and that a wife could not succeed in a defence to an action for adherence unless upon proof that would support a demand by her for judicial separation. The conclusion at which I have arrived on the facts renders it unnecessary to decide either point. During the argument much reliance has been placed upon the case of *Paterson* v. *Russell*. The case can hardly be regarded as conclusive upon any legal point. It turns entirely upon its own special facts. Lord Brougham was apparently sitting alone, and appears at an early stage to have taken a strong view against the decision of the Scotch Courts. With great deference, I am personally far more impressed with the persuasiveness of the view of the Scotch Judges, but of course Lord Brougham's judgment is binding, and whenever the very same state of facts presents itself I should feel coerced to follow it. I adopt and do not seek to go behind the opinion of Lord Wellwood on the facts—he having seen and heard the witnesses. In my opinion, Mrs Mackenzie had reasonable cause for leaving her husband's house and for staying away from it. In my opinion, also, the pursuer never contemplated or wished for the return of his wife. Her genuine offers of reconciliation he slighted and put away, and his own offers were regarded by the wife not unnaturally with suspicion and as not made with a *bona fide* desire to win her back, but rather as steps to a process of divorce for desertion, which would have stripped her of name, home, and fortune. I concur in thinking his appeal should be dismissed with costs.

LORD MACNAGHTEN—My Lords, I am of the same opinion and I have nothing to add.

LORD MORRIS—My Lords, I also concur.

Counsel for the respondent then submitted that she should be allowed costs, to be taxed as between agent and client.

He argued—In cases between husband and wife in Scotland it was the custom not to apply the ordinary principle of taxing costs as between litigants. The principle usually acted on in such cases was that which was commonly described as costs between agent and client. He did not say that that would entitle the wife to every expense however excessive, or to unnecessary expenses, but costs as between agent and client in the sense of all that was reasonably necessary. Such costs had been allowed the wife in *Collins* v. *Collins*, February 18, 1884, 11 R. (H. of L.) 19, which was also an action for divorce.

Counsel for the appellant argued—There was no doubt that when spouses had been living together and the husband brought an action of divorce against the wife and failed in it, and had been held liable in costs, the principle of taxation adopted was, as stated by Lord Fraser, not as between party and party or agent and client, but an intermediate principle, by which the expenses allowed to the wife should only be such as ought necessarily and properly to be incurred in conducting the action according to the circumstances of the case—Fraser's Husband and Wife, ii. 1233. That was because the wife's debt was the husband's debt. [LORD CHANCELLOR—But in a case of an appeal to this House that would cover all costs properly incurred between agent and client. It might be very different below.] The ordinary rule was only applicable where the wife had no separate estate, but here the wife had separate estate, and the spouses had been living altogether separate. At anyrate, the order should be so framed as only to apply to what was reasonable, and not to everything which might have been expended.

Interlocutor appealed from affirmed, and appeal dismissed with costs, to be taxed as between agent and client.

Counsel for the Appellant—Asher, Q.C.—Graham Murray, Q.C.—Cullen. Agents—Druces & Attlee—J. & A. F. Adam, W.S.

Counsel for the Respondent—Lord Advocate (Balfour, Q.C.)—Haldane, Q.C. Agents—Grahames, Currey, & Spens—Tods, Murray, & Jamieson, W.S.

Tuesday, May 7.

(Before the Lord Chancellor (Herschell), Lord Watson, Lord Ashbourne, Lord Macnaghten, and Lord Shand.)

ELIOTT *v.* PURDOM.

(*Ante*, vol. xxxi., p. 801, and 21 R. 955.)

Husband and Wife—Marriage-Contract—Provision to Wife—Whether Wife a Creditor for Amount of Provision.

By bond of annuity, executed in contemplation of marriage, E provided an annuity of £1000 to his wife, "to be applied by her towards the expenses of my household and establishment, and that during all the days of my life," and he renounced his *jus mariti* and right of administration of and in relation to the estate and effects of his wife, including the said annuity, declaring that the same should be and remain a separate estate in her person free of any right or claim on his part whatsoever. Some years after the marriage E executed a trust-deed for behoof of his creditors.

Held (*aff.* judgment of First Division) that the bond of annuity merely conferred upon the wife a right of administering the annuity for the husband's benefit, and that she was not entitled to rank on her husband's estate for the